BRB No. 98-1639

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| ROBERT M. WARD | ) | |
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| Claimant-Petitioner | ) | DATE ISSUED: |
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| v. | ) | |
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| WEST STATE, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| EAGLE PACIFIC INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits and Order Denying Motion for Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Meagan Flynn and David A. Hytowitz (Pozzi Wilson Atchison L.L.P.), Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Motion for Reconsideration (97-LHC-0713) of Administrative Law Judge Edward C. Burch 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 findings of fact and conclusions of law of the administrative law judge which 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 marine machinist, suffered an injury to his right shoulder on October 2, 1992, while pulling on an improperly sealed strainer; claimant continued working intermittently for employer following this incident until August 3, 1994, when employer closed its facility.[1]

In his decision, the administrative law judge found that although claimant's initial shoulder condition was caused by the work incident, claimant's shoulder and neck conditions subsequent to October 1994 were unrelated to his work injury. Accordingly, he found that claimant's work-related condition had fully resolved by February 4, 1993, and that claimant had been fully compensated for his temporary total disability resulting from his work injury. The administrative law judge thereafter denied claimant's motion for reconsideration.

On appeal, claimant argues that the administrative law judge erred in his admission of certain medical reports into the record, and in concluding that his neck and shoulder conditions after 1994 were unrelated to his 1992 work incident and consequently denying further compensation. Employer responds, urging affirmance.

We initially address claimant's contention that the administrative law judge erred in admitting the reports of Dr. Farris into evidence. It is the duty of the administrative law judge to fully inquire into all matters and to receive into evidence all relevant and material testimony and documents; in this regard, it is well-established that an administrative law judge has broad discretion in determinations pertaining to the admission of evidence. *See, e.g., Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1988), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); 20 C.F.R. §702.338. Thus, decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

In the instant case, claimant contends that the administrative law judge erred in admitting the reports of Dr. Farris because his opinion was submitted only three days before the hearing and claimant was unable to cross-examine Dr. Farris because the scheduled post-

[1]The record reflects that employer paid claimant temporary total disability compensation from December 14, 1992, to February 8, 1993, CXS 7, 8, and from December 14, 1994, until May 25, 1995. CXS 10, 11.

hearing deposition was canceled. The administrative law judge specifically addressed claimant's objections and admitted the Dr. Farris' 1995 report, *see* CX 50, because it was submitted by both parties, and that physician's 1998 report, *see* EX 3, because nothing precluded claimant, who was represented by counsel, from rescheduling the cancelled deposition. As claimant's due process rights were not abridged, *see Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), and as the administrative law judge's decision to admit this evidence is rational, we hold that the administrative law judge did not abuse his discretion in admitting into evidence Dr. Farris' two reports. *See generally Cooper v. Offshore Pipelines Int'l,* 33 BRBS 46 (1999).

Claimant next challenges the administrative law judge's findings regarding his alleged post-1994 shoulder condition. Claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Obert v. John T. Clark & Son of Maryland,* 23 BRBS 157 (1990). 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). Once claimant establishes his *prima facie* case, Section 20(a), 33 U.S.C. §920(a), of the Act provides claimant with a presumption that his condition is causally related to his employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Upon invocation of the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

In addressing this issue, the administrative law judge initially found that claimant had failed to establish a harm to his shoulder; specifically, the administrative law judge concluded that while claimant may have experienced pain, he was released to return to regular work, he failed to seek medical help for twenty months, he failed to allege any disability on his application for unemployment compensation, and the record reflects inconsistent diagnoses. *See* Decision and Order at 18. In order to establish the harm element of his *prima facie* case, however, claimant need not show that he has a specific condition; rather, claimant need only establish that he has sustained some physical harm, *i.e.*, that something has gone wrong with the human frame. *See Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968)(*en banc*); *Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989). In the instant case, it is uncontested by the parties that a work-related incident occurred on October 2, 1992, in which claimant injured his shoulder. Moreover, the medical evidence of record,

specifically the reports of Drs. Janzen, Franks, Rosenblaum and Farris, all diagnose conditions related to claimant's shoulder in the ensuing years.[2] Claimant, thus, has established his *prima facie* case and is entitled to invocation of the Section 20(a) presumption. *Brown v. I.T.T. Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990). We, therefore, reverse the administrative law judge's finding on this issue, and remand the case for the administrative law judge to consider whether employer has rebutted the presumption, and, if necessary, to weigh all of the evidence and resolve the causation issue based on the record as a whole.[3] *See generally Casey v. Georgetown Univ.*

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[2]The record contains the following diagnoses: Dr. Janzen - right shoulder pain/tendinitis and impingement syndrome/dyesthesias, EX 2 (Oct/Dec. 1994); Dr. Franks - painful arc syndrome/cervical discogenic pain, CX 48 (May 1995); Dr. Rosenbaum - right cervical radiculopathy right shoulder tendinitis, CX 49 (June 1995); Dr. Farris - chronic right shoulder pain with possible adhesive capsulitis, CX 50 (June 1995).

[3]The administrative law judge offered a cursory conclusion. After assuming, *arguendo*, that claimant established his *prima facie* case, he stated:

> I find that the evidence noted is sufficient to rebut Claimant's showing and, weighing the evidence as a whole, Claimant has failed to prove by a preponderance of the evidence that his later shoulder complaints constituted a compensable injury.

*Medical Center*, 31 BRBS 147 (1997).

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Decision and Order at 19, fn. 20. This decision is violative of the Administrative Procedure Act (APA) which requires that the administrative law judge adequately detail the rationale behind his decision and specify the evidence upon which he relied, and requires remand. *See* 5 U.S.C. §557(c)(3)(A); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

Next, claimant challenges the administrative law judge's finding that his neck condition is unrelated to the work incident of October 1992. In his decision, the administrative law judge determined that the Section 20(a) presumption applied to link claimant's neck condition to his employment with employer. The administrative law judge found, however, that the opinion of Dr. Farris was sufficient to establish rebuttal of the Section 20(a) presumption. In addressing the issue of causation, Dr. Farris opined that it was medically improbable that claimant's neck condition was related to his industrial injury but, rather, claimant's condition was the result of natural degenerative changes.[4] Accordingly, as the opinion of Dr. Farris severs the causal link between claimant's neck condition and his employment with employer, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

The administrative law judge then weighed all of the evidence of record and credited the opinion of Dr. Farris over the opinions of Drs. Janzen, Rosenbaum and Franks, in concluding that claimant failed to establish a causal connection between his neck condition an his employment. Specifically, the administrative law judge found Dr. Farris to be highly

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[4]In his report of January 12, 1998, Dr. Farris opined that it was "difficult to relate [claimant's] right shoulder complaints to the industrial injury of October 3, 1992," and, based on the objective studies and medical history, stated that

> it would appear the [claimant's] cervical spine problems are due to the natural degenerative process rather than to any specific injury. Consequently, it is medically improbable that the complaints of stiffness and soreness of the cervical spine or the numbness or the right hand are related to the alleged industrial injury... .

EX 3 at 38-39.

qualified and his opinion to be better reasoned and documented. In adjudicating a claim, the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge provided valid reasons for crediting the opinion of Dr. Farris and this opinion provides substantial evidence in support of his finding that claimant's neck condition is not work-related. Accordingly, we affirm the administrative law judge's conclusion that causation was not established. *Duhagon*, 169 F.3d at 618, 33 BRBS at 3 (CRT).

Accordingly, the administrative law judge's finding that claimant's shoulder condition is not work-related is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge