BRB No. 92-2417

FRANK COLONNA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York for claimant.

Cornelius V. Gallagher (Linden & Gallagher), New York, New York, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (91-LHC-2918) of Administrative Law Judge Ralph A. Romano 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 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).

Claimant began working for employer in 1966 as a hi-lo driver unloading lumber from ships. Claimant also worked for employer as a crane operator loading and unloading cargo until his

retirement in 1987. Claimant incurred injuries to his back at work in 1961, 1966, and 1972. Claimant also testified that he sustained a back injury in 1983 while climbing a crane ladder. In 1990, Dr. Post diagnosed claimant as having a herniated disc with root irritation, caused in part by his work activities. Claimant filed a claim for compensation under the Act on March 4, 1991, asserting that his back condition constitutes an occupational disease.

In his Decision and Order, the administrative law judge found that the distinction between "traumatic injury" and "occupational disease" is unnecessary in this case, as the central issue is the causal relationship of claimant's back condition to his employment. Decision and Order at 3. The administrative law judge stated, however, that if he were to decide this issue, he would find that claimant incurred a continuous exposure, gradual injury, which is an "occupational disease." *Id.* at 7. The administrative law judge found the evidence sufficient to invoke the presumption of causation contained in Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer failed to produce sufficient evidence to rebut the presumption. The administrative law judge further concluded that the evidence of record supports a finding that claimant stopped working in April 1987 due to his back pain and is entitled to an award of permanent total disability benefits. The administrative law judge granted employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in characterizing the issue before him as one of causation rather than as whether claimant suffers from an occupational disease. Employer contends that claimant does not have an occupational disease as defined by the United States Court of Appeals for the Second Circuit in *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989), *aff'g* 22 BRBS 170 (1989), and that benefits, therefore, must be denied. Employer alternatively maintains that the administrative law judge erred in finding claimant stopped working due to his back pain and in finding that he is entitled to permanent total disability benefits. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer, relying on *Gencarelle*, 892 F.2d 173, 23 BRBS 13 (CRT), first argues that the administrative law judge erred in shifting the focus to causation and in failing to analyze the claim as one for occupational disease as presented by the parties. Employer's contention is without merit. Applying the reasoning of the Board's and Second Circuit's decisions in *Gencarelle*,[1] the Board has held that the aggravation by working conditions of a claimant's lumbar stenosis is not an occupational disease. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); *see also Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). We agree, however, with the administrative law judge that the

[1]In *Gencarelle*, 22 BRBS at 173, the Board restated the characteristics of an occupational disease as formulated by Professor Larson: 1) an inherent hazard of continued exposure to conditions of a particular employment; and 2) gradual rather than sudden onset. 1B A. Larson, *Workmen's Compensation Law* §41.31. The Second Circuit, in *Gencarelle*, 892 F.2d at 177-178, 23 BRBS at 18-19 (CRT), essentially broke the first element into two sub-elements -- "hazardous conditions" that are "peculiar to" one's employment as opposed to other employment generally.

issue of whether claimant's condition is termed an occupational disease or a traumatic injury is irrelevant in this case. The distinction can be crucial in determining whether a claim is timely filed inasmuch as the statute of limitations is two years in a occupational disease case, but only one year in a traumatic injury case.[2] *See Gencarelle*, 22 BRBS at 173. In this case, however, although employer raised the statute of limitations defense at the hearing, this defense was not raised in employer's closing brief before the administrative law judge, the administrative law judge did not address the issue, and employer did not raise the issue on appeal.

The Section 20(a) presumption aids a claimant in proving that his injury arises out of and in the course of his employment. The presumption applies to the issue of whether an injury was causally related to employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). In order to avail himself of the Section 20(a) presumption claimant must show that he sustained an injury, *i.e.*, physical harm, and that an accident took place or working conditions existed that could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of a harm within the meaning of the Act. *See Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In the instant case, claimant suffered harm, a back injury, which could have been caused by his work as a hi-lo driver and crane operator.[3]

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the potential causal connection between the injury and employment. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 199). Where, as here, claimant's claim is for a gradual work-related injury, employer must establish that claimant's condition was not caused, aggravated or contributed to by his employment. *Gencarelle*, 22 BRBS at 175; *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). In the instant case, the administrative law judge found that employer failed to produce substantial evidence to rebut the presumption that claimant's back condition is work-related. Dr. Lerman examined claimant in 1992, and claimant related an incident at work in 1983 in which he hurt his back while climbing a crane ladder. Dr.

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[2]In either case, however, the statute of limitations does not begin to run until the claimant is aware of the full nature and extent of the harm sustained as a result of the work-related injury. *See, e.g., Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); 33 U.S.C. §§912, 913; 20 C.F.R. §§702.212, 702.222. In this case, the administrative law judge found that claimant was not aware that his back condition resulted from his work activities until he saw Dr. Post in July 1990, and claimant filed his claim on March 4, 1991, within one year of his "awareness."

[3]Claimant testified that as a hi-lo driver he had to drive over stacks of lumber which caused the machine to bounce. Claimant also experienced vibrations as a crane operator and had to climb ladders at odd angles to reach the operating car. Tr. at 25-28, 34-36, 38-41.

Lerman noted that a CT scan report indicated a herniated disc. He stated that claimant's employment as a hi-lo driver and crane operator was not a causative agent in the development of his disc disease, but he found that claimant has a permanent disability due to previous back, leg and arm injuries, genetic conditions, and the aging process. The administrative law judge found that inasmuch as claimant's claim is for a gradual injury and Dr. Lerman attributed claimant's disability in part to prior injuries, his opinion is insufficient to rebut the Section 20(a) presumption that claimant's condition is work-related. We affirm this finding, as Dr. Lerman's opinion in insufficient to rule out that claimant's employment contributed to his disability. *See Caudill*, 25 BRBS at 96.

We also reject employer's contention that the administrative law judge erred in finding that claimant stopped working due to his back pain, and in awarding claimant permanent total disability benefits. The administrative law judge credited claimant's testimony that he stopped working in April of 1987 because of his back pain and resultant inability to continue working, and not for the purpose of availing himself of an attractive retirement package.[4] Moreover, the administrative law judge credited Dr. Post's opinion that claimant's work activities were a contributory cause of his disc herniation, which forced him to retire. Cl. Ex. 1. Consequently, the administrative law judge awarded claimant permanent total disability benefits.

We affirm the award of permanent total disability benefits, as the administrative law judge rationally determined that claimant's back condition forced him to retire. *See generally MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986). In evaluating the evidence, the fact-finder is entitled to weigh the evidence and to draw his own inferences from it. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge's credibility determinations are rational and within his authority as factfinder, and the credited opinion and testimony constitute substantial evidence to support his findings, the award of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[4]Employer states that claimant testified he retired when he was offered attractive retirement benefits, and that claimant's Social Security records or the New York Shipping Association Pension Fund records fail to indicate claimant's retirement was due to his medically disabling condition. *See* Tr. at 81-83. Claimant, however, testified that he retired due to pain, and then he accepted the benefits. *Id.* The administrative law judge stated that claimant lost income when he retired, and that he would not have voluntarily done so given his desire to fund his children's educations.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge