U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0201

STEVE BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED: 6/29/2023
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
PORTS AMERICA (d/b/a WCTS)	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Matthew S. Sweeting and Jeffrey L. Rhodes (Sweeting Rhodes Law, PLLC), Tacoma, Washington, for Claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for Ports America (d/b/a WCTS)/Ports Insurance Company, Inc.

James P. McCurdy (Lindsay Hart, LLP), Portland, Oregon, for Jones Stevedoring Company, Inc.

Before GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Ports America appeals Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Awarding Benefits (2020-LHC-00954; 2020-LHC-00961) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[1]

Claimant has worked as a lasher since 2002. He began experiencing tingling and burning sensations in his hands and arms in 2017. Although he experienced these symptoms, he continued to work. Dr. Edward Tay administered an electromyography test (EMG) on November 1, 2019, and diagnosed carpal tunnel syndrome. TR at 44. That same day Claimant was then seen by Dr. Soma Mandal, his primary care physician, who stated he was a candidate for surgery.[2] TR at 44. On January 11, 2020, Claimant worked at Jones Stevedoring where he de-lashed cars on a vessel and drove cars. At one point, he lost feeling in his left hand and got it jammed beneath a car's tire. TR at 25-26. He managed to complete his shift, sought an examination with Dr. Gregory Gutke, and made an appointment for January 14, 2020. EX 9 at 99; TR at 27, 46. On January 13, 2020, Claimant took a job with Ports America as a yard supervisor which required him to drive a truck and use a computer keyboard all day. He testified the work bothered his wrists, and his symptoms were worse on January 14 than they had been on January 11. TR at 27, 32-33, 77. Claimant filed a claim for compensation against each employer on January 15, 2020. CX 3; Jones EX 1. In light of his increased pain, Claimant opted for surgery sooner than intended. He underwent right carpal tunnel release surgery on February 14, 2020, and left carpal tunnel release surgery on March 3, 2020. TR at 34-35; EX 9 at 110-113; EX 16 at 488.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant's injury occurred in Washington state. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

[2] Claimant stated he intended to wait until April or May 2020 for the surgery, hoping to work more and save money for the recovery time when he would be unable to work. TR at 24-25, 45.

The ALJ found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), and found neither employer rebutted it. D&O at 11-13. Next, the ALJ found Ports America is the last responsible employer and ordered it to pay Claimant temporary total disability benefits from January 16, 2020, until December 11, 2020, and permanent partial disability benefits under the schedule beginning December 12, 2020, based on an average weekly wage (AWW) of $2,730.27. Ports America filed a motion for reconsideration on December 21, 2021, which the ALJ denied on January 13, 2022. *Id.* at 15-16.

Ports America appeals the ALJ's decision. It contends he made four errors: 1) finding Claimant successfully invoked the Section 20(a) presumption against it; 2) finding it did not rebut the Section 20(a) presumption; 3) finding Ports America is the last responsible employer; and 4) not accounting for Claimant's diminished wage-earning capacity in the AWW calculation. Jones Stevedoring filed a response to Ports America's petition for review, urging affirmance. Jones Stevedoring argues the ALJ correctly found Ports America was the last responsible employer because Claimant experienced an aggravation of his symptoms and, according to the aggravation rule, even a small increase in symptoms triggers full recovery from the last employer. Jones Stevedoring Response Brief (Jones Stevedoring Resp.) at 8. However, it agrees with Ports America's AWW argument. Claimant responded to Ports America and to Jones Stevedoring, urging affirmance of the ALJ's decision while acknowledging he has no interest in the responsible employer issue. Ports America filed briefs replying to both Claimant and Jones Stevedoring.

To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must produce some evidence that: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (Dec. 29, 2022) (Decision on Recon.), *appeal pending*; *see, e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010)*; Brown v. I.T.T/Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). The claimant bears an initial burden of production to invoke the Section 20(a) presumption.[3] *Rose*, 56 BRBS at 31. Credibility plays no role in addressing whether a claimant has established a prima facie case. *Rose*, 56 BRBS at 37. In this regard, the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence." *Id.* at 37. Instead, the claimant need only "present some evidence or allegation that if true would

[3] "The burden of production or 'some evidence' standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory framework." *Rose*, 56 BRBS at 38.

state a claim under the Act."[4] *Id.* Consequently, if the claimant produces some evidence to support his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

No party disputes that Claimant has carpal tunnel syndrome. The ALJ found Claimant invoked the Section 20(a) presumption against both employers with Dr. Jonathan L. Ritson's and Dr. H. Richard Johnson's opinions. Dr. Ritson opined Claimant had "[b]ilateral moderate carpal tunnel syndrome" and "[t]his is causally related, on a more-probable-than-not basis, to the repetitive work of Mr. Brown's career as a longshoreman with repetitive use of his arms and hands." EX 16 at 568. Dr. Johnson opined "[t]he original cause of Mr. Brown's bilateral carpal tunnel syndrome was the repetitive use of his hands required in the performance of many of the duties that a longshoreman performs on a daily basis." EX 5 at 18. As Claimant undisputedly performed repetitive work for Jones Stevedoring (longshoring) on January 11, 2020, and for Ports America (keyboarding) on January 13, 2020, Claimant has shown both a harm and working conditions that could have caused the harm. As Claimant's burden at the invocation stage is a light one, and he produced two opinions connecting his carpal tunnel syndrome to his work as a longshoreman, we affirm the ALJ's finding that Claimant invoked the presumption against both Employers. *Rose*, 56 BRBS at 37.

Where, as here, the Section 20(a) presumption was invoked to link the claimant's harms with his employment, the burden shifts to the employer to rebut the presumption by producing substantial evidence that the injury was not caused or aggravated by the claimant's working conditions. *Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *see also Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In order to rebut the Section 20(a) presumption, an employer must present substantial evidence that the claimant's injury did not arise out of and in the course of his employment. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *E.g., Rainey*, 517 F.3d 632, 42 BRBS 11 (CRT) (quoting *Richardson v. Perales,* 402 U.S. 389, 401 (1971)). An equivocal opinion as to etiology is insufficient to support rebuttal. *Parsons Corp. of California v. Director, OWCP,* 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980) (rebuttal requires evidence "specific and comprehensive enough to sever the potential connection between the disability and the work environment;" the standard is not met where an expert could not say exposure did not trigger or accelerate the disease); *Phillips v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 94 (1988).

[4] "Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation." *Rose*, 56 BRBS at 38.

Ports America asserts Dr. Christopher Olch's opinion is sufficient to rebut the Section 20(a) presumption. Dr. Olch examined Claimant on May 19, 2021; he also reviewed records and took a history. Following his examination and analysis, Dr. Olch reported Claimant's condition pre-existed his work on January 11 and 13, 2020, and the work on those dates did not aggravate, accelerate, exacerbate, or worsen Claimant's carpal tunnel condition "on a more-probable-than-not basis." Ports EX 16 at 26-30. He also reported Claimant's permanent impairment from the residual of his condition "is not attributable to an aggravation of a prior injury." *Id.*

The ALJ found Dr. Olch's medical opinion is not sufficient to rebut the Section 20(a) presumption because in his testimony Dr. Olch stated the cause of Claimant's carpal tunnel syndrome is "multi-factoral" and includes occupational and non-occupational factors. He indicated Claimant's weight, body mass, and family history of amyloidosis, as well as his repetitive occupational longshoring work, are all contributing factors. Further, he stated that as of November 2019, prior to his alleged injuries with Jones Stevedoring and Ports America, Claimant's carpal tunnel syndrome "was irreversible" and "required surgery" but "was going to naturally progress and worsen." TR at 102-105. Dr. Olch opined Claimant's work on January 11 and January 13 would have caused symptoms but would not have caused pathologic or physiologic worsening. TR at 105-106, 118-120. Moreover, he indicated electrodiagnostic studies before and after each work date would have shown whether there was a pathological effect, but no study was conducted until after Claimant's surgeries. TR at 116-117. Therefore, the ALJ concluded Dr. Olch stated there was no worsening of Claimant's carpal tunnel syndrome in January 2020 because his February and March surgeries made it impossible to tell if there was worsening at that time. D&O at 12-13. Additionally, the ALJ found Dr. Olch testified Claimant's carpal tunnel syndrome was "irreversible" in November 2019 and would naturally continue to worsen, but:

> Dr. Olch and Respondents seem to believe this forecloses the possibility that nothing [Claimant] did after November 1, 2019, could affect the worsening in any way – as if the deterioration of [Claimant's] carpal tunnel syndrome was predestined to proceed on a fixed schedule, no matter what the circumstances. He was happy to allow Respondents, and by extension, me, to infer it – but, based on his testimony, it is nevertheless merely an inference from what he actually said. And it is an inference I am not willing to draw. However, irreversible [Claimant's] carpal tunnel syndrome was on November 1, 2019, it was not yet, according to Dr. Olch, as bad as it would ever get.

Id. at 13. For these reasons, the ALJ found Dr. Olch's opinion "is unpersuasive" and does not rebut the Section 20(a) presumption. *Id.* at 12-13.

The ALJ erred in weighing Dr. Olch's opinion at the rebuttal stage. "[A]n employer's burden at rebuttal [is] one of production." *Rose*, 56 BRBS at 32. An employer must produce substantial evidence that throws factual doubt onto the claimant's prima facia case, and here Dr. Olch's opinion does that. Specifically, in his report, Dr. Olch stated: "[Claimant's] symptoms are not related to his work for Jones Stevedoring on January 11, 2020 on a more-probable-than-not basis;" "[Claimant's] work for Ports America on January 13, 2020 did not aggravate, exacerbate, accelerate, or worsen his condition on a more-probable-than-not-basis;" and "[Claimant] has a permanent impairment from residual of his carpal tunnel syndrome. This is not attributable to or caused by alleged injury, and the impairment is not attributable to an aggravation of a prior injury." Ports EX 16 at 26-30; Jones EX 42 at 26-30. Dr. Olch's opinion in his written report is unequivocal,[5] and therefore the ALJ erred in finding Ports America did not rebut the Section 20(a) presumption.[6] *O'Kelley,* 34 BRBS 39, 41. Consequently, the presumption drops from the

[5] In Dr. Olch's medical report, he states Claimant's injury is not related to the specific days of his work at issue in this case. Because the burden on rebuttal is a burden of production, Dr. Olch's medical report constitutes substantial evidence a reasonable person could find casts doubt on the causal connection between Claimant's injury and his employment and satisfies that burden. Although Dr. Olch's subsequent testimony may be contrary to the opinion he expressed in his report, weighing the credibility of Dr. Olch's medical report against his subsequent hearing testimony is a determination for the ALJ (not the BRB) to make and should therefore come at the third stage of the causation analysis. For these reasons, we disagree with our dissenting colleague's belief that Dr. Olch conceded Claimant's injury is related to those days of work and that his testimony renders his prior medical report insufficient to rebut the presumption.

[6] Although Dr. Olch attributed Claimant's condition to his overall longshore work, he did raise doubt with respect to the injurious working conditions Claimant alleged he experienced on January 11 and January 13, 2020, that are at issue in this case. An employer's burden on rebuttal requires it to cast doubt on the relationship between the claimant's harm and any injurious work exposure or working conditions for which it may be responsible. It need not cast doubt on all of the claimant's work. *See Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010) (in a multi-employer case, each employer may rebut the presumption with substantial evidence that it is not the last responsible employer; once an employer rebuts the presumption, it may only be held liable if the claimant shows it is responsible by a preponderance of the evidence); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980) (rebuttal requires evidence "specific and comprehensive enough to sever the potential connection between the disability and the work environment"); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000) (the employer meets its burden with evidence demonstrating the absence of a causal relationship and need not prove another agency of causation to rebut the presumption); *see generally U.S. Industries/Federal Sheet Metal,*

case, and the ALJ must weigh the record as a whole to assess whether Claimant's injury is work-related. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Price v. Stevedoring Services of Am.*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), *and aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

When the ALJ weighs all the evidence and resolves the case based on the record as a whole, the claimant bears the burden of persuasion by a preponderance of the evidence. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). The factfinder is entitled to weigh the medical evidence and draw his own inferences from it; he is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the ALJ's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

Here, the ALJ did not weigh the evidence as a whole but engaged in a conflated analysis as to why he found, albeit erroneously, that Dr. Olch's opinion was not sufficient to rebut the presumption. D&O at 12. Weighing the evidence as a whole requires the ALJ to weigh the claimant's evidence against the employer's evidence. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (ALJ credited the claimant's evidence over the employer's evidence); *Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999) (ALJ discredited the claimant's physician, who provided the only evidence on causation); *Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019) (Board remanded the case because the ALJ did not address all relevant causation evidence). Although he gave Dr. Olch's opinion little weight, the ALJ did not find it rebutted the presumption and then take the next step and weigh it against Claimant's evidence or otherwise render findings as to whether Claimant's evidence is credible. *See Santoro*, 30 BRBS 171.

Although the United States Court of Appeals for the Ninth Circuit has adopted the "harmless error" doctrine with respect to the application of Section 20(a), *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT), it applies when the ALJ has actually weighed the record as a whole before the third stage and substantial evidence supports the ALJ's conclusion. *Id.*; *Price*, 36 BRBS at 61. In this case, it is clear the ALJ did not weigh the record as a whole. He found Dr. Olch's opinion is not credible and is insufficient to rebut the presumption,

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Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982) (an employer need not rebut every conceivable theory of recovery).

and therefore awarded Claimant benefits without placing the burden of persuasion on Claimant. Consequently, we cannot dismiss the ALJ's error as harmless.

Therefore, we vacate the award of benefits and remand the case to the ALJ for a proper weighing of the record evidence as a whole, placing the burden of persuasion on Claimant. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Santoro*, 30 BRBS 171.

We next address Ports America's remaining contentions in the interest of judicial efficiency, in the event the ALJ finds on remand that Claimant's injury is work-related.

To establish which employer is the last responsible employer in a traumatic injury case,[7] the ALJ must weigh the relevant evidence and determine whether the disability is the result of the natural progression of the initial injury or an aggravation due to a subsequent injury. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004);[8] *Found. Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Buchanan v. Int'l Transp. Services*, 33 BRBS 32, 35 (1999), *aff'd sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 F. App'x 547 (9th Cir. 2001).

While the ALJ accepted Dr. Olch's opinion that Claimant's carpal tunnel syndrome was irreversible in November 2019 and would naturally progress and worsen, the ALJ declined to infer that nothing thereafter could aggravate it. D&O at 13.[9] Instead, he credited Claimant's testimony regarding his carpal tunnel symptoms when he described them as worse on January 14, 2020, than they had been before January 11, 2020. TR 33;

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[7] The ALJ reasonably found Claimant's carpal tunnel syndrome is a traumatic injury and not an occupational disease. *Gencarelle v. Gen. Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Specifically, in discussing whether Section 8(f), 33 U.S.C. §908(f), applies, the ALJ concluded Claimant's carpal tunnel syndrome is a "cumulative-trauma injury." D&O at 15.

[8] In *Price*, the court affirmed the Board's affirmance of the ALJ's finding that Metropolitan Stevedore was the responsible employer, despite the fact that the claimant worked for it only one day before he had surgery on his knee. The court stated the record supported the ALJ's finding that the claimant's activities on that day made his condition worse. It also explained the last responsible employer rule distributes the risk of liability amongst employers and sometimes they will be liable in cases where they are not primarily responsible for the worker's injury.

[9] "However irreversible Mr. Brown's carpal tunnel syndrome was on November 1, 2019, it was not yet, according to Dr. Olch, as bad as it would ever get." D&O at 13.

D&O at 3. As Dr. Olch conceded Claimant had symptoms from his work on January 13, 2020, and an aggravation or progression of an underlying condition is not necessary for there to be a compensable injury; an increase in symptoms resulting in disability is sufficient, *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). Disability is an economic concept, *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89, 95(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), and as Claimant was not able to work again after January 13, the ALJ's conclusion that Ports America is the last responsible employer is reasonable and supported by substantial evidence. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

Next, Ports America contends the ALJ erred in determining Claimant's AWW. Specifically, it argues Claimant was not fit for longshore work following his 2019 diagnosis and prior to his alleged January 2020 injury, so his AWW should not be based on his actual earnings but should be based on something more reflective of his true wage-earning capacity. Jones Stevedoring supports Ports America's argument. Therefore, they assert Claimant's AWW should have been calculated using Section 10(c) instead of Section 10(a). 33 U.S.C. §910(a), (c).

On its pre-hearing statement form, Jones Stevedoring summarily stated that Claimant's AWW as of January 2020 was $2,720.27 under Section 10(a). Jones Stevedoring Pre-Hearing Stmt. at 2. In its closing brief, however, Jones Stevedoring joined Ports America in arguing Claimant's AWW should be calculated using Section 10(c), asserting his wage-earning capacity should be determined as of January 13, 2020, instead of using the preceding year of his actual earnings because Claimant testified his carpal tunnel syndrome prevented him from performing his job at full capacity.[10] Contrary to its pre-hearing statement, Jones Stevedoring argued Claimant's AWW should be:

> the minimum wage of the State of Washington at the time of the loss, as the record indicates that Claimant was capable of performing, at most, sedentary work prior to his bilateral carpal tunnel release surgeries. In this case, that amounts to $540.00 per week, and a corresponding compensation rate of $360.00 per week.

Jones Stevedoring Closing Brief at 13-14. On appeal, Ports America specifically asserts "[t]he average weekly wage used to calculate any benefits owed by Ports [America] should reflect only the work [Claimant] remained capable of performing as of January 13, 2020."

[10] Claimant testified about the period between 2019 and 2020 when he stopped working; he stated he felt he could not grasp things well or work in the complete manner he used to be able to work. Nevertheless, he continued to take on his "usual" jobs and earn his usual wages. *See* HT at 38-39.

Ports America Brief at 36. Both employers contend Claimant's acknowledgement of his decreased productivity should reduce his weekly wage.

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) to arrive at an AWW. The computation methods are directed towards establishing the claimant's earning power at the time of injury. 33 U.S.C. §910(a)-(d); *see, e.g., Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Sections 10(a) and 10(b) are the statutory provisions applicable in determining an employee's AWW where the injured employee's work is regular and continuous. The computation of average annual earnings is made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. §910(c); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (9th Cir. 1983).

Section 10(a) of the Act provides:

> Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a). Section 10(a) mandates the use of a claimant's wages if he worked "substantially the whole of the year." 33 U.S.C. §910(a). The Ninth Circuit has adopted a bright line rule that Section 10(a) must be applied where the claimant works 75% of the available workdays in a year. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Stevedoring Services of Am. v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005); *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT).

In this case, the ALJ acknowledged Claimant's recognition of his "increasing difficulty" in performing his job but rejected the contention that Claimant knowingly acted

in an unsafe manner by accepting the jobs he took. In so stating, he found there is no evidence to suggest Claimant should have known not to work on January 11 or 13, 2020, or was negligent in doing so. He explained the Act is a no-fault statute and "found no grounds to disregard [Claimant's] longshore work in calculating his [AWW.]" D&O at 13-14. Therefore, the ALJ adopted Jones Stevedoring's initial $2,720.27 AWW figure computed under Section 10(a) without further discussing how that calculation was made or discussing Jones Stevedoring's changed position on the issue. *Id.* at 14.

Claimant's Exhibit 4 contains his payroll records and establishes he worked consistently throughout 2018 and 2019, and, therefore, "substantially the whole of the year" before his January 2020 injuries. Under the Act and Ninth Circuit law, Section 10(a) must apply. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT); *Price*, 382 F.3d 878, 38 BRBS 51(CRT); *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT). Ports America's and Jones Stevedoring's suggestion to use Washington State's minimum wage at the time of Claimant's injuries has no basis in calculating AWW or awarding benefits under the Longshore Act and would be an arbitrary substitution for Claimant's actual wages. As Ports America has not shown the ALJ erred in awarding benefits based on an AWW calculated under Section 10(a) of the Act and has identified no other error with the calculation, we reject its argument. *Castro*, 401 F.3d 963, 39 BRBS 13(CRT).

Accordingly, we vacate the ALJ's Decision and Order Awarding Benefits and remand the case for the ALJ to weigh the evidence as a whole in accordance with this decision. Should he determine Claimant sustained a work-related injury, he may reinstate his remaining findings.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. Although the ALJ's Section 20(a) rebuttal analysis suggests he errantly held Ports America (Employer) to a burden of persuasion rather than production, remand is not required on that basis. As explained below, Dr. Olch, the only medical expert to offer an opinion on Employer's behalf, conceded that Claimant's carpal tunnel syndrome is related to his work

on the alleged dates of injury at both Jones Stevedoring and Ports America. Therefore, his opinion does not rebut the Section 20(a) presumption, and Claimant established entitlement to benefits as a matter of law.

Under Section 20(a) of the Longshore Act, 33 U.S.C. §920(a), a claimant is entitled to a presumption that his injury is work-related if he "present[s] some evidence or allegation" that: 1) he suffered a harm, and 2) a work accident or working conditions could have caused the harm. *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (Dec. 29, 2022) (Decision on Recon.), *appeal pending*; *see, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Once invoked, as here, an employer can rebut the presumption only by "presenting substantial evidence that is 'specific and comprehensive enough to sever the potential connection between the disability and the work environment.'" *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010), *quoting Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir. 1998).

Thus, "not all evidence is substantial evidence." *Rose*, 56 BRBS at 40 (Buzzard, J., concurring and dissenting); *see, e.g., Ramsay Scarlett & Co. v. Director, OWCP* [*Fabre*], 806 F.3d 327, 331 (5th Cir. 2015) (speculative evidence is not substantial evidence to rebut the presumption).[11] Rather, the ALJ must decide, as a matter of law, "whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651 (9th Cir. 2010), *citing Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55 (1st Cir. 2010) (substantial evidence is that which, objectively speaking, "*could* satisfy a reasonable factfinder" that the "requisite fact exists"). I have little trouble concluding Employer did not meet its burden.

Employer relies on Dr. Olch's opinion. In his written report, dated June 1, 2021, Dr. Olch initially stated that Claimant's carpal tunnel syndrome is related to his history of repetitive longshore work, but is not related to his specific repetitive longshore work for Jones Stevedoring and Ports America on the claimed dates of injury, January 11, 2020 and January 13, 2020. Ports EX 16 at 26-30; Jones EX 42 at 26-30. If that conclusion was the entirety of Dr. Olch's opinion on the matter, I might agree with the majority that Employer

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[11] *See also Bis Salamis, Inc. v. Dir., Off. of Workers' Comp. Programs* [*Meeks*], 819 F.3d 116, 129 (5th Cir. 2016) (conclusory medical opinions are not substantial evidence to invoke the presumption); *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 56 (1st Cir. 2010) (medical opinions that fail to address the cause of the relevant injury are not substantial evidence to rebut the presumption); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 226 (4th Cir. 2009) (evidence that addresses an initial injury but not an alleged aggravation is "no evidence at all" that could rebut the presumption); *Biestek v. Berryhill*, 139 S. Ct. 1148, 1160 (2019) (J. Gorsuch, dissenting) ("clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence").

produced substantial evidence rebutting the presumption. However, Dr. Olch elaborated on his opinion at the September 29, 2021 hearing. He continued to identify Claimant's "occupational factors . . . as a longshoreman, perform[ing] forceful repetitive work with his hands" as "a risk factor" for his carpal tunnel syndrome. TR at 104. And, given Claimant's history of such work, he reiterated his conclusion that Claimant's carpal tunnel syndrome predated his work for Jones Stevedoring and Ports America. *Id*. at 105. Critically, though, when asked whether Claimant's work for those companies on January 11, 2020 and January 13, 2020 worsened his carpal tunnel, Dr. Olch testified that Claimant's condition was symptomatic "all the time during his shift" with Jones Stevedoring and he "had symptoms of carpal tunnel" during his shift with Ports America. *Id*. at 105-106.

Under Board precedent, Dr. Olch's testimony that Claimant's carpal tunnel syndrome became symptomatic as a result of his work for Jones Stevedoring and Ports America is insufficient to rebut the Section 20(a) presumption that his condition is related to his work for those employers. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988) (an increase in symptoms constitutes an aggravation, and thus an injury, under the Act).[12] Thus, notwithstanding Dr. Olch's belief that Claimant's work for those companies did not result in a "pathologic or physiologic worsening" of Claimant's condition, his assessment that Claimant's carpal tunnel became symptomatic on January 11, 2020 and January 13, 2020 supports, rather than casts doubt upon, the work-relatedness of the injury. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 226 (4th Cir. 2009) ("[N]o matter the nature of the evidence, it is not substantial if it cannot respond to the prima facie case in the first place."), *citing Parsons Corp. v. Dir., OWCP*, 619 F.2d 38, 41 (9th Cir. 1980).

The basis for the majority's rebuttal finding is that Dr. Olch's written report disputing causation can be considered in isolation from his testimony admitting it. Decision at 6. Thus, under the majority opinion, Dr. Olch's testimony is irrelevant to the rebuttal analysis and instead must be weighed against his written report at the third step of the Section 20(a) inquiry – when the ALJ is tasked with weighing the evidence of record as a whole, with the burden of persuasion on Claimant. *Id*.

But a piecemeal approach to analyzing whether Employer rebutted the presumption is unsupported by the law or facts. Dr. Olch was called to testify about the opinions set

[12] In *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988), the Board held that uncontroverted evidence of the claimant's chest pain at work, although "a symptom temporary in nature," established a work-related aggravation of his underlying coronary artery disease. The majority does not address *Care*, but at least allows that Dr. Olch's testimony "may be contrary" to the statements he made his written report disputing causation.

forth in his written report. The additional detail provided by his testimony, concerning the same injury as his written report, is simply a clarification of his opinion, not a separate opinion to be considered independent of his written report. *See* 29 C.F.R. §18.50(c)(2)(ii) (testifying expert witness must provide a written report with "all opinions [he] will express," "the basis and reasons for them," and "the facts or data [used] in forming them"); FRCP Rule 26(a)(2)(B), 1993 advisory committee note (purpose of Rule 26(a)(2), analogous to OALJ Rule 18.50(c)(2), is to provide opposing parties "a reasonable opportunity to prepare for effective cross examination"). Thus, the entirety of Dr. Olch's opinion – written report *and* testimony – is relevant when determining whether it constitutes substantial evidence rebutting the Section 20(a) presumption. *See Richardson v. Perales*, 402 U.S. 389, 402-410 (cross-examination can establish that an expert's written report is not "substantial evidence," as it allows "for a full and true disclosure of the facts").

Because Dr. Olch's opinion does not rebut the Section 20(a) presumption, I would affirm the ALJ's finding that Claimant established entitlement to benefits. *See Ogawa*, 608 F.3d at 648 ("harmless error analysis applies to petitions for review brought under the Longshore Act").

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge