BRB No. 99-0979

JOHN G. MCCARTHY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason and Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-2347) of Administrative Law Judge Fletcher E. Campbell, 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 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, a welder, injured his right knee pulling lines at work on September 5, 1989. Employer voluntarily paid claimant temporary total disability benefits from January 8, 1990, through February 11, 1990, and December 19, 1995, through December 21, 1995, and an eight percent scheduled permanent partial disability award for the right knee. Claimant sought temporary total disability benefits from August 20, 1996, through October 31, 1996,

when he was recovering from knee surgery which, he alleged, was due to his September 5, 1989, work injury while working for employer. Claimant left employer in December 1989 and subsequently worked as a welder for three different covered employers.[1] The administrative law judge awarded claimant permanent total disability benefits from August 20, 1996, through October 31, 1996, finding that his right knee surgery and disability were related to his work injury with employer on September 5, 1989. The administrative law judge rejected employer's intervening cause argument as speculative. Moreover, the administrative law judge rejected employer's argument that the claim was barred by the holding in *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980), because claimant was neither permanently nor partially disabled during the period in question.

On appeal, employer contends that the administrative law judge erred in finding claimant's surgery and resulting disability work-related. Employer also contends that the award is barred by the holding in *PEPCO*. Claimant responds in support of the administrative law judge's award.

Employer contends that the administrative law judge erred in finding claimant's surgery and resulting disability work-related by focusing on the cause of claimant's surgery from a post-surgery rather than a pre-surgery perspective. Employer relies on *Everett v. Newport News Shipbuilding & Dry Dock*, 23 BRBS 316 (1989), in support of this contention. Employer also contends that the administrative law judge erred by not finding claimant's surgery necessitated either by a subsequent car accident or by an injury with a subsequent employer, either of which should relieve it of liability.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has

[1]From May 1990, through December 1994, claimant worked at Metro Machine. From February 1995, through October 1997, claimant worked at Dreadnought Marine. Claimant has worked at Norfolk Machine & Welding since December 10, 1997.

been established with claimant bearing the burden of persuasion. *See id.; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). If employer establishes that claimant's disability is due to an intervening cause, it is relieved of that portion of the disability attributable to the intervening cause. *See Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997). Employer also may be relieved of liability if it establishes that claimant's disability is due to an aggravating injury occurring with a subsequent covered employer. *See Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999). The administrative law judge invoked the Section 20(a) presumption based on Dr. Fithian's testimony that the surgery was necessitated in part by a meniscus tear which was possibly work-related. He found that employer did not establish rebuttal as it presented no evidence to establish that the condition requiring surgery and the resulting disability were not due in part to the 1989 work injury. *See* Decision and Order at 7; Cl. Ex. 8 at 13-14.

Employer's reliance on *Everett* in support of its contention that the administrative law judge erred in finding claimant's need for surgery and resulting disability related to his employment is misplaced. In *Everett*, the claimant suffered from asbestosis and underwent surgery to remove a nodule in his right lung. The administrative law judge found that the claimant did not establish his *prima facie* case in order to invoke the Section 20(a) presumption because claimant did not establish that the lung nodule removed in surgery was related to his asbestos exposure. The Board reversed the administrative law judge's finding, holding the the proper inquiry for the administrative law judge was whether the claimant underwent surgery as a result of his uncontested asbestosis or asbestos exposure, and not whether the nodule ultimately removed was itself related to the asbestos exposure. The Board stated that this required an evaluation of the pre-surgical medical opinions regarding the need for surgery rather than of the post-surgical opinions regarding the cause of the nodule and that the evidence was uncontradicted that claimant underwent the surgery at least in part due to his asbestosis and asbestos exposure. *Everett*, 23 BRBS at 318-319.

Contrary to employer's contention, *Everett* does not mandate that the administrative law judge determine in every case whether a claimant's surgery is work-related from a pre-surgical perspective. Rather, in *Everett*, as in this case, the issue concerns the work-relatedness of the condition requiring surgery, and the administrative law judge in the instant case determined that the need for claimant's surgery was, in part, due to his 1989 work-related knee injury with employer. The fact that the administrative law judge may have relied on a post-surgical rather than a pre-surgical opinion to make this finding is not dispositive in this case. In any event, also contrary to employer's contention, both the pre-surgical and post-surgical opinions establish, without contradiction, that claimant underwent surgery at least in part as a result of his 1989 work-related knee injury.[2] Thus, the

[2]Pre-surgery, Dr. Fithian thought claimant had a meniscus tear from his 1989 work

administrative law judge's finding that the surgery was necessitated in part due to the work injury is affirmed.

Employer also contends that claimant's surgery and disability are due to an intervening event, namely, claimant's 1994 motor vehicle accident, thereby relieving it of liability. We affirm the administrative law judge's finding that employer did not establish an intervening cause so as to relieve it of liability as he rationally found that employer produced only the speculative possibility that there may have been an intervening cause based on Dr. Fithian's testimony that the loose bodies in the knee were caused by a different injury than the 1989 work injury and the mere occurrence of a subsequent 1994 motor vehicle accident. *See Plappert*, 31 BRBS at 109; Decision and Order at 8; Emp. Exs. 10, 12; Cl. Ex. 8 at 31-32. There is no medical evidence linking claimant's surgery to a car accident. As the administrative law judge properly found that claimant established invocation of the Section 20(a) presumption and that employer did not establish rebuttal thereof, we affirm his finding that the cause of claimant's surgery and resulting disability are work-related.[3] *See generally Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

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injury and was a good candidate for arthroscopic debridement. *See* Cl. Exs. 1e, 3a, 8 at 23-24. Post-surgery, Dr. Fithian also identified two loose bodies in addition to the meniscus tear, which he stated were caused by a new injury. *See* Cl. Exs. 1f, 3a, 8 at 10-14. Furthermore, Dr. Fithian testified that 85percent of the need for surgery was due to the loose bodies and thus that 15 percent of the need for surgery was due to the meniscus tear. He stated he eventually would have performed the surgery for the meniscus tear alone. *See* Cl. Ex. 8 at 30-31.

[3]Thus, we reject employer's alternative assertion that its liability is limited to 15 percent for the meniscus tear based on our affirmance of the administrative law judge's finding that employer did not establish an intervening cause. *See Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981).

Employer further contends that the administrative law judge erred by not addressing its argument that it is not responsible for the payment of benefits in this case, as subsequent work injuries, including one in 1990 with Metro Machine and one in 1996 with Dreadnought Marine, caused the need for the knee surgery. In a case involving multiple injuries with different covered employers, the determination of the responsible employer turns on whether the claimant's condition is the result of the natural progression or aggravation of a prior injury. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). In order to be relieved of liability, employer must establish that a subsequent work injury with a subsequent covered employer aggravated or accelerated claimant's prior work injury to result in claimant's disability. *See Buchanan*, 33 BRBS at 36.

In the instant case, the administrative law judge did not specifically address the responsible employer issue noting only that, "Employer denies liability, contending that a subsequent maritime employer is the responsible firm." Decision and Order at 2. Any error in this regard is harmless, however, as employer presented no evidence to establish which, if any, of claimant's subsequent work injuries, including a 1990 right knee injury while employed with Metro Machine and a 1996 right leg injury with Dreadnought Marine aggravated, accelerated, or combined with claimant's prior work injury to result in claimant's disability.[4] *See* Emp. Exs. 7 at 11, 12; Cl. Ex. 8 at 25-28, 32-33. The mere occurrence of these injuries is insufficient to relieve employer of liability. As employer did not establish that these subsequent injuries aggravated or accelerated claimant's prior injury to result in claimant's disability, we affirm the administrative law judge's order that employer pay claimant the compensation to which he is entitled. *Buchanan*, 33 BRBS at 36.

Lastly, employer contends that the administrative law judge erred in awarding claimant permanent total disability benefits in this case, first contending that claimant sought only temporary total disability benefits, and secondly contending that a claim for temporary total disability benefits following the payment of scheduled permanent partial disability benefits is precluded by the Supreme Court's holding in *PEPCO*, 449 U.S. at 268, 14 BRBS at 363. We reject the latter contention, as the administrative law judge properly found that *PEPCO* does not preclude an award of temporary total disability benefits in this case. In *PEPCO*, the Supreme Court held that a claimant who is permanently partially disabled due to an injury to a member listed in the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C.

[4]Dr. Fithian testified that claimant's surgery was caused 85 percent by a new injury. *See* Cl. Ex. 8 at 30-31. Dr. Fithian stated in letters dated November 1, 1996, August 24, 1998, and January 11, 1999, that claimant may have developed new problems due to work activities sometime between 1992-1996 but the physician was not aware of a specific injury that occurred at that time. *See* Cl. Exs. 5, 6a, 8 at 6-16, 28-29; Emp. Exs. 16, 17, 22.

§908(c)(1)-(20), is limited to the recovery provided therein, and may not receive an award under Section 8(c)(21) for a loss in wage-earning capacity. *PEPCO*, 449 U.S. at 268, 14 BRBS at 363 ; *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999). This holding does not preclude an award for temporary total disability after the schedule award has been paid. *See generally PEPCO*, 449 U.S. at 277 n. 17, 14 BRBS at 366 n. 17; *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). As to employer's former contention, we agree that claimant is limited to an award of temporary total disability from August 20, 1996, through October 31, 1996. *See* Tr. at 9. The administrative law judge stated that he was awarding claimant "the benefits he seeks," Decision at Order at 9, and it is apparent that his ultimate award of permanent total disability benefits for this period is merely a typographical error. Therefore, we modify the administrative law judge's order to reflect that employer should pay claimant temporary total disability benefits for the above period.

Accordingly, the administrative law judge's Decision and Order awarding benefits is modified in part to reflect that claimant is entitled to temporary total disability benefits from August 20, 1996, through October 31, 1996. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge