BRB Nos. 00-1088
and 00-1088A

JOHN A. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SELBY BATTERSBY COMPANY	)	
	)	
and	)	
	)	
THE HARTFORD INSURANCE COMPANY	)	DATE ISSUED: July 27, 2001
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
and	)	
	)	
EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN (WAUSAU)	)	
	)	
FEDERAL INSURANCE COMPANY	)	
	)	
HOME INSURANCE COMPANY	)	
	)	
COMMERCE AND INDUSTRY INSURANCE COMPANY	)	
	)	
Carriers-Respondents Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News,

Virginia, for claimant.

Gerard E. W. Voyer, Donna White Kearney, and Christopher J. Wiemken (Taylor & Walker, P.C.), Norfolk, Virginia, for The Hartford Insurance Company.

Matthew H. Kraft (Inman & Strickler, P.L.C.), Virginia Beach, Virginia, for Employers Mutual Liability Company of Wisconsin (Wausau).

David R. Kunz and Caroline Rieker (David Robertson Kunz & Associates), Philadelphia, Pennsylvania, for Federal Insurance Company.

Steven H. Theisen (Midkiff, Muncie & Ross, P.C.), Richmond, Virginia, for Home Insurance Company.

R. John Barrett, F. Nash Bilisoly, and Kelly O. Stokes (Vandeventer Black LLP), Norfolk, Virginia, for Commerce and Industries Insurance Company.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and Hartford Insurance Company (Hartford) cross-appeals, the Decision and Order (99-LHC-1154) of Administrative Law Judge Fletcher E. Campbell, 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 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 worked for the Selby Battersby Company (Selby Battersby) from 1946 until he retired in 1981. Claimant's Social Security records show that during this time he intermittently worked for other employers as well. C/I Ex. at 1. His job at Selby Battersby involved "mixing" the composition for the floors of carriers, submarines and tankers on board the ships at shipyards. Tr. at 36-37. He worked at several different shipyards including those in Newport News, Baltimore, and Pascagoula. Tr. at 37. He testified that he worked around pipe coverers on board ships and that he saw dust being generated by their work. Tr. at 38, 40. Claimant stated that he believed that the "scratch" that he used for his mixing contained asbestos, but agreed that the bags in which the substance came made no reference to asbestos. Tr. at 49. Claimant also was occasionally involved with removing old

flooring, which he described as asbestos-like tile. The parties stipulated to the following periods of insurance coverage: Wausau Insurance Company (through Employers Mutual Liability Insurance Company of Wisconsin)(Wausau) from April 1, 1968, through April 1, 1973; Hartford, from April 30, 1977, through April 30, 1982; and Commerce and Industry Insurance Company, from April 30, 1982, through March 1, 1986. Claimant filed a claim under the Act for medical benefits to cover the cost of periodic monitoring for his asymptomatic asbestosis.

In his decision, the administrative law judge found, based on the parties' stipulation, that claimant has asbestosis, and thus that he established an "injury." The administrative law judge found, however, that claimant did not establish that he was exposed to asbestos while working for Selby Battersby. Accordingly, the administrative law judge found that claimant did not establish that his asbestosis is work-related. The administrative law judge found, assuming that had claimant established that his condition was causally related to asbestos exposure at Selby Battersby, he nonetheless would not be entitled to future medical benefits. The administrative law judge also determined that had claimant carried his burden on the issue of the work-relatedness of his condition, Hartford would be the responsible carrier.

On appeal, claimant challenges the administrative law judge's finding that he did not establish that his asbestosis is employment-related and that he is not entitled to future medical expenses. Hartford responds, urging that the administrative law judge's finding that claimant did not establish exposure to asbestos and that he is not entitled to future medical costs, be affirmed. On cross-appeal, Hartford challenges the administrative law judge's finding that, assuming claimant established exposure to asbestos and therefore that his asbestosis is causally related to his work at Selby Battersby, Hartford is the responsible carrier. Wausau, Federal Insurance Company, Commerce and Industry Insurance Company and Home Insurance Company respond to both appeals, urging that the administrative law judge's decision be affirmed in all respects.

Claimant argues that the administrative law judge erred in not finding that he was exposed to asbestos, *i.e.*, did not establish the "working conditions" prong of his *prima facie* case, despite claimant's testimony of exposure in many instances, evidence presented by one of employer's carriers that establishes the use of asbestos-containing products for a significant portion of claimant's employment, and the absence of evidence from employer disputing asbestos use. In order for a claimant to be entitled to medical expenses, the injury must be work-related. *Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989). Claimant bears 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 his *prima facie* case. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). 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). If the elements of claimant's *prima facie* case are established, the Section 20(a) presumption applies to link claimant's harm to his employment. 33 U.S.C. §920(a); *see Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

We affirm the administrative law judge's finding that claimant did not establish his *prima facie* case. In finding that claimant failed to prove his case, the administrative law judge reasoned that the composition of the "scratch" claimant used is unknown; that Mr. Beierschmitt, retired superintendent for Selby Battersby, testified that company used something called Selbalith, which contained asbestos, but there is no evidence connecting Selbalith with "scratch;" that there is no evidence regarding the materials contained in the pipe insulation near which claimant allegedly worked; and that even though claimant testified that the insulation he saw had glass flakes, the record does not verify that these flakes were asbestos, fiberglass, or something else. CX 3 at 36, 71-72. The administrative law judge concluded that while claimant testified that the "scratch" he used generated dust which he now believes to have been asbestos, Tr. at 49, that speculation based on second-hand statements of co-workers does not constitute probative, material and competent evidence to establish that the substance was, in fact, asbestos. The administrative law judge also found that claimant was not a credible witness and that his recollection was hazy at best, not because of an intent to deceive, but because of advanced age or for other reasons. Decision and Order at 11-12. The administrative law judge found claimant's testimony at the hearing to be confusing and contradictory. The administrative law judge concluded that in light of the lack of credibility of claimant's testimony and the total absence of testimony of any co-worker or other person who could verify asbestos exposure through first-hand knowledge of the venues where claimant worked, claimant failed to sustain his burden of demonstrating exposure to asbestos while working for Selby Battersby. Thus, he concluded that claimant did not establish working conditions which may have exposed him to asbestos.[1] Decision

[1]Claimant argues that the administrative law judge's comment that "many things generate dust and most of them do not contain asbestos," Decision and Order at 11, is

and Order at 5.

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evidence of an assumption of facts, not in this record, and evidence of a total ignorance of U.S. Naval shipbuilding construction sites between 1946 and 1981. Cl. Br. at 12. Claimant also contends that by requiring him to show what kind of insulation employer used on pipes, the administrative law judge is placing an unfair burden on him. Claimant, however, is asking the administrative law judge to make assumptions about shipbuilding, in the absence of record evidence, and the burden of proof is on claimant to establish his *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

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); *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 fully considered claimant's testimony regarding his alleged exposure to asbestos, as well as the absence of corroborating evidence, and concluded that claimant was not exposed to asbestos while working for Selby Battersby. On the basis of the record before us, the administrative law judge's decision to reject the testimony of claimant is neither inherently incredible nor patently unreasonable. Moreover, the administrative law judge rationally determined that the evidence of employer's use of a substance containing asbestos does not establish that claimant actually was exposed to that product. *See generally* *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 (2nd Cir. 1961). Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's determination that claimant failed to establish the existence of work-related conditions during his tenure with Selby Battersby which could have caused his asbestosis. As claimant failed to establish an essential element of his *prima facie* case, we affirm the denial of the claim for medical benefits.[2] *See* *U. S. Industries/Federal Sheet*

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[2]The administrative law judge, relying on *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424 (1997), determined that even had claimant established the work-relatedness of his asbestosis, claimant was not legally entitled to recover medical monitoring costs under the Longshore Act. In *Metro North*, the Supreme Court held that an employee who was exposed to asbestos, but was disease and symptom-free, could not recover under the Federal Employees Liability Act (FELA) for negligently inflicted emotional distress, as the statute permits plaintiffs to recover for emotional injury only if they sustain a "physical impact" as a result of defendant's negligence. As contact with a substance which can potentially cause disease at a substantially later time does not meet this test, the Court held the employee could not recover damages for his emotional distress and similarly could not recover a lump sum for medical monitoring costs that he expected to incur in the future. In rendering its decision, however, the Court specifically noted that the parties did not dispute that an exposed employee could recover related reasonable medical monitoring costs if and when he developed symptoms. 521 U.S. at 438. As the case at bar arises under the Longshore Act, rather than under FELA, there are significant distinctions which the administrative law judge did not address. This case does not involve issues of negligence or recovery in tort for alleged emotional distress. The Longshore Act provides for possible entitlement by a claimant to reimbursement for the cost of future medical monitoring for a work-related harm in the absence of disability if claimant sets forth an evidentiary basis to support a finding that such monitoring is reasonable and necessary. *See* 33 U.S.C. §907*;* 20 C.F.R. §702.402*; Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Romeike*, 22 BRBS at 57. Thus, the

Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982).

In light of our affirmance of the administrative law judge's finding that claimant did not establish his *prima facie* case, we need not address Hartford's contentions, on cross-appeal, regarding the responsible carrier issue.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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administrative law judge erred in relying on *Metro North* as a basis for denying medical monitoring. The error, however, is harmless, as the administrative law judge also found that claimant would not be entitled to medical monitoring "[c]onsidering this case from the point of view of the necessity of the proposed medical monitoring." Decision and Order at 13. The administrative law judge found that Dr. Donlan did not state why he thinks that an annual x-ray is necessary or important, and did not cite any medical literature on the subject, and that therefore, despite being claimant's treating physician, his opinion is unexplained and unreasoned.