BRB No. 97-0481

WILLIAM B. EMERY	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
ADMIRALTY COATINGS CORPORATION	)	
	)	
and	)	
	)	
SIGNAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Rafal, Swartz, Taliaferro & Gilbert, P.C.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kimberley Herson Timms (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (95-LHC-1287) of Administrative Law Judge Daniel A. Sarno, 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 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, while working as a sandblaster for employer, sustained an injury to his right shoulder on November 18, 1994. On November 30, 1994, claimant's treating physician, Dr. Siegel, diagnosed a tear in claimant's right shoulder tendon complex for

which he recommended conservative treatment, and opined that claimant could return to light duty work, if available, with no pushing, pulling, lifting or overhead activity with his right shoulder. At that time, claimant informed Dr. Siegel that there was no such thing as light duty sandblasting work. Acting on claimant's repeated requests that he be returned to the work-force,[1] Dr. Siegel on January 4, 1995, and again on January 9, 1995, suggested that claimant attempt to perform his position as a sandblaster full duty, but cautioned him not to overtax himself. Claimant never returned to work as a sandblaster, but did obtain subsequent employment positions in succession as a painter with Main Industries (Main), a leadman and superintendent with JEMM Industries, Incorporated, and as a consultant with Mr. Dirt, Incorporated. Claimant left his position with Mr. Dirt on April 23, 1996, and has not worked since that date.

Meanwhile, on October 20, 1995, Dr. Siegel, after observing no improvement in claimant's shoulder condition, recommended surgery.[2] Dr. Siegel also opined that the worsening of claimant's shoulder condition was a natural progression of the original work-related injury and not due to any additional physical stress sustained by claimant during his subsequent employment as a painter for Main Industries. Dr. Neff, after examining claimant on February 20, 1996, agreed that claimant suffered a partial tear of the rotator cuff tendon of the right shoulder. Dr. Neff, however, opined that claimant's job as a painter was responsible to some degree for the worsening of his right shoulder symptoms.

Employer voluntarily paid temporary total disability benefits from November 23, 1994, through January 4, 1995. Claimant sought temporary total disability benefits from October 26, 1995 until April 1, 1996, and temporary partial disability benefits thereafter. Employer argued that claimant's continuing disability was due to an aggravation of his old injury while working with a subsequent employer and thus declined to pay any additional compensation.

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[1]Claimant's requests were premised on need.

[2]Despite the repeated recommendations, the surgery was never performed. The record indicates that Dr. Siegel agreed to perform the surgery without any advance agreement of payment by the carrier, but the hospital would not go along with this concession.

In his Decision and Order Awarding Benefits, the administrative law judge determined that claimant did not aggravate his shoulder injury in subsequent employment and therefore concluded that employer is responsible for any and all medical treatment, including surgery, needed for claimant's right shoulder. In addition, the administrative law judge found that claimant is entitled to continuing temporary partial disability benefits from October 26, 1995.[3]

On appeal, employer challenges the administrative law judge's determinations that claimant's subsequent employment did not aggravate claimant's condition and that claimant is entitled to temporary partial disability benefits. Claimant responds, urging affirmance.

Employer initially argues that it should not be held liable for benefits, as it alleges claimant's current disability is due to the aggravation of his prior condition due to his work at Main Industries and thus is not the result of the natural progression of the original injury. In a case involving a subsequent injury, an employer may be relieved of liability if the credited evidence establishes that claimant's disabling condition was caused by a subsequent event, provided employer also proves that the subsequent event was not caused by claimant's work-related injury. *Bass v. Broadway Maintenance,* 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer is liable for the entire disability if the second injury is the natural and unavoidable result of the first injury; however, where the second injury is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

[3]At employer's request, the administrative law judge issued an Errata Order dated November 18, 1996, altering claimant's average weekly wage and weekly loss of wage-earning capacity, and thus, increasing the rate at which claimant's temporary partial disability benefits are to be paid. The administrative law judge also issued on November 26, 1996, his Order Denying employer's Motion for Reconsideration, in which employer contested the validity of any award of benefits past the date of the hearing.

In addressing this issue, the administrative law judge explicitly considered the relevant medical evidence of record and initially determined that both Dr. Siegel and Dr. Neff agreed that claimant sustained a partially torn rotator cuff tendon as a direct result of a work-related accident on November 18, 1994, and that the tear never completely healed. The administrative law judge accorded greater weight to Dr. Siegel's explanation that any disability incurred by claimant after April 1995 is from the natural progression of the original work-related shoulder injury and thus could have easily occurred without a "reaggravation, reinjury or new trauma," Employer's Exhibit 8-37, as it is very well reasoned and because Dr. Siegel served as claimant's treating orthopedist. In contrast, the administrative law judge determined that Dr. Neff's opinion that claimant's work as a painter with Main Industries aggravated his pre-existing shoulder injury is not as well reasoned as Dr. Siegel's opinion, particularly since Dr. Neff failed to explain how claimant's right shoulder, which he felt had been rendered useless for working purposes by the first injury, could somehow be rendered more useless for working purposes later.[4] The administrative law judge is entitled to evaluate the credibility of all witnesses, and may draw his own inferences and conclusions from the evidence. *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In the instant case the credibility determinations made by the administrative law judge in resolving this issue are rational and within his authority as factfinder. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). As substantial evidence supports his finding, we affirm the administrative law judge's determination that claimant's right shoulder disability results from the natural progression of claimant's November 18, 1994, injury, and thus, affirm his conclusion that employer is liable for benefits for the entire disability. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc,* BRBS , BRB Nos. 96-776, 96-1031 (Sept. 17, 1997).

Employer next contends that the administrative law judge's award of benefits beyond the date of the hearing violates the Administrative Procedure Act (APA) and its due process rights, since it contends no evidence of a continuing disability could have been entered into the record. Employer thus argues it has been forced to make payments for benefits without the opportunity of being heard.

Employer's contention is without merit. Initially, the Act provides benefits for temporary partial disability during the "continuance of such disability" of up to 5 years, 33 U.S.C. §908(e), and thus contemplates ongoing awards. *See also* 33 U.S.C. §908(a), (b), (c)(21). Pursuant to the Act, employer has been afforded a full pre-deprivation, trial-type

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[4]In any event, we note that Dr. Neff's opinion, which states that claimant's current condition is a result of the initial work injury plus the employment with Main Industries establishes that claimant's condition was caused, at least in part, by his November 18, 1994, work-related accident. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc,* BRBS , BRB Nos. 96-776, 96-1031(Sept. 17, 1997).

hearing before the administrative law judge and thus has not been deprived of property without due process of law. *See Shell OffShore, Inc. v. Director, OWCP,* 112 F.3d 312 (5th Cir. 1997). Moreover, in the instant case, employer was cognizant of the claim for continuing temporary partial disability benefits, as evidenced by its own acknowledgment that claimant was seeking continuing temporary partial disability benefits after April 1, 1996. HT at 8; Employer's Post-Hearing Brief at 1. Employer, therefore, is incorrect in its assertion that it has not been given notice and the opportunity to be heard on this issue and we hold that the administrative law judge's decision comports with the requirements of the Administrative Procedure Act. *See* 5 U.S.C. §554(c)(2), and 33 U.S.C. §919(d).

In addition, contrary to employer's contention, the existing record does contain evidence to support an award of continuing temporary partial disability benefits. In *Hoodye v. Empire United Stevedores*, 23 BRBS 341 (1990), upon which employer in part relies, the Board held that it was within the authority of an administrative law judge to issue a "continuing" award of benefits if the "evidence established claimant remained disabled." *Hoodye*, 23 BRBS at 343. In addition, the Board held that "where maximum medical improvement has not been reached and claimant is disabled, the appropriate remedy is a continuing award of temporary total or partial disability." *Hoodye*, 23 BRBS at 343. In the instant case, there is no evidence of record that claimant has yet reached maximum medical improvement. *See* Claimant's Exhibits 8-27, 11-1; Employer's Exhibit G. Moreover, the administrative law judge found that a comparison of claimant's average weekly wage at the time of his injury, and his post-injury wage-earning capacity reveals a loss in wage-earning capacity compensable under Section 8(e) of the Act. *See* 33 U.S.C. §908(e); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190 (1984). Claimant has therefore met his burden of establishing the requisite loss in wage-earning capacity for entitlement to temporary partial disability benefits. *Id*. Thus, it was employer's burden to show that claimant did not, in fact, have any loss in wage-earning capacity.[5] As the record stands, employer has not met its burden on this issue.

Lastly, we note that contrary to employer's contention, employer is not foreclosed from seeking modification pursuant to Section 22 of the Act, 33 U.S.C. §922. Modification based on a change in condition may be granted where there has been a change in claimant's economic or physical condition, *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988), and thus,

[5]We also reject employer's contention that claimant is not disabled because he was gainfully employed from April 1, 1996, up to the time of the hearing by Mr. Dirt. In fact, claimant's employment with Mr. Dirt paid wages of $300 per week which is below claimant's average weekly wage of $668.08. The administrative law judge, however, found that claimant's wages while employed with Mr. Dirt did not reflect his true post-injury wage-earning capacity and instead relied on the post-injury wages earned by claimant while working as a lead man and superintendent for JEMM Industries, Incorporated, which nevertheless indicated a loss in wage-earning capacity.

upon the proper showing, employer may be entitled to have the administrative law judge's initial Decision and Order Awarding Benefits modified to reflect that change. We therefore affirm the administrative law judge's award of medical benefits and temporary partial disability benefits as those determinations are rational and supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge