BRB No. 01-0551

MICHAEL A. COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 19, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-LHC-2015) of Administrative Law Judge Fletcher E. Campbell, Jr., 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, a painter in employer's X33 department, alleged that he injured his back and hip at work on April 1, 1999, after bumping his left side while descending a manhole on board the *U.S.S. Nimitz*. Claimant sought temporary total disability benefits from May 14 through November 2, 1999, March 16 through 26, 2000, and April 10 and 11, 2000, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Employer did not voluntarily pay any benefits. The only issue before the administrative law judge was whether claimant's injuries were caused by a work

accident. The administrative law judge found that claimant suffered a harm and that a work accident occurred on April 1, 1999, which could have caused the harm. However, he concluded that claimant was not entitled to the benefit of the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), finding no probative medical evidence tying the April 1, 1999, accident to claimant's degenerative disc disease. Even if the presumption were invoked, the administrative law judge held that it would be rebutted based on Dr. Holden's opinion that claimant's ruptured disk was not caused by the 1999 work accident. Upon a weighing of the evidence, the administrative law judge stated that he would find that claimant did not establish a causal relationship between the 1999 work accident and his subsequent back disability. Therefore, the administrative law judge denied benefits on claimant's theory of recovery that he injured his back and hip at work on April 1, 1999.

Applying a theory of recovery which claimant first raised in his post-hearing brief, the administrative law judge found, however, that claimant's degenerative and ruptured disk could have been caused in whole or in part by his overall work at the shipyard based on Dr. Holden's opinion to that effect. The administrative law judge found that the Section 20(a) presumption was invoked as to whether claimant's years of work at the shipyard caused, contributed to, or aggravated his degenerative and ruptured disk, based on Dr. Holden's opinion that claimant's disk injury is caused by "an accumulation of years of smoking and working, whether it be at the shipyard or at home or at any other place." Emp. Ex. 4 at 4. The administrative law judge further found that employer did not establish rebuttal of the Section 20(a) presumption. Thus, the administrative law judge awarded the disability and medical benefits claimant sought on this theory of recovery. The administrative law judge stated that he was aware that the original claim was based on an alleged 1999 work accident but found that he had authority to consider new issues under Section 702.336, 20 C.F.R. §702.336. The administrative law judge concluded, "As Dr. Holden's statement, which Employer proffered, gave Employer ample notice of the possible connection between Claimant's work and his subsequent back disability, I find that there has been no prejudice to Employer." Decision and Order at 7.

On appeal, employer challenges the administrative law judge's award of benefits based on this new issue or theory of recovery. Claimant has not responded to this appeal.

Employer contends that the administrative law judge erred in awarding benefits on a different theory of recovery than that asserted by claimant, who alleged only that he injured his back at work in an accident occurring on April 1, 1999, and not that his working conditions could have caused his back problems. Employer contends that although the administrative law judge has discretion to consider a new issue *sua sponte*, he must provide notice to the parties and afford them an opportunity to respond before considering the new issue. As the administrative law judge did not provide notice and opportunity to respond

before considering the new theory of recovery, employer contends the award of benefits must be vacated.

The United States Supreme Court held in *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), that an administrative law judge is not required to adjudicate a claim which was not made and that the Section 20(a) presumption does not require the administrative law judge to address and employer to rebut every conceivable theory of recovery. Nonetheless, the Act's regulations afford an administrative law judge the discretion to address a new issue. *See* 20 C.F.R. §702.336(b); *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT)(1st Cir. 1988). Section 702.336(b) permits the administrative law judge to consider "[a]t any time prior to the filing of the compensation order in the case," any new issue upon his own motion, but requires that he give the parties "not less than 10 days' notice of the hearing on such new issue." *See Velez*, 856 F.2d 402, 21 BRBS 155(CRT); *Ramirez v. Sea-land Services, Inc.*, 33 BRBS 41 (1999).

We hold that the administrative law judge abused his discretion by considering a new theory of recovery without providing the parties notice and an opportunity to respond. *See Velez*, 856 F.2d 402, 21 BRBS 155(CRT); *Ramirez*, 33 BRBS 41; 20 C.F.R. §702.336(b). Claimant did not allege this theory of recovery either in his pre-hearing statement or at the hearing. In his pre-hearing statement dated March 29, 2000, claimant merely asserted that he sustained an injury on April 1, 1998 (sic) while working for employer. At the hearing on November 3, 2000, claimant's counsel explicitly stated that the only claim before the administrative law judge was the one which alleged that an accident at work on April 1, 1999, caused claimant's back problems.[1] Tr. at 14-15. In his post-hearing brief dated

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[1] At the hearing, the following exchange took place:

> Clt. Atty: Now tell the Judge the exact type of activity that you were doing on April the 1st.
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> Clt. : I was basically spraying DI void on a number two CAT, and the part wasn't probably no bigger than this box I'm sitting in. It's on a forty-five degree angle. I got to crawl through collars. I have a restriction that I'm not allowed to be kneeling, bending or squatting. But yet, they proceeded to put me in that position that I had to go and do a job.
>
> Clt. Atty: All right. Well, let me –
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> Emp. Atty: Well, Your Honor? I guess I'm curious if that's going to be part of the claim. Is there some allegation that he had a previous

injury that's involved?

Clt. Atty: No, Judge, we're not claiming that.

J. Campbell: Well hold it. He just asked him a question. Do you have an objection to this testimony?

Emp. Atty: Your Honor, I am going to object if we're going to try and bring in some new injury and say he worked outside of his restrictions. I mean, I don't know anything about that. I'm only under the impression that this is an April 1st injury, not that there's some other issue.

Clt. Atty: That is the only claim before you today, Judge.

January 22, 2001, claimant first raised the contention that general working conditions caused his back and leg injuries. Although this theory was based on Dr. Holden's November 16, 1999, opinion, the fact that employer proffered the opinion did not give employer notice that the claim would be amended to rely on it. Moreover, while claimant could properly amend his claim to add this theory of recovery,[2] in this case the new theory was raised too late for employer to respond to it, as the parties filed simultaneous post-hearing briefs.[3] Clt. Post-hearing Br. at 8, 9, 15, 16.

We agree with employer that the administrative law judge erred in considering the assertion that claimant's injury was related to general working conditions without providing the parties notice that he would do so and allowing them the opportunity to respond to it and to introduce evidence addressing the claim. Contrary to the administrative law judge's finding, employer was prejudiced by this action. Employer was led to believe by claimant through his pre-hearing statement and counsel's statement at the hearing that no issue other than the April 1, 1999, alleged accident would be addressed. Employer, therefore, did not attempt to rebut any other theory of recovery. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631. The fact that employer introduced Dr. Holden's report into evidence does not preclude employer from introducing other evidence addressing whether claimant's general working

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Tr. at 14-15.

[2]Thus, employer's argument that the Board should reverse the administrative law judge and hold claimant may not raise this theory must be rejected as it is not supported by *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.1 (1982); *see generally Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT)(5th Cir. 2001).

[3]Employer referred to Dr. Holden's opinion in its post-hearing brief but relied heavily on that part of the opinion which excluded claimant's 1999 work accident as a cause of his disability. Emp. Post-hearing Br. at 4, 10-12.

conditions caused or aggravated claimant's back condition.

We therefore vacate the administrative law judge's award of benefits based on claimant's general working conditions, and we remand the case to the administrative law judge for further consideration. On remand, the administrative law judge must allow the parties the opportunity to submit additional evidence and argument relevant to claimant's contention that his back condition is related to his general working conditions. *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits based on claimant's general working conditions is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge