BRB No. 93-0428

MARK L. LEMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Shannon T. Mason, Jr. and Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2595) of Administrative Law Judge Richard K. Malamphy, Jr., awarding benefits 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 injured his left wrist while working for employer on July 7, 1989 and underwent a left dorsal wrist synovectomy on May 17, 1990. Employer voluntarily paid temporary total disability benefits from May 5, 1990 to August 12, 1990, and from August 31, 1990 to October 28, 1990. Claimant's Exhibit 6(a). Thereafter, on October 28, 1991, claimant had a cyst aspirated from his left wrist.

In his Decision and Order, the administrative law judge awarded claimant permanent partial disability compensation for a twelve percent impairment pursuant to Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3). The administrative law judge subsequently determined, however, that claimant is not entitled to temporary total disability benefits for the three week period immediately following his October 28, 1991, cyst aspiration.

On appeal, claimant challenges the administrative law judge's permanent partial disability award and his denial of claimant's request for temporary total disability benefits for the three week period following the second surgical procedure on his wrist. Employer responds, urging affirmance.

Claimant initially challenges the administrative law judge's decision to award claimant permanent partial disability compensation for a twelve percent impairment to his left wrist pursuant to Section 8(c)(3) of the Act. Specifically, claimant asserts that he has sustained a twenty-three percent impairment to his left upper extremity and, thus, should be entitled to compensation pursuant to Section 8(c)(1) of the Act. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge, in awarding claimant compensation based upon a twelve percent impairment rating, credited and relied upon the opinion of Dr. McArthur rather than the opinion of Dr. Gwathmey. In his examination of April 14, 1992, Dr. McArthur performed a Jamar strength test and noted that there was a significant decrease in grip strength between claimant's left and right hand. Dr. McArthur thereafter opined that claimant has a twelve percent impairment of the upper extremity as a result of his condition. Claimant's Exhibits 9, 10. In contrast, Dr. Gwathmey, who examined claimant on March 27, 1991, took into account both claimant's loss of flexion in the wrist and loss of strength in opining that claimant has a twenty-three percent permanent partial impairment rating.[1] Claimant's Exhibit 12 at 13-14. In deciding to credit the testimony of Dr. McArthur over that of Dr. Gwathmey, the administrative law judge specifically noted that Dr. Gwathmey appeared to base his impairment rating on an erroneous interpretation of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (AMA *Guides).* Specifically, Dr. Gwathmey incorporated a loss of strength into that rating, while Drs. McArthur and Bryan stated that loss of strength should not be figured into claimant's rating since claimant did not have a peripheral spinal nerve or a nerve root cause for his loss of strength. Claimant's Exhibits 4, 9, 10.

We hold that the administrative law judge committed no error in relying upon the opinion of Dr. McArthur rather than the opinion of Dr. Gwathmey in concluding that claimant sustained a twelve percent permanent partial disability. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept

[1]Drs. Bryan and Davidson, the remaining physicians of record, opined that claimant had a three percent disability of his hand. Claimant's Exhibits 2, 4, 5(c); Employer's Exhibits 5, 6(3), 10.

the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, and as these credited opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant suffers from a twelve percent permanent partial disability.[2] *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987).

Next, we agree with claimant that the administrative law judge erred in awarding him permanent partial disability compensation under the schedule pursuant to Section 8(c)(3), rather than Section 8(c)(1), of the Act. Section 8(c)(1), 33 U.S.C. §908(c)(1), provides compensation for the loss of use of the arm; Section 8(c)(3), 33 U.S.C. §908(c)(3), provides compensation for the loss of use of the hand. In the instant case, Dr. McArthur, the physician relied upon by employer and credited by the administrative law judge, as well as Dr. Gwathmey, the physician relied upon by claimant, gave impairment ratings to claimant's upper extremity.[3] *See* Claimant's Exhibits 10, 13 at 10; Employer's Exhibit 13 at 10. As the medical opinion credited by the administrative law judge provides solely an impairment rating to claimant's upper extremity, we vacate the administrative law judge's award of permanent partial disability compensation pursuant to Section 8(c)(3), and we modify the administrative law judge's decision to reflect claimant's entitlement to permanent partial disability compensation for a twelve percent disability to his left upper extremity pursuant to Section 8(c)(1) of the Act.

Lastly, claimant challenges the administrative law judge's denial of his request for an award of temporary total disability compensation for the three-week period following the October 28, 1991, surgical procedure performed on his wrist. Claimant bears the burden of proving that he has sustained a harm or pain, and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1990). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption applies to link the harm or pain with claimant's employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). If, however, employer presents specific and comprehensive evidence sufficient to sever the connection between the injury and the employment, the presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 829 (1976).

The possibility of an intervening cause does not bar invocation of the Section 20(a) presumption. Rather, employer can rebut the presumption by producing substantial evidence that

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[2]Contrary to claimant's contention, "true doubt" is not applicable under the Act. *Director, OWCP v. Greenwich Collieries*, __ U.S. __, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994).

[3]We note that employer, in its response brief, concedes that Dr. McArthur rated claimant's upper extremity rather than claimant's hand. *See* Employer's brief at 4.

claimant's condition was caused by a subsequent, non work-related event. However, where a non work-related injury follows a work-related injury, employer is liable for the entire resulting condition if the second injury was the natural and unavoidable result of the first injury. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, 901 F.2d 1112 (5th Cir. 1990).

In the instant case, when addressing claimant's request for compensation following his second wrist surgery, the administrative law judge summarily stated that "[w]ithout delving into the arguments of the parties, I find that claimant is precluded from receiving temporary total disability for three weeks immediately following the aspiration performed on October 28, 1991." *See* Decision and Order at 10. Thereafter, without evaluating the evidence of record, the administrative law judge concluded that "[c]laimant has failed to show that a separate injury occurred under which he could receive benefits." *Id.* It is uncontroverted, however, that claimant sustained a post-injury cyst on his left wrist which required surgery. Accordingly, we hold that the administrative law judge erred in failing to consider the Section 20(a) presumption of causation; moreover, the administrative law judge's failure to independently analyze and discuss the medical evidence of record violates the Administrative Procedure Acts' requirement for a reasoned analysis. *See* 5 U.S.C. §557(c)(3)(A); *Williams v. Newport News Shipbuilding and Dry Dock Co.*, 17 BRBS 61 (1985). We therefore vacate the administrative law judge's implicit finding that there is no causal relationship between claimant's post-injury left wrist cyst and his work injury, and we remand the case for the administrative law judge to reconsider the evidence in light of the Section 20(a) presumption. *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Accordingly, the administrative law judge's decision is modified to reflect claimant's entitlement to permanent partial disability compensation for a twelve percent impairment to his left upper extremity pursuant to Section 8(c)(1). The administrative law judge's determination that claimant is not entitled to temporary total disability for the three-week

period following his cyst aspiration is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge