

PHILIP K. FONTENOT)
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Claimant-Respondent)
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v.)
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MORENO ENERGY SERVICES,) DATE ISSUED: 05/31/2012
INCORPORATED)
)
)
and)
)
LOUISIANA WORKERS')
COMPENSATION CORPORATION)
)
Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington,
Administrative Law Judge, United States Department of Labor.

Christopher R. Philipp, Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana,
for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-00310) of Administrative Law Judge Clement J. Kennington 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).

Claimant, a foreman, alleged he sustained an injury to his lower back when he was working in a container shoveling clay-like material into buckets on August 19, 2009. He stated that he twisted his back while lifting a bucket. At the time of this incident, claimant had a claim pending for state workers' compensation benefits for a work-related injury to his neck and shoulder he had suffered during the course of his employment in a motor vehicle accident on July 8, 2009. *See* Tr. at 4-5. In his claim for benefits for the August 2009 work accident, claimant sought temporary total disability benefits for the period from August 20 through August 31, 2009, continuing temporary total disability benefits beginning September 4, 2009, and out-of-pocket and future medical expenses for his back, including surgery performed by Dr. Cobb. ALJ Ex. 1; Cl. Post-Hearing Br. at 4. Claimant acknowledged that he cannot receive total disability payments under both workers' compensation laws; therefore, although he elected to receive state compensation payments because the benefits are greater than those paid under the Act, claimant asserted that if the state workers' compensation were to end, he would be entitled to temporary total disability benefits under the Act until he is no longer disabled. *See* 33 U.S.C. §903(e). Employer controverted the claim.

The administrative law judge accepted the parties' stipulations which included that claimant suffered an "injury that arose out of and in the course of the worker's employment with Employer" at the Thunderhawk Platform MS Canyon on August 19, 2009, and that claimant timely notified employer of his injury.¹ Decision and Order at 2; ALJ Ex. 1. Nevertheless, the administrative law judge also found that claimant sustained a work accident or there existed working conditions that could have caused his injury on August 19, 2009, and that injury was serious enough to warrant surgery. Decision and Order at 7. Thus, he found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking his injury to his employment. As the administrative law judge found that claimant cannot perform his usual work, he awarded claimant continuing temporary total disability benefits beginning August 19, 2009, as well as reimbursement for his treatment by Dr. Cobb and future medical expenses related to this injury. The administrative law judge granted employer a credit for all wages paid to claimant after August 19, 2009, and for compensation previously paid to claimant under the Louisiana workers' compensation act. 33 U.S.C. §903(e). On appeal, employer challenges the administrative law judge's determination that claimant had a work-related accident on August 19, 2009, arguing that the administrative law judge misapplied the Section 20(a) presumption to this issue. Alternatively, employer contends the ongoing award should be reduced because claimant requested only approximately 40 days of

¹To the contrary, the stipulations also include a statement that an issue to be resolved is whether the accident was in the course of and arose out of claimant's employment. ALJ Ex. 1.

benefits and those medical expenses he paid personally.² Claimant responds, urging affirmance.

Employer contends the administrative law judge erred in finding that claimant suffered a work accident or injury on August 19, 2009, because claimant alleged that an injury occurred yet he did not introduce any accident report or witnesses. Contrary to employer's contention, the administrative law judge acknowledged and accepted the parties' stipulation that claimant sustained a work-related injury on August 19, 2009. As a general rule, stipulations made by parties are binding upon those who made them upon their acceptance by the administrative law judge. The Board will not review a factual issue raised on appeal where the facts were stipulated. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). Stipulations are offered in lieu of evidence and, thus, may be relied upon to establish an element of the claim. *See Ramos v. Global Terminal Container Services, Inc.*, 34 BRBS 83 (1999). In any event, the administrative law judge addressed the issue concerning the occurrence of an accident, and the record contains substantial evidence supporting the administrative law judge's invocation of the Section 20(a) presumption. Contrary to employer's contention, the administrative law judge did not apply Section 20(a) to presume the accident occurred. Rather, the administrative law judge clearly stated that he credited claimant's testimony regarding the occurrence of the incident, as is within his discretion. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also 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 (2^d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In addition, the administrative law judge found that the medical records establish that claimant had back problems and underwent surgery following this incident. Cl. Ex. 2. Thus, the administrative law judge properly applied the Section 20(a) presumption only after he determined that claimant established the elements of a prima facie case, and the findings that claimant established a harm and an accident at work which could have caused his harm are supported by substantial evidence. As employer presented no evidence to rebut the Section 20(a) presumption, claimant's injury is work-related as a matter of law. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th

²At the hearing on December 16, 2010, claimant acknowledged that he has been compensated under the state law since October 15, 2009. Therefore, he requested temporary total disability benefits from September 4, the last day he worked for employer, through October 14, 2009, the day before he received state benefits for his July 2009 injury. Tr. at 47.

Cir. 2000); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Accordingly, via stipulation or substantial evidence of record, we affirm the administrative law judge's finding that claimant sustained a work-related injury on August 19, 2009.

Employer, alternatively, summarily contends the administrative law judge erred in awarding continuing temporary total disability benefits, as, at the hearing, claimant modified his request to a closed period of benefits between September 4 and October 14, 2009. *See* n.2, *supra*. We decline to disturb the administrative law judge's award. While claimant's counsel made the above statement at the hearing, *see* Tr. at 47, the administrative law judge properly summarized claimant's request for benefits in his decision, stating that claimant seeks continuing benefits under the Act in the event his state workers' compensation benefits are terminated. Decision and Order at 6. Thus, although claimant is currently receiving state workers' compensation benefits, the administrative law judge's decision properly establishes that claimant is entitled to an award of temporary total disability benefits under the Longshore Act for the duration of his temporary total disability related to his August 2009 injury. If claimant's state compensation were to cease, yet he were to remain temporarily totally disabled due to the August 2009 injury, the award ensures his continuing entitlement to benefits. Because the administrative law judge awarded employer a credit against the state compensation paid to claimant, 33 U.S.C. §903(e), employer's liability currently is the same as if the administrative law judge awarded the closed period of benefits under the Act. *See generally Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962); *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 13 BRBS 301 (5th Cir.), *cert. denied*, 454 U.S. 1123 (1981). Therefore, we reject employer's contention, and we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge