BRB No. 98-0344

BARRY JOHN BELLANGER	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORTH AMERICAN SHIPBUILDING, INCORPORATED	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Permanent Partial Disability and Medical Benefits and the Decision and Order Upon Reconsideration - Affirming Original Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Eugene G. Gouaux, Jr., Lockport, Louisiana, for claimant.

Robert P. McCleskey, Jr. and Maurice E. Bostick (Phelps Dunbar, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Permanent Partial Disability and Medical Benefits and the Decision and Order Upon Reconsideration - Affirming Original Decision and Order (96-LHC-2162) of Administrative Law Judge Daniel A. Sarno, 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, who was employed as a first-class fitter for employer, alleges that he sustained an injury to his back, specifically a herniated disc at L5-S1, as a result of an accident at work on April 29, 1994. Claimant filed a claim for benefits under the Act seeking permanent partial disability compensation based on this alleged work accident. In his initial decision, the administrative law judge determined that the alleged work incident described by claimant did not occur, and that, accordingly, claimant failed to establish entitlement to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. Thus, the administrative law judge denied claimant's claim for disability and medical benefits. Subsequently, claimant filed a motion for reconsideration with the administrative law judge, wherein he alleged for the first time that the heavy duty work activities of his employment aggravated his pre-existing back condition. In a Decision and Order Upon Reconsideration, the administrative law judge found that the evidence of record regarding claimant's working conditions was insufficient to establish claimant's *prima facie* case; accordingly, the administrative law judge affirmed his initial decision denying benefits.

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

Initially, claimant challenges the administrative law judge's determination that he did not sustain the alleged work-related accident on April 29, 1994. 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. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof.[1] *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989);

[1]Although claimant contends that the Act must be liberally construed and doubtful questions of law and fact must be resolved in his favor, the United States Supreme Court has held that the "true doubt rule" does not apply to cases under the Longshore Act because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which requires that the party seeking the award bear the burden of persuasion. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

see also Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, claimant contends that a specific work incident occurred on April 29, 1994, when the weld of a padeye broke and hit claimant on the hip, causing him to fall on his buttocks and lie on his back. Tr. at 30. In this regard, claimant testified that Kirby Martin, a friend and co-worker, helped him to his feet following this incident. The administrative law judge, after discussing the testimony of claimant and his co-workers, determined that the evidence of record suggests a lack of credibility by claimant; accordingly, the administrative law judge declined to credit claimant's testimony that a definitive work-related accident occurred on April 29,1994. *See U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982).

In rendering this determination, the administrative law judge noted that claimant testified that he left work on the day of the alleged accident around 3:00 p.m., but that the time records for that date indicate that claimant left work at the regular time of 4:57 p.m. *Compare* Tr. at 44, 103, 171 *with* EX-13 at 1; EXS-23 at 23, 27. The administrative law judge additionally noted that Dr. Vargas' records indicated that claimant, as of May 2,1994, had been complaining of pain in his left hip and leg for three to five months. EX-2. Similarly, the emergency room records corroborate Dr. Vargas' records in that they indicate that, on May 31, 1994, claimant had left hip and leg pain for three to five months.[2] EX-4 at 20. The administrative law judge next found that the testimony of Kirby Martin was not credible, as Mr. Martin gave inconsistent reasons as to why he was in claimant's work area at the time of the alleged accident.[3] In contrast, the administrative law judge found the testimony of Don Cheramie, employer's paramedic, persuasive. Mr. Cheramie noted that although claimant had seen him numerous times for other injuries, there was no clinic record that claimant, as he asserted, sought treatment with employer for a work injury on April 29, 1994. *Compare* Tr. at 206 *with* Tr. at 36. Furthermore, Mr. Cheramie testified that neither the office of Dr. Vargas nor Chabert Hospital, where claimant alleges he was treated following the accident, contacted him to report a work accident, which is the normal procedure for billing purposes. Tr.

[2]In discussing these medical records, the administrative law judge considered and rejected claimant's assertions that the dates in question reflected misunderstandings.

[3]We note that Mr. Martin testified that he did not witness the incident described by claimant; rather, Mr. Martin helped claimant to his feet after the alleged accident occurred.

at 209-210, 224. Finally, the administrative law judge noted that claimant did not file an accident report with employer until June 13, 1994, six weeks after the alleged accident, and immediately after he was fired by employer for destruction of property on the job site.

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 Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988). In the instant case, the administrative law judge considered claimant's testimony as well as the testimony of claimant's co-workers, employer's paramedic, and employer's time records, and concluded that claimant did not, in fact, sustain a work-related accident as described on April 29, 1994. On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible nor 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). Accordingly, we affirm the administrative law judge's determination that claimant failed to establish the existence of a specific work-related incident occurring on April 29, 1994, which could have caused his present back condition.

Claimant next challenges the administrative law judge's determination on reconsideration that his assertion that the heavy duty work required by his employment with employer aggravated his back injury was insufficient to entitle him to invocation of the Section 20(a) presumption. In establishing his *prima facie* case, claimant is not required to prove by affirmative medical evidence that the working conditions in fact caused the harm; rather, claimant's burden is to establish the existence of working conditions which could conceivably cause the harm alleged. *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990); *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989). In addressing this new contention on reconsideration, the administrative law judge found that claimant, who testified that he was a ship fitter and that he did heavy work, did not elaborate further on his job duties. Thus, the administrative law judge concluded that the evidence presented by claimant only addressed this issue in a brief, incomplete and unpersuasive manner; accordingly, the administrative law judge determined that claimant failed to meet his burden of proving the existence of work conditions which could have caused or aggravated his back condition. As the administrative law

judge's finding in this regard is rational and supported by the record, it is affirmed. *See O'Keeffe,* 380 U.S. at 354. Accordingly, as claimant failed to establish an essential element of his *prima facie* case, the administrative law judge properly denied his claim for benefits. *See U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

Accordingly, the administrative law judge's Decision and Order Denying Permanent Partial Disability and Medical Benefits and Decision and Order Upon Reconsideration - Affirming Original Decision and Order are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge