

ROBERT D. KENVYN, II)

Claimant-Respondent)

v.)

MEGA CRANE RENTALS,)
INCORPORATED)

DATE ISSUED: June 15, 2001

and)

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH,)
PENNSYLVANIA)

Employer/Carrier-)
Petitioners)

DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

R. Michael McHale (McHale Law Firm), Lake Charles, Louisiana, for claimant.

Cynthia A. Galvan (Brown Sims, P.C.), Houston, Texas, for employer/carrier.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-LHC-0459) of Administrative Law Judge Clement J. Kennington 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

On August 29, 1994, claimant sustained multiple injuries while in the course of his

employment for employer when he fell approximately 45 feet, striking the handrail of a platform stairway. Immediately following the accident, claimant underwent emergency surgery which entailed a splenectomy to remove his ruptured spleen; a hemigastrectomy and Billroth II anastomosis, in which approximately three-fifths of claimant's stomach was removed; and a transverse colectomy necessitated by a ruptured colon. Since his accident and surgery, claimant has been treated by several medical specialists for multiple gastrointestinal conditions, including gastroesophageal reflux with a small hiatal hernia, anemia, malnutrition, an inability to maintain weight, dumping syndrome, and Crohn's disease. In addition, he has received medical treatment for wrist, shoulder and back pain, kidney stones, depression and post-traumatic stress disorder. Employer voluntarily paid compensation for temporary total disability from September 6, 1994 to January 15, 1999, at a compensation rate of \$375.29 per week based on an average weekly wage of \$562.91, and additionally paid some of claimant's medical expenses. *See* 33 U.S.C. §§908(b), 907.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant suffered a work-related injury on August 29, 1994, and that he reached maximum medical improvement on February 3, 2000. The administrative law judge next addressed the issue of whether a causal relationship exists between claimant's August 29, 1994 work injury and his orthopedic and psychiatric conditions and Crohn's disease, which would require employer to provide medical care for these conditions under Section 7(a) of the Act, 33 U.S.C. §907(a). The administrative law judge afforded claimant the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption linking these conditions to his employment, and determined that employer failed to produced sufficient evidence to rebut the presumption. Accordingly, the administrative law judge found employer liable for the medical expenses resulting from these conditions.

With respect to the issue of the nature and extent of claimant's disability, the administrative law judge found that claimant established a *prima facie* case of total disability and that employer failed to establish the availability of suitable alternate employment. The administrative law judge accordingly found claimant entitled to temporary total disability compensation from the date of his injury through February 2, 2000, and to permanent total disability compensation thereafter. *See* 33 U.S.C. §908(a). After finding Section 10(c) of the Act, 33 U.S.C. §910(c), was the appropriate subsection to be used for calculating claimant's average weekly wage, the administrative law judge determined that the record did not establish adequate information to substantiate an average weekly wage different from the amount upon which employer's voluntary payments of compensation were based. Relying on employer's original calculations as accurate, the administrative law judge awarded compensation at a weekly rate of \$375.29.¹

¹Employer's voluntary payments of compensation were made at a weekly compensation rate of \$375.29, based on an average weekly wage of \$562.91. *See*

On appeal, employer avers that the administrative law judge erred in determining that employer is liable for the treatment of claimant's Crohn's disease. Employer additionally challenges the administrative law judge's average weekly wage determination. Claimant responds, urging affirmance.

Medical Benefits

An award of medical benefits is contingent upon a finding of a causal relationship between the condition for which medical benefits are being sought and the employment. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Thus, the Section 20(a) presumption applies to the issue of whether the injury for which medical benefits are sought arose out of and in the course of employment. In the instant case, the administrative law judge properly invoked the Section 20(a) presumption, as he found that claimant suffered a harm and that an accident occurred which could have aggravated that harm. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Port Cooper*, 227 F.3d 284, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT)(1984).

EX 3.

Employer's argument that the administrative law judge erred in awarding medical benefits for claimant's Crohn's disease contains no reference to the Section 20(a) presumption and, accordingly, identifies no specific error with respect to the administrative law judge's finding that employer failed to rebut the presumption. Rather, employer argues simply that it should not be held liable for the treatment of claimant's Crohn's disease since that condition pre-existed his August 29, 1994, work injury. The argument made by employer on appeal reflects a misapprehension of employer's burden with respect to rebuttal of the Section 20(a) presumption in light of the aggravation rule. In order to rebut the Section 20(a) presumption, employer could not simply rely on evidence that claimant's Crohn's disease was not *caused* by his work injury; instead, employer must produce evidence that the August 29, 1994, work injury did not aggravate, accelerate, or combine with claimant's Crohn's disease. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Kubin*, 29 BRBS at 119. In evaluating whether employer rebutted the presumption with the opinion of its medical witness, Dr. Twomey, the administrative law judge acknowledged Dr. Twomey's opinion that claimant's Crohn's disease was not caused by his splenectomy. The administrative law judge found, however, that inasmuch as Dr. Twomey's testimony establishes the inseparability of claimant's Crohn's disease and the dumping syndrome caused by his work injury, the doctor's opinion is insufficient to rebut the presumption. *See* Decision and Order at 16-17, 21; EX 10 at 47. The administrative law judge's evaluation of Dr. Twomey's testimony and the inferences drawn therefrom are reasonable and supported by the evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT)(5th Cir. 1995); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as Dr. Twomey's testimony supports a finding that claimant's work injury aggravated or combined with his Crohn's disease, the administrative law judge's determination that Dr. Twomey's opinion does not rebut the Section 20(a) presumption is affirmed. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). As there is no other evidence that could support rebuttal,² we affirm the administrative law judge's conclusion that claimant is entitled to reasonable and necessary medical expenses related to his Crohn's disease. *See Romeike*, 22 BRBS 57; *Ballesteros*, 20 BRBS 184.

²As correctly found by the administrative law judge, both the opinions of Drs. White and Schwartz support a finding that claimant's work injury combined with or aggravated his Crohn's disease. *See* Decision and Order at 11-16, 20-21; CXS 2, 8, 13, 14; EX 12.

Average Weekly Wage

Employer and claimant are in agreement that the administrative law judge correctly determined that Section 10(c) of the Act, 33 U.S.C. §910(c), governs the calculation of claimant's average weekly wage in the instant case.³ Employer argues, however, that the administrative law judge's average weekly wage determination is not based on credible

³Section 10(c) provides a method for determining average annual earnings. Section 10(c), in relevant part, provides that:

average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). Once the administrative law judge arrives at a figure approximating an entire year of work, this figure is divided by 52 to determine claimant's average weekly wage. 33 U.S.C. §910(d)(1). The average weekly wage provides the basis for the compensation rate. See 33 U.S.C. §908.

evidence of record. Employer contends, in this regard, that the administrative erred by not basing his calculation of claimant's average weekly wage under Section 10(c) on the evidence submitted by employer regarding the earnings of two other employees in the same or similar class of employment, which employer avers is the only credible and fair evidence of record of the amount claimant could have earned while working as a rigger for employer.

The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant claim arises, has stated that the prime objective of Section 10(c) is to arrive at a figure that reasonably represents a claimant's annual earning capacity at the time of his injury. *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407, 34 BRBS 44, 46(CRT)(5th Cir. 2000); *Hall v. Consolidated Employment Systems*, 139 F.3d 1025, 1031, 32 BRBS 90, 95-96(CRT)(5th Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 441, 30 BRBS 57, 59(CRT)(5th Cir. 1996); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26, 29(CRT)(5th Cir.1991). In determining earning capacity under Section 10(c), "the administrative law judge must make a fair and accurate assessment of the injured employee's *earning capacity* – the amount that the employee would have the potential and opportunity of earning absent the injury." *Gatlin*, 936 F.2d at 823, 25 BRBS at 29(CRT). Typically, this earning capacity will be best reflected by the injured employee's wages at the time of his injury. *See Staftex Staffing*, 237 F.3d at 407, 34 BRBS at 46(CRT); *Hall*, 139 F.3d at 1031, 32 BRBS at 96(CRT). Neither the claimant's actual earnings at the time of injury, nor the actual earnings of other employees in the same class of employment controls the administrative law judge's average weekly wage calculation under Section 10(c), although they are factors to be considered by the administrative law judge in making his determination. *See Gatlin*, 936 F.2d at 823, 25 BRBS at 29(CRT). An administrative law judge has significant discretion in determining the appropriate average wage. *See Staftex Staffing*, 237 F.3d at 406, 34 BRBS at 45(CRT); *Bunol*, 211 F.3d at 297, 34 BRBS at 32(CRT). The administrative law judge's average weekly wage determination, however, must be based on adequate evidence of record. *See Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052 (1978).

In the case at bar, the administrative law judge determined that the record in this matter does not contain adequate information to substantiate an average weekly wage different from the figure originally calculated by employer in making its voluntary payments of compensation. Stating that he would rely on employer's original calculations to be accurate, the administrative law judge awarded benefits based on the average weekly wage of \$562.91, used by employer in making its voluntary payments of compensation. *See Decision and Order* at 28. We agree with employer that the average weekly wage determination made on this basis by the administrative law judge cannot be affirmed. In relying on the average weekly wage figure of \$562.91, the administrative law judge did not fulfill his mandate under Section 10(c) to take into consideration all relevant record evidence and, on the basis of his consideration of such evidence, to arrive at a figure that reasonably

represents claimant's annual earning capacity at the time of injury. *See generally Staftex Staffing*, 237 F.3d 404, 34 BRBS 44(CRT); *Hall*, 139 F.3d 1025, 32 BRBS 90(CRT); *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); *Taylor*, 14 BRBS 489; *Wise*, 7 BRBS 1052. We must, therefore, vacate the administrative law judge's average weekly wage determination, and remand the case to the administrative law judge for an appropriate average weekly wage determination pursuant to Section 10(c).⁴

⁴The administrative law judge's reliance on employer's original calculation of claimant's average weekly wage may effectively mean that his average weekly wage determination is based on the actual earnings claimant received during his 1 ½ weeks of work for employer. We note, in this regard, that employer appears to concede that claimant's actual wages during those 1 ½ weeks served as the basis for employer's voluntary payments of compensation. See Memorandum of Law in Support of Petition for Review at 4; Tr. at 11. The record in this case, however, is devoid of evidence as to the specific amount earned by claimant during that period. Although employer's Safety and Human Resources Director, Willis Barker, testified that he had claimant's 1994 W-2 form, see Tr. at 91, 93, the form was not offered into evidence. Moreover, the record does not establish with specificity the number of hours or days worked by claimant during his period of employment with employer.

On remand, the administrative law judge must decide, first, whether the existing record in this case contains sufficient evidence to support a determination of claimant's earning capacity at the time of his injury pursuant to Section 10(c). In considering the adequacy of the existing record, the administrative law judge must evaluate the evidence of record regarding the actual earnings of claimant and of other employees in the same class of employment. *See* 33 U.S.C. §910(c); *Gatlin*, 936 F.2d at 823, 25 BRBS at 29(CRT). We note, in this regard, that contrary to the administrative law judge's statement that he had no indication of what claimant's actual hourly wage was, *see* Decision and Order at 28, the record contains considerable evidence regarding claimant's hourly wage. *See* EX 1; EX 2; EX 11 at 14-16; CX 15 at 2; Tr. at 44, 73-74, 87-88, 93-94. Although a determination by the administrative law judge of claimant's hourly wage, in and of itself, does not provide a sufficient basis for calculating his average weekly wage in this case, it nonetheless constitutes relevant evidence that should be considered by the administrative law judge on remand. The administrative law judge therefore should evaluate the evidence regarding claimant's hourly rate of pay, resolve the conflicts in that evidence, and, based on his weighing of the evidence, arrive at an independent judgment as to claimant's hourly wage. *See generally* *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT)(5th Cir. 1995); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997); *Ballesteros*, 20 BRBS 184.⁵

⁵Similarly, the record contains some evidence with respect to the number of hours worked per day by claimant during his 1 ½ week period of employment with employer. *See* EX 11 at 63-64; Tr. at 87, 93-94. Evaluation of that evidence by the administrative law judge on remand also may have relevance to the determination of claimant's average weekly wage.

The administrative law judge also should specifically determine, on remand, whether the evidence submitted by employer regarding the annual wages earned in 1994 by Robert Brown and Lanarido Perry, two other inexperienced riggers employed by employer in 1994, provides enough information to constitute probative evidence in determining claimant's annual earning capacity under Section 10(c). In evaluating this evidence pursuant to Section 10(b), 33 U.S.C. §910(b), the administrative law judge found that it would be inappropriate and unfair to use the wages of Brown or Perry as representative of claimant's earning capacity at the time of injury. *See* Decision and Order at 27. The administrative law judge noted, in this regard, that the record does not indicate the hiring dates of Brown and Perry, the number of hours or months worked by either employee in 1994, or how much business was done by employer in 1994. *Id.* While lack of this evidence may prohibit a calculation of average weekly wage under Section 10(b) based on the co-workers' wages, *see McDonough v. General Dynamics Corp.* 8 BRBS 313 (1978)(must have evidence of co-worker's average daily wage in order to utilize Section 10(b)), the absence of this evidence does not necessarily preclude use of the co-workers' wages pursuant to Section 10(c). Employer contends on appeal that the earnings of Brown and Perry constitute the best evidence of claimant's annual earning capacity, asserting that these two employees worked for a full year for employer in the same class of employment as claimant. *See* Memorandum of Law in Support of Petition for Review at 10. The administrative law judge, however, apparently found the record evidence insufficient to conclusively establish that Brown and Perry, in fact, worked a full year for employer in 1994.⁶ On remand, the administrative law judge should determine whether the evidence provided regarding the earnings of Brown and Perry, when considered in conjunction with the evidence regarding claimant's actual earnings and the hearing testimony of employer's Safety and Human Resources Director, Willis Barker, regarding the earnings and hours worked by employer's riggers, provides a basis for arriving

⁶The record contains the affidavit of company President Ronald Lutz, stating that at the time of claimant's injury, employer employed other riggers who, like claimant, earned \$6 per hour. Lutz's affidavit further states that Brown and Perry were "full time employees with the same job as Mr. Kenvyn," that Brown earned \$12,350.25 in 1994 and that Perry earned \$11, 279.25 in 1994; 1994 W-2 statements for Brown and Perry are attached to the affidavit. EX 1. *See* Decision and Order at 9.

The record, however, also contains hearing testimony by Safety and Human Resources Director Barker relevant to this issue. Barker testified, in this regard, that he did not know Brown's and Perry's hiring dates, did not know whether they worked twelve months in 1994, and that he was unable to answer claimant's attorney's question as to whether Brown and Perry could have commenced their employment with employer in June 1994. *See* Tr. at 89-90, 98-99.

at a figure that reasonably represents claimant's annual earning capacity.⁷ *See Staftex Staffing*, 237 F.3d at 407, 34 BRBS at 46(CRT).

If, on remand, the administrative law judge concludes that the existing record does not provide sufficient information to support a determination of claimant's earning capacity at the time of injury pursuant to Section 10(c), he may reopen the record for the receipt of evidence relevant and material to a determination of claimant's average weekly wage. *See generally* 20 C.F.R. §702.338; *Taylor*, 14 BRBS 489; *Wise*, 7 BRBS 1052.

Accordingly, the administrative law judge's average weekly wage determination 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.

⁷Barker stated that the wages earned by Brown and Perry accurately reflect what claimant would have earned in a full year of work for employer. *See* Tr. at 88-89, 98-99. He further testified that inexperienced riggers earned \$6 per hour in 1994, that employees are paid overtime after 40 hours at a time-and-a-half-rate, that they are paid for a minimum of twelve hours for each day of offshore work, and that they may work as many as 18-20 hours per day. *See* Tr. 87-88, 93-96. Having testified to the cyclical nature of employer's business and that employees are called in to work on an as-needed basis, Barker estimated that the annual wages of inexperienced riggers could vary as much as \$5,000, with annual earnings ranging from about \$12,000 to \$16,000. *See* Tr. at 86, 94-97. Barker, who was not employed by employer until 1996, conceded that he did not know how much business employer had in 1994. *See* Tr. at 89, 98.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge