BRB No. 10-0150

BART PARENT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DYNAMIC INDUSTRIES, INCORPORATED	)	DATE ISSUED: 09/24/2010
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2008-LHC-00376) 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 alleged that he sustained an injury on August 10, 2006, while working as a scaffolding superintendent on an offshore oil platform. Specifically, claimant averred that his injury occurred when he was assisting a co-worker who was installing scaffolding under a deck. Claimant testified that he suddenly felt an intense, burning pain in the left side of his neck. Claimant reported the injury to employer and asked to return home early for medical treatment.[1] Upon returning home, claimant sought treatment from a chiropractor, Dr. Miller, from whom claimant previously had received periodic adjustments to his neck and back. On September 19, 2006, claimant underwent MRIs of his cervical spine and left shoulder, based on Dr. Miller's referral, which reflected objective findings for claimant's ongoing complaints of left shoulder and neck pain. EX 5 at 8-11. Subsequently, claimant treated with Dr. Sinclair for his left shoulder and Dr. Logan for his cervical problems. Dr. Sinclair diagnosed claimant with degenerative arthritis of the cervical spine and rotator cuff tendonitis. Dr. Logan diagnosed cervical degenerative disc pain. Thereafter, claimant filed a claim for benefits, which employer controverted. Claimant has not been employed in any capacity since the work incident.

In his decision, the administrative law judge found that claimant submitted sufficient evidence to establish that he suffered a harm and that working conditions existed which could have caused the harm. Therefore, the administrative law judge invoked the Section 20(a) presumption of causation, 33 U.S.C. §920(a). The administrative law judge found that employer, arguably, established rebuttal of the Section 20(a) presumption. On weighing the evidence as a whole, the administrative law judge found that claimant carried his burden to establish that his neck and shoulder conditions were aggravated by the work-related incident on August 10, 2006. Because there was no evidence that claimant had reached maximum medical improvement, the administrative law judge found that his condition remains temporary. Based on the opinions of Drs. Sinclair and Logan, the administrative law judge found that claimant established his inability to return to his usual employment as a scaffolding supervisor. Moreover, as employer did not present any evidence of suitable alternate employment, the administrative law judge found that claimant is totally disabled. Accordingly, the administrative law judge awarded claimant continuing temporary total disability benefits beginning August 11, 2006, as well as reasonable and necessary medical expenses resulting from the work injury. 33 U.S.C. §§907, 908(b).

On appeal, employer contends that the administrative law judge erred in finding that an accident occurred at work that could have caused claimant's disabling condition. Employer contends that claimant's condition is solely due to his pre-existing degenerative conditions. Claimant has not responded to this appeal.

[1] Claimant's report of injury, dated August 11, 2006, states he suffered a recurring pinched nerve in his neck and left shoulder. EX 2.

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 at work or working conditions existed which could have caused the harm or aggravated a pre-existing condition. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Once claimant has established his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his injuries are causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injuries were neither caused nor aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Pursuant to the "aggravation rule," employer is liable for the totality of claimant's disability where a work injury aggravates a pre-existing condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

Claimant has medically documented physical ailments. Specifically, based on MRI results and physical examinations, claimant was diagnosed with degenerative disc disease of the cervical spine and left shoulder rotator cuff tendonitis. EX 5. Therefore, the administrative law judge properly found that something has gone wrong with the human frame. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998), *citing Southern Stevedores Co. v. Henderson*, 175 F.2d 863, 866 (5th Cir. 1949); Decision and Order at 10. The administrative law judge's finding that claimant established the "harm" element of his *prima facie* case is supported by substantial evidence and is affirmed. *See, e.g., Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987).

With regard to the second prong, employer contends the administrative law judge erred in finding that an incident occurred at work that could have caused or aggravated claimant's neck and shoulder conditions. Employer contends that although claimant reported his physical symptoms to employer, he also reported that "[t]his was not an accident," and he did not mention any incidents with scaffolding to his physicians. Employer also notes that claimant filed a claim for non-workers' compensation short-term disability benefits.

We reject employer's contention of error. In invoking the Section 20(a) presumption and in finding for claimant on the record as a whole, the administrative law judge rationally credited claimant's testimony that his job required him to lift posts of varying weights and that the posts on the day in question weighed 28 to 30 pounds. Tr. at 29. The administrative law judge addressed employer's contention regarding claimant's statement that no accident had occurred. Decision and Order at 11. However, he relied on claimant's testimony that he made this statement because he did not fall or have anything dropped on him, and was not crushed. *Id.* at 21. In this regard, claimant

reported on his notice of injury form that his pain flares up "when I have a work load as large as this one." CX 2 at 3. Similarly, claimant testified that he filed for short-term disability benefits before he filed his claim under the Act because of the absence of an "accident" as claimant understood the term. Tr. at 38; EX 3. In addition, contrary to employer's contention, claimant reported to Dr. Sinclair on September 19, 2006, that the onset of his pain occurred at work on August 10, 2006, in the course of lifting, pulling, pushing, twisting and reaching. EX 4 at 13. Moreover, the administrative law judge relied on the opinions of Drs. Sinclair and Logan that claimant's degenerative conditions could have been aggravated by his lifting at work. *See* EX 7 at 24-26; EX 8 at 28-29; *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). It was within the administrative law judge's discretion to credit claimant's testimony, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and substantial evidence supports the finding that the work claimant performed on August 10, 2006, could have aggravated claimant's neck and shoulder conditions. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Therefore, the administrative law judge's finding that claimant is entitled to the benefit of the Section 20(a) presumption is affirmed. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT).

This evidence also supports the administrative law judge's finding, based on the record, as a whole, that claimant's neck and shoulder conditions were aggravated by claimant's work.[2] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In addition to claimant's testimony, the administrative law judge relied on the opinions of Dr. Sinclair and Dr. Logan that claimant's existing conditions could be aggravated by the work activities claimant described, resulting in an aggravation of symptoms. EX 8 at 26-28; EX 7 at 24-26. The record contains no evidence to the contrary. The Board is not empowered to reweigh the evidence, but must respect the rational findings and inferences

[2] The administrative law judge found that employer "arguably" rebutted the Section 20(a) presumption by virtue of claimant's statement that no accident had occurred and Dr. Sinclair's opinion that there was no "trauma" to claimant's neck and shoulder. As substantial evidence supports the administrative law judge's finding on the record as a whole that claimant's neck and shoulder conditions were aggravated by his employment, we need not address the administrative law judge's rebuttal finding. *But see Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008) (in order to rebut the Section 20(a) presumption the evidence must address aggravation).

of the administrative law judge. *See, e.g., Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As substantial evidence supports the administrative law judge's finding that claimant's neck and shoulder conditions were aggravated by the work incident of August 10, 2006, and as employer has raised no errors in the administrative law judge's consideration of the evidence, we affirm the administrative law judge's award of disability and medical benefits. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

Accordingly, the administrative law judge's 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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BETTY JEAN HALL
Administrative Appeals Judge