BRB No. 92-1198

LEROY L. POLLAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Granting Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lee E. Wilder (Rutter & Montagna), Norfolk, Virginia, for claimant.

Cathleen Reilly-Brew (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Granting Section 8(f) Relief (91-LHC-0511) of Administrative Law Judge Richard K. Malamphy 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 sustained an injury to his back on June 15, 1988, while lifting a tool belt during the course of his employment with employer. Employer voluntarily paid claimant temporary total disability benefits from July 12, 1988, through September 25, 1988, from January 16, 1989, through February 12, 1989, and from February 23, 1989, through May 30, 1990; thereafter, employer paid claimant temporary partial disability benefits from May 31, 1990, and continuing. 33 U.S.C. §908(b), (e). At the formal hearing, the parties stipulated that claimant's average weekly wage at the time of injury was $387.94 and that maximum medical improvement was reached on May 26, 1989.

In his Decision and Order, the administrative law judge found that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption of causation, that claimant is unable to resume his usual employment duties with employer, and that employer established the availability of suitable alternate employment with a residual wage-earning capacity of the minimum wage. He also found that employer was entitled to relief under Section 8(f), 33 U.S.C. §908(f), based on claimant's pre-existing back problems and severe psoriasis. Accordingly, the administrative law judge awarded claimant permanent partial disability benefits from May 31, 1990, and continuing. 33 U.S.C. §908(c)(21).

On appeal, employer challenges the administrative law judge's findings regarding causation and claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in finding that claimant's back condition is related to his employment. Employer specifically argues that it has met its burden of establishing the lack of a causal nexus between claimant's back condition and his employment with employer. We disagree.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a) presumption which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Before Section 20(a) is applicable, claimant must establish that he has sustained some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, 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 James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the instant case, the administrative law judge found that claimant sustained back pain, and that working conditions existed, namely the lifting of a tool bag, which could have caused the pain; accordingly, the administrative law judge invoked the Section 20(a) presumption. Next, the administrative law judge found that employer submitted no evidence sufficient to rebut the Section 20(a) presumption. The administrative law judge's conclusion is supported by the record. Dr. Hakim, upon whom employer relies in support of its contentions, does not unequivocally state that claimant's back condition is unrelated to his employment with employer; rather, Dr. Hakim opined that claimant's ongoing back pain would become aggravated at work from time to time due to his underlying disease process. *See* EX 15 at 18. Dr. Hakim also noted on January 25, 1989, that claimant's symptoms were clearly aggravated by the strenuous nature of his work and that he counseled claimant that he should consider a job duty change. *See* EX 20. This opinion is insufficient to rebut the presumption as it does not rule out a causal relationship between claimant's back pain and his employment with employer; therefore, we affirm the administrative law judge's finding that claimant's back condition is causally related to his employment. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Employer next contends that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity. We agree. Where, as in the instant case, it is uncontroverted that claimant is incapable of performing his usual employment duties and employer has demonstrated the availability of suitable alternate employment that claimant is capable of performing, the administrative law judge must determine claimant's post-injury wage-earning capacity. *See generally Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award of permanent partial disability is based on the difference betwen claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

In the instant case, the administrative law judge, after determining that employer had established the availability of suitable alternate employment, found that such employment would pay claimant the minimum wage. In rendering this finding, the administrative law judge noted that, contrary to employer's assertion that it had established a post-injury wage-earning capacity of $7.00 - $7.75 per hour, employer's vocational witnesses conceded this higher hourly wage rate was one which claimant could only eventually obtain. *See* Decision and Order at 7. Our review of the record, however, indicates that the administrative law judge mischaracterized employer's evidence regarding claimant's post-injury wage-earning capacity. Specifically, employer's vocational experts, after acknowledging at the formal hearing that lower paying employment opportunities were certainly available to claimant, set forth numerous employment opportunities paying in excess of $7.00 per hour, *see* Transcript at 95-112, EX-16; additionally, employer's witness specifically opined that claimant was capable of securing a position paying $7.75 per hour. *See* Transcript at 90. Based

upon the foregoing, we hold that the administrative law judge erred in failing to discuss fully the testimony of employer's witnesses regarding claimant's post-injury wage-earning capacity. Accordingly, we vacate the administrative law judge's finding regarding claimant's post-injury wage-earning capacity, and we remand the case to the administrative law judge for reconsideration of all of the evidence relevant to this issue.

Lastly, employer asserts that as claimant actually worked as a security guard and as a small tool repairman for several months post-injury, and stopped working for reasons unrelated to his injury, the administrative law judge erred in failing to address this evidence when calculating claimant's post-injury wage-earning capacity. We agree. Claimant's actual post-injury employment can constitute suitable alternate employment. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993). In the instant case, it is uncontroverted that claimant worked in two positions post-injury, and that in each instance claimant left these positions for reasons unrelated to his injury. The administrative law judge erred when, after initially stating that claimant was physically capable of performing the employment duites required in these two post-injury jobs, he failed to discuss these positions when addressing the issues of suitable alternate employment and claimant's post-injury wage-earning capacity. Earnings in these jobs are relevant evidence to be weighed in determining claimant's wage-earning capacity. On remand, the administrative law judge must consider these positions when addressing the issue of claimant's post-injury wage-earning capacity.

Accordingly, the administrative law judge's determination of claimant's post-injury wage-earning capacity is vacated, and the case is remanded for further consideration of this issue 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

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge