

BRB No. 93-1222

NORMAN DESORMEAUX)
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Claimant-Respondent)
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v.)
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SOUTHERN PETROLEUM)
LABORATORIES, INCORPORATED) DATE ISSUED: _____
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and)
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COMMERCIAL UNION INSURANCE)
COMPANIES)
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Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeal of the Decision and Order and Decision on Motion for Reconsideration of Lee J.
Romero, Jr., Administrative Law Judge, United States Department of Labor.

Carla M. Perron (Domengeaux, Wright, Moroux & Roy), Lafayette, Louisiana, for claimant.

W. Patrick Klotz and Andre C. Gaudin (Best, Koeppel & Klotz), New Orleans, Louisiana,
for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative
Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order and Decision on Motion for Reconsideration (91-LHC-2266) of Administrative Law Judge Lee J. Romero, Jr., 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant allegedly sustained an injury to his cervical region on April 20, 1988, during the course of his employment as a meter technician with employer. Tr. at 29, 34-38, 70-71. Drs. Martinez and Rivet diagnosed cervical spondylitic disease, cervical cord compression, and occipital neuralgia, and recommended cervical fusion surgery, CX 1; EXS 10, 12, which claimant underwent on January 14, 1992. Tr. at 69. Claimant filed a claim for benefits under the Act.

The administrative law judge determined that claimant's cervical condition was causally related to his April 20, 1988, work-accident, and that, as a result of that condition, claimant became temporarily totally disabled on May 23, 1990. Accordingly, benefits were awarded. The administrative law judge subsequently denied employer's Motion for Reconsideration.

On appeal, employer challenges the administrative law judge's findings regarding the existence of a harm; alternatively, employer asserts that the administrative law judge erred in determining that claimant's cervical condition is causally related to his April 20, 1988, work-accident. Employer also alleges error in the administrative law judge's disability determination. Claimant responds, urging affirmance.

After consideration of the administrative law judge's Decision and Order and Decision on Motion for Reconsideration, the arguments raised on appeal, and the evidence of record, we hold that these decisions are supported by substantial evidence and contain no reversible error. Initially, we affirm the administrative law judge's finding that claimant established a harm, spondylitic disease, based on claimant's October 27, 1991, myelogram and CT scan. CXS 1, 2, 5; *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Next, we need not address employer's specific contention that the evidence, including Dr. Levy's opinion that claimant incurred no injury or disease to his cervical region as a result of the April 20, 1988, work accident, EX 13, is sufficient to rebut the Section 20(a), 33 U.S.C. §920(a), presumption of causation. Assuming, *arguendo*, that Dr. Levy's opinion is sufficient to rebut the presumption, the administrative law judge's determination that causation is established based on the record as a whole is rational and supported by substantial evidence. Specifically, the administrative law judge, as factfinder, credited the opinions of Drs. Martinez and Rivet, both of whom related claimant's condition to trauma, over Dr. Levy's contrary opinion, because Drs. Martinez and Rivet examined claimant earlier in time, more frequently, and also saw claimant after the October 27, 1991 myelogram. CXS 1, 2, 4-6, EX 10; see *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); see generally *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's finding that claimant's cervical condition is related to his April 20, 1988, work accident. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

We reject employer's assertion of error regarding the administrative law judge's determination as to the date claimant's temporary total disability commenced. Based upon Dr. Martinez's credited May 23, 1990, opinion that claimant was not fit for duty, and his supporting

deposition testimony, the administrative law judge rationally determined that claimant's temporary total disability began on May 23, 1990. CX 6, EX 10; *see New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Lastly, contrary to employer's contention, the administrative law judge specifically noted the record evidence regarding claimant's post-injury in-house sale of perfume products. In this regard, the administrative law judge stated that claimant's income from these sales did not exceed claimant's costs. *See* Decision and Order at 9-10; Tr. at 178, 180-183. As the administrative law judge's findings on this issue are supported by substantial evidence, they are affirmed. Accordingly, employer did not meet its burden of demonstrating suitable alternate employment establishing claimant's post-injury wage-earning capacity. 33 U.S.C. §908(h); *see Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990); *see generally Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). We thus affirm the administrative law judge's award of temporary total disability compensation commencing May 23, 1990.

Accordingly, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge