BRB No. 01-0405

ROBERT BURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TIDEWATER TEMPS, INCORPORATED	)	DATE ISSUED: Jan. 17, 2002
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Richard E. Garriott, Jr., and Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-1679) of Administrative Law Judge Richard E. Huddleston 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). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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, while employed as a laborer for employer and assigned to Newport News

Shipbuilding & Dry Dock Company (NNS), allegedly sustained an injury to his left wrist sometime in October 1998. Claimant subsequently sought and received treatment from Dr. Cavazos on October 27, 1998, who diagnosed a broken bone in claimant's left wrist, placed the injured limb in a soft cast, and removed claimant from work. On November 10, 1998, Dr. Cavazos stated that claimant's left wrist injury was a result of his working and a direct result of his heavy lifting using a wheelbarrow. Dr. Cavazos subsequently performed corrective surgery on claimant's left wrist. At his last examination dated August 30, 1999, Dr. Cavazos reiterated his opinion that claimant should remain off from work; however, in a September 28, 1999, deposition, Dr. Cavazos indicated that claimant would be capable of light duty work after a work hardening program.

Claimant testified that he sustained an injury to his left wrist twenty years earlier for which he had never obtained treatment, and which up until October 1998, had never significantly bothered him. Based on Dr. Cavazos's opinion, claimant filed a claim for temporary total disability benefits alleging that his work for employer at NNS, consisting of shoveling sand into wheelbarrows, resulted in an aggravation of a pre-existing asymptomatic condition of his left wrist. Employer asserted that claimant's left wrist injury is not work-related.

In his decision, the administrative law judge initially acknowledged that he excluded three of employer's exhibits, *i.e.,* a labor market survey and *curriculum vitae* of Barbara Byers, and the medical report of Dr. Davlin, as they were not exchanged in compliance with the pre-hearing order issued in this case. On the merits, the administrative law judge determined that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer did not establish rebuttal of this presumption. He further determined, in the alternative, that the evidence of record as a whole establishes that claimant's left wrist injury is work-related. The administrative law judge concluded that claimant is entitled to a continuing award of temporary total disability benefits from October 27, 1998, as claimant established that he is unable to perform his usual employment and the record contains no evidence showing the availability of suitable alternate employment.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance

Employer first argues that it has been prejudiced by the administrative law judge's exclusion of its labor market survey and causation evidence. Employer avers that the dates of submission of this evidence to claimant, October 11, 1999, for Dr. Davlin's report, and October 12, 1999, for the labor market survey, are reasonable even though they do not comply with the administrative law judge's pre-hearing order. Employer thus contends that this evidence should have been admitted as it is in direct response to Dr. Cavazos's deposition, taken only four days prior to the time limit, the administrative law judge's order

uses permissive rather than mandatory language, *i.e.*, failure to follow this notice "*may* result in appropriate sanctions . . . ," and this evidence is extremely relevant to the case at hand.

The administrative law judge's pre-hearing order dated June 16, 1999, states in pertinent part:

> All parties shall complete discovery, number and exchange exhibits, and exchange witness lists 20 days prior to the date set for formal hearing.
>
> Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.

An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Moreover, an administrative law judge has the discretion to exclude even relevant and material testimony for failure to comply with the terms of a pre-hearing order. *See Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

We first address the evidence relevant to causation which was excluded from the record. At the hearing, employer sought to submit the report of Dr. Davlin, and claimant objected on the grounds that it was not identified in discovery documents, and was in violation of the pre-hearing Order. Hearing Transcript (HT) at 18-21. After inquiring as to employer's reasons for the late submission of this document, HT at 21-25, the administrative law judge excluded the exhibit on the grounds cited by claimant. HT at 26. In particular, the administrative law judge observed that employer had a considerable period of time during which it was free to conduct any discovery of the evidence that claimant was going to submit. Specifically, the opinion of Dr. Cavazos had remained essentially unchanged on this issue since November 10, 1998. Thus, employer could have very easily submitted the opinion of its own expert, Dr. Davlin, in a timely fashion. HT at 26. As Dr. Cavazos's causation opinion was not altered in his deposition, which was taken just prior to the expiration of the administrative law judge's deadline, this finding is rational. As employer thus has not shown that the administrative law judge's action is arbitrary, capricious or an abuse of discretion, the exclusion of employer's causation evidence, *i.e.*, Dr. Davlin's medical report, is affirmed. *See generally Ezell*, 33 BRBS 19; *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc*., 22 BRBS 46 (1989)(party seeking to admit evidence must exercise due diligence in developing its claim prior to hearing); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987).

With regard to employer's labor market survey and the accompanying *curriculum vitae* of Ms. Byers, the administrative law judge, after considerable discussion, HT at 28-34, similarly excluded this evidence as it was not offered in compliance with his pre-hearing order. HT at 34. The administrative law judge observed that if employer truly felt

"surprised" by Dr. Cavazos's statement, made only four days prior to the expiration of the administrative law judge's time limit, that claimant was capable of light duty work if he underwent work hardening, its remedy at that point, on September 28, 1999, should have been to ask for a continuance of the hearing. Given the change in Dr. Cavazos's disability opinion, however, we cannot affirm the administrative law judge's exclusion of employer's evidence.

Section 702.338 provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. 20 C.F.R. §702.338. Additionally, under Section 702.338 the administrative law judge may reopen the record for receipt of relevant and material evidence "at any time, prior to the filing of [a] compensation order." *Id.* Section 702.339 provides that administrative law judges are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but should conduct the hearing in a manner that will best ascertain the rights of the parties. 20 C.F.R. §702.339; *see also* 33 U.S.C. §923.

In the instant case, claimant's treating physician, Dr. Cavazos, repeatedly stated from October 27, 1998, and on into September 1999, that claimant should remain off from work as a result of his employment-related injury. *See* Claimant's Exhibits (CX) 1B, 1E, 1L - 1O, 1S, 1U, 1X. Moreover, in his report dated August 2, 1999, Dr. Cavazos stated that claimant has remained out of work since he first saw him on October 27, 1998, and recommended that he remain out of work another three or four months. CX 1C. Dr. Cavazos, however, modified his opinion regarding claimant's ability to work, stating for the first time on September 28, 1999, that claimant would be capable of light duty work after a work-hardening program. Specifically, at his deposition, Dr. Cavazos testified that his prior opinion regarding claimant's inability to return to work was premised on his assumption that claimant was to return to a manual labor type position, CX 2A at 27, and he further stated that he now believed that claimant could perform some light duty work within his restrictions, so long as he received some work hardening. CX 2A at 32-33. Dr. Cavazos's statements at deposition thus significantly affected the parties' positions regarding claimant's ability to work and brought to the forefront the issue of claimant's capability to perform suitable alternate employment. Employer obtained its labor market survey within two weeks. This evidence is clearly relevant and material, as exemplified by the fact that the administrative law judge, in his decision, specifically determined that "no evidence is available in the record to show that suitable alternate employment was available for claimant." Decision and Order at 11.

Moreover, given the importance of the excluded evidence in this case and the administrative law judge's use of permissive rather than mandatory language in his pre-hearing order, employer's pre-hearing submission of its labor market survey to claimant on October 12, 1999, does not warrant the extreme sanction of exclusion.[1] As Dr. Cavazos's

[1]While employer could have sought a continuance, as the administrative law

deposition regarding claimant's ability to perform light duty work raised, essentially for the first time, the issue of suitable alternate employment only four days before the pre-hearing time limitation for submission of evidence, and as employer's submission of its labor market survey was in direct response to Dr. Cavazos's modified position, we hold that the administrative law judge abused his discretion and violated Section 702.338 by excluding this relevant and material evidence.[2] *See generally Ramirez v. Southern Stevedores*, 25

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judge stated, we note that other alternatives were available to the judge to avoid prejudice to the parties. Employer's evidence was a timely response to claimant's doctor's revised opinion, coming about two weeks later. Although submitted after the date required by the pre-hearing order, it was nonetheless submitted ten days before the October 22 hearing. Moreover, any prejudice to claimant due to the late submission could have been cured by holding open the record to allow claimant time to obtain additional evidence in response.

[2]We note that the instant case is distinguished from *Durham v. Embassy Dairy*, 19 BRBS 105 (1986), wherein the Board held that the administrative law judge has the discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338, as that case did not involve the last minute addition of a new issue,

BRBS 260 (1992). Consequently, we must vacate the administrative law judge's award of temporary total disability benefits and remand this case for consideration of employer's labor market survey. On remand, the administrative law judge may reopen the record in order to allow claimant an opportunity to respond to employer's labor market survey. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

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i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the administrative law judge's pre-hearing order. Similarly, as employer herein exercised due diligence in obtaining its labor market survey upon learning of claimant's ability to perform light duty work, the instant case is distinguished from the Board's decisions in *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989), and *Sam v. Loffland Bros.*, 19 BRBS 228 (1987), wherein the Board held that the party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.

Employer next challenges the administrative law judge's invocation of the Section 20(a) presumption, alleging invocation was based entirely on claimant's counsel's opening statement and employer's alleged concession regarding the applicability of this provision, without any consideration of the relevant evidence of record. Employer's contention lacks merit. After citing the appropriate standard for invocation of the Section 20(a) presumption, the administrative law judge determined that employer conceded that claimant was entitled to invocation of this presumption. He therefore concluded that the parties stipulated that claimant has shown that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury. The language relied upon by the administrative law judge, as noted below, supports his finding that employer did, in fact, concede invocation.[3] In any event, we hold that the administrative

[3]The discussion between employer's counsel (EC) and the administrative law judge (ALJ) is as follows:

EC: Well, your Honor, I think that, given the status of this case and *[claimant's] own testimony that he was working and he had some sort of injury, the possibility that it could have happened out of the work, as the statute reads, indicates that the presumption would be invoked*, and we would have to rebut the presumption.

ALJ: Okay

EC: I'm not here today saying that - -

law judge's finding of invocation is supported by the evidence of record which establishes that claimant sustained an injury, *i.e.*, a broken bone in his left wrist, and that working conditions existed which could have caused or aggravated the condition, *i.e.*, Dr. Cavazos directly related claimant's heavy lifting while using a wheelbarrow as a cause of his injury, and Dr. Ellis admitted that "it is quite possible that repetitive trauma may exacerbate a prior problem and make it temporarily more noticeable." Employer's Exhibit 9; *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Consequently, the administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption is affirmed. *Id.*

Employer also asserts that the administrative law judge erred in finding that it did not establish rebuttal of the Section 20(a) presumption, as Dr. Ellis's opinion severs any causal connection between claimant's left wrist injury and his employment. Moreover, employer argues that in his consideration of the evidence as a whole, the administrative law judge erred in crediting the opinion of Dr. Cavazos over the contrary well-substantiated opinion of Dr. Ellis, and thus in concluding that claimant's left wrist condition is work-related.

Once Section 20(a) is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused or aggravated by his employment. If it does so, the presumption falls from the case and the administrative law judge must weigh all of the evidence, with claimant bearing the burden of persuasion on the issue of the work-relatedness of his condition. *See, e.g., Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

ALJ: Okay, thank you.

EC: We don't even get to that point. [Counsel then proceeds to discuss Dr. Cavazos's opinion on light duty work].

HT at 12 (emphasis added).

In his decision, the administrative law judge determined that Dr. Ellis's testimony is insufficient to sever the causal connection. Specifically, he found that Dr. Ellis's opinion that the cause of the old fracture of claimant's left wrist has nothing to do with his work with a wheelbarrow, is insufficient to rebut the presumption that claimant's employment aggravated his pre-existing, asymptomatic fracture. Dr. Ellis stated "that [claimant] had a temporary exacerbation of a prior problem by a repetitive strain process," and that "it is quite possible that repetitive trauma may exacerbate a prior problem and make it temporarily more noticeable." Employer's Exhibit 9. The administrative law judge concluded that Dr. Ellis's opinion does not sever the connection between the displacement of the left wrist fracture and claimant's employment. This finding is in accordance with law, as Dr. Ellis's opinion does not state that claimant's wrist condition was not aggravated by his employment. Thus, we affirm the administrative law judge's finding that Section 20(a) was not rebutted and, consequently, that the condition is work-related.[4] *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

Accordingly, the administrative law judge's award of temporary total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order is affirmed.

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[4]In light of our affirmance of the administrative law judge's finding that employer did not establish rebuttal of the Section 20(a) presumption, we need not consider employer's contentions regarding the administrative law judge's alternative finding of causation on the record as a whole. Nevertheless we note that this finding is likewise supported by substantial evidence. On this issue, after an extensive consideration of the relevant evidence of record, the administrative law judge acted within his discretion in according greatest weight to the opinion of claimant's treating physician, Dr. Cavazos, to find that claimant's left wrist condition was work-related. *See generally Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge