BRB No. 07-0848

A.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOFTON INDUSTRIES, INCORPORATED	)	DATE ISSUED: 04/29/2008
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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 and the Order Denying Motion for Reconsideration (2006-LHC-00863) of Administrative Law Judge Lee J. Romero, Jr., 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 was working as an operator rigger for employer when he was injured on August 9, 2004. Claimant and a co-worker were "nippling up a wellhead" together

holding a wrench when the co-worker left to perform an associated task and the weight of the wrench came down on claimant's arm. Claimant testified that he felt an extreme amount of pain in his left shoulder. He reported the accident to his supervisor and was referred to Dr. Duval. Dr. Duval recommended that claimant undergo a functional capacity evaluation and referred claimant to Dr. Cobb. Dr. Cobb had treated claimant for a previous injury to his neck. After claimant failed to respond to conservative treatment, Dr. Cobb referred claimant to Dr. Mitchell, a pain management specialist. Dr. Mitchell recommended physical therapy and a series of epidural steroid injections to treat claimant's neck and shoulder pain. Employer refused to authorize further medical treatment for the injury and declined to pay further disability benefits. Claimant sought approval of the recommended medical treatment and continuing temporary total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant established invocation of the Section 20(a) presumption that he injured his left shoulder in the accident at work, but did not establish a *prima facie* case that he injured his neck in the accident on August 9, 20004. The administrative law judge rejected employer's argument that claimant's lack of credibility rebuts the Section 20(a) presumption as there was objective evidence of a left shoulder strain. He further found that employer submitted no contrary medical evidence. Regarding disability, the administrative law judge reviewed the relevant evidence and found that claimant has not reached maximum medical improvement as he was not provided the medical care recommended by his treating physician, Dr. Cobb. Moreover, the administrative law judge found that Dr. Cobb placed claimant on "no-work" status pending treatment that was not provided and that he has not been released to work above the light category, which his previous job exceeds. Thus, claimant demonstrated an inability to perform his former work. As employer submitted no evidence of suitable alternate employment, the administrative law judge found that claimant is entitled to continuing temporary total disability benefits.

In reviewing claimant's request for continuing medical treatment for his shoulder injury, the administrative law judge found that the recommended treatment of Drs. Duval, Cobb, and Mitchell was reasonable and necessary for claimant's left shoulder injury. Consequently, the administrative law judge ordered employer to reimburse claimant for payments made to Dr. Mitchell for emergency room treatment and for prescriptions related to the left shoulder injury. The administrative law judge denied employer's motion for reconsideration.[1]

[1] In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel a fee in the amount of $6,687.50, representing 26.75 hours of legal services at the hourly rate of $250.

On appeal, employer contends that the administrative law judge erred in finding the evidence establishes that claimant suffered an injury as a result of the accident in August 2004. At most, employer contends that claimant suffered a strain, which resolved and no longer requires medical treatment, and that any current problems relate to an earlier injury. Claimant has not responded to this appeal.

In order to be entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). 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 the present case, it is undisputed that an accident occurred on August 4, 2004, in the course of claimant's employment. Moreover, claimant was treated by Drs. Duvall, Cobb, and Mitchell, who opined that claimant suffered a shoulder strain which could have been caused by the accident.[2] *See* Cl. Exs. 1, 2. Therefore, we affirm the administrative law judge's finding that the evidence establishes invocation of the Section 20(a) presumption that claimant's shoulder condition is work-related. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 179 (1996).

Once Section 20(a) is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In the present case, employer contends that rebuttal of the Section 20(a) presumption is established inasmuch as claimant's testimony is inconsistent and not credible. Although claimant's description of his symptoms has varied, Drs. Cobb and Duval found objective evidence that an injury had occurred to claimant's left shoulder. The administrative law judge found employer presented no evidence rebutting the presumption. He rejected employer's contention that it established rebuttal on the basis that claimant's testimony lacks credibility in light of the objective evidence of a left shoulder strain. The

[2] Claimant was also examined by Dr. Taylor at the request of the Social Security Administration. Dr. Taylor noted left shoulder pain of unknown etiology and a history of anterior cervical fusion. Dr. Taylor found no reason to limit claimant's work-related activities. Emp. Ex. 7. The administrative law judge gave no weight to Dr. Taylor's opinion. Decision and Order at 17.

administrative law judge's finding that employer failed to produce substantial evidence rebutting the presumption is affirmed. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *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). Claimant therefore established a work-related injury to his left shoulder.

Employer also contends that any injury claimant suffered to his left shoulder on August 9, 2004, resolved with no residual disability. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). If claimant's disability is due, even in part, to the work-related injury, claimant may be entitled to compensation under the Act. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

In the present case, claimant was treated by Dr. Cobb for pain in his shoulder and arm following his accident in August 2004. Dr. Cobb diagnosed a strain of claimant's rotator cuff and brachiitis. Cl. Ex. 2. In addition, Dr. Cobb opined that claimant was suffering from cervical radiculitis, which the administrative law judge found was not related to the 2004 work injury. In October 2004, Dr. Cobb recommended treatment with Dr. Mitchell, a pain management specialist, "for consideration of additional nonsurgical options involving [claimant's] left arm." Cl. Ex. 2 at 15. In October 2005, Dr. Cobb placed claimant on "no work" status pending the recommended pain management treatment. The administrative law judge found that as employer had not authorized the recommended treatment, claimant remained unable to return to his former duties, due at least in part to his work-related injury. We affirm the administrative law judge's finding as it is supported by substantial evidence. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Moreover, as employer did not submit any evidence of suitable alternate employment, we affirm the administrative law judge's finding that claimant is entitled to continuing temporary total disability benefits. *See Marinelli*, 34 BRBS at 119; *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Employer also contends that the administrative law judge erred in awarding medical treatment after October 2004, as that was the latest date that any type of medical treatment for claimant's shoulder was performed or diagnosed. Section 7(a) requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Claimant has established a *prima facie* case for

compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In order for medical care to be compensable, it must be appropriate for the injury, *see* 20 C.F.R. §702.402, and the administrative law judge has the authority to determine the reasonableness and necessity of a procedure refused by employer. *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002).

In the present case, claimant was treated by Drs. Duval, Cobb and Mitchell for his left shoulder injury. Dr. Duvall noted on August 12, 2004, that x-rays of claimant's shoulder revealed a Type II acromion, and placed claimant on sedentary work duty. Dr. Duvall released claimant from treatment on September 23, 2004, as he had no further treatment to offer at that time, but opined that a functional capacity evaluation would be advisable. Subsequently, claimant began treatment with Dr. Cobb, who diagnosed a strain of the rotator cuff and a possible lower brachial strain. Cl. Ex. 2. In October 2004, Dr. Cobb recommended that claimant be evaluated by Dr. Mitchell, a pain management specialist, for treatment of his left arm. *Id.* at 15. On October 31, 2005, Dr. Cobb opined that claimant suffers from brachiitis and cervical radiculitis and again recommended that claimant see a pain management specialist as he could offer no further treatment. *Id.* at 13-14. Although employer refused to authorize treatment with Dr. Mitchell, a pain management specialist, claimant began treatment with Dr. Mitchell in February 2006. Dr. Mitchell diagnosed cervicalgia, brachial radiculitis, spasm of the trapezius muscle, left shoulder pain, lower back spasm, and left lower extremity pain. *Id.* at 42-44. He recommended that claimant receive cervical epidural injections and physical therapy. Subsequently, claimant received three epidural steroid injections, which Dr. Mitchell stated were to treat claimant's cervical radiculitis. Cl. Ex. 3.

The employee must establish that the medical expenses are related to the compensable injury. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed Appx. 126 (5th Cir. 2002)(table). The administrative law judge found that employer refused treatment for claimant's left upper extremity including the functional capacity evaluation recommended by Dr. Duval, the pain management referral made by Dr. Cobb, and the treatment recommended by Dr. Mitchell. In view of the credited evidence, employer's argument that it is not liable for treatment after October 2004 is rejected. However, the evidence indicates that claimant received treatment for cervical pain as well as the injury to his left shoulder. Specifically, Dr. Mitchell administered three cervical epidural steroid injections for treatment of claimant's "cervical radiculitis." Cl. Ex. 3. The administrative law judge found that claimant's cervical pain is not related to the work injury in August 2004. As there is evidence that some of the requested treatment may be exclusively for this condition, we vacate the administrative law judge's finding that employer is liable for all of claimant's medical treatment and remand the case for the administrative law judge to address whether any

specific treatment was not related to claimant's shoulder injury and award medical benefits accordingly. *See generally Weikert*, 36 BRBS 38.

Accordingly, the administrative law judge's award of medical benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge