BRB No. 12-0525

AMY MUNDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PLATYPUS MARINE	)	DATE ISSUED: 06/24/2013
	)	
and	)	
	)	
AIG CHARTIS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits and the Order Granting Motion for Reconsideration of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer and AIG Chartis Insurance Company.

Jennifer Kim (Metz & Associates, P.S.), Seattle, Washington, for employer and Majestic Insurance Company.

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

PER CURIAM:

Employer and carrier AIG Chartis Insurance Company appeal the Decision and Order Awarding Compensation and Benefits (2011-LHC-00655, 00656) of Administrative Law Judge Richard M. Clark 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).

Claimant developed pain in her left elbow in May 2006, later diagnosed as lateral epicondylitis, and a left shoulder strain, due to repetitive use of her left arm while performing lifting and sweeping in the course of her janitorial duties for employer. As a result, claimant became unable to work in November 2006. Following a period of conservative treatment, claimant returned to light-duty work with employer from March 20, 2007 until May 18, 2007, when complaints of swelling and numbness in her left hand prompted Dr. McGovern to remove her from work. Dr. McGovern performed a left lateral epicondylar release on June 18, 2007, and subsequently approved claimant for light-duty work with restrictions. Claimant returned to full-time modified work with employer on September 24, 2007. On December 20, 2007, claimant sustained an injury to her left arm after sweeping debris into a shovel at work; claimant stopped working on January 8, 2008. Subsequently, claimant was diagnosed with chronic lateral epicondylitis, a left radial nerve condition, left ulnar nerve neuropathy, and recurring left shoulder pain. Claimant thereafter had revision surgeries relating to her left elbow condition on February 23, 2009, and August 2, 2010. She has not returned to work.

At the time of claimant's initial injury, Majestic Insurance Company (Majestic) was employer's carrier. On May 21, 2007, AIG Chartis Insurance Company (Chartis) became employer's carrier and it remained in this capacity through the date of claimant's second injury on December 20, 2007. Each carrier paid claimant benefits for periods of disability relating to her work injuries but a dispute arose as to which carrier is responsible for claimant's ongoing condition as of August 15, 2008.

In his Decision and Order, the administrative law judge found that claimant sustained a work-related left elbow injury on May 25, 2006, and that she sustained a permanent aggravation of that condition as a result of the December 20, 2007 work incident. The administrative law judge thus found Chartis, as employer's carrier at the time of the most recent injury, solely liable for the entire resulting disability from the date of aggravation, December 20, 2007, forward. The administrative law judge found that claimant reached maximum medical improvement with regard to the entirety of her left

elbow/arm injuries as of August 2, 2011,[1] that claimant cannot return to her janitorial work for employer due to her injuries, that employer did not establish the availability of suitable alternate employment, and that claimant nevertheless diligently but unsuccessfully tried to secure gainful employment. Applying Section 10(c), 33 U.S.C. §910(c), the administrative law judge calculated claimant's average weekly wage at $438.88 for purposes of her May 25, 2006 injury and at $438.74 for purposes of her December 20, 2007 injury. Accordingly, the administrative law judge found Majestic liable for benefits for various periods through September 23, 2007. The administrative law judge found Chartis liable for temporary total disability benefits from January 8, 2008 to August 1, 2011, and for a continuing award of permanent total disability benefits thereafter. The administrative law judge found Majestic liable for all medical benefits up to December 19, 2007, at which point Chartis became liable. The administrative law judge ordered Chartis to reimburse Majestic for medical and disability benefits it paid after December 20, 2007.

On appeal, Chartis challenges the administrative law judge's finding that it is liable for claimant's benefits after March 20, 2008, as well as the administrative law judge's calculation of claimant's average weekly wage and his decision to allow Dr. Earle to testify at the hearing. Majestic and claimant each respond, urging affirmance of the administrative law judge's decision. Chartis has filed a reply brief.

We first address Chartis's contention that the administrative law judge abused his discretion by allowing Dr. Earle to testify at the hearing since, at his June 29, 2011 deposition, he offered exactly the testimony that Majestic indicated he would offer at the hearing. Chartis maintains that Majestic's rationale for having Dr. Earle testify at the hearing, i.e., because it was concerned about the effectiveness of the physician's initial testimony, is insufficient justification for the administrative law judge to allow him to testify a second time, on the same subject, with no new evidence in the record to warrant a supplemental assessment.

An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary, capricious, or an abuse of discretion. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). In this case, the record establishes that Chartis had adequate prior notice as to the possibility of Dr. Earle's being called as a witness at the hearing. Majestic identified Dr. Earle, in its Pre-Hearing Statement and Witness/Exhibit

[1]The administrative law judge found that claimant reached maximum medical improvement for her left lateral epicondylitis and left radial nerve condition as of February 23, 2010, for her left shoulder condition as of June 1, 2011, and for her left ulnar nerve neuropathy as of August 2, 2011.

List dated August 15, 2011, as one of its "Witnesses Expected to Testify at Trial," and moreover, Chartis was provided with, and took advantage of, the opportunity to cross-examine the witness at the September 14, 2011 hearing. HT at 89-100. Consequently, Chartis has not shown that the administrative law judge's decision to allow Dr. Earle to testify at the hearing was arbitrary, capricious, or an abuse of discretion and thus the administrative law judge's action in this regard is affirmed. *Burley*, 35 BRBS 185; *Cooper*, 33 BRBS 46.

Chartis next contends the administrative law judge applied an incorrect legal standard in concluding Chartis is the liable carrier after March 20, 2008. Chartis contends the administrative law judge did not determine if, as of March 20, 2008, claimant's disability and need for medical care were the natural and unavoidable consequence of the December 20, 2007 injury. Additionally, Chartis argues that the administrative law judge erred in finding that the December 20, 2007 injury resulted in a permanent aggravation of claimant's condition, rather than only a temporary exacerbation of symptoms that resolved by March 20, 2008. Chartis contends the opinions offered by Drs. O'Riordan, Jackson, McFadden and McGovern concluding that claimant only experienced a temporary increase in symptoms rather than a permanent aggravation are, in contrast to the administrative law judge's findings, well-reasoned and supported by the evidence.

In cases involving multiple traumatic injuries, the determination of the responsible carrier turns on whether the claimant's disabling condition is the result of the natural progression or an aggravation of a prior injury.[2] The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that, in allocating liability between successive employers and carriers in cases involving traumatic injury, the employer/carrier at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer/carrier on the risk at the time of the aggravation is liable for the entire disability resulting therefrom.[3] *Metropolitan Stevedore*

[2]The rule for determining which carrier is liable for the totality of a claimant's disability is the same as the rule for ascertaining the responsible employer. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *see also Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

[3]Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). It follows that the employer at the time of the aggravation is liable for the resulting disability. *Id.*

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); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). Where claimant's work results in an exacerbation of his symptoms, the employer/carrier at the time of the work events resulting in the exacerbation is responsible for any resulting disability. *See 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). The Ninth Circuit has emphasized that a subsequent employer/carrier may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer/carrier is not the primary factor in the claimant's resultant disability.[4] *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In his decision, the administrative law judge concluded that the work incident on December 20, 2007, resulted in a permanent aggravation of claimant's underlying condition. In weighing the relevant evidence, the administrative law judge found the opinions of Drs. O'Riordan, Jackson and McFadden, that the shoveling incident of December 20, 2007, influenced claimant's condition only for approximately three months, but that the December 20, 2007 injury had no effect on the symptoms or pathology of claimant's condition following this temporary exacerbation, are not supported by medical evidence. Decision and Order at 34-36. The administrative law judge found that none of these physicians explained why the three-month period of purported temporary exacerbation applied specifically to claimant. Rather, the administrative law judge found that Dr. O'Riordan based his conclusion on his general clinical experience that soft tissue typically heals in three months, while Dr. McFadden admitted that the three-month period was "somewhat arbitrary." Additionally, the administrative law judge found that the three-month period does not coincide with any examination of claimant indicating she had returned to her baseline status prior to the December 2007 incident. He noted that claimant did not return to work or improve drastically in March 2008, but instead was limited to sedentary work by a March 2008 functional capacity evaluation, which, the administrative law judge found, makes the three-month period of alleged temporary exacerbation unpersuasive. The administrative law judge found, based on the contemporaneous medical examinations and claimant's testimony regarding her symptoms, that she was, from a physical and functional

[4]Thus, contrary to Chartis's contention, it is irrelevant that claimant's initial May 2006 work injury remains a contributing cause of her disability and need for treatment, if it is determined that the December 20, 2007 injury permanently aggravated that underlying condition.

standpoint after the December 20, 2007 shoveling incident, "significantly more restricted in her functional activities" to the point that she did not return to the baseline level of janitorial work she had performed with employer prior to that incident. Decision and Order at 34-35.

Additionally, the administrative law judge found that it was only after the December 20, 2007 incident, that Dr. McGovern and claimant discussed the possibility of a second surgery. Consequently, the administrative law judge accorded more weight to the opinion of Dr. Earle, that the December 20, 2007 shoveling incident "permanently aggravated" claimant's condition, than to those of Drs. McGovern, Jackson and O'Riordan, particularly where it was corroborated by other evidence in the record.[5] Thus, based on Dr. Earle's opinion, as supported by claimant's increased symptoms and restrictions and need for additional surgeries subsequent to that incident, the administrative law judge concluded that Chartis, as the last carrier, is solely liable for the entire resulting disability from December 20, 2007, forward.

The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. The Board is not empowered to reweigh the evidence, but must affirm the administrative law judge's weighing of the evidence if it is rational. *See generally Hawaii Stevedores, Inc. v. Ogawa,* 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge extensively reviewed the evidence of record in terms of the appropriate law,[6] and his finding that claimant sustained a permanent aggravation resulting in disability as a result of the December 2007 injury is rational and supported by substantial evidence. Therefore, we affirm the finding that Chartis, as the last carrier, is solely liable for the entire resulting disability from December 20, 2007, forward. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

[5]The administrative law judge acknowledged that Dr. Earle's opinions would be afforded "less weight" because the physician had not examined claimant when he initially made his findings, he did not review certain items in claimant's file prior to 2011, and because he is not an orthopedic surgeon. Nonetheless, the administrative law judge found that Dr. Earle's opinion was entitled to "some weight," and to greater weight than those of Drs. McGovern, Jackson and O'Riordan, where it was corroborated and thus better supported by other evidence in the record.

[6]Thus, contrary to Chartis's contention, the administrative law judge discussed and applied the appropriate "two injury" and aggravation standards in resolving the responsible carrier issue in this case. *See* Decision and Order at 29-37.

Chartis lastly challenges the administrative law judge's calculation of claimant's average weekly wage for the December 20, 2007 injury. Chartis contends that the record does not support the administrative law judge's finding that claimant's earnings in the 12.5714 weeks before the December 20, 2007 injury were representative of claimant's earning capacity because she was working with significant restrictions. Chartis thus contends that claimant's average weekly wage should be based on her earnings for the period from November 15, 2005 to November 14, 2006, prior to her first injury.[7]

Section 10(c) of the Act, 33 U.S.C. §910(c), directs the administrative law judge to determine claimant's annual earning capacity at the time of injury "having regard to the previous earnings of the injured employee in the employment in which [she] was injured."[8] Thus, the goal of Section 10(c) is to arrive at a sum that reflects the potential of claimant to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *see Deweert v. Stevedoring Services of America*, 272 F.3d 1241, (9th Cir. 2001) (average weekly wage calculated at time of injury not time of disability unless disability truly latent); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990) (average weekly wage calculated at time of aggravating injury). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c); accordingly, the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount calculated represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In this case, the administrative law judge properly observed that claimant's average weekly wage relevant to Chartis's liability should be calculated at the time of the aggravation because it constituted a new injury. *Hastings v. v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *see generally Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003). The administrative law judge found that the wages claimant earned from September 24, 2007, the date she returned to work after her first operation, to December 20, 2007, the date of her aggravation/new injury, are a reasonable and fair approximation of claimant's wage-earning capacity at the

[7]Chartis thus argues that claimant's average weekly wage for purposes of the December 20, 2007, injury should be the same as it was at the time of the first injury, i.e., $438.88, rather than $438.74 as calculated by the administrative law judge. In her response brief, claimant comments on this anomalous contention, but nevertheless states that substantial evidence supports the administrative law judge's conclusion.

[8]No party contends that Section 10(a) or Section 10(b) should be applied in this case. 33 U.S.C. §910(a), (b).

time of that injury. In reaching this conclusion, the administrative law judge found that it was reasonable to expect that, but for the December 20, 2007 accident, claimant would have continued working eight-hour shifts, five days per week, at the rate of $12.50 per hour, with occasional but rare absences for her left arm pain.[9] He thus divided claimant's total earnings over the course of that period of $5,515.63 by the number of weeks claimant worked, 12.5714, to arrive at an average weekly wage of $438.74. Chartis has not established error in this method of calculating claimant's average weekly wage. The result reached by the administrative law judge accords with Section 10(c) as it constitutes a reasonable estimate of claimant's annual earning capacity at the time of the injury, it is supported by substantial evidence, and is in accordance with law. We, therefore, affirm the administrative law judge's calculation of claimant's average weekly wage at $438.74 as of the date of the December 20, 2007 accident. *See Healy Tibbitts Builders*, 444 F.3d 1095, 40 BRBS 13(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Compensation and Benefits and the Order Granting Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9]The administrative law judge found that this was supported, in part, by claimant's report of decreased symptoms and the increase in approved work activities shortly before the December 20, 2007 accident.