BRB Nos. 00-1168
and 00-1168A

GABRIELLE NIELSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	DATE ISSUED: Aug. 27, 2001
	)	
v.	)	
	)	
U.S. NAVY EXCHANGE	)	
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Self-Insured	)	
Employer/Administrator-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Granting In Part Claimant's Motion for Reconsideration, and Supplemental Decision and Order Granting Attorney Fees of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Gordon W. Jenkins (Jenkins Law Office), Idaho Falls, Idaho, for claimant.

Marshall Ferguson (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer/administrator.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, and the Order Granting In Part Claimant's Motion for Reconsideration, and employer appeals the Supplemental Decision and Order Granting Attorney Fees (98-LHC-2306) of Administrative Law Judge Richard A. Morgan 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on July 26, 1995, during the course of her employment as a sales clerk. Claimant signed a notice of injury form dated July 26, 1995, which stated that she had a sore right forearm from moving and unpacking boxes. Claimant received treatment for her right hand, wrist, and elbow, including surgery on December 22, 1995. Subsequently, on September 27, 1996, an MRI of claimant's cervical spine disclosed herniated discs at C5-6 and C6-7. Claimant underwent a discectomy and cervical fusion on December 10, 1996. On May 6, 1997, an MRI of the right shoulder indicated a torn rotator cuff, for which claimant underwent surgery on June 24, 1997. Claimant complained of chronic dizziness beginning in July 1997. In September 1997, claimant was evaluated for increased pain associated with her left arm ulnar nerve, and she also was diagnosed with a psychological disorder associated with pain due to her multi-symptomatic physical condition. At the March 31, 2000, formal hearing, claimant alleged that her neck, left and right arm, and right shoulder conditions, as well as her dizziness and psychological condition, are related to the July 26, 1995, work injury. In testifying at the hearing, claimant described the accident as occurring when she was standing on a stool and a box fell off an overhead shelf, striking claimant and causing her to fall backwards to the ground. Tr. at 36-41.

In his Decision and Order, the administrative law judge found that claimant's right arm and psychological conditions are related to her July 26, 1995, work injury. The administrative law judge also determined that claimant's description at the hearing of her work injury was not credible, and thus that claimant failed to establish the existence of an accident at work that could have caused her neck, right shoulder, and left arm conditions, as well as her dizziness. The administrative law judge found that, due to her work injuries, claimant is unable to return to her usual employment as a cashier/clerk, but that employer established the availability of suitable alternate employment, which claimant rebutted by diligently, but unsuccessfully, attempting to secure alternate employment. The administrative law judge found that claimant's psychological condition has not reached maximum medical improvement, and he awarded claimant continuing compensation for temporary total disability. 33 U.S.C. §908(b). The administrative law judge also found employer responsible for medical treatment associated with claimant's right hand, wrist and forearm, and her psychological condition. *See* 33 U.S.C. §907. The

administrative law judge denied claimant's motion for reconsideration with respect to whether claimant's neck and right shoulder conditions are related to the July 26, 1995, work injury.[1] Claimant's attorney subsequently requested an attorney's fee of $31,217 and costs of $6,803. In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge found he was without authority to approve a fee for time expended and costs incurred while the claim was before the district director. The administrative law judge approved the requested hourly rate of $180 and 127.1 hours of the requested 131.3 hours while the claim was before the Office of Administrative Law Judges (OALJ), and he awarded counsel a total fee of $22,878. The administrative law judge reduced claimant's requested costs of $5,959.44 while the case was pending at the OALJ to $3,546.46.

On appeal, claimant challenges the administrative law judge's finding that she failed to establish a *prima facie* case that her dizziness, neck, right shoulder, and left arm conditions are related to an injury at work on July 26, 1995. BRB No. 00-1168. Employer responds, urging affirmance. Employer appeals the administrative law judge's fee award. BRB No. 00-1168A. Employer argues that the awarded hourly rate of $180 is excessive, and employer challenges as unnecessary 10.5 hours and $821.06 in costs allowed for travel between Idaho Falls, Idaho, and Seattle, Washington. Claimant responds, urging affirmance of the fee award.

We first address claimant's arguments relating to the administrative law judge's determination that she did not sustain work-related injuries to her neck, right shoulder, and left arm, as well as dizziness, in an incident occurring on July 26, 1995. Claimant has the burden of proving the existence of a harm and that an accident occurred at work or that working conditions existed which could have caused the harm in order to establish a *prima*

[1]The administrative law judge granted claimant's motion for reconsideration with regard to specific medical expenses claimant alleged were related to her right arm and psychological conditions and the administrative law judge allowed claimant additional time to submit a memorandum clarifying which medical bills of record are related to the treatment of these conditions. In a second decision on reconsideration, the administrative law judge ordered employer to pay additional medical expenses of $3,010.34 for treatment related to claimant's right arm and psychological conditions.

facie case. *See U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish each element of her *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).

In the instant case, the administrative law judge, after discussing the relevant evidence, discredited claimant's testimony that a work-related accident occurred as described by claimant at the formal hearing. In rendering this determination, the administrative law judge noted the discrepancy between claimant's testimony that a box fell onto her head and neck while she was on a stool thereby causing her to fall, twist her neck, and injure her right arm, and the notice of injury form dated July 26, 1995 and signed by claimant, which reports a sore right forearm after moving and unpacking boxes. *Compare* Tr. at 35-41 *with* EX 2. The administrative law judge also found significant the fact that none of the medical reports generated in proximity to the July 1995 work injury indicate that claimant was injured in the manner she described at the hearing. Specifically, the administrative law judge credited the July 26, 1995, report of Mr. Sawicki, a physician's assistant, which noted that claimant hurt her right arm lifting and that she is having right forearm pain, EX 4, and the July 27, 1995, report of Dr. Bethel, in which claimant was diagnosed with right forearm tenosynovitis secondary to overuse syndrome at work, CX 9. Moreover the administrative law judge credited the reports of Drs. Scheyer, Nacht, Grow, Ma, and Simon, which were generated between October 1995 and September 1996. CXS 8, 10, 11, 15, 16, 20. The administrative law judge found that none of these reports contain a history of boxes falling on claimant as alleged and all of these doctors diagnosed a work-related repetitive motion type injury. The administrative law judge found that the first report of an accident as alleged by claimant at the formal hearing is the October 1996 report of Dr. Greenwald, which notes claimant's history of shelves falling on her about one month before the reported date of injury.[2] EX 10. Finally, the administrative law judge noted that claimant did not suffer from dizziness until after an automobile accident in July 1997.

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

[2]After this date, the medical reports consistently state that this is how claimant's injury occurred, and claimant's claim form, LS-203, dated March 1997, states that claimant's injury occurred in the manner described at the hearing.

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 in 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). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or 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). In the instant case, the administrative law judge considered claimant's hearing testimony, as well as the contemporaneous notice of injury and medical reports, and concluded that claimant did not, in fact, sustain the work-related accident as she described on July 26, 1995. 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.[3] *Id.* We therefore affirm the administrative law judge's determination that claimant failed to establish that the existence of a work-related incident occurring on July 26, 1995, which could have caused her dizziness and neck and right shoulder conditions. As claimant failed to establish an essential element of her *prima facie* case regarding these specific alleged injuries, her claim for benefits for these injuries 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); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

[3]As a result of his discrediting claimant's testimony, the administrative law judge similarly found unreliable the parts of the physicians' opinions that related claimant's conditions to the accident she described at the hearing.

We must, however, vacate the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption, 33 U.S.S. §920(a), linking her left arm condition to conditions of employment occurring on July 26, 1995. On remand, the administrative law judge must address evidence relating claimant's left arm condition to her employment. Specifically, claimant was initially examined by Dr. Nacht on November 1, 1995, for her right arm condition. He diagnosed overuse syndrome of the right wrist and forearm. On November 20, 1995, Dr. Nacht noted, in addition to the results of his right arm examination, that claimant's left arm ulnar nerve was subluxing as well and that she was developing a similar ulnar palsy. On December 6, 1995, Dr. Nacht reported that claimant has bilateral subluxing ulnar nerves, symptomatic on the right but not severely symptomatic on the left. He opined that claimant's condition is due to repetitive work tasks and her hypermobile ulnar nerves. CX 8. Dr. Nacht's subsequent records document both left and right arm complaints. *See also* CXS 25, 30. The record evidence shows increasing left arm symptomatology in September 1997, for which claimant wore an arm brace, EX 11, and Dr. Greenwald recommended ulnar transposition surgery in October 1997, CX 30. Accordingly, as the record contains evidence of a left arm injury consistent with the working conditions on which the administrative law judge relied to find that claimant's right arm injury is work-related, we remand for the administrative law judge to address this and other relevant evidence. If it is determined that claimant established her *prima facie* case regarding her left arm injury, the administrative law judge must then consider whether employer presented substantial evidence to rebut the Section 20(a) presumption.[4] *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Employer appeals the fee awarded to claimant's counsel. Specifically, employer contends that the awarded hourly rate of $180 is excessive, and that the administrative law judge erred in allowing 10.5 hours of travel time between Idaho Falls, Idaho, and Seattle, Washington, for counsel's round trip to the formal hearing. We reject employer's contentions. Section 732.132 of the regulations, 20 C.F.R. §702.132, provides that the award of an attorney's fee shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, the administrative law judge found claimant's counsel entitled to a fee based on an hourly rate of $180 because of the complexity of the case. As employer has not satisfied its burden of

[4]The administrative law judge credited, *inter alia*, Dr. Nacht's opinion relating claimant's right wrist, forearm and elbow condition to her work and to hypermobile ulnar nerves in finding that claimant's right arm condition is related to her employment. Decision and Order at 24.

showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of $180, we affirm the administrative law judge's finding. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251, 253 (1998). The administrative law judge also allowed for travel time and costs associated with counsel's round-trip between Idaho Falls and Seattle, reasoning that counsel has a right to choose the locale for the formal hearing most favorable to claimant's interests. As the administrative law judge rationally found that the hours requested are reasonable and necessary, we affirm the administrative law judge's allowance of 10.5 hours for travel time between Idaho Falls, Idaho, and Seattle, Washington.[5] *See generally Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138, 141 (1986).

Accordingly, we vacate the administrative law judge's finding that claimant's left arm condition is not work-related, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

[5]Claimant's counsel's request that he be allowed to supplement his fee petition to the administrative law judge and include billing for paralegal work is properly addressed to the administrative law judge. *See generally Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999)*; Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge