BRB Nos. 98-1413 and
98-1413A

ERNEST J. PARKER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING	)	DATE ISSUED: July 28, 1999
AND DRY DOCK CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Morris H. Fine (Fine, Fine, Legum & Fine, P.A.), Virginia Beach, Virginia, for claimant.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (97-LHC-0748, 97-LHC-0749, 97-LHC-0751, 97-LHC-0752) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on claims 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).

Claimant began working for employer as a welder in 1974. He sustained an injury to his right knee on December 8, 1983, after which he was assigned permanent restrictions of no climbing or squatting. Employer paid compensation for a five percent impairment. Claimant subsequently filed claims for a back injury and right and left hand injuries.

In his Decision and Order, the administrative law judge awarded claimant temporary partial disability compensation from April 8, 1996 through March 19, 1997, stemming from claimant's right and left hand injuries. He then awarded medical benefits for the knee, and right and left hand conditions. The administrative law judge did not award any permanent disability compensation for the hand injuries under Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3), and claimant does not appeal this finding.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment and his refusal to admit evidence relating to claimant's diligence in seeking alternate work. Employer responds, urging affirmance. Employer, on cross-appeal, alleges that claimant did not timely file claims for his hand injuries, and also challenges the administrative law judge's finding that the right and left hand conditions are work-related. Employer also challenges the administrative law judge's award of temporary partial disability benefits. Claimant has not responded to this appeal.

TIMELINESS

Employer argues that claimant's claims for right and left hand injuries filed on July 25, 1996, were untimely. Employer contends that claimant knew on May 20, 1993, when he first sought treatment for his right wrist, that his condition was work-related, and knew that his condition would impact his wage-earning capacity when, during a visit to Dr. Gwathmey in 1993, Dr. Gwathmey suggested that he limit gripping as much as possible, and another time advised claimant to modify his job. Section 13(a) of the Act applies in cases involving traumatic injuries and requires that a claimant file his claim for benefits within one year of the time he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his injury and his employment.[1] 33 U.S.C. §913(a). A claimant

[1]Section 13(a) states, in relevant part, that:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable

need not file a claim until he is aware that he is suffering a compensable injury, *i.e.*, when he is aware of a loss of wage-earning capacity. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). The administrative law judge found that although claimant was aware of the work-relatedness of his condition in 1993, he had no reason to know that his injury was likely to impair his wage-earning capacity until Dr. Gwathmey's September 6, 1995, letter, which stated: "I believe his days as a welder are numbered and I think he needs to begin looking for alternative activities at the shipyard or elsewhere." Emp. Ex. 53-4. Inasmuch as claimant knew of the work-relatedness of his hand injuries earlier, but was not at that time aware that the injuries would affect his earning capacity until Dr. Gwathmey stated that he needed to find different work, the administrative law judge's finding that claimant's July 25, 1996, claims were timely in light of the September 6, 1995, date of awareness, Emp. Exs. 19-2, 53.4, accords with law, and is affirmed. *Parker,* 935 F.2d at 20, 24 BRBS at 98 (CRT); *see also Paducah Marine Ways v. Thompson,* 82 F.3d 130, 30 BRBS 33 (CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP,* 43 F.3d 1206 (8th Cir. 1994).

CAUSATION

> diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a).

Employer next challenges the administrative law judge's finding that it failed to rebut the Section 20(a) presumption with respect to both hands. 33 U.S.C. §920(a).[2] Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

The administrative law judge acted within his discretion in finding Dr. Gwathmey's March 31, 1997, report, that "[t]here is a little degenerative arthritis in the right thumb but I cannot relate that to a specific activity at work and believe whatever break down he may getting there is a normal disease of life," Emp. Ex. 59, ambiguous, because it was unclear to him whether Dr. Gwathmey could not relate any of claimant's hand problems to work or just the arthritis in claimant's right thumb, and whether the arthritis is a separate problem from the hand injury which resulted in the work restrictions. *See American Grain Trimmers, Inc. v. OWCP*, F.3d , No. 97-3080, 199 WL 404697 (7th Cir. June 21, 1999). Employer's argument that the gap between doctor visits of September 8, 1993, and February 21, 1995, and the fact that claimant complained of pain in both hands in 1995, both imply that there has been a separate right hand injury from the one forming the basis of the original complaint, likewise has no merit, as the administrative law judge reasoned that the work restrictions had not been lifted during this period, and there was no medical evidence that the initial hand problem had gone away. The

[2]Employer appears to be arguing that the administrative law judge erred in finding that claimant was entitled to invocation of the Section 20(a) presumption. We reject employer's argument in this regard. The administrative law judge relied on Dr. Gwathmey's July 13, 1993, report in which he states, referring to claimant's right hand, that claimant "probably has a chronic tendinitis exacerbated by the gripping activities at work," Emp. Ex. 53-3, which establishes a harm, and working conditions which could have aggravated the condition as to the right hand. Decision and Order at 12. It is therefore irrelevant whether the pain was caused by lifting welding pads or using wire cutters for an extended period of time, as both of these tasks were part of the working conditions which could have caused the injury. Moreover, an injury does not have to result from trauma, but can occur gradually. *Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986). Claimant is therefore entitled to invocation of the Section 20(a) presumption in this case. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Dr. Gwathmey first refers to left wrist pain on February 21, 1995. Emp. Ex. 53-3. This report and Dr. Gwathmey's September 6, 1995, report that he believes that claimant's left hand trouble is most likely secondary to his work activities provides claimant with the Section 20(a) presumption as a matter of law.

administrative law judge concluded that the doctor's testimony did not rebut the Section 20(a) presumption, as his opinion was based on speculation and probabilities. As the record supports the administrative law judge's conclusion that Dr. Gwathmey's opinion did not unequivocally rule out a connection between decedent's employment and his disability, he did not err in finding it insufficient to rebut the Section 20(a) presumption. *See American Grain Trimmers*, 1999 WL 404697 at 6; *Bridier*, 29 BRBS at 90.

EXTENT OF DISABILITY

Claimant challenges the administrative law judge's finding that employer established suitable alternate employment. Where, as in the instant case, it is undisputed that claimant is unable to perform his usual pre-injury work, the burden shifts to employer to establish the availability of suitable alternate employment. *See Lentz v. The Cottman Co*., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988)*; Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). The administrative law judge's determination in this case that employer established the availability of suitable alternate employment is supported by substantial evidence. Although claimant argues that Ms. Whitfield, the vocational expert on whose report the administrative law judge relied, did not consider claimant's herniated disc when she prepared the labor market study, the administrative law judge found that Ms. Whitfield's lack of knowledge of this fact did not affect the validity of her testimony or the labor market survey because Dr. Wardell told her that claimant had no restrictions related to his back, Tr. at 144, and approved the positions she identified, after a meeting where she explained the tasks involved. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995); *see generally Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Moreover, we reject claimant's argument that potential employers should have been told about claimant's herniated disc, as employer need not contact prospective employers to inform them of claimant's limitations and determine whether they would consider hiring him. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997). The Board has also previously rejected claimant's argument that the jobs identified are not suitable because they pay much less than claimant's job prior to the injury. *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

We also reject claimant's argument that he was denied due process because employer has the resources to hire a vocational expert, while he does not, and that employer should pay for him to retain an expert. Claimant's contention is without support in the Act. It is well established that an administrative law judge has broad discretion in conducting hearings. 20 C.F.R. §702.339. A determination in this regard will constitute reversible error only if it is so prejudicial as to result in a denial of due process. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40, 43-45 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir.

1993); *see generally Chavez v. Todd Shipyards Corp*., 24 BRBS 71 (1990), *aff'd in pert. part,* 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992). Due process requires an opportunity to rebut evidence and cross-examine witnesses. *See generally Richardson v. Perales*, 402 U.S. 389, 401-402 (1971).

In the instant case, the initial labor market survey was created in November 1994. It was updated on December 20, 1996, and in July 1997, and claimant was advised of this fact. At the initially scheduled hearing, on July 21, 1997, the administrative law judge noted that claimant did not depose employer's vocational expert, Ms. Whitfield, and granted claimant's motion to continue the hearing, allowing him time to develop his case concerning suitable alternate employment. The administrative law judge suggested that claimant either depose Ms. Whitfield or retain his own expert. It appears that claimant did neither. He did, moreover, have the opportunity to cross-examine her at the September 1997 hearing, which is all that is required for a party to be afforded due process.[3] We therefore conclude that the administrative law judge accorded claimant all due process rights to which he is entitled under the Act. Accordingly, as the administrative law judge granted claimant's request for continuance for precisely this reason, provided him an opportunity to depose Ms. Whitfield or hire his own expert, claimant has not been denied his right to due process. *See Parks v. Newport News Shipbuilding & Dry Dock Co.,* 32 BRBS 90, 93 (1998).

[3]The Act does not provide for employer to pay in advance for claimant to retain a vocational expert. If claimant retains a vocational expert, and prevails on the issue, he may collect the expert's fee as part of costs. *See* 33 U.S.C. §928(d). The regulations at 20 C.F.R. §§702.501-702.508, however, provide for a vocational rehabilitation adviser on the staff of the district director in cases of permanent disability. *See* 33 U.S.C. §939. In this case claimant obtained vocational services after his injury on November 9, 1985. Emp. Ex. 3. Claimant's request for vocational rehabilitation services from the Department of Labor in September 1996 was denied on the ground that he was working at the time and there was no recommendation for payment of compensation. Emp. Ex. 20.

We agree with claimant, however, that the administrative law judge erred in excluding his evidence related to the issue of diligence. A claimant may rebut employer's showing of suitable alternate employment and thus retain entitlement to total disability benefits by demonstrating that he diligently tried but was unable to secure alternate employment. *See Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). At the hearing, the administrative law judge sustained employer's objection to claimant's testimony with respect to his employment-seeking activities on the ground that claimant failed to supplement his answers to interrogatories with this information, and the administrative law judge therefore accepted no evidence on the issue. Tr. at 56-63.

In *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997), the Board held that it was within the administrative law judge's discretion to permit claimant a post-hearing job search where employer did not present evidence of suitable alternate employment until the hearing. The Board held that the administrative law judge violated employer's right to due process by failing to provide employer with an opportunity to cross-examine claimant or to respond to his post-hearing affidavit regarding the job search, and remanded the case for the administrative law judge to provide employer with an opportunity to refute the evidence.

The administrative law judge possesses broad discretion in conducting the formal hearing. *See Wayland v. Moore Dry Dock,* 21 BRBS 177 (1988). His actions regarding the admissability of evidence are reversible only it they are arbitrary, capricious, or an abuse of discretion. *See Ramirez v. Southern Stevedores*, 25 BRBS 260, 264 (1992). Given that diligence is part of the extent of disability analysis and that employer's expert prepared the market labor survey, so that employer cannot claim prejudice and lack of notice, we conclude that the administrative law judge abused his discretion in refusing to admit claimant's evidence on this issue. *See id.* at 264. Moreover, the administrative law judge's action violates 20 C.F.R. §702.338, under which the administrative law judge "shall inquire fully into matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters," as he did not receive into the record evidence on one of the issues in the case. We therefore reverse the administrative law judge's ruling that claimant is not permitted to offer evidence related to his attempts to contact prospective employers from the list provided him by Ms. Whitfield. The case is remanded for the administrative law judge to allow claimant to submit this evidence and to render a finding as to whether claimant diligently sought alternate employment within the compass of jobs shown to be available. *Palombo,* 937 F.2d at 70, 25 BRBS at 1 (CRT). Employer must be given the opportunity to cross-examine claimant if he testifies and to offer rebuttal evidence. *See Ion v. Duluth, Missabe Iron Range Ry. Co.,* 32 BRBS 268 (1998);

Ion, 31 BRBS at 75.

WAGE-EARNING CAPACITY

The administrative law judge awarded claimant temporary partial disability benefits based on a loss of overtime due to his hand and wrist injuries.[4] Employer argues that claimant worked more in 1995 because there was more work available in 1995 than in 1996. We affirm the administrative law judge's award as supported by substantial evidence. An award for temporary partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(e). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the claimant's wage-earning capacity shall equal his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. If such earnings do not represent the claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *See* 33 U.S.C. §908(h). Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity, where overtime was a normal and regular part of claimant's pre-injury employment and accordingly was included in determining claimant's average weekly wage. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981).

In the present case, the administrative law judge found that claimant sustained a loss of wage-earning capacity based on evidence of reduced overtime hours and claimant's credited testimony that since he was taken out of the welding shop and assigned to the rod shack because of his injury, he did not get any more overtime. Contrary to employer's contention that there is no evidence of the number of overtime hours claimant worked, the administrative law judge noted that claimant worked 739.56 overtime hours in 1995, the year before restrictions were imposed, and 48 hours of overtime in 1996. Emp. Ex. 57. We note that the record in the present case reflects that claimant had a history of working overtime prior to

[4]The administrative law judge awarded claimant temporary partial disability compensation benefits from April 8, 1996, through March 19, 1997, the date on which Dr. Gwathmey determined claimant achieved maximum medical improvement. Emp. Ex. 53-4. According to Dr. Gwathmey, claimant has no permanent ratable hand impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*.

his injury and that overtime was available to other welders after his injury. Tr. at 55; Cl. Exs. 35, 36. The relevant inquiry where claimant is seeking to establish a loss of wage-earning capacity based on a loss of overtime earnings is whether overtime was available to claimant and claimant was unable to work those hours due to his injury. *See Brown v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 110, 113 (1989). Contrary to employer's allegation, the administrative law judge only relied on earnings of other welders to illustrate that their earnings remained approximately the same during the 1995-1996 period, while claimant's dropped from $42,259 to $29,043.79. Moreover, the fact that restrictions were imposed at claimant's request, as employer argues, is irrelevant, if claimant was unable to perform overtime work due to a work-related injury. Employer's allegation that the fact that claimant last worked overtime on January 21, 1996, over one month before restrictions were imposed and two months before transferring to the rod shack was due to unavailability of work, rather than to the injury, is speculation. The record reflects that claimant's hand problems increased starting in September 1995, and that he consulted Dr. Gwathmey on September 6, 1995, December 18, 1995, January 17, 1996, prior to the imposition of restrictions. Even if employer's contention that there was less work in 1996 than in 1995 were true, the record reflects that comparable welders' earnings remained approximately the same during this period. Inasmuch as the administrative law judge's finding that claimant established that, absent his injury, he would have taken advantage of the opportunities available to work overtime is rational and supported by substantial evidence, and employer has failed to establish that the administrative law judge's weighing of the evidence is irrational, we affirm his determination that claimant established a loss in wage-earning capacity based on a loss of overtime earnings. *See generally Kubin v. Pro-Football, Inc.,* 29 BRBS 117 (1995).

Accordingly, the administrative law judge's refusal to consider evidence relating to claimant's diligence is vacated and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Chief Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

MALCOLM D. NELSON
Acting Administrative Appeals Judge