BRB No. 90-1776

DAVID C. AUFANG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TACOMA BOATBUILDING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
PACIFIC MARINE INSURANCE COMPANY	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	
	)	
Employer/Carriers-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

James R. Walsh, Lynnwood, Washington, for claimant.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer and carrier Liberty Northwest Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-1218, 89-LHC-1219) of Administrative Law Judge James J. Butler denying benefits 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 if they 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 welder-fitter for employer beginning in 1974. In 1982,

claimant sustained a work-related back injury, and ultimately settled his claim for compensation for the injury under an approved Section 8(i) settlement. *See* 33 U.S.C. §908(i). In 1983, claimant returned to work for employer performing modified work; he continued working in that capacity until July 1985 when he was terminated as part of a general reduction-in-force. Upon recalling its employees in November 1985, employer advised claimant that modified work was no longer available for him; thus, claimant did not return to work at that time. Thereafter, on July 1, 1986, claimant returned to work for employer, although the work to which he was assigned proved to be not within his medical restrictions. Claimant worked for three days despite experiencing increasing back pain. On his fourth day of work, July 7, 1986, while in the course of carrying a flat bar on his shoulder, claimant suffered sharp back pain causing him to drop the flat bar. Claimant immediately sought medical attention at St. Peter Hospital's emergency room and has not returned to work since that day.

Claimant filed a claim for benefits under the Act, contending that he had become permanently totally disabled as a result of his July 1986 injury. Following a formal hearing, the parties filed briefs with the administrative law judge. In his Decision and Order, the administrative law judge denied claimant's claim on the grounds that claimant did not sustain a work-related injury in July 1986, concluding that:

> [Claimant's] effort to return to work in early July of 1986 finally served, I hope, as a last bitter lesson that his already severely impaired back would not tolerate the vigorous but regular strains and stresses required of an ordinary workman in the shipyard. As a result of this work-trial the employee lost nothing, he merely learned something.

Decision and Order at 6.

On appeal, claimant challenges the administrative law judge's denial of benefits; specifically, claimant contends that the administrative law judge erred in incorporating employer's post-hearing brief into his decision without independently analyzing the evidence and that the administrative law judge erred in failing to find that claimant sustained a work-related injury in July 1986 resulting in permanent total disability. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge erred in virtually adopting employer's brief as his decision; specifically, we note that the administrative law judge's decision and order substantially consists of either verbatim quotations from employer's brief or the administrative law judge's abbreviated and paraphrased version of employer's arguments and analysis of the evidence. Decisions rendered by administrative law judges under the Act are required by the Administrative Procedure Act to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Thus, in rendering a decision, an administrative law judge must adequately detail the rationale behind his decision, he must analyze and discuss the medical evidence of record, and he must explicitly set forth the reasons as to why he has accepted or rejected such evidence. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380

(1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

Although it is not *per se* error for an administrative law judge to adopt or to incorporate verbatim language from a party's pleading, *see Williams*, 17 BRBS at 62; *Orange v. Island Creek Coal Co.*, 3 BLR 1-636 (1978), an administrative law judge's incorporation of factual and legal assertions from a party's brief is impermissible to the extent it prevents independent review of the evidence by the adjudicator. *Id.* In the instant case, the administrative law judge's decision reflects a selective analysis of the evidence and conclusory findings.

For example, the administrative law judge cited to the opinions of two treating physicians, Drs. Reese and Emmons, in support of his decision. Specifically, the administrative law judge, citing only to Dr. Reese's 1987 deposition, stated that that physician opined that claimant's July 1986 work activities did not permanently aggravate his physical condition. *See* Decision and Order at 6. In so doing, the administrative law judge failed to take into consideration Dr. Reese's subsequent letter dated October 17, 1988, or his 1989 deposition testimony, which, if credited, could support a finding that claimant's back condition was aggravated or accelerated by his return to work in July 1986. In the October 17, 1988 letter, Dr. Reese reported that claimant's July 7, 1986 injury contributed to a permanent worsening or aggravation of his condition. *See* Cl. Ex. 3. In his 1989 deposition, Dr. Reese testified that there was a permanent worsening of claimant's condition due to his work conditions in July 1986 because claimant was deconditioned after being off work for a year. *See* Liberty Northwest Ex. 25 at 20-21, 24-31. Thus, the administrative law judge erred in relying on the opinion of Dr. Reese, as expressed in his 1987 deposition, to find claimant did not sustain an injury in July 1986 without addressing Dr. Reese's two subsequent statements further expounding on his opinion as to whether claimant's return to work in 1986 contributed to a permanent aggravation of his back condition.[1] Based upon the administrative law judge's failure to perform independent factfinding based upon the totality of the evidence of record, we conclude that remand of this case to the administrative law judge is necessary.

On remand, the administrative law judge must independently consider the medical evidence of record, consistent with the applicable legal standards, regarding the issue of whether claimant sustained a work-related aggravation of his back condition in July 1986. It is well-established that, in order to establish that he has suffered an injury under the Act, a claimant need only establish some physical harm, *i.e.*, that something has gone wrong with
the human frame. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc*); *see also Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989). Credible complaints of subjective symptoms and pain are sufficient to establish the element of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). Similarly, experiencing back pain at work can be sufficient to establish an injury. *See Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981). Furthermore, an injury includes one occurring gradually as a result of continuing exposure

[1]Dr. Emmons, who examined claimant on July 16, 1986, could not determine the course of claimant's back pain. *See* Cl. Ex. 6.

to conditions of employment, and it is sufficient if the employment aggravates the symptoms of the process. *See Care v. Washington Metropolitan Area Transit Authority,*, 21 BRBS 248, 250 (1988). Where an employment-related injury aggravates, combines with or accelerates a pre-existing condition, the entire resultant condition is compensable. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). If claimant establishes that he suffered some harm or pain and that an accident occurred or working conditions existed which could have caused the harm or pain, claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his condition is caused or aggravated by his employment. *See generally Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If, on remand, the administrative law judge finds the Section 20(a) presumption invoked, he must determine whether employer has produced substantial countervailing evidence to rebut the presumption that claimant's back condition was caused or aggravated by his return to work in July 1986. *See generally Care*, 21 BRBS at 251. If the administrative law judge determines that the presumption has been rebutted, he must consider the causation issue based upon the record as a whole, with employer bearing the ultimate burden of persuasion. *See Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980).

Finally, if the administrative law judge finds that claimant sustained a back injury caused or aggravated by his return to employment in July 1986, he must independently consider the issue of the nature and extent of claimant's disability.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge