BRB Nos. 99-0794
and 99-0794A

DANIEL J. KUEBEL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: April 27, 2000
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order - Granting Claim of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson) Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Granting Claim (98-LHC-2654) of Administrative Law Judge Linda S. Chapman 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, while working for employer as a fifth wheel driver on March 4, 1998, allegedly sustained an injury to his back when he hit a pothole. Claimant subsequently underwent an anterior cervical discetomy and fusion. On November 1, 1998, claimant retired as a longshoreman and began general janitorial work on December 7, 1998.

In her Decision and Order, the administrative law judge found that claimant had

established entitlement to invocation of the Section 20(a), 33 U.S.C. §920(a), statutory presumption and that employer failed to rebut it. She therefore found causation established. Next, the administrative law judge calculated claimant's average weekly wage for compensation purposes to be $1,043.60 per week from the date of his injury until October 1, 1998, and $1,298 per week thereafter. Further, the administrative law judge concluded that employer had established the availability of suitable alternate employment and that claimant's residual wage-earning capacity was $481 per week. Accordingly, claimant was awarded temporary total disability compensation from the date of his work-injury until October 20, 1998, and permanent partial disability compensation thereafter. *See* 33 U.S.C. §908(b), (c)(21).

On appeal, claimant alleges that the administrative law judge erred in her calculation of his average weekly wage prior to October 1, 1998. Employer cross-appeals, arguing that the administrative law judge erred in finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption.

Initially, we will address employer's cross-appeal wherein employer contends that the administrative law judge erred in finding causation; specifically, employer asserts that the administrative law judge erred in finding claimant's testimony regarding the occurrence of a work-incident on March 4, 1998, to be credible.[1] We disagree. In order to be entitled to the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he sustained a harm and that working conditions existed or an accident occurred which could have caused or aggravated the harm. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1997). 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). In establishing his *prima facie* case, however, claimant is not required to introduce affirmative

[1]We note that although employer phrases its arguments in terms of rebuttal of the Section 20(a) presumption, asserting that it set forth specific and comprehensive evidence sufficient to sever the connection between claimant's condition and his employment, employer's argument actually addresses the administrative law judge's conclusion that claimant established his *prima facie* case, as it relates specifically to the occurrence of a work-incident on March 4, 1998.

medical evidence proving that the accident or working conditions in fact caused his harm; rather, claimant must show only the existence of an accident or working conditions which could have caused the harm alleged. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

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 an accident occurred which could have caused the harm. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In support of his claim for benefits under the Act, claimant testified that he was driving a chassis when he swerved to avoid a fellow worker, causing him to hit a pothole which jarred him out of his seat. HT at 102-104. In addressing this issue, the administrative law judge considered the discrepancies found in the testimony of record and medical reports and ultimately determined that the alleged incident occurred as described by claimant based upon the accounts of claimant, the eyewitnesses to the accident, and the testimony of claimant's supervisors, which she found credible and persuasive. *See* Decision and Order at 9-10. It is well-established that an administrative law judge is entitled to weigh the credibility of all witnesses and to draw her own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge rationally considered the inconsistencies in the testimony of the various witnesses and medical reports and thereafter acted within her discretion in crediting claimant's account of the incident with the pothole in finding that the alleged accident in fact occurred. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). We therefore reject employer's challenge to the administrative law judge's assessment of claimant's credibility, and affirm the administrative law judge's invocation of the Section 20(a) presumption and her ultimate finding that claimant's medical condition is causally related to his employment.

We next address claimant's appeal of the administrative law judge's calculation of his average weekly wage prior to October 1, 1998. In her Decision and Order, the administrative law judge specifically relied upon the decision of the United States Court of Appeals for the Fourth Circuit in *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15 (CRT)(4th Cir. 1999) in initially determining that claimant's average weekly wage from the date of claimant's accident, March 4, 1998, until October 1, 1998, the start of a new contract year, was $1,043.60; the administrative law judge calculated this sum by utilizing the wages reflected in claimant's tax records for the relevant year, $67,259, less the $13,259 paid to claimant during that period pursuant to his entitlement to container royalty, holiday and vacation pay.[2] After October 1, 1998, the administrative law judge determined that

[2]The record reflects that claimant received $13,259 in container royalty payments, holiday and vacation pay in both 1997 and 1998. *See* EX 14.

claimant's average weekly wage was $1,298, which included container royalty, holiday and vacation payments. *See* Decision and Order at 14.

As the instant claim arises within the jurisdiction of the Fourth Circuit, that court's holding in *Wright* is dispositive of the issue raised by claimant on appeal. In *Wright*, the court held that vacation, holiday, and container royalty payments are considered wages if claimant has earned the payments through actual work. In cases where the claimant has already become entitled to receive such payments due to the number of hours worked prior to his work-related injury, and thus has no pre-injury capacity to earn any additional vacation, holiday, or container royalty pay until the start of the next contract year, the court determined that the calculation of claimant's pre-injury average weekly wage must exclude the value of these payments for the contract year in order to ensure that claimant's average weekly wage will reasonably represent his pre-injury capacity to earn additional vacation, holiday, and container royalty pay from work. The court went on to state, however, that once the next contract year begins, claimant's average weekly wage must be readjusted to reflect his pre-injury ability to earn these payments for the new contract year. *See Wright*, 155 F.3d at 329, 33 BRBS at 30 (CRT).

In the instant case, after setting forth the holding of the court in *Wright*, the administrative law judge found that

> ...the record reflects that as of March 4,1998 [the date of injury], the Claimant had worked more than 700 hours, and thus was eligible to receive container royalties and vacation and holiday pay as of the date of his injury (Tr. 98-99). Thus, from the date of his injury until October 1, 1998, the start of the new contract year, the Claimant's average weekly wage is $1043.60 ($54,000/52); after that date, it is $1298.00.

Decision and Order at 14. Thus, at the time of his injury, claimant had already worked the requisite number of hours (700) necessary to entitle him to payment of vacation, holiday, and container royalty payments for that contract year. HT at 98-99. The administrative law judge accordingly followed the mandate of the Fourth Circuit in *Wright* by calculating claimant's average weekly wage from the date of injury until the date of the new contract based on his wages earned, less the payments made to him as a result of the hours worked

pre-injury. As the administrative law judge's calculation of claimant's average weekly wage is supported by substantial evidence and is in accordance with law, it is affirmed. *Wright*, 155 F.3d at 329, 33 BRBS at 30 (CRT).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge