BRB No. 98-1465

DONNA SIDEBOTTOM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED: Aug. 4, 1999
	)	
and	)	
	)	
GAY AND TAYLOR, THOMAS HOWELL GROUP	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order -- Awarding Benefits and the Decision and Order on Employer's Motion for Reconsideration of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Roger R. Kline (Mancini, Schreuder, Kline & Conrad, P.C.), Warren, Michigan, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart, Chartered), Chicago, Illinois, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order -- Awarding Benefits and the Decision and Order on Employer's Motion for Reconsideration (95-LHC-916, 95-LHC-917, 93-LHC-2179, 93-LHC-2180) of Administrative Law Judge Mollie W. Neal rendered on claims 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 sustained four work-related injuries to her right shoulder and arm on September 2, 1991, October 27, 1992, October 8, 1993, and January 8, 1994. Employer voluntarily paid claimant temporary total disability benefits for the time claimant was off work, and claimant returned to work in a light duty capacity after each incident. After the last injury, claimant returned to light duty work as a store associate with employer in April 1995, but could no longer perform the job as of May 1995. Employer voluntarily paid claimant temporary total disability benefits from May 1, 1995, and continuing.[1]

In her decision, the administrative law judge found that the three injuries claimant sustained in 1992-1994 were not "new" injuries but were "aggravations" of

[1]Claimant has been diagnosed with deQuervain's disease of the right wrist, carpal tunnel syndrome of the right hand, reflex sympathy disorder, tendinitis, chronic pain syndrome, and chronic sympathetic dystrophy of the right upper extremity. Cl. Ex. 4; Emp. Ex. 3.

the prior 1991 injury and that therefore claimant's average weekly wage should be calculated based on the average weekly wage at the time of the initial 1991 injury. The administrative law judge also found that claimant suffers from a 95 percent impairment in function to her right arm. Consequently, the administrative law judge ordered employer to pay claimant temporary total disability benefits at the stipulated compensation rate of $170.50 per week based on claimant's 1991 average weekly wage of $188.51 for the periods claimant was unable to work because of her injuries, and temporary partial disability benefits for the periods claimant returned to her light duty sales clerk job after each exacerbation. The administrative law judge also ordered employer to pay claimant scheduled permanent partial disability benefits for a 95 percent loss of function for her right arm in accordance with Section 8(c)(1) and (19) of the Act, 33 U.S.C. §908(c)(1), (19). Furthermore, the administrative law judge required employer to pay claimant for occupational retraining therapy of her left arm.

In her decision on reconsideration, the administrative law judge apparently modified her award to exclude the 95 percent scheduled permanent partial disability award, and instead found claimant currently temporarily totally disabled.[2] The administrative law judge authorized the district director to recalculate the temporary

[2]We note, however, that this is inconsistent with the administrative law judge's finding that claimant's condition became permanent on December 5, 1994, as the date permanency is reached separates temporary from permanent disability. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S.

total and partial disability benefits awarded because of certain errors she had made in her initial decision.

On appeal, employer challenges the administrative law judge's average weekly wage determination on various grounds and her finding that claimant is totally disabled. Employer also contends that it has been prejudiced by the administrative law judge's delay in issuing her decision. Claimant responds in support of the administrative law judge's award. In addition, claimant's counsel has filed a fee petition for work performed before the Board. Employer objects to the hourly rate requested.

Employer initially contends that the administrative law judge erred in finding that claimant suffered only one injury in 1991, as it contends the medical evidence establishes that each work incident constituted an aggravation of claimant's condition, each of which is considered a new injury under the Act. Employer therefore contends that the benefits it owes claimant for each injury should be calculated on the average weekly wage at the time of each injury, instead of on the average weekly wage at the time of the 1991 injury. *See also* discussion, *infra*. The parties stipulated that claimant's average weekly wage was $104.87 in 1992 , $121.04 in 1993, and $94.51 in 1994.

1073 (1991); *Price v. Dravo Corp.*, 20 BRBS 94 (1987).

Initially, we note that the premise of employer's argument, that if the subsequent incidents aggravated claimant's 1991 injury, it is liable only for benefits at the lower average weekly wages for each successive incident, overlooks the fact that in such cases claimant may well be entitled to concurrent awards for continuing disability from each injury; thus, even if each incident is a new injury, employer's ultimate liability may nonetheless be unchanged when all the awards are combined, as the ultimate goal is to ensure that claimant is fully compensated for the loss in earning capacity, whether from one work-related injury or multiple injuries. To further explain, it is correct that a claimant's benefits are calculated based on the average weekly wage at the time of a compensable injury. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); 33 U.S.C. §910. If the claimant's disability is due to the natural progression of the 1991 injury, then benefits are properly calculated based on claimant's average weekly wage at the time of this injury. If, however, any or all of the subsequent incidents aggravated claimant's condition, her average weekly wage is to be calculated as of the time of the aggravation, as such constitutes a "new injury" within the meaning of the Act. *Id; See Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Under the latter circumstances, the employer, however, is not relieved of liability for the loss in wage-earning capacity due to the prior injuries. Where the preceding injuries result in a loss of wage-earning capacity such that claimant's later average weekly wage, based on the residual wage-earning

capacity, at the time of the subsequent aggravations is lower, claimant is entitled to concurrent awards in order to be fully compensated for the full loss in wage-earning capacity due to all of the injuries.[3] *See Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995); *Hastings,* 628 F.2d at 85, 14 BRBS at 345; *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). With these principles in mind, we now address employer's contention that the work injuries in 1992, 1993, and 1994, aggravated claimant's condition. For the reasons that follow, we vacate the administrative law judge's finding that the 1991 average weekly wage is to be used for all benefits and we remand this case for further consideration.

[3]A claimant may receive concurrent permanent partial disability awards, or concurrent permanent partial disability and permanent total disability awards, provided that the total award is not in excess of the statutory maximum compensation allowable for permanent total disability. *See Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *see also ITO Corp. of Baltimore v. Green*, F.3d , 1999 WL 528157, No. 98-1972 (4th Cir. Jul. 23, 1999).

The administrative law judge found that the three subsequent injuries were "aggravations" or "exacerbations" of the 1991 injuries to her right wrist, hand, and shoulder but were not new and distinct injuries. This conclusion cannot be reconciled with the legal principle that an "aggravation" is a "new injury" under the Act. *See Del Vacchio*, 16 BRBS at 190. In so concluding, the administrative law judge credited the opinions of Drs. Gunckle and Webb. Decision and Order -- Awarding Benefits at 20-22. The opinions of Drs. Gunckle and Webb, however, support the conclusion that claimant suffered from an exacerbation or an aggravation of her initial injury as a result of the subsequent incidents.[4] *See* Cl. Exs. 2, 3; ALJ Ex. at 23-24, 41, 44-45. Moreover, as employer accurately points out, claimant suffered from increased pain and her restrictions were increased after each injury. Cl. Exs. 2, 3; Emp. Ex. 4; ALJ Ex. at 23-24, 38, 44-45; Tr. at 31-32, 36-42,

[4]In November 1992, following claimant's return to work on light duty as a sales associate and the reinjury of her right upper extremity, Dr. Gunckle reported that she suffered an exacerbation of her symptoms, and a significant irritation to her right shoulder and further stated that he believed that she had a continuation of the chronic inflammatory process of her right upper extremity and dystrophic type problem and these injuries would preclude her from returning to her usual job duties or her restricted job duties. Cl. Ex. 3; ALJ Ex. at 23-24. There is no medical evidence of record following claimant's 1993 work injury that establishes that claimant suffered from an exacerbation following this specific incident. However, there is medical evidence following claimant's 1993 work injury that establishes that claimant suffered severe pain and her restrictions were increased. *See* Cl. Ex. 3; ALJ Ex. at 38; Tr. at 41-42, 75-76, 86. Dr. Webb stated that he believed the 1994 injury exacerbated her reflex syndrome. Cl. Ex. 2; ALJ Ex. at 41. The administrative law judge erroneously attributed Dr. Webb's statement regarding the 1994 injury to claimant's 1993 injury. *See* Decision and Order at 21; Cl. Ex. 2; ALJ Ex. at 41. Following claimant's 1994 injury, Dr. Gunckle noted continued irritation injury to the right wrist, the same type of mechanism from her previous injuries. Cl. Ex. 2; ALJ Ex. at 44-45.

46, 73, 75-76, 80-82, 86-88. Indeed, Dr. Gunckle stated in his February 7, 1994, report, "that [claimant] has tried to return to work three times and every time she does she reinjures herself...." ALJ Ex. 44. As this evidence could establish that each work incident resulted in a distinct aggravation, or new injury under the Act, the administrative law judge's decision must be remanded for reconsideration of the tinding that claimant suffered only one injury. *See Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 223-224 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992); *Del Vacchio*, 16 BRBS at 190. Consequently, we vacate the administrative law judge's finding that claimant suffered only one injury within the meaning of the Act, and remand this case for further consideration.

Consistent with this holding, we also vacate the administrative law judge's determination that claimant's average weekly wage for the 1992-1994 injuries is the same as her 1991 average weekly wage; on remand, the administrative law judge must also reconsider this issue consistent with applicable law. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Lopez*, 23 BRBS at 299. In order to fully compensate claimant for all her injuries, claimant may be entitled to concurrent awards for partial and total disability to the maximum statutory extent allowable in order to fully compensate her for the loss of earning capacity resulting

from these injuries.[5] *See Brady-Hamilton*, 58 F.3d at 419, 29 BRBS at 101 (CRT); *Hastings*, 628 F.2d at 85, 14 BRBS at 345*; Lopez*, 23 BRBS at 299.

[5]In her decision on remand, the administrative law judge should specify the dates she awards claimant temporary total, temporary partial, permanent partial, and permanent total disability benefits as it is not clear from her decision on reconsideration the exact awards made in this case. It appears that in her initial decision, the administrative law judge found claimant reached permanency, yet she apparently awarded continuing temporary total disability benefits until such time as suitable alternate employment was located. If claimant's condition is permanent, the appropriate award is permanent total disability is the availability of suitable alternate employment is not established. Moreover, although the administrative law judge discussed claimant's entitlement to scheduled permanent partial disability benefits for her arm, we note that a shoulder injury is an unscheduled injury which is compensable under Section 8(c)(21), 33 U.S.C. . *See Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981).

Employer next contends that the administrative law judge erred in finding that claimant's average weekly wage for the 1991 injury is $188.51. Employer asserts that claimant's 1991 average weekly wage should be either $121.20 based on claimant's pre-injury earnings, or $97.55, the wages of a similarly situated employee. An administrative law judge may hold employer bound by its stipulation regarding average weekly wage. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994). Since employer stipulated to claimant's average weekly wage with respect to the 1991 injury, the administrative law judge acted within her discretion in holding employer bound by its stipulation.[6] *See Simonds*, 27 BRBS at 120; Decision and Order -- Awarding Benefits at 23, 24-25; Employer's Pre-Hearing Statement, Stipulations for the 1991 injury, #13. Consequently, we affirm the administrative law judge's finding that claimant's 1991 average weekly wage is $188.51 as stipulated to by employer.

Employer next contends that the administrative law judge erred in finding that claimant is currently totally disabled as it established the availability of suitable alternate employment. Employer asserts that its post-hearing labor market survey, Dr. Gunckle's opinion that certain job duties are within claimant's restrictions, and

[7]Employer's Pre-Hearing Statement sets forth the stipulations in this case. With respect to the 1992-1994 injuries, the stipulations with respect to average weekly wage indicate that claimant's average weekly wage is disputed. With regard to claimant's 1991 injury, the stipulation reads, "The Claimant's average weekly wage was: $188.51."

the fact that claimant sought employment at two locations identified by employer in its labor market survey, satisfy its burden of establishing the availability of suitable alternate employment. To establish her *prima facie* case of total disability, claimant must establish that she is unable to perform her usual employment due to her work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Once claimant establishes that she is unable to perform her usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Employer's Pre-Hearing Statement, Stipulations for the 1991 injury, #13.

On reconsideration, the administrative law judge found that claimant is totally disabled since she is currently unable to work due to her arm injury and has not undergone the occupational retraining recommended by Dr. Gunckle necessary to determine the suitability of alternate employment. Decision and Order on Employer's Motion for Reconsideration at 2-3. This finding is rational and supports the administrative law judge's finding that claimant is totally disabled. Thus, although the administrative law judge did not discuss and weigh the relevant post-hearing evidence submitted by both parties before determining that claimant is currently totally disabled, any error is harmless. Moreover, this evidence supports the administrative law judge's finding. On July 7, 1995, Messrs. Flaharty and Broe performed a labor market survey for employer which targeted retail sales jobs for claimant. Emp. Ex. 4. Subsequently, Messrs. Flaharty and Broe requested approval of these jobs by Dr. Gunckle but he did not respond to their request. Emp. Ex. 5; Cl. Ex. 14. However, in May 1995, prior to employer's labor market survey, Dr. Gunckle stated that claimant could not return to her previous job in retail sales or return to the same job duties. Cl. Ex. 11. On September 6, 1995, claimant reported that the prospective employers at the sales jobs were unable or unsure if they could accommodate her since she is only able to use one hand.[7] Cl. Ex. 9. She further

[8]Contrary to employer's contention, the fact that claimant applied to two of the retail sales jobs identified in employer's labor market survey does not establish that these jobs were suitable, especially in light of the fact that Dr. Gunckle stated that she could not return to retail sales and did not feel that claimant is going to be able to be gainfully employed. *See*

stated that employer was unable to accommodate her in retail sales and that Mr. Kageff, claimant's vocational consultant employed by the Office of Workers' Compensation Programs, had abandoned targeting retail sales jobs for her. Cl. Ex. 9. Meanwhile, Mr. Kageff targeted telemarketing and alarm surveillance monitoring jobs for claimant, which Dr. Gunckle approved.[8] Cl. Exs. 11, 12. However, Mr. Kageff believed that claimant could only consider these jobs if she undergoes retraining of her non-dominent left arm (cross dominance training) which employer has not approved. Cl. Ex. 12. Mr. Kageff closed claimant's file on September 1, 1995 because cross dominance training was not authorized. Cl. Ex. 10. On

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Cl. Exs. 11, 13.

[8]Although Dr. Gunckle did approve of claimant working in telemarketing and alarm surveillance monitoring jobs, this approval apparently was conditional upon claimant's obtaining cross dominance training requested by Mr. Kageff and approved by Dr. Gunckle. Cl. Exs. 10-12. Subsequently, Dr. Gunckle on November 10, 1995, stated that he did not feel that claimant is going to be able to be gainfully employed. Cl. Ex. 13. Employer's reliance on Employer's Exhibit 6, Dr. Gunckle's letter to the rehabilitation specialist indicating that certain job duties were within claimant's restrictions, is disingenuous as Employer's Exhibit 6 was not admitted into the record. *See* Decision and Order -- Awarding Benefits at 2; Emp. Br. at 25.

November 10, 1995, Dr. Gunckle stated that he does not feel claimant is going to be able to be gainfully employed. Cl. Ex. 13. Therefore, as the evidence establishes that claimant is totally disabled, we affirm it. *See generally Lostaunau v. Campbell Industries Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

Lastly, employer contends that the administrative law judge's delay in issuing her decision prejudiced employer in that it prevented employer from establishing suitable alternate employment, and that if the administrative law judge had held employer liable for claimant's cross dominance training sooner, claimant would now be able to work and would not be entitled to disability benefits from employer.[9] Employer must establish that it was prejudiced by the administrative law judge's delay in issuing her decision; prejudice has been found where there was an inaccurate reflection of the evidence in the administrative law judge's decision or where credibility determinations were central to the disposition of the case. *See Del Vacchio*, 16 BRBS at 192; *Welding v. Bath Iron Works Corp.*, 13 BRBS 812, 818 (1981). As employer does not assert either that there were factual errors in the administrative law judge's decision or that credibility determinations were dispositive

[10]The administrative law judge issued her decision on May 15, 1998. The hearing was held on June 15, 1995, and the parties submitted post-hearing evidence through December 1995, at which time employer filed its post-hearing motion. Employer's post-hearing motion was denied by the administrative law judge in her May 15, 1998, decision.

of this case, employer has not established that it was prejudiced by the administrative law judge's delay.[10] Therefore, we reject employer's contention. *See Del Vacchio*, 16 BRBS at 192.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board, requesting a total fee of $1,820, which represents 9.1 hours of work at $200 per hour. Employer objects to the hourly rate. We reject employer's objection, and award counsel the entire fee requested as it is reasonable in light of

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Decision and Order -- Awarding Benefits at 3-6.

[11]Contrary to employer's assertion that the administrative law judge's delay hindered its ability to demonstrate suitable alternate employment after December 1995, nothing in the record indicates that employer could not have submitted additional post-hearing evidence on this issue. Moreover, employer did not voluntarily pay the cross dominance training when it was first requested by Mr. Kageff, and approved by Dr. Gunckle, in 1995. Employer may seek modification of the administrative law judge's award in the future if claimant undergoes the cross dominance training and is able to return to work. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995); 33 U.S.C. §922.

claimant's success in defending her award of benefits against employer's appeal. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998)(decision on reconsideration *en banc*); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's finding that claimant sustained only one injury is reversed. The administrative law judge's finding that claimant's average weekly wage for all benefits is $188.51 is vacated, and the case is remanded to the administrative law judge for recalculation of claimant's average weekly wage as to the 1992-1994 injuries as well as for a determination of whether claimant is entitled to consecutive or concurrent awards for these injuries. In all other respects, the administrative law judge's Decision and

Order -- Awarding Benefits and Decision and Order on Employer's Motion for Reconsideration are affirmed. Claimant's counsel is entitled to an attorney's fee of $1,820 for work performed before the Board to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge