BRB No. 90-1952

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| JOHN TRACHSEL | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
| | ) | DATE ISSUED:_____ |
| STEVEDORING SERVICES OF AMERICA | ) | |
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| and | ) | |
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| EAGLE PACIFIC INSURANCE COMPANY | ) | |
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| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

Rodney C. Pranin (Pranin & Muldoon), Wilmington, California, for claimant.

Robert E. Babcock (Laughlin, Falbo, Levy & Moresi), Long Beach, California, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-3244) of Administrative Law Judge James J. Butler denying 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.* (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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On Friday, October 16, 1987, in the course of his employment as a gearman for employer, claimant was parking hustlers. At approximately 9:00 p.m., upon exiting the back door of a hustler, claimant slipped on a step, tried to hang on, twisted and fell. He remained on duty until the end of his shift that night (3:00 a.m.). Claimant testified that his pain grew worse over the weekend, and he reported his injury on Monday, October 19. Tr. at 33-34. Claimant was first treated by Dr. Lorenz on October 21, 1987 because of pain in his lower back, left hip and left buttocks. He found the prescribed therapy unsuccessful and discontinued the treatment on February 15, 1988. Tr. at 36, 41-43. On February 17, 1988, employer terminated claimant's compensation. The next day, claimant filed a claim for permanent total disability benefits, and on March 4, 1988, employer controverted the claim. Emp. Exs. 4-6.

Claimant began treatment with Dr. Hunt in February or March 1988. Tr. at 51. Dr. Hunt diagnosed low back strain and, based on the results of a February 1988 CT scan, a ruptured L4-5 disc. Cl. Ex. 4. Dr. Hunt concluded that claimant has a 25 percent impairment of the whole person, and he certified claimant for disability retirement. *Id.* In March 1989, at employer's request, claimant was examined by Dr. Miller. Dr. Miller concluded that claimant's October 1987 injury did not cause any permanent disability beyond that caused by a 1977 injury, and he acknowledged claimant's retirement but found that claimant was physically capable of returning to his usual employment. Emp. Ex. 17.

At the hearing, the parties disputed the nature and extent of claimant's disability. The administrative law judge found claimant's testimony incredible, credited Dr. Miller's opinion, concluded there is no work-related permanent impairment, and denied benefits. Decision and Order at 12. Claimant appeals the decision, making numerous contentions, and employer responds, urging affirmance.

Claimant asserts that the administrative law judge based his decision on evidence not in the record. Particularly, claimant challenges the administrative law judge's reference to the medical opinions of Dr. Lorenz and Dr. Woolf. Claimant further asserts error in the administrative law judge's reliance on allegedly inaccurate summaries of the medical reports which are a part of the record. It is axiomatic that all evidence must be formally admitted into the record at the hearing before the administrative law judge and that an agency may not issue a decision based on evidence not formally admitted. *See, e.g., Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985); 5 U.S.C. §556(e); 20 C.F.R. §702.338. In this case, we conclude that the administrative law judge did not err in referring to summaries of medical opinions which are part of the record, although the actual reports are not.[1] The administrative law judge did not refer to the actual reports, nor did he

[1]As claimant made no attempt to admit the actual medical reports into evidence at the trial level, he may not introduce them into the record at the appellate level. *See, e.g., Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986). Employer seeks sanctions against claimant's counsel in the form of employer's attorney's fee for the time needed to respond to counsel's attempts to introduce the additional evidence into the appellate record. However, attorney's fees may not be considered costs within the meaning of Section 26, 33 U.S.C. §926, and cannot be assessed against any party

base his decision on the summaries alone. *See* Decision and Order at 2, 4, 11. On the material issue of the case, the administrative law found that claimant is able to return to his usual work. Notwithstanding his references to the opinions of Drs. Lorenz and Woolf, the administrative law judge credited Dr. Miller's opinion, which is of record and indicates that claimant's condition neither warrants additional medical care nor prevents him from returning to his usual work. *See* Emp. Ex. 17 at 7. Consequently, we reject claimant's assertions regarding the administrative law judge's reliance on opinions not admitted into evidence.

Claimant next challenges the administrative law judge's failure to discuss whether claimant is able to bowl without pain. Claimant admitted he bowls weekly in two leagues, and stated that although it hurts, bowling is the only exercise he gets.[2] Tr. at 88-92, 102. A video tape taken by an investigator showed claimant bowling numerous games on several different occasions. Emp. Ex. 38. The investigator testified that during his surveillance he never saw claimant grimace or gesture as if he were in pain, and he never saw claimant limp or wear a brace for his back. Tr. at 109. Moreover, claimant admitted he did not miss any weeks of bowling and, as of the date of the hearing, he was in his 29th week of a 35-week schedule. Tr. at 97-98, 110; Emp. Ex. 39. According to Dr. Miller, the tape confirmed his opinion that claimant has "no significant permanent partial disability as a direct consequence of the 1988 [sic] incident." Emp. Ex. 18. Dr. Woolf viewed the tape and described claimant's movements as "free, continuing, flowing and graceful throughout," lacking evidence of impairment, pain, restriction or discomfort. Emp. Ex. 16. Dr. Woolf stated that if claimant's disc bulges caused him pain, it would be noticeable in his actions. He, therefore, concluded that claimant is capable of working as the exertion required by bowling could, in many instances, equal that required by longshore or casual work. *Id.* The administrative law judge determined the film dispelled Dr. Hunt's conclusion of the severity of claimant's impairment because it showed that bowling presented no apparent difficulty for claimant. Decision and Order at 5. Though claimant may have suffered pain while bowling, the administrative law judge found that the pain, if any, was neither visibly apparent nor disabling. Therefore, we reject claimant's contention.

Claimant also contends the administrative law judge failed to invoke the Section 20(a), 33 U.S.C. §920(a), presumption. This contention is also rejected. The Section 20(a) presumption aides a claimant in determining whether an injury is work-related. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated in part on reconsideration*, 24 BRBS 63 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT) (4th Cir. 1982); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Whether claimant's injury is work-related is not at issue in this case as employer does not dispute the occurrence of an accident at work. *See* Emp. Exs. 3, 5; Decision and Order at 3. The only dispute in this case concerns the nature and extent of claimant's disability resulting from the accident, and that issue is not affected by the Section 20(a) presumption. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981).

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pursuant to that section. Toscano v. Sun Ship, Inc., 24 BRBS 207 (1991).

[2]Claimant lied about his bowling in his deposition. Emp. Ex. 19 at 38-40, 88-89. At the hearing, he admitted he lied and regretted doing so. Tr. at 59, 98-102.

Claimant maintains that the administrative law judge improperly discredited Dr. Hunt's opinion because he failed to discuss the opinion of Dr. Otto. Additionally, he contends the administrative law judge substituted his own opinion for that of Dr. Hunt. Questions of witness credibility, including medical witnesses, 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). However, the administrative law judge may not substitute his opinion for the opinion of a medical expert. *Scivally v. Sullivan*, 966 F.2d 1070 (7th Cir. 1992); *Gober v. Matthews*, 574 F.2d 772 (3d Cir. 1978). In this case, the administrative law judge did not substitute his own opinion for Dr. Hunt's. Instead, the administrative law judge discredited Dr. Hunt's opinion because he found it was contradicted by Dr. Miller's opinion and because it was based primarily on claimant's statements, which were found to be incredible. Decision and Order at 10-11. Contrary to claimant's assertions, the administrative law judge found no objective evidence to support Dr. Hunt's diagnosis, and a review of Dr. Otto's interpretation of the February 1988 CT scan supports the administrative law judge's conclusion that Dr. Hunt's interpretation of the scan was "unique."[3] Emp. Ex. 15; Decision and Order at 4. Moreover, Dr. Miller, who also interpreted the CT scan results, found they reveal "nothing except some bulging and minor degenerative changes." Emp. Ex. 17. Therefore, we reject claimant's contentions and hold that the administrative law judge rationally credited Dr. Miller's opinion and discredited Dr. Hunt's opinion as is within his discretion as the trier-of-fact.[4] *Perini Corp.*, 306 F.Supp. at 1321.

[3]Dr. Otto, a radiologist, determined that the CT Scan showed a disc bulge at L4-5, whereas Dr. Hunt diagnosed a ruptured disc at L4-5.

[4]The administrative law judge also reasoned that Dr. Hunt's opinion was not reliable because, unlike Dr. Miller, he was not aware of claimant's complete medical history. Cl. Ex. 4; Emp. Ex. 17; Decision and Order at 5.

Finally, claimant contends the administrative law judge erred in adopting employer's contentions in their entirety, thus violating the Administrative Procedure Act.[5] A review of employer's post-hearing brief and the Decision and Order reveals that much of the decision incorporated the language contained in employer's post-hearing brief. Although it is not *per se* error for an administrative law judge to adopt or incorporate verbatim language from a party's pleading, incorporation of factual and legal assertions from a party's brief is impermissible to the extent it prevents independent review of the evidence by the adjudicator. *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). Given the administrative law judge's findings and conclusions regarding Dr. Miller's opinion and the surveillance tape, we determine that he rationally concluded that claimant failed to establish a *prima facie* case of total disability. Dr. Miller's medical opinion constitutes substantial evidence supporting the administrative law judge's conclusion that claimant is able to perform his regular job, and thus has not established a *prima facie* case of total disability. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Consequently, we reject all of claimant's contentions as they raise no reversible error on the part of the administrative law judge.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5]The Administrative Procedure Act requires an administrative law judge to adequately detail the rationale behind his decision, analyze and discuss the medical evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.* 21 BRBS 252 (1988); 5 U.S.C. §557(c)(3)(A).