BRB No. 99-0666

DENIS K. REID	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JORE CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Richard E. Weiss (Small, Snell, Weiss & Comfort, P.S.), Tacoma, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (97-LCH-2755) 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 if they 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, working for employer as a welder/mechanic/laborer, tripped and fell on October 16, 1993, sustaining injuries to his left foot and the left side of his body. Dr. Bradley diagnosed a herniated lumbar disk at L5-S1, and subsequently

performed a micro disk lumbar laminectomy on December 22, 1993. After physical therapy and completion of a work hardening program, claimant returned to his regular full-duty position with employer in March 1994. Over the next two years, claimant, though working full-time at his regular employment, continued to complain of back pain and sought further treatment from Drs. Bradley, Tauben and Peterson, resulting in a diagnosis of radiculopathy. In September 1996, Dr. Peterson recommended that claimant receive epidural steroid injections at the bilateral L5 and S1 nerve root levels, and if unsuccessful, that claimant undergo additional back surgery.[1]

On the way home following his first epidural injection on November 26, 1996, claimant was involved in an automobile accident which caused additional back pain, and prevented claimant from returning to work. Drs. Peterson, Laurnen and Campbell observed that claimant's pre-existing back pain intensified, and that he now complained of right lower back pain which did not previously exist. Dr. Peterson opined, and Dr. Campbell agreed, that the work-related accident on October 16, 1993, was the cause of a significant portion of claimant's current disability. In contrast, Dr. Bidgood opined that claimant is no longer disabled due to the work accident.[2]

In his decision, the administrative law judge initially determined that claimant invoked but employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a). Upon consideration of the record as a whole, the administrative law judge found that 70 percent of claimant's current disability is attributable to the work-related accident of October 16, 1993, and that 30 percent is attributable to his subsequent car accidents. The administrative law judge therefore concluded that claimant established a compensable claim under the Act, and that employer is liable for the portion of claimant's current disability attributable to his work-related injury. He therefore found employer liable for 70 percent of claimant's temporary total disability benefits from November 27, 1996, to January 26, 1997, permanent total disability benefits from May 1, 1997, to March 20, 1998, and permanent partial disability benefits thereafter. In addition, he awarded claimant all future medical costs

[1]Dr. Bradley previously recommended epidural injection treatment in June 1994, but altered his opinion when he noted that claimant's pain seemed to have subsided in September 1994. Additionally, Dr. Bidgood concurred with the course of treatment recommended by Dr. Peterson.

[2]Claimant was also involved in a car accident on January 8, 1998. Only Dr. Campbell examined claimant following his second automobile accident, and although she did not explicitly address the issue of the cause of claimant's pain in her opinion, she nevertheless noted that the intensified pre-existing radiculopathy is due to the prior industrial accident.

necessitated by the October 16, 1993, work-related accident. Lastly, the administrative law judge determined that employer is not entitled to Section 8(f) relief, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's finding that claimant's disability is in part causally related to the work accident. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred in awarding benefits to claimant as his present disability is solely attributable to the two car accidents. Additionally, employer argues that the administrative law judge erroneously used the physical restrictions imposed by Dr. Campbell in 1998 following the second car accident to assess claimant's ability to perform his usual work and any suitable alternate employment.

Claimant is entitled to the Section 20(a) presumption linking his disabling condition to the work accident, as it is uncontested that claimant has an injury to his back and that a work accident occurred. *See generally Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon.*, 31 BRBS 109 (1997). In a case involving a subsequent injury, an employer can rebut the Section 20(a) presumption by showing that the claimant's disabling condition was caused by a subsequent event, provided the employer also proves that the subsequent event was not caused by the claimant's work-related injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981).

In the instant case, the administrative law judge found that claimant sustained a work-related back injury on October 16, 1993, and that the two subsequent automobile accidents aggravated that condition, but also caused claimant to develop pain in new areas. The administrative law judge thus concluded that the automobile accidents were independent and intervening causes which sever the nexus between claimant's work-related back injury and his current disability. Based upon the record as a whole, however, the administrative law judge credited the opinions of Dr. Peterson and Dr. Campbell, and determined that 70 percent of claimant's current disability is a result of the work-related incident and that the remaining 30 percent is due to the subsequent car accidents.

In weighing the record as a whole on the issue of causation, the administrative law judge rationally accorded greatest weight to claimant's treating physicians, Drs. Peterson and Campbell. He found their opinions that claimant's current disability is

substantially due to his prior work-related back injury, and to a smaller extent to a new injury sustained in the car accidents, are consistent with each other. He further found they had a greater opportunity to observe claimant's condition over a significant period of time. *See generally Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147 (CRT)(9th Cir. 1998), *amended*, 164 F.3d 480, *cert. denied*, 120 U.S. 40 (1999); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge thus rejected Dr. Bidgood's contrary opinion that claimant's current disability is solely attributable to his subsequent automobile accident. As the record herein contains substantial evidence which supports the administrative law judge's decision, and his decision is consistent with law, we affirm his conclusion that claimant's current disability is in part work-related and that employer is liable for the 70 percent portion of the disability attributable to the work injury. *See Leach,* 13 BRBS at 235.

Employer is correct in theory that restrictions imposed solely due to the subsequent car accidents should not be considered in making determinations regarding claimant's ability to perform his usual work and/or suitable alternate employment. However, in the instant case, the administrative law judge credited the opinions of Drs. Peterson and Campbell. Prior to the first car accident, Dr. Peterson stated that claimant's job was not appropriate for him over the long term and that re-training was advisable. EX 4 at 29. He repeated his opinion about retraining following the car accident. EX 4 at 34, 36. In May and September 1997, Dr. Campbell attributed claimant's physical restrictions entirely to his work-related back injury.[3] EX 10 at 12; CXG at 132. As employer challenges only the administrative law judge's reliance on these opinions,[4] and as the Board may not reweigh the evidence, we hold that the administrative law judge rationally relied on the statements of Drs. Peterson and Campbell to find that claimant was incapable of performing his usual work as a welder/mechanic/laborer since November 26, 1996, and only capable of performing the light duty category of work identified in employer's labor market

[3]Specifically, in her Work Capacity Evaluation, Dr. Campbell answered "No" to the question as to whether claimant has any limitations due to any non-work-related condition(s). EX 10 at 2; *see also* CXG at 132. In September 1997, Dr. Campbell limited claimant's lifting to no more than 10 pounds. CXG at 132. Following the January 1998 car accident, however, Dr. Campbell stated claimant could not lift more than 20 pounds, CXG at 131, and the administrative law judge used the higher figure. EX 10 at 10; CX G at 133.

[4]In so doing, the administrative law judge rejected Dr. Bidgood's contrary opinion that, in 1997, claimant was not disabled from the work injury. Just prior to the first car accident, moreover, Dr. Bidgood gave claimant restrictions limiting him to intermittent sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting and standing for up to six hours per day, with a lifting restriction of 20 to 50 pounds. EX 11 at 5.

survey dated March 20, 1998. Therefore, the award of temporary total, permanent total, and permanent partial disability benefits is affirmed as it supported by substantial evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge