BRB Nos. 98-0162
and 98-0162A

LEONARD BOURNE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gail D. Nicholson (Nicholson & Nicholson), Gulfport, Mississippi, for claimant.

Jessica S. Upshaw (Hopkins, Crawley, Bagwell, Upshaw & Persons, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (96-LHC-2478) of Administrative Law Judge Fletcher E. Campbell, Jr., denying benefits 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 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, employed as a pipefitter, sustained a work-related injury to his left shoulder on October 4, 1994. On October 7, 1994, claimant was examined by Dr. Peden who diagnosed an acute blocked trauma contusion of the left shoulder with a normal range of motion, and released claimant to work with a 35 pound lifting restriction of the left arm for one week. On October 14, 1994, claimant was involved in an automobile accident and went to the emergency room for treatment of upper body injuries. In particular, claimant received treatment for his back and neck.

Claimant returned to Dr. Peden for a follow-up examination of his work-related injury on October 17, 1994, complaining of increased shoulder pain. At that time, claimant did not inform Dr. Peden of his automobile accident. Dr. Peden noted that claimant's range of motion had decreased as to extension and rotation and, consequently, referred claimant to an orthopedic specialist, Dr. Graham. Dr. Graham diagnosed and later surgically repaired a rotator cuff tear in claimant's left shoulder, and ultimately released claimant with no restrictions in February 1995. Claimant subsequently sought additional treatment from Dr. Longnecker, who, following an examination, advised that another rotator cuff repair operation of the left shoulder should be undertaken. Employer voluntarily paid claimant temporary total disability compensation for the period from October 5, 1994, to February 7, 1995, and has paid all medical bills except those submitted by Dr. Longnecker relating to charges incurred after September 4, 1996.

In his decision, the administrative law judge found that claimant invoked, and employer rebutted, the Section 20(a) presumption, 33 U.S.C. §920(a). Upon consideration of the record as a whole, the administrative law judge determined that claimant has not shown that he was disabled from his work-related injury for more than the ten-day period between October 4, 1994, to October 14, 1994. Consequently, as employer has already paid benefits for this period, the administrative law judge concluded that claimant is not entitled to any additional compensation. Moreover, the administrative law judge determined that since claimant has shown no connection between any present rotator cuff tear and the work-related injury, employer is not liable for the second proposed rotator cuff surgery. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. In its cross-appeal, employer asserts that the administrative law judge erred by not specifically considering whether, due to claimant's material misrepresentations, employer should be entitled to sanctions under 33 U.S.C. §931. In response, claimant argues that the administrative law judge acted appropriately in summarily rejecting employer's argument concerning Section 31.

Claimant contends that the administrative law judge erred in finding no causal relationship between claimant's injury, resulting disability, and the October 4, 1994, work accident. Claimant asserts that the administrative law judge erroneously credited the medical opinions of Drs. Peden and Graham, that any present disability is attributable to his automobile accident rather than his work accident, over the contrary opinion of Dr. Longnecker, as there is no evidence in the record which establishes that claimant hurt his shoulder in the automobile accident. Claimant further argues that the administrative law judge erroneously refused to order continued medical benefits for a second operation on claimant's left shoulder since Dr. Longnecker unequivocally states that claimant must have this surgery as a result of his work-related injury.

In the instant case, the administrative law judge properly invoked the Section 20(a) presumption as the parties stipulated that claimant suffered a work injury. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Upon invocation of the presumption the burden shifts to employer to present specific and comprehensive evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In the instant case, the administrative law judge properly determined that employer rebutted the Section 20(a) presumption based on the opinions of Drs. Peden and Graham. Dr. Peden opined that claimant had no lasting impairment or work restrictions from the work accident and would have recovered with regard to his left shoulder within two weeks if it had not been for the automobile accident on October 14, 1994. Dr. Graham stated that claimant's present disability is attributable to the automobile accident, rather than the job accident, and that the need for any additional rotator cuff surgery would not be due to the work injury. *See generally Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co*., 22 BRBS 271 (1989).

In assessing the evidence as a whole regarding causation, *see, e.g., Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 89 (1998), the administrative law judge considered the medical reports and deposition testimony of Drs. Peden, Graham and Longnecker, and determined that Dr. Graham's opinion that claimant's disability is attributable to the automobile accident and not the work-related incident of October 4, 1994, is better reasoned and documented than the opinion of Dr. Longnecker. In particular, the administrative law judge found Dr. Graham's discussion regarding the type of shoulder injuries normally sustained in an occupational setting and as a result of an automobile accident very compelling, as it was based on his practical experience in treating these conditions. In short, Dr.

Graham testified that the mechanism of a fall on an outstretched hand in an occupational setting and that of force being transmitted up a steering wheel in an automobile accident are nearly identical and thus, in order to discern which would be more likely to produce a rotator cuff tear, one must look at "the timing of the complaints relative for example, from the injury at work versus the complaints that occurred immediately following the automobile accident." EX 9 at 12-13. Based upon the history contained in the medical records related to claimant's visits to Dr. Peden, first on October 7, 1994, and then on October 17, 1994, as well as the accident report and notes pertaining to claimant's hospital visit on October 14, 1994, following his automobile accident,[1] Dr. Graham opined that it would be highly likely that claimant's rotator cuff injury is related to his automobile accident and not his employment. The administrative law judge further found that Dr. Graham's opinion on causation is supported by Dr. Peden, who similarly opined that the original rotator cuff injury resulted from the automobile accident.

In contrast, the administrative law judge noted that while Dr. Longnecker explicitly stated that the automobile accident had nothing to do with his left shoulder complaints, he persistently failed to explain the reasoning behind this statement. In addition, the administrative law judge found that Dr. Longnecker admitted that weight lifting or any other violent injury with a contusion might cause a rotator cuff injury and that on close questioning, despite his previous dismissal of the idea, Dr. Longnecker could not rule out the possibility that claimant's automobile accident caused the rotator cuff tear. CX 1 at 15, 23-24. In fact, at deposition, Dr. Longnecker acknowledged that claimant "maybe bruised his [left] shoulder somewhat" as a result of his automobile accident. CX 1 at 5.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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). In the instant case, the administrative law judge's decision to credit the opinions of Drs.

[1]Thus, contrary to claimant's contention, Dr. Graham did consider the relevant evidence relating to claimant's automobile accident on October 14, 1994, in formulating his opinion on causation.

Graham and Peden over the contrary opinion of Dr. Longnecker is rational and within his discretion. We therefore affirm the administrative law judge's determination, based on the record as a whole, that after October 14, 1994, claimant's left shoulder condition is not causally related to his October 4, 1994, work accident. *See Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 98 (1997); *Rochester v. George Washington University*, 30 BRBS 233 (1997). Moreover, the administrative law judge's denial of medical benefits related to a proposed second rotator cuff surgery is affirmed, as the administrative law judge rationally concluded that claimant's work-related left shoulder injury had, in essence, resolved and that the subsequent proposed surgery and corresponding treatment was not as a result of claimant's work injury. *See 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).

In its cross-appeal employer asserts that the administrative law judge erred in failing to address the question of whether it is entitled to credit for overpayments in accordance with Section 31 of the Act, due to claimant's material misrepresentations in this case. In particular, employer argues that claimant's concealment of his October 14, 1994, automobile accident directly resulted in his receipt of benefits voluntarily paid by employer that were otherwise not due him under the Act.

Section 31(a) of the Act specifically provides that any false statement or representation, which is knowingly and willfully made for the purpose of obtaining benefits under the Act, is a felony, punishable by a fine of not more than $10,000 or imprisonment not to exceed five years or both. 33 U.S.C. §931(a)(1). The United States Attorney for the district in which the injury is alleged to have occurred is to make every reasonable effort to investigate promptly any complaint made under this subsection. 33 U.S.C. §931(a)(2).

We reject employer's contention. First, by its plain language Section 31 does not provide a method for employer to recoup payments it has made. Inasmuch as the Act does not provide a method for employer to recoup payments from claimant, although wrongfully paid, when no future compensation payments are owed and in the instant case the administrative law judge explicitly determined that claimant is not entitled to any future compensation, we hold that the administrative law judge properly concluded that he need not address the issue of whether employer is entitled to a credit for overpayments. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992). *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 112 S.Ct. 3056 (1992); *Phillips v. A-Z International*, 30 BRBS 215 (1996); 33 U.S.C. §914(j). Second, as noted

above, Section 31(a)(2) places prosecutorial power for alleged misrepresentations with the United States Attorney for the district in which the injury is alleged to have occurred. Thus, the administrative law judge does not have jurisdiction to consider the issue raised employer in this case pursuant to Section 31(a). *See generally Phillips*, 30 BRBS at 215.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge