BRB No. 04-0188

NEAL DENNIES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRANSOCEAN TERMINAL OPERATORS d/b/a P&O PORTS LOUISIANA, INCORPORATED	)	DATE ISSUED: Oct. 15, 2004
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision Denying Claimant's Petition for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

William Vincent, Jr., New Orleans, Louisiana, for claimant.

William C. Cruse (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Decision Denying Claimant's Petition for Reconsideration (2002-LHC-255) 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 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).

Claimant sustained two injuries while working for employer, the second of which

is at issue here. On September 26, 2000, claimant injured his left shoulder, back, and hip in an accident at work. Employer paid claimant temporary total disability and temporary partial disability benefits between October 3, 2000, and January 7, 2001, in the amount of $8,967.32. On June 6, 2001, the parties entered into a Section 8(i), 33 U.S.C. §908(i), settlement for an additional $40,000. The settlement provided that employer would be responsible for treatment related to the injury authorized prior to the approval of the settlement. Claimant returned to work following this injury on November 19, 2001. Decision and Order at 4-5.

On January 18, 2002, while he was speaking with a co-worker, the brakes of the van in which he was a passenger failed, and the van rolled forward, trapping claimant's left forearm between the metal flange of a chassis and the driver's side-view mirror of the van. Tr. at 135-138. Claimant testified that he had to forcibly pull his arm out, he was cut, and he had to go to the hospital.[1] Tr. at 138-134. Claimant received stitches to sew up the V-shaped laceration on his forearm, and he later alleged that the jerking motion caused a neck injury and/or aggravated his prior left shoulder condition.

The administrative law judge found, *inter alia*, that there is no question that claimant sustained the laceration. Decision and Order at 15. With regard to the neck/shoulder condition, the administrative law judge stated that it appeared that claimant established a *prima facie* case of causation, but considering the evidence presented by employer, the lack of contemporaneous complaints about a neck or shoulder injury, and claimant's questionable demeanor while testifying, the administrative law judge found that Section 20(a), 33 U.S.C. §920(a), could not be invoked. Decision and Order at 18. Assuming, *arguendo*, that the presumption should be invoked, the administrative law judge found that it had been rebutted by employer's evidence and, on the record as a whole, any neck and/or shoulder condition was not

[1]Claimant testified that, because of the way the bumper of the van caught the chassis, putting the van in reverse was not an option to free his arm. Allegedly, the driver used his weight as leverage on the passenger side, and then claimant "jerked" his arm several times to free it. Tr. at 137-139. Employer disputes this version, noting that there is no contemporaneous record evidence to support it and that the driver was not called to corroborate it.

related to the January 2002 incident.[2] *Id.* The administrative law judge denied claimant's motion for reconsideration. Claimant appeals the finding that he did not sustain a neck or shoulder injury as a result of the January 2002 incident, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that the January 2002 incident did not injure or aggravate claimant's neck and/or left shoulder condition. He asserts that the opinion of his treating physician, Dr. Murphy, should be given greater weight and that the administrative law judge erred in relying on the opinion of employer's expert, Dr. Steiner. We reject claimant's contention.

In determining whether an injury is work-related, a claimant is aided by the Section 20(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. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *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. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). 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).

Claimant contends the administrative law judge erred in failing to apply the Section 20(a) presumption or, alternatively, in failing to find that claimant's current

[2]The administrative law judge awarded claimant temporary partial disability benefits from January 18 through March 26, 2002, based on an average weekly wage of $617.42, for the forearm injury. He also awarded medical benefits related to the forearm injury and interest on unpaid compensation. Decision and Order at 23-24.

shoulder condition is related to his January 2002 injury. The administrative law judge found that claimant failed to establish a *prima facie* case; however, he alternatively found that if the presumption is invoked, it has been rebutted. Contrary to claimant's contention, there is substantial evidence of record to support the administrative law judge's determination that claimant did not injure his neck or re-injure or aggravate his shoulder condition in the January 2002 incident. Thus, any error the administrative law judge may have committed in failing to invoke the Section 20(a) presumption is harmless, as the administrative law judge properly found the presumption rebutted by substantial evidence, removing it from the case.

With regard to the medical evidence, we initially reject claimant's contention that the administrative law judge should have given greater weight to Dr. Murphy's opinion. Although Dr. Murphy, claimant's treating physician, may have opined that claimant aggravated his shoulder and/or injured his neck, Cl. Exs. 6A-6B, his opinion is not entitled to "special" weight. A treating physician's opinion is not entitled to determinative weight when the administrative law judge finds other medical opinions to be more credible. *See generally Newton v. Apfel*, 209 F.3d 448 (5th Cir. 2000). In this case, Dr. Steiner's opinion contradicts Dr. Murphy's on the issue of whether claimant's shoulder and/or neck condition was caused or aggravated by the January 2002 incident, and the administrative law judge found Dr. Steiner's opinion to be more credible. Decision and Order at 18. Dr. Steiner examined claimant five times after his September 2000 injury and once after his January 2002 injury, and he reviewed both pre- and post-January 2002 left shoulder MRI films, concluding that they are essentially the same with no objective evidence of re-injury or aggravation. Cl. Ex. 13 at 12-13; Emp. Ex. 9. He concluded that claimant had recovered from the forearm laceration and that any remaining pains in claimant's shoulder were related to the original injury in 2000. He specifically stated that claimant's second injury did not cause or aggravate his shoulder condition, as his symptoms were the same type he had before the January 2002 injury and were not the kind of symptoms that would disappear. Rather, he felt they were the kind of symptoms that claimant would have to learn to live with, and he stated he would have expected the same sorts of complaints from claimant even absent the second injury. Tr. at 312-314, 319-320. Thus, Dr. Steiner believed claimant's current shoulder problems were a continuation from his first injury. Tr. at 319. Dr. Steiner's opinion constitutes substantial evidence rebutting the Section 20(a) presumption. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003).

In weighing the evidence as a whole and the credibility of Dr. Steiner's opinion, the administrative law judge found claimant's testimony evasive and discredited it. The administrative law judge noted that medical reports did not corroborate claimant's testimony that he had complained of shoulder problems related to the 2002 incident

contemporaneously with the incident.[3] The administrative law judge credited Dr. Steiner's opinion that the two left shoulder MRI results, showing the shoulder's condition before and after the accident, were essentially the same and did not reveal additional injury or aggravation. Decision and Order at 18; Decision Denying Recon. at 1-2. It is within the administrative law judge's discretionary powers to determine how to credit and weigh the evidence of record. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Here, the administrative law judge considered all of the relevant evidence of record and concluded that claimant's shoulder condition was not aggravated by the January 2002 incident. We affirm the administrative law judge's rational determination.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[3]Claimant correctly notes that he did complain of shoulder pain to one of Dr. Stokes's nurses during the intake interview on February 18, 2002. The administrative law judge discussed this complaint, noting that while it was made to a nurse, it was not reiterated to the doctor until March 5, 2002. Decision and Order at 18. The administrative law judge's finding that claimant did not complain of shoulder pain contemporaneously with the accident is not undermined by the intake notes, as a complaint made four weeks after the accident cannot be considered to have been made "contemporaneously."