

BRB Nos. 03-0224
and 03-0224A

DEBORAH BERGE)
)
Claimant-)
Cross-Respondent)
)
v.)
)
PACIFIC SHIP REPAIR)
AND FABRICATION)
)
and)
)
MONTLAKE CASUALTY)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent)

DATE ISSUED: Nov. 20, 2003

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills,
Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Roy D. Axelrod, Solana Beach, California, for employer/carrier.

Kathleen H. Kim (Howard Radzely, Acting Solicitor of Labor; Donald S.
Shire, Associate Solicitor; Mark Flynn, Acting Counsel for Longshore),
Washington, D.C., for the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and employer cross-appeals the Decision and Order Awarding Benefits (2001-LHC-2848) of Administrative Law Judge Richard D. Mills 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured her back on June 15, 1999, during the course of her employment as a ship repair logger/foreman. Claimant and employer agreed that claimant is unable to return to her usual work but that she is physically capable of alternate employment as a material, shipping, receiving or stock clerk. The parties agreed that claimant was temporarily totally disabled between June 16 and October 19, 1999, and temporarily partially disabled between October 19, 1999, and January 6, 2000. They also stipulated that claimant's condition reached maximum medical improvement as of January 7, 2000. Decision and Order at 2-3. The only unresolved issues were claimant's average weekly wage and employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief.

The administrative law judge awarded claimant temporary total disability benefits between June 16 and October 19, 1999, temporary partial disability benefits from October 20, 1999, through January 6, 2000, and permanent partial disability benefits from January 7, 2000, and continuing. Decision and Order at 17. With regard to employer's request for Section 8(f) relief from continuing liability for benefits, the administrative law judge determined that claimant suffered from a manifest, pre-existing, permanent partial disability to her back and neck as a result of prior work and automobile accidents in 1995, 1997, and 1998, and that this disability, in conjunction with her work injury, contributed to her current level of disability. Decision and Order at 16-17. Accordingly, he awarded employer Section 8(f) relief. On the issue of average weekly wage, the administrative law judge concluded that claimant is not bound by the stipulation of her weekly earnings she made in her state claim for workers' compensation benefits and that, using Section 10(c), 33 U.S.C. §910(c), claimant's average weekly wage at the time of her injury was \$725.16. Decision and Order at 11-14, 17-18. The Director appeals the award of Section 8(f) relief, challenging only the determination that employer satisfied the contribution element, and employer responds, urging affirmance. BRB No. 03-0224. Employer cross-appeals, challenging the administrative law judge's average weekly wage finding. Claimant responds, urging affirmance. BRB No. 03-0224A.

Section 8(f)

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted this Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest, pre-existing permanent partial disability, and that the claimant's current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). In order to satisfy the contribution element in a case involving a permanent partial disability, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, requires the employer to show, by medical or other evidence, that the overall disability is materially and substantially greater than it would have been had the pre-existing condition never existed. *Sproull*, 86 F.3d at 900, 30 BRBS at 52(CRT). Because the Director does not dispute the finding that claimant had a manifest, pre-existing disability in her back and neck, the only issue with regard to Section 8(f) entitlement is whether employer has satisfied the "materially and substantially greater" requirement of the contribution element.¹

In 1995, following an automobile accident, Dr. Cella performed a neurological examination on claimant and diagnosed cervical strain/sprain, thoracic strain, bilateral TMJ syndrome, extensor tenosynovitis of the right elbow, right supinator tunnel syndrome and headaches. Emp. Ex. 19 at 163, 169. In 1996, Dr. Haneline, a chiropractor, assessed claimant's level of impairment from the 1995 accident, determining that she suffered from a 24 percent permanent impairment to the whole person. Emp. Ex. 18. In 1997, Dr. Haneline examined claimant again after another automobile accident, noting a compounding effect due to the previous trauma to her neck and back. He precluded claimant from heavy lifting and excessive use of her arms and shoulders. *Id.* Dr. Goetz, who specialized in physical medicine, opined claimant would suffer neck instability and vertebral slippage, making surgery a future possibility. Emp. Ex. 21. After the 1999 work-related injury, Dr. Dodge treated claimant for cervical thoracic strain with persistent neck, upper back and arm

¹We reject employer's assertion that the Director cannot challenge the administrative law judge's Section 8(f) findings because he did not appear at the hearing. Employer bears the burden of establishing its entitlement to Section 8(f), and the Director's absence does not constitute waiver of his right to protect the Special Fund against unjustified claims. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 888, 31 BRBS 141, 143-144(CRT) (5th Cir. 1997).

radicular pain.² He reviewed her previous medical records and concluded that she never fully recovered from the prior injuries. He also stated that, prior to May 1998, claimant was restricted from heavy lifting and excessive use of her arms and shoulders and, in January 2000, he added to claimant's restrictions, prohibiting her from overhead work and restricting her from repeated bending and stooping. Emp. Ex. 13. In comparing her pre-work-injury condition with her post-work-injury condition, Dr. Dodge stated that claimant has additional work restrictions and that she lost one-half of her pre-work-injury capacity for lifting, bending and stooping. *Id.*

The administrative law judge credited Dr. Haneline's 1996 assessment that claimant had an impairment of 24 percent of the whole person related to her 1995 injuries, and Dr. Dodge's conclusion that claimant sustained "further impairment" to her back and neck as a result of the 1999 work injury. He also relied on Dr. Dodge's opinion that at least some portion of her current disability to her neck and back can be attributed to her earlier back and neck injuries, as she continued to feel the effects of those injuries at the time of her 1999 work accident. Decision and Order at 16-17. In addressing whether employer has shown that the pre-existing disability makes claimant's present disability materially and substantially greater than it would have been absent the pre-existing disability, the administrative law judge credited those same opinions. He found compelling claimant's pre- and post-work-injury restrictions, noting that claimant was already significantly restricted as a result of her back condition and that her capacity for lifting, bending and stooping was further decreased by a margin of 50 percent as a result of the 1999 work injury. Decision and Order at 17. Thus, the administrative law judge concluded that employer demonstrated that claimant's current permanent partial disability is materially and substantially greater than it would have been absent the pre-existing disability to her back and neck. *Id.*

The Director contends the administrative law judge erred in awarding Section 8(f) relief, asserting employer has not shown that the pre-existing condition made claimant's current economic disability materially and substantially greater than it would have been absent the pre-existing condition. The Director also argues that the administrative law judge's findings are inadequate as a matter of law, and that employer failed to present evidence independently assessing the level of disability from the work injury alone.

Initially, we reject the Director's assertion that employer must establish the "materially and substantially greater" element on an economic basis. As employer asserts, the notion that a disability must have an economic effect to qualify for Section 8(f) relief has long been rejected by the courts and the Board. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29

²Claimant also injured her neck and back at work on May 18, 1998. Decision and Order at 3; Emp. Ex. 25.

BRBS 87(CRT) (1995); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996); *Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41 (1986). As the Ninth Circuit requires contribution to be shown by “medical or other evidence,” employer was not required to present economic evidence to satisfy its burden. *Sproull*, 86 F.3d at 900, 30 BRBS at 52(CRT).

In finding that claimant’s pre-existing disability made her current disability “materially and substantially greater,” the administrative law judge relied on the fact that claimant’s prior abilities, significantly limited by a 24-percent impairment, were further cut in half by the work injury. In conjunction with this assessment, the administrative law judge considered claimant’s work restrictions and found they showed that claimant’s pre-existing condition had a great impact on her overall condition. Specifically, as of May 1998, claimant was already prohibited from heavy work and from excessive use of her arms and shoulders. Added after the 1999 injury were further restrictions to refrain from overhead work, bending, and stooping. Claimant’s substantial restrictions prior to her 1999 injury convinced the administrative law judge that claimant’s pre-existing condition was significant, and perhaps greater than the disability related to the 1999 work injury, and made her overall condition materially and substantially greater.

When the “magic words” regarding a “materially and substantially greater” contribution are absent from the record, the administrative law judge is permitted to resolve the issue by making “inferences based on such factors as the perceived severity of the pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them.” *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 307, 31 BRBS 146, 149(CRT) (5th Cir. 1997). In this case, Dr. Dodge stated that the pre-existing and current injuries combined; however, he did not specifically state that the overall condition was “materially and substantially greater” due to the pre-existing condition. The administrative law judge, however, rationally determined that employer established that claimant’s current condition is materially and substantially greater than it would have been absent the pre-existing disability by virtue of the comparison between claimant’s pre- and post-injury restrictions. *Director, OWCP, v. Coos Head Lumber & Plywood Corp.*, 194 F.3d 1032, 33 BRBS 131(CRT)(9th Cir. 1998). Substantial evidence supports this conclusion. Accordingly, we affirm the administrative law judge’s determination that employer established the contribution element and, thus, entitlement to Section 8(f) relief.³ *Id.*

³The Director also argues that the “subtraction method” proposed by Dr. Dodge to apportion impairment among claimant’s injuries is insufficient to establish the “materially and substantially greater” requirement. Although the United States Court of Appeals for the Fourth Circuit requires an employer to quantify levels of impairment, and

Estoppel

Employer contends in its cross-appeal that the administrative law judge erred in not holding claimant bound by the wage stipulation in her state workers' compensation case. Specifically, employer and claimant agreed in that case that claimant's earnings were \$655.14 per week.⁴ Claimant was awarded state workers' compensation benefits based on this agreed rate. Emp. Exs. 16, 17. In her claim for benefits under the Act, claimant contended her average weekly wage was \$705.76, and employer contended she was estopped, pursuant to the doctrines of collateral estoppel, judicial estoppel, and *res judicata*, from asserting a higher average weekly wage than that to which she had previously stipulated. The administrative law judge rejected employer's estoppel arguments under all three theories and concluded claimant could raise, and he could address, the issue of average weekly wage in this case arising under the Act. Decision and Order at 11-13.

Under federal law, *res judicata* can apply only if: 1) the parties in the current action are the same or are in privity with the parties in the prior action; 2) the court that rendered the prior judgment was a court of competent jurisdiction; 3) the prior action must have terminated with a final judgment on the merits; and 4) the same claim or cause of action must be involved in both actions. *Gulf Island-IV, Inc. v. Blue Streak-Gulf Is. Ops.*, 24 F.3d 743 (5th Cir. 1994); *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990); *Sider v. Valley Lines*, 857 F.2d 1043 (5th Cir. 1988); *Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (2003); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). The administrative law judge here determined that *res judicata* does not apply to bind claimant to the prior stipulation because *res judicata*, or claim preclusion, applies to bar subsequent *claims*. Decision and Order at 12. As the issue of average weekly wage is not a "claim," we hold that the administrative law judge properly rejected this argument. *Simpson v. Director, OWCP*, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

it held that subtracting the pre-existing level of impairment from a claimant's current level of impairment is an insufficient method of calculating the level of impairment due to the work injury alone and, thus, is insufficient for determining whether a disability is materially and substantially greater because of the pre-existing condition, *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *see also Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003), the Ninth Circuit has neither adopted the quantification method nor held the "subtraction method" to be legally deficient. Therefore, we reject the Director's challenge to the administrative law judge's decision on this basis.

⁴Under state law, this resulted in "indemnity rates" of \$436.96 for temporary disability and \$160/\$170 per week for permanent disability." Emp. Ex. 16.

The administrative law judge also determined that claimant is not bound to the stipulation by the application of judicial estoppel. Decision and Order at 12. Judicial estoppel “precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” *Fox v. West State, Inc.*, 31 BRBS 118, 122 (1997) (citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)). Thus, judicial estoppel is implicated only if the first forum in which the party’s case is heard accepts the legal or factual determination alleged to be at odds with the party’s position advanced in the current forum. *Masayeva v. Hale*, 118 F.3d 1371 (9th Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998); *Fox*, 31 BRBS at 123. In this case, the administrative law judge found that claimant’s assertion of a higher average weekly wage under the Act is not at odds with her stipulation of particular weekly earnings under the state law, as there was no indication that such earnings were calculated using Section 10 of the Act, 33 U.S.C. §910. The administrative law judge concluded that to estop claimant from litigating the issue of average weekly wage based on this theory would have the effect of adopting the state law’s manner of calculating weekly earnings. As claimant’s decision to assert an average weekly wage under the Act different from the weekly earnings stipulation under state law is not an attempt to gain advantage by arguing incompatible positions, the administrative law judge’s rejecting of employer’s judicial estoppel argument is reasonable, and we affirm it. *Fox*, 31 BRBS at 122-123.

Finally, the administrative law judge found that collateral estoppel does not apply. Decision and Order at 13. For collateral estoppel to bar a party from re-litigating an issue, the issue at stake must be identical to the one alleged in a prior litigation, the issue must actually have been litigated, the determination of that issue must have been a critical and necessary part of the judgment of the earlier action, and the parties or their privies must have had a full and fair opportunity to litigate the issues. *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313 (1971); *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995); *Holmes*, 37 BRBS at 29; *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996); *Ortiz*, 25 BRBS 228. The administrative law judge found that the weekly earnings issue under the state law is not the same as the average weekly wage issue under Section 10 of the Act and that average weekly wage was not actually litigated in the state claim. Decision and Order at 13. According to claimant’s post-hearing brief, in the claim under the California workers’ compensation law, claimant and employer disputed apportionment and attorney’s fees. They offered stipulations, one of which was claimant’s weekly earnings. Thus, not only were claimant’s earnings not at issue, but they were not a critical or necessary part of the judgment in the state claim. See *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 206 (1999). Additionally, the Board has held that a stipulation in a prior claim cannot bind a party if it was not an issue actually litigated, *Uzdavines*, 37 BRBS at 46; *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97, 98 (2000), or if there is no declaration that the parties intended to be bound by that stipulation in the future, *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136

(1989). As none of these factors applies, we affirm the administrative law judge's determination that collateral estoppel cannot be invoked.⁵ Consequently, we reject employer's argument, and we affirm the administrative law judge's conclusion that claimant can raise the issue of average weekly wage in her claim under the Act.

Average Weekly Wage

After determining that average weekly wage was properly in dispute before him, the administrative law judge found that Section 10(c) applies, as there was no evidence of the number of days claimant worked per week, necessary under 33 U.S.C. §910(a), or evidence of the wages of a similarly situated employee, necessary under 33 U.S.C. §910(b). Decision and Order at 13; *see Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). He then found that claimant was a regular full-time employee who earned \$34,082.66 during the one-year period prior to her 1999 injury. As she did not work five weeks of that time, the administrative law judge adjusted claimant's wages to account for those five weeks. Thus, he divided \$34,082.66 by 47 to arrive at weekly earnings of \$725.16; he multiplied \$725.16 by five and added that amount to claimant's actual annual income, arriving at earnings of \$37,087.47 for the preceding year; and he divided that figure by 52 as required by Section 10(d), 33 U.S.C. §910(d), arriving at an average weekly wage of \$725.16. Decision and Order at 14.

Employer contends this average weekly wage figure exceeds the wage asserted by claimant and is inconsistent with Section 10(c), (d) of the Act. Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's average annual earnings at the time of his injury. Actual earnings need not control; however, the administrative law judge must make a finding as to a dollar amount that reasonably represents the claimant's annual earning capacity. *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Section 10(d) of the Act provides that an administrative law judge should divide a claimant's average annual earnings by 52 in order to arrive at an average weekly wage. 33 U.S.C. §910(d). In computing a claimant's average weekly wage, the Board has stated that an administrative law judge may account for time lost from work and that a claimant's earnings need not be reduced due to time missed for non-recurring involuntary events. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991) (funeral); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990) (other work injury); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984) (non-work injury); *LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979) (strike); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978) (layoff). The Ninth Circuit has held that Section 10(c) computations may account for lost work time due to strikes. *Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9th Cir. 1982),

⁵ Moreover, collateral estoppel does not apply if the legal standards are not the same in the two forums. *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988).

vacated and remanded on other grounds, 462 U.S. 1101, *on remand*, 713 F.2d 462 (1983); *see also Stafftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). While Section 10(d) contemplates that an administrative law judge will extrapolate from weekly earnings to determine an annual wage-earning capacity and then divide by 52, rather than using the increased weekly earnings, “[e]ither approach yields the same mathematical result.”⁶ *Stafftex Staffing*, 237 F.3d at 408, 34 BRBS at 46-47(CRT); *see also Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT).

In this case, the administrative law judge’s determination that claimant’s annual wages should be adjusted to account for the five weeks of work she missed complies with case precedent if those five weeks were missed due to non-recurring involuntary events. The administrative law judge, however, merely noted the missed time and summarily stated that claimant’s wages must be adjusted. A review of the record reveals that claimant was not paid for the following weeks of work: August 16, 1998, March 7, 1999, May 2, May 9, and May 16, 1999. Cl. Exs. 6, 9; Emp. Ex. 3. In her post-hearing brief, she states that her wages decreased in the calendar year of 1998 due to her 1998 work injury. While claimant’s 1998 injury could have flared up and caused her to miss work during the 52 weeks preceding the 1999 injury, the record contains no explanation as to why claimant missed these five weeks of work.

Because the missed periods of work have not been explained, we cannot affirm the administrative law judge’s adjustment in claimant’s wages to account for that time. Consequently, we must vacate his decision. *See Conatser v. Pittsburgh Testing Laboratory*, 9 BRBS 541, 546 (1978)(administrative law judge should not account for voluntary curtailment of earnings). We remand the case for the administrative law judge to recalculate average weekly wage, in light of the above-referenced cases, and to arrive at a reasonable estimate of claimant’s annual earnings at the time of her injury. The administrative law judge must explain whether and how claimant’s periods of non-work affected her pre-injury annual earnings and, thus, her average weekly wage under the Act.

⁶ That is, it is unnecessary to multiply by 52 and then divide by 52.

Accordingly, the administrative law judge's average weekly wage finding is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge