

J.M.)
)
 Claimant-Petitioner)
)
 v.)
)
 UNIVERSAL MARITIME SERVICES) DATE ISSUED: 07/23/2009
 CORPORATION)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION, LTD)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits in Part of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Lawrance B. Craig, III (Valle, Craig & Vazquez, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Awarding Benefits in Part (2006-LHC-0089) of Administrative Law Judge Alan L. Bergstrom 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 longshoreman, alleged he sustained injuries to his upper and lower back when the truck he was driving at work on March 10, 2005 hit a pothole. Alternatively, claimant argued that his lower back condition was caused or aggravated by the work hardening program he undertook to facilitate his return to work. He sought compensation for various periods of total and partial disability as well as medical benefits associated with these injuries.

In his Decision and Order, the administrative law judge found that claimant's upper back condition is the result of his work accident, and he awarded disability compensation and medical benefits arising out of this injury.¹ The administrative law judge determined, however, that claimant's lower back condition is not the result of the work incident, and he denied benefits for disability arising out of this injury. In this regard, the administrative law judge found that the work hardening program claimant underwent was solely for the non-work-related lower back condition and that any injury claimant suffered during this program is not compensable.

Claimant appeals, contending the administrative law judge erred in finding that the injury he sustained during the work hardening program is not compensable.² Employer responds, urging affirmance of the administrative law judge's decision.

If claimant sustains an injury during a necessary medical examination or treatment, work hardening program, or vocational program prescribed for the work injury, employer is liable for the consequences of such injury. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Claimant contends that the work hardening program he was undergoing resulted in further injury to his lower back and that the resultant injury is compensable because it occurred in the course of a program intended to return claimant to his pre-injury work capacity. In this regard, claimant contends that the work hardening program was not prescribed only for his lower back condition but for his entire back which would

¹ The administrative law judge found claimant entitled to compensation for temporary total disability from March 11 through March 20, 2005, and for permanent partial disability from June 23, 2005, through April 14, 2006, as well as a *de minimis* award of \$15.15 per week from April 14, 2006, and continuing. Decision and Order at 77.

² Claimant does not allege error in the administrative law judge's finding that the lower back injury arose approximately five months after the work injury and, although its etiology was unclear, it was not related to the work incident.

encompass the work-related upper back injury. The administrative law judge found that claimant did not sustain a lower back injury in the work incident on March 10, 2005. He further found that the work hardening program, prescribed by Dr. Jarolem, was for claimant's lower back problems which arose five months after the work accident.

The administrative law judge found that Dr. Jarolem, claimant's treating physician, stated on April 21, 2005 and July 14, 2005, after conservative treatment and physical therapy, that claimant's neck and upper back condition had reached maximum medical improvement. Dr. Jarolem released claimant to work. Claimant began to complain of lower back pain on July 19, 2005, and an MRI taken at that time showed a herniation at L5-S1. CX 14 at 13-14. Dr. Jarolem stated he prescribed the work hardening program on August 3, 2006, to improve claimant's condition from the lower back herniation. *Id.* On September 2, 2006, claimant returned to Dr. Jarolem complaining of increased pain following the program and an additional MRI revealed a second herniation at L4-5. EX 2 at 20. Dr. Jarolem attributed the new herniation to the work hardening program and stated that the program was too physically demanding. CX 14 at 9-10. The administrative law judge found that Dr. Jarolem prescribed the program only to address claimant's lower back problems, and that the new injury is not compensable because the original low back injury is not compensable. Decision and Order at 67. We affirm the administrative law judge's conclusion that the work hardening program was not related to claimant's upper back work injury as it is rational and based on substantial evidence of record. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Therefore, as the work hardening program was not prescribed for a work injury, the injury claimant sustained in the program is not compensable.

Claimant also argues that the new injury should be compensable because it was incurred during a program whose purpose was to fully return claimant to the work force, which is the purpose of the Act. The purpose of the Act is to compensate workers injured on the job. *U.S. v. Bender Welding & Machine Co.*, 558 F.2d 761 (5th Cir. 1977). The term "injury" itself is defined as "accidental injury or death arising **out of and in the course of employment....**" 33 U.S.C. §902(2)(emphasis added). Compensation is premised on the occurrence of an injury arising from the workplace. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). There is no provision for employer's liability for injuries sustained by individuals preparing to re-enter the work force unless the original impediment to employment was due to a work-related injury. Claimant's argument has no basis in the Act or the regulations and is rejected.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge