

V.B.)
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 Claimant-Petitioner)
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 v.)
)
 KODY MARINE) DATE ISSUED: 05/28/2008
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 and)
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 LOUISIANA WORKERS')
 COMPENSATION CORPORATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Jeremiah A. Sprague and Dax C. Foster (Falcon Law Firm), Marrero, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-LHC-00961) of Administrative Law Judge Clement J. Kennington 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, a tugboat welder for employer, alleged that an incident occurred at work on December 4, 2003, which caused his current back and left knee conditions. Claimant testified that he suffered an injury when he was crawling out from underneath a tugboat and tripped and fell over a piece of pipe. Tr. at 14. He reported the alleged accident that night to his foreman, Mr. Bourg, and sought medical treatment at West Jefferson Hospital “about two days later.” *Id.* at 15. Claimant underwent back surgery on November 4, 2006. Employer voluntarily paid some disability and medical benefits, but controverted the claim.¹

In his Decision and Order, the administrative law judge found that claimant is not a credible witness and that he failed to establish that the alleged work incident of December 4, 2003, occurred. Therefore, the administrative law judge denied claimant’s claim.

On appeal, claimant contends the administrative law judge erred in denying his claim for benefits. Employer responds, urging affirmance of the administrative law judge’s denial of benefits.

In order to establish his *prima facie* case, claimant must prove both that he sustained a harm and that an accident occurred at work or working conditions existed which could have caused or aggravated his harm. *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). If claimant establishes these two elements, he is entitled to a presumption that his injury is work-related. 33 U.S.C. §920(a); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

Claimant contends the administrative law judge erroneously found that the work accident did not occur, as employer conceded that claimant reported an injury and authorized medical treatment. Claimant also contends the administrative law judge erred in failing to rely on the report of Dr. Todd that claimant sustained a work injury.

¹ The parties agreed that claimant was employed by employer on December 4, 2004, that claimant advised employer of the alleged injury on December 4, 2004, and that employer voluntarily paid some benefits. Decision and Order Denying Benefits at 2, Stips. 1, 2, 3, 5. Claimant did not submit any medical bills for payment, and employer has paid medical benefits totaling \$43,495.69.

We reject claimant's contentions and affirm the administrative law judge's finding that the work accident did not occur. The administrative law judge noted there were no witnesses to the accident. Despite claimant's claim of treatment at the emergency room, the administrative law judge found that no records from this treatment were admitted into evidence. The administrative law judge also discussed Dr. Todd's report dated December 8, 2003, in which claimant reported the work accident, but the administrative law judge also found that claimant did not seek any medical treatment for the next nine months.² The administrative law judge found this lack of treatment belied claimant's claim of injury. The administrative law judge also found that the mere fact of physical injury as documented by Dr. Todd does not establish that a work accident occurred. The administrative law judge also discredited claimant's testimony because he found claimant's assertions of physical limitations contradicted by photographs and testimony from an employee of employer indicating that claimant has physical capabilities which are better than those he alleged.³

It is well established that 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.*

² Dr. Todd stated in his chart note dated September 30, 2004, that claimant had returned for treatment after a hiatus of approximately nine months and that claimant had not had any medical treatment in the interim. Dr. Todd stated that claimant had not been working because of pain from the injury of December 4, 2003. Dr. Todd stated, however, that due to the length of time between visits he could not causally relate claimant's pain to any injury. CX 1 at 55.

³ We reject claimant's contention that the administrative law judge erred in permitting employer to introduce into evidence these photographs and the testimony of the photographer, Dana Matherne, an employee in employer's human resources department. As part of its cross-examination of claimant, employer showed the pictures taken by Ms. Matherne to claimant to elicit information about his alleged physical limitations. Tr. at 32-38. Claimant's counsel was permitted to address the photographs on his re-direct examination of claimant. *Id.* at 41. The administrative law judge requested that Ms. Matherne testify in order to authenticate the photographs. *Id.* at 51. Claimant's counsel was permitted to cross-examine her. *Id.* at 53. The administrative law judge has the discretion to permit the admission of evidence offered in violation of his pre-hearing order. *See Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986); 20 C.F.R. §702.339. As claimant was afforded the opportunity to testify concerning the pictures and to cross-examine Ms. Matherne, his due process rights were not violated. *See, e.g., Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 89 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

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 (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. *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 this case, the administrative law judge provided rational reasons for rejecting claimant's testimony concerning the occurrence of the work accident, and claimant has not demonstrated any error in the administrative law judge's weighing of the evidence or credibility determinations. Moreover, employer is not estopped from contending the accident did not occur notwithstanding its payment of benefits. *See generally Foster v. Davison Sand & Gravel*, 31 BRBS 191 (1997). As the administrative law judge's finding that claimant did not establish that the work accident occurred is rational and supported by substantial evidence, claimant failed to establish an essential element of his *prima facie* case. *Bolden*, 30 BRBS 71. Therefore, his claim for benefits was properly denied. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge