BRB No. 07-0385

M.T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED/ AVONDALE DIVISION	)	DATE ISSUED: 09/28/2007
	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Andrew W. Horstmyer, Diamondhead, Mississippi, for claimant.

Richard S. Vale, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-2158) of Administrative Law Judge Lee J. Romero, Jr., 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 ankle and left knee in a fall at work on April 14, 2004. She was diagnosed with a patella contusion and an ankle sprain, and an MRI revealed patellafemoral chondromalacia. On June 8, 2005, claimant fell when her knee "gave out," and she required stitches in her left heel. By December 2005, three treating physicians had released claimant to return to her usual work and one had released her to

light-duty work.[1] Cl. Exs. A, B, D. In January 2006, claimant returned to Dr. Treuting because of continuing pain in her ankle, and she also reported back pain. Cl. Ex. D. In February 2006, claimant returned to Dr. Meyer for continuing pain in her knee, and he recommended a repeat MRI. Cl. Ex. E. That same day, she also was examined by Dr. Katz, employer's expert orthopedic surgeon, who recommended treatment for claimant's symptoms. Cl. Ex. L. Employer paid claimant temporary total disability benefits from June 18 through July 5, 2004. Jt. Ex. 1. Claimant sought additional benefits.

The administrative law judge found, *inter alia*, that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption relating her injuries to her employment and that employer rebutted the presumption. On weighing the evidence as a whole, he found that substantial evidence supported claimant's claim that her knee, ankle and back pain are related to her 2004 work injury. Decision and Order at 28-31. Additionally, the administrative law judge found that claimant established a *prima facie* case of total disability and that employer presented evidence of suitable alternate employment, but despite due diligence, claimant was unsuccessful in obtaining alternate employment. *Id.* at 35-45. Therefore, the administrative law judge awarded claimant temporary total disability benefits from April 14, 2004, through July 31, 2005, and permanent total disability benefits from August 1, 2005, and continuing. *Id.* at 49-50. Employer appeals the award, and claimant responds, urging affirmance.

Employer first asserts that claimant's fall at home in 2005, which resulted in a lacerated heel, was an intervening accident and that it is therefore not liable for her back problems or for medical bills related to this incident. This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit has two standards for determining whether an event constitutes a supervening cause. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998);[2] *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). One standard requires the supervening cause to originate entirely outside of the employment and to overpower and nullify the work injury. *Voris*

[1]Claimant initially treated with Dr. Johnson who released her to return to her usual work by July 2004. Cl. Ex. B. Dr. Treuting released claimant to return to her usual work in April 2005, and Dr. Meyer released her to return to her usual work in July 2005, reiterating that recommendation in December 2005. Cl. Exs. D, E. In June 2005, Dr. Eissa recommended claimant return to light-duty work. Cl. Ex. D.

[2]In *Shell Offshore*, the Fifth Circuit declined to decide which standard is the operative standard, as, on the facts of that case, the employer did not meet either standard for a supervening cause. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

v. Texas Employers Ins. Ass'n, 190 F.2d 929 (5th Cir. 1951). The second standard holds that if a work injury is worsened by an independent cause, it could constitute a supervening injury. *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on reh'g on other grounds*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981). The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury, *see Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); however, where the second injury is the result of an independent supervening cause, the employer is relieved of liability for that portion of the disability attributable to the supervening cause. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). As the employer is the proponent when asserting a supervening cause, the employer bears the burden of proving that the claimant's condition is due to a supervening cause. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

As in *Shell Offshore*, employer here has not demonstrated that the 2005 fall is a supervening event under either standard of the Fifth Circuit, as the administrative law judge rationally found that the effects of the work injury caused claimant to fall. The administrative law judge credited claimant's testimony that her injured left knee "gave out" and caused her to fall, resulting in a laceration to her heel. Decision and Order at 29. Additionally, the administrative law judge found that the physical therapist noted that claimant had instability during an exercise a few days before her fall. *Id.*; Cl. Ex. E at 49. Although Dr. Meyer testified that claimant's knee was not unstable, he also opined that claimant's inactivity could have led to weakness of the quadriceps muscle and that could have caused feelings of instability in knee, resulting in the fall. Decision and Order at 29; Emp. Ex. 14 at 42-44. Thus, the credited evidence supports the conclusion that the 2005 fall is not a supervening incident, but is the result of claimant's work injury. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Therefore, as employer did not establish that the medical bills arising out of the fall were due to any supervening cause, we affirm the administrative law judge's finding that employer is liable for medical benefits associated with the June 2005 fall.

We also reject employer's assertion that claimant's back pain must have been caused by a supervening incident because her first complaint of back pain was not made until January 2006. We have affirmed the administrative law judge's finding that claimant's work injury caused her to fall in June 2005, and employer has not identified any other incidents that could be a supervening event. Moreover, the administrative law judge rationally found a causal connection between claimant's back pain and her work injuries. Although Dr. Treuting questioned the validity of claimant's knee pain in March 2005, in 2006 when she complained to him of back pain, he referred her to Dr. Eissa for evaluation and/or treatment of that back pain. Cl. Ex. D; Emp. Ex. 16. Dr. Eissa related

claimant's back pain to her limp, and he prescribed medication. Cl. Ex. D. As the administrative law judge found, the evidence establishes that claimant was limping before her June 2005 fall, and employer did not offer evidence of any cause for her limp other than the original 2004 work injury. Decision and Order at 30; Emp. Ex. 16 at 6, 8, 11. Accordingly, the administrative law judge relied on Dr. Eissa's opinion and inferred that claimant's back pain is related to her 2004 work injury.[3] Decision and Order at 30-31. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). It is within the administrative law judge's authority to credit and weigh the testimony of the witnesses, including medical testimony, and to make inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As the administrative law judge's inferences are rational, *see generally MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987), and as the credited evidence establishes the absence of any intervening cause of claimant's back pain, employer is liable for medical benefits for this condition.[4] *See Bass*, 28 BRBS at 15-16; *Merrill*, 25 BRBS at 144-145; *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981).

Employer also contends that, as Drs. Meyer and Treuting released claimant to return to her usual work on or before December 8, 2005, the administrative law judge erred in finding claimant totally disabled. In order to establish a *prima facie* case of total disability, a claimant must establish that she cannot return to her usual work. If she does so, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g*

[3]We reject employer's assertion that the administrative law judge erred in relying on Dr. Eissa's opinion because his credentials were not in the record and Dr. Eissa is not a treating physician. Dr. Treuting testified that Dr. Eissa is a doctor of physical medicine and rehabilitation and that he works in the same group practice with Drs. Meyer and Treuting. Emp. Ex. 16 at 23-24. Given that Dr. Eissa evaluated claimant's condition more than once and prescribed medicine for claimant's pain, the administrative law judge was not required to disregard his opinion on the basis that he is not a "treating physician" or to summarily give the opinions of Drs. Meyer and Treuting greater weight because they are "treating physicians." *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

[4]Moreover, as the administrative law judge found that the June 2005 fall did not result in any disabling conditions and that any disability claimant has is due to her work injury, the 2005 fall could not affect employer's liability for disability benefits.

denied, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether work is realistically available and suitable for the claimant. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If the employer establishes the availability of suitable alternate employment, the employee may nonetheless prevail in obtaining total disability benefits if she demonstrates that she diligently tried but was unable to secure alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

In this case, the administrative law judge found that claimant is incapable of returning to her usual work as an electronic technician, which was a medium-duty job requiring her to board ships and climb ladders. He found credible claimant's complaints of continued pain, her testimony that she is unable to return to her usual work, and her testimony that she is unable to perform tasks and chores that she could perform prior to her injury. Decision and Order at 26-27; Tr. at 57, 85. The administrative law judge relied on the physical restrictions set by Drs. Meyer and Eissa in 2005. Decision and Order at 39-40. Although Dr. Eissa did not specify restrictions to claimant's ankle, knee and leg movement in his check-box recommendation for light-duty work in May 2005, Dr. Meyer had contemporaneously recommended restrictions on climbing, kneeling and squatting. Under these circumstances, the administrative law judge could rationally include Dr. Meyer's prior restrictions with Dr. Eissa's recommendation in order to create a full picture of claimant's physical restrictions, particularly in view of claimant's credited complaints relating to these ailments. Decision and Order at 16-17, 39-40. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (the choice between reasonable inferences is left to the administrative law judge); *Calbeck*, 306 F.2d 693 (administrative law judge may draw inferences and conclusions from the record). Therefore, any error the administrative law judge may have made in attributing the additional physical restrictions to Dr. Eissa is harmless.

Further, due to claimant's continuing pain, the administrative law judge found that claimant sought and received additional treatment from her doctors following the initial releases to return to work in 2004 and 2005. Specifically, in 2006, while Dr. Treuting determined that there was nothing further he could do for claimant's ankle, he referred her to Dr. Eissa for evaluation of her back pain. Dr. Eissa prescribed medication. The administrative law judge found that this treatment was consistent with Dr. Eissa's 2005 recommendation, which remained unchanged, that claimant be released to perform light-duty work. Decision and Order at 35. Similarly, following claimant's continued

complaints of pain in 2006, Dr. Meyer decided that a repeat MRI would be beneficial and treatment would follow based on the results of that test. The administrative law judge found that, despite Dr. Meyer's 2005 recommendation that claimant return to her regular work, his actions in 2006 were consistent with a finding that claimant is restricted to light-duty work. *Id.* The administrative law judge also relied on the recommendation of Dr. Katz, who examined claimant one time at employer's request, that claimant return to light-duty work but undertake a functional capacity evaluation to see if she can return to medium-duty work. *Id.* Thus, although Drs. Meyer and Treuting released claimant to return to her usual work in 2005, the record contains substantial evidence, including claimant's credible testimony, supporting the administrative law judge's finding that claimant cannot return to her usual work. *See Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *see generally Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Padilla v. San Pedro Boat Works*, 34 BRBS 39 (2000); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

Next, the administrative law judge found that employer presented evidence of suitable alternate employment; however, he concluded that claimant diligently pursued but was unable to secure alternate employment, and is, therefore, totally disabled. Employer challenges this finding. In this case, employer presented a number of jobs it deemed suitable for claimant. Emp. Ex. 18. The administrative law judge rejected all but two as being unsuitable. Decision and Order at 40-43. Despite the administrative law judge's determination that most of the jobs identified were unsuitable for claimant, claimant testified that she applied for all of the jobs identified by employer. *Id.* at 44; Tr. at 58-66, 75-76. Further, he found that, in December 2004 and January 2005, she attempted to work at a Macy's department store and a Shell gas station, and, on her own initiative, claimant posted her resumé with an internet placement agency and applied for an electronics position through that agency. Decision and Order at 44; Tr. at 58-66, 77. Based on her efforts, the administrative law judge found that claimant diligently tried to find employment but that she was unable to secure a position. Employer argues that, as of the date of the hearing, claimant had two employment applications pending and, thus, was not "unsuccessful" in her search. Contrary to employer's assertion, it was rational for the administrative law judge to find that claimant's job hunt was unsuccessful based on the record before him. *See Fortier*, 38 BRBS 75; *Fox v. West State, Inc.*, 31 BRBS 118 (1997). Therefore, we affirm the administrative law judge's rational conclusion that claimant is totally disabled, as well as his award of benefits.[5]

[5]If claimant's circumstances have changed since the administrative law judge's decision and she has secured a job, then employer may file a motion for modification. 33 U.S.C. §922. In the meantime, claimant has established an inability to return to her usual work and a lack of success in obtaining alternate employment.

Finally, claimant's counsel has filed a fee petition for work performed before the Board between February 11 and April 24, 2007. Counsel requests $8,650, representing 34.6 hours at a rate of $250 per hour. Employer has filed objections, arguing that counsel's hourly rate is excessive, the fee petition is premature, and three entries improperly violate the minimum billing rule. We reject employer's objections with the exception of the challenge to the entry on February 13, 2007, which we reduce to .125 hour for the review of the Board's Acknowledgement of Appeal Order. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (table); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (.125 hour is sufficient time to review a one-page letter and .25 hour is sufficient for drafting a one-page letter); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*. 32 BRBS 51 (1998) (fees may be awarded during pending appeal but are not enforceable until all appeals are exhausted); 20 C.F.R. §802.203(d)(4), (e). In all other respects, employer has not shown that the fee request is unreasonable or the services unnecessary; therefore, we award counsel an attorney's fee payable by employer in the amount of $8,618.75, representing 34.475 hours at an hourly rate of $250.

Accordingly, the administrative law judge's Decision and Order is affirmed. Counsel is entitled to an attorney's fee in the amount of $8,618.75 for work performed before the Board, payable directly to counsel by employer.

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