BRB Nos. 03-0533
and 03-0612

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| RENE J. NOBLE | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| ADVANTAGE FINANCIAL GROUP | ) | |
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| and | ) | |
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| LEGION INSURANCE COMPANY | ) | DATE ISSUED:April 29, 2004 |
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| Employer/Carrier-Respondents | ) | |
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| EMPIRE STEVEODORING ALLIED, INCORPORATED | ) | |
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| Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order, the Decision on Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Harry E. Forst, New Orleans, Louisiana, for claimant.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order, the Decision on Claimant's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (2001-LHC-2256) of Administrative Law Judge C. Richard Avery 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant testified that he was working as a stevedore in either May or June of 1997, when he was injured while unloading zinc slabs from a vessel.[1] Claimant testified that he was standing in the hold of the ship when a hydraulic hose broke and leaked fluid. Claimant, who was wearing a hard hat while he worked, asked for a bag of sawdust to absorb the fluid, and a 25 pound bag of sawdust was thrown into the hold from 60 feet above on the deck. The bag hit claimant on the top of the head, knocking him to his knees. Claimant complained of a headache and went home for the day. Claimant continued to work in the days after the accident, but sought treatment in July 1997 at St. Charles General Hospital for headaches and burning sensations and numbness in his fingers. He was diagnosed with a neck sprain. Claimant began treatment with Dr. Barnes on September 23, 1997, who diagnosed cervical compression syndrome. On November 24, 1997, Dr. Barnes noted that claimant continued to have pain in his neck and lower back, but that he had a good response to medication, and that he should return only as needed. Claimant sought benefits under the Act.

Claimant was involved in a motor vehicle accident on March 27, 1998. Claimant sought medical treatment for lower back pain as well as neck and arm pain.[2] Claimant began treatment with Dr. Danielson, a neurosurgeon, who found that claimant had three cervical disc herniations. He performed an anterior cervical discectomy on September 8, 2000. Dr. Danielson opined that claimant could return to heavy duty employment approximately one year after the surgery.

In his Decision and Order, the administrative law judge found that claimant established invocation of the Section 20(a) presumption that his cervical condition is work-related. 33 U.S.C. §920(a). However, the administrative law judge also found that

[1] Claimant was employed by Advantage Financial Group (Advantage Financial), a non-union labor pool which made labor gangs available to the various stevedoring companies. Claimant testified that through Advantage Financial, he worked for several different stevedoring companies in 1997, including Empire Stevedoring Allied, Inc. (Empire), MariTrend, and First Marine.

[2] At the time of the motor vehicle accident, claimant was employed as a bounty hunter.

the evidence rebutted that presumption, and he concluded that claimant's cervical condition after March 1998, including the need for surgery in September 2000, was due solely to the motor vehicle accident. In addition, the administrative law judge found that the evidence is insufficient to establish invocation of the Section 20(a) presumption that claimant's lower back pain is related to the work accident in 1997. The administrative law judge found that claimant reached maximum medical improvement for the work injury on November 24, 1997, the date Dr. Barnes stated that claimant should return for treatment only as needed. In addition, the administrative law judge found that as claimant continued to work as a stevedore following the incident in May or June of 1997, and was never advised to stop working by his treating physician or placed on restrictions, claimant failed to establish a *prima facie* case of total disability, and thus is not entitled to disability benefits. The administrative law judge also found that Advantage Financial is the responsible employer and that claimant's average weekly wage was $144.06. The administrative law judge summarily denied claimant's motion for reconsideration. Subsequent to the issuance of the administrative law judge's decision, claimant's counsel filed an attorney's fee petition for work performed before the administrative law judge. The administrative law judge awarded claimant's counsel a fee in the amount of $4,522, plus expenses of $1,320.66.

On appeal, claimant contends that the administrative law judge erred in finding sufficient evidence to rebut the Section 20(a) presumption that claimant's cervical condition is work-related and in finding that the evidence does not support invocation of the Section 20(a) presumption that claimant's lower back condition is work-related. Claimant also contends that the administrative law judge erred in finding that claimant's work-related neck injury is not disabling, that claimant's average weekly wage was $144.06, and that Advantage Financial is the responsible employer. BRB No. 03-0533. In addition, claimant appeals the administrative law judge's fee award, contending that the administrative law judge erred in reducing counsel's fee by 66 percent to account for limited success. BRB No. 03-0612. Employer responds, urging affirmance of the administrative law judge's decisions.

Initially, claimant contends that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption that his cervical condition was causally related to the 1997 work accident. Where, as in the instant case, it is undisputed that the evidence establishes invocation of the Section 20(a) presumption that claimant's cervical condition is related to his work-related accident, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director,* OWCP, 194 F.3d 684, 33 BRBS 187(CRT) ( 5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS

466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by a subsequent non-work-related event, which was not the natural or unavoidable result of the initial work injury. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Where the subsequent injury is the result of an intervening cause, employer is relieved of liability for the disability and medical treatment attributable to the subsequent injury, but remains liable for any disability due to the work injury. *Arnold v. Nabors Offshore Drilling Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed. Appx. 126 (5th Cir. 2002)(table); *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

In the instant case, the administrative law judge found that claimant's cervical condition and the cervical surgery required to repair claimant's cervical herniations were not a natural and unavoidable consequence of claimant's work-related accident. Rather, the administrative law judge found that they were due solely to an intervening cause, specifically the motor vehicle accident in March 1998. We cannot affirm this finding. The record contains the medical report and testimony of Dr. Danielson, claimant's treating neurosurgeon following the motor vehicle accident. Dr. Danielson attributed claimant's need for cervical surgery to both the work accident in 1997 and the motor vehicle accident in 1998. Emp. Ex. 14 at 17. He further opined that the cause of claimant's disc herniations at C5-6 and C6-7 was both the work injury in 1997 and the motor vehicle accident in 1998. *Id.* at 15. He explained that the negative neurologic examinations performed in 1997 were not reliable to rule out disk pathology at that time, *id.* at 16, and that without an MRI taken before the motor vehicle accident, he is unable to opine to what degree claimant's current condition is due to the auto accident alone. Thus, as there is no evidence that claimant's cervical condition is due solely to the motor vehicle accident, and the only medical evidence attributes the condition in part to claimant's work injury, employer has not presented substantial evidence that claimant's cervical condition is not causally related to his employment. *See Conoco*, 194 F.3d at 690, 33 BRBS at 191(CRT). Therefore, we reverse the administrative law judge's determination that the Section 20(a) presumption is rebutted, and we hold that claimant's cervical condition, including his need for surgery, is work-related as a matter of law, and that employer is liable for medical treatment and any resulting disability. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Plappert*, 31 BRBS at 16.

Claimant also contends that the administrative law judge erred in finding that the evidence is insufficient to invoke the Section 20(a) presumption that his lower back condition is related to his employment. In order to invoke the Section 20(a) presumption, claimant must show that he sustained a harm and that either an accident occurred or working conditions existed which could have caused the harm. *See Gooden*, 135 F.3d

1066, 32 BRBS 59(CRT); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

In the instant case, the administrative law judge reviewed the evidence and found it relevant that claimant did not mention low back pain to his fellow employees following the work accident, at the time he sought treatment at St. Charles General Hospital in July 1997, or to Dr. Barnes when he started treatment in September 1997. The administrative law judge found that Dr. Barnes first mentioned that claimant suffered from low back pain in a deposition describing his condition in November 1997, but found it more significant that Dr. Barnes did not order tests for claimant's lower back. Dr. Danielson initially opined that claimant's low back condition was due entirely to the motor vehicle accident in March 1998, but revised his opinion after seeing the reference in Dr. Barnes's deposition to low back pain in 1997. The administrative law judge also found it relevant that Dr. Danielson found no objective evidence of pathology in claimant's lower back.

After weighing this evidence the administrative law judge concluded that the evidence is insufficient to establish invocation of the Section 20(a) presumption as it does not establish that claimant sustained a harm to his lower back by the falling bag of sawdust in 1997. Of the pre-motor vehicle accident evidence, only Dr. Barnes's statement in a deposition regarding claimant's condition in November 1997 raises the possibility of a back injury, and the administrative law judge found that this reference is unsupported by the balance of the evidence. After the motor vehicle accident, Dr. Danielson stated that he was giving claimant the benefit of the doubt that he had a back problem and the doctor linked it to the work accident based only on the statement in Dr. Barnes's deposition. As the administrative law judge considered all of the relevant evidence, and specifically addressed the probative value of Dr. Barnes's deposition statement, we affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant sustained a back injury at the time of the work accident in 1997. *See U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 616, 14 BRBS at 633; *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

Claimant also contends that the administrative law judge erred in finding that he was not disabled as a result of his neck injury. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See, e.g., Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). The administrative law judge found that although Dr. Barnes submitted a release from work form dated October 15, 1997, for September 9, 1997 and continuing, Dr. Barnes stated in November 1997 that claimant was responding to medication and that he need not return unless he found it necessary. The administrative law judge considered it significant that claimant did not return to Dr. Barnes, or any other medical provider, until after the motor vehicle accident in March 1998. Moreover, contrary to the information in

his earlier work release form, in a deposition dated October 3, 2001, Dr. Barnes testified that he did not have an opinion as to whether claimant could perform his usual duties in 1997, either at the time of the deposition or looking back to the time of treatment. The administrative law judge found that claimant continued to work both as a stevedore and as a bounty hunter after his injury. The administrative law judge weighed the evidence and found that it was insufficient to show that claimant was unable to perform his usual duties following the work accident in May or June 1997. We affirm the administrative law judge's finding that claimant failed to establish a *prima facie* case of total disability prior to the motor vehicle accident as it is rational and supported by substantial evidence. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem.*, 909 F.2d 1488 (9th Cir. 1990)(table). However, there is evidence of record that claimant was unable to work following the motor vehicle accident in March 1998. *See* Emp. Ex. 14. Thus, as we have held that claimant's cervical condition following the motor vehicle accident, including the need for neck surgery and any resulting disability therefrom, is due, at least in part, to his work injury, we remand the case for the administrative law judge to consider the extent of claimant's disability due to that condition from March 1998 and continuing. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

In determining claimant's average weekly wage at the time of the work-related injury pursuant to Section 10(c), 33 U.S.C. §910(c), claimant contends that the administrative law judge erred in relying on the Social Security Administration wage records because they did not include the wages he earned at Empire and Advantage Financial in 1997. Claimant contends that as an alternative method, it would have been more appropriate for the administrative law judge to have used the Department of Labor Bureau of Labor Statistics figure in 1997 of $9 per hour for a longshoreman for a 40 hour week, which yields an average weekly wage of $360. Under Section 10, 33 U.S.C. §910, computation of average annual earnings must be made pursuant to subsection (c) if subsection (a) or (b) cannot be reasonably and fairly applied. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The administrative law judge is accorded broad discretion in determining claimant's annual earning capacity under Section 10(c). *See, e.g., Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979); *Fox v. West State Inc.*, 31 BRBS 118 (1997).

The administrative law judge rejected claimant's suggestion that he use the average wage of $9 per hour to determine claimant's average weekly wage, finding that there is no evidence that claimant worked 40 hours a week before the work accident. The evidence of claimant's earnings prior to the work accident in May or June of 1997 includes claimant's tax return for 1997, which shows earnings of $4,773.38, a pay stub from Advantage Financial dated June 1997, which shows a year to date total of $1,013.63, and a log sheet showing that claimant worked one day for Empire, but there is

nothing to show that he was paid separately by Empire for this time. The record also contains the Social Security Administration wage report which shows that claimant earned a total of $11,236.86 for the eighteen month period including all of 1996 and half of 1997 from various employers, but it does not include the earnings from Advantage Financial or Empire.[3] Emp. Ex. 11.

Initially, we reject claimant's contention that his average weekly wage should be calculated using the average stevedore hourly wage of $9 multiplied by a 40 hour week to reach an average weekly wage of $360, as the administrative law judge properly found that there is no evidence that claimant ever worked a 40 hour week. The highest earnings the record supports is the $11,236.86 claimant earned as shown in the Social Security Administration records, Emp. Ex. 11, plus the $1,013.63 earned at Advantage Financial, Cl. Ex. C, which is a total of $12,250.49 for 1996 and 1997. This figure divided by the 78 week period it covers yields an average weekly wage of $157.05. Thus, we modify the administrative law judge's calculation of claimant's average weekly wage to include the amount received from Advantage Financial.

Claimant also contends on appeal that the administrative law judge erred in finding that Empire was not the borrowing employer for purposes of liability under the Act. The borrowed employee doctrine provides that a borrowing employer may be held liable for benefits if application of the tests for such employment so indicates. *Total Marine Services, Inc. v. Director, OWCP [Arabie]*, 87 F.3d 774, 30 BRBS 62(CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996). The United States Circuit Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises, set forth a nine-part test to determine the responsible employer in a borrowed employee situation in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and in *Gaudet v. Exxon Corp.*, 562 F.2d 351, 6 BRBS 712 (5th Cir. 1977), and the Board has applied this test in cases arising under the Act.[4] *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

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[3] The Social Security Administration reported that claimant earned $6,758.36 from Bayside Chrysler Plymouth Dodge, Inc., $593.28 from Harrison County Board of Supervisors, $893.25 from Ed Saylor Chrysler Plymouth Dodge, Inc., $2,391.75 from Maritrend, Inc., and $1,183.50 from Total Logistics Company. Emp. Ex. 11.

[4] The *Ruiz-Gaudet* test lists the following questions for determining if an employee is a borrowed servant: (1) who has control over the employee and the work he is performing, other than mere suggestions of details or cooperation; (2) did the employee acquiesce in the new work situation; (3) who furnished tools and place for performance; (4) who had the right to discharge the employee; (5) who had the obligation to pay the employee; (6) did the original employer terminate his relationship with the employee; (7)

The administrative law judge considered the nine factor test set forth in *Ruiz* and concluded that the weight of the evidence establishes that Advantage Financial is the responsible employer. We affirm. Specifically, the administrative law judge found that while there is some evidence that Empire may have exerted control over the gangs organized by Advantage Financial, there is insufficient evidence to support finding that Empire supervised claimant on the day of the injury inasmuch as there was conflicting testimony regarding the identity of the ship and the stevedoring company involved that day. The administrative law judge found that regardless of which stevedoring company claimant may have been working with on the day of the injury, he was hired by Advantage Financial, which had supervisors at the site, was responsible for medical bills, issued the paychecks, and assembled the gangs. Therefore, while it is not clear from the record whether claimant was performing the work of Empire, he was providing labor for Advantage Financial. The administrative law judge also found that Advantage Financial continued to have supervisors present at the work site and was responsible for injuries, so it did not terminate its relationship with claimant. Moreover, claimant supplied his own hard hat and the administrative law judge found there is not enough evidence to determine which stevedoring company's heavy equipment was being used on the date of the injury. Lastly, the administrative law judge found that while the work gangs changed stevedoring companies daily, the only thing that was consistent was the involvement of Advantage Financial, which retained the right, along with the stevedoring companies, to fire its employees. Thus, although claimant testified that he thought he was working for Empire on the day of the accident and the funds for claimant's pay would have come from Empire if he had been working for that company on the day of the injury, the administrative law judge found that the overwhelming weight of the evidence establishes that claimant was an employee of Advantage Financial on the day of the injury. Decision and Order at 28. Because the administrative law judge used the applicable law and his findings are supported by substantial evidence, we conclude he rationally determined that Advantage Financial is the responsible employer and is liable for claimant=s benefits. *Total Marine*, 87 F.3d at 779, 30 BRBS at 66(CRT); *Gaudet*, 562 F.2d at 357-359; *see also Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997); *Vodanovich*, 27 BRBS at 286.

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whose work was being performed; (8) was there an agreement or meeting of the minds between the original and borrowing employer; and (9) was the new employment over a considerable length of time. The Fifth Circuit has held that the principal focus of the *Ruiz-Gaudet* test should be whether the second employer itself was responsible for the working conditions experienced by the employee and the risks inherent therein, and whether the employment with the new employer was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Gaudet*, 562 F.2d at 357.

On appeal of the Supplemental Decision and Order, claimant contends that the administrative law judge erred in reducing counsel's fee by 66 percent to account for limited success. An attorney=s fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. '928, and the applicable regulation, 20 C.F.R. '702.132, which provide that the award of any attorney=s fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). However, if a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992).

In the present case, the administrative law judge found that claimant's counsel successfully established claimant's entitlement to medical benefits for a nine month period, but that he denied temporary partial disability benefits and temporary total disability benefits. Therefore, the administrative law judge found that claimant was successful on only one out of three of the outstanding issues and he reduced the number of hours spent by counsel by 66 percent. Inasmuch as we reverse the administrative law judge's finding that claimant's cervical condition, including the need for surgery, is not related to his work injury, and the case is remanded case for consideration of the extent of claimant's disability which is due, at least in part, to his work injury, we also must vacate the administrative law judge's award of an attorney's fee. On remand, the administrative law judge should award a fee, pursuant to *Hensley*, commensurate with claimant's degree of success in light of the proceedings on remand. *See generally Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999).

Accordingly, the decision of the administrative law judge finding that claimant's cervical condition after March 1998 is not related to his work injury is reversed, and employer is held liable for any resulting medical treatment and disability compensation as a matter of law. The case is remanded for consideration of claimant's entitlement to disability benefits for his cervical injury after March 27, 1998. The administrative law

judge's calculation of claimant's average weekly wage is modified to reflect the addition of the wages claimant earned at Advantage Financial in 1997, which yields an average weekly wage of $157.05. The administrative law judge's decision is affirmed in all other respects. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge