BRB No. 07-0310

P.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TERRAL RIVERSERVICE, INCORPORATED	)	DATE ISSUED: 08/15/2007
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Decision and Order on Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Barry A. Roach, Lake Charles, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Decision and Order on Reconsideration (2006-LHC-0409) of Administrative Law Judge Clement J. Kennington 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 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 dragline operator, alleged that he injured his neck on June 21, 2004, while securing a barge by pulling a rope. HT 23-24. On that same date, claimant advised employer that he had suffered an injury to his right hand and was experiencing pain and numbness in his hand and forearm; claimant was subsequently diagnosed as suffering from right carpal tunnel syndrome. EX 3. Dr. Leonard, an orthopedic surgeon, performed a carpal tunnel release on July 27, 2004. CX 14. Despite claimant's continued complaints of numbness in his biceps, Dr. Leonard released claimant to return to his usual duties on September 1, 2004. EX 2. Claimant began treating with Dr. Foret, an orthopedic surgeon on February 22, 2006, and, on June 29, 2006, underwent a cervical MRI which showed a left paracentral disc protrusion at C6-7 with cervical radiculitis on the right side. Foret depo. at 11. Claimant sought temporary total disability compensation for the June 21, 2004, alleged injury to his neck.[1]

In his Decision and Order, the administrative law judge found that claimant failed to establish the elements of his *prima facie* case and therefore was not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation with regard to his neck condition. Accordingly, the administrative law judge denied disability compensation and medical benefits related to claimant's neck condition. On reconsideration, the administrative law judge acknowledged that he had originally stated, mistakenly, that claimant had failed to file a timely post-hearing brief but that he nonetheless had considered the brief in reaching his decision.[2] Additionally, he reiterated his reasons for finding that clamant failed to establish his *prima facie* case. He stated as well that, assuming, *arguendo*, invocation of the Section 20(a) presumption, employer established rebuttal thereof and claimant did not establish the work-relatedness of his neck condition.

Claimant appeals, contending the administrative law judge erred in finding that he failed to establish his *prima facie* case. Employer responds, urging affirmance.

In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See Bolden v. G.A.T.X. Terminals Corp.*, 30

[1] Employer paid temporary total disability from July 27, 2004 through November 5, 2004, for the carpal tunnel syndrome and release surgery.

[2] *See* Errata, filed October 19, 2006, correcting the administrative law judge's Decision and Order Denying Benefits to reflect that both parties filed briefs.

BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The Section 20(a) presumption does not apply to aid claimant in establishing his *prima facie* case.[3] *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

In this case, claimant asserted that the work incident which occurred on June 21, 2004, caused his current neck condition. In his initial decision, the administrative law judge stated he did not credit claimant's uncorroborated version of the rope incident. Thus, he found that claimant did not invoke the Section 20(a) presumption. Decision and Order at 11. On reconsideration, the administrative law judge explained further that claimant "failed to present credible evidence of a neck injury associated with an alleged rope pulling incident." Decision and Order on Recon. at 2. The administrative law judge based this finding on claimant's delayed and inconsistent reporting of neck pain and the rope incident. *Id.*

The administrative law judge erred to the extent that he required claimant to present evidence linking his neck injury to the rope incident. Claimant is not required to establish that the accident in fact caused his harm, but only that an accident occurred which could have caused the harm. *See, e.g., Champion v. S&M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982). In the instant case, it is undisputed claimant currently suffers cervical radiculitis. Moreover, employer appears to have accepted that a rope-pulling incident occurred on June 21, 2004, as it relates to claimant's carpal tunnel syndrome. As such an event could have caused his neck pain, the occurrence of the rope-pulling incident would entitle claimant to invocation of the Section 20(a) presumption linking his neck condition to this incident. *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).

However, any error in this regard is harmless as the administrative law judge's alternate findings are supported by substantial evidence. Decision and Order on Recon. at 2. Where claimant establishes his *prima facie* case, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused by his employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the administrative law judge finds the presumption rebutted, he must weigh all of the evidence and resolve the causation issue based upon the record as a whole, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v.*

[3] Contrary to claimant's assertion that doubtful questions must be resolved in his favor, it is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

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).

The administrative law judge found that employer rebutted the presumption based on the testimony of Dr. Leonard. Dr. Leonard, an orthopedic surgeon, who treated claimant for his carpal tunnel syndrome and performed the release surgery, testified that his examination of claimant failed to reveal any indication of a cervical injury. EX 6 at 16. Furthermore, Dr. Leonard opined that, as claimant did not complain of neck pain for almost six months after the accident, there is no connection between the accident and claimant's neck condition. *Id.* at 17-19. This opinion constitutes substantial evidence sufficient to rebut the Section 20(a) presumption, and the administrative law judge's finding in this regard is affirmed. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003).

Upon weighing the evidence as a whole, the administrative law judge found that claimant failed to establish a causal connection between his neck condition and the work accident. Decision and Order on Recon. at 2. The administrative law judge gave less weight to Dr. Foret's opinion because it was based on his belief that claimant had consistently complained of neck and interscapular pain from the date of the accident. Foret Dep. at 33. However, the administrative law judge found that claimant failed to report any neck pain to his doctors despite repeated examinations or to seek any medical help for this condition until 2006. *See, e.g.*, EX 6 at 16, 17-19; HT at 46. For this reason, the administrative law judge also accorded no weight to claimant's testimony that he injured his neck in the rope-pulling incident.

It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See generally 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 in this case properly analyzed the evidence as a whole, and his decision is rational and supported by substantial evidence. Accordingly, we affirm the administrative law judge's finding that claimant's neck condition is not work-related, and the consequent denial of benefits. *See, e.g., Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge