BRB No. 06-0206

DAMON ZENO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL, INCORPORATED	)	DATE ISSUED: 09/25/2006
	)	
and	)	
	)	
SIGNAL MUTUAL IDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Robert J. Helbock (Helbock Napp & Gallucci, LLP), Staten Island, New York, for claimant.

Francis M. Womack, III (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-00562) of Administrative Law Judge Janice K. Bullard 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 mechanic for employer, alleged he sustained an aggravating injury to his lower back in a work accident occurring on August 30, 2004. At the time, claimant was receiving treatment for back pain. He sought total disability benefits for the period from August 31, 2004 through April 18, 2005. Employer controverted the claim, maintaining that no accident occurred at work on August 30, 2004. It is undisputed that claimant had received an epidural injection for his pre-existing back pain from Dr. Davey on August 26, 2004, and that he had requested and had been denied light-duty work by employer on August 30, 2004, shortly before his alleged work accident.

In her Decision and Order, the administrative law judge found that claimant did not establish that an accident occurred on August 30, 2004. Therefore, the administrative law judge found that claimant is not entitled to the Section 20(a) presumption. 33 U.S.C. §920(a). Accordingly, the administrative law judge denied the claim. On appeal, claimant challenges the administrative law judge's finding that he failed to establish that an accident occurred at work on August 30, 2004. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

In order to make out a *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, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). 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). If these two elements are established, claimant is entitled to a presumption that his injury is work-related. 33 U.S.C. §920(a); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

The administrative law judge found that claimant has a harm, back pain, for which he underwent treatment before and after the alleged incident. The administrative law judge found, however, that claimant did not establish that a work-related accident in fact occurred on August 30, 2004. There were no witnesses to the alleged accident. The administrative law judge found that claimant's testimony concerning the occurrence of the accident is not credible. She found his credibility compromised by the varying accounts of both the origin of his pre-existing condition and how the accident occurred. The administrative law judge also determined that claimant had a motive to fabricate the incident. Decision and Order at 9-11.

We affirm the administrative law judge's finding that claimant failed to establish that an accident occurred at work on August 30, 2004. The administrative law judge found that claimant gave two differing versions of how the accident occurred: (1)

moving a dolly bearing two heavy tanks of gas, Tr. at 19, 42; and (2) picking up or lifting a 150-pound gas tank, CX A, C at 1, 8; EX 6 at 1. The administrative law judge found that this was not merely a question of semantics but was, in fact, critical to the central issue, as there were no witnesses to the alleged accident. The administrative law judge further found that, after the alleged accident, claimant attributed his pre-existing back pain to his general working conditions, whereas prior to August 30, 2004, he had told his physicians the pain was due to his playing football in high school, lifting weights, and a motor vehicle accident. EX 2; Tr. at 25, 27, 57. The administrative law judge also found that claimant had a motive to fabricate the incident because employer had denied him light-duty work earlier that day. Tr. at 18, 60. In addition, the administrative law judge found that Dr. Miller's opinion does not aid claimant because his opinion concerning the cause of claimant's back pain after August 30, 2004, was specifically premised on claimant's history of the accident being correct. EX 6 at 3.

It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her 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). 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). Based on the lack of consistent documentary evidence of record, and the administrative law judge's rational rejection of claimant's testimony, *id.*, we affirm the administrative law judge's finding that claimant did not establish the occurrence of an accident at work on August 30, 2004 that could have caused or aggravated his physical complaints. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). As claimant did not establish an essential element of his *prima facie* case, the administrative law judge properly denied benefits. *See U.S. Industries/Federal Sheet Metal*, 455 U.S. 608, 14 BRBS 631; *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge