BRB No. 96-1635

CURTIS JENKINS Claimant-Petitioner v. PUERTO RICO MARINE, INCORPORATED and NATIONAL UNION FIRE INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Glen A. McClary (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-1522) of Administrative Law Judge John C. Holmes 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 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 refrigerator mechanic, injured his left shoulder while prying open a refrigerated container door with a crowbar on April 5, 1994, while working for employer. On April 7, 1994, claimant sought treatment for this work-related injury with Dr. Pennick, who diagnosed a left shoulder strain, and released claimant to return to work on April 11, 1994. Prior to returning to work, claimant slipped and fell in the bathtub at home on April 10, 1994. He was taken to the hospital and diagnosed as having a fractured rib. Subsequently, claimant was hospitalized on April 14-18, 1994, for alcohol withdrawal hallucinosis. A closed fractured right rib was noted in the hospital records. On April 27, 1994, claimant sought treatment with Dr. Jones, an orthopedic surgeon, who diagnosed a rotator cuff tear of the left shoulder and performed surgery on claimant's left shoulder on September 23, 1994.

In his Decision and Order, the administrative law judge denied claimant's claim for additional benefits after April 10, 1994. The administrative law judge found that claimant was entitled to the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), but that the subsequent slip and fall in the bathtub at home on April 10, 1994, was the intervening cause of claimant's need for rotator cuff surgery. Therefore, other than for a few days, the administrative law judge concluded that claimant's disability did not arise from his work-related shoulder strain. On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits to which claimant has replied.

Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated or accelerated the condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). That a possible intervening cause occurred does not bar invocation of the presumption. *Id.* Consequently, the administrative law judge properly determined that the Section 20(a) presumption was invoked. Employer can rebut the presumption by producing specific and comprehensive evidence that claimant's disabling condition was caused by an intervening cause which was not the natural or unavoidable result of the initial work injury. *See Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1994)*; Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). The Section 20(a) presumption may be rebutted by circumstantial evidence if the evidence is sufficiently specific to sever the potential connection between a particular injury and a work-related accident. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995)(decision on reconsideration). This evidence, however, must be more than mere hypothetical probabilities or speculation. *Swinton*, 554 F.2d at 1085, 4 BRBS at 481.

Claimant contends that the administrative law judge erred in concluding that the fall at home on April 10, 1994, was an intervening cause of his work-related left shoulder injury, and thus erred in finding that employer established rebuttal of the Section 20(a) presumption. The administrative law judge based his conclusion that claimant's disability did not arise from the injury at work on April 5, 1994, on the following circumstantial evidence. The administrative law judge noted that claimant was not diagnosed with a rotator cuff tear prior to the fall in the bathtub but was diagnosed by Dr. Pennick as having only a shoulder strain two or three days after the work-related injury. Decision and Order at 4; Cl. Ex. 3. The administrative law judge stated that a rotator cuff tear would have manifested itself in this time frame. Decision and Order at 4. Additionally, the administrative law judge found that claimant's testimony at the hearing that his shoulder injury was due solely to the work injury was not credible in light of his statement to Dr. Jones that he injured his shoulder "again" when he fell at home and his statement on a JMA/ILA Welfare Fund form that he was unable to work after April 14, 1994, due to "slip and fell tub in bathtub suffered broken ribs and surgery on shoulder." Decision and Order at 4, 5; Cl. Exs. 18, 20B; Tr. at 34. The administrative law judge also noted that neither Dr. Carbonell nor Dr. Jones specifically determined which accident would most likely cause the rotator cuff tear, but he nonetheless inferred that the likelihood of a cuff tear would be greater in an accident than in a use of too much force, as in the work accident. Decision and Order at 4; Emp. Ex. 2 (deposition of Dr. Jones) at 8-9; Deposition of Dr. Carbonell at 25-26.

We hold that the circumstantial evidence on which the administrative law judge relied is insufficient to rebut the Section 20(a) presumption in this case. Initially, we note that although the administrative law judge stated he invoked the Section 20(a) presumption linking claimant's disability to his work injury, he later stated that "[t]he only suggested connection between [c]laimant's work related injury and his eventual rotator cuff surgery is his own testimony," which the administrative law judge discredited. Decision and Order at 5. It is, however, employer's burden on rebuttal to put forth substantial evidence severing the connection between claimant's employment injury and his disability. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Holmes*, 29 BRBS at 18. It is not claimant's burden to affirmatively establish a causal relationship until the presumption is rebutted. *See Swinton*, 554 F.2d at 1082 n. 35, 4 BRBS at 476 n. 35.

Furthermore, there is no evidence to support the inferences drawn by the administrative law judge in this case. Dr. Carbonell did not treat claimant for his shoulder injury and specifically declined to give an opinion as to the cause of claimant's rotator cuff tear. Dr. Carbonell's deposition at 25-26. Dr. Jones stated, "Either of the incidents could have caused the rotator cuff tear," and he stated, within a reasonable degree of medical probability, that he could not determine which of the two events caused claimant's rotator cuff tear. Emp. Ex. 2 (Dr. Jones' deposition) at 8-9. Reasonable inferences supported by the evidence may not be disturbed. *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). However, in light of the opinion of Dr. Jones, the administrative law judge's inference that claimant's rotator cuff

tear was caused by the fall in the bathtub is not reasonable as it is based only on the administrative law judge's own belief that such an injury would have revealed itself to Dr. Pennick on April 7, 1994, and would more likely be caused by a fall than by a prying motion.[1] *See Swinton*, 554 F.2d at 1084, 4 BRBS at 479 (circumstantial evidence not accompanied by other evidence tending to prove that the condition "is of a type that ordinarily would have become manifest more readily" is insufficient to establish rebuttal of the Section 20(a) presumption). The remaining circumstantial evidence, claimant's statement to Dr. Jones that he "reinjured" his shoulder in the bathtub fall, and his statement on the JMA/ILA form,[2] are legally insufficient to rebut the Section 20(a) presumption. This evidence is, at best, equivocal, and as such, is insufficient to establish that claimant's rotator cuff tear is not the result of the work accident. *See generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). As employer did not put forth substantial evidence establishing that claimant's rotator cuff tear was not due to the work accident, *see generally Brown,* 893 F.2d at 294, 23 BRBS at 22 (CRT); *Swinton*, 554 F.2d at 1075, 4 BRBS at 466, we reverse the administrative law judge's finding that claimant's surgery and disability are not work-related. Thus, a causal relationship between claimant's employment and his left shoulder condition has been established. *See generally Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The administrative law judge's denial of benefits is therefore vacated, and the case is remanded to the administrative law judge for consideration of the remaining issues.

[1]The administrative law judge did not discuss in his decision the likelihood of fracturing a rib on the right side, *see* Cl. Ex. 7A, and tearing a rotator cuff in the left shoulder in the same fall.

[2]This form is a claim for disability benefits from the JMA/ILA Welfare Fund. Cl. Ex. 20B. On this form, in response to, "If accident, where and how it occurred", claimant wrote, "slip and fell in bathtub suffered broken ribs and surgery on shoulder." In response to "Was illness or injury due, in any way, to the patient's occupation?", claimant underlined "yes" and wrote "hurt shoulder at P.R.M.M.I. (left shoulder)." *Id*.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge