BRB No. 07-0570

E.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOON ENGINEERING COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/17/2007
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Swartz & Goodove, P.C.), Norfolk, Virginia, for claimant.

Dana Adler Rosen (Clarke, Dolph, Rapaport, Hull, Brunick & Garriott, P.L.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2006-LHC-0747) of Administrative Law Judge Richard K. Malamphy 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 initially injured his back while working for employer in 1988. He underwent a laminectomy performed by Dr. Waters, and in 1990, he underwent a fusion at L5-S1 performed by Dr. Markham. He saw both doctors until 1993, and then he saw them each in 1996 for follow-up visits. He had no further medical treatment for his back until after an incident in 2003 which caused back pain.[1] On March 17, 2003, claimant leaned over, either at work or at home in his truck in his driveway, and he felt a "pop" in his back.

In April 2003, Dr. Markham determined there was a well-healed scar, a solid fusion, though some hardware was disconnected, a normal neurological examination, no significant degenerative changes, and moderate radiculopathy. Cl. Ex. 2-1. Four months later, in August 2003, Dr. Markham referred claimant to Dr. Dervay, a pain management specialist. Claimant has been treated for pain since 2003. In April 2005, Dr. Kirven examined claimant, and he reported in July that claimant's back and leg pain is related to his 1988 work injury and subsequent surgery. Cl. Ex. 3-9; Cl. Ex. 4. In October 2005, Dr. Kirven wrote to "clarify" his opinion, and he stated that claimant's current pain is muscular and has nothing to do with the previous surgery, as there is no evidence of trauma to or near the fusion. Emp. Ex. 1. In 2006, Dr. Markham stated that he had not seen claimant since 2003; he opined that any patient who had a back fusion is at some increased risk for back pain and that the previous fusion is one of several factors that can contribute to the reoccurrence of pain such as claimant described to him in 2003. Cl. Ex. 2-8. Claimant sought medical benefits for his continuing treatment.[2]

The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption based on claimant's 1988 injury and medical treatment following the 2003 incident. Decision and Order at 7. He then found that employer rebutted the presumption based on Dr. Kirven's second report, and he stated that he must weigh the evidence of record. Decision and Order at 8. The administrative law judge stated that, in early 2005, Dr. Kirven related the 2003 pain to the 1988 injury and that, in late 2005, he then related the pain to the 2003 "reaching maneuver." The administrative law judge also stated that Dr. Markham treated claimant for several years during and after 1988, with

[1]Although he had not been treated for pain between 1993 and 2003, claimant testified that he had occasional flare-ups of pain throughout the years and that he would self-medicate, exercise and stretch to try to relieve the pain. Emp. Ex. 4 at 7, 10-12; Tr. at 23-24.

[2]Claimant and employer settled the 1988 claim for disability benefits in 1995, leaving his entitlement to medical benefits open. The only issue before the Board is claimant's entitlement to medical benefits for the 2003 injury. Employer initially paid for claimant's 2003 treatment but ceased payments upon learning that the incident occurred at claimant's work.

treatment continuing after the 2003 episode, and that Dr. Markham stated in 2006 that patients with fusions frequently have pain flare-ups like claimant suffered. The administrative law judge determined that Dr. Markham's opinion is more persuasive than Dr. Kirven's because Dr. Kirven changed his opinion. Based on this evidence, the administrative law judge found that the treatment necessitated by the 2003 incident was related to the 1988 injury, that the condition following the 2003 incident is the natural progression or aggravation of the 1988 injury, and that employer is liable for medical benefits related thereto. Decision and Order at 8.

Employer challenges the administrative law judge's findings. It argues that the 2003 incident itself is in question, as claimant changed his story about how his back pain occurred, and it argues that the incident is an intervening event relieving it of liability. Employer states that the administrative law judge failed to assess claimant's credibility, failed to properly apply Section 20(a), and erred in finding that claimant's 2003 injury was the result of the natural progression of the 1988 injury. Claimant argues that the evidence supports the administrative law judge's findings, and he urges the Board to affirm the administrative law judge's award.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or an accident occurred at work which could have caused, aggravated, or accelerated the condition. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). It is undisputed that claimant here suffered a work-related harm, a back injury at work in 1988 necessitating surgery, and that he currently has back pain in the same area. Thus, as the administrative law judge found, claimant is entitled to the Section 20(a) presumption. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

It is an employer's burden to rebut the Section 20(a) presumption that the claimant's injury is work-related with substantial evidence that there is no causal connection between the injury and his employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the claimant sustains a subsequent injury, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that the claimant's condition was caused by the subsequent event; in such a case, the employer must also show that the first work-related injury did not cause the second injury. *See, e.g, Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). An employer is liable for the entire disability if the second injury is the natural and unavoidable result of the first injury. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Where the second injury is the result of an intervening cause, however, the employer is relieved of liability for that portion of the disability attributable to the second injury. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

In this case, the administrative law judge found that Dr. Kirven's second letter, which stated that the 2003 back pain was not related to the 1988 injury, rebutted the Section 20(a) presumption. As the administrative law judge found that the presumption was rebutted, it dropped from the case, making moot employer's assertion that the administrative law judge improperly invoked the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(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. *Id.*; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer argues that the leaning incident was a supervening cause relieving it from liability for medical benefits related to the 2003 injury. Claimant argues that the 2003 back pain was the natural result of his 1988 injury. The administrative law judge noted the confusion as to how the 2003 back pain was caused, but he found in any event that there was no trauma to claimant's body.[3] Decision and Order at 8. Dr. Kirven was the only doctor to state that claimant's current condition is not related to the 1988 injury. The administrative law judge found Dr. Kirven's opinion unpersuasive because, between his first report in July 2005 and his second report in October 2005, Cl. Ex. 3-9; Emp. Ex. 1, and absent any further examinations, he changed his opinion about the relationship between claimant's first and second injuries. The remaining medical evidence, the opinion of Dr. Markham, supports claimant's position, as Dr. Markham stated that patients with a history of back fusion are at risk for increased recurrence of back-pain flare-ups such as the type claimant suffers. Cl. Ex. 2-8. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and weighing the evidence of record. *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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I.

[3]Dr. Markham's first report stated that claimant leaned over at work at Shore Memorial Hospital and felt the "pop." Claimant stated that when he learned Dr. Markham wrote that the incident occurred at work, he corrected the history to reflect that it had occurred when he leaned across the passenger seat of his truck to start his truck on a cold morning. Cl. Ex. 2-2; Emp. Ex. 4 at 20-21. The remaining medical evidence and testimony, including a follow-up discussion with Dr. Markham, reflects that the incident occurred at home. We reject employer's assertion that claimant's credibility is in question because he "changed his story." The issue is not whether an incident occurred, as there is no dispute that claimant leaned over and felt pain, but, rather, whether that pain is related to the original work injury. Consequently, the case turns on medical evidence, and the issue of where the incident occurred is not determinative. *See Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980).

1969). As substantial evidence supports the administrative law judge's finding that claimant's back pain is the result of the natural progression of his 1988 back injury, we affirm the award of medical benefits.[4] *Emery*, 228 F.3d 513, 34 BRBS 91(CRT).

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

[4]We also reject employer's assertion that claimant's pain was caused by an intentional act of misconduct or negligence. Although claimant intended to lean over, he stated he did not intend to cause harm to himself. His testimony reflects that he had started his truck this way during cold weather for years and that he was aware any activity such as leaning, bending, sitting too long, and reaching could cause pain. Tr. at 11, 20-22, 27. An employee must take reasonable precautions against re-injury, *see generally Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (Smith, J., concurring & dissenting), and injuries that are the direct result of an employee's intentional post-injury misconduct are not compensable, *see, e.g., Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983). However, claimant's act of leaning over does not constitute an intentional act of post-injury misconduct. *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992) (post-injury actions did not "overpower and nullify" causal relationship); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, 901 F.2d 1112 (5th Cir. 1990) (table) (where claimant was released to heavy-duty work and was injured while stepping into a truck, it could not be said he failed to take precautions).