BRB No. 12-0261

CURTIS L. NATHAN (DESKINS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CASCADE GENERAL/VIGOR INDUSTRIAL, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 01/29/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer and Signal Mutual Indemnity Association.

Stephen E. Verotsky (Sather Byerly & Holloway), Portland, Oregon, for employer and American Home Assurance Company.

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

PER CURIAM:

Employer and its carrier, Signal Mutual Indemnity Association (Signal), appeal the Decision and Order Awarding Benefits (2010-LHC-00312; 2010-LHC-00313) of Administrative Law Judge Russell D. Pulver 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).

On March 5, 2008, claimant, during the course of his employment as a journeyman electrician, was struck across his lower back by a hatch while he was climbing out of the hold of a vessel. Claimant filed an injury report with employer and the following day reported to the emergency room where he underwent an evaluation and x-rays. Claimant was diagnosed with a lumbar strain and back contusion and prescribed Naproxen and Percocet; he returned to his usual employment duties with employer on or about March 12, 2008. On April 1, 2008, Signal replaced American Home Assurance Company (American Home) as employer's insurance carrier. Claimant testified that he continued to experience back pain. On May 7 and 11, 2008, he sought treatment at the hospital emergency room. Claimant's condition was diagnosed as an inflammation of a nerve root and L5 radiculopathy. He last worked for employer on May 15, 2008, and thereafter continued to take prescription medication and to seek medical care for his complaints of pain. Employer voluntarily paid claimant benefits through February 19, 2009.

In his Decision and Order, the administrative law judge found that claimant sustained a work-related injury on March 5, 2008, and that he sustained an aggravation of this injury when he returned to his usual employment duties with employer between March 12 and May 15, 2008. As employer changed carriers effective April 1, 2008, the administrative law judge assigned liability for claimant's benefits to the more recent carrier, Signal. Decision and Order at 14-21. The administrative law judge found that claimant's back condition had not reached maximum medical improvement, that claimant is unable to perform his usual employment duties as a journeyman electrician due to his injury, and that employer established the availability of suitable alternate employment as of October 26, 2010. *Id*. at 21-26. The administrative law judge calculated claimant's average weekly wage as $557.03 pursuant to Section 10(c), 33 U.S.C. §910(c). He awarded claimant temporary total disability benefits from May 15, 2008, through October 25, 2010, temporary partial disability benefits from October 26, 2010, and continuing, and medical benefits. 33 U.S.C. §§908(b), (e), 907.

On appeal, Signal challenges the administrative law judge's determination that it is the carrier responsible for the payment of claimant's disability and medical benefits subsequent to April 1, 2008. Alternatively, Signal challenges the administrative law judge's findings regarding the extent of claimant's disability, the calculation of claimant's average weekly wage, and the award of medical benefits. Claimant responds, urging affirmance of the administrative law judge's decision. American Home responds in support of the administrative law judge's responsible carrier finding.

Responsible Carrier

Signal first challenges the administrative law judge's finding that it, rather than American Home, is the carrier responsible for any benefits due claimant under the Act subsequent to April 1, 2008. In this regard, Signal asserts that the evidence of record fails to establish that claimant sustained an aggravation of his back condition subsequent to his return to work on March 12, 2008. Signal contends it is not the responsible carrier because claimant experienced only flare-ups upon his return to work for employer due to his return to work before he had fully recovered from his March 5, 2008, work injury.

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 and carriers in cases involving traumatic injury, the employer/carrier 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 an aggravation of the original injury, the employer/carrier on the risk at the time of the aggravation is liable for the entire disability resulting therefrom.[1] *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 is responsible for any resulting disability. *See Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). In this regard, the Ninth Circuit has emphasized that a subsequent employer/carrier may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer/carrier is not the primary factor in the claimant's resultant disability. *See*

[1]Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. The relative contribution of the pre-existing condition and the aggravating injury are not weighed. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

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 (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 employer after April 1, 2008, aggravated his pre-existing conditions. The administrative law judge made specific findings supporting his conclusion that claimant's employment with employer between March 12 and May 15, 2008, aggravated his pre-existing condition and worsened his symptoms: 1) claimant returned to work with employer within a week of his March 5, 2008, injury; 2) claimant's testimony establishes the existence of work duties, including carrying a 10 to 15 pound tool belt, climbing ladders, pushing, pulling, kneeling and crawling, and riding a bicycle, which the doctors agreed could aggravate his nerve root condition and worsen his symptoms; 3) claimant, although complaining of pain upon his return to work, nonetheless performed his usual employment duties until May 15, 2008; 4) Dr. Dorsen opined that engaging in strenuous activities can aggravate nerve root irritation and worsen symptoms in a symptomatic patient such as claimant; and 5) claimant testified that the severity of his symptoms ultimately resulted in his inability to continue his employment with employer. *See* Decision and Order at 19-21.

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 all of the evidence presented by the parties on this issue, and he relied on the aforementioned factors in finding that claimant's post-April 1, 2008, employment aggravated his nerve root inflammation and worsened his symptoms, resulting in disability.[2] As the administrative law judge's finding is supported by substantial evidence and consistent with law, we affirm the administrative law judge's finding that Signal is liable for the benefits due claimant under the Act. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez v. Stevedoring*

[2]We note Signal's argument that the administrative law judge erred in "relying heavily" upon the opinion of Dr. Berselli in addressing this issue. However, the administrative law judge primarily credited the testimony of claimant and the opinion of Dr. Dorsen in concluding that claimant experienced an aggravation of his nerve root condition when he returned to work following the initial March 5, 2008, work injury. *See* Decision and Order at 20. Thus, we need not address Signal's contention that the administrative law judge erred in relying on Dr. Berselli's opinion because it was obtained through *ex parte* communication with claimant's counsel.

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).

Suitable Alternate Employment

Signal contends the administrative law judge erred in finding that it had not established the availability of suitable alternate employment prior to October 26, 2010; specifically, Signal asserts that the written report of its vocational expert, Mr. Stipe, establishes that suitable alternate employment was available to claimant as of December 31, 2008.

Where, as in this case, claimant has established his inability to return to his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish that suitable work was realistically and regularly available to claimant on the open market. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Since an injured claimant's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available, employer can attempt to meet its burden by submitting a retrospective labor market survey establishing the availability of suitable jobs at a date earlier than that of the vocational report. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

In his decision, the administrative law judge found that Mr. Stipe's report documented the availability of at least one opening for a fast food worker with four different fast food restaurants. Decision and Order at 23-25. The administrative law judge acknowledged that these four employers indicated that they had had similar jobs available during the previous twelve months, *see* RX 77 at 338, 340, 344, 347, but he concluded that suitable alternate employment as a fast food worker was not established until October 26, 2010, the date of Mr. Stipe's report. Decision and Order at 26.

In challenging the administrative law judge's finding that it did not establish the availability of suitable alternate employment until October 26, 2010, Signal argues that Mr. Stipe's report states that various specific positions "existed back to 2008" and were available "over the last several years." *See* Signal Br. at 18, *citing* RX 77 at 314. Specifically, Signal asserts that it established the availability of suitable alternate employment no later than December 31, 2008. *Id.* at 17-19. The reference in the vocational report cited by Signal to jobs in 2008 refers to assembly workers and

polisher/finishers, and the statement regarding the availability of employment "over the last several years" was made in reference to kitchen helpers. The administrative law judge, however, found only the fast food jobs to constitute suitable alternate employment. *See* Decision and Order at 25; RX 77 at 314. Signal has thus cited to no evidence in support of its contention that the four fast food employment positions identified by Mr. Stipe were available in December 2008; accordingly, we reject Signal's contention of error in this regard.

We cannot affirm, however, the administrative law judge's finding that employer established the availability of suitable alternate employment only as of October 26, 2010. In his decision, the administrative law judge specifically found that each of the employers who had openings for fast food workers on October 26, 2010, the date of employer's labor market survey, further indicated that they had had employment openings available in the preceding twelve months. Decision and Order at 25 *citing* RX 77 at 338, 340, 344, 347. The administrative law judge, without discussion, summarily found that suitable alternate employment was available to claimant as of October 26, 2010. *Id.* at 26. As it is well-established that an employer can attempt to meet its burden of establishing the availability of suitable alternate employment by submitting a labor market survey which establishes the availability of suitable jobs at a date earlier than that of the vocational report, the administrative law judge erred in not addressing the evidence that fast food openings were available in the year prior to the survey. *See Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.). We therefore vacate the administrative law judge's finding that Signal did not establish the availability of suitable alternate employment until October 26, 2010, and we remand the case for further consideration of this issue.

Average Weekly Wage

Signal contends that the administrative law judge erred in utilizing only claimant's actual earnings at the time of his injury in determining claimant's average weekly wage. Moreover, Signal asserts that the administrative law judge improperly used a Section 10(a) calculation under Section 10(c).

Section 10(c) of the Act, 33 U.S.C. §910(c), directs the administrative law judge to determine claimant's annual earning capacity at the time of injury "having regard to the previous earnings of the injured employee in the employment in which he was injured." Thus, the goal of Section 10(c) is to arrive at a sum that reflects the potential of claimant to earn absent injury. *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). Average weekly wage calculations based solely on a claimant's new, higher wages have been affirmed where they reflect the potential to earn

at that level. *Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *Bonner*, 600 F.2d 1288; *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c); 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 v. West State, Inc.*, 31 BRBS 118 (1997).

In this case, the administrative law judge calculated claimant's average weekly wage by dividing claimant's total earnings with employer in the year preceding his work-injury, $6,238.79, by 56, the number of days that claimant worked for employer during that period. The administrative law judge then multiplied the resulting sum, $111.40, by 260, the number of work days in a full year, and divided the result by 52, the number of weeks in a full year, to calculate claimant's average weekly wage at the time of his injury, $557.03. Decision and Order at 26-28. In making this mathematical calculation based solely on claimant's earnings with employer, the administrative law judge stated that claimant's employment with employer was substantially different from his prior employment positions, and that claimant's work for employer constituted a stable, full time job. *Id.* at 28. We affirm the administrative law judge's use of only claimant's higher earnings with employer to calculate his average weekly wage as it is in accordance with law. *See Healy Tibbitts Builders, Inc.*, 444 F.3d 1095, 40 BRBS 13(CRT); *Bonner*, 600 F.2d 1288.

We agree with Signal, however, that the administrative law judge's calculation of claimant's average weekly wage cannot be affirmed. As correctly argued by Signal, the administrative law judge's determination of claimant's average weekly wage, although purportedly calculated pursuant to Section 10(c) of the Act, utilized the precise mathematical process set forth in Section 10(a) of the Act, 33 U.S.C. §910(a).[3] *See* Decision and Order at 28 n.21. In addressing the average weekly wage issue, the administrative law judge properly determined that Section 10(a) cannot be used to

[3]Section 10(a) of the Act, 33 U.S.C. §910(a), is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months, which is then multiplied by 260 if claimant was a five-day per week worker, with the resulting figure divided by 52. The sum yielded by this calculation is claimant's statutory average weekly wage. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

calculate claimant's average weekly wage since claimant did not work substantially the whole of the year in employment as an electrician.[4] *Id.* at 27; *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). The administrative law judge cannot use a Section 10(a) calculation pursuant to Section 10(c), as the use of Section 10(c) is specifically premised on the inapplicability of Section 10(a). *See* 33 U.S.C. §910(c). A Section 10(a) calculation arrives at a theoretical approximation of what claimant would have earned in a full year; thus, such a calculation is premised by statute on a claimant's working substantially the whole of the year prior to the injury in the same employment. *See Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101 (1983). As that factor was not met in this case, the administrative law judge cannot use this calculation. Accordingly, as the administrative law judge's calculation of claimant's average weekly wage is not in accordance with law, we vacate it and remand the case for the administrative law judge to recalculate claimant's average weekly wage pursuant to Section 10(c), taking into consideration the arguments raised by the parties in support of their positions on this issue.

Medical Benefits

Signal also challenges the administrative law judge's decision to hold it liable for the cost of claimant's future back surgery; specifically, Signal contends that the record does not support a finding that surgery is presently reasonable and necessary for the treatment of claimant's back condition. We affirm the administrative law judge's award of medical benefits to claimant, including the cost of back surgery should claimant decide to proceed with that procedure.

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." *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Medical care must be appropriate for the injury, 20 C.F.R. §702.402, and claimant must establish that the requested services are reasonable and necessary for the treatment of the work injury. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). 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 Serv. Corp.*, 36 BRBS 38 (2002).

[4]In addition, there is no evidence of the wages of co-workers; therefore Section 10(b) is not applicable. 33 U.S.C. §910(b).

In this case, claimant was diagnosed with pre-existing spondylolisthesis at L5-S1 and, following his work incidents, nerve root irritation and right-sided L5 radiculopathy. In September 2008, based upon claimant's complaints and the results of an EMG and MRI, Dr. Dorsen recommended that claimant undergo decompression and fusion surgery. Claimant, however, declined this recommendation and continued to seek conservative treatment. In his December 2010 deposition, Dr. Dorsen reiterated his opinion that surgery was appropriate if claimant remained symptomatic, *see* CX 10 at 17-18, and claimant, at the November 17, 2010 hearing, expressed a desire to proceed with surgery. Tr. at 69. In his decision, the administrative law judge concluded that, as no physician opined that surgery was unreasonable, the treatment recommended by Dr. Dorsen was both reasonable and necessary to treat claimant's back conditions, and he therefore held employer liable for that surgery should claimant undergo the procedure in the future.[5] Decision and Order at 28-29. As employer has not established error in the administrative law judge's award of medical benefits to claimant, including future surgery, that award is affirmed. *See* 33 U.S.C. §907; *Amos v. Director, OWCP*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1998), *cert. denied*, 528 U.S. 809 (1999); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

[5]Signal's contention that, as claimant's primary care physician, Dr. Johnson, expressed doubts regarding the surgery recommended for claimant, the issue of the appropriate care due claimant transferred to the district director pursuant to Section 7(e) of the Act, 33 U.S.C. §907(e), is misplaced. First, in discussing the evidence regarding claimant's medical care, the administrative law judge specifically found that Dr. Johnson is not a neurosurgeon. Decision and Order at 29. Next, while Section 7(e) provides for a claimant's examination by a physician employed or chosen by the Secretary of Labor, the authority to resolve disputes over the necessity of any treatment rests with the administrative law judge. *See Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment as of October 26, 2010, and his calculation of claimant's average weekly wage, are vacated, and the case remanded for reconsideration of these issues. In all other respects, Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge