BRB No. 97-1290

FARON F. FOLSE	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
TOTAL MINATOME CORPORATION	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, c/o ALEXSIS RISK	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Joseph L. Waitz, Jr. (Waitz & Downer), Houma, Louisiana, for claimant.

Lance S. Ostendorf (Campbell, McCrainie, Sistrunk, Anzelmo & Hardy), Metarie, Louisiana, and Elton F. Duncan, III, and Richard E. Jussaume, Jr. (Duncan & Currington, L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Reconsideration (96-LHC-1050, 96-LHC-1051) of Administrative Law Judge C. Richard Avery rendered on claims 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 sustained injuries as a result of two alleged work-related accidents while working on offshore oil rigs for employer. Of pertinence to the instant appeal is the accident which occurred on October 25, 1994.[1] While working with a mechanic, claimant hit his head on the compressor cylinder of an engine, which resulted in neck pain and persistent headaches. Claimant first sought medical treatment and reported the accident to employer on November 7, 1994. Claimant was initially diagnosed by Drs. Landry and Riggs as having pulled some muscles and ligaments in his neck and was released to return to regular duty work without restrictions on November 17, 1994. Claimant returned to work but continued to have neck pain.

Claimant was subsequently examined by Dr. Kinnard who ultimately opined that claimant has a herniated disc at C5-6, nerve root irritation at the C6-7 level and superimposed, pre-existing spondylosis. Dr. Kinnard attributed the herniated disc to the October 25, 1994, accident and opined that the pre-existing spondylosis could have been aggravated at that time. In addition, Dr. Kinnard stated that claimant cannot return to his usual work and would be able to perform only light to medium work in the future. Dr. Kinnard, however, considered claimant temporarily unable to perform any work as of June 7, 1995, the date that an MRI revealed the severity of claimant's cervical condition. Moreover, Dr. Kinnard opined that claimant needed surgery and thus concluded that he had not reached maximum medical improvement with regard to his work-related neck condition.

Claimant also was examined by Dr. Steiner, who opined that claimant has degenerative disc disease that pre-existed his October 25, 1994, accident and that his physical examination of claimant revealed no signs of cervical nerve root impingement, irritation or neurologic deficit. Dr. Steiner testified that claimant's condition had remained virtually unchanged since January, 1995, and that surgery

---

[1]Claimant was involved in a second accident at work on October 26, 1994, wherein he allegedly injured his left elbow while pulling on a wrench. In his decision, the administrative law judge determined that claimant's left elbow injury is not work-related, and thus, denied benefits. As these findings are not challenged on appeal, we shall not discuss the circumstances and/or disposition of that aspect of this case in our decision.

was not necessary in his opinion. Moreover, Dr. Steiner stated that claimant could return to his usual work.

In his decision, the administrative law judge initially determined that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption with regard to his neck injury, and that employer did not establish rebuttal thereof.[2] Accordingly, the administrative law judge concluded that claimant's current cervical condition is work-related. The administrative law judge then determined that claimant is unable to perform his usual employment, that employer did not put forth any evidence showing the availability of suitable alternate employment, and that claimant's condition is not yet permanent. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for his work-related neck injury. Employer thereafter filed a motion for reconsideration, which was summarily denied.[3]

On appeal, employer challenges the administrative law judge's findings that claimant's neck condition is work-related and that claimant is not able to return to his usual employment. In addition, employer argues that the administrative law judge erred by awarding benefits without first providing employer an opportunity to present evidence of suitable alternate employment. Claimant responds, urging affirmance. Employer has also filed a Motion to Suspend but Not Abandon its Appeal in which it requests that the Board remand this case to the district director in order that it may assert its right to Section 8(f), 33 U.S.C. §908(f), relief. In

---

[2]The administrative law judge alternatively determined that even assuming that employer established rebuttal of the Section 20(a) presumption, the evidence, when weighed as a whole, supports a finding that claimant's present cervical condition is a result of his October 25, 1994, work accident.

[3]In its motion, employer argued that the administrative law judge erred in finding that claimant's neck injury was work-related, that claimant could not return to his usual employment and by entering final judgment in this case without permitting employer the opportunity to submit evidence of suitable alternate employment.

response, claimant has filed a Motion to Proceed with the case.

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's Decision and Order, and Decision and Order on Reconsideration, are supported by substantial evidence and contain no reversible error. In weighing the relevant medical evidence, the administrative law judge found Dr. Kinnard's medical opinion more reliable because he examined claimant over a period of time and his diagnosis and decision regarding surgery are based on actual data from claimant's tests. In contrast, the administrative law judge noted that Dr. Steiner examined claimant only once, almost two years after his work accident, and predominantly relied upon his review of only some of claimant's medical records. The administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As his determinations in resolving the causation issue regarding claimant's neck injury are rational and his finding is supported by the opinion of Dr. Kinnard, the administrative law judge's conclusion that claimant's C5-6 disc herniation and nerve root irritation at the C6-7 level, were caused, at least in part, by his October 25, 1994, work accident, is affirmed. *Uglesich v. Stevedoring Services of America,* 24 BRBS 180 (1991).

Similarly, the administrative law judge's finding that claimant is unable to perform his usual job is supported by the testimony of his treating physician, Dr. Kinnard, and of claimant regarding his ongoing neck pain and headaches, which he testified prevents him from returning to his usual employment. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Thus, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability. *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991). Moreover, we reject employer's contention that the administrative law judge erred by not allowing it the opportunity to submit evidence of suitable alternate employment, as employer was aware prior to the hearing that claimant had not returned to his usual work. Indeed, the administrative law judge noted at the hearing that "if I were to find that [claimant] is disabled, I assume that I would find total disability on a temporary basis," to which employer's counsel responds, "yes, sir." Hearing Transcript at 129. Consequently, employer had ample opportunity to submit evidence relevant to its burden of establishing the availability of suitable alternate employment, but instead elected to rely solely on its evidence that claimant was able to return to his usual employment. Inasmuch as the administrative law judge correctly found that

employer produced no evidence of suitable alternate employment, his award of temporary total disability benefits is affirmed. *See SGS Control Services v. Director, OWCP,* 86 F.3d 438, 444, 30 BRBS 57, 62 (CRT)(5th Cir. 1996); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

Lastly, Section 8(f) shifts the liability to pay compensation for *permanent* disability after 104 weeks from the employer to the Special Fund. As the administrative law judge found that claimant has not reached maximum medical improvement and thus awarded temporary total as opposed to permanent total disability benefits, we reject employer's

motion to suspend this appeal, since there is no basis for Section 8(f) relief on an award of temporary disability benefits.[4]

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]According to claimant's brief, claimant underwent the cervical surgery recommended by Dr. Kinnard on May 19, 1997. Brief at 5. We note that any party can seek modification of an ongoing award based on a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 295-296, 30 BRBS 1, 2-3 (CRT) (1995). Employer may attempt to show suitable alternate employment when claimant is able to work, and may seek Section 8(f) relief at the point at which a degree of permanency has been affixed to any disability sustained by claimant due to his neck injury.