

BRB Nos. 98-0841
and 98-0841A

DALE J. ESTAY)
)
 Claimant-Respondent)
 Cross-Petitioner)
)
 v.)
)
 TERMINAL SERVICES,) DATE ISSUED:
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner)
 Cross-Respondent) DECISION and ORDER

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

Douglass V. Freret II (Galloway, Johnson, Tompkins & Burr), New Orleans, Louisiana, and Gordon L. Hackman, Boute, Louisiana, for claimant.

Edward J. Koehl, Jr., and Scott A. Decker (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and Decision and Order Denying Motion for Reconsideration (96-LHC-1966) of Administrative Law Judge Lee J. Romero, Jr., 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, employed to repair and replace fender systems at a dock structure along the Mississippi River, allegedly sustained injuries to his lower back, neck and legs on October 26, 1993, as a result of falling from the side of the dock onto the barge, TIMBERWOLF, from which he and his co-workers had been doing the majority of their work. Following his fall, claimant continued to work by operating a crane on the TIMBERWOLF, a job in which he could remain seated. After missing one day due to soreness from the accident, claimant returned to work, primarily operating the crane rather than handling timbers because of his alleged injuries. Claimant's employment was terminated by employer on December 3, 1993, for absenteeism and for disagreements with his foreman. Claimant thereafter worked briefly in his own tree trimming business, before obtaining a job with Johnson Brothers, in January and February of 1994, dismantling gondolas from the former World's Fair site. In March 1994, claimant began working for St. Charles Parish Public Works as a laborer, a position he held until August 7, 1995, when he injured his back throwing a sand bag. Claimant has not worked since that time, and sought temporary total or permanent total disability benefits.

In his decision, the administrative law judge first determined claimant's claim is covered under the Longshore Act as the TIMBERWOLF is not a vessel in navigation. The administrative law judge then determined that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer could not establish rebuttal thereof. The administrative law judge therefore concluded that claimant's back condition is work-related, and accordingly, found claimant entitled to temporary total disability benefits from August 7, 1995, based on an average weekly wage of \$64.57, calculated pursuant to Section 10(c), 33 U.S.C. §910(c). In addition, the administrative law judge determined that claimant is entitled to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Claimant thereafter filed a motion for reconsideration which was denied by the administrative law judge.

On appeal, employer challenges the administrative law judge's findings that the instant case is covered by the Act, that claimant's injury is work-related, and that the issue of suitable alternate employment is not ripe for consideration. On cross-appeal, claimant challenges the administrative law judge's calculation of his average weekly wage under Section 10(c), as well as his findings that claimant was not totally disabled until August 7, 1995, and that claimant is not entitled to a Section 14(e), 33 U.S.C. §914(e), penalty and/or costs under Section 26, 33 U.S.C. §926.

COVERAGE

Employer first contends that claimant's employment-related connection to the TIMBERWOLF satisfies two basic elements of Jones Act seaman status and as such the administrative law judge has erroneously determined that claimant is covered under the Longshore Act. Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), excludes from longshore coverage "a master or member of a crew of any vessel." The United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "master or member of a crew of any vessel" under the Longshore Act.¹ *Chandris*,

¹A "seaman" under the Jones Act is defined as a "member of a crew" of a vessel as stated in the Act. See *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT) (1991). In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the United States Supreme Court identified certain elements for seaman status. They are: 1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, and 2) the employee must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. *Latsis*, 515 U.S. at 370; see also *Wilander*, 498 U.S. at 337, 26 BRBS at 75 (CRT). In its opinion in *Latsis*, the Court stressed that "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Latsis*, 515 U.S. at 370. The Court further declared that "[t]he ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." *Latsis*, 515 U.S. at 370.

Inc. v. Latsis, 515 U.S. 347 (1995); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT) (1991). The issue of whether a worker is a seaman/member of a crew is primarily a question of fact, and the Board will defer to the administrative law judge's determination of crew member status if it has a reasonable basis. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

In the instant case, the administrative law judge's finding that the TIMBERWOLF is not a "vessel in navigation" and thus, that claimant is, as a land-based worker, covered by the Longshore Act, is supported by substantial evidence and in accordance with law. The administrative law judge determined that, although the TIMBERWOLF was vessel-like in the sense that it was able to float and was not permanently fixed to the shore or bottom, it was neither designed nor equipped for navigation, it had no means of propelling itself, and it served principally as a work platform for claimant and his co-workers. These findings establish that claimant lacked a connection to a "vessel in navigation," as is required for status as a seaman. See *Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995)(holding that floating platform constructed and used primarily as a work platform is not a vessel in navigation as any transportation function performed was merely incidental to its primary purpose);² *Ducrepont v. Baton Rouge Marine Enters., Inc.*, 877 F.2d 393 (5th Cir. 1989) (concluding that a barge moored to shore and used as a stationary work platform was not a vessel in navigation); *Bernard v. Binnings Construction Co.*, 741 F.2d 824 (5th Cir. 1984)(holding that a small work platform without independent means of propulsion was not a vessel in navigation); see also *Delange v. Dutra Construction Co., Inc.*, 153 F.3d 1055, 32 BRBS 157 (CRT)(9th Cir. 1998)(holding that barge used as a construction platform is not a vessel in navigation). Therefore, the administrative law judge's finding that claimant is not a member of a crew is affirmed.

CAUSATION

Employer next argues that the record does not support the administrative law judge's determination that claimant sustained an injury, let alone a disabling injury,

²In *Burchett*, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant case arises, identified three factors which are usually present when floating platforms are not vessels: (1) the structures involved were constructed and used primarily as a work platforms; (2) they were moored or otherwise secured at the time of the accident; and (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose. *Burchett*, 48 F.3d at 176.

as a result of his October 26, 1993, work-related accident. Employer maintains that several facts support the conclusion that claimant did not sustain a work-related injury: that claimant did not want to fill out an accident report form; that he refused to see a doctor; that he returned to work immediately following the accident; that he missed only one day of work because his back was sore, and that he did not see a doctor until eight weeks after the accident. In addition, employer asserts that claimant's false statements and actions subsequent to the date of his alleged injury similarly do not support the administrative law judge's finding that claimant sustained a work-related injury on October 26, 1993.³

³Employer's contentions in this regard are based on claimant's work activities following his dismissal from employer, the fact that he denied sustaining any back injuries, and his passing of pre-employment physicals.

Claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have potentially caused the harm, in order to establish his *prima facie* case. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). A claimant's subjective complaints of pain alone may be sufficient to establish the harm element of the *prima facie* case. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In the instant case, the administrative law judge determined that claimant established that he suffers from back and neck problems which could have been caused or aggravated by the October 26, 1993, work accident. In rendering this finding, the administrative law judge relied upon claimant's credible complaints of pain, coupled with the fact that two witnesses were present who actually saw claimant fall from the dock to the barge. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). As employer notes, the record contains a number of potential inconsistencies tending to challenge the veracity of claimant's statements regarding his injuries. However, the administrative law judge fully considered and rejected these flaws in finding that claimant's testimony was credible.⁴ See generally *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994); Decision and Order at 19-20. Consequently, we affirm the administrative law judge's finding that claimant has established his *prima facie* case for application of the Section 20(a) presumption. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT)(5th Cir. 1986); *Quinones v. H. B. Zachery, Inc.*, 32 BRBS 6 (1998).

Once claimant has established his *prima facie* case, a presumption is created which can be rebutted by employer through substantial evidence establishing the absence of a connection between the injury and the employment. See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). Employer can rebut the presumption in a case involving a subsequent injury by showing that claimant's disabling condition was caused by a subsequent non work-related event, provided employer also proves that the subsequent event was not caused by claimant's work-related injury. See generally *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT) (5th Cir. 1997); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, employer is relieved of liability for that portion of the disability attributable to the second injury. *Plappert v. Marine*

⁴For instance, the administrative law judge explicitly found that claimant's failure to mention his injuries from the October 26, 1993, accident in subsequent employment forms was sufficiently explained by his motivation for securing employment in order to support his family. Decision and Order at 20.

Corps Exchange, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

In addressing the issue of rebuttal, the administrative law judge specifically considered and rejected employer's contention that claimant's accident on August 7, 1995, served as a superseding intervening cause of claimant's current physical condition. In particular, the administrative law judge found that the testimony of claimant's treating physician, Dr. Adatto, supports a conclusion that the injury resulting from claimant's accident on August 7, 1995, was a natural progression of the work injury previously sustained on October 26, 1993, and noted that the record contains no medical evidence to the contrary. In fact, Dr. Hoffman testified that claimant's fall on October 26, 1993, could have contributed to his lower back problems, while Drs. Murphy⁵ and Jayakrishnan did not address the issue of causation. Moreover, the administrative law judge found that claimant did not engage in any intentional or negligent conduct contrary to his physician's restrictions with regard to the accident on August 7, 1995, and thus, claimant showed a degree of due care in regard to his work injury and was taking reasonable precautions to guard against re-injury. *See generally Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998)(Smith, J., concurring & dissenting); *Grumbley v. Eastern Associated Terminals Co.*, 8 BRBS 650 (1979). We therefore affirm the administrative law judge's findings that employer has not established rebuttal and thus, that the injuries sustained by claimant as a result of the October 26, 1993, work-related accident contributed to his present physical condition. *See Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992) (subsequent exacerbation of injury in heavy work for other employers did not overpower and nullify causal relationship with initial injury); *Quinones*, 32 BRBS at 6; *Plappert*, 31 BRBS at 110; *Konno v. Young Bros., Ltd*, 28 BRBS 57 (1994).

EXTENT OF DISABILITY

Employer lastly argues that claimant is capable of obtaining and performing suitable alternate employment as described by the January 21, 1997, vocational rehabilitation report, and thus is not entitled to total disability benefits. In his decision, the administrative law judge determined that claimant was able to perform his usual employment following the work-related accident of October 26, 1993, and

⁵Dr. Murphy performed an independent evaluation of claimant on May 23, 1996, at the request of the Department of Labor. He found degenerative changes in claimant's spine without any major herniation and recommended continued conservative treatment with modification of physical activities. As noted above, he did not render any findings regarding causation.

that claimant was capable of performing similar work until his August 7, 1995, accident and resulting injury which constituted a natural progression of the original work-related injury. The administrative law judge therefore determined that claimant was totally disabled as of August 7, 1995, stating that Dr. Adatto's opinion precluded claimant's continued employment. Decision and Order at 24. The administrative law judge thus concluded that any discussion concerning suitable alternate employment would be premature given his determination that claimant had not as yet reached maximum medical improvement with regard to his work-related injuries since he desired to undergo the surgery recommended by Dr. Adatto.

We vacate the administrative law judge's award of temporary total disability benefits from August 7, 1995. It is not clear from the record that Dr. Adatto's opinion supports the administrative law judge's finding that claimant was unable to return any employment, since Dr. Adatto states that claimant could, if he wanted to, and in fact had, albeit for a short period of time, returned to light work subsequent to August 7, 1995. HT at 37-39. Moreover, the administrative law judge did not address Dr. Adatto's testimony regarding claimant's physical limitations at the time of the hearing, which appear to be the same as those previously imposed in July 1994, when claimant was still working. HT at 29, 43. Although this evidence may support a finding that claimant cannot return to his usual employment, it does not necessarily support a finding that claimant's injuries preclude him from all employment. See generally *Lostanau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Consequently, the administrative law judge's determination that claimant is entitled to temporary total disability benefits is vacated, and the case is remanded for the administrative law judge to clarify his finding in light of the relevant evidence of record. If, on remand, the administrative law judge determines that claimant is not precluded from all employment, he must then consider whether employer's labor market survey is sufficient to meet its burden of showing the availability of suitable alternate employment. See *SGS Control Services*, 86 F.3d 438, 443-444, 30 BRBS 57, 61-62 (5th Cir. 1996); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); see also *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); see generally *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). A claimant is not totally disabled merely because his condition is still temporary. See 33 U.S.C. §908(e); see generally *Hoodge v. Empire/United Stevedores*, 23 BRBS 341 (1990).

In his cross-appeal, claimant argues that the administrative law judge erred in

determining that he was not totally disabled until August 7, 1995, as the evidence of record establishes that claimant continued to work following his October 26, 1993, accident only through extraordinary effort and in extreme pain. Claimant also maintains that the date of his total disability should be determined at the latest as of the date that Dr. Adatto noted that he was having trouble managing his normal daily activities because of pain, April 7, 1994. While claimant testified that he was in pain while performing his post-injury employment, he never stated that it rose to the level of excruciating pain and thus, that he continued to work only through extraordinary effort. The Board has held that a mere showing of the existence of pain may be sufficient to support an award for partial disability, but it is not sufficient to support an award for total disability where claimant continues to or can work. See generally *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986); *Adam v. Nicholson Terminal & Dry Dock Corp.*, 14 BRBS 735 (1981); cf. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988). The administrative law judge found that claimant was fully capable of working full-time within certain limitations without extraordinary effort as evidenced by the fact that post-injury for over 16 months he regularly worked four ten-hour days per week. Thus, claimant's contention that he is entitled to total disability benefits prior to August 7, 1995, is rejected.

AVERAGE WEEKLY WAGE

Claimant next argues that the administrative law judge erred in applying Section 10(c) rather than Section 10(b), 33 U.S.C. §910(b), in calculating his average weekly wage, as the facts in the instant case make application of the latter provision more appropriate. Claimant alternatively argues that if Section 10(c) is applicable to the instant case, the administrative law judge erred in determining claimant's average weekly wage because the Social Security earnings statements used by the administrative law judge are an inaccurate portrayal of his earning capacity and because the administrative law judge failed to consider the actual wages earned by claimant until August 7, 1995, the date from which claimant could no longer work.

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. The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. See *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26

(CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

While the administrative law judge incorrectly noted in his decision that Section 10(b) is not applicable because claimant had not worked “substantially all of the year,” the administrative law judge nevertheless determined, on reconsideration, that the inapplicability of Section 10(b) is premised on the fact that the record is devoid of evidence of reliable earnings of any of claimant’s co-workers. Specifically, the administrative law judge determined that while the record contains testimony that claimant’s co-worker, Mr. Hebert, earned \$9.50 per hour, there is no evidence of Mr. Hebert’s total earnings for any period before claimant’s injury or of the number of hours or days worked during that period. Consequently, the administrative law judge properly determined that Section 10(b) is inapplicable. See 33 U.S.C. §910(b); see generally *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

With regard to Section 10(c), the administrative law judge examined claimant’s earnings history as reflected by his Social Security earnings statement, noting that said evidence reveals that claimant’s earnings have been sporadic and intermittent. The administrative law judge additionally noted that while claimant testified that he operated a “sideline” tree service for 15-16 years to subsidize his income, he was paid cash for his services which was never reported on his income tax returns and for which there was no evidence offered into the record. Moreover, the administrative law judge determined that claimant’s wages at the time of injury did not adequately reflect his earning capacity. The administrative law judge based this conclusion on the temporary and unpredictable nature of claimant’s employment, as evidenced by the fact that he had worked only ten weeks for employer prior to his termination. The administrative law judge therefore took claimant’s total reported earnings from 1985 through 1993 (\$30,220.33), and divided that figure first by 9, and then by 52 weeks to arrive at an average weekly wage of \$64.57. See generally *New Thoughts Finishing Co. v. Chilton*, 118 F.2d 1028, 31 BRBS 51 (CRT); *Gatlin*, 936 F.2d at 819, 25 BRBS at 26 (CRT). The administrative law judge’s determination regarding claimant’s average weekly wage is affirmed as it is supported by substantial evidence.⁶ See generally *Hall v.*

⁶Inasmuch as the goal of Section 10(c) is to arrive at a sum that reasonably represents a claimant’s annual earning capacity *at the time of his injury* consideration of post-injury events are not generally relevant to average weekly wage determinations. See *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff’d sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994). Therefore, we reject

Consolidated Employment Systems, Inc., 139 F.3d 1025, 32 BRBS 90 (5th Cir. 1998)(holding that although the administrative law judge's decision to exclude claimant's earnings at the time of injury in calculating claimant's average weekly wage pursuant to Section 10(c) comes dangerously close to reversible error, the administrative law judge's finding is affirmed as it is supported by the substantial evidence standard).⁷

SECTION 14(e) and SECTION 26

Claimant's last assertions that the administrative law judge erred in failing to award penalties under Section 14(e) and costs under Section 26 are without merit and therefore rejected. First, as the administrative law judge determined, claimant is not entitled to a Section 14(e) assessment as employer filed its notice of controversion in this case on June 16, 1995, prior to the time that claimant was found to be entitled to any benefits, *i.e.*, August 7, 1995. *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987). Similarly, we hold that the absence of any discussion regarding claimant's entitlement to Section 26 costs in the administrative law judge's decision is not error as neither an administrative law judge nor the Board has the authority to award such costs. *Boland Marine & Manufacturing Co. v. Rhiner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Henry v. Coordinated Caribbean Transport*, 32 BRBS 29 (1998).

Accordingly, the administrative law judge's award of temporary total disability benefits is vacated, and the case is remanded for further consideration consistent

claimant's contention that his post-injury wages are relevant to the calculation of his average weekly wage. *See also LeBlane v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195 (CRT)(5th Cir. 1997).

⁷Inasmuch as claimant's average weekly wage is less than the minimum compensation rate determined under Section 6(b), 33 U.S.C. §906(b), claimant is entitled to payment of any total disability at a rate equal to his full average weekly wage. 33 U.S.C. §906(b)(2).

with this opinion. In all other regards, the administrative law judge's Decision and Order and Decision and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge