**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0211

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| MICHAEL STELLY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 03/30/2021 |
| TIGRESS ENVIRONMENTAL & DOCKSIDE SERVICES, LLC | ) | |
| | ) | |
| and | ) | |
| | ) | |
| LOUISIANA WORKERS' COMPENSATION CORPORATION | ) | DECISION and ORDER |

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

J. Derek Aswell (Broussard & David), Lafayette, Louisiana, for Claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for Employer/Carrier.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Patrick M. Rosenow's Decision and Order (2019-LHC-00303) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged he hurt his back lifting pipe on March 19, 2018, during the course of his employment. He reported his injury that day to Employer's owner, Jan Comeaux, and sought medical treatment. Tr. at 33, 36; CX 2 at 15; EX 5 at 75. Claimant was Employer's sole employee and the alleged accident was not witnessed. He has not returned to work. Tr. at 24, 29. Claimant filed a claim for benefits under the Act, which Employer controverted on the basis that no accident at work caused or aggravated Claimant's back condition. Decision and Order at 12; CX 1 at 8, 18.

The administrative law judge determined John Dies, a nurse practitioner, was the only medical expert who opined on the cause of Claimant's lower back pain, and he was uncertain whether Claimant's pain is due to his alleged work accident or to pre-existing diabetes. Decision and Order at 13; CX 14 at 273. The administrative law judge found Claimant's hearing testimony inconsistent with his medical records and deposition testimony regarding the circumstances of his alleged work accident. Decision and Order at 13. He determined Claimant's understanding that Ms. Comeaux was trying to sell the business might have motivated him to file a disability claim. *Id*. at 14. The administrative law judge concluded Claimant failed to establish that an accident occurred at work on March 19, 2018. *Id*. at 14. Accordingly, he denied the claim.

On appeal, Claimant challenges the administrative law judge's finding that he did not establish the work accident occurred and thus did not invoke the Section 20(a) presumption of a work-related injury. 33 U.S.C. §920(a). Employer responds that the administrative law judge's denial of the claim should be affirmed.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a prima facie case that: (1) he suffered a harm; and (2) an accident occurred or conditions existed at work which could have caused that harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). The Section 20(a) presumption does not apply to aid a claimant in establishing his prima facie case. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Rather, the claimant has the burden of proving the existence of an injury or harm and the occurrence of an accident or working conditions that could have caused the harm. *See Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). If the claimant establishes the two elements of his prima facie case, Section 20(a) applies to presume that the harm was caused by the work incident. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *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 U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

In this case, Claimant experienced physical symptoms and introduced into evidence medical reports demonstrating he has a harm to his back. Decision and Order at 12-13; *see* CXs 2-4. The administrative law judge found 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).

The "accident" prong of a claimant's prima facie case requires the administrative law judge to determine whether the employment event alleged to have caused the harm occurred. *See Bolden*, 30 BRBS at 73; *Hartman v. Avondale Shipyards, Inc.*, 23 BRBS 20, *vacated on other grounds on recon.*, 24 BRBS 63 (1990); *see also Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). The administrative law judge has the authority to address witness credibility in determining whether the claimant has made a prima facie case and to draw his own inferences and conclusions from the evidence. *Meeks*, 819 F.3d at 127-131, 50 BRBS at 36-38(CRT); *see also Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Such credibility determinations may be disturbed only if they are inherently incredible or patently unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *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.

The administrative law judge found Claimant's credibility "highly significant" because the only direct evidence that the accident occurred is his testimony. The accident was unwitnessed and the other reports of its occurrence are based on Claimant's recounting of the alleged accident. Decision and Order at 12-13;[1] *see* CX 14 at 273. The administrative law judge determined Claimant's hearing testimony "is inconsistent with much of the other evidence." *Id*. Specifically, Claimant's hearing testimony about the size of the pipe he lifted conflicted with his deposition testimony, and Ms. Comeaux's testimony.[2] In addition, his testimony conflicted with the medical record entries, which the administrative law judge described as "repeatedly and directly inconsistent." *Id.* For

[1] The administrative law judge noted Claimant reported the accident to Employer the day it allegedly occurred and to each medical professional. Decision and Order at 12.

[2] At the hearing, Claimant testified he was injured lifting a piece of 3/4 inch thick pipe that was around three feet long and five inches in diameter, and weighed about 200 pounds. At his deposition, Claimant testified the pipe was ten feet long and three inches in diameter. *Compare* Tr. at 34 *with* Tr. at 60. Ms. Comeaux testified pipe at the facility tended to be 30 to 40 feet long and 2 to 2 7/8 inches in diameter. EX 5 at 53-54.

example, Claimant testified his pain level on the day of the accident at the emergency room of the Abrom Kaplan Memorial Hospital was 8 or 9, while the emergency room report notes a 5/10 pain level. *Compare* Tr. at 38, 69-70 *with* CX 3 at 26. The administrative law judge also found Claimant did not recall reporting to the emergency room physician, Dr. Stella Immanuel, that he had frequent similar back pain episodes six weeks earlier or telling Dr. George Williams on April 5, 2018, that he is diabetic.[3] *Compare* Tr. at 68-69, 71 *with* CXs 3 at 26, 4 at 61, 72-74.[4] The administrative law judge also gave weight to Claimant's understanding that Employer's business was failing and that Ms. Comeaux was trying to sell the business and found that Claimant, in fear he would be let go, "could [have had] motive to file a disability claim."[5] Decision and Order at 14; *see* Tr. at 61-64; EX 5 at 84-87. Due to the inconsistencies in Claimant's testimony and his possible motive to file a claim, the administrative law judge concluded Claimant failed to establish the accident at work occurred. Decision and Order at 12-14.

We reject Claimant's assertions of error in the administrative law judge's determination that he did not establish the occurrence of a work accident on March 19, 2018. The administrative law judge's credibility determinations regarding Claimant's testimony about whether the accident occurred are not "inherently incredible or patently unreasonable[,]" and are independent of any speculation about Claimant's motive. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT); *Lennon*, 20 F.3d 658, 28 BRBS 22(CRT). Therefore, as it is supported by substantial evidence of record, we affirm the administrative law judge's finding that a work accident did not occur. Claimant thus failed to establish an essential element of his claim for benefits. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT); *Goldsmith*, 838 F.2d 1079, 21 BRBS 27(CRT); *Bolden*, 30 BRBS 71.

[3] The administrative law judge also relied on Claimant's not recalling Dr. Jude Faulk's October 19, 2018 office note that Claimant, pursuant to the advice of his lawyer, did not follow-up on a recommended test and asked for a disability note. Decision and Order at 13-14; *see* CX 5 at 94.

[4] Claimant checked diabetes on the list of his medical disorders as part of Dr. Williams' pre-examination forms. Dr. Williams' report does not state Claimant reported he was noncompliant with his treatment for diabetes. CX 4 at 387, 398-401; *see also* Tr. at 75-76.

[5] Ms. Comeaux testified Claimant was the sole employee at the time of his alleged March 2018 accident and she terminated her lease at the facility in August 2018. EX 5 at 15-16, 23, 88.

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge