BRB No. 96-0988

LOLA M. SHEETS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Richard E. Weiss (Small, Snell, Weiss & Comfort, P.S.), Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2167) of Administrative Law Judge Alexander Karst denying benefits 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 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 hustler driver for employer, alleged that she was involved in a work-

related accident on January 27, 1994, when she slipped on the second of three steps while exiting her truck, and fell approximately 3-1/2 feet, landing on her buttocks in a sitting position. Claimant was taken by ambulance to St. Joseph's Hospital, where she was treated for cervical and lumbar strains and released. The day after her alleged accident, claimant kept a previously scheduled appointment with Dr. Gilman, who had been treating her in connection with a December 12, 1986, work-related neck and arm injury. Until he retired in 1996, Dr. Gilman continued to provide treatment for injuries to claimant's neck, shoulders, back and legs which he related to the alleged January 27, 1994 work-related accident. As of the time of his retirement, Dr. Gilman had not released claimant to return to work. Claimant sought permanent total disability compensation and medical benefits under the Act. Employer disputed liability for the claim, contending that the alleged work-related accident never took place, but rather had been staged by claimant to avoid being fired after she became aware that a random test of her urine performed nine days earlier on January 18, 1994, revealed traces of marijuana. In a Decision and Order issued on April 2, 1996, the administrative law judge denied the claim, finding that the alleged work incident of January 27, 1994 never occurred, and that, consequently, claimant failed to establish a *prima facie* case for invocation of the Section 20(a) presumption, 33 U.S.C. §920(a).

On appeal, claimant challenges the administrative law judge's determination that she failed to establish her *prima facie* case, contending that the administrative law judge's finding that the January 27, 1994, accident did not occur, and his ultimate decision denying compensation, are irrational and not supported by substantial evidence. Employer responds, urging affirmance.

In order to establish entitlement to the Section 20(a) presumption, claimant bears the burden of proving that she has suffered an injury, *i.e.*, a physical harm, and that a work-related accident occurred or working conditions existed which could have caused the harm. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish both elements of her *prima facie* case by affirmative proof. *See Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, __U.S. __, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994).

We affirm the administrative law judge's denial of benefits because his finding that claimant failed to establish the accident element of her *prima facie* case is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. at 359. In the present case, the administrative law judge found that claimant's testimony regarding the occurrence of the alleged January 27, 1994, work accident, which was unwitnessed, was not credible because of her demeanor at the hearing, her remarkable history of having 12 prior industrial injury claims,[1] and the fact that her testimony was both

[1]The administrative law judge noted that based on Dr. Gilman's chart notes it appeared that between 1983 and the claimed 1994 work injury, claimant had been off work on account of the twelve prior injuries a total of nearly six and a half years. Decision and Order at 8.

internally inconsistent and contradicted by public records or affidavits of disinterested physicians. Moreover, he found claimant's testimony incredible because, after examining claimant, Drs. Nelson and Bradley opined that she was pretending to have physical limitations which were anatomically incongruous.

Claimant argues on appeal that the administrative law judge erred in determining that she failed to establish her *prima facie* case because she provided compelling testimony that she sustained a work accident on January 27, 1994. Claimant maintains that the administrative law judge erred in discrediting this testimony because it was corroborated by the medical people who treated or examined her shortly after the alleged work accident, none of whom suspected her of faking or malingering, and all of whom related claimant's problems to the alleged work injury. We disagree. The administrative law judge specifically considered this argument below and rationally rejected it. Based primarily on the hearing testimony of Dr. Wallace Nelson, the administrative law judge found that the doctors, nurses, fireman, and ambulance driver who saw claimant shortly after the alleged incident had merely taken her word and assisted or treated her on the assumption that she told them the truth because none of them had reported any physical findings such as scrapes, bruises or marks on her body which confirmed that she fell or was injured. Decision and Order at 13, 14; Tr. at 222-276; Cx. F; Exs. 7, 21.

In addition, contrary to claimant's assertions, the administrative law judge reasonably interpreted claimant's testimony regarding the occurrence of the alleged accident as internally inconsistent. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). In discrediting claimant's testimony on this basis, he accurately identified discrepancies between claimant's testimony at the hearing on July 12, 1995, her deposition testimony on May 18, 1995, and statements provided to various health care providers regarding the manner in which claimant fell, the nature of her injuries, and her history of twelve prior industrial claims. Decision and Order at 9-14; Tr. at 41, 46, 47, 102-104, 227-246; Cxs. D, E, F, G, H, L; Exs. 4, 5, 6, 9, 11, 21, 22. Moreover, he noted that while claimant alleged that she slipped on the wet steps of the cab of her truck because it had been raining, this testimony was refuted by an affidavit provided by meteorologist Kent Short which indicated that there had been no measurable rainfall on

either January 26 , 1994, or January 27, 1994. *See* Ex. 17 at 165-168; Ex. 22 at 48, 53; Decision and Order at 11. [2]

The administrative law judge also reasonably rejected claimant's assertion that she had no motive for fabricating the alleged injury because she did not know of the results of the January 18, 1994 drug testing as she had been out of town on vacation from January 22, 1994 until shortly before arriving at work on January 27, 1994. Tr. at 51, 53, 140-143. Based on testimony provided by claimant's supervisor, Mr. Morrison, and an affidavit submitted by Dr. Contostavlos, a board-certified forensic pathologist who worked for Drug-Scan, Inc., the independent medical laboratory which performed the testing, the administrative law judge rationally inferred that claimant knew that her prior drug test was positive prior to the alleged January 27, 1994, work injury. Mr. Morrison testified that on January 24 or January 25, 1994, DrugScan phoned him and asked for assistance in locating claimant, after trying unsuccessfully to contact her by telephone and leaving messages on her boyfriend's answering machine, the number given with her specimen. Tr. at 157-158, 213. Mr. Morrison indicated that in response he personally left a message on claimant's boyfriend's answering machine, asking claimant to either call him back or call Dr. Contostavlos. In his affidavit, Dr. Contostavlos stated that at approximately 11:03 p.m. EST on January 26, 1994, he left a message, requesting that claimant call him and approximately 17 minutes later someone identifying herself as the claimant called and was informed that the January 18, 1994, drug test was positive for marijuana. Cx. L at 193-195; Ex. 18 at 169-170.

Finally, the administrative law judge found that the most incontrovertible item of evidence weighing against crediting claimant's testimony was the fact that when a subsequent urine sample was performed on the day of claimant's alleged January 27, 1994, work injury, it was found to contain only water. Based on the uncontroverted testimony of Dr. Nelson that human kidneys and bladder do not produce only water, Tr. at 247-248, the administrative law judge rationally inferred that it was likely that claimant had tampered with the testing. Decision and Order at 5, 12-13; Tr. at 172, 247-248; Cx. L at 191-192; Ex. 3 at 21, Ex. 15.

[2]The administrative law judge also indicated that he considered the fact that claimant had apparently lied about her brother's dying in an automobile accident in order to obtain paid funeral leave to be significant evidence of claimant's propensity for deceit. *See* Tr. at 85-87; 197-198; Decision and Order at 9-10.

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 occurrence of the alleged work-related accident on January 27, 1994.[3] As claimant failed to establish an essential element of her *prima facie* case, her claim for benefits was properly denied. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *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 Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3] In light of our affirmance of the administrative law judge's determination that claimant failed to satisfy the "accident" requirement of her *prima facie* case, we need not address claimant's remaining arguments regarding rebuttal of the 33 U.S.C. §920(a) presumption and the extent of disability.