

DAVID C. AUFANG)
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 Claimant-Petitioner)
)
 v.)
)
 TACOMA BOATBUILDING COMPANY) DATE ISSUED: July 22, 1999
)
 and)
)
 PACIFIC MARINE INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 LIBERTY NORTHWEST INSURANCE)
 COMPANY)
)
 Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Dismissal on Remand - Order Denying Benefits on Remand of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

James R. Walsh, Lynnwood, Washington, for claimant.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer and carrier Liberty Northwest Insurance Company.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Claimant appeals the Order of Dismissal on Remand - Order Denying Benefits on Remand (89-LHC-1218, 89-LHC-1219) of Administrative Law Judge Edward C. Burch 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).

This case, which has a long and complex procedural history, is before the Board for the third time. To recapitulate, claimant injured his back in 1982 while working for employer as a welder-fitter, and ultimately settled his claim for compensation arising out of this injury pursuant to an approved Section 8(i) settlement. See 33 U.S.C. §908(i). In 1983, claimant returned to modified duty work for employer. Claimant sustained additional injuries to his back while performing modified work in incidents occurring in January 1984, and on January 21, 1985, and May 15, 1985.¹ In July 1985, claimant was terminated as part of a general reduction-in-force. Upon recalling its employees in November 1985, employer advised claimant that modified work was no longer available for him and thus, claimant did not return to work at that time. Thereafter, on July 1, 1986, claimant returned to work for employer, although the work to which he was assigned proved to be beyond his medical restrictions. On his fourth day of work, July 7, 1986, while carrying a flat bar on his shoulder, claimant experienced sharp back pain. Claimant immediately sought medical attention at a hospital emergency room and has not returned to work since that day. Pacific Marine Insurance Company (Pacific Marine) was employer's insurance company from the date of claimant's

¹Although claimant alleges another injury on October 14, 1984, the medical records cited in support of this injury reflect that the injury occurred on August 14, 1974. See LXS 24, 25.

initial 1982 back injury until February 28, 1986.² Thereafter, Liberty Northwest Insurance Company (Liberty Northwest) assumed insurance coverage of employer.

Claimant filed a claim for benefits under the Act, contending that he became permanently totally disabled as a result of his July 1986 injury, while Liberty Northwest was on the risk. Claimant additionally raised the injuries occurring in 1984 and 1985, while Pacific Marine was on the risk. In his Decision and Order, Administrative Law Judge James J. Butler denied the claim on the grounds that claimant did not sustain a work-related injury in July 1986; the administrative law judge declined to address the previous incidents occurring while Pacific Marine was on the risk.

Claimant thereafter appealed Judge Butler's Decision and Order to the Board. On January 26, 1994, the Board issued a Decision and Order vacating Judge Butler's denial of benefits and remanding the case for further consideration of the issue of whether claimant sustained a work-related aggravation of his back condition in July 1986. *Aufang v. Tacoma Boatbuilding Co.*, BRB No. 90-1776 (Jan. 26, 1994)(unpub.).

²The parties have advised that both Tacoma Boatbuilding Company and Pacific Marine Insurance Company are now defunct. We note that Section 18(b) of the Act, 33 U.S.C. §918(b), states that “[i]n cases where judgment cannot be satisfied by reason of the employer’s insolvency or other circumstances precluding payment,” the Secretary of Labor may, in her discretion and to the extent she deems advisable, make payments from the Special Fund. 33 U.S.C. §918(b); 20 C.F.R. §702.145(f). See *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201, 206 n.2 (1991); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 144 n.2 (1989).

On remand, Administrative Law Judge Edward C. Burch³ (the administrative law judge) determined that claimant suffered a work-related injury on July 7, 1986, but that claimant is not permanently and totally disabled as a result of that injury.⁴ Accordingly, claimant's claim for permanent total disability benefits was denied. In addition, the administrative law judge determined that employer is not liable for any medical treatment beyond July 16, 1986. Lastly, after calculating claimant's average annual earnings pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), the administrative law judge awarded claimant temporary total disability benefits totaling \$373.33 for the period between July 8, 1986 and July 16, 1986.

³The record reflects that the case was reassigned to Judge Burch because of the retirement of Judge Butler in 1993.

⁴The administrative law judge found that the record supports the proposition that claimant is no more disabled than he would have been had he never returned to work on July 1, 1986.

Thereafter, claimant appealed and employer/carrier Liberty Northwest cross-appealed the administrative law judge's Decision and Order After Remand -- Denying Benefits. By Order dated November 19, 1996, the Board granted claimant's motion to remand the case to the administrative law judge for adjudication of his claim for disability compensation arising out of the work incidents which he alleged occurred prior to 1986.⁵ In addition, the Board dismissed claimant's appeal, BRB No. 96-0969, with prejudice based on his representation that he did not wish to challenge the administrative law judge's findings with regard to any disability for which carrier Liberty Northwest may be liable. The Board therefore concluded that the administrative law judge's finding that carrier Liberty Northwest is liable only for temporary total disability benefits from July 8, 1986 through July 16, 1986, is final. The Board proceeded to decide carrier Liberty Northwest's cross-appeal on the merits, and in a Decision and Order issued February 26, 1997, affirmed the administrative law judge's award of temporary total disability benefits for the period between July 8, 1986 and July 16, 1986.

On remand, the administrative law judge denied the claim for disability arising out of the alleged incidents occurring prior to 1986, stating as follows:

The only claim that has ever been before the office of administrative law judges is a claim for total permanent disability which culminated with the incident of July 7, 1986. As the Board stated on page 2 of its unpublished decision of January 26, 1994, BRB No. 90-1776, which remanded Judge Butler's decision: "Claimant filed a claim for benefits under the Act, contending he had become totally disabled as a result of his July 1986 injury." Despite that only the July 7, 1986 culmination was before the court we are now directed to consider a 1985 injury. As previously stated there is some reference in the record to a fall in January of 1985 and a pulled back muscle in May of 1985. Thus, those incidents have already been tried. And, as previously stated, claimant lost little or no time from work as a result of these incidents and there is no evidence that his condition permanently worsened as a result of those incidents. In the presentation of the case the 1985 incidents

⁵The Board specifically remanded the case so that the administrative law judge may address claimant's contentions that he is disabled as a result of injuries occurring before carrier Liberty Northwest was on the risk. The Board recognized that claimant had properly raised these claims before Judge Butler in the initial adjudication, but that they were not addressed. Moreover, the Board noted that employer's prior carrier, Pacific Marine, was separately represented and present at the hearing.

were mentioned, but were considered to have merged into the greater event of July 7, 1986. That which does not exist cannot be chronicled. Having considered all evidence relating to the 1985 incidents, there is no basis to award additional disability benefits as a result of anything that occurred prior to July 1986.

Order of Dismissal on Remand at 2-3.

On appeal, claimant contends that the administrative law judge erred by failing to comply with the Board's remand order to address claimant's entitlement to benefits as a result of injuries occurring prior to 1986. Claimant avers that he is permanently totally disabled as a result of his 1984 and 1985 injuries, and that, accordingly, he is entitled to permanent total disability compensation and medical benefits. Carrier Liberty Northwest responds that claimant's appeal does not involve Liberty Northwest or its period of coverage of employer.⁶ The Director has not responded to claimant's appeal.⁷

Initially, we agree with claimant that the administrative law judge erred in failing to comply with the Board's remand order. Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operation of the Benefits Review Board, provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." Herein, in remanding the case to the administrative law judge, the Board specifically stated that the administrative law judge was to consider claimant's entitlement to compensation for any disability arising out of the incidents occurring prior to 1986. In failing to consider the evidence regarding claimant's possible entitlement to either disability or medical benefits under the proper legal standard, the administrative law judge on remand erred by failing to follow the Board's directive. *See Obert v. John*

⁶The administrative law judge found that carrier Liberty Northwest has no responsibility in this matter and, accordingly, dismissed Liberty Northwest with prejudice. The administrative law judge's dismissal of Liberty Northwest is consistent with the Board's previous determination that the administrative law judge's finding that Liberty Northwest is liable only for benefits for the period from July 8, 1986 through July 16, 1986, is final. As Liberty Northwest has no liability for the incidents that are the subject of the instant claim, we grant its motion to be dismissed as a party to this action.

⁷By Order of February 9, 1999, the Board ordered the Director to file a response brief. The Director did not respond, despite the fact that if any benefits are awarded on these injuries, the Director will be required to determine whether they should be paid by the Special Fund. *See n.2, supra.*

T. Clark and Son of Maryland, 23 BRBS 157, 159 (1990).

With respect to claimant's possible entitlement to disability compensation and medical benefits, we note that this case involves both questions of causation and the nature and extent of disability. Claimant has alleged that the work-related incidents that occurred in 1984 and 1985 combined with his prior medical condition to result in disability. The administrative law judge, however, without citing to a single case addressing the relevant law regarding the issues before him, summarily denied benefits on the basis of his findings that claimant lost little or no time from work as a result of those incidents and that there is no evidence that claimant's condition permanently worsened as a result of the incidents. We hold that, in denying benefits on this basis, the administrative law judge did not properly apply the Section 20(a) presumption of causation, 33 U.S.C. §920(a), the aggravation rule, and the applicable law regarding the nature and extent of disability. We therefore must vacate the administrative law judge's denial of disability benefits and remand the case for the administrative law judge to reconsider the issues of causation and disability.

In establishing the work-relatedness of his condition, claimant is aided by the Section 20(a) presumption, which applies generally to the issue of whether claimant's injury or disability is work-related. See, e.g., *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). If claimant establishes that he suffered some harm or pain and that an accident occurred or working conditions existed which could have caused the harm or pain, claimant is entitled to the Section 20(a) presumption that his condition is caused or aggravated by his employment. See generally *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). The burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was not caused by the work accident or that the work accident did not aggravate claimant's underlying condition. *Id.*

The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.* 18 BRBS 212, 214 (1986). Whether the circumstances of a claimant's employment combine with the pre-existing condition so as to increase his symptoms to such a degree as to incapacitate him for any period of time or whether they actually alter the underlying process is not significant. See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), *aff'g* 11 BRBS 561 (1971).

Moreover, the severity of a claimant's injury is not determinative of whether an aggravation occurred since even a minor incident can aggravate a pre-existing condition and impair a claimant's ability to work. See, e.g., *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991). Thus, in a case such as this one where claimant asserts that the work accidents aggravated an underlying condition, it is incumbent upon employer to introduce evidence affirmatively establishing that the work accidents did not aggravate or accelerate the underlying condition in order to rebut the Section 20(a) presumption. See *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982).

Accordingly, as the administrative law judge failed both to apply the Section 20(a) presumption and to provide any discussion of the record evidence relevant to the issue of causation, he must, on remand, provide a reasoned discussion of the evidence relevant to the cause of claimant's disability, consistent with the Section 20(a) presumption and the aggravation rule.

With respect to the issue of disability, we note that claimant is entitled to disability benefits for any period his work injury causes a total or partial loss of wage-earning capacity. See generally *Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 321, 31 BRBS 129 (CRT)(5th Cir. 1997); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). While the administrative law judge found that claimant lost little or no work time following the work incidents occurring prior to July 1986, and that claimant's condition did not permanently worsen as a result of those incidents,⁸ the administrative law judge did not make a finding as to whether claimant had any period of disability following these incidents. Thus, on remand, the administrative law judge must consider whether claimant suffered any loss of wage-earning capacity in the periods following the work-related incidents in question. We note, in this regard, that any evidence that might support a finding that claimant, at some point in time, was no longer disabled by injuries sustained in these work incidents does not establish that claimant did not suffer any disability in the periods immediately following the incidents. See generally *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 383 (1990).

Lastly, it is well-established that claimant is entitled to reimbursement for all

⁸As the administrative law judge failed to support these findings with citations to record evidence, they cannot be affirmed. On remand, the administrative law judge must specifically consider all evidence of record relevant to the duration of any disability resulting from the 1984 and 1985 work incidents.

reasonable and necessary medical treatment related to the work injury. 33 U.S.C. §907(a); *see, e.g., Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). Claimant need not be economically disabled in order to be entitled to medical benefits. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). On remand, therefore, the administrative law judge must consider claimant's entitlement to medical benefits for any reasonable and necessary medical treatment related to the work injuries that are the subject of the instant claim.

Accordingly, the administrative law judge's Order of Dismissal on Remand is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge