BRB No. 95-2246

LOIS D. FANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WASHINGTON METROLITAN AREA TRANSIT AUTHORITY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand -- Denial of Benefits of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

William P. Dale and Charles F. Fuller (McChesney & Dale, P.C.), Bowie, Maryland, for claimant.

Michael D. Dobbs and Erik C.J. Anderson (Mell, Brownell & Baker), Washington, D.C., for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order on Remand -- Denial of Benefits (87-DCW-0027, 89-DCW-0027) of Administrative Law Judge Charles P. Rippey 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 District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (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).

This case has been before the Board previously. Claimant injured her left arm on May 6, 1978, while working as a bus driver for employer. She underwent a left arm ulnar nerve transfer, and returned to work for employer as a subway station attendant on October 26, 1981. Claimant subsequently injured her lower back while working as a station attendant on March 16, 1982, when she lifted a large metal station gate. She thereafter worked intermittently for employer until July 27, 1984, at which time she stopped working for employer altogether, allegedly because of lower back pain.

In October 1984, claimant was involved in two non work-related car accidents; the accident on October 6, 1984, was minor and the October 28, 1984, accident was more severe. On April 9, 1985, she underwent a discectomy and vertebrae fusion at L4-5 and L5-S1 performed by Dr. Jackson. Employer voluntarily paid temporary total disability benefits from July 28, 1984 until January 22, 1986. Claimant subsequently underwent a second discectomy and fusion in January 1989; metal plates and a rod were inserted in her lower back. Claimant sought continuing compensation as of January 23, 1986, for either temporary total or permanent total disability, and medical expenses.

In his initial Decision and Order dated April 28, 1992, the administrative law judge determined that claimant is permanently and totally disabled as a result of her two spinal surgeries, but further found that the cause of her disability was Dr. Jackson's mistaken diagnosis of spinal instability and not anything arising out of and in the course of her employment. In so concluding, the administrative law judge credited Dr. Jenkins's medical opinion that there was no objective evidence of spinal instability prior to the initial surgery, and that the second surgery was necessitated when the first surgery failed. Additionally, the administrative law judge attributed claimant's pain symptoms between the time of her 1982 work injury and the 1985 surgery to a demyelinating condition, most probably multiple sclerosis, and not the March 16, 1982, work injury.

Claimant appealed, challenging the administrative law judge's finding that her lower back symptomatology and disability were not caused by her March 16, 1982, work injury. Specifically, claimant challenged the administrative law judge's conclusions that she had no objective evidence of disc pathology, and that the surgery had been performed based on a mistaken diagnosis from Dr. Jackson. Claimant also challenged the administrative law judge's finding that any back pain she experienced on March 16, 1982, was due to multiple sclerosis. Employer responded, urging affirmance.

On appeal, the Board reversed the administrative law judge's finding that there was no objective evidence of a trauma-induced back injury. The Board initially noted that the administrative law judge acted within his discretion in rejecting Dr. Jackson's testimony that he had observed ruptured discs at L4-5 while performing claimant's first back surgery in light of Dr. Jenkins's testimony that the discs were not observable until after their removal because the procedure had been performed from an anterior approach. The Board determined, however, that he had erred in discrediting Dr. Mercer's post-surgical pathological report reflecting findings consistent with a ruptured disc based on the fact that the discs were destroyed when they were removed and, accordingly, were never visually identified as defective or herniated. The Board stated that although the discs were removed in piecemeal fashion, there was no evidence of record which indicates that the post-operative pathology report inaccurately describes a ruptured disc or that a pathologist is unable to differentiate disc fragments removed by surgical procedure from disc fragments ruptured by a trauma-induced herniation. Accordingly, the Board held that as claimant established a harm, *i.e.*, back pain and a herniated disc, and employer did not dispute the occurrence of the March 1982 work incident, claimant is entitled to the Section 20(a) presumption as a matter of law. The Board also reversed the administrative law judge's

finding that claimant's pain following her March 16, 1982, work accident was due to her demyelinating condition, which was based on Dr. Jenkins's deposition testimony, because Dr. Jenkins did not unequivocally state that the 1982 work incident did not cause or contribute to claimant's back pain, herniated discs, and the resulting surgery. Inasmuch, however, as the administrative law judge had not previously considered the impact of claimant's October 6 and October 28, 1984, non work-related car accidents in assessing the cause of claimant's disability, the Board remanded the case for the administrative law judge to make additional findings. *Fant v. WMATA*, BRB No. 90-707 (Apr. 28, 1992)(unpublished).

On remand, the administrative law judge reopened the record for employer's submission of additional evidence. Based upon pathology reports submitted from Drs. Shmookler and Jenkins, the administrative law judge held that claimant is not entitled to the Section 20(a) presumption, contrary to the Board's prior determination, because she failed to make out a *prima facie* case of a trauma-induced herniated disc in view of the newly admitted evidence. Although the administrative law judge found that the Section 20(a) presumption was not applicable, he nonetheless considered rebuttal and found that claimant's surgery and resulting disability were not the natural or unavoidable result of her March 16, 1982, work injury, but instead were caused solely by the intervening non-work-related car accident on October 28, 1984.

In the present appeal, claimant challenges the administrative law judge's finding that she is not entitled to the Section 20(a) presumption, as well as his finding that her disability is not causally-related to the March 1982 work injury on various grounds. Employer responds, urging affirmance. Claimant replies, reiterating the arguments made previously and, in addition, asserting that employer improperly placed before the Board evidence which was not part of the formal record[1] and that employer's introduction of the pathology

[1]In her reply brief, claimant takes issue with employer's reference in its response brief to photographic evidence indicating that claimant was performing physical labor subsequent to her back operations in a landscaping business she owned, which employer contends refutes that claimant is permanently totally disabled. Employer submitted this evidence via a Petition for Modification filed with the administrative law judge on April 17, 1996, which the administrative law judge denied. Claimant contends that employer has improperly

reports on remand violated the " law of the case" doctrine.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that her disabling condition is causally related to her employment. In order to invoke the Section 20(a) presumption, claimant must prove that she suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). We initially reject claimant's assertion that the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption violates the "law of the case" doctrine. As new evidence was introduced on remand, the underlying factual situation changed. Thus, the "law of the case" doctrine is not applicable. *See generally Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). We agree with claimant, however, that the administrative law judge erred in holding on remand that claimant is not entitled to the Section 20(a) presumption because she failed to prove that she suffered from a traumatically-induced herniated disc. For purposes of establishing a *prima facie* case and invocation of the Section 20(a) presumption, an injury has been established where "something unexpectedly goes wrong within the human frame." *Wheatley v. Adler,* 407 F.2d 307, 313 (D.C. Cir. 1968)(*en banc*). In finding that claimant failed to establish the harm element of her *prima facie* case, the administrative law judge in the present case relied on pathology reports from Drs. Shmookler and Jenkins, which indicate that it is impossible to differentiate microscopically between disc fragments removed "piecemeal" during surgery and those ruptured by a trauma-induced herniation. Both doctors, however, recognized disc pathology, *i.e.*, that something had "gone wrong" within claimant's body. Moreover, employer does not dispute claimant's complaints of ongoing pain. Accordingly, as claimant established a harm, *i.e.,* pain and disc pathology, and it is undisputed that the work accident occurred, claimant is entitled to the Section 20(a) presumption that her ongoing back problems are work-related, and the administrative law judge's determination to the contrary is reversed. *See Cairns v. Matson Terminals Inc.*, 21 BRBS 252 (1988).

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placed this evidence, which was not admitted into the record below, before the Board in an effort to "castigate" her, and requests that the Board reject the evidence and return it to employer. The Board cannot consider any evidence which was not a part of the formal record before the administrative law judge. *See* 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985).

Once claimant establishes a *prima facie* case, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. If the presumption is rebutted, the administrative law judge must weigh all of the relevant evidence in reaching a decision. Where claimant is involved in a subsequent accident, employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by the subsequent event.[2] *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983). Where employer establishes that claimant's disability is the result of an intervening cause, employer is relieved of liability for that portion of claimant's disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill*, 25 BRBS at 144; *Peterson v. General Dynamics* Corp., 25 BRBS (1991)(*en banc)*, *aff'd sub nom. Insurance Company of North America v. Director, OWCP*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1264 (1993).

Notwithstanding his finding that claimant was not entitled to the Section 20(a) presumption, the administrative law judge in the present case considered whether rebuttal had been established and determined that claimant's surgery and resultant disability were solely due to the October 28, 1984, non work-related auto accident. On appeal, claimant challenges that determination. Claimant argues that, in so concluding, the administrative law judge mischaracterized and ignored relevant evidence, and that, because the record clearly demonstrates that the work injury contributed to her need for surgery and resultant disability and there is no affirmative evidence which eliminates this possibility, the administrative law judge erred in finding rebuttal established and in denying her claim.

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[2]Where claimant sustains a subsequent injury, employer remains liable for the disability thereafter if the injury is the natural or unavoidable result of the initial work injury. *See Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, No. 89-4803 (5th Cir. Apr. 19, 1990). In such a case, employer can escape liability by establishing that the subsequent injury was the result of the negligence of claimant or a third party. *See Cyr v. Crescent Wharf & Warehouse Co.,* 211 F.2d 454 (9th Cir. 1954). In this case, there is no allegation that the subsequent accidents were the natural or unavoidable result of the work injury; they are separate events.

The administrative law judge initially found that Dr. Jackson's January 30, 1986, and March 1, 1985, progress notes alone provided substantial evidence to support a finding that claimant's disabling condition was caused solely by the October 28, 1984, car accident. Supp. Decision and Order at 10. After comparing Dr. Jackson's treatment and medical records prior to the October 28, 1984, auto accident with those thereafter, the administrative law judge found that it was evident that the October 28, 1984, car accident was the sole cause of claimant's disability. In so concluding, he noted that prior to the October 28, 1984, auto accident, the medical evidence was uniformly negative for disc displacement or herniation, whereas a February 14, 1985, CT scan performed by Dr. Booshan four months after the accident was interpreted as indicating a lateral bulging disc at L3-4 and L5-S1. In addition, he found that also significant in Dr. Jackson's decision to perform surgery was a nerve conduction velocity and EMG examination performed by Dr. Siu W. Lee. Emp. Brief on Remand, Att. 27. He additionally noted that on September 28, 1984, prior to the October 1984 auto accidents, claimant underwent a thorough orthopedic examination by Dr. Roman Cham, who opined that claimant's x-rays were negative and that she exhibited minimal, if any, objective findings to support a permanent disability.[3] In addition, he found that a neurological exam performed by Dr. Lightfoot on October 22, 1984, reflected that claimant exhibited no evidence of neurological compromise to account for her low back pain, and that he diagnosed a chronic lumbo-sacral strain syndrome. The administrative law judge also cited Dr. Jackson's April 3, 1985, progress note in which he stated that claimant had sustained two additional injuries superimposed upon her previous back condition, one on October 6, 1984, and a more severe injury on October 28, 1984, in which claimant sustained a disc injury at L4-5. Finally, he credited a statement contained in the deposition testimony of Dr. Gordon, an orthopedic surgeon, to the effect that any changes on the CAT scan, which appear to have been Dr. Jackson's basis for suggesting surgery, developed at some point after October 1984. Depo. at 37-38; Supp. Decision and Order at 17.[4]

We agree with claimant that the administrative law judge erred in concluding that the January 30, 1986, and March 1, 1985, progress notes of Dr. Jackson alone provide substantial evidence sufficient to rebut the Section 20(a) presumption and establish the absence of a causal nexus with claimant's work injury. Although Dr. Jackson stated in his January 30, 1986, note that claimant's recent surgery is not directly related to her injury sustained at work, he did not address whether the March 16, 1982, work injury played an indirect role in the need for surgery. Thus, he did not rule out a causal connection, *i.e.*, that

[3]Although the administrative law judge indicated that this suggested that claimant's work-related injury had resolved as of September 28, 1984, thereafter he cites several medical reports from various physicians which document that claimant continued to suffer from chronic cervical and lumbar strains.

[4] Dr. Gordon, however, also testified that he wasn't really sure what the basis was for performing the fusion in the first place, Depo. at 40, and that claimant's attempt to correct her problem by undergoing surgery was a result of her ongoing pain, Depo. at 56-57.

claimant's condition was due to a combination of the 1982 work injury and 1984 car accident. *See generally Plappert v. Marine Corp. Exchange*, ___ BRBS ___, BRB Nos. 96-776, 96-1031 (March 18, 1997). Similarly, the March 1, 1985, note indicated that based on objective testing he believed that claimant's injury was internal with internal disc displacement which made the disc bulge at L4-5. He related her symptoms to the October 28, 1984, work injury, and stated that if claimant didn't improve in one month he would perform surgery. This note also does not address whether the work injury played a role in the need for surgery. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92(1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP,* 8 F.3d 29 (9th Cir. 1993).

More importantly, in analyzing the causation issue, the administrative law judge did not consider all of Dr. Jackson's medical reports [5] or his hearing testimony.[6] Although Dr. Jackson testified at the hearing that the October 28, 1984, auto accident aggravated the low back condition claimant initially suffered on March 16, 1982, Tr. at 78, he also testified that the need for claimant's surgery arose due to a combination of the March 16, 1982, injury and the October 28, 1984, auto accident, Tr. at 84. In addition, Dr. Jackson stated that without the October 28, 1984, aggravation, he probably would have operated for the March 1982 injury in 1988, Tr. at 84. Moreover, he testified that claimant's condition immediately prior to the October 1984 auto accidents was not stable, Tr. at 126-127, that in September 1984 he was considering hospitalizing claimant again because of radiating pain, Tr. at 126, and that someone with chronic lumbosacral strains such as that which claimant had is more susceptible to serious injuries upon the subsequent occurrence of an accident such as the October 1984 accidents, Tr. at 206-209. Dr. Jackson also testified that he believed there was no question that the March 1982 injury contributed to the disc tear which was significantly aggravated by the October 28, 1984, accident, Tr. at 92-94. Inasmuch as the portions of Dr. Jackson's testimony not considered by the administrative law judge are clearly relevant to the causation issue and refute the reports cited by the administrative law judge, and inasmuch as the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), requires him to consider, analyze and discuss all of the relevant evidence, we vacate his finding that claimant's October 28, 1984, car accident was the sole cause of her residual disability and remand the case for reconsideration of the causation issue in light of all of the relevant evidence.[7] *See Cotton v. Newport News Shipbuilding & Dry Dock*

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[5]Claimant argues that, for example, in an April 3, 1985, progress note, Dr. Jackson indicates that there was a causal connection between the work injury and the subsequent accident because he stated: "Claimant has sustained two additional injuries to her back super imposed [sic] upon her pre-existing lower back condition." *See* Petitioner's Brief at 16; Emp. Brief on Remand, Att. 11.

[6]Employer argues in its response brief that the administrative law judge considered Dr. Jackson's hearing testimony and rationally rejected it because it differed from statements he made in his contemporaneous medical reports. Employer also suggests that he rationally viewed this evidence as suspect because Dr. Jackson previously attributed claimant's need for surgery to the auto accident to further claimant's civil lawsuit for that accident which was settled for $50,000, thus demonstrating his willingness to change his testimony to further claimant's pecuniary interests. While the administrative law judge could have discredited Dr. Jackson's hearing testimony for the suggested reasons, he did not discuss it at all. Moreover, contrary to employer's assertions, the fact that the administrative law judge previously discredited Dr. Jackson's opinion in his initial Decision and Order is irrelevant because he relied heavily on select portions of Dr. Jackson's medical records on remand.

[7]In a letter to employer's counsel dated October 26, 1992, Dr. Jenkins stated that the March 16, 1982, event was irrelevant to claimant's chronic, as opposed to her transitory,

Co., 23 BRBS 380 (1990); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

We also vacate the administrative law judge's finding that employer is relieved of all liability in this case. Even if claimant's car accident is an intervening cause of her ultimate disability, as was found by the administrative law judge, employer is only relieved of liability for that portion of claimant's disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 164 (1991), *aff'd sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). Accordingly, on remand, the administrative law judge must consider all of the relevant evidence and determine whether any part of a claimant's disability is related to the work injury.[8]

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand -- Denial of Benefits is reversed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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symptoms, was irrelevant to her lumbar surgery, and is irrelevant to her central nervous system disorder. Emp. Brief On Remand, Att. 40. Inasmuch as the administrative law judge did not consider or evaluate this relevant evidence in rendering his decision, it should be considered in evaluating the cause of claimant's disability on remand.

[8]While the opinion of Dr. Jenkins would support the prior determination that claimant's October 28, 1984, car accident was the *sole* cause of her residual disability, Dr. Jackson stated in his January 13, 1987, report that 75 percent of claimant's disability was attributable to the October 1984 auto accident, and 25 percent was attributable to the work injury, Emp. Ex. 19. The administrative law judge did not consider this evidence in determining that employer is relieved of all liability and must do so on remand.