

JOHN E. BRILEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CERES GULF, INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order on Motion for Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Kathleen K. Charvet, Susan S. Harper (McGlinchey Stafford Lang), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order on Motion for Reconsideration (91-LHC-2402) of Administrative Law Judge Donald W. Mosser 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 which 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 injured his left knee during the course of his employment for employer on August 19, 1985. Employer voluntarily paid claimant temporary total disability compensation from August 20, 1985, to July 15, 1986, 33 U.S.C. §908(b), and permanent partial disability compensation for a 15 percent impairment to claimant's left knee thereafter. 33 U.S.C. §908(c)(2), (19). Claimant subsequently sought additional benefits under the Act.

In his Decision and Order, the administrative law judge initially found the claim time-barred pursuant to Section 13 of the Act, 33 U.S.C. §913. Assuming, *arguendo*, that a claim had been timely filed, the administrative law judge found that claimant's neck and back symptomatology are not related to the work injury, that employer established the availability of suitable alternate employment, that claimant would be entitled to benefits for permanent total disability from March 17, 1986, to December 3, 1986, 33 U.S.C. §908(a), and permanent partial disability compensation thereafter for a 15 percent impairment to the left knee. Lastly, the administrative law judge found employer to be entitled to Section 8(f) relief. 33 U.S.C. §908(f). In the Supplemental Decision and Order on Motion for Reconsideration, the administrative law judge rejected claimant's motion to admit evidence into the record pertaining to the timeliness of his claim and reiterated his finding that the claim is time-barred.

On appeal, claimant challenges the administrative law judge's finding that the claim is time-barred, and the administrative law judge's denial of claimant's motion to admit post-hearing evidence. Claimant also challenges the administrative law judge's findings that his neck and back symptomatology are not related to his work injury, and that claimant sustained a 15 percent impairment to his left knee. Employer responds, urging affirmance.

We reject claimant's assertions of error regarding the administrative law judge's denial of claimant's motion to admit evidence on reconsideration after issuance of the administrative law judge's Decision and Order and the administrative law judge's ultimate finding that the claim is time-barred under Section 13 of the Act.¹ An administrative law judge's actions regarding the admissibility of evidence are reversible only if they are arbitrary, capricious, an abuse of his discretion or not in accordance with law. *See Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

¹Section 13(a) of the Act states, *inter alia*, that:

Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefor is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred.

33 U.S.C. §913(a).

In this regard, the party seeking to admit evidence must exercise due diligence in developing the issues prior to the hearing. *See Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). In the instant case, the administrative law judge, after determining that claimant sought to admit evidence which was not new but, rather, consisted of documents which were easily obtainable prior to the formal hearing, denied claimant's request to admit additional evidence into the record on reconsideration; in addressing this motion, the administrative law judge specifically noted that claimant's evidence included letters from claimant's counsel and letters and reports that were sent to both claimant's counsel and employer. We hold that the administrative law judge acted within his discretionary authority in denying claimant's motion based upon claimant's failure to obtain and submit this documentary evidence prior to issuance of the administrative law judge's Decision and Order.² *See Sam*, 19 BRBS at 228; *see also* 20 C.F.R. §702.339. Moreover, we hold that, based upon the evidence of record, the administrative law judge rationally found the instant claim to be time-barred. Specifically, it is uncontroverted that employer's last payment of compensation to claimant was made on May 1, 1987, and that employer filed its Notice of Controversion on July 22, 1987. Claimant was advised on June 9, 1987, by the district director's office to request a hearing if he wished to pursue a claim; however, the record contains no evidence indicative of such action by claimant until November 29, 1990, when he filed a pre-hearing statement. *See CX 1*. Based upon the record before us, we cannot say that the administrative law judge's determination, based on the evidence of record, that claimant's claim was untimely filed is 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). Accordingly, the administrative law judge's finding that Section 13 bars the instant claim is affirmed.³ *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

Lastly, we affirm the administrative law judge's determination that claimant's back and neck complaints are unrelated to his work injury. In addressing this issue, the administrative law judge, after setting forth the medical evidence of record, credited the opinions of Drs. Nutick and Mimeles over the opinion of Dr. Bolerjack. The testimony of Dr. Nutick, who found no relationship between claimant's neck and back conditions and the August 1985 work incident, is sufficient to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Moreover, the credited opinions of Drs. Nutick and Mimeles constitute substantial evidence in support of the administrative law judge's ultimate finding that claimant's neck and back conditions are not work-related. Accordingly, we affirm this determination by the administrative law judge.⁴

²We note that claimant did not seek either a continuance of the formal hearing or to hold the record open post-hearing for the admission of additional evidence.

³We note that the administrative law judge did not afford claimant the benefit of the Section 20(b) presumption, 33 U.S.C. §920(b). Any error committed by the administrative law judge in this regard, however, is harmless, as the administrative law judge credited substantial evidence to find the claim time-barred. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40 (CRT)(D.C. Cir. 1987).

⁴As claimant's claim for disability benefits is time-barred, we need not address claimant's contentions regarding the extent of his knee impairment.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge