BRB No. 03-0294

JAHYRI COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOLLINGER SHIPYARD, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	DATE ISSUED: Dec. 22, 2003
	)	
Employer/Carrier-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

William S. Vincent (Law Offices of William S. Vincent), New Orleans, Louisiana, for claimant.

Robert S. Reich and John R. Dildy (Reich, Meeks & Treadaway, L.L.C.), Metarie, Louisiana, for employer/carrier.

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

Employer appeals the Decision and Order (2002-LHC-1118) of Administrative Law Judge Lee J. Romero, Jr., awarding benefits 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). Claimant urges affirmance of the administrative law judge's decision. We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, while working for employer as a roustabout on April 3, 2000, slid on a wet surface and hit the left side of his forehead on a beam. As a result of this incident, claimant had a knot on his forehead, and began experiencing pain in his neck and back, as well as a series of headaches. On April 3, 2000, Dr. Marcello diagnosed a scalp hematoma, and a concussion without the loss of consciousness, related to the work incident. Dr. Marcello also opined that claimant could return to modified work and that he anticipated no permanent effects from claimant's injuries.

Due to persistent neck and back pain, claimant sought treatment from Dr. Flood, who, on April 26, 2000, indicated that there was evidence for cervical and lumbar syndromes, and recommended that claimant undergo a neurological assessment. On June 23, 2000, Dr. Flood observed that the CAT scan and MRI of claimant's lumbar region were normal but opined that claimant was temporarily totally disabled pending the outcome of a functional capacity evaluation (FCE) and a follow-up evaluation by Dr. Manale. Dr. Manale, who treated claimant from July 25, 2000, until July 12, 2001, diagnosed cervical and lumbar sprains, degenerative disc disease, and headaches with blackout spells, and opined that claimant was temporarily totally disabled up through August 12, 2001. At deposition, Dr. Manale opined that claimant reached maximum medical improvement on May 16, 2001, and noted that he might release claimant to return to his previous occupation in the shipyard because there was nothing in claimant's medical records that constituted a contraindication, but he otherwise recommended that claimant restrict his overhead activity. Dr. Murphy evaluated claimant on February 28, 2002, and diagnosed a cervical disc injury with bulging at C4-5 and C5-6. He observed that claimant required no specific treatment but imposed permanent restrictions, as a result of claimant's work injuries, to avoid lifting, climbing vertical ladders, and repetitive activities above shoulder level.

Dr. Cenac, an orthopedist, concluded, following a review of the reports of Drs. Marcello and Flood and an examination of claimant on May 31, 2000, that there were no residual problems from claimant's alleged work injury of April 3, 2000, that claimant could return to his prior employment without physical limitations, and that claimant needed no further medical evaluation or treatment as a result of his work incident. Dr. Trahant, a neurologist, opined on June 2, 2000, that claimant sustained a cervical strain and cerebral concussion with post-traumatic headaches, and that at present, claimant should be able to return to work in a light duty capacity and then return to work at full duties after an additional 3-4 weeks. On April 18, 2001, Dr. Lea, an orthopedic surgeon, diagnosed work-related cervical and lumbar strains that had completely resolved within three months of the April 3, 2000, date of injury. He also opined that claimant could return to his prior work without any permanent activity restrictions or impairment due to his alleged work injuries.

Employer voluntarily paid temporary total disability benefits from April 7, 2000, until April 16, 2000, and medical benefits under Section 7 of the Act, 33 U.S.C. §907. Claimant, however, maintained that he was unable to perform any work as a result of his work-related injuries until at least May 11, 2001, and thus sought additional benefits under the Act. Employer responded, asserting that claimant did not suffer any work-related injury to his cervical and/or lumbar regions, that his subsequent automobile accidents are intervening causes that would terminate any liability and that the settlements claimant entered into with regard to those accidents preclude his right to recover any compensation under the Act pursuant to Section 33(g), 33 U.S.C. §933(g).[1] In addition, employer sought dismissal of the claim because of claimant's refusal to accurately respond to its discovery requests.

In his decision, the administrative law judge initially rejected employer's motion to dismiss, as well as its contention that Section 33(g) bars claimant's entitlement to benefits in this case. On the merits, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer could not establish rebuttal thereof. Assuming, *arguendo*, that employer established rebuttal, the administrative law judge concluded, based upon a review of the entire record, that claimant's automobile accidents were not intervening causes, and thus, that claimant sustained work-related cervical and lumbar spine injuries as a result of his accident on April 3, 2000. The administrative law judge next determined that claimant could not return to his usual employment and that employer established the availability of suitable alternate employment as of February 15, 2002. Accordingly, he awarded claimant temporary total disability benefits from April 3, 2000, to May 15, 2001, permanent total disability benefits from May 16, 2001, to February 14, 2002, and permanent partial disability benefits from February 15, 2002, as well as medical benefits.

Employer challenges the administrative law judge's award of benefits, asserting that the administrative law judge erred in finding that claimant was unable to perform his usual employment, since the evidence indicates that claimant's complaints are overwhelmingly subjective, that he is in good physical condition, and that he is able to

[1]Claimant also sustained additional neck pain as a result of two separate motor vehicle accidents occurring on June 11, 2001, and February 11, 2002. In each instance, claimant settled any outstanding claims for $900. Specifically, he stated that he received $900 in settlement for damage to his vehicle resulting from the June 11, 2001, and that he later received $900 in settlement for any injuries resulting from the February 11, 2002, accident. In response to employer's position, claimant alleged that these automobile accidents caused a temporary exacerbation of his work-related symptoms and thus prolonged his inability to return to work.

return to his usual work. Specifically, employer contends that the administrative law judge improperly accorded greatest weight to the opinion of Dr. Manale in finding that claimant could not return to his usual employment, since Drs. Marcello, Cenac, Lea, and Trahant, and a vocational expert, Mr. Crane, all opined that claimant was capable of returning, post-injury, to his usual work as a roustabout. Employer further argues that the administrative law judge's finding that claimant had been mowing lawns and pressure washing houses since May 2001, and acknowledgement of Dr. Manale's opinion, as of May 16, 2001, that there is nothing in claimant's record that constitutes a contraindication to return to work, including to his former employment at the shipyard, directly conflicts with the administrative law judge's conclusion that claimant is entitled to permanent total disability compensation from May 16, 2001, until February 14, 2002. In addition, employer avers that the administrative law judge erred in crediting claimant's testimony regarding his alleged inability to work, as the record contains pervasive misrepresentations indicative of claimant's untruthfulness in this case. In particular, employer points to claimant's repeated efforts to conceal information regarding his automobile accidents.

Claimant may establish a *prima facie* case of total disability by showing that he is unable to perform his usual employment duties due to a work-related injury. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Where a claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See, e.g., Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Turner*, 661 F.2d 1031, 14 BRBS 156.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445

(1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). Following a thorough review of the record,[2] and relying principally on the disability opinions of claimant's treating physicians, *i.e.*, on Dr. Flood's opinion for the period between April 3, 2000, and July 24, 2000, and on Dr. Manale's opinion in the period thereafter, as well as on claimant's testimony regarding his continuing complaints of pain, his post-injury medical limitations, and the physical requirements of his prior occupation as a roustabout, the administrative law judge rationally concluded that claimant could not return to work at his usual employment as a result of injuries sustained from his work accident on April 3, 2000. As the administrative law judge's credibility determinations are neither inherently incredible nor patently unreasonable, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), his finding that claimant is incapable of returning to his usual job as a roustabout is affirmed as it is supported by substantial. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Diosdado v. Newpark Shipbuilding & Repair*, Inc., 31 BRBS 70 (1997). Moreover, as the record indicates that employer did not present evidence as to the availability of suitable alternate employment until February 15, 2002, we affirm the administrative law judge's award of temporary total disability benefits from April 3, 2000, until May 15, 2001, and permanent total disability benefits from May 16, 2001, until February 14, 2002.[3] *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Employer next argues that the administrative law judge incorrectly calculated claimant's periods of disability and post-injury wage-earning capacity, or alternatively failed to apply a credit for salary paid to claimant following his accident. Employer maintains that in calculating claimant's post-injury wage-earning capacity, the administrative law judge failed to take into account claimant's earnings from May 16, 2001, cutting grass on a part-time basis. Employer also contends that the administrative law judge erroneously reduced claimant's post-injury wage-earning capacity as of the

[2]Included in the administrative law judge's review is a consideration of the contrary opinions of Drs. Marcello, Cenac, Lea and Trahant, and the vocational expert, Mr. Crane. In addition, the administrative law judge discussed at length the issue of claimant's credibility, and concluded that while multiple inconsistencies detract from the weight to be accorded claimant's testimony, those statements which formed the basis of Dr. Manale's opinions were generally unequivocal and credible. *See* Decision and Order at 22-24.

[3]The administrative law judge's determination, based on Dr. Manale's opinion, that claimant reached maximum medical improvement with regard to his work-related injuries on May 16, 2001, is affirmed. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

date suitable alternate employment was established, $269.60 per week on February 15, 2002, back to the date of injury, $250.22 in April 2000. Alternatively, employer avers that the administrative law judge failed to provide employer with a credit for amounts claimant earned mowing grass and pressure washing houses during periods of alleged total disability.

An award for partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (e), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Sections 8(c)(21) and 8(h) require that a claimant's post-injury earnings must be adjusted back to the wage level paid at the time of claimant's injury in order to neutralize the effects of inflation when this figure is compared to claimant's pre-injury average weekly wage. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT)(D.C. Cir. 1986); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Where, as in the instant case, the actual wages paid at the time of the injury in claimant's post-injury job are unknown, the Board has held that the percentage increase in the National Average Weekly Wage (NAWW) should be applied to adjust a claimant's post-injury wages downward in order to account for inflation. *See Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996).

The administrative law judge determined that employer established the availability of suitable alternate employment, via positions identified in its labor market survey dated February 15, 2002, as a meter reader, garbage truck driver, a driver for an electrical company, and as a shuttle bus driver. The administrative law judge next calculated claimant's post-injury wage-earning capacity at $269.60, by multiplying the average of the hourly rates of these four positions, $6.74, by a forty-hour work week. He then adjusted claimant's post-injury wage-earning capacity downward, by using the NAWW, in order to account for inflation, to arrive at a post-injury wage-earning capacity of $250.22. As the administrative law judge's use of the NAWW is in accordance with law, we reject employer's assertion that the administrative law judge erroneously reduced claimant's post-injury wage-earning capacity, and thus we affirm his calculation of the wages that employer's identified positions would have paid in 2000. *Quan*, 30 BRBS 124.

With regard to claimant's post-injury part-time work, cutting grass and pressure washing houses, the administrative law judge explicitly stated that claimant maintained no books, nor did he file any tax returns, with regard to his earnings. Hearing Transcript (HT) at 145-46. In addition, the record does not include any information regarding claimant's earnings in this work. The administrative law judge therefore rationally

declined to address claimant's earnings from these part-time positions in calculating claimant's post-injury wage-earning capacity, as the record is devoid of evidence as to the amount of those earnings. Consequently, the administrative law judge's award of permanent partial disability benefits commencing on February 16, 2002, is affirmed. Moreover, in contrast to employer's contention, it is not entitled to a credit for the money earned by claimant in this employment because none of the Act's specific credit or offset provisions is applicable. *See Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

Employer next contends that the administrative law judge was incorrect in finding that claimant's settlements did not preclude recovery pursuant to Section 33(g) of the Act. Section 33(g) provides a bar to claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining employer's prior written consent.[4] 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). Section 33(g) specifically refers to Section 33(a) of the Act, which states:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ

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[4]Specifically, Section 33(g) provides:

> (1) If the person entitled to compensation . . . enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed . . . .
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> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g)(1), (2)(1994).

> is liable in damages, he need not elect whether to receive such compensation or to recover damages against such persons.

33 U.S.C. §933(a). Thus, Section 33 applies where a third party is liable in damages for the same disability or death for which compensation is sought. *Goody v. Thames Valley Steel Corp*., 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP,* 131 F.3d 132 (2d Cir. 1997).

In the instant case, the administrative law judge explicitly addressed the pertinent question as to whether claimant's claim for compensation and the settlement agreements arose from the same disability. In this regard, he found that the third-party tortfeasors involved in the automobile accidents were not liable in damages for the same disability for which claimant's compensation is sought, *i.e.*, disability related to the work injury sustained on April 3, 2000. In short, the administrative law judge concluded, based on the evidence of record, that the car accidents did not, in any way, contribute to claimant's disability from his work-related injuries and as such, the resulting settlements of those accidents did not involve the subject matter of the instant claim filed under the Act.[5] He therefore concluded that Section 33 of the Act is inapplicable. As the administrative law judge's decision is rational, in accordance with law, and supported by substantial evidence, it is affirmed. *Goody*, 31 BRBS 29.

Employer lastly asserts that the administrative law judge erred in finding that claimant's two motor vehicle accidents were not intervening causes of his disability. Employer argues that claimant confirmed that following both accidents he experienced, and received treatment for, neck pain related to those incidents. Employer maintains that as such, these accidents resulted in a worsening of claimant's condition and thus establish a supervening cause of claimant's condition.

Under Section 20(a), the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director,* OWCP, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer can rebut the presumption by producing substantial evidence

[5]In fact, the administrative law judge determined that as a result of his work-related injuries, claimant was totally disabled from April 3, 2000, until February 14, 2002, regardless of the impact of the automobile accidents on June 11, 2001, and on February 12, 2002.

that claimant's disabling condition was caused by a subsequent non work-related event, which was not the natural or unavoidable result of the initial work injury. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Where the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for the disability and medical treatment attributable to the subsequent injury. *Arnold v. Nabors Offshore Drilling Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed.Appx. 126 (5th Cir. 2002)(table); *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Marsala v. Triple A Machine Shop*, 14 BRBS 39 (1981).

In the instant case, the administrative law judge concluded that claimant's post-injury automobile accidents were not intervening or supervening causes sufficient to rebut the Section 20(a) presumption. In arriving at this determination, the administrative law judge found that prior to the first accident in June 2001, claimant still experienced pain related to his work injuries, and that while the pain increased after his accidents, nothing in the record indicates that these accidents were severe enough to worsen claimant's work-related condition. In support of this finding, the administrative law judge relied on the fact that Dr. Manale actually observed fewer complaints of neck and back pain after the June 2001 accident, and that Dr. Murphy, who examined claimant in February 2002, subsequent to the date of both automobile accidents, observed "no spasm in the neck" and "a very slight restriction from full motion in extension and rotation," and that he did not prescribe any medications for pain. Claimant's Exhibit 8. In addition, the administrative law judge observed that the first objective evidence of claimant's disc pathology was found in October 2000, prior to the time of claimant's automobile accidents, and that no physician offered an opinion that claimant's present condition was worsened or caused by his automobile accidents; rather the only opinions unquestionably establish that claimant sustained cervical and lumbar injuries as a result of his April 3, 2000, work accident. Consequently, the administrative law judge's finding that claimant's post-injury automobile accidents are not intervening causes of his disability is supported by substantial evidence and is therefore affirmed. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge