U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0226

BRUCE J. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Feb. 26, 2016
GILCHRIST CONSTRUCTION COMPANY, LLC	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dustin G. Flint (Williamson, Fontenot & Campbell, LLC), Baton Rouge, Louisiana, for claimant.

L. Lane Roy (Brown Sims, P.C.), Lafayette, Louisiana, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-00814) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a construction worker for employer, alleged that a specific work incident occurred on Wednesday, October 24, 2012, which resulted in injuries to his cervical and lumbar spine with radiculopathy, as well as shoulder pain, headaches and depression. Claimant was a member of a four-person crew, under the immediate supervision of crew foreman James Doyle, assigned to build a new bridge over a navigable bayou in New Iberia, Louisiana.[1] *See* Tr. at 59-60, 75-76; JX 5 at 27. On the day of the alleged incident, claimant was assigned to cut wood pilings for the new bridge. *See* Tr. at 22-23, 58-59; JX 5 at 22-24, 27-29. Claimant testified that while he was in the process of lifting the scrap end of a cut piling and attaching it to a crane line, he felt a popping sensation in the right side of his back.[2] Tr. at 24-25, 28-30; JX 5 at 31-32, 78-79. He testified that he did not experience immediate back pain but that about forty minutes later, while he and a crew member named "Carl" were drilling holes in pilings, his back began to hurt.[3] Tr. at 29-30; JX 5 at 31, 33, 78. Claimant and Carl continued drilling for the rest of the day. Tr. at 31; JX 5 at 39. Claimant testified that, when Mr. Doyle drove him back to the campground at the end of the work shift, he told Mr. Doyle that he felt something pop in his back while he was picking up a piling and that he needed

[1] During the period that claimant was employed by employer, he stayed in a camper provided by employer in a campground in New Iberia. *See* Tr. at 31-32, 59; JX 5 at 10-11. Claimant's foreman James Doyle, who stayed in an adjacent camper, drove claimant to and from the worksite each day. *See* Tr. at 35; JX 5 at 20, 26. The administrative law judge noted that claimant's home in Hineston, Louisiana is approximately 115 miles from New Iberia. Decision and Order at 4 n.3.

[2] On deposition, claimant testified that another crew member, David Navarro, saw that he had a problem lifting the piling and came to help him lift the piling to attach it to the crane cable; claimant stated that he told Mr. Navarro at that time that he had hurt his back. JX 5 at 40-41. In his hearing testimony, however, claimant stated that it was not until the following day, Thursday, that Mr. Navarro asked why claimant was limping and claimant replied that his back was hurt. Tr. at 36-37. When cross-examined about his prior deposition testimony that Mr. Navarro came to his aid on the day of the alleged incident, claimant provided inconsistent accounts regarding the timing of his discussions with Mr. Navarro. *Id.* at 60-62.

Mr. Navarro testified on deposition that he did not see claimant injure himself and was not aware of any work injury to claimant on October 24, 2012. JX 8 at 12-15. When asked whether, as of the last day claimant worked on the job, claimant ever complained to Mr. Navarro about any kind of injury, Mr. Navarro testified that claimant had mentioned that he had gone to the emergency room because his sciatic nerve was hurting him but that claimant never said this problem was due his employment. *Id*. at 15, 22-23.

[3] Claimant testified that while he and Carl were drilling, he told Carl that he had hurt his back while picking up the end of a piling. Tr. at 29-31; JX 5 at 43.

to see a doctor. According to claimant, when Mr. Doyle dropped him off at his camper, claimant repeated his request to see a doctor but Mr. Doyle simply drove off without responding. Tr. at 31-34; JX at 41-43.

Claimant further testified that on the following morning, Thursday, while still at the campground, he told Mr. Doyle that he needed to do something about his painful back. Tr. at 34-36. Claimant stated that he then worked on Thursday, performing tasks that were not strenuous, and that his back tightened up and his pain increased over the course of the day.[4] According to claimant, that evening at the campground, Mr. Doyle ignored claimant's request to take him to the doctor.[5] *Id*. at 37. Claimant testified that on Friday morning, he again asked Mr. Doyle to take him to the doctor, but that Mr. Doyle simply drove off. Tr. at 38-39. He further testified that on Friday, his wife then drove him from the campground to his home.[6] *Id.* at 39, 66-68.

Claimant initially testified that he went to the emergency room at Rapides Regional Medical Center on Saturday morning; when questioned about hospital records reflecting that he arrived at the emergency room on Saturday at 8:41 p.m., claimant replied that he thought he had gone to the emergency room on Saturday morning.[7] Tr. at

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[4] In his deposition, claimant testified that the day of his injury was his last day of work for employer, and that he must have been hurt on Thursday. JX 5 at 45-46.

[5] Claimant also testified that on Thursday, Mr. Doyle refused claimant's request to file a workers' compensation claim. Tr. at 4. Claimant asserts that Mr. Doyle was motivated to sabotage claimant's compensation claim by an argument between them regarding Mr. Doyle's personal relationship with claimant's sister. *See* Cl. Pet. for Rev. at 10-11; Tr. at 42-44.

[6] At the hearing, claimant testified that on Thursday, he called his wife to ask her to pick him up and that she came to New Iberia that day. Tr. at 66; *see also* JX 5 at 47. Claimant's wife, however, testified that she had been staying with claimant in the camper in New Iberia, and was there from the day of his injury until Friday when they drove home. Tr. at 83-87, 92-93, 97-98. She testified that on Wednesday evening, claimant told her that he had been injured that day while lifting a piling and that the *left* side of his lower back hurt. *Id.* at 84-85, 107-108.

[7] In his deposition, claimant testified that he went straight to the emergency room at Rapides Hospital after leaving the campground on Friday without first going home and that he returned to the emergency room for a second visit on Saturday morning. JX 5 at 45-48, 51-55. Medical records from Rapides Regional Medical Center reflect that claimant was treated in the emergency room on Saturday evening, October 27, 2012; there is no indication that claimant was seen on Friday, October 26, or on Saturday morning, October 27. JX 1B. Claimant testified that after leaving the emergency room

39-40, 68-70. Claimant testified that on Monday, October 29, he had a phone conversation with Mr. Doyle and Clay Kays, employer's project manager, in which he reported that he had been injured. *Id.* at 45-46. Claimant further testified that, at some point within the next several days, employer's safety director, Kevin Grage, called to tell claimant that his claim had been turned over to workers' compensation personnel.[8] *Id.* at 46-47.

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on Saturday, he called Mr. Doyle to advise him of his emergency room visit and to request workers' compensation; claimant stated that he did not hear anything further from Mr. Doyle until Monday morning. Tr. at 41, 44-45; *see also id*. at 88. However, claimant also testified that Mr. Doyle came to his house on Sunday and, in the presence of claimant's wife, threatened claimant. *Id.* at 57. In her hearing testimony, claimant's wife made no mention of a visit to their home by Mr. Doyle.

[8] Mr. Kays, employer's project manager, testified that he first learned of claimant's alleged work injury on the Monday morning following the alleged incident when he received a phone call from Mr. Doyle. Tr. at 137-138, 143-146. Mr. Kays then notified Mr. Grage of the injury alleged by claimant. *Id.* at 138-139, 145. Mr. Kays testified that claimant's account could not be corroborated by the other members of his crew, whose statements were taken. *Id*. at 139. Mr. Kays, who visited claimant's job site on a daily basis, testified that claimant did not tell him on Wednesday, October 24, that he was injured that day, and that he did not see any indication that claimant was hurt on that Wednesday or the following day. *Id.* at 131, 133, 137. He further stated that Mr. Navarro never reported to him that claimant had an accident. *Id*. at 133. Mr. Kays also testified that company policies require any injured person or other crew member who sees an injury to report the incident and require prompt referral of injured workers for medical attention. *Id*. at 134-137, 150; *see also id*. at 157-159, 162, 180-181 (similar testimony by Shawn Stevens and Kevin Grage).

Shawn Stevens, the bridge project superintendent who was onsite every day, testified that he did not see any indication that claimant was hurt on the job and that none of the other workers on the job told him that claimant had complained that he was injured. Tr. at 153, 158, 163-164, 166, 168-169.

Mr. Grage, employer's safety director, testified that he was notified of claimant's reported injury during a conference call on Monday morning with Mr. Doyle, Mr. Kays and Mr. Stevens. *Id.* at 175-176. After speaking on the phone with claimant, Mr. Grage questioned Mr. Doyle, who said that the first time he heard about claimant's alleged injury was on Sunday when he received a phone call from claimant. *Id*. at 177-178. After claimant told Mr. Grage that he also had told his co-workers David Navarro and Carl about his injury, Mr. Grage questioned them, but they told Mr. Grage that they had no idea what claimant was talking about. *Id.* at 178-180, 183, 188.

Rapides Regional Medical Center records document that claimant was seen in the emergency room on Saturday evening, October 27, 2012, with complaints of back pain with right leg numbness. *See* JX 1B at 63, 67, 69. Claimant reported that he hurt his back at work the previous Wednesday and that he had pain in his right leg, *id.* at 69; he also reported that two weeks earlier he injured his back lifting heavy wood and that the pain had since worsened. *Id*. at 67; *see also id*. at 70. Claimant's back examination was normal, and he was diagnosed with right sciatica. *Id*. at 68. Records of a subsequent visit to the Rapides Regional Medical Center emergency room on December 7, 2012 reference an October 27, 2012 lifting injury. *Id*. at 35. Claimant had decreased range of motion on physical examination of his back and x-rays revealed mild lumbar degenerative disease; claimant was diagnosed with a lumbosacral strain. *Id*. at 33, 36, 39-41, 47, 51. On January 19, 2013, claimant was seen in the Oakdale Community Hospital emergency room for low back pain after a work injury three months earlier. *See* JX 1A at 1, 4, 7. Claimant had positive findings on examination of his back, and was diagnosed with low back pain/sciatica. *Id.* at 5. In an initial visit with Dr. Bozelle, a physical medicine specialist, on November 21, 2013, claimant reported numerous physical complaints and a work injury to his low back on October 24, 2012. *See* JX 1G. In the reports of the initial visit and subsequent visits on December 18, 2013 and January 27, 2014, Dr. Bozelle opined that claimant had a work-related injury and diagnosed multiple cervical and lumbar spine conditions as well as bilateral shoulder pain, headaches and depression. *Id.*

Also included in the evidentiary record is documentation of a visit to the Christus Cabrini Hospital emergency room on October 6, 2012, that predated claimant's reported October 24, 2012 work incident. *See* Supp. EX 1. These records indicate that claimant experienced low back pain radiating to his right leg after lifting a steel beam weighing about 170 pounds three days earlier. At the time of his emergency room visit, claimant rated his pain as ten on a ten-point scale and reported numbness and stabbing pain in his right leg. He was diagnosed with right lumbar strain with right sciatica.[9]

[9] Following the administrative law judge's admission of the Christus Cabrini Hospital records, claimant was deposed a second time on December 18, 2014, and the parties filed supplemental briefs addressing claimant's October 6, 2012 Christus Cabrini Hospital emergency room visit. *See* Decision and Order at 5 n.6. Claimant testified on deposition that he went to the Christus Cabrini Hospital emergency room about three days after an incident in which he experienced pain between his shoulder blades after picking up a steel beam while working for employer on the bridge project in New Iberia. Supp. Dep. at 7-10, 17, 19, 46, 55, 89-91. He further testified that he did not think his back pain was significant enough to constitute an injury for purposes of workers' compensation, and he did not want to lose his job. *Id*. at 47-54, 96-99. He testified that following his return to work after the October 6, 2012 emergency room visit, he was able to perform his usual work and had no further problems with his back until the October 24, 2012 work incident. *Id*. at 15, 63, 101-102.

Claimant has not worked since October 24, 2012. *See* Tr. at 10, 51. He filed a claim for ongoing temporary total disability and medical benefits for back, neck, right leg, and right arm injuries which he claimed were caused by the work incident that allegedly occurred on that date. 33 U.S.C. §§907, 908(b); *see* JXs 3, 9. Employer controverted the claim, asserting that claimant did not sustain an injury at work on October 24, 2012. *See* JX 9; Tr. at 17-18.

In his Decision and Order, the administrative law judge found that claimant was not a credible witness and that there was other credible testimony that claimant did not sustain a workplace injury on October 24, 2012. He therefore concluded that claimant did not establish the accident element of his prima facie case and, accordingly, denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's finding that he failed to establish his prima facie case.[10] Employer responds, urging affirmance of the administrative law judge's decision.

We affirm the administrative law judge's finding that claimant did not establish his prima facie case. In order to establish a prima facie case, claimant bears the burden of establishing the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see* 33 U.S.C. §920(a); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The Section 20(a) presumption applies only after these two elements are

[10] Claimant additionally assigns error to the administrative law judge's admission of the Christus Cabrini Hospital records which were submitted by employer after the close of the hearing. *See* Cl. Pet. for Rev. at 14-15; Decision and Order at 5 n.6; Supp. EX 1. We reject claimant's arguments and affirm the administrative law judge's admission of Supp. EX 1, as claimant has shown no abuse of discretion in this case. An administrative law judge has broad discretion concerning the admission of evidence, and any decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary, capricious, or an abuse of discretion. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *see* 33 U.S.C. §923(a); 20 C.F.R. §§702.338, 702.339. Prior to accepting Supp. EX 1, the administrative law judge allowed claimant the opportunity to file objections. *See* Decision and Order at 5 n.6. In response, the parties deposed claimant a second time and filed supplemental briefs addressing the Christus Cabrini Hospital records. *Id*. Based on these facts, it cannot be said that claimant was prejudiced by the administrative law judge's admission of Supp. EX 1. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

established. 33 U.S.C. §920(a); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). In this case, claimant experienced physical symptoms and introduced into evidence medical reports demonstrating that he has a harm to his back.[11] *See* JX 1B; *see also* JXs 1A, 1G. This evidence establishes the "harm" element of claimant's prima facie case. *See Perry v. Carolina Shipping Co.*, 20 BRBS 90, 92 (1987) ("A harm has been defined as something that unexpectedly goes wrong with the human frame."); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 166, 27 BRBS 14, 16(CRT) (5th Cir. 1993).

Before the administrative law judge, claimant asserted that a definitive work incident occurred on October 24, 2012, which caused his back pain; claimant averred that he injured himself while lifting a cut piling. It is claimant's burden to establish each element of his prima facie case by affirmative proof, and, thus, claimant was required to establish the actual occurrence of the specific October 24, 2012 work accident. *See Bolden*, 30 BRBS 71. In determining whether claimant met this burden, the administrative law judge properly made credibility determinations and evaluated the conflicting evidence. *See Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Bolden*, 30 BRBS 71; *Jones v. J. F. Shea Co.*, 14 BRBS 207 (1981).

The administrative law judge rationally discredited claimant's testimony that a specific work-related accident occurred on October 24, 2012. *See* Decision and Order at 9, 12. The administrative law judge thoroughly summarized the totality of the record, which reflects that claimant's own hearing and deposition testimony are inconsistent. *See* Decision and Order at 3-7; *see also* discussion, *supra* at notes 2, 4, 7. Moreover, the administrative law judge found that there are significant inconsistencies between the testimony of claimant and his wife regarding the events related to claimant's claimed October 24, 2012 work accident and the medical treatment he sought thereafter. *See* Decision and Order at 3-6, 9; *see also* discussion, *supra* at notes 6, 7. Although claimant testified that he told Mr. Doyle and two of his co-workers on October 24 that he had sustained a work injury that day, employer's witnesses, who were credited by the administrative law judge, testified that claimant had not informed them of such a work accident. *See* Decision and Order at 3-4, 6-7, 9, 12; *see also* discussion, *supra* at notes 2, 8. Additionally, the administrative law judge found that employer's witnesses credibly testified about employer's policies regarding reporting workplace injuries and providing prompt medical treatment to injured workers, policies that were made known to all

[11] The administrative law judge found that claimant did not establish the "first element" of a prima facie case, and characterized this element as "workplace injury." Decision and Order at 12. Based on the administrative law judge's use of this terminology, we cannot be certain whether the administrative law judge was referring to the harm element or the accident element. Employer takes the position that the administrative law judge found that the accident element was not established, and urges affirmance of that finding. *See* Emp. Resp. Br. at 12.

employees. *See* Decision and Order at 6-7, 9, 12; *see also* discussion, *supra* at note 8. The administrative law judge therefore discredited claimant's testimony that he had repeatedly informed Mr. Doyle of an October 24, 2012 work accident but that Mr. Doyle failed to procure medical attention for claimant or take other action, a failure which would have violated company policy. *See* Decision and Order at 9, 12.

We affirm the administrative law judge's findings because they are rational, supported by substantial evidence, and in accordance with law. It is well-established that the administrative law judge has the authority to address questions of witness credibility and is entitled to draw his own inferences and conclusions from the evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co. Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see Bolden*, 30 BRBS 71. In this case, the administrative law judge addressed at length the inconsistencies in claimant's testimony, and the contrary testimony of claimant's co-workers, and concluded that claimant did not establish that the alleged work event occurred. On the basis of the record before us, the administrative law judge's decision to discredit claimant's testimony is rational. Therefore, we affirm the administrative law judge's finding that a work accident did not occur as alleged by claimant. Claimant thus failed to establish an essential element of his prima facie case and the denial of benefits is therefore affirmed.[12] *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71.

[12] Because we affirm the administrative law judge's finding that claimant is not entitled to invocation of the Section 20(a) presumption, we do not reach claimant's contention that employer failed to rebut the presumption.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge