BRB No. 98-1539

DAVID P. HAINES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CASCADE GENERAL, INCORPORATED	)	DATE ISSUED: 8/20/99
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

John M. Oswald (Bottini, Bottini & Oswald, P.C.), Portland, Oregon, for claimant.

Ronald W. Atwood (Ronald W. Atwood, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-LHC-2517) of Administrative Law Judge Paul A. Mapes 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 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, a shipyard rigger, injured his back at work on May 14, 1996, when he fell out of a dumpster. Employer voluntarily paid claimant temporary total disability benefits from May 15, 1996, to October 29, 1996, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Claimant has not returned to work since May 14, 1996. The administrative law judge denied claimant's claim for back surgery performed on June 23, 1997, his psychological injury claim, and his claim for additional temporary total disability benefits after October 1996.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits, but feels that it is ethically obligated to direct the Board to the case of *Amos v. Director, OWCP*, 153 F.3d 1051, *as amended by*, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999), *petition for cert. filed*, 67 U.S.L.W. 3643 (U.S. Apr. 12, 1999)(No. 98-1649), with respect to the compensability of claimant's back surgery.

Claimant initially contends that the administrative law judge erred in denying his claim for back surgery performed on June 23, 1997, after finding it unreasonable and unnecessary. Claimant asserts that the administrative law judge did not discuss and weigh Dr. Farris's deposition testimony in which the physician responded "certainly" to the question of whether it was reasonable to expect that another physician would perform surgery for the same condition.

In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). In *Amos*, 153 F.3d at 1051, *as amended by*, 164 F.3d at 480, 32 BRBS at 144 (CRT), the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, held that, although an employer is not required to pay for unreasonable and inappropriate treatment, when an injured employee is faced with competing medical opinions about the best way to treat his work-related injury, each of them medically reasonable, it is for the patient--not the employer or the administrative law judge--to decide what is best for him. In so holding, the court relied on the proposition that, "In general, if claimant gets conflicting instructions on treatment from different doctors, and chooses to follow his or her own doctor's advise (sic), this is not unreasonable." *Amos*, 153 F.3d at 1054, 32 BRBS at 147 (CRT), *quoting* 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §10.10[5](1999).

The administrative law judge denied claimant's claim for back surgery performed on June 23, 1997, by Dr. Flemming, finding that the surgery was not reasonable or necessary. Decision and Order Denying Benefits at 17-18. Initially, the administrative law judge noted that he gave substantial weight to the facts that

Dr. Flemming found medical justification for recommending the surgery and that claimant was willing to accept that recommendation, and that ordinarily this evidence alone would be sufficient to warrant a finding that the surgery was compensable. Decision and Order Denying Benefits at 18. The administrative law judge then provided four reasons why he found that the surgery was not reasonable and necessary, namely: (1) Drs. Farris and Rosenbaum did not find sufficient clinical evidence to correlate claimant's symptoms with the disc herniations found on the magnetic resonance imaging; (2) claimant had comparable or worse left leg symptoms which could not be correlated to his right sided disc herniations as noted by Dr. Farris; (3) surgery was not likely to relieve claimant's symptoms because Drs. Harvey, Rosenbaum and Farris found that at least some of claimant's alleged symptoms were functional in that they lacked an organic basis; and (4) claimant gave inconsistent accounts concerning the results of his surgery and still claims to be totally disabled even though the most likely cause of any impairment (his disc herniations) has been surgically corrected. Decision and Order Denying Benefits at 18; Cl. Exs. 22, 29, 41, 61, 63; Emp. Exs. 9, 12, 13, 17, 20, 24; Tr. at 37-38.

In light of the fact that the administrative law judge did not discuss and weigh Dr. Farris's relevant testimony and in light of the Ninth Circuit's decision in *Amos,*[1] we must vacate the administrative law judge's denial of medical benefits for claimant's back surgery, and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must discuss and weigh Dr. Farris's answer "certainly" to the question of whether it was reasonable to expect that another physician would perform the surgery for the same condition. *See* Emp. Ex. 26 at 38 (also numbered as Emp. Ex. 26 at 171). Additionally, the administrative law judge must discuss and apply the holding in *Amos* in reconsidering the compensability of claimant's back surgery on remand. *Amos*, 153 F.3d at 1051, *as amended by*, 164 F.3d at 480, 32 BRBS at 144 (CRT).

We next address claimant's challenge to the administrative law judge's finding that claimant did not suffer from a work-related psychological injury. Claimant contends that the administrative law judge erred in giving greater weight to Dr. Glass's opinion than to that of Dr. Larsen since Dr. Larsen is claimant's treating psychiatrist.

The Section 20(a) presumption is applicable in psychological injury cases.

[1]The administrative law judge's Decision and Order Denying Benefits was filed on July 27, 1998, prior to the issuance of *Amos* in September 1998.

Manship v. Norfolk & Western Ry. Co., 30 BRBS 175 (1996); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case that he has a psychological condition and that an accident occurred or that working conditions existed which could have caused or aggravated the condition. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with specific and comprehensive evidence that claimant's condition is not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

The administrative law judge denied claimant's claim for his psychological injury after crediting the opinion of Dr. Glass over that of Dr. Larsen. Decision and Order Denying Benefits at 19-20. Dr. Larsen, whose opinion the administrative law judge found sufficient to invoke the Section 20(a) presumption, stated that claimant's pre-existing psychiatric condition did in fact worsen after his work injury. Cl. Ex. 71. Dr. Glass, whose opinion the administrative law judge relied upon to establish rebuttal, opined that claimant's work injury did not aggravate, accelerate, or exacerbate his pre-existing psychiatric conditions. Emp. Ex. 18; Tr. at 91-92. In weighing the evidence, the administrative law judge acted within his discretion in crediting Dr. Glass's opinion over the contrary opinion of Dr. Larsen for the following reasons, specifically: (1) Dr. Glass's opinion that claimant's symptom exaggeration was deliberate and conscious was supported by claimant's test scores which were unusually elevated even for someone in a psychiatric unit and which were extremely high for obvious symptoms of depression but not subtle symptoms; (2) Dr. Larsen's restrictions as related by claimant (incapable of lifting more than 20 pounds and sitting in one position for more than 20 minutes) were more severe than the restrictions imposed by Dr. Flemming, claimant's back surgeon (limiting claimant to medium work); and (3) Dr. Larsen's opinion that claimant is so psychologically disabled that he cannot perform any type of work is inconsistent with the relatively minor changes in his treatment of claimant since the work injury. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); Decision and Order Denying Benefits at 19-20; Cl. Exs. 50, 71; Emp. Exs. 18, 25; Tr. at 67, 69-77, 82-83, 85-86, 91-92. Inasmuch as the administrative law judge's credibility determination is rational*, see Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988), and his finding is supported by substantial evidence, we affirm the administrative law judge's denial of claimant's claim for a psychological injury.

Claimant lastly contends that the administrative law judge erred in failing to award him additional temporary total disability benefits after October 1996. Claimant argues that employer is liable for disability compensation following surgery even if the medical services for the surgery are found not to be compensable, citing to *Wheeler v. Interocean Stevedoring*, *Inc.*, 21 BRBS 33 (1988). We agree with claimant's contention.

Employer is liable for the entire disability resulting from the consequences of claimant's work injury, unless the subsequent progression of claimant's condition is due to an intervening cause, in which case employer is relieved of the liability attributable to the intervening cause. *Wheeler*, 21 BRBS at 36; *see also Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). The courts and the Board have held that in order to break the causal connection, the intervening cause must be due to the intentional conduct of claimant or a third party, or to the negligent conduct of claimant or a third party, and this negligent conduct must have had no relationship to the primary injury or to claimant's employment. *Wheeler*, 21 BRBS at 36; *see also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); *Marsala v. Triple A South*, 14 BRBS 39 (1981). A physician's treatment of a work-related injury, even to the point of malpractice, does not break the causal nexus. 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §10.09[1](1999). Furthermore, when claimant's conduct in seeking treatment and his choice of doctor are reasonable under the circumstances, claimant may receive disability benefits for any increased disability due to surgery. *Id.* at §10.12; *Wheeler*, 21 BRBS at 36. In *Wheeler,* the Board affirmed the administrative law judge's finding that surgery performed on the claimant's back was unnecessary. The Board held, however, that the claimant was entitled to disability compensation following the surgery as there was no evidence of an intervening cause of the ensuing disability.

In this case, the administrative law judge determined that claimant was not entitled to additional temporary total disability benefits after October 1996, finding the opinions of Drs. Farris and Glass more convincing than Dr. Larsen's opinion or claimant's testimony. Decision and Order Denying Benefits at 20-21. We affirm the administrative law judge's denial of temporary total disability benefits after October 1996 and prior to claimant's surgery on June 23, 1997, as the administrative law judge acted within his discretion in crediting Dr. Farris's opinion that claimant's work injury was stable, required no further medical treatment, and resulted in no permanent disability, over that of claimant's testimony that he is unable to return to

work.[2] *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); Decision and Order Denying Benefits at 21; Cl. Ex. 45; Tr. at 41.

We must, however, vacate the administrative law judge's denial of temporary total disability benefits from the date of surgery on June 23, 1997, and remand for the administrative law judge to reconsider his finding in light of *Wheeler*, 21 BRBS at 33. In the instant case, claimant's conduct in seeking treatment and his choice of doctor do not constitute intentional or negligent conduct severing the causal connection. Moreover, Dr. Flemming's treatment of claimant does not constitute an intervening cause as there is no evidence on his part of either intentional misconduct or negligent conduct unrelated to claimant's primary injury. *See Bludworth Shipyard*, 700 F.2d at 1046, 15 BRBS at 120 (CRT). Employer is therefore liable for any disability following the surgery. For this reason, the administrative law judge's finding that claimant is not entitled to further disability compensation is vacated, and this case is remanded to the administrative law judge for further consideration of the nature and extent of claimant's disability following his back surgery. *See Wheeler*, 21 BRBS at 33; Cl. Ex. 69; Emp. Ex. 25.

[2]The opinions of Drs. Larsen and Glass are irrelevant with respect to claimant's claim for temporary total disability benefits after October 1996, inasmuch as the administrative law judge rationally found that claimant's psychological injury is not work-related. *See* Decision and Order Denying Benefits at 19-21.

Accordingly, the administrative law judge's findings that claimant's surgery and disability thereafter are not compensable are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.[3]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[3]In the last sentence of his brief, claimant states, "Claimant also adds that attorney fees are at least appropriate for prevailing over the employer's denial of the compensability of the L3-4 and L4-5 disc herniations which the [administrative law judge] did not award." Cl. Br. at 7. Claimant's counsel is entitled to an attorney's fee on remand if the administrative law judge awards additional disability or medical benefits. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).