BRB No. 00-0677

MAY MARCO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
THE PASHA GROUP	)	
	)	
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Patrick B. Streb (Welton Law Office, P.C.), Oakland, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for Stevedoring Services of America and Eagle Pacific Insurance Company.

B. James Finnegan (Finnegan, Marks & Hamptom), San Francisco, California, for Marine Terminals Corporation and Majestic Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, McATEER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Stevedoring Services of America (SSA) appeals the Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration (96-LHC-1711, 96-LHC-1712) of Administrative Law Judge Alexander Karst 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 conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury to her right shoulder while working as a lasher for SSA on August 2, 1991.[1] Dr. Meyers initially diagnosed impingement syndrome and later performed arthroscopic surgery on February 19, 1992. Claimant however continued to experience pain and a limited range of motion in her right shoulder. Dr. Meyers diagnosed partial adhesive capsulitis and performed a manual manipulation of claimant's right shoulder on March 9, 1994, to locate scar tissue. Following that procedure, claimant's symptoms improved to the point where Dr. Meyers released her to return to work at her usual occupation on September 12, 1994. SSA voluntarily paid temporary total disability benefits from August 3, 1991, through September 26, 1994, and medical expenses related to the treatment of claimant's right shoulder injury.

[1]Claimant began working as a Class B longshore worker on August 19, 1989. She stated that she would receive longshore jobs with various employers out of the union hiring hall.

Upon her return to work, claimant testified that she selected her jobs carefully so as to avoid any heavy lifting, heavy work and/or jobs requiring overhead use of her right arm. She continued to experience problems with her right shoulder, which ultimately led to Dr. Meyers's recommendation, on June 5, 1995, of another arthroscopic surgery. Claimant however elected to delay the surgery for as long as possible.

On August 10, 1995, claimant sustained an injury to her right middle finger as a result of a slip and fall while working as a lasher for Marine Terminals Corporation (MTC). Claimant received immediate treatment for her right hand injury and returned to work the next day. She thereafter worked on and off until August 25, 1995, when she alleged that excruciating pain in her right shoulder prevented her from continuing to work. Claimant's last day of work was as an automobile driver for The Pasha Group (Pasha). Meanwhile, on August 14, 1995, claimant visited Dr. Meyers complaining of pain in her right fingers and increased right shoulder symptoms. Dr. Meyers diagnosed a contusion/sprain of the right middle finger and sprain of the right shoulder, and ultimately opined that claimant was unable to work as of August 28, 1995. Claimant has not worked since that date.

MTC paid temporary total disability benefits and medical expenses for claimant's right finger and right shoulder strain until March 4, 1996, when an orthopedic consultant concluded that the effects of the August 28, 1995, injury should have resolved within one to three weeks. Claimant thereafter filed her claim for benefits for the shoulder injury, naming SSA, MTC, Pasha and Crescent Wharf & Warehouse as responsible employers.[2] At the hearing, each of the named employers agreed that claimant was temporarily totally disabled and in need of further surgery on her right shoulder; they disagreed however over which is liable as responsible employer. Specifically, SSA argued that the August 10, 1995, accident caused a permanent aggravation of the right shoulder condition and thus asserted that MTC was responsible, while MTC and Pasha each averred that claimant's disability is due solely to the natural degeneration of the August 1991 injury.

In his decision, based on a consideration of the record as a whole, the administrative law judge determined that claimant's present disability is due solely to the August 2, 1991, injury and its natural progression. He therefore concluded that SSA is the responsible employer. The administrative law judge then determined, pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), that claimant's average weekly wage at the time of her 1991 injury was $539.68. Accordingly, SSA was ordered to pay claimant temporary total disability

[2]By Order dated July 21, 1998, the administrative law judge dismissed the claim against Crescent Wharf & Warehouse.

benefits from August 28, 1995, and future medical benefits relating to treatment of her right shoulder injury, including any surgery. On reconsideration, the administrative law judge added that SSA shall reimburse MTC for all medical expenses incurred for treatment of claimant's right shoulder after August 10, 1995.

On appeal, SSA challenges the administrative law judge's determinations regarding the responsible employer issue and calculation of claimant's average weekly wage. MTC responds, urging affirmance of the responsible employer finding. Claimant also responds, urging affirmance of the administrative law judge's calculation of her average weekly wage.

SSA initially argues that the administrative law judge erred by holding it liable as responsible employer in this case. Specifically, SSA avers that the administrative law judge overlooked the standard set out in *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999), and thus did not require MTC to prove by a preponderance of the evidence that claimant's disability is due solely to the natural progression of the initial injury. Additionally, SSA contends that MTC did not meet its burden of proof in this case, particularly since the factual evidence in this case establishes that claimant sustained an injury to her right shoulder on August 10, 1995.

In determining the responsible employer in the case of multiple traumatic injuries, if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). Once the existence of work-related injuries with more than one covered employer is established, the inquiry is whether the claimant's disability is due to the natural progression of the first injury or is due instead to the aggravating or accelerating effects of the second injury. *Buchanan*, 33 BRBS 35. "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." *Kelaita*, 799 F.2d at 1311. Accordingly, resolution of this issue determines which employer is liable for the totality of claimant's disability, *see, e.g., Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75 (CRT); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *see also Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), and requires the administrative law judge to weigh the evidence as a whole, and to determine which party's evidence is more persuasive. *See Buchanan,* 33 BRBS at 35-36.

In the instant case, the administrative law judge correctly identified the primary issue as whether claimant's present disability is due solely to the 1991 injury and its natural degenerative progression, a second discrete injury or aggravation on August 10, 1995, or is due to the cumulative trauma from working for several employers preceding the start of her disability on August 28, 1995. The administrative law judge then proceeded to resolve this issue by weighing the evidence of record.[3] In this regard, the administrative law judge did, in contrast to SSA's contention, apply the correct standard in resolving the responsible employer issue in this case. *See Buchanan*, 33 BRBS at 35-36.

[3]While the administrative law judge did apply the Section 20(a) presumption in this case, it ultimately had no bearing on the responsible employer issue as the administrative law judge made his determination only after a thorough discussion and weighing of the evidence of record. *See Buchanan*, 33 BRBS at 35. Moreover, to the extent that the administrative law judge relied on the Section 20(a) presumption, he did, in contrast to SSA's contention, place the initial burden of persuasion on MTC as he initially addressed whether claimant sustained a separate shoulder injury in August 10, 1995. *Id*. at 36.

Considering the record as a whole, the administrative law judge found that the opinions of Drs. Charles, Stark and Meyers, as well as the emergency room medical report, and the superintendent's accident report following the August 10, 1995, accident, militate against claimant's claim that she suffered a discrete injury to her right shoulder on August 10, 1995, or that her condition is due to cumulative trauma. Specifically, the administrative law judge concluded that Drs. Charles, Stark and Meyers[4] all agreed that claimant's present disability was caused by the natural degeneration of her right shoulder following the 1991 injury and not by the 1995 injury or cumulative trauma.[5] The administrative law judge further acknowledged that Dr. Meyers reported in June 1995 that claimant was in need of additional surgery on her right shoulder and that four days following the work injury of August 10, 1995, Dr. Meyers reported that there was no significant change in the condition of claimant's right shoulder. Thus, Dr. Meyers's only recommended treatment for injuries resulting from claimant's August 10, 1995, fall concerned her right middle finger.

The administrative law judge also found that the emergency room nurse's intake notes on August 10, 1995, and the report completed by the emergency room physician, Dr. Murphy, did not mention an injury to claimant's right shoulder on August 10, 1995. Moreover, the administrative law judge determined that the accident report filed by claimant's superintendent following the August 10, 1995, accident only mentions an injury to her right middle finger, and that claimant's workbook contained entries, on August 2 and 3, 1995, which indicate that claimant's right shoulder was troubling her at least one week prior to the August 10, 1995, accident. Lastly, the administrative law judge observed that even though claimant has not worked since mid-1995, her right shoulder actually became worse between 1996 and 1998,[6] reinforcing the conclusions of Drs. Charles, Stark and Meyers that

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[4]In making his determination as to Dr. Meyer's opinion, the administrative law judge relied on Dr. Meyers's testimony that he thought that "if [claimant] hadn't had that [August 1995] injury, this would have come along anyway. Because I wanted to do something before all this started after she developed this clicking thing." Decision and Order at 6-7, citing Claimant's Exhibit (CX) 14 pp. 292-293. Moreover, in contrast to SSA's assertion, there is no evidence that Drs. Charles and Stark exhibited bias in rendering their opinions in this case.

[5]The administrative law judge alternatively added that even if Dr. Meyers's opinion were construed so as to support SSA's contention that the August 10, 1995, accident aggravated the previously existing condition, the contrary opinions of Drs. Charles and Stark would still be more persuasive. SSA's reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1998), *cert. denied*, 120 S.Ct. 40 (1999), for the proposition that a treating physician's opinion is entitled to special weight is misplaced in this case, as the administrative law judge relied on the treating physician's opinion.

[6] The administrative law judge found support for this by looking at the MRI evidence.

her disability is due to an inexorable degenerative process.

The administrative law judge therefore concluded that SSA is the responsible employer as claimant's present right shoulder condition is due solely to the August 2, 1991, injury and its natural progression. As the administrative law judge's determinations are rational, supported by substantial evidence, and in accordance with law, his finding that SSA is the responsible employer is affirmed. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

SSA next argues that the administrative law judge erred in calculating claimant's average weekly wage as of the August 2, 1991, injury based on the wages of union employees with similar seniority, as the record shows that claimant worked substantially fewer hours than her peers in the two years preceding that injury. SSA maintains that claimant voluntarily removed herself from the work force for personal reasons and thus argues that it would be manifestly unfair and contrary to the remedial purposes of the Act to require it to augment claimant's earnings to the level of her peers who were available to work.

An MRI in 1996 revealed a partial tear of the rotator cuff, and an MRI in 1998 revealed a complete tear.

Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied.[7] *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997, *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The fact-finder has broad discretion in determining average weekly wage under Section 10(c). *See Louisiana Insurance Guaranty Association v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 2000).

In his decision, the administrative law judge rejected the computations proffered by SSA and claimant, and instead looked to the average annual wages of 20 similarly situated workers for 1990 and 1991.[8] In calculating claimant's average weekly wage, the administrative law judge determined that these employees earned, on average, $25,324 in 1990, and $30,803 in 1991. He therefore concluded that claimant's average annual wage for that period was $28,063.50, and thus that her average weekly wage at the time of her August 1991, injury was $539.68.

[7]No party suggests that Section 10(a) or (b) should be utilized in this case.

[8]The administrative law judge rejected SSA's contention that claimant's average weekly wage should be computed from her actual earnings in the year immediately preceding the injury, as employer's calculation of those earnings, $16,279.37, did not accurately reflect her earnings for that period, *i.e.*, $19,916.37. The administrative law judge rejected claimant's contention that her average weekly wage be based on all longshore workers' wages in the San Francisco, California area in 1991, as that figure included Class A workers, which claimant is not.

The record establishes that claimant worked substantially fewer hours than her peers between 1989 and 1993 because of her need to stay home to protect her mother from spousal abuse. The administrative law judge acknowledged this fact, and determined that inasmuch as claimant's inability to work regularly was voluntary and recurring, her low hours should be reflected in her average weekly wage.[9] While Section 10(c) explicitly contemplates the use of similarly situated employees in calculating average weekly wage, *see* 33 U.S.C. §910(c), it is not clear whether the administrative law judge's present calculation fully takes into account claimant's diminished hours, particularly since his average annual wage finding of $28,063.50, substantially exceeds claimant's actual earnings during that same time, *i.e.*, $19,916.37. Additionally, we note that the administrative law judge erred in his statement that SSA proposed using the averages of the 1990 and 1991 wages of 20 Class B longshore workers to calculate claimant's average weekly wage. Decision and Order at 9. Contrary to the administrative law judge's finding, SSA has steadfastly urged the use of claimant's actual earnings in the year prior to her 1991 injury, so as to accurately reflect her low hours in her average weekly wage. *See* SSA's Pre and Post Hearing Statements; SSA's Trial Exhibit Index; SSA X 7. Secondly, although, as the administrative law judge observed, SSA's exhibits include a comparison chart for those similarly situated employees, *see* SSA X 22, SSA explicitly noted that said evidence was introduced solely to show that a use of these figures is not a fair and reasonable representation of claimant's average weekly wage at the time of the 1991 injury because of her diminished hours. SSA's Trial Exhibit Index, notation for Exhibit 22. Consequently, we vacate the administrative law judge's calculation of claimant's average weekly wage and remand for reconsideration of this issue. On remand, the administrative law judge must reconcile the disparity between his finding of claimant's average annual wage of $28,063.50, and claimant's actual earnings of $19,916.37, over the same time period, given his finding that claimant's diminished hours should be reflected in her average weekly wage.

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[9]The administrative law judge addressed the effect of claimant's diminished work hours by including the wages of employee #8806, who worked only 381 hours in 1990, and no hours in 1991. The administrative law judge concluded that employee #8806's wages should be included to avoid an unfairly inflated representation of claimant's average weekly wage.

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge