BRB No. 09-0771

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| GEORGINA CARANGAN | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| RESOURCE CONSULTING, INCORPORATED | ) | |
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| and | ) | |
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| AMERICAN PROTECTION INSURANCE COMPANY | ) | DATE ISSUED: 06/02/2010 |
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| and | ) | |
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| BROADSPIRE/LUMBERMAN'S MUTUAL CASUALTY COMPANY | ) | |
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| Employer/Carriers-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

William Turley and Robert D. Wilson (The Turley Law Firm, APLC), San Diego, California, for claimant.

Christopher Galichon (Galichon & Macinnes, APLC), San Diego, California, for employer/carriers.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-LHC-00876, 00877, 00878) of Administrative Law Judge Gerald M. Etchingham 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).

Claimant injured her left thumb on July 1, 2001, during the course of her employment for employer as an electrical technician. Claimant was working on a submarine docked in Hawaii at the time of her work injury. In the fall of 2001, claimant returned to San Diego, California, where she worked at employer's SPAWARS facility, which is not located on the waterfront. Claimant informed employer of her July 2001 work injury on May 15, 2002. Employer placed claimant on modified duty until she became unable to work; employer voluntarily paid claimant temporary total disability compensation under the Act commencing on June 24, 2002. Claimant subsequently reported pain radiating from her left thumb, up her forearm, and into the elbow, shoulder, and the left side of her neck. On September 19, 2002, claimant underwent surgery on her left hand/wrist for carpal tunnel syndrome. CX 5 at 4. In January 2003, claimant reported that, in addition to left hand and elbow pain, both thumbs and wrists hurt. Claimant underwent surgery on her left thumb and wrist in the winter of 2003. EX 5 at 153-155. In June 2003, claimant was diagnosed with right hand/wrist carpal tunnel syndrome, right thumb arthritis and right hand tendinitis. *Id*. at 147. She underwent carpal tunnel release surgery on her right hand/wrist in the summer of 2003. *Id*. at 139-142. Claimant underwent right thumb ligament reconstruction and right hand/wrist tendon interposition surgeries in the fall of 2003. Claimant filed a claim under the Act on April 15, 2004, alleging that she is temporarily totally disabled by the left thumb injury and from work-related cumulative trauma injuries to her arms, shoulders, neck, spine and legs. EX 15 at 463, 465. Claimant underwent a second right wrist surgery on May 10, 2005, and on February 28, 2006, she had left elbow surgery. CX 2 at 24-28, 42. In December 2006, claimant was diagnosed with non work-related lymphoma, for which she underwent surgery and chemotherapy. After claimant no longer required treatment for lymphoma, she underwent a second right thumb reconstruction surgery on April 22, 2008. CX 2 at 104. Claimant was recuperating from this procedure and unable to work as of the date of the formal hearing on August 27, 2008.

In his decision, the administrative law judge rejected employer's contention that claimant's cumulative trauma claim is not covered under the Act, pursuant to Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3), 903(a). The administrative law judge found that claimant provided employer with timely notice of her left thumb injury on May 15,

2002, because she was unaware this injury would affect her wage-earning capacity until she was placed on modified duty by employer at that time. 33 U.S.C. §912(a). The administrative law judge found that claimant's failure to provide timely notice of her cumulative trauma injuries was excused because employer received contemporaneous medical reports from claimant's physicians documenting her complaints from May 2002 to April 2004, when claimant filed her cumulative trauma claim. 33 U.S.C. §912(d)(1). The administrative law judge found that the April 2004 claim was timely filed, since claimant filed this claim shortly after employer stopped its voluntary payments of compensation. 33 U.S.C. §913(a). The administrative law judge found that claimant's bilateral thumb, wrist, and carpal tunnel conditions are work-related, as are her left elbow and neck conditions. The administrative law judge found that claimant's work injuries are not at maximum medical improvement because she is currently recovering from a work-related surgery on her right thumb and further surgery on her left thumb is indicated. The administrative law judge found that claimant is unable to return to her usual work for employer, and that employer did not establish the availability of suitable alternate employment during the period that claimant was undergoing treatment for non work-related lymphoma because claimant's work-related right thumb condition also prevented her from working at that time. Accordingly, the administrative law judge awarded claimant continuing compensation for temporary total disability from June 25, 2002. 33 U.S.C. §908(b).

On appeal, employer challenges the administrative law judge's findings that claimant timely provided it notice of her work injuries, that her April 2004 cumulative trauma claim was timely filed, that claimant's right thumb injury is work-related, and that claimant is entitled to compensation during the period she was unable to work due to her non work-related lymphoma, as well as the ongoing award of temporary total disability benefits. Claimant responds, urging affirmance. Employer filed a reply brief.

Employer first challenges the administrative law judge's finding that the claims for claimant's left thumb and cumulative trauma injuries are not barred for non-compliance with Section 12 of the Act, 33 U.S.C. §912. Employer avers that claimant was aware that the 2001 work injury would impair her wage-earning capacity by the fall of 2001, as claimant testified that she did not immediately report the injury because she did not want to be sent to San Diego where she believed employer did not have any work available for her. *See* Tr. at 64. The administrative law judge credited claimant's testimony that she delayed reporting her July 2001 work injury until May 2002 because she hoped that her condition would get better, and he relied on the absence of any evidence that claimant missed work prior to her reporting the left thumb injury. *See* Tr. at 65. Accordingly, the administrative law judge concluded that claimant gave employer timely notice of this injury as he found that claimant was unaware the injury impaired her

wage-earning capacity until she was placed on modified duty by employer in May 2002. *See* Tr. at 68-69.

Section 12(a) of the Act, 33 U.S.C. §912(a), requires that claimant must, in a traumatic injury case, give employer written notice of her injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and her employment.[1] *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice of the injury pursuant to Section 12(a). *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). "Awareness" for purposes of Section 12 in a traumatic injury case occurs when claimant is aware, or should have been aware, of the relationship between her injury, employment, and an impairment in earning capacity, and not necessarily on the date of the accident. *See Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *see also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997).

In this case, the fact that claimant was aware that she injured her left thumb at work on July 1, 2001, does not establish she was then aware that this injury would affect her wage-earning capacity. The administrative law judge rationally relied on the absence of any evidence that claimant lost time from work prior to reporting the injury to employer and on claimant's testimony that she hoped her injury would resolve itself, as grounds for finding that claimant was unaware before she reported the injury in May 2002 that the injury would affect her wage-earning capacity. Moreover, claimant's testimony that she did not immediately report the work injury because she did not want to be sent to San Diego where employer did not have available work does not establish that claimant was aware of the full extent of the harm resulting from the work injury, since

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[1] Section 12(a), 33 U.S.C. §912(a), states:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment . . . .

claimant was able to continue working full-time prior to reporting the injury in May 2002. *See E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002). It was only after she reported the injury that claimant was promptly given modified duty. Consequently, as the administrative law judge's finding that claimant did not become aware of the relationship between her employment injury and an impairment of her earning capacity until she was placed on modified duty after reporting the injury to employer in May 2002 is supported by substantial evidence, it is affirmed. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979). Therefore, we affirm the administrative law judge's finding that claimant's notice of her left thumb injury to employer in May 2002 was timely. 33 U.S.C. §912(a).

Employer also argues the administrative law judge erred in finding that claimant's failure to provide it with timely notice of work injuries allegedly resulting from cumulative trauma to her upper extremities was excused pursuant to Section 12(d). Specifically, employer maintains it was prejudiced since, by not receiving notice of claimant's left thumb injury until May 2002, it was unable to promptly investigate this claim and provide treatment, which may have avoided the harm to her other body parts. Moreover, employer alleges prejudice because it was unable to determine whether some of claimant's bilateral upper extremity injuries arose during the course of her subsequent non-covered employed at its SPAWARS facility. The administrative law judge found that, after claimant reported her left thumb injury to employer in May 2002, employer continued to receive medical reports from doctors to whom employer had referred claimant. The administrative law judge found that employer, consequently, had contemporaneous notice of claimant's work-related cumulative trauma injuries to her right thumb and wrist, left hand, wrist, elbow, and her neck. The administrative law judge found that any injury claimant may have sustained to her right thumb in July 2001 does not bar her subsequent cumulative trauma claim for this injury because she had no reason to believe her right thumb injury impaired her wage-earning capacity until she began to suffer more serious problems that were first treated in 2003. The administrative law judge concluded that any failure by claimant to provide proper notice for her subsequent injuries is excused under Section 12(d)(1) of the Act because employer had actual notice of claimant's work injuries within 30 days of claimant's becoming aware that these injuries were work-related and impaired her earning capacity.

Section 12(d) of the Act, 33 U.S.C. §912(d), provides in pertinent part:

> Failure to give such notice required by Section 12(a) shall not bar any claim under this chapter (1) if the employer . . . or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice,

> or (3) if the deputy commissioner excuses such failure [for one of the enumerated reasons]. . . .

Pursuant to Section 20(b), employer bears the burden of producing substantial evidence that none of these excusing provisions applies. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

Employer does not challenge the administrative law judge's finding that employer obtained knowledge of the work-relatedness of claimant's injuries to her right thumb and wrist, left hand, wrist, elbow, and neck at the same time as claimant received this information. Nor does employer challenge the administrative law judge's finding that claimant had no reason to believe that her right thumb injury impaired her wage-earning capacity until she began to suffer more serious problems that were first treated in 2003. These findings constitute substantial evidence that employer had actual knowledge of the cumulative trauma injuries asserted by claimant prior to the filing of her claim in April 2004. Thus, the administrative law judge's finding that any failure by claimant to provide proper notice for her subsequent injuries is excused under Section 12(d)(1) of the Act because employer had actual notice of claimant's work injuries is supported by substantial evidence and is affirmed.[2] *See Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); *Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003).

We next address employer's contention that the administrative law judge erred by finding that the claim for claimant's cumulative trauma injuries to her hands, wrists, arms and neck was timely filed under Section 13(a). Section 13(a) provides in pertinent part:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore (sic) is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment….

33 U.S.C. §913(a). Thus, voluntary compensation payments by an employer toll the one-year limitations period for filing a claim under the Act. *Chong v. Todd Pacific Shipyards*

[2] We therefore need not address employer's contention that it was prejudiced by claimant's failure to provide formal notice of her cumulative trauma injuries. *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986).

*Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990); *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

The administrative law judge found that claimant filed her claim on April 15, 2004, alleging cumulative trauma injuries to her hands, wrists, arms, and neck, less than two months after employer terminated its voluntary compensation payments. The administrative law judge addressed employer's assertion that it was voluntarily paying compensation for temporary total disability related only to claimant's left thumb injury. The claim for the left thumb condition was filed as part of the April 2004 claim.[3] EX 15 at 463. The administrative law judge found that, inasmuch as employer had contemporaneous knowledge of claimant's cumulative trauma injuries as they developed, employer's voluntary payments of temporary total disability included these injuries and thus tolled the filing requirement under Section 13. Alternatively, the administrative law judge found that the filing period was tolled until claimant was aware that these particular injuries would impair her wage-earning capacity, which would render timely the filing of her claim in April 2004.

We have affirmed the administrative law judge's finding that employer had actual knowledge of claimant's cumulative work-related injuries to her right thumb and wrist, left hand, wrist, elbow, and her neck based on its contemporaneous receipt of claimant's attending physicians' reports. Specifically, after claimant informed employer of her left thumb injury in May 2002, employer received medical reports of the many surgeries claimant underwent in 2002 and 2003. Employer does not challenge the administrative law judge's finding that it voluntary paid claimant temporary total disability compensation during this period. *See* EX 15 at 473. There is no evidence supporting employer's contention that its voluntary compensation payments while claimant recuperated from these surgeries were related solely to disability caused by claimant's left thumb injury. As claimant was totally disabled, there would be only one type of compensation payments due for all injuries. *See generally Korineck v. General Dynamics Corp./Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956). Section 13 was designed to insure fairness to employers by preventing the revival of stale claims in cases in which evidence has been lost, memories have faded, and witnesses have disappeared. *Smith*, 21 BRBS at 87. None of these factors is present in this case. Accordingly, we affirm the administrative law judge's finding that claimant's claim for her cumulative trauma injuries was timely filed in relation to employer's timely filed in relation to employer's last voluntary payment of compensation. *See Chong*, 22 BRBS 242; *see also U.S.*

[3] Employer does not challenge the administrative law judge's finding that the claim for claimant's left thumb condition was timely filed.

*Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Employer next challenges the administrative law judge's finding that claimant's right thumb injury is work-related. In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking her right thumb condition to her employment based on the testimony of Dr. Greenfield, employer's examining physician, that claimant's bilateral thumb and wrist conditions, her bilateral carpal tunnel syndrome, and her left elbow and neck conditions are related, at least in part, to her work for employer. Tr. at 249-250, 292-293. The administrative law judge found that employer did not present sufficient evidence to rebut the presumption. Accordingly, the administrative law judge found that these conditions are compensable work-related injuries. Decision and Order at 25-26.

Employer argues that the administrative law judge's finding that claimant's right thumb condition is work-related is "incomprehensible" in light of the administrative law judge's finding that claimant did not initially report a right thumb injury when she reported the left thumb injury in May 2002. In his decision, the administrative law judge stated that he "did not find claimant very credible in her testimony about whether she injured her right thumb in July 2001 and whether she reported a right thumb injury in May 2002." Decision and Order at 16. The administrative law judge concluded that it is "more likely than not" that claimant did not report a right thumb injury to employer when she reported the left thumb injury. *Id*. at 17. The administrative law judge nonetheless found that the discrepancy in claimant's testimony that she reported a right thumb injury in May 2002 does not significantly detract from claimant's overall credibility "because it is plausible that she did report a minor right thumb injury and because her right thumb was only a minor concern at that time." *Id*. Claimant subsequently filed a claim alleging a cumulative trauma injury to, *inter alia*, both upper extremities. EX 15 at 465. Thus, in view of Dr. Greenfield's testimony that claimant's right thumb condition is related, at least in part, to her work for employer, whether claimant reported a right thumb injury in May 2002 or injured her right thumb in a specific incident in July 2001 is immaterial. Dr. Greenfield's credited opinion is sufficient evidence to support the administrative law judge invocation of the Section 20(a) presumption linking claimant's right thumb condition to her employment. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Employer does not challenge the administrative law judge's crediting of Dr. Greenfield's testimony, nor his finding that this opinion does not rebut the Section 20(a) presumption. Accordingly, we affirm the administrative law judge's finding that claimant's right thumb condition is related to her employment as it is supported by substantial evidence and in accordance with law. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Employer next challenges the temporary total disability award by first contending the administrative law judge erred in finding that claimant's work injuries have not reached maximum medical improvement. Employer argues that the administrative law judge erred by not crediting the uncontradicted medical opinions of Drs. Braun and Greenfield that claimant's work injuries are at maximum medical improvement. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 46 (1983).

In his decision, the administrative law judge declined to credit the opinions of Drs. Braun and Greenfield who opined at various times that claimant's work injuries had reached maximum medical improvement. Decision and Order at 28; *see* CXs 2 at 4-5; 3 at 5-6; EXs 1 at 23; 3 at 73. The administrative law judge relied on claimant's inability to work as of the date of the hearing because she was recovering from right thumb surgery performed four months earlier, her need for additional left thumb surgery, and he found that claimant's various injuries continue to improve with treatment. Accordingly, the administrative law judge found that claimant's work injuries are not at maximum medical improvement.

We affirm the administrative law judge's finding that claimant's work injuries are not at maximum medical improvement as this finding is supported by substantial evidence and rational. In his February 5, 2008 report, Dr. Braun opined that claimant needed bilateral thumb reconstructions. CX 2 at 99, 102. Dr. Braun performed a right thumb reconstruction in April 2008, from which claimant was recovering at the date of the hearing on August 27, 2008. Tr. at 305. Dr. Braun opined that claimant would be temporarily disabled by this surgery until September 2, 2008. CX 2 at 110. For these reasons, the administrative law judge rationally found not credible Dr. Braun's opinion on October 15, 2007, that claimant became "permanent and stationary" in February 2007 "since the diagnosis of lymphoma was made at that time." Decision and Order at 19; *see* EX 3 at 73. Dr. Greenfield acknowledged that he only pronounced claimant at maximum medical improvement in August 2007 because he did not know how long claimant's lymphoma treatment would take, Tr. at 260; *see* EX 1 at 23, and Dr. Greenfield also testified that he would not consider claimant at maximum medical improvement if she

continued to receive appropriate care.[4] Tr. at 304. Claimant's inability to continue treating her work injuries while undergoing treatment for non-work-related lymphoma from September 25, 2006, to January 4, 2008, does not render her work injuries at maximum medical improvement during this period; claimant's condition is not at maximum medical improvement until treatment for her work-related injuries is complete. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Accordingly, as claimant was temporarily totally disabled while recuperating from right thumb surgery at the date of the hearing, and further left thumb surgery was anticipated, the administrative law judge rationally concluded that claimant's work injuries are not at maximum medical improvement.[5] *Monta*, 39 BRBS 104; *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000).

Employer next challenges the administrative law judge's award of temporary total disability compensation from September 25, 2006, to January 4, 2008, while claimant underwent treatment for non work-related lymphoma. *See* CX 2 at 9, 144. Employer argues only that it has no obligation to provide benefits because claimant conceded at the hearing that she was not entitled to compensation during this period. In his decision, the administrative law judge discussed claimant's counsel's statement at the hearing that there was no claim for compensation from September 25, 2006, to January 4, 2008. Decision and Order at 30; *see* Tr. at 317-318. In her pre-injury statement and post-hearing brief, however, claimant argued that she is entitled to compensation for the entire period, commencing in May 2002. ALJX 15 at 7. The administrative law judge stated that, as he is not bound by formal rules of procedure except as provided by the Act, he would address the merits of claimant's entitlement to compensation from September 25, 2006, to January 4, 2008. *See* 33 U.S.C. §923(a). The administrative law judge found that employer was able to introduce evidence refuting claimant's claim and thus was not prejudiced by his addressing this issue.[6] The administrative law judge also found that employer did not file a request to submit a reply brief in light of claimant's revised position in her closing brief. Based on his finding that claimant has been unable to work since June 2002 due to her work-related injuries, pursuant to the Board's decision in

[4] In September 2006, Dr. Greenfield pronounced claimant at maximum medical improvement "if she declines to proceed with the recommended surgery by Dr. Braun in a timely fashion." CX 3 at 5-6.

[5] Accordingly, we need not address employer's arguments regarding the extent of claimant's permanent disability to her neck and thumbs.

[6] Employer submitted labor market surveys conducted in August 2007 and August 2008. EXs 10, 17.

*Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979), the administrative law judge found that claimant is entitled to compensation from September 25, 2006, to January 4, 2008, notwithstanding her inability to work during this period from non work-related lymphoma as well.[7] Decision and Order at 30-31.

We reject employer's contention of error. It was within the administrative law judge's discretion to address claimant's contention, raised both before and after the hearing, that she is entitled to compensation during the period she underwent treatment for non work-related lymphoma. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom*, *Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). The administrative law judge rationally found that employer was not prejudiced because claimant had raised the issue in her pre-hearing statement, employer presented evidence refuting a claim of total disability, and it did not request to file a reply brief due to claimant's alleged changed position. *See Nelson v. American Dredging Co.*, 30 BRBS 205 (1996), *aff'd in part and rev'd in part on other grounds*, 143 F.3d 789, 32 BRBS 115(CRT (3rd Cir. 1998); *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987). Accordingly, we affirm the award of temporary total disability benefits from September 25, 2006, to January 4, 2008.

Finally, employer challenges the administrative law judge's award of continuing compensation for temporary total disability from June 25, 2002. In its Petition for Review, employer states that the administrative law judge "should have found that Claimant was able to work during various periods, including in her current condition." Employer's Petition for Review at 2. In its brief, employer states that, "[C]laimant would not be entitled to any permanent partial disability … after payment of the scheduled disability because of the proof provided by Employer/Carrier that Claimant has a retained earning capacity." *Id*. at 17. Employer noted the evidence it submitted to show the availability of suitable alternate employment. *Id*. at 17 n. 43.

Section 802.211(b) of the Board's regulations states, in pertinent part:

> Each petition for review shall be accompanied by a supporting brief . . . which: Specifically states the issues to be considered by the Board; presents . . . an argument with respect to each issue presented with

[7] In *Drake*, the Board held that claimant is entitled to compensation for a continuing work-related loss of wage-earning capacity notwithstanding that the claimant also is disabled by a loss of wage-earning capacity from a non work-related condition during the same period of time. *Drake*, 11 BRBS at 290-291.

> references [to the record]; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b). The Board has held that a brief filed by a party represented by counsel must address the administrative law judge's decision and discuss the way in which that decision is not supported by substantial evidence or in accordance with law. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988). Mere assignment of error or recitation of favorable evidence is not sufficient to invoke Board review. *Collins*, 23 BRBS at 228-229; *Carnegie v. C&P Telephone Co.*, 19 BRBS 57, 58-59 (1986). In this case, employer has not addressed the administrative law judge's findings or identified any error committed by the administrative law judge in finding that claimant has been totally disabled due to her work injuries since June 25, 2002. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 19 (1997); *Collins*, 23 BRBS at 228-229; *Carnegie*, 19 BRBS at 58-59. Accordingly, we affirm the administrative law judge's award of temporary total disability compensation. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

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

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