BRB Nos. 08-0750
and 08-0750A

F.W.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 07/22/2009
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Gerald R. Rucci (Law Office of Gerald R. Rucci, LLC), New London, Connecticut, for claimant.

Conrad M. Cutcliffe (Cutcliffe Glavin & Archetta), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (2007-LHC-1025, 2007-LHC-1026) of Administrative Law Judge Daniel F. Sutton 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a machinist, suffered two injuries during the course of his employment. On April 20, 1991, he suffered an injury to his respiratory system when he was exposed

to polyurethane paint. CX A. On June 30, 1993, he injured his back while lifting a box of parts. EX 6 at 16. In 1995, the parties entered into a settlement agreement for claimant's back injury pursuant to Section 8(i), 33 U.S.C. §908(i), in which claimant received approximately $125,000 in disability compensation; employer remained liable for future medical care. CX 27. Claimant's claim for respiratory injuries remained open. In 1996, claimant's employment with employer was terminated as a result of a layoff. HT at 66. Claimant subsequently obtained employment earning more than his pre-injury wages. Claimant developed sleep apnea, which, he contended, was due in part to his work-related respiratory impairment. On December 21, 2001, claimant ceased working, allegedly due to the disabling effects of the medication he takes for his sleep apnea. Claimant sought continuing temporary total disability benefits.

On July 7, 2001, claimant injured his back and neck when a chair on which he was sitting at a casino collapsed. He was subsequently awarded $500,000 in damages. Employer alleged that some of the medical expenses it paid after July 7, 2001, were related to the casino fall and not to the work injuries. Employer therefore placed a lien for $23,500 on the proceeds. This money is being held in escrow by the attorney who represented claimant for the casino accident. Before the administrative law judge, claimant sought release of this lien and a finding that employer remains liable for his medical benefits related to the 1993 back injury.

In his decision, the administrative law judge found that claimant's obstructive sleep apnea (OSA) is due to claimant's work-related respiratory injury, that it constitutes an occupational disease, and that claimant retired due to the effects of the medication he takes for OSA. Accordingly, the administrative law judge awarded claimant ongoing temporary total disability benefits as of December 21, 2001, based upon his wages at the time he left his last employment, as well as medical benefits arising out of his work-related respiratory condition. In this regard, the administrative law judge found that claimant's injury is an occupational disease such that Section 10(i) of the Act, 33 U.S.C. §910(i), applies to the average weekly wage determination. With respect to the back injury, the administrative law judge found that the incident at the casino constitutes an intervening cause of claimant's back condition such that employer is not liable for any medical benefits for that injury after July 7, 2001. The administrative law judge stated, however, because the attorney who holds funds in escrow for employer had not been joined to the proceeding, the enforcement of employer's lien "must be left to a separate proceeding." Decision and Order at 27. He stated, nonetheless, that "it would appear that [claimant's attorney] should pay [employer] $15,741.00 from claimant's judgment monies that he is currently holding in escrow," *id.*, to reimburse employer for medical benefits employer paid for claimant's back injury after July 7, 2001.

Employer appeals, arguing that the administrative law judge erred in finding that claimant's OSA is the result of an occupational disease rather than a traumatic injury. Thus, employer contends that the average weekly wage applicable for this injury is the one in effect in 1991, rather than that in effect in 2001 when claimant stopped working. Claimant cross-appeals, contending the administrative law judge erred in failing to find employer liable for certain medication prescribed after July 7, 2001, in "awarding" employer $15,741 in reimbursement for prescription medication costs when employer paid only $9,211.51 in such costs, and in failing to assess a penalty against employer for failing to pay or release from the lien in a timely manner the uncontested sum of $7,757.94.

We first address employer's appeal. Employer contends that claimant's average weekly wage should be calculated as of the time of the 1991 accident causing the respiratory injury rather than as the time claimant's disability commenced. In this regard, employer avers the administrative law judge erred in finding that claimant's sleep apnea is an occupational disease.

Under Section 10 of the Act, 33 U.S.C. §910, the average weekly wage for disability compensation is based upon the injured claimant's average weekly wage at the "time of the injury." Section 10(i) provides that with respect to a claim for an occupational disease which does not immediately result in disability the time of injury shall be deemed the date on which the employee becomes aware of the relationship between the employment, the disease, and the disability. 33 U.S.C. §910(i).

The administrative law judge found that claimant suffers an occupational disease based upon the factors outlined in *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).[1] In *Gencarelle*, the Second Circuit stated there are three elements to the occupational disease definition. The employee must suffer from a "disease;" hazardous conditions of employment must cause the disease; and these conditions must be "peculiar" to one's employment as opposed to other employment in general. *Id.*, 892 F.2d at 177-178, 23 BRBS at 18(CRT); *see also* 33 U.S.C. §902(2). The court stated that "disease" has been expansively interpreted to include "'any serious derangement of health' or 'disordered state of an organism or organ.'" *Id.*, 892 F.2d at 175, 23 BRBS at 18(CRT)(citing 1B A.Larson, *The Law of Workman's Compensation*, §41.42 (1987 & Supp. 1988)).[2] The court further held that "hazardous conditions"

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit.

[2] The current citation for this proposition is 3 *Larson's Workers' Compensation Law* §§52.03, 52.04 (2009).

generally refer to external, environmental substances. *Id.* In *Gencarelle*, the court declined to rule on whether the claimant's repeated bending of his knees was a "hazardous condition," instead ruling that such activity was not "peculiar" to the claimant's employment. The court held that repeated bending, stooping, squatting and climbing are common to many occupations and, "indeed to life in general." *Id.*, 892 F.2d at 176, 23 BRBS at 19(CRT). Thus, the court held that the third element for an occupational disease was not met. *Id.; see also Port of Portland v. Director, OWCP*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000).

In this case, the administrative law judge found that claimant's condition meets all three of the *Gencarelle* criteria. The administrative law judge found that claimant suffers from OSA, which is a serious derangement of his health. The administrative law judge found that claimant was exposed to hazardous conditions when he inhaled the toxic paint fumes at work. The administrative law judge also found that such exposure was peculiar to claimant's employment as a machinist inside a torpedo tube. Although employer argues that claimant's condition constitutes a traumatic injury because he was exposed to the toxic fumes only a single time, prolonged exposure is not a requirement under the test set forth in *Gencarelle.*[3] Because the administrative law judge properly applied the criteria of *Gencarelle* and his findings are supported by substantial evidence, we affirm the conclusion that claimant suffers from an occupational disease. Moreover, claimant's exposure to toxic paint in 1991 did not result in disability until 2001; thus, the administrative law judge properly found Section 10(i) applicable as claimant has an occupational disease which did not immediately result in disability. Accordingly, we affirm the conclusion that claimant is entitled to compensation based on his average weekly wage at the time he became aware of the relationship between the employment, the disease, and the disability, which here is the date of onset of claimant's disability in December 2001.[4] 33 U.S.C. §910(i); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22

[3] Employer cites no cases in support of its argument that a single exposure to injurious substances converts a condition which otherwise meets the *Gencarelle* criteria into a traumatic injury. Under employer's theory a single exposure to, for example, asbestos would not qualify asbestosis as an occupational disease.

[4] We note that even if claimant's condition was not considered to be an occupational disease, the result employer seeks is not fore-ordained. The Second Circuit's decision in *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985), is not directly on point. In that case, claimant's 1970 knee injury resulted in immediate disability followed, in 1979, by increased disability due to the original injury. The court held that, as claimant did not suffer an aggravation, his wages in 1970 must be the basis for his compensation. Unlike the present case, claimant in *Morales* did not have a latent disability. In the years since *Morales*, moreover, the United States Courts of Appeals have divided on the issue of

BRBS 108(CRT) (2d Cir. 1989). As employer does not contest any other aspect of the administrative law judge's decision, we affirm the award of temporary total disability benefits.

In his appeal, claimant contends the administrative law judge erred in not holding employer liable for the prescription drug Aciphex which he took both before and subsequent to the casino accident for relief of acid reflux resulting from the pain medication he takes for the 1993 work injury to his back. Claimant contends that employer is liable for $2,894.18 to cover the cost of this drug from January 2002 to August 25, 2003, averring that only his use of pain medication increased after the casino accident and that his dosage of Aciphex was the same before and after the casino incident.

In order to establish entitlement to medical care and benefits under Section 7(a), 33 U.S.C. §907(a), claimant must establish that the treatment is necessary for a work-related condition. *Bath Iron Works Corp. v. Preston,* 380 F.3d 597, 38 BRBS 60(CRT)(1st Cir. 2004). The administrative law judge found that claimant's back condition after July 7, 2001, is the result of the intervening incident at the casino, and he held that employer's liability for all of claimant's back-related prescription medications ceased as of that date.[5] The administrative law judge based this determination on Dr. Doherty's opinion that his treatment of claimant after July 7, 2001, including the medications prescribed, were attributable to the casino incident. EX 1 at 73. Dr. Doherty's records indicate that he prescribed various pain medications, but not Aciphex. *See* EX 1 at 82-87.

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which average weekly wage would apply in the case of a traumatic injury which does not immediately result in disability. The Ninth Circuit held that where a claimant's injury in 1979 due to a traumatic episode did not disable claimant until 1983, claimant was entitled to receive benefits based on the wages she was receiving at the time she became disabled. *Johnson v. Director, OWCP,* 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991). The Fifth Circuit, on the other hand, held that claimant was entitled to compensation based on his average weekly wage at the time of his fall from a ladder, in 1987, not the date he became permanently disabled due to this fall in 1992. *LeBlanc v. Cooper/T.Smith Stevedoring, Inc.,* 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997); *see also Leathers v. Bath Iron Works Corp.,* 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998)(use average weekly wage when claimant was aware that carpal tunnel syndrome resulted from work and that continued use of pneumatic tools was prohibited due to injury).

[5] Claimant does not contest this finding, except with regard to the Aciphex prescription.

The administrative law judge did not specifically discuss claimant's use of Aciphex for gastrointestinal problems allegedly arising out of his taking pain medication for the 1993 work injury. Although the administrative law judge relied on the opinion of Dr. Doherty concerning treatment and medication of the back injury following the casino incident, the administrative law judge did not address the medical records of Drs. Patel and McDermott who treated claimant for his gastrointestinal problems both prior to and subsequent to the casino accident. CX I. Claimant also submitted the prescriptions written by these physicians both prior to and following the casino accident to establish that his use of Aciphex for his gastro-reflux disease remained the same. CX J. As the administrative law judge did not specifically address employer's continued liability for this medication, we must remand the case for further consideration. On remand, the administrative law judge must determine if claimant's gastrointestinal problems following the casino accident are due to his work injury such that employer remains liable for the cost of this medication pursuant to Section 7(a).

Claimant next alleges that the administrative law judge erred in "awarding" employer $15,741 for reimbursement of sums it paid for medication following claimant's injury at the casino.[6] Claimant contends that the total amount employer paid for prescribed medication on behalf of claimant is $9,211.51. EX 37. We reject claimant's contention that the administrative law judge "awarded" employer reimbursement of this amount. The administrative law judge specifically stated that employer's entitlement to reimbursement out of the damages award must be the subject of a separate proceeding. Decision and Order at 27. He did not award employer reimbursement but commented that it appeared that the attorney holding these monies in escrow, who was not a party to the proceedings, should release it to employer. *Id.* However, to the extent that the administrative law judge believed that the parties agreed that employer is entitled to reimbursement of $15,741, such is not supported by the record. Decision and Order at 3.

Employer stated it was seeking $15,741 in reimbursement. *See* Emp. Post hearing Br. at 10 n.1; EX 37. Claimant contended that the amount due is $9,211.51 based on Employer's Exhibit 37. Cl. Post-hearing Br. at 10-11. Claimant, however, accounts only for those amounts listed on pages 2 to 20 of that exhibit. It also contains two additional pages of medications which, when totaled, equal $17,342.67. EX 37 at 21-22. In view of the remand on the issue of employer's continued liability for the Aciphex prescription and the administrative law judge's misunderstanding regarding the amount in question, the administrative law judge should make a finding regarding the actual amount of the medical costs following July 2001 for which employer is not liable.

[6] At the time of the hearing, $23,498.94 was being held in an escrow account by the attorney who represented claimant for the casino accident.

Finally, claimant urges the assessment of a penalty against employer for its failure to release to claimant the uncontested sums held in escrow, which claimant alleges is $7,757.94. The administrative law judge lacks authority to release escrow money to either employer or claimant; moreover, there is no section of the Act or its regulations that provide for a penalty under these circumstances, as the funds in escrow are not "compensation." 33 U.S.C. §§902(2), 914; *see generally Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1997), *aff'd sub nom. Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

Accordingly, the administrative law judge's award of temporary total disability benefits is affirmed. The denial of all medical benefits for claimant's back injury is vacated, and the case is remanded for the administrative law judge to address employer's liability for the Aciphex prescriptions consistent with this opinion. The administrative law judge also should address the amount of the medical expenses subsequent to the casino incident for which employer is not liable.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge