BRB No. 97-430

EDWARD JOLLY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRINITY MARINE GROUP	)	DATE ISSUED:
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Harris M. Dulitz, Metairie, Louisiana, for claimant.

Collins C. Rossi (Bernard, Cassisa & Elliott), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Decision and Order (95-LHC-2778) 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 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 employed as a shipfitter, injured his lumbar spine and fractured a rib on March 15, 1994, after falling into an uncovered hole in the main deck of a vessel under construction. Employer voluntarily paid claimant temporary total disability benefits from April 29, 1994 through September 25, 1994. Claimant sought additional benefits. The administrative law judge awarded claimant temporary partial disability benefits from March 15, 1994 to April 29, 1994, temporary total disability benefits from April 29, 1994 to

December 23, 1994, and permanent partial disability benefits from December 23, 1994, and continuing. The administrative law judge further awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, and interest.

On appeal, employer challenges the administrative law judge's finding that claimant's disability is work-related, and his finding that claimant's post-injury wage-earning capacity is the minimum wage of $4.25 per hour. Employer also challenges the administrative law judge's decision to admit Claimant's Exhibit 16, and his exclusion of Ms. Brondum's testimony regarding claimant's most recent employment as a dishwasher. Claimant responds in support of these findings, but asserts that the administrative law judge erred in terminating his temporary total disability benefits on December 23, 1994.[1]

Employer initially contends that the administrative law judge erred in finding that claimant's disability is causally related to his work injury. Employer concedes that claimant's pre-existing degenerative disc disease was temporarily aggravated by the work injury, but asserts that the work restrictions imposed by Dr. Finney as of September 1995 are solely due to claimant's pre-existing degenerative disc disease. Under the "aggravation rule," where an employment injury worsens or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*); *Johnson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 160 (1989). Section 20(a) applies to the issue of whether an injury or disability is work-related. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). The presumption is invoked if claimant establishes the existence of a harm and working conditions that could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In order to rebut the presumption, employer must produce specific and comprehensive evidence that claimant's condition was not caused, aggravated or contributed to by the work accident. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). If the presumption is rebutted, it falls out of the case and claimant must establish a causal relationship based on the record

[1]We decline to consider claimant's argument regarding the date the administrative law judge terminated his temporary total disability benefits as claimant did not file a cross-appeal and his argument, raised in his response brief, is not in support of the administrative law judge's decision. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); Cl. Resp. Br. at 1, 4, 14-15, 17.

as a whole. *Universal Maritime Corp. v. Moore*, ___ F.3d ___, No. 96-2612 (4th Cir. Sept. 16, 1997).

After consideration of employer's contentions on appeal, claimant's response, and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's finding that claimant's injury is work-related. In determining that claimant's current condition is work-related, the administrative law judge discussed and weighed claimant's testimony along with the opinions of Drs. Finney, Landry, and Segura. Decision and Order at 6-7; Emp. Exs. 6, 8, 10; Tr. at 51-68. Assuming, *arguendo*, that the opinions of Drs. Finney and Landry were sufficient to establish rebuttal of the Section 20(a) presumption, the administrative law judge credited claimant's testimony that he was symptom free prior to his 1994 accident and that his present condition has existed only since and because of his work-related fall. Decision and Order at 6-7; Tr. at 22-23, 26-29. The administrative law judge found that claimant's testimony is supported by Dr. Segura's opinion that claimant's pre-existing degenerative disc disease, assuming that he has it, could be aggravated by trauma. Tr. at 58-59. Contrary to employer's argument that the administrative law judge could not rely on Dr. Segura's opinion because Dr. Segura did not personally examine claimant, the administrative law judge has broad discretion in evaluating the medical opinions and is not required to defer to a physician who has examined claimant. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, while Dr. Segura's opinion may be insufficient by itself to establish a causal relationship between claimant's pre-existing degenerative disc disease and his work-related fall because it does not state that an aggravation actually occurred in this case, it is supportive of claimant's testimony. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). The administrative law judge acted within his discretion in crediting claimant's testimony, supported by Dr. Segura's opinion, over the opinions of Drs. Finney and Landry, which the administrative law judge found lacked certainty.[2] As his credibility determinations are neither inherently incredible nor patently unreasonable, and the Board is not empowered to reweigh the evidence, we affirm his findings regarding causation. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Donovan*, 300 F.2d at 741.

Employer next contends that the administrative law judge erred in concluding that

[2]The administrative law judge noted that Dr. Finney thought that claimant should have recovered more quickly from his work-related fall, but the physician later stated that anyone with pre-existing degenerative disc disease is at risk for any job that requires a lot of heavy lifting, bending, or stooping. Decision and Order at 6; Emp. Exs. 6 ,10. The administrative law judge also noted that Dr. Landry stated that with the history he was provided, it did not "sound" as if the work-related fall would have damaged his lower back. Decision and Order at 6; Emp. Ex. 8.

claimant has a post-injury wage-earning capacity of $4.25, and not $6, per hour since claimant's failure to cooperate with employer's vocational consultant, Ms. Brondum, precluded employer from establishing a higher post-injury wage-earning capacity. Employer relies upon the decision in *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989), that an administrative law judge may consider a claimant's refusal to cooperate with employer's vocational expert in determining whether claimant is totally disabled, in support of its contention.

In determining that claimant's post-injury wage-earning capacity is $4.25, the minimum wage at the time, the administrative law judge found that claimant was working full-time as a dietary trainee in a nursing home earning $4.25 per hour or $170 per week. Decision and Order at 4, 9. The administrative law judge further noted that employer offered Ms. Brondum's testimony that claimant is capable of performing certain jobs such as cashier, parking lot attendant, and dispatcher within his medical restrictions which pay between $4.25 per hour to $6 per hour, and that claimant refused to interview with her. Decision and Order at 6, 9; Emp. Ex. 9; Tr. at 94-105.

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). In determining whether the employee's actual post-injury wages fairly and reasonably represent his wage-earning capacity, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979).

In the instant case, the administrative law judge's finding that claimant's post-injury wage-earning capacity is $4.25 per hour is supported by substantial evidence, notwithstanding that he did not address whether claimant's refusal to cooperate with employer's vocational expert affects claimant's post-injury wage-earning capacity. Claimant's actual earnings at the time of the hearing were $4.25 per hour, and Ms. Brondum's identification of two available cashier positions at Schwegmann's and Shell which pay the same wage supports the administrative law judge's finding regarding claimant's post-injury wage-earning capacity.[3] *See Guthrie v. Holmes & Narver, Inc.,* 30

[3]We reject employer's contention that Ms. Brondum's testimony necessarily supports a finding of a post-injury wage-earning capacity of $6 per hour. Although Ms. Brondum identified one job that paid $6 per hour, she also testified that claimant has a post-injury

BRBS 48, 52 (1996), *rev'd on other grounds sub nom. The Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997). Therefore, we affirm the administrative law judge's finding.

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wage-earning capacity of approximately $5 per hour. Tr. at 104.

Employer lastly contends that the administrative law judge erred in admitting Claimant's Exhibit 16 over its objection and in excluding Ms. Brondum's testimony regarding claimant's most recent employment as a dishwasher at a restaurant upon claimant's objection. The administrative law judge has broad discretion concerning the admission and exclusion of evidence and any decision regarding the admission and exclusion of evidence is reversible only if arbitrary, capricious, or an abuse of discretion. *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). The administrative law judge is not bound by any formal rules of evidence and may admit hearsay evidence that he considers reliable. *See* 33 U.S.C. §923(a); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

At the hearing, the administrative law judge admitted Claimant's Exhibit 16, a letter from Ms. Wynne, the office manager at Kenny Rogers Roasters' Restaurant, which stated that claimant had to resign from his dishwasher position at the restaurant due to a disability which did not allow him to perform his duties, over employer's objection that it is hearsay. Tr. at 5-7. The administrative law judge found that hearsay is admissible under the Act, and provided that when claimant testified as to his employment at the restaurant, employer could cross-examine claimant on that issue. Contrary to employer's argument, the administrative law judge acted within his discretion in admitting Claimant's Exhibit 16 over employer's objection after providing employer the opportunity to cross-examine claimant regarding the contents of this exhibit.[4] *See Vonthronsohnhaus*, 24 BRBS at 154.

[4]Claimant subsequently testified that he spoke to Ms. Wynne when the restaurant closed down but that she was not his supervisor and that he did not have any contact with her at all while he was working at the restaurant. Tr. at 77. Claimant also testified that he had problems bending, lifting 35-50 pounds, and standing for a long period of time while working as a dishwasher at the restaurant. Tr. at 77-78.

Later at the hearing, the administrative law judge excluded Ms. Brondum's testimony concerning what had been told to Ms. Wynne by Sandy, claimant's former supervisor at the restaurant, regarding claimant's employment as a dishwasher, upon claimant's objection. Tr. at 105-107. Although hearsay evidence is admissible in administrative hearings, as noted above, the administrative law judge may reject it if it is not based on first-hand knowledge. *See Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). Contrary to employer's argument that the administrative law judge should have allowed Ms. Brondum to testify regarding what Ms. Wynne told her that Sandy told Ms. Wynne about claimant's job performance, we hold that the administrative law judge acted within his discretion in excluding Ms. Brondum's testimony regarding this issue. *See Wenanski*, 8 BLR at 1-487. Although employer could have called either Ms. Wynne or Sandy as witnesses to testify about claimant's ability to perform his job as a dishwasher, it chose not to do so. Consequently, we affirm the administrative law judge's admission of Claimant's Exhibit 16 and the exclusion of Ms. Brondum's testimony concerning claimant's most recent employment at the restaurant as within his discretionary authority.[5] *See Vonthronsohnhaus*, 24 BRBS at 154; *Wenanski*, 8 BLR at 1-487.

Accordingly, 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

[5]While employer attempts to draw a parallel between the instant case and *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992), the two cases are distinguishable. In *Ramirez*, the Board held that the administrative law judge abused his discretion in granting claimant's request for a post-hearing deposition of his treating physician while denying employer's request for a post-hearing deposition of its vocational expert following the issuance of newly imposed work restrictions placed on claimant by his doctor. *Ramirez*, 25 BRBS at 264. In the instant case, the administrative law judge acted within his discretion in admitting Claimant's Exhibit 16, even though it is hearsay, as claimant was subject to cross-examination, and in excluding a part of Ms. Brondum's testimony, which is also hearsay, as it was not based on first-hand information.

REGINA C. McGRANERY
Administrative Appeals Judge