BRB No. 97-0482

DAVID MORAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
METRO MACHINE CORPORATION	)	
	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order -- Granting Disability Benefits and the Decision Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order -- Granting Disability Benefits and the Decision Denying Employer's Motion for Reconsideration (95-LHC-2220) of Administrative Law Judge Richard K. Malamphy 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 injured his back during the course of his employment on February 21, 1992, when he was attempting to remove his hand from beneath a 200 to 400 pound machine casing that he was assisting in lifting. Claimant returned to work on June 19, 1995, in a light duty capacity. Employer voluntarily paid compensation for temporary total and partial disability, as well as medical benefits, up through and including October 24, 1994. The case was referred to the administrative law judge for a formal hearing when the

parties failed to agree on whether claimant was entitled to disability benefits after October 24, 1994. The administrative law judge awarded claimant temporary total disability benefits for the period between October 25, 1994 through June 18, 1995, and permanent partial disability compensation from June 19, 1995, and continuing,[1] as well as medical benefits, rejecting employer's assertion that claimant's present disability is not due to his February 21, 1992, work injury. The administrative law judge denied employer's request for reconsideration.

On appeal, employer challenges the administrative law judge's finding that claimant's continuing disability is derived from his work-related injury and not from a pre-existing degenerated disc. Employer argues in this instance that the administrative law judge erred in applying the Section 20(a) presumption to link claimant's current disability to the work injury. Employer also asserts that the award of continuing compensation for the period after the record closed is unsupported by substantial evidence and that it is contrary to law.[2] Upon consideration of the Decision and Order of the administrative law judge, the administrative record as a whole and the arguments raised on appeal, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that it accords with applicable law. We therefore affirm the administrative law judge's decisions in all respects.

We reject employer's contention that the administrative law judge erred in applying the Section 20(a) presumption. Section 20(a), 33 U.S.C. §920(a), accords claimant with a presumption that his disabling condition is causally related to his employment. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 8-9 (1995); *see Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297, 23 BRBS 22, 25 (CRT)(11th Cir. 1990). In order to invoke this

[1]The parties stipulated that, should the administrative law judge award benefits, then claimant would be entitled to temporary total disability benefits from October 25, 1994 to June 18, 1995 and temporary partial disability benefits from June 19, 1995 through the date of the hearing, May 7, 1996. *See* Stipulation ¶ 10.

[2]Employer asserts that an award of benefits for which there is no evidence of disability violates both due process and the Administrative Procedure Act. In the context of this record, employer asserts that there is no evidence developed after the date of the hearing which establishes claimant's continuing disability.

presumption, claimant must demonstrate that he has suffered some harm and that a work-related accident occurred that could have caused, aggravated or accelerated the condition for which compensation is sought. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295, 24 BRBS 75, 80 (CRT) (D.C. Cir. 1990). In this case the administrative law judge correctly invoked the presumption based on the parties' stipulation that claimant suffered a work-related injury to his back on February 21, 1992. Decision and Order at 3. This finding is further supported by Dr. Partington's conclusion that the accident aggravated claimant's degenerative disc disease. *See* CX-1:1; EX-1 (Deposition) at 35.

Upon invocation of this 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); *see also Universal Maritime Corp. v. Moore*, ___ F.3d ___, No. 96-2612 (4th Cir. Sept. 16, 1997). This presumption does not lapse over time and continues in effect until employer introduces substantial countervailing evidence that the work injury did not cause, contribute to or accelerate the underlying condition. *See generally Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 90 (1995). The administrative law judge rationally found that the evidence of record does not satisfy employer's burden of rebutting the Section 20(a) presumption, in that no physician unequivocally stated that claimant's work injury did not aggravate claimant's underlying disc disease resulting in his current disability.[3] *See* CX-1:1, 16; CX-6; EX-1:30, 31, 34 Because the administrative law judge properly found that employer failed to rebut the Section 20(a) presumption, in that no physician ruled out the work-related aggravation of claimant's disc disease, we affirm his finding that claimant's disability is work-related. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

We also reject employer's challenge to the administrative law judge's award of continuing disability compensation, as well as its assertion that such an award violates its due process rights.[4] Because the Act affords employer with, *inter alia*, a full pre-deprivation hearing before the administrative law judge, it has not been deprived of property without due process of law. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 315 (5th Cir. 1997). Moreover, there is no support in the Act for the proposition that an award of benefits cannot, as a matter of law, be issued for periods beyond the date of the hearing. Section 8 provides for awards "during the continuance" of temporary or permanent disability, 33

[3]Claimant's entitlement to benefits is based on the aggravation of his pre-existing degenerative disc disease. Under the aggravation rule, *see Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968), a claimant is compensated for the totality of his disability if the injury aggravates, accelerates, or combines with an underlying condition.

[4]Employer's reliance on *Hoodye v. Empire/United Stevedores*, 23 BRBS 341, 343 (1990), is misplaced. As pointed out by claimant, *Hoodye* supports a continuing disability award.

U.S.C. §908(a), (b), (c)(21), (e), and there is no basis in the statute for finding disability terminates on the date of a hearing. Employer may seek modification of the award pursuant to Section 22 of the Act, 33 U.S.C. §922, should claimant's condition change so that he is no longer disabled. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995).

Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of his work-related injury, *see Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290, 292 (1994); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1985), and must establish a *prima facie* case of disability by demonstrating that he is unable to return to his usual employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 5 (CRT)(2d Cir. 1991); *see Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986). Employer did not contend below that claimant is not disabled, *see* Tr. at 6-7, and the burden shifted to employer to prove that the claimant has no loss in wage-earning capacity in his injured condition or that his actual post-injury wages do not constitute his wage-earning capacity as injured. *See generally Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985). On appeal, employer points to no specific evidence contrary to the administrative law judge's findings on disability, but argues only that continuing awards beyond the date of the hearing are not permissible. As employer presents no evidence that claimant's disability ceased, and the statute clearly contemplates awards during the continuation of disability, we affirm the administrative law judge's award.

Accordingly, we affirm the Decision and Order and the Decision Denying Reconsideration awarding benefits in all respects.

SO ORDERED

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge