

BRB No. 02-0450

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| DAVID ARSENAULT |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| A & B INDUSTRIES OF MORGAN CITY |) | DATE ISSUED: <u>Feb. 6, 2003</u> |
| |) | |
| and |) | |
| |) | |
| LOUISIANA WORKERS= COMPENSATION |) | |
| CORPORATION |) | |
| |) | |
| Employer/Carrier- |) | |
| Petitioners |) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Allen L. Smith III, New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-LHC-1762) 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.* (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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

This is the second time that this case is before the Board. Claimant, while

working for employer as a general laborer on April 7, 1998, was struck in the face by a chain and fell approximately thirty-five feet to the ground. As a result of this accident, claimant sustained multiple fractures to the right side of his face for which he underwent surgery. He also suffered a fracture to his pelvis and broken teeth. Claimant thereafter complained of headaches, blurred vision, memory loss and back pain.

In the initial Decision and Order, Administrative Law Judge Kerr determined that a causal relationship existed between claimant=s work accident and his vision, headache, memory, dental and back pain complaints. Thereafter, the administrative law judge awarded claimant temporary total disability compensation from April 8, 1998, and continuing, based upon an average weekly wage of \$679.31, medical benefits, interest and an attorney=s fee.

On appeal, the Board addressed at length the causation findings rendered by the administrative law judge and affirmed his determination that a causal relationship existed between claimant=s work injury and his vision, headache, memory, myofascial, and back pain complaints, and affirmed as well the administrative law judge=s calculation of claimant=s average weekly wage for compensation purposes.

The Board determined, however, that employer had identified multiple, separate and distinct dental conditions which should have been considered independently by the administrative law judge when addressing the issue of whether claimant=s dental problems were work-related. Accordingly, the Board vacated the administrative law judge=s finding of a causal relationship between claimant=s dental conditions and his employment with employer, and remanded the case for the administrative law judge to reconsider this issue. See *Arsenault v. A & B Industries of Morgan City*, BRB No. 00-1196 (Sept. 21, 2001)(unpub.).

On remand, the case was assigned to Administrative Law Judge Mills who, in his Decision and Order on Remand, determined that while employer failed to rebut the invoked Section 20(a), 33 U.S.C. '920(a), presumption with regards to claimant=s fractured teeth and pain, employer did rebut the presumption as it applied to claimant=s dental caries and periodontal problems. After reviewing the medical records which had been submitted into evidence, the administrative law judge thereafter concluded that claimant=s dental caries and periodontitis were not related to his employment with employer and, thus, are not compensable under the Act. The administrative law judge concluded, however, that employer is liable to claimant for the reasonable medical expenses related to the treatment of claimant=s fractured teeth and temporomandibular/myofacial pain. See 33 U.S.C. '907.

Employer now appeals the administrative law judge=s award of benefits to claimant. Claimant responds, urging affirmance.

In its present appeal, employer has raised no issues with regard to the administrative law judge's decision on remand; rather, employer has filed a brief with the Board which is identical to the one which it filed when it appealed Judge Kerr's initial Decision and Order. The issues raised in that first brief by employer, wherein employer challenged the administrative law judge's calculation of claimant's average weekly wage and his determination that a causal relationship existed between claimant's vision, headache, back, dental, myofascial and memory complaints and his employment, were thoroughly considered and addressed by the Board in its previous decision and its determinations on these issues constitutes the law of the case. See *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000); *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Employer has not offered a basis for the Board to depart from this doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. See *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

¹As the Board indicated in its previous decision, the administrative law judge's decision to rely upon claimant's testimony regarding his complaints of blurred vision and headaches, and to invoke the Section 20(a) presumption to link these two conditions to claimant's April 7, 1998, work accident, is not patently unreasonable; those complaints are supported by the medical evidence of record which establishes that claimant sustained multiple work-related, facial fractures, and following the accident he had treatment for swelling, limited upper gaze and migraine headaches. See *Arsenault*, slip op. at 2-3. Moreover, the Board concluded that none of the physicians relied upon by employer establishes rebuttal of the invoked presumption as it applies to claimant's remaining conditions. Specifically, as Dr. Martin did not address aggravation, his testimony is insufficient to establish that claimant's employment did not aggravate his pre-existing arthritic back condition; Dr. Mohamed did not address the cause of claimant's ongoing complaints of discomfort in both temporomandibular joints; and Dr. Adams did not affirmatively state that claimant's memory problems are not related to his work injury. See *id.* at 3-4. Employer on remand succeeded in establishing the non work-related nature of claimant's dental caries and periodontal problems; thus, the employer's initial challenge to the administrative law judge's decision regarding those conditions is moot. Lastly, the Board affirmed the administrative law judge's rational determination that Section 10(c) of the Act, 33 U.S.C. '910(c), should be utilized in calculating claimant's average weekly wage, and the actual calculation under that subsection since it is reasonable. See *id.* at 5-6.

Employer=s contention that the administrative law judge=s award of benefits should be reversed is therefore rejected and, as employer does not raise any issue with regard to the administrative law judge=s decision on remand, that decision is affirmed.

Accordingly, the administrative law judge=s Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge