BRB No. 04-0715

ALBERT AHERN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 06/13/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, LTD), Gulfport, Louisiana, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2003-LHC-1203) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' 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 if they 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 first class structural welder, injured his back on April 23, 1991, and underwent surgery in January 1992. Upon being released to full duty in May 1992 by his treating physician, Dr. Winters, claimant left employer's employ and secured a series of jobs as a structural welder performing heavy labor with physical requirements similar to

those in shipyard work.[1] Claimant testified that he worked long hours welding, climbing, bending, stooping and lifting 20 to 50 pounds. HT at 39-40. Claimant did not seek medical treatment for any back problems throughout this period of time. In December 1999, claimant began performing handrail construction work. On the third day of this job, claimant felt severe pain while trying to move iron railings, and he was off work for three days. Dep. at 29-30; HT at 52-53. Claimant ultimately was released from this employment in 2000 because he was unable to work full-time due to his back pain. Claimant has not returned to work and sought compensation for permanent total disability arising out of his 1992 back injury.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation, but found that it was been rebutted by employer's submission of medical and anecdotal evidence of intervening injuries to claimant's back.[2] Upon weighing all of the evidence, the administrative law judge concluded that claimant's current back disability is not the result of the natural and unavoidable degradation of his original work-related injury but arose out of intervening injuries claimant sustained during his subsequent employment. Accordingly, he denied compensation.[3]

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[1] Claimant's employers included Brown & Root, President Casino, Bracken Construction Company, CMI, Friede Goldman, Tindal Concrete, Ace Contractors, and Washburn. HT 30-45.

[2] Once claimant establishes his *prima facie* case proving the existence of an injury or harm and that a work-related accident occurred he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *Port Cooper/T.Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Upon invocation, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *Ortco Contractors, Inc. v. Charpentier,* 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied,* 540 U.S. 1056 (2003). If the administrative law judge finds the presumption rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

[3] The administrative law judge awarded claimant compensation for temporary total disability from April 25 to May 22, 1991, from May 31 to June 10, 1991, from August 7 to August 30, 1991, and from November 8, 1991, to May 11, 1992; he awarded compensation for permanent total disability from May 12 to May 21, 1992. Employer had already paid total disability benefits for these periods. The administrative law judge also found employer liable for all past and future medical care arising out of the 1991 work injury. Decision and Order at 21-22.

Claimant appeals, contending only that the administrative law judge erred in finding that he sustained any intervening injuries, alleging the record lacks evidence that such events occurred. Employer responds, urging affirmance.

Employer is liable for claimant's entire disability if it is due to the natural or unavoidable result of the first, work-related injury. Where, however, claimant's disability is the result of an intervening cause, employer is relieved of liability for that portion of the disability attributable to the second injury. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon en banc* 31 BRBS 13 (1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has "articulated somewhat different standards as to what constitutes a supervening cause." *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 313, 31 BRBS 129, 131(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929, 934 (5th Cir. 1951), the court stated that a supervening cause is one that originates entirely outside of employment and "overpowers and nullifies" the initial injury. In *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir.), *modified on reh'g*, 657 F.2d 665, 13 BRBS 851 (1981), the court stated that "A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause."

We need not address the evidence in terms of these two standards, as claimant's contention on appeal is limited to the administrative law judge's finding regarding whether there were, in fact, any intervening incidents during claimant's employment subsequent to his return to work.[4] *See generally Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT). The administrative law judge found that although claimant did not testify to sustaining any new, discrete injuries, HT at 29, 62, he did testify that he performed heavy labor for many years that aggravated his back pain, *see, e.g.*, HT at 41, 45, 49-50, and that his last job with Artie Bertucci caused him great pain. Specifically, claimant testified that he hurt his back while lifting and yanking handrailings in 1999, HT at 53-54, and the administrative law judge found that references in notes from a mental health clinic corroborate the occurrence of an injury at Artie Bertucci. The administrative law judge further noted that claimant did not seek medical attention for back pain between October

[4] Claimant's brief, virtually identical to the one submitted to the administrative law judge, contains many pages of facts and boilerplate case citations, much of it irrelevant to the administrative law judge's finding that an intervening injury relieves employer of liability for claimant's current disability; the brief barely rises to the level necessary to invoke Board review. 20 C.F.R. §802.211; *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Carnegie v. C&P Telephone Co.*, 19 BRBS 57 (1996).

1993 and September 2000, EX 23 at 25, and that he had not left any of his previous employers due to an inability to perform his job due to back pain. In addition, the administrative law judge relied on Dr. Winters's opinion that claimant's current condition is not the natural or unavoidable result of his 1991 work injury, but is due to incidents of repetitive aggravating injuries that occurred with subsequent employers. EX 23 at 29-30, 40-41. Thus, the administrative law judge concluded that claimant's disability is due to an intervening cause and employer is not liable for disability and medical benefits for claimant's current condition.

We affirm the administrative law judge's finding that claimant sustained an intervening injury as it is rational and supported by substantial evidence. The administrative law judge rationally construed claimant's testimony concerning his work for Artie Bertucci as supporting the occurrence of an intervening event in view of claimant's previous ability to work in heavy labor without needing medical treatment. In addition, Dr. Winters's opinion supports the finding that claimant's heavy labor and the incident at Artie Bertucci's caused damage to claimant's back beyond that due to the natural progression of claimant's 1991 injury. It is within the administrative law judge's discretion to draw inferences from and to determine the weight to be accorded to the evidence of record. *See generally 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); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As claimant has failed to identify any reversible error in the administrative law judge's finding that he is not entitled to additional benefits for the 1991 injury, we affirm the administrative law judge's decision.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge