BRB Nos. 93-1943
and 93-1943A

HARRY BONIN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
THAMES VALLEY STEEL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly and Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

David C. Davis (McGann, Bartlett & Brown), Vernon, Connecticut, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (91-LHC-2408) of Administrative Law Judge Martin J. Dolan, 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 was employed as a fitter for employer working on contracts for General Dynamics' Electric Boat Division. Claimant testified that, at one time, he had had a good working relationship

with his supervisors, but that he ran into a misunderstanding with the personnel office regarding leave. According to claimant, his supervisor had an informal arrangement which awarded workers with time off for superior work. During an absence awarded by his supervisor, claimant called in to speak to his supervisor but was transferred to the personnel office as the supervisor was also absent that day. The personnel office informed claimant that his absence was not excused, and claimant was subsequently fired on May 25, 1989. Claimant grieved his termination through the union, and, after arbitration, received full reinstatement with all seniority rights and contractual benefits, retroactive to the date of his termination.

Claimant was assigned to a new supervisor following reinstatement. Claimant alleges that he was given job assignments which were normally assigned to less-skillful employees, and that management attempted to give him a warning for absenteeism for a period of time prior to his firing. In addition, management refused to excuse an absence although claimant had a doctor's note and attempted to issue him two more warnings, bringing him to within one warning of termination. Claimant continued to have difficulties with his superiors, alleging they harassed him, and he was unable to cope with the harassment. Claimant was hospitalized on April 22, 1990, for six days due to his mental condition, but failed to notify employer of his hospitalization. Claimant has not been employed since April 20, 1990 and has not sought work since that date. Claimant sought state workers' compensation benefits and benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant was a maritime employee under Section 2(3), 33 U.S.C. §902(3), of the Act and that both employer's waterfront storage area and employer's fabricating plant are covered sites pursuant to Section 3(a), 33 U.S.C. §903(a), of the Act. However, in reviewing whether claimant's present mental condition was caused by his employment, the administrative law judge found that while claimant has established that he has an injury, namely depression, he did not establish working conditions that could have caused this harm. Thus, the administrative law judge found that the evidence was insufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption of causation, and benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that there were no working conditions which could have caused claimant's depression. Moreover, claimant contends that as there is no evidence sufficient to rebut the Section 20(a) presumption of causation, the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge's finding that claimant's working conditions did not cause his depression. However, employer contends on cross-appeal that the administrative law judge erred in finding that claimant was engaged in maritime employment and thus was covered under Section 2(3) of the Act. In addition, employer contends that the administrative law judge erred in finding that employer's steel fabrication shop is a covered situs pursuant to Section 3(a) of the Act. Claimant responds, urging affirmance of these findings.

Claimant contends on appeal that the administrative law judge erred in finding that claimant had not established a *prima facie* case for invocation of the Section 20(a) presumption. Specifically, claimant contends that the administrative law judge improperly found that claimant was not a

credible witness and that the administrative law judge did not address evidence that corroborated claimant's testimony. Claimant has the burden of proving the existence of an injury or harm and that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). 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*, U.S. , 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994).

In the present case, the administrative law judge found that while claimant established that he has an injury, depression, he did not establish working conditions that could have caused the harm. The administrative law judge found that claimant only offered his own self-serving testimony and that he was not a credible witness, based on his demeanor during testimony. The administrative law judge also found that the witness offered for corroboration, claimant's co-worker William Jackson, did not establish any harassing behavior on the part of the supervisors, and that Dr. Braden's testimony regarding the cause of claimant's depression was too equivocal and speculative. Credibility determinations fall within the purview of the trier-of-fact and are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991).

However, as claimant contends, the record in the instant case also contains a letter from John T. Savage, the Financial Secretary-Treasurer for the union local, stating that claimant had filed a grievance against management for harassment and that following a review of the case, the executive board of the union had determined that claimant was being harassed and discriminated against by the company. Cl. Ex. 9. Specifically, this letter addresses the warnings that claimant was issued after his reinstatement which the board found were in violation of the shop contract.[1] Although the administrative law judge identifies this evidence as a part of the record, Decision and Order at 8-9, when reviewing the evidence of harassment, he does not address this letter or the warnings claimant received. Claimant raised these warnings as support for his contention that he was being harassed. *See* Tr. at 19-20. Because the administrative law judge failed to discuss this evidence which may be sufficient to establish claimant's *prima facie* case, we vacate the administrative law judge's finding that there were no working conditions that could have caused claimant's depression, and remand the case for the administrative law judge to consider all of the relevant evidence.

On cross-appeal, employer contends that as claimant did not load or unload ships or containers, and spent some of the time fabricating steel for non-maritime use, he was not a maritime worker pursuant to Section 2(3) of the Act. After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's finding that claimant is a covered employee comports with applicable law. Contrary to employer's contentions, the administrative law judge found that after the initial two

[1]This letter states that the issue was not pursued because the company ceased operations shortly after the board made its determination.

months claimant worked for employer, 100 percent of his time was spent fabricating parts that were used as submarine decks and tanks. We, therefore, affirm the administrative law judge's finding that claimant's duties were covered under the Act. *See Alford v. American Bridge Div.*, 642 F.2d 807, 7 BRBS 484 (5th Cir. 1978), *modified in part on reh'g*, 655 F.2d 86, 13 BRBS 268 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982); *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989); *Dennis v. Boland Marine & Manufacturing, Inc.*, 13 BRBS 528 (1985).

Employer also contends on cross-appeal that the administrative law judge erred in finding that employer's steel fabrication shop is a covered situs pursuant to Section 3(a). After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we also hold that the administrative law judge's finding that the two sites where the harassment allegedly occurred are covered under the Act is in accordance with law. Employer does not contest the administrative law judge's findings regarding the waterfront storage area; thus, it is not disputed that this storage area, which abuts the Thames River, was used by employer to load finished products onto barges for transport, and that at least some of claimant's injury was allegedly caused by harassment at this site. *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). In addition, the administrative law judge determined that the steel fabrication plant, which is across a street and some railroad tracks from the river, is a covered situs as it depended on its close proximity to the river for shipping the fabricated parts to General Dynamics, the site was not shown to be merely fortuitous, and the mixed use nature of the area does not necessarily prevent it from being a covered situs. We therefore affirm the administrative law judge's finding that the two sites where claimant's injury was alleged to have occurred are covered under Section 3(a) of the Act. *See Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

Accordingly, the Decision and Order of the administrative law judge's finding that there were no working conditions that could have caused claimant's depression is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The decision is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge