

BRB No. 10-0207

DEBORAH BENGE	)
	)
Claimant-Respondent	)
	)
v.	)
	)
PACIFIC SHIP REPAIR AND	)
FABRICATION	)
	)
and	)
	)
RELIANCE INSURANCE COMPANY	) DATE ISSUED: 12/03/2010
	)
Employer/Carrier-	)
Petitioners	)
	)
DIRECTOR, OFFICE OF WORKERS'	)
COMPENSATION PROGRAMS, UNITED	)
STATES DEPARTMENT OF LABOR	)
	)
Respondent	) DECISION and ORDER

Appeal of the Decision and Order and the Order Granting Claimant's Motion for Reconsideration and Denying Employer's Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Galichon (Galichon & MacInnes, APLC), San Diego, California, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinharter, 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:**

Employer appeals the Decision and Order and the Order Granting Claimant's Motion for Reconsideration and Denying Employer's Motion for Reconsideration (2010-LHC-0207) of Administrative Law Judge Gerald M. Etchingham 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 sustained injuries to her neck, back and shoulders on June 15, 1999, during the course of her employment with employer as a ship repair lagger/foreman. Claimant sought benefits under the Act and, in a Decision and Order dated October 28, 2002, Administrative Law Judge Mills awarded claimant: (1) temporary total disability benefits from June 16, 1999 through October 19, 1999; (2) temporary partial disability benefits from October 20, 1999 through January 6, 2000; and (3) permanent partial disability benefits commencing January 7, 2000, the date upon which he found claimant reached maximum medical improvement, for a period of 104 weeks, payable by employer, after which time the Special Fund would commence the payment of benefits to claimant pursuant to Section 8(f), 33 U.S.C. §908(f).<sup>1</sup> JX 1.

Claimant's condition subsequently deteriorated and, on October 8, 2007, she underwent a three-level discectomy. JX 13 at 9. Due to her alleged incapacity during the period of recovery following this surgery, claimant sought modification of Judge Mills's award pursuant to Section 22 of the Act, 33 U.S.C. §922.

In his Decision and Order, the Administrative Law Judge Etchingham (the administrative law judge) awarded claimant temporary total disability benefits, payable by employer, from October 7, 2007, through June 30, 2008; additionally, the administrative law judge found that employer is liable for claimant's attorney's fee. Both claimant and employer sought reconsideration of this decision and, in an Order dated October 20, 2009, the administrative law judge, *inter alia*, found that claimant achieved permanent total disability status as of July 1, 2008.

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<sup>1</sup> The Director, Office of Workers' Compensation Programs, appealed, and employer cross-appealed, this decision to the Board. In a decision dated November 20, 2003, the Board remanded the case for a recalculation of claimant's average weekly wage. *Benge v. Pacific Ship Repair & Fabrication*, BRB Nos. 03-0224/A (Nov. 20, 2003)(unpub.). The award of Section 8(f) relief was affirmed. The administrative law judge's decision on remand was not appealed.

On appeal, employer challenges the administrative law judge's finding that claimant's total disability commenced on October 7, 2007, that claimant's disability was temporary in nature following her surgery, and that it is liable for claimant's attorney's fee. The Director, Office of Workers' Compensation Programs (the Director), and claimant respond, urging affirmance of the administrative law judge's decisions in their entirety.

Employer initially contends that the administrative law judge erred in concluding that claimant underwent back surgery on October 7, 2007, and that, consequently, she became totally disabled as of that date. We agree. The administrative law judge, without citation to the record, stated that claimant underwent a "diskectomy on October 7" and that, since the parties, in their briefs, inconsistently reported the date claimant's total disability began, this date of surgery would serve as the date on which claimant's period of total disability began. *See* Decision and Order at 2 n.2. A review of the record, however, indicates that: 1) both claimant and Dr. Dodge testified that claimant's surgery was performed on October 8, 2007, *see* Tr. at 15; EX 13 at 8; 2) claimant filed a claim for modification seeking total disability compensation commencing October 8, 2007, *see* ALJX 1 – Cl. June 16, 2009 Pre-Hearing statement; and 3) the parties stipulated that claimant's total disability commenced on October 8, 2007. *See* ALJX 1 – Stipulations. While, as the administrative law judge stated, the parties may have been inconsistent in setting forth the date of claimant's surgery,<sup>2</sup> this evidence establishes that the surgery was performed on October 8, 2007. Accordingly, we modify the administrative law judge's decision to reflect that claimant's entitlement to total disability benefits commenced on the stipulated date of October 8, 2007, the date on which she underwent a diskectomy for her work-related injury. *See generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

Employer next argues that the administrative law judge erred in characterizing the nature of claimant's disability as temporary subsequent to her October 8, 2007, surgery. In support of its contention, employer avers that Judge Mills's determination that claimant's condition reached maximum medical improvement as of January 7, 2000, precludes a finding that claimant's disability was temporary in nature following her October 8, 2007 surgery. Employer contends that claimant's condition has been longstanding and of an indefinite duration, that any change in her condition was not the result of an aggravation or exacerbation of her work injury, and that no evidence has been presented which would indicate a change in the characterization of claimant's disability. We reject these contentions.

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<sup>2</sup> In her response brief to the Board, claimant states that her neck surgery took place on October 8, 2007. *See* Cl. Opposition to Petition for Review at 5, 8.

The issue of a claimant's disability under the terms of the Act is generally addressed in terms of its nature, that is whether the disability is permanent or temporary, and its extent, that is whether the disability is total or partial. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9<sup>th</sup> Cir. 1990), *rev'd Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991). In this regard, the Board has stated that, during periods of temporary exacerbations, an award for temporary total disability will subsume an award for permanent partial disability, since total disability presupposes the loss of all wage-earning capacity. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Moreover, the Board has affirmed an award of temporary total disability benefits where claimant, while initially determined to have sustained a permanent partial disability, became temporarily totally disabled as a result of a subsequent work-related surgical procedure.<sup>3</sup> *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989). In addition, Section 22 applies when the moving party establishes a change in her physical condition, such as a deterioration. *See generally Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988).

In this case, claimant was initially awarded compensation for permanent *partial* disability resulting from the multiple injuries she sustained on June 15, 1999. Thereafter, on October 8, 2007, claimant underwent a diskectomy which the parties concede resulted in a change in the extent of her work-related disability from *partial* to *total*. *See* Decision and Order at 3. In addressing the nature of claimant's post-surgical total disability, the administrative law judge relied upon the testimony of claimant and her treating physician, Dr. Dodge, who performed claimant's diskectomy on October 8, 2007. Claimant testified that her mobility was severely restricted following her surgery. *See* Tr. at 17-18, 22-23. Dr. Dodge, who continued to treat claimant post-surgery, opined that claimant was totally disabled following her surgery, and that she did not return to permanent and stationary status until July 1, 2008. *See* JX 13 at 9-10; JX 16 at 12. Thus, contrary to employer's contention, the evidence establishes a change in the nature of claimant's disability subsequent to her work-related surgery. As the administrative law judge's reliance upon the testimony of claimant and Dr. Dodge in addressing the nature of claimant's post-surgical total disability is rational, we affirm the administrative law judge's conclusion that claimant was temporary totally disabled between the date of her surgery, October 8,

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<sup>3</sup> Employer's attempt to distinguish a change in claimant's disability resulting from a post-injury exacerbation as opposed to post-injury medical treatment is without merit, as employer is responsible for the resultant disability in either case. In this case, all parties agree that the extent of claimant's disability changed from partial to total following her October 8, 2007 surgery, and that claimant is entitled to total disability compensation as a result. *See generally Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987) (employer responsible for disability following work-related surgery).

2007, and July 1, 2008, as this finding is supported by substantial evidence. *See Shaw*, 23 BRBS 96. Therefore, we affirm the finding that employer is liable for the temporary total disability benefits awarded for this period. *Shaw*, 23 BRBS 96.

Employer also argues that, since it stipulated to claimant's entitlement to total disability benefits as of October 8, 2007, the administrative law judge erred in holding it liable for claimant's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b), of the Act. We reject employer's argument and affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee. Although employer did not "contest" claimant's claim for total disability benefits commencing as of the date of her dickectomy,<sup>4</sup> employer nonetheless did not pay the benefits sought by claimant on modification and actively defended the claim; claimant was required to retain counsel in order to obtain the benefits she sought. Specifically, claimant sought and obtained temporary total disability benefits, payable by employer, as a result of her claim; her attorney is thus entitled to a fee for his work performed during these proceedings, payable by employer. *See* 33 U.S.C. §928; *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9<sup>th</sup> Cir. 1993); *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988); *see also Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5<sup>th</sup> Cir. 1998). In addition, assuming, *arguendo*, the insolvency of employer's carrier, employer remains primarily liable for the fee award to claimant's counsel. *See Marks v. Trinity Marine Group*, 37 BRBS 117 (2003). The award of an attorney's fee payable by employer is therefore affirmed.

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<sup>4</sup> Presumably because it took the position that claimant's condition remained permanent and that, therefore, any total disability benefits awarded claimant would be payable by the Special Fund.

Accordingly, we modify the administrative law judge's Decision and Order to reflect claimant's entitlement to temporary total disability benefits from October 8, 2007, through June 30, 2008. In all other respects, the administrative law judge's Decision and Order and Order on Motions for Reconsideration are 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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BETTY JEAN HALL  
Administrative Appeals Judge