U.S. Department of Labor

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

BRB No. 23-0007

MICAH RAMSEY Claimant-Petitioner v. PORTS AMERICA GULFPORT, INCORPORATED and PORTS INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 01/22/2024 DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, District Chief Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr. (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for Claimant.

Donald P. Moore (Galloway, Johnson, Tompkins, Burr & Smith), Gulfport, Mississippi, for Employer/Carrier.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order (2019-LHC-00504) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). 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 allegedly sustained physical and psychological injuries after the truck he was driving on July 30, 2018, as part of his usual work for Employer, was lifted up and then dropped down several feet by a crane.[1] He alleges the impact of that fall caused an abdominal abscess, left shoulder, left knee, neck, and back injuries,[2] as well as a number of psychological conditions, including major depressive disorder, post-traumatic stress disorder (PTSD), panic disorder, and somatic symptom disorder with predominant pain. Following the work incident, Claimant briefly returned to light-duty work on two separate occasions with Employer but has otherwise not worked since the date of the incident. HT

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because the accident occurred in Mississippi. 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, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

[2] Claimant had a prior history of back problems stemming from motor vehicle accidents in July 2003 and August 2010, as well as from several other incidents which resulted in complaints of back pain. These incidents included a November 2010 work fall in which he injured his neck and low back, and which resulted in his missing approximately one year of work. A July 5, 2018 MRI revealed disc bulges, disc protrusions, multilevel degenerative cervical disc changes, and a diagnosis of cervical disc disease. Claimant also had food-related abdominal cramping, diarrhea, and vomiting three weeks prior to his July 30, 2018 work incident.

at 202-207, 253, 268-269. Claimant filed a claim seeking temporary total disability benefits for the work injuries he purportedly sustained on July 30, 2018, which Employer controverted,[3] and the claim was transferred to the Office of Administrative Law Judges (OALJ) for a formal hearing. After a protracted discovery period,[4] the ALJ held a formal hearing on October 21 and 27, 2020.

In his decision, the ALJ stated that to invoke the Section 20(a) presumption of causation, 33 U.S.C. §920(a), Claimant must put forth sufficiently specific facts that the injuries he alleged could have been caused by the work event he described. Having weighed the relevant evidence and found Claimant and his witnesses lacked credibility, the ALJ determined Claimant failed to prove by a preponderance of the evidence his allegation that his truck dropped from a height of several feet. Instead, he found the credible evidence shows there was "more likely than not" no freefall and that the truck was set back down to the ground under control without violent impact. The ALJ therefore found Claimant did not establish the existence of an incident at work that could have caused or aggravated any of his alleged injuries and conditions.[5] Accordingly, he concluded Claimant did not invoke the Section 20(a) presumption, 20 C.F.R. §920(a), as to his abdominal, orthopedic, and/or

[3] Employer paid Claimant temporary total disability benefits from July 31 through August 5, 2018, and from August 13-19, 2018, CX 15 at 27, as well as temporary partial disability benefits from August 6-12, 2018, and from August 20, 2018, to June 5, 2019. CX 15 at 28.

[4] During discovery, Claimant requested the district director schedule an independent medical examination (IME) pursuant to Section 7(e) of the Act, 33 U.S.C. §907(e), to which Employer objected. On July 2, 2019, the claims examiner scheduled Claimant for an IME with Dr. George Murphy, which occurred on July 16, 2019, and ordered Employer to pay the corresponding $1,500 examination fee. Employer requested reconsideration of the claims examiner's decision, which the district director denied, prompting Employer's appeal of the district director's July 16, 2019 order to the Benefits Review Board. On April 8, 2020, the Board affirmed the district director's order for Employer to pay the cost of Dr. Murphy's examination, *Ramsey v. Ports America Gulfport, Inc.*, BRB No. 19-0538 (Apr. 8, 2020) (unpub.) *recon. denied* (June 26, 2020) (unpub.), and the case was remanded to the OALJ for adjudication.

[5]The ALJ found Claimant suffered from abdominal abscesses, age-appropriate spinal bulging and stenosis, and anxiety, but sustained no bodily harm to either his left knee or left shoulder or any psychological harm beyond the anxiety.

psychological injuries[6] and consequently denied Claimant's claim for benefits. The ALJ denied Claimant's motion for reconsideration on September 27, 2022.[7]

On appeal, Claimant maintains the ALJ improperly held him to a higher standard of proof than required to invoke the Section 20(a) presumption. The Director, Office of Workers' Compensation Programs (the Director), responds, similarly asserting the ALJ improperly imposed a burden of persuasion rather than production in addressing whether Claimant established his prima facie case and should have found he invoked the Section 20(a) presumption. Employer filed separate responses to Claimant's and the Director's briefs, urging affirmance of the ALJ's decision.[8] Claimant has filed a reply to Employer's brief.[9]

Claimant contends the ALJ's legal analysis in determining he did not invoke the Section 20(a) presumption is flawed. He asserts the ALJ improperly employed a burden of persuasion rather than production by requiring him to prove by a preponderance of the

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[6] The ALJ alternatively found that even if Claimant invoked the Section 20(a) presumption that his conditions are work-related, Employer rebutted the presumption in each instance, and Claimant did not demonstrate, based on the record as a whole, that his work for Employer either caused or aggravated any of those conditions.

[7] In this order, the ALJ also denied Employer's motion to strike Claimant's exhibits accompanying his motion for reconsideration as "premature" and therefore, "inappropriate." On February 13, 2023, the ALJ issued an Errata Order correcting a typographical error in referencing Claimant's exhibit numbers in his decision and order.

[8] Employer has also filed a motion to strike nine exhibits Claimant attached to his motion for reconsideration before the ALJ, as well as to an unlabeled letter from Dr. MacGregor which is attached to his Petition for Review. Claimant responds, withdrawing one of the exhibits submitted before the ALJ and otherwise urging the Board to deny Employer's motion because they were considered by the ALJ on reconsideration. In terms of the exhibits Claimant submitted before the ALJ, we agree, for as the ALJ seemingly considered them in addressing Claimant's motion for reconsideration, they are a part of the record before us. Therefore, we deny Employer's motion to strike the evidence Claimant submitted to the ALJ with his motion for reconsideration. We, however, grant Employer's motion to strike Dr. MacGregor's letter because the Board is not empowered to accept or consider new evidence. 20 C.F.R. §802.301(b); *see Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

[9] Claimant's motion for expedited review of his appeal is moot.

evidence that an accident occurred. Instead, Claimant maintains his testimony, as corroborated by his co-workers, undisputedly establishes the occurrence of a work incident which could have caused his injuries. He contends the ALJ's finding that no accident occurred because the truck was set down under control is erroneous given that five eyewitnesses saw the vehicle be picked up by the crane, heard it drop, or both, while the only witness the ALJ found credible, Employer's Marine Superintendent Ben Clark, was not even on site at the time of the incident.[10] For these reasons, Claimant avers he produced sufficient evidence to establish the working conditions element of his prima facie case under Section 20(a). Additionally, Claimant contends the ALJ erred in finding he did not establish left knee and shoulder injuries, as well as finding he suffers, psychologically, only from pre-existing anxiety. Claimant maintains his July 30, 2018 emergency room visit, as well as the reports of Drs. John Pessoney and John MacGregor, provide adequate evidence establishing the requisite harm element in terms of those injuries.

Claimant also asserts the ALJ erred in alternatively finding Employer rebutted the Section 20(a) presumption, in weighing the evidence as a whole, in making credibility assessments, and in giving greater weight to Employer's experts.[11] Employer responds, urging the Board to affirm the ALJ's decision.[12]

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[10] Claimant asserts the ALJ's inference that the eyewitnesses' testimony is biased merely because all are longshoremen is flawed. Additionally, in contrast to the ALJ's finding, he argues Mr. Clark's testimony should be discounted because it is uncorroborated, he did not witness the accident, he gave three versions of the accident, and he admitted his knowledge of the incident came from others' statements.

[11] Claimant maintains that because the ALJ found no accident occurred and found Claimant incredible, he viewed the medical evidence with a propensity to summarily disregard Claimant's doctors' opinions and afford weight to Employer's doctors. He asserts the ALJ, without adequate justification, discredited the opinions of Drs. Earl Sudderth, Murphy, and MacGregor.

[12] Employer urges the Board to affirm the ALJ's finding that Claimant failed to establish the working conditions element of his prima facie case. It maintains the record and the facts do not support Claimant's version of what happened, asserting the credible evidence supports finding the truck was never dropped but, instead, was set back down onto the ground without any significant impact. Thus, it contends the ALJ's decision to accord minimal weight to Claimant's description of the event, as well as those that his co-workers provided and to credit Mr. Clark's statements is squarely within his discretion as the factfinder and is supported by substantial evidence in the record.

The Director agrees with Claimant that the ALJ's decision cannot stand because he imposed too high a burden on Claimant at the invocation stage of the Section 20(a) presumption analysis. He asserts the ALJ's statement, that Claimant must establish the working conditions element "by a preponderance of the evidence," is invalid as it is contrary to the Board's holding in *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *appeal dismissed* (M.D. Fla. Aug. 24, 2023). Under the *Rose* standard, the Director states Claimant provided sufficient evidence to meet the burden of production required to invoke the Section 20(a) presumption. Furthermore, the Director states the Board should reject the argument that any error in the ALJ's invocation analysis is harmless because he never considered whether Claimant's evidence "could satisfy a reasonable factfinder," and his alternative findings in addressing causation on the record as a whole are inadequate and conclusory at best. In short, the Director asserts "because the ALJ's decision is so heavily infected with his credibility determinations and whether he was personally convinced by Claimant's evidence" in finding Claimant failed to establish a prima facie case, the Board must vacate the ALJ's decision and remand the case for him to apply the correct legal standard to determine whether Claimant established his prima facie case thereby entitling him to the Section 20(a) presumption that his injuries are work-related.

Invocation

The Section 20(a) presumption applies to the issue of whether an injury is causally related to employment. 33 U.S.C. §920(a); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see, e.g.*, *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981). For Section 20(a) to apply, the claimant must establish a prima facie case by showing he suffered some harm or pain, and working conditions existed or an accident occurred which could have caused the harm or pain. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 36(CRT) (5th Cir. 2016); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). Once the claimant establishes his prima facie case, the Section 20(a) presumption applies to link the harm or pain with the claimant's employment. *Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Lacy v. Four Corners Pipeline*, 17 BRBS 139 (1985); *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981); *Kelaita*, 13 BRBS at 331.

The ALJ correctly acknowledged that a claimant "need not affirmatively establish a causal connection between his work and harm" to invoke the Section 20(a) presumption, but "need only show" he sustained a harm or pain and an accident or conditions existed at

work "which *could have caused* the harm or pain" D&O at 5 (emphasis in original).[13] Nevertheless, he found Claimant failed to prove by a preponderance of the evidence his "fundamental allegation" that the crane dropped his truck in a "violent freefall" from a height of anywhere between several feet to as much as twenty feet. *Id.* at 15. Having reviewed the various accounts of the incident, *id.* at 10-15, and finding Mr. Clark's "uncontradicted" and "corroborated" testimony "significantly more reliable" than Claimant's and the other eyewitnesses' testimony, the ALJ determined it was "more likely than not" that the crane operator, Carlos Watson, "set the rig down [to the ground] under control, without violent impact." *Id.* at 15. Given this finding, he stated that to invoke the presumption of causation, Claimant "must present evidence that the injuries he alleges could have been caused" by the lifting of the truck and its safe return to the ground without any fall, as opposed to the violent impact Claimant alleged. *Id.* The ALJ likewise determined Claimant failed to prove his allegation by a preponderance of the evidence. Thus, the ALJ concluded Claimant did not establish the working conditions element of his prima facie case.

The ALJ improperly held Claimant to a higher standard of proof than the Act requires by making him prove not only that the accident occurred, but that it occurred exactly as he alleged. Instead, Claimant must present evidence to support his allegation that an accident occurred, not exactly how it occurred. In this case, as the ALJ found, it is undisputed that an incident occurred at work involving Claimant's truck being lifted off the ground by a crane and then returned to the ground in some manner. Indeed, the parties so stipulated.[14] D&O at 4. Claimant,[15] as well as aft vessel crane operator C. Watson,[16]

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[13] In this case, the ALJ reiterated that to invoke the Section 20(a) presumption of causation, Claimant "must show he suffers from an injury that could have been caused or aggravated by the incident in the truck." D&O at 6. He added "Claimant's credibility is a crucial evidentiary consideration." *Id.*

[14] The parties stipulated: "an incident occurred at Ports America Gulfport, Inc., when the crane lifted the back tires of the truck the claimant was driving," and the incident "arose out of and in the course of" Claimant's work for Employer. JX 1.

[15] Claimant stated the crane operator lowered the crane, hooked onto the container, "and then the next thing I know, my truck is moving up in the air." HT at 185. He described he felt "the truck start coming down and slam" back onto the ground with a hard impact. *Id.* at 185-186.

[16] Mr. C. Watson stated, from his crane, he could see three tires of Claimant's truck were off the ground and, while he could not judge the height, the truck then impacted the ground "hard enough to hear [it] way up in [the] crane driver position." HT at 52-55, 61;

flagman Arthur Ray,[17] and longshoremen Joseph Watson and Roosvelt Keller,[18] who were all on the scene, described the incident that occurred. Additionally, Mr. Clark's handwritten statement, investigative report, and testimony confirmed an incident occurred and documented what transpired – that Mr. Keller forgot to unlock the pin on his corner holding the container to the truck causing it to be "lifted with the back tires approximately 2 ft off the ground," though he added the crane operator "was able to set the truck back down without it falling to the ground." EXs 1, 7, 8, Dep. at 10-12, 14, 16. Thus, the record in this case contains uncontradicted evidence supporting Claimant's allegation that an incident occurred at work which had the potential to cause harm or pain.

The ALJ relied upon Mr. Clark's "significantly more reliable" testimony as opposed to that of the Claimant, whom he found "is not at all a credible witness," or the other in-person eyewitnesses (Mr. C. Watson, Mr. J. Watson, and Mr. Ray), in concluding Claimant did not establish, by a preponderance of the evidence, that the "nature of the accident" occurred as he alleged. But the ALJ did not consider whether Claimant established an accident itself occurred. Witness credibility is for the ALJ, as the trier-of-fact, to determine and, therefore, the Board must respect the ALJ's evaluation of all testimony and not

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CX 34. He also stated this was the third instance that day where a truck had been accidently lifted off the ground, HT at 48-49, 56, 60, 64; CX 34, that "[i]t's dangerous" for a driver to be picked up and dropped, and he had knowledge of similar instances where trucks had been accidently picked up by a crane which resulted in serious injuries to the driver. HT at 56-57. Mr. C. Watson further discussed his having "picked up three [other] people" due to Mr. Keller's repeated failure to pull pins attaching the containers to the trucks which prompted him to "quit" for the day after Claimant's incident. *Id.*

[17] Mr. Ray stated the front pin on the ship side of the container was not pulled which caused "the truck to hang" with both the front and rear axles off the ground. CX 18, Dep. at 11-12, 16. He stated the pin "probably slipped out some" while the truck was in the air, resulting in its front end coming back to the ground "kind of hard." *Id.* at 12-14.

[18] Joseph Watson testified he saw the crane accidently pick the truck up "at least five to six feet" to where "[i]t had three tires off the ground" and once freed from the container, the truck came down in a "[h]ard, jarring" impact with Claimant "bouncing around once he came down." HT at 78-79, 81, 82, 86; CX 34. Mr. Keller stated his failure to pull the pin attaching one corner of the container to the truck resulted in the crane picking up the container and the back end of the truck "about two foot" off the ground and then dropping it back down about 18 inches. EX 9 at 10-13, 15. He stated he did not think the landing "was real hard," but that "it don't take much" for the driver "to get jostled around pretty good." *Id.*, at 14.

interfere with his credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13 (1978). In the Fifth Circuit where this case arises, the ALJ also may make credibility determinations in evaluating whether a claimant invoked the Section 20(a) presumption. *Meeks*, 819 F.3d at 127, 50 BRBS at 36(CRT).[19] Nevertheless, to the extent the ALJ's decision can be interpreted as finding Claimant failed to invoke the presumption, the ALJ erred in relying on Claimant's lack of credibility, as well as that of the other eyewitnesses, about how the accident occurred rather than considering whether an event actually happened. For purposes of invoking the presumption, the record consists of a stipulation and eyewitness testimony supporting Claimant's assertion that his truck was lifted in the air and then set back down, as all accounts agree that, at the very least, the incident in question occurred. Where the reports differ is in the details because they disagree as to whether the truck was lifted in whole or only in part and set down gently or not. In this respect, with no dispute that something occurred, Claimant's description of the accident goes beyond just "mere fancy," *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Wheatley*, 407 F.2d at 313; *see also Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 152 (1988). Considering the stipulation and this uncontradicted evidence, the ALJ erred in finding Claimant could not support his allegation that a workplace accident occurred, and therefore in failing to properly apply the Section 20(a) invocation analysis. Thus, we reverse his finding that Claimant did not establish the requisite working conditions element of his prima facie case.[20]

[19] The Director maintains that "even in the Fifth Circuit, the Board may apply *Rose*'s burden-of-production standard." Dir. Br. at 10. He suggests following the analysis set forth in Administrative Appeals Judge Buzzard's dissent in *Rose* to "harmonize" *Rose* and *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 36(CRT) (5th Cir. 2016), in cases arising in the Fifth Circuit by having the ALJ assess on remand whether Claimant produced evidence which, if believed or credited, would show he suffered a harm and that workplace conditions existed which could have caused the harm. Because this case arises under the Fifth Circuit's jurisdiction, we are bound to follow the Fifth Circuit's interpretation on Section 20(a) invocation. *But see Rose*, 56 BRBS 27 (a claimant's burden at invocation is one of production, not persuasion, in which credibility plays no role; whether a claimant's evidence "fails or carries the day is a matter to be resolved at step three of the causation analysis, when weighing the evidence based on the record as a whole, not at step one invocation").

[20] As the reversal of the ALJ's consideration of the working conditions element is based on the conclusion that it is fundamentally flawed, we need not address the Director's

Claimant alleged injuries to his left shoulder, left knee, spine, as well as an abdominal abscess and psychological conditions. The ALJ found Claimant suffered a bodily harm to his stomach and spine, as well as a possible aggravation of his pre-existing anxiety, but "failed to establish a bodily harm" occurred to his left shoulder or left knee, and found he sustained no other alleged psychiatric conditions. The ALJ's findings regarding the lack of any sustained harm to Claimant's left shoulder and left knee are not supported by substantial evidence nor in accordance with the appropriate invocation standard. Absent from the ALJ's invocation analysis is any discussion of the report of Claimant's visit to Garden Park Medical Center on the evening of the accident, July 30, 2018,[21] which noted his complaints of back, abdomen, and left upper extremity pain and in which medical professionals documented a "clinical impression" of a "left shoulder strain" and a "contusion of rib on left side." CX 8(d). The ALJ did not address this evidence, which satisfies Claimant's burden that, as the ALJ stated, he "need only show" he sustained a physical harm.

At Employer's request, Dr. Pessoney examined Claimant on August 2, 7, and 13, 2018, for left knee and left shoulder pain in the "context" of the July 30, 2018 work incident. CX 11. Over the course of his three examinations, Dr. Pessoney noted Claimant exhibited "tenderness" in the "deltoid and the trapezius" muscles of his left shoulder, as well as in the "anterior-lateral tibial plateau" and "medial joint line" of his left knee. *Id.* He also documented that Claimant's shoulder motion "is painful to abduction, flexion and external rotation," and that his left knee was painful "on external rotation and abduction." *Id.* Based on these findings, he repeatedly diagnosed "uncomplicated" sprains of Claimant's left shoulder and left knee, imposed limitations of no climbing and no lifting or pulling with the left arm, and recommended physical therapy and a "referral to a qualified orthopedist." *Id.*

In discussing invocation, the ALJ acknowledged Dr. Pessoney's diagnoses of left shoulder and left knee sprains, D&O at 23, 24, but he apparently rejected Dr. Pessoney's conclusions because they purportedly were based on an incorrect understanding of Claimant's work incident and were contrary to other medical evidence in the record. In this regard, the ALJ found Claimant "told Dr. Pessoney he had been dropped 15 to 20 feet and had pain" in his left shoulder and knee, and that Dr. Meredith Warner, in reviewing

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suggestion that we "harmonize" the standards enunciated in *Rose* and *Meeks* in cases arising in the Fifth Circuit.

[21] The ALJ noted Claimant's testimony that, following the incident, "[h]e went home, but felt worse and went to the hospital," D&O at 14, but the ALJ's causation analysis makes no mention of the medical records associated with that hospital visit.

the record, and Dr. William Sherman, in "actually look[ing] in the knee," saw "nothing" to suggest Claimant sustained a bodily harm to his left shoulder or left knee.[22] *Id.* The ALJ, however, never explicitly rejected Dr. Pessoney's diagnoses.[23] Instead, he merely concluded Claimant's lack of credibility rendered "his complaints of pain" insufficient to establish a bodily harm to either joint "in the face of objective medical findings." *Id.* The ALJ inappropriately weighed the evidence in the record as a whole at invocation rather than determining, at the initial stage of the Section 20(a) causation analysis, whether Claimant met his "fairly light burden of proof" to show he sustained a physical harm. *See generally Meeks*, 819 F.3d at 127, 50 BRBS at 35-36. The evidence shows Claimant

[22] We further note the ALJ's characterization of the reports issued by Drs. Warner and Sherman is flawed. Although the ALJ correctly stated "Dr. Warner found nothing in the record to constitute objective evidence of a bodily harm to the shoulder," D&O at 24, EX 33 at 35, he neglected to consider Dr. Warner's opinion that Claimant's subjective complaints of musculoskeletal pain, including in his left shoulder, "certainly could be an exacerbation," albeit a temporary one, due to the work-related incident, EX 33 at 31; a causation opinion Employer apparently concedes. Emp's Br. at 14. Similarly, the ALJ's finding that "Dr. Sherman actually looked in the knee, but saw nothing," D&O at 24, does not accurately reflect the surgeon's November 18, 2019 operative note. CX 6 at 48-50. While, as the ALJ stated, the operative report revealed "no arthritis, no tearing of the meniscus, no impingement, and no fracture of the femur," D&O at 24, it also contained a post-operative diagnosis of "[l]eft knee scar tissue over the anterior horn of the medial meniscus attached to the anterior cruciate ligament." CX 6 at 48, 49; CXs 36, 46. Additionally, Dr. Sherman explained that the procedure, in part, involved removal of scar tissue which "could be being trapped in the joint." *Id.* Further, while Dr. Sherman indeed noted there "were no loose bodies in the lateral or medial gutter," he nevertheless stated he "removed all loose bodies" on the medial side of Claimant's left knee, which directly conflicts with the ALJ's finding that the "operative report revealed no loose bodies." *Id.*

[23] Dr. Pessoney diagnosed Claimant with left shoulder and left knee sprains despite noting that "special tests" conducted on both joints were largely "negative" and that an x-ray of Claimant's left knee showed a "normal study." CX 11. Similarly, Dr. Sherman concluded in his October 15, 2018 report that Claimant's left shoulder, left knee, and spine are having "continued pain now that is not improved," notwithstanding the fact that Claimant's left shoulder and left knee x-rays were "normal." CX 6 at 184. Dr. Sherman also recommended that Claimant be on limited duty work, continue with anti-inflammatories, physical therapy, and activity modification, all of which he continued to recommend in regular follow-up reports through June 2019, *id.* at 174, 176, 180, notwithstanding his statement that Claimant's left shoulder and left knee x-rays were "normal," *id.* at 184.

sustained a bodily harm to his left shoulder,[24] left knee, spine, as well as an abdominal abscess and aggravation of his pre-existing anxiety, and the record contains indisputable evidence of an accident which could have caused his injuries, exacerbated his pre-existing conditions, or both. Consequently, Claimant has, as a matter of law, established a prima facie case and invoked the Section 20(a) presumption that his alleged left shoulder, left knee, stomach, spine, and anxiety conditions are work-related.[25] *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

Rebuttal

We next turn to the ALJ's alternate findings that Employer produced evidence sufficient to rebut the presumption for all but Claimant's alleged spinal injuries.[26] In order

[24] The record further documents left shoulder sprain diagnoses by Drs. Thriffeley and Murphy, CXs 4, 13, 30, Dep. at 19-20, 22; EX 39, along with repeated statements from Dr. Thriffeley that Claimant's left shoulder condition is work-related. CX 4 at 2, 5, 10, 13, 20, 25, 27.

[25] We affirm the ALJ's finding that Claimant did not establish the requisite harm and, therefore, did not invoke the Section 20(a) presumption for his other alleged psychological conditions. The ALJ permissibly discounted Dr. MacGregor's diagnoses of major depressive disorder, PTSD, panic disorder, and somatic symptom disorder because they were entirely premised on Claimant's subjective statements and his being "an accurate historian and credible patient;" underlying assumptions the ALJ found belied by the record which "is replete with instances of Claimant's exaggerating, minimizing, and withholding information." D&O at 10. As a result, the ALJ found Claimant's testimony entitled to "very little probative weight," *id.*, at 10, 25-26. *Meeks*, 819 F.3d at 127, 50 BRBS at 36(CRT). Because this is an adequate rationale for according no weight to Dr. MacGregor's opinion in regard to the harm element, we need not address the ALJ's "note" that Dr. MacGregor "showed signs of patient relationship bias" in rendering his opinion. D&O at 26.

[26] Regarding Claimant's spinal injuries, the ALJ stated that if Claimant had satisfied the working conditions element of his prima facie case, "I would have found the presumption of causation established and not rebutted." D&O at 23 n. 30. We affirm this "no rebuttal" finding because Claimant has established the working conditions element of his prima facie case as a matter of law, and the ALJ's alternative finding is unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Accordingly, we affirm the ALJ's conclusion that Claimant's back condition is work-related. However, we vacate the ALJ's corresponding finding that he "would have found the event caused a short-term transient aggravation of [a] pre-existing condition which returned to baseline

to rebut the Section 20(a) presumption, the employer must produce substantial evidence of the lack of a causal nexus. *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). To be substantial, the evidence must consist of facts, not speculation, and must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2d Cir. 2008) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *see also Conoco*, 194 F.3d at 687-88, 33 BRBS at 189(CRT).

The ALJ rationally found Employer rebutted the Section 20(a) presumption for Claimant's abdominal injury through Dr. Ringold's July 15, 2019 report stating the doctor did not think Claimant's post-accident abdominal complaints, including his abdominal symptomatology up to the time of his July 2018 work accident, which were diagnosed as acute sigmoid diverticulitis, were directly related to, or aggravated, exacerbated, or accelerated by, that work incident. EX 37. *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Next, the ALJ found Dr. Roniger's statement that he did not think the July 2018 work incident "caused any psychiatric condition in [Claimant] whatsoever," EX 42 at 10, rebutted the presumption that Claimant's psychological conditions are work-related. However, although Dr. Roniger diagnosed Claimant, as the ALJ found, with pre-existing, long-term anxiety and generally "found no indication for psychiatric treatment pertaining to the incident in July of 2018," his opinion does not address whether Claimant's pre-existing anxiety could have been aggravated or exacerbated by the work incident. For these reasons, we affirm the ALJ's finding that Employer rebutted the Section 20(a) presumption that Claimant's abdominal condition is work-related. *Bourgeois*, 946 F.3d 263, 53 BRBS 91(CRT); *O'Kelley*, 34 BRBS 39. But Dr. Roniger's opinion is insufficient as a matter of law to rebut the Section 20(a) presumption regarding Claimant's work-related anxiety as it fails to address whether the work accident aggravated or exacerbated Claimant's pre-existing anxiety. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185, 189 (2002).

As for Claimant's orthopedic conditions, the ALJ found Employer rebutted the Section 20(a) presumption relating Claimant's left shoulder and left knee conditions to his work with the opinions of Drs. Warner and Thriffeley. D&O at 24-25. In this regard, he stated Dr. Warner "found nothing in the record to constitute objective evidence of a bodily

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within two months of the incident," D&O at 23 n.30, because it is conclusory, and the ALJ failed to fully consider all the relevant evidence of record related to the nature and extent of Claimant's work-related back condition. *See generally Gelinas v. Elec. Boat Corp.*, 45 BRBS 69 (2011).

harm to the shoulder" and that both doctors indicated there is nothing that objectively shows Claimant's left knee condition and pain are causally related to the work accident. *Id.* As previously noted in this decision, n.22, *supra*, the ALJ's analysis of Dr. Warner's opinion is flawed because she explicitly conceded elsewhere in her report that Claimant's subjective complaints of musculoskeletal pain, including in his left shoulder and knee, "certainly could be an exacerbation" due to the work-related incident, EX 33 at 31.[27] Therefore, considered in its entirety, Dr. Warner's opinion is insufficient to rebut the Section 20(a) presumption with regard to Claimant's left shoulder and left knee conditions. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Nevertheless, Dr. Thriffeley's July 9, 2020 report opining that "there is nothing to indicate that any pathology or pain [in Claimant's left] knee is causally related to the July 30, 2018 incident," EX 29 at 39, constitutes substantial evidence to rebut the Section 20(a) presumption that Claimant's left knee condition is work-related. Consequently, we reverse the ALJ's finding that Employer rebutted the Section 20(a) presumption as to Claimant's left shoulder but affirm his finding that Dr. Thriffeley's July 2020 opinion rebutted the Section 20(a) presumption linking Claimant's left knee condition to his work. We therefore hold Claimant's left shoulder condition, as well as his back condition and anxiety, are work-related as a matter of law. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Weighing

Employer has cast doubt on whether Claimant's abdominal abscesses and left knee injury are work-related, prompting us to review the ALJ's alternative causation findings related to those injuries based on the record as a whole. If the employer rebuts the Section 20(a) presumption, it no longer applies, and the issue of causation must be resolved based on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Meeks*, 819 F.3d at 127, 50 BRBS at 35-36(CRT); *Plaisance*, 683 F.3d 225 46 BRBS 25(CRT); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In terms of Claimant's abdominal abscesses, the ALJ reviewed the opinions of Drs. Sudderth, Killebrew and Ringold. D&O at 15-18. Considering "the entire record," he credited Dr. Ringold's "fully supported, well-reasoned" opinion that Claimant's abdominal injury was not caused, aggravated, exacerbated, or accelerated by the July 2018 work incident because he found it is "consistent with the other credible evidence in the case." *Id.* at 18. In contrast, he accorded little weight to Dr. Sudderth's opinion that Claimant's abscesses "were the result of blunt force trauma from Claimant's

[27] Furthermore, Dr. Warner's statement that "[i]t is highly likely that [Claimant's] back, neck, shoulder and knee pain would come and go regardless of this particular incident" does not address whether the July 2018 work incident nevertheless could have aggravated or accelerated his pain.

seatbelt because of the sudden deceleration related to the fall of Claimant's truck," *id.* at 16, because it "must be viewed in the context of his close and decades long friendship with Claimant's attorney" and "relies" on the incorrect assumption that Claimant endured "a violent event and coincidental onset of symptoms" which "are not established by the evidence, notwithstanding Claimant's unreliable testimony." *Id.* at 17. He also accorded diminished weight to Dr. Killebrew's opinion, that Claimant's abdominal injuries could have resulted from his work incident, because it was "extraordinarily ambiguous," based similarly on the Claimant's alleged "report of coincidental pain," and as the doctor "appeared to do his best to avoid taking a firm stance" on the causation issue. *Id.* at 17-18. The ALJ therefore concluded, based "on full consideration of the entire record," it is more likely than not that Claimant's pre-existing diverticulitis was neither caused, aggravated nor made symptomatic by his work.

The underlying reasons for the ALJ's decision to credit Dr. Ringold's opinion that there was no credible evidence Claimant sustained "a violent event" or corresponding onset of symptoms over Dr. Sudderth's opinion are not supported by the record. First, as we have discussed, the record establishes an accident with the potential to cause Claimant's abdominal abscesses occurred at work. Additionally, the Garden Park Medical Center records from Claimant's visit on the evening of the accident, July 30, 2018, document a "mild" onset of symptoms in his back and abdomen, as well as left upper extremity pain, with primary complaints of back, left shoulder, left knee, and extremity pain. CX 8(d). The medical center report, however, noted Claimant "denies abdominal pain" and the "focused" physical examination during his visit revealed no issues with his abdomen. *Id.* Nevertheless, the examination showed tenderness in Claimant's left rib and left shoulder, which led to the "clinical impression" of a "left shoulder strain" and "contusion of rib on left side." *Id.* Dr. Sudderth acknowledged the hospital record documented Claimant's having reported pain on his left side[28] and clinically showed evidence of an injury to his left side which could have resulted from the work incident and either caused or aggravated his abdominal abscesses. HT at 141, 168, 169. He suspected "the seat belt had probably injured [Claimant's] belly and injured his intestine," HT at 101-102, so "the injury was secondary" to the work accident.[29] *Id.* at 107-108, 130-131, 161-162. This evidence, in

[28] Dr. Sudderth's testimony confirmed the hospital record documented initial abdomen pain but also that Claimant "denies abdominal pain." HT at 166. He explained Claimant's abdominal pain "was slow developing and that the wall of the bowel was injured at the time of the accident, but it took a week, two weeks, three weeks, whatever to manifest itself to the point that you saw abscesses." *Id.* at 162.

[29] Dr. Sudderth explained Claimant sustained a "blunt abdominal trauma" as a result of the work accident where "the seat belt has compressed the abdominal wall in such a way that it has caused trauma," HT at 127, and also due to "seat belt syndrome" where the

conjunction with the eyewitnesses' testimony,[30] indicates Claimant was involved in a work incident which caused some "coincidental pain" prompting his visit to the emergency room on the date of the incident. As the ALJ did not thoroughly review Dr. Sudderth's reports and testimony,[31] we vacate his finding that Claimant did not establish, on the record as a whole, that his pre-existing diverticulitis was aggravated or made symptomatic in the form of abdominal abscesses by his work and remand the case for further consideration of this issue.[32]

The ALJ's consideration of causation based on the record as a whole in regard to Claimant's left knee injury is likewise inadequate as it consists of one conclusory sentence, and it is unclear whether he considered the entirety of the evidence. The ALJ summarily stated "I would have found that Dr. Thriffeley's and Dr. Warner's opinions not only rebutted the presumption, but established more likely than not that nothing related to his

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"person has a seat belt on and they have a sudden deceleration and the intestine keeps going," "injur[ing] the little, tiny blood vessels that are going into the colon." *Id.* at 107-109. The ALJ then asked Dr. Sudderth if, in his expert opinion, Claimant's injuries "were both caused by the blunt force trauma" from the seat belt pressing suddenly against his abdomen, to which he replied, "[y]es sir." HT at 130-131.

[30] Claimant testified the accident caused his seat belt to break or pop off. HT at 283-284.

[31] The ALJ found Dr. Sudderth's hearing "demeanor" tainted because the doctor "views himself as part of his friend's [Claimant's attorney] litigation team." D&O at 17, n.27. Dr. Sudderth, however, explicitly testified under oath that he would "not cut [Claimant or his attorney] any slack" in providing his medical opinion because of his personal relationship with Claimant's attorney. HT at 137. There is no indication the ALJ considered this explicit statement prior to determining the doctor's "demeanor" and according diminished weight to his causation opinion.

[32] Although the ALJ's decision addressed the cause of "Claimant's pre-existing diverticulitis," he did not specifically consider whether Claimant's post-accident abdominal abscesses, which he found constituted Claimant's undisputed abdominal injury, were either caused or aggravated by the work incident. We affirm, however, the ALJ's decision to accord no weight to Dr. Killebrew's "extraordinarily ambiguous" opinion. Dr. Killebrew initially indicated Claimant's "abscess could be related to the accident," but he subsequently testified that upon further reflection of Claimant's records, he did not "have an opinion in this case as to whether the diverticular abscess was caused by the trauma or not." EX 52, Dep. at 21.

work caused or aggravated any injury to his knee." D&O at 25. As we noted above, the ALJ's discussion of Claimant's left knee does not fully or adequately reflect what the record indicates. The ALJ did not fully consider either Dr. Sherman's March 25, 2021 medical report, in which he opined that Claimant's left knee pain and injury "was directly" a result of the work incident, CX 46, or Dr. Warner's May 3, 2019 evaluation and assessment that Claimant's left knee pain "certainly could be an exacerbation" due to the work-related incident, EX 33 at 31. For these reasons, we vacate the ALJ's finding that Claimant's left knee injury is not work-related. On remand, the ALJ must engage in a complete consideration of the relevant evidence as a whole, and reassess whether Claimant established his left knee condition is directly related to, or was aggravated, exacerbated, or accelerated by, the July 2018 work incident. *Meeks*, 819 F.3d at 127, 50 BRBS at 35-36(CRT); *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see generally Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT). Should the ALJ find Claimant's abdominal and/or knee conditions are work-related, he must undertake an inquiry as to the nature and extent of any disability arising from those injuries, in addition to determining the nature and extent of any disability arising from his compensable anxiety, left shoulder, and back conditions.

Accordingly, we reverse the ALJ's findings that, for purposes of invoking the Section 20(a) presumption, Claimant did not establish the working conditions element of his prima facie case or establish harm to his left shoulder and left knee. In addition, we reverse his alternate findings that Employer established rebuttal for Claimant's left shoulder injury and anxiety. We affirm the ALJ's findings that Employer rebutted the presumption for Claimant's abdominal and knee conditions, vacate his findings for those

injuries based on the record as a whole, and remand the case for further consideration of whether those conditions are related to the work incident.[33] On remand, the ALJ must also address the nature and extent of any disability stemming from Claimant's work-related anxiety, left shoulder, and back conditions, which we hold are work-related as a matter of law. Finally, we affirm the ALJ's finding that Claimant's other psychological conditions are not work-related.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[33] On remand, when weighing the medical opinion evidence, the ALJ may consider the varying reports of how the accident occurred, including whether Claimant's version of events is credible; the ALJ also may consider Claimant's credibility when determining the nature and extent of his disability. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995) ("The ALJ's selection among inferences is conclusive if supported by the evidence and the law.").