BRB No. 04-0857

ROY L. BURTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONBULK MARINE TERMINAL	)	DATE ISSUED: 07/26/2005
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Shari S. Miltiades (Shari S. Miltiades, P.C.), Savannah, Georgia, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2003-LHC-0394) of Administrative Law Judge Stephen L. Purcell 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant allegedly injured his left knee as a result of a slip and fall accident while working as a stevedore foreman for employer on or about March 31, 2001. Claimant

purportedly informed one of employer's supervisors of his injury following the alleged accident, but he explained that he did not seek any professional treatment at that time because he had just missed four months of work due to a stroke and was fearful that he might lose his job. Rather, claimant self-treated with Vioxx, as well as a muscle stimulator and a knee brace, all of which, he stated, enabled him to continue to work without missing any time until he was terminated by employer on May 30, 2001. Claimant subsequently held a number of jobs but ultimately stopped working due to a myriad of medical concerns unrelated to his alleged left knee injury.

Claimant first sought treatment for his left knee injury on April 8, 2002. At that time, Dr. Palmer diagnosed osteoarthritis of the knee, and opined that claimant "aggravated a pre-existing arthritis in his knee" as a result of the slip and fall accident allegedly sustained on March 31, 2001. Claimant's Exhibit (CX) 9. Between the alleged incident on March 31, 2001, and his visit with Dr. Palmer in April 2002, claimant saw Dr. Sauers, Dr. Allen, and cardiologists Drs. Beard and Bottner for treatment of his other pre-existing and ongoing medical conditions, *i.e.*, chronic knee pain, chronic back pain, arthritis in his hands, an Achilles tendon injury and a heart condition. Claimant, however, stated that he did not inform any of them of his alleged left knee injury because they were not knee specialists.

Claimant also stated that he previously injured his left knee around 1994, resulting in a surgery, and his right knee in 1998, but that any problem with his knees did not prevent him from doing his usual work for employer until after the alleged March 31, 2001, incident. Moreover, claimant stated that he sustained a back injury in July 1997, and suffered a stroke in May 2000, which left him with some limitations.

In his decision, the administrative law judge concluded that claimant is not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his alleged left knee injury, as he did not establish that he sustained any injury while working for employer. Accordingly, benefits were denied. On appeal, claimant argues that in contrast to the administrative law judge's findings, his testimony regarding the events of March 31, 2001, in conjunction with his resulting complaints of left knee pain, are sufficient to establish a *prima facie* case of causation entitling him to the Section 20(a) presumption. Employer responds, urging affirmance.

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. *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 reviewed the relevant evidence pursuant to the appropriate standard for establishing a *prima facie* case under Section 20(a). *See* Decision and Order – Denying Benefits at 16. In this regard, the administrative law judge acknowledged claimant's testimony that he was the last person to leave the vessel *SNOWBIRD* on March 31, 2001, when he slipped on the gangway and injured his left knee, that his accident was witnessed by Joey Hurst and another unidentified man, that he reported the incident to employer's stevedore superintendent, James Traver, and that he opted for self-treatment, rather than professional treatment of his injury, out of concern that he might lose his job. Hearing Transcript (HT) at 24-28. The administrative law judge, however, determined that the other evidence of record belies claimant's statements regarding this alleged accident.

In particular, the administrative law judge found that neither Mr. Hurst nor Mr. Traver had any recollection or knowledge of the alleged incident of March 31, 2001, and both stated that they did not see claimant exhibit any subsequent signs of an injured left knee.[1] HT at 58-60, 65-66. The administrative law judge also found significant the facts that subsequent to the alleged March 31, 2001, incident, claimant continued to work for employer, without any reported absences, until he was let go for reasons unrelated to his alleged injury,[2] and that claimant made no mention, whatsoever, of his alleged left knee injury or resulting problems to Dr. Sauers on May 8 or July 11, 2001, to Dr. Bottner on June 13, 2001, to Dr. Allen on August 16, 2001, or to Dr. Beard on September 26, 2001. In contrast, the administrative law judge found that Dr. Allen, whom claimant saw for treatment with respect to his left lower extremity, explicitly noted that claimant "denies injury." Employer's Exhibit (EX) 3. Based on this evidence the administrative law judge concluded that claimant's testimony concerning his alleged March 31, 2001, injury is not credible.[3]

Furthermore, the administrative law judge found, in contrast to claimant's position, that the testimony of Frank Rodriguez likewise does not support a finding that

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[1] The administrative law judge further found that claimant did not identify or produce the other individual who supposedly witnessed the accident.

[2] Employer terminated claimant on May 30, 2001, because of its stevedore-restructuring plan.

[3] Moreover, the administrative law judge recognized that claimant is well-versed in the process for reporting work-related injuries and of the benefits of doing so with regard to disability compensation, as evidenced by the fact that following each of his prior work-related injuries, *i.e.*, 1994 left knee injury, 1997 back injury, and 1998 right knee injury, claimant reported the injury, received treatment and missed significant periods of work for which he sought and received disability compensation. Thus, the administrative law judge found claimant's rationale for not seeking immediate professional treatment, *i.e.*, that he was fearful of losing his job, suspect.

claimant sustained a work-related injury on March 31, 2001. Specifically, the administrative law judge determined that Mr. Rodriguez had no direct knowledge of any incident involving claimant, as he was not working on either the day of the alleged incident or the following day. Moreover, the administrative law judge found that Mr. Rodriguez's overall testimony regarding the alleged injury was vague, given that Mr. Rodriguez admitted that he could not remember when claimant told him that "I hurt my knee yesterday," CX 10 at 15, that he could not state whether the conversation was about an injury sustained by claimant at home or at work, CX 10 at 16, and that he could not recall which leg was bothering claimant on the day of the conversation. CX 10 at 16-18.

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 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 the inconsistencies in claimant's testimony regarding the date of his alleged accident as they relate to the other evidence of record, and concluded that claimant did not, in fact, sustain a work-related accident as described on March 31, 2001. On the basis of the record before us, we hold that the administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible nor patently unreasonable. *Id.* Consequently, we affirm the administrative law judge's determination that claimant failed to establish that the alleged work-related accident on March 31, 2001, in fact occurred. 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; *Bolden*, 30 BRBS 71.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge