

BRB No. 03-0690

BOBBIE L. SUTTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
COOPER/T. SMITH STEVEDORING)	DATE ISSUED: <u>July 13, 2004</u>
)	
Self-Insured)	
Employer-Respondent)	
)	
and)	
)	
I.T.O. CORPORATION OF VIRGINIA, INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Granting Medical Benefits for Lumbar Spine Impairment of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

F. Nash Bilisoly (Vandeenter Black LLP), Norfolk, Virginia, for Cooper/T. Smith Stevedoring.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for I.T.O. Corporation of Virginia, Incorporated.

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

PER CURIAM:

I.T.O. Corporation of Virginia, Incorporated (I.T.O.) appeals the Decision and Order (98-LHC-2902) 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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. Claimant, a longshoreman, suffered injuries during the course of his employment with both captioned employers. On May 17, 1996, claimant sustained an injury to his right knee while working for I.T.O. On January 22, 1997, he suffered work-related injuries to his right ankle and heel while working for Cooper/T. Smith Stevedoring (CTS). Claimant filed a claim seeking permanent total disability benefits from I.T.O. and/or CTS. In addition to his leg injuries, claimant alleged he sustained a work-related back injury.

In his first decision, the administrative law judge found that claimant is totally disabled as a result of the injuries to his right lower extremity. Consequently, the administrative law judge ordered CTS, as the last employer, to pay claimant temporary total disability benefits from January 21, 1997 through September 21, 1997, and continuing permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). The administrative law judge ordered I.T.O. to provide continuing medical benefits to claimant for treatment arising out of the injury to his right knee. With regard to claimant's back condition, the administrative law judge determined that claimant was entitled to invocation of the Section 20(a) presumption and that employer had established rebuttal of thereof. Upon weighing the evidence, the administrative law judge concluded that claimant did not sustain any chronic lumbar impairment.

Both claimant and CTS appealed to the Board. Claimant argued that the administrative law judge erred in finding that he did not sustain a work-related injury to his back. CTS challenged the administrative law judge's determination that claimant is totally disabled.

In its Decision and Order, *Sutton v. Cooper/T. Smith Stevedoring*, BRB Nos. 01-0517/A (Mar. 4, 2002)(unpublished), the Board affirmed the administrative law judge's award of temporary total and permanent total disability benefits based upon claimant's injuries to his right lower extremity. Additionally, the Board affirmed the administrative law judge's findings that claimant was entitled to invocation of the Section 20(a) presumption relating his back condition to his employment and that employer established rebuttal of the Section 20(a) presumption. However, the Board vacated the administrative law judge's conclusion that claimant does not have a work-related back

condition.¹ Accordingly, the case was remanded for the administrative law judge to weigh the evidence of record as a whole and to make a determination as to whether claimant's back condition is work-related. *Sutton*, slip op. at 7. If claimant's back condition is work-related, the administrative law judge was to determine the responsible employer.

CTS filed a motion for reconsideration which the Board denied. The Board rejected CTS's arguments that the administrative law judge erred in factoring claimant's back impairment into his consideration of whether CTS established the availability of suitable alternate employment. The Board also clarified its decision to state that, although claimant is not eligible for additional disability benefits as he is already totally disabled, he may be entitled to medical benefits related to treatment for a work-related back injury. Order on Recon. at 2.

On remand, the administrative law judge concluded that claimant's lumbar impairment is related to the work injury he suffered in 1996 while in the employ of I.T.O. Accordingly, he found I.T.O. responsible for necessary treatment for claimant's lumbar impairment pursuant to Section 7 of the Act, 33 U.S.C. §907. I.T.O. appeals, contending that the administrative law judge misunderstood the Board's remand instructions by interpreting the Board's decision as requiring an award of medical benefits. Additionally, I.T.O. contends that the administrative law judge erred in finding it to be the responsible employer for medical benefits for claimant's back impairment. Claimant and CTS respond, urging affirmance of the administrative law judge's decision on remand.

Initially, I.T.O. contends that the administrative law judge misconstrued or misinterpreted the Board's directive on remand, citing the administrative law judge's statement the "[t]he issue of treatment for a lumbar spine impairment was remanded for further consideration." Decision and Order at 9. This statement, I.T.O. alleges, indicates that the administrative law judge addressed the issue of responsibility for medical treatment without first determining if such an impairment exists and, if it does, whether it arises out of claimant's employment. We reject employer's contention.

¹ In this regard, the Board stated that the administrative law judge erred in his analysis of all the relevant evidence by intermingling issues relevant to causation, disability, and responsible employer. *Sutton*, slip op. at 7.

In its first Decision and Order, the Board affirmed the administrative law judge's finding that claimant was entitled to invocation of the Section 20(a) presumption,² and that employer established rebuttal of this presumption; these findings constitute the law of the case.³ *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Thus, the administrative law judge appropriately considered on remand all the relevant evidence in order to determine if claimant's back condition is work-related. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The administrative law judge found, based on Dr. Morales's opinion, that claimant had a back impairment that pre-existed the work injuries. The work-related aggravation of pre-existing condition constitutes an "injury" within the meaning of the Act. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). In finding claimant's back injury to be work-related, the administrative law judge relied on the opinions of Drs. Neff, Holden, and Wardell that claimant suffers from disabling sciatica, over the opinions of Drs. Pugach and Williamson that claimant has no back impairment. Dr. Neff attributed claimant's sciatica to the 1996 work injury. ITOX 6. Dr. Holden stated that the 1997 work injury could have temporarily aggravated claimant's pre-existing sciatica. CTSX 1. Dr. Wardell vacillated as to which work injury primarily worsened claimant's back condition, but he consistently linked claimant's back condition to one of his work injuries. ITOX 8.

It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board is not empowered to reweigh the evidence but must affirm a finding that is supported by substantial evidence. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Although I.T.O. argues that the administrative law judge erred in "re-visiting" his initial finding that claimant does not have a lumbar condition, in accordance with the Board's decision, the administrative law

² The administrative law judge found that claimant established the existence of a lower back impairment based on claimant's complaints of pain and the opinions of Drs. Wardell, Neff and Holden. In addition, Dr. Wardell opined that claimant's back pain is related to his work injuries.

³ The Board affirmed the administrative law judge's finding of rebuttal, holding that Dr. Williamson's opinion that claimant does not have any back injury whatsoever constitutes substantial evidence rebutting the Section 20(a) presumption. *Sutton*, slip op. at 6-7, n.4.

judge weighed the evidence of record and his finding that claimant has a work-related back condition is rational and supported by substantial evidence. Thus, we affirm this finding. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

I.T.O. next contends that the administrative law judge erred in finding that it is the employer liable for the medical treatment for claimant's back condition. I.T.O. contends that while claimant's back may have been injured while he was in its employ, claimant's back injury was permanently aggravated while claimant worked for CTS. Thus, I.T.O. contends CTS should be held liable for the medical treatment necessitated by claimant's back injury.

The employer at the time of an initial traumatic injury remains fully liable for disability and/or medical benefits resulting from the natural progression of that injury. If, however, claimant's subsequent employment injury aggravates or accelerates claimant's condition, the subsequent employer is fully liable for any resulting disability and/or medical benefits. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). In finding that claimant's back injury is due to the injury he sustained in 1996 with I.T.O., the administrative law judge relied on the opinions of Drs. Neff and Holden, as supported by that of Dr. Wardell. We affirm the finding that I.T.O. remains liable for any treatment necessitated by claimant's work-related, back injury, as I.T.O. has failed to establish that the injury claimant sustained in CTS's employ permanently aggravated claimant's back condition. *See Delaware River Stevedores v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *see also Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), aff'd mem., No. 99-70631 (9th Cir. Feb. 26, 2001).

Dr. Neff opined that claimant's sciatic injury was the result of his May 1996 work injury at I.T.O. Dep. at 29. Dr. Neff did not treat claimant after he sustained his second injury in January 1997, and thus offered no opinion as to whether claimant's condition was permanently aggravated by the subsequent injury. ITOX 6. Dr. Holden examined claimant after the 1997 injury, noted claimant's chronic back complaints before this injury, and opined that this injury could have aggravated claimant's condition for four to six weeks while claimant's foot injury healed. Dr. Holden stated that after that time, claimant's condition returned to his pre-January 1997 status. CTSX 1. In 1998, Dr. Wardell opined that claimant's 1997 injury permanently aggravated claimant's sciatica, ITOX 8, but in his later opinions, given in 1999 and 2000, he advised that claimant's sciatica was only temporarily aggravated by the 1997 injury and that the permanent aggravation was due to the 1996 knee injury. ITOX 8, 29. The administrative law judge found Dr. Wardell's later opinion to be supportive of the opinions of Drs. Neff and Holden. Decision on Remand at 9.

I.T.O would have the administrative law judge infer that claimant's current back condition is due to the injury he sustained with CTS because Dr. Neff opined that as of January 1997 claimant had no complaints or objective findings related to his lower back or sciatica and that claimant had no restrictions due to any back problems.⁴ ITOX 28. While such an inference would be rational, it does not compel the finding that claimant's 1997 injury permanently aggravated claimant's sciatica in the absence of any definitive medical evidence so stating. Substantial evidence supports the administrative law judge's finding that claimant's back injury is due to the 1996 injury claimant sustained while in I.T.O.'s employ, and that any aggravation due to the 1997 injury was only temporary. Thus, we affirm the administrative law judge's finding that I.T.O. is liable for medical benefits for claimant's back injury. *See Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

Accordingly, the administrative law judge's Decision and Order Granting Medical Benefits for Lumbar Spine Impairment is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴ In this regard, I.T.O. avers that Dr. Richardson's negative neurological evaluation in September 1996 and the reports of claimant's work hardening program that observe the lack of reported pain or restrictions relating to any back problems, ITOX 7, support Dr. Neff's opinion.

