BRB No. 07-0338

T.S. Claimant-Petitioner v. JONES STEVEDORING COMPANY Self-Insured Employer-Respondent and WASHINGTON UNITED TERMINALS and MARINE TERMINALS and SIGNAL MUTUAL INDEMNITY COMPANY Employers/Carrier-Respondents and SSA-MARINE, INCORPORATED and HOMEPORT INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: 10/24/2007 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William Tomlinson (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for Jones Stevedoring Company.

Robert E. Babcock (Wallace, Klor & Mann, P.C.), Lake Oswego, Oregon, for Washington United and Marine Terminals/Signal Mutual Indemnity Company.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for SSA Terminals/Homeport Insurance Company.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order (2004-LHC-2507; 2005-LHC-2226, 2227, 2228) of Administrative Law Judge Alexander Karst 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a casual longshoreman, alleges that he slipped and fell while unlashing cars on the deck of a ship on May 23, 2003, while employed by Jones Stevedoring.[1] Claimant filed an accident report that day and sought medical attention for low back pain on June 3, 2003; he was diagnosed as suffering a low back strain. CX 50. Claimant returned to light-duty work on July 15, 2003, CX 16, and to full-duty work on September 15, 2003. CX 50. Subsequently, claimant worked eight full-duty jobs, the last on October

[1] Claimant injured his back and left wrist while employed by Stevedoring Services of America on August 18, 1997, JX 2; a settlement of that claim was approved by the district director on July 29, 1999. JX 25.

13, 2003, at which time Dr. Nelson removed claimant from work due to his back pain. Claimant returned to work for several days in November 2004 and has not worked since that time. JX 106. Claimant has been diagnosed with a slight bulge at the L4-5 and L5-S1 discs and early degenerative spondylolisthesis at L4-5. CX 42 at 98A. Claimant sought benefits from Jones Stevedoring, which joined claimant's subsequent employers, alleging that any injury claimant sustained was aggravated by his subsequent work with these employers.

In his decision, the administrative law judge found that claimant failed to establish that an accident occurred in the course of his employment on May 23, 2003, which could have caused his back condition. Accordingly, he denied claimant's claim for compensation. On reconsideration, in response to a Motion for Reconsideration and Clarification, the administrative law judge amended the final paragraph of his decision to reflect that clamant failed to demonstrate that an accident occurred on May 23, 2003, or that any injury was sustained thereafter in the course of his employment duties which could have caused, aggravated or contributed to claimant's alleged back condition.

On appeal, claimant contends that the administrative law judge erred in finding that claimant lied during the course of this proceeding and that claimant therefore did not establish that he fell at work. Claimant further contends that the administrative law judge applied the wrong standard for determining if claimant established his *prima facie* case, *i.e.*, the question is not whether claimant fell but whether there were working conditions conducive to his falling. The employers respond, urging that the administrative law judge's denial of this claim be affirmed.[2]

In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a)

[2] Claimant has filed a Motion to Strike the Responses of Stevedoring Services of America, Washington United Terminals and Marine Terminals alleging these employers and their carriers have no standing to enter a dispute solely between claimant and Jones Stevedoring. The employers respond that claimant's motion should be denied. Claimant contends that he is not seeking compensation from any of his subsequent employers, although he testified that he suffered temporary flare-ups of his pain while employed by them. The administrative law judge has the authority to join other potentially liable employers upon employer's motion. *See Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); 29 C.F.R. §18.29(a)(7); Fed. R. Civ. P. 14(c). Thus, Stevedoring Services of America, Washington United Terminals and Marine Terminals are proper parties to this claim, and we deny claimant's motion to strike their responses to his appeal.

presumption, however, claimant must establish a *prima facie* case by proving 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. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We first address claimant's contention that the administrative law judge erred in addressing whether claimant proved that he actually fell at work on May 23, 2003. Claimant contends he was required to show only that conditions conducive for a fall existed on the ship. Claimant contends that he established that there was a puddle on the ship which could have caused him to slip and fall and thus that this prong of his *prima facie* case is met. We reject this contention.

Claimant alleged that he injured his back in a fall on a ship on May 23, 2003. Claimant therefore had to prove that he actually fell. *Brown v. Pacific Dry Dock Co.*, 22 BRBS 284 (1989). The "working conditions" prong of a *prima facie* case generally is limited to situations where the claimant is alleging he was injured due to exposure to injurious substances or to cases of repetitive trauma. *See, e.g., Ramey v. Stevedoring Services of America*, 139 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998). Therefore, we reject claimant's contention that the administrative law judge erred in focusing on the occurrence of an actual fall at work on May 23, 2003.

The administrative law judge found that the only evidence of a fall at work is claimant's testimony. Because he found that claimant was not a credible witness, he declined to credit claimant's testimony that the fall occurred. Claimant argues that the administrative law judge erred in rejecting his testimony based, in part, on claimant's lying in his sworn deposition. In his deposition, claimant stated that, in the interval between his back injury in 1997 and the subject injury, he never sought medical attention or treatment for his low back. JX 107 at 268. The medical evidence in the record establishes, however, that claimant routinely sought medical attention for low back pain and obtained pain medication for his back condition as recently as one month prior to this alleged incident. HT at 59; JXS 21 at 42, 23 at 46; JX 31 at 65, 35, 37

Claimant contends that he did not lie in his deposition when he stated that he had had no problems with his back between the 1997 and 2003 injuries because he had obtained the medication for his wife's use and not for any back condition that he himself

may have suffered.[3] HT at 58-60. This argument is disingenuous, as the administrative law judge rationally found that if claimant did not need the medication, then he convincingly lied to his medical providers for over five years concerning his alleged pain and symptoms. If, on the other hand, claimant procured the medications for himself, he lied in his deposition. Moreover, the administrative law judge found that the medical records following the alleged subject incident reflect that claimant gave no history of his prior back injury and the treatment therefor. *See, e.g.*, JXs 73,74, 80; CX 33. Based on these findings, the administrative law judge found it "just as likely [claimant would] perjure himself again to obtain a lucrative lifetime compensation award." Decision and Order at 7. Thus, the administrative law judge declined to credit claimant's testimony concerning the fall which was unwitnessed, and therefore concluded that claimant did not establish that an accident occurred at work on May 23, 2003.

It is well established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge addressed claimant's medical history and testimony and rationally concluded that claimant did not, in fact, sustain a work-related accident as described. On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible nor patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, we affirm the administrative law judge's determination that claimant failed to establish the existence of a work-related accident occurring on May 28, 2003, which could have caused his present back condition. As claimant failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied. *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).

[3] Claimant's wife did not testify at the hearing so the record does not contain corroboration for his statement that the medication was not for his personal use.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge