BRB Nos. 11-0696
and 11-0696A

MELISSA CALLENDER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY/MWR	)	DATE ISSUED: 07/24/2012
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order-Denying Benefits and the Order Denying Claimant's Motion for Reconsideration of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Patrick B. Streb (Weltin, Streb & Weltin), Oakland, California, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order-Denying Benefits and the Order Denying Claimant's Motion for Reconsideration (2009-LHC-01067) 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

The parties stipulated that claimant sustained a work-related injury to her lower back on November 11, 2003, in the course of her employment with employer as a recreation assistant at a fitness center in Pearl Harbor, Hawaii. Decision and Order at 2, 40. Employer voluntarily paid claimant temporary total disability benefits for various periods between November 17, 2003 and June 2, 2004, 33 U.S.C. §908(b), when she returned to full-duty work for employer at another fitness center in Wahiawa, Hawaii. *Id.* at 11, 40; EX 5. The parties further stipulated that claimant sustained another work-related injury to her lower back on February 27, 2005. Decision and Order at 3, 40. Employer voluntarily paid claimant temporary total disability benefits beginning March 1, 2005. Decision and Order at 12; CX 10. Although Dr. Kwan, claimant's treating physician, released claimant for light-duty work on May 9, 2005, CX 18 at 102-104, employer did not have work available within claimant's restrictions and, thus, continued to pay her temporary total disability benefits. *See* Emp. Resp. Br. at 6. Claimant underwent a functional capacity evaluation on December 8, 2005. Decision and Order at 28-29; CX 19. On January 11, 2006, Dr. Kwan reported that claimant was able to perform light-duty work for eight hours per day, carry up to 30 pounds, and engage in frequent sitting, walking, stair climbing and in occasional standing, squatting and trunk rotation. Decision and Order at 23; CXs 18 at 156; 19. Employer terminated claimant's employment effective March 28, 2006, due to her unavailability for work based on her medical disability. Decision and Order at 2, 13; EX 14. The parties stipulated that claimant was subsequently employed as a medical support assistant at Tripler Army Medical Center from June 26, 2006 to July 15, 2008, and that she suffered no economic loss during this period.[1] Decision and Order at 2, 9-10, 41; EX 41 at 2. Employer therefore terminated its payments of temporary total disability benefits on June 25, 2006. Decision and Order at 12; CX 10.

[1]The parties are in agreement that claimant's civilian employment with the Department of the Army at Tripler Army Medical Center was not covered under the Act. *See* Cl. Br. at 21; Emp. Resp. Br. at 24.

On February 14, 2007, claimant sustained an injury to her neck and lower back in a non-work-related motor vehicle accident (MVA), and, on June 2, 2007, she sustained another non-work-related lower back injury while lifting a 45-pound weight at a fitness center. Decision and Order at 3. On July 15, 2008, Dr. Kwan reported that as a result of claimant's back condition, she was unable to continue her employment. Decision and Order at 28; CX 18 at 260. Claimant relocated to North Carolina, where she obtained further medical treatment and underwent surgical procedures to her lower back on April 17, 2009 and October 13, 2009. Decision and Order at 10, 33-34; CX 39 at 400-402, 423-425. The parties stipulated that employer paid claimant temporary total disability benefits from July 15, 2008 to February 12, 2009. Decision and Order at 3, 12; CX 13.

Asserting that her current disability is causally related at least in part to her work-related lower back injuries, claimant sought an award of temporary total disability and medical benefits from July 15, 2008, and continuing. In response, employer asserted that claimant's current lower back condition is not the result of the natural progression of her work injuries but, rather, is due to the intervening February 14, 2007 MVA and the June 2, 2007 weightlifting incident. In the alternative, employer asserted entitlement to Section 8(f) relief, 33 U.S.C. §908(f), if claimant should be awarded permanent disability benefits.

In his Decision and Order, the administrative law judge found that claimant sustained a new injury to her lower back on or about December 14, 2006, in the course of her work for her subsequent employer, the Department of the Army. Decision and Order at 41-42. The administrative law judge thus found that the Department of the Army is responsible for claimant's lower back-related disability and medical treatment as of December 14, 2006, and that employer is not responsible for any disability or medical benefits under the Act after that date. *Id.* The administrative law judge further found that the February 14, 2007 MVA was not an intervening event as the evidence fails to establish that claimant intentionally, negligently or rashly undertook activities likely to cause further injury to her lower back. *Id.* at 42-43. The administrative law judge found, however, that the June 2, 2007 weightlifting incident constitutes an intervening cause of claimant's disabling lower back condition and, thus, also absolves employer from further liability for disability and medical benefits after that date. *Id.* at 43-46. Accordingly, the administrative law judge concluded that claimant is not entitled to additional disability or medical benefits payable by employer. *Id.* at 46-47. The administrative law judge denied employer's request for Section 8(f) relief. *Id.* at 47-48. Subsequently, the administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's finding that employer is not liable for any disability benefits and medical treatment due claimant after December 14, 2006. Employer responds, urging affirmance of the administrative law judge's findings on these issues. BRB No. 11-0696. In its cross-appeal, employer challenges the administrative law judge's finding that claimant's MVA does not constitute an intervening cause of her back condition. Claimant has not responded to

employer's cross-appeal. Employer further assigns error to the administrative law judge's finding that it is not entitled to Section 8(f) relief with respect to any permanent disability sustained by claimant. The Director, Office of Workers' Compensation Programs (the Director), responds that if the claimant is found to be entitled to permanent disability benefits, the administrative law judge's denial of Section 8(f) relief should be vacated and the case remanded for further consideration. BRB No. 11-0696A.

The appeals of both parties involve the administrative law judge's application of principles concerning what constitutes an intervening cause of claimant's disability. Claimant contends that the administrative law judge erred in finding that she sustained an injury on December 14, 2006 that is the liability of the Department of the Army and in finding that the weightlifting incident on June 7, 2007, constitutes an intervening cause of her disability. Employer contends the administrative law judge erred in finding that the February 14, 2007, MVA is not an intervening cause of claimant's disability. For the reasons that follow, we agree with both parties that the administrative law judge did not properly apply legal principles to the evidence. Therefore, we vacate the administrative law judge's findings and remand the case for further consideration.

As an initial matter, we agree with claimant that the administrative law judge erred in finding that the Department of the Army is liable for any disability due to the effects of an "injury" claimant sustained in December 2006 while she was in the Army's employ. Claimant had an onset of symptoms in December 2006, but did not seek compensation under the Act for this event. The administrative law judge erred by applying the standard for determining liability as between two covered employers, *i.e.,* natural progression versus aggravation, rather than determining whether an incident at claimant's subsequent employment constituted an intervening cause of her lower back condition. *See Buchanan v. Int'l Transp. Services,* 33 BRBS 32, 36 n.7 (1999), *aff'd mem. sub nom. Int'l Trans. Services v. Kaiser Permanente Hospital, Inc.*, 7 F.App'x 547 (9th Cir. 2001). The aggravation/last responsible employer rule extends only to determine liability among employers subject to the coverage provisions of the Act and is therefore inapplicable in this case. *See id.; see also J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009). Claimant's employment with the Department of the Army was not covered under the Act. *See* n. 1, *supra.* Therefore, the issue does not involve allocating liability between covered employers but, rather, whether claimant's present disability is due to a subsequent injury with the Department of the Army which was not the natural or unavoidable result of her original work-related injuries with employer. *See* discussion, *infra.* Thus, we vacate the finding that claimant's disability after December 14, 2006 is not the liability of employer.

With respect to an employer's continuing liability, it is well-established that employer remains liable for the natural progression of a work-related injury. *See, e.g., Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000) (administrative law judge rationally found there was no "second trauma" but simply an onset of complications from the first trauma). When a claimant sustains an injury at work

which is followed by the occurrence of a subsequent injury or aggravation either outside of work or for a non-covered employer, the covered employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. 33 U.S.C. §902(2). If, however, the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for disability attributable to the intervening cause. *Wright v. Connolly-Pacific Co.,* 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP,* 8 F.3d 34 (9th Cir. 1993). Employer remains liable for any disability attributable to the work injury notwithstanding the supervening injury. *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981); *Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979).

The contentions raised by the parties require that we first address the type of intervening incident for which an employer is not liable. The precedent applicable in this case is *Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454 (9th Cir. 1954), as this case arises within the jurisdiction of the Ninth Circuit. In *Cyr*, the court emphasized that in order to be compensable, a subsequent non-work-related accident must be the natural or unavoidable result of the original work injury in accordance with Section 2(2) of the Act.[2] The court stated that the statute's use of the term "unavoidable" places on the injured employee "the duty of using due care in regard to his injury" and limits the applicability of Section 4(b) to the original work injury.[3] *Id.* at 456; *see Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (Smith, J., concurring & dissenting). The claimant in *Cyr* injured his left hip at work. He missed 12 intermittent days of work in the next two months because of his injury, but otherwise returned to work. He sustained a second injury at his home when he fell from a stepladder and sustained additional injuries. The court discussed several scenarios under which the subsequent injury might or might not be compensable. The court stated that if the claimant fell from the stepladder because someone else shoved the ladder, any injury resulting therefrom would not be the liability of the employer because the injury was not the natural or unavoidable result of the work injury. The court further held that if the claimant was not on notice from his work injury that his leg might buckle, then he was not negligent in using the

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[2]Section 2(2) of the Act states, in pertinent part, that:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and . . . as naturally or unavoidably results from such accidental injury, . . .

33 U.S.C. §902(2).

[3]Section 4(b) of the Act states that "Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. §904(b).

stepladder and a fall might be compensable. The court stated, however, that if the second injury was "adduced by the employee's own . . . carelessness, he can have no compensation for the added injury. . ." because the injury was not unavoidable. *Id.* at 457.[4] The case was remanded for findings of fact as to whether the second injury was or was not the natural or the unavoidable result of the first injury. *Id.* at 458.

It is important to note, however, that cases do not hold that an "intervening cause" cuts off employer's liability for disability and medical benefits attributable to the original work injury. The mere occurrence of non-work-related post-injury incidents does not dictate that claimant's disability is due solely to those incidents. Rather, employer remains liable for any natural progression of the work injury, as well as for any "unavoidable" results of the work injury, notwithstanding the occurrence of an intervening incident. *See Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). Employer, however, is not liable for "compensation for the added injury. . ." due to an intervening cause. *Cyr*, 211 F.2d at 457. In *Marsala v. Triple A South*, 14 BRBS 39, 42 (1981), the Board stated:

> In this regard, it must be emphasized that the Act does contemplate apportionment of liability in cases involving subsequent injuries occurring outside work, where the subsequent injury does not result naturally or unavoidably from the primary, work-related injury. In such cases, the employer is liable only for disability arising from the primary injury. To

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[4] *Cf. Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992) (An injured claimant returned to work and was reinjured. The court declined to decide if a claimant's negligent conduct could constitute an intervening cause, but deferred to the Director and held that as claimant's second event did not "overpower and nullify" the disabling effects of the work injury it was not an "intervening cause." The court additionally noted that it was "foreseeable that workers will seek employment for which they are most qualified even if there might be some risk of aggravating an injury."); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983) (intentionally withholding from doctors fact of prior drug addiction constitutes intervening cause of disability due to readdiction following work injury). We reject claimant's contention that, pursuant to *Lira*, only "unjustified, intentional misconduct" may constitute an intervening cause. *See* Cl. Br. at 31. The *Lira* court specifically reserved the issue concerning whether less egregious conduct could sever the connection between the work injury and the disability. *See Lira*, 700 F.2d at 1052, 15 BRBS at 125(CRT); *but see Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) (court declined to overturn administrative law judge's finding that a claimant who aggravated a work-related back injury while assembling a swing set did not suffer an "intervening" injury under Fifth Circuit precedent); *see also Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).

> hold otherwise would be to require employers to compensate employees for injuries over which the employer had no control, and which had no relation to the primary injury. *Accord, Cyr, supra* at 457. Moreover, the fact that the primary injury "contributes" to the ultimate disability simply cannot be a reason for holding employer wholly liable for the ultimate disability, as the administrative law judge concluded in this case. Employer may be held wholly liable for the ultimate disability only if the statutorily prescribed connection between the work-related and subsequent injury is established. 33 U.S.C. §902(2).

(footnotes omitted) (emphasis in original). Employer's liability is terminated if the subsequent injury is the sole cause of claimant's disability. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*,32 F. App'x 126 (5th Cir. 2002); *Wright*, 25 BRBS 161.

Turning now to the parties' specific contentions, we shall address the post-injury events seriatim. With respect to claimant's non-covered employment with the Department of the Army, the administrative law judge found that claimant had increased pain caused by extended sitting during her work hours and her commute to work. This pain caused claimant to miss work for five days in December 2006, to require pain medication, and to incur the additional restriction that she be able to walk around each hour. The administrative law judge found that claimant soon returned to baseline after this flare-up. Nonetheless, he also found that employer is completely absolved for all disability compensation and medical benefits "for any period after December 14, 2006." Decision and Order at 42.

We vacate this finding. As claimant correctly contends, claimant's sitting for extended periods did not give rise to an "intervening cause" that terminates employer's liability for any benefits due after December 2006. There is no evidence that this work activity caused any part of the subsequent disability, beginning in 2008, for which claimant sought benefits. Dr. Kwan, on whose opinion the administrative law judge relied, stated that claimant had a flare-up and then she improved with medication and the ability to move around at work. *See* CX 18 at 184, 189. On these facts, there is no factual or legal basis for the administrative law judge's finding that this "sitting incident" with a non-covered employer terminates employer's liability for benefits under the Act. *See generally Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988).

With respect to the car accident on February 14, 2007, the administrative law judge rationally found that claimant was not negligent or rash in driving a car, given the restrictions from her work injury, nor did she intentionally injure herself. Nonetheless, the administrative law judge did not address whether any injuries claimant sustained in the car accident were the natural or unavoidable result of the work accident. The

administrative law judge should make findings in this respect on remand, if necessary.[5] Employer remains liable for any disability and for medical benefits that are due to the work injury notwithstanding the car accident, but is not liable for disability benefits and medical treatment due solely to the car accident if the accident was not the natural or unavoidable result of the work injury. *Marsala*, 14 BRBS 39.

Lastly, we address the June 2007 weight-lifting incident. Although the administrative law judge previously found that the December 2006 "incident" terminated employer's liability, he also found that employer's liability was terminated as of June 2, 2007 because claimant's lifting of a 45-pound weight at a fitness center on that date was a voluntary, negligent action constituting an intervening cause of claimant's disability.[6] Decision and Order at 46. The administrative law judge found that this action was in violation of the 20-pound lifting restriction placed by claimant's treating physician. *Id.* at 45.

We vacate the finding that this incident terminated employer's liability for all benefits and we remand the case for reconsideration. We reject claimant's contention that this incident cannot constitute an intervening cause merely because it was foreseeable that this claimant would use fitness equipment. Pursuant to *Cyr*, negligent or even careless conduct can establish that a subsequent injury is not the natural or unavoidable result of a work-related injury. *Cyr*, 211 F.2d at 457. However, the administrative law judge should reconsider his finding of negligence in view of the functional capacities evaluation, which noted claimant's ability to lift 43 pounds from floor to waist. CX 19.[7] More importantly, the administrative law judge must evaluate the medical evidence to assess whether claimant's disabling condition as of July 2008, as well as her need for medical treatment, was due to the work injuries of 2003 and 2005, and/or to the natural or unavoidable results of those injuries. *Hicks*, 14 BRBS 549. We stress again that employer remains liable for any consequences of the work injuries

[5]The administrative law judge found, based on Dr. Kwan's opinion, that claimant's condition returned to baseline about one month after the car accident. Decision and Order at 43. Thus, the administrative law judge could conclude on remand that claimant's subsequent disability in 2008 was not related to the car accident obviating the need to address the "natural or unavoidable" issue. *See generally Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989). It is unclear from the administrative law judge's decision, however, if medical benefits following the car accident are in dispute.

[6]Claimant lifted a 45-pound circular weight while helping a friend replace weights on a rack. Claimant testified that the weight was one inch off the floor and that she bent at the waist to remove the weight from the spoke and place it on a higher spoke. Tr. at 79-81.

[7]Claimant's other lifting and carrying abilities were lower. CX 19.

irrespective of the occurrence of an intervening event. *Marsala,* 14 BRBS at 42. Accordingly, for the foregoing reasons, we vacate the denial of all additional disability and medical benefits and remand this case for further findings.

In its cross-appeal, employer contends that the administrative law judge erred in finding that it failed to establish entitlement to Section 8(f) relief. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §944. In a case where a claimant is permanently totally disabled, an employer may be granted Special Fund relief if it establishes (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that her permanent total disability is not due solely to the most recent injury.[8] *Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 1429, 24 BRBS 25, 28(CRT) (9th Cir. 1990); *see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). If a claimant is permanently partially disabled, employer must additionally establish that her partial disability is materially and substantially greater because of the prior disability than it would be from the subsequent injury alone. *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000).

In this case, the administrative law judge specifically determined that claimant had not reached maximum medical improvement following her 2009 lower back surgeries and that, therefore, her lower back disability was not yet permanent. Decision and Order at 48. Section 8(f) relief cannot be awarded if, as in this case, there is no order awarding permanent disability benefits in excess of 104 weeks. *See* 33 U.S.C. §908(f)(1). Thus, the Board has held that it is error for the administrative law judge to consider whether the employer satisfied the prerequisites for Section 8(f) relief where the claimant has been found to only be temporarily disabled. *See Nathenas v. Shrimpboat, Inc.*, 13 BRBS 34 (1981); *see also Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985). Therefore, as the administrative law judge did not award permanent disability benefits, the issue of employer's entitlement to Section 8(f) relief was not ripe for adjudication. We therefore vacate the administrative law judge's determination that

[8]In her response brief, the Director concedes that employer satisfied the pre-existing permanent partial disability and manifest elements necessary for establishing entitlement to Section 8(f) relief. *See* Dir. Resp. Br. at 6-7. She urges that the Board vacate the administrative law judge's denial of Section (f) relief and remand the case for reconsideration of whether the contribution element is satisfied in accordance with the correct legal standards.

employer did not meet the prerequisites for Section 8(f) relief.[9] *See Nathenas*, 13 BRBS at 36.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits and the Order Denying Claimant's Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[9]As noted by employer, claimant has not asserted entitlement to permanent disability benefits. *See* Emp. Petition for Review and brief at 34 n.9. If, at some future date, claimant is awarded permanent disability benefits for more than 104 weeks, employer has preserved its right to seek Section 8(f) relief and the issue of whether employer has satisfied the prerequisites for such relief must be reconsidered in accordance with the applicable legal principles.