BRB No. 97-0217

GARY D. WILLIAMSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADVANCED AMERICAN DIVING SERVICE INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-LHC-604) of Administrative Law Judge Henry B. Lasky 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 the 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).

On November 15, 1993, while working for employer as a barge foreman, claimant suffered a left shoulder dislocation. After undergoing conservative treatment, claimant was released to return to his regular work with employer on January 9, 1994. Claimant continued to work for employer until November 1994, when he obtained employment as a pile buck foreman with Tracy Colgrove Construction Company (hereinafter, Tracy Colgrove); this job was not covered by the Act. On March 29, 1995, while working for Tracy Colgrove shoveling dirt from a ditch, claimant a suffered a second left shoulder dislocation. After undergoing surgery on May 10, 1995, claimant returned to modified work with Tracy Colgrove on August 14, 1995, and successfully pursued a state workers' compensation claim against Tracy Colgrove for time he missed from work between March 29 and August 14, 1995. It is uncontested that subsequent to the second dislocation, claimant suffered a permanent disability to the left shoulder. Claimant sought temporary total and permanent partial disability compensation under the Act from employer, alleging that his 1995 dislocation was due to the natural progression of the initial dislocation claimant experienced while working for employer in 1993.

The administrative law judge denied the claim, finding that claimant had fully recovered from his 1993 work injury prior to his 1995 dislocation and that claimant's disability following the 1995 dislocation was solely due to a new injury he sustained while working for Tracy Colgrove on March 29, 1995. Claimant appeals the denial of his claim, arguing that in finding that claimant had fully recovered from the effects of his 1993 injury at the time of his 1995 dislocation, the administrative law judge ignored relevant medical evidence. Moreover, claimant asserts that the administrative law judge erred in relying on the medical opinion of Dr. Switlyk to support his determination that the 1995 dislocation was unrelated to the 1993 injury. Employer responds, requesting affirmance of the decision below. Claimant replies, reiterating the arguments made in his initial brief.

In this case, as it is undisputed that claimant sustained a harm, a shoulder dislocation, and the occurrence of the 1993 work accident is not in dispute, the administrative law judge properly concluded that claimant was entitled to the benefit of the Section 20(a) presumption. *See Cairns v. Matson Terminals, Inc.* 21 BRBS 252 (1988). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with 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, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption is rebutted, he must weigh all 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). If claimant sustains a subsequent injury, an employer can establish rebuttal of the Section 20(a) presumption and avoid liability by showing that claimant's disabling condition was caused by the subsequent event, provided that employer also proves that the subsequent event was not caused by claimant's work injury. *See James v. Pate Stevedoring*, 22 BRBS 271 (1989). Employer is liable for the entire disability if the second injury is the natural and unavoidable result of the first injury. Where the second injury is the result of an intervening cause, however, employer is relieved of liability for that portion of the disability attributable to the intervening

cause. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

In the present case, in denying claimant's disability claim, the administrative law judge determined initially that claimant had fully recovered from his 1993 injury at the time of his 1995 dislocation based on his resumption of his full work duties and prior hobbies and his failure to obtain medical attention. Thereafter, he found that the Section 20(a) presumption had been rebutted based on the testimony and medical reports of Dr. Switlyk, as corroborated by the medical opinion of Dr. Vessely. Crediting this evidence, he ultimately concluded that claimant's 1995 condition was not due to the natural progression of his 1993 work injury.

We agree with claimant that in determining that claimant had fully recovered from this injury prior to his 1995 dislocation, the administrative law judge erred in weighing the medical evidence. Despite purporting to rely upon his opinion, the administrative law judge did not consider the totality of the medical testimony provided by Dr. Switlyk, the doctor who performed claimant's 1995 surgery. In addition, the administrative law judge did not consider the opinion of Dr. Coale, who treated claimant following the initial 1993 dislocation.

Dr. Switlyk opined that but for the loosening of the ligaments in claimant's shoulder caused by the 1993 injury, claimant would not have suffered the 1995 dislocation. CX-14 at 10-11, 13-14, 35-36. Dr. Switlyk's opinion thus does not support the conclusion that claimant fully recovered from the 1993 injury. In addition, Dr. Coale, who treated claimant for the 1993 dislocation, advised claimant that because his 1993 shoulder injury compromised his shoulder joint, he risked future problems with rotator cuff tears, laxity, arthritis and recurrent left shoulder dislocations. CX-14. Inasmuch as the administrative law judge erred in determining that claimant had fully recovered from his 1993 injury prior to the 1995 dislocation, we vacate that finding and remand for reconsideration of this issue based on all of the relevant evidence as is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(a). *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

We also agree with claimant that the medical opinion of Dr. Switlyk, upon whom the administrative law judge primarily relied, does not provide substantial evidence to rebut the Section 20(a) presumption and establish the absence of a causal nexus between claimant's 1993 work injury and his later disability. In finding that Dr. Switlyk's opinion was sufficient to rebut the Section 20(a) presumption and establish the absence of a causal nexus, the administrative law judge focused exclusively on statements Dr. Switlyk made during cross-examination taken out of context. By ignoring the doctor's overall opinion, the administrative law judge mischaracterized Dr. Switlyk's opinion. As noted by the administrative law judge, Dr. Switlyk deposed during cross-examination that claimant's 1995 dislocation was not an unavoidable result of the 1993 work injury in the sense that if claimant had not been performing the activities he was performing in 1995 the second dislocation would not have occurred. Moreover, Dr. Switlyk responded affirmatively when asked by employer's counsel if by this he meant that the 1995 activities were an intervening cause of claimant's current condition and need for surgery, CX-14 at 38. However, in a

report dated October 5, 1995, Dr. Switlyk opined that the original injury in November 1993 played a significant part in causing claimant's 1995 condition in that it created a primary pathology, *i.e.*, a Bankart tear which left him more likely to dislocate with certain combinations of force and position. Moreover, in this report he also stated that it was this pathology which was finally fixed in claimant's subsequent, May 10, 1995 surgery, although he opined that claimant's subsequent dislocation on March 29, 1995 was more than 50 percent responsible for claimant's need for subsequent care. CX-13; EX-41. In addition, Dr. Switlyk deposed that if claimant had not suffered the first dislocation, it was very, very unlikely that the second injury would have occurred; he explained that in the absence of the weakened ligaments produced by the 1993 dislocation, the shoveling activity in which claimant was engaged would not have resulted in his second dislocation in 1995. CX-14 at 9-11. Finally, while the administrative law judge stated in his Decision and Order at 7 that Dr. Switlyk opined that claimant's second injury was "the" cause of his current residuals, the record reflects that Dr. Switlyk actually testified that claimant's 1995 injury was "a" cause, along with the 1993 work injury. CX-14 at 34. It is clear from reading Dr. Switlyk's entire deposition as well as his report that his medical opinion is that claimant's 1995 disability is due to his 1993 injury as well as to his 1995 injury. The administrative law judge's reliance on this evidence to support the conclusion that claimant's 1995 disability was unrelated to his 1993 work injury is therefore misplaced. *See generally Plappert v. Marine Corps Exchange*, 31 BRBS 13, 15-16 (1997). While the medical opinion of Dr. Vessely does appear to support the administrative law judge's initial determination that claimant's current disability is not related to the November 1993 dislocation, the only reason given by the administrative law judge for crediting Dr. Vessely's testimony was his erroneous belief that it corroborated Dr. Switlyk's testimony. Inasmuch as the administrative law judge did not properly weigh the relevant evidence in analyzing the cause of claimant's disability and in determining that employer was not responsible for the benefits claimed in this case, we vacate these findings and remand this case for reconsideration. *See generally Buchanan v. International Transportation Services,* BRBS , BRB Nos. 96-1424/A/S, 97-39, 97-613 (July 9, 1997).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge