BRB Nos. 86-2976,
87-2575 and 88-1963

THOMAS LENNON	)	BRB No. 86-2976
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WATERFRONT TRANSPORT	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
THOMAS LENNON	)	BRB No. 87-2575
	)	
Claimant-Respondent	)	
v.	)	
	)	
WATERFRONT TRANSPORT	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	
THOMAS LENNON	)	BRB No. 88-1963
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WATERFRONT TRANSPORT	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeals of the Decision and Order on Remand and Order Denying Motion to Refund Benefits Paid of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor, and the Denial of a Penalty Assessment of Will Massey, Deputy Commissioner, United States Department of Labor.

Eugene D. Brierre, New Orleans, Louisiana, for claimant.

Robert E. Peyton and Daniel A. Rees (Christovich & Kearney), New Orleans, Louisiana, for employer/carrier.

LuAnn B. Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Denial of a Penalty Assessment (7-70794) of Deputy Commissioner Will Massey and the Decision and Order on Remand (84-LHC-1016) of Administrative Law Judge Quentin P. McColgin denying benefits 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). Employer appeals the Order Denying Motion to Refund Benefits Paid (84-LHC-1016) of Administrative Law Judge Quentin P. McColgin. 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).

On July 1, 1980, claimant, who worked for employer as a night dispatcher in a river-front supply trailer, injured his back when reaching for a container of film located in a storage area within the trailer. In September 1983, claimant was diagnosed as having a herniated disc by Dr. Vogel and underwent a lumbar chymopapain discectomy. Claimant sought temporary total disability benefits.

In his original Decision and Order, the administrative law judge found that claimant's employment was covered under the Act and that claimant's low back problems were caused by the work-related injury he suffered in 1980. Thus, the administrative law judge awarded claimant temporary total disability benefits as of March 14, 1982 and continuing thereafter. 33 U.S.C. §908(b). This decision was appealed to the Board by employer. The Board affirmed the administrative law judge's finding that claimant was a covered employee but held that the administrative law judge's

credibility findings regarding causation were patently unreasonable and that the administrative law judge erred in failing to consider the evidence in light of the Section 20(a) presumption, 33 U.S.C. §920(a). Lennon v. Waterfront Transport, BRB No. 86-188 (April 21, 1987)(unpub.). Thus, the case was remanded to the administrative law judge for reconsideration of causation and a determination of the nature and extent of claimant's disability if these issues were reached.

Following the issuance of the administrative law judge's original Decision and Order, a dispute arose as to the timely commencement of benefit payments. Claimant requested that employer be assessed a penalty for late payment pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f). However, the deputy commissioner denied the request, finding that it was through claimant's own omission that he did not receive payment within ten days, as he did not give proper notice of the change of his address. This finding was appealed by claimant to the Board on November 10, 1986. BRB No. 86-2976.

Following the issuance of the Board's Decision and Order vacating the award of benefits and remanding the case, employer filed a motion with the administrative law judge requesting an order requiring claimant to refund to employer all monies paid by employer pursuant to the administrative law judge's Decision and Order Awarding Benefits issued on December 16, 1985. The administrative law judge denied this motion, and employer appealed this decision to the Board, contending that as the award of benefits was vacated by the Board, claimant should be required to make restitution. BRB No. 87-2575.

On remand, the administrative law judge found that claimant established a prima facie case of causation and that there was sufficient evidence to establish rebuttal of the Section 20(a) presumption. Moreover, the administrative law judge found, after weighing the evidence of record and considering the Board's reversal of the previous finding that claimant's testimony was credible, that claimant's current condition was not causally related to the lifting accident of 1980. Thus, benefits were denied. Claimant appealed this decision, contending the administrative law judge erred in finding that a causal relationship between his employment and the herniated disc was not established. BRB No. 88-1963.

Initially, claimant appeals the deputy commissioner's denial of an assessment of a penalty for late payment against employer pursuant to Section 14(f) of the Act.[1] The Board issued an Order dated May 2, 1989, instructing claimant to show cause why this appeal should not be dismissed for failure to file a Petition for Review and brief. Claimant responded with a request for an extension of time, which the Board granted. However, a brief was not filed within the allowed time. The Board issued another Order to show cause and then granted claimant another extension on September 13, 1991, to which claimant responded by refiling his Petition for Review and brief in the case BRB No. 88-1963. The Board accepted this Petition for Review and brief for both appeals by Order dated February 4, 1992. However, the issue of the penalty assessment is not discussed in this brief. Therefore, as the denial of a Section 14(f) penalty has not been adequately briefed, we will not address this issue on appeal. Bonner v. Ryan-Walsh Stevedoring Co., 15 BRBS 321 (1983); Frisco v. Perini Corp., Marine Div., 14 BRBS 798 (1981); 20 C.F.R. §802.211.

In its appeal, employer contends that the administrative law judge erred in denying its motion that claimant be ordered to refund benefits paid pursuant to the December 16, 1985 Decision and Order Awarding Benefits which was vacated by the Board in its 1987 decision. Specifically, employer contends that the decision of the United States Court of Appeals for the Fifth Circuit in Phillips v. Marine Concrete Structures, Inc., 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), vacated on other grounds on reh'g, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990)(en banc), mandates that employer be reimbursed for funds to which claimant is ultimately found to not be entitled. We disagree.

Section 14(j) of the Act, 33 U.S.C. §914(j)(1988), allows employer a credit for its advance payments of compensation against any installments of compensation subsequently found due. There is no basis, however, for reimbursement under the Act when no future benefits are owing.[2] Ceres Gulf v. Cooper, 957 F.2d 1199, 25 BRBS 125 (CRT)(5th Cir. 1992). See also Stevedoring Services of America v. Eggert, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992),

[1] Section 14(f) states that if compensation payable under the terms of an award is not paid within ten days after it becomes due, employer shall be liable for an additional 20 percent of the installment due. Following the deputy commissioner's decision, claimant requested that this issue be referred to the Office of Administrative Law Judges. It appears that the deputy commissioner did not act upon the request.

[2] We note that at the time the administrative law judge issued his Order, he had not yet issued his decision on remand denying benefits.

cert. denied, 112 S.Ct. 3056 (1992); Vitola v. Navy Resale and Services Support Office, ____ BRBS ___, BRB No. 91-763 (Sept. 29, 1992); Cooper v. Ceres Gulf, 24 BRBS 33 (1990). Furthermore, contrary to employer's contention, the Fifth Circuit's opinion in Phillips does not mandate an order of reimbursement. In that case, the issue was whether employer was entitled to be reimbursed for overpayments it made out of installments due claimant from the Special Fund pursuant to Section 8(f), 33 U.S.C. §908(f). The court held that "the statutory language is broad, allowing reimbursement to be had 'out of any paid installment or installments of compensation due'; there is no requirement that the reimbursement come from installments still owed by the party that made the overpayment." Phillips, 877 F.2d at 1234, 22 BRBS at 86 (CRT). The court further stated that:

> The purpose of Section 14(j) is apparent: If an employer has paid out, and the claimant has received, LHWCA benefits to which it is later found that the claimant is not entitled, the employer should be able to recover those funds.

Id. This statement, however, does not extend the requirement that the reimbursement be made from future benefits, as the claimant in Phillips was receiving a ongoing award of permanent total disability benefits. Thus, as the administrative law judge ultimately found that claimant is not entitled to benefits under the Act, we affirm the administrative law judge's denial of employer's motion for an order requiring claimant to refund all previously paid benefits. Ceres Gulf, 957 F.2d at 1199, 25 BRBS at 125 (CRT).

We also reject claimant's contention that the administrative law judge erred in finding that claimant's herniated disc is not causally related to the accident on July 1, 1980. The Section 20(a) presumption, 33 U.S.C. §920(a), applies to the issue of whether an injury is causally related to employment. See Sinclair v. United Food and Commercial Workers, 23 BRB 148 (1989). If employer succeeds in rebutting the presumption, the presumption no longer controls and the issue of causation must be resolved based on the record as a whole. See, e.g., Devine v. Atlantic Container Lines, G.I.E., 23 BRBS 279 (1990)(Lawrence, J., concurring and dissenting); Neeley v. Newport News Shipbuilding and Dry Dock Company, 19 BRBS 138 (1986).

In this case, the Board held that Section 20(a) applies to link claimant's 1983 herniated disk and the work accident. The Board remanded for the administrative law judge to consider rebuttal, and, if rebuttal was established, to resolve the causation issue based on the evidence as a whole. On remand, the administrative law judge found Section 20(a) rebutted and, weighing the evidence as a whole, found that causation was not

established. On appeal, claimant challenges the administrative law judge's weighing of the evidence.

Claimant contends that Board exceeded its scope of review in determining that the administrative law judge erred in relying on claimant's testimony. The Board's previous decision on this issue constitutes the law of the case, and we will not now reexamine the issue. See Wayland v. Moore Dry Dock, 25 BRBS 53 (1991); Brocklehurst v. Giant Food, Inc., 22 BRBS 256 (1989).

Claimant also contends that the administrative law judge erred in failing to credit Dr. Vogel's opinion. In weighing the evidence as a whole, the administrative law judge found that the evidence supporting a causal connection between the July 1, 1980 lifting accident and the herniated disc consisted solely of the opinion of Dr. Vogel to this effect. The administrative law judge found, however, that Dr. Vogel had an incomplete medical history of claimant and based his conclusions in part on claimant's subjective complaints which the Board held in its earlier decision were not credible.[3] Dr. Vogel testified at the hearing that if claimant began having his low back pain as of the time of the July 1980 incident and it persisted until the time of his hospital treatment, then in all medical probability that incident caused his low back problem and herniated disc. See Tr. at 26. The administrative law judge found that the opinion of Dr. Vogel was based on inaccurate "qualifiers," namely reliance that claimant's reported symptoms were credible and an incomplete medical history.[4] Thus, the administrative law judge concluded that Dr. Vogel's opinion was insufficient to support a finding of causation. The administrative law judge's findings are based on substantial evidence, and claimant has raised no reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations. See generally Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). Therefore, we affirm the administrative law judge's finding that claimant's herniated disc is not causally related to the 1980 work accident.

[3] The Board noted that claimant denied alcohol abuse prior to his injury and failed to mention a September 1982 accident in which he fractured his coccyx. Lennon, slip op. at 4.

[4] The administrative law judge noted that Dr. Vogel did not review all prior medical reports prior to rendering his opinion; significantly, these earlier reports did not diagnose a herniated disc, and claimant did not seek medical care for his back for six months from the time he was released by Dr. Williams in October 1981. Tr. at 30-32, 99.

Accordingly, the deputy commissioner's denial of a penalty pursuant to Section 14(f) is affirmed. The Decision and Order on Remand denying benefits and the Order Denying Motion to Refund Benefits Paid of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge