BRB Nos. 98-1150 and
98-1150A

RONALD JACOBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: May 24, 1999
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents/ Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	
	)	
ILWU/PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffmann, Hart & Wagner), Portland, Oregon, for employer.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and the Director, Office of Workers' Compensation Programs (the Director) cross appeals, the Decision and Order and Decision and Order on Reconsideration (96-LHC-1748, 96-LHC-1976) of Administrative Law Judge Alfred Lindeman 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).

Claimant, a general class B longshoreman who obtained work off employer's casual board, suffered the first of his work-related injuries on August 31, 1994, when he was struck on the back of the neck while dismantling a garment hanger container. Claimant underwent treatment from several physicians for this injury, finally obtaining regular treatment from Dr. Franks commencing January 1995. Claimant also underwent physical therapy for the neck injury. On or about August 21, 1995, claimant developed a knee injury; there was no specific event associated with this malady. Claimant underwent treatment for his knee problems with Drs. Wells and Farris. Dr. Franks released claimant to work without restrictions on September 11, 1995.

On or about January 11, 1996, claimant suffered a second work-related injury to his neck, left upper limb, low back, left buttock and left posterior thigh while hammering containers with a 25 pound mallet. Claimant also subsequently developed a psychological injury associated with the pain suffered from the work-related injuries. Claimant underwent additional treatment from several physicians for these injuries, including Dr. Franks, and was found to have reached permanency by Dr. Franks on January 27, 1997, with a lifting restriction of 25 pounds continuously, and 50 pounds occasionally. Claimant remained out of work due to his psychological injury until April 21, 1997, when he returned to his job with employer obtaining work off the casual board.

The administrative law judge found that claimant is entitled to disability compensation

and to medical expenses for the August 31, 1994 injury. Thus, in addition to employer's voluntary payments of temporary total disability compensation at a weekly rate of $363.16 from September 1 - 4, 1994, and from November 9, 1994 to September 10, 1995, the administrative law judge awarded claimant temporary partial disability compensation from September 4, 1994 through September 29, 1994, and permanent partial disability compensation at a rate of $63.87 from September 6, 1995 through January 12, 1996, and continuing from April 22, 1997. The administrative law judge also concluded that claimant is not entitled to compensation for the 1995 knee injury as it was not caused by the 1994 work-related condition. Regarding the 1996 work-related injury, in addition to the voluntary temporary total disability compensation employer paid for the period from January 13, 1996 through January 27, 1997, the administrative law judge ordered that employer pay additional temporary total disability compensation from January 27, 1997 through April 22, 1997, and any unpaid medical costs associated with the 1996 injury, but he denied any additional permanent partial disability compensation for this injury. The administrative law judge denied employer relief pursuant to Section 8(f), 33 U.S.C. §908(f), on the 1994 injury, but awarded Section 8(f) relief to employer on the 1996 injury and ordered that the Special Fund commence payments of permanent partial disability 104 weeks after April 22, 1997.

Claimant requested reconsideration. In his Decision and Order on Reconsideration, the administrative law judge reiterated his prior finding that claimant is not entitled to permanent partial disability compensation for his 1996 injury, reinstating his prior findings, and additionally concluding that claimant is not entitled to a *de minimis* award in connection with the 1996 injury. The administrative law judge also concluded that claimant is entitled to concurrent temporary total disability and permanent partial disability compensation from January 13, 1996 through April 21, 1997, and that claimant is required to reimburse the intervenor ILWU-PMA Welfare Plan, for disability benefits already paid. Subsequently, in a separate Decision and Order, the administrative law judge awarded claimant's counsel an attorney fee of $26,585.00 and costs of $3,084.83.

On appeal, claimant contends that the administrative law judge erred in finding that there is no causal connection between the 1995 knee injury and the work-related 1994 neck injury, and in denying additional permanent partial disability benefits for the 1996 injury.[1] The Director cross-appeals, contending that the administrative law judge erred in awarding employer Section 8(f) relief in connection with the 1996 injury.

[1]Employer's appeal of the administrative law judge's award of an attorney's fee was dismissed by an Order issued by the Board on September 28, 1998.

Initially, we address claimant's allegation that the administrative law judge erred in finding that there is no causal nexus between claimant's 1995 knee injury and his 1994 work-related neck injury. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury is causally related to his employment. *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). Once, as here, claimant establishes that he suffered a harm, *i.e.,* the 1995 knee injury, and that employment conditions existed which could have caused, aggravated or accelerated the condition, *i.e.,* claimant's undergoing physical therapy for the work-related neck injury, *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990), claimant has established a *prima facie* case and 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 that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). In this case, although the administrative law judge did not separate his rebuttal analysis from his consideration of the causation issue based on the record as a whole, any error he may have made in this regard is harmless, because he fully considered and weighed the relevant evidence and the evidence he credited is sufficient to rebut the Section 20(a) presumption and to establish the absence of causation under the proper standards. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992).

We reject claimant's contention that the administrative law judge erred in finding that the causal nexus between the 1994 work-related injury and his 1995 knee injury was severed. Claimant sought to demonstrate that his knee injury was compensable because it was sustained while undergoing physical therapy for his neck injury by riding a stationary bike. The administrative law judge rationally found that employer severed the causal connection between the treatment for the neck injury and the knee injury by relying upon the opinion of Dr. Wells, who opined that the origin of the knee injury was idiopathic, but it was not related to the neck injury and was not sustained while riding a stationary bike. EX-38 at 84. The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Dr. Wells' conclusion that claimant's "knee injury is not causally related to his neck treatment. . . nor to use of a stationary bicycle" is an unequivocal determination that there was no causal nexus between the work-related neck injury of 1994 and the 1995 knee injury.[2]

[2]We reject claimant's contention that Dr. Wells' opinion is legally insufficient to establish rebuttal because the physician did not address whether claimant's work injury

"aggravated a condition." Although claimant is correct that generally employer must affirmatively establish that the work-related condition did not aggravate an underlying condition in order to establish rebuttal of the Section 20(a) presumption, this analysis is inapplicable to the facts of this case, inasmuch as claimant did not assert that the work accident aggravated an underlying knee condition. *See generally Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

The administrative law judge also relied in part upon the opinion of Dr. Farris, who concluded that the knee injury was unrelated to the work-related injury, because, although the injury may have been sustained while riding a stationary bike, there is nothing that connects this activity to claimant's physical therapy for the work-related neck injury; rather, the bicycle work was done in connection with a self-directed exercise program for cardio-fitness. CX-32 at 84. Contrary to claimant's contention, the physical therapy records in evidence do not undermine Dr. Farris's conclusion, as these records do not indicate that claimant rode a stationary bicycle in connection with his treatment for his 1994 neck injury. CX-25. Thus, the administrative law judge rationally found Dr. Farris's opinion that claimant's knee injury was unrelated to physical therapy for the neck injury to be reliable and supported by the other evidence of record. Consequently, we affirm the administrative law judge's determination that there is no causal connection between the 1994 work-related neck injury and the 1995 knee injury as it is rational and supported by substantial evidence. *Phillips v. Newport News Shipbuilding & Dry Dock Company*, 22 BRBS 94 (1988).

Next, we address claimant's contention that the administrative law judge erred in denying an increase in his permanent partial disability compensation commencing April 22, 1997, due to his 1996 injury. The administrative law judge found that claimant is not entitled to an award pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), because he did not suffer an additional loss in wage-earning capacity attributable to the 1996 injury.[3] Dr. Franks concluded that, as a result of the 1996 injury, claimant could physically return to work as of January 27, 1997, with a lifting restriction of 25 pounds, with an increase up to 50 pounds for limited periods during the day. CX-51 at 177 - 179, 187; Tr. at 64 - 65. The administrative law judge found that the evidence establishes that claimant could still perform a large number of jobs on the class B casual board within the physical restrictions attributable to the 1996 injury. Decision and Order at 22 - 23. In so finding, the administrative law judge relied upon the testimony of employer's vocational experts, Michelle Brooks and Richard Mann, and

[3]The administrative law judge found that claimant is entitled to an award of permanent partial disability compensation for loss in wage-earning capacity due to the 1994 neck injury. The administrative law judge concluded that, although Dr. Franks released claimant without restrictions at the date of permanency, June 11, 1995, it was reasonable for claimant to avoid jobs on the casual board which involved climbing or overhead reaching. Thus, noting that claimant had routinely accepted a higher percentage of grain elevator jobs post-injury, which paid approximately two dollars less per hour than gear locker or hold work, the administrative law judge found claimant's actual post-injury wages were a fair and reasonable measure of his post-1994 injury wage-earning capacity, and that claimant is entitled to a permanent partial disability award of $63.87 per week.

the medical opinions of Drs. Franks and Watson.[4]

We cannot affirm the administrative law judge's denial of benefits as he did not sufficiently explain the basis therefor, and since the credited medical and vocational experts agree that fewer hours of employment are available to claimant off the board as a result of the restrictions imposed due to the 1996 injury.[5] The administrative law judge did not adequately explain his implicit conclusion that, notwithstanding his additional restrictions, claimant could work the same amount of hours on the board as prior to the 1996 injury. This is particularly notable in light of the evidence of record, which is uncontroverted, that fewer hours on the board would be available to claimant as a result of the restrictions imposed on him due to the 1996 injury. *See* EX-49; EX-51; EX-65 at 624; EX-66 at 676; Tr. at 123.

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[4]Ms. Brooks testified that half of the hours on the casual board available to class B longshoreman on the waterfront were still available to claimant within his restrictions. EX-66 at 676. Mr. Mann testified that a large majority of class B work was available to claimant. EX-65 at 624. Dr. Franks reviewed the physical requirements of 27 positions available on the class B board and concluded that claimant could physically perform all but two of them. EX-49. Dr. Watson concurred with Dr. Franks' opinion. EX-51.

[5]Ronald Lewis, a dispatcher in employer's facility with Local No. 8, testified at the hearing that the availability of work to claimant on the casual board would be decreased to two or three days a week due to his physical restrictions. Tr. at 123. Contrary to claimant's contention, the administrative law judge acted within his discretion in according little weight to this testimony on the basis that Mr. Lewis admitted on cross-examination that he did not have knowledge of how much actual work would be available for claimant. *See, e.g.,* Tr. at 123; *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961); *Thompson v. Northwest Enviro Services,* 26 BRBS 53 (1992).

Furthermore, even if claimant were actually working the same number of hours and receiving the same wages, he may have nonetheless established a loss in wage-earning capacity based upon his inability to work the same number of positions off the casual board that he previously did due to his restrictions resulting from the 1996 injury. Compensation is not precluded merely because claimant has the same, or higher, post-injury wages where claimant has suffered a present loss in wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 1582 (9th Cir. 1985).

Thus, the administrative law judge's findings in this regard are vacated, and the case is remanded for the administrative law judge to reconsider the extent of claimant's permanent partial disability as a result of the 1996 injury. The administrative law judge must explicitly state how the number of available work hours available to claimant within his restrictions does or does not result in a loss of wage-earning capacity.[6] We note that, at the time of the hearing, the administrative law judge stated that he was unable to determine whether claimant's actual wages are a reasonable representation of his post-1996 injury wage-earning capacity because claimant had been back at work for only three weeks at the time of the hearing, and the only evidence in the record of claimant's actual post-injury wages was claimant's general testimony that he worked "on and off." Decision and Order at 21 - 22; Tr. at 65. On remand, the administrative law judge may, at his discretion, reopen the record to allow the parties to submit additional evidence regarding claimant's actual post-1996 injury wages, or any other evidence deemed necessary by the administrative law judge to allow him to calculate claimant's post-injury wage-earning capacity. 20 C.F.R. §702.338. If actual earnings are not reasonably representative of claimant's post-1996 wage-earning capacity, the administrative law judge must calculate an alternative dollar amount which represents post-injury wage-earning capacity, considering the relevant factors. 33 U.S.C. §908(h); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979)*; see also Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

Claimant also correctly contends that the administrative law judge erred in his consideration of claimant's entitlement to a *de minimis* award. The United States Supreme Court, in *Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997), stated that a nominal award may be entered on claimant's behalf upon a showing that there is a significant possibility that a worker's wage-earning capacity will at some future point fall

[6]Relevant to this finding are factors such as the number of other B longshoremen competing for the jobs and whether claimant would have to work more days per week to maintain his pre-injury wages.

below his pre-injury wages. Accordingly, the Court held that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant possibility of future economic harm as a result of the injury. In this case, the administrative law judge stated that although he determined that claimant had not established a present loss in wage-earning capacity, claimant could seek modification at a future date should his actual wages fall below their pre-injury level due to his 1996 injury. Decision and Order at 22; 33 U.S.C. §922. However, in his Decision and Order on Reconsideration the administrative law judge summarily stated that claimant failed to demonstrate a significant possibility of future economic harm. Decisions under the Act must comply with the Administrative Procedure Act (APA), which requires that the administrative law judge adequately detail the rationale behind his decision, analyze and discuss the evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence, in his decision. *See* 5 U.S.C. §557(c)(3)(A); *see also* 33 U.S.C. §919(d). On remand, if the administrative law judge finds no present loss in wage-earning capacity, he must reconsider claimant's entitlement to a nominal award for the 1996 injury in accordance with the applicable legal standards. *See, e.g., Rambo,* 117 S.Ct. at 1963-1964, 31 BRBS at 61-62; *see generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Finally, we turn to the Director's cross-appeal challenging the administrative law judge's award of Section 8(f) relief to employer on the 1996 injury. Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from the responsible employer to the Special Fund established in Section 44, 33 U.S.C. §944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works Corp.,* 129 F.3d 45, 31 BRBS 155 (CRT) (1st Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Initially, we agree with the Director that the administrative law judge erred in finding employer entitled to relief pursuant to Section 8(f) on the 1996 injury, and in ordering permanent partial disability payments to be made from the Special Fund inasmuch as claimant was not awarded benefits for a permanent disability resulting from the 1996 injury; according to the administrative law judge's findings, claimant's permanent partial disability award was based on his loss in earning capacity from the 1994 injury. *See Jenkins v. Kaiser Aluminum &*

Chemical Sales, Inc., 17 BRBS 183 (1985).

In the event that claimant is awarded additional permanent partial disability benefits on remand for the 1996 injury, we will address the Director's substantive contention. We do not find error in the administrative law judge's conclusion that the contribution element is established in this case.[7] Specifically, the Director asserts that the administrative law judge erred in relying upon medical evidence to find the contribution element established, because in order to do so, employer must demonstrate that the prior injury contributes to the unemployability of claimant. We disagree. In order to establish the contribution element, employer must establish, by *medical evidence or otherwise,* that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. *Sproull v. Director, OWCP,* 86 F.3d 895, 30 BRBS 49 (CRT) (9th Cir. 1996), *cert. denied,* ___U.S. ___, 117 S. Ct. 1333 (1997). Thus, while employer *may* establish the contribution element by demonstrating that claimant's employability has been diminished as a result of the prior condition, the availability of this method does not foreclose employer's option to establish the contribution prong by medical evidence, where, as here, such evidence demonstrates that claimant's physical disability is materially and substantially greater as a result of the prior condition. *See Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 (1996). In this case, the administrative law judge rationally found the contribution element established by relying upon Dr. Franks' hearing testimony that claimant's upper back complaints relating to his 1994 neck injury contributed substantially to his current symptoms, and that claimant's pre-existing narrowing at L4-5 contributed to the need for back surgery. *Id.* Consequently, we provisionally affirm the administrative law judge's award of Section 8(f) relief to employer in connection with the 1996 injury. If the administrative law judge awards permanent partial disability compensation on the 1996 injury on remand, then the administrative law judge should reinstate his award of Section 8(f) relief to employer for those benefits.

Accordingly, the administrative law judge's denial of permanent partial disability compensation for the 1996 injury is vacated, and the case is remanded for further consideration of this issue consistent with this decision. The award of Section 8(f) relief is vacated. In all other respects, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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[7]The administrative law judge found that claimant's neck and back problems resulting from the 1994 injury constituted a manifest pre-existing permanent partial disability. These findings are not challenged on appeal.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge