BRB No. 08-0462

S. A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL OILWELL VARCO	)	DATE ISSUED: 10/24/2008
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Lawrence Blake Jones and Stephen F. Armbruster (Scheuermann and Jones), New Orleans, Louisiana, for claimant.

Douglas C. Longman, Jr. (Longman Russo, APLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order (2007-LHC-01019) of Administrative Law Judge C. Richard Avery 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 supported by substantial evidence, are rational, and are 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 alleged that on June 18, 2006, he injured his neck and back lifting and carrying a heavy hose during the course of his employment for employer as a slurry machine operator on an offshore jack-up oil rig. Claimant testified that he reported head and neck pain, but not a work injury, to his supervisor and to a medic on the oil rig. Claimant continued performing his job duties on the rig until his hitch ended on July 6, 2006. Claimant testified that he went to the first available appointment with Dr. Bourgeois on July 10, 2006. Dr. Bourgeois, claimant's family physician, diagnosed cervical radiculopathy. Thereafter, on July 22, 2006, claimant notified employer that his injury occurred on the rig.

Claimant commenced treating with Dr. Cobb, an orthopedic surgeon, on August 16, 2006. Dr. Cobb diagnosed post-traumatic cervical and lumbar pain syndrome. Claimant received physical therapy and epidural steroid injections, but he reported no improvement in his symptoms. On September 24, 2007, Dr. Cobb diagnosed cervical spondylosis and lumbar degeneration with bulging disc facet hypertrophy and instability. He recommended that claimant undergo a cervical discectomy and fusion at C3-4 and an anterior lumbar interbody fusion at L5-S1. He opined that claimant is unable to work pending surgical treatment. Employer controverted the claim, contending that claimant was not injured during the course of his employment and that any injury should have quickly resolved.

In his decision, the administrative law judge found that claimant is covered under the Act as he is not a member of crew. The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his injuries to the work accident and that employer rebutted the presumption. In weighing the evidence as a whole, the administrative law judge found that claimant injured his neck and back in a work accident. The administrative law judge found that claimant's injuries have not reached maximum medical improvement. The administrative law judge found more credible the opinions of claimant's treating physicians, Drs. Bourgeois and Cobb, that claimant is unable to work, than the opinions of Drs. Bernard and Katz, who examined claimant only once and who opined that he can return to work. Because employer did not offer any evidence of suitable alternate employment, the administrative law judge found claimant entitled to compensation for ongoing temporary total disability commencing July 6, 2006. 33 U.S.C. §908(b). The administrative law judge also found employer responsible for claimant's medical treatment, and he found reasonable and necessary the surgical procedures recommended by Dr. Cobb. In his subsequent Order, the administrative law judge amended his decision to provide that claimant is entitled to compensation based on an average weekly wage of $949.07.

On appeal, employer challenges the administrative law judge's findings that claimant's injuries are work-related and that he has been unable to work since July 6, 2006. Claimant responds, urging affirmance of the award of benefits.

Employer challenges the administrative law judge's finding, based on the record as a whole, that claimant's injuries are work-related. If, as here, the administrative law judge finds that the Section 20(a) presumption is invoked and rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established between claimant's harm and his employment, with claimant bearing the burden of persuasion on this issue. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In weighing the evidence as a whole, the administrative law judge found that claimant's co-workers on the oil rig did not affirmatively testify that claimant's alleged accident never happened, but that they could not remember any such incident occurring. Decision and Order at 17; *see* Tr. at 89, 108, 113-114, 119. The administrative law judge found that employer indirectly discouraged employees from reporting injuries because employees would receive bonuses for an accident-free hitch on the oil rig. *See* Tr. at 115-116. The administrative law judge found believable claimant's testimony that he did not immediately report the work injury because he had bought a house and needed the job. Decision and Order at 18 n. 6; *see* Tr. at 23; *see also* Tr. at 31, 59, 85-86, 93. The administrative law judge also credited claimant's testimony that he was able to continue working after the injury as he was a trainee and as there was no heavy work after the rig had been set up at the beginning of his hitch.[1] Tr. at 12-13, 34-36; *see also* Tr. at 122-124. The administrative law judge found that claimant wasted little time seeking medical attention and reporting the work injury to employer after the completion of his hitch. Decision and Order at 18; *see* Tr. at 39; EX 15. The administrative law judge found that only Dr. Bernard opined that claimant's neck and back condition is not related to his employment, whereas Dr. Cobb, who treated claimant for over a year, opined that claimant's condition is related to the work incident.[2] CX 7.

[1] Claimant's hitch on the oil rig began on June 17, 2006. EX 6. Employer's crew spent the first few days of their hitch rigging equipment. Tr. at 53, 106-107.

[2] Dr. Williams examined claimant on November 2, 2006. He diagnosed cervical and lumbar spondylosis pain exacerbated by a work-related injury. CX 9; *see generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Moreover, an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom; he has the prerogative to credit one medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this case, the administrative law judge rationally found credible claimant's testimony that an accident occurred during his hitch on the oil rig notwithstanding that claimant did not immediately report his injury to employer. *See* Tr. at 20-36, 59, 85-86, 93, 122-124; *see Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993). Moreover, the administrative law judge acted within his discretion in crediting the opinion of claimant's treating physician, Dr. Cobb, that claimant's neck and back conditions are related to his employment over the contrary opinion of Dr. Bernard. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). As the administrative law judge's weighing of the evidence is rational, we affirm his conclusion that claimant established the work-relatedness of his neck and back injuries as it is supported by substantial evidence. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

Employer next argues that the administrative law judge erred by finding that claimant is unable to return to his usual employment. In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). Employer argues that the opinions of Drs. Hargrave, Bernard and Katz establish that any injury claimant sustained in June 2006 was a soft tissue injury that should have quickly resolved. In his decision, however, the administrative law judge credited the opinion of Dr. Bourgeois that claimant was unable to work while undergoing treatment with him in July and August 2006, and the opinion of Dr. Cobb, who has kept claimant off work since he first examined him on August 16, 2006. CXs 5, 7. The administrative law judge noted that Drs. Bernard and Katz recommended that claimant return to work, but he rationally found more credible the opinions of Drs. Bourgeois and Cobb because they treated claimant over a period of time whereas Drs. Bernard and Katz examined claimant only once. *See Brown*, 34 BRBS 195; *see also Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). As the administrative law judge's finding that claimant cannot return to his usual employment is

supported by substantial evidence, it is affirmed. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Moreover, employer did not offer any evidence to establish the availability of suitable alternate employment. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT) (claimant totally disabled if the administrative law judge rationally credits evidence that he cannot perform any work). Accordingly, we affirm the award of temporary total disability compensation.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge