BRB No. 99-1314

DEREK B. HUDGINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NABORS & LOFFLAND DRILLING COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Phil Watkins (Law Office of Phil Watkins, P.C.), Corpus Christi, Texas, for claimant.

Andrew Z. Schreck (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (1998-LHC-1441) of Administrative Law Judge Richard D. Mills 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant, a rough-neck on an offshore drilling rig, alleged he injured his head and neck on March 9, 1997, when his head was caught between a lifting strap and a length of pipe. In his

Decision and Order, the administrative law judge found the evidence sufficient to establish invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation, and that employer produced insufficient evidence to rebut the presumption; thus, a causal relationship between claimant's injuries and his employment existed. With regard to the extent of disability, the administrative law judge relied on the opinion of Dr. Powell that claimant could return to his usual employment as of September 22, 1997, with the proviso that claimant have a few additional physical therapy sessions. The administrative law judge found that physical therapy sessions were incompatible with claimant's position on an offshore oil platform, and, therefore, found that claimant was not able to return to his usual employment until November 3, 1997. Consequently, as the administrative law judge found that employer failed to submit any evidence of suitable alternate employment, the administrative law judge awarded claimant temporary total disability benefits from March 13, 1997 through November 3, 1997. The administrative law judge also awarded claimant medical benefits under 33 U.S.C. §907, and assessed a penalty against employer pursuant to 33 U.S.C. §914(e), on unpaid compensation as well as awarding interest and an attorney's fee.

The administrative law judge denied employer's motion for reconsideration, rejecting its contention that he applied an incorrect standard in evaluating whether it established rebuttal of the Section 20(a) presumption. The administrative law judge also denied employer's alternative request to re-open the record for the submission of additional medical evidence based on employer's argument that claimant changed his testimony at the hearing concerning the circumstances of the accident which, employer argued, prejudiced its ability to establish rebuttal.

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption. Alternatively, employer asserts that the administrative law judge erred in rejecting its request to re-open the record for the submission of additional medical evidence in support of rebuttal, based on the theory of recovery accepted by the administrative law judge. Claimant responds, urging affirmance.

Employer contends that the administrative law judge erred in invoking the Section 20(a) presumption. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm, and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A. T. X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show that working conditions existed which could have caused his harm. *See Sinclair v. United Food &Commercial Workers*, 23 BRBS 148 (1989).

Employer contends that claimant changed the theory of his claim at the hearing, and that therefore the administrative law judge erred in invoking the Section 20(a) presumption. We reject

employer's contention. Claimant initially claimed he was injured when his head became caught in a lifting strap and he was lifted off the ground; claimant contended he lost consciousness in this incident, which left him hanging. At the hearing, claimant testified he did not remember being lifted off the ground, due to his losing consciousness. The administrative law judge found that claimant's version of his accident was not entirely credible. *See* Decision and Order at 16-17. Nonetheless, the administrative law judge found that employer did not dispute that an incident involving claimant occurred on the day in question, March 9, 1997, and that all the witnesses testified that an incident involving claimant and a lifting strap in fact occurred that day. Specifically, the administrative law judge found that employer's witnesses testified that claimant had his head in an unsafe position inside the strap, and that claimant had some contact with the heavy drilling strap that left him stunned and knocked his hard hat onto the ground, although he did not lose consciousness. *Id.* at 17; Order Denying Motion for Recon. at 2. The administrative law judge, therefore, concluded that a work-related accident occurred that day which might have harmed claimant, and that claimant established the first element of his *prima facie* case.

The administrative law judge also found that claimant sustained a harm, based on the medical report of Dr. Gunderson, who found a bruise on claimant's right shoulder upon examination on March 13, 1997. The administrative law judge noted that Dr. Gunderson also diagnosed a cervicothoracic straining injury, which, the administrative law judge found, was probably based on claimant's version of the accident. The administrative law judge found, however, that Dr. Gunderson did not state that claimant was exaggerating his symptoms of neck pain. Thus, the administrative law judge concluded that claimant established the "harm" element of his *prima facie* case.

We affirm the administrative law judge's finding that the Section 20(a) presumption is invoked. The administrative law judge rationally found that claimant was involved in a work accident on the date in question, despite his finding that claimant's exact version of the accident is not credible. The administrative law judge found that the varying descriptions of the accident are not so different that employer was not able to defend the claim, in that there was no dispute that something happened to claimant with a drilling strap on the day in question. Thus, he concluded that employer was not forced to defend every conceivable theory of recovery in violation of the Supreme Court's mandate in *U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631, as it always was on notice that it was defending a claim for an accident with a drilling strap occurring on March 9, 1997. This finding is rational, and the administrative law judge's finding that the Section 20(a) presumption is invoked is supported by substantial evidence in the record. *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). The administrative law judge's finding therefore is affirmed. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

Similarly, employer's contention that the administrative law judge abused his discretion in refusing to re-open the record to allow it to submit additional medical evidence supportive of its burden regarding rebuttal of the Section 20(a) presumption lacks merit. The

administrative law judge has great discretion concerning the admission of evidence, and his determinations may be overturned only if they constitute an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The administrative law judge rationally found that although he discredited claimant's exact version of the accident, claimant's version was "close enough" to the version described by employer's witnesses that employer should have been prepared to respond to the issue of whether claimant's injuries were work-related. Specifically, the administrative law judge pointed out that he relied primarily on the testimony of employer's own witnesses, that employer certainly had access to its own witnesses, and could have used their version of the events when questioning the physicians concerning claimant's injuries. Thus, he concluded that employer was not prejudiced, and that the record would not be reopened. Inasmuch as this finding is rational, and does not constitute an abuse of the administrative law judge's discretion, it is affirmed. *See Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999).

Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence to the contrary. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Employer's only contention here is that the administrative law judge erred in requiring that it "rule out" claimant's work accident as a possible cause of claimant's injury. We reject this contention, as the administrative law judge properly, and specifically, stated that employer was required to introduce substantial evidence that claimant's injury was not work-related. *See* Decision and Order at 18; Order Denying Motion for Recon. at 2; *Conoco*, *supra*. As employer does

not otherwise challenge the administrative law judge's finding that it did not offer sufficient evidence to rebut the Section 20(a) presumption, the administrative law judge's award of benefits to claimant is affirmed.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge