

BRB No. 97-1075

IVAR B. LAWSON)
)
 Claimant-Petitioner) DATE ISSUED:
)
 v.)
)
 OFFSHORE PIPELINES,)
 INCORPORATED)
)
 and)
)
 INSURANCE COMPANY OF THE)
 STATE OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of James W. Kerr, Jr.,
Administrative Law Judge, United States Department of Labor.

Ed W. Barton (Law Office of Ed W. Barton), Orange, Texas, for claimant.

J. Louis Gibbens (Gibbens, Blackwell & Stevens), New Iberia, Louisiana, for
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-02129) of
Administrative Law Judge James W. Kerr, 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359
(1965); 33 U.S.C. §921(b)(3).

Claimant alleges that he injured his back on October 29, 1993, when he slipped and

fell while climbing onto a grader. This alleged work-incident was unwitnessed. The next day, claimant went deer hunting with employer's safety inspector, Mr. Felix Rodriguez, at which time claimant asserts that he informed Mr. Rodriguez of the occurrence of the alleged work-injury. Claimant continued to work until November 19, 1993, when he went on vacation. Although claimant complained of back pain while at work, and employer supplied claimant with both a brace and Advil, claimant did not request medical treatment while at work or while on vacation. On December 1, 1993, claimant informed employer that he was unable to return to work due to back pain and he has since been unemployed.

In his Decision and Order, the administrative law judge found the instant claim barred pursuant to Section 12 of the Act, 33 U.S.C. §912. Specifically, the administrative law judge credited evidence that claimant did not provide notice of a work injury to employer until sometime during the first week of December 1993, and that employer was prejudiced by the late notice. Additionally, 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 findings that he gave employer untimely notice of his alleged injury and that claimant failed to establish his *prima facie* case. Employer responds, urging affirmance.

We first address claimant's arguments relating to the administrative law judge's determination that he did not sustain the alleged accident on October 29, 1993. Claimant has the burden of proving the existence of an injury or harm and that an accident occurred at work 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. *See Kooley v. Marine Industries Northwest*, 22 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 definitive work incident occurred on October 29, 1993, which caused his present back condition; specifically, claimant asserts that he felt back pain when he slipped and fell. The administrative law judge, after discussing the relevant evidence, discredited claimant's testimony that a specific work-related accident occurred on October 29, 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 noted discrepancies in claimant's testimony regarding his work activities in November 1993. In this regard, the administrative law found significant the fact

that claimant, although he was aware of his duty to report an injury immediately to employer, failed to do so even though he spoke with Mr. Rodriguez on the day of the alleged incident; moreover, claimant never stated the cause of his complaints as being work-related until December 1993.¹ The administrative law judge subsequently relied upon the testimony of employer's safety inspector, Mr. Rodriguez, who testified that although claimant told him the day after the injury that his back hurt, he did not relate that discomfort to a work-incident occurring the preceding day and that, on that following day, claimant helped to install an antenna, which included climbing onto the roof of a cabin.

¹The administrative law judge additionally noted that claimant did not seek treatment until August 1994.

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*, 373 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). Moreover, the administrative law judge may discredit a claimant's testimony to find that an alleged accident arising out of the course of claimant's employment did not occur. *See Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981)(Miller, J., dissenting), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982). 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). In the instant case, the administrative law judge considered claimant's testimony, as well as the testimony of claimant's co-worker, and concluded that claimant did not, in fact, sustain a work-related accident as described on October 29, 1993. 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. We therefore affirm the administrative law judge's determination that claimant failed to establish that the existence of a work-related incident occurring on October 29, 1993, which could have caused his present back condition. As claimant failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied.² *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 Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

²We therefore need not address claimant's contentions that the administrative law judge erred in determining that he did not provide timely notice of his alleged injury and that employer was prejudiced by the lack of timely notice. *See* 33 U.S.C. §912(d)(1), (2).

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge