BRB No. 07-0153

L.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAKE CHARLES FOOD PRODUCTS, L.L.C.	)	DATE ISSUED: 08/24/2007
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
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.

Alan G. Brackett and Derek M. Mercer (Mouledoux, Bland, LeGrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-LHC-00447) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his right hip, leg, elbow, and lower back on October 30, 2003, during the course of employment for employer as a warehouse foreman. Claimant was

treated for low back pain by Dr. Heard. A MRI conducted on January 22, 2004, showed a protruding herniation at L5-S1. Dr. Heard commenced lumbar epidural steroid injection (LESI) therapy on April 27, 2004. On May 29, 2004, claimant was involved in a motor vehicle accident (MVA) when his car was rear-ended by a car traveling approximately 60 miles per hour. Claimant complained of headaches, neck pain, and an exacerbation of his lower back symptoms as a result of this incident. Dr. Heard subsequently referred claimant for evaluation by Dr. McDonnell, a surgeon, and by Dr. Stairs, a pain management specialist. Dr. McDonnell recommended a discogram and back surgery. Employer refused to authorize the procedures, and it terminated its voluntary compensation payments for temporary total disability, 33 U.S.C. §908(b), on May 26, 2005, asserting that claimant's continued back complaints are due to the May 29, 2004, MVA.

In his decision, the administrative law judge found that the MVA does not constitute a supervening cause of claimant's back disability so as to absolve employer from further compensation liability. The administrative law judge found that the pre- and post-MVA MRI test results were substantially the same, claimant was unable to work before and after the MVA, claimant's symptoms remained severe, and claimant's course of treatment did not change after the MVA. The administrative law judge denied claimant's claim for a discogram and back surgery, but he approved treatment by Dr. Stairs for pain management. The administrative law judge ordered employer to pay claimant continuing compensation for temporary total disability from October 30, 2003.

On appeal, employer challenges the administrative law judge's finding that claimant's MVA does not constitute an intervening cause of claimant's back condition that absolves it of further liability. Claimant has not responded to employer's appeal.

Employer asserts that the administrative law judge erred in finding that the MVA is not an intervening cause of claimant's disability. Employer argues that, because the administrative law judge found that the MVA subjectively worsened claimant's back condition, he was obliged to relieve employer of further liability.

This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has articulated two standards as to what constitutes an intervening cause. *See Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) (noting the tension between the two standards). In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929, 934 (5th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952), the Fifth Circuit stated that a supervening cause must be an influence originating entirely outside of the claimant's employment which "overpowers and nullifies" the initial injury. In *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on other grounds on reh'g*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981), however, the court stated that an injury is compensable "if it is

the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." *Bosarge*, 637 F.2d at 1000, 12 BRBS at 974; *see also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 19 BRBS 63(CRT) (5th Cir. 1981). Under either standard, employer is relieved of liability for that portion of claimant's disability which is attributable to the intervening cause. *See Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *see also Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed.Appx. 126 (5th Cir. 2002); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Employer, however, remains liability for any disability resulting from the work injury. *Plappert v. Marine Corps Exch.*, 31 BRBS 109, 110, *aff'g on recon. en banc* 31 BRBS 13 (1997).

The administrative law judge found that the *Voris* standard is not met in this case, as the MRIs taken before and after the MVA showed substantially the same disc herniation at L5-S1 and as claimant had severe pain before the accident occurred. CXs 21-22, 24; EX 14. On April 14, 2004, prior to the accident, Dr. Heard characterized claimant's back pain as severe and claimant testified that he received only temporary relief from the LESI therapy administered before the MVA. Tr. at 31-34; EX 14 at 13. As the disabling effect of claimant's work injury continued to the time of the MVA, we affirm the administrative law judge's finding that the MVA did not "nullify and overpower" the disabling results of the work accident as it is rational and supported by substantial evidence. *See Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992).

With regard to the *Bosarge* standard, employer contends that the evidence of claimant's increased pain following the MVA establishes that claimant's condition was worsened thereby. Indeed, claimant testified that he sustained increased low back pain after the MVA. Tr. at 33. Dr. Heard, however, regarded this as a subjective aggravation of claimant's pain, because the MRI results provide no indication of objective aggravation. EX 20 at 5-7. The administrative law judge rejected Dr. Foster's opinion that claimant's back disability is related to the MVA, because he erroneously believed that claimant had been released to work prior to the MVA. *See* Tr. at 63-68; EXs 14 at 19; 16 at 1; *see also* Tr. at 54-55. The administrative law judge concluded that claimant's condition was not worsened by the MVA in any legally significant way as claimant was totally disabled before the MVA and in need of conservative treatment, and the same disability and treatment continued after the MVA. *See* Tr. at 31-33, 41-45; EXs 16 at 4-5; 20 at 11.

We affirm this finding as it is rational, supported by substantial evidence, and in accordance with law. In *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT), claimant Gilliam sustained a work-related back injury which hindered his ability to perform his

usual work. During his week off, claimant assembled a swing set. He returned to work for his next shift and had trouble performing his work. Claimant was hospitalized at the end of his seven-day shift. The employer contended that under the *Bosarge* standard, it was relieved of liability because claimant did not need medical attention until after he assembled the swing set. The administrative law judge found that claimant's disability was compensable under the Act. The Fifth Circuit rejected employer's contention of error, stating there "is only weak evidence to suggest that assembling the swing set was a supervening cause," as the work injury caused the claimant to have trouble completing his normal work tasks even before he assembled the swing set. *Id.*, 122 F.3d at 316, 31 BRBS at 131(CRT). The court deferred to the administrative law judge, as fact-finder, in finding substantial medical evidence to support the award of benefits. *Id.*

Similarly, in this case, the administrative law judge rationally relied on the fact that claimant was totally disabled before the MVA to conclude that the accident was not an intervening cause of claimant's disability. While claimant experienced increased pain after the accident, his disability status was unchanged, and employer remains fully liable for the disability attributable to the work accident. The administrative law judge did not credit any evidence indicating that any portion of claimant's disabling back condition was due to the MVA. Decision and Order at 7-8; *cf. Arnold*, 35 BRBS 9 (where claimant had recovered from work injury, administrative law judge rationally found that subsequent back problems were due to intervening fight for which employer was not liable). The administrative law judge rationally rejected Dr. Foster's opinion regarding the effect of the MVA on claimant's condition as Dr. Foster erroneously believed that Dr. Heard had recommended a work-hardening program and functional capacities examination prior to the MVA. Decision and Order at 6; *compare* CX 19 (June 24, 2004 report) *with* Tr. at 64-65.

The Board is not empowered to reweigh the evidence, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and must defer to the facts, and reasonable inferences drawn therefrom, found by the administrative law judge if they are supported by substantial evidence. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT); *see also Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). As the administrative law judge's finding that the MVA is not an intervening cause of claimant's disability is rational, supported by substantial evidence, and in accordance with law, we affirm the conclusion that employer is fully liable for claimant's disability benefits.[1] *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

[1] As the administrative law judge's finding that the MVA is not an intervening cause of claimant's disability does not rest on the application of the Section 20(a) presumption, 20 C.F.R. §920(a), we need not address employer's contentions regarding

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

invocation and rebuttal of the presumption. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed.Appx. 126 (5th Cir. 2002).