BRB Nos. 00-0490
and 01-0595

THOMAS RUSSELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SALMON WELDING, INCORPORATED	)	DATE ISSUED: 10/3/01
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits, Decision and Order Denying Request for Reconsideration, and Decision and Order Denying Petition for Modification of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits, Decision and Order Denying Request for Modification, and Decision and Order Denying Petition for Modification (99-LHC-1487) of Administrative Law Judge Paul A. Mapes 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 began working for employer as a welder on December 14, 1998. He alleged that he sustained a work-related injury to his neck and left shoulder about 1:30 p.m. on December 22, 1998, when he was helping a co-worker move a welding machine. Claimant continued to work and did not report the incident to anyone that day. Employer, while agreeing that claimant developed a cervical injury during December 1998, disputed that it is work-related. Claimant underwent surgery on his neck in April 1999 resulting in his inability to work. Claimant, therefore, sought continuing temporary total disability benefits under the Act.

In his original Decision and Order Denying Benefits, the administrative law judge found that claimant presented sufficient evidence to establish a *prima facie* case for invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a). Specifically, the administrative law judge stated that claimant's testimony that he hurt his neck in a work accident was sufficient to invoke the Section 20(a) presumption. The administrative law judge further found, however, that employer produced substantial evidence to rebut the Section 20(a) presumption. In this regard, the administrative law judge relied on the testimony of claimant's co-worker, Mr. Browning, who denied that the incident with the welding machine occurred as described by claimant. The administrative law judge further relied on the testimony of employer's owner, Mr. Huizenga, that claimant did not tell him of the work injury, and in fact, told him he hurt himself helping a friend move, and of Mrs. Huizenga, the company's bookkeeper, that claimant's wife told her that claimant lacked personal health insurance and desired that the claim be handled under the State of Washington workers' compensation system. Weighing this evidence against claimant's testimony, the administrative law judge concluded that claimant did not establish that his injury is work-related.

Claimant filed a motion for reconsideration, which the administrative law judge denied. The administrative law judge rejected claimant's contention that he had erred by finding that claimant had the most financial incentive of all the witnesses to be untruthful. The administrative law judge also found no merit in claimant's contention that he erred in drawing an adverse inference from claimant's failure to introduce into evidence the medical records of the physician who first treated his alleged work-related injury.

Claimant appealed these decisions to the Board. BRB No. 00-0490. Prior to the Board's consideration of the appeal, claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that he had obtained new evidence demonstrating a mistake in fact in the administrative law judge's decisions. By Order dated September 13, 2000, the Board dismissed claimant's appeal, and remanded the case to the administrative law judge for consideration of claimant's motion for modification.

In his Decision and Order Denying Petition for Modification, the administrative law judge found that claimant's "new evidence," records of claimant's visit to a clinic on December 28, 1998, could have been discovered prior to the hearing by the exercise of due diligence. The administrative law judge stated that claimant's submission of the records was merely a "backdoor" method of retrying his case. The administrative law judge found that, in any event, the clinic records do not support claimant's contention that an accident occurred at work, as the doctor recorded "no injury event" in his notations. Thus, claimant's motion for modification was denied.

Claimant appeals the administrative law judge's denial of his petition for modification, BRB No. 01-0595, and in addition requested reinstatement of his appeal in BRB No. 00-0490. By Order dated April 25, 2001, the Board reinstated claimant's appeal in BRB No. 00-0490, and consolidated claimant's two appeals. Claimant contends that the administrative law judge erred in finding that a work accident did not occur that could have caused his cervical condition. Employer responds, urging affirmance.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by 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. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption is invoked, employer may rebut it by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If such evidence is produced, the presumption no longer applies and the administrative law judge must weigh the competing evidence as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

Claimant first contends the administrative law judge erred in finding that employer produced substantial evidence to rebut the Section 20(a) presumption.[1] Claimant testified that he was injured when a co-worker, Mr. Browning, "lost his balance" as he was carrying a welding machine down an empty stairway shaft, thereby causing claimant to drop the

[1]The sole issue presented here concerns whether the accident alleged by claimant in fact occurred. Claimant bears the burden of proving this fact as an element of 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). Thus, the administrative law judge here could have simply weighed all the evidence, *pro* and *con*, prior to invoking Section 20(a). Instead, he invoked Section 20(a) based on claimant's testimony, found it rebutted by contrary evidence produced by employer, and then weighed all the evidence, with claimant bearing the burden of persuasion. Since the administrative law judge fully weighed the evidence, properly allocating the burden of persuasion, we will review this case within the framework he utilized in order to determine whether the conclusion that the accident did not occur as alleged is supported by substantial evidence. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

machine and suddenly put tension onto a rope being held by claimant as he stood on a platform overlooking the stairway shaft. Tr. at 34-39. Claimant testified further that he immediately felt severe pain at the top of his left shoulder and the back of his neck, causing him to sit down for about three to five minutes to recover. *Id.* at 39. Claimant maintained that he finished his shift, although the pain bothered him and that he told Mr. Huizenga about the accident that day on their ride home. *Id.* at 43. Claimant also testified he told Mrs. Huizenga about the accident on December 24, 1998, when he picked up his paycheck, and reiterated the claim of injury to Mr. Huizenga on December 28 and December 31. *Id.* at 49, 52, 54.

In finding that employer rebutted the Section 20(a) presumption, and in weighing the evidence as a whole, the administrative law judge relied on the testimony of Mr. and Mrs. Huizenga and Mr. Browning that the accident did not occur as claimant alleged and that it was not reported in the manner to which claimant testified. Contrary to claimant's contention, this evidence is sufficient to rebut the Section 20(a) presumption as it constitutes substantial evidence that the work accident, and claimant's reporting thereof, did not occur as claimant alleged. Mr. Browning testified he and claimant were moving a welding machine on the date in question, but that he was not attempting to move the machine down the stair shaft as such a maneuver would be very dangerous. Tr. at 117. He also denied losing his balance. *Id.* at 108. Mr. Huizenga testified that claimant did not mention a work accident to him until December 31, *id.* at 19, and that claimant had told him on December 28 that he hurt his neck and back helping a friend move. *Id.* at 20. Mr. Huizenga further stated that he observed claimant wrestling without discomfort with Mr. Huizenga's four year old son when claimant picked up his check on December 23; Mrs. Huizenga also testified to this activity. *Id.* at 138, 158.[2] In addition, Mrs. Huizenga denied that claimant told her about a work injury. She testified that claimant's wife called her on January 8, 1999, and told her that claimant had no personal health insurance and intended to make a claim for a work injury.[3] Mrs. Huizenga also stated claimant requested that the claim be reported as a state workers' compensation claim. *Id.* at 159. As this evidence is sufficient to establish that the accident did not occur in the manner alleged and that claimant did not report the accident as he testified, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

[2]Claimant also testified he played with the Huizengas' son. Tr. at 48.

[3]The administrative law judge found Mrs. Huizenga's testimony corroborated by a letter she wrote on January 11, 1999, to carrier explaining that claimant had no personal health insurance, and was intending to file a workers' compensation claim. Emp. Ex. 5.

On weighing the evidence as a whole, the administrative law judge found that claimant's testimony was entitled to less weight than the testimony of the other witnesses for several reasons. The administrative law judge did not believe that claimant's former co-worker, an experienced chief engineer, would have attempted to personally carry the welding machine down the stair shaft as claimant testified. The administrative law judge also found that to credit claimant's testimony would require that he find that the other three witnesses were untruthful, which the administrative law judge declined to do. The administrative law judge further found that claimant's failure to produce the treatment records of the first physician to treat his neck injury suggested that those records might contradict claimant's testimony, and that claimant, of the four witnesses at the hearing, had the greatest financial interest in testifying untruthfully. Thus, he concluded that claimant did not establish that his injury is work-related.

Questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and determinations in this regard must be affirmed unless they are "inherently incredible" or "patently unreasonable." *Cordero v. Triple Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, claimant has not raised any reversible error in the administrative law judge's weighing of the conflicting evidence or in his assignment of weight to the witnesses' testimony based on perceived motive. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). Moreover, the administrative law judge is permitted to draw an adverse inference against a party who does not produce evidence within his control. *See, e.g., Denton v. Northrop Corp.*, 21 BRBS 37 (1988). Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's initial denial of benefits.

We also affirm the administrative law judge's denial of claimant's petition for modification. Section 22 of the Act provides the only means for changing otherwise final decisions. Modification may be granted if claimant demonstrates a mistaken determination of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). In support of his petition for modification, claimant introduced into evidence the clinic records from December 28, 1998, which, claimant contended, supported his claim of an injury occurring at work on December 22. The administrative law judge denied the petition for two reasons. First, the administrative law judge stated that claimant should have introduced these records into evidence at the initial hearing. He did not believe claimant's counsel's assertion that the failure to produce them initially was due to claimant's inability to recall the name or location of the clinic; rather he deemed it to be a litigation strategy based

on the belief that the records did not aid claimant's claim. Decision on Modif. at 4. This finding is rational, and is affirmed. *See, e.g.*, *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000) (table).

Second, the administrative law judge rationally found that the newly admitted clinic notes do not establish a mistake in fact. Specifically, the administrative law judge found that the treating doctor's notation that there was "no injury event" is inconsistent with claimant's testimony alleging the occurrence of a sudden accident that immediately caused neck symptoms, and also is inconsistent with claimant's hearing testimony that he told the doctor "what happened." The administrative law judge concluded that claimant's assertion that he did not tell the doctor about the cause of his condition because he did not want to file a workers' compensation claim is not credible. Inasmuch as the administrative law judge rationally found that claimant did not establish a mistake in fact in his initial decisions, we affirm the administrative law judge's denial of claimant's petition for modification, and the consequent denial of benefits. *See generally Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Benefits, Decision and Order Denying Request for Reconsideration, and Decision and Order Denying Petition for Modification are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge