BRB Nos. 92-663
and 92-663A

ALLEN L. THOMPSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CHEVRON U.S.A. INCORPORATED	)	DATE ISSUED: _____)
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Frank A. Bruno (Bruno & Bruno), New Orleans, Louisiana, for claimant.

Patrick A. Talley, Jr. (Milling, Benson, Woodward, Hillyer, Pierson & Miller), New Orleans, Louisiana, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (90-LHC-2489) of Administrative Law Judge C. Richard Avery 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant asserts that he suffered two work-related injuries to his back during the course of

his employment with employer. At the formal hearing, claimant testified that he initially injured his back on November 5, 1988, while attempting to lift a water-filled hose. He stated that he told Tom Wimberly, a facility operator, that the hose was too heavy, and that he injured his back while trying to lift it. *See* transcript at 19, 87, 129. Claimant further testified that on December 14, 1988, he experienced a great deal of pain in his back while lifting boxes of bottled water onto a dolly. *Id.* at 17-18. On that day, claimant notified Mr. Coney, the platform supervisor, of his condition, and Mr. Coney then took claimant to a hospital, where he was given a cortisone injection and sent home with a prescription for medication. Mr. Coney testified that claimant told him that his pain was caused by the November 5, 1988 injury, and that claimant did not say he was injured that day. *Id.* at 148-149. Claimant subsequently treated with Dr. Gorbitz on December 16, 1988 and December 23, 1988, after which time claimant terminated his relationship with Dr. Gorbitz and sought medical treatment with Drs. Klainer, Seltzer, van Wormer, and Goethe.[1]

In his Decision and Order, the administrative law judge determined that claimant had established his *prima facie* case, that employer had failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption of causation, that claimant was unable to resume his usual occupational duties with employer, that claimant's condition was temporary in nature, and that employer failed to establish the availability of suitable alternate employment.[2] Claimant was thus awarded temporary total disability benefits from December 14, 1988 and continuing. 33 U.S.C. §908(b). Next, the administrative law judge rejected claimant's contention that he was entitled to reimbursement of the medical expenses which he incurred by treating with physicians other than Dr. Gorbitz. Lastly, the administrative law judge determined that employer was liable for an assessment under Section 14(e) of the Act, 33 U.S.C. § 914(e).

On appeal, claimant challenges the administrative law judge's decision to deny claimant reimbursement for the medical expenses which he incurred subsequent to his treatment with Dr. Gorbitz. In its cross-appeal, employer challenges the administrative law judge's findings regarding both the occurrence of an accident and an injury, and the administrative law judge's subsequent application of the Section 20(a) presumption. Employer also contends, in the alternative, that the administrative law judge erred in finding that claimant had not yet reached maximum medical improvement. Lastly, employer asserts that the administrative law judge erred in finding employer liable for a Section 14(e) penalty.

In its cross-appeal, employer initially challenges the administrative law judge's determination

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[1] Claimant was examined by Dr. Gorbitz one last time on May 10, 1991. In his report, the physician stated that claimant's symptoms are indicative of degenerative disc disease of the lumbar spine, not an acute ruptured disc, and that there was no significant evidence of radiculopathy, except for minimal sensory loss in the right leg. *See* DX-35.

[2]The administrative law judge further stated that, since claimant did not suffer an economic loss following the November 5, 1988 work incident, the date of claimant's injury for compensation purposes is December 14, 1988.

that claimant sustained an injury as a result of a work-related accident occurring on December 14, 1988.[3] Claimant has the burden of proof to establish the existence of an injury or harm and that working conditions existed or an accident occurred which could have caused the injury or harm in order to establish his *prima facie* case. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 1981). Claimant, in order to establish that he has suffered an injury under the Act, need not show that he has a specific illness or disease; rather, claimant need only establish some physical harm, *i.e.*, that something has gone wrong with the human frame. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Moreover, the underlying disease need not have been caused by the worker's employment, as an aggravation of a pre-existing condition may constitute an injury. *See Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). In this case, the administrative law judge's finding that claimant sustained an injury within the meaning of the Act is supported by substantial evidence. Specifically, it is uncontroverted that claimant sustained back pains while at work on December 14, 1988. Furthermore, Dr. Gorbitz opined that, assuming claimant's complaints to be true, claimant's pre-existing degenerative disc disease had been exacerbated by a new event, while Drs. Klainer and Seltzer opined that claimant had sustained a new injury. Accordingly, as something has gone wrong within claimant's frame, we affirm the administrative law judge's finding that claimant has established the existence of an injury. *See Romeike*, 22 BRBS at 57.

Employer additionally challenges the administrative law judge's determination that claimant had a work-related accident on December 14, 1988. Specifically, employer contends that the administrative law judge erred in crediting claimant's testimony that an incident occurred at work on that date. We disagree. In the instant case, the administrative law judge, after setting forth the testimony of both claimant and Mr. Coney, accepted claimant's uncontradicted testimony that an event occurred on December 14, 1988, which could have led to an injury. As it is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence, *see John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's decision to credit the testimony of claimant, as that decision is neither inherently incredible nor patently unreasonable. Accordingly, we affirm the administrative law judge's determination that claimant established the existence of a work-related event occurring on December 14, 1988, which could have caused or aggravated his back condition. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Employer next challenges the administrative law judge's finding that claimant's back condition is related to his employment. Where, as here, claimant establishes his *prima facie* case, claimant is entitled to the presumption at 33 U.S.C. §920(a) that his injury arose out of and in the course of his employment. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*,

[3]We will initially address employer's contention that claimant did not sustain an injury arising out of and in course of his employment with employer, since the resolution of this threshold issue may render claimant's appeal moot.

892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and the 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). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Our review of the record supports the administrative law judge's finding that employer submitted no evidence sufficient to rebut the Section 20(a) presumption. Specifically, neither Drs. Gorbitz, Klainer, nor Seltzer states that claimant's back condition was not caused or aggravated by his employment. Accordingly, we affirm the administrative law judge's finding that claimant's back condition is causally related to his employment. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Employer next contends that, assuming claimant did incur a work-related injury on December 14, 1988, the administrative law judge erred in assigning probative weight to the opinion of Dr. Seltzer over the opinions of Drs. Gorbitz and Klainer to find that claimant has not yet reached maximum medical improvement. We disagree. A disability is generally considered permanent as of the date claimant's condition reaches maximum medical improvement, or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Marine Repair Service*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). The determination of when maximum medical improvement is reached so that disability may be said to be permanent is primarily a question of fact based on medical evidence. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In the instant case, the administrative law judge, after noting that Dr. Seltzer had treated claimant for the longest period of time following his injury, relied upon that physician's testimony to conclude that claimant's condition had not yet become permanent. Dr. Seltzer testified that he believed claimant had not reached maximum medical improvement, adding that it was his hope that claimant's condition would improve with either conservative measures or surgical intervention. *See* CX-4; Seltzer Dep. at 24. We cannot say, based upon the record before us, that the administrative law judge's decision to rely upon the testimony of Dr. Seltzer when addressing the nature of claimant's disability is patently unreasonable. *See Cordero*, 580 F.2d at 1331, 8 BRBS at 744. We therefore affirm the administrative law judge's finding that claimant's condition is temporary in nature. *See generally Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

Lastly, employer asserts that the administrative law judge erred in holding it liable for a Section 14(e) penalty. In this regard, employer contends that it did not learn of claimant's alleged December 14, 1988, accident until claimant filed his claim on March 28, 1989; thus, employer contends that its notice of controversion dated April 7, 1989, was timely pursuant to Section 14 of the Act. Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a notice of controversion pursuant to Section 14(d), or the failure to pay is excused by the district director after a showing by the employer that owing to conditions over which it had no control, such installment could not be paid within the period prescribed for the payment. Section 14(b) of the Act, 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

In the instant case, the administrative law judge noted that the parties stipulated that employer was notified of claimant's injury on December 14, 1988, *see* JX-1, and concluded that employer is liable to claimant for a Section 14(e) assessment, since employer did not file a notice of controversion until April 7, 1989. We note that employer's contention on appeal that it was not aware of claimant's December 14, 1988 injury until March 28, 1989, stands in direct contrast to Mr. Coney's uncontroverted testimony that he became aware of claimant's December 14, 1988 accident on or about that date, at which time he contacted claimant and prepared a written statement which related his December 14, 1988 work activities to his back condition. *See* transcript at 154-167; DX-21. Accordingly, as the administrative law judge's finding is supported by the record and is in accordance with law, we affirm his determination that employer is liable for a Section 14(e) assessment.

We now address claimant's contention that the administrative law judge erred in failing to hold employer liable for the medical charges incurred following his treatment with Dr. Gorbitz. In support of his allegation of error, claimant contends that he both notified and sought permission from employer for these treatments, but that employer denied his requests. Additionally, claimant asserts that employer should have been prevented from pursuing this issue post-trial, since employer did not raise this issue either before or during the hearing.[4]

Section 7 of the Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. 33 U.S.C. §907. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require." Under Section 7(b) of the Act, 33 U.S.C. §907(b), the Secretary is authorized to actively

[4]We note that, contrary to claimant's contention, the issue of reimbursement for claimant's medical expenses was raised at the formal hearing. *See* transcript at 181-186.

supervise an injured employee's medical care. Section 702.406(a) of the regulations states, *inter alia*, that:

> Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. . . .

20 C.F.R. §702.406(a); *see also* 33 U.S.C. §707(c)(2); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 574 F.2d 404, 10 BRBS 1 (4th Cir. 1979). The Board has held that Section 7(d) requires that a claimant first request employer's authorization for the medical services performed by any physician, including the claimant's initial choice. *See Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). However, where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Anderson v. Todd Shipyards*, 22 BRBS 20 (1989).

In the instant case, claimant testified that he voluntarily declined to be further treated by Dr. Gorbitz, his initial treating physician, because he felt Dr. Gorbitz was abusive and did not believe his complaints of pain. *See* transcript at 29. Claimant further acknowledged that he did not notify or seek authorization from employer for his subsequent treatment with Dr. Klainer, *id.* at 35, and that, after deciding to no longer be treated by Dr. Klainer because he did not agree with that physician's opinion, he sought treatment with two chiropractors, Drs. van Wormer and Goethe, and later with Dr. Seltzer. *Id.* at 31. In his decision, the administrative law judge, after noting that Dr. Gorbitz was claimant's initial choice following his work-related injury, determined that, since there is no evidence that employer denied claimant medical treatment or that claimant obtained authorization for treatment with Drs. Klainer, Seltzer, van Wormer and Goethe, employer was not responsible for the payment of the medical charges incurred by claimant as a result of his treatment with those physicians. Although our review of the record reveals that claimant subsequently sought reimbursement of these physicians' charges from employer's carrier, *see* CX-10, the record contains no evidence that claimant either requested, or was refused, authorization from either the respondents or the district director to change physicians. We therefore affirm the administrative law judge's determination that claimant is not entitled to reimbursement of medical expenses incurred by treating with physicians other than his initial choice. *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57 (CRT)(D.C. Cir. 1989).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge