BRB No. 92-1667

WILLIAM VIGIL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COASTAL MARINE ENGINEERING	)	
	)	DATE ISSUED:_____
and	)	
	)	
CALIFORNIA INSURANCE GUARANTEE ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Kathryn E. Ringgold, San Francisco, California, for claimant.

B. James Finnegan (Finnegan, Marks & Hampton, P.C.), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (90-LHC-1507) of Administrative Law Judge Thomas Schneider rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a marine machinist for employer for approximately 20 years prior to injuring his back on April 28, 1986. Tr.1 at 116, 122-123. Employer voluntarily paid claimant temporary total disability benefits at the maximum compensation rate from May 5, 1986, through September 23, 1987, ceasing payments upon receiving Dr. Isgreen's opinion that claimant can return

to his usual work. Cl. Ex. 2; Emp. Ex. 1 at 38-47; Tr.1 at 18, 24. Thereafter, claimant sought chiropractic care and did not return to the work force until October 1988 when he obtained a position as a warehouseman with Home Depot.[1] He left Home Depot on January 14, 1989, and worked for Gilco Construction as a painter/ carpenter from March 1989 until August 1990. In October 1990, claimant began work as a mechanic/machinist for CISERV. Tr.1 at 25, 132-134, 141-142; Tr.2 at 6, 8.

The administrative law judge credited the medical, but not the chiropractic, evidence and concluded that claimant sustained a lumbo-sacral sprain/strain. Further, he credited the opinion of Dr. Taylor, an agreed-upon neurosurgeon, who found that claimant can return to most facets of his usual work except he cannot lift anything over 75 pounds because the 1986 work injury aggravated claimant's pre-existing degenerative problems. Decision and Order at 3. Additionally, based on Dr. Taylor's opinion, the administrative law judge determined that claimant is capable of performing his work at CISERV which the administrative law judge found is the same as his usual work with employer. He concluded that claimant's lifting restriction is due to his degenerative changes as opposed to his 1986 work injury; therefore, he held that claimant does not have a permanent impairment as a result of his April 1986 injury. The administrative law judge stated that, even if he were to conclude that claimant's lifting restriction was caused by the 1986 injury, claimant has not suffered an economic loss and is not entitled to permanent partial disability benefits. *Id.* at 4. He also denied additional temporary total disability benefits beyond those which employer has already paid; however, he ordered employer to reimburse claimant the amount of Dr. Larson's chiropractic services, and he awarded counsel an attorney's fee. *Id.* at 5. On reconsideration, the administrative law judge found that his original decision did not indicate that claimant had a subluxation, which is necessary for reimbursement for chiropractic services. Accordingly, he reversed his awards of medical benefits and an attorney's fee. Decision and Order on Recon. at 2. Claimant appeals these decisions, and employer responds, urging affirmance.

Claimant initially contends the administrative law judge erred in denying disability benefits. Specifically, he argues that he is unable to return to his usual work and is entitled to permanent total disability benefits from September 23, 1987, through October 3, 1988, when he obtained alternate work with Home Depot. To establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related disability. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Claimant avers he was once able to lift items greater than 75 pounds, as required by a machinist, and now he is unable to do so. Tr.1 at 153. Dr. Taylor, agreed upon by the parties and credited by the administrative law judge, examined claimant on June 30, 1988, and again just before the second hearing in January 1991. He diagnosed a musculoligamentous sprain of the lumbar region, determined that claimant's condition is permanent and stationary, and concluded that claimant would not need further medical treatment. Emp. Ex. 1 at 12, 22-23. With regard to returning to work, Dr. Taylor believed claimant could perform "all but the heaviest of work[;]" consequently, he found it difficult to suggest that claimant "is capable of returning to every facet of his usual employment." Cl. Ex. 17; Emp. Ex. 1 at 22-23. At the hearing, Dr. Taylor testified that claimant has degenerative changes which pre-existed his April 1986 injury. Cl. Ex. 8; Tr.2 at 55-56.

[1]Coastal Marine went out of business on June 30, 1986. Emp. Exs. 12-16.

He also stated that claimant's 1986 injury aggravated the pre-existing condition and that this aggravation at the disc level was the basis for his opinion that claimant could not perform every aspect of his previous work. Tr.2 at 36, 39. Although Drs. Isgreen, Indeck, and Kundin disagreed with Dr. Taylor and would have released claimant to return to his usual work without restrictions, the administrative law judge specifically credited Dr. Taylor on this matter. Decision and Order at 3; Emp. Ex. 1 at 22-23, 46; Emp. Ex. 9; Tr.1 at 51-52, 111.

The administrative law judge acknowledged claimant's lifting restriction but concluded it was imposed because of his degenerative changes and not his work injury. Decision and Order at 3-4. He then determined that because claimant is now a mechanic/machinist with CISERV he, effectively, has returned to his usual work.[2] Decision and Order at 4. Because Dr. Taylor stated that claimant can no longer lift anything over 75 pounds due to the work-related aggravation of claimant's underlying degenerative condition, and because the administrative law judge accepted this opinion, we reverse the administrative law judge's finding that claimant has no work-related disability. Further, because the duties of a marine machinist require the incumbent to occasionally lift over 75 pounds, Cl. Ex. 18; Tr.2 at 21-22, we reverse the finding that claimant can return to his usual work. *See generally Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987). As claimant has demonstrated a work-related disability and an inability to return to his usual work, he has established a *prima facie* case of total disability. *Chong*, 22 BRBS at 242.

Once claimant makes such a showing, the burden shifts to employer to establish the availability of other specific jobs claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Subsequent to his 1986 work injury, claimant obtained three jobs. From October 1988 through January 14, 1989, claimant worked at Home Depot as a warehouseman. Cl. Ex. 24; Tr.1 at 132, 155. From March 10, 1989, through August 7, 1990, he worked at Gilco Construction as a painter/carpenter. Cl. Ex. 24; Tr.1 at 138, 163. Since October 1, 1990, claimant has worked as a machinist/ mechanic at CISERV. Cl. Ex. 24; Tr.1 at 165. Thus, employer has met its burden of establishing the availability of suitable alternate employment. Therefore, claimant may be, at most, partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the

[2]The administrative law judge discredited claimant's description of his duties at CISERV because he considered claimant to be an unreliable witness. This conclusion is supported by the doctors' reports which note claimant's tendencies to voluntarily restrict his motion and to exaggerate his pain. Cl.Ex. 15; Emp. Ex. 1 at 45-46; Tr.1 at 47, 51, 91-92; Tr.2 at 57. Therefore, the administrative law judge credited the testimony of Mr. Giglio, Vice President of Operations at CISERV, who is familiar with the duties of a mechanic/machinist as well as with claimant's work. Mr. Giglio testified that claimant works with tools, performs his mechanic duties satisfactorily, and has not refused work, but has not been observed lifting anything over 75 pounds. Tr.2 at 6-10, 12-15, 21-22.

difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). A claimant's wage-earning capacity may be determined by using his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity; if they do not, claimant's wage-earning capacity may be determined by considering the nature of the injury, the degree of physical impairment, his usual employment and other relevant factors. 33 U.S.C. §908(h); *Container Stevedoring Co.*, 935 F.2d at 1549, 24 BRBS at 219-220 (CRT); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In this case, it appears the administrative law judge implicitly determined that claimant's wages at CISERV adequately represent his post-injury wage-earning capacity, and it appears he applied those wages retroactively to the date of maximum medical improvement to deny additional benefits. He then determined that claimant has not sustained a loss in his wage-earning capacity. Decision and Order at 4-5. Contrary to the administrative law judge's conclusion, claimant's disability is total until employer establishes the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (Decision on Recon.). The first evidence in the record of the possible availability of suitable alternate employment is dated October 1988 -- claimant's job with Home Depot. Therefore, the administrative law judge improperly applied claimant's wages with CISERV retroactively to the date of maximum medical improvement instead of to the date on which suitable alternate employment was established. *Id.* As claimant's condition reached maximum medical improvement on September 23, 1987, but he was unable to find alternate work until October 1988, there is a gap during which time claimant may be entitled to total disability benefits.

Claimant seeks permanent total disability benefits from September 23, 1987, to October 3, 1988. Further, he seeks permanent partial disability benefits from October 3, 1988, through October 1, 1990, and permanent partial disability benefits from October 1, 1990, and continuing, at different rates based on his earnings during those periods at different jobs. Because the administrative law judge did not reach the issue of suitable alternate employment or ascertain claimant's post-injury wage-earning capacity, his conclusion that claimant did not sustain an economic loss must be vacated. Consequently, we vacate this finding and remand the case for further analysis of claimant's post-injury wage-earning capacity and his entitlement to permanent total and partial disability compensation.[3] *See generally Rinaldi*, 25 BRBS at 131; *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988); *Devillier*, 10 BRBS at 651.

[3]Sections 8(c)(21) and 8(h) of the Act require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of the claimant's injury and then compared with his average weekly wage to compensate for inflationary effects. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 7; *see also Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144 (1995) (The Supreme Court noted the administrative law judge's wage-earning capacity analysis in which he properly accounted for inflation).

Claimant next contests the administrative law judge's decision on reconsideration to set aside the award of medical benefits for the services of Dr. Larson and Dr. Murphy. Specifically, claimant maintains that employer is liable for the cost of Dr. Larson's chiropractic services and Dr. Murphy's services on referral from Dr. Larson. Claimant was first treated by Dr. Larson, a chiropractor, on June 5, 1986. He initially diagnosed, *inter alia*, thoracic subluxation and lumbar sprain/strain, and later updated his diagnosis to include, *inter alia*, lumbar sprain/strain, lumbar segmental dysfunction, overexertion, radiculitis due to lumbar subluxation, and degeneration of lumbar disc. Cl. Exs. 7, 10. In September 1986, Dr. Larson determined that claimant could return to his usual work but should continue treatment. Emp. Ex. 10. In January 1987, he concluded that claimant's condition had reached maximum medical improvement, and he referred claimant to Dr. Murphy for an impairment rating. Cl. Ex. 10; Emp. Ex. 11. Dr. Murphy examined claimant in March 1987, reported that claimant's condition was permanent and stationary, and imposed severe work restrictions. Cl. Ex. 12. In December 1987, Dr. Larson considered claimant to be totally disabled and in need of rehabilitation and an impairment rating. Cl. Ex. 13.

Claimant avers that Dr. Larson is his physician of choice, pursuant to Section 7 of the Act, 33 U.S.C. §907, and that employer had an affirmative burden to inform Dr. Larson of his authority, or lack thereof, to treat claimant, as Dr. Larson filed a first report of treatment on July 20, 1986. Further, claimant contends it was erroneous for the administrative law judge to retroactively apply Dr. Taylor's diagnosis and opinion that claimant needs no further treatment to disallow Dr. Larson's services which were rendered in good faith. Employer argues that Dr. Larson's services were unnecessary. On reconsideration, the administrative law judge reversed his initial decision and determined that employer is not liable for the costs of services rendered by Drs. Larson and Murphy. He noted that, based on the medical evidence, claimant did not have a "subluxation."[4] Decision and Order on Recon. at 2.

The administrative law judge found Dr. Larson to be an authorized physician, and he stated that authorization and release to work by another doctor does not deprive Dr. Larson of his authorized status. Decision and Order at 5. The administrative law judge's decision on reconsideration leaves this finding untouched.[5] Although Dr. Larson was authorized to treat claimant's condition, chiropractors are considered "physicians" under the Act "only to the extent that

[4]The administrative law judge relied on the findings of Drs. Indeck and Taylor that claimant has no neurological abnormality to mean that he has no subluxation. *See* Emp. Ex. 1; Tr.1 at 82-83.

[5]We reject employer's argument that claimant initially chose Dr. Kundin and then failed to obtain approval to change physicians. Although there is no explicit approval authorizing treatment with Dr. Larson, employer does not challenge the administrative law judge's finding that Dr. Larson was authorized by virtue of the fact that Dr. Larson reported his findings to employer's carrier and employer failed to inform Dr. Larson of his lack of authorization. Moreover, failure to timely respond to a request for approval of a physician can be considered constructive approval for treatment with that physician. *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57 (CRT) (D.C. Cir. 1989).

their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation. . . ." 20 C.F.R. §702.404. In the present case, Dr. Larson diagnosed subluxation and treated claimant's condition using electro-muscle stimulation, shortwave diathermy, and chiropractic adjustment to the lumbo-sacral area. Cl. Ex. 7. In his initial decision, the administrative law judge inherently deemed Dr. Larson's treatment necessary, but he did not discuss the specific findings of or treatment rendered by Dr. Larson. As Dr. Larson diagnosed subluxation, it was error for the administrative law judge to reverse his award of medical benefits on reconsideration on the basis that this diagnosis was not made.

The administrative law judge properly noted that claimant underwent a variety of treatments beyond manual manipulation of the spine. The regulations, however, limit reimbursable chiropractic expenses to charges for spinal manipulation for treatment of a subluxation. 20 C.F.R. §702.404. As Dr. Larson's chiropractic bill does not identify the cost of each type of treatment, we cannot ascertain what portion of the amount due may be reimbursable. Therefore, we remand the case to the administrative law judge to determine which treatment by Drs. Larson and Murphy is reimbursable by employer.

Claimant lastly asserts his entitlement to future medical benefits. The administrative law judge did not address this issue directly, but instead implicitly denied future medical benefits by finding that claimant does not have a permanent impairment. In his 1988 report, Dr. Taylor clearly opined that claimant did not need additional medical treatment for his work-related condition. Cl. Ex. 15; Emp. Ex. 1 at 23. Nonetheless, in response to a question at the hearing concerning this opinion, Dr. Taylor stated that claimant may need a permanent rating as well as "symptomatic treatment, but nothing specific." Tr.2 at 62. Because the administrative law judge credited Dr. Taylor's opinion overall but did not discuss claimant's entitlement to future medical treatment, and because only the administrative law judge is empowered to make findings of fact, we remand the case for further consideration of this issue. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

Claimant's counsel contends she is entitled to a fee for services rendered in this case. She requests reinstatement of the fee previously granted then disallowed by the administrative law judge on reconsideration. Employer argues that no fee is warranted, and if one is, then the amount permitted should be reduced pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Employer did not object to the fee before the administrative law judge and cannot raise new issues on appeal. *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). However, in light of our decision to remand this case for further consideration of the merits, the administrative law judge should reconsider the fee petition in light of his decision on remand.

Accordingly, the administrative law judge's decisions are vacated, and the case is remanded for reconsideration in accordance with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge