BRB No. 06-0345

HARRY HOLIDAY	)	
Claimant-Petitioner	)	
v.	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 10/31/2006
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-1052) of Administrative Law Judge Daniel A. Sarno, 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 worked for employer for approximately three years, and several times

during this period performed overtime work for employer on a non-covered situs.[1] On January 31, 2004, while working at the non-covered location, claimant developed pain in his low back while putting up metal racks. Tr. at 24. Claimant informed his supervisor of his pain on the same day but did not seek medical attention. *Id*. at 25-32. Claimant continued to work at his usual job, and he testified that on February 10, 2004, while drilling holes in boxes weighing five to eight pounds and continually bending over to pick them up, he bent over at one point and felt that he could not get up. *Id*. at 25-26, 27, 40. Claimant's co-workers took him to the medical clinic in the shipyard.[2] *Id*. at 29. Subsequently, claimant consulted doctors outside of the shipyard, and an MRI study revealed a herniated lumbar disc at L5-S1 with radiculopathy. CXs 12, 13, 14. Dr. Skidmore, claimant's treating physician, has not released him to return to work, and claimant has not worked since February 25, 2004. Tr. at 32.

In his Decision and Order, the administrative law judge found that claimant established his *prima facie* case and consequently was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). The administrative law judge then found that employer rebutted the Section 20(a) presumption. Upon weighing the evidence based on the record as a whole, the administrative law judge determined that claimant's back pain on February 10, 2004 was the result of the natural progression of his January 31, 2004, injury, and was thus not causally related to his covered employment with employer. Accordingly, the administrative law judge denied the ongoing temporary total disability benefits sought by claimant.

On appeal, claimant challenges the administrative law judge's findings with respect to the issue of causation. Employer responds, urging that the administrative law judge's decision be affirmed. Claimant has filed a reply brief.

In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's condition to his employment, claimant must establish his *prima facie* case by showing that he sustained a harm and that working conditions existed or an accident occurred which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.,* 20 BRBS 90 (1987). An employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the

[1] This work was performed at Copeland Industrial Park, which is in a different location than employer's shipyard. The parties stipulated that the work performed by claimant at Copeland does not fall within the jurisdiction of the Act. *See* Tr. at 6; Decision and Order at 2.

[2] The shipyard clinic notes of February 10, 2004, confirm the onset of claimant's symptoms: "bending over to pick up boxes spasm 2 wks ago putting up racks hurt back; felt pain in back which gradually↓ [diminished]." CX 5 at 2.

entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *see also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Thus, claimant's injury need only be due in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.,* 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor, OWCP,* 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied,* 507 U.S. 909 (1993).

Consistent with the "aggravation rule," once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his covered employment. *See, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). In a case such as this one where claimant asserts that the last work accident aggravated a prior condition, it is incumbent upon employer to introduce evidence that the work accident did not aggravate or accelerate claimant's prior back condition in order to rebut the Section 20(a) presumption. *Hensley v. Washington Metropolitan Area Transit Authority,* 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). If the presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge invoked the Section 20(a) presumption linking claimant's back problems to his covered employment with employer on the basis that claimant's February 10, 2004, back spasms and subsequent back pain constituted a harm, and that claimant's employment duties on February 10, 2004, could have caused his present medical condition. *See, e.g., Phillips v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 94 (1988). This finding is not appealed and is therefore affirmed. Claimant contends on appeal that the administrative law judge erred in finding that employer established rebuttal of the presumption. Specifically, claimant contends that the only evidence upon which the administrative law judge relied in finding the presumption rebutted are accounts of the onset of a disabling back condition on January 31, 2004. Claimant asserts that the administrative law judge provided no explanation of how such evidence rebutted the presumption that claimant's back condition was aggravated or exacerbated by claimant's work-related employment activities on February 10, 2004.

We agree with claimant that the administrative law judge's finding of Section

20(a) rebuttal in this case is flawed. In concluding that claimant's back condition is not related to his covered employment with employer, the administrative law judge summarily stated that the presumption was rebutted after discussing three pieces of non-medical evidence, specifically, the accident questionnaire completed by claimant on February 26, 2004, the deposition testimony of Richard Jay, claimant's supervisor, and claimant's claim for compensation form. Decision and Order at 6-7. In order to establish rebuttal, however, employer must produce evidence that claimant's back condition was not related to his February 10, 2004, work activities which preceded his visit to employer's shipyard clinic. In this regard, the aggravation rule applies not only where a prior injury or condition itself is worsened but also where the subsequent injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.* 18 BRBS 212, 214 (1986); *see also Gooden v. Director, OWCP,* 135 F.3d at 1066, 32 BRBS at 59(CRT) (5th Cir. 1998); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g* 11 BRBS 556 (1979). Moreover, the severity of a claimant's injury is not determinative of whether an aggravation occurred since even a minor incident can aggravate a pre-existing condition and impair a claimant's ability to work. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

The three pieces of evidence discussed by the administrative law judge in finding rebuttal contain no statements sufficient to meet these legal standards. Claimant's February 26, 2004, accident questionnaire states, in pertinent part, that claimant on January 31, 2004, experienced back pain while working for employer, but that claimant continued working since he felt that he did not need medical assistance. Thereafter, claimant experienced back spasms on February 10, 2004, for which he sought immediate medical treatment at employer's shipyard clinic. *See* EX 2-1; Tr. at 25-32; Decision and Order at 6. This statement shows that claimant had a prior back incident, but it does not indicate that the subsequent February event did not aggravate it. The questionnaire is supported by the statement of Mr. Jay, who deposed that claimant declined medical treatment on January 31, 2004, and that claimant continued working for employer until February 10, 2004, on which date he sought medical assistance. *See* Jay depo. at 3-9. Lastly, claimant's LS-203 Claim for Compensation states, without setting forth specific dates, that claimant initially experienced back discomfort while working in non-covered employment, that this condition subsequently persisted and that claimant's back then gave out while he was bending over to pick up a box. *See* EX 3-2. As these documents do not state that claimant's present back condition was not caused or aggravated by his February 10, 2004, work activities, they are insufficient as a matter of law to support a finding that the Section 20(a) presumption was rebutted. In light of the aggravation rule, mere proof of a prior injury cannot establish the absence of a causal relationship. *See, e.g., Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). We must therefore vacate the administrative law judge's finding of rebuttal.

The record contains three medical reports which the administrative law judge did

not discuss in considering employer's burden of production under Section 20(a). Specifically, Drs. Skidmore, Allen and Reid each examined claimant subsequent to claimant's visit to employer's shipyard clinic on February 10, 2004. As the administrative law judge did not consider this evidence in determining whether employer produced substantial evidence that claimant's condition was caused or aggravated by his employment activities with employer on February 10, 2004,[3] we remand the case for him to consider this issue based on the relevant evidence of record and the proper application of the law.

[3] The administrative law judge did discuss the medical evidence in considering whether claimant met his burden of proof after Section 20(a) was rebutted. As rebuttal must be reconsidered, and at this stage employer bears the burden of production, the administrative law judge must reconsider this evidence and determine whether it is sufficient to meet employer's burden to produce substantial evidence that claimant's back condition was not aggravated by the incident on February 10, 2004. In addition, the administrative law judge discounted claimant's testimony that his back pain decreased between the January and February events. However, whether claimant's pain decreased is not dispositive of the aggravation issue since the aggravation of symptoms is compensable.

Accordingly, the Decision and Order of the administrative law judge 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

BETTY JEAN HALL
Administrative Appeals Judge