BRB No. 99-163

DENNIS DUGAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FORCENERGY GAS EXPLORATION, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

R. Scott Iles, Lafayette, Louisiana, for claimant.

James J. Hautot, Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2358) of Administrative Law Judge C. Richard Avery 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 roustabout on an offshore oil rig, alleges he was injured at work on August 15, 1995, when he repeatedly struck his elbows against swinging, spring-loaded steel doors. Claimant was diagnosed with bilateral ulnar neuropathy. The administrative law judge found that claimant invoked the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer failed to rebut it. After finding that claimant has not yet reached maximum medical improvement and that employer did not identify suitable alternate employment, the administrative law judge awarded claimant temporary total disability benefits from October 5, 1995, the date claimant stopped working for employer, and continuing. On appeal, employer challenges the administrative law judge's causation finding. Claimant responds in support of the administrative law judge's award. Employer filed a reply brief.

Employer contends that the administrative law judge erred in finding a causal relationship between claimant's bilateral ulnar neuropathy and his employment. Specifically, employer contends the administrative law judge did not discuss and weigh all relevant evidence in determining whether an accident in fact occurred and thus erred in invoking the Section 20(a) presumption. Employer further contends the administrative law judge erred in finding it did not produce sufficient evidence to rebut the presumption. The Section 20(a) presumption is invoked if claimant establishes his *prima facie* case--the existence of a harm or injury and that an accident in fact occurred. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant's testimony, if credible, may establish that the alleged accident in fact occurred. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by presenting substantial evidence severing the causal connection between the injury and the employment. *See Gooden v. Director, OWCP,* 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *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, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Gooden,* 135 F.3d at 1068, 32 BRBS at 61 (CRT).

With regard to invocation of the Section 20(a) presumption, the administrative law judge found that claimant sustained an injury--numbness, weakness and tingling in his fingers and hands. The administrative law judge did not specifically address whether an accident at work in fact occurred which could have caused claimant's injury. Instead, the administrative law judge noted that the only physician to address causation was Dr. Domingue, and that he testified that, "If the symptoms started that day, then I would be hard-pressed to say that they're not related to something that

happened that day." *See* Decision and Order at 7; Emp. Ex. 11 at 15-16; Cl. Ex. 7 at 15-16. With regard to rebuttal, the administrative law judge summarily stated that he was unwilling to infer that employer established rebuttal from the facts that claimant failed to mention a work-related trauma to his early healthcare providers and that claimant failed to testify that he experienced paresthesia at the time of injury.

We must vacate the administrative law judge's causation finding and remand this case for further consideration. Before invoking the Section 20(a) presumption in this case, the administrative law judge must determine whether an accident at work in fact occurred by weighing all of the evidence, pro and con, relevant to this issue. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Claimant testified he injured his elbows when they were struck repeatedly by swinging, spring-loaded steel doors as he carried six-gallon cases of water from one area of the rig to another. He testified that his hands tingled that evening, and that he told his supervisor, Steve Hollier, the next day, who suggested he had hit his "funny bone." The contrary evidence includes the testimony of claimant's former supervisors, Messrs. Hollier and Thrailkill, that claimant told them that he did not know how he hurt his fingers and hands, as well as the records of claimant's early healthcare providers wherein claimant either denied trauma or indicated no history or recollection of trauma.[1] Emp. Exs. 4 at 27; 5 at 9, 10; 6 at 13, 8 at 4; Cl. Exs. 3, 5, 6,

[1]Claimant denied trauma on an emergency room visit to Doctor's Hospital on August 22, 1995. Emp. Ex. 6 at 13; Cl. Ex. 3. On October 6, 1995, claimant indicated no history of trauma to his treating physician, Dr. Fruge. Emp. Ex. 5 at 9; Cl. Ex. 6. Claimant told Dr. Warren on December 6, 1995, that he had an accident involving an automobile door allegedly occurring on August 16, 1995. Emp. Ex. 8 at 4; Cl. Ex. 8. On January 31, 1996, claimant reported no recollection of any injury on his visit at the University Medical Center except picking up heavy objects. Emp. Ex. 4 at 27; Cl. Ex. 5. An entry on September 7, 1995, to claimant's attendance record

8; Tr. at 82-84, 100-102. On remand, the administrative law judge should discuss and weigh all relevant evidence pertaining to the occurrence of the accident alleged by claimant, and determine if it in fact occurred. If the administrative law judge finds that it did occur, the Section 20(a) presumption is properly invoked. *See generally Damiano v. Global Terminal & Container Service,* 32 BRBS 261 (1998).

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states that claimant had "problems using his hands due to fingers were hurting him & had been seeing a pneurologists (sic), but did not know if it was due to an injury and if so, where & when injury occurred." Emp. Ex. 1 at 3.

If the administrative law judge finds invocation established, he must determine whether employer established rebuttal by introducing substantial evidence that claimant's condition is not work-related. *See American Grain Trimmers, Inc. v. OWCP,* 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999). In this regard, Dr. Domingue testified that claimant could not have injured the ulnar nerve in the accident described by claimant, unless he assumed an abnormal posture, Emp. Ex. 11 at 9-10; Cl. Ex. 7 at 9-10, although he also stated that, "If the symptoms started that day, then I would be hard-pressed to say that they're not related to something that happened that day."[2] The administrative law judge properly found this opinion insufficient to rebut the Section 20(a) presumption as it is not unequivocal. *See id.* The administrative law judge, however, did not discuss the fact that Dr. Fruge checked the "no" box in response to the question of whether claimant's injury arose out of his employment, on a form regarding claimant's eligibility for long-term disability benefits. Emp. Exs. 5 at 10, 11 at 15-16; Cl. Exs. 6, 7 at 15-16. On remand, therefore, the administrative law judge must consider whether this opinion is sufficient to rebut the Section 20(a) presumption. Employer need not establish an alternate cause of the injury, but must merely introduce substantial evidence that the work accident did not cause the injury. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). If the administrative law judge finds rebuttal established, he must reevaluate the evidence as a whole, with claimant bearing the burden of proving that his injury is work-related. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

Accordingly, the administrative law judge's finding that claimant's injury is work-related is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2]Moreover, Dr. Domingue testified that claimant should have experienced paresthesia at the time of the injury if the accident occurred the way claimant said it did. Emp. Ex. 11 at 10-12; Cl. Ex. 7 at 10-12. Claimant testified that he did not experience paresthesia at the time of the injury. Tr. at 58.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge