BRB No. 06-0838

TINA FORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAERSK PACIFIC LIMITED/APM TERMINALS PACIFIC, LIMITED	)	DATE ISSUED: 06/05/2007
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Petition for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Richard E. Weiss (Small, Snell, Weiss & Comfort, P.S.), Tacoma, Washington, for claimant.

Craig K. Connors (Bauer Moynihan & Johnson LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Denying Petition for Reconsideration (2005-LHC-279) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 alleges that she sustained injuries to her back and right side, subsequently diagnosed as rib fractures, while working for employer as a hostler driver on July 9, 2003. Specifically, claimant testified that she experienced pain in her right side, ribs and back when she backed the hostler she was driving into a loaded shipping container.[1] Following this incident, claimant completed her work shift, but missed the following day of work due to the continuation of her symptoms. On July 11, 2003, claimant filed an accident report with employer, which stated that she had sustained an injury to her back and ribs. CX 1. At this time, claimant commenced treatment with Dr. Corley, a chiropractor, who diagnosed her condition as an acute thoracic/lumbar subluxation complex with a strain/sprain. CX 4 at 7. On July 14, 2003, employer filed its First Report of Injury form wherein it listed the nature of claimant's injury as a rib strain. CX 2. Claimant attempted to return to work for different employers on August 30, 2003 and in December 2003; however, as her symptoms persisted, on both occasions she left work and sought treatment with Dr. Corley on September 10, 2003, and Dr. Lightbody on December 26, 2003. X-rays taken on September 10, 2003, and February 5, 2004, were interpreted as showing multiple rib fractures. CX 6 at 58-59, 61, 64. Claimant returned to work on March 14, 2004, and she sought benefits under the Act for various periods of time between July 9, 2003, and March 14, 2004.

In his Decision and Order, the administrative found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer established rebuttal of that presumption, and that, based on the record as a whole, claimant established a causal relationship between her employment with employer and her subsequently diagnosed rib fractures. The administrative law judge awarded claimant temporary total disability compensation from July 10, 2003 through August 29, 2003, September 7, 2003 through December 4, 2003, and December 21, 2003, through March 13, 2004, finding her unable to work during these periods. 33 U.S.C. §908(b). Employer's petition for reconsideration was denied.

On appeal, employer challenges the administrative law judge's findings regarding the causal relationship between claimant's diagnosed rib fractures and her employment with employer. Alternatively, employer contends that the administrative law judge erred in finding claimant temporarily totally disabled. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in the instant case, claimant has established invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1998), and employer has rebutted the presumption with substantial evidence, *see Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999),

[1] In order to obtain a secure connection between a container and a hostler, the hostler is backed to the container in such a way as to result in the container's "king pin" locking into a slotted disc located on the rear of the hostler. Once such a secure connection is made, the hostler is capable of moving the container at will.

the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See 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. 257, 28 BRBS 43(CRT) (1994).

Employer challenges the administrative law judge's finding that claimant established causation based on the record as a whole. Specifically, employer assigns error to the administrative law judge's decision to rely upon the testimony of claimant over that of its witnesses, Allen Tencer, Ph.D,[2] and Dr. Charles Brooks. The administrative law judge weighed the evidence of record and, relying on claimant's "entirely credible" account of her injury on July 9, 2003, found that claimant's rib fractures were related to her employment with employer. Decision and Order at 9-12. In arriving at this conclusion, the administrative law judge rejected employer's position that it was physically impossible for claimant's subsequently diagnosed rib fractures to have occurred as a result of the incident described by claimant. In this regard, the administrative law judge found that Dr. Tencer did not offer a convincing explanation for his opinion that the force required of a hostler to lift a loaded shipping container reduced, rather than increased, the strength of the jolt experienced when the hostler engaged the container, and that his analysis of the forces involved during this process was incomplete and unconvincing.[3] Decision and Order at 10-11. Regarding the testimony of Dr. Charles Brooks, the administrative law judge determined that while this physician opined that it was biomechanically implausible for someone's ribs to have been broken by the forces set in motion when a hostler is connected to a loaded container, the record does not establish that Dr. Brooks has any expertise in measuring the forces involved in such an event. The administrative law judge thus determined that, as Dr. Brooks' testimony was largely based on opinions beyond the scope of his medical expertise, his testimony was not convincing. *Id.*

We reject employer's assertion that the administrative law judge committed reversible error when he declined to rely upon the opinions of these witnesses. The weight to be accorded to the evidence of record is for the administrative law judge as the trier-of-fact, and the Board must respect his rational evaluation of the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any

[2] Dr. Tencer holds a Ph.D in mechanical engineering. EX 22 at 52.

[3] In this regard, the administrative law judge further found that the testimony of Mr. Downing, employer's power equipment manager, suggested that an increased jolt would be experienced by hostler drivers when coming to a sudden stop while connecting to a container if the driver gave the hostler engine too much gas or failed to brake promptly once the hostler engaged the container. Decision and Order at 11.

evidence according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, as the administrative law judge fully considered employer's evidence on this issue and set forth in detail his rationale for declining to rely upon that evidence, we affirm the administrative law judge's weighing of the evidence.

Employer additionally avers that claimant's actions following the July 9, 2003, event were wholly inconsistent with the scope and degree of the injury that she alleges and that claimant has failed to offer any objective evidence that her injuries were sustained while working for employer. In essence, employer argues that claimant's alleged injury could not have occurred as described since 1) claimant was performing her usual employment duties at the time of her alleged injury and, 2) claimant's post-injury conduct was inconsistent with one suffering the degree of pain testified to by claimant. We disagree. Contrary to employer's position, that a particular working condition or activity is routine is not determinative regarding the issue of causation. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Moreover, claimant's testimony regarding her post-injury conduct and the relationship between that conduct and her assertion that she sustained a work-injury and suffered pain immediately thereafter involve fact-finding and the evaluation of evidence, duties which resides with the administrative law judge. In this regard, employer concedes that the connection between a hostler and a container involves a bump or jolt at the moment of engagement. *See* Er's brief at 8; *see also* footnote 3. Claimant testified that, when performing this activity on July 9, 2003, she immediately experienced discomfort in her right side, ribs, and back, that she missed work the following day due to her symptoms, and that she informed employer of this work-incident and sought medical treatment for those symptoms on July 11, 2003. Moreover, claimant has submitted into evidence multiple medical records from her treating chiropractor, Dr. Corley, documenting ongoing complains of pain and discomfort, his diagnosis on July 11, 2003, of an acute thoracic and lumbar subluxation which he related to claimant's employment, and his continued treatment of claimant. *See* CX 4. Claimant has also presented the October 14, 2003 report of Dr. Maria Brooks and the February 2, 2004 report of Dr. Gilmore, both of which relate claimant's diagnosed rib fractures to her employment.[4] *See* CX 6 at 61-62; *see generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). In his decision the administrative law judge considered the totality of the record before him and, pursuant to the aforementioned evidence, his determination to credit claimant's testimony is neither inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, given the administrative law judge's broad discretion in resolving conflicts in the evidence, we affirm his determination that claimant sustained work-related injuries to her ribs as a

[4] Thus, contrary to employer's contention on appeal, claimant presented evidence to meet her burden of proof once Section 20(a) was rebutted.

result of her July 9, 2003, work-incident, as it is supported by substantial evidence. *See Carpenter v. California United Terminal*, 37 BRBS 149 (2003).

Alternatively, employer contends that the administrative law judge erred in finding that claimant is entitled to temporary total disability benefits, as she was videotaped during one of the periods of disability performing tasks which she alleged at the formal hearing she was incapable of performing. We disagree. In the present case, the administrative law judge reviewed the evidence offered by employer, specifically the videotape of claimant operating her SUV and raking leaves, and the testimony of Dr. Charles Brooks that claimant's driving her motor vehicle involved the same activities and abilities as driving employer's hostler. The administrative law judge found that claimant's activities documented on the videotape were not sufficient to establish that claimant was then capable of performing all of the duties of a longshoreman, nor did Dr. Brooks establish that he was aware of the requirements necessary for claimant to return to work after an injury or that he was aware of the difference in physical activity between driving a SUV and a hostler. Decision and Order at 13. Rather, the administrative law judge determined that claimant's assertion that she was disabled for three periods of time between July 2003 and March 2004 is supported by her own credible testimony and by the records of her medical providers, Drs. Corley, Maria Brooks, Lightbody and Gilmore. *See* CXs 4, 5, 6. We affirm the administrative law judge's finding that claimant was incapable of performing her usual employment duties during the periods of time at issue, as that finding is rational and supported by substantial evidence.[5] Therefore, we affirm the administrative law judge's award of temporary total disability benefits to claimant during the periods of July 10, 2003 through August 29, 2003, September 7, 2003 through December 4, 2003, and December 21, 2003, through March 13, 2003.

[5] In crediting claimant's testimony, the administrative law judge found that her attempts to return to her prior employment duties in September and December 2003 indicated a strong motivation to work. Decision and Order at 12.

Accordingly, the Decision and Order Awarding Benefits and the Order Denying Petition for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge