BRB No. 00-1196

DAVID ARSENAULT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
A & B INDUSTRIES OF MORGAN CITY	)	DATE ISSUED: Sept. 21, 2001
	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

David K. Johnson (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-1762) of Administrative Law Judge James W. Kerr, 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).

While working for employer as a general laborer on April 7, 1998, claimant

was suspended in a basket from a crane. The crane began to tip over, during which time claimant was struck in the face by a chain, and claimant subsequently fell approximately thirty-five feet to the ground. As a result of this accident, claimant sustained multiple fractures to the right side of his face for which he subsequently underwent surgery, a fracture to his pelvis, and broken teeth. Claimant thereafter complained of headaches, blurred vision, memory loss and back pain. In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from April 8, 1998, and continuing, based upon an average weekly wage of $679.31, medical benefits, interest and an attorney's fee. On appeal, employer challenges the administrative law judge's determination that claimant suffers from blurred vision and headaches, and that claimant's dental, memory and back problems are work-related. Employer additionally contends that the administrative law judge erred in calculating claimant's average weekly wage. Claimant has not responded to employer's appeal.

CAUSATION ISSUES

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption with regards to claimant's vision and headache complaints. *See* 33 U.S.C. §920(a). We disagree. In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused the injury or harm.[1] *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). A claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary to invoke the presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). In the instant case, it is uncontroverted that claimant established the existence of a work-related accident which could have caused the harms alleged. Moreover, the medical evidence of record establishes that as a result of the subject work-incident claimant sustained multiple facial fractures, including the possible fracture of his right orbit, which required surgical intervention, that claimant experienced swelling and limited upper gaze following the accident, and that claimant reported and was treated for migraine headaches post-injury. *See* Emp. Exs. 1-3, 5-6, 13-14. In his decision, after setting forth all of the medical evidence, the administrative law judge relied upon claimant's complaints in determining that claimant sustained blurred vision and headaches following his work-injury. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is well-

[1]A harm has been defined as something that unexpectedly goes wrong with the human frame. *Wheatley v. Adler*, 607 F.2d 307 (D.C. Cir. 1968).

established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's decision to rely upon claimant's testimony is not patently unreasonable; we therefore hold that the administrative law judge did not err in finding that claimant established his *prima facie* case in regards to his complaints of blurred vision and headaches. Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption to link these two conditions to claimant's April 7, 1998, work accident. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

Employer next asserts that the administrative law judge erred in determining that it failed to produce medical evidence sufficient to sever the presumed causal link between claimant's memory, dental, and back pain complaints and claimant's April 7, 1998, work-injury. Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director*, OWCP, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). 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); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995). 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). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT)(1984).

We affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption linking claimant's back, myofascial, and memory complaints to his work-injury. The administrative law judge's findings regarding these three conditions are supported by the record, as he rationally found the opinions of Drs. Martin, Mohamed and Adams, upon whom employer relies in support of its contention of error, to be insufficient to rebut the presumption. With regard to claimant's back, Dr. Martin opined that while claimant's neurological examination was normal, claimant does have degenerative arthritis in his thoracic and lumbosacral spine which may be in part responsible for his back pain. *See* Emp. Ex. 14. As Dr. Martin's testimony does not address aggravation, it is insufficient to

establish that claimant's employment injury did not aggravate his pre-existing arthritic back condition and thus cannot rebut the Section 20(a) presumption. Dr. Mohamed, while opining that claimant exhibited no evidence of any significant temporomanibular disorder, found upon examination that claimant continues to complain of discomfort in both temporomandibular joints with jaw movements. *See* Emp. Ex. 6. This opinion does not address the cause of claimant's complaints and thus does not rebut the statutory presumption. Finally, while Dr. Adams opined that claimant's current complaints of memory loss were not in keeping with the nature of his injury as described to him, Dr. Adams did not affirmatively state that claimant's memory problems are not related to his April 7, 1998, work injury. *See* Emp. Ex. 11. Accordingly, as neither the opinions of Drs. Martin, Mohamed or Adams establish that claimant's work-accident, which included being struck in the face by a chain and falling thirty-five feet to the ground, played no role in the onset of his back complaints, myofacial face pain and memory problems, the Section 20(a) presumption has not been rebutted. We thus affirm the administrative law judge's finding that claimant's ongoing pain and memory problems are causally related to his employment with employer. *See Clophus v. Amoco Production Co.,* 21 BRBS 261 (1988).

Lastly, employer avers that the administrative law judge erred in addressing the potential causal relationship between claimant's ongoing dental problems and his April 7, 1998, work accident. We agree with employer that the administrative law judge's findings regarding claimant's current dental problems cannot be affirmed. Employer concedes that claimant's work accident resulted in the fracture of one or more of claimant's teeth. Subsequent multiple dental examinations revealed that claimant suffers from dental caries and moderate to severe periodontitis, as well as fractured and loosened teeth. *See* Emp. Ex. 6. In addressing claimant's dental problems, the administrative law judge acknowledged Dr. Ripps's opinion, that claimant's dental caries were not work-related, *see id.* at 5, as well the opinion of Dr. Yukna, that it was unlikely that claimant's present periodontal condition was caused by his work injury. *See id.* at 6. The administrative law judge then concluded, however, that since no physician opined that the problems associated with claimant's fractured teeth were unrelated to his work-injury, employer had not rebutted the presumption that a causal relationship existed between claimant's work accident and his dental problems. *See* Decision and Order at 12. Contrary to the administrative law judge's conclusory statement combining the totality of claimant's oral conditions under the designation of dental problems, however, employer presented evidence that claimant suffers from multiple, separate and distinct dental conditions, some of which may not be related to his April 7, 1998, work-injury. We therefore vacate the administrative law judge's determination that employer has failed to present substantial evidence sufficient to sever the presumed causal relationship between claimant's dental problems and his work injury, and we remand the case for the administrative law judge to address the issue of whether employer has rebutted the statutory presumption as it applies to the separate and distinct dental conditions identified by employer. If the administrative law judge finds that the Section 20(a) presumption is

rebutted in regards to any of claimant's specific dental conditions, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see also Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT).

AVERAGE WEEKLY WAGE

Employer additionally contends that the administrative law judge erred in calculating claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c).[2] Specifically, employer asserts that the administrative law judge was required to use the evidence of record which pertained to the earnings of an employee of the same class as claimant, pursuant to Section 10(b), 33 U.S.C. §910(b), which is applicable to injured workers who have not been employed for substantially the whole year preceding the injury. *See Harrison v. Todd Pacific Shipyards Corp.,* 21 BRBS 339 (1988). Alternatively, employer challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c) of the Act.

[2]Section 10 sets forth three alternative methods for determining claimant's average annual wage, 33 U.S.C. §910(a), (b), (c); the average annual wage is then divided by 52, pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. We note that, as employer does not aver that Section 10(a) governs the calculation of claimant's average weekly wage, we need not address the applicability of that subsection.

Section 10(b) applies where the employee was not employed for substantially the whole of the year; calculation of average weekly wage under subsection (b) is based on the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. *See* 33 U.S.C. §910(b). In the instant case, the administrative law judge concluded that claimant's pre-injury, average weekly wage should not be calculated by using the earnings of a comparable general laborer since, as conceded by employer on appeal, the records of the similar employee offered by employer indicate that this employee worked only twenty-five weeks in the year preceding claimant's injury.[3] Accordingly, as the administrative law judge rationally determined that employer's proffered employee had not worked substantially the whole of the year preceding claimant's injury, we reject employer's contention that the administrative law judge was required to use Section 10(b) of the Act when computing claimant's pre-injury average weekly wage.

Lastly, employer argues in the alternative that the administrative law judge's actual calculation of claimant's average weekly wage is in error. We disagree. An administrative law judge has considerable latitude in calculating a claimant's average weekly wage pursuant to Section 10(c) of the Act. *See generally Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999). Accordingly, the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

Under Section 10(d) of the Act, 33 U.S.C. §910(d), it is proper to divide a claimant's annual earnings by 52. In this case, it is uncontroverted that claimant earned $8,151.74 during his twelve weeks of employment with employer prior to the date of his work injury. *See* Emp. Ex. 16. Starting with this wage figure, the administrative law judge calculated claimant's annual earning capacity to be $35,324.12, which he then divided by 52 to arrive at an average weekly wage of $679.31. As the administrative law judge's calculation of claimant's average weekly wage under Section 10(c) of the Act is reasonable, we reject employer's assertion of error, and we affirm the administrative law judge's calculation. *See Staftex Staffing v. Director, OWCP*, 217 F.3d 365, 34 BRBS 44 (CRT)(5th Cir. 2000). The administrative law judge's award of temporary total disability benefits based on this average

[3]Employer additionally concedes that this employee left its employ on February 12, 1998, approximately two months before the date of claimant's work-injury. *See* Employer's brief at 9.

weekly wage is therefore affirmed.[4]

Accordingly, the administrative law judge's finding of a casual relationship between claimant's multiple dental conditions and his work injury is vacated, and the case remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

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[4]While specifically raising only causation and average weekly wage, employer's brief at points refers generally to the extent of claimant's disability. Contrary to the statement made by employer in its brief, claimant is not required to establish that he is incapable of performing any work post-injury in order to qualify for total disability benefits. Rather, claimant may establish a *prima facie* case of total disability by proving that he is incapable of returning to his usual employment duties with employer. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In the case at bar, employer does not challenge the administrative law judge's determination that claimant has established his *prima facie* case. Moreover, as employer did not identify specific employment opportunities as being available and suitable for claimant, the administrative law judge rationally concluded that employer failed to establish the availability of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001). Accordingly, the administrative law judge's award of total disability benefits to claimant is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge