

GARY P. SELLERS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PORT-COOPER/T. SMITH)	DATE ISSUED:
STEVEDORING COMPANY)	
)	
and)	
)	
EDWARD S. SCHAFFER,)	
INCORPORATED)	
)	
Employer/Carrier-)	DECISION and ORDER
Respondents)	

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Sidney Ravkind, Houston, Texas, for claimant.

Christopher R. Hart (Fulbright and Jaworski), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-1103) of Administrative Law Judge Lee J. Romero, Jr., 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his low back on January 17, 1990, when he slipped on the floor of a warehouse, while working for employer as a clerk/checker on the Houston waterfront. Claimant sought treatment for his back, but continued to work through April 19, 1990. Based on continued complaints of back pain, Dr. Christensen hospitalized claimant on April 23, 1990 for diagnostic testing Cl. Ex. 9 at 11. Claimant was hospitalized on April 26, 1990, for accelerated hypertension

but returned to work on April 30, 1990. Claimant suffered a stroke on May 7, 1990, which the parties agree was not work-related and as a result of which he sustained cognitive difficulties. On May 23, 1990, his treating orthopedic surgeon, Dr. Christensen, indicated that claimant's back work-up was "essentially within normal limits." Emp. Ex. 12 at 8. Claimant thereafter retired, and testified that he retired because his stroke caused difficulties with reading and writing, and because of the effects of his back injury. Tr. at 57. He subsequently underwent two angioplasties. Employer voluntarily paid claimant temporary total disability benefits from April 21, 1990, until September 4, 1990. Claimant sought additional temporary total disability compensation and permanent partial disability compensation commencing January 14, 1991, based on Dr. Christensen's deposition testimony that claimant had a 10 percent permanent partial disability of the back. Depo. at 15-17.

The administrative law judge awarded claimant compensation for a ten percent temporary partial disability from April 27, 1990, to January 10, 1991, but denied the claim for permanent partial disability compensation thereafter, finding that claimant had no residual permanent impairment due to his back injury and that his non-work-related stroke was a supervening cause of his loss in wage-earning capacity. On appeal, claimant initially disputed the administrative law judge's award of temporary partial disability, alleging entitlement to temporary total disability compensation during this period. The parties, however, subsequently compromised on the temporary disability issue and claimant filed an Amended Petition for Review In View of Tender of Temporary Total Disability Compensation to January 10, 1991. In the amended petition, claimant argues that the administrative law judge erred in failing to award him benefits after the January 10, 1991, maximum medical improvement date based on Dr. Christensen's assessment of a ten percent permanent partial disability. Employer responds, urging affirmance.

After review of the administrative law judge's Decision and Order in light of the record evidence, we affirm his denial of permanent partial disability compensation. Dr. Christensen deposed that claimant sustained a ten percent permanent partial disability resulting from the low back injury based on his belief that claimant would sometimes be able to work with his back pain, while at other times his back symptoms would prevent him from working. The administrative law judge, however, rationally discredited this testimony based on the fact that it was inconsistent with Dr. Christensen's January 14, 1991 and May 13, 1991, reports, Cl. Exs. 9 at 5, 10, and testimony which indicated that claimant had no residual disability from the back injury and was capable of performing his prior work. Cl. Ex. 14 at 27-28, 44-45. Inasmuch as it is the administrative law judge's duty as factfinder to weigh the evidence and to accept or reject all or any part of any witness's testimony according to his judgment, and his decision not to credit Dr. Christensen's deposition testimony is neither inherently incredible nor patently unreasonable, we affirm this credibility determination¹ and accordingly his denial of compensation for a 10 percent permanent partial disability for claimant's back injury. See *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941,

¹Claimant also argues that the administrative law judge erred in failing to resolve factual doubts in his favor. The United States Supreme Court has held that the "true doubt" rule violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which states that "except as otherwise provided by statute the proponent of a rule or order has the burden of proof." *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), *aff'g Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993).

25 BRBS 78, 81 (CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge