BRB No. 92-2529

RANDOLPH RYKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED:_____
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

Russell A. Metz (Metz, Frol & Jorgensen, P.S.), Seattle, Washington, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-1744) of Administrative Law Judge Henry B. Lasky 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

On January 31, 1990, after welding overhead while standing on a scaffold bench, claimant became disoriented and fell, sustaining a lumbosacral strain. Emp. Ex. 2; Tr. at 40-42. He returned to light duty work on February 21, 1990 and to full duty work on March 12, 1990; however, he was laid off in a reduction-in-force on March 14, 1990. Emp. Exs. 2-3. Thereafter, claimant worked as a welder in temporary jobs in both Washington and Tennessee from March 29 through November 19, 1990. Tr. at 44-46. On November 19, 1990, claimant twisted his back, heard a popping sound, and felt immediate pain while getting out of his car at the end of a work-day. Tr. at 47-49. His doctor diagnosed a ruptured disc and performed a hemilaminectomy on December 12, 1990. Cl. Ex. 3. On January 14, 1991, claimant filed a claim for permanent partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21) (1988), as well as additional temporary total disability benefits pursuant to Section 8(b), 33 U.S.C. §908(b).

A formal hearing was held on June 3, 1992, wherein the parties disputed the cause, nature and extent of claimant's disability, the applicable average weekly wage, and employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. The administrative law judge found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his ruptured disc is due to the work injury, that employer presented sufficient evidence to rebut the presumption, and that, on the record as a whole, claimant's ruptured disc is not the natural or unavoidable result of his January 1990 injury. Therefore, he concluded that employer is not liable for permanent partial disability benefits. Decision and Order at 7-9. Additionally, the administrative law judge found that employer correctly calculated claimant's average weekly wage when it paid temporary total disability benefits to claimant in February 1990 for his back strain. Consequently, he concluded that claimant is not entitled to additional temporary total disability benefits and declined to address the remaining issues. *Id.* at 9-10. Claimant now appeals the decision, contending the administrative law judge erred in finding that his ruptured disc is not work-related and in calculating his average weekly wage. Employer responds, urging affirmance.

Initially, we note that neither party challenges the administrative law judge's determination that claimant is entitled to the Section 20(a) presumption. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause or contribute to his injury. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1264 (1993); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In this case, claimant contends the administrative law judge erred in finding the Section 20(a) presumption rebutted. We disagree. Dr. Tatkow, who examined claimant in April 1992, testified that claimant's January 1990 fall "could not possibly have been the proximate cause of his herniated disc" because of the 10-month interval between the initial injury and the rupture.[1] Emp. Ex. 16 at 27. Under the Act, the unequivocal testimony of a physician stating that no relationship exists between an injury and a claimant's employment is sufficient to rebut the Section 20(a) presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Contrary to claimant's contention, Dr. Tatkow's opinion constitutes sufficient rebuttal evidence; therefore, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See, e.g., Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Because employer presented sufficient evidence to rebut the Section 20(a) presumption, the administrative law judge decided the issue of causation on the whole body of proof. *Stevens*, 23 BRBS at 194. Claimant submitted the opinion of Dr. Wilburn to support his claim of a causal relationship between the work accident and the herniated disc. Dr. Wilburn, claimant's treating physician, explained that calcification of a disc occurs over a period of time, and that claimant's January 1990 injury "either caused or accelerated or extenuated the onset of a degenerative disc process . . . that did result in a disc rupture." Cl. Ex. 10 at 13, 24. In contrast, Dr. Simmons, the emergency room physician who treated claimant on November 19, 1990, opined that claimant's ruptured disc "seemed like it was a fresh injury that may or may not have been related to a previous injury." Emp. Ex. 15 at 8. In addition to the opinions of Drs. Simmons, Tatkow, and Wilburn, the administrative law judge noted that the record contains evidence which establishes that, between claimant's return to work in March 1990 and his injury in November 1990, he worked as a welder in several temporary jobs and did not seek medical treatment for his back condition until the disc ruptured. Emp. Exs. 4-5, 7; Tr. at 44-46, 76. Based on the record as a whole, the administrative law judge determined that claimant's November 1990 ruptured disc is not related to his January 1990 fall. Decision and Order at 7-9.

Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, it is within the administrative law judge's discretion to credit the opinion of Dr. Tatkow over that of Dr. Wilburn.[2] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge's credibility determinations are neither inherently incredible nor patently unreasonable, and as the record contains substantial evidence to support the administrative law judge's decision, we reject claimant's contentions and affirm the finding that claimant's November 1990 ruptured disc is not related to his January 1990 back injury.[3]

[1]Dr. Tatkow stated that a herniated disc would manifest itself within a short period, such as a few weeks or months, but that an interval such as the one here would seem to be a "stretch of the imagination." Emp. Ex. 16 at 28.

[2]Dr. Simmons' testimony appears to be equivocal.

Phillips, 22 BRBS at 96.

Next, claimant contends the administrative law judge erred in calculating average weekly wage for his period of temporary total disability. Specifically, claimant argues that his average weekly wage is $491.32. Employer maintains that it paid the appropriate amount of temporary total disability benefits between February 1 and February 20, 1990 based on an average weekly wage of $247.74. *See* Emp. Ex. 1 at 2. The administrative law judge rejected claimant's figure as being three times the amount he actually earned, accepted employer's calculation under Section 10(c) of the Act, 33 U.S.C. §910(c), and denied additional temporary total disability benefits. Decision and Order at 9-10. For the reasons below, we reject claimant's contention that he is entitled to additional benefits based on an average weekly wage of $491.32, and we affirm the administrative law judge's finding.

The administrative law judge has considerable latitude in calculating a claimant's average weekly wage pursuant to Section 10(c).[4] *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). Although he may use the claimant's actual past wages to make the computation, provided they are a reasonable representation of the claimant's earning capacity, the administrative law judge need not do so, as actual earnings are not controlling under Section 10(c). *See Bonner*, 600 F.2d at 1292; *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). A review of the record in this case reveals that claimant earned approximately $9,900 in 1989. Emp. Ex. 9; Tr. at 61-63. Dividing claimant's earnings by 52 results in an average weekly wage of $190.38; multiplying that figure by 2/3 results in a compensation rate of $126.92. 33 U.S.C. §§908(c)(21), 910(d)(1). Clearly, claimant's actual earnings support an average weekly wage determination that is significantly lower than the $491.32 figure he purports is applicable. As we find no support for claimant's assertion, we reject it.

In this regard, we also note that the administrative law judge observed that claimant's actual earnings for the years 1985 through 1989 never exceeded the statutory minimum average weekly wage, whether he was attending school at the time or not.[5] Further, the administrative law judge noted that two employees hired at the same time as claimant earned approximately $4,900 and $5,600 in 1989, working 10 weeks and 13 weeks, respectively. Cl. Ex. 11; Decision and Order at 9. In acknowledging these facts, the administrative law judge determined that claimant's average weekly wage fell short of the minimum average weekly wage for the period between October 1,

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[3]Thus, we need not address claimant's contention regarding the nature and extent of his disability.

[4]Section 10(c) is used to determine a claimant's average weekly wage in situations where his employment is seasonal, part-time, or intermittent, and where Section 10(a), (b) cannot reasonably or fairly be applied. 33 U.S.C. §910(a)-(c); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91, 92 (1987).

[5]Claimant's social security records indicate that he earned approximately $8,600 in 1985, $4,500 in 1986, $4,100 in 1987, and $5,200 in 1988. Emp. Ex. 9; Tr. at 61-63.

1989 and September 30, 1990, as calculated by the Department of Labor.[6] 33 U.S.C. §906(b)(2); OWCP Notice No. 69, Vol. A BRBS at 4-126 (September 22, 1989). Therefore, he found that employer's calculation and payment of temporary total disability benefits based on the average weekly wage of $247.74 was appropriate.[7] As Section 10(c) of the Act allows the administrative law judge considerable latitude in determining claimant's average weekly wage, and as the administrative law judge approved employer's use of the statutory minimum average weekly wage, which is greater than claimant's actual average earnings, we hold that claimant has not established the basis for an award of additional temporary total disability benefits. *See Richardson*, 14 BRBS at 859.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge

[6]The minimum compensation rate for the period between October 1, 1989 and September 30, 1990 is $165.16; consequently, the minimum average weekly wage is $247.74 ($165.16 is 2/3 of $247.74).

[7]We note a typographical error in the administrative law judge's Decision and Order in that he indicated the correct average weekly wage is $247.47 instead of $247.74. Decision and Order at 9; *see also* Emp. Ex. 1 at 2; n.6, *supra*.