BRB No. 06-0546

JUNIUS DAVIS	)	
Claimant-Petitioner	)	
v.	)	
QUALITY CONSTRUCTION AND PRODUCTION, LLC	)	DATE ISSUED: 04/30/2007
and	)	
GRAY INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER on RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's decision in the captioned case, *Davis v. Quality Constr. & Prod., LLC*, BRB No. 06-0546 (Jan. 31, 2007)(unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §§802.407, 802.409.

To recapitulate, on May 30, 2004, claimant and two or three other workers were being lifted from the deck of the *M/V Noonie G*, a supply vessel, to an offshore platform in a "Billy Pugh" personnel basket in high seas when the basket struck the *Noonie G's* metal grocery box. After contact between the personnel basket and the grocery box occurred, the crane operator continued to lift the personnel basket onto the platform, whereupon claimant and the other employees disembarked. The following morning, claimant complained of back stiffness and discomfort. Claimant was then airlifted to the mainland, and subsequently transported by employer to the hospital, where he was prescribed various pain medications and later diagnosed with a disc herniation at L5 – S1 and a mild annular bulge at C5-6.

In his Decision and Order, the administrative law judge declined to rely on claimant's testimony that he struck the *Noonie G's* grocery box while being lifted from the deck of that vessel on May 30, 2004; rather, the administrative law judge found that another worker actually made contact with the grocery box. Accordingly, the administrative law judge rejected claimant's assertion that he was injured at work and,

after consequently determining that claimant failed to establish the second element of his *prima facie* case, he dismissed claimant's claim as lacking merit. On appeal, claimant contended that the administrative law judge erred in determining that his evidence is insufficient to establish his *prima facie* case and in thus denying him the benefit of the Section 20(a) presumption. Employer responded, urging affirmance.

On appeal, the Board determined that the uncontroverted evidence establishes that claimant was riding in the personnel basket when it struck a grocery box during its ascent from the deck of the *Noonie G* and that this event is sufficient to establish the existence of a work incident on May 30, 2004, that could have caused or aggravated claimant's present back condition. Accordingly, the Board reversed the administrative law judge's finding that claimant is not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and it remanded the case for the administrative law judge to consider the remaining issues. *See Davis*, slip op. at 3-5.

In its motion for reconsideration, employer contends that the Board exceeded the scope of its authority and engaged in factfinding when it determined that claimant established the existence of a work incident on May 30, 2004, which could have caused his present physical condition, thus satisfying the second element of his *prima facie* case and entitling him to invocation of the Section 20(a) presumption. Claimant responds, urging the Board to deny employer's motion.

In determining whether his injury is work-related, claimant initially has the burden of proving the existence of an injury or harm and that a work-related accident occurred, or conditions existed, at work which could have caused or aggravated that harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case. In doing so, claimant is not required to prove that the working conditions in fact caused the harm; rather, claimant must show that working conditions existed which *could have* caused his harm. *Id.* Once claimant establishes his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his condition is causally related to his employment.

On reconsideration, employer contends that claimant did not claim an injury based on the personnel basket's striking the grocery box but sought to establish the second prong of his *prima facie* case solely on the basis that he personally struck the *Noonie G's* grocery box when the personnel basket on which he was riding began its ascent from that vessel. Employer's br. on reconsideration at 2-3. Contrary to employer's argument, claimant raised both theories in claiming benefits. Before the administrative law judge claimant argued in the alternative that, should his having struck the *Noonie G's* grocery

box be disputed, "there is no dispute that the personnel basket struck the grocery box in a "hard" manner. [cite omitted] Thus the second element under section 920(c) [sic] is satisfied as an incident occurred while [claimant] was in the course and scope of his employment with [employer] when the personnel basket he was traveling in struck a grocery box." Claimant's post-hearing br. at 5. This alternative argument regarding the existence of a work incident which could have caused claimant's harm was acknowledged by the administrative law judge in his decision when he wrote "Claimant contends that . . .(3) a mere jerk of the personnel basket was sufficient to cause Claimant's back impairment; . . .(5) it does not matter who hit the grocery box since the personnel basket on which Claimant was standing hit the grocery box hard." Decision and Order Denying Benefits at 7. Thus, claimant specifically raised and pleaded the argument that he was injured when the personnel basket itself struck the *Noonie G's* grocery box. As such, it is a proper basis for his claim to which the Section 20(a) presumption may attach. *See U.S. Industries,* 455 U.S. 608, 14 BRBS 631. In view of the fact that this theory was asserted before the administrative law judge, we reject employer's argument that the claimant based his claim for benefits under the Act solely on his having struck the *Noonie G's* grocery box.

Employer does not challenge the determination that uncontroverted evidence in the record establishes that claimant was riding in the "Billy Pugh" personnel basket when that basket struck the grocery box during its ascent from the deck of the *Noonie G*; rather, employer concedes that the personnel basket did strike the *Noonie G's* grocery box. Employer's br. on reconsideration at 2-3. In this regard, the Board in its decision set forth the testimony of Mr. Strong, the captain of the *Noonie G*, Mr. Sutton, a deckhand on the *Noonie G*, Mr. Duck, a worker who rode the personnel basket with claimant, Mr. Lirette, the platform crane operator, and Mr. Ladd, a rigger, who each testified that the personnel basket occupied by claimant made contact with the *Noonie G's* grocery box on May 30, 2004. *See* EX 11A at 13-27; Tr. at 119-125; EX 16 at 14-15, 18-19; CX 25 at 20-22; CX 26 at 21-31. As employer does not dispute the credibility of these five workers, who unequivocally establish the occurrence of a work incident which could have caused or aggravated claimant's present back condition, we reject employer's contention that the Board engaged in factfinding by citing to and relying upon these witnesses. We accordingly reaffirm our previous determination that claimant has established the existence of a work incident which could have potentially caused or aggravated his present back condition, and that invocation of the Section 20(a) presumption has therefore been established as a matter of law.

Accordingly, employer's motion for reconsideration is denied.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge