BRB No. 93-0615

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| LOIS K. PIERCE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| INGALLS SHIPBUILDING, INCORPORATION | ) | DATE ISSUED: |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits and Decision Denying Claimant's Motion for Reconsideration of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Jerry L. Hutcherson, Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Decision Denying Claimant's Motion for Reconsideration (90-LHC-1267) of Administrative Law Judge G. Marvin Bober 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, an electrician, sustained an injury to her knee injury while working for employer on January 9, 1987. Claimant has not returned to work since this injury occurred. Employer voluntarily paid compensation and medical benefits for claimant's knee injury. 33 U.S.C. §908(c)(2), 907. Subsequently, claimant sought permanent total disability compensation, contending that her present back condition is causally related to her 1987 work injury.

In his Decision and Order, the administrative law judge initially invoked the Section 20(a), 33 U.S.C. §920(a), presumption of causation, then found that employer established rebuttal of that

presumption. Next, after considering the record as a whole, the administrative law judge found that claimant's back condition was not caused by her January 9, 1987 shipyard accident. Decision and Order at 5-9. Accordingly, the instant claim for benefits was denied. Claimant's motion for reconsideration was denied by the administrative law judge.

On appeal, claimant argues that the administrative law judge erred in failing to admit her children's statements into the record. Additionally, claimant contends that the administrative law judge erred in determining that employer has produced substantial evidence to rebut the presumption and that, alternatively, the administrative law judge erred in finding that causation had not been established on the record as a whole. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred by failing to admit two written statements by her children into the record; claimant asserts that these statements would establish that Dr. Enger, claimant's treating physician, neglected to address her complaints of back pain. At the conclusion of the formal hearing, the administrative law judge closed the record except for the deposition of Dr. Enger, which was subsequently noticed on February 11 and taken on February 25, 1991. *See* Hearing Transcript at 63-65; Emp. Ex. 10. Neither claimant nor claimant's counsel attended the deposition; subsequently, counsel made several unsuccessful attempts to depose Dr. Enger. On July 25, 1991, claimant submitted her brief to the administrative law judge along with two unsworn affidavits from her children. Because claimant failed to demonstrate good cause for her failure to attend the deposition of Dr. Enger and because her absence from the deposition was the basis for her request to admit this additional evidence, the administrative law judge declined to admit these statements into the record post-hearing. *See* Decision and Order at 6 n. 4. On reconsideration, the administrative law judge again declined to admit this additional evidence, finding that "at no time did claimant seek an order to compel Dr. Enger's deposition," and therefore, did not pursue additional available remedies. *See* Decision on Reconsideration at 2.

It is well-established that the administrative law judge has the discretion to hold the record open after a hearing for the receipt of additional evidence; however, a party seeking to have evidence admitted must exercise diligence in developing its claim prior to the hearing. *See Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46, 50 (1989); *Sam v. Loffland Brothers Co.*, 19 BRBS 228, 230 (1987). The Board has interpreted the relevant provisions of the Act's implementing regulations, 20 C.F.R. §§702.338, 702.339, as affording administrative law judges considerable discretion in ruling on requests for the admission of evidence into the record. *See Wayland v. Moore Dry Dock*, 21 BRBS 177, 180 (1988). In the instant case, claimant has failed to establish that the administrative law judge abused his discretion in declining to admit her children's statements into the record. Accordingly, claimant's contention of error is rejected. *See Smith*, 22 BRBS at 50.

Claimant next argues that the administrative law judge erred in finding the Section 20(a) presumption rebutted. We disagree. In the instant case, the administrative law judge properly invoked the Section 20(a), 33 U.S.C. §920(a), presumption as he found that claimant suffered a harm, specifically back pain, and that an accident occurred which could have caused this condition. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). If, however, employer presents specific and comprehensive evidence sufficient to sever the connection between the injury

and the employment, the presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In the instant case, the administrative law judge found that the opinion of Dr. Enger was sufficient to rebut the presumption. Dr. Enger unequivocally opined that claimant's back pain is not causally related to her January 1987 work-injury. *See* Emp. Ex. 6 at 6; Enger Deposition at 13-14. As this opinion constitutes specific and comprehensive evidence sufficient sever the causal connection between claimant's injury and her back condition, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted.[1] *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Lastly, claimant alleges that the administrative law judge erred by failing to find that causation had been established based on the record as a whole. We disagree. After setting forth the medical evidence of record, the administrative law judge credited the opinion of Dr. Enger, claimant's treating physician, over the opinion of Dr. Pribill who, the administrative law judge noted, opined that claimant's back condition "could have" been caused by her January 1987 work accident. In rendering this credibility determination, the administrative law judge specifically found Dr. Enger's opinion to be well-supported and clear, while, in contrast, Dr. Pribill's opinion was speculative. Moreover, the administrative law judge noted that Dr. Pribill had agreed that Dr. Enger was probably in the best position to make a judgment on claimant's diagnosis. *See* Cl. Ex. 22 at 20. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's credibility determinations regarding the medical opinions of record are neither inherently incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's determination that claimant's back condition is not work-related.[2] *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert, denied*, 440 U.S. 911 (1979).

Accordingly, the Decision and Order Denying Benefits and the Decision Denying Claimant's Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

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[1]We note that, contrary to claimant's contention, proof of another agency of causation is not necessary to rebut the Section 20(a) presumption. *See Todd Pacific Shipyards v. Stevens*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984).

[2]Although claimant additionally asserts that the administrative law judge erred in failing to resolve all factual doubt in her favor, the United States Supreme Court recently determined that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge