BRB Nos. 08-0312
and 08-0312A

A.M.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
METRO MACHINE OF PENNSYLVANIA	)	DATE ISSUED: 11/26/2008
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order–Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

A.M., Chester, Pennsylvania, *pro se*.

Michael D. Schaff (Schaff & Young, P.C.), Philadelphia, Pennsylvania, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals and employer cross-appeals the Decision and Order–Denying Benefits (2007-LHC-0692, 0693) of Administrative Law Judge Ralph A. Romano 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). In an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law adverse to claimant in addition to the issues raised by employer. We must affirm the administrative law judge's findings if they are rational,

supported by substantial evidence, and 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 ship dismantler, alleged he sustained injuries to his left wrist, right shoulder, neck and back as a result of two injuries at work. The first injury, which was to his left hand, occurred on October 3, 2000, when a lead-filled hose hit the side of his hand while he was sandblasting. The second injury took place on October 13, 2000, when he stepped on a plank and hit his head on a bulkhead, causing him to fall backward. Following both injuries claimant returned to light-duty work after receiving medical treatment.[1] He performed his normal job duties thereafter until November 22, 2000, when he voluntarily terminated his employment, EX 28; on November 23, 2000, claimant admitted himself into a drug rehabilitation facility. HT at 78. Claimant was unemployed until 2003 or 2004 when he returned to work; he held a series of jobs until he ceased working on November 17, 2006, following an injury while moving furniture. Claimant sought ongoing temporary total disability compensation, as well as payment of medical bills.

In his decision, the administrative law judge found that claimant's intoxication is not a bar to his claim for benefits. Nonetheless, the administrative law judge found that claimant failed to establish that the injury to his left wrist was due to the incident on October 3, 2000, or that he sustained an injury to his right shoulder on October 13, 2000. Although the administrative law judge concluded that claimant's cervical spine injury was the result of the October 13, 2000, incident, he found that claimant did not establish that he was disabled as a result of this injury at the time he left employment with employer. Consequently, he denied all benefits.

Claimant, representing himself, contends the administrative law judge erred in denying benefits under the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer has filed a cross-appeal, arguing that the administrative law judge erred in concluding that claimant's October 13, 2000, injury was not solely caused by his drug intoxication. 33 U.S.C. §903(c).

We first address employer's cross-appeal. Employer contends that the administrative law judge erred in finding that claimant's intoxication does not bar claimant's claim for any harm arising out of the October 13, 2000, incident. Section 3(c) of the Act, 33 U.S.C. §903(c), provides that "[n]o compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee...." (emphasis added). This provision must be applied in conjunction with Section 20(c), which provides that, in

[1] Claimant was suspended for one week starting October 23, 2000, for testing positive for cocaine use following his second injury.

the absence of substantial evidence to the contrary, it is presumed that the injury was not occasioned solely by the intoxication of the injured employee. 33 U.S.C. §920(c). Accordingly, in order to rebut the Section 20(c) presumption, employer bears the burden to produce substantial evidence that claimant's injury was due solely to his intoxication. *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986).

Substantial evidence supports the administrative law judge's finding that claimant was under the influence of cocaine at the time of the October 13, 2000, incident. *See, e.g.*, HT at 48. Nonetheless, the administrative law judge properly determined that this fact is insufficient to rebut the statutory presumption. Decision and Order at 20. Employer presented no evidence that claimant's intoxication was the sole cause of the accident and the mere fact of intoxication is insufficient to rebut the Section 20(c) presumption. *Sheridon*, 18 BRBS 57; *Birdwell v. Western Tug & Barge*, 16 BRBS 321 (1984); *Shelton v. Pacific Architects & Engineers, Inc.*, 1 BRBS 306 (1975). Therefore, as it is in accordance with law, we affirm the administrative law judge's finding that claimant's claim is not barred by Section 3(c).

We next address the administrative law judge's finding that claimant's wrist injury is not related to the accident on October 3, 2000. In establishing that an injury is work-related, a claimant is aided by Section 20(a) of the Act which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm alleged. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not due to the work accident. *See, e.g., American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Moreover, as claimant's wrist arthritis pre-existed the incident at work, the aggravation rule applies, and employer must produce substantial evidence that claimant's pre-existing condition was not aggravated by the work accident.[2] *C&C Marine Maint. Corp. v. Bellows*, 538 F.3d 293 (3d Cir. 2008);

[2] The "aggravation rule" states that when an employment injury aggravates, accelerates, contributes to, or combines with, a pre-existing condition, employer is liable for the entire resultant disability. *C&C Marine Maint. Corp. v. Bellows*, 538 F.3d 293 (3d Cir. 2008); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

see Bath Iron Works Corp. v. Preston, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

The administrative law judge found claimant entitled to invocation of the Section 20(a) presumption with regard to his wrist injury. After the October 3, 2000, incident, Dr. Burnett placed claimant's left wrist in a splint. A bone scan indicated a possible fracture of the navicular bone. CX 2. Claimant has been diagnosed with severe degenerative changes in this wrist. EX 8 at 7. Claimant underwent a left wrist arthroscopy and synovectomy, an excision of the left scaphoid, a four quadrant fusion with distal bone radius bone graft, and posterior interosseous neurectomy on May 11, 2001. CX 9 at 7. The administrative law judge found, however, that employer established rebuttal of the Section 20(a) presumption based on Dr. Schmidt's opinion that a navicular fracture is typically caused by falling on an outstretched hand, not by the accident alleged, and that claimant suffers degenerative arthritis which predates his work injury. Upon weighing the medical evidence, the administrative law judge concluded that claimant failed to establish a causal relationship between his wrist injury and the work accident.

We cannot affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. The administrative law judge found rebuttal established based on Dr. Schmidt's opinion that a navicular bone fracture is not generally caused by a blow to the hand, but by falling on an outstretched hand, and that claimant's arthritis, which necessitated the surgery, predated the work injury, which was only a soft tissue injury. Decision and Order at 17. Although this evidence shows that claimant's wrist condition was not directly caused by the work accident, the administrative law judge did not address whether employer produced substantial evidence that claimant's pre-existing condition was not aggravated by the work incident. Where, as here, claimant has a pre-existing condition, employer must produce substantial evidence that the work accident did not aggravate the condition in order to rebut the Section 20(a) presumption. *C&C Marine Maint.*, 538 F.3d at 298-299; *see also Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). As the administrative law judge did not address this issue, we vacate the finding that employer rebutted the Section 20(a) presumption, and we remand the case for findings on this issue. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

We next address the administrative law judge's findings with regard to claimant's claim for a right shoulder injury. The administrative law judge found that claimant failed to establish his *prima facie* case with regard to his alleged right shoulder injury. The administrative law judge found claimant failed to establish he injured his right shoulder as a result of the October 13, 2000, work injury because there is no credible testimony or evidence to link the shoulder pain to the event. The administrative law judge alternatively found that employer established rebuttal of the Section 20(a) presumption

and that, on the record as a whole, claimant did not establish the work-relatedness of his shoulder condition

We cannot affirm the administrative law judge's findings regarding and invocation and rebuttal of the Section 20(a) presumption. The administrative law judge erred in requiring claimant to produce medical evidence to affirmatively link his pain to the work incident in order to establish his *prima facie* case. *See, e.g., Ramey v. Stevedoring Services of America,* 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Hampton v. Bethlehem Steel Corp.,* 24 BRBS 141 (1990). Claimant's burden at invocation is to produce evidence that he has a physical harm and that the work accident *could have* caused the harm. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990) (referencing "minimal requirements" for invocation of the Section 20(a) presumption).

It is uncontested that claimant struck his head at work on October 13, 2000, and fell onto his back. Thus, claimant has established the "accident" prong of his *prima facie* case. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds,* 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Although the administrative law judge found that claimant did not establish a "harm," the record reflects that claimant complained of pain to his right shoulder within weeks of the accident. EX 5. In relating his history to various physicians, claimant consistently maintained that he suffered right shoulder pain.[3] CX 4; EX 5. Moreover, claimant underwent surgery to repair a full thickness tear of his supraspinatis shoulder tendon in April 2006. CX 6; EX 13. Because the administrative law judge improperly required claimant to demonstrate a causal relationship between his shoulder pain and the work accident and did not discuss all relevant evidence in determining if claimant suffered a "harm," we must vacate his finding that claimant did not establish his *prima facie* case with respect to his shoulder injury. The case is remanded to the administrative law judge for further consideration of this issue. *See generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

Furthermore, we cannot affirm the administrative law judge's alternate finding that employer rebutted the Section 20(a) presumption with regard to claimant's shoulder injury. The administrative law judge found that claimant's shoulder x-rays were negative, and the administrative law judge noted that in January 2001 Dr. Schmidt stated claimant had no ongoing shoulder pathology. EX 8. The administrative law judge relied on Dr. Mendez's November 2000 opinion that claimant's shoulder pain is not work-

[3] Claimant's initial examination after the injury references a left shoulder complaint. EX 4.

related. EX 5. The administrative law judge also noted that in December 2005, claimant's "regular" MRI was found to be normal. CX 8. However, Dr. Shatouhy advised at that time that claimant undergo an "arthrogram MRI" in view of his continued complaints of pain. *Id.* Claimant underwent this more specialized test and it revealed a torn rotator cuff, for which claimant underwent surgery in 2006. CX 6. As the administrative law judge did not discuss claimant's rotator cuff tear demonstrated on the more specialized MRI, we cannot affirm the administrative law judge's reliance on the earlier negative test results to rebut the Section 20(a) presumption. Therefore, on remand, the administrative law judge must address rebuttal in terms of the harm established in claimant's *prima facie* case.

The administrative law judge found that claimant is not entitled to any disability compensation because no physician stated, at the time claimant voluntarily quit his job on November 22, 2000, that he was totally disabled, *i.e.*, that he was unable to perform his usual work. Substantial evidence supports this statement. Claimant was performing his regular duties when he quit work; moreover, employer also had light-duty work for claimant at that time.[4] As claimant voluntarily left his job for reasons unrelated to his injuries, any loss in wage-earning capacity due to his leaving the job is not compensable. Employer, however, remains liable for any disability related to the work injury which would have occurred notwithstanding claimant's loss of this work. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). If claimant's wrist or shoulder injuries are work-related, any work restrictions for these conditions that would have precluded claimant's performing his usual or light-duty work for employer, or resulted in a loss of wage earning capacity in those jobs, may result in liability for disability benefits. *See generally Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Moreover, claimant underwent surgery in 2001 and 2006 for his wrist and shoulder conditions, respectively, and may have sustained periods of total disability thereafter during which he was unable to perform any work.[5] Thus, in view of our decision to remand this case for further findings regarding the cause of claimant's wrist and shoulder injuries, the administrative law judge must reconsider claimant's disability status in view of his causation findings on remand.

[4] By letter dated November 10, 2000, employer informed claimant that it had light-duty positions "at a variety of levels." EX 27.

[5] The administrative law judge found that claimant's cervical complaints are work-related, but that claimant's initial restrictions due to this pain were accommodated by employer, and that, on November 17 and 29, 2000, claimant was released to unrestricted work. EX 5 at 3. Thereafter, the record does not contain any medical evidence restricting claimant's ability to work due to his cervical condition.

Finally, the administrative law judge must address claimant's entitlement to medical benefits necessitated by his work injuries. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, such as for his cervical condition, employer may be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Claimant must, however, establish that the treatment procured or anticipated is necessary for the treatment of his work-related injury in order to be entitled to such treatment at employer's expense, notwithstanding the finding that claimant's injury itself is work-related. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989). Thus, on remand, the administrative law judge must address the medical treatment received by claimant for the injuries determined to be work-related and employer's liability for related and necessary treatment.

Accordingly, the administrative law judge's finding that the claim is not barred by Section 3(c) is affirmed. The administrative law judge's Decision and Order denying benefits for lack of disabling work-related conditions is vacated, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge