

BRB Nos. 04-0874
and 04-0874A

JOSEPH J. MILLER)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
P&O PORTS LOUISIANA, INCORPORATED)	DATE ISSUED: 08/18/2005
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of C. Richard Avery,
Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr. (Law Offices of William S. Vincent, Jr.), New
Orleans, Louisiana, for claimant.

William C. Cruse and Jennifer Cortes (Blue Williams, L.L.P.), Metairie,
Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (2003-LHC-1845) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered multiple fractures to his right foot on September 18, 2000, when it was hit by a four-by-four which had been thrown into the hold in which claimant was

working. As a consequence of this injury, claimant developed Reflex Sympathetic Disorder (RSD) in his injured foot and leg. In order to provide relief from pain, a spinal stimulator was implanted on February 12, 2003; it malfunctioned in May 2003 and was surgically repaired on October 23, 2003. Claimant filed a claim alleging he sustained a psychological condition due to his pain, and that he developed a disabling back condition due to the spinal stimulator surgeries.

In his Decision and Order, the administrative law judge found that claimant's back pain, as well as his psychological condition, are related to his work injury. He also found that employer established the availability of suitable alternate employment. Accordingly, he awarded claimant permanent partial disability compensation for a 15 percent impairment to the foot, 33 U.S.C. §908(c)(4), as well as compensation for temporary total disability from September 18, 2000, to October 8, 2003, and for temporary partial disability thereafter, based upon an average weekly wage of \$552.53.

Employer appeals and claimant cross-appeals this decision. Employer argues that the administrative law judge erred in not limiting claimant to an award under the schedule and in finding his psychological condition to be work-related. Claimant contends that the administrative law judge erred in determining his pre-injury average weekly wage.

Employer first contends that the administrative law judge erred in not limiting claimant to an award under the schedule for the injury to his foot based on his erroneous findings that claimant also suffers from a disabling back condition related to the work injury. Employer contends that although the implant of the spinal stimulator was necessary for the treatment of claimant's foot pain, claimant did not suffer any disability as a result of the spinal stimulator implant. We reject this contention.

Employer is liable for any disability that arises out of the treatment for claimant's work-related injury. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Such an injury necessarily arises out of and in the course of claimant's employment. *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1988). Where claimant suffers from a disabling, non-scheduled, condition that results from a work injury to a scheduled member, claimant is entitled to receive compensation under the schedule as well as for any loss of wage-earning capacity due to the non-scheduled condition. 33 U.S.C. §908(c), (e); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Contrary to employer's contention, it is not necessary that the non-scheduled condition cause *additional* disability beyond that which would be due to the scheduled injury. Rather, the non-scheduled condition standing alone need only cause a loss in wage-earning capacity in order for claimant to be entitled to an award for a loss in wage-earning capacity due to the back condition, in addition to the scheduled award for the first. *Bass*, 28 BRBS at 18; *see also Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67 (1998), *modified in part*, 185

F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988).

Employer conceded that claimant was unable to return to his usual work due to his foot injury, prior to the implantation surgery. The administrative law judge found that the spinal stimulator necessitated restrictions on claimant's activities. Dr. Hubbell restricted claimant from flexing his hips more than 90 degrees, raising his elbows above his shoulders, stooping, bending, twisting, and reaching, due to the implanted device and the surgery to correct the malfunction. EXs 13, 16; CXs 4, 5. The administrative law judge found that these restrictions would prevent claimant's return to his usual work, and that, based on the testimony of Ms. Favaloro, employer's vocational consultant, some of the jobs employer identified in its labor market survey are not suitable for claimant because they require these prohibited activities. Decision and Order at 12; Tr. at 195-198. Claimant's back injury, therefore, resulted in fewer potential jobs being available to him.

We affirm the administrative law judge's award of temporary partial disability benefits for the loss in wage-earning capacity caused by claimant's back condition. The administrative law judge's finding that the restrictions imposed by Dr. Hubbell for claimant's back condition prevent claimant from returning to his usual work and from performing some of the alternate jobs identified by employer is amply supported by the evidence of record. Claimant is entitled to benefits for the full loss in wage-earning capacity due to his unscheduled condition, even if the foot injury separately caused similar restrictions. *Green*, 32 BRBS at 69. Moreover, that these restrictions are due to the spinal stimulator implant and not to some "structural" back problem does not relieve employer of liability for claimant's loss in wage-earning capacity due to the restrictions. *Wheeler*, 21 BRBS 23; *Weber*, 19 BRBS 146. Therefore, as it rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's temporary partial disability award.

Employer also contends that the administrative law judge erred in finding that claimant's psychological condition is due to his work injury.¹ Claimant first sought treatment for psychological problems on August 29, 2002, at which time Dr. Wolfson diagnosed claimant with adjustment disorder characterized by depressed mood, anhedonia, weight loss, fatigue, diminished ability to concentrate and sleep disturbance, and he treated claimant with psychotherapy and anti-depressant medication. EX 8. Dr. Wolfson discharged claimant from his care on March 25, 2003. Employer does not contest its liability for this treatment, conceding that this difficulty arose out of claimant's pain and financial problems related to his work injury.

¹ Claimant does not contend that this condition results in a loss of wage-earning capacity but rather seeks employer's liability for medical treatment for this condition. 33 U.S.C. §907.

However, on November 20, 2003, claimant again sought psychological help from Dr. Macgregor who diagnosed claimant with acute major depressive disorder as a direct result of the consequences of his work injury. CX 3. Employer objects to the administrative law judge's conclusion that this episode also was related to claimant's work injury and that employer is liable for continued psychological treatment. Rather, employer contends that claimant's condition is the result of long-standing emotional problems and is unrelated to the work injury because claimant sought treatment after his spinal stimulator was repaired and he no longer was in pain.

In establishing that an injury is causally related to his employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related event occurred which could have caused or aggravated the harm. See *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); see also *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In the instant case, it is undisputed that claimant suffered a work accident on September 18, 2000, and that he suffers psychological problems which a physician has related to his work injury. Accordingly, the administrative law judge properly found that he is entitled to invocation of the Section 20(a) presumption.

Upon invocation, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. See *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). To establish rebuttal in the instant case, employer relies upon the opinion of Dr. Culver who opined that claimant's long-standing personality disorder is not work-related and that because claimant was no longer in significant pain his present condition is not work-related. EX 17. The administrative law judge found Dr. Culver's opinion insufficient to establish rebuttal. While Dr. Culver related claimant's current psychological problems to a personality disorder developed in childhood as well as to alcohol abuse and stated that the problems were not work-related, EXs 14, 17, the administrative law judge found that Dr. Culver's opinion is insufficient to overcome the Section 20(a) presumption that the work accident and its sequelae aggravated claimant's underlying psychological condition. Decision and Order at 9. Dr. Culver stated that claimant's psychological problems are not "entirely" work-related and that he could have had a regression or recrudescence of his psychiatric symptoms due to the stimulator malfunction and resultant pain which caused him to seek further help from Dr. Macgregor. EX 14 at 15. The administrative law judge found Dr. Culver's opinion is insufficient to establish rebuttal of the Section 20(a) presumption because although he stated that the work accident did not cause claimant's psychological problems, he did not also state that the accident did not aggravate or trigger the condition.

If a pre-existing condition is aggravated by a work accident, the entire resultant condition is compensable. See *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); see also *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir.1967)(“employers accept with their employees the frailties that predispose them to bodily hurt”); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164 (1979). As the administrative law judge rationally found Dr. Culver’s opinion insufficient to establish rebuttal of the Section 20(a) presumption, we affirm the administrative law judge’s finding that claimant’s psychological condition is work-related and that employer is liable for treatment for this condition.² *Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

We next address claimant’s appeal of the administrative law judge’s calculation of his pre-injury average weekly wage. A claimant’s average weekly wage at the time of injury is determined by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). Section 10(a) applies when claimant worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant’s employment is regular and continuous but he has not been employed in that employment for substantially the whole of the year, Section 10(b) may be applied based on the wages of comparable employees.³ Section 10(c) provides a general method for determining annual earning capacity where neither Section 10(a) nor (b) can fairly or reasonably be applied to calculate claimant’s average weekly wage at the time of the injury. See *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

The administrative law judge utilized Section 10(c), dividing claimant’s wages for the 41 weeks he worked for employer, \$28,731.39, by 52 for an average weekly wage of \$552.53. Decision and Order at 13. Claimant contends that the administrative law judge should have applied Section 10(a) to compute his average weekly wage because he worked substantially the whole year. Despite claimant’s contention that his average daily wage can be calculated by assuming he was either a five or six-day per week worker, there is no specific evidence of record establishing the number of days claimant worked in the 41 weeks preceding his injury. Such evidence is necessary for the application of

² In his Decision and Order, the administrative law judge found employer liable for the treatment of claimant’s psychological condition but denied payment for treatments provided by Drs. Murphy and Macgregor because claimant failed to seek authorization to change physicians. This finding is not challenged on appeal.

³ No party argues that Section 10(b) is applicable in this case.

Section 10(a).⁴ See generally *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). Therefore, we reject claimant's contention that the administrative law judge erred in not using Section 10(a) to calculate claimant's average weekly wage.

Claimant next argues that the administrative law judge should have divided the wages he earned for employer by 41 weeks, the number of weeks claimant worked as a longshoreman prior to the accident, for an average weekly wage of \$700.77. Alternatively, he contends the administrative law judge should have included the monies earned by claimant during his 11 weeks of self-employment, \$2,500, and divided that figure, \$31,231.39, by 52 weeks for an average weekly wage of \$600.60.

We agree with claimant that the administrative law judge's calculation of his average weekly wage cannot be affirmed. The administrative law judge divided the wages claimant earned for 41 weeks of longshore work by 52 weeks because he found that claimant voluntarily removed himself from the work force for 11 weeks, and to exclude these 11 weeks from the calculation would be "manifestly unfair" to employer. Decision and Order at 13.

Claimant had been employed as a longshoreman for ten years. For 11 weeks in 2000, claimant attempted to start his own power-washing business. This attempt proved unsuccessful, although claimant alleges he earned \$2,500 in this period, and he returned to longshore work. Thus, the administrative law judge's finding that claimant voluntarily removed himself from the workforce for 11 weeks is not supported by substantial evidence and the administrative law judge's decision to divide claimant's longshore earnings by 52 weeks cannot be affirmed. The case cited by the administrative law judge, *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987), is not on point in that the claimant therein removed himself from his full-time job to perform part-time volunteer work. The Board held that the administrative law judge did not err in basing the claimant's annual earning capacity on only his part-time longshore earnings. Claimant removed himself from the full-time work force prior to his injury and therefore was only to be compensated for the part-time loss in wage-earning capacity. In contrast, in this case, claimant undertook another job and earned a small sum for his 11 weeks of work. Section 10(c) explicitly states that claimant's average weekly wage should have regard for the earnings of the employee in the employment in which he was working at the time

⁴ Under Section 10(a), claimant's total annual salary is divided by the actual number of days he worked to produce an average daily wage which is multiplied by 260 for a five-day employee or 300 for a six-day employee to produce an average weekly wage. See 33 U.S.C. §910(d).

of the injury or other employment of the employee, “including the reasonable value of the services of the employee if engaged in self-employment.” 33 U.S.C. §910(c). The objective of Section 10(c) is to arrive at a figure which is a reasonable representation of the claimant’s annual earning capacity at the time of injury, and the administrative law judge is not limited only by the wages claimant earned in longshore employment immediately prior to the injury. *Empire United Stevedores*, 936 F.2d 819, 25 BRBS 26(CRT). As further findings of fact are necessary, we vacate the administrative law judge’s finding that claimant’s average weekly wage is \$ 552.53, and we remand the case to the administrative law judge for reconsideration of this issue. See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997).

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

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge