BRB No. 06-0546

JUNIUS DAVIS	)	
Claimant-Petitioner	)	
v.	)	
QUALITY CONSTRUCTION AND PRODUCTION, LLC	)	DATE ISSUED: 01/31/2007
and	)	
GRAY INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington., Administrative Law Judge, United States Department of Labor.

Anthony F. Salario, Marksville, Louisiana, for claimant.

John H. Hughes (Allen & Gooch), Lafayette, Louisiana, for employer/ carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-LHC-1164) of Administrative Law Judge Clement J. Kennington 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 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 worked for employer as a pipe welder on offshore oil platforms. While working offshore, claimant would perform his employment duties on one platform, and upon the completion of his shift would be transferred to another platform where he would sleep. Workers were transferred between platforms via vessels utilizing a "Billy Pugh" personnel basket. This personnel basket consists of two rings attached to each other by rope webbing, with the top ring smaller than the bottom ring. *See* EX 12; CX 25 at 12. Workers would step onto the lower, larger ring, and either link arms or hold onto the webbing while a platform crane would lift the basket from the vessel's deck onto the receiving platform or visa versa. 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, in such a personnel basket in high seas when the personnel 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 workers disembarked.

The following morning, claimant complained of back stiffness and discomfort. Claimant was airlifted to the mainland and subsequently transported by employer to the hospital. Claimant was prescribed various pain medications and was later diagnosed with a disc herniation at L5–S1 and a mild annular bulge at C5-6. Claimant has not returned to work since the date of the alleged work incident, and his physician has recommended that he undergo a L5-S1 bilateral diskectomy with pedicle screw fusion.

In his Decision and Order, the administrative law judge, after initially stating that he was not impressed with claimant's credibility, 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. Pursuant to this finding, the administrative law judge rejected claimant's assertion that he was injured at work, and he consequently determined that claimant failed to establish the second element of his *prima facie* case. Accordingly, the administrative law judge dismissed the claimant's claim as lacking merit.

On appeal, claimant contends that the administrative law judge erred in determining that his evidence is insufficient to establish his *prima facie* case and in thus denying him invocation of the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision.

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). 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; see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant establishes his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides him with a presumption that his condition is causally related to his employment. Upon invocation of the presumption, the burden shifts to employer to produce substantial evidence that claimant's condition was neither caused nor aggravated by his employment.[1] *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT)*;* S*winton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *O'Kelley*, 34 BRBS 39. If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole. *Id.; see also Director, OWCP, v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In the instant case, claimant contends that the administrative law judge erred in denying him the benefit of the Section 20(a) presumption since, he asserts, he has established that he sustained a harm, specifically a back injury, and that a work incident occurred on May 30, 2004, which could have caused or aggravated that condition.[2] We agree. In denying claimant's claim, the administrative law judge declined to credit claimant's testimony that it was he who struck the *Noonie G*'s grocery box while being lifted from that vessel's deck on May 30, 2004. Contrary to claimant's recollection of events on that day, the administrative law judge found that it was Mr. Duck who struck the grocery box and, pursuant to that finding, the administrative law judge determined that claimant failed to establish the second element of his *prima facie* case. Decision and Order at 9.

The administrative law judge's determination that claimant failed to establish his *prima facie* case cannot be affirmed since the record establishes that claimant was riding in a "Billy Pugh" personnel basket that struck a grocery box during its ascent from the deck of the *Noonie G* and this event is sufficient to establish the existence of a work incident on May 30, 2004, which could have caused or aggravated claimant's present

[1] The aggravation rule provides that where an injury aggravates, accelerates, or combines with a prior injury, the entire resulting condition is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc).*

[2] It is undisputed that claimant has been diagnosed with a herniated disc. Thus, claimant has established the existence of a harm in the instant case.

back condition. Specifically, Mr. Strong, the captain of the *Noonie G* on May 30, 2004, testified that the vessel was experiencing 8 to 10 foot waves when the personnel basket struck the grocery box on its ascent to the platform. EX 11A at 13-27. Mr. Sutton, a deckhand on the *Noonie G* who held the tag line on the personnel basket during its ascent, recalled 6 to 8 foot swells when the basket made contact with the vessel's grocery box. Tr. at 119-125. Mr. Duck, who rode the personnel basket with claimant, testified that 6 to 8 foot seas kicked the *Noonie G* sideways during the basket's ascent, but that it was he and the lower ring of the personnel basket that struck the grocery box. EX 16 at 14-15, 18-19. Mr. Lirette, the platform crane operator who was responsible for lifting the personnel basket from the deck of the *Noonie G* to the platform, testified that the *Noonie G* was drifting away from the platform when he commenced lifting the personnel basket from its deck, and that the basket was approximately five feet from the deck when it made contact with the grocery box. CX 25 at 20-22. Lastly, Mr. Ladd, a rigger, similarly testified that the personnel basket occupied by claimant made contact with the *Noonie G*'s grocery box. CX 26 at 21-31.

Given this evidence, the administrative law judge erred in rejecting claimant's claim based solely on his finding that claimant himself did not strike the *Noonie G*'s grocery box during the personnel basket's ascent from that vessel to the platform. As the record contains substantial, uncontroverted evidence that claimant was on the personnel basket when it struck the *Noonie G*'s grocery box while being lifted from that vessel's deck during the presence of 6 to 8 foot waves, claimant has established the existence of a work incident which could have potentially caused or aggravated his present back condition. *See generally Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985). We, therefore, reverse the administrative law judge's finding that claimant has failed to establish the accident/working conditions element of his *prima facie* case, and hold that invocation of the Section 20(a) presumption has been established as a matter of law. Accordingly, we remand the case for the administrative law judge to consider whether employer has rebutted the presumption by producing substantial evidence that claimant's back condition was not caused or aggravated by the incident involving the basket.[3] *See Conoco,* 194 F.3d 684, 33 BRBS 187(CRT); S*winton*, 554 F.2d 1075, 4 BRBS 466;

[3] After concluding claimant did not establish the second prong of his *prima facie* case, the administrative law judge summarily stated that even if claimant had made a sufficient showing, it was rebutted by employer's credible testimony. Decision and Order at 9. This statement does not offer a basis for affirmance, as the administrative law judge did not reference the testimony to which he referred, and the context indicates that the reference is to employer's evidence that claimant did not strike the grocery box itself. The question on rebuttal, however, involves the causal link between the established incident and claimant's back condition, an inquiry generally resolved by medical evidence.

O'Kelley, 34 BRBS 39. Should the administrative law judge determine that the presumption is not rebutted, or that, although rebutted, claimant has established a causal connection between his present back condition and his employment with employer based on the record as a whole, *see Devine*, 23 BRBS 279, the administrative must then address any remaining issues.

Accordingly, the administrative law judge's finding that claimant is not entitled to invocation of the Section 20(a) presumption is reversed, and the case is remanded 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