

HENRY C. BATSON )  
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 Claimant-Petitioner )

v. )

MARINE PORT TERMINALS, )  
 INCORPORATED )

DATE ISSUED SEP 30 2005

and )

LIBERTY MUTUAL INSURANCE )  
 COMPANY )

Employer/Carrier- )  
 Respondents )

DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Henry C. Batson, Brunswick, Georgia, *pro se*.

Richard J. Harris (Brennan, Harris & Rominger LLP), Savannah, Georgia, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2003-LHC-02917) of Administrative Law Judge Richard K. Malamphy 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 in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On May 20, 1988, claimant was injured in the course of his employment as a longshoreman while throwing bags of animal feed in the hold of the *M/V Galatia* in the Port of Brunswick, Georgia. Claimant originally complained of pain in his lower back and groin. The record indicates that claimant suffered a herniated disc at L5-S1 as a result of the accident and underwent surgery to repair the disc. Emp. Ex. 4. Eventually, claimant also complained of pain in his neck and upper back. By Compensation Order dated August 20, 1993, the district director approved the parties' settlement of the compensation claim for injuries to claimant's back sustained in the accident.<sup>1</sup> 33 U.S.C. §908(i); *see* Emp. Exs. 15, 16. The parties agreed that claimant is entitled to ongoing medical treatment for the injury to his back. 33 U.S.C. §907; Emp. Ex. 16.

In 1994, claimant was involved in a non work-related motor vehicle accident. The dump truck in which claimant was sitting was struck from the rear, and claimant immediately sought treatment at the emergency room for back pain; he was discharged when no fractures were found. Dr. Hodges reported on November 28, 1995, that as a result of the motor vehicle accident, claimant had suffered a sprain/strain of the cervical spine with exacerbation of prior complaints of cervicalgia and spondylosis. Emp. Ex. 18 at 84. Claimant was subsequently diagnosed with a torn left shoulder rotator cuff, which required surgery. Employer denied coverage for the surgery contending that it was not related to the 1988 work injury. The surgery was performed by Dr. Gurley on November 30, 2000. Emp. Ex. 32. In addition, Dr. Gold examined claimant in November 1999 and diagnosed left C6-7 foraminal encroachment secondary to spondylosis. Emp. Ex. 28. Dr. Gold recommended an anterior cervical discectomy and fusion to repair claimant's cervical spine. *Id.* Claimant sought to hold employer liable for this medical treatment. Employer contended in response that claimant's neck and shoulder conditions were the result of the intervening accident in 1994.

In his decision and order, the administrative law judge found invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's current neck and shoulder conditions were caused by his work-related injury based on the reports of claimant's neck and shoulder pain in the record. However, the administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on employer's theory that there were no objective findings of neck and shoulder impairments in the record until after the motor vehicle accident in 1994. In weighing the evidence as a whole, the administrative law judge found that there are no medical opinions that relate claimant's neck and shoulder impairments to the 1988 work accident. Therefore, the administrative law judge found that claimant did not establish that his neck and shoulder

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<sup>1</sup> The parties agreed to settle the compensation claim for a lump sum payment of \$75,000 and \$400 per month for ten years, beginning August 27, 1993. Emp. Exs. 15, 16.

conditions are causally related to the 1988 work accident, and he thus denied medical benefits for these conditions. The administrative law judge, however, ordered employer to provide medical treatment for claimant's lumbar spine and psychological impairments, as previously agreed.

Claimant appeals this decision without legal representation. Employer responds, urging affirmance of the administrative law judge's decision. Employer also contends that the evidence of a supervening cause establishes rebuttal of the presumption that claimant's neck and back conditions are work-related.

In order to be entitled to medical benefits, a claimant need only establish he sustained a work-related injury, an issue to which the Section 20(a) presumption applies. *See* 33 U.S.C. §§907(a), 920(a); *see Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). Where, as in the instant case, the administrative law judge finds that the evidence is sufficient to establish invocation of the Section 20(a) presumption that claimant's neck and shoulder conditions are related to his work-related accident, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11<sup>th</sup> Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The presumption may be rebutted by negative evidence if it is specific and comprehensive enough to sever the potential connection between the particular injury and a job-related accident. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (decision on recon.). Employer can also rebut the presumption by producing substantial evidence that claimant's condition was caused by a subsequent non work-related event, which was not the natural or unavoidable result of the initial work injury. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Where the subsequent injury is the result of an intervening cause, employer is relieved of liability for the medical treatment attributable to the subsequent injury, but remains liable for any medical treatment due to the work injury. *Arnold v. Nabors Offshore Drilling Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed.Appx. 126 (5<sup>th</sup> Cir. 2002)(table); *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

We cannot affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption with regard to claimant's neck condition. The administrative law judge did not discuss any evidence, but merely accepted employer's "theory" to establish rebuttal of the Section 20(a) presumption. Decision and Order at 5. Therefore, we must remand the case to the administrative law judge for discussion of the medical evidence in relation to rebuttal of the Section 20(a) presumption.

In this regard, the record contains a report by Dr. Paul that claimant complained of neck pain as early as April 1989, *see* Emp. Ex. 6, and continued to report pain in his neck throughout his treatment with Dr. Hodges. Emp. Ex. 18. Thus, there is evidence of neck pain pre-dating the motor vehicle accident. Claimant was seen in the emergency room immediately following his motor vehicle accident in November 1994. The x-rays taken at that time indicate that claimant did not suffer any acute fractures in the accident. However, the x-ray of the cervical spine revealed disc space narrowing at C6-7, that the inferior border of the vertebral body of C6 and the superior border of the vertebral body of C7 appeared sclerotic and that there was an osteophyte extending down from the anterior inferior aspect of the C6 vertebrae. Emp. Ex. 17 at 3. Dr. Henning stated that these findings are chronic in nature and are possibly from an old trauma. *Id.* Combined with claimant's continuing complaints of neck pain, this evidence may indicate that claimant's neck injury predated his motor vehicle accident. However, the record also contains the opinion of Dr. Hodges, one of claimant's treating physicians, that claimant's motor vehicle accident in November 1994 injured claimant's neck to such an extent it ruptured a disc at C5-6. Emp. Ex. 43. Dr. Deriso, a reviewing physician, did not give a specific opinion on the etiology of claimant's cervical spine complaints but did opine that any effect from the 1988 work accident would have been readily apparent and would have been reflected contemporaneously in the medical records. He also opined that claimant did not need further surgery on either his cervical or lumbar spine. Emp. Ex. 35 at 36-37.

The administrative law judge did not address any of this evidence or make any findings regarding whether employer established that claimant's neck condition is not due to the work injury and/or whether the motor vehicle accident was an intervening cause sufficient to establish rebuttal of the Section 20(a) presumption. *See Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT); *O'Kelley*, 34 BRBS 39. While the administrative law judge can accept or reject any part of any testimony or opinion, *see Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5<sup>th</sup> Cir. 1995), in this case the administrative law judge did not discuss evidence "that might affect the outcome" of the case. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5<sup>th</sup> Cir. 2000), quoting *United States v. Arron*, 954 F.2d 249, 251 (5<sup>th</sup> Cir. 1992). Therefore, we vacate the administrative law judge's finding that employer is not liable for medical treatment for claimant's neck injury and we remand the case for further consideration of the evidence to determine whether employer established rebuttal of the Section 20(a) presumption.<sup>2</sup>

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<sup>2</sup> If the administrative law judge finds that rebuttal is established, we affirm the administrative law judge's finding that employer is not liable for medical treatment for claimant's neck injuries. The administrative law judge correctly found that there is no

With regard to claimant's shoulder injury, Dr. Deriso's opinion that claimant's torn rotator cuff, which was diagnosed in May 2000 by Dr. Jurs, is not related to his work injury is sufficient to establish rebuttal of the Section 20(a) presumption. *See O'Kelley*, 34 BRBS 39; Emp. Ex. 35. Moreover, as no physicians attribute claimant's torn rotator cuff to his 1988 work accident, the administrative law judge properly denied benefits for this condition. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

Accordingly, we affirm the administrative law judge's findings that claimant's shoulder condition is not work-related and that employer is not liable for medical treatment for this condition. The administrative law judge's finding that claimant's neck condition is not work-related is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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evidence of record stating that claimant's neck complaints are, in fact, causally related to the 1988 work accident. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).