BRB Nos. 07-0752
and 07-0752A

J.P.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
STRACHAN SHIPPING COMPANY	)	DATE ISSUED: 04/24/2008
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Granting Petition for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimant.

Melinda Rich Harper and Rick L. Rambo (Fulbright & Jaworski, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Order Granting Petition for Reconsideration (2006-LHC-00028) of Administrative Law Judge Lee J. Romero, 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).

Claimant, a gang foreman and rigger, injured his knees and left ankle when he fell on April 16, 1999, while attempting to remove lasher rods. Claimant returned to work on June 11, 1999, but suffered an additional period of temporary total disability from July 16, 2000, to June 9, 2001, following surgery to his left ankle. Claimant sought total disability benefits for the period he was unable to work, and temporary partial disability compensation for those periods in which he was employed but unable to work his usual hours as a result of his injury. Claimant also sought medical benefits for the bilateral total knee replacements recommended by several physicians.

In his decision, the administrative law judge awarded claimant compensation for temporary partial disability in the years 2000, 2001, 2002, and 2005, finding that he lost work hours in each of those years due to his injury.[1] He also found claimant entitled to medical benefits associated with the proposed surgeries, as he found that claimant's current knee conditions were aggravated by the fall at work. The administrative law judge also stated that claimant will be entitled to temporary total disability compensation for the periods of disability following such surgery.[2]

On appeal, employer contends the administrative law judge erred in his calculation of claimant's post-injury wage-earning capacity and in finding compensable claimant's prospective right knee replacement surgery. In his appeal, claimant contends the administrative law judge erred in failing to award temporary total disability benefits for the period between July 14, 2000 through October 5, 2000, following the surgery on claimant's ankle.

We first address claimant's contention that the administrative law judge erred by not awarding compensation for the period between July 14, 2000 through October 5, 2000, when he was totally disabled following surgery on his left ankle. Employer agrees

[1] As claimant's disability remains temporary, the administrative law judge found that it is premature to rule on employer's request for relief pursuant to Section 8(f).

[2] In his Order Granting Petition for Reconsideration, the administrative law judge modified his initial decision to reflect the limitation imposed by Section 6(b)(1), 33 U.S.C. §906(b)(1), that a claimant's compensation rate shall not exceed an amount equal to 200 percent of the national average weekly wage at the time of claimant's injury. Accordingly, the administrative law judge set claimant's compensation rate at $871.76 per week, as opposed to the $947.48 awarded in the initial decision.

with claimant that the administrative law judge should have entered this award. The administrative law judge found that claimant's left ankle condition was the result of his work accident, a finding which employer does not dispute. Moreover, the record reflects that claimant was not released to return to work until October 5, 2000, and therefore was totally disabled during this period of time. JXs 1, 5. As there is no dispute between the parties regarding the work-relatedness of the ankle injury, the necessity of the medical treatment, or the period of total disability, we modify the administrative law judge's award to reflect claimant's entitlement to compensation for temporary total disability from July 14 through October 5, 2000.[3] 33 U.S.C. §908(b).

We next address employer's argument that the administrative law judge erred in calculating claimant's loss in wage-earning capacity. An award for temporary partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(e), (h); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1988). 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 those earnings fairly and reasonably represent his wage-earning capacity. *See Penrod Drilling Co. v. Johnson,* 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Only if such earnings do not fairly and reasonably represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *See Louisiana Ins. Guar. Ass'n v. Abbott,* 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In this case, the administrative law judge determined that claimant's average weekly wage, pursuant to 33 U.S.C. §910(c), was $1,424.36, based upon claimant's actual wages, container royalty, holiday and ILA pay. Decision and Order at 50-52. The administrative law judge then found that claimant's pre-injury hourly wage was $40.41, by dividing claimant's total income of $74,066.75 earned in the year prior to his injury by the 1832.75 hours worked in 1999. He further concluded that claimant's work injury had resulted in his being restricted to fewer job categories resulting in fewer number of hours worked post-injury. Based on the number of hours claimant worked in subsequent

[3] The award of temporary partial disability compensation which overlaps this period therefore is vacated.

years,[4] the administrative law judge determined claimant's loss of wages resulting from his injury by multiplying the number of hours lost times claimant's pre-injury hourly wage. Thus, he found claimant entitled to compensation in various amounts for the years 2000, 2001, 2002, and 2005, the years he worked fewer hours than he had in 1999.[5]

Employer contends that the administrative law judge failed to address the totality of claimant's post-injury earnings in determining his loss in wage-earning capacity. Specifically, employer notes that the administrative law judge merely multiplied the hours lost due to injury by the pre-injury hourly rate and did not address whether claimant's total earnings post-injury, including any container royalty, holiday, and ILA pay, fairly and reasonably represent his wage-earning capacity.

We agree with employer that the calculation of claimant's lost wage-earning capacity cannot be affirmed, as the administrative law judge did not address average weekly wage and wage-earning capacity on an equal footing. *See, e.g., Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649, 658 (1979). The administrative law judge's finding that claimant's decrease in hours worked is a result of his work injury is supported by substantial evidence, as he rationally credited claimant's testimony that his pain restricts his ability to work in some jobs. However, the administrative law judge did not address whether claimant's total post-injury earnings, including any container

---

[4] The record reflects that claimant worked 1832.75 hours in the year prior to his injury (1999) and the following hours subsequent to it after his release to full-duty work:

2000 1318 hours - loss of 514.75 hours

2001 1796 hours - loss of 36.75 hours

2002 1752 hours - loss of 80.75 hours

2003 1879 hours - gain of 46.25 hours

2004 1900 hours - gain of 67.25 hours

2005 1679 hours - loss of 153.75 hours.

EX 156.

[5] Specifically, the administrative law judge found claimant entitled to temporary partial disability compensation of $13,865.98 in 2000; $989.95 in 2001; $2,175.19 in 2002; and $4,141.61 in 2005.

royalty pay, holiday, and ILA pay, fairly and reasonably represent claimant's wage-earning capacity. By comparing claimant's pre-injury hourly rate, derived from all sources of payments, to only claimant's post-injury hours, the administrative law judge may have inflated claimant's loss of wage-earning capacity if claimant in fact also received container royalty, holiday, and ILA pay after his injury. In addition, if claimant received higher wages post-injury that fairly represent his post-injury earning capacity, the calculation utilized by the administrative law judge would not have taken this increase in earning capacity into account by relying solely on the number of hours worked. *See Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002). Therefore, we must vacate the administrative law judge's calculation of claimant's temporary partial disability benefits and remand for further finding of fact.

On remand, the administrative law judge must compare claimant's average weekly wage and post-injury wage-earning capacity on an equal footing. As the administrative law judge's calculation of claimant's average weekly wage was not appealed, the administrative law judge must, on remand, take the total of claimant's post-injury earnings including any additives earned that comprised claimant's average weekly wage and determine if the wages fairly and reasonably represent claimant's wage-earning capacity in his injured capacity.[6] *See Penrod Drilling*, 905 F.2d 84, 23 BRBS 108(CRT). If they do, then the administrative law judge should compare that figure, adjusted for inflation, to claimant's average weekly wage to determine any loss in wage-earning capacity.[7] *See generally Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). On remand, the administrative law judge should address employer's contention that he should compare claimant's aggregate post-

[6] On the facts of this case, where average weekly wage is not appealed, we disagree with employer that, alternatively, the administrative law judge could have calculated claimant's pre-injury hourly wage only with regard to his salary payments, exclusive of container royalty, holiday, and ILA pay. We note, however, that only additives earned through work, and not while claimant was totally disabled, should be accounted for in claimant's post-injury wage-earning capacity. *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), *SEACO v. Richardson*, 136 F.3d 1290, 32 BRBS 56(CRT) (11th Cir. 1998).

[7] The party contending that the claimant's actual post-injury earnings do not represent his wage-earning capacity bears the burden of so proving. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). If the administrative law judge finds that claimant's post-injury earnings do not fairly and reasonably represent his wage-earning capacity, he must calculate a dollar amount, based on evidence of record, which does represent claimant's earning capacity in his injured condition. 33 U.S.C. §908(h).

injury earnings, divided by the 300 weeks he worked post-injury, to claimant's average weekly wage rather than compare each individual post-injury year's earnings to claimant's average weekly wage.

Employer also contends that the administrative law judge erred in finding claimant's right knee condition is work-related and that he is, therefore, entitled to knee replacement surgery at employer's expense.[8] In order to be entitled to medical benefits under Section 7(a), 33 U.S.C. §907(a), at employer's expense, claimant must establish that the treatment is necessary for a work-related condition. Claimant is aided by the Section 20(a) presumption in establishing the work-relatedness of his condition, if he establishes his *prima facie* case. In this case, it is uncontested that claimant had pre-existing osteoarthritis in his right knee and that he fell on this knee at work on April 16, 1999. Thus, it is presumed, pursuant to Section 20(a), that the work accident aggravated claimant's pre-existing knee condition. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). 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. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). If the Section 20(a) presumption is rebutted, then the administrative law judge must weigh all of the relevant evidence to determine if a causal relationship has been established, an issue on which claimant bears the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

Employer contends the administrative law judge erred in finding that the opinions of Drs. Freeman and Weiner do not rebut the Section 20(a) presumption. Claimant has pre-existing osteoarthritis in both knees stemming from prior injuries and surgeries. *See, e.g.*, EXs 28, 81; JX 1 at 32. Thus, the aggravation rule is implicated in this case, and it is employer's burden on rebuttal to produce substantial evidence that claimant's right knee condition was not aggravated by the work accident. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Dr. Freeman stated on March 9, 2005, that, to a reasonable degree of medical probability, claimant's knees would be in the same condition regardless of the work accident. JX 6 at 9. Dr. Weiner stated on June 10, 1999, that claimant's *left* knee condition was aggravated by the work accident. JX 6 at 55. After a review of medical reports from the intervening year, Dr. Weiner opined on April 24, 2006, that he agreed with Dr. Freeman that claimant's knees are in the same condition as they would have been absent the work accident and that the proposed surgeries are not related to the work accident. EX 160.

[8] Employer does not challenge the finding that surgery for claimant's left knee is compensable.

The administrative law judge found that Dr. Freeman's opinion is not sufficient to rebut the Section 20(a) presumption because he did not conduct a physical examination of claimant or inquire about claimant's surgical history or work restrictions resulting from prior injuries. Decision and Order at 43. The administrative law judge found Dr. Weiner's opinion insufficient to rebut the Section 20(a) presumption because he did not provide any reasoning for the change in his conclusion regarding any relationship between the injury and the work accident. *Id.* at 44 The administrative law judge concluded, therefore, that as the Section 20(a) presumption was not rebutted, it was unnecessary for him to weigh the evidence as a whole. *Id.*; *but see id.* at 59-61.

We cannot affirm the finding that employer did not rebut the Section 20(a) presumption, as it is not supported by substantial evidence.[9] Contrary to the administrative law judge's finding, it is clear from the face of Dr. Freeman's report that he examined claimant and was aware of his prior knee problems.[10] Moreover, while Dr. Weiner stated in 1999 that claimant's left knee condition was aggravated by the work accident and, in 2006, that claimant's current knee conditions are not related to the work accident, there is no indication in the record that Dr. Weiner gave arguably inconsistent opinions regarding claimant's *right* knee condition. Moreover, the administrative law judge did not address whether the passage of time and Dr. Weiner's review of other medical reports could account for his arguably divergent opinions. As the administrative law judge gave invalid reasons for finding that these opinions do not rebut the Section 20(a) presumption, we must remand this case. On remand, the administrative law judge must address whether one or both of these medical opinions constitutes substantial evidence that claimant's *right* knee condition was not aggravated by the 1999 work accident. If the administrative law judge finds the presumption rebutted, he must re-

[9] We reject employer's contention that Dr. Bryan's opinion also rebuts the Section 20(a) presumption. Dr. Bryan stated in September 2004 that claimant's right knee condition is "constitutional" whereas the left knee condition was aggravated by the work accident. JX 2 at 5. In February 2006, however, Dr. Bryan stated that he was amending his previous comments and that the work accident accelerated the need for surgery in both knees. CX 6. Thus, his opinion cannot constitute substantial evidence that claimant's right knee condition is not related to the work accident. *See generally Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

[10] Dr. Freeman's report states, "Examination reveals significant degenerative changes with enlargements of both knee joints…," JX 6 at 9, and that his evaluation "encompasses the subjective complaints and history as given by the examinee, as well as the medical records provided for my review and the physical examination." *Id.* He also stated that "many medical records were provided for my review. I reviewed that material." *Id.* at 8.

weigh the evidence as a whole to determine if claimant met his burden of establishing that his right knee condition was aggravated by the work accident such that employer is liable for the replacement surgery on that knee.[11] *Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT).

Accordingly, the administrative law judge's Decision and Order is modified to reflect that claimant is entitled to temporary total disability benefits for the period of July 14 through October 5, 2000. The temporary partial disability award in effect for this period is vacated. The administrative law judge's findings concerning claimant's loss in wage-earning capacity and employer's liability for the proposed replacement surgery on claimant's right knee are vacated, and the case is remanded for further findings consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[11] The administrative law judge purported to weigh the evidence as a whole, *see* Decision and Order at 59-61, on the issue of claimant's entitlement to medical benefits, but the rationale he gave for giving less weight to the opinions of Drs. Freeman and Weiner is based on the same erroneous reasons he provided in finding the opinions insufficient to rebut the Section 20(a) presumption. *Id.*