BRB No. 09-0601

KEVIN W. McCLENDON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TETRA TECHNOLOGIES, INCORPORATED	)	DATE ISSUED: 01/20/2010
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr. (Couture & Soileau, LLC), New Orleans, Louisiana, for claimant.

Christopher L. Zaunbrecher and Kathy L. Smith (Briney & Foret), Lafayette, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-LHC-562) of Administrative Law Judge Clement J. Kennington 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 if they 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 was struck on his head and neck, and knocked unconscious, by a falling wing valve during the course of his employment as an "A" operator/rigger with employer on December 27, 2006. Upon regaining consciousness, claimant was airlifted to a hospital where he complained of back, neck, and shoulder pain. Claimant subsequently sought medical treatment for complaints related to his back, neck, and both shoulders. Employer voluntarily paid benefits to claimant between December 28, 2006, and August 27, 2007.

In his Decision and Order, the administrative law judge found that claimant's neck, back, and shoulder conditions were causally related to his employment with employer. The administrative law judge determined that claimant's left shoulder condition has reached maximum medical improvement, but that his back, neck and right shoulder conditions have not, and that claimant is unable to return to gainful employment. The administrative law judge utilized Section 10(c) of the Act, 33 U.S.C. §910(c), to determine that claimant's average weekly wage at the time of his injury was $1,020.85, and he awarded claimant temporary total disability compensation from December 27, 2006, and continuing. 33 U.S.C. §908(b). The administrative law judge also held employer liable for claimant's medical expenses, interest on accrued unpaid compensation benefits, and an assessment pursuant to Section 14(e), 33 U.S.C. §914(e), of the Act.

On appeal, employer challenges the administrative law judge's findings regarding the nature and extent of claimant's disability, claimant's entitlement to medical benefits, the calculation of claimant's average weekly wage, and its liability for an assessment pursuant to Section 14(e) of the Act. Claimant responds, urging affirmance of the administrative law judge's decision.

Nature of Disability

Employer initially contends that the administrative law judge erred in failing to find that claimant's back, neck, and right shoulder conditions have reached maximum medical improvement. We disagree. Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. *See generally Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988). A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

Employer asserts that the opinions of Drs. Gabel and Kaldis establish that claimant's back, neck, and right shoulder conditions have reached a state of permanency. The administrative law judge, however, relied upon the opinion of Dr. Eidman, claimant's treating physician, who recommended that claimant undergo additional medical treatment in order to alleviate his present conditions. Specifically, Dr. Eidman recommended that claimant undergo epidural steroid injections and a possible discrogram, and he opined that with additional treatment claimant's conditions would improve. Based upon the opinion of Dr. Eidman, the administrative law judge rationally concluded that claimant had not reached maximum medical improvement as additional medical treatment with a view to improving his back, neck, and right shoulder conditions was anticipated. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT). We therefore affirm the administrative law judge's finding on this issue. *See generally Leone v. Sealand Terminals Corp.*, 19 BRBS 100 (1986).

Extent of Disability

Employer next challenges the administrative law judge's award of temporary total disability compensation to claimant subsequent to December 27, 2006; specifically, employer avers that the opinions of Drs. Gabel and Kaldis establish that claimant is capable of gainful employment and that, moreover, employer's labor market survey establishes the availability of suitable alternate employment that claimant is capable of performing. It is well-established that claimant bears the burden of proving the extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must demonstrate that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In addressing this issue, the administrative law judge credited the testimony of claimant and Dr. Eidman, claimant's treating physician. In this regard, Dr. Eidman opined that claimant is incapable of gainful employment, including light duty, based upon the pain claimant presently experiences and the amount of prescription pain medication claimant currently is prescribed in order to treat that pain. *See* CX 1 at 16, 25, 33, 38, 43; CX 12 at 21. Claimant testified that he continues to be prescribed five medications a day, including Hydrocodone, Mobic, a muscle relaxer, and a pill for his back pain; claimant additionally testified that he is unable to work due to the totality of the post-injury pain that he experiences and the amount of the aforementioned medication that he takes on a daily basis. *See* Tr. at 86 - 92, 97 - 98.

The law is clear that in arriving at a decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from

the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). On appeal, employer seeks a reweighing of the evidence, which the Board is not empowered to do. The administrative law judge was entitled to assess the medical evidence of record as well as 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 his decision that claimant is incapable of returning to work in any fashion at the present time is supported by the credited medical evidence and claimant's testimony. Decision and Order at 22. *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, as it is supported by substantial evidence, the administrative law judge's finding that claimant is incapable of any employment is affirmed. It follows that claimant is totally disabled. *See generally Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). Accordingly, we affirm the administrative law judge's conclusion that claimant is entitled to temporary total disability compensation as of December 27, 2006.[1]

Average Weekly Wage

Employer challenges the administrative law judge's use of Section 10(c) of the Act to calculate claimant's average weekly wage. Specifically, employer contends that since claimant worked substantially the whole of the year preceding his work-accident, Section 10(a) of the Act should be used to calculate claimant's average weekly wage so as to reflect claimant's average wage during the 52 weeks prior to that incident. We disagree. Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision for calculating claimant's annual earning capacity to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[2] *See Hall v.*

[1] As we have affirmed the administrative law judge's finding that claimant is presently incapable of returning to work in any fashion, we need not address employer's contention that its proffered labor market survey established the availability of suitable alternate employment.

[2] No party contends that Section 10(b) should be applied in the instant case.

Consolidated Employment Systems, Inc., 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

We reject employer's contention that the administrative law judge was required to calculate claimant's average weekly wage pursuant to Section 10(a) of the Act. The administrative law judge specifically considered and rejected employer's argument in this regard, finding that although claimant worked substantially the whole of the year prior to his work-injury, Section 10(a) could not be fairly applied since claimant's work schedule, *i.e.*, fourteen days of work followed by seven days of leave, is different than that contemplated by Section 10(a). Decision and Order at 32. On appeal, employer does not challenge the administrative law judge's finding that claimant worked fourteen consecutive days followed by seven days off; thus, Section 10(a) is inapplicable since claimant was neither a five- or six-day per week worker. We therefore affirm the administrative law judge's decision to utilize Section 10(c), rather than Section 10(a), of the Act to calculate claimant's average weekly wage at the time of his work-injury.

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c), *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *Fox v. West State Inc.*, 31 BRBS 118 (1997). Accordingly, the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount calculated represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Fox*, 31 BRBS 118. In the instant case, the administrative law judge calculated claimant's average weekly wage by dividing claimant's total earnings in the year preceding his work-injury, $41,854.79,[3] by 41, the number of weeks that claimant worked during that period. We hold that the result reached by the administrative law judge is reasonable, is supported by substantial evidence, and best reflects claimant's earning capacity with employer at the time of his injury.[4] *See Gallagher*, 219 F.3d 426,

[3] In his response brief, claimant argues that his actual annual earnings in the year preceding his work-injury totaled $44,869.79; we decline to address this contention since it should have been raised in a cross-appeal. *See Garcia v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

[4] We reject employer's contention that under Section 10(a) or (c), the administrative law judge should have divided claimant's actual earnings by 52. Subsections (a), (b) and (c) all seek to derive a figure representing annual earnings, which

34 BRBS 35(CRT). We, therefore, affirm the administrative law judge's determination of claimant's average weekly wage.

Choice of Physician and Medical Expenses

Employer avers that the administrative law judge erred in determining that Dr. Eidman was claimant's first choice of physician for the treatment of claimant's back complaints. Specifically, employer asserts that as Dr. Gabel referred claimant to Dr. Kaldis, and as Dr. Kaldis examined claimant, rendered an opinion regarding claimant's physical condition, and recommended treatment, Dr. Kaldis was claimant's first choice of physician.

Section 7(b) of the Act, 33 U.S.C. §907(b), permits an injured employee to select his own physician. In addressing employer's contention on this issue, the administrative law judge found that 1) claimant presented himself to Dr. Kaldis upon the recommendation of Dr. Gabel;[5] 2) Dr. Kaldis saw claimant on two occasions but did not render any major treatment; 3) claimant was thereafter seen a third time by Dr. Kaldis at the request of employer's carrier; and 4) claimant never agree to treat with Dr. Kaldis and immediately informed employer's carrier of his decision not to pursue treatment with that physician. Decision and Order at 27. The administrative law judge next found that Dr. Kaldis testified that he was not claimant's treating physician but, rather, he considered himself to be an "independent medical examiner." *Id.*; *see* EX 19 at 28. Lastly, the administrative law judge determined that claimant sought treatment with Dr. Eidman after Drs. Gabel and Kaldis released claimant to return to work, effectively refusing

---

are then divided by 52 under Section 10(d)(1). Section 10(a) requires a specific formula to be utilized to calculate claimant's annual earnings and, as we have explained, that formula cannot be applied here. Under Section 10(c), the administrative law judge may derive a weekly earnings figure by dividing claimant's actual earnings by the number of weeks worked and then extrapolating that figure over the entire year to achieve a figure representing claimant's annual earnings. In this case, the administrative law judge found claimant worked a total of 27 weeks offshore and received 14 weeks of employer-mandated breaks. He was unable to work part of the year due to Hurricane Katrina and the lack of work. Employer has not established that use of a 41-week divisor on these facts distorts claimant's earning capacity. While the administrative law judge technically should have multiplied the resulting weekly figure by 52 to achieve annual earnings which should then be divided by 52, as the Fifth Circuit explained in *Gallagher*, this step is not necessary as the same result would be reached.

[5] Dr. Gabel and Dr. Kaldis are employed by the same medical practice.

claimant medical care despite claimant's ongoing complaints of pain.[6] Pursuant to these findings, the administrative law judge concluded that Dr. Eidman was claimant's initial choice of physician for the treatment of claimant's back condition. Employer has not established reversible error in the administrative law judge's findings on this issue; accordingly, as the administrative law judge addressed the evidence on this issue and rationally concluded that Dr. Eidman was claimant's physician of choice for the treatment of his back condition, that finding is affirmed. *See generally Hunt v. Newport News Shipbuilding & Dry Dock Co.,* 28 BRBS 364 (1994), *aff'd mem.,* 61 F.3d 900 (4th Cir. 1995).

Employer also challenges the administrative law judge's award of medical expenses related to claimant's back, neck, and right shoulder conditions. Specifically, employer contends that the record is insufficient to establish the necessary nature of claimant's past and future medical treatment. We affirm the administrative law judge's award of medical benefits to claimant.

Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require.

In order for a medical expense to be assessed against employer, therefore, the expense must be both reasonable and necessary, and must be related to the injury at hand. *See Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Weikert v. Universal Maritime Service Corp.,* 36 BRBS 38 (2002).

In the instant case, the administrative law judge found that the medical treatment procured by claimant for his back, neck, and right shoulder conditions after his release from Drs. Gabel and Kaldis was both reasonable and necessary to treat those ongoing conditions. In this regard, the administrative law judge credited the opinion of Dr.

[6] The administrative law judge also found that carrier refused requests for authorization for treatment by Dr. Eidman. Thus, claimant was released from the obligation to continue to seek employer's approval, and it is liable for reasonable and necessary treatment procured by claimant on his own initiative. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied,* 479 U.S. 826 (1986).

Eidman, which provides substantial evidence to support his finding that the treatment rendered to claimant is reasonable and necessary. Consequently, we affirm the administrative law judge's award of medical benefits associated with claimant's work-related back, neck, and right shoulder conditions. *See McGrath*, 289 F.2d 403; *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Section 14(e)

Lastly**, e**mployer contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment on the amount of benefits due claimant between August 28, 2007, and November 27, 2007. Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director based on employer's showing that the non-payment was due to circumstances beyond its control. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993). Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

The undisputed facts of this case support the administrative law judge's determination that employer is liable for a Section 14(e) assessment on all compensation due and unpaid from August 28, 2007 to November 25, 2007. The administrative law judge found that while employer commenced the payment of disability benefits to claimant on December 28, 2006, it terminated those payments on August 14, 2007. As of this date, a dispute existed between the parties as to the amount of compensation due claimant. Once this dispute existed, employer had 28 days to pay the benefits due or 14 days to file a notice of controversion with the district director in order to avoid incurring liability under Section 14(e). *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Before the administrative law judge, the parties stipulated that employer filed its first notice of controversion on November 25, 2008. *See* JX 1. On appeal, employer does not contend that it timely filed a notice of controversion; rather, employer asserts that it should not be held liable for a Section 14(e) assessment since it "reasonably controverted Claimant's entitlement to benefits." *See* Employer's br. at 17. This statement does not provide a basis for excusing employer's failure to file a timely notice of controversion. Accordingly, the administrative law judge's finding that employer is liable for a Section 14(e) assessment on all benefits due and unpaid between August 28, 2007, and November 27, 2007, the date of the informal conference is affirmed. *See Maes*, 27 BRBS 128 (a Section 14(e) assessment terminates at the earliest

point at which the Department of Labor has notice of the relevant facts which a proper controversion would reveal, such as the date of an informal conference).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge