BRB No. 05-0509

ARTHUR COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH AMERICAN FABRICATORS	)	DATE ISSUED: 03/10/2006
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Christopher R. Schwartz, Metairie, Louisiana, for claimant.

Robert P. McCleskey, Jr., and Anne Derbes Keller (Phelps Dunbar, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration (2004-LHC-872) of Administrative Law Judge C. Richard Avery 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 pipefitter/tacker, alleged that he injured his back and left leg on September 19, 2003. He

reported the injury on September 22, 2003, and was examined by Dr. Davis who returned him to his usual work on that day. On September 23, 2003, claimant was terminated from employment due to poor job performance and excessive absenteeism. Dr. Ziomek restricted claimant from working from October 16, 2003, to November 18, 2003. On January 7, 2004, Dr. Johnston stated claimant could work with restrictions. Claimant started working for a pawn shop in February 2004.

The administrative law judge found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his injury is work-related, and that employer did not establish rebuttal thereof. The administrative law judge stated that the parties stipulated that maximum medical improvement had not been reached. The administrative law judge awarded claimant temporary total disability benefits from October 16, 2003, to November 18, 2003, and from January 7, 2004, to February 1, 2004, and ongoing temporary partial disability benefits from February 1, 2004, based on a loss in wage-earning capacity. The administrative law judge found that claimant did not request authorization to seek treatment with Drs. Ziomek and Johnston, and therefore concluded that employer is not responsible for the payment of their medical bills. Nonetheless, in the "order" portion of his decision, the administrative law judge ordered employer to pay for all reasonable and necessary medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge imposed a ten percent assessment pursuant to Section 14(e), 33 U.S.C. §914(e), against employer. The administrative law judge denied claimant's claim of discrimination pursuant to Section 49 of the Act, 33 U.S.C. §948a, as well as employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's finding that claimant has a work-related injury. Employer also challenges the awards of disability and medical benefits, and the Section 14(e) assessment.[1]

Employer first argues that the administrative law judge erred in invoking the Section 20(a) presumption and finding that it was not rebutted. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he

[1] Claimant filed two briefs entitled "Respondent's Reply to Petition for Review." In these briefs, claimant challenges the administrative law judge's findings that employer is not liable for the medical treatment rendered by Drs. Ziomek and Johnston and that employer did not violate Section 49 of the Act. Employer filed a motion to strike these pleadings, as they do not address the issues raised in employer's petition for review and brief. 20 C.F.R. §802.212. We grant employer's motion, and we decline to address the contentions raised by claimant as claimant did not file a notice of cross-appeal and as the issues he raises are not in support of the administrative law judge's findings. *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

establishes a *prima facie* case by showing that he suffered a harm and that a work accident occurred which could have caused the harm or aggravated a pre-existing condition. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence to the contrary. *See Ortco Contractors*, 332 F.3d 283, 37 BRBS 35(CRT); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT).

We affirm the administrative law judge's findings pursuant to Section 20(a) as they are rational and supported by substantial evidence. The administrative law judge rationally relied on claimant's testimony that he was injured at work while attempting to pull himself out of a tight spot in a tank to establish that claimant sustained a harm and that an accident at work occurred which could have caused the harm, since it was corroborated by the reports of Drs. Davis, Ziomek, and Johnston, who treated claimant's injuries. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); Decision and Order Awarding Benefits at 17; Decision on Motion for Reconsideration at 1-2; Cl. Exs. A, B; Emp. Exs. 7, 8; Tr. at 27-29. That the administrative law judge rejected claimant's testimony on other issues does not require that he reject the testimony regarding the occurrence of this incident, as an administrative law judge may accept or reject a witness's testimony in whole or in part. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge also rationally found that employer did not establish rebuttal since employer offered no evidence to controvert the existence of a causal relationship between claimant's injuries and his employment. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); Decision and Order Awarding Benefits at 17; Decision on Motion for Reconsideration at 1-2. Messrs. Fortenberry and Manning, employer's yard superintendent and personnel manager, respectively, did not refute claimant's testimony that he was injured in a work accident. Additionally, Dr. Davis's treatment of an alleged right leg injury does not negate the work-relatedness of claimant's left leg injury, as the administrative law judge found that other evidence reflected that claimant sustained a left leg injury at work. Decision and Order Awarding Benefits at 19 n. 4. As the administrative law judge's finding that the Section 20(a) presumption is invoked and not rebutted is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's injuries are work-related.[2]

[2] Employer argues on appeal that the administrative law judge erred in stating that the parties stipulated that claimant was involved in a work-related accident on September 19, 2003. Emp. Petition for Review at 1; Emp. Br. at 1-3, 7-10. Any error in this regard is harmless since the administrative law judge made distinct findings that claimant established invocation of the Section 20(a) presumption. *See* discussion, *supra*. Hence, the administrative law judge did not give claimant the benefit of any purported stipulation that an

Conoco, Inc., 194 F.3d at 691, 33 BRBS at 191-192(CRT).

Employer next argues that the administrative law judge erred in awarding claimant total and partial disability benefits based on the reports of Drs. Ziomek and Johnston, and that the administrative law judge should have credited Dr. Davis's opinion on the extent of claimant's disability since he was claimant's choice of physician. Total disability awards pursuant to Section 8(a), (b) are appropriate when claimant cannot return to any work. 33 U.S.C. §908(a), (b); *see generally Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). Partial disability awards are appropriate when claimant returns to work but sustains a loss in his wage-earning capacity. *Id.*; 33 U.S.C. §908(c)(21), (e), (h).

We affirm the administrative law judge's award of total disability benefits from October 16 to November 18, 2003, as it is supported by Dr. Ziomek's restricting claimant from working during this period. *See Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); Decision and Order Awarding Benefits at 19, 20, 23; Cl. Ex. B at 4, 9; Emp. Ex. 8 at 13, 18. Moreover, we affirm the administrative law judge's award of total disability benefits from January 7 until February 1, 2004. The administrative law judge rationally found that Dr. Johnston's restrictions prevented claimant from performing his usual work and that, moreover, employer did not establish the availability of suitable alternate employment consistent with Dr. Johnston's restrictions during this period.[3] *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d

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accident occurred at work on September 19, 2003.

[3] Dr. Johnston restricted claimant from lifting over 20-25 pounds and climbing "unprotected" heights, stated claimant needed to alternate sitting and standing, and that claimant should avoid stooping, bending, carrying, and squatting. Cl. Ex. A at 14.

1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied*, 125 S.Ct. 36 (2004); *Riley*, 262 F.3d 227, 35 BRBS 87(CRT); Decision and Order Awarding Benefits at 19-20, 23; Cl. Ex. A at 14. The administrative law judge also rationally awarded claimant ongoing partial disability benefits for a loss in wage-earning capacity commencing February 1, 2004, based upon claimant's obtaining a suitable job on that date with a pawn shop. *Kalama Services, Inc.*, 354 F.3d 1085, 37 BRBS 122(CRT); Decision and Order Awarding Benefits at 20, 23-24; Tr. at 33-34. Contrary to employer's contention, the administrative law judge need not have credited Dr. Davis's opinion that claimant could return to his usual work because he was claimant's choice of physician, nor was he required to discredit the opinions of Drs. Ziomek and Johnston because they were based in part on claimant's subjective symptoms. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Emp. Exs. 7, 8; Cl. Exs. A, B. As the administrative law judge's award of disability benefits is supported by substantial evidence, it is affirmed.

Employer also argues that the administrative law judge erred in awarding claimant temporary disability benefits based on his mistaken belief that the parties stipulated that maximum medical improvement had not yet been reached. The administrative law judge set forth on page 2 of his decision the parties' stipulations, including one they did not make, "Maximum medical improvement has not yet been reached." Decision and Order Awarding Benefits at 2; *see* Jt. Ex. 1.

The administrative law judge erred in stating that the parties stipulated that maximum medical improvement had not been reached as the stipulations provided to the administrative law judge stated the nature and extent of claimant's disability were contested issues. Jt. Ex. 1. Consequently, we remand this case to the administrative law judge to determine whether claimant's disability is temporary or permanent. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

Employer further argues that the administrative law judge improperly imposed a Section 14(e) assessment against it. Once employer has knowledge of claimant's injury or a dispute exists between the parties as to the amount of compensation due, employer has 28 days to pay the amount claimed or 14 days to file a notice of controversion in order to avoid incurring a 10 percent assessment on the amount due, pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). 33 U.S.C. §914(d); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Employer filed its notice of controversion on October 16, 2003, after learning of claimant's injury on September 22, 2003. Emp. Ex. 1. In imposing

the Section 14(e) assessment against employer, the administrative law judge stated,

> Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer filed a notice of controversion on October 16, 2003, clearly more than 14 days after the injury. Therefore, as Employer did not controvert within 14 days of learning of injury, §14(e) penalties are assessed against Employer.

Decision and Order Awarding Benefits at 23; *see also id.* at 24; Decision on Motion for Reconsideration at 2.

We reverse the administrative law judge's imposition of a Section 14(e) assessment against employer on the facts of this case. As employer correctly points out, there arguably was no dispute in this case until October 16, 2003, when Dr. Ziomek first restricted claimant from working. More significantly, however, the administrative law judge did not award claimant disability benefits prior to that date. *See generally Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987)(employer must pay a Section 14(e) assessment only on compensation due prior to its timely filing of a notice of controversion); 33 U.S.C. §914(e); Emp. Exs. 1; 8 at 13; Cl. Ex. B at 9. A Section 14(e) assessment cannot be imposed for a period when no benefits are due. *See Cox*, 19 BRBS 195. Because no benefits were awarded prior to October 16, 2003, and employer filed a notice of controversion on that date, the administrative law judge erroneously imposed against employer an assessment pursuant to Section 14(e).

Employer lastly argues that the administrative law judge erroneously ordered employer to pay or reimburse claimant for "all" reasonable and necessary medical expenses, resulting from his work injury, despite his finding that employer is not responsible for the past treatment provided by Drs. Ziomek and Johnston. Claimant presented for reimbursement bills from Drs. Ziomek and Johnston. The administrative law judge found that employer is not liable for the past treatment provided by Drs. Ziomek and Johnston since claimant did not request authorization to seek treatment from either Drs. Ziomek or Johnston and did not receive a referral from either Drs. Davis or Ziomek to seek treatment with Dr. Johnston, a specialist Board-certified in orthopedic surgery. 33 U.S.C. §907(d). Moreover, the administrative law judge found that that Dr. Davis did not refuse to treat claimant. Decision and Order Awarding Benefits at 21-22. Consequently, the administrative law judge denied claimant's request for reimbursement for the bills of Drs. Ziomek and Johnston. Because the administrative law judge's "order" that employer pay all reasonable and necessary work-related medical bills is not consistent with his specific findings, we modify the administrative law judge's order to reflect that employer is not liable for the past treatment provided by Drs. Ziomek and Johnston.

Accordingly, the case is remanded to the administrative law judge for a determination as to whether claimant's disability is temporary or permanent. The administrative law judge's imposition of a Section 14(e) assessment against employer is reversed. The administrative law judge's order regarding medical benefits is modified to reflect that employer is not responsible for the medical benefits relating to past treatment by Drs. Ziomek and Johnston. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge