BRB Nos. 10-0270
and 10-0270A

JANICE OLDS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS	)	DATE ISSUED: 10/29/2010
	)	
and	)	
	)	
CHARTIS INSURANCE	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and Decision and Order on Motion for Reconsideration of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

Michael Marmer (Samuelsen, Gonzalez, Valenzuela & Brown, L.L.P.), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and Decision and Order on Motion for Reconsideration (2008-LDA-00096) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are

supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was hired by employer, a contractor, to work as an executive administrative assistant at a site in Iraq. Claimant testified that she was injured on April 4 or 5, 2006, in Fort Benning, Georgia, while being issued her flak jacket prior to deployment. She claims the jacket was too heavy for her to lift and a man assisted her. He dropped the jacket on her back, and she fell to her knees in pain. Tr. at 32, 39. She did not report this injury but, instead, continued through the deployment process.[1] Claimant avers that during the course of travel from the United States to Iraq, and while working in the office in Iraq, she aggravated her back condition further. Tr. at 55, 58, 61, 63. Claimant stated that on May 3, 2006, she was in so much pain that she requested medical attention but she was not permitted to go to the clinic because the office was short-staffed. Tr. at 66-67. When she returned to work the next day, expecting to be permitted to go to a doctor, she was called into a meeting and given her termination papers because her job had been eliminated.[2] Tr. at 65, 68. Employer arranged for medical care and paid claimant temporary total disability benefits from May 7, 2006, through April 28, 2007. Emp. Ex. 7; Tr. at 70. Claimant has been diagnosed with lumbar spondylolisthesis, spondylosis, degenerative disc disease, osteoarthritis, mechanical back pain, and lumbar radiculopathy. Cl. Ex. 1; Tr. at 95. Claimant filed a claim seeking permanent disability benefits and additional medical benefits.

The administrative law judge credited claimant's testimony concerning the occurrence of the injuries at work and found that she was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. He also found that employer did not rebut the presumption, that claimant sustained a work-related injury and cannot return to her usual work, and that she has demonstrated a diligent effort to return to alternate work but has been unable to do so. Accordingly, the administrative law judge awarded claimant medical benefits and temporary total and permanent total disability benefits based on an average weekly wage of $2,451.93. As her compensation rate exceeded the statutory maximum rate, 33 U.S.C. §906(b), the administrative law judge awarded the statutory maximum rate. Decision and Order at 2-3, 16-19, 29-32. On reconsideration, the administrative law judge struck the portion of his order that referenced a Section

[1]Claimant testified that she did not report the injury during training because she knew it would preclude her from being deployed. She also did not report the injury earlier during her time in Iraq because she thought she would lose her job. Tr. at 42, 46, 63-64.

[2]Claimant does not assert retaliatory termination.

10(f), 33 U.S.C. §910(f), annual adjustment to claimant's temporary total disability benefits; however, he rejected employer's argument that claimant is limited to the Section 10(f) adjustment rather than the statutory maximum rate as of October 1, 2007. He also amended his order to properly reflect the stipulated date of maximum medical improvement, February 19, 2007. Therefore, the administrative law judge awarded claimant medical expenses, temporary total disability benefits from May 4, 2006, through February 18, 2007, at a rate of $1,073.64 per week, and permanent total disability benefits from February 19, 2007, at a rate of $1,073.64 until October 1, 2007, when her benefits increased to $1,160.36 per week as "calculated from an average weekly wage in 2006 of $2,451.93 and subject to the statutory maximum compensation." Order at 2. Thereafter, claimant's benefits would be adjusted annually in accordance with Section 10(f), subject to the statutory maximum rate.

Employer appeals, disputing that the injury as described by claimant occurred and asserting that the administrative law judge committed several errors in awarding and calculating benefits. Claimant responds, urging affirmance. BRB No. 10-0270. Claimant cross-appeals, for the purpose of preserving an issue for appeal to the circuit court, arguing that although the administrative law judge followed the Board's decision in *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006), *Reposky* was wrongly decided and, therefore, claimant's benefits were wrongly calculated. Employer responds, arguing that the cross-appeal should be dismissed because it does not seek any relief in this case, and also arguing, as it argued in its appeal, that the administrative law judge incorrectly applied *Reposky*. BRB No. 10-0270A.

Injury

Employer first contends the administrative law judge erred in finding that the injury occurred as claimant alleged in light of unbiased testimony from former employees who explained the procedure for the issuance of equipment. Alternatively, employer argues that it was erroneous for the administrative law judge to find that it did not rebut the Section 20(a) presumption. We reject employer's arguments.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that she sustained a harm or pain and that conditions existed or an accident occurred at her place of employment which could have caused the harm or pain. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631

(1982). In this case, there is no dispute that claimant has back problems. Claimant also must establish that an accident and/or working conditions existed which could have caused, aggravated, or contributed to her harm. *See Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Jones v. J. F. Shea Co., Inc.*, 14 BRBS 207, 210-211 (1981). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). This rule applies not only where the underlying condition is affected but also where the work causes the claimant's underlying condition to become symptomatic. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Employers must accept "the frailties that predispose" their employees to injury. *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979).

Claimant, a U.S. citizen who has resided in Kuwait for nearly 20 years, applied for and was offered a job as an executive administrative assistant for employer. She flew from Kuwait to Reston, Virginia, where she spent approximately two weeks in training before being sent to Fort Benning, Georgia, where she received tactical and survival instructions and deployment equipment.[3] Tr. at 32-35. Claimant testified that she was injured during the issuance of a flak jacket. She also testified that the pain got worse as she traveled to Iraq and as she performed her duties as an executive administrative assistant.[4] Employer submitted the testimony of Mr. Arellano, the former site manager at Fort Benning, and Mr. Cruz, who received equipment on the same day, in support of its argument that the alleged accident did not happen.[5]

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[3]Claimant testified she underwent a pre-employment medical screening while in the U.S. Tr. at 34.

[4]Her duties included filing in high and low file cabinet drawers, sitting for long periods of time at a computer, carrying a laptop computer to/from work daily, and climbing into an SUV when they were sent on meal breaks. Tr. at 54-63.

[5]Mr. Arellano stated that the proper procedure for getting a flak jacket was a two-day process. He said claimant would have been fitted for the jacket with a woman present one day and, on another day, she would have been issued the jacket as well as other equipment in line with no "trying on," and the armor would have been separate from the jacket. Mr. Arellano also testified that he would have been informed if anyone had been injured in the issuance line and that person would not have been deployed. However, Mr. Arellano was not present the day claimant was issued her jacket. Emp. Ex. 28. Mr. Cruz stated that he did not see or hear about claimant being injured during the issuance process. Cl. Ex. 13 at 16, 60; Emp. Ex. 26.

Contrary to employer's assertion, claimant's testimony, which the administrative law judge credited, constitutes substantial evidence supporting his finding that the flak jacket incident occurred. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). A claimant's credible testimony is sufficient to establish the working conditions element of a *prima facie* case. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998); *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). In this case, the administrative law judge found claimant's testimony to be specific and credible, he found no medical evidence establishing that claimant's condition was symptomatic before April 2006, and he noted that the doctors confirmed that the flak jacket incident could have contributed to claimant's symptoms. The administrative law judge also found that crediting Mr. Arellano's testimony regarding general practices at Fort Benning does not impeach claimant's testimony as to what occurred in her particular situation – especially as Mr. Arellano was not present at the time. Moreover, he found that Mr. Cruz did not see claimant being issued her flak jacket and could neither confirm nor dispute claimant's testimony in that regard. Thus, the administrative law judge reasonably found that their statements do not constitute directly contradictory evidence proving that the incident did not happen.[6] Decision and Order at 7, 16-17. The administrative law judge rationally found that claimant established a work incident that could have caused her harm. *See Preston*, 380 F.3d 597, 38 BRBS 60(CRT); *Damiano*, 32 BRBS 261; *Quinones*, 32 BRBS 6.

[6]Employer also contends it was improper for the administrative law judge to draw an adverse inference against it for not presenting better witnesses to the incident and argues the administrative law judge should have drawn an adverse inference against claimant for failing to get corroborating witnesses. Review of the record reveals that the administrative law judge did not rely on an adverse inference in finding that claimant established an incident or working conditions that could have caused her harm, as he stated that claimant's testimony was credible "in its particularized, undisputed detail[.]" Decision and Order at 8. The decision to apply an adverse inference is discretionary. *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, *aff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *see BNSF Ry. Co. v. Brotherhood of Maintenance*, 550 F.3d 418, 424 (5th Cir. 2008). As the administrative law judge did not apply an adverse inference against employer, we reject employer's contention of error as well as its suggestion that the administrative law judge should have drawn an adverse inference against claimant for failing to produce corroborating evidence.

Additionally, claimant stated that her condition was aggravated by the travel and day-to-day working conditions. Although employer's witnesses stated that claimant never complained of pain, filed an injury report, or requested medical attention before her termination, Cl. Ex. 13 at 32-35, 41; Emp. Exs. 11, 25-26, the administrative law judge found that claimant's working conditions, including wearing a flak jacket and helmet while traveling, carrying heavy duffle bags, sitting for long periods of time, and moving in awkward positions, all could have aggravated her back condition. The administrative law judge specifically credited Mr. Cruz's testimony that he recalled Mr. Santos, the Human Resources Director in Iraq, telling him that claimant had requested to see a doctor "probably" a few days before her termination, stating that this confirmed claimant's version of the events. Decision and Order at 9; Cl. Ex. 13 at 53. Mr. Cruz also confirmed claimant's testimony that she worked very long days, mostly sitting at a desk. Cl. Ex. 13 at 33. Further, Dr. Abitbol, claimant's medical expert, stated that claimant had an underlying back condition, common in people her age, and that the events described by claimant could have given rise to her symptoms. Dr. Abitbol testified that claimant's work activities, even absent the flak jacket incident, would have been sufficient to aggravate her underlying condition. Tr. at 94-101. Thus, the administrative law judge properly found that claimant established working conditions that could have aggravated her harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Manship v. Norfolk Western Ry. Co.*, 30 BRBS 175 (1996). As claimant demonstrated both an accident at work and working conditions that could have aggravated her back condition, we affirm the administrative law judge's invocation of the Section 20(a) presumption as it is supported by substantial evidence. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

Employer contends the administrative law judge erred in failing to find that it rebutted the Section 20(a) presumption. It asserts that the testimony of Messrs. Arellano and Cruz is sufficient to rebut the presumption by showing that the accident could not have occurred. Contrary to employer's argument, if that evidence had been sufficient to prove that the injury could not have occurred the presumption would not have been invoked, but once a claimant establishes a *prima facie* case, employer's burden is to produce substantial evidence that the injury is not work-related. The administrative law judge found that testimony of Messrs. Arellano and Cruz established only that they did not know about any injury claimant may have suffered, not that claimant's condition is not work-related, and the administrative law judge weighed and rejected this evidence at invocation. Cl. Ex. 13 at 16, 60; Emp. Exs. 26, 28. Moreover, the administrative law judge found that Dr. Best, employer's expert, agreed that the flak jacket incident contributed to claimant's on-going symptoms.[7] Decision and Order at 18; Cl. Ex. 1 at 30.

[7]The doctors agreed that spondylolisthesis and spondylosis were pre-existing asymptomatic conditions that could have been aggravated by the flak jacket incident as well as the prolonged travel and work conditions. Cl. Exs. 1-2; Tr. at 97-99.

Therefore, his opinion fails to rebut the presumption. Accordingly, the administrative law judge properly found that employer did not rebut the Section 20(a) presumption and that claimant's back condition is work-related as a matter of law. *Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

Extent of Disability

Employer contends the administrative law judge erred in finding that claimant cannot return to her usual work. In order to establish a *prima facie* case of total disability, a claimant must establish that she cannot return to her usual work due to a work injury. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). If the claimant establishes an inability to return to her usual work, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if she diligently tried. *Id.*; *see also Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). If the employer establishes the availability of suitable alternate employment, the employee may nonetheless prevail in obtaining total disability benefits if she demonstrates that she diligently tried but was unable to secure alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *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); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

Dr. Abitbol, claimant's expert, diagnosed claimant with back problems and recommended surgery. Tr. at 103. He stated that claimant can work prior to surgery, but that she must not lift over 20 or 30 pounds, except on occasion, she must avoid bending, stooping, and squatting, and she must change positions frequently. He opined that she cannot return to her usual work where she had to be seated for long periods of time, but agreed if she could change positions frequently this aspect of work could be tolerated. He also stated that she could not wear a flak jacket or travel in less than first class for long trips, as those would irritate her spine. Tr. at 103-104. Dr. Abitbol expected claimant's condition to improve following her surgery. Tr. at 125. Dr. Best believed claimant was not a surgical candidate and that she could return to her office work with employer. However, he advised that she lift no more than 30 to 40 pounds, except on occasion, and that she not be in a position where she needs to wear a flak jacket because the compressive force on her spine could cause a worsening of her condition and an eventual need for surgery. Cl. Ex. 1 at 19-32. As the administrative law judge concluded, the job-related transportation requirements alone preclude claimant from

returning to her usual work pursuant to the opinions of both doctors.[8] Even excluding the transportation requirements, because claimant's usual work is in Iraq, she could be put in a position where she would have to don the flak jacket, and this would be contrary to the doctors' orders. Additionally, claimant testified that, on a daily basis, she had to carry a laptop computer back and forth, climb into an SUV, and sit long hours at her desk. As these activities conflict with Dr. Abitbol's restrictions, it was rational for the administrative law judge to find that claimant cannot return to her usual work.[9] Decision and Order at 20. Therefore, claimant has established a *prima facie* case of total disability. *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT).

Employer contends the administrative law judge erred in finding it did not establish the availability of suitable alternate employment, as claimant is not incapable of working and it identified at least two suitable jobs. Claimant responds, asserting that even if the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment, the error is harmless as he also found that claimant diligently tried to return to work but was unable to do so, and employer did not appeal this finding. Employer provided a labor market study prepared by Dr. Ali, a medical doctor with no particular vocational expertise, who identified 103 jobs he thought suitable for claimant. The administrative law judge addressed the jobs identified in Dr. Ali's report but rejected any vocational conclusions he offered.[10] Decision and Order at 24. The administrative law judge rejected all but two of the jobs for various reasons and determined that two jobs does not constitute a "range" of available jobs.[11]

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[8]Although claimant lives in Kuwait, she would need to fly to the U.S. for re-training and re-issuance of equipment prior to working in Iraq.

[9]The administrative law judge acknowledged that Dr. Abitbol stated that claimant could do sedentary work as long as she has the option to sit/stand when necessary. Decision and Order at 23.

[10]Employer originally hired a vocational expert in Kentucky but hired Dr. Ali upon learning claimant would be returning to her home in Kuwait. The administrative law judge questioned why employer did not hire a vocational expert in Kuwait. Decision and Order at 24.

[11]Employer asserts that the administrative law judge found three jobs suitable for claimant: Jobs 4, 18 and 89. However, the administrative law judge specifically found #89, an entry-level sales position, unsuitable because the physical demands of traveling to the client meetings were not specified and were, therefore, uncertain. Decision and Order at 28. Thus, we reject employer's assertion that Job 89 should be deemed suitable. Employer does not challenge the administrative law judge's finding that the remaining 100 jobs are unsuitable.

Consequently, he concluded that employer did not satisfy its burden of establishing the availability of suitable alternate employment. Decision and Order at 29. Contrary to the administrative law judge's statement that identifying two jobs is insufficient, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has not set a quota on the number of jobs needed to satisfy this burden.[12] *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660; *see also Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). We need not address this issue, however, as claimant correctly asserts that the administrative law judge found that she conducted a diligent but unsuccessful search for post-injury employment, and employer did not challenge this finding.[13] *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Accordingly, any error in stating that two jobs does not satisfy employer's burden of demonstrating the availability of suitable alternate employer is harmless. We affirm the finding that claimant is totally disabled.[14] *See Fortier*, 38 BRBS 75; *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

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[12]The administrative law judge relied on the Board's decision in *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990), to conclude that identifying only two jobs is insufficient. Relying on the United States Court of Appeals for the Fourth Circuit's law which requires a "range" of available jobs, the Board in *Vonthronsohnhaus* upheld the administrative law judge's finding that a single job is insufficient evidence of suitable alternate employment. The Fifth Circuit, the jurisdiction in which *Vonthronsohnhaus* arose, later rejected the conclusion that the demonstration of only one specific job is automatically insufficient to meet an employer's burden. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

[13]The administrative law judge found that claimant attempted to train as a secretary in Kuwait, but the work caused too much pain, that she obtained a tutoring job but was let go within a few weeks, that she also tried to restart her own tutoring business, but lack of contacts, the result of several years absence from the field, made her attempt unsuccessful. Additionally, he found that claimant tried to contact a number of the employers on Dr. Ali's list but was unsuccessful. Decision and Order at 29; Cl. Ex. 19; Tr. at 151-152, 156, 171-172, 177.

[14]Contrary to employer's assertion that claimant stipulated to a post-injury wage-earning capacity and cannot be considered totally disabled, claimant conceded only that if she had the recommended back surgery she would likely have a residual earning capacity of $30,000-$36,000. Tr. at 24. She has not had the recommended back surgery, as it is an issue of contention in this case. *See* discussion *infra*.

Average Weekly Wage

Employer next contends the administrative law judge erred in using only the wages claimant received for the three weeks she worked in Iraq to calculate her average weekly wage. Employer asserts that the administrative law judge should have used a "blending" method, including pre-injury wages and/or pre-deployment wages, as this case is distinguishable from *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), and *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006).

The parties stipulated that claimant's average weekly wage is to be calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). Decision and Order at 2. Under Section 10(c), an administrative law judge has wide discretion in determining an employee's annual earning capacity. The goal of Section 10(c) is to reflect the potential of the claimant to earn absent the injury. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Simons*, 43 BRBS at 20. The Board held, in both *Simons* and *Proffitt*, that employees injured during the course of their work overseas, in a dangerous environment and under a one-year contract, are to be compensated based on their overseas wages. *Simons*, 43 BRBS at 21 (claimant worked as a truck driver in Kuwait and Iraq; injured two months into his one-year contract); *Proffitt*, 40 BRBS at 45 (claimant worked as a labor foreman in Iraq; injured 3 ½ months into his one-year contract). The Board specifically rejected the "blended approach" in cases involving a one-year contract. *Simons*, 43 BRBS at 21 n.5. Employer contends this case is distinguishable because claimant was not working under a one-year contract, but, rather, an "at will" contract. It also argues that claimant was not working in a hazardous area, as she was working in an office, and she stopped work due to the elimination of her position not due to her injury.

Employer's job offer to claimant required she work 12 hours per day and seven days per week, and it included hazard pay. The contract created a voluntary or "at will" relationship, and the initial assignment was predicted to be one year, but that was not guaranteed. Cl. Ex. 12. During the course of her employment with employer, claimant earned $1,442.31 per week while in the U.S. for training, $2,001.20 per week in Kuwait, and $2,451.93 per week in Iraq. Cl. Ex. 7. Prior to her employment with employer, claimant's earnings came from tutoring or teaching in Kuwait or from her contracting company in Kuwait. *See* Tr. at 52, 172. The administrative law judge relied on *Simons* and *Proffitt* to award claimant benefits based solely on her weekly earnings of $2,451.93 during the three weeks she worked in Iraq. Decision and Order at 31.

The administrative law judge found that claimant was injured in the U.S. and that her condition was aggravated by the work in Iraq, and she was earning the higher wages at the time she had to stop working.[15] Although claimant's job was eliminated, the administrative law judge found that claimant requested medical attention prior to her termination, effectively determining that she had ceased work because of her work injury. Thus, pursuant to *Proffitt* and *Simons*, the administrative law judge properly excluded any wages claimant earned prior to working for employer. *Simons*, 43 BRBS 18; *Proffitt*, 40 BRBS 41.

Additionally, as claimant had received pay raises from employer based on where she was working, we affirm the administrative law judge's calculation of her average weekly wage using only her wages from the three weeks she worked in Iraq, as opposed to also including the wages earned from employer while she worked in the U.S. and Kuwait. *See Healy Tibbitts*, 444 F.3d 1095, 40 BRBS 13(CRT); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979); *see also Hastings v. Earth Satellite Corp.*, 8 BRBS 519 (1978), *aff'd in pertinent part*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980) (average weekly wage calculated at time of injury; aggravation is a new injury). Further, we decline to distinguish this case on the basis that it involves an "at will" contract as the Ninth Circuit has stated that there is no error in calculating average weekly wage based on the wages earned during a short period of employment with an employer provided the fact-finder considers previous earnings. *Healy Tibbitts*, 444 F.3d at 1103, 40 BRBS at 19(CRT) (citing *Bonner*, 600 F.2d at 1292). As the administrative law judge acknowledged claimant's differing levels of wages while working for employer, but nevertheless awarded benefits based on the highest wages which claimant was earning at the time she last aggravated her back and stopped working, we affirm the administrative law judge's average weekly wage finding as it is rational and supported by substantial evidence. *Id.*

Calculation of Permanent Total Disability Benefits

Employer contends the administrative law judge erred in calculating claimant's benefits beginning October 1, 2007. Specifically, as claimant's benefits changed from

[15]Employer's assertion that claimant's office work was not in a dangerous area, so as to distinguish her situation from those in *Simons* and *Proffitt*, is meritless. The contract clearly included hazard pay as a supplement to claimant's wages/incentive for employment. Additionally, the fact that claimant resides in Kuwait, as opposed to the U.S., is insufficient reason to deprive her of the higher wages as a basis for her compensation.

temporary total disability to permanent total disability in February 2007, employer asserts that the administrative law judge should have awarded claimant the statutory maximum benefit as of February 2007 but applied the annual Section 10(f) increase for permanent disability benefits on October 1, 2007, rather than awarding the statutory maximum benefit for that date and on each successive October 1.

The Board held in *Reposky*, 40 BRBS 65, that, pursuant to Section 6(b)(1), (c),[16] a claimant is limited to the maximum compensation rate in effect at the time his disability commences and not at the time the award is issued.[17] *Reposky*, 40 BRBS at 75; *see also J.T. [Tracy]*, 43 BRBS 92 (2009); *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). The Board also held that the claimant's temporary total disability benefits remained at the maximum in effect at the time the disability commenced. When the disability became permanent and total, the claimant "became

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[16]33 U.S.C. §906(b)(1), (c) states:

> (b)(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
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> (c) Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

[17]Claimant filed a cross-appeal in this case for the purpose of preserving the issue of the proper interpretation of Section 6(c) for appeal to the circuit court. Claimant argues that the relevant maximum compensation rate is that in effect at the time the decision is awarded and not at the time the disability commenced. Thus, claimant disputes the holding in *Reposky*. The Board has rejected a previous challenge to the *Reposky* decision. *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009). The Ninth Circuit has not yet addressed this issue but has two appeals pending, *Price v. Stevedoring Services of America*, No. 08-71719, 2008 WL 4133467, and *Roberts v. Sea-Land Services*, No. 08-70268, in which oral argument was held almost one year ago. As claimant's cross-appeal does not seek any relief or challenge any findings of fact or conclusions of law in this proceeding, we reject her arguments. 20 C.F.R. §802.201(a)(2). However, we also deny employer's motion to dismiss claimant's cross-appeal, as claimant is entitled to preserve the issue for appeal.

entitled to the new maximum rate on the next October 1, and this rate was then subject to annual adjustments." *Reposky*, 40 BRBS at 76-77; *see also Heavin*, 43 BRBS at 16.

In this case, the maximum compensation rate for the period from October 1, 2005, through September 30, 2006, was $1,073.64.[18] Order at 2; Decision and Order at 32. As claimant's compensation rate $1,633.72 ($2,451.93 x 66 2/3 percent), exceeded the maximum rate, the administrative law judge awarded claimant temporary total disability benefits from May 4 through February 18, 2007, at the rate of $1,073.64. Order at 2; Decision and Order at 32. As of February 19, 2007, when claimant's condition became permanent, the administrative law judge ordered employer to pay permanent total disability "at a rate of $1,073.64, with yearly adjustments under Section 10(f) commencing on October 1, 2007, calculated from an average weekly wage in 2006 of $2,451.93 and subject to the statutory maximum compensation." Order at 2. He also stated that claimant's compensation rate beginning October 1, 2007, is subject to the maximum compensation rate of $1,160.36. *Id.* Employer argues that, because claimant received permanent total disability benefits during the year preceding October 1, 2007, the benefits claimant was then receiving should have been increased by the percent of annual increase on October 1, 2007, rather than being increased to the statutory maximum as of that date. Thus, employer argues that claimant should have been paid benefits at a rate of $1,073.64 until October 1, 2007, at which time her benefits would increase by 4.12 percent to $1,117.87.[19] On each successive October 1, employer asserts, the amount claimant was then being paid would increase by the annual percentage and she would not be entitled to the new maximum rates.

Pursuant to *Heavin* and *Reposky*, employer's argument is incorrect. In *Heavin*, the claimant's condition became permanent on July 6, 1988. The Board stated that, as the claimant "was 'currently receiving' permanent total disability benefits on October 1, 1988, he became entitled to the maximum rate in effect on that date." *Heavin*, 43 BRBS at 17. Commencing every October 1 thereafter, the claimant's benefits are to be adjusted pursuant to Section 10(f) of the Act, subject to the maximum rate for that fiscal year. *Id.*; *Reposky*, 40 BRBS at 77. Therefore, because claimant in this case was receiving permanent total disability benefits prior to October 1, 2007, and because her

[18]The relevant rate can be found at http://www.dol.gov/owcp/dlhwc/ NAWWinfo.htm.

[19]Employer also argues that it paid temporary total disability benefits beyond February 19, 2007, so any amounts it paid should be considered permanent total disability benefits. The administrative law judge awarded employer a credit for the payments made. Decision and Order at 32; Order at 2.

compensation rate based on her average weekly wage exceeded the maximum rate, she is entitled to compensation at the maximum rate in effect on October 1, 2007, $1,160.36. Commencing October 1, 2008, and each October 1 thereafter, her benefits are subject to adjustment pursuant to Section 10(f). If the resulting figure is less than claimant's actual calculated compensation rate of $1,633.72, then her benefits are limited to the maximum compensation rate for that fiscal year. *Heavin*, 43 BRBS at 17; *Reposky*, 40 BRBS at 77. As the administrative law judge properly applied the law, we affirm his award of permanent total disability benefits.

Future Medical Benefits

Employer contends that the administrative law judge erred in relying on the opinion of Dr. Abitbol instead of Dr. Best in awarding future medical benefits, as there are no findings to support Dr. Abitbol's conclusion that claimant is a candidate for surgical intervention. Claimant responds that it was rational for the administrative law judge to credit Dr. Abitbol's opinion over that of Dr. Best. The administrative law judge did not address medical benefits as an independent issue; however, he awarded them to claimant, including the cost of lumbar decompression and stabilization surgery. Decision and Order at 32.

Section 7(a) of the Act, 33 U.S.C. §907(a), provides that an employer is liable for reasonable and necessary medical expenses for treatment of a work-related injury. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979). Medical care must be appropriate for the injury, 20 C.F.R. §702.402, and the claimant can establish a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for the work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

In this case, claimant has been examined by no fewer than ten physicians. Decision and Order 9-15. It is unclear which physician is claimant's "treating" physician, as she has been treated in Iraq, Germany, and Kentucky, prior to her return to her home in Kuwait.[20] Claimant has undergone conservative treatment, including pain medication, physical therapy, and epidural injections, and still complains of debilitating pain. Dr. Abitbol recommended lumbar decompression and stabilization from L3-L5,

[20]Neither Dr. Abitbol nor Dr. Best is claimant's treating physician. *See* Decision and Order at 19 n.19. Thus, the Ninth Circuit's decision in *Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999) (a claimant's treating physician's opinion is entitled to special weight), is not directly controlling.

and he testified there is sufficient medical evidence to support such a procedure as claimant has had appropriate conservative treatment.[21] Cl. Ex. 1 at 106; Tr. at 103, 116-117. Dr. Best reported that surgery was not appropriate as claimant did not have instability in her back and as she performed well on the function capacity evaluation he conducted. Decision and Order at 13; Emp. Ex. 1. Claimant wishes to have the surgery recommended by Dr. Abitbol. Tr. at 175.

Although the administrative law judge did not specifically address the medical benefits issue, in discussing claimant's ability to return to her usual work, he gave greater weight to Dr. Abitbol's opinion, as he found that Dr. Best did not address the cumulative trauma during the journey to Iraq and did not acknowledge that claimant had reduced pain during Dr. Best's examination due to the epidural injection she had received prior to meeting with Dr. Best. Decision and Order at 19-20. Subsequently, the administrative law judge ordered employer to pay for all reasonable, necessary and appropriate medical expenses including the lumbar decompression and stabilization surgery. Decision and Order at 32; Order at 2. As the administrative law judge's weighing of the evidence is not unreasonable, we affirm his decision to give greater weight to Dr. Abitbol's opinion. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck*, 306 F.2d 693; *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). Therefore, the administrative law judge reasonably awarded medical benefits in accordance with Dr. Abitbol's treatment recommendations. Further, as both Drs. Abitbol and Best agreed that claimant has a back condition warranting restrictions but they disagreed on whether claimant is a surgical candidate, claimant was presented with two valid treatment options. In such situations, it is reasonable to allow the claimant make the decision in conjunction with her doctor. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005); *see generally Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). As the administrative law judge's decision is rational, we affirm the award of medical benefits.

[21]Following an examination on June 12, 2006, Dr. Puno also recommended surgery for claimant at the L4-5 level. Decision and Order at 12; Cl. Ex. 1 at 63-64.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge