BRB No. 91-2193

BERNARD GAINES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED:_____)
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence A. Arcell (Barker, Bourdreaux, Lamy & Foley), New Orleans, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey, Stafford, Cellini & Lang), New Orleans, Louisiana, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (89-LHC-3778) of Administrative Law Judge James W. Kerr, 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.* (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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, on Friday, June 27, 1986, allegedly sustained an injury to his back when he was jolted while driving his forklift over a bump during the course of his duties as a forklift operator. Tr. at. 41-42, 47. Claimant stated that although he immediately experienced pain after hitting the bump, he continued working until the end of his shift at

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

6:00 p.m. *Id.* at 42. Claimant reported to work the following day, and later visited the emergency room at Mercy Hospital with complaints of low back pain radiating into a headache. Decision and Order at 3; Emp. Ex. 9. Claimant also complained of a sore throat and was found to have a temperature of 102 degrees. Based on claimant's symptoms, he was hospitalized, prescribed penicillin, and scheduled for a myelogram. Claimant was examined by various physicians during his hospitalization and follow-up care resulting in conflicting medical opinions concerning whether his symptoms are work-related. Claimant subsequently reported the alleged accident to employer on Monday, June 30, 1986. Emp. Ex. 1.

In his Decision and Order, the administrative law judge found that claimant did not present sufficient evidence to sustain his burden of proof that a work-related injury occurred on June 27, 1986. Additionally, the administrative law judge found that, even if the Section 20(a) presumption had been invoked, that presumption would have been rebutted by the opinion of Dr. Applebaum. Accordingly, the administrative law judge denied the instant claim for benefits.

On appeal, claimant challenges the administrative law judge's findings regarding the occurrence of an injury on June 27, 1986. Claimant further contends that the administrative law judge erred in failing to render a decision which comports with the Administrative Procedure Act. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a) presumption which applies to the issue of whether an injury is causally related to his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Before Section 20(a) is applicable, however, claimant must establish his *prima facie* case, *i.e.*, that he sustained some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In this case, it is uncontroverted that claimant suffers from back pain. The first element of his *prima facie* case is thus not at issue. In order to invoke Section 20(a), however, claimant must establish that the alleged accident occurred.

In the instant case the administrative law judge concluded that claimant failed to establish that a work-related accident occurred on June 27, 1986. Specifically, the administrative law judge rejected claimant's testimony that he experienced pain after driving over a bump based upon his failure to immediately report the incident to anyone, his failure to produce eyewitnesses to corroborate his allegations, and his return to work the following day. *See* Decision and Order at 6. In making this credibility determination, the administrative law judge did not address claimant's testimony that his failure to report the alleged incident on June 27, 1986, a Friday, was occasioned by the lack of a supervisor or superintendent on duty that day, and that he thereafter immediately reported the incident on Monday, June 30, 1986. *See* Tr. at 51-55.

Additionally, the administrative law judge did not set forth and discuss the testimony of Mr. Nelson, claimant's co-worker, who testified as to the existence of a working condition which could

have caused claimant's harm, *i.e.*, the presence of a bump in the blacktop at employer's facility.[1] Tr. at 27-29. Thus, contrary to the administrative law judge's statement, there is evidence corroborating the existence of a condition at work which could have caused the injury. In addition, Mr. Nelson testified that claimant described the alleged accident to him the next day, and the administrative law judge indicated at the hearing that this testimony would be considered insofar as it was relevant to claimant's state of mind. In view of the administrative law judge's reliance on claimant's working that day and the time lapse in notifying employer in discrediting claimant, this evidence must be considered.

Hearings of claims arising under the Act are subject to the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must analyze and discuss the evidence of record; failure to do so will violate the Administrative Procedure Act's requirement for a reasoned analysis. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Based upon the administrative law judge's failure to address the totality of claimant's testimony, as well as the testimony of Mr. Nelson, we must vacate the administrative law judge's decision, and remand the case for reconsideration of whether claimant established his *prima facie* case. On remand, the administrative law judge must address all of the evidence relevant to this issue, and specifically determine whether claimant has established that an accident occurred or working conditions existed which could have caused the harm alleged by claimant.

On remand, should claimant establish the two elements of his *prima facie* case, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link the injury with claimant's employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption, the burden shifts to employer to present specific and countervailing evidence sufficient to sever the causal connection between the injury and employment. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.* 17 BRBS 153 (1985).

We note that the administrative law judge, in his decision, stated that if the Section 20(a) presumption had been invoked, the testimony of Dr. Applebaum was sufficient to establish rebuttal. *See* Decision and Order at 7. The administrative law judge did not, however, proceed to weigh all of the evidence and resolve the causation issue based on the record as a whole. In this regard, we note that the administrative law judge did not set forth, discuss, or analyze the testimony of Dr. Vogel, a neurosurgeon who treated claimant from June 29, 1986 through November 12, 1987, which, if credited, would support a finding of causation. *See* Jt. Ex. 1; Emp. Ex. 6. Specifically, Dr. Vogel diagnosed claimant as having sustained a work-related acute lumbersacral sprain. *See* Jt. Ex. 1 at 25-26. Accordingly, on remand, should the administrative law judge determine that the Section

[1]At the formal hearing the administrative law judge, after noting that Mr. Nelson had not witnessed the alleged incident involving claimant, stated that Mr. Nelson's testimony "will not in any manner be considered for the fact that an accident occurred." *See* Tr. at 33. We note that this statement did not preclude consideration of Mr. Nelson's testimony regarding the presence on a bump in the blacktop at employer's facility.

20(a) presumption has been both invoked and rebutted, the administrative law judge must weigh all of the evidence of record and resolve the causation issue based on the record as a whole. *See Hughes*, 17 BRBS at 153.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge