BRB No. 10-0417

WALTER A. WEST	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITT CORPORATION	)	DATE ISSUED: 11/29/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown, P.C.), Houston, Texas, for claimant.

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-LDA-00043) of Administrative Law Judge Russell D. Pulver 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Commencing in 2005, claimant was employed in Kuwait as a heavy mobile mechanic. Claimant's employment duties, which involved heavy physical labor, included the rebuilding of Humvees, HETs, and HEMTTs.[1] On August 24, 2007, employer offered clamant a similar mechanic position, involving the same heavy labor duties, at a higher rate of pay in Iraq, contingent upon claimant's undergoing a physical examination. On August 29, 2007, claimant underwent an employer-sponsored physical examination, which he passed, and in September 2007, he was transferred by employer to Iraq. Claimant had been diagnosed in 2001 and 2004 with a left disc bulge at L4–5, and a broad-based disc bulge at L5–S1.

On March 18, 2008, claimant experienced left leg pain while working in employer's shop. Although claimant stated that his condition did not improve he continued to perform his regular employment duties for employer until April 3, 2008, on which date he returned to the United States for a previously scheduled vacation. On April 7, 2008, claimant sought medical care and was prescribed medication and physical therapy for his leg pain. Claimant subsequently underwent x-rays, and MRIs of his leg and back led to a diagnosis of disc problems that caused his leg pain.[2] On May 28, 2008, a laminectomy was performed on claimant's lower back at L5 – S1; claimant testified that his leg pain improved after this procedure. Claimant was subsequently released to full-duty work with a fifty-pound lifting restriction. However, on July 25, 2008, employer informed claimant that it would review his medical records prior to allowing him to return to work. Following the completion of this review by its medical examining company, employer accepted claimant's "resignation" and denied claimant's request for additional medical treatment.[3] In August 2008, claimant testified that he began to experience back pain while packing boxes in preparation for his relocation from Texas to California.

In his 60-page Decision and Order, the administrative law judge found that claimant experienced left leg pain while working for employer in Iraq, that claimant's treatment for his leg pain included back surgery, and that claimant subsequently experienced back pain. The administrative law judge found that claimant is entitled to

[1] HETs and HEMTTs are acronyms for heavy equipment transporters and trucks used by the military.

[2] Specifically, claimant's April 30, 2008 MRI was interpreted as revealing, *inter alia*, a chronic disc bulge/herniation at L4-L5, and a new large extruded inferiority migrated fragment, in comparison to claimant's prior MRI, at L5 – S1. CX 31 at 2.

[3] Claimant testified, however, that he had not resigned his position with employer. *See* Tr. at 83 - 84.

invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer did not establish rebuttal of that presumption. Assuming, *arguendo*, that employer rebutted the Section 20(a) presumption, the administrative law judge reviewed the record as a whole and found that claimant established a causal connection between his conditions and his employment with employer. The administrative law judge found that claimant is unable to resume his usual employment duties with employer, that claimant's condition reached maximum medical improvement, and that employer established the availability of suitable alternate employment on February 6, 2009. Accordingly, after calculating claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), and determining that claimant was entitled to the maximum compensation rate pursuant to Section 6, 33 U.S.C. §906, the administrative law judge awarded claimant temporary total disability benefits for the period of March 18, 2008 to February 6, 2009, and permanent partial disability benefits from February 6, 2009, and continuing. 33 U.S.C. §908(b), (c)(21).

On appeal, employer contends that the administrative law judge erred in finding that claimant sustained a compensable injury related to his employment with employer. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer raises three contentions in support of its position that the administrative law judge erred in finding claimant's claim to be compensable under the Act. Employer alleges that the administrative law judge failed to address whether claimant's condition is the result of the natural progression of his pre-existing back conditions. Employer also contends that claimant failed to allege that his initial leg pain and subsequent back pain is due to any incident at work and, thus, that the administrative law judge erred in invoking the Section 20(a) presumption. Finally, assuming the compensability of claimant's condition in 2007, employer contends that any disabling condition suffered by claimant after his release to return to work in July 2008 is due to an intervening cause. We reject employer's contentions of error and, for the reasons that follow, we affirm the administrative law judge's decision in its entirety.

Employer's contention that claimant's injury in March 2008 was the result of the natural progression of his pre-existing back condition ignores the aggravation rule and the scope of the Section 20(a) presumption. Under the aggravation rule, where a claimant's employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*,

799 F.2d 1308 (9th Cir. 1986).[4] In this regard, Section 20(a) presumes that the employment caused or aggravated claimant's condition, provided claimant establishes his *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). In this case, claimant testified that he experienced left leg pain on March 18, 2008, while working in employer's shop, which was attributed to a back condition by his physicians. *See* Tr. at 51–55, 93. The administrative law judge found claimant to be a credible witness. Decision and Order at 11, 44 - 46. As the administrative law judge's credibility determination is not "inherently incredible or patently unreasonable," it must be accepted by the Board. *Cordero v. Triple A Machine Shop*, 850 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We thus affirm the administrative law judge's finding that claimant established the existence of a harm for the purposes of establishing the first prong of his *prima facie* case. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Employer, citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), next asserts that since claimant sustained only an "attack of pain," and did not proffer evidence demonstrating any discrete trauma, claimant did not meet his burden of establishing the second prong of his *prima facie* case. In *U.S. Industries*, the Supreme Court stated, "A prima facie 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *Id.*, 455 U.S. at 615, 14 BRBS at 633. Requiring claimant to prove the two elements of his *prima facie* case is consistent with *U.S. Industries. See, e.g., Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). In his decision, the administrative law judge relied on claimant's testimony in finding that he established the second element of his *prima facie* case. Decision and Order at 45–46. Claimant testified that his employment duties as a mechanic involved strenuous work such as, *inter alia*, replacing truck suspensions, engine and transmission work, removing transfer cases, and the rebuilding of hubs. *See* Tr. at 39–40, 42, 47–48. In discussing the March 18, 2008, employment activities which gave rise to his claim for benefits under the Act, claimant testified that he and his co-

[4] Pursuant to 20 C.F.R. §704.101, this claim was filed in OWCP District 2 in New York. The case was then transferred to OWCP District 18 in Long Beach, California. As the Long Beach district director filed and served the administrative law judge's decision, Ninth Circuit law applies in this case. 42 U.S.C. §1651(b); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979)

workers worked on vehicles, cleaned parts for those vehicles, and moved new and used parts so that they could be returned to the warehouse. *Id.* at 51–52. It was at this time, when claimant was " moving these parts around," that claimant experienced the onset of pain in his leg.[5] *Id.* at 52–53. The administrative law judge rationally credited this testimony and claimant's claim that his leg pain is work-related goes beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982). Thus, as claimant established the existence of employment activities that could have caused his leg pain, claimant made out his *prima facie* case to which Section 20(a) applies to presume that his leg pain is work-related.[6] *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT). As claimant had a pre-existing back condition, Section 20(a) presumes that claimant's leg pain was either directly caused by the work incident or is due to the aggravation of his pre-existing condition. *Bath Iron Works Corp. v. Preston*, 380 F.3d

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[5] Claimant wrote in his Injury and Illness Incident Report, in the section labeled "Employee Statement," that he

> was at work cleaning my work area moving parts and pallets which consisted of bending and lifting light to heavy objects. I had lifted a part off the ground to put onto a pallet when I felt what I thought was a pulled muscle in my leg.

CX 1.

[6] Moreover, as claimant's leg pain was attributed to a back condition by his physicians and this back condition required surgery in May 2008, Section 20(a) applies as well to presume that the surgery and any consequences therefrom are related to claimant's employment. *See generally Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002). Claimant clearly raised his post-surgery back pain as a cause of his disabling impairment. *See U.S. Industries*, 455 U.S. 608, 613, n.7, 14 BRBS 631, 633, n.7; *see* Cl. Post-hearing brief. Claimant is not required to produce, at this juncture of his case, an affirmative medical opinion stating that his subsequent back pain was related to his work-related back surgery in order to satisfy his *prima facie* case. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). We similarly reject employer's challenge to claimant's credibility. *See* Emp. br. at 22. The administrative law judge addressed the inconsistencies in claimant's testimony, *see* Decision and Order at 11, and his decision to credit claimant's testimony regarding his leg and back pain is rational and supported by substantial evidence. *Id.* at 11, 45 – 46; *see generally 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).

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597, 38 BRBS 60(CRT) (1st Cir. 2004). Consequently, as the administrative law judge's findings are supported by substantial evidence and in accordance with law, the administrative law judge invocation of the Section 20(a) presumption is affirmed. *See Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998).

Employer next contends that any currently disabling injury from which claimant suffers is not related to his employment with employer but, instead, is due either to the natural progression of his pre-existing back condition or to an intervening injury claimant sustained after he recovered from his May 2008 back surgery. Employer avers that: 1) claimant has a long history of back problems, including a degenerative condition, predating his employment with employer; 2) claimant's back pain did not arise until August 2008 when he was packing boxes; 3) Dr. Dodge and Dr. van Dam opined that packing boxes can cause pain; and 4) claimant's August 2008 back pain arose from a different location in his back. Once the Section 20(a) presumption is invoked, employer can rebut it by producing substantial evidence that the injury was not caused or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT). Moreover, employer can rebut the presumption by producing substantial evidence that claimant's disabling condition is due to a subsequent non work-related event which is not the natural or unavoidable result of the original work injury. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *see also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983). In such a case, where the subsequent injury or aggravation is not a natural or unavoidable result of the work injury but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

We affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. Mere evidence that claimant had a pre-existing condition cannot rebut the presumption in view of the aggravation rule. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). In addition, the fact that claimant's back pain arose after his back surgery, and from a spinal location different from that upon which his back surgery was performed, is not dispositive, since claimant's August 2008 back pain may be compensable if it arose as a result of that work-related back surgery.[7] *See generally Mattera v. M/V Mary*

[7] Employer, throughout its brief, focuses upon the onset and alleged resolution of claimant's leg pain. The medical evidence of record supports the administrative law judge's finding that claimant's leg pain was the result of a spinal condition; moreover, it is undisputed that claimant underwent back surgery on May 28, 2008 in an effort to

Antoinette, Pacific King, Inc., 20 BRBS 43 (1987). Moreover, the administrative law judge rationally found that the opinions of Drs. Dodge and van Dam, upon whom employer relies, do not rebut the presumption. Dr. Dodge opined that claimant's current level of impairment can be attributed to three events: claimant's work in Iraq (15 percent), claimant's August 2008 packing activity (25 percent), and claimant's pre-existing disc herniation and degenerative disc disease (50 percent). *See* EX 22 at 28 – 30. Thus, as the opinion of Dr. Dodge attributes claimant's present condition in part to his employment injury with employer, it cannot rebut the Section 20(a) presumption. *See C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). Moreover, Dr. van Dam, in discussing the relationship between claimant's injury and employment with employer, opined that claimant's back condition, leg pain, and resultant surgery were related to his employment with employer. *See* EX 26 at 16–18, 38–39. He did not offer an opinion that claimant's present condition is unrelated to the work incident but is related to his packing activities. *See* EX 26. Thus, this opinion does not rebut the Section 20(a) presumption or establish that claimant's condition is due to an intervening cause. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). Consequently, the administrative law judge rationally found that employer did not offer substantial evidence of the absence of a connection between claimant's employment and a worsening of his back condition or that claimant's condition is the result of an intervening cause. *See Cyr*, 211 F.2d 454; *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). As employer has identified no evidence sufficient to rebut the Section 20(a) presumption, we affirm the administrative law judge's finding that claimant's disabling condition is causally related to his employment with employer.[8] *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Lastly, employer summarily avers that the administrative law judge erred in determining that claimant was disabled during the period of July 24 through October 22, 2008. *See* Emp. br. at 31. Relying upon claimant's testimony regarding the nature of his employment duties with employer and the thirty-pound lifting restriction placed on

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resolve his leg pain, and that claimant subsequently complained of back pain. CX 31 at 5; EX 26 at 24 – 25.

[8] Thus, any error committed by the administrative law judge in setting forth the rebuttal standard is harmless. Moreover, assuming *arguendo* that employer rebutted the presumption, we note that employer does not challenge on appeal the administrative law judge's alternative finding that claimant, through the credited testimony of Dr. van Dam, established a causal relationship between his disabling back condition and his employment based upon the record as a whole. *See* Decision and Order at 49; Emp. br. at 15–31; *see generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642 (9th Cir. 2010)(court endorses harmless error doctrine).

claimant by Dr. van Dam in October 2008, the administrative law judge found that claimant is unable to perform his former employment duties with employer. Decision and Order at 51–52; *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). Moreover, employer made claimant's former job unavailable in July 2008. As employer has not demonstrated error in the administrative law judge's finding that claimant cannot perform his usual work, it is affirmed. Additionally, as employer does not challenge the administrative law judge's findings regarding the extent of claimant's work-related disability both before and after this period of time, the administrative law judge's award of total and partial disability benefits to claimant is also affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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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BETY JEAN HALL
Administrative Appeals Judge