BRB No. 98-1302

ROBERT W. DODD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CROWN CENTRAL PETROLEUM CORPORATION	)	DATE ISSUED: June 25, 1999
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Robert W. Dodd, Houston, Texas, *pro se*.

Andrew Schreck (Galloway, Johnson, Tompkins & Burr), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits and Order Denying Motion for Reconsideration 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). In an appeal by a claimant without representation by counsel, the Board will review the

administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On October 24, 1995, claimant, a pumper/dock standby, experienced pain in his right knee while allegedly hurrying across employer's facility during the course of his employment duties. After reporting this incident to his terminal foreman and employer's loss control coordinator, claimant was transported to the hospital where he was held for some period of time; x-rays taken during this hospitalization indicated mild soft tissue swelling in claimant's knee. Employer, two days after this incident, documented claimant's accident on an injury report form. Claimant returned to work on November 7, 1995, and continued to perform his job duties until employer locked out all of its employees following a contract dispute. Claimant, who received compensation under the Texas State Workmen's Compensation statute, sought benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant failed to establish his *prima facie* case and thus he concluded that claimant was not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Accordingly, the administrative law judge denied claimant's claim for benefits. On reconsideration, the administrative law judge summarily dismissed claimant's contention that he had improper representation at the hearing. Additionally, the administrative law judge found that the case of *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998), was not dispositive of the case before him. Accordingly, he affirmed his denial of benefits.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim. Employer responds, urging affirmance.

In his decision, the administrative law judge found that claimant had not established his *prima facie* case and that, accordingly, claimant was not entitled to invocation of the presumption at 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, claimant must affirmatively establish that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). For the reasons that follow, we reverse the administrative law judge's determination that claimant failed to establish his *prima facie* case.

In concluding that claimant had not established his *prima facie* case, the administrative law judge initially found that claimant had failed to establish a harm; specifically, the administrative law judge concluded that while claimant may have

experienced pain in his right knee on October 24, 1995, subsequent medical examinations failed to reveal anything wrong within the human frame other than pre-existing arthritis. *See* Decision and Order at 12. In order to establish the harm element of his *prima facie* case, however, claimant need not show that he has a specific condition; rather, claimant need only establish that he has sustained some physical harm, *i.e.*, that something has gone wrong with the human frame. *See Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968)(*en banc*); *Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989). In the instant case, claimant was immediately hospitalized following complaints of right knee pain on October 24, 1995; hospital x-rays revealed a mild soft tissue swelling with questionable linear soft tissue calcification or avulsion fracture over the medial aspect of claimant's knee joint. *See* CX-9. Drs. Mathias and Garcia subsequently diagnosed right knee pain and soft tissue calcification. *See* CXS 9 and 10. Therefore, the physicians of record believed claimant's complaints of pain and found them supported at least in part by objective testing of the knee. Accordingly, the medical evidence of record, as well as claimant's testimony, establishes that something has gone wrong within the human frame. *See Romeike,* 22 BRBS at 57. We, therefore, reverse the administrative law judge's finding that claimant failed to establish the harm element of his *prima facie* case.

Next after stating that "[a]t most claimant was walking when he experienced ..... pain," *see* Decision and Order at 12, the administrative law judge summarily concluded that no accident at work in fact occurred. In establishing the "working conditions" element of his *prima facie* case, claimant is not required to prove that a specific accident occurred; rather, claimant must show that an accident occurred or working conditions existed which could have caused, aggravated or accelerated the harm alleged. *See Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989). Thus, establishment of the "working conditions" prong requires that the administrative law judge determine whether the employment events claimed as a cause of the harm sustained by claimant in fact occurred. *See U.S. Industries/Federal Sheet Metal,* 455 U.S. at 608, 14 BRBS at 631.

In the case at bar, it is uncontroverted that claimant experienced right knee pain while either walking, rushing or hurrying along while in the course of his employment. *See* HT at 30, 64-68, 80-81, 90-91. The speed of claimant's forward progress, however, is irrelevant to the disposition of this issue; the relevant fact is that claimant was performing his employment duties when he experienced right knee pain which resulted in his hospitalization. We therefore reverse the administrative law judge's finding on the "working conditions" element, based on the uncontested fact that claimant was in the course of his employment when he experienced the harm alleged. As claimant has thus established his *prima facie* case, we hold that claimant is entitled to the Section 20(a) presumption that the knee pain he experienced on October 24, 1995 is causally related to his employment.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut

the presumption by establishing that claimant's condition is not caused or aggravated by his employment. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present substantial evidence sufficient 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). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). As the administrative law judge did not address these issues, we remand the case for the administrative law judge to determine whether employer rebutted the presumption. 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 Devine*, 23 BRBS at 279. Lastly, if the administrative law judge finds a causal relationship between claimant's conditions and his work injury, he must then consider the nature and extent of claimant's disability.

On appeal, claimant also contends that the administrative law judge erred in his admission of various medical opinions into the record. In his order denying reconsideration, the administrative law judge specifically found that claimant was adequately represented by counsel. As there was no objection to such evidence at the time of its admission by the administrative law judge, we decline to address this issue as it is raised for the first time on on appeal. *See Hite v. Dresser Guiberson Pumping Co.*, 22 BRBS 87 (1989).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge