BRB No. 91-1699

MYRA SNAZA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUSKY TERMINALS	)	DATE ISSUED:
	)	
and	)	
	)	
AIG/NATIONAL UNION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding (Medical) Benefits and Decision on Petition for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

William D. Hochberg (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant.

Arthur R. Chapman (Lane, Powell, Spears, Lubersky), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding (Medical) Benefits and Decision on Petition for Reconsideration (87-LHC-2103) of Administrative Law Judge Alfred Lindeman awarding benefits 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 if they 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 her lower back on February 4, 1988, when she slipped and fell while in the course of her employment with employer. Claimant returned to work after a few days, but she was forced to stop working on February 18, 1988, due to lower back pain. Claimant again resumed working on July 15, 1988, until August 8, 1988, when she again stopped working due to lumbar pain. Claimant subsequently returned to her longshore employment on December 9, 1988. Employer voluntarily paid compensation for temporary total disability from February 18 to July 14, 1988, and from August 8 to December 8, 1988. 33 U.S.C. §908(b). Since her return to work, claimant has had numerous work-related incidents while working for different employers. These subsequent incidents resulted in lumbar pain and occurred in December 1988, late April or early May 1989, August 1989, and June, July, and October 1990.

At the formal hearing on January 9, 1991, employer challenged its continuing liability for compensation and medical benefits to claimant after claimant returned to work on December 9, 1988. Employer contended that the subsequent work-related incidents sustained by claimant were intervening causes of claimant's chronic lumbar pain. In support of her contention that she is entitled to compensation for periods of temporary total and temporary partial disability, claimant asserted that her back disability is related to her February 4, 1988, work injury. The parties also disputed the proper average weekly wage upon which compensation benefits were to be calculated, although they stipulated that the applicable average weekly wage is either $687.37 or $618.08. *See* 33 U.S.C. §910. Finally, the parties requested that the administrative law judge resolve the issue of various unpaid medical bills. *See* 33 U.S.C. §907.

The administrative law judge initially addressed the average weekly wage issue, finding that claimant worked substantially the whole year prior to the February 4, 1988, work injury, and that her work was permanent and steady rather than seasonal, intermittent, part-time or discontinuous. Accordingly, the administrative law judge concluded that claimant's average weekly wage is $618.08, pursuant to Section 10(a), 33 U.S.C. §910(a), based on her wages during the 52 weeks preceding her injury. Regarding claimant's back disability, the administrative law judge determined that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's disability is related to the February 4, 1988, work injury, due to the occurrence of subsequent work-related back injuries. Thereafter, the administrative law judge found, based on the record as a whole, that claimant's back symptoms after the December 31, 1988, work incident were related to the February 4, 1988, injury because the lumbar pain experienced after working that day arose without any particular injurious movement and within only a few weeks after her return to work. The administrative law judge next found, however, that claimant's subsequent episodes of increased symptomatology, commencing with an incident in late April or early May 1989, were the result of intervening work-related causes or new injuries. Accordingly, he found that employer's liability under the Act ended at that time. Alternatively, the administrative law judge found that claimant failed to establish any loss of wage earning capacity due to the February 1988 injury after her return to work in December 1988; thus, claimant was denied additional compensation after December 9, 1988, the date upon which she returned to work. Lastly, the administrative law judge determined that employer is liable for claimant's reasonable medical expenses only until the aggravating injury at work in April or May 1989.

Claimant moved for reconsideration of the administrative law judge's Decision and Order. In his Decision on Petition for Reconsideration, the administrative law judge restated his finding that claimant's average weekly wage at the date of injury is $618.08, pursuant to Section 10(a). On appeal, claimant challenges the administrative law judge's findings regarding causation, extent of disability, average weekly wage and her entitlement to medical benefits. Employer responds, urging affirmance.[1]

Claimant initially contends that the administrative law judge erred by failing to apply the Section 20(a) presumption and by finding that claimant's ongoing lumbar symptomatology is due to subsequent intervening work injuries rather than to the work injury of February 4, 1988. In support of her contentions, claimant asserts that the uncontradicted evidence of record establishes that her back disability is due to the natural progression of the February 4, 1988, work injury. Moreover, claimant argues that the evidence establishes that the subsequent work incidents were temporary flare-ups that were solely attributable to her February 4, 1988, injury rather than the cause of any cumulative back trauma.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that her disabling condition is causally related to her employment if she shows that she suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Because it is undisputed that claimant suffered a harm, *i.e.*, a back injury, and that the work accident occurred, claimant is entitled to the presumption. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with 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). If the administrative law judge finds the Section 20(a) presumption is rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

If claimant sustains a subsequent injury, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was caused by the subsequent event; in such a case, employer must additionally establish that the first work-related injury did not cause the second injury. *See, e.g., Kelaita v. Director, OWCP*, 799 F.2d 1308, 1310-1311 (9th Cir. 1986). Employer is liable for the entire disability if the second injury is the natural and unavoidable result of the first injury. Where the second injury is the result of an intervening cause, however, employer is relieved of liability for that portion of disability attributable to the second injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). The United States Court of

[1]By Board Order issued March 20, 1992, employer's Motion for an Order of Voluntary Dismissal of its Cross-Appeal, BRB No. 91-1699A, was granted. *See* 20 C.F.R. §802.401.

Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has defined the aggravation rule as follows:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.

Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 624, 25 BRBS 71, 75 (CRT)(9th Cir. 1991), *quoting Kelaita*, 799 F.2d at 1311.

We agree with claimant that the administrative law judge erred when, in considering the issue of causation, he failed to analyze the evidence of record pursuant to the relevant legal standard regarding aggravation and natural progression. In considering this issue, the
the administrative law judge, without reference to the medical testimony of record, initially determined that the Section 20(a) presumption was rebutted by the occurrence of work-related incidents subsequent to December 1988. *See* Decision and Order at 5. The mere occurrence of subsequent injuries, however, is not sufficient to rebut the presumption. Rather, in order to rebut the presumption, employer must produce substantial evidence that the disability is the result of the subsequent event. *See James*, 22 BRBS at 271. Our review of the voluminous record in this case indicates the existence of medical testimony which, if credited by the administrative law judge, would support a finding that claimant's disability is due to aggravations occurring after the 1988 injury. We therefore vacate the administrative law judge's finding of rebuttal, and we remand the case for consideration of whether the medical evidence employer has produced constitutes substantial evidence that claimant's condition was caused by a subsequent event which was not the natural and unavoidable result of her February 1988 work injury. *See Foundation Constructors, Inc.*, 950 F.2d at 621, 25 BRBS at 71 (CRT); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1911), *aff'd mem. sub nom. Wright v. Director, OWCP*, No. 92-70045 (9th Cir. Oct. 6, 1993).

Moreover, we note that the administrative law judge, upon finding that the Section 20(a) presumption was rebutted, concluded without specifically crediting any of the medical testimony of record that claimant's post-December 1988 symptoms were the result of intervening causes or new injuries. Prior to rendering this conclusion, the administrative law judge stated that his

task is complicated somewhat by the use of the terms `aggravation' and `exacerbation' by the medical practitioners whose reports and testimony are of record, because it is difficult to determine whether the terms were used in the sense that would satisfy the definition of a new injury under the Act, [cite omitted], or in a sense that meant the subsequent `flare-ups' were the `natural or unavoidable result' of the February 1988 injury, [cite omitted].

Decision and Order at 5. The record in this case contains the opinions of approximately ten physicians, each of whom addressed the issue of whether claimant's post-December 1988 injuries were either intervening events or were the natural and unavoidable result of her February 1988 injury. Accordingly, should the administrative law judge on remand determine that employer has rebutted the presumption, he must consider and discuss all of the medical evidence relevant to the issue of causation, make appropriate findings based on the relevant law and evidence, and give an explanation of the reasons for that determination.[2] *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Claimant next contends that the administrative law judge erred in determining her average weekly wage at the time of her injury. Specifically, claimant argues that the administrative law judge erred in utilizing Section 10(a), rather than Section 10(c), of the Act to calculate claimant's average weekly wage. We disagree. In the instant case, the parties stipulated that claimant's average weekly wage, if Section 10(a) is applicable, is $618.08, or, if Section 10(c) is applicable, is $687.37.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied.

[2]Should the administrative law judge on remand conclude that claimant's post-April 1989 symptomatology is related to her February 1988 injury, he must then determine whether employer is liable for medical benefits subsequent to April 1989.

Section 10(a) is to be applied when an employee worked "substantially the whole of the year" immediately preceding her injury. 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). The Board has held that "substantially the whole of the year" refers to the nature of claimant's employment. *See Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). In the instant case, after noting that claimant's status had changed from that of a casual laborer to that of a "B" man on March 23, 1987, the administrative law judge found that claimant had worked as a "B" man for 45 weeks during that year preceding her injury, and concluded that claimant's employment was steady and continuous; the administrative law judge thus determined that claimant's average weekly wage at the time of her injury should be calculated pursuant to Section 10(a) of the Act. As the administrative law judge's determination on this issue accords with law, we hold that the administrative law judge committed no error in utilizing Section 10(a) to calculate claimant's average weekly wage at the time of her injury. *See id.*

Lastly, claimant challenges the administrative law judge's denial of her claim for temporary total and partial disability benefits subsequent to December 8, 1988. Pursuant to Section 8(e) of the Act, 33 U.S.C. §908(e), 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. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). In the instant case, the administrative law judge found, based upon the totality of the record, that claimant did not sustain a loss of wage-earning capacity after her return to work on December 9, 1988, and that, accordingly, claimant was entitled to no compensation subsequent to that date. Specifically, after determining that claimant worked more hours in 1989, 1473.5, than she worked in 1987, 1205.25, the administrative law judge found that claimant's earnings during 1989 computed to an average weekly wage of $749.89, which is greater than the average weekly wage of $618.08 at the date of her injury in February 1988. Claimant, on appeal, does not challenge these computations; accordingly, we affirm the administrative law judge's determination that claimant sustained no loss of wage-earning capacity subsequent to her return to work on December 9, 1988, and his consequent denial of temporary partial disability compensation, as his finding is supported by substantial evidence. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). If, on remand, the administrative law judge finds that claimant's back pain after April 1989 is work-related, he may reconsider whether claimant is entitled to specific periods of temporary total disability compensation.

Accordingly, the administrative law judge's findings regarding causation are vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding (Medical) Benefits and Decision on Petition for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge