BRB No. 11-0254

DALLAN WALTERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS/VERTEX AEROSPACE	)	DATE ISSUED: 12/21/2011
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Keith L. Flicker and Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2009-LDA-0268) of Administrative Law Judge Patrick M. Rosenow 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 was employed in Kuwait as a mechanic. Claimant's duties involved performing heavy wheel maintenance and installing armor on vehicles. On May 29, 2005, claimant injured his back while removing a hub from a truck. Claimant continued to work for employer, albeit in modified duty, until August 17, 2005, when he returned to the United States for treatment. Dr. Craven diagnosed claimant's condition as a disc herniation and degeneration at L5–S1, and, on September 9, 2005, Dr. Craven performed back surgery on claimant for these conditions. Upon receiving a medical release on August 23, 2006, claimant attempted to return to work for employer. However, employer informed him that no work was available. Although claimant continued to experience back symptoms and pain,[1] for which he sought medical care from Dr. Craven, he commenced employment with Duit Construction (Duit) on February 25, 2007. On September 12, 2007, claimant experienced another back "catch" episode while working for Duit. Claimant testified that the work he was doing at the time was not physically difficult and occurred when he rolled over under the vehicle on which he was working. Tr. at 49. Claimant remained employed with Duit until October 25, 2007, when he was terminated in part due to his back symptomatology. He has not been gainfully employed since he left Duit's employ on October 25, 2007.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his current back condition is related to the work injury, and that employer did not establish rebuttal of that presumption. Assuming, *arguendo,* that employer rebutted the Section 20(a) presumption, the administrative law judge found that claimant established that his present back condition is causally related to his initial work-related injury. The administrative law judge found that claimant's period of employment with Duit from February 25 through October 25, 2007, constituted suitable alternate employment, and that claimant experienced no loss in wage-earning capacity during this period of time. The administrative law judge found that claimant has been totally disabled since October 25, 2007. The administrative law judge awarded claimant temporary total disability compensation from August 17, 2005, through August 10, 2006, permanent total disability compensation from August 11, 2006, through February 24, 2007, and permanent total disability compensation from October 26, 2007, and continuing, as well as medical benefits. 33 U.S.C. §§908(a), (b), 907.

On appeal, employer challenges the administrative law judge's award of disability and medical benefits to claimant subsequent to October 26, 2007. Claimant responds, urging affirmance of the administrative law judge's Decision and Order in its entirety.

[1]Claimant described his back symptoms as "catches" or twinges that caused pain and soreness in his back. *See* Tr. at 46.

Employer contends the administrative law judge erred in finding that claimant's current back condition is due to the work injury and not to an intervening event during his employment at Duit. Where, as in this case, it is presumed, pursuant to Section 20(a), that claimant's disabling condition is related to the work accident, employer can rebut it by producing substantial evidence that claimant's disabling condition is due to a subsequent event which is not the natural or unavoidable result of the original work injury. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *see also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). In this case, employer asserts that an incident occurred on September 12, 2007, while claimant was employed by Duit, that constitutes an intervening cause of claimant's disability; employer asserts therefore that it is not liable for any disability or medical benefits following this incident.

This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has applied two seemingly different standards for determining whether an event constitutes a supervening cause. *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);[2] *Bludworth*, 700 F.2d 1046, 15 BRBS 120(CRT); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). One standard requires the supervening cause to originate entirely outside of the employment and to overpower and nullify the initial work injury. *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951). The other standard holds that a work injury worsened by an independent cause could constitute a supervening injury. *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on reh'g on other grounds*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997). However, where the subsequent injury is not the natural or unavoidable result of the work injury but is the result of an independent supervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Employer remains liable for any disability attributable to the initial injury. *Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979).

[2]Most recently, in *Shell Offshore*, the Fifth Circuit declined to decide which standard is the operative standard, as, on the facts of that case, the employer did not meet either standard for a supervening cause. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

We affirm the administrative law judge's finding that employer did not establish that claimant sustained a supervening injury while employed with Duit. The fact that claimant experienced back symptoms subsequent to the termination of his employment with employer and during his employment with Duit does not establish that claimant's disability is due to an intervening event, since claimant's back symptoms are compensable if they arose as a result of his work-related back injury and consequent surgery. *See generally Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987). The administrative law judge noted claimant's testimony that he had suffered back "catches" after his surgery and that the "catch" he sustained during his work for Duit was of the type he had experienced previously. Decision and Order at 18. Claimant testified that the work he was performing for Duit on September 12, 2007 was not difficult or unusual. Tr. at 49-51. Moreover, the administrative law judge found that the opinion of Dr. Craven, upon which employer relies, is insufficient to establish that the event at Duit constitutes an intervening cause of claimant's disability. Dr. Craven acknowledged that claimant had experienced back flare-ups prior to September 12, 2007. In discussing the relationship between claimant's present complaints and the incident at Duit, Dr. Craven stated that he could not "say with a high degree of medical certainty" whether claimant's present back condition was the result of an aggravating injury at Duit or was the result of the progression of his back fusion surgery. *See* CX 28 at 58, 69. As Dr. Craven's opinion reflects that claimant's condition could be the result of the natural progression of the initial injury, the administrative law judge rationally found that it does not constitute substantial evidence to rebut the Section 20(a) presumption. Thus, the administrative law judge properly found that employer did not establish that claimant's present condition is due to an intervening cause.[3] *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Therefore, we affirm the administrative law judge's finding that claimant's disabling condition is causally related to the injury he sustained with employer as it is rational, supported by substantial evidence, and in accordance with law.[4] *See generally Admiralty Coatings Corp.*, 228 F.3d 518, 34 BRBS 95(CRT); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d

[3]While the "intervening injury" rule might apply to a situation where a second trauma occurs in an area first injured during the claimant's prior employment, but since healed, employer remains liable for the onset of complications resulting from the first work injury. *Admiralty Coatings Corp.*, 228 F.3d at 518, 34 BRBS at 95(CRT).

[4]Thus, we need not address employer's argument regarding which supervening event standard should be applied in this case. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge).

Employer next challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment subsequent to October 25, 2007. Specifically, employer argues that claimant's earnings while he was employed by Duit between February 25 and October 25, 2007, establish a continuing post-injury wage-earning capacity since claimant would have been able to continue working for Duit had he not sustained a "new injury" on September 12, 2007. We reject employer's contention of error.

Where, as in this case, claimant has demonstrated his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc*., 31 BRBS 70 (1997). In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ledet v. Phillips Petroleum Co.,* 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

The administrative law judge found that claimant's employment with Duit constituted suitable alternate employment, but that this employment became unavailable to claimant on October 25, 2007, when Duit declined to continue claimant's employment as a result of claimant's recurring back symptoms. *See* Decision and Order at 17. Thus, as we have affirmed the administrative law judge's finding that claimant's present back condition is related to his injury with employer and employer concedes that claimant's position with Duit became unavailable to him as of October 25, 2007, we affirm the administrative law judge's finding that claimant's suitable alternate employment ended and consequently became unavailable as of October 25, 2007. As claimant established a *prima facie* case of total disability as of that date, the burden of proof shifted to employer to establish the availability of other suitable alternate employment. *See generally Vasquez v. Continental Maritime of San Francisco*, 23 BRBS 428 (1990); *Mendez v. Nat'l Steel & Shipbuilding Co.,* 21 BRBS 22 (1988). As it is uncontroverted that employer did not proffer any evidence of additional job opportunities that claimant was capable of performing following his termination by Duit, employer has not established the availability of suitable alternate employment. We thus affirm the administrative law judge's award of total disability benefits to claimant commencing October 26, 2007. *Ceres Marine Terminal v. Hinton,*

243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge