BRB No. 01-0256

JOHN S. GRAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOSS POINT MARINE/HALTER MARINE SHIPYARD	)	DATE ISSUED: Nov. 2, 2001
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth, Ocean Springs, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-0904) of Administrative Law Judge C. Richard Avery 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).

This case arises from claimant's 1997 claim for medical benefits under Section 7 of

the Act, 33 U.S.C. §907, for carpal tunnel syndrome allegedly resulting from a work-related accident occurring on May 28, 1993, when claimant lifted heavy manhole cover inserts to seal manholes in the engine room. Specifically, the issue before the administrative law judge was whether employer is liable for nerve conduction and EMG studies to confirm Dr. McCloskey's clinical diagnosis of carpal tunnel syndrome. At the time of the hearing, claimant was receiving permanent partial disability benefits, pursuant to a stipulated order, for a work-related back injury sustained on September 3, 1993, which caused him to cease his employment with employer as of September 25, 1993. Claimant has remained unemployed, except for the period from March 21, 1995 through July 1995, when he worked as a welder assembling tree stands for deer hunting.

In his Decision and Order, the administrative law judge found that claimant produced sufficient evidence to invoke the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), linking his carpal tunnel syndrome to his employment with employer, but that employer presented sufficient evidence to establish rebuttal. Weighing the evidence as a whole, the administrative law judge found that claimant did not prove that he suffered a work-related injury with employer, and he denied medical benefits. Alternatively, the administrative law judge found that employer is not liable for medical benefits as claimant sustained a new injury while working with the subsequent employer, which superceded the May 1993 injury, if one occurred, or if claimant suffered an injury with employer, the subsequent employment aggravated the earlier injury. Thus, the administrative law judge also denied medical benefits on these grounds.

On appeal, claimant contends that the administrative law judge erred in denying medical benefits. Employer responds, urging affirmance; employer also contends the administrative law judge erred in invoking the Section 20(a) presumption.

The right to medical benefits is never time-barred; entitlement to medical benefits, however, is contingent upon a finding of a causal relationship between the injury and the employment. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994)(decision on recon. *en banc*). An injury need not be economically disabling for claimant to be entitled to medical benefits. *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which is invoked if claimant establishes that he suffered a harm and that an accident occurred or working conditions existed which could have caused the harm. *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Bolden v. G.A.T. X. Terminals Corp.*, 30 BRBS 71 (1998); *Kelaita v. Triple Machine Shop*, 13 BRBS 326 (1981). Employer may establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's harm is not work-related. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Employer is liable for claimant's medical treatment if his current condition is the natural or unavoidable result of

the work injury with employer; however, where claimant's condition is the result of an intervening cause, *i.e.*, his employment welding deer stand components, in this case, employer is relieved of liability for that portion of the disability attributable to the second injury. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). If employer establishes rebuttal of the Section 20(a) presumption, the presumption no longer controls. The administrative law judge then must weigh all the evidence as a whole, and claimant bears the burden of proving that his condition is related to the work injury by a preponderance of the evidence. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

We must remand the instant case for the administrative law judge to apply the correct legal standards to determine if employer is liable for the recommended medical testing. We first address employer's contention that the administrative law judge erred in invoking the Section 20(a) presumption. Although this issue was raised in employer's response brief, if accepted, the conclusion propounded by employer supports the administrative law judge's ultimate denial of benefits and it therefore is proper for the Board to address this issue. *See Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.*, 32 BRBS 118 (1998).

To establish invocation of the Section 20(a) presumption, it is claimant's burden to prove that he sustained a harm and that an accident occurred or working conditions existed which could have caused the harm alleged. *See, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT)(5th Cir. 2000); *see also U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant stated on his claim form that he suffered a work-related accident on or about May 28, 1993, when he lifted heavy manhole inserts, causing traumatically-induced carpal tunnel syndrome to his right arm. CX 3; *see also* Cl. brief at 6. The administrative law judge invoked the Section 20(a) presumption based on claimant's testimony that he experienced arm pain while lifting manhole covers in May 1993, and Dr. Gonzalez's chart note of June 1, 1993 indicating claimant's complaints of arm pain due to lifting. This evidence supports the administrative law judge's invocation of the Section 20(a) presumption, but, as employer contends, the administrative law judge is required to weigh all relevant evidence regarding the occurrence of a work accident prior to determining if the Section 20(a) presumption is invoked. *See Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). In this regard, the administrative law judge did not discuss claimant's 1996 deposition wherein claimant did not reference an arm or hand injury when asked to describe any work injuries prior to the September 7, 1993 back injury, EX 7 at 17-18, or his 1996 interrogatory answers which also do not mention an arm injury occurring at work in May 1993. EX 10 at 25. Moreover, as employer correctly states, Dr. McCloskey's reports reference only the injury occurring in September 1993. CX 4-8.

Finally, although the administrative law judge invoked the Section 20(a) presumption, he also questioned whether the May 1993 injury in fact occurred. *See* Decision and Order at 15. On remand, therefore the administrative law judge must weigh all evidence relevant to whether an accident in fact occurred and make a finding on this element of claimant's *prima facie* case.[1] *Lacy*, 17 BRBS 139.

We also must remand this case for the administrative law judge to reconsider his rebuttal analysis. In order to rebut the Section 20(a) presumption employer must produce substantial evidence that claimant's harm is not related to his employment. *Conoco*, 194 F.3d 684, 38 BRBS 187(CRT). The fact that carpal tunnel syndrome was not definitively diagnosed prior to claimant's subsequent non-covered employment does not establish that claimant's harm is not work-related. Dr. McCloskey stated in August 1994 that he suspected claimant had carpal tunnel syndrome, CX 5, and he explained in 1995 that he knew from a clinical standpoint that claimant had carpal tunnel syndrome, as it is a progressive condition. CX 7. Dr. McCloskey, moreover, does not state that claimant's condition is not work-related, and thus his opinion is not substantial evidence severing the connection between claimant's condition and his employment. *See Gencarelle v. General Dynamics Corp.,* 22 BRBS 170 (1989), *aff'd,* 892 F.2d 173, 23 BRBS 13 (2d Cir. 1989).

Employer contended, however, that claimant's subsequent, non-covered employment is the cause of claimant's need for additional medical treatment. In this regard, the administrative law judge applied the standard for determining liability as between two covered employers, *i.e.,* natural progression versus aggravation, instead of determining whether claimant's subsequent employment constitutes an intervening cause of claimant's condition. *See Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has articulated two standards as to what constitutes an intervening cause. *See Shell Offshore v. Director, OWCP,* 122 F.3d 312, 31 BRBS 129 (CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998)(noting the tension between the two standards). In *Voris v. Texas Employers Ins. Ass'n,* 190 F.2d 929, 934 (5th Cir. 1951), *cert. denied,* 342 U.S. 932 (1952), the court stated that a supervening cause must be an influence originating entirely outside of employment which "overpowers and nullifies" the initial injury. In *Mississippi v. Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on other grounds on reh'g,* 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981), however, the court stated that an 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

[1]It is uncontested that claimant has a harm to his arms and/or hands.

been worsened by an independent cause." *Id.*, 637 F.2d at 1000, 12 BRBS at 974; *see also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT)(5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 19 BRBS 63 (5th Cir. 1981). In this case, Dr. McCloskey stated on June 12, 1995 that "the key thing though is that his current employment [the subsequent non-covered employment] has really brought the problem to the forefront." CX 7. On remand, the administrative law judge must consider this opinion in the context of the law of the Fifth Circuit. Employer is relieved of liability for that portion of claimant's medical benefits which is attributable to the intervening cause. *Plappert*, 31 BRBS at 110. If, however, the cause of claimant's condition cannot be apportioned between the work injury and the subsequent event, employer is fully liable. *Id.* Thus, we vacate the administrative law judge's findings with respect to causation, and we remand the case to the administrative law judge for further findings regarding employer's liability for medical benefits.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge