BRB No. 97-0654

EDWARD GILDS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
COOPER/T. SMITH STEVEDORING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
COOPER/T. SMITH CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order Granting Employer's Motion for Reconsideration, and Order Denying Claimant's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Alan G. Brackett and Daniel J. Hoerner (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, Order Granting Employer's Motion for Reconsideration, and Order Denying Claimant's Motion for Reconsideration (95-LHC-2074) of Administrative Law Judge James W. Kerr, 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On October 17, 1993, claimant sustained multiple injuries when the truck in which he

was driving hit a pothole, causing him to be thrown about the cab. Claimant underwent medical treatment, and thereafter was enrolled in a work-hardening program. On October 12, 1994, during the course of his work-hardening program, claimant noticed swelling in his right leg while working on the quadriceps machine. Claimant went to the hospital, where the physician diagnosed his injury as a right knee effusion. Claimant was discharged from the work hardening program on October 21, 1994. On December 22, 1994, while getting off a stool at a bar, claimant's right knee gave way. On January 23, 1995, he underwent surgery to repair a ruptured right quadriceps tendon. Employer voluntarily paid medical benefits and temporary total disability from October 18, 1993 to January 31, 1995. Claimant returned to his regular work duties on March 26, 1995, and sought additional temporary total disability benefits from January 31, 1995, through March 26, 1995, and scheduled permanent partial disability benefits thereafter, contending that his right quadriceps tear resulted from the weakening of the tendon during his work hardening program.

The administrative law judge found that the weight of the medical evidence established that claimant's right quadriceps tendon ruptured on December 22, 1994, when he twisted his knee while getting off a bar stool. In addition, crediting the medical opinion of Dr. Gaunche rather than the opinions of Dr. Manale and Dr. Murphy, the administrative law judge determined that the rupture of claimant's tendon on December 22, 1994, was due to his twisting incident, rather than the natural degenerative condition of his knee or the effects of his work-hardening injury. Moreover, he found that claimant's ruptured tendon was not the natural or unavoidable result of either his October 1993 work injury, or his October 12, 1994 work-hardening injury, but rather was due to claimant's failure to exercise due diligence with regard to his injury; he noted that claimant, despite having knowledge of his need for treatment of his prepatellar bursitis at the time of Dr. Murphy's October 27, 1994, examination, failed to inform Dr. Manale of his knee condition when he met with him on November 4, 1994. The administrative law judge further stated that he was persuaded that, despite Dr. Manale's contrary testimony, claimant could have averted the eventual rupture by going through the medical treatment recommended by Dr. Murphy. Accordingly, he denied benefits based on claimant's failure to establish causation.[1]

[1]The administrative law judge originally awarded temporary total disability benefits from January 31, 1995, through March 26, 1995, because there was "no medical evidence in the record showing that claimant could have returned to work but for the non-compensable injury." Decision and Order - Awarding Benefits at 11. However, in response to employer's motion on reconsideration, the administrative law judge reconsidered and denied benefits.

Claimant also filed a motion for reconsideration which the administrative law judge denied summarily.

Claimant appeals the denial of benefits, contending that the administrative law judge erred in concluding that the rupture of his right quadriceps tendon was not work-related, and that he failed to exercise due care with regard to his treatment of his injury. Employer responds, urging affirmance.

Section 20(a) of the Act, 33 U.S.C.§920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either an accident occurred or working conditions existed on his job which could have caused or aggravated the harm. *See Manship v. Norfolk Western Railway Co.,* 30 BRBS 175, 179 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Claimant's argument that the administrative law judge erred in finding that claimant's quadriceps tear is not work-related has merit. Initially, in analyzing this issue, the administrative law judge did not consider the relevant evidence in terms of the Section 20(a) presumption. It is undisputed that claimant sustained a harm, a ruptured quadriceps tendon. He was involved, moreover, in a work-related accident on October 17, 1993, as well as a second work-related injury on October 12, 1994, while participating in the work hardening program; Dr. Manale related claimant's December 1994 ruptured tendon to the work hardening program. As claimant established both elements of a *prima facie* case, he is entitled to invocation of the Section 20(a) presumption on the facts presented as a matter of law. *See Kubin v. Pro-Football, Inc.,* 29 BRBS 117, 119 (1995); *Konno v. Young Brothers, Ltd,* 28 BRBS 57, 59 (1994).

Because the administrative law judge did not invoke the Section 20(a) presumption, he did not properly allocate the burden of proof to employer to present evidence that claimant's ruptured quadriceps tendon was not related to his work injury. As the administrative law judge did not evaluate the relevant medical evidence to determine whether employer established that claimant's quadriceps tear was not caused, contributed to, or aggravated by either employment-related event, we vacate the administrative law judge's finding that claimant's quadriceps tear is not work-related. The case must be remanded for the administrative law judge to address whether the Section 20(a)

presumption was rebutted.[2] *Peterson v. General Dynamics Corp.,* 25 BRBS 71 (1991),

[2]Where the evidence credited by the administrative law judge is sufficient to rebut Section 20(a), remand may be avoided. In the instant case, however, the administrative law judge's findings are not sufficient to support a conclusion of rebuttal as a matter of law. Initially, the administrative law judge found that the rupture occurred in December 1994 rather than during the work hardening program. This conclusion alone cannot rebut Section 20(a), as the issue is whether employer severed the connection between the rupture and work-related events. Dr. Manale testified that the rupture was related to the work hardening program based on his opinion that the program weakened claimant's tendon to the point that it ruptured later in the barroom. Thus, claimant's theory that his injury is compensable is consistent with a finding that the actual rupture occurred in December.

The administrative law judge also credited Dr. Gaunche, who testified that an association could be made between claimant's October 1994 knee symptoms and the rupture, but that the rupture was "probably" not related. CX-16. On remand, the administrative law judge must evaluate this opinion in order to determine whether it establishes that claimant's ruptured tendon was not related to either work-related injury. Finally, the administrative law judge stated that claimant's natural degenerative condition

aff'd sub nom. Ins. Co. of America v. U.S. Dept. of Labor, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). If the administrative law judge finds that employer has introduced evidence sufficient to rebut the presumed causal nexus under Section 20(a), he must resolve the causation issue based on the record evidence as a whole.

The administrative law judge's finding that claimant failed to exercise due care with regard to his injury and that as a result employer was relieved of liability for claimant's ruptured quadriceps tendon injury also cannot be affirmed. In a case involving a subsequent injury, employer can rebut the Section 20(a) presumption by showing that the claimant's disabling condition was caused by a subsequent event, provided that the subsequent event was also not caused by the claimant's work-related injury. *Plappert v. Marine Corps Exchange*, 31 BRBS 13,15 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Bass v. Broadway Maintenance*, 28 BRBS 11, 15 (1994). Where employer establishes that claimant's disability is the result of an intervening cause, employer is relieved of liability for that portion of claimant's disability attributable to the intervening cause. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

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could have caused the rupture. Whether claimant had an underlying degenerative condition is not determinative in view of the aggravation rule. *See Strachan Shipping v. Nash,* 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*). Therefore, remand is necessary here for the administrative law judge to consider the evidence in accordance with Section 20(a) to determine whether it was rebutted by medical evidence severing the causal relationship.

A subsequent injury which is the result of the employee's intentional or negligent conduct can, in appropriate circumstances, serve as an intervening cause sufficient to relieve employer of liability for the increased disability attributable to the intervening cause. *See Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994 (5th Cir. 1981). In the present case, however, there is no evidence in the record which supports the administrative law judge's findings. Initially, the conclusion that claimant's failure to inform Dr. Manale of Dr. Murphy's recommended treatment of his prepatellar bursitis[3] amounted to negligence is not supported by the record. Dr. Murphy testified that while claimant should have been treated, his condition was not serious at that point in time. Tr. at 109. Moreover, the administrative law judge's finding that employer was relieved of liability because, if claimant had undergone the recommended treatment, the eventual rupture could have been averted lacks any support in the relevant opinions of Drs. Murphy and Manale. Dr. Murphy testified that if claimant had been treated, it would have lessened the possibility that he would eventually have a quadriceps rupture. Tr. at 116. Dr. Manale testified that, while it was possible that claimant could have delayed the rupture, it was his belief, although he could not say with certainty, that once claimant began experiencing symptoms, as he did following the October 1994 work hardening injury, claimant was doomed. Tr. at 185-186. Inasmuch as neither physician testified that claimant's eventual rupture could have been avoided by his having undergone the treatment of his prepatellar bursitis recommended by Dr. Murphy, the administrative law judge's finding in this regard is not supported by substantial evidence. *See generally Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). We therefore reverse the administrative law judge's finding that claimant's failure to exercise due diligence in informing Dr. Manale of the need for the treatment of his prepatellar bursitis recommended by Dr. Murphy constituted an intervening cause sufficient to relieve employer of liability. *See Shell Offshore, Inc. v. Director, OWCP,* 122 F.3d 312 (5th Cir. 1997); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989).

[3] Dr. Murphy testified that the bursitis could have been treated with anti-inflammatory medication and maybe some temporary restriction of activities.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order Granting Employer's Motion for Reconsideration, and Order Denying Claimant's Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge