

BRB Nos. 03-255,
03-255A and 03-255B

RONALD L. JACOBSON)

Claimant-Respondent)

Cross-Petitioner-A)

v.)

MARINE TERMINALS)
CORPORATION)

DATE ISSUED: Dec 16, 2003

and)

MAJESTIC INSURANCE COMPANY)

Employer/Carrier-)

Petitioners)

Cross-Respondents)

and)

STEVEDORING SERVICES)
OF AMERICA)

and)

HOMEPORT INSURANCE)
COMPANY)

Employer/Carrier-)

Cross-Respondents)

Cross-Petitioners-B)

and)

COLUMBIA GRAIN,)
INCORPORATED)

and)	
)	
LIBERTY NORTHWEST)	
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
and)	
)	
JONES STEVEDORING COMPANY)	
)	
Self-Insured Employer)	
Respondent)	
)	
and)	
)	
ILWU/PMA WELFARE FUND)	
)	
Intervenor)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Decision and Order on Remand and the Order on Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock, Sherwood, Oregon, for Marine Terminals Corporation and Majestic Insurance Company.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for Stevedoring Services of America and Homeport Insurance Company.

Dennis R. VavRosky (VavRosky MacColl Olsen, P.C.), Portland, Oregon, for Columbia Grain, Incorporated and Liberty Northwest Insurance Corporation.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for Jones Stevedoring Company.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Marine Terminals Corporation (MTC) appeals and claimant and Stevedoring Services of America (SSA) cross-appeal the Decision and Order on Remand and the Order on Reconsideration (96-LHC-1748, 96-LHC-1976, 00-LHC-0055, 00-LHC-0056) of Administrative Law Judge William Dorsey 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 the 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).

This case is before the Board for a second time. Claimant, a general class B longshoreman who obtained work off the casual board, suffered the first of his work-related injuries on August 31, 1994, when he was struck on the back of the neck while dismantling a garment hanger container during the course of his employment with MTC. He underwent treatment from several physicians for this injury, finally obtaining regular treatment from Dr. Franks commencing January 1995. On or about January 9, 1996, claimant suffered a second work-related injury to his neck, left upper limb, low back, left buttock and left posterior thigh while hammering containers with a 25-pound mallet during the course of his employment with MTC. Claimant also subsequently developed a psychological injury due to pain associated with his work-related injuries. Claimant underwent additional treatment from several physicians for these injuries, and was found to have reached permanency by Dr. Franks on January 27, 1997. Claimant remained out of work due to his psychological injury until April 21, 1997, after which he returned to obtaining longshore work from the casual board.

In the initial decision by Administrative Law Judge Lindeman, claimant was found entitled to disability compensation and to medical expenses for the August 31, 1994 injury. Thus, in addition to MTC's voluntary payments of temporary total disability compensation at a weekly rate of \$363.16 from September 1 - 4, 1994, and from November 9, 1994 to September 10, 1995, 33 U.S.C. §908(b), the administrative law judge awarded claimant temporary partial disability compensation from September 4 -29, 1994, 33 U.S.C. §908(e), temporary total disability compensation from September 30 to

November 8, 1994, and permanent partial disability compensation at a weekly rate of \$63.87 from September 6, 1995 through January 12, 1996, and continuing from April 22, 1997, 33 U.S.C. §908(c)(21). The administrative law judge also concluded that claimant is not entitled to compensation for a 1995 knee injury as it was not caused by the 1994 work-related condition. Regarding the 1996 work-related injury, in addition to the voluntary temporary total disability compensation MTC paid for the period from January 13, 1996 through January 27, 1997, the administrative law judge ordered that MTC pay additional temporary total disability compensation from January 27, 1997 through April 21, 1997, due to claimant's work-related psychological condition, and any unpaid medical costs associated with the 1996 injury, but he denied additional permanent partial disability compensation for this injury. The administrative law judge denied MTC relief pursuant to Section 8(f), 33 U.S.C. §908(f), on the 1994 injury, but awarded Section 8(f) relief for the 1996 injury, and he ordered the Special Fund to commence payment of permanent partial disability 104 weeks after April 22, 1997. On reconsideration, the administrative law judge reiterated his prior finding that claimant is not entitled to permanent partial disability compensation for his 1996 injury, and he additionally concluded that claimant is not entitled to a *de minimis* award in connection with the 1996 injury. The administrative law judge also found that claimant is entitled to concurrent temporary total disability and permanent partial disability compensation from January 13, 1996 through April 21, 1997, and that claimant is required to reimburse the intervenor, the International Longshoreman's and Warehouseman's Union/Pacific Maritime Association Welfare Fund (the Welfare Fund), for medical and disability benefits it paid claimant.

Claimant appealed and the Director, Office of Workers' Compensation Programs (the Director), cross-appealed Judge Lindeman's decision to the Board. *Jacobson v. Marine Terminals Corp.*, BRB Nos. 98-1150/A (May 24, 1999). The Board affirmed the administrative law judge's finding that claimant's 1995 knee injury was not caused by his work-related neck condition. The Board vacated the administrative law judge's denial of compensation for permanent partial disability commencing on April 22, 1997, due to claimant's 1996 work-related neck and back injury. Based on the uncontradicted evidence of record that fewer hours of work are available to claimant, the Board held that the administrative law judge did not adequately explain his implicit conclusion that, notwithstanding claimant's additional work restrictions after his 1996 injury, claimant could work the same number of hours that he labored before this injury. The Board stated that claimant could establish a loss of wage-earning capacity based on his inability to work the same number of positions available to a casual laborer due to his work restrictions resulting from the 1996 injury. The Board also directed the administrative law judge to reconsider claimant's entitlement to a *de minimis* award should he find on remand no present loss of wage-earning capacity, and that he render reviewable findings in accordance with the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A). The Board vacated the administrative law judge's award of Section 8(f) relief to MTC for the 1996 injury, inasmuch as the administrative law judge found no loss of wage-earning

capacity due to this injury. Finally, in the event the administrative law judge awarded claimant additional permanent partial disability benefits for the 1996 injury on remand, the Board addressed and rejected the Director's contention that MTC did not establish the contribution element for Section 8(f) relief.

On remand, the case was assigned to Administrative Law Judge Dorsey due to the retirement of Judge Lindeman. In his decision on remand, the administrative law judge initially found that Section 13(a) of the Act, 33 U.S.C. §913(a), does not bar MTC from joining Columbia Grain, Incorporated (Columbia), Jones Stevedoring Company (Jones), and Stevedoring Services of America (SSA) as parties, and that claimant's deposition taken by MTC in 1999 is inadmissible, as these employers were not yet joined to the case at that time. The administrative law judge also rejected the contention by MTC that, due to a finding of total disability by the Social Security Administration, claimant is estopped from arguing that his May 2, 1997, injury during the course of his employment with Hall-Buck Marine, Incorporated (Hall-Buck), caused only a temporary period of disability. However, the administrative law judge found that MTC is not precluded from contending that Hall-Buck is the responsible employer for claimant's current disability.

The administrative law judge next addressed the nature and extent of claimant's disability, finding that claimant is temporarily totally disabled by the physical injuries he sustained on January 9, 1996, while employed by MTC, and the resulting psychological disability caused by these injuries. In this regard, the administrative law judge credited a November 1996 diagnosis by Dr. Davies of a pain disorder associated with his medical condition, including an unsuccessful cervical fusion and two low back surgeries, and with psychological factors, dependence on narcotic pain medications and sedatives, and a personality disorder. The administrative law judge found there is no evidence of record that claimant reached maximum medical improvement from his psychological condition. The administrative law judge found that MTC is the responsible employer for claimant's compensation and medical benefits, and he ordered MTC to provide treatment for claimant's psychological condition consisting of a multi-disciplinary inpatient evaluation and pain management program. The administrative law judge determined that claimant's subsequent injury with Hall-Buck resulted solely in bursitis of the left hip, which resolved, and that claimant's subsequent work activities with Columbia, Jones, and SSA caused only transient pain that resolved without aggravating claimant's condition. The administrative law judge concluded that claimant's present disability is a result of the natural progression of his 1994 and 1996 injuries with MTC.

The administrative law judge found MTC entitled to a credit for claimant's longshore earnings of \$7,126.96 during the period he returned to work from April 22 to July 30, 1997, and for disability compensation benefits totaling \$33,924.09, which Hall-Buck paid claimant in settlement of the claim for his May 2, 1997, hip injury. *See* 33 U.S.C. §908(i). The administrative law judge deemed moot claimant's petition for modification, 33 U.S.C. §922, of Judge Lindeman's decision denying claimant compensation for permanent partial disability resulting from the 1996 injury, on the basis

that he had reconsidered the nature and extent of claimant's disability due to the 1996 injury and awarded claimant ongoing compensation for temporary total disability. The administrative law judge denied MTC's petition for Section 8(f) relief as he found that claimant has not reached maximum medical improvement from the combination of his physical and psychiatric disabilities. Claimant was awarded \$3,078.82 as reimbursement for reasonable and necessary medical expenses. 33 U.S.C. §907(a). The administrative law judge declined to address the issue raised by SSA as to the amounts owed to the Welfare Fund for disability and advanced medical benefits to claimant, inasmuch as neither the Welfare Fund, claimant nor MTC raised the issue, and claimant was previously ordered by Judge Lindeman to reimburse the Welfare Fund. *See* 33 U.S.C. §917.

In his Order on Reconsideration, the administrative law judge denied MTC's motion that his responsible employer determination be held in abeyance pending claimant's psychological and physical evaluation. The administrative law judge also rejected the contention of both MTC and claimant that claimant's psychological and physical conditions reached maximum medical improvement on July 31, 1998. The administrative law judge declined to reverse his finding that MTC is entitled to a credit against its compensation liability equal to the amount of the Hall-Buck settlement, and a credit for claimant's longshore earnings from April 22 to July 30, 1997. The administrative law judge rejected claimant's contention that the amount of the credit taken by MTC for claimant's longshore earnings should be reduced to reflect the increase in the National Average Weekly Wage from 1995 to 1997. Finally, based on claimant's motion for reconsideration and the response by the Welfare Fund, the administrative law judge remanded the claim to the district director for further development of the issue of the Welfare Fund's entitlement to a lien for disability and medical benefits it had provided claimant due to his work injuries.

On appeal, MTC challenges the administrative law judge's finding that claimant's 1996 work injury did not reach maximum medical improvement, his ordering MTC to provide claimant an inpatient multi-disciplinary physical and psychological evaluation, his finding MTC to be the responsible employer, and the denial of MTC's motion to admit claimant's 1999 deposition. BRB No. 03-255. Claimant, SSA, Jones, and Columbia respond, urging affirmance of the administrative law judge's responsible employer determination. Claimant and SSA also urge affirmance of the administrative law judge's denial of MTC's motion to admit claimant's 1999 deposition. Claimant responds in agreement with MTC regarding the administrative law judge's ordering MTC to provide an inpatient multi-disciplinary evaluation, contending that the administrative law judge should have ordered MTC to provide reasonable and necessary medical care as directed by his treating physician, Dr. Gallegos. Claimant also cross-appeals the administrative law judge's finding that his 1996 work injury has not reached maximum medical improvement, and the administrative law judge's awarding MTC a credit equal to the amount of his settlement with Hall-Buck and a credit for his longshore earnings from April 22 to July 30, 1997. Claimant further challenges the administrative law

judge's refusal to adjust the amount of the credit given to MTC for his longshore earnings based on the increase in the National Average Weekly Wage from January 9, 1996, to July 1997. Claimant contends the administrative law judge erred by failing to require MTC to pay claimant \$14,633.89 to reimburse the Welfare Fund for medical benefit payments that Judge Lindeman had ordered claimant to pay the Welfare Fund. Finally, claimant challenges the administrative law judge's apparent termination of claimant's compensation benefits for temporary total disability upon his completion of the inpatient multi-disciplinary evaluation. BRB No. 03-255A. MTC responds, urging affirmance of the administrative law judge's awarding of a credit for the Hall-Buck settlement and for claimant's longshore earnings, and the administrative law judge's decision to remand to the district director the issue of the Welfare Fund's entitlement to reimbursement. Columbia responds, urging affirmance of the administrative law judge's award of a credit for the Hall-Buck settlement. SSA appeals the administrative law judge's finding that Section 13(a) does not preclude MTC from joining it to the claim. BRB No. 03-255B. Jones responds in agreement with SSA's appeal. MTC responds, urging affirmance of the administrative law judge's finding in this regard.

MTC first argues that the administrative law judge exceeded the scope of the Board's remand order. Specifically, since Judge Lindeman found claimant permanently disabled upon his return to work in April 1997, MTC challenges Judge Dorsey's addressing the nature of claimant's disability due to his January 1996 work injury, and his finding that claimant is temporarily disabled. In his decision, the administrative law judge construed the Board's remand instructions as requiring him to consider anew the nature and extent of claimant's disability due to the January 9, 1996, injury. Decision and Order at 4. In this regard, the Board remanded for the administrative law judge to reconsider his findings as to the extent of claimant's permanent partial disability from April 22, 1997, due to his 1996 injury. The Board stated that the administrative law judge may re-open the record on remand to admit evidence regarding claimant's actual post-injury wages or any other evidence necessary to calculate his wage-earning capacity. *Jacobson*, BRB Nos. 98-1150/A, slip op. at 8-9.

In this case, claimant had been back to work for only three weeks at the time of the May 13, 1997, hearing before Judge Lindeman. Thus, there is little evidence in the original record regarding claimant's wage-earning capacity after he returned to work on April 22, 1997. Claimant also filed, on March 23, 1999, a motion for modification of Judge Lindeman's decision, contending that his neck condition had substantially worsened, that he has been unable to work since August 1, 1997, and that he required re-fusion of his neck at C3-4 and C5-6 on April 7, 1998. Additionally, claimant sustained a work-related injury on May 2, 1997, during the course of his employment with Hall-

Buck.¹ A second hearing was conducted before Judge Dorsey on August 16, 2001. In his July 13, 2001, pre-hearing statement, claimant asserted entitlement to compensation for permanent total disability or permanent partial disability from April 22 to July 30, 1997, temporary total disability from July 31, 1997, to July 31, 1998, and permanent total disability from July 31, 1998. MTC joined as potentially responsible employers Columbia, Jones, and SSA for whom claimant obtained casual employment between April 22 and July 30, 1997. MTC also asserted that claimant's May 2, 1997, injury with Hall-Buck aggravated his neck and back conditions, and that Hall-Buck is the responsible employer. At the hearing, claimant, MTC, and SSA submitted medical and vocational evidence addressing claimant's physical and psychological disabilities after April 22, 1997.

We hold that the administrative law judge acted within his discretion to reconsider on remand the nature and extent of claimant's disability after he returned to work on April 22, 1997. The Board expressly stated that the administrative law judge could re-open the record for evidence of claimant's wage-earning capacity after April 22, 1997, and moreover, claimant requested Section 22 modification of Judge Lindeman's denial of compensation for permanent partial disability after April 22, 1997. Claimant specifically raised entitlement to compensation for permanent total disability before August 1, 1997, and for temporary total disability from August 1, 1997. As the burdens of proof are essentially the same, the administrative law judge did not err in awarding temporary total disability benefits prior to August 1, 1997. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Furthermore, given the limited record before Judge Lindeman at the May 13, 1997, hearing regarding claimant's disability after he returned to work on April 22, 1997, the events subsequent to the hearing, and the broad scope of modification proceedings, the administrative law judge did not err in considering all issues related to the nature and extent of claimant's disability after April 22, 1997. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Bath Iron Works Corp. v. Director, OWCP (Hutchins)*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

¹ Claimant and Hall-Buck settled the claim for compensation and medical benefits, with Hall-Buck paying claimant \$10,000. The parties also negotiated a hold-harmless agreement for \$23,924.09 in time loss benefits claimant received from the Welfare Fund for the period from August 1, 1997 to August 1, 1998. Hall-Buck agreed to pay, adjust or litigate on claimant's behalf any claim for repayment of these benefits by the Welfare Fund. Judge Dorsey approved the settlement in a decision issued on August 3, 2001. 33 U.S.C. §908(i).

Alternatively, MTC asserts that, in finding that claimant's disability is temporary in nature, the administrative law judge failed to comply with Section 702.336(b), 20 C.F.R. §702.336(b), which states that the administrative law judge must provide the parties with notice when he raises a new issue, and he must hold the record open to provide the parties with an opportunity to respond. Specifically, MTC argues that the administrative law judge failed to provide the parties with notice that he would address the nature of claimant's disability after his return to work on April 22, 1997.

The administrative law judge, however, did not, *sua sponte*, raise claimant's entitlement to compensation for temporary total disability. Claimant raised the issue in his motion for modification and in his pre-hearing statement. Moreover, in his closing briefs, claimant specifically linked his entitlement to temporary total disability benefits from August 1, 1997, to July 31, 1998, in part, to his psychological condition. Claimant's October 15, 2001, closing brief at 25-26; claimant's November 15, 2001, closing reply brief at 3-4, 7, 9. In its closing reply brief, MTC responded to claimant's assertion of a psychological disability, but did not address claimant's assertion of resulting temporary disability. MTC's December 6, 2001, closing reply brief at 1-6. Accordingly, MTC had notice of and an opportunity to respond to claimant's assertions of temporary disability after April 22, 1997, due to his work-related psychological condition, and we therefore reject the assertion of MTC that the administrative law judge addressed this issue without complying with Section 702.336(b). *See generally Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

MTC and claimant appeal the administrative law judge's finding that claimant's 1996 injury has not reached maximum medical improvement. MTC argues that claimant has not worked for six years, and the prospect that claimant's psychological condition will improve with treatment is not a rational basis for finding that claimant's psychological disability is not permanent in nature. Claimant asserts that his neck reached maximum medical improvement on July 31, 1998, *see* CX 34 at 202,² and that his psychological condition also reached maximum medical improvement by that time.

² At his final examination of claimant's neck on July 31, 1998, Dr. Berkeley opined that claimant had made an excellent recovery and that his neurological examination was essentially normal. Dr. Berkeley advised claimant against continued longshore work, imposed work restrictions, and limited claimant to light work. MTC 15 at 252.

Claimant argues that his psychological condition is not likely to improve with treatment given the length of time his condition has gone untreated.³

In his decision, the administrative law judge found that claimant is entitled to compensation for temporary total disability from the date of his January 9, 1996, injury due to his physical injuries and the psychological effects of those injuries. The administrative law judge credited the November 1996 diagnosis of Dr. Davies that claimant has a pain disorder, dependence on narcotic pain medications and sedatives, and a personality disorder. MTC 3 at 18. The administrative law judge found there is no evidence that claimant has reached maximum medical improvement from these psychiatric conditions. Decision and Order at 34. On reconsideration, the administrative law judge rejected the contentions of claimant and MTC that he render a finding of maximum medical improvement based solely on claimant's orthopedic conditions, as he determined that these injuries are interrelated with claimant's psychological condition. Order on Recon. at 8-9.

We affirm the administrative law judge's finding that claimant's condition remains temporary despite that the work injury occurred in 1996, as it is rational and supported by substantial evidence. In this case, the administrative law judge credited the opinions of numerous physicians that claimant should undergo treatment for his psychiatric conditions and drug dependency. Decision and Order at 36-37. Thus, the administrative law judge rationally declined to find that claimant's psychological impairment became permanent as of the date claimant's physical condition became permanent. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Moreover, the administrative law judge correctly observed the absence of any medical evidence addressing the permanency of claimant's psychological condition, and MTC and claimant do not raise any error in this regard. As the uncontradicted evidence of record establishes that claimant requires medical treatment for his work-related psychological condition, we affirm the administrative law judge's finding that claimant has not reached maximum medical improvement. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Jenkins v. Kaiser Aluminum & Chemical Sales Co.*, 17 BRBS 183 (1985). Accordingly, as there

³ We reject claimant's contention that the administrative law judge's finding places the burden on him to establish that he cannot perform any work, after such time as his condition is found to be permanent. Claimant was awarded compensation for temporary total disability. On modification, it would be MTC's burden to show that claimant has a post-injury wage-earning capacity. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003). Moreover, MTC would likely also seek to establish that claimant's psychological condition is at maximum medical improvement. Pursuant to the decision of Judge Lindeman, MTC has established entitlement to Section 8(f) relief should claimant become entitled to permanent disability benefits.

are no other contentions of error with regard to the administrative law judge's award of temporary total disability benefits, we affirm this award.

MTC next challenges the administrative law judge's order to provide claimant with an inpatient multi-disciplinary evaluation, and to authorize any treatment recommended as a result of this evaluation. Judge Lindeman found that claimant has a psychological condition related to his 1996 injury with MTC. *Jacobson v. Marine Terminals Corp.*, 96-LHC-1748, 1976, slip op. at 17 (Mar. 23, 1998). Specifically, he and Judge Dorsey found that claimant has serious psychiatric impairments from anxiety and depression that are related to his 1996 work injury with MTC. *Id.*; Decision and Order at 24. Claimant, therefore, is entitled to medical services for the treatment of these conditions. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999).

Claimant's treating physician, Dr. Gallegos, first saw claimant in February 1996 with complaints of left leg pain. CX 41 at 256. Dr. Gallegos began prescribing claimant psychotropic drugs in April 1996 based on claimant's complaints of anxiety and depression. *Id.* at 264-291. Claimant was evaluated for MTC by Dr. Davies, a neuropsychologist, in November 1996. Dr. Davies diagnosed a pain disorder, dependence on narcotic pain medications and sedatives, and a personality disorder. MTC 3 at 18. Neither Dr. Davies nor Dr. Gallegos imposed any work restrictions based on claimant's psychological complaints and Dr. Gallegos released him to return to work on April 22, 1997. Dr. Gallegos, however, continued prescribing medication for anxiety and depression, as well as narcotic pain medication. CX 15 at 112-132.

A month after his April 1998 cervical fusion surgery by Dr. Berkeley, claimant presented to the emergency room at Emanuel Hospital and Health Center on May 13, 1998, complaining of chronic neck pain and requesting information on physician-assisted suicide. Claimant was admitted to the psychiatric unit, where he was diagnosed with recurrent major depression and adjustment disorder. SSA 8 at 569-578. Dr. Berkeley's reports on claimant's post-surgical neck condition state that claimant had no neurological deficits; however, he opined that claimant required psychiatric treatment, and he informed Dr. Gallegos of his concerns in both May and June 1998. CX 33 at 199-201; MTC 15 at 249. Dr. Gallegos discontinued prescribing narcotic medications in response to claimant's suicidal ideation, and he recommended that claimant see a psychiatrist. CX 17 at 133-134. Claimant was examined by Dr. Gold, a psychiatrist, on July 17, 1998. CX 40 at 236-240. Dr. Gold diagnosed major depression or chronic adjustment disorder. Claimant testified that he discontinued treating with Dr. Gold since his insurance paid only twenty percent of the treatment cost. Tr. at 122; CX 53 at 457-458. Dr. Gallegos resumed prescribing narcotic pain medication in August 1998, an anti-depressant in September 1998, and an anti-anxiety drug in October 1998. CX 17 at 137, 139-140.

In February 1999, Dr. Gallegos reported that claimant requires a physical and psychiatric evaluation regarding the limits on his ability to work, but that no insurance

plan will provide the evaluation. CX 17 at 145. Dr. Gallegos specifically testified that on one occasion he spoke with an adjuster representing MTC who became “emotional” and “offensive” towards claimant, and she stated that she “was not even going to discuss” MTC’s providing claimant a physical capacities and mental health evaluation. SSA 7 at 503-504. Claimant returned to Dr. Gold in March 1999 at the urging of his attorney. CX 40 at 245-248. Claimant saw Dr. Gold two additional times in April 1999 before he discontinued treatment. Dr. Gold noted claimant’s payment concerns. In June 1999, Dr. Gallegos referred claimant to Advanced Pain Management Center, whose bills were only partially paid under claimant’s union health plan, and the plan terminated coverage at this facility in October 2000. CXs 17 at 150; 53 at 461. Finally, on July 13, 1999, Dr. Gallegos opined that claimant has been totally disabled due to his psychological condition since July 31, 1997, and that he remains disabled. CX 17 at 141; *see also* MTC 17 at 262; SSA 7 at 500-501.

In his decision, the administrative law judge found that claimant’s psychological condition warrants further evaluation and multi-disciplinary treatment. The administrative law judge concluded that an inpatient evaluation and pain management program is necessary to determine the extent of claimant’s psychological and physical disabilities and to develop an appropriate course of treatment to reach maximum medical improvement. Decision and Order at 25, 36-37. The administrative law judge specifically credited the reports of Drs. Schmidt and Seres, and the testimony of Dr. Vessely. Dr. Schmidt, a neurosurgeon, evaluated claimant in December 1997. He recommended a thorough multi-disciplinary evaluation, including a report from a psychologist, before he would prescribe any treatment. CXs 27 at 183, 187; 28 at 188. Dr. Seres, another neurosurgeon, examined claimant in February 1999. He also recommended a multi-disciplinary pain management program. SSA 6 at 380-381. Dr. Vessely, an orthopedic surgeon, evaluated claimant in July 2001. He opined that claimant needed inpatient hospital treatment to reduce his drug dependency. SSA 6 at 280-284, 343-344.

An administrative law judge may order specific medical care which has been recommended by claimant’s physician and which the employer refused to authorize. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff’d mem. sub nom Sea Tac v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). In this case, Dr. Gallegos noted in February 1999 that claimant requires a physical and psychiatric evaluation. He testified that MTC was not willing to even discuss authorizing such an evaluation. Based on Dr. Gallegos’s recommendation in 1999 that claimant undergo a physical and psychiatric evaluation, the refusal by MTC to provide such an evaluation, and the supporting opinions of Drs. Schmidt, Seres, and Vessely, we hold that the administrative law judge’s ordering MTC to provide a multi-disciplinary inpatient evaluation and pain management program is rational and supported by substantial evidence. *See Caudill*, 25 BRBS 92. Therefore, we affirm the award of this treatment.

MTC next challenges the administrative law judge's responsible employer determination. Specifically, MTC contends that the administrative law judge erred by requiring MTC to prove that claimant's ultimate disability is not the consequence of his injuries with MTC. MTC argues that a showing by the initial employer of a subsequent injury shifts the burden to the subsequent employer to show no contribution during the course of claimant's employment with the subsequent employer. Thus, in this case, MTC argues that the burden of proof was on Columbia, Jones, and SSA to show that claimant's 1996 work injury was not aggravated during the course of his employment for them from April 22 to July 30, 1997.

The Ninth Circuit has held that, in cases of multiple traumatic injuries, if the disability resulted from the natural progression of the prior injury, and would have occurred notwithstanding the subsequent injury, then the responsible employer is the one at the time of the initial injury. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624, 25 BRBS 71, 75(CRT) (9th Cir. 1991), citing *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). However, if the second injury aggravated, accelerated or combined with the earlier injury, resulting in claimant's disability, the employer for whom claimant worked at the time of the second injury is the responsible employer. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003). In *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001), the Board stated that, in cases of multiple traumatic injury,

resolution of [the responsible employer] issue involves the weighing of the evidence of record; in this sense, each employer's burden is more properly considered to be that of persuasion, rather than of production, as each employer bears the burden of persuading the fact finder, by a preponderance of the evidence, that the claimant's disability is due to the injury with the other employer.

Buchanan, 33 BRBS at 35. Thus, the initial employer need not establish that the injury claimant sustained in its employ played no role in claimant's disability in order to be absolved of liability. It need establish only that the injury claimant sustained during the subsequent employment aggravated, accelerated or combined with claimant's prior injury to result in claimant's disability. *Id.* at 36. Pursuant to *Buchanan*, therefore, it was the burden of MTC to establish that a subsequent injury contributed to claimant's disability.

In this case, the administrative law judge, after quoting *Buchanan*, correctly stated the burden of each employer to establish that another employer is responsible for claimant's injury. Decision and Order at 38; *see also* Order on Recon. at 5. The administrative law judge then discussed the evidence which MTC contended shifted liability to a subsequent employer, and he instead credited the opinion of claimant's treating neurosurgeons for his neck and back conditions, Drs. Franks and Berkeley, and

his treating internist, Dr. Gallegos, that no work claimant performed after April 22, 1997, aggravated or combined with claimant's 1994 and 1996 injuries with MTC. Decision and Order at 38-40; *see* SSAs 4 at 166-173, 176-177, 191-193; 7 at 465, 491,495, 512; CXs 16 at 97-100, 109-110; 51 at 390-391, 416-423, 435, 440. The administrative law judge found that claimant suffered only transient pain upon his return to work in April 1997, and that claimant's injury on May 2, 1997 with Hall-Buck caused only left hip bursitis, which resolved. Decision and Order at 40. The administrative law judge also found that the final opinions of Drs. Wayson, Seres, and Vessely are that claimant's condition is due to the natural progression of his injuries with MTC, especially from his failed cervical fusion. *Id.* at 39-40; *see also* CXs 35, 36; SSAs 5 at 225, 238, 240-243; 6 at 280-283, 350. Accordingly, we hold that the administrative law judge applied the proper standard in evaluating the relevant evidence.

MTC also contends that the administrative law judge's responsible employer determination fails to comply with the APA in that the administrative law judge failed to discuss the effects of claimant's employment after April 22, 1997, on his psychological condition, nor did the administrative law judge discuss the affidavit by claimant's attorney attached to claimant's March 1999 motion for modification in which claimant's attorney stated that claimant re-injured his lower back and neck on May 2, 1997, while working for Hall-Buck.

At the hearing, MTC contended that claimant's psychological condition resulted solely in a three-month period of permanent total disability from January to April 22, 1997. MTC Closing Argument at 43-45; Closing Reply Argument at 3-6. Moreover, MTC proffered no evidence for the administrative law judge to consider with respect to its contention that claimant's psychological condition was aggravated by his post-April 22, 1997 employment. On reconsideration, the administrative law judge rejected MTC's contention that the subsequent employers must establish that claimant's physical or psychological condition was not aggravated by claimant's employment with them, and he found that MTC failed to make its case that it is not the responsible employer. Order on Recon. at 5. Inasmuch as the administrative law judge explicitly rejected on reconsideration that the subsequent employers must show the absence of psychological aggravation, and MTC provided no evidence that claimant's psychological condition actually was aggravated by his subsequent employment, we hold that the administrative law judge was not required by the APA to further address MTC's contention of a subsequent psychological aggravation.

Moreover, we hold harmless any error in the administrative law judge's failure to address the affidavit of claimant's attorney regarding the alleged aggravation of claimant's 1996 injury by claimant's subsequent employment with Hall-Buck. The administrative law judge properly addressed the relevant medical evidence relating to his responsible employer determination pursuant to the applicable law. The administrative law judge specifically found the medical evidence more convincing than claimant's statements made after his May 2, 1997 injury. *See* Decision and Order at 30, 35, 39.

Thus, the administrative law judge was not required by the APA to address the affidavit of claimant's attorney, as the administrative law judge rationally relied on the medical evidence of record to determine that MTC is the responsible employer. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980).

MTC challenges the administrative law judge's finding inadmissible claimant's February 1999 deposition. MTC sought to introduce the deposition for the purposes of attacking claimant's credibility, showing that claimant's 1997 injury at Hall-Buck contributed to his ultimate disability, and establishing that claimant is estopped from denying a causal contribution from the 1997 Hall-Buck injury. After their joinder, Columbia, Jones, and SSA objected to the admission of claimant's February 1999, deposition, inasmuch as they were not yet parties to the case at the time the deposition was taken, and thus, they did not have the opportunity to cross-examine claimant. They asserted that claimant was unable to remember much of his 1999 deposition testimony at his deposition in 2001, which rendered useless their examinations of claimant regarding his prior testimony.

In his decision, the administrative law judge agreed with the contentions of the joined employers, and he ruled that due process considerations preclude the admission of claimant's February 1999 deposition. Decision and Order at 29-30. Additionally, the administrative law judge found that his ruling on the deposition makes little difference to the outcome of the case as he found claimant's testimony unpersuasive because of his poor memory. The administrative law judge stated that he was disinclined to rely on anything claimant said at the hearing and in his 2001 deposition in the absence of some corroboration, and he would similarly accord little weight to the February 1999 deposition. *Id.* at 30.

The administrative law judge has great discretion concerning his evidentiary rulings, which the Board will reverse only if they are shown to be arbitrary, capricious, or an abuse of discretion. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003). In this case, the administrative law judge rationally determined that the absence at claimant's February 1999 deposition of the subsequently joined employers precludes the deposition's admission into evidence for the purpose of determining the responsible employer. *See Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). The administrative law judge also acted within his discretion by not admitting the deposition for the limited purpose of impeaching claimant's credibility. The administrative law judge specifically gave limited weight to claimant's testimony, and he found that claimant's statements made after 1997 were not credible absent some corroboration. Thus, the administrative law judge was not required to admit claimant's 1997 deposition as further evidence impeaching claimant's credibility. Accordingly, as MTC's contentions regarding the administrative law judge's responsible employer determination and evidentiary rulings are without merit, and as the administrative law judge's findings

are rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's conclusion that MTC is the employer responsible for claimant's compensation and medical benefits.⁴

Claimant next challenges the administrative law judge's finding that MTC is entitled to a credit for the disability compensation benefits claimant received from Hall-Buck for his May 2, 1997, work injury, pursuant to a Section 8(i) settlement. In the approved settlement agreement, claimant received \$10,000, plus Hall-Buck assumed responsibility for \$23,924.09 in time loss benefits, which claimant received from the Welfare Fund for the period from August 1, 1997, to August 1, 1998.

In his decision, the administrative law judge found that claimant is not entitled to be compensated twice for any period, and he allowed MTC a credit for the amount of claimant's settlement with Hall-Buck. Decision and Order at 40. On reconsideration, the administrative law judge rejected claimant's contention that MTC is not entitled to a credit for the settlement, pursuant to *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2001), as the cases are factually dissimilar. In *Alexander*, the United States Court of Appeals for Ninth Circuit, within whose jurisdiction this case arises, held that the liable employer is not entitled to a credit for amounts claimant receives pursuant to Section 8(i) settlements with other potentially liable employers in the same occupational disease claim. *Accord New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *pet. for cert. pending*, No. 03-366 (Sept. 8, 2003). The administrative law judge found *Alexander* distinguishable, in that it addressed settlement payments made by multiple employers for the same disability, whereas in this case, claimant received a settlement from Hall-Buck for a left hip injury, and MTC is the responsible employer for claimant's back, neck, and psychological conditions. Although *Alexander* is factually distinguishable from this case, we nonetheless hold that the administrative law judge erred in awarding MTC a credit for the Hall-Buck settlement.

The extra-statutory credit doctrine originated from the aggravation rule, which requires an employer to pay full compensation for an employee's entire disability, even if the work-related injury simply aggravated a pre-existing disability.⁵ *See generally Todd*

⁴ Given our disposition of the responsible employer issues, we decline to address SSA's contention, BRB No. 03-255B, that it was improperly joined as a party to the claim because MTC failed to request joinder within one year after claimant was aware, or should have been aware, that his longshore employment from April 22 to July 30, 1997, may have aggravated his neck and back conditions. *See generally Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985).

⁵ The credit provided by Section 3(e) of the Act, 33 U.S.C. §903(e), is not available in this case, as the Hall-Buck settlement was entered into under the Act, and not a different workers' compensation statute or the Jones Act. *See I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989)

Shipyards Corp. v. Director, OWCP [Clark], 848 F.2d 125, 21 BRBS 114(CRT) (9th Cir. 1988). The credit doctrine applies in cases where the worker has been actually compensated for disability to the same body part at a previous point in time; in order to avoid a double recovery to the claimant, the subsequent employer's liability for the aggravation of the impairment is reduced by the amount the worker has previously received for a part of the overall impairment to the same body part. See generally *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); see also *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); cf. *I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989) (subsequent employer not entitled to a credit for Section 8(i) settlement with earlier employer for injury to same body part where subsequent employment aggravated the earlier injury). In this case, neither the aggravation rule nor the credit doctrine applies as the Hall-Buck settlement for an injury to claimant's left hip is for an injury to a different body part than the back, neck, and psychological injuries for which claimant was awarded compensation payable by MTC. See *Alexander*, 297 F.3d at 808-809, 36 BRBS at 27(CRT); *Clark*, 848 F.2d at 127, 21 BRBS at 116(CRT); see also *Transbay Container Terminal v. U.S. Dep't of Labor, Benefits Review Board*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998). In this case there is no double recovery for the same injury, and thus MTC is not entitled to a credit for the amount of the Hall-Buck settlement.⁶

Claimant next argues that the administrative law judge erred by allowing MTC a credit of \$7,126.96 for claimant's actual longshore earnings from April 22 to July 30, 1997. The administrative law judge awarded claimant compensation for temporary total disability during this period, as he found that claimant was physically incapable of performing longshore work when he returned to work in April 1997. Decision and Order at 35. The administrative law judge credited evidence that claimant either had to request a replacement worker because he could not perform his assigned duties, or he depended on other longshore workers to perform his duties for him. *Id.* at 8-10. On reconsideration, the administrative law judge rejected claimant's contention that, as in cases of sheltered employment, claimant should be able to retain the wages he received as a result of being carried by sympathetic co-workers while he was totally disabled. The administrative law judge also found that during this period claimant was not working due to extraordinary effort. Order on Recon. at 6-7.

We reverse the administrative law judge's awarding MTC a credit of \$7,126.96 for claimant's earnings from April 22 to July 30, 1997. See generally *Cooper*, 33 BRBS at 53. The administrative law judge found that claimant was totally disabled during this

⁶ We note that our holding is consistent with the Ninth Circuit's concern in *Alexander* against "overzealously" extending the credit doctrine and thereby discouraging settlement of claims under the Act. See *Alexander*, 297 F.3d at 809, 36 BRBS at 27(CRT).

period as he could not physically perform his usual longshore employment, and that his earnings during this period were the result of the beneficence of his co-workers. These findings are not challenged on appeal. Where a claimant establishes that he has been working in sheltered employment or as a result of extraordinary effort, he has been found entitled to compensation for total disability because the employer has not established suitable alternate employment. See *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Lewis v Haughton Elevator*, 5 BRBS 62 (1976), *aff'd*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978). In this case, we hold that the administrative law judge erred by finding the sheltered employment exception inapplicable because claimant relied on the beneficence of his co-workers rather than on the beneficence of an employer itself. In either case, as the administrative law judge found that claimant has no wage-earning capacity as he is physically unable to perform his assigned work due to his January 1996 injury and the medication prescribed therefore, he is entitled to compensation for total disability. See *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *aff'g in part, part, Patterson v. Savannah Machine & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting); *Proffitt v. E.J. Bartells Co.*, 10 BRBS 435 (1979). In the absence of any evidence that claimant's wages were intended as advance payments of compensation, MTC is not entitled to a credit of \$7,126.96 for claimant's actual longshore earnings from April 28 to July 30, 1997, as the administrative law judge found claimant received these wages solely due to the beneficence of his co-workers.⁷ See 33 U.S.C. §914(j); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Patterson*, 15 BRBS at 43.

Claimant next argues that the administrative law judge erred by failing to order MTC to pay claimant \$14,633.89 so claimant may pay this amount to the Welfare Fund for medical benefits it provided claimant for his 1994 and 1996 injuries. In his decision, the administrative law judge declined to address this issue as it was raised by SSA, and not by claimant, MTC, or the Welfare Fund. Additionally, the administrative law judge found that claimant was previously ordered to reimburse the Welfare Fund by Judge Lindeman. Decision and Order at 41. Claimant moved for reconsideration of this issue, and the Welfare Fund responded, requesting reimbursement of \$74,354.20 in advanced medical benefits and \$23,924.09 in disability benefits. On reconsideration, the administrative law judge stated that as the parties first developed and submitted evidence on the credit on reconsideration, the issue should first be considered by the district director. Accordingly, the administrative law judge remanded the lien claim for initial consideration by district director. Order on Recon. at 8; see 20 C.F.R. §702.336(a).

On appeal, claimant challenges the administrative law judge's failure to address MTC's liability for the \$14,633.89 medical benefits lien that was initially awarded by

⁷ Accordingly, we need not address claimant's contention that any credit to MTC based on these earnings should be reduced by the percentage increase in National Average Weekly Wage.

Judge Lindeman. *See Jacobson v. Marine Terminals Corp.*, 96-LHC-1748, 1976, slip op. at 4 (May 6, 1998) (decision on recon.). On reconsideration, Judge Lindeman rejected claimant's argument that MTC should be found liable to reimburse the Welfare Fund, which he found would result in a double recovery to claimant. *Id.* Claimant did not appeal Judge Lindeman's reimbursement order. In its decision, the Board affirmed all unappealed findings, *Jacobson v. Marine Terminals Corp.*, BRB No. 98-1150A, slip op. at 12, and claimant may not now appeal Judge Lindeman's determination. *Ravalli v. Pasha Maritime Services*, 36 BRBS 91, *denying recon. in* 36 BRBS 47 (2002). As the case is pending before the district director, claimant may raise his contentions there and may appeal any adverse findings that are ultimately issued by an administrative law judge.

Finally, claimant asserts that the administrative law judge's decision and his order on reconsideration may be construed as terminating claimant's entitlement to compensation for temporary total disability after claimant undergoes an inpatient multi-disciplinary evaluation. In his decision, the administrative law judge ordered MTC to pay claimant compensation for temporary total disability from January 9, 1996, to the present. Decision and Order at 42. In the text of his Order on Reconsideration, the administrative law judge, in addressing the parties' contentions that he erred in finding claimant's condition temporary, stated, "I deem Claimant temporarily and totally disabled at least until he undergoes an inpatient multi-disciplinary evaluation. . . . MTC shall continue to pay disability benefits for the January 9, 1996 from that date until the evaluation takes place." Order on Recon. at 9. Section 22 provides the only means for changing otherwise final compensation orders. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Thus, any ambiguity in the administrative law judge's decisions regarding the duration of claimant's compensation award must be resolved in favor of providing for a continuing award, as such awards are indicated by the plain language of the Act. *See* 33 U.S.C. §908(a), (b), (c)(21), (c)(23) (benefits paid during the continuance of such disability); *see also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990). Accordingly, we hold that the administrative law judge's decision provides for a continuing award of compensation for temporary total disability, subject to modification under Section 22 of the Act.

Accordingly, the administrative law judge's award of a credit to MTC for claimant's settlement agreement with Hall-Buck, and for claimant's longshore earnings from April 28 to July 30, 1997, are reversed. In all other respects the administrative law judge's Decision and Order on Remand and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge