

BRB Nos. 03-0212
and 03-0212A

JOHN J. BEATTY)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
NOVOLOG BUCKS COUNTY,) DATE ISSUED: Oct. 31, 2003
INCORPORATED)
)
and)
)
SIGNAL MUTUAL IDEMNITY COMPANY)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents) DECISION and ORDER

Appeals of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Thomas R. Uliase (Uliase & Uliase, P.C.), Haddon Heights, New Jersey, for claimant.

Eugene Mattioni (Mattioni, LTD), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand (2001-LHC-0966) of Administrative Law Judge Ralph A. Romano 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=Keefe*

v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant was hired by employer to work as a laborer in May 1998. Prior to this, claimant sustained work-related injuries to his back on two separate occasions while working for a non-maritime employer, Mead Packaging Corporation, culminating each time in surgery by Dr. Thanki in April 1992 and August 1993. After the second surgery, claimant worked for several companies until his hiring with employer. With regard to his back condition, claimant did not visit Dr. Thanki from June 1997, until February 1, 2000, when he stated that his back symptoms, *i.e.*, stiffness in his back carrying over into his job, prompted his return for treatment. At that time, Dr. Thanki observed chronic and intractable pain and stiffness in claimant=s lower back, and he scheduled an MRI for February 16, 2000, in an effort to rule out a new disc herniation.

Meanwhile, on February 14, 2000, claimant, while operating a forklift for employer, allegedly felt pain in his back when he bent over to pick an air filter. Claimant thereafter went to see his chiropractor, Dr. McCullough, and reported for his scheduled MRI, as well as a follow-up visit with Dr. Thanki on February 22, 2000. At that time, Dr. Thanki diagnosed a herniated lumbar disc at L2-3, and lumbar degenerative disc disease and epidural scar tissue at L4-5. Dr. Thanki opined that the February 14, 2000, injury led to the herniated disc and resulted in an exacerbation of claimant=s symptoms, but that the disc herniation was not expected to be the cause of all of symptoms, including those exhibited prior to that date. Claimant returned to light duty work, as a parts room attendant, for employer on June 1, 2000. In the interim, claimant filed a claim seeking disability benefits as a result of his alleged February 14, 2000, accident.

In his Decision and Order, the administrative law judge found that claimant established invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. ' 920(a), and that employer established rebuttal thereof. The administrative law judge then determined, after analyzing all of the relevant evidence, that claimant sustained a work-related injury on February 14, 2000, which aggravated his pre-existing back condition, and thus that he had a compensable injury under the Act. Accordingly, the administrative law judge determined that claimant is entitled to an award of temporary total disability benefits from February 14, 2000, through May 31, 2000. He further determined that claimant is not entitled to any subsequent award of temporary partial disability compensation for his alleged loss in overtime work.

On appeal, employer challenges the administrative law judge=s findings that claimant sustained an injury compensable under the Act, and that it is liable for any benefits in this case. On cross-appeal, claimant challenges the administrative law judge=s finding that he is not entitled to an award of partial disability benefits following his return to work on June 1, 2000.

Employer contends that the administrative law judge improperly applied the Section 20(a) presumption in finding that claimant sustained a new injury as a result of his alleged February 14, 2000, work accident. Employer maintains that the alleged injury was just another flare-up of claimant=s ten-year-old underlying condition that bothered him when he bent over, and that as such his condition must be regarded as idiopathic in nature, not arising out of his employment.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, 33 U.S.C. § 920(a), which may be invoked only after he establishes a *prima facie* case, *i.e.*, he demonstrates that he suffered a harm and that an accident occurred at work or working conditions existed which could have caused that harm or aggravated a pre-existing condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *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 claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge rationally determined, based upon the opinions of Drs. Thanki and McCullough, that claimant sustained a harm as a result of the February 14, 2000, incident, and that claimant=s credible testimony established the existence of working conditions, *i.e.*, the work function of bending down to pick up an air filter, that could have caused said harm. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Bolden*, 30 BRBS 71. Consequently, the administrative law judge=s conclusion that claimant established invocation of the Section 20(a) presumption is affirmed. *Id.* The administrative law judge next found that employer established rebuttal by virtue of the expert opinions of Drs. Bennett and Axelrod, who opined that the work incident was a merely a manifestation or flare up of a chronic, pre-existing back impairment due to his two back surgeries in 1992 and 1993. As Section 20(a) was rebutted, it falls from the case, and employer=s contention that the administrative law judge misapplied it is rejected.

Upon evaluating the evidence as a whole, the administrative law judge concluded that claimant established he sustained a work-related back injury. In this regard, the administrative law judge rationally accorded greatest weight to claimant=s testimony and the opinions of Drs. Thanki and McCullough, which established a significant change in pattern in the pain location and level, range of motion, muscle spasm, and frequency of medical treatment, as well as a change in claimant=s functional capacity and surgical options following the subject incident. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Additionally, the administrative law judge reasonably rejected, as internally inconsistent, the opinions of employer=s experts, Drs. Axelrod and Bennett, since they admit that essentially any movement could trigger an exacerbation of claimant=s back condition, yet they do not believe that the February 14, 2000, work incident could have aggravated or worsened that condition.

Id. Accordingly, the administrative law judge=s finding that claimant sustained a work-related back injury, specifically an aggravation of his pre-existing back condition, is affirmed as it is supported by substantial evidence. *See generally Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *American Stevedoring, Ltd. V. Marinelli*, 243 F.3d 54, 35 BRBS 41(CRT)(2^d Cir. 2001).

Claimant argues on cross-appeal that the administrative law judge erred in finding that he did not sustain any loss in wage-earning capacity upon his return to work on June 1, 2000. Claimant contends that his testimony establishes that he was unable to work as much overtime post-injury as he did pre-injury, thereby resulting in a compensable loss in wage-earning capacity. Claimant further maintains that the record establishes that his average weekly wage at the time of his February 14, 2000, injury was \$1,040.36, and that his post-injury wage-earning capacity, based on his actual earnings from June 1, 2000, through April 26, 2001, is \$672.43, thus evincing a weekly loss in wage-earning capacity in the amount of \$367.93.

¹The administrative law judge specifically observed that Dr. Axelrod stated that claimant is a Gentleman who [at] every moment of the day can allege an injury simply from turning left, turning right, bending forward, getting up out of bed,@ Employer=s Exhibit (EX) 40 at 31, but then he Airrationally concludes,@ that the work activity in question could not have aggravated or worsened his back condition. Decision and Order at 7. Similarly, the administrative law judge found that Dr. Bennett=s opinion that the February 14, 2000, work incident was simply Aanother episode of lower back pain similar to those episodes [claimant] had in the past,@ was inconsistent since there was no evidence that claimant was rendered unable to work, as he was in this instance, when these similar past pain episodes occurred. Decision and Order at 7.

Under Sections 8(c)(21), and 8(e) of the Act, 33 U.S.C. ' '908(c)(21), 8(e), an award for partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. '908(h). Loss of overtime is a factor in determining post-injury wage-earning capacity; claimant must establish that, absent his injury, he would have worked available overtime. *Brown v. Newport News Shipbuilding & Dry Dock* 23 BRBS 110 (1989).

In considering claimant=s entitlement to partial disability benefits upon his return to work on June 1, 2000, the administrative law judge found that the record suggests a capability on the part of claimant to do overtime work despite medical advice to the contrary, and thus he concluded that claimant is not entitled to any award of partial benefits. While the record indicates that claimant did, in fact, work some overtime upon his return to work on June 1, 2000, it appears that those overtime hours were diminished from his pre-injury hours. In particular, the record shows that in the one-year period prior to his February 14, 2000, injury, claimant worked an average of 17.82 hours (926.75 hours divided by 52 weeks) of overtime per week. Claimant=s Exhibit (CX) L. Upon his return to work, claimant averaged only 3.97 hours (182.39 hours divided by 46 weeks) of overtime per week. CX L. From this evidence, it appears that overtime was a normal and regular part of claimant's pre-injury employment and, moreover, that the administrative law judge included overtime earnings in determining claimant's average weekly wage. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981). The administrative law judge, however, did not make any explicit findings regarding claimant=s post-injury wage-earning capacity, and thus, he did not compare claimant=s wage-earning capacity to his pre-injury average weekly wage to discern claimant=s entitlement, if any, to an award of partial disability benefits. Consequently, we must vacate the administrative law judge=s denial of partial disability benefits and remand for reconsideration of claimant=s entitlement to such benefits.

On remand, the administrative law judge must make findings regarding both the nature and extent of disability in this case pursuant to the appropriate statutory provisions and case law. In particular, he must discern whether claimant=s work-related condition is temporary or permanent. He also must calculate claimant=s post-injury wage-earning capacity pursuant to Section 8(h), and fully address claimant=s contention that he has a loss in wage-earning capacity due to his inability to work his previous level of overtime. In this regard, the administrative law judge should discuss the availability of overtime at employer=s facility post-injury, and claimant=s physical ability to engage in the available overtime work. *Everett*, 23 BRBS 316; *Brown*, 23 BRBS 110; *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987).

²The administrative law judge determined that claimant=s average weekly wage at the time of his February 14, 2000, injury was \$1,040.36.

Accordingly, the administrative law judge=s finding that claimant=s back condition is work-related is affirmed. The administrative law judge=s determination that claimant is not entitled to an award of partial disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge