

DERMOT A. MURPHY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
WILHELMSSEN TECHNICAL SOLUTIONS)	DATE ISSUED: 08/13/2013
)	
and)	
)	
SINGAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Eric J. Halverson, Jr., Metairie, Louisiana, for claimant.

Edward S. Johnson and Gavin H. Guillot (Johnson, Johnson, Barrios & Yacoubian), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-LHC-1644) of Administrative Law Judge C. Richard Avery 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, who serviced refrigerator equipment aboard vessels for employer, sustained a work-related back injury in June 1996.¹ He experienced several flare-ups of his back condition between 2000 and 2010, including, relevant to this case, on August 7 and 13, 2010. Specifically, on August 7, 2010, claimant stated that he “pulled” his back while installing a line on a compressor aboard the M/V Moray, a vessel in dry dock in Curacao. Nevertheless, claimant finished this project without reporting the incident and returned to Louisiana, where, on August 10, 2010, he selected his next assignment working aboard the M/V Catherine Knutsen (Knutsen), which was anchored in the Mississippi River. On August 13, 2010, claimant, while acquainting himself with the refrigeration system aboard the Knutsen, stated that he immediately felt pain in his low back and radiating down his right leg after lifting a five-gallon oil drum. After a break, claimant finished the inspection but told no one about the incident. He went home in pain, took medication and went to bed, only to arise the next morning, August 14, 2010, in greater pain. As a result, claimant’s wife had to drive him to the office to complete paperwork on the Knutsen job.

Still in significant pain, claimant stated he called and emailed his supervisor, Mr. Fryberg, on August 15, 2010, to inform him of the episode on the Moray; claimant stated he did not mention the Knutsen incident at that time because he did not think the specifics mattered and he simply lumped the two events together. HT at 90, 92, 145. On August 16, 2010, claimant sought treatment at the emergency room, and then from Dr. Corales, who ordered an MRI and diagnosed claimant with a herniated disc at L4-5. Dr. Corales suggested that surgery might be appropriate, an opinion shared by Dr. Donner. Claimant, however, opted for conservative treatment with a chiropractor, Dr. Hannan, which ultimately proved unsuccessful.

Claimant stated that he eventually informed employer’s office manager, Ms. Fahlen, about the Knutsen incident, but that he did not formally report the Knutsen incident until he hired his attorney in January 2011. The issue, thereafter, became which of the two work incidents, i.e., the one on the Moray and/or the one on the Knutsen, is the cause of claimant’s condition and inability to perform any work since August 13, 2010. Claimant received no compensation or medical benefits after March 2011,² and this, coupled with his decision to undergo surgery for his back condition, prompted his pursuit of this claim under the Act.

¹Claimant was diagnosed with a disc herniation in his thoracic spine and bulging discs in his lumbar region as a result of the June 1996 work incident.

²Claimant received benefits relating to the August 7, 2010 incident, paid by ACE/ESIS, an international carrier who covered claimant’s condition, as having occurred outside of United States waters in Curacao, for employer under a “voluntary compensation policy.”

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his present low back condition to the August 13, 2010 incident aboard the Knutsen, and that employer did not establish rebuttal thereof. Nonetheless, the administrative law judge found in the alternative that the evidence as a whole establishes that the August 13, 2010 incident aboard the Knutsen contributed to claimant's present low back condition. The administrative law judge found claimant incapable of returning to his usual employment and that employer did not establish the existence of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from August 16, 2010, as well as medical benefits including, specifically, the back surgery recommended by Dr. Corales. 33 U.S.C. §§908(b), 907.

On appeal, employer challenges the administrative law judge's findings that claimant established his prima facie case pursuant to Section 20(a), that employer did not rebut the Section 20(a) presumption, and that the evidence as a whole establishes a causal connection between the August 13, 2010 Knutsen incident and claimant's present low back condition. Claimant responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief.

Employer contends the administrative law judge erred in finding that claimant is entitled to the Section 20(a) presumption that his low back injury is related to the work incident allegedly sustained on August 13, 2010. Employer argues that the inconsistencies regarding the alleged August 13, 2010 incident aboard the Knutsen and the fact that no physician affirmatively linked claimant's present back condition to that incident is cause for the Board to reverse the administrative law judge's application of the Section 20(a) presumption.

In order to establish a prima facie case, a claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or working conditions existed that could have caused the harm. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). If these two elements are established, the Section 20(a) presumption applies to relate the claimant's injury to his employment. *Port Cooper/T.Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Under the aggravation rule, if a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986).

In this case, the administrative law judge found that Dr. Corales's records and opinions are sufficient to establish that claimant suffered an injury in August 2010 and that claimant credibly testified as to the lifting incident on the Knutsen. Specifically, the administrative law judge relied on Dr. Corales's statements: that, while claimant's back

“showed a lot of wear and tear” over the years since his initial 1996 workplace injury, claimant was doing fairly well until August 2010; that an MRI dated September 10, 2010, showed a prominent disc herniation at L4-L5 not seen in the 2009 MRI;³ that the change in claimant’s MRI from 2009 to 2010, was due to claimant’s re-injury in August 2010; that claimant’s disc herniation could have resulted from this re-exacerbation or a new disc herniation that combined with his pre-existing degenerative disease; and that while claimant has had chronic pain off and on for years, it “has significantly worsened when he began having his initial right buttock and radicular symptoms following his injury while on a ship on 8/13/10.” CX 13. The administrative law judge also found that Dr. Corales explained that the heavy nature of claimant’s work could have been a factor contributing to his low back condition. CX 20 at 95. Additionally, the administrative law judge found that claimant gave a credible account of the accident that occurred aboard the Knutsen on August 13, 2010;⁴ claimant felt a popping in his back that he had not felt before and immediate intensified pain as he lifted the oil drum. The administrative law judge found that the testimony of claimant’s wife, that claimant arrived home from work following that incident and told her he had “really finished [his] back this time,” HT at 161, corroborates claimant’s testimony that he suffered an injury on that date. Moreover, the administrative law judge found it significant that claimant was capable of continuing to work after the August 7, 2010 accident aboard the Moray, but unable to perform any work following the August 13, 2010 Knutsen event. Decision and Order at 19-21.

The Board is not permitted to reweigh the evidence but may ascertain only whether substantial evidence supports the administrative law judge’s decision. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001);

³Dr. Corales observed that the 2010 disc herniation was in the same location as the bulging disc which was diagnosed following claimant’s 1996 injury.

⁴As employer argues, there are inconsistencies in the reporting of the time and manner of claimant’s alleged August 13, 2010 incident aboard the Knutsen, which the administrative law judge acknowledged. *See* Decision and Order at 19, 20. Nonetheless, the administrative law judge found that these inconsistencies exist primarily as a result of claimant’s being, as Dr. Corales described, a “vague, elusive historian,” Decision and Order 21, that they most likely are the result, as explained by claimant, of his having rolled the August 7 and 13, 2010 work events/accidents together, and that claimant’s testimony regarding these events is “truthful,” Decision and Order at 20. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). This credibility determination is within the administrative law judge’s sound discretion. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990).

Compton v. Avondale Industries, Inc., 33 BRBS 174 (1999). It is well-established that the administrative law judge has the authority to address questions of witness credibility and is entitled to draw his own inferences from the evidence; that other inferences could have been drawn does not establish error in the administrative law judge's conclusion. See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995). The administrative law judge's finding that an accident occurred on August 13, 2010, while claimant was aboard the Knutsen, that could have caused the herniated disc is rational and supported by substantial evidence. Decision and Order at 18-19. As claimant established both a harm, a herniated disc at L4-L5, and the occurrence of an incident at work on August 13, 2010, which could have caused that harm, the administrative law judge properly invoked the Section 20(a) presumption, and that finding is affirmed. *H.B. Zachary Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Employer next contends the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption. Employer maintains that the administrative law judge applied an incorrect legal standard in reaching his conclusion on rebuttal.

Once the claimant establishes a prima facie case, as here, Section 20(a) of the Act applies to relate his injury to his employment, and the burden shifts to the employer to rebut the presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), cert. denied, 540 U.S. 1056 (2003); *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated a pre-existing condition to result in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the employer rebuts the presumption, it no longer controls, and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that while employer outlined the vague nature of claimant's reporting of his injuries, there was nothing "substantial" presented to suggest that claimant was not credible in his account of the August 13, 2010 incident

aboard the Knutsen.⁵ Decision and Order at 19-20. Additionally, the administrative law judge found that employer did not offer any evidence that the nature of claimant's work aboard the Knutsen, involving moderate to heavy physical activity, was not such that it could have caused or aggravated his low back condition. *See, e.g., Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). As it is supported by substantial evidence, we affirm the administrative law judge's finding that the Section 20(a) presumption was not rebutted. *Id.* Moreover, we affirm the administrative law judge's finding that the evidence as a whole weighs in favor of claimant's claim, as he rationally credited claimant's testimony regarding the August 13, 2010 incident and Dr. Corales's undisputed testimony that claimant's work for employer could have contributed to his back condition and its apparent worsening in August 2010. Decision and Order at 20-21. As the administrative law judge's finding of a causal relationship between claimant's injury on board the Knutsen on August 13, 2010, and his present low back condition is rational and supported by substantial evidence, we affirm the award of benefits.⁶

⁵The administrative law judge correctly observed that employer must "rebut the presumption with substantial evidence [which the administrative law judge further noted "has been defined as 'such evidence as a reasonable mind might accept as adequate to support a conclusion'"] employment conditions did not cause the injury." Decision and Order at 17. The administrative law judge's summary of his rebuttal discussion, however, includes the statement that employer's "attempts to *disprove* the fact of the accident on August 13, 2010 were unsuccessful," Decision and Order at 20 (emphasis added), which conflicts with the position of the United States Court of Appeals for the Fifth Circuit that employer need not "prove the deficiency" in claimant's prima facie case; rather, "all it must do is advance evidence to throw factual doubt on the prima facie case." *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Nonetheless, as the administrative law judge's conclusion is premised on his finding that employer presented "nothing substantial" to suggest that the August 13, 2010 incident did not occur, and as the administrative law judge's alternative finding that the evidence as a whole weighs in favor of claimant's claim is rational, supported by substantial evidence and is in accordance with law, we hold that any error in the administrative law judge's use of the phrase "disprove the fact" in terms of Section 20(a) rebuttal is harmless. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000).

⁶Employer has not raised any contentions relating to the administrative law judge's finding that claimant is incapable of returning to any work and, thus, is totally disabled.

Accordingly, the administrative law judge's Decision and Order is affirmed.
SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge