BRB No. 97-1746

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| REGINA DIXON PREWITT | ) | |
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| Claimant-Respondent | ) | DATE ISSUED: |
| | ) | |
| v. | ) | |
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| CONOCO, INCORPORATED | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

R. Scott Iles, Lafayette, Louisiana, for claimant.

David L. Barnett, New Orleans, Louisiana, for self-insured employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees (96-LHC-2149) of Administrative Law Judge Lee J. Romero, 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*, as extended by the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On June 19, 1994, claimant sustained injuries to her neck and left shoulder when she was hit by one end of a turnbuckle during the course of her employment as an offshore production operator for employer. Claimant has not worked since this accident. Employer

voluntarily paid temporary total disability compensation to claimant from July 13, 1994 to November 30, 1995. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found regarding causation that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), statutory presumption and that employer failed to rebut it. The administrative law judge further determined that claimant has not yet reached maximum medical improvement, that claimant is unable to perform her usual work, and that, as claimant has not been released to return to work by her treating physician, consideration of suitable alternate employment would be premature. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from June 20, 1994, and continuing. Thereafter, claimant's attorney submitted a fee petition for services performed before the Office of Administrative Law Judges, and employer filed objections to this fee request. In a Supplemental Decision and Order, the administrative law judge addressed the objections raised by employer and awarded claimant's attorney a fee.[1]

Employer now appeals, arguing that the administrative law judge erred in finding that claimant established her *prima facie* case for invocation of the Section 20(a) presumption and that employer failed to establish rebuttal of that presumption. Employer additionally challenges the administrative law judge's determination that claimant remained totally disabled due to her work-related injuries beyond September 19, 1994. Finally, employer appeals the administrative law judge's award of the attorney's fee. Claimant responds, urging affirmance of the administrative law judge's decisions.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption; specifically, employer asserts that the administrative law judge erred in finding claimant's testimony regarding the occurrence of a work-incident on June 19, 1994, to be credible. We disagree. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish her *prima facie* case by showing that she suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994); *Volpe v. Northeast Marine Terminals,* 14 BRBS 17 (1981), *rev'd on other grounds,* 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In establishing her *prima facie* case, claimant is not required to introduce affirmative medical evidence proving that the accident or working conditions in fact caused the harm; rather, claimant must show only the existence of an accident or working conditions

[1]On October 15, 1997, the administrative law judge denied claimant's motion to reconsider certain denied entries in the fee award.

which could conceivably cause the harm alleged. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, we hold that the administrative law judge properly invoked the Section 20(a) presumption, as he found that claimant suffered a harm and that an accident occurred which could have caused the harm. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In this regard, that the administrative law judge, after having rationally found the inconsistencies in claimant's testimony alleged by employer to be inconsequential, acted within his discretion in crediting claimant's account of the incident with the turnbuckle in finding that an accident in fact occurred. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 120 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342 (1988). We note, moreover, that it is not necessary that claimant identify the specific aspect of the accident which caused her neck and shoulder pain. *See generally Peterson v. Columbia Marine Lines*, 21 BRBS 294, 303 (1988). We therefore reject employer's challenge to the administrative law judge's assessment of claimant's credibility, and affirm the administrative law judge's invocation of the Section 20(a) presumption.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut that presumption with substantial evidence that claimant's condition was not caused or aggravated by her employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between claimant's injury and her employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *see also 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). In the instant case, employer contends that the administrative law judge erred in finding that it failed to submit sufficient evidence to establish rebuttal. Employer argues, in essence, that claimant did not sustain, in a work-related accident, the injuries forming the basis of her claim for compensation; in support of this argument, employer cites various discrepancies in claimant's testimony and the medical evidence of record. Employer, however, has identified no specific and comprehensive evidence ruling out a causal relationship between claimant's employment and her neck and shoulder injuries, and, thus, has failed to meet its burden of proof on rebuttal. *See, e.g., Brown*, 893 F.2d at 294, 23 BRBS at 22 (CRT).[2] We therefore affirm the administrative law judge's finding that

[2]Employer's contention that the injuries forming the basis of the claim for compensation are inconsistent with claimant's account of her work injury does not satisfy employer's burden of proof on rebuttal. Moreover, contrary to employer's assertion, claimant's claim for compensation was not limited to the specific diagnoses of nerve root damage in the left side of her neck and trapezius muscle

employer failed to submit evidence sufficient to rebut the presumed causal link between claimant's neck and shoulder conditions and her June 1994 work accident.

Employer next assigns error to the administrative law judge's finding that claimant remained totally disabled due to her work-related injuries beyond September 19, 1994, arguing that any disability experienced by claimant after that date was due to medical conditions that were not caused by the June 1994 work incident. Specifically, employer contends that Dr. Fresh's opinion that claimant's neck injury had fully resolved by September 19, 1994 and that her bilateral tendinitis was a new and different condition establishes that claimant had no work-related disability after September 19, 1994. Employer argues, alternatively, that even if claimant's tendinitis is considered to be work-related, Dr. Fritchie's testimony establishes that this condition resolved by January 12, 1995 at the latest.

It is well-established that, in adjudicating a claim, an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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). In the instant case, the administrative law judge accorded greater weight to the opinion of claimant's treating orthopedist, Dr. Fritchie, than to the opinion of Dr. Fresh on the basis of Dr. Fritchie's treatment of claimant beginning on September 19, 1994, and continuing for over two and one-half years.

Although Dr. Fritchie released claimant from treatment to return on an as-needed basis following his January 12, 1995 exam, which was negative for neck and shoulder problems, claimant returned to that physician with neck and shoulder complaints on June 22, 1995, and received subsequent treatment for those complaints. Dr. Fritchie testified that, although claimant's bilateral tendinitis resolved, he continued to treat claimant's neck condition. Dr.

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strain but, rather, encompassed the range of neck and shoulder complaints for which claimant was treated following the June 1994 work accident. *See generally Meehan Seaway Service Co. v. Director, OWCP,* 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104, 107 (1989).

Fritchie attributed claimant's continuing symptoms to her work accident. *See* EX 22 at 19-21, 38-39, 44-45. In addressing this issue, the administrative law judge specifically credited Dr. Fritchie's testimony that he needed additional diagnostic testing to assess claimant's neck condition and that he currently had claimant on an off-work status. *See* Decision and Order at 28-29; EX 22 at 41-42. It was within the administrative law judge's discretionary authority to credit Dr. Fritchie's opinion over the opinion of Dr. Fresh, in light of his continuing treatment of claimant after claimant was last seen by Dr. Fresh. *See Calbeck*, 306 F.2d at 693; *Todd Shipyards Corp.*, 300 F.2d at 741. As Dr. Fritchie's opinion constitutes substantial evidence that claimant was disabled due to her work accident subsequent to September 19, 1994, we reject employer's contention that any work-related disability ended as of September 19, 1994.

Lastly, we address employer's appeal of the attorney's fee awarded by the administrative law judge to claimant's counsel. Claimant requested a fee of $15,037.50, representing 91.75 hours of services performed by her lead counsel at a rate of $150 per hour, 15 hours of services performed by her associate counsel at a rate of $100 per hour, and costs of $339.55. In a Supplemental Decision and Order, the administrative law judge addressed the specific objections raised by employer, disallowed all time requested for associate counsel, approved the $150 hourly rate for lead counsel, reduced the number of hours sought by lead counsel to 83.5 hours, disallowed $71.92 of the costs sought, and thereafter awarded claimant's counsel a fee of $12,792.63. Employer's argument that counsel's fee application in its entirety was impermissibly based on a method of billing in minimum increments of one-quarter hour is rejected, as the administrative law judge considered this objection, and his award generally conforms to the criteria set forth in the decisions of the United States Courts of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished). We agree, however, with employer's specific contention that the administrative law judge did not reduce the fee in conformity with *Fairley* and *Biggs* with respect to two entries for the review of one-page documents. Thus, consistent with the criteria set forth in *Fairley* and *Biggs*, we reduce the entries dated March 18, 1997, and March 21, 1997, from one-quarter hour to one-eighth hour.[3]

[3]In her response brief, claimant requests that she be awarded an attorney's fee for services rendered before the Board. Claimant may file a fee petition for services rendered in the successful defense of this appeal within 60 days of

issuance of this decision, consistent with the requirements set forth at 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. The administrative law judge's Supplemental Decision and Order is modified to reflect employer's liability to counsel for a fee of $12,717.63, representing 83 hours of services rendered at a rate of $150 per hour, and $267.63 in costs.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge