BRB No. 09-0235

R.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES TERMINALS, INCORPORATED	)	DATE ISSUED: 07/23/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

R.W., Newport News, Virginia, *pro se*.

Lawrence P. Postol (Seyfarth Shaw, L.L.P.), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2008-LHC-00112) of Administrative Law Judge Kenneth A. Krantz 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). In an appeal by a claimant without counsel, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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). If they are, they must be affirmed.

Claimant was working for employer as a hustler truck driver on April 3, 2006, when the rear end of the trailer attached to the hustler he was driving struck a fender of a transtainer, a machine that loads and unloads containers from the hustler trailer. Claimant stated that he felt no pain that day and finished his shift; he first felt pain in his

right lower back 48 hours after the incident. Claimant sought treatment, he was diagnosed with a lumbosacral strain and remained out of work until May 26, 2006. Cl. Exs. 8, 10-11; Tr. at 6, 25-28, 72; Emp. Ex. 81 at 4. Claimant sought temporary total disability and medical benefits for this injury under both the Longshore Act and the Virginia Workers' Compensation Act. Prior to the hearing on this case, the Virginia Workers' Compensation Commission denied the state claim.

The administrative law judge found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption because he established that he suffered harm, back pain, and there was an incident at work which could have caused that harm, striking the transtainer fender. Decision and Order at 13. The administrative law judge also found that employer rebutted the presumption based on the opinion of Dr. Ross who stated that this incident did not cause claimant's back pain. *Id.* at 15. After finding the presumption rebutted, the administrative law judge found that the factual findings of the Virginia Workers' Compensation Commission (the Commission) are entitled to collateral estoppel effect because the burden on claimant to establish entitlement to compensation was the same under both laws. Thus, he found that claimant failed to prove by a preponderance of the evidence that his back injury was causally related to his employment. *Id.* at 15-17. Further, the administrative law judge stated that, even if collateral estoppel did not apply, he would credit Dr. Ross's opinion and find, on the record as a whole, that claimant's injury is not work-related. *Id.* at 17-19. Claimant, without legal representation, appeals this decision.[1] Employer responds, urging affirmance.

We affirm the administrative law judge's finding that claimant's injury is not work-related as substantial evidence of record supports this finding. In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. Once the claimant establishes a *prima facie* case, as here, Section 20(a) applies to relate the disabling injury to the employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the employer rebuts the presumption, it no longer controls and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[1] Claimant specifically contends the administrative law judge erred in crediting Dr. Ross's opinion.

The administrative law judge credited the testimony of claimant and his supervisor, Mr. Gallagher, who both stated that the accident was minor, as claimant was traveling at approximately five miles per hour. Additionally, Mr. Gallagher stated that the damage to the transtainer fender was minor and could be fixed by hand. Tr. at 72-74, 84-85. Mr. Gallagher also testified that, upon his arrival at the site following the incident, he asked claimant whether he was injured and whether he wanted to report the accident, and claimant replied "no" to both questions. Tr. at 83. Mr. Gallagher also testified that claimant stated he did not realize he had hit the fender. Tr. at 74. Dr. Ross, whose opinion the administrative law judge credited to rebut the Section 20(a) presumption, opined "within a degree of medical certainty" that this minor incident did not injure claimant's back. He based his conclusion on several facts: the impact was low-speed and involved the rear end of the trailer; claimant did not feel pain until two days later; and claimant is non-compliant with his diabetes regimen which could account for back pain and fatigue. Emp. Exs. 84, 95. Dr. Ross also stated that even if the truck had come to an abrupt stop, there was no explanation for the two-day delay in claimant's experiencing pain. Emp. Ex. 95 at 70. Thus, Dr. Ross opined that it was "medically improbable" that the accident caused claimant's back pain. Emp. Ex. 95 at 49. As the administrative law judge properly found that employer produced substantial evidence demonstrating that the work incident did not cause claimant's back pain or injury, we affirm the administrative law judge's determination that employer rebutted the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Accordingly, the presumption falls out of the case, and claimant bears the burden of persuading the administrative law judge by a preponderance of the evidence that his injury is work-related. *Id.*

The administrative law judge next addressed employer's argument that the Commission's decision is entitled to full faith and credit and collateral estoppel effect. The doctrine of collateral estoppel precludes litigation by the parties in a second action of issues necessarily, actually, and finally litigated in the first action. In order for an administrative law judge deciding a claim under the Act to give collateral estoppel effect to a finding by a state agency acting in an adjudicative capacity, the same legal standards must be applicable in both forums. *Bath Iron Works Corp v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). In this case, as the Section 20(a) presumption has been rebutted, claimant bears the burden of establishing his claim of a work-related injury by a preponderance of evidence. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge correctly found that claimant bore the same burden before the Commission. Decision and Order at 16; *Dep't of Transportation v. Mosebrook*, 13 Va. App. 536, 413 S.E.2d 350 (1992); *see* Emp. Ex. 1 at 3.

The issue actually litigated before the Commission was whether claimant sustained an injury related to the April 3, 2006, work accident. The Commission concluded that he did not. Specifically, it found that claimant's testimony regarding the event itself, as supported by the medical records, was insufficient to "support a finding that [claimant's] back pain on April 5, 2006, is causally related to the impact on April 3, 2006." Emp. Ex. 1 at 4. Accordingly, the Commission concluded that claimant failed to prove he sustained a compensable injury, and it denied his claim for state workers' compensation benefits. *Id.* The record indicates and the administrative law judge found that claimant had a full and fair opportunity to litigate the issue before the Commission, that the issue was a necessary part of the Commission's judgment, and that the Commission's decision is valid and final. Decision and Order at 16-17. Thus, as the issue before the Commission was the same as that before the administrative law judge under the Act, and as the legal standards are the same in both forums, the administrative law judge found that the Commission's decision is entitled to collateral estoppel effect and that he is bound by the finding that claimant's back condition is not related to the work incident. Decision and Order at 16-17. This conclusion comports with the law. *Acord*, 125 F.3d 18, 31 BRBS 109(CRT); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Benn]*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983). Therefore, we affirm the administrative law judge's denial of benefits.[2]

[2]The administrative law judge stated that, even if the doctrine of collateral estoppel did not apply, claimant failed to establish that his back pain/injury was work-related on the record as a whole. Decision and Order at 17-19. Specifically, the administrative law judge gave no weight to Dr. Wolan's opinion, which he deemed "contradictory and ambiguous"; the administrative law judge found that Dr. Wardell did not render a decision on the cause of claimant's condition, he found that Dr. Rogers agreed with Dr. Ross's opinion, he rejected claimant's arguments for discrediting Dr. Ross's opinion, and he found that Dr. Ross's opinion is unbiased and based on more accurate information than Dr. Datyner's opinion and is, therefore, more persuasive. *Id.* Contrary to claimant's contention, the administrative law judge acted within his discretion in crediting Dr. Ross's opinion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In light of these determinations as to weight and credibility, it was rational for the administrative law judge to find that claimant failed to meet his burden of persuasion. *Id.* at 19; *see, e.g., Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *see also Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D.Md. 1999).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGIINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge