

RONALD L. MURPHY)
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 Claimant-Petitioner)
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 v.)
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 TODD PACIFIC SHIPYARDS)
 CORPORATION)
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 and)
)
 AETNA CASUALTY and SURETY)
 COMPANY)
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 and)
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 EAGLE PACIFIC INSURANCE)
 COMPANY)
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 and)
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 INDUSTRIAL INDEMNITY)
 COMPANY)
)
 Employer/Carriers-)
 Respondents)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Claim for Disability Benefits of Christine McKenna, Administrative Law Judge, United States Department of Labor.

Ted R. Willhite (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant.

Charles R. Henshall, Seattle, Washington, for employer and Aetna Casualty and Surety Company.

Raymond H. Warns, Jr. (Faulkner, Banfield, Doogan & Holmes, P.C.), Seattle, Washington, for employer and Industrial Indemnity Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order on Claim for Disability Benefits (94-LHC-3307) of Administrative Law Judge Christine McKenna awarding temporary total disability benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for Todd Shipyards for nearly 30 years primarily as a pipefitter. He was exposed to industrial fumes during the period between 1987 and 1992, and he alleged that this exposure resulted in the development of a disabling work-related pulmonary condition.¹ Claimant apparently retired in 1992. The administrative law judge awarded claimant additional temporary total disability compensation for separate periods in 1988 and 1991 which were found to be "acute episodes" in which exposure to industrial irritants exacerbated claimant's underlying asthma and chronic obstructive pulmonary disease.² Decision and Order at 27. The administrative law judge, however, denied permanent disability benefits, finding that in spite of work-related exacerbations of claimant's underlying pulmonary disease, these aggravations produced no permanent effect. On appeal, claimant asserts that the evidence demonstrates that he is permanently and totally

¹Claimant alleged exposure to hydrochloric acid, sulfuric acid, fumes from copper and galvanized metal, solvents and paint thinner, Decon-based lead paint, sandblasting, acrylic paints and cadmium. The administrative law judge found insufficient evidence of exposure to cadmium.

²Employer voluntarily paid temporary total disability benefits from June 23 through June 28, 1992.

disabled as a result of this work-related aggravation of his underlying chronic obstructive pulmonary disease. In response, employer argues that the administrative law judge's findings on the merits are supported by substantial evidence.³

³We decline to address employer's arguments with respect to the timeliness of this claim, because employer did not file a cross-appeal and the contention does not support the administrative law judge's decision. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91 (1983); see *Dalle-Tezze v. Director, OWCP*, 814 F.2d 129 (3d Cir. 1987). We have previously rejected employer's challenge to the adequacy of claimant's brief on appeal. See *Murphy v. Todd Pacific Shipyards Corp.*, BRB No. 96-1057 (Dec. 23, 1996)(Order).

The aggravation of a pre-existing condition itself constitutes a compensable injury within the scope of the Act, as the administrative law judge recognized by awarding claimant temporary total disability benefits for the periods of acute exacerbations. See generally *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The administrative law judge erred, however, in finding that claimant is necessarily limited to an award only during the periods of acute exacerbations. In so finding, the administrative law judge relied on the Board's decision in *Crum v. General Adjustment Bureau*, 12 BRBS 458 (1980) (Miller, J., dissenting), wherein the Board held that a claimant was limited to temporary disability benefits because his cardiac symptoms subsided when he was removed from the workplace. See also *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983) (Miller, J., concurring). The United States Court of Appeals for the District of Columbia Circuit reversed this holding, stating that although the claimant's condition improved with the cessation of his workplace exposure, his underlying angina remained indefinite and his disability was likely to be permanent. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480, 16 BRBS 115, 124 (CRT)(D.C. Cir. 1984); see also *Boone v. Newport News Shipbuilding & Dry Dock Co.* 21 BRBS 1, 3 (1988). The fact that a claimant's symptoms may be alleviated by a departure from the workplace does not support a finding that the work-related aspect of his condition has resolved. *Crum*, 738 F.2d at 480, 16 BRBS at 125 (CRT). Temporary recurring symptoms may nonetheless be permanent within the meaning of the Act if they continue for a lengthy period, and appear to be of a lasting or indefinite duration, as opposed to a condition in which recovery merely awaits a normal healing period.⁴ *Id.*, 738 F.2d at 480, 16 BRBS at 124 (CRT), citing *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248, 250 (1988).

⁴The administrative law judge also cited the Board's decision in *Champion v. S & M Traylor Bros.*, 14 BRBS 251 (1981) (Miller, J., dissenting), for the proposition that a claimant is limited to an award for a temporary work-related aggravation of an underlying pulmonary condition. This decision cites the Board's decision in *Crum*, 12 BRBS at 458, which, as noted, was reversed. The Board's decision in *Champion* also was reversed, on other grounds, by the United States Court of Appeals for the District of Columbia Circuit. *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982). The Board's decision in *Champion* is thus of dubious validity.

Nor is it material that claimant's underlying condition was not caused or permanently worsened by claimant's workplace exposures. *Crum*, 738 F.2d at 480, 16 BRBS at 125 (CRT). The administrative law judge found, based on the opinions of Drs. LeDoux and Sparks, that claimant's underlying pulmonary condition is not work-related and that the work exposures did not permanently worsen the underlying disease. Nevertheless, this same evidence credited by the administrative law judge could establish that claimant's pulmonary condition precludes further employment in an environment marked by exposure to industrial irritants due to the possibility of further aggravations.⁵ If such is the case,

⁵Dr. LeDoux first saw claimant in 1989, and diagnosed asthma and chronic obstructive lung disease which conditions he reported on October 19, 1990 "can be actually worsened upon exposure to respiratory irritants." IEX-6.11; LeDoux Dep. at 20, 29. Dr. LeDoux recommended that claimant thus be placed in a "[work] situation" with minimal exposure. IEX-6.11; Dep. at 13. Dr. LeDoux also observed that claimant has a "significant work place impairment and [claimant] presently has been unable to work in his previous capacity." IEX-6.21. At the time of claimant's examination in December 1994, Dr. LeDoux stated that claimant would be able to work only in a sedentary capacity in a clean environment. Dep. at 27

Dr. Sparks, while attributing claimant's permanent chronic obstructive pulmonary

claimant has established a *prima facie* case of total disability because his work injury prevents him from returning to his usual job.⁶ See *Care*, 21 BRBS at 250; *Boone*, 21 BRBS at 3. Inasmuch as the administrative law judge relied on the Board's overruled decision in *Crum*, and did not consider, under the proper standards, the possibility that claimant has an additional disability, we must vacate the denial of additional disability benefits. The case is remanded to the administrative law judge for further consideration of the nature and extent of claimant's disability under the proper standards.

disease to cigarette abuse, testified that “[claimant] had such severe disease that the consequences of any exacerbations become more and more severe.” Sparks Dep. at 44-45. Dr. Sparks also stated that claimant's employment “should avoid direct contact with known respiratory tract irritants including dust, fume, gases, etc.” She stated claimant should work in a clean air environment. IEX-10.

⁶If claimant establishes a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment within the geographic area where claimant resides which claimant is capable of performing given his age, education, physical restrictions, and work experience, and which he could secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988).

Accordingly, the administrative law judge's denial of additional benefits is vacated, and this case is remanded to the administrative law judge for further findings consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge