BRB No. 05-0962

ROOSEVELT JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADM/GROWMARK RIVER SYSTEM, INCORPORATED	)	DATE ISSUED: 08/08/2006
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Alan G. Brackett and Derek M. Mercer (Mouledoux, Bland, LeGrand & Brackett, L.L.C.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-LHC-460, 2004-LHC-528) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this case, claimant sustained an injury to his left knee on May 25, 2002. He continued to work until he underwent surgery in September 2002. Employer paid disability and medical benefits. Thereafter, claimant returned to light-duty work in February 2003 and full-duty work in March 2003. Claimant alleges he injured his back on March 11, 2003, when his left knee gave out while he was climbing into a tractor in a grain barge. Claimant's doctor advised claimant to rest for two days and then return to light-duty work. In May 2003, employer terminated claimant's employment for allegedly reporting a contrived accident. Claimant filed a claim for benefits, and employer

disputed the occurrence of an accident in March 2003, as well as any injury or disability occurring therefrom.

The administrative law judge found that claimant established the elements necessary for a *prima facie* case, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption relating claimant's back injury to his work. He then found that employer did not rebut the presumption. Additionally, he found that claimant's left knee and back conditions have not reached maximum medical improvement, that claimant cannot return to his usual work, and that employer established the availability of suitable alternate employment in March 2005. Decision and Order at 18-22. Therefore, the administrative law judge awarded claimant medical benefits, temporary total disability benefits from May 16, 2003, through March 30, 2005, and temporary partial disability benefits thereafter. *Id.* at 23-24. Employer appeals the award of benefits; claimant has not responded.

Initially, employer contends the administrative law judge erred in invoking the Section 20(a) presumption, arguing that claimant did not establish the occurrence of an accident on March 11, 2003. Employer argues that the "laws of kinetic motion" preclude the accident from having happened the way claimant described. It also argues that the photographs show the absence of dusty footprints on the bucket or the step of the tractor and the unattached safety latch; therefore, it asserts that claimant never intended or attempted to get into the tractor. Employer also contends claimant did not fall because the photographs show that the grain was not disturbed in a manner consistent with someone trying to get up, as claimant stated he did. Finally, employer asserts that the contradictory versions claimant told to his doctors and employer's investigators and comments claimant made to employer's claims examiner, Ms. Stafford, support its conclusion that claimant faked the accident.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir.

1999); *see also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge credited claimant's testimony that he fell backward when his knee gave out while climbing into the tractor, as he found that claimant had complained of his knee giving out prior to the accident date. Moreover, the administrative law judge credited the facts that claimant had been considered a good employee prior to March 11, 2003, there were no eyewitnesses to dispute claimant's claim of a accident, the proper way to get into the tractor was to step up in the bucket, and the photographs showed claimant lying on the grain-covered floor in front of the tractor's bucket and corroborated his description of where he landed. Decision and Order at 18. Accordingly, the administrative law judge concluded that the accident claimant described was plausible. We reject employer's assertion that this conclusion is not rational.

While the administrative law judge did not directly address each of employer's assertions, the arguments employer makes to dispute the occurrence of an accident on March 11, 2003, do not compel the conclusion that the administrative law judge erred. First, there is no expert testimony on the "laws of kinetic motion" such that the administrative law judge could find that it was impossible for the accident to have occurred as described by claimant. Additionally, claimant's versions of the accident varied insignificantly,[1] and the administrative law judge noted that there were no witnesses to the accident, making employer's arguments as to claimant's intentions mere supposition. Moreover, although Ms. Stafford testified that claimant told her he did not want to return to work because he believed he would have an accident if he did so, the administrative law judge noted that Ms. Stafford conceded she did not report or otherwise document the statement. Decision and Order at 8; Tr. at 94-95. Finally, with regard to the photographs, the administrative law judge found that they corroborated claimant's statement as to where he fell, as they do indeed show claimant laying in the grain at the front of the tractor, Decision and Order at 18; Emp. Exs. 25-26. As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd*

[1]Claimant told the administrative law judge, Dr. Ruel, and employer's investigators that his knee gave out when he stepped up onto the tractor. The doctor at the emergency room wrote that, while climbing up, claimant's leg got weak, his hand slipped, and he fell backward. Cl. Exs. 1, 3; Emp. Ex. 9; Tr. at 22.

Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and as his decision to credit claimant's testimony, as corroborated by the photographs, is not patently unreasonable or inherently incredible, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the administrative law judge's finding that a work accident occurred on March 11, 2003, is supported by substantial evidence. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 37 BRBS 23(CRT) (5th Cir. 2000); *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). In conjunction with the finding that claimant established he has back and knee pain, which employer did not challenge, we affirm the administrative law judge's finding that claimant invoked the Section 20(a) presumption relating his injuries to his work. *Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT).

Next, employer contends the administrative law judge erred in finding it did not rebut the Section 20(a) presumption, relying on the same evidence. The administrative law judge found that employer's evidence did not rebut the presumption. In addition to the above, the administrative law judge found there is no medical evidence to rebut the finding of back and knee pain, and that employer's surveillance videotapes, which were taken after the incident, do not serve to rebut the Section 20(a) presumption. Decision and Order at 18-19. Accordingly, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption and his consequent finding that claimant's injury is work-related. *Bunol*, 211 F.3d 294, 34 BRBS 29(CRT).

Employer next contends the administrative law judge erred in finding that claimant is disabled as a result of his injury. The administrative law judge found that neither claimant's knee nor his back condition has reached maximum medical improvement.[2] He also found that claimant cannot return to his usual work and that employer did not establish the availability of suitable alternate employment until March 2005. Decision and Order at 20-21. Employer argues that claimant has no disability and can return to his usual work, and, alternatively, that it established the availability of suitable alternate employment in 2003, rendering any disability claimant may have had partial at that time.

To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). In this case,

[2]The administrative law judge found that employer has not provided the recommended medical treatment for either claimant's back or his left knee. Decision and Order at 20-21.

the administrative law judge credited the opinions of Drs. Ruel and Moss, stating that claimant has work restrictions and is limited to medium-duty or light-duty work.[3] Decision and Order at 20-21; Cl. Exs. 1, 6; Emp. Exs. 13-14. Claimant's usual work required him to drive tractors inside grain barges, hook chains to tractors to lower them into the barge, and physically assist with the maintenance and repair if something broke down. Decision and Order at 3; Tr. at 14-16. Employer argues that the surveillance videotapes and Dr. Burvant's opinion establish that claimant is not disabled and can return to his regular work. The administrative law judge found that Dr. Burvant did not examine claimant after the March 2003 incident, but merely viewed videotapes of him driving a backhoe/bulldozer to demolish a family home, and that Dr. Burvant, alone, expressed the opinion that claimant could return to his usual work. The administrative law judge also found that the videotapes do not establish that claimant could return to this type of heavy work for 12 hours per day. Decision and Order at 20-21. As the doctors have placed limitations on claimant's ability to work, and as the administrative law judge rejected employer's evidence to the contrary, it was rational for the administrative law judge to conclude that claimant is unable to return to his usual work. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987).

Finally, employer argues that it established the availability of suitable alternate employment in November 2003 pursuant to testimony given by Dr. Stokes, a vocational rehabilitation specialist. The administrative law judge found that employer established the availability of suitable alternate employment for claimant in March 2005 when Dr. Stokes submitted his labor market survey. If a claimant establishes a *prima facie* case of total disability, then he is considered totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether the job is realistically available and suitable for the claimant. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d

[3]Pursuant to the January 2003 functional capabilities evaluation, Dr. Burvant advised claimant to protect his left knee by limiting himself to medium duty, avoiding ladders, limiting stair climbing, and restricting the amount of weight lifted. Emp. Exs. 13-14. Following the March 2003 incident, Dr. Ruel adopted Dr. Burvant's advice and placed claimant on those restrictions once again. Cl. Ex. 1. Dr. Moss recommended diagnostic studies of claimant's back and neck in May 2003 and recommended claimant remain in light-duty work until a diagnosis could be made. Cl. Ex. 6. In addition, Dr. Jayakrishnan diagnosed claimant with rib contusions on March 28, 2003, and he restricted claimant to light-duty work with no lifting, pulling or climbing. Cl. Ex. 2.

1039, 26 BRBS 30(CRT) (5th Cir. 1992); *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).

The administrative law judge found that claimant was capable of working in 2003 because he worked in light-duty work following the accident and would have continued to do so but for his termination. Decision and Order at 21. In his testimony at the April 2005 hearing, Dr. Stokes stated that, according to his job bank list, Acme Trucking was accepting applications and hiring for dispatchers in November 2003. Dr. Stokes gave the hourly rates of pay for that job and stated that it would "fit within the parameters" of claimant's restrictions. Tr. at 82-83. The administrative law judge did not specifically address this testimony, but he found that employer did not carry its burden of demonstrating suitable alternate employment until March 2005 when Dr. Stokes performed a labor market survey identifying six suitable jobs. Decision and Order at 22, n.16. Moreover, he noted that Dr. Stokes testified that he did not perform a retroactive survey. *Id.* at 8; Tr. at 82-83.

Employer contends Dr. Stokes's April 2005 testimony is sufficient to establish suitable alternate employment in November 2003. An employer may attempt to retroactively establish suitable alternate employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.). This case arises under the jurisdiction of the United States Court of Appeals for the Fifth Circuit. Under Fifth Circuit law, in the absence of the identification of general job openings, an employer may satisfy its burden of showing the availability of suitable alternate employment by identifying a single job where there is a reasonable likelihood that the claimant could obtain that job under the appropriate circumstances. For example, if the job requires a high degree of skill and claimant is one of a qualified few who possess those skills, then a single job may satisfy the employer's burden. *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT); *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (5th Cir. Sept. 19, 1994) (unpublished);[4] *see also Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998). In this case, the dispatcher position discussed by Dr. Stokes as being available in November 2003 constitutes a single job opening. There is no evidence that this job required a specific skill that claimant possessed that would have given him a reasonable likelihood of securing the position, nor is there evidence of other general jobs available in that time frame. Therefore, Dr. Stokes's testimony concerning the sole general dispatcher position, available in November 2003, is insufficient to satisfy employer's burden. *Holland*, 32 BRBS at 182. We affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment until March 2005, whereupon

[4]The Rules of the Fifth Circuit state that unpublished opinions issued prior to January 1, 1996, serve as precedent. 5th Cir. R. 47.5.3.

claimant's work-related disability became partial. *See Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge