

ANDREW DANIELS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	DATE ISSUED: <u>FEB 23, 2005</u>
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy D. McNair, Erie, Pennsylvania, for claimant.

Michael D. Schaff (Naulty, Scaricamazza & McDevitt), Philadelphia, Pennsylvania, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2003-LHC-1087) of Administrative Law Judge Daniel L. Leland 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. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, who was employed as an assistant foreman for employer, sought benefits under the Act for injuries sustained on January 15, 2001, when a steel wedge fell from a work platform above him, striking him in the back of his neck. After being struck,

claimant fell and blacked out briefly. He did not immediately seek medical attention and returned to work. Claimant testified that he began to experience balance problems within one to three months after this work incident, and subsequently developed numbness and tingling in his arms, but did not then associate his symptoms with his work-related accident. On May 18, 2001, claimant went to the emergency room with complaints of chest and arm pain and lightheadedness; a cardiac work-up was conducted which ruled out cardiac problems as the source of claimant's symptoms. Subsequently, claimant sought medical attention for his worsening symptoms which included numbness, tingling and pain in both hands and arms and his right leg, neck, shoulder and back pain, and balance problems. Claimant ultimately was referred to Dr. Loesch, a Board-certified neurosurgeon, who performed a discectomy and fusion on claimant's cervical spine on December 21, 2001. Although he was unable to perform some aspects of his job, claimant continued to work as an assistant foreman for employer until shortly before his surgery. Employer voluntarily paid claimant temporary total disability compensation from December 21, 2001 through August 28, 2002. 33 U.S.C. §908(b). Thereafter, claimant sought temporary total disability benefits from August 29, 2002, and continuing.

In his Decision and Order, the administrative law judge accepted the parties' stipulations including, *inter alia*, the stipulation that claimant suffered a work-related injury on January 15, 2001. Next, the administrative law judge found that claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his cervical spine condition to his employment, that employer proffered substantial evidence to rebut that presumption, and that, based on the record as a whole, claimant established a causal relationship between his employment with employer and his cervical problems. Having noted the parties' agreement that claimant has not reached maximum medical improvement, the administrative law judge next determined that claimant is unable to perform his regular duties as an assistant foreman for employer, and claimant is not capable of performing the duties of the jobs identified by employer as establishing the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from August 29, 2002, and continuing.

On appeal, employer challenges the administrative law judge's findings regarding the causal relationship between claimant's disabling condition and his employment with employer and the extent of claimant's disability. Claimant responds, urging affirmance of the administrative law judge's Decision and Order in its entirety.

Employer initially challenges the administrative law judge's finding that claimant's cervical spine problems are causally related to his January 15, 2001 work accident;<sup>1</sup> specifically, employer contends that the administrative law judge erred in

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<sup>1</sup> We will not consider employer's argument on appeal that the record in this case does not establish a definitive date on which claimant's work accident occurred. Emp. Brief at 4-7. Employer is bound by its stipulation at the hearing that claimant sustained a

crediting the opinion of claimant's treating neurosurgeon, Dr. Loesch, over the contrary opinions of Drs. Babins and Bookwalter.

Where, as in the case at bar, claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.2d 53, 31 BRBS 19(CRT) (1<sup>st</sup> Cir. 1997); *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1(CRT) (3<sup>d</sup> Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997). The administrative law judge must then weigh all of the relevant evidence and determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In this case, the administrative law judge found that claimant invoked the Section 20(a) presumption based on his cervical condition and the January 15, 2001 work incident, but that employer established rebuttal based on the opinions of Drs. Babins and Bookwalter. Upon consideration of all of the relevant evidence of record, the administrative law judge concluded that claimant's present cervical spine condition is causally related to his January 15, 2001 work accident. Decision and Order at 9-10. In so finding, the administrative law judge accorded determinative weight to Dr. Loesch's opinion that claimant's symptoms result from a herniated cervical disc caused by his work-related injury. Decision and Order at 9; EX 19; CX 11 at 8-10, 24-26, 29-45, 51-52. The administrative law judge found Dr. Loesch's opinion entitled to greater weight than the contrary opinions of Drs. Babins, EXs 26, 31, and Bookwalter, EX 25, in part on the basis that Dr. Loesch regularly treated claimant for more than two years and performed the surgery on claimant's cervical spine. In contrast, he found that Dr. Babins examined claimant only once and that Dr. Bookwalter, who never examined claimant, based his opinion on a review of claimant's medical records which did not encompass a review of the actual x-ray and MRI films. The administrative law judge additionally determined that Dr. Loesch had a better understanding of the date of onset of claimant's symptoms in relation to the date of his work accident than did Drs. Babins and Bookwalter. The administrative law judge rejected employer's assertion that claimant's failure to associate his symptoms with his work accident until several months after the

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work-related injury on January 15, 2001. Decision and Order at 2; Hearing Tr. at 4-5. *See Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986).

accident suggests the absence of a causal relationship, reasoning that as claimant is not a physician, he is not qualified to render an opinion regarding the etiology of his medical condition. Decision and Order at 10. The administrative law judge also rejected employer's contention that Dr. Loesch's deposition testimony that claimant's cervical spine condition is related to his work accident should be discredited in view of the doctor's previous indication on a disability claim form dated December 19, 2001, EX 13, that claimant's condition was not work-related. The administrative law judge determined, in this regard, that at the time the disability claim form was completed, Dr. Loesch was unaware of claimant's work accident and was focused on the treatment, rather than the etiology, of claimant's condition. The administrative law judge further observed that upon being subsequently informed of the work accident that occurred on January 15, 2001, Dr. Loesch made the association between claimant's accident and his symptoms. Decision and Order at 10; EX 19; CX 11 at 25, 30-31, 40-45, 48-52, 55-56.

We reject employer's assertion that the administrative law judge erred in weighing the evidence of record regarding the issue of causation. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and has considerable discretion in evaluating the evidence of record. *See, e.g., James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5<sup>th</sup> Cir. 2000); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4<sup>th</sup> Cir. 1994). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT); *Pennsylvania Tidewater Dock Co. v. Director, OWCP*, 202 F.3d 656, 34 BRBS 55(CRT) (3<sup>d</sup> Cir. 2000); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has cautioned that the Board is not empowered to disturb an administrative law judge's conclusion on the basis that the evidence would permit a contrary conclusion to be reached; rather, the Board must uphold the administrative law judge's inferences and findings which are reasonable and supported by substantial evidence. *See Pennsylvania Tidewater Dock Co.*, 202 F.3d at 659, 663, 34 BRBS at 56, 60(CRT). *See also Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4<sup>th</sup> Cir. 2003); *Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT); *Burns*, 41 F.3d at 1562, 1564, 29 BRBS at 37-38, 41-42(CRT). In the instant case, the administrative law judge fully addressed each of employer's contentions regarding the causal relationship between claimant's cervical condition and his employment when he evaluated and weighed the competing evidence of record. Moreover, the administrative law judge provided a rational basis for relying on the opinion of Dr. Loesch<sup>2</sup> over the

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<sup>2</sup> We disagree with employer's characterization of Dr. Loesch's opinion regarding the causal relationship between claimant's work accident and his cervical spine condition as *equivocal*. Emp. Brief at 8, 11-12. The administrative law judge thoroughly

contrary opinions of Drs. Babins and Bookwalter, *see Pennsylvania Tidewater Dock Co.*, 202 F.3d at 663, 34 BRBS at 60(CRT), and his ultimate finding is thus supported by substantial evidence. We therefore affirm the administrative law judge's conclusion that claimant's cervical condition is related to claimant's employment with employer.

Employer next challenges the administrative law judge's finding that claimant is temporarily totally disabled; in this regard, employer avers that the administrative law judge erred in finding that the offers made to claimant of employment within employer's facility do not constitute suitable alternate employment.<sup>3</sup> Where, as here, it is uncontested that claimant is unable to return to his usual employment, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3<sup>d</sup> Cir. 1979). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether the identified position is realistically available and suitable for the claimant. *See Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7<sup>th</sup> Cir. 2000). Employer may meet its burden by offering claimant a job in its facility; however, employer must demonstrate the availability of work which is necessary and which claimant is capable of performing. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5<sup>th</sup> Cir. 1996); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*).

Employer avers that the administrative law judge erred in finding that the offers of light duty work in a modified assistant foreman position in its facility were not demonstrated to be suitable for claimant. Decision and Order at 11; EXs 21-23, 28, 30; Hearing Tr. at 32-40, 97-109. In finding that the light duty position in employer's facility is beyond claimant's physical capabilities, the administrative law judge compared claimant's physical restrictions with the requirements of the modified position offered by

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summarized Dr. Loesch's written reports and deposition testimony, Decision and Order at 5-6, and reasonably credited Dr. Loesch's deposition testimony in which he explained the evolution of his views regarding the most accurate diagnosis of claimant's cervical spine condition and the causal relationship between claimant's condition and his employment, Decision and Order at 9-10. Based on his consideration of the entirety of Dr. Loesch's deposition testimony, the administrative law judge found probative Dr. Loesch's ultimate medical conclusion that claimant's present condition is the result of a herniated cervical disc caused by his January 15, 2001 work injury. Decision and Order at 9; CX 11 at 8-10, 29-30, 38, 42, 51-52.

<sup>3</sup> Employer does not challenge on appeal the administrative law judge's determination that the positions identified in employer's labor market survey are not suitable for claimant.

employer. *See Stratton*, 35 BRBS at 7; *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Specifically, the administrative law judge, having credited claimant's testimony concerning his physical limitations, determined that the physical requirements listed in employer's October 2003 job description, including walking 100 to 150 yards from the office to the shop at least once a day, were beyond claimant's capabilities.<sup>4</sup> EX 28. Moreover, the administrative law judge credited Dr. Loesch's testimony that claimant's cervical spine condition prevents him from working a full-time sedentary job and that he would advise against claimant's attempting to return to light duty work with employer. Decision and Order at 11; CX 11 at 46-48, 53-54, 56-57. In this case, the administrative law judge's decision to rely upon the testimony of claimant and Dr. Loesch regarding claimant's inability to perform the light duty position in employer's facility, as described in the attachment to employer's October 23, 2003 letter and in the hearing testimony of employer's plant manager Steven Miley, is reasonable and supported by substantial evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 28(CRT) (5<sup>th</sup> Cir. 1991); *see generally Pennsylvania Tidewater Dock Co.*, 202 F.3d 656, 34 BRBS 55(CRT). We therefore affirm the administrative law judge's determination that the light duty assistant foreman position offered by employer is not suitable for claimant and, thus, does not demonstrate the availability of suitable alternate employment, *see Mijangos*, 948 F.2d 941, 25 BRBS 28(CRT), and his consequent award of temporary total disability benefits to claimant.

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<sup>4</sup> The administrative law judge previously summarized the hearing testimony of employer's plant manager, Steven Miley; Mr. Miley testified that the October 2003 job description, which entailed the fewest physical requirements, would require that claimant walk a distance of 100 to 150 yards from the office to the shop, and that he would probably leave the office a few times a day. Decision and Order at 3; Hearing Tr. at 102-104.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge