BRB Nos. 04-0757
and 04-0757A

FRED JACKSON, JR.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
HALTER-MARINE, INCORPORATED	)	DATE ISSUED: 06/20/2005
	)	
and	)	
	)	
ZURICH-AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners-Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United Sates Department of Labor.

Tommy Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Collins C. Rossi, Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (2003-LHC-2381) 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 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 rigger on January 19, 2001, allegedly received an electric shock while helping to move a section of deck plating. As a result of this alleged incident, claimant testified that he was thrown to the ground, Tr. at 25, and he contemporaneously complained of muscle spasms in his hands, legs, back and neck. Glen Odom, employer's leadman for maintenance, testified that he escorted claimant to employer's first aid station following the incident. Mr. Odom additionally testified that an electrician subsequently examined the work site and reported that there was water in the top of an electric light pole that caused it to short out and electrify the pole. Tr. at 51-53, 57-58. In this regard, Gregory Pearson, who is employed as a maintenance electrician by employer, testified that his investigation of the scene of claimant's incident revealed that one of the bulbs in a light fixture had broken, that the fixture filled with water which thereafter ran down the pole to create a puddle at the pole's base, and that the resulting puddle created a "hot zone." Tr. at 65. Mr. Pearson further stated that, as it was his understanding that claimant was the only person to walk through this area while touching a deck plate, that would explain why only claimant received a shock. Tr. at 67-69. Lastly, Mr. McKinnon, employer's operator foreman, testified that he was within 10 yards of claimant when claimant sustained an electrical shock, bent over, and appeared to be in serious pain. Mr. McKinnon further stated that claimant needed assistance in reaching employer's safety van which then took claimant to the first aid office. CX-22.

Claimant subsequently returned to work for employer in a light-duty capacity. He continued to experience back and neck pain, and treated with a number of physicians. On February 22, 2002, claimant was placed on disability status by employer when it discovered that claimant had been prescribed narcotic medication; subsequently, in December 2002, employer terminated claimant. Employer paid claimant temporary total disability compensation from January 27, 2001, to January 30, 2001, and temporary partial disability from February 22, 2002, until December 27, 2002, based on an average weekly wage of $579. Tr. at 11; CXs 4, 6.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge further determined that employer failed to introduce evidence sufficient to establish that claimant's work incident did not exacerbate and aggravate his cervical and lumbar spine conditions and therefore, failed to rebut the Section 20(a) presumption. Next, the administrative law judge found that claimant established a *prima facie* case of total disability and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant continuing temporary total disability compensation starting on December 28, 2002. The administrative law judge also awarded past and future reasonable medical care and treatment related to claimant's work-related injuries.

On appeal, employer challenges the administrative law judge's finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption and that employer failed to establish rebuttal of that presumption. Claimant responds, urging affirmance of the administrative law judge's finding of causation. In his cross-appeal, claimant challenges various issues related to his medical treatment and expenses. Employer responds, urging that the administrative law judge's decision be affirmed as to these issues.

Employer first contends that the administrative law judge erred in invoking the Section 20(a) presumption; specifically, employer asserts that the evidence of record does not support a finding that claimant sustained an electric shock while at work on January 19, 2001. We disagree. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish his *prima facie* case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). 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 this regard, a harm has been defined as something that has unexpectedly gone wrong with the human frame. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Claimant is not required to introduce affirmative medical evidence proving that the accident or working conditions in fact caused the harm; rather, claimant must show only the existence of an accident or working conditions which could potentially cause the harm alleged. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

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). Claimant complained of muscle spasm in his hands, legs, back and neck on January 19, 2001, and thereafter reported complaints of cervical and lumbar pain for which he has undergone treatment. Although employer avers that since claimant was not "electrocuted" on January 19, 2001, he did not establish a harm, the administrative law judge found that claimant related consistent complaints of cervical and lumbar pain to the numerous physicians with whom he treated post-injury. As these conditions are sufficient to establish that claimant sustained a harm, claimant has established this element of his *prima facie* case.

Employer next argues that claimant did not establish the second prong of his *prima facie* case. Specifically, employer contends that since Dr. Sumner testified that amperage, not voltage, is the proper measurement of the severity of an electrical shock,

and the record contains no evidence regarding the amperage of the alleged shock which claimant received on January 19, 2001, claimant did not establish the existence of working conditions that could have caused his alleged injury. Employer's argument has no merit. In the instant case, claimant, Mr. Odom, Mr. Pearson and Mr. McKinnon each testified regarding the circumstances surrounding claimant's work incident of January 19, 2001, and all are in agreement that claimant sustained an electrical shock which resulted in claimant's being taken to employer's first aid station. Moreover, the administrative law judge noted the subsequent opinion of Dr. Kergosien, who reported that the shock incident could have caused claimant's cervical disc herniation, lumbar spasms and hyperflexion, CX 7, and the opinions of Drs. Kesler and Sumner that claimant has pre-existing degenerative disc disease which was very possibly aggravated by the electrical shock. Based upon the foregoing, we hold that the administrative law judge rationally concluded that claimant established his *prima facie* case, and we affirm his invocation of the Section 20(a) presumption. *See Sinclair,* 23 BRBS 148.

Employer next alleges that the administrative law judge utilized an impermissible "ruling out" standard when addressing the issue of rebuttal, and that the testimony of Dr. Sumner is sufficient to meet its burden. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier,* 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *O'Kelley*, 34 BRBS 39. 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. *O'Kelley*, 34 BRBS 40. *See Strachan Shipping Co. v. Nash,* 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). In the instant case, employer contends that the administrative law judge erred in finding that it failed to submit sufficient evidence to establish rebuttal. Specifically, employer argues that pursuant to the holdings of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, it need not "rule out" the possibility of any causal relationship between the claimant's employment and the injury in order to establish rebuttal and that the administrative law judge imposed this impermissible standard by requiring an unequivocal showing that the electric shock allegedly sustained by claimant on January 19, 2001, played no role in claimant's injury.

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption linking claimant's present cervical and lumbar complaints to his employment with employer, as the administrative law judge properly cited and applied the controlling law of the Fifth Circuit and he rationally found the opinion of Dr. Sumner, upon whom employer relies in support of its contention of error, to be insufficient to rebut the presumption. Specifically, the administrative law judge initially

set forth at length the controlling law in the Fifth Circuit. Decision and Order at 13-14. The administrative law judge did not cite a "ruling out" standard; rather, the administrative law judge, in addressing Dr. Sumner's testimony, stated

> Dr. Sumner . . . considered Claimant open, cooperative and straightforward. Additionally, he testified that while Claimant's diabetes and degenerative disease could have directly caused his condition, Dr. Sumner also stated that the moderate electrical shock could have exacerbated Claimant's pre-existing spinal condition. He specifically testified that at least a small portion of Claimant's current spinal problems were attributable to his work incident.

Decision and Order at 14; EX 13 at 28. The administrative law judge's summation accurately reflects Dr. Sumner's testimony. Dr. Sumner additionally stated that "whenever you're confronted with preexisting chronic disease and there's some acute event, then that acute event is likely to exacerbate the preexisting disease and I certainly think it's credible to accept that [claimant] experienced some or was at risk of experiencing some short-lasting exacerbation of his disc disease. . . . " EX 13 at 24. Lastly, Dr. Sumner believed that it was "more likely than not to say that a small percentage [[of accelerated degenerative change in [claimant's] spine]] is a result of the incident." *Id.* at 28. Accordingly, as the opinion of Dr. Sumner supports the conclusion that claimant's January 19, 2001, work incident may have exacerbated and aggravated his cervical and lumbar conditions, it cannot rebut the Section 20(a) presumption. As the presumption has not been rebutted, we affirm the administrative law judge's finding that those conditions are causally related to claimant's employment with employer. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

In his cross-appeal, claimant argues that the administrative law judge erred in failing to order employer to pay for spinal surgery recommended by Dr. Smith, who is the only neurosurgeon to examine and treat him. We reject this contention. Section 7 of the Act, 33 U.S.C. §907, generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Section 7(a) of the Act states that:

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment ..., for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, the expense must be both

reasonable and necessary, and it must be related to the injury at hand. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, the administrative law judge concluded that the surgery proposed by Dr. Smith was neither reasonable nor necessary. In arriving at this conclusion, the administrative law judge found that Dr. Smith did not initially believe that claimant was a surgical candidate because of his general complaints of pain; Dr. Smith subsequently reversed his position in April 2001 and recommended surgery, although he opined that surgery may or may not help claimant. In contrast to Dr. Smith, Dr. Kesler, who examined claimant in May 2002 and April 2004, opined that claimant was not a candidate for surgery; rather, the administrative law judge found that Dr. Kesler repeatedly recommended injections for claimant's pain but that claimant refused that course of treatment. Pursuant to this testimony, the administrative law judge concluded that the recommended surgery was not reasonable or necessary, as Dr. Smith only treated claimant for a short period of time and there was no second opinion to affirm his surgical recommendation. As the administrative law judge's finding on this issue is supported by substantial evidence, it is affirmed. *Ezell v. Direct labor, Inc.*, 37 BRBS 11 (2003).

Lastly, claimant contends that the employer should be required to reimburse him for all medical expenses related to his work injury of January 19, 2001. It is well established that the circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address the decision and demonstrate why substantial evidence does not support the result reached; adequate briefing must therefore include a discussion of the relevant law and evidence. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). The Board's Rules of Practice and Procedure state:

> Each petition for review shall be accompanied by a supporting brief . . . which: Specifically states the issues to be considered by the Board; presents . . . an argument with respect to each issue presented with references [to the record]; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b). Therefore, where a party is represented by counsel, "mere assignment of error is not sufficient to invoke Board review." *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

In the instant case, claimant's last contention of error fails to meet these threshold requirements. Specifically, claimant's brief contains a one sentence statement in support

of his contention for additional medical benefits. *See* Clt's br. at 14. As such, claimant has failed to address the administrative law judge's decision. The administrative law judge awarded claimant all past and future reasonable medical care and treatment arising out of his work-related injuries and, with the exception of the proposed surgery discussed *supra*, claimant in his brief has not identified specific medical treatment for which he has sought authorization from employer and which has been denied. We therefore affirm the administrative law judge's award of medical expenses to claimant. As a claim for medical benefits is never time barred, claimant can file a claim for medical benefits if and when further treatment of a work-related condition becomes necessary, and employer refuses to authorize treatment or reimburse claimant. *Siler v. Dilllingham Ship Repair*, 28 BRBS 38 (1994).[1]

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[1] Claimant alleges throughout his brief that he "never exercised his [right to his] choice of physician." Cl. Cross-Petition Br. at 14. Claimant, however, does not specify whether employer has denied him the right to do so, if and how he has been prejudiced by such, and how it is relevant to the relief he seeks.