BRB No. 99-1220

LAWRENCE S. HOWE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NOVA GROUP, INCORPORATED	)	DATE ISSUED: 08/29/000
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Respondent's Motion for Summary Decision of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Preston Easley (Law Offices of Preston Easley), San Pedro, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Trovillion, Inveiss & Ponticello), San Diego, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Granting Respondent's Motion for Summary Decision (98-LHC-755) of Administrative Law Judge Richard A. Morgan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Longshore Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a carpenter/laborer when, on July 29, 1997, he alleges he injured his neck and back while lifting and carrying a generator with a co-worker. Claimant

sought benefits under the California state workers' compensation system and filed a claim for benefits under the Longshore Act. The parties sought, and were granted, a continuance of the claim under the Longshore Act pending the outcome of the state claim. Following a trial before the Worker's Compensation Appeals Board, State of California (WCAB), Workers' Compensation Judge Louie found that:

> Lawrence Howe, applicant, born 1/13/52, while employed on 7/29/97, as a carpenter...at San Diego, California...did not sustain injury arising out of and occurring in the course of his employment to his neck and back.

See Employer's Motion for Summary Decision, January 18, 1999, Exhibit D. Claimant's Motion for Reconsideration of this decision and appeal to the Court of Appeals of the State of California were denied.

The claim under the Longshore Act was then set for a hearing on February 12, 1999. Employer filed a motion for summary decision based upon the application of collateral estoppel to the issue of whether claimant's injury was causally related to his employment. The administrative law judge granted employer's motion finding that the issue decided by the state board was identical to the one presented in the present case, *i.e.*, whether claimant's injury arose out of and in the course of the employment, that the parties in the instant claim are the same as at the state level, and that the state decision was final. Thus, the administrative law judge concluded that claimant is precluded from relitigating the issue of causation. Moreover, the administrative law judge found that as there is no genuine issue of material fact remaining for determination, summary decision is appropriate.

On appeal, claimant contends that the administrative law judge erred in finding that his claim under the Longshore Act is precluded by application of collateral estoppel. Claimant contends that as he has a lighter burden of proof under the Longshore Act than under the California workers' compensation act, collateral estoppel does not apply in the instant case. Employer responds, urging affirmance of the administrative law judge's decision.

Under the principle of collateral estoppel, relitigation of an issue necessarily and actually litigated in a prior adjudication is precluded in a subsequent case only where the parties had a full and fair opportunity to litigate the issue. *See Figueroa v. Campbell* Industries, 45 F.3d 311, 315 (9th Cir. 1995); *Levi Strauss & Co. v. Blue Bell Inc.*, 778 F.2d 1352 (9th Cir. 1985)(*en banc*); *Plourde v. Bath Iron Works Corp.*, BRBS , BRB No. 99-836 (May 9, 2000). Such "full and fair opportunity" is not present where the applicable legal principles or standards of proof are not the same in the prior and subsequent proceedings. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *Barlow v.*

Western Asbestos Co., 20 BRBS 179 (1988); *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987). Thus, collateral estoppel effect may be denied because of differences in the burden of proof. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997); *Plourde*, slip op. at 4-5.

In order to determine whether the administrative law judge properly applied the principle of collateral estoppel to bar the relitigation of claimant's claim, it is necessary to review the standards of persuasion on the issue of the cause of the claimant's injury borne by the parties in the California action and in the Longshore Act claim. Under the California system, the worker must show not only that the injury arose out of and in the course of employment, but also that "the injury is proximately caused by the employment...." Cal. Lab. Code §3600. Although the California workers' compensation law must be "liberally construed" in favor of the injured worker, Cal. Lab. Code §3202, the burden is normally on the worker to show proximate cause by a preponderance of the evidence, Cal. Lab. Code §3202.5. Section 3202.5 provides in relevant part:

> Nothing contained in Section 3202 shall be construed as relieving a party ... from meeting the evidentiary burden of proof by a preponderance of the evidence. 'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

See, e.g., Riverview Fire Protection District v. Workers' Compensation Appeals Board, 23 Cal.App.4th 1120, 1123, 28 Cal.Rptr.2d 601, 603 (Cal. Ct. App.1994).

Under the Longshore Act, Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Initially claimant must affirmatively establish a *prima facie* case by demonstrating that he suffered an injury, and that an accident occurred or working conditions existed which could have caused the harm alleged. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998). An injury occurs "if something unexpectedly goes wrong within the human frame." *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Once the elements of a *prima facie* case are established, the presumption provided by Section 20(a) applies to link the harm to the employment. *See Lacy v. Four Corners Pipe Line,* 17 BRBS 139 (1985). The burden of production then shifts to employer to rebut the presumption with substantial evidence that claimant's injury was not caused or aggravated by this employment. *See Duhagon v. Metropolitan Stevedore Co.*,

169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If employer produces "substantial evidence to the contrary," the presumption falls from the case, and the evidence on the issue of the cause of claimant's injury is weighed, pro and con, with claimant bearing the burden of persuasion by a preponderance of the evidence. *See Moore*, 126 F.3d at 262, 31 BRBS at 122-123(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Thus, it is apparent that the California and Longshore schemes are not identical as a claimant proceeding under California law at all times bears the burdens of both production and persuasion. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979). The elements of claimant's *prima facie* case under the Longshore Act are subject to the same burdens of proof as in the California proceeding, as they are in the case where employer has introduced sufficient evidence to rebut the Section 20(a) presumption. *Casey*, 31 BRBS at 151. In the case where the Section 20(a) presumption is invoked and is not rebutted, however, claimant prevails through the operation of the presumption even in the absence of evidence affirmatively linking the injury to the employment. *See Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984).

The California State Workers' Compensation Appeals Board found that claimant did not carry his burden of showing that his injury arose out of and in the course of his employment. It is not clear from this finding, however, whether claimant failed to establish that he sustained an injury, or that he failed to establish that there was an accident occurred or working conditions existed which could have caused an injury, or that he failed to establish a causal relationship between any injury and his employment based on a preponderance of the evidence. As claimant must affirmatively establish the first two elements under the Longshore Act, but is aided by the Section 20(a) presumption in establishing the third element once he makes out a *prima facie* case, it is necessary to discern the basis for the California decision.[1] Only then can it be determined whether the issue decided in the

[1]The administrative law judge quoted language from an unpublished decision of the Ninth Circuit that, under the Longshore Act, claimant has the burden of persuasion to establish "the issue of employment-relatedness . . . even if [employer] fails to rebut the [Section 20(a)] presumption." Order at 4, *quoting Valenzuela v. Director, OWCP*, 142 F.3d 447 (table), 1998 WL 205799 (9th Cir. April 15, 1998). The decision goes on to state that if employer does not establish rebuttal, "the evidence the claimant produced to state his prima facie case will preponderate." *Valenzuela*, 1998 WL 205799 at n.2. Thus, the decision does

California order carried the same burden of proof as under the Act, and therefore whether the California decision must be given collateral estoppel effect. Therefore, we vacate the administrative law judge's finding that the claim under the Act is precluded by application of collateral estoppel, and we remand the case for further consideration.

If, on remand, the administrative law judge finds that the California Board concluded that claimant did not sustain an injury on July 29, 1997, or that there was no accident or were no working conditions which could have caused the injury, then the Longshore claim is properly subject to collateral estoppel. However, if the California decision is based on claimant's failure to establish a causal relationship between his injury and his employment, the administrative law judge must apply Section 20(a) of the Act. If he determines that employer introduced substantial evidence rebutting the presumed causal connection between claimant's injury and his employment, the burden on claimant would be the same as under the California statute, and thus application of collateral estoppel would be appropriate. *See generally Casey*, 31 BRBS at 151. If, however, claimant invokes the Section 20(a)

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recognize that where Section 20(a) is not rebutted, claimant must prevail. As the decision does not further address application of the presumption, or the fact that it operates to link the two elements of claimant's *prima facie* case, and does not provide any details regarding the basis of the California decision, it is of limited value as well as designated "not published" by the court. Moreover, as the Supreme Court in *Greenwich Collieries* specifically recognized that claimants benefit from the presumption "easing their burden" in claims under the Act, application of Section 20(a) is unaffected by *Greenwich Collieries*. The fact that the ultimate burdens of persuasion are the same under California law and the Longshore Act thus does not absolve the administrative law judge of the duty to inquire into the basis for the California decision in order to determine whether it rests on grounds involving the same burden of proof rather than on any element of causation where claimant is entitled to benefit from Section 20(a).

presumption, and employer offers insufficient evidence to rebut it, collateral estoppel effect cannot be afforded to the California decision.

Accordingly, the Order Granting Respondent's Motion for Summary Decision is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge