BRB No. 97-1547

WALTER HALL	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
GLOUCESTER MARINE TERMINAL, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
PENN TERMINALS, INCORPORATED	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Stanely B. Gruber (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Stephen J. Harlen and Barbara D. Huntoon (Swartz, Campbell & Detweiler), Philadelphia, Pennsylvania, for employer/carrier.

John E. Kawczynski (Weber Goldstein Greenberg & Gallagher), Philadelphia, Pennsylvania, for respondent Penn Terminals, Incorporated.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-LHC-157, 97-LHC-306) of Administrative Law Judge Ainsworth H. Brown 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 alleged that he sustained an injury to his neck during the course of his employment with employer on May 4, 1995, after he placed seventy-five pound "hurricane pins" into the ground in order to secure a crane. It is undisputed that normally this task requires the work of two people—specifically, a crane operator, who sits in the operator cab 85 to 90 feet above ground, to maneuver the crane into the proper position, and a second person on the ground to assist in lining up the crane and then locking the pins into their holes. In the instant case, claimant alleged that on May 4, 1995, he could not locate his co-worker, Charles Smith, and therefore had to perform both tasks himself. Charles Smith contradicted claimant's allegation, testifying that he positioned the hurricane pins into their positions on the day in question. Claimant, who worked part-time for employer as well as another employer, Penn Terminals, Incorporated (Penn Terminals), returned to work for employer the next day, but alleged that he experienced pain in his neck.

On May 8, 1995, claimant sought treatment from his primary care physician, Dr. Milligan. On May 26, 1995, claimant was diagnosed with a herniated disc at the C7-T1 level and on September 1, 1995, claimant underwent a discectomy and fusion. Thereafter, claimant sought temporary total disability compensation under the Act from May 6, 1995 through December 1, 1995, *see* 33 U.S.C. §908(b), as well as medical benefits under Section 7 of the Act, 33 U.S.C. §907. Denying that the alleged incident on May 4, 1995 occurred, employer joined Penn Terminals, contending that claimant's cervical back condition was caused by an injury claimant suffered while working for Penn Terminals in 1993, when he was thrown approximately 20 feet by a rope and landed on his head and chest.

In his Decision and Order, the administrative law judge found that claimant failed to establish that the alleged traumatic injury to his neck occurred on May 4, 1995, and thus failed to establish a *prima facie* case sufficient to invoke the presumption of causation under Section 20(a) of the Act, 33 U.S.C. §920(a). Accordingly, the administrative law judge denied the claim. On appeal, claimant contends that the administrative law judge erred in finding that he is not entitled to

invocation of the Section 20(a) presumption and by failing to find that his cervical back condition was caused by his May 4, 1995 work-incident. Both employer and Penn Terminals respond, urging affirmance.

It is well-established that claimant bears the burden of 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, in order to establish his *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof.[1] *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).[2]

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[1]Contrary to claimant's assertion, Section 20(a) of the Act does not apply to the determination of whether an accident occurred. Thus, if claimant alleges that an accident caused his injury, he must establish that the alleged accident did in fact occur. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

[2]Claimant's assertion that the Supreme Court, in *Greenwich Collieries*, stopped short of invalidating the "true doubt" rule is without merit. In *Greenwich Collieries*, the Supreme Court held that Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), which places the "burden of proof" on a proponent of a rule or order, applies to cases arising under the Act. *Greenwich Collieries*, 512 U.S. at 271, 28 BRBS at 44-45 (CRT). Thereafter, the Court discussed the definition of the phrase "burden of proof" as that term is used in Section 7(c), and determined that "burden of proof" means "burden of persuasion." Consequently, the Court held

Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

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that application of the "true doubt" rule under the Act violates the Administrative Procedure Act by easing the claimant's burden of proving the validity of his claim. *Id.*, 512 U.S. at 276, 281, 28 BRBS at 46, 48 (CRT).

In rendering his decision, the administrative law judge analyzed claimant's testimony and determined that claimant's allegation of a traumatic injury to his neck on May 4, 1995, lacked credibility. In this regard, the administrative law judge found claimant's testimony less convincing than the testimony of Charles Smith, claimant's co-worker, and Lewis Brigante, claimant's supervisor. While noting inconsistencies in Smith's testimony, the administrative law judge, in light of the process and conditions involved and since claimant allegedly performed this task at night after a 16 hour shift, ultimately found credible Smith's assertion that he assisted claimant on May 4, 1995, since no one has ever fixed the crane in the proper position without ground support.[3] Brigante testified that claimant did not report any neck injury to him on May 5, 1995, but rather told him in June 1995 that he was experiencing neck pain due to the 1993 injury or an improper sleeping position. Tr. at 86. Moreover, the administrative law judge found it implausible that claimant would suffer an injury on May 4, 1995, and yet not report such an incident to many of the physicians who subsequently treated him.[4] *See* GMT Ex. 12; Cl. Exs. 3-4. The administrative law judge also found it contradictory that on May 5, 1995, claimant would tell Smith and Brigante of an injury while working for employer, yet decide to seek treatment with his own physician, Dr. Milligan, and physicians referred by Penn Terminals, rather than an employer referred physician.[5] The administrative law judge discredited the

[3]The administrative law judge noted that claimant's testimony raised concerns about his credibility. Specifically, claimant initially considered filing a claim against Penn Terminals, but changed his mind when he believed such a claim would be denied. Tr. at 85-86. In addition, the administrative law judge noted that claimant initially told Brigante in June 1995 that his neck pain was related to the 1993 injury or due to an improper sleep position. Tr. at 86.

[4]Dr. Milligan's note of May 15, 1995, states that claimant's condition stemmed from his old workers' compensation injury from two years prior. GMT Ex. 12. Subsequently, claimant was referred by Penn Terminals to the Park Care Industrial Health clinic; these physicians' note that claimant's neck pain occurred on May 4, 1995, but do not describe any incident. Cl. Ex. 3. The history given to Drs. Mendez and Cervantes cite only the 1993 injury at Penn Terminals. Cl. Ex. 4; GMT Ex. 12.

[5]We note that claimant's assertion that Dr. Heppenstall referred to an incident on May 4, 1995, is erroneous. The medical notes of Dr. Heppenstall, who performed surgery on claimant, do not comment on the etiology of claimant's condition. Cl. Ex. 5. The reference indicated by claimant was provided by Dr. Koffler on his discharge summary, wherein it is mentioned that claimant suffered an episode of neck pain while operating a crane on May 4, 1995. Cl. Ex. 7. The administrative law judge found this to be a subjective finding, based on the discredited information provided by claimant. Decision and Order at 6.

opinion of Dr. Bachman that claimant's herniation occurred in May 1995, *see* Cl. Ex. 10, as Dr. Bachman failed to present any rationale for this conclusion and the records on which he relied do not address whether an accident occurred on May 4, 1995. Thus, the administrative law judge concluded that the alleged traumatic injury to claimant's neck on the night of May 4, 1995, did not occur. Decision and Order at 12-13. Although, the administrative law judge may have erred in not specifically addressing the May 8, 1995 note of Dr. Milligan, which states a history of pain in claimant's shoulder for three days and makes reference to claimant's working on a crane for 20 straight hours, *see* Cl. Ex. 2, any error is harmless, in view of the administrative law judge's credibility findings and the evidence as a whole.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the administrative law judge may discredit a claimant's testimony to find that an alleged accident arising out of the course of claimant's employment did not occur. *See Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981)(Miller, J., dissenting), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

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 generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). We therefore affirm the administrative law judge's determination that claimant failed to establish that the alleged accident on May 4, 1995, occurred. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997); *Bolden*, 30 BRBS at 73. 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. at 608, 14 BRBS at 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge