BRB No. 98-1631

DARYL MANUEL Claimant-Respondent v. TAYLOR ENERGY COMPANY and CIGNA INSURANCE COMPANY Employer/Carrier- Petitioners	))))))))))))))	 DATE ISSUED: 9/17/99 DECISION and ORDER

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

Carl W. Robicheaux, Abbeville, Louisiana, for claimant.

Michael J. Remondet, Jr., and Dona K. Renegar (Jeansonne & Remondet), Lafayette, Louisiana, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-1090) of Administrative Law Judge Lee J. Romero, Jr., 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).

On June 16, 1991, while working as an operator for employer, claimant sustained an injury to his back. Claimant subsequently developed gastroenterological, psychological, and urological problems which he attributed to the June 1991 work-incident. Claimant

underwent back surgery in August 1993; in July 1997, claimant relocated to Texas. Employer voluntarily paid temporary total disability compensation to claimant from June 17, 1991 through June 24, 1996, permanent partial disability compensation from June 25, 1996 and continuing, and medical benefits. *See* 33 U.S.C. §§908(b), (c)(21), 907

In his Decision and Order, the administrative law judge concluded that claimant's gastroenterological conditions subsequent to September 16, 1995, were not work-related, but that, as employer failed to submit specific and comprehensive evidence to the contrary, claimant's psychological and urological ailments were causally related to his June 1991 work accident. The administrative law judge next determined that claimant was unable to resume his usual employment duties with employer as of September 12, 1991, and that employer failed to establish the availability of suitable alternate employment; thus, the administrative law judge awarded claimant temporary total disability compensation from September 12, 1991, through August 30, 1995, and permanent total disability compensation thereafter. Lastly, the administrative law judge held employer liable for claimant's medical expenses, including a sleep lab study discussed by Dr. Breaux.

On appeal, employer challenges the administrative law judge's findings regarding the causal relationship between claimant's employment and his present psychological and urological conditions, the extent of claimant's disability, and its liability for various medical expenses. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Causation

We will first address employer's contention that the administrative law judge erred in linking claimant's post-January 1997 psychological condition, as well as his urological problems, to his June 16, 1991, work-incident. In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his 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). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Phillips v. Newport*

News Shipbuilding & Dry Dock Co., 22 BRBS 94 (1988); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). If employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Initially, employer contends that claimant's post-January 1997 psychological problems are not causally related to his June 16, 1991, work injury.[1] Specifically, employer asserts that claimant, who did not undergo treatment for his depression between January and November 1997, failed to establish that any present psychological problems are work-related. Contrary to employer's assertion, however, claimant need not affirmatively prove causation; rather, once claimant establishes his *prima facie* case, the Section 20(a) presumption provides the causal nexus. *See Sinclair v. United Food and Commercial Workers,* 23 BRBS 148 (1989). In the instant case, the administrative law judge found, and employer does not dispute, that both Drs. Ally and Culver diagnosed claimant post-injury with depression; thus, claimant has established the existence of a harm under the Act for purposes of establishing his *prima facie* case. Accordingly, as the "working conditions" element of claimant's *prima facie* case is not challenged on appeal, claimant is entitled to invocation of the Section 20(a) presumption. *See Sinclair,* 23 BRBS at 148. As employer has identified no evidence ruling out a causal relationship between claimant's employment and his post-injury psychological problems, employer has failed to meet its burden of proof on rebuttal; accordingly, we affirm the administrative law judge's finding that claimant's present psychological problems are causally related to his employment with employer.

Employer next challenges the administrative law judge's finding that it failed to establish rebuttal of the presumed causal connection between claimant's urological difficulties and his work injury; specifically, employer relies upon the testimony of Drs. Breaux and Culver in support of its contention that claimant's present problems are unrelated to his work injury. Dr. Breaux, however, acknowledged that claimant's psychological problems were a possible cause of his present urological difficulties. *See* EX-3 at 14. Similarly, Dr. Culver opined that claimant's urological difficulties may be the result of his back surgery and consequent medications. *See* EX 4 at 24-26, 57-59. Thus, as neither Dr. Breau nor Dr. Culver ruled out a connection between claimant's work injury or its sequelae and his current urological difficulties, these opinions are insufficient as a matter of law to establish rebuttal pursuant to Section 20(a). *See Bridier v. Alabama Dry Dock &*

[1]Employer concedes that claimant's pre-January 1997 psychological problems were work-related.

Shipbuilding Corp., 29 BRBS 84 (1995). Thus, a causal relationship between claimant's urological problems and his employment has been established. *See Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175 (1996); *Bass v. Broadway Maintenance,* 28 BRBS 22 (1994); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). Accordingly, the administrative law judge's finding on this issue is affirmed.

***Prima Facie* Case of Total Disability**

Employer contends that the administrative law judge erred in determining that claimant is incapable of performing his usual employment duties with employer. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *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); *Hooe v. Todd Shipyards Corp.,* 21 BRBS 258 (1988).

In the instant case, the administrative law judge credited the opinion of Mr. Stampley, employer's vocational expert, who opined after reviewing claimant's medical records that claimant should not return to his usual employment duties as an operator with employer, a position Mr. Stampley opined required medium duty work. *See* Tr. at 187-188. In this regard, the administrative law judge determined that the May 13, 1996, report authored by Dr. Schutte, the physician treating claimant's back condition, which indicated that claimant could be evaluated for medium to heavy type work based upon an undated surveillance film taken of claimant performing various activities, could not be construed as a reasoned medical opinion and thus was given little weight. *See* JX-5 at 5.

We reject employer's contention that the administrative law judge erred in failing to credit and rely upon the May 13, 1996, report of Dr. Schutte. An administrative law judge is not bound to accept the opinion of any particular medical examiner, but rather, is entitled to weigh the credibility of all witnesses and draw his own inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Anderson,* 22 BRBS at 22. In the instant case, the administrative law judge rationally found that Dr. Schutte's May 13, 1996 report was not determinative as to the extent of claimant's disability since the

surveillance film upon which the report was based was not entered into evidence, the date of the surveillance film was unknown, and the report in question did not set forth in sufficient detail the activities being performed by claimant. *See O'Keeffe*, 380 U.S. at 359. Based on this lack of evidence within the report, as well as the absence of any supporting evidence, the administrative law judge found that the medium to heavy work capability referenced in that report was not supported by the record.[2] The administrative law judge found claimant reached maximum medical improvement on August 31, 1995, and that Dr. Schutte opined his condition was stabilized and unchanged . In evaluating claimant's work capacity, the administrative law judge further relied on a February 1995 functional capacity evaluation, finding claimant could perform modified sedentary and light duty work, as well as a later evaluation in February 1997, which found claimant capable of light work with restrictions and which the administrative law judge concluded provided the best evidence of claimant's capabilities thereafter. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is incapable of resuming his pre-injury work with employer. *See Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989).

Suitable Alternate Employment

Employer next argues that the administrative law judge erred in concluding that it failed to establish the availability of suitable alternate employment. Where, as in the instant case, claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991)*; Turner,* 661 F.2d at 1031, 14 BRBS at 156. 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 Roger's Terminal,* 784 F.2d at 687, 18 BRBS at 79 (CRT); *see also Turner,* 661 F.2d at 1031, 14 BRBS at 156; *Palombo,* 937 F.2d at 70, 25 BRBS at 1 (CRT); *Legrow*, 935 F.2d at 430, 24 BRBS at 202 (CRT); *Tann,* 841 F.2d at 540, 21 BRBS at 10 (CRT); *Hooe,* 21 BRBS at 258.

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[2]The administrative law judge detailed claimant's course of treatment with Dr. Schutte commencing in 1992, and described the restrictions given claimant at various times. *See* Decision and Order at 12-15, 42-44. He properly evaluated Dr. Schutte's May 13, 1996, note in context with the doctor's reports.

Employer first avers that the administrative law judge erred in rejecting its August 1992 labor market survey on the basis that this survey did not identify wage scales for the positions identified. We agree. Employer's vocational witness, Mr. Stampley, identified twelve jobs as being available and suitable for claimant in August 1992; in compiling his report identifying these twelve positions, Mr. Stampley set forth census pay ranges for the positions identified. *See* JX-22. Moreover, Dr. Schutte indicated that claimant was capable of performing the identified positions. *Id.* The administrative law judge, however, declined to consider whether the identified positions were available and suitable for claimant; rather, the administrative law judge determined that the proffered survey was insufficient to establish the availability of suitable alternate employment solely upon his finding that the survey lacked the necessary information required to determine claimant's post-injury wage-earning capacity. Contrary to the administrative law judge's rationale in rejecting this survey, claimant's ability to perform the identified jobs is dispositive of this issue, and the wage ranges in employer's survey provide sufficient information for the administrative law judge to determine claimant's earning capacity should any of the jobs be suitable for him. We therefore vacate the administrative law judge's finding regarding employer's August 1992 labor market survey, and we remand the case to the administrative law judge for reconsideration of that report as it pertains to the issue of whether employer established the availability of suitable alternate employment. *See generally Moore v. Universal Maritime Corp.,* 33 BRBS 54 (1999).

Employer next contends that the administrative law judge erred in determining that its April 1996 labor market survey did not establish the availability of suitable alternate employment; moreover, employer asserts that the administrative law judge additionally erred in concluding that claimant diligently sought employment during this period of time. We disagree. Contrary to employer's assertions on appeal, there is substantial evidence in support of the administrative law judge's conclusion that claimant diligently, though unsuccessfully, attempted to secure employment as of August 1996. Specifically, the administrative law judge found that claimant documented his contact with fifty-two employers, as well as two employment agencies, but was unsuccessful in obtaining a job. *See* CXS 1, 2. Thus, we affirm the administrative law judge's determination that claimant diligently tried and was unable to secure employment as of August 1996, and his consequent award of permanent total disability benefits as of that time, as those findings are rational and supported by the record.[3] *See Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT).

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[3]Accordingly, any error committed by the administrative law judge in his evaluation of employer's April 1996 labor market survey is harmless.

Employer also challenges the administrative law judge's determination that its January 1998 labor market survey did not establish the availability of suitable alternate employment; specifically, employer alleges that the administrative law judge erred in relying upon the 1997 functional capacity evaluation to determine claimant's physical restrictions. We disagree. In determining claimant's physical restrictions, the administrative law judge relied upon the February 1997 functional capacity evaluation limiting claimant to a maximum lifting capability of fifteen pounds and no bending, as well as containing limitations on crouching, sitting and walking. *See* JX-21. Pursuant to this survey, the administrative law judge determined that the positions identified in employer's 1998 labor market survey required work activity outside of claimant's restrictions. *See* JX-22. It is well-established that, in arriving at his decision, the administrative law judge is entitled to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). After a thorough review of the record, we hold that the administrative law judge acted within his discretion in relying upon the restrictions placed on claimant in 1997, and thereafter in concluding that the jobs identified in employer's 1998 labor market survey did not establish the availability of suitable alternate employment because they required physical activity beyond that prescribed to claimant. Accordingly, we affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment in 1998, and his consequent award of permanent total disability compensation to claimant at that time. *See generally Uglesich v. Stevedoring Services of America,* 24 BRBS 180 (1991).

Lastly, employer avers that claimant's actual employment in two positions post-injury establishes claimant's ability to reenter the labor force, arguing that the administrative law judge erred in finding to the contrary. An award of total disability compensation for a period when a claimant is working is the exception rather than the rule. *See, e.g., Jordan v. Bethlehem Steel Corp.,* 19 BRBS 82 (1986). Such an award is permitted, however, where claimant's post-injury employment is due solely to the beneficence of the employer and therefore is sheltered work, *see, e.g., Legrow,* 935 F.2d at 430, 24 BRBS at 202 (CRT), or where claimant works only through extraordinary effort and in spite of excruciating pain. *See, e.g., Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). In the instant case, it is uncontroverted that claimant, between September 3, 1996 and January 3, 1997, worked for Service Masters; thereafter, between February 13, 1997 and June 30, 1997, claimant worked for LeBon Opticians. *See* CX-29. The administrative law judge found that each of these positions did not constitute suitable alternate employment since claimant testified that each required him to perform work outside of his physical restrictions which exacerbated his back pain and symptoms; consequently, the administrative law judge determined that employer failed to establish claimant's post-injury wage-earning capacity through these jobs. *See* Decision and Order at 50-51. As this finding is supported by substantial evidence, it is affirmed. *See generally Edwards v. Director, OWCP,* 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied,* 511 U.S. 1031 (1994).

Medicals

We next address employer's challenge to the administrative law judge's decision to hold it liable for a sleep lab study. In both his report and his deposition testimony, Dr. Breaux opined that sleep lab testing was an option in order to determine the etiology of claimant's urological difficulties. *See* JX-3 at 4; EX-3 at 22-25. In rendering this opinion, Dr. Breaux stated that such a study was "perhaps the only way to really know for certain" whether claimant's problems were related to his depression. *See* EX-3 at 22-23. In his decision, the administrative law judge, after noting the lack of contrary medical evidence regarding this issue, accepted Dr. Breaux's option as a viable course of treatment, stating that a sleep lab study is "appropriate and necessary to determine the etiology of Claimant's condition such that it can be treated appropriately." *See* Decision and Order at 53.

The Longshore Act sets forth specific provisions regarding a claimant's entitlement to medical benefits. Specifically, Section 7, 33 U.S.C. §907, of the Longshore Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Anderson*, 22 BRBS at 20. In this regard, Section 7(a) of the Act states that

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Thus, in order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary and must be related to the injury at hand. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, employer has identified no evidence to dispute Dr. Breaux's opinion that sleep lab testing is an option to further assist in the treatment of claimant's urological problems. We therefore affirm the administrative law judge's determination that claimant is entitled to undergo a sleep lab study at employer's expense, as that finding is supported by the evidence. *See generally Wheeler*, 21 BRBS at 35.

Lastly, employer contends that since Dr. Sethma failed to comply with the reporting procedures set forth in Section 7(d)(2) of the Act, it should not be held

liable for that physician's medical charges. Under Section 7(d)(2) of the Act, an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. 33 U.S.C. §907(d)(2) (1988); *see Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pert. part*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); 20 C.F.R. §702.422.[4] The Board has held that the authority to determine whether non-compliance with Section 7(d)(2) may be excused rests with the district director and not the administrative law judge. *Krohn v. Ingalls Shipbuilding, Inc.,* 29 BRBS 72 (1994)(McGranery, J., dissenting); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

In his decision, the administrative law judge made no specific finding regarding the applicability of Section 7(d)(2) to the instant case; rather, the administrative law judge noted employer's position regarding this issue and thereafter recommended that Dr. Sethma's "alleged non-compliance" with Section 7(d)(2) be excused by the district director. *See* Decision and Order at 53. As it is uncontroverted that Dr. Sethma failed to comply with the reporting requirement of Section 7(d)(2), we hold that employer's liability for the medical charges of Dr. Sethma must be vacated and the case remanded to the district director for a determination as to whether that non-compliance should be excused in the interest of justice.

According, the administrative law judge's determinations regarding employer's 1992 labor market survey and its liability for Dr. Sethma's medical charges are vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion. The administrative law judge is to transfer this case to the district director who, after consideration of the Section 7(d)(2) issue, shall return the case to the Office of Administrative Law Judges for consideration of the extent of claimant's disability and entry

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[4]The implementing regulation, Section 702.422, states in pertinent part:

> For *good cause* shown, the Director may excuse the failure to comply with the reporting requirements of the Act. . . .

20 C.F.R. §702.422(b) (emphasis added).

of an award of medical benefits for the services rendered by Dr. Sethma consistent with the district director's finding. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge