BRB No. 98-1086

HARRY GARDNER	)	
	)	
Claimant-Respondent	)	
	)	
	)	
	)	
ART CATERING	)	DATE ISSUED: April 27, 1999
	)	
and	)	
	)	
LOUISIANA WORKER'S COMPENSATION CORPORATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Tony B. Jobe, Madisonville, Louisiana, for claimant.

David K. Johnson (Wall, Johnson, Stilner, Patterson, Egan & Wilton), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-LHC-1730) of Administrative Law Judge James W. Kerr, Jr., 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).

This case is before the Board for a second time. To recapitulate the facts, from January 1 until May 30, 1993, claimant worked as a steward in charge of the catering services employer provided on the *Booker 15*, an oil rig. Claimant testified that he was exhausted and under constant stress in this position. On February 4, 1993, claimant had a heart attack and was transported from the rig to Terrebon General Hospital where he was treated by Dr. Abben, a cardiologist. Dr. Abben released claimant to return to work, with the restriction of no heavy lifting, on February 15, 1993. Claimant continued to be treated by Dr. Abben and his colleagues, but returned to work and, except for a month in March 1993 when the workers were moved to a temporary location, worked on the rig until May 31, 1993, when that job ended.

Several days after his work on the rig ended, claimant again developed chest pains and underwent an angioplasty to clear his right artery. In the summer of 1993, an angiogram revealed that claimant's pain was due to scarring on his heart. In June 1994, claimant had a severe heart attack and eventually underwent double bypass surgery on September 2, 1994. According to Dr. Abben, claimant's heart muscle reflected moderate damage as a result of his problems. Since being released for light duty work in September 1993, claimant has held various jobs, but has not returned to his prior work. He sought permanent partial disability compensation and medical benefits under the Act.

The administrative law judge found that claimant established a work-related injury, consisting of a myocardial infarction on February 4, 1993. However, the administrative law judge found that employer was not liable for disability and medical benefits after May 20, 1993, as he found that any problems claimant had thereafter were attributable to his underlying coronary artery disease and not to his work-related February 1993 myocardial infarction. The administrative law judge also concluded that because claimant had not missed any work as a result of the February 1993 myocardial infarction, he was not entitled to any disability compensation prior to May 20, 1993, but awarded him reasonable and necessary medical expenses for the February 4, 1993 myocardial infarction. Claimant appealed this decision to the Board.

In its decision, the Board held that inasmuch as the administrative law judge relied upon Dr. Abben's testimony that claimant's underlying coronary artery disease was aggravated by his employment in invoking the Section 20(a), 33 U.S.C. §920(a), presumption of causation, the administrative law judge erred in determining that claimant's only work-related injury was his February 1993 myocardial infarction. *See Gardner v. Art Catering*, BRB No. 96-1671 (July 21, 1997)(unpublished). The Board held that as the Section 20(a) presumption in conjunction with the aggravation rule links claimant's underlying coronary artery disease with his employment, the burden was on employer to demonstrate that the disease was not aggravated by claimant's work. Accordingly, as Dr. Abben's opinion that the underlying disease was aggravated by claimant's employment is the only relevant

evidence, the Board held that the record is devoid of proof that claimant's coronary artery disease was not aggravated by his employment, and, therefore, the Section 20(a) presumption is not rebutted. In addition, as Dr. Abben related claimant's right-sided artery problems to workplace stress and stated that these problems continued to worsen, leading to surgery involving both the left and right sides, the Board held that Dr. Abben's opinion establishes that claimant's disability after May 1993 was due at least in part to his work-related condition. Thus, the Board remanded the case to the administrative law judge for consideration of the nature and extent of claimant's disability, and instructed the administrative law judge to award medical benefits on remand.

On remand, the administrative law judge initially found that claimant has established a case of total disability as Dr. Abben opined that claimant cannot return to his former work offshore. However, he found that from February 15, 1993, to May 31, 1993, Dr. Abben allowed claimant to return to his previous work. He returned to work with employer until May 1993 when that job ended. He performed his usual work adequately, regularly, full-time, and without help, and thus the administrative law judge concluded that claimant suffered no loss in wage-earning capacity during this period.

The administrative law judge also found that after the job with employer ended in May 1993, claimant stated that he began experiencing chest pains. He sought treatment with Dr. Abben, who performed two subsequent angioplasties. The administrative law judge found that claimant was unable to return to offshore employment at that time due to his work-related condition, and employer did not offer evidence of suitable alternate employment.[1] Moreover, he found that claimant is entitled to continuing partial disability from November 1993 and continuing as his current wages as a restaurant worker fairly and reasonably reflect his wage-earning capacity. In addition, he awarded all reasonable and necessary medical expenses for the treatment of claimant's heart condition, including claimant's expenses in traveling to and from his medical appointments with the Cardiovascular Institute of the South.

On appeal, employer contends that claimant's underlying heart condition is not work-related and that claimant is not entitled to disability benefits as he had no loss in wage-earning capacity following the February 1993 myocardial infarction. Moreover, employer

[1]However, the administrative law judge awarded employer a credit for the two weeks at the end of September 1993, when claimant worked as a full-time night cook at a restaurant earning $6.50 per hour.

contends that the administrative law judge erred in finding that claimant suffered a residual loss in wage-earning capacity, and that the administrative law judge erred in finding that the medical treatment after May 1993 was work-related.

Initially, employer contends that the evidence does not establish that claimant's underlying heart condition was caused by any circumstance or occurrence at work for employer, and thus claimant is not entitled to compensation or medical benefits. In its initial Decision and Order, the Board held that claimant's heart problems after May 30, 1993, were due at least in part to his work-related injury based on the aggravation rule and Dr. Abben's uncontroverted opinion; the Board remanded the case for consideration of the nature and extent of claimant's disability due to his heart condition, and instructed the administrative law judge to award claimant reasonable and necessary medical expenses for treatment rendered in connection with his heart condition. *See Gardner*, slip op. at 4. The Board has held that where a party appeals a Decision and Order on remand raising issues addressed by the Board in its prior decision, the first decision of the Board constitutes the law of the case and must be followed. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986). We therefore decline to address employer's contentions regarding causation, as it was fully resolved in the Board's first Decision and Order, and we affirm the administrative law judge's finding that claimant is entitled to benefits.

Alternatively, employer contends that claimant has failed to show any disability resulting from his heart problems and therefore is not entitled to compensation benefits. Where claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of actual job opportunities within the geographic area where claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this case, the administrative law judge found that claimant was unable to return to his former employment on the rig due to his work-related condition after May 1993; employer does not assert error in the administrative law judge's finding that claimant cannot return to his former employment on the oil rig, but instead asserts that claimant has no disability because he performs the same job, that of a cook, onshore. Dr. Abben specifically related his recommendation against claimant's returning to work on the offshore rig to the stress of working there, including being on call at all hours, responding to equipment breakdowns, and enduring excessive heat, as well as being far from immediate medical help, and the effect of this stress on claimant's heart condition. Thus, we affirm the administrative law judge's finding that claimant cannot return to his former employment on the offshore rig. *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Based on this finding, we affirm the administrative law judge's conclusion that claimant was entitled to temporary total disability benefits from May 1993 to October 1, 1993, as employer offered no evidence of suitable alternate employment and claimant was unemployed during that period. *See Clophus v.*

Amoco Prod. Co., 21 BRBS 261 (1988).

The administrative law judge then found that claimant obtained work in the food service industry from November 1993 and continuing. Contrary to employer's allegations, claimant testified to his actual earnings in his post-injury employment, and the administrative law judge could properly credit this evidence in determining claimant's actual post-injury earnings. The administrative law judge found that neither party provided evidence that claimant's actual wages did not fairly and reasonably represent his post-injury wage-earning capacity. He also noted that while there was no explanation as to claimant's post-injury work, claimant does not allege that he has been working under extraordinary pain or effort. Thus the administrative law judge concluded that claimant's partial disability benefits should be based on his actual post-injury wages.[2] As employer's brief fails to discuss the relevant law and evidence supporting its contentions that claimant has no disability, we decline to address this issue further. *See Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988). Therefore, we affirm the administrative law judge's finding that claimant's actual post-injury wages fairly and reasonably represent his wage-earning capacity and affirm the award of continuing partial disability benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding compensation and medical benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2]The administrative law judge awarded temporary partial disability benefits from November 1993 to the date of maximum medical improvement, January 1, 1995, and permanent partial disability benefits from that date and continuing.

REGINA C. McGRANERY
Administrative Appeals Judge