U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0128
and 16-0128A

KELLY ZARADNIK	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
THE DUTRA GROUP, INCORPORATED	)	
	)	DATE ISSUED: Dec. 9, 2016
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and Order Granting Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor, and the Order Ruling on Claimant's Motion to Continue and Employer/Carrier's Motion to Change Location of Hearing of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England Ponticello & St. Clair), San Diego, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals, and claimant cross-appeals, the Decision and Order Granting Benefits and Order Granting Reconsideration (2012-LHC-00988) of Administrative Law Judge William Dorsey, and claimant challenges the Order Ruling on Claimant's Motion to Continue and Employer/Carrier's Motion to Change Location of Hearing of Administrative Law Judge Steven B. Berlin 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 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).

Claimant alleged that she sustained cumulative injuries to her left hip, back, hands, and lungs, over the course of her work as a union pile driver which began in 1991. Prior to her work for employer, claimant had been diagnosed with several pulmonary and orthopedic conditions.[1] *See* HT at 47-50, 199-201, 232-233, 236-237; CX 23. Claimant worked for employer for parts of 48 days, from July 23 until September 20, 2010,[2] when her entire crew was laid off due to the completion of the job. HT at 56. Claimant subsequently worked in non-covered employment for Stone & Webster (S & W) on two separate occasions,[3] with the second job ending with a lay-off on or around January 27, 2012. Claimant stated she thereafter unsuccessfully looked for work until September 2012, when she received notice that she would receive Social Security disability benefits. She retired from the union that same month.

[1]Claimant's prior health concerns included diagnoses of asthma, bilateral hip osteoarthritis, multiple back strains and two hospitalizations for silica exposure. CX 23.

[2]Claimant's duties for employer included lifting and carrying objects, such as 50-pound sand jacks, sheets of plywood, and supporting timbers, across uneven ground; loading and unloading trucks; operating forklifts; and operating and refueling other equipment such as compressors, Hole-Hawg drills, welders, chainsaws and beam saws. HT at 81, 88, 100-102, 106, 112, 124-125, 285; CX 24. Claimant stated she typically wore a tool belt, weighing roughly 30 pounds, all day, and that she occasionally carried an additional tool bag which might weigh between 60-65 pounds. HT at 110, EX 3 at 40-43, 49-50. Claimant further stated that she was regularly exposed to airborne particulate matter in her work with employer, including dust generated from sandblasting and concrete pours, and fumes from glues used to laminate the plies of plywood, and from diesel fuel expelled from various tools and vehicles. HT at 88-90, 92-92, 95-99, 123.

[3]Claimant served as a lead person for S & W, doing concrete and form work at the San Onofre Nuclear Power Facility, in October and November of 2010. Claimant returned to work for S & W in late October 2011, assembling office furniture, until she was laid off.

Claimant filed a claim for benefits under the Act against employer on October 12, 2011, seeking compensation for cumulative trauma injuries to her hips, back, and hands, and for her pulmonary conditions, alleging that her work for employer contributed to, aggravated and/or accelerated her underlying orthopedic and respiratory conditions. Employer controverted the claim.

In his decision, the administrative law judge found that claimant provided timely notice to employer of her injuries under Section 12 of the Act, 33 U.S.C. §912, and that the claim was timely filed under Section 13 of the Act, 33 U.S.C. §913. The administrative law judge found claimant entitled to the Section 20(a) presumption that all of her claimed orthopedic and respiratory conditions are related to her work for employer, and that employer established rebuttal thereof. 33 U.S.C. §920(a). Addressing the evidence as whole, the administrative law judge found that claimant's work for employer as a pile driver aggravated, accelerated, and/or contributed to her overall orthopedic and respiratory conditions. The administrative law judge rejected employer's contention that claimant's subsequent employment with S & W is the cause of her disabling conditions. Thus, the administrative law judge found claimant entitled to, and employer liable for, ongoing temporary total disability benefits commencing January 28, 2012, 33 U.S.C. §908(b), and medical benefits for her work-related conditions. 33 U.S.C. §907(a). The administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's findings that claimant provided timely notice of her injuries, that she timely filed her claim for benefits, and that, on the merits, claimant's orthopedic and respiratory conditions are related to her work with employer. BRB No. 16-0128. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief. On cross-appeal, claimant challenges the administrative law judge's finding that her total disability is temporary rather than permanent. Claimant also challenges Judge Berlin's pre-hearing Order denying an attorney's fee for claimant's response to employer's motion for a change in venue. BRB No. 16-0128A. Employer responds, urging rejection of claimant's contentions. Claimant has filed a reply brief.

Timeliness

Employer contends that claimant's notice of injury and claim for compensation dated October 12, 2011, were untimely filed. Employer maintains that the administrative law judge's findings that claimant became "aware" of her hip injury on August 29, 2011, and her respiratory condition on November 9, 2012, are contrary to the evidence and law. Employer states that the record is replete with statements from claimant that she was aware of the relationship between her work activities with employer and her allegedly worsening hip and respiratory conditions prior to her last day of work in that job on September 20, 2010.

Section 12(a) of the Act, 33 U.S.C. §912(a), requires that claimant must, in a traumatic injury case, give employer written notice of her injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and her employment. *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice of the injury pursuant to Section 12(a). *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). "Awareness" in a traumatic injury case occurs when the claimant is aware, or should have been aware, of the relationship between the injury, the employment, and an impairment of her earning power, and not necessarily on the date of the accident, or in this repetitive trauma case, the date of the last trauma. *See Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990) (discussing same standard in 33 U.S.C. §913). In a case involving an occupational respiratory disease which does not immediately result in disability, claimant must give employer notice of her injury within one year of her awareness of the relationship between the employment, the disease and the disability. 33 U.S.C. §912(a).

The administrative law judge found that it was only after Dr. Ezzet, on August 29, 2011, explained that claimant's hip problems were work-related and advised her to leave her career as a pile driver, that claimant became aware of the full extent, character, and impact of her hip injury. Decision and Order at 25; Order on Recon. at 2. Specifically, the administrative law judge found that by August 29, 2011, claimant knew she had a hip injury, that her work over the years had made it worse, and that her symptoms had increased while working for employer. Additionally, the administrative law judge found that August 29, 2011, represents the first time claimant became aware that she suffered an "impairment of earning power," as that is when Dr. Ezzet told her to quit working as a pile driver. He thus concluded that claimant's inability to return to her usual work as a pile driver on August 29, 2011, initiated the Section 12(a) statute of limitations. With regard to claimant's respiratory conditions, the administrative law judge found there was nothing during claimant's work for employer which alerted her to the possibility that her work may have aggravated or accelerated her pre-existing respiratory conditions until she received a medical opinion to that effect from Dr. Harrison on November 9, 2012.

Substantial evidence supports the administrative law judge's findings that claimant first became aware of the relationship between her hip and respiratory injuries, her work for employer, and an impairment to earning power on August 29, 2011 and November 9, 2012, respectively. In his report dated August 29, 2011, Dr. Ezzet diagnosed osteoarthritis and "had a lengthy and frank discussion" with claimant informing her that

he "does not think construction work is in her best interest any longer," because of her left hip condition. CX 23. Specifically, Dr. Ezzet stated that claimant "does not tolerate [construction work] well with her arthritic hips and would not be a good candidate for that kind of work if she has her hip replaced." *Id.* Drs. Harrison and Greenfield each agreed that Dr. Ezzet's August 29, 2011 report represents the first time any doctor declared claimant disabled as a result of her hip condition. CX 21 at 59; Post-Hearing Dep. of Dr. Greenfield at 25. The opinions of Drs. Ezzet, Harrison and Greenfield thus support the administrative law judge's finding that claimant first became aware, or should have been aware, of the relationship between her hip injury, her work for employer, and an impairment in her earning capacity, on August 29, 2011. *See SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016); 932 F.2d 819, 24 BRBS 130(CRT); *see also E.M.* [*Mechler*] *v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp Int'l v. Director, OWCP,* 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

Moreover, Dr. Harrison's November 9, 2012 report, in which he diagnosed asthma/chronic obstructive pulmonary disease (COPD) and opined that claimant's occupational exposures, specifically to diesel exhaust, silica, welding fumes, and construction dust, contributed to her respiratory conditions,[4] CX 14, represents the first medical opinion tying claimant's respiratory conditions specifically to her work for employer. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only) (in occupational disease cases the time limitations do not begin to run until the claimant is aware of the relationship between covered employment, the disease, and the disability). The administrative law judge's date of awareness findings are, therefore, affirmed as they are supported by substantial evidence. *J.M. Martinac Shipbuilding*, 900 F.2d 180, 23 BRBS 127(CRT). Consequently, we affirm the administrative law judge's finding that claimant's notice to employer, filed on October 12, 2011, of her respiratory condition was timely. *Id.*

Because claimant did not gain "awareness" of her hip condition until August 29, 2011, the administrative law judge, on reconsideration, correctly determined that claimant's notice to employer, which occurred as a result of the filing of her claim on October 12, 2011, was 14 days late and, thus, untimely. As such, he considered, but rejected, employer's arguments that it was prejudiced by that untimely notice. Claimant's failure to give her employer timely notice of her injury pursuant to Section 12(a) of the Act is excused if the employer had knowledge of the injury or was not

[4]Dr. Harrison reiterated in his testimony that claimant's asthma and COPD are "a result of cumulative exposure" to respiratory toxins while on the job, and specifically, that claimant's work for employer "contributed to the cumulative injury to her lung that occurred over the duration of her employment as a pile butt." CX 21 at 13.

prejudiced by the claimant's failure to give proper notice or if the district director excuses the failure to file on grounds provided by the statute. 33 U.S.C. §912(d). Pursuant to Section 20(b) of the Act, the employer bears the burden of producing substantial evidence that it did not have knowledge of the injury and was prejudiced by the late notice. *Kashuba v. v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Bivens*, 23 BRBS 233. Prejudice under Section 12(d)(2) may be established where the employer provides substantial evidence that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. *See Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

Contrary to employer's contention, the administrative law judge correctly determined that the prejudice inquiry is limited to the period between claimant's date of awareness and the employer's receipt of notice or knowledge of the injury. Thus, prejudice cannot be established by the fact that claimant worked for S & W in 2010 after she left employer, because this employment was before her date of awareness. Nonetheless, we reject employer's contention that the opinion of its expert, Dr. Greenfield, was adversely affected by claimant's late notice because he could not garner sufficient information on claimant's hip condition prior to the start of her work for S & W. The record establishes that Dr. Greenfield did not find a lack of this information hindered his ability to provide an opinion regarding the cause of claimant's hip condition. In this regard, Dr. Greenfield testified at deposition that while a medical examination of claimant immediately after she stopped working for employer "would have" provided him with more "insight into [claimant's] condition at that time," he was able to use "secondary information, such as [claimant's] complaints and the actual functional capacity she demonstrated at these jobs for consideration" in forming his opinion that claimant's orthopedic conditions are related to activities of daily living and the continuing trauma of her last work with S & W. Greenfield's Dep. at 24-25. Employer's conclusory allegation of an inability to investigate the claim when it was fresh is insufficient to establish prejudice. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *Vinson*, 37 BRBS 103; *Bustillo*, 33 BRBS 15; *see also Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). As the administrative law judge's finding that claimant's untimely notice to employer did not prejudice employer is rational, supported by substantial evidence, and in accordance with law, we affirm his conclusion that claimant's failure to comply with Section 12(a) does not bar the claim for her hip injury.[5] *Id.*

[5]Moreover, we reject employer's general contention that claimant's claim is barred pursuant to Section 13 of the Act as the record establishes that claimant's October 12,

Section 20(a): Causation
Orthopedic Injuries

Employer contends the administrative law judge erred by not requiring claimant to establish, based on the evidence as a whole, that her orthopedic conditions are work-related. Employer maintains that the administrative law judge, instead, erroneously treated this case as a two-injury, multiple-employer matter, by applying *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), to resolve the causation issue.[6]

Claimant asserted she sustained hip, back and bilateral hand injuries from her work with employer. Once, as here, the Section 20(a) presumption, 33 U.S.C. §920(a), is invoked and rebutted, the Section 20(a) presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, with the claimant bearing the burden of proving on the record as a whole that her injuries are work-related.[7] *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, when the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. The

---

2011 claim, filed within one-year of her date of awareness, i.e., August 29, 2011, for the hip condition and November 8, 2012, for the respiratory conditions, is timely pursuant to Section 13(a), (b)(2) of the Act, 33 U.S.C. §913(a), (b)(2). *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982).

[6]Employer concedes that claimant's work for employer could have aggravated her degenerative, arthritic, orthopedic conditions but asserts that there is no proof in the record that this work did, in fact, aggravate claimant's underlying conditions. In particular, employer maintains that there is no evidence of any change in claimant's underlying conditions as a result of her work for employer.

[7]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant is entitled to the Section 20(a) presumption that her orthopedic and respiratory conditions are related to her covered employment, that employer rebutted the presumption, and that claimant is totally disabled as a result of her work-related conditions. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

relative contribution of the pre-existing condition and the aggravating injury are not weighed for purposes of this particular injury. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

We reject employer's contention that the administrative law judge failed to place the burden on claimant of establishing the work-relatedness of her orthopedic conditions. The administrative law judge's citation of *Price* was for the purpose of recognizing that a work-related aggravation of an underlying condition constitutes an "injury" under the Act. *See* Decision and Order at 41, 44-45; Order on Recon. at 5-6. Furthermore, the administrative law judge correctly recognized that it is immaterial to the causation inquiry whether claimant's injuries disabled her while she was working for employer. *See* 33 U.S.C. §902(2); *see generally Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Gardner v. Bath Iron Works Corp*., 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). The administrative law judge credited "much of" claimant's account of her working conditions with employer, finding that "she remains the best source of information regarding the work she performed," and that "[h]er testimony is not so different from that of the managers." Decision and Order at 17. The administrative law judge then rationally credited medical evidence that claimant's work for employer aggravated, accelerated and/or contributed to her orthopedic conditions. In this regard, the administrative law judge rationally accorded greater weight to the opinions of Drs. Stark and Harrison than to that of Dr. Greenfield. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The administrative law judge found the opinions of Drs. Stark and Harrison, that claimant's work as a pile driver, including her work with employer, in fact, caused, aggravated or accelerated her back, bilateral hip and carpal tunnel injuries, are better reasoned than Dr. Greenfield's.[8] Decision and Order at 47-48; CXs 3, 5, 7, 14 20 at 12-13, 21 at 28. As the administrative law judge's weighing of the evidence is rational and his conclusion is supported by substantial evidence of record, we affirm his finding that claimant sustained cumulative orthopedic injuries to her hips, hands and back as a result of her work with employer. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

[8]The administrative law judge rationally found that Dr. Greenfield's opinion is based on an "erroneous premise," and his "reasoning is inconsistent with the treatment of cumulative trauma injuries." Decision and Order at 48. In particular, the administrative law judge found that Dr. Greenfield's opinion seems predicated on identifying the predominant cause of claimant's condition, rather than determining whether claimant's work with employer was a contributing factor to that condition. The administrative law judge also found that Dr. Greenfield's general finding, that every time claimant "loaded" her hip joint, which the administrative law judge found included regular movement while at work, there would be additional "fretting" of the cartilage cells, actually supports, rather than detracts, from a finding that claimant's work for employer aggravated her injury. *Id.*

Respiratory Conditions

Employer contends the administrative law erred in finding that claimant sustained a respiratory injury while in its employ.[9] Employer maintains that the record contains no creditable evidence linking claimant's work for employer to any worsening of her respiratory conditions.[10]

Claimant stated that she was exposed to several forms of airborne particulate matter while working for employer, including sandblasting and concrete dust, as well as to diesel fumes. HT at 88-89, 96-99. Crediting this testimony, the administrative law judge found that claimant "was exposed to potentially harmful conditions" with employer, with the largest contributor to claimant's pulmonary problems being "her exposure to the numerous sources of diesel fumes at the work sites."[11] Decision and Order at 11, 50.

The administrative law judge extensively reviewed the medical evidence relevant to the cause of claimant's respiratory conditions, including the underlying rationales

---

[9]Employer contends the parties stipulated that claimant's respiratory condition did not worsen due to her work with employer. This "stipulation" contention is based on the following dialogue between attorneys during the cross-examination of Dr. Harrison at his deposition. Claimant's counsel, in an effort to "speed it along," stated that "I think [employer's counsel's] question is there's nothing in the medical record that identifies a permanent worsening associated with work at [employer]," to which employer's counsel responded, "I'll stipulate to that." CX 21 at 50. Claimant's counsel then replied, "I'll stipulate there's no record that says that." *Id.* This purported stipulation was never formally raised before, or recognized by, the administrative law judge either through pre-hearing filings or during the hearing. *See* Decision and Order at 2. In any event, Dr. Harrison's testimony that claimant's work for employer "contributed to the cumulative injury to her lung that occurred over the duration of her employment as a pile butt," CX 21 at 13, contradicts this alleged stipulation. Employer's "stipulation" contention is therefore rejected.

[10]Employer contends that Dr. Harrison's opinion should be accorded diminished weight because "<u>every single time</u> Dr. Harrison has been an expert, he has found the worker's condition to be industrially" related. Emp. Br. at 39 (emphasis in original). We reject employer's contention. Employer has not established the invalidity of this opinion nor does it establish bias. The administrative law judge found that Dr. Harrison, in this case, explained the underlying rationale for his opinion. CXs 14, 21.

[11]The administrative law judge found that claimant was exposed to diesel fumes, though she likely overstated the degree of that exposure. Decision and Order at 18-19.

provided by the physicians. *See* Decision and Order at 32-36, 41-43, 49-51. The administrative law judge credited Dr. Harrison's opinion, that claimant's work with employer, in fact, contributed to the cumulative injury to her lungs, CX 21 at 13, over the contrary opinion of Dr. Bressler, that claimant's work for employer did not contribute to her pulmonary disease, EX 1. Decision and Order at 51; *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). In reaching this conclusion, the administrative law judge found that Dr. Bressler's underlying reasoning is "unconvincing." Decision and Order at 50. Specifically, the administrative law judge found that, in contrast to Dr. Bressler's position, it matters little that claimant suffered no acute exacerbations or any worsening of her respiratory condition while with employer, as that does not preclude a finding that claimant's occupational exposures could have aggravated her respiratory conditions. The administrative law judge found that, by acknowledging that years of exposure to working conditions like those she experienced with employer could cause respiratory problems, Dr. Bressler "effectively concedes that exposure to those conditions for 48 days [while with employer] would also contribute to [the] harm, even if in a small way." *Id.* at 51; *see also* Dr. Bressler's Dep. at 40-41.

The Board is not empowered to reweigh the evidence. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, the administrative law judge's weighing of the evidence is rational and his conclusion is supported by substantial evidence of record in the form of Dr. Harrison's opinion. Therefore, we affirm the finding that claimant's asthma/COPD is related to her work exposures with employer. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

Intervening Cause

Employer contends that claimant's subsequent work for S & W is the cause of her bilateral hand condition. Employer avers that Dr. Harrison did not address the effect of claimant's work at S & W, and thus maintains that Dr. Greenfield's opinion, that claimant's work at S & W resulted in a change in, and thus, contributed to, her bilateral hand condition, is sufficient to establish that claimant's work at S & W caused the entirety of that injury.

If a claimant sustains a subsequent injury outside of work or for a non-covered employer that is not the natural or unavoidable result of the original work injury, any disability attributable to that intervening cause is not compensable. *See J.T.* [*Tracy*] *v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). However, the covered employer remains liable for any disability attributable to the work injury, or for the natural progression or unavoidable

result of the work injury, notwithstanding the supervening injury. 33 U.S.C. §902(2); *Leach v. Thompson's Dairy, Inc.,* 13 BRBS 231 (1981). If claimant's disabling condition is due to both the work injury and the subsequent non-covered injury, the covered employer is relieved of liability for disability caused by the subsequent non-covered injury only if there is evidence apportioning the claimant's disability between the two injuries. *Id.* However, if there is no evidence of apportionment between the injuries, the covered employer is liable for the claimant's entire disabling condition. *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997).

Contrary to employer's contention, Dr. Harrison addressed the relationship between claimant's bilateral hand condition and her work for S & W. Dr. Harrison conceded that claimant's work assembling office furniture at S & W might have contributed to her hand problem, CX 21, Dep. at 68, but he also stated that his "opinion doesn't change that the [claimant's] employment at [employer] was a significant contributing factor to the disability caused by her bilateral carpal tunnel syndrome. It is a factor in the cumulative trauma over a period of years."[12] *Id.*, Dep. at 69. Dr. Greenfield stated that claimant's work duties at S & W, "where she was putting together steel-case cabinets would be an activity that would potentially aggravate her carpal tunnel." Dr. Greenfield's Dep. at 20. Dr. Greenfield, however, also stated that carpal tunnel is "most likely" related to genetics and a predisposition to develop it, particularly where, as in this case, there is nothing to suggest traumatic carpal tunnel syndrome. *Id.*, Dep. at 20-21. Nonetheless, Dr. Greenfield agreed that repetitive tasks could aggravate or worsen an individual's carpal tunnel syndrome. *Id.* The administrative law judge found, based on this evidence, that claimant's carpal tunnel syndrome is likely due to her work both with employer and with S & W. Decision and Order at 53.

The administrative law judge thus properly found that employer's intervening cause argument is flawed because a necessary element of its defense is missing, i.e., evidence apportioning claimant's disability between her covered and non-covered employment. Decision and Order at 53; Order on Recon. at 6-8; *Plappert*, 31 BRBS at 15-16, 31 BRBS at 109-110. In the absence of such evidence, the last covered employer in whose employ the claimant sustained a disabling injury remains liable for claimant's entire orthopedic disability. *Tracy*, 696 F.3d at 838, 46 BRBS at 70(CRT). Therefore, we affirm the administrative law judge's finding that claimant's work with S & W after she left employer is not an intervening cause of claimant's orthopedic disability that relieves employer of liability. *See generally Jones v. Director, OWCP*, 977 F.2d 1106,

[12]Dr. Harrison additionally stated, "I'm not arguing that [claimant's work with employer] is the sole cause of her carpal tunnel, but [it] is a significant contributing factor in her carpal tunnel." CX 21, Dep. at 70.

26 BRBS 64(CRT) (7th Cir. 1992); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co*., 211 F.2d 454 (9th Cir. 1954).

BRB No. 16-0128A
Nature of Claimant's Disability

Claimant contends the administrative law judge erred in finding that the nature of her disability is temporary rather than permanent. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), or when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016); *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has recently addressed the nature of a claimant's disability in a case like this one, where potential surgery is involved. In *Carrion*, the Ninth Circuit stated that the crux of the permanent versus temporary nature of a claimant's injury is "whether the disability will resolve after a normal and natural healing period. If the answer is yes, the disability is temporary. If the answer is no, the disability is permanent." *Carrion*, 821 F.3d at 1173, 50 BRBS at 63(CRT). In reaching a conclusion on this issue, the Ninth Circuit articulated, "the appropriate question to ask is not whether a future surgery would ameliorate [claimant's] knee condition, but whether there was actual or expected improvement to his knee after a normal and natural healing period. The impact of a future knee replacement should be assessed after the surgery, not in anticipation of such a contingency." *Id.*, 821 F.3d at 1174, 50 BRBS at 64(CRT); *see also Pacific Ship Repair & Fabrication, Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012).

Finding claimant has been "universally advised" that she requires a left hip replacement at some point, that claimant plans to undergo the procedure as soon as she is able, and that the surgery has the potential to substantially improve claimant's condition, the administrative law judge determined that claimant continues to seek treatment with a view toward improving her condition. The administrative law judge thus concluded claimant's disability remains temporary in nature. Decision and Order at 56. Given the Ninth Circuit's decision in *Carrion*, we vacate the administrative law judge's finding that claimant's disability remains temporary, and we remand this case for reconsideration of the nature of claimant's disability pursuant to *Carrion*.[13] *Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT).

[13]The administrative law judge did not separately address whether claimant's work-related respiratory condition is permanent. On remand, the administrative law

Judge Berlin's August 13, 2012 Order

Claimant challenges Judge Berlin's pre-hearing Order dated August 13, 2012, imposing attorney's fee sanctions against claimant's counsel for alleged "inconsistencies" in, as well as "frivolous" and "manipulative purposes" behind, claimant's opposition to employer's motion for a change of venue and her motion for a brief continuance.

At claimant's counsel's request, this case was originally set for a hearing in San Francisco, California, on September 20, 2012. Employer, on August 9, 2012, moved to change the location for the hearing to San Diego, California. Claimant opposed employer's motion and simultaneously moved to continue the San Francisco hearing to a later date. Citing 20 C.F.R. §702.337(a),[14] and noting that the only location on the record for claimant's residence is Encinitas, California, that the distance from claimant's residence to the OALJ's hearing location in San Diego is approximately 30 miles, and that the distance from claimant's residence to the OALJ's hearing location in San Francisco is about 476 miles, Judge Berlin stated that "the hearing must be set in San Diego unless Claimant can show good cause for the San Francisco location." Berlin Order date August 13, 2012 at 2. Judge Berlin, however, found claimant did not show good cause for holding the hearing more than 75 miles from her residence and thus, granted employer's motion to change the location to San Diego. *Id.* at 3. Judge Berlin then added that "given the inconsistencies in Claimant's counsel's arguments and his manipulative purposes, no fees will be awarded to Claimant's counsel for work performed on either of these two motions." *Id.*

We reject claimant's contention of error. Irrespective of Judge Berlin's imposition of a sanction, claimant's counsel is not entitled to a fee for his work opposing employer's change of venue motion because claimant's motions were entirely unsuccessful. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992) (the adjudicator may sever the services on the unsuccessful claims from those on the successful claims).

Accordingly, the administrative law judge's finding that claimant's disability is temporary in nature is vacated, and the case is remanded for further consideration

---

judge should address this issue. *See Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014).

[14]Section 702.337(a) of the Act's regulations states: "Except for good cause shown, hearings shall be held at convenient locations no more than 75 miles from the claimant's residence." 20 C.F.R. §702.337(a).

consistent with this opinion. In all other regards, the administrative law judge's Decision and Order Granting Benefits and Order Granting Reconsideration are affirmed. Judge Berlin's Order Ruling on Claimant's Motion to Continue and Employer/Carrier's Motion to Change Location of Hearing, including his denial of attorney's fees for work performed by claimant's counsel on the motions for a change in venue and for a continuance, is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

_____
RYAN GILLIGAN
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to affirm the administrative law judge's findings that claimant's failure to comply with Section 12(a) does not bar the claim for her hip injury and that claimant sustained cumulative orthopedic injuries to her hips, hands and back as a result of her work with employer. I also concur with my colleagues' decisions to vacate the administrative law judge's finding that claimant's disability is temporary in nature, and to affirm Judge Berlin's Order ruling on Claimant's Motion to Continue and Employer/Carrier's Motion to Change Location of Hearing, including his denial of attorney's fees for work performed by claimant's counsel on the unsuccessful motions for a change of venue and for a continuance. However, I respectfully dissent from their decision to affirm the administrative law judge's findings that claimant's asthma/COPD is related to her work exposures with employer and that claimant's work with S & W after she left employer is not an intervening cause of claimant's bilateral hand condition. For the reasons set forth below, I would vacate these two determinations and have the administrative law judge, on remand, reconsider these issues in terms of the relevant evidence and applicable standard. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2^{d} Cir. 1982).

The administrative law judge correctly determined that claimant was entitled to the Section 20(a) presumption that her respiratory conditions are related to her work for employer and that employer established rebuttal thereof. Addressing the evidence as a whole, the administrative law judge credited claimant's testimony regarding her airborne

work exposures, as well as Dr. Harrison's opinion,[15] that claimant's work with employer contributed to the cumulative injury to her lungs, to conclude that claimant "was exposed to potentially harmful conditions" with employer. Decision and Order at 11, 50. Thus, he concluded that claimant's respiratory injury is related to her work with employer.

In reaching this conclusion, the administrative law judge did not address whether the record establishes that claimant's work for employer actually aggravated her underlying respiratory conditions. Specifically, while the administrative law judge credited evidence showing that airborne exposures consistent with those claimant experienced with employer might aggravate her underlying respiratory conditions, he did not assess whether this evidence establishes that claimant's exposures actually aggravated her respiratory conditions. After the Section 20(a) presumption is rebutted, it is claimant's burden to establish "the necessary causal link between the injury and employment." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010) (quoting *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 53, 44 BRBS 13, 15 (CRT) (1st Cir. 2010)). I would, therefore, vacate the administrative law judge's finding that claimant's asthma/COPD is related to her work for employer and require, on remand, that the administrative law judge analyze all of the evidence and make a specific determination, with claimant bearing the burden of persuasion, as to whether she sustained an actual respiratory injury due to her exposures with employer.

With regard to the issue of whether claimant's post-employer work with S & W constituted an intervening cause of claimant's bilateral hand condition, I believe the administrative law judge failed to address Dr. Greenfield's opinion that claimant's post-employer work with S & W, and not her work for employer, resulted in a change in her carpal tunnel syndrome. *See* Dr. Greenfield's Dep. at 20-21, 29-30. Because the administrative law judge did not address and weigh this evidence in relation to whether claimant's work at S & W alone caused her bilateral carpal tunnel syndrome, I would vacate the administrative law judge's finding that claimant's work with S & W is not an intervening cause of her bilateral hand condition and remand the case for further findings. *See generally Volpe*, 671 F.2d 697, 14 BRBS 538. Since claimant was not disabled prior to her work stints with S & W, the proper inquiry is whether claimant's bilateral hand disability and/or need for medical benefits is due to the natural progression of the condition caused by her work with employer, or whether the disabling injury is due solely to an intervening injury at S & W. *See* 33 U.S.C. §902(2); *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). As the administrative law

[15]The administrative law judge also rejected Dr. Bressler's opinion, that claimant's work for employer did not contribute to her pulmonary disease, because the underlying reasoning of that opinion is "unconvincing." Decision and Order at 50.

judge did not address Dr. Greenfield's opinion under this standard, I would remand the case for further findings.

For the foregoing reasons, I would vacate the administrative law judge's causation finding with regard to claimant's respiratory condition, and the finding that claimant's S & W employment is not the intervening cause of claimant's bilateral hand condition, and remand the case for the administrative law judge to make specific findings with regard to these issues.

_____

JUDITH S. BOGGS
Administrative Appeals Judge