

PAUL BUTLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED: <u>May 12, 2005</u>
	)	
and	)	
	)	
MISSISSIPPI INSURANCE GUARANTY	)	
ASSOCIATION	)	
	)	
Self-Insured Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Paul Butler, Ellisville, Mississippi, *pro se*.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (94-LHC-2284, 97-LHC-2628) of Administrative Law Judge Larry W. Price 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). As claimant appeals without representation by counsel, we will review the administrative law judge's findings of fact and conclusions of law to determine whether they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). If they are, they must be affirmed.

This is the second time that this case, which has a long and complicated procedural history, has been before the Board. Claimant was exposed to asbestos while working for employer during several periods of time between 1958 and 1967. On May 5, 1965, claimant injured his back while working as a shipfitter. He subsequently underwent a laminectomy and spinal fusion and was thereafter placed on light duty at his regular wage. Employer voluntarily paid claimant temporary total disability compensation based upon an average weekly wage of \$92.25, until he reached maximum medical improvement on March 2, 1967, and permanent partial disability compensation at a weekly rate of \$18.45, thereafter. Claimant filed a claim for his back injury on December 19, 1967, ALJ EX 18, and the parties thereafter agreed that employer would pay claimant continuing permanent partial disability benefits at an increased rate. On July 18, 1978, employer suspended compensation payments, as the payments to claimant had exceeded the maximum amount of \$24,000 allowed under the Act at the time the injury occurred.<sup>1</sup> Claimant filed a claim for asbestosis on December 6, 1989. EXs 33-35. On November 21, 1988, claimant had a non-work-related accident when he slipped and fell after stepping on a coat hanger. On July 28, 1992, claimant began pursuing a claim for additional compensation as a result of his 1965 back injury, seeking benefits from 1978, when employer made its last payment of benefits to claimant as a result of claimant's back complaints. EX 27. The Mississippi Insurance Guaranty Association, on the risk at the time, controverted the claim on June 24, 1992.<sup>2</sup> EX 28; JX 2. An informal conference was held in the fall of 1992, CX 1 at 11, where the parties stipulated to an average weekly wage of \$92.25, at the time of the back injury.

The claims for both the back injury of May 5, 1965, and asbestosis were consolidated and a hearing before the administrative law judge was held on April 23, 1998. In a Decision and Order - Denying Benefits dated October 26, 1998, the administrative law judge found that claimant's claim for additional benefits for his work-related back injury was barred by the statute of limitations or, alternatively, by the doctrine of laches. The administrative law judge further found that even if not barred as untimely, claimant had no loss in wage-earning capacity after he became self-employed in 1970, and his non-work-related fall in 1988 constituted an intervening cause of his disability, severing the causal connection between claimant's 1965 work injury and his present back complaints. The administrative law judge thus denied further benefits for the back injury, and he also denied claimant's asbestosis claim, finding that claimant had no impairment and was not entitled to any medical benefits. Claimant appealed this decision to the Board in November 1998. BRB No. 99-288. While the case was pending

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<sup>1</sup> Prior to the 1972 Amendments there was a \$24,000 limit for permanent partial disability awards. 33 U.S.C. §914(m) (1970) (repealed 1972).

<sup>2</sup> Employer is self-insured with respect to the asbestos-related claim.

before the Board, claimant filed a motion for modification. In light of this motion, the Board remanded the case to the administrative law judge. On October 12, 1999, the administrative law judge issued a Decision and Order Denying Motion for Modification. Claimant thereafter appealed to the Board, BRB No. 00-232, and additionally reinstated his prior appeal with the Board. Claimant then filed a second motion for modification while the case was pending before the Board. The Board again remanded the matter to the administrative law judge for modification proceedings. On October 11, 2001, the administrative law judge issued a Decision and Order Denying Second Motion for Modification. Claimant appealed this decision to the Board on December 27, 2001.<sup>3</sup> BRB No. 02-345.

On appeal, the Board initially reversed the administrative law judge's finding that claimant's claim for his back condition was barred by the doctrine of laches and the Act's statute of limitations. Next, the Board held that while substantial evidence supports the administrative law judge's conclusion that any increased disability experienced by claimant subsequent to 1988 followed from his 1988 slip and fall, claimant's present back complaints may be owing, in part, to his underlying 1965 work-injury, as the credited medical evidence attributed claimant's back problems to an aggravation of his original condition. Accordingly, the Board vacated the administrative law judge's denial of benefits for claimant's present back condition, and remanded the case for reconsideration of the evidence relative to the cause of claimant's present back complaints and for the administrative law judge to determine the extent of any disability attributable to his 1965 work-related injury. Lastly, the administrative law judge was instructed on remand to consider whether claimant is entitled to periodic medical monitoring for his asbestos-related pleural disease. *Butler v. Ingalls Shipbuilding, Inc.*, BRB Nos. 99-288, 00-232, 02-345 (Jan. 24, 2003)(unpub.). On August 29, 2003, the Board modified its decision to reflect that, on remand, the administrative law judge is not required to address claimant's entitlement to compensation benefits prior to 1988, but upheld the remand for the administrative law judge to reconsider the evidence of record and to determine whether claimant has any continuing disability as a result of his 1965 injury. *Butler v. Ingalls Shipbuilding, Inc.*, BRB Nos. 99-288, 00-232, 02-345 (Aug. 29, 2003) (Order on Motion for Recon.)(unpub.).

In his Decision and Order on Remand, Administrative Law Judge Price (the administrative law judge), found that claimant is not entitled to compensation benefits for any disability after the 1988 non-work-related accident, as there is no causal connection between his current disability and the initial 1965 work-related injury. Decision on Remand at 5. Specifically, the administrative law judge determined that employer

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<sup>3</sup> By order dated February 15, 2002, the Board reinstated claimant's appeals in BRB No. 99-288 and BRB No. 00-232, and consolidated them with BRB No. 02-345.

presented substantial countervailing evidence to overcome the Section 20(a) presumption that claimant's current back condition is causally related to his original 1965 injury; he found that the 1988 injury was an intervening cause which severed the connection between claimant's current condition and his 1965 work injury and concluded that claimant's 1988 injury is the sole cause of his loss of wage-earning capacity and resulting disability. The administrative law judge also awarded claimant medical expenses related to periodic medical monitoring of claimant's pleural plaques; thus, no issues remain with regard to claimant's asbestosis claim.

Claimant, without representation by counsel, appeals the administrative law judge's decision on remand denying his claim for ongoing compensation benefits. Employer responds, urging affirmance. Claimant has replied to employer's response brief.

We affirm the administrative law judge's finding that claimant is not entitled to additional compensation as a result of his 1965 work injury. Where causation is at issue, Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. Under Section 20(a), the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5<sup>th</sup> Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by a subsequent non work-related event which was not the natural or unavoidable result of the initial work

injury.<sup>4</sup> See *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. See *Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Where a subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is due to an intervening cause, employer is relieved of liability for that portion of the disability attributable to the intervening cause. See *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

In concluding on remand that employer presented substantial evidence that the 1988 slip and fall in claimant's home was an intervening cause of all subsequent disability, the administrative law judge reconsidered the lay and medical evidence of record. He noted that Dr. Wiggins reported in 1996 that claimant had an essentially symptom free interval of almost 17 years prior to the 1988 incident and then a reoccurrence of persistent back pain following two traumatic events occurring at home. The administrative law judge found that, therefore, any medical treatment was the result of the 1988 injury, rather than the natural progression of the 1965 work-related accident; that the record contains no medical evidence that claimant sought treatment for his back condition between 1972 and 1989; and that after the 1988 accident claimant told several doctors and a physical therapist that he had not suffered from back problems during the

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<sup>4</sup> In *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998), the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, discussed the evolution of the standard of what constitutes a supervening cause in that circuit, and stated that it has articulated "somewhat different standards" from that of other courts. *Shell Offshore, Inc.*, 122 F.3d 312, 316, 31 BRBS 129, 131(CRT). The court stated that the first standard, as enunciated in *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5<sup>th</sup> Cir. 1951), holds that a supervening cause is an influence originating entirely outside of employment that overpowers and nullifies the initial injury. *Voris*, 190 F.2d at 934. Subsequently, in *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5<sup>th</sup> Cir.), *modified on reh'g*, 657 F.2d 665, 13 BRBS 851 (1981), another panel of the Fifth Circuit held that a subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause. *Borsage*, 637 F.2d at 1000, 12 BRBS at 974.

prior several years. The administrative law judge reasoned that after claimant reached maximum medical improvement from the 1965 injury, he was assigned a permanent partial disability rating, but sustained no loss in wage-earning capacity, whereas as a result of the 1988 injury, claimant did experience a loss in wage-earning capacity, as he was not able to perform any gainful employment.<sup>5</sup> The administrative law judge also noted that various diagnostic tests performed during claimant's hospitalization between January 17, and January 25, 1989, yielded normal results. EX 19 at 1-2, 7, 11.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961). In the instant case, the administrative law judge rationally determined that the testimony of Dr. Wiggins, in conjunction with the negative evidence and claimant's own testimony, constitutes substantial evidence sufficient to rebut the Section 20(a) presumption and to establish that there is no causal connection between claimant's current disability and his 1965 injury. *See Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, No. 92 70045 (9<sup>th</sup> Cir. Oct. 6, 1993 ); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 829 (1976). Accordingly, as the administrative law judge fully considered the relevant evidence of record and, acting within his discretion, resolved the issue in accordance with the standards for establishing an intervening cause in the Fifth Circuit, we affirm his denial of additional disability benefits. *See Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

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<sup>5</sup> In the initial decision, Judge Di Nardi noted that Dr. Wiggins, after reviewing claimant's medical records, found no history of significant back problems between 1972 and 1989, EX 19 at 2, and that claimant told several doctors that he did not have back problems between the original injury and his 1988 non-work-related slip and fall incident.

Accordingly, the administrative law judge's Decision and Order on Remand is 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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BETTY JEAN HALL  
Administrative Appeals Judge