BRB No. 08-0427

D.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 09/18/2008
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Janmarie Toker (McTeague, Higbee, Case, Cohen, Witney, & Toker, P.A.), Topsham, Maine, for claimant.

John King, Jr. (Norman Hanson & DeTroy), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LHC-1125, 1126, 1127, 1128, and 1129) of Administrative Law Judge Jeffrey Tureck 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 alleged that he sustained a work-related back injury as a result of a combination of seven incidents, the first six of which occurred over the course of his work for employer while the seventh, which preceded the period for which he claims

disability, occurred at home.[1] Specifically, claimant sustained repeated mid and lower back strains, for which he received medical treatment, as a result of incidents that occurred during his work for employer on March 25, 1991, October 9, 1992, January 8, 1993, February 16, 2000, and February 2, 2003. Additionally, claimant stated that he sustained "excruciating" back pain while insulating in employer's shipyard in either 2004 or 2005, but that he did not seek any particular treatment after this incident.

On July 17, 2006, claimant experienced intense back pain while in his backyard. On the following day he sought treatment with Dr. Inger, who ultimately diagnosed low back pain due to a herniated nucleus pulposus and spinal stenosis, prescribed physical therapy and anti-inflammatory drugs, and recommended that claimant remain off work until further notice. Having seen improvement in claimant's condition, Dr. Inger cleared claimant to return to work as of September 18, 2006. Thus, as a result of his injury, claimant was not able to work from July 17, 2006, to September 18, 2006. On October 9, 2006, Dr. Inger opined that it is more probable than not that claimant's back condition is related to the series of ongoing injuries he sustained over the course of his work for employer.[2]

In his decision, the administrative law judge found that claimant is entitled to the Section 20(a) presumption with regard to his back condition, and that employer did not establish rebuttal thereof. 33 U.S.C. §920(a). Nevertheless, the administrative law judge added that even if employer established rebuttal, he credited Dr. Phelps's opinion that claimant's back condition is work-related. He thus awarded claimant temporary total disability benefits from July 17, 2006, to September 18, 2006,[3] as well as all relevant medical benefits.

On appeal, employer challenges the administrative law judge's findings that claimant is entitled to the Section 20(a) presumption and that employer did not establish rebuttal. Claimant responds, urging affirmance.

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[1] Claimant has held three positions over the course of his work for employer. Specifically, he worked as a rigger for approximately the first 15 years of that employment, then worked approximately two years as an insulator, before performing custodial duties for employer.

[2] Dr. Phelps concurred with Dr. Inger's opinion that claimant's condition was related to his work for employer, while Dr. Ciembroniewicz proffered the contrary position that claimant's back condition was not in any way related to that work.

[3] The administrative law judge observed that employer did not contest the fact that claimant's back injury kept him out of work during this particular period of time.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we affirm the administrative law judge's Decision and Order as it is supported by substantial evidence and contains no reversible error. To establish a *prima facie* case for purposes of invocation of the Section 20(a) presumption, 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. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 , 38 BRBS 60(CRT) (1st Cir. 2004); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Mar. 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).

While, as employer correctly notes, the mere existence of a physical impairment,[4] without any connection with claimant's work for employer, is plainly insufficient to establish a *prima facie* case under Section 20(a) pursuant to *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the claimant in this case claimed that conditions at work caused his harm.[5] Contrary to employer's argument,

[4] It is undisputed that claimant demonstrated the requisite harm, *i.e.*, back pain, for purposes of establishing his entitlement to the Section 20(a) presumption.

[5] Thus, employer's argument that, under *U.S. Industries*, claimant cannot establish a *prima facie* case because his pain occurred at home is without merit. In *U.S. Industries*, claimant suffered pain at home and filed a claim asserting it was related to a specific accident at work which the administrative law judge found did not occur. Holding that the Section 20(a) presumption attaches only to the claim actually made, the Court held that the lower court erred in requiring employer to rebut a claim based on general working conditions, as claimant had not made such a claim. However, the court specifically stated that if the administrative law judge had believed the claimed accident occurred, then claimant Riley's claim would have stated a *prima facie* case. *U.S. Industries*, 455 U.S. at 616, 14 BRBS at 633. Moreover, the Act compensates injuries which occur as the result of the natural progression of initial work injury even if the injury occurs away from the work site. *See* 33 U.S.C. §902(2); *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

the fact claimant experiences a harm outside work does not prevent invocation of the presumption if he establishes that working conditions could have caused the harm. *See James v. Tate Stevedoring Co.*, 22 BRBS 271 (1989); *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). The record in this case supports the administrative law judge's finding that the conditions of claimant's work for employer could have caused his July 17, 2006, back injury. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In this regard, the administrative law judge rationally concluded that claimant's work activities, which included the lifting of chain-falls, straps, and shackles weighing up to 75-80 pounds, the climbing of ladders, and frequent bending and twisting of his back and hips, could have caused a gradual back injury. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Additionally, the record contains undisputed evidence that claimant sustained repeated mid and lower back strains as a result of at least five of the six incidents that occurred during his work for employer on March 25, 1991 (mid back strain), October 9, 1992 (thoracic lumbar muscle strain), January 8, 1993 (lumbar strain), February 16, 2000 (musculoskeletal low back pain), and February 2, 2003 (lower back strain).[6] Moreover, Dr. Phelps specifically opined that "[i]t is medically more likely than not that [claimant's] work-related activities, including those related to his custodial work (mopping, buffing, twisting, bending, and lifting) caused his multilevel disc condition." Claimant's Exhibit 43 at 65. As substantial evidence supports the administrative law judge's conclusion that claimant established both elements of his *prima facie* case, the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption is affirmed. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *see generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

The administrative law judge next found that the opinion of Dr. Ciembroniewicz, that the July 17, 2006, injury was not related to claimant's work for employer, is insufficient to establish rebuttal of the Section 20(a) presumption. Decision and Order at 9. Nevertheless, the administrative law judge also found that he would accord greatest weight to the opinion of Dr. Phelps that claimant's activities at work caused his

[6] After each of these five incidents claimant sought medical attention either through employer's health department or with employer's knowledge resulting in the accompanying diagnoses. The sixth incident, which occurred while claimant was insulating in either 2004 or 2005, resulted in his feeling excruciating back pain. Claimant did not seek medical attention to address these symptoms.

multilevel disc condition, and thus, the administrative law judge concluded that claimant's July 17, 2006, back injury is work-related. As the opinion of Dr. Phelps constitutes substantial evidence in support of the conclusion that claimant's July 17, 2006, injury is related to his employment, and as the administrative law judge's decision to credit this evidence is within his discretion as the fact-finder, *see generally 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's finding that claimant has established that his disabling back condition is work-related.[7] Consequently, we affirm the administrative law judge's award of temporary total disability benefits from July 17, 2006, to September 18, 2006.

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

[7] Any error in the administrative law judge's Section 20(a) rebuttal analysis is harmless, as his finding that claimant's back injury is work-related is supported by substantial evidence. *See generally Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175, 179 (1996); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).