BRB No. 00-1063

EDENIA SCUDDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAERSK PACIFIC, LIMITED	)	DATE ISSUED: July 24, 2001
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & Moorhead, L.L.P.), Wilmington, California, for claimant.

William N. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for employer/carrier.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (99-LHC-0998) of Administrative Law Judge Daniel L. Stewart rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 5, 1997, claimant injured her back, neck, and knees during the course

of her employment for employer as a UTR driver. Claimant received physical therapy for her injuries and she underwent surgery on her right knee on September 2, 1998. Claimant returned to work in February 1999. After claimant's work injury, employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from November 6, 1997, to June 24, 1998, and from September 2 to November 11, 1998. Employer also paid compensation for a seven percent permanent partial impairment of the right knee. 33 U.S.C. §908(c)(2). Claimant sought, *inter alia*, additional compensation for temporary total disability from June 25 to September 1, 1998, and from November 11, 1998, to February 17, 1999, and for permanent partial disability for a 14 percent impairment of her right knee.

In his decision, the administrative law judge found that claimant was able to return to her usual employment as a UTR driver from June 25 to September 1, 1998, prior to her right knee surgery on September 2, 1998. The administrative law judge found that claimant was unable to work from September 2 to December 16, 1998, and that claimant's right knee reached maximum medical improvement on December 17, 1998, at which time claimant could return to her usual work. The administrative law judge therefore awarded claimant additional compensation for temporary total disability from November 12 to December 16, 1998. The administrative law judge also denied claimant compensation for a 14 percent impairment of her right knee. The administrative law judge credited evidence that claimant's additional right knee impairment was due, in part, to claimant's longshore employment after her November 5, 1997, work injury, and that, therefore, a subsequent longshore employer is responsible for the additional right knee impairment and for any necessary medical treatment attendant thereto. The administrative law judge found that claimant is not entitled to further medical treatment for the injuries caused by the November 5, 1997, work accident. Finally, the administrative law judge found that claimant had an average weekly wage at the date of injury of $1,231.04.

On appeal, claimant challenges the administrative law judge's denial of compensation for temporary total disability from June 25 to September 1, 1998, from December 17, 1998, to January 25, 1999, and for the 14 percent impairment to her right knee. Claimant also challenges the administrative law judge's denial of medical treatment for her neck, back, and both knees, and the administrative law judge's average weekly wage determination. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that she was able to return to her usual employment from June 25 to September 1, 1998, prior to her undergoing right knee surgery on September 2, 1998. Claimant further contends that the administrative law judge erred by denying her compensation for temporary total disability from December 17, 1998, to January 25, 1999, when claimant's treating physician, Dr. Shields, opined that claimant's right knee reached maximum medical improvement and he released her to return to work. Claimant bears the burden of establishing that she is unable to perform her usual

work due to her work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In his decision, the administrative law judge initially determined that he would rely on the objective medical evidence of record due to his doubts as to claimant's overall credibility. Decision and Order at 36-37. Moreover, the administrative law judge found Dr. London well-qualified and credible. The administrative law judge credited Dr. London's testimony that claimant was physically able to work as a UTR driver from June 25 to September 1, 1998. Tr. at 158, 161-163, 191; EX 6 at 24-26. Additionally, the administrative law judge noted the deposition testimony of Dr. Shields that claimant was unable to work driving a UTR because of her lifting restriction, CX 19, 35 at 31-32; however, the administrative law judge credited claimant's testimony that her duties as a UTR driver did not require her to lift more than two or three pounds and that she did not know why Dr. Shields stated that driving a UTR required lifting. Tr. at 112-113. The administrative law judge, in essence, found that this misunderstanding detracted from Dr. Shields's opinion. As substantial evidence supports the administrative law judge's finding that claimant could perform her usual work from June 25 to September 1, 1998, the denial of temporary total disability benefits for this period is affirmed. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem.*, 909 F.2d 1488 (9th Cir. 1990).

Similarly, we affirm the administrative law judge's finding that claimant could return to her usual work as of December 17, 1998. The administrative law judge noted Dr. London's opinion that claimant could return to work on November 12, 1998, but found that Dr. London also stated that claimant's recovery from the surgery could take as long as three months. The administrative law judge rationally concluded from the medical evidence that claimant's condition did not appreciably change after Dr. Shields's December 17, 1998, examination, *compare* CX 30 at 89, EX 6 at 33 *with* CX 31 at 92, EX 6 at 34(f), and thus concluded that claimant could return to her usual work as of December 17, 1998. As the administrative law judge's findings and inferences are rational and supported by substantial evidence, we affirm the administrative law judge's award of temporary total disability benefits from September 2 to December 16, 1998, and the denial of such benefits thereafter. *See generally Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir.1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Chong*, 22 BRBS 242.

We next address claimant's contention that the administrative law judge erred by finding that employer is not responsible for additional permanent partial disability benefits related to claimant's work-related knee injury. In determining the responsible employer in the case of multiple traumatic injuries, if the disability results from the natural progression of an initial injury, then the initial injury is the

compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, a subsequent injury aggravates, accelerates, or combines with 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. *Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.,* No. 99-70631 (9th Cir. Feb. 26, 2001); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

In the instant case, the administrative law judge credited the impairment rating of Dr. London based on his detailed evaluation of claimant's right knee pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) over the deposition testimony of Dr. Shields, who stated that he never attempted to evaluate claimant's right knee condition pursuant to the AMA *Guides*. Dr. London opined, after his October 28, 1998, examination of claimant's right knee, that claimant has a seven percent impairment of the patella/femoral joint due to a prior right knee injury, pre-existing chondromalacia, the November 5, 1997,work injury, and continuing symptomatology. Tr. at 166-167. Employer voluntarily paid permanent partial disability benefits for this seven percent impairment. An x-ray taken at Dr. London's examination on August 18, 1999, showed a narrowing of the medial joint space at the tibia/femoral joint, which had not been present on prior x-rays or MRI scans. Tr. at 171-173, 182; EX 6 at 34(a)-(f). Dr. London opined that this condition resulted in a 14 percent impairment, and he attributed the tibia/femoral joint narrowing to the progression of claimant's pre-existing chondromalacia, claimant's November 5, 1997, work injury, daily living, and claimant's longshore employment after she returned to work in February 1999. Tr. at 173, 184-186. Based on this opinion, the administrative law judge found that claimant sustained a new injury to her knee as a result of her employment after February 1999, which resulted in a greater permanent impairment of claimant's right knee. The administrative law judge concluded, pursuant to the aggravation rule, that liability for compensation and medical benefits for this additional impairment lies with the employer or employers for whom claimant worked after she returned from her November 1997 injury.[1]

[1]The record establishes that claimant worked as a signalman, in various supervisory positions, and as a clerk upon her return to work in February 1999.

Contrary to claimant's contention on appeal, the unequivocal testimony Dr. London, and the credited portion of Dr. Shields's testimony that claimant's employment after she returned to work may have contributed to the narrowing of her knee joint, CX 35 at 36-37, constitutes substantial evidence that claimant's additional seven percent knee impairment is due, in part, to her subsequent employment, notwithstanding claimant's not losing any time from work, requesting medical treatment for this condition, or filing a claim against subsequent employers. *See generally Buchanan*, 33 BRBS at 35-37; *see also Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996). Inasmuch as the credited evidence provides support for the administrative law judge's finding that claimant's knee condition was aggravated by subsequent longshore employment, we affirm the administrative law judge's conclusion that employer is not liable for the additional impairment to claimant's knee above that in Dr. London's initial rating or for medical treatment necessitated by this new injury. *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem.,* 698 F.2d 1235 (9th Cir. 1982).

Claimant next challenges the administrative law judge's finding that she is not entitled to medical treatment for her neck, back, and both knees, which were injured in the November 5, 1997, work injury. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.,* 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison*, 30 BRBS 45; 20 C.F.R. §702.402. It is claimant's burden to prove the elements of her claim for medical benefits. *Schoen v. United States Chamber of Commerce,* 30 BRBS 112 (1996); *see also Ingalls Shipbuilding, Inc., v. Director, OWCP,* 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In the instant case, the administrative law judge found that the medical evidence does not support claimant's entitlement to ongoing medical treatment for her neck, back, and left knee. The administrative law judge credited Dr. London's testimony that no future medical treatment is necessary for these injuries, Tr. at 200-201, nor for the patellar/femoral injury to claimant's right knee that was caused by the November 5, 1997, work injury, Tr. at 187, as supported by the reports of Drs. Dillin and Farran. Dr. Dillin opined that claimant's neck condition does not prevent her from working. CX 24 at 84. Dr. Farran found no evidence of neurologic disability in claimant's neck or lower back. EX 7 at 39-40. The administrative law judge also credited Dr. Shields's deposition testimony that claimant's neck and back had improved with treatment and had stabilized; moreover, Dr. Shields stated that he was unaware of any work restrictions for these injuries. CX 35 at 10, 39-40. Inasmuch as substantial evidence supports the administrative law judge's finding that claimant's neck,

back, left knee, and right knee patellar/femoral joint injury do not require ongoing medical treatment, we affirm the denial of continuing medical benefits.[2] *See Schoen*, 34 BRBS at 114.

Finally, we address claimant's assertion the administrative law judge erred in calculating her average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). Specifically, claimant argues that the administrative law judge erred by not deducting from his calculation of claimant's earnings during the 52-week period prior to her injury the entire period from July 6 to October 19, 1997, that claimant was unable to work due to the deaths of her aunt and son.[3] Claimant contends that, after allowing for this period of unemployment, she had an average weekly wage of $1,800. The object of Section 10(c) of the Act, 33 U.S.C. §910(c), is to arrive at a sum that reasonably represents claimant's annual

[2]We reject claimant's assertion that the administrative law judge erred by not crediting Dr. Shields's testimony that claimant's neck and back require monitoring, CX 35 at 18-19, 41, on the basis that Dr. Shields is claimant's treating physician, *see generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999), as Dr. London testified that no further treatment for these conditions was necessary. *See generally Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

[3]Prior to her work injury, claimant's aunt died on July 6, 1997, and her son was the victim of a fatal shooting on July 19, 1997. As a result of these deaths, claimant received psychological treatment and state disability compensation from July to October 1997, and was not able to work.

earning capacity at the time of her injury.[4] *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Fox v. West State Inc.*, 31 BRBS 118 (1997). It is well-established that the administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *Bonner v. National Steel & Shipbuilding*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

[4]The administrative law judge's use of Section 10(c) as the applicable subsection for calculating claimant's average weekly wage is not challenged on appeal.

In the instant case, the administrative law judge initially found that he would consider claimant's earnings history from 1994, 1995, and 1996, as well as those from the 52-week period prior to claimant's November 5, 1997, work injury. In this regard, the administrative law judge found that claimant worked an average of 26.3 hours per week in 1994, 27.9 hours in 1995, 30.5 hours in 1996, and 28 hours per week during the 52-week period prior to her injury. In order to account for claimant's increasing wage-earning capacity in the years prior to her injury, he factored out only three weeks for convalescence from the deaths, resulting in an average of 30.35 hours per week. The administrative law judge therefore divided by 49 claimant's total earnings of $60,323.09 during the 52 weeks prior to the November 5, 1997, work injury, and derived an average weekly wage of $1,231.08, which he found approximated claimant's annual earning capacity.[5] Decision and Order at 40.

We affirm the administrative law judge's determination as it is rational and supported by substantial evidence. Claimant does not challenge the administrative law judge's finding of the average number of hours she worked per week in 1994, 1995, 1996. The administrative law judge acted within his discretion in determining from this data that an average weekly wage based on dividing by 49 claimant's total earnings during the 52 weeks prior to her work injury is reasonable and fair. Moreover, the administrative law judge rationally found that by factoring out only three weeks' convalescence would yield an average weekly wage and average number of hours worked per week during the 52-week period prior to her work injury consistent with the increasing average number of hours per week claimant worked during the three calender years prior to her injury.[6] *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Browder v. Dillingham Ship* Repair, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Therefore, as the administrative law judge's average weekly wage calculation reflects a reasonable representation of claimant's wage-earning capacity at the date of injury, we affirm the administrative law judge's average weekly wage determination.[7] *See generally*

[5]The administrative law judge also factored in the three weeks allowed for the recovery period by multiplying $1,231.08 by three and dividing the sum by 52, which also corresponds to an average weekly wage of $1,231.08. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); 33 U.S.C. §910(d).

[6]Claimant earned $50,058.68 in 1994, $52,212.48 in 1995, and $64,487.16 in 1996. CX 40.

[7]Absent any indication from Congress that the Act should be interpreted consistently with the Family and Medical Leave Act, 29 U.S.C. §2611 *et seq.* (1993), we reject claimant's contention that, in determining her average weekly wage, the administrative law judge was required to exclude the entire time her family physician certified that she was disabled due to the deaths in her family. *See generally Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468, 473 (1989) (Brown, J., dissenting); *Greene v. J.O. Hartman Meats*, 21 BRBS 214, 217

Richardson v. Safeway Stores, Inc., 14 BRBS 855 (1982).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

(1988).