BRB No. 89-1553

JAMES CARLYLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
YONKERS CONTRACTING COMPANY/ WEEKS STEVEDORING CORPORATION	)	DATE ISSUED:_____
	)	
and	)	
	)	
STATE INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Nicodemo DeGregorio, Administrative Law Judge, United States Department of Labor.

Angelo C. Gucciardo (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Leonard J. Linden (Linden & Gallagher), New York, New York, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-2569) of Administrative Law Judge Nicodemo DeGregorio denying benefits 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 supported by substantial evidence, are rational, and are in accordance with applicable law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began work as a dock builder for employer on August 17, 1987. He alleges he was injured on August 31, 1987 when he was lifted into the air by a guy-line for a pile-driving hammer. He claims he fell a distance of approximately 12 feet and landed on boulders and debris, injuring his head, back, left shoulder,

left arm, and left-side ribs. Tr. at 29-30. Although he could barely get up, he finally managed to do so, and with the help of his co-workers, he continued to work his regular job the remainder of the day and until he was laid off on September 4. Tr. at 31, 49-50.

Claimant sought medical attention on September 16 at the Freehold Medical Center in New Jersey. The medical record indicates that claimant fractured his left shoulder and left ribs in a fall on August 30. Emp. Ex. 6. On September 23, claimant went to the Beekman Hospital in New York for further medical care. Tr. at 33, 35. The report from that hospital indicates that a fall at work caused claimant's injuries. Emp. Ex. 7. Claimant filed a state claim for compensation and a claim under the Act that same day. Emp. Ex. 1-2.

A hearing was held on October 7, 1988, wherein the parties disputed the occurrence of a work-related incident which caused claimant's injuries. The administrative law judge discredited claimant's testimony because he found it was contradicted by testimony from other witnesses and it was "inherently incredible." Decision and Order at 3-5. Therefore, because claimant failed to establish one of the elements of a prima facie case and prove the occurrence of an accident at work, the administrative law judge denied benefits. Decision and Order at 5. Claimant appeals the decision, and employer responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after the claimant establishes a prima facie case. Hartman v. Avondale Shipyard, Inc., 23 BRBS 201 (1990), vacated in part on reconsideration, 24 BRBS 63 (1990); Bartelle v. McLean Trucking Co., 14 BRBS 166 (1981), aff'd, 687 F.2d 34, 15 BRBS 1 (CRT) (4th Cir. 1982); Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). To establish a prima facie case, claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at employer's facility which could have caused that harm or pain. In this instance, the administrative law judge found that although claimant suffered broken bones, he did not establish the occurrence of an accident at employer's facility which could have caused his injuries. Decision and Order at 5.

Claimant first contends that the administrative law judge improperly denied claimant's request to re-open the record and admit additional evidence. One month after the close of the record, claimant presented signed statements of two former co-workers professing to have seen the alleged incident as described by claimant. See Appl. to Submit Add'l Evid. dated January 13, 1989. In an Order dated February 6, 1988, the administrative law judge denied claimant's request. He found that "no good showing has been made" as to why the evidence was not presented before the close of the record and before employer filed its brief. Order at 1.

Section 702.339 of the regulations permits an administrative law judge to investigate a case so as to best ascertain the rights of the parties. See 20 C.F.R. §702.339. See also 20 C.F.R. §702.338 (indicating the administrative law judge shall inquire fully into the matter and receive relevant testimony and evidence). The Board has interpreted these provisions as affording administrative law judges considerable discretion in rendering determinations pertaining to the admissibility of evidence. See Olsen v. Triple A Machine Shops, Inc., 25 BRBS 40 (1991); Wayland v. Moore Dry Dock, 21 BRBS 177 (1988); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985). Because the admission of evidence is discretionary, the Board may overturn such a determination only if it is arbitrary, capricious or an abuse of discretion. See generally Chavez v. Todd Shipyards Corp., 24 BRBS 71 (1990), aff'd in pertinent part sub nom. Chavez v. Director, OWCP, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992). In this case, claimant sought to admit evidence consisting of statements from former co-workers. As claimant's request came approximately one month after the record had been closed, and as claimant established no reason why the evidence he sought to admit was not available earlier, the administrative law judge acted within his discretion in refusing to admit the evidence. See, e.g., Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc., 22 BRBS 46 (1989).

Claimant also contends that employer's witnesses are not credible and that substantial evidence of record supports his claim. He argues that the testimony elicited from employer's witnesses was vague and elusive, irrelevant and contradictory, and that their testimony should be disregarded. Questions of witness credibility are for the administrative law judge as the trier-of-fact. Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963); John W. McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. Perini Corp. v. Heyde, 306 F.Supp. 1321 (D.R.I. 1969).

The evidence credited by the administrative law judge supports his finding that claimant failed to prove the occurrence of an accident at work. Mr. Conner, claimant's former supervisor, whom the administrative law judge found to be honest and reliable, testified that he did not see or hear of an accident at work involving claimant.[1] Mr. Conner also stated that he did not

[1]Claimant admits he did not report the incident. Tr. at 32. Mr. Levine, the office manager during claimant's employment, testified that in the normal course of his job he would have been advised of any on-the-job accidents; however, he was not advised of any accident involving claimant. Further, Mr. Levine stated that, when first hired, claimant signed a paper agreeing to abide

observe claimant having problems performing his work because of pain or asking his co-workers for help. Decision and Order at 6; Tr. at 121, 123. Decision and Order at 5; Tr. at 65, 67-68. Mr. Lloyd, a former co-worker, testified in a deposition that he did not recall any accident as described by claimant, and he denied helping claimant with his work.[2] Decision and Order at 6; Emp. Ex. 28 at 6-8. The administrative law judge found that the testimony of employer's witnesses contradicts claimant's allegation of an injury-rendering incident at work, and it also contradicts claimant's testimony regarding his ability to perform his job. Although claimant testified he was able to perform his job until he was injured and the pain became too great, Mr. Conner and Mr. Lloyd testified that, from the start, claimant seemed unfamiliar with the mechanics of the job and did not satisfactorily perform its duties. Decision and Order at 6; Tr. at 117-119; EX 28 at 27-32.

Additionally, claimant testified that he did not seek medical attention or report his injury sooner because he feared he would lose his job if employer knew the degree to which he was injured. Tr. at 32. The administrative law judge found claimant's reason "hardly believable." Decision and Order at 6. First, he determined there is no evidence showing a practice by employer of firing or not rehiring employees who report injuries or file claims. Decision and Order at 6. Moreover, the administrative law judge concluded that once claimant lost his job due to the lay-off, the reason for his fear ended and he should have disclosed the incident. Id. at 7. Finally, contrary to claimant's testimony, the administrative law judge noted that the hospital report from Freehold Medical Center indicates the cause of claimant's injuries was a fall, but it does not specify whether the fall was employment-related. Decision and Order at 7; Emp. Ex. 6.

After considering the evidence of record, we conclude claimant has raised no reversible error in the administrative law judge's determinations of credibility. See Calbeck, 306 F.2d at 693; Hughes, 289 F.2d at 403. The administrative law judge rationally credited the testimony of employer's witnesses. See Hartman, 23 BRBS at 205-206. Thus, the administrative law judge rationally determined that claimant did not establish the second

---

by employer's rules, one of which required all accidents to be reported. Tr. at 67.

[2]Mr. Lloyd testified that claimant did fall at work; however, he described the fall as one in which claimant fell approximately two or three feet "where the shoreline washed away" and then climbed back up. Emp. Ex. 28 at 6-8, 12-13. Mr. Lloyd stated that claimant did not seem to be hurt, only embarrassed. Id. at 8.

element of a prima facie case and is not entitled to invocation of the Section 20(a) presumption. Id. Therefore, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge