BRB No. 10-0137

TOMMY BAUGHMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 07/29/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman & Dicker LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LDA-00214, 00215) of Administrative Law Judge Richard K. Malamphy 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 alleged that he injured his neck and shoulders on December 2, 2005, when a truck he was driving was struck by an improvised explosive device (IED) during the course of his employment in Iraq. Claimant further asserted that this incident caused hearing loss and neuropsychological symptoms. Claimant testified that he did not immediately report his injuries to employer because he did not want be sent home to the United States. Tr. at 40-43. He received treatment for his neck and shoulders after he returned home in June 2006. Claimant obtained work in the United States as a truck driver in September 2006. He testified that he quit this job after eight weeks because he was physically unable to perform the job. Tr. at 36. Claimant also worked for a month as a forklift driver in January 2007. Claimant testified that he was unable to continue driving a forklift due to neck pain. Tr. at 37-38. Claimant worked for Price Truck Line (Price) shuttling trailers within its facility from February 2007 until he was laid off in October 2008. Claimant filed a timely claim for compensation and medical benefits, which employer controverted.

In his decision, the administrative law judge found that claimant's neck and shoulder injuries are related to the December 2005 IED attack. The administrative law judge also found that claimant sustained a traumatic brain injury, depression, and a 56.9 percent binaural hearing loss due to the work incident, but he denied the claim for post-traumatic stress disorder. The administrative law judge found that claimant's neck and shoulder injuries reached maximum medical improvement on January 3, 2007. He found that, due to these injuries, claimant is unable to return to work for employer as a truck driver, and that employer presented no evidence to establish the availability of suitable alternate employment. The administrative law judge found that claimant's actual post-injury employment from September 2006 to February 2007 did not establish the availability of suitable alternate employment since pain from claimant's neck and shoulder injuries forced claimant to stop driving a truck and operating a forklift. The administrative law judge found that claimant's ability to work beyond his restrictions for Price from February 2007 to October 2008 establishes that claimant was permanently partially disabled during this time, but that claimant is entitled to compensation for

permanent total disability after he was laid off from that job, as it was not suitable. The administrative law judge calculated claimant's average weekly wage as $1,563.09 under Section 10(c), 33 U.S.C. §910(c). He found that claimant's actual earnings at Price establish an inflation-adjusted post-injury wage-earning capacity of $544.24 during the period he was employed there. The administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from June 7, 2006, when claimant stopped working for employer, to January 3, 2007; permanent total disability, 33 U.S.C. §908(a), from January 4, 2007, to February 18, 2007; permanent partial disability, 33 U.S.C. §908(c)(21), (h), while claimant worked for Price from February 19, 2007 to October 24, 2008; and continuing permanent total disability from October 25, 2008. The administrative law judge also awarded claimant compensation for a 56.9 percent binaural hearing loss. 33 U.S.C. §908(c)(13). The administrative law judge found that claimant did not show that his traumatic brain injury and depression are disabling. The administrative law judge found that claimant is entitled to medical treatment for these injuries, which he determined are temporary in nature, and for his neck and shoulder conditions and hearing loss.

On appeal, employer challenges the administrative law judge's findings that claimant sustained compensable work-related injuries to his neck and shoulder, that claimant is unable to return to work for employer, that claimant's actual post-injury employment does not establish the continued availability of suitable alternate employment, and that claimant is entitled to compensation for a 56.9 percent binaural hearing loss. Claimant responds, urging affirmance of the administrative law judge's decision.

We first address employer's contentions that the administrative law judge erred by finding that claimant presented substantial evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and that it presented no evidence to rebut the presumption. Employer asserts that claimant's failure to disclose before the hearing, at the hearing, and to physicians, his prior neck and right shoulder injuries render claimant's assertion of work-related neck and shoulder injuries, and the physicians' opinions based on claimant's assertion, not credible. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Once claimant has established his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his injuries are causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injuries were neither caused nor aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert.*

denied, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999)*; Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The administrative law judge discussed the injuries claimant sustained to his neck and right shoulder in October 1991 and January 1993 during the course of his employment for Boeing Company. EX 19 at 9-10, 59-60. Claimant was assigned a six percent whole body impairment rating, and he was released to return to work with restrictions in August 1993. EX 19 at 60. The administrative law judge found that the last documented complaint of neck and right shoulder pain was in June 1994. EX 22 at 118-119. The administrative law judge noted claimant's testimony that he had returned to work for Boeing in 1996 without restrictions and that from 1996 to 2005 he did not have neck problems. Tr. at 19-21. Claimant also testified that, during the December 2005 IED attack, a piece of shrapnel left a two-inch gash on the side of his helmet and that his neck problems started following this incident and got worse over time. Tr. at 30, 80. After claimant returned from Iraq, Dr. Shahouri noted neck, upper back, and shoulder stiffness and spasm in July 2006. EX 17 at 81-82. Dr. Zimmerman examined claimant in January 2007. He noted cervical muscle spasm and decreased flexion; an MRI showed a mild disc bulge at C4-5 and C5-6. Dr. Zimmerman attributed claimant's neck and shoulder pain to the December 2005 IED attack, and he opined that claimant's neck and shoulder conditions had reached maximum medical improvement. CX 4 at 10-12.

The administrative law judge addressed employer's contention that claimant's testimony should be discredited since he failed to inform physicians after the December 2005 work incident about his 1991 and 1993 neck and shoulder injuries. The administrative law judge did not find this non-disclosure significant enough to discredit claimant's testimony, or the physicians' opinions based on claimant's self-reporting, because there is no evidence that claimant's prior injuries were symptomatic from 1996 to 2005. Decision and Order at 18. The administrative law judge also credited the testimony of claimant's wife that he was not experiencing neck pain prior to working in Iraq. The administrative law judge determined that claimant's prior treatment records did not show injury to the C4-5 disc, which now exhibits mild bulging. Tr. at 91; CX 4 at 11. Accordingly, the administrative law judge found that claimant is entitled to invocation of the Section 20(a) presumption that he suffered an aggravation of his previous neck and shoulder injuries as a result of the December 2005 IED attack. The administrative law judge concluded that, since employer presented no evidence to rebut the presumption, claimant's neck and shoulder conditions were caused or aggravated by the work incident. Decision and Order at 18.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). Based on the absence of medical evidence that claimant reported neck or shoulder complaints from 1996 to 2005, and the administrative law judge's crediting of the testimony of claimant's wife that claimant was not experiencing neck pain prior to his working in Iraq, the administrative law judge rationally found that claimant's non-disclosure of his prior neck and shoulder injuries was not significant enough to discredit his testimony of neck and shoulder pain related to the December 2005 IED attack or the physicians' opinions based on claimant's self-reporting. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, substantial evidence supports the administrative law judge's finding that the December 2005 work incident could have caused claimant's condition or aggravated his pre-existing neck and shoulder injuries. Therefore, we affirm the administrative law judge's finding that claimant established his *prima facie* case entitling him to invocation of the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Moreover, the mere existence of claimant's prior neck and shoulder injuries cannot rebut the Section 20(a) presumption as it cannot constitute substantial evidence that claimant's condition was not aggravated by the incident at work. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d. 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). In the absence of such evidence, the administrative law judge properly concluded that employer failed to rebut the Section 20(a) presumption that claimant's neck and shoulder conditions are related to his employment. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

Employer next contends that the administrative law judge erred by not addressing its contention that claimant aggravated his neck and shoulder conditions during the course of his employment after he returned to work in the United States. In its Post-Hearing Brief and on appeal, employer asserts that application of the last employer rule results in shifting liability for claimant's neck and shoulder injuries onto one of claimant's subsequent employers. Employer's Post-Hearing Brief at 13-15. In this case, claimant worked at various times from October 2006 to October 2008 for Mountain Truck Lines, Incorporated, Pro Drivers, Incorporated, Rubbermaid, and Price. There is no evidence that claimant was engaged in maritime employment on a covered situs for these employers. *See* 33 U.S.C. §§902(3), (4), 903(a); Tr. at 37; EXs 23-25. The responsible employer rule only extends to determine liability among maritime employers subject to the coverage provisions of the Act and is therefore inapplicable to the situation herein. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009)*; Plappert v.*

Marine Corps Exchange, 31 BRBS 109, 110-111 n. 2, *aff'g on recon. en banc* 31 BRBS 13 (1997). Moreover, the record does not support a finding that claimant sustained a second injury with a subsequent non-covered employer that is an intervening cause of his neck and shoulder disability. *See generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Employer did not produce any medical opinion that claimant's neck and shoulder conditions were permanently aggravated by his post-injury employment from October 2006 to October 2008. Claimant testified only that his post-injury work for Melton and Rubbermaid exacerbated his pain symptomatology. Tr. at 36-37. Accordingly, we affirm the administrative law judge's finding that employer is responsible for compensation and medical benefits related to these work injuries. *Shell Offshore, Inc.*, 122 F.3d 312, 31 BRBS 129(CRT).

Employer next challenges the administrative law judge's finding that claimant is unable to return to his usual employment driving a truck. Employer asserts that claimant's subjective complaints of neck and shoulder pain are not credible, nor is Dr. Zimmerman's opinion that claimant is unable to work as a truck driver based on these complaints, in view of claimant's ability to work as a truck driver after the December 2005 IED attack and his passing three post-injury Department of Transportation (DOT) physical examinations for purposes of permitting him to drive a truck.

In order to establish a *prima facie* case of total disability, a claimant must demonstrate an inability to return to his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). The administrative law judge noted that an MRI taken in August 2006 showed disc problems at three levels of claimant's neck and that Dr. Grundmeyer recommended at that time that claimant not work until he completed physical therapy. CX 4 at 6-9. Claimant testified that, as employer did not provide compensation or medical benefits, he started working for Mountain Truck Lines before he completed physical therapy. Tr. at 34-35. The administrative law judge credited claimant's testimony that he quit working for Mountain Truck Lines because he was unable to move the 150-pound tarps the company used to protect cargo. *Id*. at 36. The administrative law judge also credited claimant's testimony that he was able to work only for four weeks for Rubbermaid driving a fork lift because of neck pain. *Id*. at 37. Dr. Zimmerman examined claimant in January 2007. Dr. Zimmerman noted that claimant exhibited decreased flexion of the cervical spine, muscle spasm, and left shoulder pain brought on by abduction, and reaching overhead and backwards. The administrative law judge credited Dr. Zimmerman's opinion that it is unlikely claimant would be able to drive a truck due to the amount of sitting and manual labor involved, and the permanent work restrictions Dr. Zimmerman set, of no sitting or operating a motor vehicle for more than two hours, no

reaching above the shoulder, and no lifting over 25 pounds. CX 4 at 11-13. The administrative law judge noted claimant's testimony that he passed a DOT physical examination in March 2008, Tr. at 63-64, but concluded, based on claimant's testimony and Dr. Zimmerman's opinion, that claimant is unable to return to work as a truck driver. Decision and Order at 24.

A claimant's credible complaints of pain alone may be sufficient to establish his inability to return to his usual work. *Eller & Co. v. Golden*, 620 F.2d 71, 8 BRBS 846 (5th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1149, 21 BRBS 122(CRT) (9th Cir. 1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982); *see Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). The administrative law judge, within his discretion, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), rationally relied on claimant's testimony as to his inability to continue working as a truck driver for Mountain Truck Lines and as a fork lift driver for Rubbermaid due to neck pain. He found that claimant's pain complaints were supported by the August 2006 MRI and Dr. Zimmerman's January 2007 examination findings and opinion as to claimant's permanent work restrictions and inability to return to work as a truck driver. Accordingly, we affirm the administrative law judge's finding that claimant cannot return to his usual work as a truck driver as it is supported by substantial evidence. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

Employer contends that claimant's actual post-injury employment established the availability of suitable alternate employment. Once the administrative law judge found that restrictions from claimant's neck and shoulder impairment prevent him from retuning to his usual employment driving trucks, the burden shifted to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may fulfill its burden by showing that claimant is actually working within his work restrictions. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Claimant may be found entitled to total disability benefits if he works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence, although an award of total disability while working is to be the exception, rather than the rule. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5

BRBS 62 (1976); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

The administrative law judge found that claimant's work for Mountain Truck Lines in September and October 2006 and Rubbermaid in January 2007 was not suitable because claimant was forced to quit both positions due to the pain they caused and that claimant remained totally disabled at these times. Decision and Order at 24-25. The administrative law judge found that claimant was able to work as a truck driver for Price from February 2007 until he was laid-off in October 2008 without extraordinary effort. *Id*. at 25. The administrative law judge found that claimant, therefore, was partially disabled during this period of employment. However, the administrative law judge found that the physical requirements of truck driving clearly exceed the work restrictions assigned by Dr. Zimmerman. The administrative law judge also noted claimant's deposition testimony that working as a truck driver caused neck spasms and pain, which he would relieve by laying flat or walking around. EX 13 at 37. Therefore, the administrative law judge concluded that, since employer did not demonstrate the availability of suitable alternate employment or that the actual work claimant performed was within his physical restrictions, claimant is entitled to compensation for total disability after he stopped working for Price. Decision and Order at 25.

We have affirmed the administrative law judge finding that claimant's complaints of neck pain while working for Mountain Truck Lines and Rubbermaid establish that claimant is unable to return to work as a truck driver. Accordingly, we also affirm, as within the administrative law judge's discretion, his reliance on claimant's testimony that he had to quit working for these employers due to neck pain to find that claimant is entitled to compensation for total disability during these periods of employment. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006). Moreover, the administrative law judge rationally found that claimant's work shuttling trailers for Price was not within Dr. Zimmerman's permanent work restrictions, although claimant did not work through excruciating pain to perform the job. Dr. Zimmerman restricted claimant from sitting in or operating a motor vehicle for more than two hours without breaks. CX 4 at 13. Therefore, the administrative law judge rationally concluded that claimant is entitled to compensation for total disability after he was laid off from Price since employer did not establish the availability of work that claimant is physically capable of performing. *See Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996); *Williams v. Marine Terminals Corp.*, 8 BRBS 201 (1978), *aff'd sub nom. Marine Terminals Corp. v. Director, OWCP*, 624 F.2d 192 (9th Cir. 1980); *see also Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). As employer has not established any error in the administrative law judge's consideration of the evidence and as substantial evidence supports the administrative law judge's conclusion that employer did not demonstrate the availability of suitable alternate employment, we affirm the

administrative law judge's award of total disability benefits as of October 25, 2008. *SGS Control Services*, 86 F.3d 438, 30 BRBS 57(CRT).

Employer also challenges the administrative law judge's award of compensation for a 56.9 percent hearing loss under Section 8(c)(13) of the Act. Specifically, employer asserts that the administrative law judge erred by taking judicial notice of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), by applying the AMA *Guides* for determining hearing loss to claimant's hearing loss data recorded at Miracle Ear on July 26, 2006, and by finding that claimant has a 56.9 percent hearing loss. Employer argues that, under Section 702.441(d), 20 C.F.R. §702.441(d), only an "evaluator" may use the AMA *Guides* to calculate hearing impairment.

In his decision, the administrative law judge found that claimant's hearing loss is related to the December 2005 IED attack. Decision and Order at 20-21. Claimant initially reported ringing in his left ear, and a medic noted that claimant had traumatic hearing loss and tinnitus secondary to the IED explosion. EX 11. The hearing technician at Miracle Ear stated that claimant had severe bilateral hearing loss of recent origin. CX 4.

We reject employer's contention that the administrative law judge erred in taking judicial notice of the AMA *Guides.* The Act requires application of these *Guides* in hearing loss cases, *see* 33 U.S.C. §908(c)(13)(E),[1] and therefore employer cannot claim error in the administrative law judge's resort to the *Guides* to evaluate claimant's hearing loss claim. Moreover, we reject employer's contention that Section 702.441(d) of the regulations, 20 C.F.R. §702.441(d), precludes the administrative law judge from applying the AMA *Guides* to the hearing results obtained by a professional. Section 702.441(d) states that "[i]n determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment*, using the most currently revised edition of this publication." 20 C.F.R. §702.441(d) (underline added). The administrative law judge properly noted that the AMA *Guides* require that each ear be tested at hearing levels of 500, 1000, 2000, and 3000 hertz. *See Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009). The audiogram administered by Miracle Ear evaluated claimant's hearing at these levels in conformance with the Act and regulations. *Id.; see*

[1] Section 8(c)(13)(E) states,

> Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

Green v. Ceres Marine Terminals, Inc., 43 BRBS 173 (2010). The administrative law judge also properly found that the results at these hertz levels for each ear are added separately, resulting in a sum for each ear. *See* AMA *Guides* at 251 (6th ed. 2008). The administrative law judge properly found that the AMA *Guides* provide a chart from which binaural impairment can be calculated using the sums recorded for each ear. *Id.* at 252-253, Table 11.2. The administrative law judge found that, using this table, the July 2006 Miracle Ear audiogram shows a 56.9 percent hearing loss. Decision and Order at 21. There is no error in the administrative law judge's applying audiogram results to the AMA *Guides* table, nor does employer contend that the administrative law judge improperly calculated claimant's hearing loss using the AMA *Guides*.. Therefore, as it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's award of compensation for a 56.9 percent hearing loss. *See generally R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge