BRB No. 00-0343

DOUGLAS J. PASCUAL, JR.	)	
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Claimant-Respondent	)	
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FIRST MARINE CONTRACTORS INCORPORATED	)	DATE ISSUED: Dec. 13, 2000
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	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
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	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and Order Denying Employer's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

J. Paul Demarest (Favret, Demarest, Russo & Lutkewitte), New Orleans, Louisiana, for claimant.

Robert P. McCleskey, Jr. and Maurice E. Bostick (Phelps Dunbar, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits and Order Denying Employer's Motion for Reconsideration (96-LHC-0028) of Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S.

359 (1965); 33 U.S.C. §921(b)(3).

This case is on appeal to the Board for the second time. Claimant, a casual holdman, alleged that he injured his neck and back at work on August 16, 1995, when a load of railroad ties fell off the opposite end of the track causing him to be thrown into the air. Claimant was hospitalized for five days after his work injury and has not returned to work. Employer did not pay any disability or medical benefits. Claimant sought temporary total disability benefits from the date of the alleged work injury and continuing, and medical benefits. In his initial decision, the administrative law judge denied claimant disability and medical benefits, finding that claimant's neck and back injuries are not work-related.

In *Pascual v. First Marine Contractors, Inc.*, BRB No. 97-1283 (June 17, 1998)(unpublished), the Board vacated the administrative law judge's finding that claimant's neck and back injuries are not work-related and his conclusion that claimant has no ongoing disability, and remanded the case to the administrative law judge for reconsideration. The Board specifically held that Dr. Laborde's opinion cannot rebut the Section 20(a) presumption, 33 U.S.C. §920(a), as he did not address aggravation and, having seen claimant for the first time one year after the accident, stated there was no way to objectively determine whether claimant sustained a sprain or muscular injury. The Board denied employer's motion for reconsideration. *Pascual v. First Marine Contractors, Inc.*, 32 BRBS 289 (1999).

In his decision on remand, the administrative law judge found that claimant's neck and back injuries are work-related, and thus that claimant is entitled to reasonable and necessary medical expenses related to the work injury. After finding that claimant established his *prima facie* case of total disability, the administrative law judge found that employer did not establish the availability of suitable alternate employment. The administrative law judge further found that claimant's average weekly wage was $360, and that claimant had not yet reached maximum medical improvement. Thus, the administrative law judge ordered employer to pay claimant temporary total disability benefits from August 16, 1995, and continuing, and medical benefits. The administrative law judge summarily denied employer's motion for reconsideration.

In the present appeal, employer challenges the administrative law judge's award of disability and medical benefits. Claimant responds in support of the administrative law judge's award.

Employer contends initially that the administrative law judge erred in finding that claimant's neck and back injuries are work-related, and asserts alternatively, that any disability sustained by claimant is the result of an intervening cause. Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194

F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96 (CRT)(5th Cir. 2000)*; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). An intervening cause is a subsequent non work-related event which is not caused by claimant's work injury. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). If employer establishes that claimant's disability is due to an intervening cause, it is relieved of that portion of the disability attributable to the intervening cause. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13.

In the instant case, the administrative law judge found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and that employer did not establish rebuttal based on Dr. Laborde's opinion. Based on the Board's prior holding in this case, we affirm his finding that employer did not establish rebuttal, as it is the law of the case. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting)*; Pascual*, 32 BRBS at 291; Decision and Order on Remand at 3-4. Moreover, we affirm the administrative law judge's alternative finding that, even if employer established rebuttal, the weight of the evidence establishes that claimant's pre-existing neck and back conditions were aggravated by his work injury. The administrative law judge acted within his discretion in affording less weight to Dr. Laborde's opinion that claimant's neck and back injuries were the same after the injury as they were before the work injury since Dr. Laborde examined claimant only once on October 22, 1996, more than one year after the work injury. *See Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998)*;* Decision and Order on Remand at 3-4; Tr. at 146-172. The opinions of Drs. Watermeier, claimant's treating physician, that claimant's pre-existing condition was aggravated by the work injury and Pearce, a radiologist, that the MRIs taken before and after claimant's work injury showed changes after the injury that are most likely related to trauma, support the administrative law judge's finding that claimant's neck and back conditions were aggravated by his work injury. Any error in the administrative law judge's failure to address employer's contention that an attack on claimant September 21, 1995, was an intervening event relieving it of liability for claimant's disability benefits is harmless as employer presented only evidence that this attack occurred but no evidence linking claimant's disability to it. *See Plappert*, 31 BRBS at 109. Thus, we affirm the administrative law judge's finding that claimant's neck and back injuries are work-related as it is supported by substantial evidence. *See Meehan Seaway Service Co.*, 125 F.3d at

[1]Contrary to employer's contentions, the fact that claimant has pre-existing conditions does not affect the administrative law judge's determination that claimant suffered an aggravation of these pre-existing conditions on August 16, 1995. Moreover, Dr. Pearce's

1163, 31 BRBS at 114 (CRT)*;* Decision and Order on Remand at 3-4; Tr. at 47-69, 112-145.

Employer next contends that claimant did not establish his *prima facie* case of total disability, and alternatively, that if he did, it established the availability of suitable alternate employment. Claimant establishes his *prima facie* case of total disability where he is unable to perform his usual employment duties due to a work-related injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). In the instant case, the administrative law judge determined that claimant established his *prima facie* case of total disability based on the opinions of Drs. Correa and O'Keefe. These opinions, however, address only claimant's inability to return to his usual work on September 19, 1995, and August 23, 1995, respectively, shortly after the accident occurred. The administrative law judge did not discuss and weigh the opinions of Dr. Watermeier, that claimant cannot return to his usual work, and Dr. Laborde, that claimant can return to any kind of employment as of October 22, 1996. Thus, we vacate the administrative law judge's finding that claimant established his *prima facie* case of total disability based on the opinions of Drs. Correa and O'Keefe, and remand this case to the administrative law judge for a discussion and weighing of all relevant evidence with regard to this issue. *See generally Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring).

Once claimant establishes his *prima facie* case of total disability, the burden shifts to employer to demonstrate within the geographic area where claimant resides, the availability of realistic opportunities which he, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661

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opinion is supported by her interpretation of the MRIs performed on July 20, 1995, and July 3, 1996. We decline to address employer's challenge to the administrative law judge's finding that claimant failed to establish invocation under Section 20(a) as employer does not allege specific error. *See Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); Emp. Br. at 28-29.

[2]Contrary to employer's contention, Dr. Murphy's opinion and the functional capacities evaluation performed in February 1994 are not relevant to the issue of claimant's disability from the 1995 work injury as Dr. Murphy last treated claimant in 1994, the same year the functional capacities evaluation was performed. *See* Emp. Exs. 1, 3; Tr. at 177-187. Moreover, it is irrelevant to the issue of claimant's total disability that claimant's restrictions were the same post-injury as they were pre-injury in this case as claimant was performing work at the time of his injury which exceeded his restrictions and claimant suffered some disabling pain resulting from the work injury.

F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the instant case, the administrative law judge found that employer did not establish the availability of suitable alternate employment as of November 6, 1996, the date of the formal hearing, based on the testimony of its expert, Ms. Lide. Employer correctly argues that the administrative law judge erred in finding that the driver positions and the toll collector position exceed claimant's restrictions against prolonged or frequent standing or sitting without the ability to get up and move about, as the uncontradicted testimony of Ms. Lide establishes that two of the four driver positions, as well as the toll collector position, allow claimant to alternate sitting and standing positions. *See* Tr. at 189-209. Moreover, employer correctly argues that the administrative law judge erred in finding that the assembler/sorter position and the service advisor position were not currently available as the uncontradicted testimony of Ms. Lide establishes that these positions were open and that the employers were accepting applications at the time of the hearing. *See* Tr. at 189-209. Consequently, we vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. On remand, if the administrative law judge finds that claimant is unable to return to his usual employment due to his work-related neck and back injuries, he must determine whether employer established the availability of suitable alternate employment. *See generally Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994); Tr. at 197-200. If the administrative law judge finds that employer established the availability of suitable alternate employment, he must determine claimant's post-injury wage-earning capacity. The administrative law judge also must determine whether claimant sustained a loss in wage-earning capacity and thus is entitled to partial disability benefits.

Employer also contends that the administrative law judge erred in calculating claimant's average weekly wage and asserts that this determination should have been based on an average of claimant's earnings since 1989. In any event, employer contends that claimant's average weekly wage should not have been based on his earnings with employer as claimant only worked for five days. Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). *See Empire United Stevedores v. Gatlin,*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). Under Section 10(c), the administrative law judge is not required to employ a specific method of calculation and has broad discretion

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[2]Contrary to employer's contention, incarceration may not preclude an award of total disability benefits if employer does not establish the availability of suitable alternate employment during the period of incarceration. *See Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998)*; Sam v. Loffland Bros.*, 19 BRBS 228 (1987). Thus, claimant may be entitled to total disability benefits during the periods of his incarceration from October 25, 1995 through February 12, 1996, and September 19 and 20, 1996, if suitable alternate employment was not available at these times.

in calculating claimant's average weekly wage based on a variety of factors. *See generally Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91 (CRT)(5th Cir. 1998). In the instant case, the administrative law judge's use of claimant's wage rate times 40 hours is a proper method of computing his average weekly wage. *See Eckstein v. General Dynamics Corp.*, 11 BRBS 781 (1980); Decision and Order on Remand at 8-9; Emp. Ex. 7; Cl. Ex. 2. Consequently, we affirm the administrative law judge's finding that claimant's average weekly wage is $360 ($9 per hour in a 40 hour week) as it is rational and supported by substantial evidence.

Employer further contends that the administrative law judge erred in finding claimant entitled to medical benefits as, employer asserts, claimant's neck and back injuries pre-existed the work injury, are degenerative in nature, and do not require surgery based on Dr. Laborde's opinion. The Act does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. 33 U.S.C. §907. In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary for the treatment of claimant's work-related injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Employer is liable for all reasonable and necessary medical benefits related to the work injury, as the administrative law judge found that the work injury aggravated claimant's pre-existing neck and back injuries. *Id.* Thus, we affirm the administrative law judge's award of reasonable and necessary work-related medical expenses as it is rational, supported by substantial evidence, and in accordance with law.

Employer lastly argues that it is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Section 8(f) shifts the liability to pay compensation for permanent disability or death benefits after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. As the administrative law judge found that claimant's condition has not yet reached maximum medical improvement, and employer has not challenged this finding, we affirm it and hold that employer is not entitled to Section 8(f) relief as claimant does not yet suffer from a permanent disability. *See* Decision and Order on

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[3]Contrary to employer's contention, claimant's earnings in his sporadic employment since 1989 may not be used to determine average weekly wage in this case, as the evidence establishes his earnings only in his 1991 employment with Avondale Shipyard and Daspit Manufacturing. *See* Emp. Ex. 23. Where wages over a range of years are used to determine average weekly wage, all years in the range must be included. *See Hall*, 139 F.3d at 1025, 32 BRBS at 91 (CRT). In this case, the fact that claimant only worked five days with employer before his work injury does not establish that claimant's five day earnings with employer are not indicative of his average weekly wage, in the absence of any other relevant evidence.

[4]We need not address employer's remaining contentions regarding claimant's credibility as the administrative law judge on remand relied on the credibility of the medical

Remand at 4-5; Emp. Br. at 43.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits and Order Denying Employer's Motion for Reconsideration are vacated with respect to the administrative law judge's findings that claimant established his *prima facie* case of total disability and that employer did not establish the availability of suitable alternate employment, and the case is remanded to the administrative law judge for further consideration of these issues consistent with this opinion. In all other respects, the administrative law judge's decision on remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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and vocational evidence to support his findings. Moreover, the opinions of Drs. Watermeier and Pearce do not rely on claimant's credibility, as the Board has previously held. *See Pascual*, slip op. at 4 (unpublished).