BRB No. 96-1706

RODNEY PULLIAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AVONDALE SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Joseph J. Lowenthal, Jr., and Patricia A. Bethancourt (Jones, Walker, Waechter, Poitevent, Carrere & Denegre L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (95-LHC-2632) of Administrative Law Judge Quentin P. McColgin 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, while working as a sheet-metal mechanic for employer on May 21, 1992, sustained an injury to his right shoulder as a result of a fall which occurred when the scaffolding upon which he was standing collapsed. Employer's physician, Dr. Mabey, diagnosed claimant's injury as a sprain of the right shoulder and permitted claimant to return to work, limiting him to light duty activity. Claimant attempted to return to work but was unable to perform his normal duties due to shoulder pain. Claimant took several days off returning to work with employer on June 8, 1992, and remained with employer until July 1992. On August 31, 1992, claimant was hired to work as a joiner by Jamestown Metal Sales, Incorporated (Jamestown).

Claimant subsequently visited Dr. Murphy on June 10, 1993. Dr. Murphy diagnosed

subacromial space impingement type syndrome of claimant's right shoulder and performed arthroscopic surgery on February 23, 1994. Claimant left his position with Jamestown just prior to his shoulder surgery and has not worked since that time. Following the surgery claimant engaged in physical therapy aimed at improving the strength and range of motion of his right shoulder. Dr. Murphy opined that claimant reached maximum medical improvement in January 1995 and assigned a 20 percent impairment rating to claimant's right upper extremity, noting that claimant would have difficulty lifting a one pound object above his head due to the condition of his right shoulder. Dr. Murphy also believed that claimant could return to gainful employment so long as he did not perform a job that required any overhead type work.

In his Decision and Order, the administrative law judge initially determined that the Section 20(a), 33 U.S.C. §920(a), presumption applies to link claimant's shoulder condition with the work accident and that employer did not establish rebuttal thereof. Accordingly, the administrative law judge concluded that claimant's disability is work-related. The administrative law judge then found that although claimant is not capable of returning to his usual employment, employer established the availability of suitable alternate employment through the testimony of its vocational counselors and claimant did not show reasonable diligence in attempting to secure alternate work. Claimant's claim for total disability benefits was therefore denied. Lastly, the administrative law judge determined that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), commencing on January 30, 1995. Moreover, the administrative law judge awarded medical benefits under Section 7, 33 U.S.C. §907. Employer appeals, challenging the administrative law judge's award of benefits. Claimant has not responded to this appeal.

Employer initially challenges the administrative law judge's finding of a causal connection between claimant's disability and his employment. Employer contends that claimant did not establish a *prima facie* case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a) presumption. Section 20(a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or an accident occurred which could have caused, aggravated, or accelerated the condition. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

In the instant case, the administrative law judge found that claimant sustained a harm, an impairment to his right shoulder that necessitated surgery, and that conditions existed at work that could have caused this impairment, *i.e.,* a fall from scaffolding. In addition, the parties stipulated that an accident/injury occurred in the course and scope of claimant's employment on May 21, 1992. *See* Joint Exhibit 1. Because it is undisputed that claimant sustained an injury to his shoulder and that a work accident occurred, the

administrative law judge properly found that claimant is entitled to the Section 20(a) presumption that his shoulder impairment is causally related to his employment. *See generally Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175 (1996); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988); *see also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989).

The administrative law judge acknowledged that employer sought to rebut the Section 20(a) presumption; employer relied on claimant's statement that he merely sprained his shoulder and the occurrence of three subsequent injuries with another employer which it asserts brought about the need for claimant's shoulder surgery. The administrative law judge, however, rejected employer's assertions, finding that at the time of claimant's statement in July 1992, the full extent of his injury was not yet known and that none of the three subsequent accidents involved his right shoulder.[1] Moreover, employer presents no other evidence that claimant's shoulder impairment was not caused by the May 21, 1992, accident. Consequently, as there is no specific and comprehensive evidence severing the causal connection between claimant's shoulder condition and his work-related accident, we affirm the administrative law judge's finding that claimant's shoulder impairment is the result of the May 21, 1992, work-related accident. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Employer next argues that, contrary to the administrative law judge's decision, it should not be liable for any benefits since the administrative law judge determined that employer established the availability of suitable alternate employment and claimant did not show due diligence in attempting to secure such employment. Contrary to employer's contention, the administrative law judge's findings of suitable alternate employment and claimant's lack of due diligence in seeking such employment merely preclude claimant's entitlement to total disability benefits and do not affect his entitlement to partial disability benefits where a loss in wage-earning capacity is found. *See generally Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160 (1984).

Lastly, employer argues that the method used by the administrative law judge to calculate the award of permanent partial disability benefits is improper. First, employer argues that there is no basis for using an average weekly wage of $330 per week.

[1]In particular, the administrative law judge found that the first accident entailed a fall which caused a contusion to claimant's right knee; the second involved oil being sprayed in claimant's left eye; and the third involved an electric shock. Employer's Exhibit 2 at 11, 13, 14, and 19.

Employer next argues that the administrative law judge erred in using an hourly wage of $5.25 to calculate claimant's post-injury wage-earning capacity. Employer further contends that the wages earned by claimant at Jamestown accurately reflect his post-injury wages and thus should be used by the administrative law judge to compute claimant's benefits.

Contrary to employer's contention, the record contains an adequate basis for the administrative law judge to find that claimant's pre-injury average weekly wage is $330. First, employer specifically stipulated that claimant's average weekly wage is $330. Joint Exhibit 1, Stipulation No. 12. Additionally, employer voluntarily paid temporary total disability benefits to claimant immediately following his shoulder injury using an average weekly wage of $330, and there can be only one average weekly wage for a given injury which all compensation payments are based.[2] *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). In determining claimant's post-injury wage-earning capacity the administrative law judge properly used the earnings in the alternate employment available to claimant following the date claimant reached maximum medical improvement after his shoulder surgery, and not the wages claimant earned at Jamestown prior to his surgery. *Berkstresser v. Washington Metropolitan Area Transit Authority,* 16 BRBS 231, 233-234 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990). The administrative law judge averaged the hourly wages provided by the five positions identified in employer's January 31, 1996, labor market survey. *See* 33 U.S.C. §908(h). He then multiplied the resulting average hourly rate by a 40 hour work week and subsequently applied the percentage increase in the national average weekly wage for each year to adjust claimant's post-injury wages downward for inflation, *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990), to arrive at claimant's post-injury wage-earning capacity. We hold that the administrative law judge acted in a reasonable manner in calculating claimant's post-injury wage-earning capacity. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). The record, however, establishes that the average hourly rate of the five relevant positions identified in the January 31, 1996, labor market survey is $5.99 and not $5.25.[3] Applying that figure to

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[2]The record establishes that employer voluntarily paid claimant temporary total disability benefits from May 25, 1992 to June 8, 1992 and from February 23, 1994 to March 6, 1995, and permanent partial disability benefits from March 7, 1995 to February 20, 1996. Joint Exhibit 1, Stipulation No. 11.

[3]Specifically, claimant testified that he applied for the Parking Lot Cashier position with Central Parking Systems. Tr. at 173-175. The remaining five positions offered the following starting hourly rates; Riverside Hilton Hotel, $7.05; Avis Car Rental, $6.65; New Orleans Private Patrol, $4.50; Best Cut Manufacturing, $7.50; and Moon's Wrecker Service, $4.25. Employer's Exhibit 6. The average hourly rate for these five positions is $5.99.

the administrative law judge's formula, claimant's wage-earning capacity is $239.60 per week and after adjustment for inflation, $214.35 per week. Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to permanent partial disability benefits based on 66_ percent of the difference between $330 and $214.35 pursuant to Section 8(c)(21).

Accordingly, the administrative law judge's Decision and Order awarding permanent partial disability benefits is modified in accordance with this decision. In all other respects, 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

REGINA C. McGRANERY
Administrative Appeals Judge