BRB No. 97-0688

JOSE QUINONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
H.B. ZACHERY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Yancy White (White, Huseman & Pletcher), Corpus Christi, Texas, for claimant.

Mike Murphy (Eastham, Watson, Dale & Forney), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Compensation Benefits (96-LHC-0928) of Administrative Law Judge Richard D. Mills 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant, a masonry foreman, allegedly sustained injuries to his back during the

course of his employment at Kwajalein Army Base in the Marshall Islands on or about May 15, 1994, and June 4, 1994. Claimant continued to perform his usual employment duties for employer until his return to San Antonio, Texas, in August 1994, whereupon claimant filed a claim under the Act seeking permanent total disability compensation. Claimant has not worked since his return to Texas.

In his Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation and that employer failed to rebut it. Thus, the administrative law judge awarded claimant permanent total disability compensation based on claimant's average weekly wage, including the value of the room and board provided to claimant while working for employer in claimant's wages.

Employer now appeals, arguing that the administrative law judge erred in finding that claimant established his *prima facie* case or, alternatively, that it failed to rebut the Section 20(a) presumption. Employer also challenges the calculation of claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially challenges the administrative law judge's determination that claimant established the existence of working conditions which could have caused his present back condition. It is well-established that claimant bears the burden of 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, in order to establish his *prima facie* case. *See 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). 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*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, it is uncontested that claimant suffered a "harm," *i.e.,* back pain. In his decision, the administrative law judge, after setting forth claimant's testimony regarding the requirements of his job, credited that testimony in finding that claimant had established the second element of his *prima facie* case. Specifically, the administrative law judge found that claimant was engaged in labor which involved lifting and moving heavy materials. *See* Decision and Order at 8. 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 and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are 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). On the basis of the record before us, the administrative law judge's decision to rely upon claimant's testimony is neither inherently

incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's determination that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption.[1] *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175 (1996); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals,* 21 BRBS 252 (1988). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 270 (1990).

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption. The administrative law judge's finding is supported by the record, as he rationally found the opinion of Dr. Arredondo, upon whom employer relies in support of its contention of error, insufficient to rebut the presumption. Although Dr. Arredondo testified that it was his opinion within a reasonable degree of medical certainty that claimant's pain was not caused by his work, he conceded that trauma may have aggravated or exacerbated claimant's pre-existing tumor. *See* CX 4 at 43-46. Accordingly, as Dr. Arredondo's testimony does not address aggravation or rule out the possibility that claimant's employment had an aggravating effect on his condition, it is insufficient to rebut the Section 20(a) presumption. Similarly, Dr. Meadows opined that an injury as described by claimant could have aggravated his underlying condition. *See* CX 3 at 13. Accordingly, as neither the opinion of Dr. Arredondo nor Dr. Meadows establishes that claimant's working conditions played no role in the onset of his undisputed back pain, the Section 20(a) presumption has not been rebutted. We thus affirm the administrative law judge's finding that claimant's back condition is causally related to his employment with employer. *See Clophus v. Amoco Production Co.,* 21 BRBS 261 (1988).

[1]We note that Mr. Ramirez, upon whom employer relies in support of its contention that claimant did not engage in heavy labor, conceded that he was unaware of whether claimant in fact performed any heavy labor. *See* RX 7 at 40.

Lastly, employer contends that the administrative law judge erred when, relying on *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), he included the value of the room and board provided by employer to claimant in his calculation of claimant's average weekly wage. Specifically, after noting that subsequent to the issuance of the administrative law judge's decision, the Board's decision in *Guthrie* was reversed by the United States Court of Appeals for the Ninth Circuit in *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997), employer urges the Board to reverse the administrative law judge's determination on this issue pursuant to the reasoning of the Ninth Circuit.[2]

Section 2(13) of the amended Act, 33 U.S.C. §902(13)(1994), defines wages as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. §3101 *et seq.*](relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

[2]We note that the instant claim was filed in Texas, within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. *See* 42 U.S.C. §1653.

Prior to the 1984 Amendments to the Act, Section 2(13) specifically included, *inter alia,* the reasonable value of board, rent, and housing in the definition of wages.[3] In interpreting pre-amendment Section 2(13), the United States Supreme Court stated that where benefits received were not "money recompensed," or "gratuities received from others," the narrow question was whether the benefits were of a "similar advantage to board, rent, housing, or lodging in that the benefits have a present value that can be readily converted into a cash equivalent on the basis of their market value." *See Morrison-Knudsen Const. Co. v. Director, OWCP,* 461 U.S. 624, 15 BRBS 155 (CRT)(1983). The 1984 Amendments to the Act thus codified the Supreme Court's holding in *Morrison-Knudsen* that fringe benefits such as employer contributions to employee benefit plans are not included in "wages" under the Act.

In addressing the issue of what constitutes "wages" for compensation purposes in the wake of the 1984 Amendments, the Board has noted that, while the plain language of Section 2(13) mandates that an advantage subject to tax withholding is a "wage," it does not mandate that a benefit not subject to tax withholding is not a wage *per se*. *See Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part sub nom. Cretan v. Director, OWCP,* 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994). This result follows from the statutory language defining wages as the money rate under the contract of hire "including" the reasonable value of an "advantage" received from employer and included in withholding. Thus, the Board has held that the Internal Revenue Service's definition of wages is not controlling of every determination of claimant's compensation rate in cases arising under the Act. *See id.; Guthrie,* 30 BRBS at 48. In *Guthrie,* where an employee's "subsistence and quarters" were provided to the employee by the employer under the terms of the employee's contract, and the value of those services was readily ascertainable, the Board determined that those services could not be deemed a fringe benefit and were thus, as a matter of law, includable in claimant's

---

[3]Specifically, Section 2(13) of the 1972 Act defines wages as:

> the money rate at which the service rendered is compensated under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing and gratuities received in the course of employment from other than the employer.

33 U.S.C. §902(13)(1982)(amended 1984).

average weekly wage as they satisfied the definition of “wages” under Section 2(13). *See Guthrie*, 30 BRBS at 50.

In reversing the Board’s decision, the United States Court of Appeals for the Ninth Circuit, after setting forth Section 2(13), stated that the Act "defers to the IRS criteria for deciding whether non-monetary compensation counts as wages. If it is not money, or an ‘advantage’ subject to withholding, it is not included.” *Wausau Ins. Cos.,* 114 F.3d at 122 , 31 BRBS at 42 (CRT). After determining that the value of meals and lodging were not income pursuant to Section 119 of the Internal Revenue Code, the court held that the value of claimant’s meals and lodging should not have been included as wages.[4] The Ninth Circuit thus read the term “including” contained in Section 2(13) as "or," stating that "wages" must be either monetary or an advantage subject to withholding. Thus, the phrase "including the reasonable value of any advantage" becomes a mandatory limitation on the inclusion of non-monetary compensation in the definition of wages. For the following reasons, we do not believe that the Ninth Circuit’s holding in *Wausau* should be extended to this case which falls within another circuit’s jurisdiction.

Analysis of the proper interpretation of a statute must begin with the language of the statute itself. *See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Unless otherwise defined, individual statutory words are assumed to carry their “ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37 (1979); *Union Pacific R.R. Co. v. Hall*, 91 U.S. 343 (1875). In the instant case, the meaning of the term “including” contained in Section 2(13) is dispositive of the issue before us. The United States Supreme Court, citing to *Webster’s New Collegiate Dictionary*, stated that it understood the term “including” to indicate an element that was part of a larger group that makes up the whole.[5] *See P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 11 BRBS 320 (1979). This interpretation is consistent with the statement contained in Sutherland *Stat. Const.* §47.07 (5th Ed.), which notes:

> [a] term whose statutory definition declares that it ‘includes’ is more susceptible to extension of meaning by construction than

---

[4]Section 119 of the Internal Revenue Code states that the value of meals and lodging provided by an employer is income unless the meals and lodging are “furnished . . . for the convenience of the employer” and “(1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.” 26 U.S.C. §119(a). Meals and lodging within this section are excluded from withholding from income. 26 C.F.R. §31-3401(a)-1(b)(9).

[5]*Webster’s New Collegiate Dictionary* defines the term “include” as, *inter alia,* to take in or comprise a part of a whole; *Webster’s* additionally notes that the term suggests the containment of something as a constituent, component, or subordinate part of a larger whole.

> where the definition declares what a term 'means.' It has been said the word 'includes' is usually a term of enlargement and not of limitation....It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated.

Sutherland *Stat. Const*., §47.07 (5th Ed.). Accordingly, while the Ninth Circuit in *Wausau* interpreted the Act as limiting wages to actual money received or non-monetary compensation subject to tax withholding, both case law and general rules of statutory construction support an interpretation that, while an advantage subject to tax withholding is a "wage" pursuant to Section 2(13), the use of the term "including" does not mandate that a benefit not subject to tax withholding is not a wage *per se*; rather, advantages subject to withholding are but one example of the benefits which may be included in wages. Thus, the plain language of the Act supports the view that the inclusion of the reasonable value of an advantage subject to withholding is not a limitation on the inclusion of items as "wages."

This interpretation of the statute is supported by the sentence of amended Section 2(13) which follows that at issue here. Section 2(13) was amended to codify the holding of the Supreme Court in *Morrison-Knudsen*, specifically to clarify the exclusion of fringe benefits from the calculation of claimant's wages for compensation purposes. Thus, the last sentence of this subsection delineates fringe benefits which are not included in a calculation of an employee's wages. Room and board are not fringe benefits under this section, as such payments are not made pursuant to a benefit plan. Thus, pursuant to the plain language of the Act, a claimant's room and board may be included in a calculation of "wages" as such payments are not excluded fringe benefits. *See generally Bennighoff v. Commissioner of Internal Revenue*, 614 F.2d 398 (5th Cir. 1980). Accordingly, we affirm the administrative law judge's decision to include the value of claimant's room and board in his average weekly wage calculation.

Alternatively, employer argues that the administrative law judge erred in his valuation of claimant's lodgings.[6] The administrative law judge determined that a reasonable value of claimant's lodging was $15.50 per day, or $108.50 per week; employer argues that a more reasonable figure would be $29.40 per week based on building costs.[7] The administrative law judge calculated the value of claimant's lodging by using the figure of $30.00 per day

---

[6]The cost of the meals provided, *i.e.,* $14.50 *per diem,* is not contested on appeal.

[7]Employer arrives at this figure based on building costs of $495,252.75 (CX 9), a useful life of two years and an occupancy rate of 162:

$$\$495,252.75 \div 162 \div 2 = \$1,528.55 \div 52 = \$29.40 \text{ per week.}$$

Emp. Brief at 14.

for room and board used in *Guthrie*[8] and subtracting the cost of claimant's meals per day (*i.e.*, $30.00 per day - $14.50 for meals = $15.50 per day for lodgings). In challenging the administrative law judge's calculation, employer does not contend that the facilities provided in either case are substantially different from each other nor does it include in its costs furnishings, maintenance, and utilities. The administrative law judge's calculation, therefore, is reasonable, and we decline to disturb it on appeal.

[8]In *Guthrie*, the dollar amount of an employee's room and board was set out in a memorandum entitled *Welcome to Johnston Atoll*. *Guthrie*, 30 BRBS at 50 n.4.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER,
Administrative Appeals Judge