

BRB No. 95-1282

DANNY GASPARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PUERTO RICO MARINE	)	DATE ISSUED: _____
MANAGEMENT COMPANY	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE	)	
COMPANY OF PITTSBURGH	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits, the Supplemental Decision and Order Awarding Attorney’s Fees, and the Second Supplemental Decision and Order Awarding Attorney Fees of Lee J. Romero, Administrative Law Judge, United States Department of Labor.

Ben E. Clayton, Abita Springs, Louisiana, for claimant.

Peter L. Hilbert, Michael J. Deblanc and Susan S. Harper (McGlinchey Stafford Lang), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits, the Supplemental Decision and Order and the Second Supplemental Decision and Order awarding attorney's fees (93-LHC-1224) of Administrative Law Judge Lee J. Romero, 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was hired by employer in 1981 as a trailer mechanic at its yard near the Industrial Canal in New Orleans. On July 30, 1984, claimant suffered a back injury during the course of his employment while attempting to remove a tire from a container chassis. The injury occurred at a workshop located on employer's yard between France Road and the Industrial Canal. Claimant has not worked since this injury.

The administrative law judge awarded benefits for temporary total disability for the period from July 30, 1984 through September 29, 1992, at which point he found claimant to have reached maximum medical improvement, and awarded compensation benefits for permanent total disability thereafter.<sup>1</sup> The administrative law judge also assessed penalties pursuant to Section 14(e), 33 U.S.C. §914(e), directed the payment of interest, if applicable, and denied employer's request for relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). In Supplemental Decisions and Orders, the administrative law judge also awarded attorney's fees to claimant's counsel. Employer appeals the administrative law judge's decision on the merits and his award of an attorney's fee.<sup>2</sup>

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<sup>1</sup>Employer paid claimant temporary total disability benefits from July 31, 1984 through the date of the hearing in the weekly amount of \$548.34. Employer has also paid \$75,461 in medical benefits.

<sup>2</sup>The one year period for review in this case under Pub. L. Nos. 104-134 and 104-208 commences on the date employer filed its last appeal in this case, May 17, 1996.

We initially reject employer's argument that the administrative law judge erred in finding coverage in this case, and affirm his finding that claimant satisfied both the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3), and the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a), both of which must be met for an employment-related injury to come within the Act's coverage. *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 73-74, 11 BRBS 320, 322 (1979). With regard to situs under Section 3(a), an area adjoining navigable waters which is "customarily used for significant maritime activity" meets the Act's situs requirement. *See Texports Stevedore, Inc. v. Winchester*, 632 F.2d 504, 515, 12 BRBS 719, 727 (5th Cir. 1980)(*en banc*), *cert. denied*, 452 U.S. 905 (1981)); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141, 7 BRBS 409, 411 (9th Cir. 1978). Employer's facility meets this test, as it was customarily used for loading and unloading its vessels which arrived one a week, as well as for storage and repair of containers and other loading equipment. The administrative law judge further found that the repair shop where the injury occurred was a covered site, as it was located on the Industrial Canal side of France Road, "proximate" to navigable waters, and the location was selected "for the purpose of repairing trailers and containers destined for ship or inland transportation" and out of a "maritime concern" for the purpose of maintaining trailers and containers destined for ship or inland transportation. Decision and Order at 24. These findings are supported by the record and support coverage under the applicable case law. Under *Winchester*, moreover, the situs requirement is met based on the coverage of an entire facility, rather than the particular site of claimant's injury within that facility. *See also Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313, 315 (1989). It is clear in this case that employer's loading facility is a covered site.<sup>3</sup> We therefore affirm the administrative law judge's determination that the situs requirement for coverage under Section 3(a) of the Act was met.

The administrative law judge also reasonably found that claimant met the Act's status requirement. Claimant worked primarily in the maintenance and repair of chassis, trailers and containers. These containers were in transit either to or from ocean-going vessels, and claimant's employment sometimes required that he board ships. The administrative law judge reasonably found this work integral to the loading and unloading aspects of employer's shipping business and correctly determined that claimant was covered under the Act. See

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<sup>3</sup>Employer's reliance on *Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), *aff'g Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), is misplaced. In that case the repair facility was a separate facility located 12 miles from employer's terminal and, although close to navigable water, the facility lacked a functional relationship with it.

*Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990). In *Coleman*, the employee's duties included work on containers, chassis and sometimes "hustlers" which carried containers around a yard located 500 yards from the Savannah River. He spent a major portion of his time changing tires and otherwise repairing and maintaining the chassis to prepare them for over-the-road transport. In affirming the Board's determination that Coleman was engaged in maritime employment, the United States Court of Appeals for the Eleventh Circuit reasoned that all of his employment activities were essentially maritime. *Coleman*, 904 F.2d at 617 n. 4, 23 BRBS at 107 n. 4 (CRT); see *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989); *Ljubic v. United Food Processors*, 30 BRBS 143, 145 (1996)(repair and maintenance of unloading equipment indisputably maritime). We therefore affirm the administrative law judge's determination that claimant's overall work was essentially maritime, and affirm his finding of coverage in this case.

Employer next asserts that the administrative law judge erred in finding that claimant's disabling back condition is related to his June 30, 1984, injury. We disagree. In establishing that an injury arises out of his employment, a claimant is aided by the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), which applies to the issue of whether an injury is causally related to his employment activities. This presumption is invoked when claimant demonstrates that he has suffered some harm and that a work-related accident occurred that could have caused the harm. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295, 24 BRBS 75, 80 (CRT) (D.C. Cir. 1990); see *Hensley v. WMATA*, 655 F.2d 264, 268, 13 BRBS 182, 186 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

It is beyond dispute that claimant suffered an initial back injury during the course of his employment. Moreover, claimant's back surgeries are embraced within the "harm" that was suffered as a result of his injury. The aggravation of a primary work-related injury by medical or surgical treatment is compensable, see *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 5 (1995), and this "aggravation ... should be regarded as resulting from the initial injuries themselves," even if the aggravation takes the form of subsequent medical treatment. *Wilder v. United States*, 873 F.2d 285, 288 (11th Cir. 1989); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Accordingly, we hold that the administrative law judge rationally accorded claimant the benefit of the Section 20(a) presumption.

Upon invocation of the presumption, the burden shifts to the employer 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, 1081, 1083, 4 BRBS 466, 475, 477 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In this case, the administrative law judge reasonably found that employer's evidence failed to sever the presumed causal nexus between the residual effects of claimant's injury, which includes the

results of consequential medical care and surgery, and claimant's disability.<sup>4</sup> Accordingly, we affirm the administrative law judge's finding that claimant's disabling back condition is derived from his employment.

As to the nature and extent of claimant's disability, the administrative law judge rationally found that claimant is permanently and totally disabled. Claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of his work-related injury, *see New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156, 163 (5th Cir. 1981); *Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290, 292 (1994), and will establish a *prima facie* case of total and permanent disability by demonstrating that he is unable to return to his usual employment. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80 (CRT)(5th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986).

In this instance, the administrative law judge could rationally credit claimant's subjective complaints of pain, regardless of the absence of objective medical findings of disability, to find that claimant had established a *prima facie* case for total disability.<sup>5</sup> *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6, 7 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *see also Mijangos*, 948 F.2d at 944, 25 BRBS at

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<sup>4</sup>Although Dr. Nutik reported in 1984 and early 1985 that he could find no objective basis for claimant's disability, *see EX-3: 3-7, 10; EX-19*, he last saw claimant on January 25, 1985, *EX-19: 23*, prior to surgery that was performed by Drs. Seltzer and Bratton on May 28, 1985 and which confirmed a disc rupture and herniation at L5-S1, *see CX-1: 51-52; CX-4: 222*, and the surgery in 1988. *CX-1*. As a result, his opinion as to the etiology of claimant's current disability is of questionable probative value. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945, 25 BRBS 78, 81 (CRT)(5th Cir. 1991). Likewise, Dr. Levy's "pre-surgery" opinions regarding the cause of claimant's injury and claimant's supposed ability to return to work are similarly obsolete. Indeed, on April 16, 1991, Dr. Levy considered claimant to be disabled and attributed this impairment to the residual effects of claimant's two surgeries. *EX- 4: 5-6*. The administrative law judge reasonably found that no physician has opined that claimant's injury has some origin other than his work-related accident. Decision and Order at 26. Similarly, Dr. King's interpretation of the January 1986 CAT scan as showing no disc herniation, and his similar interpretation of the 1985 myelogram, are insufficient to rule out the involvement of claimant's injury and its subsequent aggravations in his current disability.

<sup>5</sup>Moreover, the administrative law judge's finding that claimant could tolerate virtually no activity effectively defeats employer's assertion that the administrative law judge erred in failing to articulate whether claimant was unable to fulfill the exertional requirements of his former work.

80 (CRT); *Eller and Company v. Golden*, 620 F.2d 71, 73 (5th Cir. 1980).

The administrative law judge also properly found that employer failed to discharge its burden of proving that claimant is not totally disabled by demonstrating suitable alternate employment. *See generally Turner*, 661 F.2d at 1041, 14 BRBS at 163. The administrative law judge rationally found that employer's vocational rehabilitation evidence, *see* EXS 14, 24, did not establish suitable alternate employment under the circumstances of this case. Decision and Order at 30-31. The administrative law judge reasoned that the labor studies did not account for claimant's unceasing pain, or meet claimant's restrictions. He was entitled to credit the opinion of Ms. Hoffman, who reviewed the positions for claimant and who determined that claimant could not perform the tasks required by each, to find that employer did not demonstrate suitable alternate employment.<sup>6</sup>

Granting employer's argument that no physician has assessed claimant as totally disabled and given that there may be "considerable evidence indicating that [claimant] was physically capable of performing a number of jobs," *see Mijangos*, 948 F.2d at 944, 25 BRBS at 80-81 (CRT), the administrative law judge reasonably discounted any vocational or medical opinion as to claimant's employment potential because those conclusions did not account for claimant's persistent pain.<sup>7</sup> Because the administrative law judge's findings with respect to the nature and extent of claimant's disability are supported by substantial evidence and accord with applicable law, they are affirmed.

We also affirm the administrative law judge's denial of relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), as supported by substantial evidence and in accordance with applicable law. The administrative law judge correctly ruled that claimant's obesity does not constitute a pre-existing permanent partial disability which is cognizable by Section 8(f). As in *Brogdan v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 259, 261 (1984), there is no evidence of any disability or symptomatology attributable to claimant's weight. Moreover, Dr. Seltzer testified that he did

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<sup>6</sup>Ms. Hoffman, *see* CX-3: 45, disagreed with Dr. Seltzer, who testified that there were three positions that claimant "could try." EX-17: 67.

<sup>7</sup>This pain is well documented, in that claimant has consistently complained to numerous physicians. *See, e.g.* EX-3 (Dr. Nutik); Ex. 4 (Dr. Levy); EX-5 (Dr. Williams); EX-6 (Dr. Derbes - pain clinic; "Danny has pain all day, every day."). Dr. Seltzer, claimant's treating physician, reported that claimant suffered from chronic pain. CX-4: 78 (letter dated November 12, 1992). Further, claimant's spouse testified that claimant frequently complained of pain. Tr. at 149. *Compare Mijangos*, 948 F.2d at 944 n. 11, 25 BRBS at 80 n. 11 (CRT).

not find claimant to have suffered from a permanent partial disability on account of his "obesity." CX-2: 60; EX-17: 60.<sup>8</sup>

Turning to employer's challenge to the administrative law judge's attorney's fee award, in which he granted counsel an attorney's fee award of \$7,380 for fees and an award of expenses totalling \$152.01, we have carefully reviewed employer's contentions and find them to be without merit. The administrative law judge acted within his discretion in finding that counsel's fee petition was sufficiently specific and complied with the standards for adequate petitions as set forth in 20 C.F.R. §702.132, Supplemental Decision and Order at 4-5, and "in light of the generally well-detailed nature of the petition," could rationally determine that the legal fees and costs claimed were reasonably necessary to the prosecution of this claim. *See Forlong v. American Security & Trust Co.*, 21 BRBS 155, 163 (1988).

The administrative law judge also correctly determined that counsel was entitled to an award of legal fees for claimant's successful prosecution of this claim. Claimant established coverage under the Act, which was challenged by employer. *See Olson v. Healy Tibbits Construction Co.*, 22 BRBS 221, 225 (1989)(Brown, J., dissenting on other grounds), *remanded on other grounds*, No. 89-70306 (9th Cir. Mar. 20, 1991). Claimant obtained an award of interest on past due compensation, Decision and Order at 36, as well as applicable penalties, *see* 33 U.S.C. §914(e) and his award of permanent total disability benefits entitled claimant to the Section 10(f), 33 U.S.C. §910(f), cost of living adjustments, which are not applicable to temporary total disability benefits. Moreover, the administrative law judge also determined that claimant was successful in obtaining a larger average weekly wage by stipulation which exceeded the amount voluntarily paid by employer. *See generally* 33 U.S.C. §928(b). Because employer has failed to show that the administrative law judge abused his discretion in rendering the fee award, we hold that the administrative law judge properly awarded attorney's fees in this case.

Accordingly, we affirm the Decision and Order - Awarding Benefits and the Supplemental Decisions and Orders awarding attorney's fees in all respects.

SO ORDERED.

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<sup>8</sup>The record contains no evidence that claimant's obesity has combined with the effects of his back injury to contribute to his current disability.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge