BRB No. 99-0507

SOLOMON GALE Claimant-Respondent v. EASTERN TECHNICAL ENTERPRISES and ITT HARTFORD Employer/Carrier- Petitioners	))))))))))))))	 DATE ISSUED: DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Daniel J. Savino, Jr. (Caruso, Spillane, Leighton, Contrastano & Ulaner, P.C.), New York, New York, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees (97-LHC-433) of Administrative Law Judge Gerald M. Tierney 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts of this claim are disputed by the parties. Employer is a ship-repair company that leases a portion of the Brooklyn Navy Yard. Claimant alleged that on April 11, 1995, he suffered a work-related injury to his back after lifting one end of a pipe. Claimant testified that this incident occurred while performing welding activities in a chlorinated holding tank (CHT) on board the vessel STATE OF MAINE, and that after the incident, he exited the tank and waited for several hours in the office of his supervisor, Namir Halabi, before going home. Employer, through the testimony of Mr. Halabi, employer's former vice president of operations as well as claimant's supervisor, contended that the STATE OF MAINE does not have any CHTs and disputed claimant's entire account of his injury. Claimant sought treatment with Dr. Reich, a chiropractor, who diagnosed lumbosacral sprain, myofascial pain syndrome, lumbar facet syndrome and muscle spasm. In July 1995, Dr. Reich released claimant to modified employment, working no longer than six hours per day. In August 1995, claimant worked as a welder for two days with Ridge Machine in a welding job which did not entail any lifting. However, after working nine hours the first day, claimant could not finish his shift on the second day due to complaints of pain and did not return to work. In September 1995, Dr. Reich upgraded his diagnosis to include lumbar discopathy. Claimant, who continues to suffer from intermittent exacerbations and remissions of pain, sought temporary total disability benefits from April 11, 1995 to July 5, 1995, and permanent partial disability benefits from July 5, 1995, and continuing.

In his decision and order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, which links his back condition to his employment. Based on Mr. Halabi's testimony that the STATE OF MAINE has no CHTs and that claimant never reported a lower back injury, the administrative law judge found that employer established rebuttal of the presumption. Thereafter, the administrative law judge discredited the testimony of Mr. Halabi and found that claimant's back condition is causally related to his April 11, 1995 work accident. The administrative law judge further found that claimant's aggravation of his back condition in August 1995 while working for Ridge Machine resulted from the natural progression of the April 11, 1995 injury, and thus, employer was not relieved of liability. Next, the administrative law judge found that employer established suitable alternate employment on the basis of a doorman position and a security guard position as of July 24, 1998. Thus, the administrative law judge

awarded claimant temporary total disability compensation from April 11, 1995 to July 24, 1998, 33 U.S.C. §908(b), and ongoing temporary partial disability compensation from July 24, 1998.[1] 33 U.S.C. §908(e).

Subsequent to the administrative law judge's decision, claimant's counsel submitted a petition for an attorney's fee for work performed before the administrative law judge, requesting a fee totaling $27,500, representing 110 hours of legal services performed at an hourly rate of $250. Employer filed objections to the fee requested, contending, *inter alia*, that the fee petition failed to make any distinction as to who performed the documented tasks, their billing rate and their professional status. In a reply letter, claimant's counsel affirmed that 95 percent of the services documented was performed by lead counsel, and specified the instances that were not. In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge awarded claimant's counsel a fee totaling $24,750, for 99 hours of legal services performed at an hourly rate of $250.

On appeal, employer challenges the administrative law judge's award of benefits. Specifically, employer asserts that the administrative law judge erred in invoking the Section 20(a) presumption, and in ultimately finding that claimant suffers from a work-related back condition. Employer further contends that the administrative law judge erred in finding that it is solely responsible for claimant's benefits, and that the administrative law judge's analyses of the issues of causation and responsible employer does not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) (APA). With regard to the issue of suitable alternate employment, employer contends that the administrative

[1]The administrative law judge found that claimant had a residual earning capacity of $343.60, based on the doorman and security guard positions, and subtracted this amount from claimant's average weekly wage of $710 in calculating claimant's temporary partial disability award. In an Order Amending Decision and Order Awarding Benefits, the administrative law judge awarded claimant temporary partial disability benefits based on two-thirds of the difference between claimant's average weekly wage and his residual earning capacity.

law judge erred in rejecting numerous positions listed in its vocational report which date back to June 1995. Lastly, employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel, asserting that the fee awarded is excessive. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

We first address employer's contentions with regard to causation. If claimant establishes his *prima facie* case, by establishing the existence of a bodily harm and an accident or working conditions that could have caused the harm, Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). If the administrative law judge finds the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if causation has been established. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

Employer initially contends that the administrative law judge erred in finding that claimant established that an accident occurred on April 11, 1995, and in invoking the Section 20(a) presumption. Specifically, employer contends that the administrative law judge erred in crediting the testimony of claimant over the testimony of Mr. Halabi. We reject employer's contention. In the instant case, the administrative law judge specifically credited claimant's testimony that he injured his back while working for employer on April 11, 1995, noting that substantial medical evidence confirmed that claimant suffered an acute back injury at that time. *See* Decision and Order at 14. The administrative law judge acted within his discretion as fact-finder in crediting claimant's testimony and finding that an accident occurred at work on April 11, 1995. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 470 U.S. 911 (1979); *Quinones v. H.B. Zachary, Inc.*, 32 BRBS 6 (1998). The administrative law judge further found that the opinions of Drs. Reich, Nicoleau and Carfi, each of whom related claimant's back condition in part to the April 11, 1995 accident, established a causal relationship between claimant's injury and his employment. *See* Cl. Exs. 5, 6, 16, 17, 22. As this evidence is sufficient to entitle claimant to the benefit of the Section 20(a) presumption, we affirm the administrative law judge's finding in this regard. *See*

Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989).

Next, the administrative law judge found that Mr. Halabi's testimony that the STATE OF MAINE contains no CHTs, that he never assigned claimant to work on a CHT, and that claimant never reported a lower back injury established rebuttal of the Section 20(a) presumption. Weighing the evidence as a whole, the administrative law judge discredited Mr. Halabi's testimony as it was contradicted by the testimony of Peter Lebel, claimant's co-worker, who stated that there were CHTs on board the STATE OF MAINE.[2] *See* Tr. at 221. The administrative law judge also found employer's logbook suspicious, as the notation that claimant had left work early on April 11, 1995 due to an aggravation of an earlier smoke inhalation problem was in different handwriting than the rest of the logbook. *See* Decision and Order at 15-16; Emp. Ex. 18. Ultimately, the administrative law judge rationally found that the name of the type of tank claimant was in at the time of the alleged incident was immaterial, as Mr. Halabi testified that the STATE OF MAINE had other tanks on board. *See* Decision and Order at 16; Emp. Ex. 13 at 34, 39-40. We hold that the administrative law judge acted within his discretion as fact-finder in crediting claimant's testimony over the testimony of Mr. Halabi. *See Cordero*, 580 F.2d at 1331, 8 BRBS at 744. As there is no medical evidence in the record that claimant's back condition is unrelated to his employment, we affirm the administrative law judge's finding that claimant's back condition is related to his employment with employer.

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[2] Mr. Lebel's testimony was inconsistent, as he earlier stated that the vessel did not have CHT tanks but had other tanks. Nevertheless, though he did not remember claimant's alleged incident, he did remember working with claimant in a tank on at least one occasion. Tr. at 206.

Next, we consider employer's challenge to the administrative law judge's finding that it is not relieved of liability as a result of claimant's employment with Ridge Machine in August 1998. Claimant testified that while working for Ridge Machine on August 8, 1995, he sat for approximately nine hours and could not finish his shift the next day due to back pain. *See* Tr. at 95-96. Employer contends that this incident constitutes a distinct, acute aggravation of claimant's back condition, thereby terminating any further compensation liability. We disagree. Where there are two potentially liable covered employers, the administrative law judge must determine whether a claimant's disability resulted from the natural progression of his first injury or whether the subsequent injury aggravated, accelerated or combined with the earlier injury to result in the claimant's disability.[3] *See 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*); *Buchanan Int'l Transportation Services*, 33 BRBS 32 (1999). In the instant case, the administrative law judge found that the opinions of Drs. Reich, Carfi and Swearingen support the finding that claimant's employment with Ridge Machine in August 1995 caused a "flare-up," and was the result of the natural progression of the disability caused by the April 11, 1995 incident. Dr. Reich stated that claimant aggravated his lower back condition after returning to work in August 1995, and diagnosed a herniated disc after August 1995, but testified that this condition was not caused by claimant's employment with Ridge Machine and that there was no trauma to claimant's spine after August 1995. *See* Cl. Ex. 16 at 50, 53, 60, 62, 64. Ultimately, Dr. Reich characterized the 1995 event as a "flare-up," similar to the ones claimant had previously experienced, and stated that three weeks after the August 1995 incident, claimant was physically in the same position he was in before that incident. *Id.* at 26-27, 65. Contrary to employer's assertion, Dr. Reich's recommended physical restrictions were essentially the same both before and after the August 1995 incident at Ridge Machine. *Id.* at 65-66. Dr. Carfi related claimant's disc herniation and bulging to the April 11, 1995 injury, and testified that claimant's extended sitting in August 1995 caused at worst a flare-up, not a new or permanent injury. Cl. Ex. 17 at 28, 34, 39, 55. Dr. Swearingen opined that claimant has degenerative spine disease which was exacerbated by the April 11, 1995 incident, and characterized the August 1995 incident as another exacerbation which had resolved by December 1995. Emp. Ex. 13 at 17, 20, 24.

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[3]We note that the administrative law judge never made a determination as to whether Ridge Machine is a potentially liable covered employer, but applied the standard as if it were. *See generally Buchanan v. Int'l Transportation Services*, 33 BRBS 32, 26 n.7 (1999). Claimant's testimony indicates that Ridge Machine is also located at the Brooklyn Navy Yard, and that workers often change jobs between employer and Ridge Machine. Tr. at 161-162.

We agree with the administrative law judge that the use of the word "aggravation" by these medical examiners is not determinative of the issue. The weighing of the evidence lies solely within the administrative law judge's authority, *see generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and we hold that the administrative law judge acted within his discretion in viewing the opinions of Drs. Reich, Carfi and Swearingen as evidence that claimant's employment with Ridge Machine caused a flare-up of his back condition, similar to other flare-ups claimant has experienced since the April 11, 1995 incident, and that claimant's disability is ongoing and has been since the April 11, 1995 incident. As employer has not shown that claimant's disability was aggravated or accelerated by his employment with Ridge Machine, we affirm the administrative law judge's finding that employer's liability is not relieved as a result of claimant's employment with Ridge Machine. *See, e.g., McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). In this regard, we find no merit to employer's argument that the administrative law judge's analysis does not comport with the APA.[4] Having set forth the relevant evidence in detail, the administrative law judge weighed the evidence with regard to each of his findings and provided reasons for each of his findings based on the evidence. As employer has not established reversible error in the administrative law judge's weighing of the conflicting evidence, we reject employer's contention that the administrative law judge's decision does not comport with the APA.

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[4]The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge must independently analyze and discuss the evidence, and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

On appeal, employer further contends that the administrative law judge erred in rejecting numerous positions listed in its vocational report, which date back to June 1995, and in rejecting the classified advertisements as evidence of suitable alternate employment. We disagree. Once, as here, claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). In addressing the issue of suitable alternate employment, the administrative law judge applied the physical limitations imposed by claimant's treating physicians, Drs. Reich, Carfi, and Nicoleau, each of whom opined that claimant should not perform any heavy duty or lifting, and any excessive bending, pushing or lifting. The administrative law judge rejected all but two positions listed in employer's vocational report as being outside these physical restrictions; one position was rejected because it required a driver's licence, which claimant no longer has. In addition, the administrative law judge determined that the classified advertisements employer submitted into evidence did not establish suitable alternate employment, as they did not show the precise nature, terms and availability of the positions listed, and did not show the physical requirements of the jobs. Emp. Ex. 15. The administrative law judge rationally concluded that the job descriptions on these advertisements lacked all the details necessary to determine if claimant is capable of performing the jobs in light of his restrictions. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). As the administrative law judge's finding that employer established suitable alternate employment on the basis of a doorman position and a security guard position as of July 24, 1998, is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's determination that claimant is entitled to temporary total disability compensation from April 11, 1995 until July 24, 1998, and temporary partial disability from July 24, 1998 and continuing.

Lastly, employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel. Specifically, employer contends that the hours requested were excessive, the billing rate was excessive, and that the fee petition did not conform to the requirements under the regulations, as the fee petition failed to delineate which tasks were performed by which attorneys, and what was the billing rate for each attorney. In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge rejected employer's contention that the fee petition did not conform to the regulations, as counsel's reply to employer's objections affirmed that 95 percent of the work was performed by lead counsel, and that no clerical work was listed in the petition. 20 C.F.R. §702.132. The administrative law judge reduced counsel's requested hours from 110 to 99 hours,

as these services occurred prior to the time the matter was referred to the Office of Administrative Law Judges. The administrative law judge then affirmed counsel's requested billing rate in light of the quality of the representation, the nature of the issues involved, and the geographic location of the hearing, and awarded counsel a fee of $24,750 for 99 hours of legal services performed at an hourly rate of $250.

We reject employer's contentions regarding the number of hours and hourly rate awarded by the administrative law judge, as employer has not met its burden of showing that the administrative law judge abused his discretion in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). In addition, as counsel's fee petition provided an itemized breakdown for time spent on particular activities and adequate explanations for the activities, the administrative law judge did not err in determining that counsel's fee petition and subsequent letter conformed with the requirements under the regulations. *See* 20 C.F.R. §702.132. Accordingly, we affirm the attorney's fee awarded to claimant's counsel by the administrative law judge.

Accordingly, the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOM D. NELSON, Acting
Administrative Appeals Judge