U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0452

ROBERT MONDELLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GCT NEW YORK LP	)	
	)	DATE ISSUED: 02/09/2024
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of Decision and Order – Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

John P. James (Friedman, James & Buchsbaum LLP), New York, New York, for Claimant.

Christopher J. Field (Field & Kawczynski, LLC), Jamesburg, New Jersey, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order – Awarding Benefits (2020-LHC-00062) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).[1] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his neck and back on April 11, 2019, in the course of his employment as a lasher for Employer, when the railing on a gangway he was walking down gave way, causing him to fall.[2] Hearing Transcript (HT) at 20, 27-29. Employer began paying Claimant temporary total disability (TTD) compensation on April 12, 2019, but terminated compensation and medical benefits on July 4, 2019, upon learning Claimant was working at least 30 hours per week at a car wash business he started with his cousin in May 2019. HT at 6, 37; Employer's Exhibits (EXs) 3-4.

The ALJ conducted a formal hearing on November 12, 2020. HT at 1. Although the parties stipulated to the compensability of Claimant's April 11, 2019 workplace injury,[3] Employer disputed its continued liability, arguing Claimant's post-injury work at a car wash sufficiently aggravated his underlying condition so it constituted an intervening

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because Claimant's injury occurred in Staten Island, New York. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Prior to the subject accident, Claimant was under active chiropractic treatment with Dr. Gary Yen for neck and back pain. Hearing Transcript (HT) at 30. He did not relate this neck and back pain to any specific incident, but to general "wear and tear" as a result of his employment. *Id*. He reported it in December 2018 and filed a claim for compensation, which was denied. *Id*. at 30-32, 98; Employer's Exhibit (EX) 16 at 32. Nevertheless, Dr. Yen took Claimant off work for a short period in December 2018 through January 2019, but by April 11, 2019, he had been released and was working full duty. HT at 30-32; EX 16 at 35-36. He continued to treat with Dr. Yen after his April 2019 injury. HT at 33-34, 98-99; Claimant's Exhibit (CX) A.

[3] The parties also stipulated to timeliness, average weekly wage, Claimant's inability to return to his usual employment, and Claimant's engagement in alternate employment beginning on or around May 25, 2019. HT at 6-7.

injury and severed any causal link to his work-related injury.[4] HT at 6-7. The ALJ issued a Decision and Order – Awarding Benefits (D&O) on July 13, 2022. She found Claimant invoked the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), which Employer successfully rebutted. D&O at 38-40. However, weighing the evidence as a whole, the ALJ found Claimant's post-injury non-covered employment was insufficient to sever the causal link between his workplace injury and his worsened condition, and therefore found the entirety of Claimant's condition compensable. *Id*. at 40-42.[5]

Employer appeals the ALJ's decision on several grounds. Claimant responds, urging affirmance.

Employer first argues the ALJ erred by applying the wrong legal standard in weighing the causation evidence, particularly with respect to whether Claimant's post-injury non-covered employment constituted an intervening cause of his worsened condition. Employer's Petition for Review (Emp. PR) at 11-12. Once the Section 20(a) presumption, 33 U.S.C. §920(a), relating a claimant's harm to his employment accident has been invoked and rebutted, as here, the presumption drops from the case and the causation issue must be decided on the record as a whole, with the claimant bearing the burden of establishing, by a preponderance of the evidence, a causal relationship between

[4] Claimant and his cousin, Vito Laudadio, opened a hand car wash called The Shine Box in the last week of May 2019. EX 16 at 43-44. When Claimant was deposed on March 3, 2020, The Shine Box was still open but had not generated any profit. *Id*. at 43-45. From its opening to around September 2019, Claimant testified he was at the car wash as much as he could be, an estimated 30 hours per week, spread out from Monday to Sunday. *Id*. at 48. Beginning in September 2019, Claimant testified the time he spent at The Shine Box had decreased considerably, to about 10 to 15 hours per week, due in part to his physical condition. *Id*. at 49.

[5] The ALJ proceeded to find Claimant's injuries had not reached maximum medical improvement (MMI), Claimant established a prima facie case of total disability, and Employer successfully rebutted the presumption with a showing of suitable alternate employment earning wages of $15 per hour. D&O at 43, 45-48. Thus, she awarded Claimant temporary partial disability (TPD) benefits from July 5, 2019, through September 21, 2020, the date his treating physician took him off work, and temporary total disability (TTD) benefits from September 22, 2020, through the present and continuing. *Id*. at 52. She also found Employer liable for all reasonable and necessary medical benefits related to his workplace injury, including the recommended spinal surgery. *Id*. at 49-52.

the work accident and his injury. *Rainey v. Director, OWCP*, 517 F.3d 632, 634 (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2d Cir. 2001); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280-281 (1994). If a claimant with a work-related injury sustains a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. 33 U.S.C. §902(2); *see Colburn v. General Dynamics Corp*., 21 BRBS 219, 222 (1988); *Bailey v. Bethlehem Steel Corp*., 20 BRBS 14, 16 (1987), *aff'd mem*., 901 F.2d 1112 (5th Cir. 1990). Where the subsequent disability is not the natural or unavoidable result of the work injury, but is the result of an intervening cause, the employer is relieved of liability for the disability attributable to the intervening cause. *Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454, 456 (9th Cir. 1954); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 164 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Marsala v. Triple A South*, 14 BRBS 39, 42 (1981); *see also Plappert v. Marine Corps Exch.*, 31 BRBS 109, 110 (1997), *aff'g on recon en banc* 31 BRBS 13 (1997). The employer remains liable for any disability due to the covered work injury and is absolved of all liability for further benefits only if the subsequent injury is the sole cause of the claimant's resulting disability. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31, 33 (2010). It is the employer's burden to establish what portion of the disability is due to the intervening cause; otherwise, the employer remains liable for the entire disability. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13, 15-16, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

Employer contends the ALJ failed to properly weigh whether Claimant's uncontested worsened condition was due to an intervening cause or a natural progression of his original workplace injury; instead, it asserts she improperly looked for evidence of a new injury or second accident as proof of an intervening cause, thereby improperly increasing Employer's burden of proof. Emp. PR at 11-13. We disagree. Employer argued Claimant's post-injury work constituted the sole intervening cause of his disability, a considerable burden the ALJ properly acknowledged and applied to the evidence. D&O at 39-42. Contrary to Employer's assertion, the ALJ did not improperly look for a specific event as proof of an intervening cause but, rather, acknowledged Employer's argument that "the worsening of Claimant's condition, which occurred in November and December 2019, was due to an intervening event – Claimant's work at the car wash – rather than the April 11, 2019 workplace accident." D&O at 38. She even found Employer presented sufficient evidence in support of this argument, in the form of Dr. Seth Scholl's medical reports and deposition testimony, to rebut the Section 20(a) presumption of compensability.[6] *Id*. at 38-

[6] "Employer has produced evidence sufficient to rebut the Section 20(a) presumption. Specifically, Dr. Scholl reviewed the surveillance footage and reports that

40. However, on weighing the evidence, the ALJ rationally and reasonably found Employer did not carry its burden of showing Claimant's repetitive car wash work was the cause of his worsened condition. *Id.* at 40-42. As Employer must show either the intervening incident was the cause, in whole or in part, of Claimant's ultimate disability, and the ALJ held Employer to this standard, we reject Employer's assertion that its burden was improperly high.[7] *Macklin*, 46 BRBS at 33; *Plappert*, 31 BRBS at 15-16.

Employer next argues the ALJ erred in weighing the evidence by ignoring evidence supporting a connection between Claimant's work at the car wash and the worsening of his condition in November and/or December 2019. Emp. PR at 14-20. Specifically, Employer asserts the ALJ ignored Claimant's testimony as to the worsening of his condition in November 2019, Mr. Laudadio's contradictory testimony as to the number of hours Claimant worked at the car wash,[8] and other evidence supporting a "reasonable inference" that Claimant's work at the car wash increased immediately preceding the worsening of his condition in November and/or December 2019.[9] Emp. PR at 14-19. Employer

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[the investigator] created and opined that Claimant's actions at the car wash caused the worsening symptoms. *See* EX 19 at 53-55 (Dr. Scholl concluding that the significant worsening of symptoms and entrapment syndromes Claimant presented with at the March 2020 examination were due to the 'repetitive action that was performed over this time at the car wash.')." D&O at 40.

[7] Employer presented no evidence that Claimant's back and neck conditions were partially affected by any intervening cause.

[8] Mr. Laudadio testified he only visited The Shine Box car wash once or twice per week, usually on the weekends, EX 18 at 9 (transcript p. 27), and that during the majority of 2019 through April 2020 he was working full time as the manager of an auto body shop in Queens, *id.* at 6 (transcript pp. 14-15). According to Employer, this contradicted Claimant's testimony that Mr. Laudadio was, like him, present at The Shine Box approximately 30 hours per week from May to September 2019, EX 16 at 48-49, thus undermining Claimant's credibility regarding the amount of time he spent at the car wash and making it more likely Claimant was present at The Shine Box more than 30 hours per week, "increasing the likelihood of the worsening [of his condition] being related to that work." Emp. PR at 15.

[9] Employer argues records showing The Shine Box's increased revenue in November 2019 (Joint Exhibit (JX) 1), Claimant's testimony that he laid off staff around the same time (JX 2 at 9 (transcript pp. 34-35)), and Mr. Laudadio's absence from the

maintains the ALJ ignored this evidence to reach her conclusion, when she should have acknowledged this evidence supports Employer's argument. *Id*. at 20.

However, the ALJ addressed each piece of evidence Employer maintains was ignored and acted within her authority and discretion in weighing, crediting, and drawing her own inferences from that evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693, 695 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1325 (D.R.I. 1969). Specifically, she found Claimant's condition worsened in November and/or December 2019. D&O at 35; *see* HT at 55-56, 89-90; EX 16 at 50. She acknowledged Mr. Laudadio's statement that he only visited The Shine Box about once per week (D&O at 27) but found his overall testimony "generally without substance," as he "presented as too detached from the situation to warrant credibility." D&O at 38 n.25.

The ALJ also addressed Employer's argument regarding an alleged relationship between the "uptick" in The Shine Box's gross revenues in November 2019 and the worsening of Claimant's condition. D&O at 41. She found "an increase in gross receipts does not necessarily demonstrate a resultant increase in labor requirements," and the record lacked any evidence to support Employer's "assumption that Claimant worked at the car wash in November 2019 to facilitate its high revenue that month." D&O at 41. Rather, the ALJ found Claimant "credibly testified" his presence at The Shine Box decreased at that time. D&O at 41; *see* JX 2 at 9 (transcript pp. 35-36). Further, she found the "scant evidence of record concerning the car wash's business expenses" was insufficient to "extrapolate anything of substance" regarding Claimant's alleged increased work responsibilities or activity.[10] D&O at 41. The ALJ is accorded broad discretion in making

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business combine to create a "reasonable inference" that Claimant increased his work activities at the car wash about the same time his condition worsened. Emp. PR at 18-19.

[10] Employer also argues the ALJ engaged in prejudicial fact-finding by refusing to recognize the lack of evidence of The Shine Box's business records was the direct result of Claimant's refusal to cooperate with discovery. Emp. PR at 16-18. However, the only alleged prejudice Employer identifies as a result of this withholding was its ability to "reach informed conclusions about payments, payroll, and money taken by Claimant as his 'pay,'" thereby affecting the calculation of his post-injury wage-earning capacity. *Id*. at 18; *see also* Employer's Post-Hearing Brief at 17-18. As the ALJ correctly noted, income from a business an employee owns should not be used to reduce disability compensation. D&O at 48 n.39 (citing *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405-406 (1989)). Therefore, the lack of business records, despite being tied to Claimant's alleged lack of

credibility determinations. *Sealand Terminals v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993); *Volpe v. Northeast Marine Terminals,* 671 F.2d 697, 701 (2d Cir. 1982). Questions of witness credibility are for the ALJ as the trier-of-fact, and the Board must respect her evaluation of all testimony. *Calbeck,* 306 F.2d at 695; *Hughes,* 289 F.2d at 405. The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop,* 580 F.2d 1331, 1335 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see generally Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 130 (5th Cir. 2016) (Board may not second-guess an ALJ's factual findings or disregard them merely because other inferences could have been drawn from the evidence). Moreover, in reviewing the ALJ's findings of fact, the Board may not reweigh the evidence, but may only inquire into the existence of substantial evidence to support the findings. *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 925-927 (5th Cir. 2020). Here, the ALJ permissibly weighed the evidence Employer submitted as proof of an intervening cause and found it lacking, based primarily on her credibility determinations. As these credibility determinations are neither "inherently incredible [n]or patently unreasonable," *Cordero*, 580 F.2d at 1335, and as her findings are supported by substantial evidence, we affirm them. *Carswell v. E. Pihl & Sons*, 999 F.3d 18, 27-28 (1st Cir. 2021), *cert. denied,* 142 S.Ct. 1110 (2022).

Finally, Employer argues the ALJ erred in crediting the causation opinion of Claimant's treating spinal surgeon, Dr. Michael Gerling,[11] over Employer's expert physical medicine and rehabilitation doctor, Dr. Seth Scholl.[12] Emp. PR at 21-23. Employer

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cooperation with discovery, is irrelevant to the determination of his post-injury wage-earning capacity and the extent of his disability.

[11] Dr. Gerling first examined Claimant on August 20, 2019, and recommended spinal surgery, which he related to his workplace accident. CX B at 71-77. Dr. Gerling examined Claimant again on November 7, 2019, and December 17, 2019; at both examinations, he noted Claimant's condition was significantly worsening, repeated his surgical recommendation, and continued to relate the need for surgery to Claimant's workplace accident. *Id*. at 77, 82-83, 86, 90. In September 2020, Dr. Gerling reviewed the surveillance videos obtained of Claimant, but it did not alter his causation opinion. *Id*. at 108; CX L at 37, 39.

[12] Dr. Scholl first examined Claimant on October 14, 2019, after reviewing his medical records and the surveillance videos. EX 7; EX 19 at 4 (transcript p. 14). He opined Claimant's cervical and lumbar conditions both pre-existed Claimant's April 11, 2019 workplace accident, which had no effect on those conditions. EX 7 at 4-5. Based upon the "severe discrepancy" between Claimant's subjective reporting to Dr. Yen and the activity

maintains the ALJ's reliance on Dr. Gerling's causation opinion ignored Claimant's interim work at the car wash and was contradicted by Dr. Gerling's subsequent testimony that the same work could have caused injury or acceleration of Claimant's underlying injury. *Id*. at 21. Further, Employer argues Dr. Gerling's opinion improperly relied upon the absence of a second accident in the surveillance videos he reviewed,[13] and that Dr. Gerling failed to provide any opinion as to whether Claimant's worsening could have been due to a natural progression of his work injuries. *Id*. at 21-22. Conversely, Employer maintains Dr. Scholl expressly addressed the natural progression question and provided an uncontradicted opinion as to the emergence of two new diagnoses between October 2019 and March 2020, which the ALJ failed to address. *Id*. at 22-23. Finally, Employer argues the ALJ improperly discredited Dr. Scholl for referencing his "personal experience" as a basis for his opinion as to the weight of items Claimant was seen carrying on surveillance,

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he was observed performing on surveillance, Dr. Scholl opined Claimant could work full duty without restrictions. *Id*. at 5. When Dr. Scholl next evaluated Claimant, on March 9, 2020, he acknowledged Claimant's condition had worsened but attributed no part of this worsening to his work-related accident; rather, he opined the entirety of the worsening could be attributed to his activity at the car wash. EX 8 at 3. Upon physical examination, Dr. Scholl found evidence of carpal tunnel syndrome and ulnar entrapment; because these symptoms were not present at his previous examination, he concluded they were unrelated to Claimant's workplace accident and likely represented new injuries from "repetitive use at his car wash." *Id*. He found Claimant unable to return to work, but not as a result of his work-related injury. *Id*. at 4.

[13] Surveillance video was obtained of Claimant on May 7, May 17, May 22, May 29, June 4, June 24, June 25, October 14, and October 17, 2019. EXs 10-13. On May 22, 2019, Claimant was observed leaving Home Depot with two 2x8 pieces of lumber and two one-gallon paint cans and transferring them from a shopping cart to his vehicle. EX 10 at 14. On May 29, 2019, Claimant was observed cleaning a vehicle at his car wash, which involved holding a blower in one hand, manipulating a hose in the other, and then using a towel to wipe down the vehicle. *Id*. at 24-27. On June 4, 2019, Claimant was observed opening the front overhead bay door at The Shine Box and wiping down a vehicle. EX 11 at 6-10. On June 24, 2019, Claimant was again observed opening the overhead bay door at the car wash. EX 12 at 6. He was observed later that day carrying "large bulky" trash bags in each hand, wiping down vehicles, using a pressure washer, and carrying two 8-packs of Gatorade with one hand. *Id*. at 7-13, 16, 18-20. On June 25, 2019, Claimant was observed outside of his residence carrying two large trash bags and a red bucket. *Id*. at 22-24.

despite Dr. Gerling's similar reliance on his personal experience to formulate his medical opinion. *Id*. at 23.

We disagree. The ALJ permissibly and rationally weighed Dr. Gerling's opinion against the conflicting opinion of Employer's expert physician, Dr. Scholl, and found Dr. Scholl's opinion less convincing. *See Calbeck*, 306 F.2d at 695; *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Hughes*, 289 F.2d at 405; *Heyde*, 306 F. Supp. at 1325. She found Dr. Gerling continued to maintain Claimant required surgery as a result of his original workplace injury, even after documenting Claimant's worsening condition and work at the car wash. D&O at 40; *see* CX B at 86-87, 90-91; CX L at 54-55. Specifically, she found Dr. Gerling reviewed the surveillance videos and opined Employer "offered no evidence that Claimant was in a significant risk of injuring himself due to actions found on the surveillance video." *Id*. at 40; *see* CX B at 107-108; CX L at 40-41, 70-71. While acknowledging Dr. Scholl's identification of potential "separate and distinct" diagnoses (carpal tunnel syndrome and entrapment syndrome) at his March 2020 evaluation, the ALJ noted he did not have the benefit of reviewing all of Dr. Gerling's reports and therefore did not convincingly contradict Dr. Gerling's opinion. *Id*. at 40-41; *see* EX 19 at 14 (transcript p. 53), 16-17 (transcript pp. 64-65). The ALJ noted Dr. Scholl attributed these new diagnoses and Claimant's worsening condition to the repetitive actions he performed at the car wash, despite a lack of evidence showing Claimant repetitively performed those actions and Claimant's credible testimony as to his level of his activity at the car wash.[14] *Id*. at 41-42; EX 19 at 14 (transcript pp. 54-55). In addition, the ALJ found Dr. Scholl's reliance on his "personal experience" with respect to whether or not Claimant exceeded Dr. Gerling's 10-pound restriction undermined his credibility, as he professed a lack of knowledge as to the weight of various objects Claimant was observed carrying but then attributed Claimant's worsening condition to those same activities. *Id*. at 42; *see* EX

[14] The ALJ acknowledged Dr. Gerling did not diagnose Claimant with carpal tunnel syndrome but noted "significant stenosis" on the MRI obtained May 10, 2019, an objective finding he explained "could impinge the nerves going into the extremities." D&O at 41-42, n.28; *see* CX L at 16. As Dr. Scholl did not discuss stenosis, and as Dr. Gerling's finding predates Claimant's work at the car wash, the ALJ determined it constituted an alternate etiology for Claimant's carpal tunnel syndrome, thereby undermining Dr. Scholl's opinion that Claimant's carpal tunnel syndrome was unrelated to his April 11, 2019 workplace injury.

19 at 17 (transcript pp. 67-68), 22 (transcript pp. 86-87). As the ALJ's credibility determinations with respect to the medical experts are rational and supported by substantial evidence, we affirm her findings. *Cordero*, 580 F.2d at 1335; *see also Carswell*, 999 F.3d at 27-28; *Calbeck,* 306 F.2d at 695.

Accordingly, we affirm the ALJ's Decision and Order – Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge