BRB No. 12-0087

KARL KOHMANN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAFEZONE SAFETY SYSTEMS	)	DATE ISSUED: 09/18/2012
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Gregory S. Unger (Workers' Compensation, L.L.C.), Metairie, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-LHC-00150) 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*., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant testified that on or about February 7, 2010, he experienced pain in his left shoulder while removing overhead plywood panels during the course of his employment as a carpenter on an oil platform in the Gulf of Mexico. Claimant reported this incident to his supervisor, Mr. Vincent, who filled out a report documenting this incident and claimant's resultant complaints of pain. Claimant continued to work for employer, albeit in seemingly light-duty work, until he was laid off. Claimant subsequently underwent a physical examination while seeking other employment; this examination revealed that claimant had lifting restrictions. Claimant was not hired and he has not returned to gainful employment since March 16, 2010.

In his Decision and Order, the administrative law judge found that claimant, through his testimony and that of Mr. Vincent, established that he suffered shoulder pain and that his working conditions could have caused that pain or aggravated claimant's pre-existing shoulder condition.[1] The administrative law judge thus invoked the Section 20(a), 33 U.S.C. §920(a), presumption, found that employer did not rebut the presumption, and concluded that claimant's left shoulder condition is related to his employment with employer. The administrative law judge found that claimant's shoulder condition had not yet reached maximum medical improvement and that claimant is incapable of returning to his employment duties as a carpenter. After calculating claimant's average weekly wage at the time of his work injury to be $971.46, the administrative law judge awarded claimant temporary total disability benefits from March 16, 2010, and continuing, as well as reasonable medical care and treatment. 33 U.S.C. §§908(b), 907.

On appeal, employer contends that the administrative law judge erred in finding that claimant's left shoulder condition is related to his employment with employer and in his calculation of claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's decision.

Claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a prima facie case. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant has established his prima facie case, he is entitled to the Section 20(a), 33 U.S.C. §902(a), presumption

[1]Claimant had pre-existing degenerative disease of his shoulder joint. CX 6 at 7-8, 14.

linking his harm to his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

Employer does not challenge the administrative law judge's finding that claimant suffers from left shoulder pain. Decision and Order at 10. Employer contends, however, that the administrative law judge erred in invoking the Section 20(a) presumption because claimant and his supervisor, Mr. Vincent, are not credible as to the occurrence of an incident at work. Employer avers claimant was not at work on the day of the alleged accident. Employer also contends that claimant did not claim any pre-existing condition was aggravated by his work, as claimant claimed only the occurrence of an accident on a specific day and not his usual overhead work as the basis for his shoulder injury. Employer avers claimant was not at work on the day of the alleged accident.

We reject employer's contention that the administrative law judge erred in invoking the Section 20(a) presumption. The second prong of claimant's prima facie case requires that the administrative law judge determine whether the employment events alleged to be the cause of claimant's injury in fact occurred. *See Bolden*, 30 BRBS 71. Although claimant's claim for compensation indicates a date of injury of February 7, 2010, *see* CX 1, the administrative law judge rationally credited claimant's testimony that he was not certain about the date his pain commenced, but that it was due to his work activities in January and February 2010. Thus, the administrative law judge did not err in addressing whether claimant's overhead work prior to February 7, 2010 could have caused claimant's shoulder condition. *See generally Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Moreover, it is apparent from the parties' positions before the administrative law judge that claimant's claim encompassed the work-related aggravation of claimant's pre-existing left shoulder condition.[2] *See Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); Decision and Order at 6; CX 6.

With respect to the existence of working conditions, the administrative law judge rationally relied on the hearing testimony of claimant and the deposition testimony of his supervisor, Mr. Vincent. Decision and Order at 7-10; *see Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). Claimant testified that his work on the oil platform involved the

[2]Both claimant's LS-203 Form, Employee's Claim for Compensation, and his LS-18 Pre-Hearing Statement state that claimant sustained a left shoulder injury due to overhead working. In response, employer filed an LS-18 Pre-Hearing Statement in which it specifically averred that claimant's pre-existing shoulder condition was "not aggravated by any work activity." In addition, the aggravation issue was fully addressed by the parties in their post-hearing briefs to the administrative law judge.

demolition of a building; specifically, claimant performed overhead work which included the unscrewing of plywood roofing sheets and the knocking down of roof supports. Claimant testified that it was during these activities that he first experienced pain in his left shoulder. *See* Tr. at 28-35. Mr. Vincent testified on deposition that after claimant informed him of this incident and the onset of pain, he prepared a report documenting the event and transmitted the report to employer. *See* CX 5 at 10-13. The administrative law judge addressed the specific issues raised by employer regarding the credibility of claimant and Mr. Vincent. The administrative law judge acknowledged claimant's uncertainty regarding the exact date of the onset of his shoulder pain, but found that: claimant credibly testified that he related the event to Mr. Vincent on the day it happened; Mr. Vincent testified that claimant complained of pain; and Mr. Vincent prepared and submitted a report to employer documenting the incident. Moreover, the administrative law judge observed that employer did not present the individual to whom this report was allegedly given in order to refute Mr. Vincent's testimony.[3] Decision and Order at 7-8.

As determinations regarding the credibility of witnesses are left exclusively to the administrative law judge, and the administrative law judge, in this case, specifically addressed those factors raised by employer which arguably detract from the testimony of claimant and Mr. Vincent, we affirm the administrative law judge's finding that claimant in fact engaged in work activities that could have harmed his shoulder. *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that Section 20(a) applies to presume that claimant's employment activities caused or aggravated claimant's left shoulder harm. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *see generally 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).

Employer next contends that, if claimant is entitled to the benefit of the Section 20(a) presumption, substantial evidence was presented to rebut the presumption. Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Where aggravation of a pre-existing condition is at issue, employer must present

[3]Employer's contention in its post-hearing brief and its brief on appeal to the Board, that no accident report was prepared by Mr. Vincent, is not "evidence." *See generally Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *see Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986)(en banc). If employer establishes rebuttal of the Section 20(a) presumption, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Ceres Gulf*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984).

We reject employer's contention that it produced substantial evidence to rebut the presumption. Evidence of a pre-existing condition alone cannot rebut the presumption in view of the aggravation rule. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Moreover, the administrative law judge properly found that the opinion of Dr. Cenac is insufficient to rebut the Section 20(a) presumption, as he opined that claimant's present condition "occurred over time as a result of his ongoing employment, particularly aggravated by the six month history of working doing ceiling repair." *See* CX 6 at 15-16. Decision and Order at 10. Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the Section 20(a) presumption was not rebutted and his consequent finding of a causal relationship between claimant's employment and his shoulder condition. *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). The award of benefits therefore is affirmed.

Employer also contends that the administrative law judge erred in calculating claimant's average weekly wage. Specifically, employer avers that the administrative law judge erred by not dividing claimant's earnings with employer by 52 weeks in order to account for claimant's non-reported self-employment earnings in the year prior to his work-related injury. Claimant was self-employed prior to working for employer.

Section 10(c) of the Act, 33 U.S.C. §910(c), provides a general method for determining average weekly wage where Section 10(a) or (b), 33 U.S.C. §910(a), (b), cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of his injury.[4] The object of Section 10(c) is to arrive at a sum that reasonably represents the claimant's annual earning capacity at the time of his injury. *See James J. Flanagan Stevedore, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). It is well-established that the administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

[4]No party asserts that Section 10(a) or (b) is applicable.

In this case, the administrative law judge set forth the calculations offered by the parties, Decision and Order at 15, but determined that claimant's annual earning capacity is best represented by dividing claimant's total earnings with employer, $18,875.63, by 19.43, the number of weeks claimant worked for employer, with a resulting average weekly wage of $971.46. *Id.* The administrative law judge specifically rejected employer's contention because it is premised in the assumption that claimant deliberately filed false income tax returns to prevent a true calculation of earnings and would result in depriving claimant of the higher earnings he enjoyed with employer. *Id.* The result reached by the administrative law judge constitutes a reasonable estimate of claimant's annual earning capacity at the time of injury, is supported by substantial evidence, and is in accordance with law. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We, therefore, affirm the administrative law judge's calculation of claimant's average weekly wage.

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

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