BRB No. 01-0317

STUART WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	DATE ISSUED: Nov. 29, 2001
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Errata Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Errata Order (2000-LHC-0328) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 storekeeper, alleged that he injured his back at work on December 19, 1997, after operating a forklift for a few hours. Claimant had previously injured his back at work on May 6, 1992. Employer voluntarily paid claimant temporary partial and total disability benefits from December 20, 1997, through January 14,

1998, and from July 7, 1998, through January 17, 1999, respectively, based on claimant's average weekly wage at the time of the 1992 injury. The administrative law judge found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption for the alleged December 19, 1997, injury as the issue of "harm" was uncontested and claimant established an "accident or working conditions" which could have caused the harm. The administrative law judge further found that employer did not establish rebuttal of the Section 20(a) presumption. The administrative law judge awarded claimant temporary partial and temporary total disability benefits for the periods previously paid by employer, but at claimant's higher 1997 average weekly wage.

On appeal, employer challenges the administrative law judge's award of benefits at the higher average weekly wage, contending that claimant did not sustain an injury at work in 1997. Claimant responds in support of the administrative law judge's award to which employer replied.

Employer first contends that the administrative law judge erred in finding that an accident occurred on December 19, 1997, which could have caused claimant's injury. The Section 20(a) presumption is invoked if claimant establishes his *prima facie* case--the existence of a harm and that an accident occurred which could have caused the harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *see generally U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). Claimant's testimony, if credible, may establish that the alleged accident in fact occurred. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). The administrative law judge found that claimant established invocation of the Section 20(a) presumption based on claimant's testimony, as well as that of Dr. Redding, claimant's treating physician, and Mr. Lawrence, claimant's supervisor.[1] As the testimony of claimant, in conjunction with that of Dr. Redding and Mr. Lawrence, establishes that an accident occurred on December 19, 1997, which could have caused an increase in claimant's back pain, and as employer does not contest that claimant suffered a "harm," we affirm the administrative law judge's finding that claimant established invocation of the Section 20(a) presumption as it is supported by substantial

[1]Claimant testified that he felt a change in his usual back pain on December 19, 1997, about 11:30 a.m. after being on the forklift from 8:30 or 9:00 a.m. Tr. at 48-50. Dr. Redding stated that it was possible that claimant injured his back on December 19, 1997, by getting out of bed, from operating the forklift, or from a combination of operating the forklift and getting out of bed. Cl. Ex. 13 at 34-37, 43-45. Mr. Lawrence testified that he saw claimant in pain on the forklift. Tr. at 67-71.

evidence.[2] *See Moore,* 126 F.3d 256, 31 BRBS 119(CRT)*; Hampton*, 24 BRBS 141*;* Decision and Order at 8; Cl. Ex. 13 at 34-37, 43-45; Tr. at 48-50, 67-71.

Employer also contends that it established rebuttal of the Section 20(a) presumption by presenting evidence that claimant's increase in back pain was due to claimant's getting out of bed on December 19, 1997, and based on his failure to initially report the work injury. Employer also contends that claimant did not establish his case by a preponderance of the medical evidence as Dr. Redding provided two possible causes for claimant's increased back pain. *See* n. 1, *supra*. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by presenting substantial evidence sufficient to sever the causal connection between the injury and the employment. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Employer's burden is one of production and not persuasion as the latter rests at all times on claimant. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994); *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999)(*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999). The administrative law judge considered employer's attacks on claimant's credibility but rationally found claimant's failure to initially report his work injury at the hospital or to Dr. Redding

[2]Any error in the administrative law judge's statement that the Section 20(a) presumption aids claimant in establishing his *prima facie* case is harmless, as the administrative law judge required claimant to establish both a "harm" and an "accident or working conditions" which could have caused the harm before finding that claimant established invocation of the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT)*;* Decision and Order at 8; Emp. Br. at 9-13; Emp. Reply Br. at 1-2.

was insufficient to defeat invocation or to establish rebuttal.[3] *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT)(4th Cir. 1994); Decision and Order at 8-9; Cl. Exs. 2-6, 9-2; Emp. Exs. 2.2, 3.3. We therefore affirm the administrative law judge's finding that employer did not establish rebuttal based on claimant's failure to initially report the work injury.

Contrary to the remaining argument, the burden of production was on employer to establish rebuttal--that claimant's increased back pain was not caused or aggravated by his operation of a forklift at work. *See generally Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT)(5th Cir. 2000). Thus, Dr. Redding's identification of more than one possible cause for claimant's increased back pain does not in itself establish that claimant's increased back pain was not caused or aggravated by his operation of a forklift at work. Dr. Redding's opinion therefore is insufficient to rebut the Section 20(a) presumption. *See Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); Decision and Order at 8-9; Cl. Ex. 13 at 34-37, 43-45. As there is no medical evidence that supports a finding of rebuttal and as the administrative law judge rationally found the lay testimony taken together supportive of claimant's case, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 2000). Consequently, we affirm the administrative law judge's finding that claimant sustained an injury at work in December 1997, and the award of benefits at claimant's 1997 average weekly wage as it is rational, supported by substantial evidence, and in accordance with law.

[3]The administrative law judge acknowledged that there was a good likelihood that claimant did not know what caused his back to hurt but did know that his back pain began after certain events occurred, *i.e.,* his operation of the forklift at work. The administrative law judge found that Mr. Lawrence's testimony of the temporal proximity between claimant's pain and his operation of the forklift and Dr. Redding's opinion on contribution are more important than the fact that claimant may not have initially attributed his back pain to the operation of the forklift.

Accordingly, the administrative law judge's Decision and Order and Errata Order are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge