BRB No. 92-0328

ALVIN R. TAROLI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Shannon T. Mason, Jr. (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-1473) of Administrative Law Judge Richard K. Malamphy 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, on March 10, 1989, allegedly sustained an injury to his back while moving gas cylinders/bottles during the course of his employment with employer. *See* TR at 27. Claimant testified that he notified his supervisor, Mr. Waddy, of this incident on the day on which it occurred, *id.* at 28; Mr. Waddy, however, although acknowledging that he and his co-workers moved gas cylinders/bottles in March 1989, disavowed any knowledge of claimant's alleged back injury. *Id.* at 97. However, Mr. McReynolds, a co-worker of claimant, corroborated claimant's testimony. *Id.* at 12. Claimant testified that he experienced continuing pain after this incident, but that he did not miss any work. *Id.* at 29. On March 25, 1989, claimant was involved in an altercation with officers of the Suffolk Police Department at which time, claimant testified, one of the officers put a knee in the back of his right leg. *Id.* at 31. On May 10, 1989 and July 5, 1989, claimant sought treatment at

the emergency room of Obici Hospital complaining of pain in his left leg as a result of being kicked in the left thigh approximately two months earlier. Thereafter, claimant, complaining of pain in his left hip and back, treated with both his family physician and employer's clinic. Claimant subsequently sought medical treatment from Dr. Kells, an orthopedic surgeon, who diagnosed a herniated disc, and Dr. Magness, a neurosurgeon, who also diagnosed a herniated disc and performed surgery twice to alleviate the condition. On August 2, 1989, after his first surgery, claimant informed Dr. Magness that his lifting of the gas cylinders/bottles in early March was the source of his injury. Claimant was off work from July 10, 1989 through December 10, 1989, due to the problems with his back.

In his Decision and Order, the administrative law judge determined that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption of causation. Next, the administrative law judge found that employer rebutted the presumption and, after evaluating the record as a whole, determined that claimant's injury did not arise out of or in the course of his employment. The administrative law judge therefore denied claimant's claim for disability compensation.

On appeal, claimant contends the administrative law judge erred in finding that employer presented substantial evidence sufficient to rebut the Section 20(a) presumption. Employer responds, urging affirmance.

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 activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Before Section 20(a) is applicable, claimant must establish that he has sustained some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Kelaita v. Triple A. Machine Shop*, 13 BRBS 326 (1981). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption applies to link the harm with claimant's employment. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Additionally, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was caused by a subsequent non work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). 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. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Claimant argues on appeal that the administrative law judge erred in finding that employer introduced evidence sufficient to establish rebuttal of the Section 20(a) presumption. We agree. In the present case, the administrative law judge, after specifically stating that it is undisputed that claimant was involved in moving heavy gas cylinders/bottles in March 1989 and that claimant did sustain an injury to his back, found that claimant was entitled to invocation of the Section 20(a) presumption. Next, after setting forth the testimony of Dr. Magness and claimant, the administrative law judge determined that employer presented sufficient evidence to rebut the presumption. Lastly, the administrative law judge weighed the evidence as a whole and, after finding claimant's testimony to be wholly unreliable and Dr. Magness's testimony to be equivocal with regard to the cause of claimant's back pain, found that claimant's condition was unrelated to his employment.

We hold that the administrative law judge erred in finding that employer presented evidence sufficient to rebut the Section 20(a) presumption. In discussing Dr. Magness's testimony, the administrative law judge acknowledged that Dr. Magness did not offer a definitive opinion as to the cause of claimant's back pain; rather, Dr. Magness specifically stated that he could not determine the source of claimant's back pain. *See* EX-8; Decision and Order at 3, 5. Inasmuch as Dr. Magness could not rule out a causal connection between claimant's injury and his employment, his opinion cannot meet employer's burden of establishing rebuttal. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Kier*, 16 BRBS at 128. Next, the administrative law judge found claimant's testimony to be unreliable; specifically, the administrative law judge noted claimant's inconsistent testimony regarding his altercation with the police and his failure to relate his back pain to his employment until five months after the work-incident. Although negative evidence may be sufficient to rebut the Section 20(a) presumption if that evidence is specific and comprehensive, *see Swinton*, 554 F.2d at 1075, 4 BRBS at 466, discrediting claimant's testimony in the instant case is insufficient to establish rebuttal of the presumption and to sever the presumed causal connection.[1] As in *Swinton*, there is no direct evidence in this case either attributing

[1]Our dissenting colleagues's reliance on the United States Court of Appeals for the Fifth Circuit's decision in *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981)(*en banc*), *aff'g* 10 BRBS 73 (1979), for the proposition that a negative credibility determination will rebut Section 20(a), is misplaced. In *Pigrenet*, neither the court nor the Board addressed the employer's burden of proof pursuant to the Section 20(a) presumption. The issue in *Pigrenet* involved the cause of claimant's disability where he sustained an injury at work followed by several subsequent accidents resulting in injuries. The Board, in a footnote, noted that the administrative law judge concluded that there was adequate evidence to rebut the presumption. 10 BRBS at 75, n.3. The Board's opinion does not state the nature of this evidence, but addresses the arguments raised on appeal, which pertain to whether the administrative law judge properly weighed the evidence; the presumption having been rebutted, it dropped from the case. On appeal, the court did not mention Section 20(a), although in summarizing the facts the court specifically described medical evidence attributing claimant's problems to a subsequent automobile accident and stated that employer submitted medical and other evidence at the initial hearing. It thus cannot be assumed that the only relevant evidence was claimant's testimony. Since Section 20(a) had been rebutted, the

claimant's condition to the police altercation or stating that the work event could not have caused the harm alleged. Employer simply failed to meet its burden of proof. *See, e.g., Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (where none of the physicians of record expressed an opinion ruling out the possibility of a causal connection between claimant's accident and his disability, there was no "direct concrete evidence" sufficient to rebut the statutory presumption); *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 984 (1982) (employer's evidence on rebuttal must sever the potential connection between the disability and the work environment); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Accordingly, as neither the testimony of Dr. Magness or claimant is sufficient to establish rebuttal of the presumption, we reverse the administrative law judge's finding that employer rebutted the presumption. *See Bridier*, 29 BRBS at 84. As the presumption was not rebutted, causation is established as a matter of law.[2] The case must therefore

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issue was whether claimant established that his disability was related to his work accident; since claimant's testimony was properly discredited, the court found that the administrative law judge properly held that claimant failed to do so. Thus, *Pigrenet* addresses claimant's case after Section 20(a) is rebutted, and does not discuss employer's burden. In contrast, in the present case, the issue is whether employer presented specific and comprehensive evidence sufficient to rebut Section 20(a). Employer presented no affirmative evidence, and its meeting its burden of proof is a necessary prerequisite to weighing the evidence in the record as a whole.

[2]We disagree with our dissenting colleague's conclusion that the administrative law judge's findings support a conclusion that a work event sufficient to cause the harm alleged was not established. Our colleague acknowledges that the administrative law judge found it undisputed that claimant was involved in moving gas bottles in March 1989, but finds proof of some additional "work event" necessary. In order to invoke Section 20(a), however, claimant must establish the existence of working conditions which *could have* caused the harm; proof of a specific accident or injury is not required. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989). We also disagree with the conclusion that *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1980), supports our colleague's position. In *Goldsmith*, the United States Court of Appeals for the Ninth Circuit affirmed the Board's decision affirming an administrative law judge's decision to discredit the testimony of an employee and conclude that the employee failed to establish he suffered an alleged injury on a specific date, finding he gave differing accounts of the circumstances of the alleged accident. Thus, in *Goldsmith*, claimant failed to establish the occurrence of the work event and thus failed to establish a *prima facie* case.

In the instant case, however, the issue raised on appeal concerns whether employer established rebuttal of the presumption contained in 33 U.S.C. §920(a). The administrative law judge herein specifically found the evidence to be "undisputed that claimant was involved in moving gas bottles or cylinders in March of 1989" and that "[a]ll of the witnesses described these bottles as very heavy, and that they required awkward maneuvering by two workers." *See* Decision and Order at 4. The witnesses referred to by the administrative law judge included claimant's co-worker and

be remanded for consideration of any remaining issues.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, ADMINISTRATIVE APPEALS JUDGE, dissenting:

I respectfully dissent from the majority's decision to overrule the administrative law judge and find causation established as a matter of law. In finding that a work event occurred, causing claimant's injury, the majority overrules the administrative law judge's explicit credibility determination that the injury was not work-related. The majority has plainly exceeded its scope of review and is unable to cite any case in which a similar credibility determination has been reversed.

The administrative law judge reviewed all of the evidence, which persuaded him to conclude that claimant's testimony was "wholly unreliable" and that the injury had not been sustained as claimant testified, in the course of his work on March 10, 1989. The administrative law judge determined that the injury was not work-related. Decision and Order Denying Benefits at 5-6. He considered several factors. First, claimant described the pain as "very bad" on March 10, but missed no work until the incident with the police occurred fifteen days later. Second, he sought no medical

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his supervisor. Pursuant to this finding, the administrative law judge specifically found that claimant had "proven sufficient facts to invoke" the Section 20(a) presumption. *Id.* As the administrative law judge found that working conditions existed which could have caused claimant's harm, we disagree with our dissenting colleague's opinion that the administrative law judge's subsequent decision to discredit claimant's testimony must result in an affirmance of his conclusion that causation has not been established. Rather, as no party challenges either the existence of working conditions, *i.e.*, the movement of gas bottles or cylinders, which could have caused claimant's harm, or the administrative law judge's consequent invocation of the Section 20(a) presumption, the instant appeal must be analyzed based upon the issues raised on appeal; specifically, whether the administrative law judge properly determined that employer established rebuttal of the Section 20(a) presumption. As the negative evidence relied upon by employer is insufficient, we must reverse.

treatment for two months. Third, when he finally sought treatment, he attributed his back and left leg pain to the police kicking him in the left leg and so advised medical personnel consistently thereafter (May 10, July 5, July 10, July 18, July 20) until August 2, 1989, after his first surgery.[3] Fourth, for the first time at trial, claimant changed his account of the police incident, asserting his right leg was involved, whereas he had previously indicated consistently that it was the left. Fifth, claimant did not relate the pain to his employment until five months after the "alleged injury." The administrative law judge considered the record as a whole and determined that claimant's testimony regarding a work injury on March 10, 1989 was false. Because employer had presented testimony and medical records which supported this credibility determination, the administrative law judge found that "Employer has more than met its responsibility of disproving the work-relatedness of the injury." Decision and Order Denying Benefits at 5.

The majority's assertion that a negative credibility determination cannot sever the presumed connection is contrary to the law as set forth by the circuit courts. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1980); *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981) (*en banc*). The case at bar is essentially identical to *Goldsmith,* 838 F.2d at 1079, 21 BRBS at 27 (CRT), in which the Ninth Circuit held that the administrative law judge properly found that claimant's injury was not work-related. The claimant in *Goldsmith*, who had a history of back problems, alleged that on March 15, 1977, he had suffered a back injury while operating a jack-hammer. On the following day, he was diagnosed as totally disabled due to his back injury. The administrative law judge attributed claimant's total disability to his history of back injuries. The court stated that the administrative law judge's finding that no injurious event occurred at work on March 15, 1977 was based on "many evidentiary factors...." 838 F.2d at 1081, 21 BRBS at 32 (CRT). The most significant factor was the administrative law's judge finding that claimant's testimony was incredible, "because his reports to physicians and his testimony at the hearing were inconsistent." *Id.* Because the record supported the administrative law judge's decision, the court upheld it, explaining: "`when substantial evidence supports such a finding of fact and especially when the credibility of witnesses is involved, we will not disturb that finding on review,' *Dorris v. Director, OWCP*, 808 F.2d 1362, 1364 (9th Cir. 1987)." *Id.* The administrative law judge's finding of no causation in the instant case should likewise be upheld, because it rests on a similar credibility determination, supported by similar evidence in the record. *See Hislop v. Marine Terminals Corp.*, 14 BRBS 927, 928 (1982)(affirmed by the Ninth Circuit in an unpublished decision). *See also Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513 (D.C. Cir. 1988).

The majority's attempt to distinguish *Goldsmith* from the case at bar is unavailing because, contrary to the majority's implication, in both cases it was undisputed that claimants were

[3]On July 20, 1989, when claimant first met his surgeon, Dr. Magness, claimant related his back pain, which radiated down his left leg, to the police having kicked him in the back of the thigh. TR 5. After his surgery, however, on August 2, 1989, claimant telephoned Dr. Magness, advising him that in addition to having been kicked in the back by the police prior to the onset pain, he had been moving heavy containers at work two months earlier, which had caused soreness in his back. TR 11.

performing heavy labor which could have caused the back injury. In both cases claimants testified that they had sustained a back injury at work on a specific date and the administrative law judge in both cases disbelieved them.

Pigrenet is likewise essentially identical to the case at bar. In *Pigrenet*, 656 F.2d at 1091, 13 BRBS at 843, the Fifth Circuit held *en banc*, that substantial evidence supported the administrative law judge's determination that claimant's back injury was unrelated to his employment because, as in the instant case and in *Goldsmith*, claimant's testimony relating his back pain to a work injury was inconsistent with his statements to his doctors and to others. The employer in *Pigrenet* was unable to prove factually that claimant's injury was not work-related. Indeed, it was undisputed that claimant had stumbled and fallen on a cat walk, thereby twisting his back while working for employer on June 30, 1972. Thirteen days later he injured his back while working for another employer and he was hospitalized four days later. He subsequently injured his back further in an automobile accident. Like the claimant in the case at bar, the claimant in *Pigrenet* did not attribute his back trouble to his work with employer until after his first surgery. The Fifth Circuit upheld the determination of no causation because substantial evidence supported the administrative law judge's finding that claimant's testimony attributing his back pain to a work injury was incredible. Thus, an *en banc* decision of the Fifth Circuit in *Pigrenet*, as well as a panel decision of the Ninth Circuit in *Goldsmith* demonstrate that an adverse determination of claimant's credibility can support a finding that claimant's injury is not work-related.

The majority attempts to distinguish *Pigrenet* from the instant case by pointing out that: first, the administrative law judge in *Pigrenet* found the Section 20(a) presumption rebutted; second, the court referred to medical and other evidence. The majority concludes:

It thus cannot be assumed that the only relevant evidence was claimant's testimony. Decision and Order at 3 fn.1.

The majority appears to have forgotten that the administrative law judge below similarly found the Section 20(a) presumption rebutted. The medical evidence and other evidence in *Pigrenet* revealed claimant's prior inconsistent statements, *see Pigrenet*, 656 F.2d at 1095, 13 BRBS at 845, just as the medical and other evidence in the case at bar showed that claimant had told several physicians over a five month period that his injury to his left leg was due to his encounter with the police. *See* Decision and Order Denying Benefits at 5. Thus, neither the administrative law judge in *Pigrenet* nor the administrative law judge in the case at bar rested his decision exclusively on claimant's testimony.

It is true that neither the court's opinion in *Goldsmith*, nor in *Pigrenet*, discusses application of the Section 20(a) presumption. Since both the Ninth and Fifth Circuits include longshore cases in the bread-and-butter of their judicial diets, one cannot assume that this was an oversight: that three judges of the Ninth Circuit and twenty-four judges of the Fifth Circuit were simultaneously stricken with Section 20(a) blindness when issuing their decisions and that they chose to memorialize ill-considered opinions by ordering their publication. It is far more reasonable to assume that their analysis calls for the administrative law judge to make a credibility determination about the alleged, injurious work event prior to invoking the presumption. As a result, in cases where there is no work incident, the Section 20(a) presumption cannot be invoked. That would explain the courts' failure to discuss the presumption which was explicitly applied by the administrative law judge in *Pigrenet*, who found the presumption rebutted. But whether the credibility determination that the alleged work event did not occur is made prior to invoking the presumption as in *Goldsmith* and *Pigrenet*, or at the end, to rebut the presumption, as in administrative law judge's decisions in *Pigrenet* and in the case below, is not significant. It is very important, however, that the administrative law judge's exclusive right to make a credibility determination on the crucial issue of a case be vindicated.

The majority opinion ignores the principle of deference due the trial court's findings dependent on witness credibility. *Keller v. United States*, 38 F.3d 16, 75 (1st Cir. 1994). They can be overturned only for "clear error." *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). This is a burden which the majority does not attempt to shoulder. The majority appears to forget that the administrative law judge's conclusion that claimant's testimony of a work injury is false need not be supported by a preponderance of the evidence, but only by substantial evidence. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). In overturning the administrative law judge's credibility determination, which has abundant support in the record, the Board has exceeded its power

of review. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).

The majority's decision to preclude a credibility determination from severing the connection between claimant's injury and his employment is not only contrary to the law, as I have demonstrated, it is also fundamentally unsound. It would prevent those employers, who pay their employees to perform heavy labor, from defending against unscrupulous claims for back injury, no matter where or when the injury occurred. Essentially, the majority's construction of the Section 20(a) presumption would deny employers due process of law. In view of the limited scope of our review, the deference owed to credibility determinations and factual findings of the administrative law judge, and the evidence of record supporting the administrative law judge's findings, I would affirm the administrative law judge's decision denying benefits. *See Goldsmith, supra; Pigrenet, supra*.

REGINA C. McGRANERY
Administrative Appeals Judge