BRB No. 98-238

JONATHAN TATE Claimant-Respondent v. WALASHEK INDUSTRIAL AND MARINE and SIGNAL ADMINISTRATION, INCORPORATED Employer/Carrier-Petitioners and CNA INSURANCE COMPANY Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer and Signal Administration, Inc.

David A. Hamby, Jr., and Jene W. Owens, Jr. (Brooks & Hamby, P.C.), Mobile, Alabama, for employer and CNA Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer and Signal Administration (Signal) appeal the Decision and Order (95-LHC-2835, 96-LHC-460) of Administrative Law Judge Richard K. Malamphy 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 worked for employer as a boilermaker mechanic. In 1992, he sustained an injury to his back and his neck. Cl. Exs. 1-3, 5; Emp. Ex. 7; Resp. Exs. 1-3, 28B at 7-8, 10, 18.[1] At the time of this injury, CNA Insurance Company (CNA) was on the risk, and it paid claimant benefits while he remained out of work from January 1993 until May 2, 1995, when he returned to work as a light duty boilermaker mechanic for employer. Emp. Ex. 7; Tr. at 101-102. Upon claimant's return to work, CNA ceased paying benefits. Cl. Ex. 4. Although the job was designated as "light duty," claimant testified it caused him pain, necessitating a request for medication and an appointment with his doctor for May 15, 1995. On May 8, 1995, claimant asked to shorten his work day from eight hours to six hours, and employer approved the change. Emp. Ex. 17; Tr. at 51-53. After working two hours on May 11, 1995, however, claimant was injured when he moved some doors. He went to the doctor's office where he was diagnosed with a strain and was told to stay out of work until his treating physician, Dr. Park, examined him on May 15, 1995. Emp. Ex. 7; Tr. at 54-58. On May 15, 1995, Dr. Park determined that claimant's condition had improved since May 11 and that he could return to the light duty work he was performing before the onset of pain. Emp. Ex. 7; Tr. at 59. Claimant returned to employer, but, according to claimant, employer refused to allow him to work due to the risk he presented. Tr. at 60.

[1]Because there are two carriers involved, Signal's exhibits are designated as "Emp. Ex." and CNA's exhibits are designated as "Resp. Ex."

One month later, in June 1995, claimant found employment and began work as a cook in a restaurant. He testified that his shoulder continued to hurt, and in March 1996, an MRI of claimant's right shoulder revealed a partially torn tendon and his doctor, Dr. Cockrell, recommended surgery.[2] Resp. Ex. 30; Tr. at 63. In January 1997, claimant underwent an operation to repair a torn rotator cuff. Cl. Ex. 35; Emp. Ex. 11; Resp. Exs. 30-31. Claimant filed a claim for benefits from May 2, 1995, and continuing. Cl. Exs. 5-6.

The administrative law judge found that Signal is the responsible carrier because claimant sustained a work-related aggravation of his pre-existing back, neck and shoulder conditions on May 11, 1995, when Signal was on the risk. Decision and Order at 11-13. Further, he determined that the appropriate average weekly wage on which to base claimant's award of benefits is that which was in effect at the time of his 1992 injury. Therefore, he ordered Signal to pay claimant temporary total disability benefits from May 12 through May 15, 1995, permanent total disability benefits from May 16 through June 16, 1995, permanent partial disability benefits from June 17, 1995, through January 18, 1997, based on the difference between claimant's 1992 average weekly wage and his initial wages as a cook of $6 per hour, temporary total disability benefits from January 19 through January 24, 1997, while claimant underwent and recovered from surgery, and permanent partial disability benefits from January 25, 1997, and continuing based on the difference between claimant's 1992 average weekly wage and claimant's wages as a cook of $7 per hour. Decision and Order at 14-15, 21-23. Additionally, the administrative law judge concluded that both CNA and Signal are liable for some medical benefits. CNA, he held, must reimburse claimant for medical expenses related to the injury prior to May 11, 1995, except he found that the chiropractic expenses are not compensable. He held Signal liable for all medical expenses after May 11, 1995. *Id.* at 15-20. Finally, the administrative law judge granted Signal's request for Section 8(f), 33 U.S.C. §908(f), relief. *Id.* at 20-21. Signal appeals the administrative law judge's decision. CNA responds, urging affirmance. Claimant responds, urging affirmance, but notes his agreement with Signal that the May 1995 job was sheltered employment, and that he may be entitled to permanent total disability benefits as a result.

Signal contends it is not the carrier responsible for claimant's benefits. In this

[2]Claimant was forced to change physicians because CNA was no longer paying benefits. Therefore, he had his shoulder problem treated under the insurance he obtained as a cook, and the new plan would not refer him to Dr. Park. Tr. at 63-64.

regard, Signal argues that claimant's one week of light duty employment in May 1995 was sheltered and unsuitable; therefore, it argues that any injury claimant sustained on May 11, 1995, did not cause claimant a loss in wage-earning capacity, as claimant was already totally disabled.

Initially, we note there is no dispute that CNA was the carrier at the time of the 1992 injury and that Signal was the carrier at the time of the May 1995 incident. Further, it is well-established that, in multiple traumatic injury cases, the administrative law judge must determine whether a claimant's disability resulted from the natural progression of his first injury or whether the subsequent injury aggravated, accelerated or combined with the earlier injury to result in the claimant's disability. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd sub nom. Employers National Ins. Co. v. Equitable Shipyards, Inc.*, 640 F.2d 383 (5th Cir. 1981); *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). If the disability is the result of the natural progression of the first injury, then the carrier at risk at the time of the first injury is liable. If, however, the disability is the result of the second injury, then the carrier at risk at the time of the second injury is liable for the totality of the disability resulting therefrom. *Id.*

Although the administrative law judge set forth the proper law, he resolved the issue of the responsible carrier by utilizing the Section 20(a), 33 U.S.C. §920(a), presumption to determine that a work-related injury occurred in 1995 while Signal was on the risk. Decision and Order at 11-13. This injury, he stated, was caused when claimant lifted heavy doors at work, and it aggravated his prior back, neck and shoulder conditions. *Id.* at 13. While claimant is entitled to the benefit of the Section 20(a) presumption to aid in establishing that he sustained a work-related injury on May 11, 1995, the presumption does not assist one carrier rather than another once the issue involves determining which injury caused claimant's economic disability and thus which carrier is responsible for claimant's benefits. *See Buchanan v. International Transportation Services*, 31 BRBS 81 (1997); *Kooley*, 22 BRBS at 145-146. Thus, as the administrative law judge did not ascertain whether the 1992 injury, the 1995 injury or both injuries caused claimant's disability, his analysis is incomplete and the case must be remanded for further findings.

In assessing claimant's disability status after the first injury, the administrative law judge must determine whether the work to which claimant returned in May 1995 constituted alternate employment that was both suitable and of sufficient duration to establish a post-injury wage-earning capacity. *See generally Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S.

1031 (1994). In ascertaining the suitability of the job at employer's facility, the administrative law judge should determine whether the requirements of the position were within claimant's physical capabilities, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), or whether he worked only through extraordinary effort, *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), and contrary to the administrative law judge's statement, whether the position was sheltered is indeed relevant to the determination of whether suitable alternate employment was established, as such employment is insufficient to mitigate employer's liability for benefits for total disability.[3] *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980); *see also Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). If claimant was totally disabled prior to May 11, 1995, then CNA is liable for the entire amount of permanent disability benefits due claimant as the incident on May 11 did not increase claimant's disability. If, however, the job at employer's facility constituted suitable alternate employment, but claimant nonetheless had a loss in wage-earning capacity in that job, claimant is entitled to an award of permanent partial disability benefits payable by CNA. Under this scenario, Signal is liable for any totally disabling exacerbation sustained by claimant on May 11, 1995, and for any increase in claimant's partial disability resulting from this injury based on claimant's residual wage-earning capacity at the time of the second injury. *See* discussion*, infra*. Concurrent awards of benefits are permitted under the Act provided the claimant receiving such awards does not receive compensation for more than the total loss of his wage-earning capacity. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980).

Moreover, Signal correctly contends that the administrative law judge's findings regarding claimant's average weekly wage are inconsistent with his imposition of liability on Signal for the totality of claimant's disability. Specifically, Signal contends that if it is responsible for any of claimant's benefits, the administrative law judge erred in holding it liable based on claimant's 1992 average weekly wage. Signal argues, correctly, that benefits due for the 1995 injury should be based on the difference between claimant's wage-earning capacity in 1995 (his average weekly wage as of May 11, 1995) and his post-injury wage-earning capacity thereafter. *Bentley v. Sealand Terminals, Inc.*, 14 BRBS 469 (1980). A claimant's average weekly wage at the time of his second injury or aggravation must be used to

[3]Sheltered employment has been defined as work for which an employee is paid even if he cannot perform the work and which is unnecessary. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

calculate benefits for that injury. *Brady-Hamilton Stevedore Co.*, 58 F.3d at 419, 29 BRBS at 101(CRT); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In this case, the parties agree that claimant's 1992 average weekly wage was $811.73. In 1995, he earned $13 per hour working six- and eight-hour days for employer ($520 and $390 per week respectively), and he later earned $6 per hour working 40 hours per week ($240) as a cook in a restaurant. Cl. Ex. 43; Emp. Ex. 17. After his shoulder surgery in 1997, claimant returned to the restaurant on a part-time basis and earned $7 per hour, and he also worked as a part-time clerk, earning $7 per hour. Both part-time jobs combined for a 40-hour work week ($280). Tr. at 65-67.

Although he found that claimant sustained an aggravation in 1995 and he acknowledged the differing wages, the administrative law judge simultaneously found that Signal is liable for benefits based on claimant's 1992 average weekly wage. These findings are conflicting and cannot stand. Therefore, we vacate the administrative law judge's average weekly wage findings, and we remand the case for him to resolve this issue consistently with his findings regarding the carrier responsible to claimant. Any benefits for which CNA is liable must be based on claimant's 1992 average weekly wage, and any benefits for which Signal is liable must be based on claimant's average weekly wage at the time of the 1995 aggravation. *Lopez v. Southern Stevedores,* 23 BRBS 295 (1990).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.[4]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[4]We reject Signal's remaining contention that the rehabilitation counselor is not a credible witness and should not be relied upon. Her opinion was not a factor in the administrative law judge's decision.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge