BRB No. 11-0292

HOLLY JO LINDROTH	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
	)	
INTERNATIONAL TRANSPORTATION SERVICES, INCORPORATED	)	
	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	DATE ISSUED: 12/15/2011
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
STEVEDORING SERVICES OF AMERICA TERMINALS	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Timothy W. Sprinkles (Law Offices of Charles D. Naylor), San Pedro, California, for claimant.

Christopher M. Galichon (Galichon & MacInnes, APLC), San Diego, California, for International Transportation Services, Incorporated and American Longshore Mutual Association.

James P. Aleccia (Aleccia, Socha & Mitani), Long Beach, California, for Marine Terminals Corporation and Signal Mutual Indemnity Association.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for Stevedoring Services of America Terminals and Homeport Insurance Company.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

International Transportation Services, Incorporated (ITS) appeals the Decision and Order Awarding Benefits (2008-LHC-2149, 2150, 2151, 2152) of Administrative Law Judge Anne Beytin Torkington 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

During the morning of January 18, 2006, claimant experienced severe back pain while working a second shift for ITS as a utility tractor rig operator. Claimant finished her shift, returned home and took her regular shift off due to back pain. Claimant returned to work on January 19, 2006, for Marine Terminals Corporation (MTC). Claimant continued to experience back pain and, as her symptoms increased, she sought medical care on January 31, 2006. An MRI revealed, *inter alia*, a central disc protrusion with annular tear at L5-S1. On February 7, 2006, claimant experienced increased back pain that radiated down her right leg while working for Stevedoring Services of America Terminals (SSAT). Claimant's symptoms of pain continued the following day, February 8, 2006, when she worked as a clerk for MTC. Claimant subsequently underwent medical treatment, including epidural injections, with a number of physicians and she remained off work until September 1, 2006, when she returned to work as a clerk for

MTC. Claimant, who continued to experience low back symptoms and receive medical treatment for her complaints, last worked in longshore employment on December 10, 2007, at which time she was employed by ITS. On January 8, 2008, claimant underwent an anterior L5-S1 lumbar fusion, diskectomy and decompression.

Claimant filed claims against each of the employers for whom she worked prior to her last day of longshore employment, December 10, 2007, contending that she sustained a low back injury on January 18, 2006, and a cumulative trauma injury as a result of her continued employment from September 1, 2006, through December 10, 2007. Before the administrative law judge, the parties agreed that ITS may be liable for claimant's benefits commencing January 18, 2006, that SSA may be liable for any benefits due claimant on February 7, 2006, that MTC may be liable for any for benefits due claimant as of February 8, 2006, and that ITS may be liable for any benefits due claimant subsequent to December 10, 2007.

In her Decision and Order, the administrative law judge found that claimant established that her back injury could have been caused by the incident on January 18, 2006, and/or by her continued employment thereafter. The administrative law judge thus found claimant entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge found that the employers established rebuttal of the Section 20(a) presumption and that, based on the record as a whole, claimant established she injured her low back on January 18, 2006, and exacerbated her back condition while working between September 1, 2006 and December 11, 2007. Pursuant to these findings, the administrative law judge found that ITS is the employer liable for any benefits due claimant under the Act. The administrative law judge found that claimant's condition reached maximum medical improvement on November 12, 2009, that claimant was unable to perform her usual employment duties from February 8 to August 31, 2006, and from December 11, 2007, and continuing, and that ITS established the availability of suitable alternate employment that claimant was capable of performing on a part-time basis as of June 1, 2009. The administrative law judge accepted the parties' stipulation that claimant's average weekly wage at the time of her January 18, 2006, work injury was $1,459.44, and found that claimant's average weekly wage as of December 10, 2007, was $2,639.54, calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). The administrative law judge awarded claimant temporary total disability benefits from February 8 to August 31, 2006, and from December 11, 2007 to May 31, 2009, temporary partial disability benefits from June 1 to November 11, 2009, and permanent partial disability benefits from November 12, 2009, and continuing, and medical benefits. 33 U.S.C. §§908(b), (c)(21), (e); 907.

On appeal, ITS asserts that the administrative law judge erred in finding that it is the employer responsible for the payment of any benefits due claimant subsequent to February 8, 2006. ITS additionally challenges the administrative law judge's findings

regarding claimant's average weekly wage as of December 10, 2007, and claimant's post-injury wage-earning capacity. Claimant, SSAT, and MTC each respond, urging affirmance of the administrative law judge's decision. ITS has filed a reply brief.

Responsible Employer

ITS challenges the administrative law judge's determination that it is the employer responsible for all benefits due claimant under the Act. In this regard, ITS asserts that, while it does not challenge the administrative law judge's finding that claimant sustained a work-related back injury on January 18, 2006, while working for ITS, claimant subsequently aggravated her condition on either February 7 or February 8, 2006, while working for SSAT and MTC respectively. ITS avers that the administrative law judge erred in finding that claimant last sustained an aggravation to her condition on December 10, 2007, while in its employ. We reject these contentions of error

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 in cases involving traumatic injury, the employer 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 a subsequent injury which aggravates, accelerates, or combines with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Metropolitan Stevedore 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 at the time of the work events resulting in the exacerbation are responsible for any resulting disability. *See Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *see also Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 241, 35 BRBS 154, 160(CRT) (3d Cir. 2002). In this regard, the Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See 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, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In this case, substantial evidence supports the administrative law judge's finding that claimant's employment with SSAT on February 7, 2006, and with MTC on February 8, 2006, did not aggravate the back condition resulting from her January 18, 2006, work

injury. *See* Decision and Order at 32-33. The administrative law judge made specific findings in concluding that claimant's employment on these two days did not aggravate her underlying back condition: 1) although claimant testified that she experienced pain on these two days, her credible testimony establishes that, while taking ibuprofen daily, her symptoms of pain were not greater on these days than she experienced following her January 18, 2006, work injury; 2) claimant's symptoms of pain increased, or were unmasked, on February 8, 2006, at which time she had ceased taking medication for her symptoms; and 3) Dr. Delman opined that claimant's work activities immediately subsequent to January 18, 2006, did not aggravate her back condition.[1]

Claimant was disabled from February 8 through August 31, 2006. Regarding claimant's work from September 1, 2006, through December 10, 2007, the administrative law judge found that the preponderance of the evidence establishes that claimant's low back condition was aggravated by her continued employment and that ITS is therefore liable for any benefits due claimant as of December 11, 2007. The administrative law judge found that claimant credibly testified that she experienced worsening symptoms of back pain subsequent to her return to work on September 1, 2006. The administrative law judge specifically rejected ITS's argument that claimant last experienced a work-related aggravation of her underlying back condition on August 30, 2007, based on Dr. Rogers' finding on that date of increased nerve root irritation, since claimant continued to work for an additional three months until her symptoms became so severe that Dr. Rogers removed claimant from employment on December 13, 2007. The administrative law judge noted that Dr. Rogers also stated that it was probable that this work activity worsened claimant's condition.[2] The administrative law judge also relied on the opinions of Drs. London and Delman, that claimant's work activities through December 11, 2007 aggravated her back condition and contributed to her ultimate impairment. ITSXs 5 at 40a; 8 at 65; MTCXs 6 at 58R; 19 at 522; 20 at 32.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In this case, the administrative law judge addressed the evidence

[1]In reports dated May 23, 2006, and September 25, 2009, Dr. Delman opined that claimant sustained an injury to her back on January 18, 2006, which was not aggravated by her subsequent employment through February 8, 2006. *See* CX 11 at 126; MTCX 6 at 58R.

[2]Dr. Rogers opined that while claimant's January 8, 2008, surgical fusion at L5-S1 was due "mostly" to her original injury, claimant's subsequent employment activities through December 10, 2007, likely exacerbated her condition. CX 20 at 599.

presented by the parties and substantial evidence supports her finding that claimant's employment on February 7 and 8, 2006, did not aggravate her back condition and that her continued employment from September 2006 through December 11, 2007, the last of which occurred with ITS, did aggravate her condition. Therefore, we affirm the administrative law judge's finding that ITS, as the last employer, is liable for all benefits due claimant under the Act. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010); *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 F.App'x 547 (9th Cir. 2001).

Average Weekly Wage

ITS challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a), for the purpose of compensating claimant for her cumulative trauma injury commencing December 11, 2007. Before the administrative law judge, ITS argued that claimant's average weekly wage as of December 11, 2007, should be calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c).[3] The administrative law judge declined to accept ITS's calculation, finding that as claimant worked 182 days during the 52 weeks prior to her December 11, 2007, injury, it was appropriate to apply Section 10(a) of the Act to calculate claimant's average weekly wage because claimant worked substantially the whole of the year prior to the injury. The administrative law judge divided claimant's earnings for the 52-week period prior to her last day of employment, $96,079.19, by the number of days she worked, 182, and found that claimant's daily wage was $527.91, with corresponding annual earnings of $137,255.99, for a five-day worker. Dividing that figure by 52 pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), the administrative law judge found that claimant's average weekly wage was $2,639.54. In challenging the administrative law judge's decision to utilize Section 10(a) of the Act to determine claimant's average weekly wage, ITS contends that the resulting figure is unreasonable in light of claimant's historical earnings. We reject ITS's assertions of error.

Section 10(a) of the Act, states:

> If the injured employee shall have worked in the employment in which he was working at the time of his injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred sixty

[3]ITS specifically took the position that the wages claimant earned in the calendar year prior to December 11, 2007, should be divided by 52 in order to arrive at her applicable average weekly wage for compensation purposes.

> times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a). In this case, the administrative law judge found that utilization of Section 10(a) to calculate claimant's average weekly wage as of December 10, 2007, was neither unfair nor unreasonable, and that claimant was required to take days off due to her work-related back pain such that her actual earnings were lower than they otherwise would have been. In its reply brief, ITS concedes that claimant worked the whole of the prior year before her work injury; rather, ITS avers, without discussion, that claimant's work was not "continuous" such that she was not a five-day per week worker. We reject ITS's contentions in this regard, as it has presented no evidence that claimant was not five-day per week worker or that claimant's employment involved "fixed, determinable periods of inactivity" that would render Section 10(a) inapplicable. *See Stevedoring Services of America v. Price*, 382 F.3d 878, 885, 38 BRBS 51, 54(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

Moreover, the administrative law judge did not err in applying Section 10(a) merely because the resulting average weekly wage is greater than claimant's actual earnings in the 52 weeks prior to her injury. The Ninth Circuit has held that overcompensation alone is an insufficient reason to rebut the use of Section 10(a). *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). In *Matulic*, the Ninth Circuit held that when a claimant works 75 percent of the workdays of the measuring year Section 10(a) applies, if the necessary information is in the record. *Id.*, 154 F.3d at 1058, 32 BRBS 151-152(CRT); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 12(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). In this case, the administrative law judge found that while claimant worked 182 days during the 52 weeks preceding her work injury, or 70 percent of the days available to her during that period of time, the number of days worked by claimant was depressed since she was required to take days off of work due to her recurring back pain; thus the administrative law judge found that utilizing Section 10(a) to calculate claimant's average weekly wage is neither unfair nor unreasonable. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). Regarding her period of employment between September 1, 2006, and December 11, 2007, claimant testified that she declined signal job work since that type of work required more time for her to recover after a shift, and that she took days off work as needed. *See* Tr. at 96-97, 112. Thus, contrary to ITS's argument on appeal, the administrative law judge's use of Section 10(a) is not precluded by *Matulic* since her findings regarding the number of days claimant worked prior to her December 11, 2007, work injury are supported by substantial evidence.[4] *See Matulic*, 154 F.3d at 1058, 32 BRBS at

[4]ITS's comparison of the administrative law judge's calculation of claimant's average weekly wage as of December 10, 2007, to the parties' stipulation regarding

152(CRT). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's calculation of claimant's average weekly wage as of December 10, 2007, to be $2,639.54, pursuant to Section 10(a). *Id.*

Post-Injury Wage-Earning Capacity

ITS challenges the administrative law judge's finding regarding claimant's ability to work post-injury. In support of its contention of error, ITS states that no physician opined that claimant is permanently limited to six hours of employment per day. Claimant, in response, asserts that the administrative law judge made a rational finding that claimant is precluded from working more than six hours a day post-injury.

An award for partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity.[5] 33 U.S.C. §908(c)(21), (e), (h). In calculating claimant's post-injury earning capacity as of June 1, 2009, the date employer established that suitable alternate employment was available for claimant, the administrative law judge found that claimant was capable of working on a part-time, six hours per day, basis. Specifically, the administrative law judge found that Dr. Rogers opined in March 2009 that claimant could commence post-injury employment on a limited basis, six hours per day, during the first two weeks of her return to work. *See* SSATX 5 at 43. During his October 2009, deposition, Dr. Ravessoud opined that claimant might be capable of performing part-time sedentary, non-longshore work, *see* CX 21 at 768; however, Dr. Ravessoud subsequently stated that claimant was permanently disabled from returning to work in the open labor market. *Id.* at 807. In light of claimant's injury and her complaints of pain, the administrative law judge found that these two physicians were clearly concerned about claimant's ability to work full-time. As claimant's condition had not appreciably changed since March 2009, the administrative law judge found it was reasonable to conclude that claimant is limited to part-time employment as a result of her

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claimant's average weekly wage as of the date of her January 18, 2006, work injury is inapposite, as it is undisputed that claimant sustained two distinct injuries which give rise to her claim for benefits under the Act. Additionally, while ITS seeks to compare the hours claimant worked in 2004 and 2005 with the number of hours claimant worked in the year preceding December 10, 2007, in order to establish that claimant's 2007 hours were in fact typical of her work history, ITS has cited to no evidence regarding the number of days claimant worked in 2004 and 2005, *see* CX 6; thus, a comparison of the percentage of days claimant worked during each period cannot be made.

[5]The administrative law judge's findings that claimant cannot perform her usual work and that employer established the availability of suitable alternate employment, paying $8.50 per hour, as of June 1, 2009, are uncontested on appeal.

work-related condition. The administrative law judge construed Dr. Ravessoud's part-time limitations to be consistent with Dr. Rogers' limiting claimant's work to six hours per day. Decision and Order at 42.

We affirm the administrative law judge's finding that claimant is limited to working six hours per day as of June 1, 2009. While ITS correctly states that the administrative law judge declined to rely upon Dr. Ravessoud's opinion that claimant is disabled from all work, *see* Decision and Order at 38, that finding does not establish error in her decision to rely on Dr. Ravessoud's prior opinion that claimant was capable of part-time employment, as it is consistent with Dr. Rogers' opinion that claimant's pain limits her ability to work. The administrative law judge is entitled to weigh the medical evidence of record and to draw inferences therefrom as well as to determine claimant's credibility, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and she may credit any part of any opinion. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Her decision that claimant is capable of returning to gainful employment work, for six hours per day, as of June 1, 2009, is both permissable and supported by the evidence upon which she relied. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge). Thus, the administrative law judge's determination that claimant is capable of working only six hours per day as of June 1, 2009, is affirmed, as is the resultant calculation of claimant's post-injury wage-earning capacity.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge