BRB No. 03-0383

HUBERT PHIL CALVIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONOCO, INCORPORATED	)	DATE ISSUED: Feb. 18, 2004
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Henri M. Saunders (Cardenas Law Firm), Baton Rouge, Louisiana, for claimant.

David L. Barnett (Ostendorf, Tate, Barnett & Wells, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2002-LHC-0235) of Administrative Law Judge Lee J. Romero, Jr., 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. '1301 *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 sustained an injury to his back while working for employer on an offshore oil platform on September 26, 1992. He stated he was attempting to manually free the shaft of a generator by standing on a 48-inch wrench while in the generator enclosure. To exert enough force to turn the wrench, he pushed down with his feet, while in a hunched-over position, and pressed his back into the ceiling. He testified

he immediately heard a loud "pop" in his back and felt pain. Emp. Exs. 1, 15 at 29-30; Tr. at 43-45. Claimant was treated by a medic and flown by helicopter to the hospital. The next day he returned to finish his hitch, but was allowed to "work as tolerated." Cl. Ex. 8 at 5; Tr. at 49-51. Claimant was diagnosed with a compression fracture at L3,[1] but he did not lose any time from work, was treated conservatively, and was released by his doctor, Dr. Ioppolo, in January 1993. Cl. Ex. 12 at 9-11. Claimant sought additional treatment in May 1994 because pain prevented him from tolerating his work any longer. Cl. Exs. 2 at 65, 12 at 12. Employer paid claimant his full salary under its "Comprehensive Disability Income Plan" (CDIP) from May 11, 1994, through June 12, 1995. Thereafter and until January 4, 1999, employer paid claimant temporary total disability benefits, and from January 5, 1999, through May 7, 2001, it paid claimant permanent partial disability benefits. After employer ceased paying benefits, claimant filed a claim for additional benefits, contending he is still disabled.

The administrative law judge found that a work-related injury occurred on September 26, 1992, and that claimant remains disabled from said injury, and he awarded claimant permanent total and permanent partial disability benefits from May 11, 1994, and continuing, allowing employer a credit for benefits paid. However, the administrative law judge disallowed employer's request for a credit for the continuing salary it paid claimant against its liability under the Act. Decision and Order at 20-22, 25, 35, 41. Employer appeals the award of benefits and the disallowance of the credit. Claimant responds, urging affirmance.

Initially, we reject employer's assertion that the administrative law judge erred in finding it did not rebut the Section 20(a), 33 U.S.C. §920(a), presumption. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain *and* that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34

[1]An initial CT scan revealed a central/right-sided bulge at L5, but an MRI thereafter did not substantiate any nerve root compression at that level. Cl. Ex. 12 at 6, 9-10. Other objective tests revealed disc bulges, disc desiccation, and disc degeneration at multiple levels, facet disease, disc narrowing, and early signs of neuropathy, as well as the fracture at L3. Cl. Exs. 2, 13 at 18-20.

BRBS 29(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found that claimant sustained a harm, a compression fracture at L3 and low back pain syndrome, and that there was an accident on September 26, 1992, that could have caused that harm.[2] Decision and Order at 20. Consequently, he properly invoked the Section 20(a) presumption relating claimant's back condition to his employment. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). Employer attempted to rebut the presumption by submitting evidence of claimant's involvement in an automobile accident in 2000 as an intervening injury and of gaps in his treatment to show that his work injury healed and that any continuing disability is due only to the aging process. The administrative law judge rejected both of these rebuttal theories.

The administrative law judge concluded that claimant is a credible witness and that any gaps in his medical treatment were the result of his desire to avoid being limited to light duty work and considered as having suffered a "lost-time" accident. Decision and Order at 17; Tr. at 53, 67. In addressing rebuttal, the administrative law judge found there was no substantial evidence to show that claimant's chronic pain was not work-related, as no doctor related the pain to anything other than his work accident. Decision and Order at 22; Cl. Exs. 12-13. The administrative law judge also found there is no substantial evidence in the record to establish that the automobile accident in 2000 was an intervening cause. He determined that claimant was not injured as a result of that crash, that claimant only had a precautionary x-ray taken because of his history, and that claimant did not seek medical treatment thereafter until May 2001. Decision and Order at 22; Cl. Ex. 13; Tr. at 61-62. As the administrative law judge rationally found that

[2]Although the administrative law judge erroneously stated that employer stipulated to the fact and date of injury, his error is harmless as there is substantial evidence to support the conclusion that an accident occurred on September 26, 1992, namely the testimony of claimant, which the administrative law judge credited, and the emergency room report. Decision and Order at 21; Cl. Ex. 8 at 5; Cl. Ex. 16; Emp. Exs. 1, 15 at 29-30; Tr. at 43-47, 49-51. Similarly, we reject employer's argument that the administrative law judge erred in reporting the contents of Claimant's Exhibit 8 at 5. Decision and Order at 7. The error is harmless as the administrative law judge did not rely on it in rendering his decision.

employer did not establish an intervening cause of claimant's injury, *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998), or introduce substantial evidence that claimant's back injury is not work-related, *Bunol*, 211 F.3d 294, 34 BRBS 29(CRT), we affirm the finding that Section 20(a) is not rebutted. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Furthermore, the administrative law judge specifically stated that, on the record as a whole, claimant established the work-relatedness of his injury by the preponderance of the evidence. Decision and Order at 22. He credited not only claimant's statements regarding the injury and the pain, but also Dr. Ioppolo's statement that the pain is causally related to the work accident. *Id.* at 21-22; Cl. Ex. 12 at 30. Accordingly, we affirm the administrative law judge's finding that claimant's injury is work-related. *See Quinones v. H.B. Zachary, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Employer next contends the administrative law judge erred in finding the existence of a continuing disability. Specifically, it argues that claimant's work-related back problems ceased when the compression fracture at L3 healed in January 1993, and it asserts that claimant's continued pain is related to the aging process. While claimant's doctors could not definitively identify what was causing claimant's continued pain, Dr. Ioppolo stated that the compression fracture at L3 was not "going to go away" and could cause long-term back pain. Cl. Ex. 12 at 17-18, 30. Dr. Clark, claimant's treating physiatrist, also could not explain claimant's chronic pain and said he would defer to Dr. Ioppolo's opinion on causation. Cl. Ex. 13 at 28, 44. The administrative law judge found that claimant credibly testified that he continues to experience pain, that he has done so since the accident in 1992, and that, as of May 1994, the pain prevented him from performing his usual work. As a claimant's credible complaints of pain are sufficient to support a finding of inability to work, and as claimant's back pain here is related to his work accident, we reject employer's argument that there is no continuing disability as a result of that pain. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). Because employer has not challenged the findings regarding maximum medical improvement and suitable alternate employment, we affirm the administrative law judge's award of permanent total and permanent partial disability benefits.

Employer also contends the administrative law judge erred in failing to grant it a credit against its liability under the Act for the full salary payments it made to claimant between May 11, 1994, and June 12, 1995. Employer argues that its CDIP is equivalent to the salary continuation plan found in *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT), and that, as in *Shell Offshore*, it should be granted a full credit for those payments. We disagree with employer. In order for an employer's payments of salary to be credited against its liability for benefits under the Act pursuant to Section 14(j), it must

establish that those payments were "advanced payments of compensation." 33 U.S.C. §914(j); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978); *Luker v. Ingalls Shipbuilding*, 3 BRBS 321 (1976). One method of establishing that the payments were "advanced payments of compensation" is to notify the district director that compensation payments had begun. 33 U.S.C. §914(c); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Breen v. Olympic Steamship Co.*, 10 BRBS 334 (1979).

Employer's CDIP specifically provides:

> The amount of income you receive from CDIP after termination from employment is reduced by the income you receive or are eligible to receive from other income benefits, whether or not actually paid, had you made timely application under any or all of the following:
>
> 1. Workers' Compensation benefits either paid or payable for the period of time benefits were received under CDIP....

Emp. Post-Hearing Brief at Exh. 1.[3] As the administrative law judge stated, this program calls for the reduction of an employee's income under the plan by the amount he receives or could receive from a number of compensation plans. He correctly concluded that the plan does not call for the income payments to be credited against employer's liability for workers' compensation or other benefits. Decision and Order at 41. Thus, the plain language of the plan contemplates that salary payments would be made in conjunction with disability benefits and not in lieu of them. Further, as the administrative law judge also found, there is no evidence in the record to establish that employer notified the district director that its continuing payments of salary to claimant were payments of compensation under the Act. Decision and Order at 41. Accordingly, it was reasonable for the administrative law judge to conclude that employer's salary payments from May 11, 1994, through June 12, 1995, were not advanced payments of compensation. *Patterson*, 846 F.2d at 723, 21 BRBS at 59(CRT); *Breen*, 10 BRBS at 336.

Contrary to employer's argument, we cannot determine whether its salary continuation plan is identical to the plan involved in *Shell Offshore*. In *Shell Offshore*, the plan provided for 26 weeks of full pay and 26 weeks of half-pay to the employee. The administrative law judge determined that the full payments of salary were advanced payments of compensation but that the half-payments were not. No party challenged his

[3]Payments under the CDIP would also be reduced by benefits from retirement plans, social security, other government programs, and other disability programs.

finding as to the full payments; however, Shell contested the administrative law judge's decision to give it a credit for only two-thirds of the payments made. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the current case arises, held that the evidence did not support or explain a two-thirds credit, and it modified the decision to reflect Shell's entitlement to a full credit. *Shell Offshore*, 122 F.3d at 318, 31 BRBS at 132-133(CRT). The question of whether the full payments constituted "advanced payments of compensation" was not at issue before the court, and the only description the court gave of the relevant provision of the plan stated: "while the full-wage payments were to be offset by compensation payments, the SDB Plan stated that the half-wage payments were not to be so offset." *Id.*, 122 F.3d at 318, 31 BRBS at 133(CRT). Employer latches on to this sentence and contends the administrative law judge erred by making a distinction between the words "offset" and "reduce." While the words may be interchangeable, the lack of a thorough discussion in *Shell Offshore* makes it impossible to compare plans to ascertain whether employer's plan is identical to the Shell plan and deserves to be treated in the same manner. Thus, the matter is left to the fact-finder, and the administrative law judge's determinations that employer did not notify the district director of the commencement of compensation payments and that the salary payments were not advanced payments of compensation are rational. We, therefore, affirm his decision to disallow a credit for the salary payments. *Patterson*, 846 F.2d at 723, 21 BRBS at 59(CRT); *Fleetwood*, 16 BRBS at 286; *Breen*, 10 BRBS at 336.

Finally, employer contends the administrative law judge erred in calculating claimant's post-injury wage-earning capacity. It argues that the administrative law judge erred in adjusting claimant's post-injury wages to account for inflation between the date of injury and the date he began working in suitable alternate employment because those wages are reasonably representative of his post-injury wage-earning capacity and the Act does not provide for the inflationary adjustment. Contrary to employer's assertion, the administrative law judge did not err in accounting for inflationary effects on claimant's wages. Long-standing law interprets Section 8(h) of the Act, 33 U.S.C. §908(h), as requiring the administrative law judge to compare the claimant's average weekly wage at the time of the injury with the wages his post-injury job paid at the time of the injury. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). This assures that the calculation of lost wage-earning capacity is not distorted by inflation or depression. *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). Thus, contrary to employer's argument, the administrative law judge properly accounted for inflation in comparing claimant's average weekly wage in 1992 with his actual wages in suitable alternate employment in 1999. Decision and Order at 43-45; *see Quan v. Marine Power & Equip. Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990) (proper to use the percentage increase in the National Average Weekly Wage and adjust post-injury earnings downward to the date of injury). Consequently, we reject employer's argument

regarding the inflationary adjustments, and, as no party challenges the specific calculations, we affirm the administrative law judge's post-injury wage-earning capacity findings.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge