BRB No. 06-0437

WILLIE B. RICHMOND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS	)	DATE ISSUED: 02/27/2007
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, Bay St. Louis, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2004-LHC-2747) of Administrative Law Judge Lee J. Romero, Jr., awarding benefits 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, an insulator, suffered a series of work-related injuries to her knees, hands and wrists during the course of her employment.[1] In 1997, claimant was assigned

[1] Claimant sustained knee injuries in 1984, 1986, 1996 and 2003, and underwent knee surgery in 1984, 1996 and 2005.

to permanent light-duty work due to her physical restrictions. On June 30, 2003, however, claimant was assigned work outside her restrictions onboard a ship; she left work on July 25, 2003, when she became incapacitated due to her knee pain. Employer terminated claimant on August 18, 2003, because it no longer had work available within her physical restrictions. In March 2004, claimant obtained non-maritime employment at the Beau Rivage casino. She worked there until August 2004, when she had to stop due to her multiple physical problems. Claimant filed a claim against employer for periods of total and partial disability.

In his Decision and Order, the administrative law judge found that claimant's current knee condition arose out of her longshore employment,[2] and that claimant's employment at the Beau Rivage casino did not sever employer's liability for claimant's knee condition. He found that claimant's condition became permanent on December 29, 2003, and that employer did not establish the availability of suitable alternate employment, except for the period claimant was employed at the casino. Accordingly, he awarded claimant compensation for temporary total disability from August 18 to December 28, 2003, for permanent total disability from December 29, 2003, to March 15, 2004, for scheduled permanent partial disability from March 16, 2004 to September 27, 2004, and for ongoing permanent total disability commencing September 28, 2004, as well as medical expenses arising out of her work injury to her knees. 33 U.S.C. §§907, 908(a), (b), (c)(2).

Employer appeals, contending that the administrative law judge erred in finding it liable for claimant's current knee disability, alleging that claimant's employment at the casino aggravated her bilateral knee condition and severed its liability. Employer also contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment prior to March 16, 2004, and in finding that claimant ceased working at the casino due in part to her knee condition. Employer further avers that the administrative law judge erred in finding that claimant's knee condition is permanent. Claimant responds, urging affirmance of the administrative law judge's decision in all respects. Employer filed a reply brief.

Employer first argues that the administrative law judge erred in finding it liable for any disability claimant may currently suffer due to her knee injuries, contending that claimant's post-injury employment at the Beau Rivage aggravated her knee condition and severed its liability. Claimant's job at the casino required her to walk and stand. The

[2] The administrative law judge also found that claimant's current carpal tunnel problem and DeQuervain's disease are not related to her longshore employment.

administrative law judge found that claimant's employment at the casino was not an intervening cause of claimant's disability, pursuant to the law of the Fifth Circuit, but resulted from the natural progression of her underlying degenerative condition.

If the progression of the claimant's condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for the disability attributable to the intervening cause. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Leach v. Thompson's Dairy*, 13 BRBS 231 (1981). The Fifth Circuit has articulated two, potentially differing, standards as to what constitutes a supervening cause. In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), the court held that a supervening cause is an influence originating entirely outside of employment that overpowers and nullifies the initial work-related injury. In *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), however, the court stated that a supervening cause is one that causes the condition to worsen.

The Fifth Circuit discussed these standards in *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998), and held that neither standard was met in the case before it. The claimant sustained a work-related back injury. His pain intensified after he assembled a swing set. The administrative law judge found that the latter activity exacerbated claimant's symptoms, but that it did not constitute a supervening cause of claimant's disability. The court affirmed, holding that assembling the swing set did not overpower and nullify the work-related injury, pursuant to the *Voris* standard. *Shell Offshore*, 122 F.3d at 315, 31 BRBS at 131(CRT). The court also affirmed the administrative law judge's finding that assembling the swing set did not worsen the claimant's condition, pursuant to *Bosarge. Id.*

In this case, the administrative law judge found that claimant's activities in her subsequent employment did not constitute an intervening cause of claimant's disability. He found that claimant's job duties, which required walking and standing, are unavoidable and natural activities of daily living, and that Dr. Dyas had not restricted claimant from these activities. Dr. Dyas, who offered the only medical opinion concerning claimant's knee condition after July 25, 2003, stated that walking and standing could render claimant's underlying condition symptomatic. EX 22 at 34-35. Dr. Dyas also stated, however, that her impairment of 20 percent to each knee pre-existed the work at the casino and was not increased thereby. EX 22 at 34, 37.

The administrative law judge found that, pursuant to *Voris*, 190 F.2d 929, claimant's work at the Beau Rivage did not "overpower and nullify" the initial work-related injury. This finding is rational and supported by substantial evidence, as Dr. Dyas stated that the degenerative process was set in motion by the many injuries claimant had

over the years during her employment with employer, EX 22 at 38, 45, and that claimant did not sustain any single traumatic injury while employed at the Beau Rivage. *See Shell Offshore*, 122 F.3d at 315, 31 BRBS at 131(CRT). We also affirm the administrative law judge's finding that claimant's employment at the casino did not worsen her condition, pursuant to *Bosarge*, in light of Dr. Dyas's statement that claimant's disability did not increase as a result of her subsequent employment. *Id.* Therefore, as employer has not demonstrated error in the administrative law judge's assessment of the Dr. Dyas's opinion in light of the applicable law, we affirm the administrative law judge's finding that employer is liable for the disability and medical benefits due claimant as a result of her bilateral knee condition. *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

Employer next contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Employer argues that it established suitable alternate employment based upon the labor market survey provided by Mr. Sanders, its certified rehabilitation expert, prior to claimant's obtaining a job at the casino. EX 19. Alternatively, employer contends that claimant's job at the casino constituted suitable alternate employment and that claimant left this employment for reasons unrelated to her work-related knee condition.

Once, as here, claimant establishes her inability to perform her usual work because of her work injury, the burden shifts to employer to establish that jobs are reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon her age, education, work experience and physical restrictions and which she could realistically secure if she diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer argues that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment on the open labor market. The administrative law judge rejected employer's labor market survey identifying three jobs available as of August 15, 2003, because the physical requirements of the jobs were not identified. EX 19. We affirm this finding, as the administrative law judge is not able to assess the suitability of positions without this information. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992).

The administrative law judge also rejected the three jobs available as of November 24, 2003, on the basis that employer did not establish that they are within claimant's restrictions. The administrative law judge found, based on Dr. Dyas's opinion, that claimant was limited to light-duty work with no lifting over 20 to 25 pounds, no climbing, no climbing aboard a ship, and no stooping, squatting, or excessive strain on her knees. CX 2 at 2-3; Decision and Order at 30. The administrative law judge found that the job at Clarke Oil required occasional lifting of 30 pounds, and, therefore, is not within claimant's restrictions. The administrative law judge found that all three identified positions require occasional bending, stooping and squatting and therefore are

not suitable because employer did not establish that claimant could engage in these activities on an occasional basis.

Employer contends that it is claimant's burden to establish what restrictions she has due to her work injury and that the administrative law judge's finding is not supported by Dr. Dyas's opinion as that doctor found that claimant cannot engage in "excessive" activities with her knees. Employer therefore contends that jobs that require "occasional" stooping and squatting are suitable. We reject employer's contention of error, as the administrative law judge rationally interpreted the whole of Dr. Dyas's reports as prohibiting the types of activities required by the jobs identified in employer's labor market survey. On August 14, 1003, Dr. Dyas stated that claimant will have trouble stooping, squatting, climbing, carrying tool boxes and walking long distances. CX 2 at 3. He further opined that claimant would be a danger to herself and to co-workers if she tried to climb aboard a ship, stoop, squat or strain her knees excessively. *Id*.; EX 17 at 1. On October 7, 2003, Dr. Dyas stated that claimant "is unable to work in a position which requires stooping, climbing and so forth due to her knee condition." CX 2 at 2. Based on these reports, we hold that the administrative law judge rationally found that the jobs employer identified, which require "occasional" stooping and squatting, are not suitable for claimant. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Therefore, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment prior to claimant's obtaining a position at the Beau Rivage casino.

The administrative law judge found that the casino job was suitable alternate employment from March 16, 2004 until September 2004, when Dr. Dyas stated claimant was unable to work. EX 17 at 13. The administrative law judge found that her inability to work was due to a combination of her non work-related hand condition and her knee injuries. Decision and Order at 32. Employer contends that this finding is not supported by substantial evidence, and that the job continued to be suitable from the perspective of claimant's work-related knee condition.

We reject employer's contention. On August 19, 2004, Dr. Dyas prepared a medical assessment which placed new physical restrictions on claimant based on x-rays showing that her knee joints were "worn out" and that her osteoarthritis was advancing. CX 1 at 8; CX 3. This new assessment, in addition to placing restrictions on claimant's use of her hands, limited her standing, walking, climbing, stooping and kneeling. CX 3. Subsequently, Dr. Dyas performed a left knee arthroscopy on February 17, 2005. CX 1 at 5; EX 22 at 39-40. The administrative law judge rationally found that the restrictions due to claimant's knee condition rendered the Beau Rivage job unsuitable as the job required walking and standing in excess of the restrictions. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001). We, therefore, affirm the administrative law judge's finding that as of September 27, 2004, the casino

job was no longer suitable for claimant. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). Consequently, we affirm the administrative law judge's award of total disability benefits for the period between August 18 to December 28, 2003, and ongoing from September 28, 2004.

Finally, employer argues that the administrative law judge erred in finding that claimant reached maximum medical improvement on December 29, 2003. Employer maintains that claimant's condition is not permanent because she underwent knee surgery on February 17, 2005, and additional arthroscopy has been recommended.

A claimant is considered permanently disabled if she has any residual disability after reaching maximum medical improvement, the date of which is determined by medical evidence and is not dependent on economic factors. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). A disability may be permanent if it has continued for a lengthy period and appears to be of lasting or indefinite duration as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Cor*p., 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In finding that claimant's condition was permanent as of December 2003, the administrative law judge relied upon the opinion of Dr. Dyas who assigned a disability rating to claimant's knees at that time. The administrative law judge found that although claimant subsequently underwent surgery, Dr. Dyas stated that her condition was not expected to improve as a result of the surgery.

We affirm the administrative law judge's finding that claimant's condition is permanent. Dr. Dyas stated that claimant had a 20 percent impairment to each knee as of December 2003, and that was as good as her condition was going to get. CX 2 at 1; EX 22 at 28-29. He explained that she had further surgery on her left knee in February 2005, and that she had not yet fully recovered from the surgery. EX 22 at 40-41. He further stated, however, that it was not clear she would improve as a result of the surgery and that any decision about surgery on the other knee would have to await the outcome of the first surgery. *Id.* at 40. Since claimant had a permanent impairment to each knee prior to the most recent surgery, and as any improvement in the underlying condition was speculative, the administrative law judge did not err in finding that claimant's condition was permanent. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). It had lasted for many years and Dr. Dyas testified as to the degenerating nature of the condition. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). The administrative law judge rationally found under these circumstances that the nature of the underlying permanent condition was not altered by a period of temporary disability due to surgery. *See generally Leech v. Service Engineering Co.*, 15 BRBS 18, (1982). Therefore, we affirm the administrative law judge's finding that claimant's disability has been permanent since December 2003,

as it is rational, supported by substantial evidence, and in accordance with law. *See generally McCaskie v. Aalborg Ciserv Norfolk, Inc*., 34 BRBS 9 (2000).

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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REGINA C. McGRANERY
Administrative Appeals Judge