

BRB No. 01-0331

LOUIS HILL, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MARINE INDUSTRIES NORTHWEST)	DATE ISSUED: <u>10/29/01</u>
)	
and)	
)	
MAJESTIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

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

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Richard A. Nielson (Le Gros Buchanon & Paul), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits, the Order Denying Request for Reconsideration, and the Order Granting Respondents' Motion for Reconsideration (1999-LHC-2088) 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 boilermaker for employer, alleges that a specific work incident occurred

on January 6, 1999, which caused his current back condition. Specifically, claimant testified that he injured his back when, while climbing up through a hole onto the main deck of the tugboat on which he was working, a steel post holding a safety cable broke causing him to fall backward approximately 12 to 14 feet onto a staging platform located below the main deck.¹ Claimant, who allegedly landed upright on his feet as a result of his having continued to grasp the broken post and safety cable, reported this alleged incident to employer, was sent to a local hospital, and was thereafter diagnosed with a herniated disc.

In his Decision and Order, the administrative law judge determined that the alleged work incident of January 6, 1999, never occurred, and that, accordingly, claimant failed to establish his *prima facie* case. Accordingly, the administrative law judge concluded that claimant was not entitled to compensation for his current back condition, and he denied the claim. Claimant's motion for reconsideration was denied by the administrative law judge. Thereafter, in response to a subsequent filing by employer, the administrative law judge issued an Order wherein he stated that even if the respondents had the burden of proof regarding the question of whether a work incident occurred on January 6, 1999, he would have found that such an accident could not and did not occur as alleged by claimant.

On appeal, claimant challenges the administrative law judge's finding that he did not suffer an injury on January 6, 1999, while working for employer. Employer responds, urging affirmance of the administrative law judge's decision.

¹Claimant testified that he had been sent to retrieve a jackhammer-sized "needle gun" which had been left on a staging platform located below the main deck. Rather than utilizing an available gangplank, claimant averred that he descended through a hole in the main deck, and possibly through additional levels of the tugboat, in order to save time. After slinging the needle gun over his shoulder, claimant testified that he attempted to ascend to the main deck the same way that he had descended, *i.e.*, through the holes cut in the deck levels.

Claimant challenges the administrative law judge's determination that he did not have a work-related accident on January 6, 1999. Specifically, claimant contends that the administrative law judge erred in failing to credit his testimony regarding the events that allegedly occurred on that day. We disagree, and for the reasons that follow we affirm the administrative law judge's decision in its entirety. Claimant has 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 a *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); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof.² 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).

The administrative law judge in the instant case, after addressing claimant's testimony in detail, discredited that testimony in concluding that the January 6, 1999, work incident as described by claimant did not occur. In rendering this determination, the administrative law judge initially concluded that while some discrepancies in testimony recalled many months later are understandable and an indication of the normal failings of human memory, claimant's core testimony regarding the events allegedly occurring on January 6, 1999, is incredible. Specifically, the administrative law judge initially found that claimant's testimony regarding the physical state of the vessel on which he allegedly fell was fundamentally wrong. In this regard, claimant testified that he possibly climbed through multiple holes cut into the tugboat's decks and hull on the day of the alleged incident. The administrative law judge found, however, that claimant's foreman, Mr. Norman, credibly testified that by January 6, 1999, the aft section of the tugboat's hull had been removed, leaving only a single hole in the main deck of the vessel. This hole thus led not to another deck or the vessel's hull but, rather, to a staging platform which had been constructed under the aft section of the vessel.

²Claimant's argument that all doubts must be resolved in his favor is without merit. See *Director, OWCP v. Greenwich Collieries*, 521 U.S. 267, 28 BRBS 43(CRT) (1994).

Next, the administrative law judge addressed claimant's testimony regarding the alleged events which led to his purported fall. Claimant testified that, after retrieving the needle gun and wrapping that tool around his neck, he ascended back to the main deck through the holes whence he had descended. Upon reaching the main deck, claimant stated that he grabbed one of the safety posts which had been welded at the four corners of the hole, placed one foot on the deck itself and, while he was attempting to raise his other foot to the deck, fell backward when that post bent and ultimately broke. Contrary to claimant's testimony, the administrative law judge found that employer established through the testimony and documentation of Mr. Norman that based upon the positioning of the welds attaching the safety posts to the main deck, it was only possible to break the weld, and thus detach the safety post from the main deck, by pushing or pulling the post away from the hole in the deck.³ Moreover, the administrative law judge, after taking into consideration claimant's weight and the fact that he was carrying a needle gun around his neck at the time of the alleged incident, found it to be implausible that claimant would forego the use of an available gangplank and choose instead to climb through a hole to the main deck, using only allegedly jagged holes to hold onto during his upward ascent.

Based upon the foregoing findings, the administrative law judge concluded that claimant failed to establish the occurrence of an accident on January 6, 1999, which could have caused his back injury. After a review of the record, we affirm the administrative law judge's finding because it is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe*, 380 U.S. 359. 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*, 372 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). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. See generally *Bolden*, 30 BRBS 71; *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, claimant has not raised any reversible error in the administrative law judge's credibility determinations. Accordingly, we affirm the administrative law judge's determination that claimant failed to

³Specifically, following claimant's report of his alleged fall, Mr. Norman examined the area in question and found one safety post, albeit not the one claimant thought he had broken, to be detached from the main deck. After examining the welds on the remaining three attached safety posts, all of which left 25 percent of the post's circumference nearest the corner of the hole uncovered, Mr. Norman concluded that all four posts had been welded by the same welder and that pushing or pulling one of the posts towards the hole would not break the weld.

establish the existence of a work-related incident occurring on January 6, 1999, which could have caused his present back condition. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). 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).

Accordingly, the Decision and Order Denying Benefits, the Order Denying Request for Reconsideration, and the Order Granting Respondents' Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge