BRB Nos. 09-0858
and 09-0858A

CORRINE TANON-FREEMAN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	DATE ISSUED: 06/30/2010
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

William Patrick Muldoon (Pranin & Muldoon), Wilmington, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for employer and Majestic Insurance Company.

Lisa M. Conner (Aleccia, Conner & Socha), Long Beach, California, for employer and Signal Mutual Indemnity Association.

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

PER CURIAM:

Employer Marine Terminals Corporation and carrier Majestic Insurance Company (Majestic) appeal, and claimant cross-appeals, the Decision and Order Awarding Benefits (2006-LHC-00294) 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 conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On June 11, 2002, claimant sustained injuries to her right knee, hip, cervical, thoracic and lumbar spines when the UTR which she was driving was struck repeatedly by another UTR. Claimant subsequently treated with numerous physicians, complaining of headaches and pain in her neck, shoulder, back, arm, hip, chest and knees. Claimant filed a claim for benefits under the Act and, on October 4, 2002, surgery was performed on her right knee. Subsequently, claimant underwent, *inter alia*, x-rays, myelograms, cervical epidural injections, facet joint injections, a thoracic MRI, a nerve conduction study, and an EMG. Majestic, employer's carrier on the risk at the date of injury, commenced voluntary payments of temporary total disability benefits to claimant on June 15, 2002.

Claimant continued to complain of headaches and constant pain in her neck, back, shoulder, and right hip. After undergoing additional x-rays, a cervical MRI, and a CT scan, claimant, on April 7, 2004, underwent an anterior cervical microdiskectomy at C4 – C5, C5 – C6, and C6 – C7, an anterior cervical fusion with allograft bone at C4 - C5, C5 – C6, and C6 – C7, and an anterior cervical plating at C4 – C7. Claimant continued to experience pain in her lumbosacral back and she underwent a lumbar MRI, x-rays and physical therapy.[1]

On February 14, 2005, claimant commenced modified work for employer as a marine clerk and dock signal person; however, claimant was limited to approximately two days of employment per week due to her ongoing physical problems. On April 27, 2005, when Signal Mutual Indemnity Association (Signal) was employer's insurance carrier, claimant experienced an increase in pain in her neck, back, and right hip while performing dock signal work. After receiving a diagnosis of a sprain/strain of her

[1] Although it was recommended that claimant undergo an additional lumbar epidural injection at this time, claimant apparently did not have this procedure performed.

thoracic and lumbar spines, claimant filed a second claim for benefits under the Act, asserting that her work activities resulted in an increase in her headaches and neck, shoulder, back, and hip pain. Claimant continued to receive medical care including physical therapy, MRIs of her thoracic and lumbar spines, cervical x-rays, and additional thoracic facet joint injections.

In an effort to return to gainful employment with employer, claimant sought and was granted on December 6, 2005, an Americans with Disabilities Act (ADA) accommodation between March 20, 2006 and December 4, 2006, for employer as a tower clerk. She has not been gainfully employed since her last day of work, December 4, 2006.

At the conclusion of the May 9, 2006, formal hearing before the administrative law judge, he requested that claimant undergo an interdisciplinary medical evaluation. Claimant was subsequently evaluated by Dr. Richeimer and participated in a pain management program where she was evaluated by Dr. Namerow. Upon concluding the pain management program, claimant continued to report pain in her thoracic spine, neck, arm, foot and head, and her continued medical treatment included another thoracic MRI, a discogram, a cervical CT scan, and diagnostic nerve block injections.

In his Decision and Order, the administrative law judge found that claimant's thoracic, hip and chest injuries and pain are related to her employment with employer, that claimant's conditions reached maximum medical improvement on June 18, 2007, and that claimant is unable to return to gainful employment. The administrative law judge determined that claimant sustained work-related injuries on June 11, 2002, when employer was insured by Majestic, that she had a temporary aggravation of her conditions on April 27, 2005, when employer was insured by Signal, and that claimant's condition returned to baseline on November 22, 2005. Thus, the administrative law judge held Signal liable for the payment of claimant's benefits during the period of April 27 through November 22, 2005, and Majestic liable for all other periods of disability compensation due claimant.[2]

[2] Specifically, the administrative law judge ordered Majestic to pay claimant temporary total and temporary partial disability compensation for various periods of time between June 15, 2002, and December 4, 2006, and permanent total disability compensation from June 18, 2007, and continuing. Signal was ordered to pay claimant temporary total disability benefits for the period April 27 through November 22, 2005.

On appeal, Majestic challenges the administrative law judge's findings regarding the extent of claimant's disability, as well as the administrative law judge's determination that it is the carrier responsible for the payment of any benefits due claimant under the Act subsequent to November 22, 2005. Signal and claimant respond, urging affirmance of the administrative law judge's decision in its entirety.[3]

EXTENT OF CLAIMANT'S DISABILITY

Majestic challenges the administrative law judge's award of total disability compensation to claimant; specifically, Majestic avers that it presented evidence sufficient to establish that claimant is capable of returning to gainful employment in some capacity. It is well-established that claimant bears the burden of proving the extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must demonstrate that she is unable to return to her usual work. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). If claimant establishes her inability to return to her usual employment duties with employer, the burden shifts to employer to demonstrate that suitable alternate work was available in claimant's community. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish that suitable alternate work was realistically and regularly available to claimant on the open market. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Where claimant is physically incapable of any employment, she is totally disabled. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). Here, the administrative law judge, after setting forth claimant's extensive medical treatment since the occurrence of her initial work-injury on June 11, 2002, *see* Decision and Order at 5 – 30, credited the opinion of Dr. Richeimer, as supported by the testimony of claimant, in concluding that claimant is incapable of gainful employment.

The administrative law judge determined that the question of the extent of claimant's present work-related disability was best addressed by the opinions of the last two physicians, Drs. Richeimer and Namerow, who had the opportunity to evaluate

[3] In her brief, claimant states that she filed a protective cross-appeal for the purpose of preserving her alternative arguments raised before the administrative law judge regarding the issue of the carrier responsible for benefits.

claimant's entire medical record including her participation in a pain management program.[4] Decision and Order at 41. Dr. Richeimer, following his examination of claimant and a review of claimant's voluminous medical records, diagnosed claimant with failed cervical surgical syndrome, pain and myofascial syndrome. Dr. Richeimer further stated that claimant was not helped by her participation in the pain management program that he had recommended and that no surgical options exist for treating claimant's thoracic spine condition. While conceding that employment could be beneficial to claimant, Dr. Richeimer opined that claimant is totally disabled from all employment, including sedentary work. JX 8. Claimant, whom the administrative law judge found to be genuine and believable, testified that her symptoms increase when she engages in either daily or work activities and that she believes that she is incapable of returning to gainful employment. Claimant stated that in December 2006, she left her final attempt at employment with employer, which required her to type while in a seated position, because her shoulder, neck, head, chest and thoracic pain became progressively worse while she was working. JX 1 at 2 – 3; Tr. 2 at 78, 85; Tr. 1 at 134 – 135; CX 97 at 2045 - 61.

Dr. Namerow stated that when claimant entered the pain management program at Daniel Freeman Memorial Hospital, she was "highly symptomatic and unemployable despite her desire to work." JX 1 at 6. Upon her completion of the program, however, Dr. Namerow opined that although claimant had not gained the coping skills that they had wished to instill during her participation in the program, she was capable of part-time sedentary employment and that a return to work would be therapeutic for her. JX 7 at 15 – 18.

Majestic contends that the administrative law judge erred by declining to consider the opinions of Drs. Malekafzali, Loddengaard, White, Miller, London and Harber, along with the opinions of Drs. Richeimer and Namerow, when addressing the extent of claimant's present work-related disability. Specifically, Majestic asserts that the administrative law judge's dismissal of these six physicians' opinions without explanation violates the Administrative Procedure Act. We disagree. In his decision, the administrative law judge found that each of the aforementioned six physicians had

[4] Following the formal hearing before the administrative law judge, and at the administrative law judge's direction, the parties agreed to have claimant's pain and physical limitations assessed by a pain management group. Tr. 1 at 210, 217. Claimant was evaluated by Dr. Richeimer at the University of Southern California Keck School of Medicine. Following his examination of claimant, Dr. Richeimer referred claimant to an in-patient pain management program at the Daniel Freeman Memorial Hospital. Claimant participated in this program between January 22 and February 17, 2007, during which time she was monitored by Dr. Namerow.

assigned different restrictions to claimant at various times during the course of her ongoing treatment, but before claimant participated in and completed the pain management program, and that each opined that claimant was capable of returning to work in some capacity; however, the administrative law judge found that each of claimant's attempts to return to work for employer failed due to claimant's continued pain.[5] Decision and Order at 8, 11, 15, 22, 41. Pursuant to this finding, the administrative law judge found that claimant's present ability to work is best addressed by weighing the opinions of Drs. Richeimer and Namerow, the only two physicians who evaluated claimant's entire medical record and treated claimant for her pain. Decision and Order at 41. Thus, contrary to Majestic's contention, the administrative law judge adequately explained his decision to rely on the opinions of Drs. Richeimer and Namerow in determining the extent of claimant's present work-related disability. As his finding that these opinions provide the most recent and relevant restrictions is rational, we affirm his decision to base his determination of the extent of claimant's current work-related disability on them.

We further affirm the administrative law judge's finding, based upon his weighing of the opinions of Drs. Richeimer and Namerow as well as claimant's testimony, that claimant is unable to work. In declining to rely upon the opinion of Dr. Namerow, the administrative law judge stated that he was unconvinced that Dr. Namerow's understanding of claimant's medical and work history was complete.[6] The administrative law judge found that Dr. Namerow was unclear as to his understanding of longshore work and of claimant's reasons for her belief that she was unable to perform specific longshore activities and that Dr. Namerow ultimately deferred to Dr. Harber's expertise regarding longshore activities.[7] The administrative law judge found

[5] Claimant returned to work for employer on June 2, 2003, three days between January 11 and January 26, 2004, approximately two days per week between February 14 and April 27, 2005, and approximately one day per week between March 20 through December 4, 2006. In each instance, claimant ceased working due to increasing symptoms of pain.

[6] Although Majestic avers that the administrative law judge erred in relying upon the size of the medical record reviewed by Dr. Namerow, the administrative law judge's decision indicates that he relied upon Dr. Namerow's actual testimony when evaluating that physician's opinion. *See* Decision and Order at 43 - 44.

[7] Dr. Harber's August 2, 2005, opinion, which was rendered as a result of claimant's request for an ADA accommodation, was based on medical evidence in existence prior to that date and, thus, did not take into consideration claimant's subsequent complaints of pain in the job she performed under the ADA accommodation and her participation in a pain management program. *See* MTC/MX 14.

it meaningful that Dr. Namerow believed that work is therapeutic and that he neither set forth specific evidence supportive of his opinion that claimant is physically capable of working nor did he state what changed between claimant's beginning the pain management program, at which time Dr. Namerow found claimant to be unemployable, and its completion when he stated that claimant is capable of returning to work, particularly since he stated that the program failed to instill in claimant the skills appropriate for coping with her pain. *Compare* JX 1 at 6 *with* JX 7 at 17, 20. The administrative law judge also found that none of the doctors, including Dr. Namerow, questioned the validity of claimant's pain. The administrative law judge thus found Dr. Namerow's opinion to be less persuasive that than of Dr. Richeimer, and he accepted Dr. Richeimer's opinion, supported by the credible testimony of claimant, that claimant is totally disabled from all employment, including sedentary work. JX 8 at 10 – 12, Ex. 2.

The law is clear that in arriving at a decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence.[8] *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). On appeal, employer seeks a reweighing of the evidence, which the Board is not empowered to do. The administrative law judge was entitled to assess the medical evidence of record as well as claimant's credibility, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his decision that claimant is incapable of returning to work in any fashion at the present time is supported by the credited medical evidence and claimant's testimony. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge). Thus, as the opinion of Dr. Richeimer and the testimony of claimant provide substantial evidence to support the administrative law judge's determination that claimant is unable to perform any employment, we affirm the administrative law judge's finding that claimant is totally disabled. *Devor*, 41 BRBS 77.

[8] Majestic cites 20 C.F.R. §404.1527, a regulation which addresses the evaluation of medical opinions in claims for old age, survivor and disability benefits arising under the provisions of Title II of the Social Security Act (SSA), which it avers requires the administrative law judge to credit the opinion of Dr. Namerow over that of Dr. Richeimer. We reject Majestic's position that this regulation should be applied in this longshore case. The regulation cited by Majestic addresses a separate federal statute which is significantly different from the Longshore Act, and Majestic has set forth no authority mandating or authorizing the use of this regulation beyond claims arising under the SSA.

RESPONSIBLE CARRIER

Majestic challenges the administrative law judge's determination that it is responsible for the payment of benefits due claimant subsequent to November 22, 2007; specifically, Majestic asserts that the administrative law judge erred in finding that claimant's April 27, 2005, work-injury did not result in a permanent aggravation of her pre-existing medical conditions. In support of this argument, Majestic cites the testimony of Dr. Richeimer that claimant's April 27, 2005, work-related flare-up in symptoms was a minor contributor to her long-term position.

The determination of the responsible carrier, in the case of multiple traumatic injuries, turns on whether the claimant's condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the carrier at the time of that injury is responsible for compensating the claimant for the entire disability. If there is a second injury which aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the carrier at the time of the second injury is liable for all medical expenses and compensation related thereto. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005); *see also Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004). Where claimant's work results in an aggravation of his symptoms, the employer and carrier at the time of the work events resulting in the aggravation are responsible for any resulting disability. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

In his decision, the administrative law judge determined that the opinions of Drs. White, Miller and London establish that claimant's April 27, 2005, work activities resulted in a flare-up in her pain symptoms, and that consequently Signal, employer's carrier at the time of this incident, was responsible for the payment of benefits due claimant from that date until her condition returned to baseline.[9] Finding that the MRI results, CT scans and x-rays performed after April 27, 2005, demonstrated no change in claimant's condition when compared to claimant's test results following her June 11, 2002, work-injury, at which time Majestic was on the risk as employer's carrier, the administrative law judge discussed claimant's testimony that her symptoms of pain

[9] Majestic does not dispute its liability for benefits due claimant under the Act prior to April 27, 2005.

flared up on April 27, 2005, then returned to their prior level, and that in her opinion her disability did not worsen as a result of this incident. Decision and Order at 45 – 46. After further noting that Dr. Richeimer stated that it was medically improbable that claimant's April 2005 incident resulted in a permanent worsening of claimant's condition, the administrative law judge relied upon the opinion of Dr. White that claimant's June 2002 injury resulted in her ongoing disability and that claimant, following treatment and facet joint injections, was capable of returning to work with restrictions on November 22, 2005.[10] *See* MTC/SXs 7 at 109 110; 15 at 293. The administrative law judge concluded that claimant never fully recovered from the June 2002 accident, and found that following claimant's April 27, 2005, flare-up of pain, claimant's condition returned to baseline on November 22, 2005, when Dr. White found her condition to be permanent and stationary.[11] Decision and Order at 45 – 47.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, substantial evidence supports the administrative law judge's determination that claimant, on April 27, 2005, sustained a temporary employment-related flare-up of her pain symptoms which resolved as of November 22, 2005, the date on which claimant was released to return to work, with restrictions essentially the same as those prior to the April 27, 2005, incident. *See Metropolitan Stevedore Co.*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, No. 08-72267, 2010 WL 35023 (9th Cir. Apr. 23, 2010). Accordingly, we affirm the administrative law judge's finding that Signal is the carrier responsible for the payments of all benefits due claimant during the period of April 27 through November 22, 2005, and that Majestic is the carrier liable for all other periods of benefits due claimant as a result of her June 11, 2002, work injury.

[10] The restrictions placed on claimant by Dr. White on November 22, 2005, are essentially the same as those under which claimant worked prior to her April 27, 2005, flare-up of symptoms. *Compare* MTC/SXs 7 at 110 *with* 16 at 344.

[11] The administrative law judge also accepted the opinions of Drs. London and Miller, both of which are supportive of his finding that claimant's April 27, 2005, flare-up resolved. Decision and Order at 47.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge