BRB No. 00-1189

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| JASPER O. HICKEY | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| TODD PACIFIC SHIPYARDS CORPORATION | ) | DATE ISSUED: Sept. 13, 2001 |
| | ) | |
| and | ) | |
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| EAGLE INSURANCE GROUP, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Michael F. Pozzi, Renton, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (1999-LHC-1424) of Administrative Law Judge Anne Beytin Torkington 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 was hired as a metal-joiner to install ventilation systems. On July 10, 1997,

during a temporary assignment installing steel shelving on a jumbo ferry, claimant injured his back. Tr. at 48-51. Dr. Kunkler, claimant's treating physician, diagnosed lumbosacral strain, and an MRI in August 1997 revealed degenerative disc disease with foraminal narrowing at L5-S1, but no evidence of herniation. Cl. Ex. 2; Emp. Ex. 3. Claimant returned to light duty work on November 17, 1997, Emp. Ex. 2; Tr. at 53, but continued treatment for his back. In February 1998, claimant was seen by two doctors, Dr. Zietak, a physiatrist referred by Dr. Kunkler, and Dr. Bradley, an expert hired by employer, both of whom released claimant to return to his usual work on February 26, 1998. Dr. Bradley found residual subjective complaints of pain with no corresponding objective findings, he noted claimant's excessive weight, and he determined that claimant's condition reached its pre-injury status. Emp. Ex. 2. Dr. Zietak diagnosed claimant with chronic low back and left leg pain, pre-existing degenerative disc disease and being overweight. As claimant's examination was within normal limits, Dr. Zietak determined that surgery or further treatment was unwarranted, but she recommended continuing back exercises. In March 1998, Dr. Zietak signed a letter from employer's claims examiner, concurring with Dr. Bradley's opinion. Cl. Ex. 3. In May 1998, due to persistent complaints of pain, Dr. Kunkler referred claimant to a neurosurgeon, Dr. Wright. Dr. Wright described claimant's complaints as "classic" symptoms of left sciatica, believed they were most likely due to increased foraminal stenosis, and suggested claimant undergo a foraminotomy at L5-S1. Emp. Ex. 6. Employer denied authorization for this surgery.

The administrative law judge found that claimant's condition reached maximum medical improvement on February 26, 1998, the date on which Drs. Bradley and Zietak, whom she credited, stated that claimant's condition returned to its pre-injury status. Consequently, she denied claimant additional compensation. Decision and Order at 15, 18. The administrative law judge held employer responsible for the cost of medical services provided by Dr. Wright on May 20 and August 26, 1998, as those visits were intended to treat claimant's residual complaints, possibly related to his work injury. Nevertheless, she found that employer is not responsible for the cost of a foraminotomy. She concluded that the surgery is unnecessary and unreasonable for the treatment of claimant's work-related injury because there is no evidence that claimant's current symptoms are related to his 1997 work injury, inasmuch as Dr. Zietak concluded that surgery was unwarranted in February 1998 and Dr. Bradley testified that claimant did not have a nerve root compression. *Id.* at 16. Claimant appeals the denial of the medical benefits to cover the surgery, and, in the event he is permitted to undergo surgery, he challenges the finding of maximum medical improvement. Employer responds, urging affirmance.

Section 7(a) of the Act, 33 U.S.C. §907(a), provides that an employer is liable for reasonable and necessary medical expenses for treatment of a work-related injury. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979). Medical care must be appropriate for the injury, 20 C.F.R.

§702.402, and the claimant can establish a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for the work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Where the administrative law judge determines that the claimant's disability has resolved, warranting no further treatment, or where she determines that the treatment is unreasonable or unnecessary, the employer is not liable for the cost of treatment. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that a claimant's treating physician's opinion is entitled to special weight, and has stated that, "[a]lthough the employer is not required to pay for unreasonable or inappropriate treatment, where the claimant is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999). Thus, where the treating physician's recommendation was not shown by other medical testimony to be unreasonable, the court held that the administrative law judge was not entitled to choose between two reasonable courses of treatment; rather, the court held that claimant was entitled to make the decision as to whether to have surgery.

Claimant contends the administrative law judge erred in denying medical benefits because she erred in finding that claimant's condition was not a manifestation of his work injury and in finding that the surgery is not a reasonable or necessary treatment for such condition. Claimant's initial argument essentially raises causation, as it involves whether claimant's condition was work-related, and his contention has merit, as the administrative law judge did not properly address whether claimant's condition is related to the work injury. Without discussion, she placed the burden of showing a causal nexus on claimant stating: "[a]side from Dr. Wright's assessment, which the Court declined to follow, there is no objective evidence or expert testimony to suggest that Claimant's current symptoms are a manifestation of his 1997 injury." Decision and Order at 16. The administrative law judge then proceeded directly to the issue of whether the surgery is reasonable and necessary to treat claimant's back condition, and she concluded it is not. In order to reach the question of whether a particular treatment is reasonable or necessary, however, the administrative law judge must first make a determination as to whether the condition to be treated is work-related and, therefore, potentially compensable. *Ballesteros*, 20 BRBS 184; *see also* 20 C.F.R. §702.402; *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988).

In determining whether a condition is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which is invoked after he establishes a *prima facie* case. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th

Cir. 2000); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Once the presumption is invoked, an employer may rebut it by producing substantial evidence to show that a claimant's employment did not cause, aggravate or contribute to his condition. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof, with the claimant bearing the burden of persuasion. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge improperly placed the burden on claimant to show that his condition was work-related without applying the presumption and determining if employer established rebuttal. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). As it is not disputed that an event occurred at work in 1997 which could have caused the harm to claimant's back documented by the MRI, the Section 20(a) presumption applies to the issue of whether claimant's ongoing complaints are related to that work injury. The administrative law judge did not evaluate the evidence consistent with Section 20(a) and employer's burden of production. She also did not address whether claimant's pre-existing obesity, combined with his work injury, may have been the cause of claimant's troubles. In this regard, employer must rebut the presumption with evidence that claimant's ongoing condition was not directly caused by the work incident and that it was not the result of an aggravation of, or combination with, a pre-existing injury.

In rendering her decision, the administrative law judge credited the opinions of Drs. Bradley and Zietak. Neither of these doctors, however, examined claimant after February 26, 1998, and thus did not address the cause of claimant's continuing symptoms. While Dr. Zietak stated that claimant's weight was a factor affecting his condition, she admitted in her deposition that his condition could have changed from the time she last saw him to the time he was examined by Dr. Wright. Emp. Ex. 19 at 16. Additionally, although Dr. Bradley found no objective evidence to support claimant's continued complaints of pain in February 1998, both he and Dr. Zietak acknowledged in their depositions that trauma could render an asymptomatic back symptomatic. Emp. Exs. 18 at 27-28, 19 at 23. Accordingly, we vacate the administrative law judge's determination that claimant's symptoms, for which surgery is

recommended, are not work-related, and we remand the case for her to reconsider the evidence in light of the Section 20(a) presumption. *See Addison*, 22 BRBS 31; *Frye*, 21 BRBS 194.

We also vacate the finding that the recommended surgery is unreasonable and unnecessary, as the administrative law judge failed to apply the holding in *Amos* in deciding this issue. In *Amos*, the Ninth Circuit held that a treating physician's opinion is entitled to special weight. *Amos*, 153 F.3d at 1054, 32 BRBS at 147-148(CRT). Although the administrative law judge mentioned *Amos* in reference to Dr. Zietak's opinion on maximum medical improvement, she did not discuss that case for its main import: the necessity of particular medical treatment. *See id.* As the question before her concerned whether a surgical procedure was a reasonable and necessary course of treatment, and as this case arises in the Ninth Circuit, the evidence herein must be evaluated in light of *Amos*.

In the case before us, the evidence establishes that claimant was referred to a specialist, Dr. Wright, by his treating physician, Dr. Kunkler. Dr. Wright, therefore, also must be considered a treating physician, and his opinion regarding the need for surgery is entitled to special weight.[1] *Amos*, 153 F.3d at 1054, 32 BRBS at 147-148(CRT). The administrative law judge gave Dr. Wright's opinion no weight, and she credited the opinions of doctors who last examined claimant six months before the recommendation for surgery was made.[2] While the administrative law judge is entitled to weigh the medical evidence and evaluate the credibility of the witnesses, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), under *Amos* the pertinent inquiry is whether the other medical opinions of record establish that Dr. Wright's surgical recommendation was unreasonable. In applying *Amos*, the administrative law judge should also consider the time frames in which Dr. Wright and the other physicians evaluated claimant. For these reasons, we vacate the

[1]Employer asserts that Dr. Wright may not be a "treating physician" as he only saw claimant on two occasions. However, the administrative law judge accorded "treating physician" status to Dr. Zietak, who, like Dr. Wright, examined claimant two times after having been recommended by Dr. Kunkler. Decision and Order at 14.

[2]The administrative law judge credited the opinions of Drs. Bradley and Zietak. Decision and Order at 16. Dr. Bradley stated that surgery is warranted only for foraminal stenosis when there is evidence of a compressed nerve, and that factor is absent here. Emp. Ex. 18 at 20. However, the MRI on which Dr. Wright relied, in conjunction with claimant's complaints, was more than one year old by the time Dr. Wright made his recommendation for surgery. Dr. Zietak considered surgery inappropriate in February 1998, but she acknowledged in her deposition that claimant's condition could have changed since she saw him to such an extent that surgery was warranted by August 1998. Emp. Ex. 19 at 16.

denial of benefits and remand the case to the administrative law judge. In the event the administrative law judge finds that claimant's continuing back symptoms are related to his 1997 work injury, she must then reconsider the evidence in light of the Ninth Circuit's decision in *Amos* and determine whether surgery is necessary to treat the work-related condition.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.[3]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[3]In addition to the issue of whether he is entitled to medical benefits to cover the cost of the recommended surgery, claimant also challenged the findings regarding maximum medical improvement and his credibility. It is for the administrative law judge to determine the credibility of witnesses, and her findings will not be disturbed unless found to be "inherently incredible" or "patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In light of our decision to vacate and remand the case the administrative law judge, we need not address claimant's remaining contention.