

BRB No. 99-0165

CHAD PRYOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRANK’S CASING CREW AND	)	DATE ISSUED: <u>10/22/99</u>
RENTAL TOOLS, INCORPORATED	)	
	)	
and	)	
	)	
LOUISIANA WORKERS’	)	
COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

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

Louis M. Corne, Lafayette, Louisiana, for claimant.

David K. Johnson (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-LHC-613) 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 if they 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 August 14, 1996, claimant felt his back pop as he bent down to lift a bar to latch

the spider<sup>1</sup> during the course of his employment with employer as a member of a casing crew. Claimant has not worked since this accident. On August 27, 1996, claimant filled out a job-related injury report for employer. EX 2. Employer arranged for claimant to be seen the following day by Dr. Muldowny, an orthopedic surgeon; Dr. Muldowny remained claimant's treating physician as of the time of the hearing. Employer paid \$497 in medical benefits for claimant's back injury, but did not voluntarily pay any disability benefits to claimant.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and that employer failed to rebut it. The administrative law judge further determined that claimant has not yet reached maximum medical improvement, that claimant is unable to perform his usual work, and that employer has not identified suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from August 14, 1996, and continuing, 33 U.S.C. §908(b), and medical benefits, 33 U.S.C. §907.

On appeal, employer contends that the administrative law judge erred in finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption. Employer additionally challenges the administrative law judge's determination that claimant is totally disabled due to his work-related injury. Claimant responds, urging affirmance of the administrative law judge's Decision and Order in its entirety.

Employer initially contends that, as there is no credible evidence that claimant suffered any harm during the course of his work activities for employer and no objective medical evidence of an injury, the administrative law judge erred in invoking the Section 20(a) presumption. We disagree. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he suffered a harm and that an accident occurred at work or that working conditions existed which could have caused the injury or harm. *See U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption applies to link the harm with claimant's employment. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

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<sup>1</sup>The spider is a device used to lock into place the casing pipe that secures the sides of a well. See Tr. at 12-14.

In the instant case, we hold that the administrative law judge properly invoked the Section 20(a) presumption, as he found that claimant suffered a harm and that working conditions existed which could have caused the harm.<sup>2</sup> See *Hampton*, 24 BRBS at 144; *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342 (1988). In addressing this issue, the administrative law judge relied upon claimant's testimony, which he found to be credible, that claimant experienced back pain while operating the spider on August 14, 1996. See *Harrison*, 21 BRBS at 342; see generally *Mijangos v. Avondale Shipyards, Inc.*, 948 F.941, 25 BRBS 78 (CRT)(5th Cir. 1991). Moreover, the administrative law judge found claimant's testimony regarding his back injury to be corroborated by the hearing testimony of Mr. LeBlanc, claimant's co-worker, and he expressly found any discrepancies between claimant's and Mr. LeBlanc's testimony with respect to the timing of claimant's injury and the breaks from work taken by claimant on August 14, 1996, to be inconsequential. We hold that the administrative law judge acted within his discretion when he accepted the explanations provided by claimant for his delay in filing his written injury report and by Mr. LeBlanc for his initial written denial that claimant had complained to him of back pain on August 14, 1996. See Decision and Order at 11-12;<sup>3</sup> see also *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 120 (1995); *Hampton*, 24 BRBS at 144; *Harrison*, 21 BRBS at 342. Although employer contends that the accounts of events provided by claimant and Mr. LeBlanc are contradicted by the testimony and written statements of claimant's supervisor, Mr. Menard,

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<sup>2</sup>Although employer avers that claimant failed to prove either element of his *prima facie* case, it presents argument only on the harm element. As employer does not set forth arguments or authorities in support of its contention that the accident or working conditions element was not met, we conclude that this issue was inadequately briefed and need not be addressed by the Board. See *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); 20 C.F.R. §802.211.

<sup>3</sup>The administrative law judge credited claimant's testimony that he delayed filing a written injury report based on his hope that his back symptoms would improve and that, accordingly, the members of the casing crew would not lose their monetary safety bonus. See Decision and Order at 12; Tr. at 45, 103-105. Additionally, the administrative law judge credited Mr. LeBlanc's hearing testimony that the reason he filed a false written statement denying that claimant had told him of his back injury was to preserve the crew members' entitlement to a safety bonus. See Decision and Order at 11; Tr. at 113-123. We note, in this regard, that Mr. Short, manager of casing operations, testified that if any crew member was to lose five or more work days due to a work-related injury, each member of that crew would lose his safety bonus. See Decision and Order at 9; Tr. at 178-181.

and co-worker, Mr. Hebert, as well as by the testimony of the casing operations manager, Mr. Short, we conclude that the competing assessment of the witnesses' credibility and characterization of the record evidence offered by employer does not provide a basis for overturning the administrative law judge's credibility determinations. We note, in this regard, that in adjudicating a claim, an administrative law judge is entitled to evaluate the credibility of all witnesses, and has considerable discretion in evaluating the evidence of record. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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 (2d Cir. 1961). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. See *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Todd Shipyards Corp.*, 300 F.2d at 742. As the administrative law judge's assessment of the credibility of each of these witnesses and the inferences drawn by the administrative law judge from the record evidence are rational, they are affirmed.<sup>4</sup> *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Similarly, employer's argument that the administrative law judge erred in finding that claimant established the injury element of his *prima facie* case in the absence of objective medical evidence of a back injury is without merit. Even where there are no objective findings of an injury, claimant's subjective complaints of pain alone may be found sufficient to establish the injury element. See *Harrison*, 21 BRBS at 342; *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, notwithstanding the absence of definitive objective findings of an injury in the instant case, the administrative law judge could properly find the injury element to be further supported by medical opinions that claimant suffered a chronic lumbar strain or aggravation of a previous degenerative condition. See Decision and Order at 12; see generally *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157, 160 (1990). Accordingly, we affirm the administrative

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<sup>4</sup>Employer's challenge to the administrative law judge's assessment of claimant's credibility on the basis of a prior workers' compensation claim filed by claimant also must fail. The administrative law judge fully considered whether claimant's credibility is undermined by the circumstances of his previous compensation claim, and determined that the facts surrounding the prior claim have no bearing on claimant's credibility. See Decision and Order at 11. The fact that employer might draw inferences from the evidence regarding the previous claim that differ from those drawn by the administrative law judge is not a basis for disturbing the administrative law judge's credibility determination. See *Kubin*, 29 BRBS at 120; see also *Mendoza*, 46 F.3d at 498, 29 BRBS at 79 (CRT).

law judge's invocation of the Section 20(a) presumption. As employer does not challenge on appeal the administrative law judge's finding that employer failed to submit evidence sufficient to rebut the invoked presumption, the administrative law judge's determination that claimant's condition is causally related to his employment is affirmed.

Lastly, employer contests the administrative law judge's finding that claimant has established that he is totally disabled. As correctly noted by employer, the Section 20(a) presumption does not apply to the issue of the nature and extent of disability; rather, claimant bears the burden of establishing the nature and extent of his disability. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). In order to establish a *prima facie* case of total disability, claimant has the burden of establishing that he is unable to return to his usual work. *See Mijangos*, 948 F.2d at 944, 25 BRBS at 80 (CRT); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Once claimant establishes his *prima facie* case, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Mijangos*, 948 F.2d at 944, 25 BRBS at 80 (CRT); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In challenging the administrative law judge's finding of total disability, employer contends that claimant failed to submit any evidence other than his subjective complaints of pain to establish that he is incapable of performing his usual employment duties with employer. Contrary to this assertion, however, the record in the instant case contains medical evidence, which was credited by the administrative law judge, supportive of a finding of total disability. Specifically, in addressing the extent of claimant's disability, the administrative law judge accorded greater weight to the opinion of Dr. Muldowny, as claimant's treating orthopedist, than to the opinion of Dr. Gidman,<sup>5</sup> who saw claimant on only one occasion. The administrative law judge's weighing of the medical opinions on this basis is rational and in accordance with law. *See Director, OWCP v. Vessel Repair, Inc.[Vina]*, 168 F.3d 190, 33 BRBS 65 (CRT)(5th Cir. 1999); *Mendoza*, 46 F.3d at 498, 29 BRBS at 79 (CRT). Moreover, Dr. Muldowny's opinion that claimant, due to the severity of his pain, cannot perform his usual work, *see* DP 1 at 14, 18-19, constitutes substantial evidence in support of claimant's *prima facie* case of total disability, notwithstanding the absence of definitive medical

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<sup>5</sup>We note that even Dr. Gidman did not offer an unequivocal opinion that claimant is capable of resuming his usual work. Rather, he stated that claimant needs to have a functional capacity evaluation and an evaluation of the psychosocial factors affecting his subjective complaints. *See* EX 7.

findings of structural pathology that would account for claimant's complaints. *See, e.g., Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21-22 (1989); *Clophus v. Amoco Production Co.*, 21 BRBS 261, 265 (1988). We, therefore, affirm the administrative law judge's finding that claimant is presently totally disabled and, as employer failed to present any evidence of suitable alternate employment, his consequent award of temporary total disability compensation to claimant. *See, e.g., Clophus*, 21 BRBS at 265.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge