BRB No. 05-0996

TROY M. DUPRE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRANK'S CASING CREW AND RENTAL TOOLS, INCORPORATED	)	DATE ISSUED: 08/30/2006
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer-Carrier/ Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Jeremiah A. Sprague (Falcon Law Firm, PLC), Marrero, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-LHC-1895) of Administrative Law Judge C. Richard Avery 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 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 allegedly developed back pain and discomfort while working for employer as a tong operator on September 15, 2003.[1] Claimant testified that his employment duties required him to carry several heavy items including pick-up lines weighing 50-60 pounds, tool boxes that weighed 25-30 pounds, and stands weighing 40-50 pounds which held the tongs that he used to tighten pipe. Tr. at 14. Claimant was subsequently diagnosed with a right L5-S1 disc herniation, CX 1 at 7, 10, and he thereafter sought temporary total disability compensation and medical benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, and that employer failed to rebut it. The administrative law judge further determined that claimant is unable to perform his usual work and that employer had not established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from September 20, 2003, and continuing, and medical benefits. 33 U.S.C. §§908(b), 907.

Employer now appeals, arguing that the administrative law judge erred in finding that claimant established his *prima facie* case or, alternatively, that it failed to rebut the Section 20(a) presumption. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption with regard to claimant's back complaints; specifically, employer avers that claimant has not affirmatively established the occurrence of a work-related accident which could be related to his present condition. We reject this contention. Claimant bears the burden of proving the existence of an injury, or harm, and that a work-related accident occurred or working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If these two elements are established, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link claimant's injury or harm with his employment. *Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Merrill v.*

[1] Claimant explained that a tong is part of a hydraulic tong system that tightens pipe when putting pieces of pipe together.

Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

In the instant case, the administrative law judge found the Section 20(a) presumption invoked on the basis that claimant established a "harm," *i.e.,* his back pain, and that working conditions which could have caused his pain existed, as claimant testified he was required to perform heavy lifting. He also relied on the deposition testimony of claimant's brother, Mr. Dupre, who stated that claimant's crew lifted casing slips weighing approximately 150 pounds multiple times. The administrative law judge further found that Dr. Haydel's notes indicate that claimant experienced pain after performing heavy pulling at work, and that his co-workers testified that he told them he was experiencing back pain while they were on the job. Decision and Order at 16.

These findings are sufficient to establish claimant's *prima facie* case. Initially, employer's contention that claimant did not do so because he did not prove a specific accident occurred must be rejected. A compensable claim may be based on general working conditions or cumulative trauma as well as a specific accident. *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). Employer's remaining arguments essentially go to the weight given evidence by the administrative law judge and his credibility determinations. The administrative law judge is entitled to evaluate the credibility of all witnesses, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and his determinations in this regard are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge rationally credited the testimony that claimant was required to perform repeated heavy lifting and this evidence is sufficient to establish the existence of working conditions which could have caused his harm, we affirm the administrative law judge's determination that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial countervailing evidence that claimant's condition was not caused or aggravated by his employment conditions. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). In establishing rebuttal of the presumption, proof of another agency of causation is not necessary as long as employer introduces substantial evidence that the injury is not related to the employment. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1998). If the presumption is rebutted by employer, it drops from the case, and the administrative law judge must then weigh all the evidence and resolve the causation issue

on the record as a whole with claimant bearing the burden of persuasion. *See Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Employer contends that the administrative law judge erred in finding that it failed to submit evidence sufficient to establish rebuttal. In support of this argument, employer posits that Dr. Harris's October 6, 2003, report establishes rebuttal and that claimant did not attribute his back complaints to a work event when he initially sought medical treatment in September; rather, it was not until October that claimant reported a work-related condition. Employer, however, has identified no reversible error in the administrative law judge's decision. The administrative law judge addressed Dr. Harris's note of October 6, 2003, and found that while it indicates that claimant's condition was not caused by an "accident," it did not establish that claimant's condition was not caused by his employment.[2] Decision and Order at 17. As the administrative law judge's finding that employer failed to produce substantial evidence that claimant's back pain was not related to his working conditions is supported by the record,[3] we affirm the administrative law judge's findings that Section 20(a) was not rebutted and claimant's back condition is causally related to his employment with employer. *See Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

[2] In response to the question "Was disability caused by an accident," Dr. Harris checked a box marked "No." *See* EX 1.

[3] The administrative law judge also rejected employer's reliance on the testimony of Mr. Blakeman, who indicated in his accident report that the condition was not work-related. Mr. Blakeman testified that claimant called to say he needed time off because he had "helped his brothers" and experienced back pain. Decision and Order at 17. The administrative law judge noted that Mr. Blakeman's testimony was the only indication claimant injured his back performing another activity and Mr. Blakeman could not recall what claimant was allegedly doing at this time. Contrary to employer's general assertion, the administrative law judge did not require employer to prove another "process" caused the alleged condition in contravention of *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1998), but rather properly evaluated Mr. Blakeman's testimony and found it was not "substantial evidence to the contrary" under Section 20(a).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge