BRB Nos. 97-0304
and 97-0304A

MARK JAMES SAVOY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OFFSHORE RIGS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United Stated Department of Labor.

G. Tim Alexander, III, Lafeyette, Louisiana, for claimant.

Thomas J. Smith (Galloway, Johnson, Tompkins & Burr), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order, and claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees (94-LHC-3186), of Administrative Law Judge Lee J. Romero, 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 sought benefits for a back injury allegedly sustained when he slipped and

fell on a gateway on an offshore oil rig on April 13, 1994, during the course of his employment for employer. On April 15, 1994, claimant was transported from employer's rig for a medical examination by Dr. Walker, who restricted claimant to light-duty work for a week. That same day, employer offered claimant light-duty employment commencing the next day; claimant, however, did not report for work the following day. Claimant failed to appear for a follow-up appointment with Dr. Walker on April 22, 1994. Employer contracted with an investigator to conduct videotape surveillance of claimant. Videotape taken on April 21, 1994, and April 29, 1994, allegedly shows claimant building a fence and washing a pick-up truck, respectively. Claimant has not returned to work since the date of the work incident. He seeks continuing temporary total disability compensation and medical benefits under the Act.

In his Decision and Order, the administrative law judge initially addressed claimant's credibility and the credibility of his brother, Scott Savoy. Specifically, the administrative law judge discussed the Savoy brothers' allegation that the subject depicted in the surveillance videos is not claimant but, rather, is Scott Savoy. The administrative law judge found that, while he could not conclusively identify the subject in the April 21, and April 29, 1994, videos, employer established by a preponderance of the evidence that claimant was depicted on the videos as constructing a fence on April 21, 1994, and washing a pick-up truck on April 29, 1994. The administrative law judge next found that, although claimant was placed on restricted duty immediately following the work incident, employer's offer of light-duty employment on April 15, 1994, established the availability of suitable alternate employment. The administrative law judge then credited medical evidence that claimant was able to return to his usual employment for employer as a rigger on April 21, 1994, one week following the work incident. Alternatively, the administrative law judge credited the testimony of Mr. Stokes, a vocational consultant, and a labor market survey he prepared to find that employer had also established the availability of suitable alternate employment in the open market. Accordingly, the administrative law judge found claimant was not entitled to compensation under the Act.

On appeal, claimant challenges the administrative law judge's findings that he was able to return to his usual employment on April 21, 1994, and that employer established the availability suitable of alternate employment. Employer responds, urging affirmance.[1]

[1]On November 18, 1996, employer filed its Notice of Appeal in this case. BRB No. 97-0304A. By Order dated November 25, 1996, the Board acknowledged employer's cross-appeal, and directed employer to file its Petition for Review and brief within thirty (30)

days of its receipt of this acknowledgment. Employer moved for an enlargement of time to file a cross-Petition for Review and brief, which the Board denied in an Order issued January 22, 1997. As of the date of this decision, employer has not submitted its Petition for Review and brief. We therefore dismiss employer's cross-appeal as abandoned. 20 C.F.R. §802.402.

On April 1, 1997, claimant filed an appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees. BRB No. 97-0304S. Employer responds, asserting that claimant's supplemental appeal should be dismissed as untimely filed. We agree. Section 802.205 of the Board's rules of practice and procedure provides that a Notice of Appeal must be filed within thirty (30) days from the date upon which the Decision and Order was filed in the Office of the District Director. 20 C.F.R. §802.205. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees in this case was filed in the Office of the District Director on January 16, 1997. Claimant's appeal of this decision, therefore, should have been filed on or before February 18, 1997. Claimant's Notice of Appeal was dated March 27, 1997, and received by the Board on April 1, 1997.The allegation of claimant's attorney that he did not receive the Supplemental Decision and Order until March 7, 1997, due to a change of his business address does not toll the thirty day period for filing a Notice of Appeal, as service is only mandated on the parties. *See Beach v. Noble Drilling Corp.*, 29 BRBS 27 (1995)(McGranery J., concurring). Accordingly, claimant's appeal of the Supplemental Decision and Order Awarding Attorney's Fees is dismissed as untimely filed. 33 U.S.C. §921(a); 20 C.F.R. §802.205.

Claimant initially challenges the administrative law judge's finding that employer established the availability of suitable alternate employment as of April 15, 1994. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Const. Co.,* 17 BRBS 56 (1985). Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties immediately following his work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the specific geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). Employer may meet this burden by offering claimant a job in its facility. *See Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). In order to meet its burden by offering a job in its facility, the job must be actually available to claimant. *See Mendez v. National Steel & Shipbuilding Co.,* 21 BRBS 22 (1988).

In the instant case, the administrative law judge found employer established the availability of suitable alternate employment based upon the testimony of Mr. Morrison Jambron, employer's safety representative. Mr. Jambron testified that suitable alternate employment within the light-duty restrictions placed on claimant by Dr. Walker on April 15, 1994, was available with employer the next day, April 16, 1994. *See* Tr. at 189. Specifically, Mr. Jambron testified that he accompanied claimant to his examination with Dr. Walker on April 15, 1994, that following that examination he called employer's offshore rig

and was informed that claimant could perform light-duty work there and that claimant subsequently agreed that he would appear at employer's Morgan City terminal the next day for a helicopter ride to the rig. Mr. Jambron further stated, however, that claimant failed to appear for work the following day. *See* Tr. at 189-190. Contrary to claimant's assertion on appeal, Mr. Jambron's testimony does not indicate that the light-duty position offered to claimant was located in Houma, Louisiana. The administrative law judge's decision to rely upon the testimony of Mr. Jambron regarding the availability of light-duty employment for claimant on employer's rig, and the offer of that employment to claimant, is not 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). Accordingly, we affirm the administrative law judge's determination that, as of April 16, 1994, employer established the availability of suitable alternate employment at its facility within claimant's restrictions.

Claimant next asserts that the administrative law judge erred in determining that he was capable of resuming his usual employment duties with employer as of April 22, 1994. In support of his allegations of error, claimant contends that the administrative law judge erred in concluding that he is depicted on the video tapes of record, and that that erroneous determination was thereafter relied upon by the administrative law judge to credit medical evidence that claimant was capable of returning to his usual employment on April 22, 1994. In concluding that claimant did not sustain a compensable impairment subsequent to April 22, 1994, the administrative law judge initially addressed the surveillance videos and discredited the testimony of claimant and his brother, Scott Savoy, that Scott is the subject in the videos. The administrative law judge found Scott Savoy's testimony to be untrustworthy and, after noting numerous inconsistencies between claimant's hearing and deposition testimony, the administrative law judge found that claimant's "regard for the truth to be completely lacking and his testimony for the most part incredulous." *See id.* The administrative law judge also drew an adverse inference against claimant for his failure to call as a witness his former girlfriend, Ms. Wattigny, at whose trailer the fence was being built on April 21, 1994. Tony Biers, who shot the videos, and claimant's co-employees, Mark Babin and Morrison Jambron, identified claimant as the subject in the videos. Thus, "by a preponderance of the credible evidence," the administrative law judge found employer established that claimant is the subject in the videos building a fence on April 21, 1994, and washing his pick-up truck on April 29, 1994. *See id.* at 28. 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 from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1961), *cert. denied*, 372 U.S. 954 (1963); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, the administrative law judge discussed at length the subject depicted in the videotapes presented into evidence; thus, as the administrative law judge's ultimate determination is supported by substantial evidence, it is affirmed.

The administrative law judge next addressed the medical evidence of record; based on claimant's lack of credibility, the administrative law judge discredited those medical opinions that relied on claimant's history or subjective complaints. Thereafter, the

administrative law judge credited the medical opinions of record that relied, in part, on the assumption that claimant is the subject in the surveillance videos. Specifically, the administrative law judge credited the opinion of Dr. Walker, who initially examined claimant on April 15, 1994, and who testified that claimant should have recovered within one week and that it was "more probable than not" that claimant's back condition had resolved on April 21, 1994, if he built a fence that day. EX 37 at 10-11. Similarly, Dr. Gidman, who examined claimant on May 19, 1994, reviewed the surveillance videos and opined that claimant could return to all normal activity as of the date of the videos. EX 38 at 10-15. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). As the administrative law judge's credibility determinations are rational and within his authority as a factfinder, and as the credited medical opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant sustained no impairment subsequent to April 22, 1994. *See generally Cordero,* 580 F.2d at 1331, 8 BRBS at 744.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.[2]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

[2]We decline to address claimant's contention that employer has failed to provide continuing medical benefits, as this contention must initially be addressed by the district director. *See* 33 U.S.C. §§907, 919.