BRB No. 02-0248

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<tr><td>GERALD COZZO

Claimant-Petitioner

v.

GLOBAL TERMINAL AND CONTAINER SERVICES, INCORPORATED

Self-Insured Employer-Respondent</td><td>)
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DATE ISSUED: Nov. 8, 2002

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Robert J. Helbock, Jr. (Helbock Nappa & Gallucci, LLP), Staten Island, New York, for claimant.

Before: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2001-LHC-00123) of Administrative Law Judge Robert D. Kaplan 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).

On April 2, 2000, claimant, a hustler driver, alleged that he injured his right knee at work when he was hit by a vehicle driven by a co-worker. Claimant did not return to work after the alleged accident and his longshoreman registration was revoked effective May 8, 2000, by the New York Harbor Waterfront Commission due to a felony conviction. Overruling claimant=s motion to strike Employer=s Exhibits 4-7 from the record, the administrative law judge admitted them into evidence. The

administrative law judge denied benefits, finding that claimant did not establish his *prima facie* case for invocation of the Section 20(a) presumption, 33 U.S.C. '920(a), because he did not establish that the alleged accident in fact occurred. On appeal, claimant challenges the administrative law judge's admission of Employer=s Exhibits 4-7 and his finding that claimant did not establish that an accident in fact occurred. Employer did not file a response brief.

Claimant initially contends that the administrative law judge erred in admitting Employer=s Exhibits 4-7. Claimant contends this evidence concerns the condition of claimant=s right knee prior to the occurrence of the alleged work accident and thus is not relevant to the issues in the instant case. The administrative law judge has great discretion concerning the admission of evidence and any decision regarding the admission of evidence is reversible only if it is arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *see also* 20 C.F.R. '702.338. The administrative law judge admitted Employer=s Exhibits 4-7 over claimant=s motion to strike these documents, finding them relevant to the issue of whether claimant actually sustained an injury on April 2, 2000, as he alleged. The administrative law judge rationally found the exhibits relevant to the issue before him and therefore did not abuse his discretion in admitting the contested exhibits. *See Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); Decision and Order Denying Benefits at 1-2 n. 1. Consequently, we affirm the administrative law judge=s admission of Employer=s Exhibits 4-7 and his denial of claimant=s motion to strike these exhibits.

Claimant next contends that the administrative law judge erred in finding that the alleged accident did not in fact occur. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he

[1]Employer=s Exhibit 4 is a magnetic resonance imaging (MRI) interpretation of claimant=s right knee dated April 29, 1993, reporting a thickening of the anterior cruciate ligament with increased signal compatible with a tear and no frank meniscal tear. Employer=s Exhibit 5 is an illegible document which employer attempted to withdraw at the hearing, but the administrative law judge left it in the record after stating that he could not rely on it because he could not read what it said. Tr. at 35. Employer=s Exhibit 6 is an x-ray interpretation of claimant=s right knee dated April 21, 1993, reporting unremarkable right knee and soft tissues, no fracture or dislocation, and well-preserved joint spaces. Employer=s Exhibit 7 is an x-ray interpretation of claimant=s right knee dated November 24, 1997, indicating degenerative changes and a small suprapatellar effusion.

establishes a *prima facie* case by showing that he suffered a harm and that a work accident occurred which could have caused the harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). 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.*, 360 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). The administrative law judge=s credibility determinations will not 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).

After discussing and weighing all relevant lay and medical evidence, the administrative law judge found that claimant=s testimony that a work accident occurred on April 2 is not credible, and thus that he could not rely on it to make such a finding. Claimant testified that he was hit by a truck driven by a co-worker, Mr. Santiago, at work on April 2, 2000, and that two other co-workers assisted him to a foreman after the alleged accident. Tr. at 18-28. Mr. Santiago conceded that he backed up his truck at work on that day but stated he did not know of the alleged accident until he was called into a foreman=s office and saw a fresh scratch on claimant=s knee. Emp. Ex. 11 at 6-18; Cl. Ex. 7 at 2-8, 12-13. The administrative law judge found that there was no credible lay or medical evidence corroborating claimant=s testimony concerning the accident and that claimant had a strong motivation to obtain compensation because his longshore career was coming to an end. The administrative law judge found that claimant is not credible because he was convicted of a felony punishable by more than one year=s imprisonment and the crime involved dishonesty. As the administrative law judge=s rejection of claimant=s testimony is not inherently incredible or patently unreasonable, we affirm his finding. *See Goldsmith v. Director, OWCP,* 838 F.2d 1079, 21 BRBS 27(CRT)(9th Cir. 1988); *Cordero,* 580 F.2d 1331, 8 BRBS 744; *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); Decision and Order Denying Benefits at 5-8; Emp. Exs. 1, 2 at 6, 3, 8, 10 at 6-16, 11 at 6-18, 12; Cl. Exs. 1, 6 at 5-7, 15-17, 7 at 2-8, 12-13; Tr. at 18-28, 52-55. Furthermore, the administrative law judge rationally found that Mr. Santiago=s testimony does not corroborate claimant=s testimony

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[2]2Claimant=s longshore permit was revoked because of his 1995 conviction of a federal felony relating to the importation and distribution of cocaine between June 1992 and November 1994, and because he committed fraud, deceit, and misrepresentation in applying for waterfront jobs in 1979 and 1984 by falsely stating on his employment applications that he had not used narcotic or hallucinogenic drugs. Emp. Ex. 9.

since claimant=s scratch could have been self-inflicted and there were no other witnesses to the accident. *See Calbeck*, 360 F.2d 693; *John W. McGrath Corp.*, 289 F.2d 403; Decision and Order Denying Benefits at 5-6; Emp. Ex. 11 at 6-18; Cl. Ex. 7 at 2-8, 12-13; Tr. at 18-28.

Moreover, the administrative law judge acted within his discretion in finding most credible the wholly negative objective findings by Dr. Montalbano, the emergency room physician who saw claimant several hours after the alleged accident. Decision and Order Denying Benefits at 7; Emp. Exs. 2 at 6, 10 at 6-16. On April 5, 2000, and August 2, 2000, respectively, claimant saw Drs. Suarez and Magliato, both Board-certified orthopedic surgeons. The administrative law judge acted within his discretion in finding that the reports by Drs. Suarez and Magliato that claimant=s torn meniscus was due to his being struck by a truck at work on April 2 must be discounted because they relied on claimant=s report of the event, which the administrative law judge rationally found is not credible. *Calbeck*, 360 F.2d 693; *John W. McGrath Corp.*, 289 F.2d 403; Decision and Order Denying Benefits at 7; Emp. Ex. 8; Cl. Exs. 1, 6 at 5-7, 15-17. Contrary to claimant=s contention, the administrative law judge was not required to credit the opinion of Dr. Magliato over that of Dr. Montalbano simply because Dr. Magliato is an independent medical examiner, as the administrative law judge gave a rational reason for crediting Dr. Montalbano=s report. Consequently, we affirm the administrative law judge=s finding that claimant did not establish that the alleged accident in fact occurred and the consequent denial of benefits. *See Bolden,* 30 BRBS 71; *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982).

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[3]3Dr. Montalbano found no objective findings of major significance, and noted no discoloration, swelling, cuts, or contusions of the right knee. Emp. Exs. 2 at 6, 10 at 6-16. The x-ray and examination of the right knee were essentially negative. *Id.*

[4]4Dr. Suarez stated that claimant=s injury was caused by the work accident on April 2. Cl. Exs. 1, 6 at 5-7, 15-17. Dr. Magliato diagnosed underlying pre-existing osteoarthritic changes in the knee with superimposed trauma on April 2, and a torn median meniscus. Emp. Ex. 8.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge