

BRB Nos. 04-0914
and 05-0231

ANDRE HOLMES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WORLDWIDE LABOR SUPPORT,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
KVAERNER PHILADELPHIA SHIPYARD,	)	DATE ISSUED: 08/24/2005
INCORPORATED	)	
	)	
Employer	)	
	)	
AVONDALE INDUSTRIES	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

V. William Farrington (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Worldwide Labor Support, Incorporated.

Richard S. Vale, Christopher K. LeMieux, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for Avondale Industries and Signal Mutual Indemnity Association.

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

PER CURIAM:

Worldwide Labor Support, Incorporated (WLS) appeals the Decision and Order Awarding Benefits (2003-LHC-2502) of Administrative Law Judge Larry W. Price and the Compensation Order Award of Attorney's Fees (OWCP No. 02-131533) of District Director Richard V. Robilotti 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was hired as a welder by WLS on October 4, 2001. Shortly thereafter, he was sent to work at Kvaerner shipyard (Kvaerner) in Philadelphia, Pennsylvania. During this employment, claimant reported neck pain, allegedly due to welding in the same position for a prolonged period of time. On October 26, 2001, Dr. Goldstein diagnosed a left cervical strain, prescribed medication and physical therapy, and returned claimant to work with restrictions. Claimant returned to work but alleged that Kvaerner terminated him. He then went home to Louisiana and obtained employment as a first class welder with Avondale Industries, for whom he worked from November 30, 2001, through February 13, 2002.

Claimant stated that he stopped working for Avondale after suffering a flare-up of neck and shoulder pain from the previous incident at Kvaerner. He did not report the injury to Avondale but instead called WLS to report a reinjury. WLS sent claimant to Dr. Shackleton on February 14, 2002, and he diagnosed cervical degenerative disc disease and foraminal stenosis at C3-4, prescribed medication and physical therapy, and opined that claimant was able to return to work at a light-duty level. Claimant continued to seek medical treatment over the next two years with a variety of doctors, who diagnosed cervical spondylosis and degenerative disc disease. On February 6, 2004, Dr. Nutik opined that claimant had sustained an onset of left-sided neck pain while working at Kvaerner in October 2001, that claimant's current complaints were related to that initial report of pain, and that claimant's work at Avondale might have aggravated some of his underlying symptoms. Dr. Nutik also opined that claimant would be capable of performing four of the jobs identified in WLS's labor market survey, dated January 27, 2004.

In his decision, the administrative law judge found that claimant established a *prima facie* case, invoking the Section 20(a) presumption, 33 U.S.C. §920(a), by showing

that he sustained a left cervical strain that could have been caused by working conditions he experienced at Kvaerner. The administrative law judge, however, determined that Dr. Nutik's testimony, that claimant's welding activities during his stint at Avondale "might have aggravated some of the underlying symptoms," was sufficient to rebut the Section 20(a) presumption. The administrative law judge then found that the evidence as a whole does not establish the occurrence of an injury or aggravation while claimant worked at Avondale and thus he concluded that claimant's current neck and shoulder problems are causally related to his work at Kvaerner, while he was an employee of WLS.¹ The administrative law judge further found that claimant could not return to his usual employment as of February 13, 2002, and that WLS established the availability of suitable alternate employment as of January 27, 2004. Accordingly, the administrative law judge ordered WLS to pay claimant temporary total disability benefits from February 13, 2002, through June 3, 2002, permanent total disability benefits from June 4, 2002, through January 26, 2004, and permanent partial disability benefits thereafter, as well as medical benefits. Both the administrative law judge and the district director subsequently issued awards for an attorney's fee to claimant's counsel for work performed at their respective levels.

WLS appeals the administrative law judge's Decision and Order Awarding Benefits, BRB No. 04-0914, his Supplemental Decision and Order Awarding Attorney Fees, BRB No. 04-0914Q, and the district director's Compensation Order Award of Attorney's Fees, BRB No. 05-0231.² On appeal, WLS contends that Avondale is the responsible employer in this case as the record establishes that claimant's employment with Avondale aggravated his prior neck condition. WLS also challenges the administrative law judge's calculation of claimant's average weekly wage. Avondale responds, urging affirmance of the administrative law judge's responsible employer finding. Claimant has not responded to this appeal.

¹ The administrative law judge found that Kvaerner was not a borrowing employer, and thus, that WLS is responsible for payment of claimant's compensation benefits. *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). WLS does not challenge this determination on appeal.

² On March 4, 2005, the Board dismissed WLS's appeal of the administrative law judge's award of an attorney's fee, BRB No. 04-0914Q. *Holmes v. Worldwide Labor Support, Inc.*, BRB Nos. 04-0914Q (March 4, 2005) (unpub. Order).

In a case involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's condition is the result of the natural progression or aggravation of a prior injury. If the claimant's disability results from the natural progression of the first injury, then the claimant's employer at the time of the first injury is the responsible employer. If his covered employment thereafter aggravates, accelerates or combines with the earlier injury, resulting in the claimant's disability, claimant has sustained a new injury and the employer at that time is the employer responsible for the payment of benefits thereafter. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). The Section 20(a) presumption does not apply to the responsible employer issue.³ *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997); *see also Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). The first employer bears the burden of proving that there was a new injury or aggravation with the second employer in order to be relieved of its liability as responsible employer. The second employer, on the other hand, must prove that claimant's condition is solely the result of the injury with the first employer in order to escape liability. A determination as to which employer is liable requires the administrative law judge to weigh the evidence as a whole, and to arrive at a conclusion supported by substantial evidence. *Buchanan*, 31 BRBS 81.

In this regard, the administrative law judge rejected WLS's contention that claimant's employment with Avondale aggravated his neck condition, as he found that the record contained no evidence to support the existence of any injury at Avondale. The

³ In the instant case, the administrative law judge invoked the Section 20(a) presumption in favor of claimant in addressing the issue of whether claimant sustained an injury while in the employ of WLS, but then found that WLS rebutted the presumption with evidence regarding whether claimant's neck condition resulted from the natural progression of the 2001 injury or an aggravation with Avondale. *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997). Section 20(a) applies to whether claimant's neck injury arose from his employment and there is no dispute in this case that claimant has a work-related injury. The presumption thus is not applicable in this responsible employer case. *See McAllister v. Lockheed Shipbuilding*, ___ BRBS ___, BRB No. 04-0887 (Aug. 19, 2005). Inasmuch as the administrative law judge weighed the evidence as a whole in determining the responsible employer, any error in this regard is harmless. *See generally Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

administrative law judge observed that although claimant testified that he stopped working at Avondale after suffering a flare-up of neck and shoulder pain, he only reported an unrelated eye injury before leaving work. The administrative law judge determined that claimant's failure to report the alleged aggravation was "in stark contrast," to how he duly reported the eye injury and filled out an injury report. Decision and Order at 15. In addition, the administrative law judge found that Dr. Shackleton, who examined claimant the day after the alleged neck aggravation, found nothing to indicate such an aggravation and merely diagnosed claimant with a chronic neck sprain. Similarly, the opinions of claimant's other treating physicians, Drs. Hubbell, Cazale and Mathai, do not contain any statements to support a finding that claimant sustained an injury while working for Avondale in February 2001, or that claimant's employment with Avondale aggravated his pre-existing neck condition. Claimant's Exhibits 2, 3; Employer's Exhibit 10. Dr. Nutik testified that claimant's work for Avondale "might have aggravated some of the underlying symptoms" of his neck condition. The administrative law judge however found that Dr. Nutik's statements were, by his own admission, speculative. Decision and Order at 15. In this regard, the administrative law judge observed that according to Dr. Nutik, all anyone has in this case with regard to the cause of claimant's condition is claimant's history of injury, which the administrative law judge added is suspect because claimant was not a credible witness.⁴ The administrative law judge thus concluded that the evidence, in sum, does not establish the occurrence of an injury or aggravation in February 2002 while claimant worked for Avondale, and thus, that WLS is liable for claimant's benefits in this case.

In adjudicating a claim, it is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Accordingly, we hold that the administrative law judge acted within his discretion in rejecting, as speculative, Dr. Nutik's statements regarding claimant's potential aggravation of his neck condition as a result of his subsequent employment with Avondale. As the administrative law judge rationally found that the record contains no credible evidence that claimant sustained an injury or aggravation of his neck and shoulder complaints while working for Avondale,

⁴ The administrative law judge found that claimant "was not a particularly credible witness" for as claimant acknowledged at the hearing, he lied on his Avondale job application in that he failed to disclose his prior neck and shoulder injury or his termination from Kvaerner. Nevertheless, the administrative law judge relied on claimant's testimony to the extent that it was corroborated by other evidence in the record. Decision and Order at 13.

we affirm the administrative law judge's conclusion that WLS is the responsible employer. *Delaware River Stevedores, Inc.*, 279 F.3d 233, 35 BRBS 154(CRT); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *McKnight*, 32 BRBS 165.

WLS next argues that the administrative law judge should have calculated claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), by taking his total earnings from 1999 through 2001, \$26,042.08, and dividing that figure first by three and then by 52 to arrive at an average weekly wage of \$166.94. In contrast to WLS's position, the administrative law judge determined that the most reasonable means of calculating claimant's average weekly wage under Section 10(c), taking into account both his high-earning capacity as a welder and the fact that he was not a regular worker, is to divide his total earnings during the time he worked for Avondale between July 18, 2001, and February 13, 2002, \$12,448.99, by the corresponding number of weeks, *i.e.*, 30, to arrive at an average weekly wage of \$414.97.

Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied.⁵ See *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum that reasonably represents the 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). The administrative law judge has broad discretion in making a determination of claimant's average weekly wage under Section 10(c), see *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part*, 600 F.2d 1288 (9th Cir. 1979); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981), and his finding will be affirmed if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997).

In this case, the administrative law judge relied on claimant's earnings through his last day of employment with Avondale in 2002 when he ceased work due to his disability. In *McKnight*, 32 BRBS at 171-173, the Board discussed the conflicting law in the circuits regarding the appropriate "time of injury" for calculating average weekly wage in the case of a latent disability due to a traumatic injury. The Board held that the law espoused by the United States Courts of Appeals for the Second and Fifth Circuits, *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130(CRT) (2^d Cir. 1985), which states that in latent disability cases benefits are to

⁵ In the instant case, no party alleges that Section 10(a) or 10(b), 33 U.S.C. §910(a), (b), is applicable.

be based on the average weekly wage at the time of the accident which caused the injury, better applies the language of Section 10 of Act, 33 U.S.C. §910.⁶ The Board further stated that it would follow the holdings of the Fifth and Second Circuits in cases before the Board except those arising in the Ninth Circuit. *McKnight*, 32 BRBS at 173.

Thus, in this case which arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge erred in basing claimant's average weekly wage on his earnings prior to February 13, 2002. Although the full extent of claimant's disability became manifest as of that date, the administrative law judge found, and that finding is affirmed, that claimant's disability is the result of his October 4, 2001, work injury. Consequently, as October 4, 2001, is the date of injury, claimant's average weekly wage must be determined with reference to his earnings at that time. *LeBlanc*, 130 F.3d at 162, 31 BRBS at 198(CRT); *Morales*, 769 F.2d at 68, 17 BRBS at 134(CRT). We, therefore, vacate the administrative law judge's finding that claimant's average weekly wage is \$414.97 and remand for reconsideration of claimant's average weekly wage. *McKnight*, 32 BRBS at 173.

Lastly, as WLS does not raise any specific contentions in its appeal of the district director's compensation order, BRB No. 05-0231, we affirm the district director's award of an attorney's fee. In particular, we note that WLS's concedes in its petition for review in that appeal that it is liable for the attorney's fee awarded by the district director if it is found liable as the responsible employer.

⁶ In contrast, the United States Court of Appeals for the Ninth Circuit has determined that, in a case involving a latent traumatic injury, a claimant's average weekly wage is to be calculated at the time the permanent disability becomes manifest, rather than at the time of the accident. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *see also Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *cf. Port of Portland v. Director, OWCP*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999) (the Ninth Circuit held, based on the facts of that case, that the claimant's average weekly wage should be calculated in reference to his earnings at the time he sustained the accident and not from the time that his subsequent work-related back injury became disabling).

Accordingly, the administrative law judge's finding that claimant's average weekly wage is \$414.97 is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order Awarding Benefits and the district director's Compensation Order Award of Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge