BRB Nos. 99-0453
and 99-0453A

DEAN F. BOWMAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (98-LHC-1073) of Administrative Law Judge John C. Holmes 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).

Claimant was injured on February 13, 1996, when the fifth wheel he was driving was struck by a forklift. The accident crushed his vehicle and caused the twisted metal to puncture a hole in claimant's left thigh. Claimant sought treatment with Dr. Wapner, who referred him to Dr. Schuster, a plastic surgeon. Dr. Schuster performed surgery on claimant's thigh on March 1, 1996, and in October 1996. Claimant first reported to Dr. Wapner with complaints of back pain on June 6, 1996 and was diagnosed with lumbar radiculopathy. Cl. Ex. 3; Emp. Ex. 11. He attempted to return to work on August 21, 1996, but he was unsuccessful and has not returned to work since. Subsequently, it was discovered that claimant has diabetes and cirrhosis of the liver, and he was awaiting a liver transplant at the time of the hearing.

In his Decision and Order, the administrative law judge found that claimant's back condition was not caused or exacerbated by his industrial injury and, even if it had been, it did not cause a permanent impairment that would prevent claimant from returning to his usual work. Thus, the administrative law judge found that claimant was limited to recovering permanent partial disability benefits under the schedule for his thigh injury. The administrative law judge also found that maximum medical improvement was reached on May 12, 1997, and he accepted Dr. Wapner's analysis and conclusion that claimant suffers from a twelve percent impairment of the left leg. Lastly, the administrative law judge reviewed the evidence under Section 10(c), 33 U.S.C. §910(c), and found that claimant's actual wages in 1995, the year preceding the injury, are an accurate reflection of his pre-injury wage-earning capacity, and thus he had an average weekly wage of $680.58.

On appeal, claimant contends that the administrative law judge erred in failing to consider whether claimant's restrictions due to his thigh injury prevent him from returning to his usual work, and that the administrative law judge erred in giving greater weight to the opinion of Dr. Wapner. Claimant also contends on appeal that the administrative law judge did not properly consider the significant loss in wage-earning capacity that claimant suffered and that the administrative law judge erred in finding that claimant's back condition had resolved. Lastly, claimant contends that the administrative law judge erred in determining his average weekly wage, as he improperly factored in the weeks claimant was off due to unemployment. Employer responds, urging affirmance of the administrative law judge's finding that claimant is limited to a scheduled award for his thigh injury. On cross-appeal, employer contends that the administrative law judge erred in finding that it had stipulated to claimant's average weekly wage. Moreover, employer contends that the determination of claimant's average weekly wage should not include the Guaranteed Annual Income (GAI) payments received in the year preceding the injury.

Claimant contends on appeal that the administrative law judge erred in finding that his back condition had healed and resulted in no permanent disability.[1] In the present case, the administrative law judge fully weighed the evidence, according Dr. Wapner's opinion determinative weight. The administrative law judge noted that Dr. Wapner, who initially treated claimant after his work injury, is an expert in the field of orthopedics and based his opinion on a thorough review of the record and his own examinations. The administrative law judge found persuasive evidence in the record that any continuing back problem claimant

[1]The administrative law judge found that "any continuing back problem is unrelated to the industrial injury," without discussing the issue in terms of Section 20(a), 33 U.S.C. §920(a). Decision and Order at 6. If invoked, Section 20(a) provides claimant with a presumption that his back condition is causally related to his employment. In this case, any error by the administrative law judge in failing to apply Section 20(a) is harmless. While Dr. Bauerle's opinion that claimant's back condition is related to the injury he suffered on February 13, 1996, at work is sufficient to invoke the Section 20(a) presumption, Dr. Wapner's opinion that claimant's back condition is a result of degenerative changes and is not related to the accident on February 13, 1996, in any way is sufficient to establish rebuttal of the Section 20(a) presumption. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997). Once the presumption is rebutted, it drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue and render a decision supported by the record. *Universal Maritime Corp.*, 126 F.3d at 256, 31 BRBS at 119 (CRT); *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987). Thus, resolution of this issue turns on the administrative law judge's evaluation of the evidence in the record as a whole.

has is unrelated to the accident: claimant did not report back pain to Dr. Wapner until several months after the injury and the physicians generally found at most a back sprain which has a normal healing period of a few months. The administrative law judge also noted that the pain has appeared intermittently and was not described consistently by claimant or the physicians. The administrative law judge rejected the opinions of Drs. MacGibbon, Bauerle, and Slaughter, that claimant was suffering from chronic lumbar strain related to the work injury, as these opinions lack a rationale and analysis. Thus, the administrative law judge credited Dr. Wapner's opinion that the compression fracture of a cervical vertebrae antedated claimant's injury and that any continuing back problem is unrelated to the industrial injury. Accordingly, as the administrative law judge's ultimate conclusion regarding the lack of a connection between claimant's back complaints and the work injury is rational and supported by substantial evidence in the record, it is affirmed. *See generally Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981). As we affirm the administrative law judge's finding that claimant's back complaints are not related to the work injury of February 13, 1996, we need not address claimant's contentions regarding the extent of disability due to his back condition.

Claimant also contends that the administrative law judge erred in failing to consider whether he was restricted from returning to his former employment due to the limitations imposed by his thigh injury. A claimant who suffers an injury to a scheduled member is not limited to recovery under the schedule, but may recover compensation for total disability if the facts support such an award. *See Potomac Electric Power Co. (PEPCO) v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366 n.17 (1981). If claimant establishes that he cannot return to his former duties, and employer fails to establish suitable alternate employment, claimant may be found to be totally disabled by an injury to a scheduled member. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). As claimant correctly contends, the administrative law judge erred in limiting his review of the evidence to a discussion of whether claimant was permanently disabled by his back condition. However, even if the evidence is looked at in the light most favorable to claimant, and it is presumed that he can not return to his former duties due to his thigh injury, the administrative law judge credited the report of the vocational counselor, Sharon Hankin, which identified a number of jobs requiring only sedentary work that claimant could perform. Emp. Exs. 34, 35; H. Tr. at 288-299. The nature and terms of these positions are listed in a labor market survey and were reviewed by all of claimant's treating physicians, who approved of almost all of the positions. *See* Emp. Exs. 37-39, 65, 66. This finding is uncontested. Therefore, as suitable alternate employment is established, we affirm the administrative law judge's finding that claimant is limited to permanent partial disability benefits under the schedule for a twelve percent impairment of the left leg, which is unaffected by any actual loss in wage-earning capacity that claimant may have suffered. 33 U.S.C. §908(c); *PEPCO,* 449 U.S. at 268, 14 BRBS at 363.

Both parties challenge the administrative law judge's determination of claimant's average weekly wage. Initially, we agree with employer's contention that it did not stipulate

to claimant's average weekly wage prior to the Order Granting Partial Summary Decision. While employer agreed to pay "at least $51,104.62" for temporary total disability for the periods of February 14, 1996 through August 21, 1996, and October 28, 1996 through May 11, 1997, and for the residual permanent partial disability to claimant's left leg pursuant to the Order Granting Partial Summary Decision, the administrative law judge noted in that order that claimant's average weekly wage was still in contention. Therefore, we will address the parties' contentions regarding the administrative law judge's average weekly wage determination.

Specifically, employer contends that the GAI payments received by claimant in the year preceding the injury should not be included as wages. However, the Board has held that GAI payments constitute wages under Section 2(13), 33 U.S.C. §902(13), and are included in average weekly wage. *McMennamy v. Young & Co.*, 21 BRBS 351 (1988); *see also Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15 (CRT)(4th Cir. 1998). Thus, we affirm the administrative law judge's finding that claimant's average weekly wage should include the GAI payments.

Claimant contends that the administrative law judge erred in including the eighteen weeks in the year preceding the injury that claimant was unemployed in the average annual earnings calculation. The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). The administrative law judge found that claimant's pattern of employment was typical on the docks in Baltimore in the past and was likely to continue. The objective of Section 10(c) is to reach a fair and reasonable approximation of claimant's wage-earning capacity at the time of the injury. *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). A definition of "earning capacity" for purposes of this subsection is the "ability, willingness, and opportunity to work." *Tri-State Terminals, Inc.*, 596 F.2d at 757, 10 BRBS at 706-707. As the administrative law judge based his average weekly wage determination on claimant's earning capacity at the time of injury as evidenced by his past work history, we affirm the administrative law judge's finding that claimant had an average weekly wage of $692.14 ($35,991.17/52).[2]

Accordingly, the administrative law judge's Decision and Order awarding permanent partial disability benefits and denying permanent total disability benefits is affirmed. The decision is modified to reflect an average weekly wage of $692.14.

SO ORDERED.

[2]The administrative law judge made an error in his calculation of claimant's average weekly wage as he found that claimant earned $35,391.17, rather than the actual amount of $35,991.17. *See* Cl. Ex. 15. The decision is modified to correct this error.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge