BRB No. 93-0204

WILLIE L. BOLDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
G.A.T.X. TERMINALS CORPORATION	)	DATE ISSUED: _____
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown, P.C., Houston, Texas, for claimant.

Claude L. Stuart, III (Phelps Dunbar), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-2874) of Administrative Law Judge Daniel L. Stewart 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 maintenance mechanic for employer, alleges that he experienced a tightening and stiffening of his back when, on January 17, 1989, the wrenches which he was using to tighten base bolts on a boom slipped. Claimant completed his shift without reporting this alleged incident to employer. *See* Tr. at 24-27. Claimant testified that on the next morning, January 18, 1989, he felt pain in his thighs and legs and that, because of this pain, he took the day off from work using vacation, rather than sick, leave. On January 19, 1989, claimant was seen by Dr. Grimes for a

complete physical examination. *Id.* at 30-32. Claimant notified employer of the alleged incident on February 13, 1989, and filed a report of the alleged incident on February 16, 1989. CX 18.

Claimant worked intermittently during the next few weeks. On February 20, 1989, employer met with claimant regarding the fact that the date of the accident as reported by claimant was January 18, 1989, a day when he was off from work. Before claimant left the meeting, he wrote a note which reads, in part, "On the 18th day of February, while tightening base bolts on west crane, I strained my back & legs. The next day I went to the doctor."[1] CX 19. Employer thereafter refused to allow claimant to return to work without a full medical release, which claimant eventually received from Dr. Moore in March 1990. EX M. On July 26, 1990, a physician at employer's clinic restricted claimant from heavy lifting. EX 8. Claimant returned to work on August 27, 1990, but complained of ongoing pain. On August 29, 1990, Dr. Greider released claimant for work with restrictions. Employer has not allowed claimant to return to work under the restrictions set forth by Dr. Greider.

Employer paid temporary total disability benefits to claimant for the period from February 21, 1989 to August 27, 1990, *see* 33 U.S.C. §908(b); it stopped paying claimant's medical expenses as of April 1990. In his Decision and Order, the administrative law judge determined that the alleged work incident of January 17, 1989, never occurred, and that, accordingly, claimant failed to establish his *prima facie* case. Accordingly, the administrative law judge concluded that claimant was not entitled to compensation for this current back condition and denied the claim.

On appeal, claimant challenges the administrative law judge's finding that he failed to establish his *prima facie* case. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant challenges the administrative law judge's determination that claimant did not have a work-related accident on January 17, 1989. Specifically, claimant contends that the administrative law judge erred in discrediting evidence that an accident occurred at work on that date. We disagree. 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 and 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. *See 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). In the instant case, claimant asserted that a definitive work incident occurred on January 17, 1989, which caused his current back condition; specifically, claimant testified that he felt back discomfort when the wrenches which he was using to tighten base bolts slipped. The administrative law judge, after discussing claimant's inconsistent statements regarding the date of his alleged work-related accident, discredited claimant's testimony that a specific work-related accident occurred on January 17, 1989. *See U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In rendering this determination, the

[1]As the administrative law judge noted, claimant has alleged that he was injured on January 17, 1989, not February 18, 1989. Decision and Order at 13.

administrative law judge noted claimant's confusion over the date of the incident, that Dr. Grimes' report of his January 18, 1989, examination of claimant indicated that claimant stated that he had been experiencing pain for two weeks[2] and did not at that time set forth a work connection to his complaints,[3] and that claimant had failed to report promptly the alleged incident, although he had done so in the past in connection with prior work accidents.[4] *See* Decision and Order at 7-8.

The administrative law judge also was not persuaded by the testimony of Messrs. McQueen and Hickerson, claimant's co-workers, and that of claimant's wife, stating that their statements regarding claimant's physical condition did not establish the date of the alleged work incident. Lastly, the administrative law judge found that although Dr. Grimes opined in his February 2, 1989 report that claimant's back strain seemed to be related to claimant's use of large pipe wrenches at work, the opinion was not a description of a specific incident. *See* Decision and Order at 28. Moreover, while claimant correctly asserts that the reports of Drs. Greider, Ponder and Fletcher refer to the alleged January 17, 1989 work incident, the administrative law judge indicated that he could not accept claimant's story at face value and specifically noted that, (1) Dr. Greider conceded that claimant's degenerative disk disease could have come about without any inciting trauma and that he had no basis aside from what claimant told him for his opinion that the incident occurred as alleged, *see* CX 1 at 43-45; Decision and Order at 21; (2) claimant himself discredited the history taken by Dr. Ponder because claimant testified, on cross-examination, that he did not report back pain to Dr. Ponder, as Dr. Ponder indicates he did, *see* Tr. at 120-122; and (3) Dr. Fletcher's report dated April 24, 1989 is the first report "to relate the industrial injury as Claimant now describes it..." *See* EX B at 34-35; Decision and Order at 10-11. Moreover, Dr. Moore testified that he recorded claimant's history as claimant gave it to him and took it at "face value", EX P at 24, which the administrative law judge emphasized he, himself, could not do.

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); *see also Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). In the instant case, the administrative law judge considered the inconsistencies in claimant's testimony regarding

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[2]The administrative law judge noted that on deposition, claimant testified that he was treated by Dr. Grimes two weeks after the alleged incident occurred. EX 3 at 30-33, 37.

[3]Dr. Grimes' initial report specifically states that there had been "[n]o definite trauma or other inciting events." EX P.

[4]The administrative law judge noted that claimant gave three different explanations for his delayed reporting of the alleged incident, namely (1) he thought the injury was minor; (2) employer's safety program sought to keep down the amount of injuries - although claimant had previously filed several accident reports; and (3) accident forms were unavailable.

the date of his alleged accident, as well as claimant's failure to report the alleged incident to Dr. Grimes on January 19, 1989, and concluded that claimant did not, in fact, sustain a work-related accident as described on January 17, 1989. 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. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish the existence of a work-related incident occurring on January 17, 1989, which could have caused his present back condition. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant failed to establish an essential element of 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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge