

BRB No. 01-0455

DONALD W. DURANT, JR. )  
 )  
 Claimant-Petitioner )  
 )  
 v. )

BAYOU FLEET, )  
 INCORPORATED )  
 )  
 and )  
 )  
 LOUISIANA WORKERS' )  
 COMPENSATION CORPORATION )  
 )  
 Employer/Carrier- )  
 Respondents )

)  
 DATE ISSUED: Jan. 11, 2002

) DECISION and ORDER

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

Donald W. Durant, Jr., Slidell, Louisiana, *pro se*.

Ted Williams (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order (00-LHC-1827, 3034, 3035, 3036, 3037, 3038) 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. *Id.*

Claimant, who was employed as a port engineer by employer, filed claims under the Act, based on a series of injuries which he alleged aggravated his underlying back condition, culminating on August 16, 1999, the day employer terminated him because he was physically unable to perform his job duties any longer. *See CX 1.* As a result of his alleged work-related condition, claimant

sought temporary total disability compensation and medical benefits.

In his Decision and Order, the administrative law judge, after noting that claimant provided no evidence that his work for employer caused, aggravated or accelerated his condition, stated that claimant blames unwitnessed, undocumented and unmentioned accidents at work for his present medical condition and declined to accept claimant's testimony without corroboration. The administrative law judge thus concluded that claimant failed to establish his *prima facie* case and consequently was not entitled to invocation of the Section 20(a) presumption. Accordingly, the administrative law judge denied claimant compensation.

Claimant, representing himself, appeals, contending that the administrative law judge erred in denying his claim for temporary total disability compensation and medical benefits. Employer responds, urging affirmance of the administrative law judge's decision.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, 33 U.S.C. §920(a), which may be invoked only after he establishes a *prima facie* case, *i.e.*, he demonstrates that he suffered a harm and that an accident occurred at work or working conditions existed which could have caused that harm. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir.1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also 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 by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Industries*, 455 U.S. 608, 14 BRBS 631. 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 was not related to the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). 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) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (*en banc*); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). Thus, employer must present evidence addressing aggravation or contribution in order to rebut the Section 20(a) presumption. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

Initially, we note that employer does not dispute that claimant established the harm element of his *prima facie* case, *i.e.*, chronic back pain, disc degeneration at L4-5, spinal stenosis of L4-5

with bilateral foraminal narrowing, and bilateral L4-5 spondyloslisthesis.<sup>1</sup> See EX 3. However, while employer does not contest claimant's description of his job duties throughout his two year tenure, employer argued, and the administrative law judge found, that claimant's back condition was unrelated to his work with employer.

Claimant contends that administrative law judge erred in not giving him the benefit of the Section 20(a) presumption since, he asserts, he has established that he has a back condition and that his work at employer's facility subjected him to strenuous physical activity. We agree. In concluding that claimant has not made a *prima facie* case, the administrative law judge erred in requiring claimant to demonstrate that his employment activities with employer either caused, aggravated or accelerated his back condition. Decision and Order at 11. See *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Although the administrative law judge found that claimant established that he has a harm, generally a chronic back condition, the administrative law judge erred in finding that claimant did not establish the existence of working conditions which could have aggravated or accelerated his back condition.

The parties are in agreement that claimant's work for employer was physically strenuous, requiring him to move pipe, pull chain, build blocks and tackles, set up cranes and rig buckets, generally without assistance. HT at 93-95, 99-100; EXS 6, 7. Indeed, Kenneth Touts, employer's controller, testified that claimant's work at employer's facility consistently would aggravate and render symptomatic claimant's back condition, HT at 23, 33, 40-42, that employer had offered claimant light-duty work at approximately half his salary, HT at 34, and that claimant would start the workday, work for two hours, lay down for four hours, then work for two hours. HT at 36. Moreover, employer terminated claimant because the physical demands of his position were beyond claimant's abilities. HT at 33. Thus, claimant's testimony that he performed heavy labor, and regularly experienced back pain and discomfort while working for employer, is not contested but rather is corroborated by the other relevant evidence regarding his work activities. This evidence, moreover, is sufficient to establish that working conditions existed which could have caused, aggravated or accelerated claimant's back pain. Claimant need not prove that an accident occurred or relate his harm to a specific event, but may base his claim upon general working conditions over a period of time. See *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Therefore, having established that strenuous working conditions existed which could have aggravated his back condition, claimant established the second element of his *prima facie* case.

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<sup>1</sup>In this regard, the administrative law judge specifically stated that “[c]laimant’s long standing back discomfort is well documented both by his testimony at trial and the medical records and testimony received into evidence.” See Decision and Order at 11.

Contrary to the administrative law judge's conclusion, claimant is not required to prove that his work activities were sufficient, in fact, to cause, aggravate or accelerate his back condition prior to invocation of the presumption. *See Stevens*, 23 BRBS at 193. Once claimant establishes a harm, and the existence of working conditions which *could* have caused it,<sup>2</sup> Section 20(a) applies to link the harm to the work activities, placing the burden of producing substantial evidence in rebuttal upon employer. We, therefore, reverse the administrative law judge's finding that claimant failed to establish the working conditions element of his *prima facie* case, and we hold that claimant is entitled to invocation of the Section 20(a) presumption of the Act. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). The case is accordingly remanded for the administrative law judge to consider whether employer has rebutted the presumption with substantial evidence that claimant's back condition is not related to his employment activities with employer. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

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<sup>2</sup>Claimant also submitted the medical opinions of Drs. Bourgeois and Kaufman in support of the proposition that his work activities could have aggravated his back condition.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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