

BRB Nos. 11-0776
and 11-0776A

MICHAEL MACKLIN)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
HUNTINGTON INGALLS)	DATE ISSUED: 07/27/2012
INCORPORATED)	
)	
Formerly known as)	
NORTHROP GRUMMAN)	
SHIPBUILDING, INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Charlene A. Moring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2010-LHC-01252) of Administrative Law Judge Kenneth A. Krantz rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial

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

The parties stipulated that claimant sustained a work-related injury to his left knee on November 7, 2008, while working as a rigger for employer. JX 1. Claimant underwent arthroscopic surgery on his left knee in December 2008. Tr. at 15. In January 2009, claimant returned to work in employer’s tool room, performing light-duty work within his knee-related restrictions.¹ *Id.* at 15-16; EX 10 at 5. In May 2009, claimant was diagnosed with metastatic prostate cancer, and in June 2009, he began daily radiation therapy for that condition. Tr. at 16; EX 6. On August 13, 2009, Dr. Brown, claimant’s oncologist, reported that claimant was scheduled to complete radiation therapy on August 18, 2009, and was unable to return to work until six weeks after the completion of the therapy. CX 1. On September 16, 2009, Dr. Brown extended claimant’s disability for an additional twelve weeks and, on December 2, 2009, he again extended claimant’s disability status for an additional twelve weeks, because of his cancer. EXs 4, 5.

On December 4, 2009, claimant saw Dr. Lannik, of Portsmouth Orthopedic Associates, because of a recurrence of his left knee pain. Following this examination, Dr. Lannik reported that claimant was to remain off work until December 18, 2009. Tr. at 17; CX 2 at 1. On December 18, 2009, claimant was seen by Dr. Blasdell, of the same practice, who stated that claimant could return to work with full knee restrictions.² Tr. at 17; CX 2 at 2-3. By letter dated February 23, 2010, employer advised claimant that, as of the following day, work was available to him within Dr. Blasdell’s restrictions. CX 3 at 1. On February 24, 2010, Dr. Graham, claimant’s treating urologist, reported that claimant’s cancer appeared to be in remission and that claimant was able to function close to his initial work capacity. EX 6. On February 25, 2010, Dr. Blasdell stated that

¹Subsequently, on July 29, 2009, Dr. Blasdell, of Portsmouth Orthopedic Associates, reported that claimant could return to full-duty work with no restrictions for his left knee. EX 1.

²Dr. Blasdell imposed the following restrictions on claimant, to remain in effect from December 18, 2009 to February 18, 2010: no lifting of more than 20 pounds, no walking or standing for more than an hour at a time without intermittent breaks, no walking on uneven ground or on scaffolding, no kneeling or squatting, and no climbing stairs or ladders. CX 2 at 3.

During a December 30, 2009, visit, Dr. Blasdell treated claimant’s knee pain with injections and continued claimant’s full knee restrictions. CXs 2 at 4; 4 at 1. At a January 18, 2010, return visit, Dr. Blasdell continued claimant’s full knee restrictions until February 25, 2010. CXs 2 at 5; 4 at 1.

claimant could return to full work activities with respect to his left knee condition. CX 4 at 1. In March 2010, claimant returned to the light-duty work in employer's tool room that he previously had performed, and he continued to work in that capacity as of the date of the hearing. Tr. at 18, 20-21; EX 10 at 5, 7.

The sole issue presented for resolution at the formal hearing in this case was whether claimant is entitled to temporary total disability benefits from December 4, 2009 through February 24, 2010. JX 1. In his decision, the administrative law judge found that claimant is entitled to temporary total disability benefits for the period from December 4, 2009 to December 18, 2009, during which time he was totally disabled due to his work-related knee injury. The administrative law judge further found, however, that claimant is not entitled to any disability benefits under the Act for the period from December 18, 2009 to February 24, 2010, during which time he had been released to work with restrictions with respect to his knee but had been taken off work by his oncologist because of his non-work-related cancer. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from December 4 through December 18, 2009. 33 U.S.C. §908(b).

On appeal, employer assigns error to the administrative law judge's finding that claimant is entitled to temporary total disability benefits from December 4, 2009 to December 18, 2009. Claimant has not responded to employer's appeal. BRB No. 11-0776. In his cross-appeal, claimant contends the administrative law judge erred in denying him temporary total disability benefits from December 18, 2009 to February 24, 2010. Employer responds, urging affirmance of the administrative law judge's denial of temporary total disability benefits for this later period of time. BRB No. 11-0776A.

The appeals of both parties involve the administrative law judge's application of principles concerning what constitutes an intervening cause of claimant's disability. Employer contends the administrative law judge erred in awarding claimant temporary total disability benefits for the period from December 4, 2009 to December 18, 2009, averring that claimant is not entitled to receive total disability benefits during this period based on a flare-up of his work-related knee injury symptoms when he was already totally disabled by his prostate cancer. Claimant contends the administrative law judge erred in finding he was not entitled to temporary total disability benefits from December 18, 2009 to February 24, 2010, a period during which claimant was released by his treating orthopedist to return to work with restrictions related to his knee; in support of his appeal, claimant asserts that as his knee-related work restrictions precluded his return to his usual work as a rigger, employer was required to establish the availability of suitable alternate work within claimant's knee-related restrictions during this time period.

With respect to an employer's continuing liability, it is well established that employer remains liable for the natural progression of a work-related injury. *See, e.g., Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000) (administrative law judge rationally found there was no "second trauma" but simply an onset of complications from the first trauma). However, if claimant sustains a subsequent injury outside of work or for a non-covered employer that is not the natural or unavoidable result of the original work injury, or if he subsequently develops an unrelated medical condition that has no causal connection to the work injury, any disability attributable to that intervening cause is not compensable. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 102 (2009); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). Employer remains liable for any disability attributable to the work injury, or to the natural progression of the work injury, notwithstanding the supervening injury. *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981); *see also Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc*, 31 BRBS 13 (1997). Employer is absolved of all liability for further benefits only if the subsequent injury is the sole cause of claimant's disability. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002); *Wright*, 25 BRBS 161.

It is claimant's burden to establish he is disabled as a result of a work-related injury. *See Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63, 64 (2010); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRB 56 (1980). In order to establish a prima facie case of total disability, claimant must establish that he is unable to perform his usual employment due to the work-related injury.³ *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Rice*, 44 BRBS 64; *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). Once claimant establishes that he is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Hord*, 193 F.3d at 800, 33 BRBS at 171(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264, 31 BRBS 119, 124(CRT) (4th Cir. 1997). Employer may satisfy its burden by making available to claimant suitable alternate work within its own facility or by demonstrating that suitable alternate employment is available in claimant's community. *Hord*, 193 F.3d at 800, 33 BRBS at 171(CRT); *see also Moore*, 126 F.3d at 264, 31 BRBS at 124(CRT); *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688, 30 BRBS 93, 94(CRT) (5th Cir. 1996). Restrictions from pre-existing conditions are to be considered

³Claimant's usual employment is that which he was performing at the time of his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Thus, in this case, claimant's usual employment is his work as a rigger, not the light-duty work he subsequently performed in employer's tool room.

in addressing a claimant's ability to perform alternate employment; however, restrictions related to a condition that is the result of an intervening cause are not considered in assessing suitable alternate employment. *See Tracy*, 43 BRBS at 102; *Leach*, 13 BRBS at 234-235. If the administrative law judge finds that claimant's work-related injury precludes him from performing any employment, claimant is totally disabled. *See J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95, 97 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

In this case, the injury which gives rise to claimant's claim for disability benefits is his November 7, 2008, work-related knee injury. As a result of this injury, claimant was unable to return to his usual work as a rigger for employer. In January 2009, after recovering from knee surgery, claimant returned to light-duty work in employer's tool room. In May 2009, claimant was diagnosed with prostate cancer. It is unclear from the record exactly when claimant discontinued his work for employer in order to undergo cancer treatment. In December 2009, claimant's left knee symptoms flared up and he sought temporary total disability benefits based on this worsening of his November 7, 2008, work-related knee injury. Claimant's cancer, which was diagnosed in May 2009, represents an unrelated medical condition that occurred subsequent to the November 2008 work injury, and thus, restrictions associated with this condition cannot be considered in addressing the extent of claimant's disability. *See Tracy*, 43 BRBS at 102; *Leach*, 13 BRBS at 234-235. Contrary to employer's arguments on appeal, the mere occurrence of claimant's subsequently diagnosed non-work-related cancer does not dictate that claimant's disability is due solely to that condition. Rather, employer remains liable for any natural progression of claimant's work-related knee injury notwithstanding the occurrence of an intervening event. *See Leach*, 13 BRBS at 234-235 and n.5; *see also Plappert*, 31 BRBS at 110. Employer, however, is not liable for compensation for any additional disability caused by the intervening event. *See id.* Thus, in this case, a finding of disability must be based solely on the flare-up of claimant's work-related knee injury without regard to the disabling effects of his prostate cancer. *See Leach*, 13 BRBS at 234-235.

The administrative law judge in this case properly found that claimant is entitled to temporary total disability benefits from December 4, 2009 to December 18, 2009, based on claimant's work-related knee injury, notwithstanding that claimant was also totally disabled by his cancer during this period. The administrative law judge found in this regard that claimant's treating orthopedist Dr. Lannik ordered claimant to remain out of work from December 4 to December 18 because of the flare-up of symptoms associated with claimant's work-related left knee injury. *See Decision and Order* at 4, 6-7; CX 2 at 1. The administrative law judge's determination that during this period of time claimant was fully restricted from any work due to his knee injury is thus supported by substantial evidence. *See Decision and Order* at 7; *Rodriguez*, 42 BRBS at 97.

Contrary to employer's arguments, the fact that during this period claimant also was totally disabled by his non-work-related prostate cancer is of no legal consequence. *See Leach*, 13 BRBS at 235 n.5. As the administrative law judge properly found that claimant was totally disabled by his work-related knee condition during the period from December 4 to December 18, 2009, we affirm the administrative law judge's award of temporary total disability compensation during this period. *See Rodriguez*, 42 BRBS at 97; *Leach*, 13 BRBS at 235 n.5.

We also agree with claimant that the administrative law judge erred in his consideration of claimant's claim for temporary total disability benefits for the period from December 18, 2009 to February 24, 2010. On December 18, 2009, Dr. Blasdell released claimant to return to work with restrictions associated with claimant's work-related knee injury. CX 2 at 2-3. The administrative law judge denied disability benefits for the period from December 18, 2009 to February 24, 2010, on the basis that during this period claimant was medically restricted from working due to his prostate cancer. Decision and Order at 7. As previously discussed, however, the existence of an intervening cause does not cut off employer's liability for disability benefits attributable to the original work injury and to the natural progression of that injury. *See Leach*, 13 BRBS at 234-235. In this case, the administrative law judge committed legal error by failing to address the evidence relevant to the issue of any disabling effects of claimant's work-related knee condition separate and apart from the disability associated with claimant's prostate cancer. *See Tracy*, 43 BRBS at 102; *Leach*, 13 BRBS at 234-235. The fact that claimant was totally disabled by his cancer does not foreclose his entitlement to disability benefits during the relevant period if his knee-related work restrictions, considered alone, rendered him totally or partially disabled. *See Leach*, 13 BRBS at 235 n.5. We therefore vacate the administrative law judge's denial of temporary total disability benefits for the period from December 18, 2009 to February 24, 2010, and remand the case for reconsideration of claimant's entitlement to disability benefits during this period consistent with these applicable legal principles.

On remand, the administrative law judge must determine whether claimant established a prima facie case of total disability during the period from December 18, 2009 to February 24, 2010, by establishing that he was unable to perform his usual work as a rigger due to his work-related knee restrictions which arose as a result of a worsening of his November 7, 2008, knee injury. *See Tracy*, 43 BRBS at 102; *Leach*, 13 BRBS at 234-235; *see also Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1889). If the administrative law judge finds that claimant established a prima facie case of total disability, he must then determine whether employer met its burden of demonstrating the availability of suitable alternate employment. *See Hord*, 193 F.3d at 800, 33 BRBS at 171(CRT); *Moore*, 126 F.3d at 264, 31 BRBS at 124(CRT). In this regard, the administrative law judge must determine whether employer established the availability of

alternate employment which claimant could perform given his knee-related work restrictions.⁴ *See Hord*, 193 F.3d at 800, 33 BRBS at 171(CRT); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (en banc).

Accordingly, we affirm the administrative law judge's award of temporary total disability benefits for the period from December 4 to December 18, 2009. The administrative law judge's denial of temporary total disability benefits for the period from December 18, 2009 to February 24, 2010, is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴The fact that claimant was disabled during this period by his non-work-related prostate cancer is not germane to this inquiry. *See Leach*, 13 BRBS at 235 n.5. Thus, employer could satisfy its burden of establishing suitable alternate employment by offering claimant work within his knee-related restrictions in its own facility or by identifying suitable alternate work on the open market notwithstanding that claimant's prostate cancer may have precluded him from accepting or performing such alternate employment during the relevant period.