BRB Nos. 03-0103
and 03-0103A

DENNIS DUGAS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
FORCENERGY GAS EXPLORATION, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

R. Scott Iles, Lafayette, Louisiana, for claimant.

James J. Hautot (Judice & Adley, P.L.C.), Lafayette, Louisiana, for employer/ carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (1997-LHC-3115) 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).

This is the third time that this case has been appealed to the Board. Claimant alleged that, while working for employer as a roustabout on August 15, 1995, he struck his elbows numerous times on swinging doors while carrying supplies of water. Claimant was subsequently diagnosed with bilateral ulnar neuropathy, which he alleged was caused or aggravated by the swinging-door incidents. In his initial Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. '920(a), presumption linking his injury to his employment and that employer failed to rebut the presumption. As claimant=s condition had not reached maximum medical improvement, the administrative law judge awarded claimant temporary total disability benefits beginning October 5, 1995. 33 U.S.C. §908(b).

Employer appealed this decision, challenging the administrative law judge=s determination as to the cause of claimant=s condition. The Board vacated the administrative law judge=s award and remanded the case for the administrative law judge to initially determine whether an accident occurred at work, thus entitling claimant to invocation of the Section 20(a) presumption. If the administrative law judge found that the presumption was invoked, the Board directed him to then consider whether employer presented substantial evidence to rebut the presumption. *Dugas v. Forcenergy Gas Exploration, Inc.*, BRB No. 99-0163 (Oct. 21, 1999)(unpub.).

On remand, the administrative law judge credited claimant=s testimony and found that an accident occurred at work. Decision on Remand at 3-4. Accordingly, the administrative law judge invoked the Section 20(a) presumption linking claimant=s injury to his employment. In next addressing the issue of whether employer rebutted the presumption, the administrative law judge found that Dr. Domingue=s report is equivocal, and that the notation in Dr. Fruge=s report that claimant=s injury was not work-related was merely an Ax@ mark with no supporting rationale and thus was insufficient to rebut the Section 20(a) presumption. *Id.* at 5. Further, the administrative law judge stated that even if employer presented substantial evidence to rebut the Section 20(a) presumption, the record on the whole supports the conclusion that claimant's injury is work-related. *Id.* at 5-6. Employer filed an appeal of this decision with the Board, BRB No. 00-0604, but then filed a motion for modification with the administrative law judge. The Board dismissed employer=s appeal without prejudice and remanded the case to the administrative law judge to consider employer=s motion.

Pursuant to employer's motion for modification, the administrative law judge held a new hearing and accepted additional evidence. With regard to the cause claimant's injury,

the administrative law judge denied modification, finding that employer did not present evidence that either the Section 20(a) presumption was not properly invoked or that it was rebutted; thus, employer failed to show a mistake in fact. Decision on Modif. at 8. Next, the administrative law judge found that employer established that claimant=s condition has improved and that he is no longer disabled from performing his usual work or suitable alternate work. *Id.* at 8-9. In drawing this conclusion, the administrative law judge credited the opinions of Drs. Fruge and Hurst and that of Mr. Bordelon, a vocational counselor. As he found that there was a change in claimant=s physical and economic condition, the administrative law judge granted modification and terminated benefits as of December 4, 1998, the date Mr. Bordelon first reported the availability of suitable alternate employment. *Id.* at 9-10. Finally, the administrative law judge declined to find a date of maximum medical improvement, stating that only Dr. Hurst addressed this issue and the true answer depends on whether claimant has a treatable disease, which can only be determined by further testing. *Id.* at 11.

Claimant appealed, and employer cross-appealed, the administrative law judge's Decision and Order on Employer's Motion for Modification to the Board. Claimant averred that the administrative law judge erred in terminating claimant=s benefits and finding that he can return to his usual work or alternate work. In its appeal, employer again challenged the administrative law judge's finding claimant=s condition was work-related and also asserted he erred in failing to find a date of maximum medical improvement.[1] The Board initially addressed employer's contentions of error, holding that since substantial evidence in the form of claimant's testimony, which the administrative law judge credited, supports the finding that an accident occurred at work which could have caused claimant's neurological condition, the administrative law judge properly invoked the Section 20(a) presumption. Next, the Board affirmed the administrative law judge's conclusions in the decisions originally appealed and on modification that employer did not rebut the Section 20(a) presumption. The Board also affirmed the administrative law judge's conclusion that employer did not establish a mistake in the determination of a fact with regard to the work-relatedness of claimant's injury, and thus affirmed his denial of employer's motion for modification on this ground. *Dugas v. Forcenergy Gas Exploration, Inc.*, BRB Nos. 00-0604; 01-0337/A (Dec. 12, 2001)(unpub.)(*Dugas II)*.

The Board then addressed claimant's contention that the administrative law judge erred in finding that employer met the requirements for Section 22 modification on the

[1]Employer additionally sought reinstatement of its appeal of the administrative law judge's Decision and Order on Remand, in which it argued that claimant's present medical condition is not work-related. BRB No. 00-0604.

grounds of a change in condition and his consequent decision to modify his original award, terminating temporary total disability benefits. The Board held that the administrative law judge, based on the testimony of Dr. Hurst, videotapes, and evidence of the availability of suitable alternate employment which appears to be less physically demanding than his usual work, rationally found that claimant was no longer physically incapable of performing his usual or suitable alternate employment. The Board agreed, however, that the administrative law judge erred in failing to ascertain claimant's residual wage-earning capacity, since there is no evidence that claimant is completely healed and, because claimant's usual work is now unavailable, he cannot obtain his former wages. The Board therefore vacated the administrative law judge's termination of claimant's benefits, and instructed the administrative law judge on remand to make a finding of a wage-earning capacity in a specific dollar amount, and to adjust those post-injury wages to the time of the injury to account for inflationary effects. Moreover, the Board stated that, if the administrative law judge finds that claimant has a loss of wage-earning capacity, claimant may be entitled to temporary partial disability benefits pursuant to Section 8(e) of the Act, 33 U.S.C. '908(e), beginning December 4, 1998, the date on which employer established the availability of suitable alternate employment. *Dugas II*, slip op. at 7-8. Lastly, the Board instructed the administrative law judge on remand to address whether and/or when claimant's condition became permanent, and to award or deny benefits accordingly. *Dugas II*, slip op. at 8-9.

Upon this second remand from the Board, the administrative law judge accepted into evidence the deposition of Dr. Kline, a neurosurgeon who examined claimant on March 25, 2002. In addressing this opinion in his decision on remand, the administrative law judge found that Dr. Kline, while offering no opinion regarding claimant's present restrictions, was of the opinion that claimant would benefit from surgery. Subsequently, the administrative law judge determined that, as claimant's condition has yet to appear to be of a lasting and indefinite duration, and future treatment involving the healing process appears to be in order, claimant has not yet reached maximum medical improvement. Next, the administrative law judge determined that employer established the availability of suitable alternate employment as of December 4, 1998, paying $24,000 per year and that, consequently, claimant sustained no loss of wage-earning capacity as of that date. Accordingly, the administrative law judge reaffirmed his prior determination that employer's liability for compensation benefits terminated as of December 4, 1998, the date on which employer established the availability of suitable alternate employment paying in excess of claimant's pre-injury earnings.

In the present appeal, claimant challenges the administrative law judge's decision to address the issue of claimant's post-injury wage-earning capacity on remand. Employer responds, urging the Board to affirm the administrative law judge's calculation of claimant's post-injury wage-earning capacity. In its cross-appeal, employer challenges the administrative law judge's finding of a causal relationship between claimant's condition and his employment with employer, as well as the administrative law judge's determination that

claimant's condition has not yet reached maximum medical improvement.

As noted above, claimant initially challenges the administrative law judge's decision on remand to address the issue of claimant's post-injury wage-earning capacity. Specifically, claimant avers that the issue of his post-injury wage-earning capacity was not "germane to the issue on remand." *See* Clt's brief at 3. Claimant's contention in this regard is without merit as the Board, in its decision remanding this case to the administrative law judge for the second time, determined that the administrative law judge erred in failing to ascertain claimant's residual wage-earning capacity. Specifically, the Board stated that, should claimant's disability be deemed to be temporary in nature, the extent of such disability is measured by his loss of wage-earning capacity. Having affirmed the administrative law judge's determination that claimant was no longer physically incapable of performing his usual or suitable alternate employment, the Board stated that claimant may be entitled to an award of temporary partial disability compensation pursuant to Section 8(e) of the Act, 33 U.S.C. §908(e). As the administrative law judge had only given a range of claimant's potential post-injury wage-earning capacity, the Board directed the administrative law judge on remand to make a finding of claimant's wage-earning capacity in a specific dollar amount. *See Dugas II,* slip op. at 7-8. Accordingly, we reject claimant's contention of error and we hold that the administrative law judge on remand properly followed the directive of the Board when he addressed the issue of claimant's post-injury wage-earning capacity. Additionally, as claimant does not contest the administrative law judge's specific calculation of his post-injury wage-earning capacity, that determination by the administrative law judge, and the consequent denial of disability benefits to claimant subsequent to December 4, 1998, is affirmed.

Next, claimant implicitly argues that the administrative law judge erred in failing to award ongoing temporary total disability and medical benefits based upon Dr. Kline's recommendation that claimant undergo surgery and not be released to return to work. The administrative law judge specifically awarded claimant reasonable and necessary medical benefits in two of his prior decisions, *see* Decision and Order at 9; Decision and Order on Remand at 6, and Dr. Kline unequivocally declined to address the issue of whether claimant is presently restricted from performing any activities, as he examined claimant for the sole purpose of determining whether treatment was possible for his conditions. *See* Kline depo. at 44. Accordingly, we reject claimant's contentions of error and hold the administrative law judge properly found claimant is not totally disabled.[2]

In its cross-appeal, employer raises no new issues regarding the administrative law judge's findings in his second decision on remand; rather, employer has refiled with the

[2]Should claimant undergo surgery or have another change in his condition, he may seek additional benefits subject to the limitations of the Act. *See* 33 U.S.C. §922.

Board the two briefs which it filed in support of its prior appeals. As employer recognizes in the accompanying Petition for Review, these issues were fully addressed in the Board's prior opinion affirming the administrative law judge. Under the "law of the case" doctrine an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999); *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). In its previous decision in the instant case, the Board held that substantial evidence in the form of claimant's testimony, which the administrative law judge found to be credible, supports the administrative law judge's finding that an accident occurred at work which could have caused claimant's harm and thus the Section 20(a) presumption was invoked. *See Dugas II*, slip op. at 5. Moreover, in remanding the case to the administrative law judge for a second time, the Board agreed with employer's argument that the administrative law judge on remand should consider the date on which claimant reached maximum medical improvement. *See id.* at 8-9. The administrative thereafter reconsidered this issue and concluded that as further treatment of claimant's condition appears to be in order, claimant has not yet reached maximum medical improvement, and employer does not challenge this specific finding. As employer, in its present appeal, has not demonstrated error in these findings by the administrative law judge, they are affirmed.

Regarding the issue of whether employer rebutted the Section 20(a) presumption, the Board in its previous decision affirmed the administrative law judge's determination that the medical opinions relied upon by employer were insufficient to rebut the presumption. *See Dugas II*, slip op. at 5-7, citing, *inter alia*, *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 98(CRT)(5th Cir. 2000), *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 2000), and *Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999). In *Conoco*, 194 F.3d at 689-690, 33 BRBS at 191-192(CRT), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant claim arises, found that the Board applied an incorrect legal standard to rebuttal in requiring "specific and comprehensive evidence *ruling out* a causal relationship between claimant's employment and her . . . injuries," and held that employer must only present "substantial evidence that the injury was not caused by the employment" in order to rebut the presumption. Nonetheless, the court affirmed the award of benefits as the administrative law judge did not err in his credibility determinations and none of the doctors disputed that claimant's pain and impairment stemmed in part from the work injury, thus bringing the claim within the aggravation rule. Relevant to the present case, the administrative law judge found the opinion of Dr. Hurst, which employer submitted on modification, was insufficient to rebut the presumption because the doctor, in opining that claimant's condition is caused by a systemic disease process as opposed to trauma, conceded (1) that his clinical suspicions would require additional diagnostic testing to confirm the cause of claimant's problem and (2) "that the door episode at work 'possibly' may have 'escalated or aggravated' claimant's

undulying condition. (EX 6, p. 43)." Decision and Order on Modification at 8. In affirming this conclusion, the Board stated that employer "failed to present a doctor's opinion which unequivocally stated that claimant's ulnar condition was not caused, aggravated, exacerbated or contributed to by the work incidents." *Dugas II*, slip op. at 6-7.

Subsequent to this decision, in *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5th Cir. 2003), the Fifth Circuit reinterated its holding regarding the substantial evidence standard for rebuttal. In *Ortco Contractors*, the court held that the use of language requiring evidence which "unequivocally states," or "affirmatively states" that a condition is not work-related in order to rebut the presumption indicates application of the rejected "rule out" standard. The court held that standard for rebuttal is precluded by the plain terms of the Act and reiterated that the "evidentiary standard for rebutting the Section 20(a) presumption is the *minimal* requirement that an employer submit only 'substantial evidence to the contrary.'" *Id.*, 332 F.3d at 289-290, 37 BRBS at 38-39(CRT)(emphasis in original). This intervening controlling authority requires that we re-examine our initial decision on this issue. For the reasons that follow, we reverse the administrative law judge's determination that employer did not rebut the Section 20(a) presumption of causation.

The first basis relied upon by the administrative law judge in finding Dr. Hurst's opinion was insufficient to rebut is that the doctor needed further testing to confirm his diagnosis of a non-work-related cause. However, employer is not required to prove another agency of causation in order to rebut Section 20(a), but must only produce substantial evidence that the condition is not work-related. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Thus, the fact that the doctor could not definitively diagnose the disease process he suspected does not render his opinion inadequate. The administrative law judge's second reason for rejecting Dr. Hurst's opinion involved the doctor's admission that a work-related aggravation of claimant's condition was possible. However, where a doctor gives an opinion to a reasonable degree of probability that a condition is not caused or aggravated by claimant's work, the opinion cannot be deemed insufficient merely because he admits a work nexus is a possibility. *Id.* at 41-42. In the present case, Dr. Hurst opined in a 1999 deposition that claimant's job did not cause his present medical condition and specifically stated that, while it is a possibility that claimant's employment aggravated his condition, such an aggravation is not probable. Emp. Ex. 6 at 45-46. Dr. Hurst was thereafter deposed for a second time in 2000, whereupon he testified that while there is always a thin remote possibility of a causal relationship between claimant's condition and his employment, it was his opinion within a 99 percent degree of certainty that such a causal relationship does not exist in the instant situation. Emp. Ex. 7 at 11, 22-23. It is clear from these depositions that while Dr. Hurst admitted that a work-related nexus was possible, he was simply acknowledging that he could not give an opinion with 100 percent certainty. He clearly stated, with more than a reasonable degree of certainty, that claimant's condition was not related to hitting his elbows at work as alleged. Dr. Hurst's opinion is thus substantial

evidence that claimant's condition is not related to his employment with employer and is sufficient to rebut the Section 20(a) presumption.[3] *See Ortco Contractors,* 332 F.3d 283, 37 BRBS 35(CRT). We must therefore vacate our prior decision and reverse the administrative law judge's conclusion that employer failed to rebut the Section 20(a) presumption. The case is remanded for the administrative law judge to weigh all of the evidence regarding the issue of causation.[4] *See Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT)(1994).

[3]We thus need not address employer's argument that Dr. Domingue's opinion also rebuts the presumption, although we note that the administrative law judge interpreted this opinion as a whole as supportive of a causal relationship. January 18, 2000, Decision and Order at 6.

[4]In his January 2000 decision prior to modification, the administrative law judge made an alternative finding of causation on the record as a whole. As that finding was based on the record prior to employer's submission of additional evidence on modification, the administrative law judge must reconsider the issue.

Accordingly, the administrative law judge's finding that employer failed to establish rebuttal of the Section 20(a) presumption is reversed, and the case is remanded for the administrative law judge to weigh all of the evidence regarding the issue of causation. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge