

U.S. Department of Labor

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Issue Date: 15 May 2009

CASE NO.: 2008-LHC-1453

OWCP NO.:07-179732

IN THE MATTER OF

W. J.,¹

Claimant

v.

**NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer/Carrier**

APPEARANCES:

W. J., PRO SE

On behalf of Claimant

DONALD P. MOORE, ESQ.

On behalf of Employer

BEFORE: C. RICHARD AVERY

Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et. seq., (The Act), brought by Claimant against Northrop Grumman Ship Systems, Inc. (Employer). The formal hearing

¹ Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

was conducted in Gulfport, Mississippi on February 5, 2009. Employer was represented by counsel, but Claimant chose to represent himself. Each presented documentary evidence and made oral and written arguments.² The following exhibits were received into evidence: Claimant's Exhibits 1-8 and Employer's Exhibits 1-15.³ This decision is based on the entire record.⁴

Statement of the Evidence

Claimant is 47 years old. He completed the twelfth grade, but rather than graduate high school, he received a GED. He spent three years in the Marine Corps and was honorably discharged. He has worked as an upholsterer in the past, and on March 21, 2006, Claimant began working for Employer as an electrician, earning \$14.92 per hour.

On February 8, 2007, Claimant was performing electrical work in an enclosed space when the room became filled with smoke and dust from welding that was taking place. Specifically, a door was being fitted for the only opening into the room. There was no other ventilation. Claimant testified that he and other workers had to step outside to escape the dust, and later that day Claimant said he began feeling badly and went home early. He felt worse the next day and by February 10, 2007, he was taken by ambulance to Singing River Hospital, where he remained for three days.

The physician at Singing River Hospital, Dr. Cuccia, initially thought Claimant's problem stemmed from the inhalation of the welding smoke or fumes. However, after blood tests were performed, Dr. Cuccia seemingly changed his diagnosis to bacterial pneumonia, and, upon Claimant's release from the hospital, recommended that he see Dr. Travers.

Claimant saw Dr. Travers on two occasions.⁵ When he failed to improve, lost weight and began experiencing shortness of breath and right-sided pain, Dr. Travers referred Claimant to a pulmonologist, Dr. Miles. Claimant, however,

² Employer filed a Pre-Hearing Submission, and Claimant was granted time post-hearing to file a brief.

³ Additionally, Claimant and Employer each submitted one exhibit post-hearing.

⁴ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- (Tr. __); Joint Exhibit- (JX __, pg.__); Employer's Exhibit- (EX __, pg.__); and Claimant's Exhibit- (CX __, pg.__).

⁵ Claimant acknowledges that Dr. Travers was his first choice of physician. (See EX-6).

chose to see Dr. Rodberg, but for some reason was seen by Dr. Rodberg's partner, Dr. Taylor. Dr. Taylor, also a pulmonologist, saw Claimant twice and released him to work in mid-March 2007.

Upon reporting back to work, Claimant saw the shipyard physician, Dr. Warfield, who cleared Claimant to return to work, which Claimant did on March 30, 2007. Because he continued to feel ill, Claimant said he exhausted his vacation leave, and thereafter continued working until August 7, 2007, when he went to the VA Hospital and was pulled from work by Dr. Tejedor. Apparently, based on the history provided, Dr. Tejedor initially attributed Claimant's condition to work-related exposure. However, once Dr. Tejedor reviewed the Singing River Hospital records, he adopted the opinion stated therein, much to Claimant's disagreement.

Claimant has not worked since August 7, 2007. He still seeks treatment from the VA Hospital, and says he now suffers from an enlarged heart and had a stent implanted in one of his arteries. He very much believes he suffered from chemical-induced pneumonia, and does not agree with the conclusions expressed by physicians.

Claimant was paid compensation based on an average weekly wage (AWW) of \$862.90⁶ from February 12, 2007 until April 4, 2007, and Employer has paid \$3,047.49 in medical benefits. However, based on the medical evidence, Employer has now taken the position that this is not a compensable claim. Claimant acknowledged he was a smoker and had complained of a cough for two weeks before the dust episode.

Leslie Eugene Johnson, at the union's request, investigated the smoke inhalation charges and found the event had occurred as Claimant stated, and that other workers had left the area as well. He explained that the room's only ventilation was the door where the welding was taking place. He reported his findings to the union and to Mr. Pope in the Safety Department, but no written report was prepared.

Joseph Anderson, Jr. was the remaining witness. He explained, as administrator of workers' compensation claims for Employer, how claims are handled. He testified that the reports of Drs. Taylor and Travers led to compensation being denied Claimant.

⁶ Claimant agreed the AWW of \$862.90 was correct.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the “true doubt” rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee’s employment. *Darnell v. Bell Helicopter Int’l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one “arising out of or in the course of employment.” 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant was diagnosed with pneumonia and went into septic shock shortly after exposure to welding fumes at work in a poorly ventilated room. Due to the temporal proximity between the work-related exposure and his diagnosis, I find that Claimant has invoked the Section 20(a) presumption of compensability.

Employer does not deny that Claimant was exposed to welding fumes during his employment; rather, Employer argues that this exposure was unrelated to his subsequent bout with pneumonia, and therefore Claimant's condition is non-compensable.

Claimant first sought medical treatment on February 10, 2007, from Singing River Hospital. He presented with weakness and shortness of breath, along with pain in his right side, and he admitted to having a cough for a few weeks. After reviewing a blood culture, Dr. Cuccia, the attending physician, diagnosed Claimant with streptococcal bacteremia, which had developed as a result of community-acquired pneumonia, not fume inhalation. (EX-10, pp. 25, 36, 90).

Singing River Hospital referred Claimant to Dr. Travers for follow-up treatment. (EX-10, p. 25). Dr. Travers noted that Claimant's condition was slow to resolve and referred him to a pulmonologist. (EX-11, p. 8). On April 2, 2007, Dr. Travers opined that exposure to welding fumes had not contributed to Claimant's pneumonia. (EX-11, p. 11).

Claimant saw Dr. Taylor, a pulmonologist, on March 14, 2007. Dr. Taylor concurred with Dr. Cuccia's diagnosis of severe community-acquired pneumonia with sepsis, but he noted that Claimant was recovering appropriately, albeit slowly. (EX-12, pp. 2-3). He agreed with Dr. Travers that Claimant's exposure to welding fumes had not contributed to his pneumonia. (EX-12, p. 4).

In July 2007, Claimant began seeking treatment at the VA Hospital for chronic right-sided chest pain. (EX-9, p. 96). He saw Dr. Tejedor, a pulmonologist, who initially attributed Claimant's pulmonary condition to the fumes he inhaled at work on February 8, 2007. (EX-9, p. 79). However, upon later receiving and reviewing the records from Singing River Hospital, Dr. Tejedor rejected his original opinion, and stated that Claimant's diagnosis with streptococcal pneumonia put "a whole new light on my previous diagnosis and I cannot relate pneumococcal pneumonia and sepsis to inhalation of fumes 24-48 hours prior." (EX-9, p. 76). More than a year later, upon Claimant's insistence that his initial diagnosis was wrong, Dr. Tejedor again reviewed his medical

records. Once he did so, he continued to deny that Claimant's pneumonia was related to exposure to welding fumes, stating that the records reflected the "gold standard" for a diagnosis of community-acquired pneumonia. (EX-9, p. 34).

In light of the foregoing evidence, I find that Employer has presented sufficient medical evidence to rebut Claimant's Section 20(a) presumption of compensability; and, weighing the evidence as a whole, and under the guidance of *Director, OWCP v. Greenwich Collieries, supra*, I find Claimant's injury is not causally related to his exposure to welding fumes during his employment with Employer. Although I find Claimant to be credible in his belief, and the coincidence between Claimant's exposure and his diagnosis to be odd, every physician who examined him agreed that his pulmonary condition was not caused by any work-related incident. In sum, Claimant has failed to carry his burden and thus is not entitled to compensation.

ORDER

It is hereby **ORDERED, ADJUDGED and DECREED** that:

Claimant's claims for compensation and medical benefits under the Act is hereby **DENIED**.

Entered this 15th day of May, 2009, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge