BRB No. 98-1453

WILLARD HUNTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORT COOPER/T. SMITH STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED: July 14, 1999
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Employer's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts and Associates), Houston, Texas, for claimant.

Karla K. Houser (Brown, Sims, Wise & White), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Denying Employer's Motion for Reconsideration (97-LHC-2428) of Administrative Law Judge James W. Kerr, 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 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).

Claimant alleged that he suffered an injury to his left shoulder on April 5, 1997 when the forklift he was operating backed over various pieces of dunnage causing the steering wheel to spin out of control. Claimant reported the incident to both employer's foreman and superintendent approximately two hours later, when he experienced pain in his shoulder.

Employer immediately sent claimant to the hospital, where he was diagnosed as having sustained torn ligaments in his left shoulder. Claimant has not returned to work since the date of this incident.

On April 7, 1997, two days after it was informed of the incident, employer examined a forklift which it believed to be involved in the aforementioned event but made no repairs. Employer conceded, however, that it had not recorded the identification number of the forklift used by claimant on April 5. Thereafter, employer unsuccessfully attempted to recreate the incident as described by claimant utilizing a forklift which it considered to be identical to the one operated by claimant; specifically, employer was unable to have the forklift kick back, *i.e.,* have the steering wheel spin, when backing over dunnage.

In his Decision and Order, the administrative law judge concluded, based upon the testimony of claimant and his co-workers, that claimant established the existence of dangerous working conditions which could have caused his torn ligament, that claimant was therefore entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut the same; accordingly, the administrative law judge found causation established. Next, the administrative law judge determined that claimant remained temporarily totally disabled from April 6, 1997. Accordingly, the administrative law judge awarded claimant continuing temporary total disability compensation plus medical benefits.

Thereafter, employer filed a motion for reconsideration with the administrative law judge, contending that the administrative law judge on a number of occasions in his decision erroneously characterized the testimony of its witnesses and evidence. In his Order Denying Employer's Motion for Reconsideration, the administrative law judge specifically set forth and addressed each of employer's contentions and, after conceding that he may have mischaracterized some of the evidence presented by employer, found that any error committed would not in any way affect the ultimate outcome of the case. Specifically, the administrative law judge reiterated his opinion that claimant established his *prima facie* case based upon an injury to his left shoulder and his testimony, supported by that of three of his co-workers, that working conditions existed which could have caused, aggravated, or accelerated his condition. Accordingly, employer's motion was denied.

On appeal, employer contends that the administrative law judge erred in finding that an accident or injury occurred during the course of claimant's employment; alternatively, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the Section 20(a) presumption.[1] Claimant responds, urging affirmance.

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[1]Employer has filed with the Board a brief which is nearly identical to its motion for reconsideration filed before the administrative law judge. In this regard, we note that employer's brief does not address the administrative law judge's decision on reconsideration and, in fact, concludes by requesting that the administrative law judge "reconsider the

Employer initially challenges the administrative law judge's determination that claimant established the existence of a work-related accident or injury which could have caused his present condition. 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 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. *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, employer does not dispute that claimant has suffered a harm, *i.e.*, a torn ligament in his left shoulder, but argues that no work incident occurred which could have resulted in claimant's current condition. In support of this contention, employer notes that it was unable to recreate the work incident as described by claimant, and that its witnesses established that forklifts with hydraulic steering systems are not subject to kicking back. In concluding that claimant affirmatively established the existence of working conditions which could have caused his harm, the administrative law judge on reconsideration specifically addressed and rejected each of employer's contentions, and relied upon claimant's testimony as supported by the testimony of Mssrs. Bennett, Wise and Haynes, his work colleagues, that forklifts have the propensity to kick back. Moreover, the administrative law judge found that claimant was working for employer at the time of the onset of his shoulder pain, that claimant was immediately sent to the hospital, and that claimant was thereafter diagnosed as having sustained a torn ligament in his left shoulder. Lastly, the administrative law judge found the fact that employer could not reconfigure the dunnage in the exact same manner as that which claimant ran over on April 5, 1997, to be relevant, as employer thus did not recreate the same circumstances under which claimant alleged that the incident occurred.

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*, 371 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).

Decision and Order Awarding Benefits in the referenced matter." *See* Employer's brief at 14.

Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *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 specifically considered each of employer's concerns and concluded that claimant did, in fact, sustain a work related accident on April 5, 1997. On the basis of the record before us, the administrative law judge's decision to credit the testimony of claimant is neither inherently incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's finding that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is 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); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.,* 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between claimant's injury and her employment. *See Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). If employer establishes rebuttal of the presumption, 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); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, employer summarily contends that the administrative law judge erred in finding that it failed to submit sufficient evidence to establish rebuttal. In support of its allegation of error, employer argues that the injury for which he seeks benefits is not related to a work accident, citing in support the testimony of Dr. Zeigler, an engineering expert, who testified that claimant's accident could not have occurred in the manner described. This testimony goes to the occurrence of the accident as alleged, and the administrative law judge in any event found that Dr. Zeigler's test was not an accurate recreation of claimant's accident. Employer has produced no medical or other evidence sufficient to sever the causal relationship between claimant's employment and his shoulder injury; thus, it has failed to meet its burden on rebuttal. *See, e.g., Brown,* 893 F.2d at 294, 23 BRBS at 22 (CRT). We therefore affirm the administrative law judge's finding that claimant's shoulder condition is related to his employment. As a result, the award of disability and medical benefits is affirmed.

Accordingly, the Decision and Order Awarding Benefits and the Order Denying Employer's 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

REGINA C. McGRANERY
Administrative Appeals Judge