

LARRY NELSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS	)	DATE ISSUED:
CORPORATION	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Larry M. Nelson, Seattle, Washington, *pro se*.

Charles E. Henshall (Thomas G. Hall & Associates), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-1828) of Administrative Law Judge Paul A. Mapes 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 October 31, 1989, claimant injured his left knee during the course of his employment for employer. Surgery to repair a torn medial meniscus was performed on November 7, 1989. On November 15, 1989, claimant began physical therapy to rehabilitate his knee. Claimant subsequently experienced back pain symptomatology, which he alleges is related to his rehabilitation regimen. Employer voluntarily paid claimant temporary total disability compensation from November 1, 1989, to June 12, 1990, and compensation for a 5 percent permanent partial impairment of the left knee due to the work injury. 33 U.S.C. §§908(b), (c)(2), (19). Employer controverted claimant's claim for continuing compensation for temporary total disability due to his back symptomatology, which it maintained is unrelated to claimant's work injury.

In his Decision and Order, the administrative law judge applied the Section 20(a) presumption, 33 U.S.C. §920(a), which he found employer rebutted. He then applied the "true doubt rule" to find that the physical therapy prescribed after claimant's left knee surgery aggravated claimant's previous back impairment. Claimant was thus awarded temporary total disability compensation until September 8, 1992, at which time the administrative law judge found that employer established the availability of suitable alternate employment paying \$6.85 per hour, and permanent partial disability compensation thereafter at a rate of \$49.97 per week. 33 U.S.C. §908(c)(21), (h). Finally, claimant was denied a penalty under Section 14(e), 33 U.S.C. §914(e), and employer was awarded relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer contends the administrative law judge erred in finding claimant's back condition to be causally related to his left knee injury. Employer additionally asserts that the administrative law judge erred in arbitrarily determining that claimant has a residual wage-earning capacity of \$6.85 per hour. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Employer initially challenges the administrative law judge's finding that claimant's back pain is related to the October 31, 1989, work-related knee injury. Where, as in the instant case, claimant establishes his *prima facie* case, claimant is entitled to the presumption at 33 U.S.C. §920(a) that his injury or harm arose out of and in the course of his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Mattera v. M/V Mary Antonette, Pacific King, Inc.*, 20 BRBS 43 (1987) (an injury sustained during the course of vocational testing is covered under the Act, because it necessarily arose out of and in the course of claimant's employment); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986)(same rationale for injury occurring during medical examination). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the casual connection between the injury and the employment. *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 the instant case, after finding that claimant had invoked, and employer had rebutted, the Section 20(a) presumption, the administrative law judge considered the issue of causation based upon the record as a whole. In addressing this issue, the administrative law judge initially stated that, pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980), employer still bore the burden of persuasion even after it had rebutted the presumption. The administrative law judge thereafter concluded that, since the evidence was evenly balanced regarding the issue of causation, the "true doubt rule" required that the benefit of the doubt be given to claimant. Accordingly, the administrative law judge found that claimant's back condition was aggravated by the medical treatment and physical therapy that had been prescribed as a result of his work-related knee injury.

Subsequent to issuance of the administrative law judge's Decision and Order, the United States Supreme Court held in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), that application of the "true doubt rule" does not apply to cases under the Act because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which requires that the party seeking the award bear the burden of persuasion. Pursuant to *Greenwich Collieries*, the administrative law judge's reliance upon the "true doubt rule" requires that we remand the case because the administrative law judge has not weighed the medical evidence of record regarding the alleged causal connection between claimant's work-related knee injury and his back condition. Accordingly, we vacate the administrative law judge's finding that claimant's back condition is related to his work injury and remand the case for him to determine if, in light of all relevant evidence, claimant has met his burden of establishing a causal relationship between his back condition and the work injury. See *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995)(decision on recon).

Employer next contends that the administrative law judge erred in finding that claimant has a residual wage-earning capacity of \$6.85 per hour. Pursuant to Section 8(c)(21), an award for permanent partial disability 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). Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. See *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Sections 8(c)(21) and 8(h) require that wages earned in a post-injury job be adjusted to the wages that the job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. See *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

In the present case, the administrative law judge determined that five positions identified by

employer establish the availability of suitable alternate employment.<sup>1</sup> Next, in calculating claimant's post-injury wage-earning capacity, the administrative law judge stated that "[g]iving the claimant the benefit of the doubt as to the actual wage he could obtain if he diligently sought work, I find that claimant has a residual earning capacity of \$6.85 per hour." *See* Decision and Order at 29. The administrative law judge's summary statement regarding this issue is in violation of the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). We therefore vacate the administrative law judge's determination of claimant's post-injury wage-earning capacity; on remand, the administrative law judge must make appropriate findings based on the relevant law and evidence and give an explanation of the reasons and basis for that determination. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>1</sup>Specifically, employer identified positions as a night auditor, bookkeeper, estimator, accounting clerk and accounts receivable clerk paying \$6.85, \$7.00-\$8.00, \$7.00, \$7.20, and \$9.50 per hour respectively.