BRB No. 97-1446

BENEDETTO VASILE	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-0240) of Administrative Law Judge Ralph A. Romano 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).

On July 31, 1996, claimant, a clerk/checker, alleged that he injured his head

and right shoulder when a box fell on him while working for employer. The administrative law judge awarded claimant temporary total disability benefits from July 31, 1996, to September 19, 1996. The administrative law judge also awarded medical benefits prior to September 19, 1996, and interest. On appeal, employer challenges the administrative law judge's finding that claimant was injured in an accident at work and his award of temporary total disability benefits. Claimant responds in support of the administrative law judge's decision.

Employer initially contends that the administrative law judge improperly applied the Section 20(a) presumption in this case. 33 U.S.C. §920(a). We agree. The Section 20(a) presumption is invoked if claimant establishes his *prima facie* case, *i.e.,* that he sustained a harm and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant's testimony, if credible, may establish that the alleged accident in fact occurred. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by presenting specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997).

The administrative law judge found invocation of the Section 20(a) presumption based on the fact that claimant sustained a harm as documented by the emergency records from St. James Hospital and the reports of Drs. Parisi and Patel.[1] Decision and Order at 4-5; Cl. Ex. 1; Emp. Ex. 11. He also found that claimant established working conditions which could have caused the harm, specifically, shelves containing stacked boxes of papers, based on claimant's testimony and photographs taken by employer's manager of health and safety, Mr. Lysick. Decision and Order at 5; Tr. at 14-15; Emp. Ex. 2. At rebuttal, the administrative law judge found that the alleged accident did not in fact occur as he found it unbelievable that an uncovered box containing loose papers could fall nine

[1]The emergency records from St. James Hospital dated July 31, 1996, diagnosed head contusion and spinal sprain. Emp. Ex. 11. On August 1, 1996, Drs. Parisi and Patel diagnosed contusion of vertex and right parietal area, post concussion syndrome with headaches and dizziness, acute cervical derangement, contusion sprain of right shoulder, and acute dorso-lumbar derangement. Cl. Ex. 1.

feet without emptying its contents. Decision and Order at 5. Upon evaluating the evidence, the administrative law judge was "unable to find Claimant not credible" in that the contents of the box may have been replaced when claimant was unconscious and as employer's evidence regarding the placement of the box after the accident was suspect as the photographs taken by Mr. Lysick showed that the box had been moved although Mr. Lysick testified that the box had not been moved. Decision and Order at 5-6; Tr. at 71-72; Emp. Ex. 2(a)-(c).

We must vacate the administrative law judge's award in this case and remand for further findings inasmuch as the administrative law judge has made inconsistent findings. Before invoking the Section 20(a) presumption in this case, the administrative law judge must determine whether an accident in fact occurred by weighing all of the evidence, pro and con, relevant to this issue and by resolving the issue of the credibility of claimant's testimony concerning the occurrence of the accident.[2] *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 fact that working conditions existed that could have caused the harm is insufficient in this case as claimant must prove that the alleged accident in fact occurred. *See, e.g.*, *Hampton,* 24 BRBS at 141; *Harrison,* 21 BRBS at 339. If the administrative law judge finds invocation established, he must determine whether employer has established rebuttal consistent with the applicable legal standards. *See MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987). If so, he must reevaluate the evidence as a whole, with claimant bearing the burden of proof. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171

[2]Employer asserts that resolving claimant's credibility necessarily involves taking into account the issues of whether and how long claimant was unconscious after the alleged accident, claimant's physical condition upon being released from the hospital, inconsistencies in claimant's account of how the alleged accident occurred, whether claimant was holding a cup of coffee at the time of the alleged accident, as well as other facts relevant to the occurrence of the alleged accident. Emp. Br. at 5-7.

(1996). It is legally insufficient for the administrative law judge to state that he cannot "find Claimant [is] not credible," and yet award benefits. *Id.*

Employer also contends that the administrative law judge erred in finding claimant temporarily totally disabled from July 31, 1996, to September 19, 1996. The administrative law judge found that the opinions of Drs. Parisi and Patel confirmed claimant's temporary total disability. Decision and Order at 7; Cl. Ex. 1; Emp. Ex. 11. Moreover, the administrative law judge rationally concluded that Dr. Zuckermann's opinion was confirmatory of some injury having been sustained.[3] *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Emp. Ex. 12. The administrative law judge, however, acted within his discretion in terminating claimant's temporary total disability benefits on September 19, 1996, based on Dr. Swearingen's report that claimant had no disability or impairment after that date.[4] *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Decision and Order at 7; Emp. Ex. 6. Consequently, we affirm the administrative law judge's award of temporary total disability benefits to claimant from July 31, 1996, to September 19, 1996, if the administrative law judge on remand finds that causation is established.

Accordingly, the administrative law judge's Decision and Order is vacated as to the administrative law judge's finding of causation, and this case is remanded to the administrative law judge for reconsideration consistent with this opinion. If the administrative law judge again finds causation established on remand, his award of temporary total disability benefits from July 31, 1996, to September 19, 1996, is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3]Dr. Zuckermann diagnosed post-traumatic concussion syndrome, vertigo, headache, and cervical sprain with musculature tenderness. Emp. Ex. 12.

[4]Claimant did not have to establish the requirements of his usual work in order to establish total disability in this case as the reports of Drs. Parisi and Patel state that claimant is temporarily totally disabled, *i.e.*, that he cannot return to any work. *See generally Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988); *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); Cl. Ex. 1.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge