BRB No. 97-0752

J. T. HOLMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ST. JOHN CLEANING & REPAIR	)	DATE ISSUED:
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Kara Williams, New Orleans, Louisiana, for claimant.

Jacqueline L. Egan (Egan, Johnson, Stiltner & Patterson), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation Benefits (94-LHC-3007) of Administrative Law Judge Richard D. Mills 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, a leaderman responsible for overseeing several other employees, alleges that he sustained an injury to his back while pulling on a cable in order to tie off a barge sometime in April 1993. Claimant testified that his co-workers witnessed this incident and that he immediately informed his supervisor of it. Claimant, who continued to work through June 25, 1993, did not seek medical treatment until June 23, 1993, and was subsequently diagnosed with a disc herniation.

Claimant filed a claim for benefits under the Act, seeking permanent total disability compensation. Initially, two hearings were held before Administrative Law Judge Quentin P. McColgin. Following the second formal hearing, Judge McColgin became unavailable to issue a decision. The case was therefore transferred to Administrative Law Judge Richard D. Mills (hereinafter the administrative law judge), who scheduled a third hearing at the apparent request of employer's counsel. Claimant immediately objected to the scheduling of a third hearing and, in a Motion and Order for Judgment on the Record, sought an immediate decision by the administrative law judge based on the record before him. The administrative law judge granted claimant's motion and, in his Decision and Order, initially found that the date of the alleged incident was April 5, 1993, as it was on that date that barges were being moved by employer. Next, the administrative law judge determined that the alleged specific work incident described by claimant did not occur, and that, accordingly, claimant failed to establish his *prima facie* case. Thus, the administrative law judge concluded that claimant was not entitled to compensation for his current back condition and denied the claim.

On appeal, claimant challenges the administrative law judge's decision not to hold a third hearing and his finding that claimant failed to establish his *prima facie* case. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, claimant contends that the administrative law judge erred in failing to order a third hearing. Before the administrative law judge, however, claimant advocated the opposite position; in fact, claimant filed a motion with the administrative law judge unequivocally objecting to scheduling a third hearing and requesting that a decision be rendered on the record. Claimant therefore waived any rights to a new hearing resulting from the assignment of a new administrative law judge. *See Pigrenet v. Boland Marine & Manufacturing Co.,* 656 F.2d 1091, 13 BRBS 813 (5th Cir. 1981) (*en banc*).

Claimant next challenges the administrative law judge's determination that he did not sustain a work-related accident on April 5, 1993. 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

[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

BRBS 142 (1989); *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 witnessed by all of his co-workers occurred in April 1993 which caused his present back condition; specifically, claimant asserts that he experienced a cramping sensation in his back while pulling on a cable. 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 discredited claimant's testimony that a definitive work-related accident occurred on April 5, 1993. *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 relied upon the testimony of claimant's co-workers, specifically Mssrs. Jessie Reed, Carlton Lewis, Rayfield Lewis, and McArthur Holmes (claimant's nephew), all of whom testified, contrary to claimant's testimony, that they did not witness the incident described by claimant and that they were unaware as to how claimant injured his back. The administrative law judge additionally noted the testimony of Mr. Metcalf, claimant's supervisor, who stated that he could not recall claimant informing him of an injury in April 1993 and that claimant continued to work at his normal duties until June 1993. Lastly, the administrative law judge found the testimony of Mr. Poplus, a co-worker of claimant's who testified that he saw the incident described by claimant, incredible based upon evidence that Mr. Poplus was not "on the clock," and therefore not working, for employer on either April 4, 1993 or April 5, 1993.

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-worker's which conflicts with that testimony, and concluded that claimant did not, in fact, sustain a work-related accident as described on April 5, 1993. On the basis of the record

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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).

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 work-related incident occurring on April 5, 1993, which could have caused his present back condition. As claimant failed to establish an essential element his *prima facie* case, his claim for benefits was properly denied. *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 is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge