BRB No. 08-0250

G.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES	)	DATE ISSUED: 07/29/2008
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and E. Paul Gibson (Riesen Law Firm), Charleston, South Carolina, for claimant.

Joseph D. Thompson, III (Haynsworth Sinkler Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-0114) of Administrative Law Judge Kenneth A. Krantz 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, a hustler driver, suffered injuries when his vehicle was bumped by a fellow driver on February 2, 2006. Claimant was taken to the emergency room following the accident. Pain in claimant's lower back and knee resolved, but claimant sought disability and medical benefits for a left shoulder injury that claimant alleged arose out of the work accident. Employer paid claimant total disability benefits from March 24 to May 18, 2006.

In his decision, the administrative law judge found that claimant established his *prima facie* case and is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking his shoulder injury to the work accident. The administrative law judge further found that employer rebutted the presumption and that, upon weighing all of the evidence, claimant failed to establish a causal relationship between his shoulder injury and his work accident. Accordingly, he denied benefits.

Claimant appeals, arguing that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Employer responds, urging affirmance.

In this case, it is uncontested that claimant was involved in a hustler accident at work and that he suffers a left shoulder condition that could have been caused or aggravated by the accident.[1] Thus, the administrative law judge found that claimant established his *prima facie* case, and, pursuant to Section 20(a), it is presumed that claimant's shoulder injury is related to the work accident. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not due to the work accident. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP,* 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied,* 528 U.S. 1187 (2000); *Bath Iron Works Corp v. Director, OWCP,* 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). As claimant had a pre-existing left shoulder condition, employer also must establish that the work

[1] Claimant has been diagnosed with os ascromiale, complete chronic tear of supraspinous and infraspinalus tendon with partial retraction of both tendons, a possible "SLAP" tear, tendonitis of the proximal portion of the biceps tendon, and an ossified density, possibly representing a loose body. CX 6; CX 12.

accident did not aggravate claimant's condition.[2] *Conoco, Inc.,* 194 F.3d 684, 33 BRBS 187(CRT); *see Newport News Shipbuilding & Dry Dock Co. v. Fishel,* 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *see also Strachan Shipping Co. v. Nash,* 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). If the Section 20(a) presumption is rebutted, claimant bears the burden of establishing, based on the record as a whole, that his shoulder condition is work-related. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

We agree with claimant that the administrative law judge erred in finding that employer produced substantial evidence to rebut the Section 20(a) presumption. The administrative law judge found rebuttal established because claimant failed to produce medical evidence to substantiate his claim that his shoulder condition is, in fact, related to the work accident, noting that the medical evidence suggests that the onset of claimant's shoulder problems pre-dated the accident. Decision and Order at 15. The administrative law judge also relied on the fact that claimant did not inform Drs. Song and Morrow of his prior medical history, including his shoulder condition, and was untruthful concerning his inability to work after the accident. *Id.* at 15-16.

These findings are legally insufficient to rebut the Section 20(a) presumption. The absence of medical evidence affirmatively supporting a causal relationship between claimant's shoulder condition and the work injury is irrelevant to a rebuttal analysis, as Section 20(a) presumes the causal connection exists. *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Thus, it is not claimant's burden to establish the work-relatedness of his injury at this point in the analysis. Rather, it is employer's burden to produce substantial evidence that claimant's shoulder condition is not related to the accident, including evidence that the work accident did not aggravate the pre-existing condition. *Bath Iron Works Corp. v. Director, OWCP [Shorette],* 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Moreover, the administrative law judge's reliance on claimant's inaccurate post-injury work history and claimant's failure to inform some of the physicians of his pre-existing condition is

[2] The administrative law judge stated that claimant first raised the aggravation rule in his post-hearing brief. The administrative law judge stated he would not consider the issue because an aggravation "is unsupported by the evidence." Decision and Order at 17, n. 8. This statement is inconsistent with the administrative law judge's reliance on claimant's pre-existing shoulder condition in finding the Section 20(a) presumption rebutted. Claimant clearly had a pre-existing shoulder condition, claimant raised the issue of aggravation, and on the facts of this case, the application of Section 20(a) presumes that the pre-existing condition was aggravated by the work accident. *See Bath Iron Works Corp. v. Preston,* 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

insufficient to establish rebuttal of the Section 20(a) presumption.[3] *Webb v. Corson & Gruman*, 14 BRBS 444 (1981); *see generally Simonds v. Pittman Mechanical Contractors, Inc.,* 27 BRBS 120(1993), *aff'd sub nom Pittman Mechanical Contractors, Inc. v. Director, OWCP,* 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). In *Webb*, the Board stated that "any failure to disclose [medical history] does not tend to show that claimant's knee and back were not injured, either anew or cumulatively, in the employment accident." *Webb*, 14 BRBS at 448 (emphasis in original).

In this case, moreover, the medical opinions do not rebut the Section 20(a) presumption as a matter of law because the physicians do not state that claimant's shoulder condition was not caused or aggravated by the work accident. Dr. Song, a Board-certified radiologist who interpreted claimant's MRI, opined that while the degenerative changes in claimant's shoulder predated the work accident, he could not state with any certainty whether the accident caused or hastened the complete tear in claimant's rotator cuff, CX 12 at 16-17, nor could he state that the accident had not caused claimant's condition to some degree.[4] *Id.* at 24-25. Dr. Pillai treated claimant for shoulder problems prior to the work accident and diagnosed osteoarthritis and resolving bursitis. EX 15 at 31. Following the work accident, Dr. Pillai diagnosed claimant with problems in his rotator cuff, *id.* at 32, but offered no opinion on the effects of the accident on claimant's shoulder. Finally, Dr. Morrow, an orthopedic surgeon who recommended surgery, offered no direct opinion concerning the etiology of any of the problems in claimant's shoulder other than to note that claimant reported the accident in his medical history. CX 5. Thus, the medical evidence does not rebut the Section 20(a) presumption as none of the physicians states that there is no connection, either as cause or aggravation, between claimant's injuries and the work accident. *Shorette,* 109 F.3d 53, 31 BRBS 19(CRT); *Swinton,* 554 F.2d 1075, 4 BRBS 466; *Burley v. Tidewater Temps*, 35 BRBS 185 (2002). In the absence of any evidence, much less substantial evidence, that claimant's shoulder condition was not caused or aggravated by the work accident, claimant's claim is work-related as a matter of law by operation of Section 20(a). *Bath Iron Works Corp. v. Preston,* 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Therefore, we reverse the administrative law judge's finding that claimant's shoulder condition is not work-related. We vacate the denial of benefits and remand the case for the administrative law judge to address any remaining issues.

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[3] We note that Dr. Pillai treated claimant both before and after the work accident. *See* discussion *infra.*

[4] Dr. Song stated that without prior studies he could not conclude whether claimant's shoulder condition was totally caused, aggravated or made more severe by the accident. EX 12 at 25.

Accordingly, the Decision and Order denying benefits is vacated. The administrative law judge's finding that claimant's shoulder condition is not work-related is reversed. The case is remanded for consideration of the remaining issues.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge