BRB No. 97-660

ROBIN T. MOODY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self insured	)	
Employer-Respondent	)	DECISION and ORDER

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

James K. Wetzel, P.A., Gulfport, Mississippi, for claimant.

Ronald T. Russell (Franke, Rainey & Salloum, P.L.C.C.), for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2877, 95-LHC-2878, 95-LHC-2879) 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*. (the Act). We must affirm the findings of fact and the 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 sustained three work-related injuries while working for employer as an electrician. On June 18, 1992, he fell from a six-foot ladder, injuring his right shoulder, wrist and neck. Thereafter, claimant was taken off work and treated for 30 days by Dr. Wiggins. Around July 15, 1992, Dr. Wiggins released claimant to return to work without permanent restrictions, finding that he had no permanent physical impairment. On July 22, 1992, claimant injured his right shoulder while pulling cable. Claimant returned to Dr. Wiggins initially, but then switched to a new orthopedist, Dr. Winters, who diagnosed a torn rotator cuff. Dr. Winters opined that claimant reached maximum medical improvement from this

injury on January 5, 1993, with no permanent impairment or restrictions, and released him for light duty work. Vol. I, EX-8, p.1; Tr. at 40-42. On March 5, 1994, while assigned to work in an overhead section of a refrigerator room, claimant injured his knees while crawling on a stainless steel floor. Dr. Winters diagnosed claimant's condition as chondromalacia and removed him from work until June 19, 1994. Throughout this period, in addition to treating claimant's knees, Dr. Winters provided treatment for claimant's continuing complaints of problems stemming from his June and July 1992 work injuries. On June 16, 1994, Dr. Winters opined that claimant had reached maximum medical improvement, and, although he found no evidence of permanent physical impairment, released him for work with permanent restrictions prohibiting lifting more than 30 pounds frequently, or 50 pounds occasionally. Volume I, EX-8, p. 5. Claimant returned to light duty work for employer in June 1994, although he continued to complain of wrist, shoulder, and knee pain. In early September 1994, claimant aggravated a pre-existing service-related back injury while moving a television set. As a result, he received treatment from a physical therapist and was seen at the Veterans Administration Hospital on September 12 and 14, 1994. Claimant continued working for employer until September 28, 1994, at which time he alleged that he could no longer continue because of the cumulative effect of his work injuries. Claimant sought temporary disability benefits under the Act from June 16, 1994, when employer ceased paying disability compensation, until October 20, 1994, and permanent total or permanent partial disability compensation thereafter in connection with the three work-related injuries.

In his Decision and Order, the administrative law judge initially found that claimant reached maximum medical improvement from his work injuries as of June 16, 1994. He further determined that employer owed no additional compensation after that date as claimant had recovered from his work injuries and returned to work, concluding that his subsequent non-industrial back injury in September 1994 while moving the television was the supervening cause of his disability thereafter. Claimant appeals, contending that the administrative law judge erred in finding that the date of maximum medical improvement was June 16, 1994, rather than October 20, 1994, and in finding that claimant's subsequent non-work related back injury was an intervening cause of his disability. Employer responds, requesting affirmance of the decision below.

Initially, we affirm the administrative law judge's finding that claimant reached maximum medical improvement on June 16, 1994. An employee is considered permanently disabled either when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), or if claimant 's condition has continued for a lengthy time and it appears to be of a lasting or indefinite duration, as opposed to one which merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The date of permanency is determined solely by medical evidence. *Sketoe v. Dolphin Titan International*, 28 BRBS 212, 221 (1994)(Smith, J., dissenting on other grounds); *see also Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 61 (1985). In the present case, although claimant argues that his condition did not reach permanency until October 20, 1994,

because it was not until that time that Dr. Winters rated him as having a 5 percent permanent physical impairment, the administrative law judge reasonably determined that maximum medical improvement had been reached as of June 16, 1994, based on the earlier opinion of Dr. Winters which established that claimant's condition appeared to be of an indefinite duration. *Devine*, 23 BRBS at 286. Inasmuch as this opinion provides substantial evidence to support the administrative law judge's finding regarding the date of permanency, it is affirmed. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

We next address claimant's contention that the administrative law judge erred in finding that claimant's non-work related back injury in September 1994 was an intervening cause of his disability. Claimant specifically asserts that it was irrational for the administrative law judge to infer that because Dr. Winters first rated claimant as having a 5 percent permanent physical impairment after this incident on October 20,1994, this activity rather than his work-related injuries was the cause of his disability. Claimant asserts that the impairment rating was based solely on his work-related conditions and there is no record evidence that this back injury resulted in any permanent injury or disability or that lifting the television aggravated his work-related injuries.

In establishing that his condition is causally related to employment, claimant is aided by the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a). *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990). In the present case, the administrative law judge properly found, based upon the parties' stipulations, that claimant is entitled to invocation of the Section 20(a) presumption, as it is undisputed that he sustained a harm, *i.e.,* the multiple injuries to his wrist, knees and shoulder, and that he was involved in three work-related accidents which could have caused the harm. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 59 (1994); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).[1] Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by the employment event. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). The Section 20(a) presumption applies to link claimant's disabling condition to his employment, placing the burden of rebuttal on employer where another cause, including a subsequent intervening event, is alleged. *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). Thus, employer may meet its rebuttal burden by producing substantial evidence that claimant's disabling condition was caused by a subsequent non-work related event. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Bass v. Broadway Maintenance,* 28 BRBS 11 (1994); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Where the subsequent disability is not the natural or unavoidable result of the work injury, but is the

[1]The administrative law judge initially found that as the parties had stipulated that claimant suffered three work-related injuries, he saw "no need to do further analysis under 33 U.S.C. §920", but concluded that should a Section 20(a) review be in order, it was his determination that employer had shown an independent event to be the cause of claimant's alleged disability. *See* Decision and Order at 9.

result of an intervening cause, employer is relieved of liability for the disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 164 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993).

In the instant case, although the administrative law judge did not explicitly analyze the relevant evidence in terms of rebuttal of the Section 20(a) presumption, he found that claimant suffered an intervening injury caused by his own recklessness in moving a television for which employer does not owe compensation. *See* Decision and Order at 12. In so concluding, he noted that the act of moving the television was a "rash" activity for claimant to have attempted knowing his multitude of shoulder wrist and knee complaints. Moreover, he inferred that because claimant had returned to work for three months and exhibited no objective evidence of injury or permanent impairment when he was evaluated by Dr. Winters on September 1, 1994, but was subsequently rated as having a 5 percent permanent physical impairment by Dr. Winters on October 20,1994, claimant's moving activity rather than his work-related injuries was the cause of his present condition.

We agree with claimant that the administrative law judge's finding that claimant's present condition is due to the September 1994 non work-related back injury rather than his work injuries is not supported by substantial evidence. An administrative law judge's failure to evaluate the record evidence in terms of Section 20(a) rebuttal is harmless error where the evidence he ultimately relies upon is sufficient to rebut the Section 20(a) presumption and establish the absence of a causal nexus in the record as a whole. *See Burson v. T. Smith & Sons, Inc.*, 22 BRBS 124 (1989). We are unable to affirm the administrative law judge's finding that claimant's disability is not work-related in the present case, however, because there is no evidence attributing claimant's impairment to his back injury. The evidence on which the administrative law judge relied, *i.e.*, the fact that Dr. Winter gave claimant a 5 percent permanent impairment rating on October 20, 1994, when he had not done so previously, cannot establish that claimant's permanent impairment is related to causes others his work injuries, inasmuch as Dr. Winters rated only the work-related injuries.[2] Dr. Winters attributed the 5 percent permanent impairment he assessed on October 20, 1994, solely to claimant's work-related shoulder, wrist and knee injuries. Dr. Winters's October 20, 1994, impairment rating thus cannot establish that claimant's disability is due to the September 1994 incident rather than the work injuries. Inasmuch as Dr. Winters ultimately concluded that claimant had a 5 percent impairment due to his work

[2]On October 20, 1994, Dr. Winters imposed additional restrictions regarding kneeling, squatting, and stair climbing, and his chart notes state that claimant has a 5 percent permanent impairment to the whole body due to his "multitude of complaints including shoulders and wrist pain, and bilateral knee pain." CX-3. On December 9, 1994, Dr. Winters reiterated that claimant has a 5 percent partial permanent impairment to the body as a whole because he had complaints in his shoulder, lower extremities, and other areas. CX-3; Volume 1, EX-8, p. 8. On January 5, 1995, Dr. Winters found that claimant had a "9% impairment to the upper extremity for his injury to his shoulder which is equivalent to a 5% impairment to the whole person." CX-3; Volume 2, EX-5, p. 7.

injuries, which is consistent with the permanent restrictions he imposed when he released claimant to return to work in June 1994, the administrative law judge's finding that claimant had recovered from his work injuries is not supported by this uncontroverted evidence.

The administrative law judge also found that claimant's activity in moving the television was reckless and rash for someone with his history of injuries. A subsequent injury which is the result of the employee's intentional or negligent conduct can, in appropriate circumstances, serve as an intervening cause sufficient to relieve employer of liability for the increased disability attributable to the intervening cause. *See generally Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983). In the present case, however, as claimant is not seeking compensation for his September 1994 back injury and there is no record evidence that moving the television had any effect on his work-related injuries, this line of cases is inapplicable.[3] Inasmuch as employer failed to present any medical evidence supporting the assertion that claimant's disability was due to the non work-related incident, it has not rebutted Section 20(a). *See generally Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). We therefore reverse the administrative law judge's finding that claimant's September 1994 non work-related back injury was the intervening cause of his disability and hold that causation is established as a matter of law. The case must therefore be remanded for consideration of all remaining issues.

[3]The record indicates only that claimant suffered a back strain from moving the television for which he received treatment from a physical therapist, Douglas Bates, on September 12, 1994, Volume 2, EX-8, p. 6, and from the Veterans Administration hospital on September 14, 1994, Volume 2, EX-7, p. 11.

Accordingly, the administrative law judge's Decision and Order denying benefits based on claimant's failure to establish causation is reversed, 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