BRB Nos. 07-0916
and 07-0916A

R.M.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SABRE PERSONNEL ASSOCIATES, INCORPORATED	)	DATE ISSUED: 07/23/2008
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY c/o TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

R.M., Orange, Texas, *pro se*.

C. Douglas Wheat (Wheat Oppermann & Meeks, P.C.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Texas Property and Casualty Insurance Guaranty Association (TGA)[1] appeals, and claimant, who is without legal representation, cross-appeals, the Decision and Order (2006-LHC-1618) of Administrative Law Judge Patrick M. Rosenow 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 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 injured his right ankle on July 18, 1998, when he slipped at work. He finished his shift that day, but sought medical treatment the next work day and has not returned to his former duties. He has been treated for injuries to his right ankle, foot, and back, and he underwent back surgery in 2005. He participated in a Department of Labor rehabilitation program and has had a number of jobs since his injury. Currently, claimant works at a car wash and is under the care of a pain management physician. Employer paid disability compensation from the date of the injury until December 15, 2005. Claimant sought additional disability benefits and medical treatment for his back condition under the Act.

In his Decision and Order, the administrative law judge found that it is not contested that claimant injured his right ankle in the accident on July 18, 1998. However, the administrative law judge found that claimant does not suffer from "foot drop," and that, while the evidence establishes that claimant suffers from a back condition, this injury is not work-related. Therefore, the administrative law judge found that TGA is not liable for any disability caused by or medical treatment for these conditions. The administrative law judge also found that claimant was not prevented by his ankle injury from returning to his usual duties after April 9, 2003, the date the injury reached maximum medical improvement. Thus, the administrative law judge awarded claimant temporary total disability benefits from the date of injury to April 9, 2003, based on the average weekly wage of $620. The administrative law judge found that TGA is liable for a Section 14(e) assessment, 33 U.S.C. §914(e), on the difference between the rate at which employer paid benefits and that found by the administrative law judge, interest and an attorney's fee. The administrative law judge rejected TGA's contention that it is exempt from the payment of a Section 14(e) assessment, interest and attorney's fees pursuant to state law.

[1] TGA is a state-created insurer designed to protect claimants from financial loss caused by the insolvency of an original, covered insurer. In this case, both employer and its original insurer, Reliance National Indemnity Company, are insolvent.

On appeal, TGA contends that the administrative law judge erred in calculating claimant's average weekly wage and in finding that its liability for a Section 14(e) assessment, interest, and attorney's fees is not precluded pursuant to state law.[2] On claimant's appeal, we will review the administrative law judge's findings that claimant does not suffer from foot drop and that his back injury is not work-related, as these findings were adverse to claimant.

Claimant contended that he sustained a foot drop of the right foot and a back injury as a result of the work injury. In order to be entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his injuries to his employment, claimant must first establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found that claimant did not establish that he suffers from foot drop. Claimant testified that he has this condition, Tr. at 53, and he manifested it during his examinations. Cl. Ex. 15; Emp. Ex. 36. The physicians who examined claimant, however, consistently stated that there could be no foot drop with a normal EMG. Claimant underwent an EMG in 1999, which indicated L5-S1 right side radiculopathy, and on October 15, 2002, which was normal. Emp. Exs. 16, 34. Dr. Barrash stated that none of the objective signs for foot drop was present, including asymmetrical atrophy. Emp. Exs. 7-8. Dr. McNeil noted that claimant exhibited inconsistent ability to dorsiflex his right foot as he could not do it in testing but could when putting on his socks.[3] Cl. Ex. 9. The administrative law judge rationally found that claimant was not a credible witness, and thus, that his testimony did not establish that he suffered from this condition. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8

[2] On December 11, 2007, the district director found employer to be in default of the compensation awarded by the administrative law judge. The district director found employer liable for an additional 20 percent of the amount due, pursuant to Section 14(f), 33 U.S.C. §914(f). TGA correctly asserts that the Board cannot enforce this award. The Act's enforcement procedures are contained in Section 18 of the Act, 33 U.S.C. §918. *See also* 20 C.F.R. §702.372.

[3] Dr. Stanley noted that he did not treat claimant for foot drop and stated that it was claimant's least objective injury. Cl. Ex. 9.

BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As substantial evidence supports the administrative law judge's finding that claimant did not establish that he suffers from foot drop, the denial of benefits for this condition is affirmed. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

In considering claimant's back injury, the administrative law judge found it uncontested that claimant has a lumbar injury, but that "claimant failed to show that it is more likely than not that his herniation was either created or aggravated by his fall in July 1998 or subsequent altered gait and crutch use," without discussing the issue in terms of Section 20(a). Decision and Order at 41, 44. If invoked, Section 20(a) provides claimant with a presumption that his back condition is causally related to his employment. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT). In this case, any error by the administrative law judge in failing to apply Section 20(a) is harmless. While Dr. Stanley's opinion that claimant's back condition is related to the injury he suffered on July 18, 1998, due to his altered gait and use of crutches, is sufficient to invoke the Section 20(a) presumption, *see* Cl. Exs. 9, 18, Dr. Barrash's opinion that claimant's back surgery and subsequent condition are not related in any way to his work-related ankle injury or to the accident on July 18, 1998, *see* Emp. Ex. 19 at 17, is sufficient to establish rebuttal of the Section 20(a) presumption. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). 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. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *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 the issue of the work-relatedness of claimant's back injury turns on the administrative law judge's evaluation of the evidence as a whole.

The administrative law judge considered Dr. Stanley's opinion that claimant's back injury was caused or exacerbated by the fall in June 1998 or by claimant's subsequent altered gait and crutches, but noted that Dr. Stanley also thought it unusual that claimant did not complain of back pain until seven months following the accident. Cl. Ex. 9 at 23. The administrative law judge also considered the opinion of Dr. McNeil that claimant's back condition was either caused by the 1998 work-related accident or was caused derivatively through altered gait and crutch use. Cl. Ex. 15. However, he found these opinions outweighed by Dr. Barrash's opinion that the 1998 accident did not cause claimant's back condition, either directly or indirectly by an altered gait, Emp. Ex. 19 at 17, because Dr. Barrash relied less on claimant's subjective complaints. The administrative law judge also noted Dr. Stanley's later opinion that claimant's altered gait and crutch use was not the cause of claimant's herniated disc. Cl. Ex. 9 at 22. The

administrative law judge is entitled to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion of any particular expert, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As it is supported by the credited opinions of Dr. Barrash and Dr. Stanley, we affirm the administrative law judge's finding that claimant did not establish that his back condition is work-related. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1998), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Rochester v. George Washington Univ.*, 30 BRBS 233 (1997). Consequently, we also affirm the administrative law judge's finding that employer is not liable for medical treatment for claimant's back condition, 33 U.S.C. §907; *see generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), or for any disability caused by claimant's back condition.

TGA contends that the administrative law judge erred in calculating claimant's average weekly wage by reference only to his two months of wages with employer rather than with reference to his earnings in the five years prior to the injury. Pursuant to Section 10(c), 33 U.S.C. §910(c), the administrative law judge used claimant's hourly rate at the time of injury of $15.50 times a 40-hour week to conclude that claimant's average weekly wage is $620. He noted that claimant had worked for employer for only two months at significantly higher wages than he previously had earned, but stated that there is no evidence that claimant would not have continued to work for employer had he not been injured and that this figure best represented claimant's earning capacity at the time of injury. Decision and Order at 45.

The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Although Section 10(c) permits the use of wages from the claimant's other prior employment, *see, e.g., New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997), it does not require such use, as the administrative law judge is afforded wide discretion in arriving at a Section 10(c) calculation. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000). We reject employer's contention that the administrative law judge must take into account the earnings from a longer period prior to claimant's injury pursuant to *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT). In that case, the Fifth Circuit held that the administrative law judge may look to a claimant's earnings in more than the 52 weeks preceding the injury, but must use all the earnings from the period he selects. In this case, the administrative law judge appropriately considered claimant's earning capacity at the time of his injury and rationally based the average weekly wage

computation solely on claimant's earnings with employer. The administrative law judge's calculation of claimant's average weekly wage is rational, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's earning capacity at the time of injury. *Staftex Staffing*, 237 F.3d 404, 34 BRBS 44(CRT). We therefore affirm his determination that claimant's average weekly wage is $620.00.

TGA also contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment, interest, and attorney's fees, asserting that the statutory language of the Texas Property and Casualty Insurance Guaranty Act (TPCIGA), *see* Tex. Ins. Code Ann. Art. 21.28-C (2005), provides it with an exemption from any liability for these payments. TGA maintains that the relevant TPCIGA clause, *i.e.*, Tex. Ins. Code Ann. Art. 21.28-C, §8(a), is similar to the Florida Insurance Guaranty Act clause interpreted by the Board in *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992), such that the Board should hold that TGA is exempt from the Section 14 (e) assessment, interest, and an attorney's fee which the administrative law judge awarded claimant in this case.[4]

The administrative law judge held TGA liable for interest and an attorney's fee on the basis that the Longshore Act pre-empts any state law purporting to limit TGA's liability for such payments. Decision and Order at 45-47. With regard to the Section 14(e) assessment, the administrative law judge found the state statute is not pre-empted. However, pursuant to the Board's unpublished, but factually indistinguishable, decision in [*M.P.*] *v. Levingston Shipbuilding Co.*, BRB No. 06-0821 (June 25, 2007), the administrative law judge held employer liable for a Section 14(e) assessment on the difference between the average weekly wage on which it paid benefits and that awarded by the administrative law judge, until the date employer controverted the claim. Decision and Order at 45.

We reject TGA's contention that the Board's decision in *Canty*, 26 BRBS 147 precludes its liability for the assessments at issue.[5] The state statute in *Canty* precluded

[4] The administrative law judge did not award claimant's counsel an attorney's fee payable by employer in his decision, but stated that claimant's counsel could file a petition for an attorney's fee. The record forwarded to the Board does not contain any order awarding an attorney's fee.

[5] We note that the United States Court of Appeals for the Federal Circuit has held that Section 14(e) is not a penalty provision, but calls for the assessment of "additional compensation," noting that the Act specifically refers to fines and penalties in other sections. *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Fed.

the Florida Guaranty Association from being liable for "any penalties and interest." Fla. Stat. Ann. §631.57(1)(b) (West 1992). As the employer in that case was not insolvent, it was held liable for the Section 14(e) assessment and interest, despite the guaranty association's liability for compensation benefits. *Canty*, 26 BRBS at 157. The statute in this case does not preclude such liability. In pertinent part, Section 8(a) of the relevant Texas statute provides:

> The association shall pay covered claims that exist before the designation of impairment or that arise within 30 days after the date of designation of impairment, before the policy expiration date if the policy expiration date is within 30 days after the date of the designation of impairment, or before the insured replaces the policy or causes its cancellation if the insured does so within 30 days after the date of designation. The obligation is satisfied by paying to the claimant the full amount of a covered claim for benefits. The association's liability is limited to the payment of covered claims. *The association has no liability for any other claim or damages, including claims for recovery of attorney's fees, prejudgment or post judgment interest, or penalties*, extra contractual damages, multiple damages, or exemplary damages, or any other amount sought by or on behalf of any insured or claimant or any other provider of goods or services retained by any insured or claimant in connection with the assertion or prosecution of any claims, without regard to whether the claims are covered, against the insured or an impaired insurer, the impaired insurer, the guaranty association, the receiver, the special deputy receiver, the commissioner, or the liquidator. *This subsection does not exclude the payment of workers' compensation benefits or other liabilities or penalties authorized by Title 5, Labor Code, arising from the association's processing and payment of workers' compensation benefits after the designation of impairment.*

Tex. Ins. Code Ann. Art., §8(a)(2005) (emphasis added). In [*M.P.*], slip op. at 6, the Board noted that this statute "'does not exclude the payment of workers' compensation benefits or other liability or penalties,'" and requires that the TGA "'pay the full amount of any covered claim arising out of a workers' compensation policy.'" *Id.* The Board also stated that, "It cannot be disputed that benefits paid pursuant to the Longshore Act are workers' compensation benefits, *see* U.S.C. §901. . . ." such that the Section 14(e) assessment imposed in that case was not precluded by the state statute. *Id.* In a subsequent unpublished case, *J.E. v. Friede-Goldman Halter, Inc.*, BRB No 07-0565

Cir. 1997), *citing* 33 U.S.C. §§914(g), 915(a), 930(e), 931(c), 937, 938(a), (b), 941(f), 944(c)(3), 948a.

(2007), the Board employed the rationale of [*M.P.*] and affirmed TGA's liability for a Section 14(e) assessment and interest. Similarly, in this case, any attorney's fees awarded may be deemed to constitute a worker's compensation liability under the TPCIGA. Consequently, for the reasons stated in [*M.P.*] and *J.E.*, we reject employer's assertion that the TPICGA exempts TGA for liability from the Section 14(e) assessment, interest award, and attorney's fee imposed by the administrative law judge in this case.[6] The administrative law judge's awards payable by TGA thus are affirmed.[7]

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[6] The Board generally regards its unpublished decisions as lacking precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990). Nonetheless, the facts and law in [*M.P.*] and *J.E.* are indistinguishable from those in this case and it is thus appropriate to cite the discussions therein for the sake of consistency. We note that appeals of both of these decisions are pending at the United States Court of Appeals for the Fifth Circuit.

[7] Based on our disposition, we need not address the administrative law judge's pre-emption analysis.