

SHERLYN TURNER)	
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Claimant-Respondent)	
)	
v.)	
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AVONDALE INDUSTRIES,)	DATE ISSUED: <u>APR 14, 2005</u>
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Frischhertz & Associates), New Orleans, Louisiana, for claimant.

Richard S. Vale, Christopher K. LeMieux, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-LHC-1906) of Administrative Law Judge Clement J. Kennington on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, while working for employer on June 30, 1999, passed out as a result of exposure to diesel vapors and fell, striking her right shoulder in the process. Claimant received immediate emergency room treatment for a right shoulder contusion and diesel inhalation. She returned to light-duty work on July 7, 1999, and continued in that

capacity until August 29, 1999. At that time, claimant stated that back pain, as well as continued pain in her right shoulder, neck and right wrist, forced her to quit her employment and prompted further treatment from an orthopedist, Dr. Bourgeois. On September 3, 1999, Dr. Bourgeois diagnosed cervical and right wrist sprains, prescribed medication, and opined that claimant was unable to work. Dr. Bourgeois subsequently testified that he had not yet released claimant to work as of November 2000, but that in all likelihood she probably would be capable of light activity at that time. EX 38, Dep. at 20-22. Meanwhile, at employer's behest, on September 8, 1999, claimant saw an orthopedist, Dr. Katz, who diagnosed a right trapezial muscle strain and right wrist contusion; he subsequently opined on November 1, 2000, that claimant could return to full-duty work. Claimant has not worked since August 29, 1999.

Claimant was later involved in automobile accidents on October 11, 2002, and May 23, 2003. Following both instances, claimant sought and received treatment for neck and back pain from Drs. Simmons and Billings, who diagnosed, among other things, cervical and lumbar strains. JXs 12, 14. Claimant subsequently saw Drs. Cook and Swift, who respectively opined that there was no relationship between claimant's work accident and her current pulmonary (asthma) problems, or her hair loss and syncope. JXs 8, 37. Dr. Culver, a psychiatrist, diagnosed a pain disorder associated with psychological factors, histrionic personality disorder, and depression, JX 39, and opined, at his deposition, that he could not "directly" relate any of claimant's psychological conditions to the June 30, 1999, work incident. *Id.* at 48. Dr. Culver further stated that claimant "really isn't very disabled from a psychological viewpoint," *id.* at 71, although he admitted that "there is a significant psychogenic overlay to her post-[work]-accident complaints." *Id.* at 102. Meanwhile, claimant also received regular psychiatric treatment from the Central Mental Health Center. CX 6.

Employer voluntarily paid claimant temporary total disability benefits for July 4-6, 1999, and from August 30, 1999, to October 24, 1999. Claimant thereafter sought additional benefits as a result of her overall condition, *i.e.*, her orthopedic problems, hypertension, severe depression and histrionic personality disorder, back problems, asthma, and hair loss.

In his decision, the administrative law judge initially found that claimant's injuries to her neck, right shoulder and right wrist, as well as her syncope and histrionic personality disorder are work-related, but that her alleged low back pain, hair loss and continuing respiratory problems are not work-related. The administrative law judge then determined that, at present, there is no work claimant can perform as a result of a combination of her physical and psychological impairments and that claimant's post-work injury car accidents did not constitute supervening independent causes of her present condition. Accordingly, the administrative law judge found claimant entitled to a

continuing award of temporary total disability benefits from October 25, 1999,¹ as well as medical benefits related to the treatment of her work-related injuries.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance.

Employer first contends that the administrative law judge erred in finding that claimant's psychological condition is work-related. Employer contends that claimant's depression and histrionic personality disorder pre-existed the June 30, 1999, work injury, and there is no evidence that the work injury caused or aggravated these conditions.

It is well settled that a psychological impairment that is work-related, even in part, is compensable under the Act. *See, e.g., American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). The Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment, is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 2 (1990); 33 U.S.C. §920(a).

Although the administrative law judge did not specifically apply Section 20(a) of the Act, 33 U.S.C. §920(a), he weighed all of the evidence and his finding that claimant's psychological disorders are work-related is rational and supported by substantial evidence. In this regard, we reject employer's contention that the administrative law judge erred in addressing the evidence regarding causation. In his testimony, Dr. Culver stated that claimant's conditions, *i.e.*, her histrionic personality disorder, somatoform disorder and depression, are not directly related to the June 30, 1999, work accident. JX 39, Dep. at 43-47, 48. Rather, Dr. Culver opined that these conditions pre-date the work accident, and he therefore attributed them to non-work sources, *e.g.*, claimant's early life experiences and personal relationships. Nevertheless, as the administrative law judge found, Dr. Culver's opinion acknowledges that there may be an indirect relationship between claimant's present psychological condition and the work accident. In this regard, Dr. Culver explicitly stated, "I think in [claimant's] mind she's convinced more is wrong with her than is," JX 39, Dep. at 48, thus prompting him to comment that claimant's post-accident physical symptoms have primarily resulted more from what she thinks happened to her "than really did as she is the sort of patient who is highly suggestible, hypochondriacal, and inclined to somatize." JX 13, p. 20. Additionally, while Dr. Culver stated that claimant's mindset is "just a continuation of the same basic

¹ The administrative law judge concluded, based on the recommendations of Drs. Bourgeois and Murphy for additional testing, that claimant has not reached maximum medical improvement with regard to her work-related injuries.

pattern of hypochondria and psychosomatic complaints she's had for twenty years," *id.*, he acknowledged that "there is a significant psychogenic overlay to her post-accident complaints." JX 39, Dep. at 102. He further observed that claimant is not a malinginer. *Id.* at 39. The administrative law judge therefore found that Dr. Culver's statements establish that claimant's present psychological and physical conditions are interrelated. Moreover, Dr. Bourgeois opined that claimant's depression "was definitely aggravated by her physical condition" resulting from the June 30, 1999, work accident. JX 38, Dep. at 30.

Under the aggravation rule, claimant's work need not be the sole or primary cause of her condition; rather if claimant's employment aggravates, accelerates or combines with her pre-existing condition, the entire resulting disability is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986); *Independent Stevedoring Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). In this case, substantial evidence supports the administrative law judge's finding that claimant's present psychological condition is due in part to the work accident she sustained on June 30, 1999, and this finding is consistent with the aggravation rule. *See Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor, OWCP*, 969 F.2d 1400, 26 BRBS 14(CRT) (2^d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). We therefore affirm the administrative law judge's finding that claimant's psychological condition is work-related. *Id.*

Employer next asserts that the administrative law judge erred in finding that claimant is unable to work due to her overall physical and psychological condition. Employer first asserts that the record establishes that claimant is, from a physical standpoint, capable of performing some type of work. Employer also contends that claimant's psychiatric records must be rejected as equivocal on the issue of claimant's employability for they alternatively indicate that claimant is, as a result of her depression, either unemployable or merely markedly limited in skills with a poor work history. In addition, employer asserts that Dr. Culver opined that claimant is not, from a psychological standpoint, disabled. Employer further contends that it has, by virtue of the vocational rehabilitation evidence, established the availability of suitable alternate employment.

With regard to disability, the administrative law judge initially found that claimant could not, from an orthopedic standpoint, return to her usual employment. In making this determination, the administrative law judge relied upon the opinions of Dr. Bourgeois, who the administrative law judge found never authorized claimant to return to work and who, as of September 9, 2000, restricted claimant to light activity with no lifting over 10 pounds, and Dr. Murphy, who restricted claimant from performing medium work which the administrative law judge deemed was essentially what her former work for employer

entailed. In addition, the administrative law judge credited claimant's testimony that her ongoing complaints of pain preclude her from performing any work. The administrative law judge's findings that claimant is unable to return to her usual employment, and thus, has established a *prima facie* case of total disability are affirmed as they are supported by substantial evidence. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Where, as here, claimant establishes that she is unable to perform her usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs in the geographic area where claimant resides which she is, by virtue of her age, education, work experience, and restrictions, capable of performing and which she could realistically secure if she diligently tried. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In the instant case, the administrative law judge found that based upon a combination of her physical and psychological impairments, there is no work claimant can perform. As employer asserts, the administrative law judge acknowledged that both Drs. Bourgeois and Murphy found, from an orthopedic standpoint, that claimant is capable of at least light activity. JX 38, Dep. at 23, 33; JX 36, Dep. at 12, 18, 23; *see also* Decision and Order at 9, 16.² Nevertheless, while claimant may be, from a physical standpoint, capable of some work post-injury, the administrative law judge's finding that claimant cannot perform any work is premised on claimant's overall condition, thereby requiring an examination of the impact of claimant's psychological condition as it relates to her ability to work. *Manship*, 30 BRBS 175.

As for claimant's employability in terms of her psychological condition, the administrative law judge recognized the opposing perspectives presented by the Central City Mental Health Clinic (the clinic), that claimant, as a result of her psychological condition, is "unemployed or markedly limited in skills with a poor work history or unable to engage in normal activities to manage income (if retired)," Claimant's Exhibit (CX) 6, p. 8, and by Dr. Culver, that claimant "really isn't very disabled from a psychological viewpoint." JX 39, Dep. at 71. In resolving this conflict, the administrative law judge rejected Dr. Culver's finding of "no psychiatric limitations," because it conflicts with claimant's treatment record with the clinic which covers a considerable period of time, as opposed to Dr. Culver's two sessions with claimant, and because Dr. Culver "acknowledged that claimant was beset with an underlying pain, and somatoform disorder which caused her to honestly believe she was experiencing severe pain and

² Dr. Katz also opined that claimant was capable of returning to full active duty as of November 1, 2000, and remained so as of October 1, 2003. JX 7; JX 34, Dep. at 22.

complicated her medical treatment.” Decision and Order at 14. The administrative law judge acted within his discretion in giving less weight to Dr. Culver’s opinion of no psychiatric disability, based upon his limited evaluation of claimant. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). The opinion by the clinic that claimant’s depression leaves her “either unemployed or markedly limited in skills with a poor work history,” Decision and Order at 14, supports the administrative law judge’s finding that claimant is, due to a combination of her psychological condition and post-injury physical limitations, incapable of performing any work. This finding is bolstered by the testimony of one of the vocational experts, Ms. Favaloro.³

Ms. Favaloro, whose deposition testimony contains a considerable discussion of claimant’s psychological condition as it relates to her employability, JX 44, Dep. at 62-63, 66-67, 70-73, 77-78, 79-92, specifically stated that assuming the clinic records and diagnosis of major depression with psychotic features is correct, and that some of the diagnoses detailed in Dr. Culver’s written reports manifest themselves, claimant may have difficulty obtaining employment and would probably not be employable.⁴ *Id.* at 67, 86. She further added that due to “some of the symptoms that [claimant] displays and when Dr. Culver is describing them,” claimant may not be able to gain employment because of her psychological condition. *Id.* at 83. Moreover, Ms. Favaloro stated, after referencing Dr. Culver’s statements that claimant “had an impaired ability to concentrate and her histrionic” personality disorder, *id.* at 84, that “if [claimant] perceives or projects, rather, to the employers what Dr. Culver is saying she believes, her chances of getting hired are probably less likely than if she presents like a person who doesn’t believe those things.”⁵ *Id.*

³ The administrative law judge rationally rejected the labor market study and accompanying testimony of Ms. Moffit-Douglas since the record reflects that she did not factor in claimant’s psychological condition in determining claimant’s post-work-injury employability. JX 43. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

⁴ From an orthopedic standpoint, however, Ms. Favaloro opined that claimant is capable of competing for the jobs identified in the labor market surveys. JX 44, Dep. at 90.

⁵ Ms. Favaloro’s statement that if Dr. Culver opined that claimant is not psychologically disabled, she “would not disagree with that,” JX 44, Dep. at 79, is rendered moot by the administrative law judge’s rejection of Dr. Culver’s opinion that claimant is not psychologically disabled.

We affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. The administrative law judge rationally found that there is no work which claimant can perform as a result of a combination of her physical and psychological impairments. This finding is supported by substantial evidence, *i.e.*, the clinic records, CX 6, and the testimony of Ms. Favaloro, JX 44, Dep. at 67, 76, 83, 86, 90.

Employer lastly contends that claimant's subsequent automobile accidents, sustained post-work injury in 2002 and 2003, are supervening independent causes of her present condition. Employer asserts that these automobile accidents overpower and nullify the initial work injury and that claimant's present condition is solely related to those incidents.

Employer is relieved of liability for disability attributable to an intervening cause. *See generally* *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Employer, however, bears the burden of establishing an intervening cause. *See, e.g., Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, has articulated two standards as to what constitutes an intervening cause. *See Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) (noting the tension between the two standards). In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929, 934 (5th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952), the court stated that a supervening cause must be an influence originating entirely outside of employment which "overpowers and nullifies" the initial injury. In *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on other grounds on reh'g*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981), however, the court stated that an injury is compensable "if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." *Id.*, 637 F.2d at 1000, 12 BRBS at 974; *see also* *Lira*, 700 F.2d 1046, 15 BRBS 120(CRT); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

In his decision, the administrative law judge found that claimant's post-work injury automobile accidents did not nullify the effects of that work injury. He found that the accidents increased claimant's pain, but they did not result in increased physical restrictions. The administrative law judge concluded that claimant was totally disabled at the time of the automobile accidents and, therefore, the accidents did not nullify the effects of that work injury.

We affirm the administrative law judge's finding as it is supported by substantial evidence. While Dr. Billings stated that claimant's work-related symptoms were improving until the date of the first automobile accident, he ultimately restricted claimant, as of February 18, 2003, from performing heavy lifting or overhead work which is the same limitation as the restrictions imposed by Drs. Bourgeois and Murphy prior to the automobile accidents. *Compare* JX 12, JX 9 and JX 10. No additional restrictions were imposed by Dr. Billings, even following the second automobile accident on May 23, 2003. JX 12. Similarly, Dr. Simmons did not impose any restrictions after examining claimant on October 15, 2002, and July 23, 2003. Specifically, Dr. Simmons, as the administrative law judge found, opined that his examination of claimant after the second car accident was "essentially normal" resulting in cervical, shoulder and lumbar strains, with no disability rating or restrictions related to that incident. Decision and Order at 18. Dr. Bourgeois further added, on April 19, 2003, that "it will be difficult to separate the residual from her work-related injury from her [present] complaints taking the history of a motor vehicle accident in October of 2002 with significant worsening into account." JX 10; *see also* JX 38, Dep. at 24. However, Dr. Bourgeois does not differentiate between claimant's work injury and the subsequent automobile accidents in stating claimant's physical restrictions. As such, the administrative law judge rationally found that the evidence of record does not meet either of the two standards articulated by the Fifth Circuit as to what constitutes an intervening cause. *See Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT). In particular, the evidence cited by employer does not show that the automobile accidents "overpowered or nullified" the initial injury, *Voris*, 190 F.2d 929, or that they "worsened" claimant's present condition beyond that which resulted following the work accident. *Bosarge*, 637 F.2d 994, 12 BRBS 969. We therefore affirm the administrative law judge's finding that the two automobile accidents are not intervening causes, as employer has not meet its burden of establishing an intervening cause. *Plappert*, 31 BRBS 13.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge