BRB Nos. 02-0562
and 02-0562A

WALLACE BOUDREAUX	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
FMC CORPORATION	)	DATE ISSUED: May 7, 2003
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Warren A. Perrin (Perrin, Landry, deLaunay, Dartez & Ouellet), Lafayette, Louisiana, for claimant.

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

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (01-LHC-1713) of Administrative Law Judge Clement J. Kennington 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, a well head service technician on an offshore rig, claims that he suffered injuries to his back while dismantling a walkway on either July 21 or 22, 1999, during the course of his employment. Upon claimant=s release to return to work in October 1999, employer determined it had no jobs available within claimant=s restrictions,[1] EX 5, but offered claimant employment at another location, which he declined. EX 8. Claimant now works as a nutritional products marketer and personal trainer, and has been diagnosed as suffering from chronic sacroiliac sprain/strain, scoliosis, spondylolysis and degenerative changes to his back. EXS 11, 16. Claimant sought disability and medical benefits under the Act.

In his decision, the administrative law judge found that claimant failed to establish the working conditions or accident element of his *prima facie* case and therefore was not entitled to the presumption at Section 20(a) of the Act, 33 U.S.C. '920(a). Assuming, *arguendo,* that claimant had invoked the presumption, the administrative law judge concluded employer established rebuttal and that the weight of the overall evidence failed to establish that claimant sustained a work-related back injury. Accordingly, he denied the claim.

Claimant appeals, arguing that the administrative law judge erred in finding

[1]Although Dr. May originally released claimant to full duty work, employer requested further documentation. Dr. May then provided restrictions of no working more than 10 hours per day, no lifting over 50 pounds, and no rough boat rides of greater than 1 to 2 hours; he also required the use of a supportive mattress. CX 3.

that he had not established his *prima facie* case. Claimant also contends that the administrative law judge erred in not finding that employer acted in violation of Section 49, 33 U.S.C. '948a. Employer responds, urging affirmance of the denial of benefits.[2]

[2]Employer also filed a cross-appeal, BRB No. 02-0562A. In its AAppeal Brief,@ employer responds to claimant=s contentions, asserting that the administrative law judge=s decision should be affirmed. One sentence in this brief challenges the administrative law judge=s evidentiary ruling excluding from the record employer=s surveillance videotapes, which employer contends the parties stipulated would be allowed into evidence. As employer failed to brief this issue, it will not be addressed. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff=g on recon. en banc* 31 BRBS 13 (1997).

In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a), 33 U.S.C. '920(a), presumption, which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. *See Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996). The Section 20(a) presumption does not aid claimant in establishing either element of a *prima facie* claim. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). Contrary to claimant=s assertion that all doubt is to be resolved in his favor, clamant bears the burden of establishing each element of his *prima facie* case by affirmative proof. *See Bolden*, 30 BRBS 71; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In order to benefit from the Section 20(a) presumption, claimant must prove that the incident which he alleges caused the harm did in fact occur on the work site, not merely that it could have occurred there. The Section 20(a) presumption attaches only to the claim raised by the claimant.[3] *See U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

We affirm the administrative law judge=s finding that claimant is not entitled to the benefit of the Section 20(a) presumption. Claimant asserted that a definitive work incident occurred on July 22, 1999. Specifically, claimant testified that he felt back discomfort while he was removing a piece of grating. The administrative law judge, after discussing claimant=s statements regarding the alleged work-related accident, discredited claimant=s testimony that this accident occurred. In making this determination, the administrative law judge noted that claimant was confused over the date of the incident, that he continued to work his regular shift and told his supervisor, Mr. Hinson, on either July 27 or 28, that his pain was not work-related, that he informed Dr. May, his treating physician, that he had a long history of the same symptoms,[4] EX 12, that on his application for short-term disability benefits, he

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[3]Here, claimant based his claim on the occurrence of a specific work event rather than on his general working conditions. Thus, the administrative law judge properly addressed whether the specific event alleged had in fact occurred.

[4]Claimant concedes a long history of similar back pain since 1982, EXs 12, 15, although most of his problems arose during his employment from 1989 to 1996 with the Sheriff=s Office as an intake officer and hospital security guard. EX 8; HT at 36, 65. Claimant=s back had been classified as a Class 4 since the late 1980s and he has undergone chiropractic treatment for back pain since 1992. EXs 12,15.

stated that Athere was no accident while working,@ EX 8, and that Dr. Bernard, an orthopedic surgeon, found that claimant=s x-rays were not consistent with a traumatic injury. EX 11.

The administrative law judge also was not persuaded by the testimony of Messrs. Cooper and Herbert, claimant=s co-workers, finding that their statements regarding claimant=s physical condition did not establish the date or the actual occurrence of the alleged work incident. Neither of the co-workers actually witnessed the alleged event nor could they remember the date of the accident; they only testified that claimant appeared to be fatigued. HT at 25, 33-34. Moreover, neither Dr. May nor Dr. Bernard found the objective evidence consistent with traumatic injury; Dr. Barczyk related the symptoms to a work place incident based solely on claimant=s statement to that effect. EX 6.

The administrative law judge, moreover, found claimant was not a credible witness, based not only on his inconsistent testimony but also on his misrepresentation of facts on his pre-employment physical, EX 13, and his insurance claim, EX 17, as well as the fact that he undergoes rigorous physical exercise at the gym everyday in violation of the restrictions placed on him by Dr. May.[5] HT at 113-129. Because claimant=s uncorroborated testimony was the only evidence supporting the occurrence of the alleged incident, the administrative law judge concluded that claimant did not, in fact, sustain a work-related accident as described on July 22, 1999.

[5]Claimant testified that he maintains a complete daily body work-out routine including, but not limited to, 225 pound squats, 175-180 pound dead-lifts, Swiss Ball stomach crunches and hyper-extensions of the back, 225 pound bench presses, two 70 pound dumbbell presses, and 30 to 245 pound chest weights. HT at 113-125.

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). Accordingly, 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). 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 July 22, 1999, which could have caused his present back condition. *Bolden*, 30 BRBS 71. As claimant has failed to establish an essential element of his *prima facie* case, his claim for disability and medical benefits was properly denied.[6] *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).

However, the administrative law judge failed to address claimant=s contention that employer terminated him as a result of his filing a claim under the Act, thereby violating the provisions of Section 49 of the Act.[7] Section 49 prohibits an employer from discharging or discriminating against an employee because he Aclaimed or attempted to claim@ compensation under the Act. 33 U.S.C. '948a. If the employee can show he is the victim of such discrimination he is entitled to reinstatement and back wages. 33 U.S.C. '948a; *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988). As the administrative law judge failed to address this contention, we remand the case for the administrative law judge to consider the evidence in accordance with the applicable legal standards under Section 49. *Dunn v. Lockheed Martin Corp.,* 33 BRBS 204 (1999).

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[6]As we affirm the administrative law judge=s finding that claimant did not sustain a work-related injury, we need not address claimant=s contentions concerning his entitlement to medical benefits.

[7]The administrative law judge noted that claimant raised this issue, *see* Decision and Order at 3, 16, but did not address it.

Accordingly, the administrative law judge=s Decision and Order denying compensation benefits is affirmed. The case is remanded to the administrative law judge for consideration of claimant=s Section 49 claim.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge