

ROBERT L. BURNS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE GEORGE HYMAN	)	DATE ISSUED:
CONSTRUCTION COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Carolyn McKenny (Koonz, McKenny, Johnson & Regan, P.C.), Washington, D.C., for claimant.

Stanley J. Brown, Stewart S. Manela, and Samuel K. Charnoff (Arent, Fox, Kintner, Plotkin & Kahn), Bethesda, Maryland, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (82-DCW-0708) of Administrative Law Judge Frederick D. Neusner awarding 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.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 *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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the third time this case is before the Board. Claimant, on February 12, 1980, suffered a stroke while working for employer as a rodman. Claimant thereafter filed a claim for temporary total disability benefits under the Act, alleging that his stroke was caused by his inhalation of propane gas while working for employer on February 12, 1980. In his Decision and Order, Administrative Law Judge Lesser, relying upon the the testimony of Dr. Schwartz, found that claimant's stroke was caused by his exposure to propane gas on employer's construction site and thus awarded claimant temporary total disability compensation commencing February 13, 1980. Lesser

Decision and Order I at 4. Employer appealed this decision to the Board. *See Burns v. The George Hyman Construction Co.*, BRB No. 84-2745 (May 30, 1986)(unpublished). The Board determined that Judge Lesser erred by assuming, without making specific findings based on the conflicting evidence in the record, that claimant had been exposed to propane gas in a quantity sufficient to cause claimant's stroke; the Board therefore remanded the case to the administrative law judge to consider

whether there was an amount of propane on the construction site sufficient to cause claimant's stroke and, more fundamentally, whether propane in any amount could have such an effect . . . .

1986 Decision and Order, slip op. at 4.

On remand, Judge Lesser ignored the specific directions of the Board and reinstated his previous award. Specifically, in a Decision and Order on Remand dated March 9, 1987, the administrative law judge, rather than considering the evidence identified by the Board as pertinent to determining whether a sufficient concentration of propane gas existed at employer's job site to have caused claimant's injury, reaffirmed his prior award of benefits based on his weighing of the medical evidence. Lesser Decision and Order II at 2-3. Employer subsequently appealed this decision to the Board.<sup>1</sup> *See Burns v. The George Hyman Construction Co.*, BRB No. 87-0708 (May 29, 1987)(unpublished). The Board concluded that Judge Lesser erred in disregarding its direction to consider the specific evidence regarding the amount of propane gas necessary to have an anesthetic effect on claimant, which underlies the basis of claimant's case that he had inhaled a sufficient quantity of propane gas, displacing oxygen and resulting in hypoxia and a stroke, and in ignoring its instructions to consider whether the concentration of propane gas was sufficient to cause claimant's injury. *See* 1987 Decision and Order, slip op. at 4. The Board, therefore, vacated Judge Lesser's determination that claimant's injury was work-related and remanded the case. Lastly, after noting that the case on remand must be assigned to a new administrative law judge since Judge Lesser had retired, the Board stated that the parties would be entitled to a new hearing on the causation issue since credibility issues are central to the resolution of this case. *Id.*

On remand, the instant case was assigned to Administrative Law Judge Neusner. Although Judge Neusner sought to schedule a formal hearing regarding the issue of causation, both parties agreed that a new hearing would be unnecessary and that the case should be decided on the basis of the existing record and briefs. Thereafter, both parties submitted briefs to Judge Neusner which dealt solely with the issue of whether claimant's stroke was caused or precipitated by his exposure to propane gas while working for employer. In a Decision and Order dated December 4, 1991, Judge Neusner determined that the record did not support a conclusion that claimant was exposed to a sufficient concentration of propane gas to displace claimant's oxygen supply to the extent of producing temporary hypoxia; the administrative law judge thereafter concluded, however, that a causal connection existed between claimant's injury and the performance of his usual employment duties with employer. Thus, the administrative law judge awarded the compensation sought by

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<sup>1</sup>Employer filed a Motion for Stay of Enforcement of the Compensation Order, which was granted by the Board in an Order dated March 23, 1987.

claimant. Neusner Decision and Order at 12-15.

On appeal, employer, after asserting that the administrative law judge's resolution of the issue regarding the concentration of propane gas at employer's work site is supported by substantial evidence, challenges the administrative law judge decision to raise and address a theory of causation, *i.e.*, general working conditions, which was never raised or addressed by either party, by the Board, or by Judge Lesser.<sup>2</sup> Claimant responds, arguing that although the administrative law judge erred in concluding that sufficient quantities of propane gas did not exist to support claimant's hypoxia theory, the administrative law judge properly considered and resolved the issue of causation based on general working conditions; thus, claimant urges affirmance of the administrative law judge's Decision and Order.

Initially, we agree with employer that the administrative law judge erred when, on remand pursuant to the Board's 1987 Decision and Order, he raised and addressed a new theory of causation, *i.e.*, whether claimant's usual employment duties with employer could have caused his injury.<sup>3</sup> Section 802.405(a) of the applicable regulations, 20 C.F.R. §802.405(a), governing the operations of the Benefits Review Board provides that "where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." Thus, on remand, an administrative law judge must follow the directives of the Board. *See Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1989); *Randolph v. Newport News Shipbuilding & Dry Dock*, 22 BRBS 443 (1989).

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<sup>2</sup>Employer filed a Motion to Stay Payment of Compensation Pending Appeal which was denied in an Order dated December 16, 1991. Employer filed a Motion for Partial Stay on January 3, 1992, which was also denied in an Order dated January 9, 1992.

<sup>3</sup>In seeking an award of benefits under the Act, claimant initially bears the burden of proving that he sustained a harm, and that working conditions existed or an accident occurred which could have caused the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link the harm with claimant's employment. *See Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

In the instant case, claimant sustained a stroke while working for employer on February 12, 1980. On November 30, 1981, claimant filed a claim for benefits. *See* Emp. Ex. D. On June 22, 1982, claimant filed an LS-18, Pre-Hearing Statement, in which he set forth the facts of his claim as follows:

On February 12, 1980, [claimant] walked into a pocket of propane gas on his job site. Immediately, he became disoriented, he could not control his arms and hands, his head began to ache. He was taken by ambulance to George Washington hospital, where he was diagnosed as having had a stroke.

LS-18 dated June 22, 1982. Thereafter, in his March 11, 1983, post-hearing brief to Judge Lesser, claimant, after specifically stating that "[t]he evidence establishes that [claimant's] stroke was precipitated by his exposure to propane gas on February 12, 1980," *see* brief at 5, argued that

[i]n the case at bar, there has been no `substantial' evidence presented in the record as a whole which is "specific" and "comprehensive enough to sever the connection" between claimant's inhalation of propane gas and his subsequent stroke on February 12, 1980 . . . .

Claimant's 1983 brief at 13. In his initial Decision and Order, Judge Lesser subsequently addressed only the relationship between claimant's stroke and his exposure to propane gas on the morning of February 12, 1980.<sup>4</sup> *See* Lesser Decision and Order I. On appeal, the Board acknowledged that theory of causation presented by claimant when, in remanding the case for reconsideration, it stated that

[t]he administrative law judge's holding rests on a conclusion that harmful amounts of propane gas existed at the site . . . Resolution of the causation issue in this case turns on the existence of harmful amounts of propane gas at the worksite at the time of injury . . . we hold that the administrative law judge erred in merely assuming the existence of sufficient propane gas without making specific findings based on the conflicting evidence regarding this issue and that remand is therefore necessary for explicit consideration of the relevant evidence. . . The case must be remanded in order for the administrative law judge to consider whether there was an amount of propane on the construction site sufficient to cause claimant's stroke. . . .

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<sup>4</sup>We note that Judge Lesser, in addressing the raised issue of timeliness pursuant to Section 13 of the Act, 33 U.S.C. §913 (1982), determined, and the Board subsequently affirmed, that claimant did not become aware of the relationship between his injury and his employment with employer until he received a letter authored by Dr. Teychenne on November 3, 1981, which stated the possibility that claimant's exposure to propane gas could have hastened the onset of his stroke. *See* Lesser Decision and Order I at 7-8; 1986 Decision and Order at 2.

1986 Decision and Order, slip op. at 4 (emphasis added).

On remand, Judge Lesser, in reaffirming his prior decision, unequivocally stated that [t]he question here is whether the Claimant's exposure to the propane gas or to the sickening stench of the gas precipitated his stroke immediately thereafter.

See Lesser Decision and Order II at 3. In its second Decision and Order, issued in 1987, the Board, in once again remanding the case for further consideration, acknowledged for a second time claimant's theory of causation, stating that

[r]ather than explicitly considering evidence identified . . . as pertinent to determining whether a sufficient concentration of propane existed at the job site to have caused claimant's injury, the administrative law judge simply reiterated his earlier determination . . . [t]he administrative law judge also ignored the Board's instructions to consider whether the concentration of propane at the job site may have dissipated . . . [b]ecause the evidence relied upon by the administrative law judge establishes the existence of propane gas at the construction site, and is not indicative of its concentration, it is insufficient to support his Decision.

1987 Decision and Order, slip op. at 4.

Lastly, the parties, in briefs filed before Judge Neusner in lieu of a hearing, addressed only the issue of claimant's exposure to propane gas when addressing the potential casual connection between claimant's employment and his stroke; claimant, in his brief dated December 29, 1989, argued only that the the work condition which caused claimant's stroke was his exposure to propane gas. See Claimant's December 29, 1989 brief at 11-19.

On remand, however, the administrative law judge determined that the Board's 1987 decision did not limit his analysis of the causation issue to reconsidering the contentions of the parties, but rather required him to discuss the relationship between claimant's usual employment duties and his injury. See Neusner Decision and Order at 7. At no time during the proceedings herein did the parties allege that claimant's stroke was the result of his usual employment duties. Rather, all parties, both before Judge Lesser, the Board, and later Judge Neusner, briefed and argued only the relationship between claimant's exposure to propane gas and the onset of his subsequent stroke. A theory of causation based upon claimant's usual employment duties was never at issue during the proceedings below. The administrative law judge erred in raising a claim based on a new theory of causation *sua sponte*. See *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Under *U.S. Industries*, only the claim raised and pleaded by claimant is a proper basis for an award of benefits. Accordingly, the administrative law judge's finding of causation based upon a relationship between claimant's stroke and his usual working conditions must be vacated, and his consequent award of compensation to claimant reversed. See *Obert*, 23 BRBS at 157.

In his response brief, claimant challenges the administrative law judge's determination that the record as a whole does not support a finding that claimant's exposure to propane gas while working for employer on February 20, 1980, either caused, precipitated, and/or hastened claimant's stroke. Although claimant has not filed a cross-appeal in this case, the Board has held that it will consider arguments raised in a response brief which support an administrative law judge's decision. *See Thorud v. Brady Hamilton Stevedore Co.*, 18 BRBS 232 (1986).

In his Decision and Order, the administrative law judge concluded that the record does not demonstrate that at the time and place of claimant's exposure there was a concentration of propane gas sufficient to cause claimant's stroke. *See Neusner Decision and Order* at 12. Although, as claimant asserts, all doubtful factual questions should be resolved in favor of the injured employee, *see Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982), claimant must, in order to establish his *prima facie* case, establish that working conditions existed which could have caused the harm alleged. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In the instant case, the administrative law judge determined that the record failed to demonstrate the existence of propane gas in a quantity sufficient to cause claimant's stroke. As factfinding functions reside in the administrative law judge, and as claimant has failed to set forth specific evidence contrary to the finding of the administrative law judge regarding this issue, we affirm the administrative law judge's determination that the record does not support a finding that claimant was exposed to a quantity of propane gas sufficient to cause his stroke. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and his award of compensation is reversed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge