

CHARLENE M. HILLIARD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ZEN-NOH GRAIN CORPORATION)	DATE ISSUED: 03/22/2007
)	
and)	
)	
FARMLAND MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III (Stanga & Mustian, P.L.C.), Metairie, Louisiana, for claimant.

Charles M. Lanier, Jr. and P. Ryan Plummer (Christovich & Kearney, LLP), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2003-LHC-2054) of Administrative Law Judge Larry W. Price 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).

This case is before the Board for the second time. Claimant alleged she suffered an injury to her lower spine, neck and right wrist on August 24, 2000, while pulling the cover off a dust tank. She continued performing her usual job duties and did not seek medical attention until August 28. Claimant's last day of work for employer was September 3, 2000. Claimant alleged she reported the workplace incident on September 6, 2000. Tr. at 14-15. Employer, however, maintained that claimant did not inform the plant superintendent of a work accident until June 8, 2001.

In his initial Decision and Order Denying Benefits, the administrative law judge found claimant's notice of injury was not timely provided under Section 12(a), 33 U.S.C. §912(a), and that such failure was not excused by operation of Section 12(d), 33 U.S.C. §912(d). Assuming, *arguendo*, that her claim was not time-barred, the administrative law judge found that claimant failed to establish that her back injury or carpal tunnel syndrome is work-related and that claimant currently suffers no disability that would prevent her return to her usual job duties. Accordingly, the administrative law judge denied benefits, as well as medical expenses related to the claimed conditions.

Claimant appealed to the Board, arguing that the administrative law judge erred in finding that her claim is time-barred, that her injuries are not work-related, and that she is not disabled. The Board reversed the administrative law judge's finding that the claim was time-barred, holding that employer did not carry its burden of establishing that it was prejudiced by claimant's delay in giving notice of her injury. *Hilliard v. Zen-Noh Grain Corp.*, BRB No. 04-0822 (Jul. 21, 2005)(unpub.), slip op. at 5; see 33 U.S.C. §§912(d)(2), 920(b). Next, because he did not make specific findings of fact with regard to each element of claimant's *prima facie* case, the Board vacated the administrative law judge's finding that claimant did not sustain any work-related injuries. *Hilliard*, slip op. at 6. Therefore, the Board remanded the case to the administrative law judge to make definitive findings of fact with regard to the essential elements of claimant's claim. *Id.* The Board also stated that if the administrative law judge found that claimant had suffered a work-related injury to her neck, back or right hand, he must address the issue of claimant's disability prior to August 8, 2002. The Board held that substantial evidence supported the administrative law judge's finding that claimant was not disabled after that date.

On remand, the administrative law judge found that claimant failed to establish the elements of her *prima facie* case, rejecting her evidence that a work accident occurred on August 24, 2000. The administrative law judge also found that claimant did not establish she has a harm to her back or neck. Accordingly, the administrative law judge again denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that she did not establish the elements of her *prima facie* case, and therefore in not invoking

the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision.

In order to establish her *prima facie* case, 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 or aggravated a pre-existing condition. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *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). If these two elements are established, claimant is entitled to a presumption that her injury is work-related. 33 U.S.C. §920(a); *Hunter*, 227 F.3d 285, 34 BRBS 6(CRT).

In this case, claimant asserted that her back and neck injuries are due to an incident at work on August 24, 2000. Claimant also contends this incident caused carpal tunnel syndrome in her right wrist, or aggravated this pre-existing condition. In his original decision in this case, the administrative law judge provided a complete and accurate summary of claimant's testimony regarding the alleged work incident. Decision and Order at 3-4. Specifically, claimant testified she had no symptoms of any kind when she went to work on August 24. Tr. at 11. She testified that as she was pulling a cover off a dust tank, she felt a sharp pain in her right hand and along her lower spine. *Id.* at 11-12. In finding on remand that claimant did not establish that this incident actually occurred, the administrative law judge stated he had "serious doubts" as to claimant's credibility. Decision and Order on Remand at 2. Specifically, based on the lack of any witness to the incident or other corroborating evidence, and claimant's inconsistent actions and statements in the months after August 2000, the administrative law judge found that claimant did not establish that the incident occurred.¹ Decision and Order on Remand at 2.

¹ In this regard, the administrative law judge found that claimant never fully explained her failure to give notice of the injury or accident to employer for over ten months and why she used her personal insurance instead of employer's workers' compensation insurance. Throughout the early months of her treatment, the administrative law judge found that claimant called in to work, but never related that she had had a work-related accident. Tr. at 27-29. The administrative law judge found that it was only after her personal health insurance was cancelled that she first claimed to have been injured in an accident at work. Decision and Order on Remand at 2; Decision and Order Denying Benefits at 13-15. The administrative law judge also noted that when

It is well established that as the factfinder the administrative law judge is entitled to weigh the evidence and to assess the credibility of all witnesses. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). 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 this case, the administrative law judge provided rational reasons for doubting claimant's credibility concerning the occurrence of an incident at work on August 24, 2000. *Id.* As there is no evidence corroborating claimant's testimony, the administrative law judge's finding that claimant failed to establish the occurrence of an incident at work is affirmed. Thus, as claimant failed to establish an essential element of her claim, we affirm the denial of benefits.² *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631; *Bolden*, 30 BRBS 71.

claimant first went to the emergency room she did not report an incident at work. CX 3. When she first saw Dr. Watermeier in September 2000, she was asked the type of accident she had. She selected "Other," not "Work." EX 6 at 107.

² Therefore, we need not address claimant's contention that the administrative law judge erred in finding that claimant did not have a harm to her back or neck.

Accordingly, the Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge