BRB No. 97-0532

ALICE A. LEJEUNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
J. J. FLANAGAN STEVEDORES	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation Benefits and Supplemental Decision and Order Granting Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Bryan F. Gill, Jr., Lake Charles, Louisiana, for claimant.

Michael D. Murphy (Eastham, Watson, Dale & Forney, L.L.P.), Houston, Texas, for employer/carrier.

Before: HALL, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Compensation Benefits and the Supplemental Decision and Order Granting Attorney Fees (95-LHC-1301) of Administrative Law Judge Richard D. Mills 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a boarding agent, hurt her back on January 22, 1994, when she slipped while boarding a ship on a gangway. Claimant initially thought that she pulled a muscle and did not seek medical attention until the beginning of March 1994, when she consulted

Dr. Gregory, a chiropractor. Claimant alleged that she had a second work accident while boarding another ship on March 17, 1994, which caused her pain in the same spot in her back she injured previously. An MRI performed in May 1994 showed a ruptured disc at C5-6, C6-7, with degenerative changes at C4-5, C5-6, C6-7, and spinal stenosis at C6-7 and C5-6. CX-24 at 13. Claimant consulted various medical providers, giving the date of her accident as either January or March 1994. Claimant was first treated by Dr. Bernauer, an orthopedic surgeon, on April 27, 1994. In November 1995, Dr. Bernauer issued a prescription for claimant to see Freda Whalen, a registered massage therapist specializing in deep tissue massage. Dr. Bernauer also referred claimant to Dr. Kober, a surgeon specializing in thoracic outlet syndrome (TOS), because he suspected that claimant exhibited symptoms of this disease. Dr. Kober ultimately diagnosed bilateral TOS.

On February 1,1994, claimant received a promotion and her monthly salary increased from $1,200 per month to $2,200. For reasons which are not clear from the record, claimant was fired on April 12, 1994. Claimant sought continuing temporary total disability benefits or alternatively, permanent partial disability benefits and reimbursement for past and future medical expenses and physical and massage therapy.

The administrative law judge found that claimant suffered an aggravating injury to her back in March 1994. He further found that claimant established a *prima facie* case of total disability and declined to consider the vocational evidence employer introduced to attempt to establish suitable alternate employment based on the fact that neither Dr. Bernauer nor Dr. Kober had opined that claimant had reached maximum medical improvement and released claimant for work. Accordingly, calculating claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), based on her actual earnings at the time of the second aggravating injury, the administrative law judge awarded claimant continuing temporary total disability benefits commencing April 13, 1994. He also awarded claimant reimbursement of various medical expenses and treatment.

On appeal, employer challenges the administrative law judge's finding that claimant sustained an aggravating injury in March 1994, and argues that claimant's average weekly wage should have been based on her lower earnings at the time of the January 22, 1994, accident. Employer also challenges the administrative law judge's award of continuing temporary total disability benefits, arguing that he abused his discretion in refusing to consider the evidence of suitable alternate employment it submitted. Finally, employer asserts that the administrative law judge erred in awarding claimant reimbursement for massage therapy. Claimant responds, urging affirmance. Employer replies, reiterating its argument that claimant did not have a second aggravating injury, and that her average weekly wage should be based on her earnings at the time of the January 1994 accident. In a supplemental brief, employer also challenges the administrative law judge's award of attorney's fees as premature. Claimant does not respond to employer's arguments relating to the fee.

We reject employer's argument that the administrative law judge erred in finding that claimant sustained a second aggravating injury in March 1994, and in using her higher

monthly earnings at that time as the basis for calculating claimant's average weekly wage. Compensation benefits must be based on claimant's average weekly wage at the time of the injury for which compensation is claimed. A work-related aggravation of a preexisting injury is compensable in itself under the Act and is considered a new injury. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Therefore, average weekly wage in aggravation cases must be based on claimant's earnings at the time of the aggravation. *Id.* Section 10(c) is the proper provision for calculating average weekly wage when an employee has received an increase in salary shortly before injury. *See Mijangos v. Avondale Shipyards, Inc.,* 19 BRBS 15 (1986), *rev'd on other grounds,* 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991); *Le v. Sioux City and New Orleans Terminal Corp.*, 18 BRBS 175 (1986).

In finding that a second aggravating incident occurred on March 17, 1994, the administrative law judge credited the testimony of claimant and that of Mr. Lejeune, her ex-husband. Tr. at 109, 122-129, 131. The administrative law judge also noted that claimant related to Dr. Bernauer that an injury occurred in March 1994 and told Darrell Briscoe, employer's adjuster, of her March injury. He further determined that it was reasonable that claimant related the January rather than the March accident to her doctors, because she experienced the onset of symptoms in January 1994. As the administrative law judge's finding that claimant sustained a second aggravating injury is rational and supported by substantial evidence, we affirm that determination as well as his determination that claimant's average weekly wage was properly calculated based on claimant's $2,200 in actual monthly earnings at that time. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 150 (1991); *Lopez v. Southern Stevedores*, 23 BRBS 295, 298 (1990).

Employer next appeals the administrative law judge's finding that claimant is temporarily totally disabled. We agree with employer that the administrative law judge's finding on this issue cannot be affirmed. The administrative law judge found that claimant established a *prima facie* case of total disability, and this finding is not disputed. The burden of proof thus shifted to employer to establish suitable alternate employment. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Both employer and claimant submitted post-hearing depositions by vocational experts discussing work they deemed suitable for and available to claimant, based on the depositions of Drs. Bernauer and Kober, and the restrictions they imposed on claimant. In finding claimant temporarily totally disabled, however, the administrative law judge relied on the fact that Drs. Bernauer and Kober, whose opinions he credited over that of Dr. George, had not stated that maximum medical improvement had been reached, and had not yet released claimant to return to work.

The fact that claimant has not reached maximum medical improvement does not itself establish entitlement to temporary total disability benefits. *See Mills v. Marine Service*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). Rather, an award of total disability is premised on claimant's inability to perform her usual or alternate work. *See generally Burson v. T. Smith & Son, Inc*., 22 BRBS 124 (1989). Dr. Bernauer, in a deposition of April 19, 1996, taken less than two weeks prior to the hearing,

stated that he believed claimant would achieve maximum medical improvement in "a month or so" and that the restrictions he imposed at that time, *i.e.,* no lifting greater than 25 lbs., no repetitive overhead work above shoulder level, no climbing ladders or repetitive bending or stooping, are about the same as they were going to be upon her reaching maximum medical improvement. CX-20 at 22, 36. Dr. Kober, deposed on April 30, 1996, two days before the hearing, also stated that it is more likely than not that claimant will have reached maximum medical improvement at her next visit and agreed with Dr. Bernauer that claimant's restrictions would remain the same upon reaching maximum medical improvement.[1] CX-23 at 39. Inasmuch as Drs. Bernauer and Kober both opined that claimant's restrictions upon reaching maximum medical improvement, which would occur in the near future, would be the same as when they had provided their testimony, the administrative law judge's decision not to consider employer's evidence of suitable alternate employment is not supported by the record. [2] We therefore vacate the finding that claimant is temporarily totally disabled and remand the case for him to reconsider the extent of claimant's disability based on the vocational evidence of record. *See Mills,* 21 BRBS at 117.

Finally, we reject employer's argument that the administrative law judge erred in ordering it to pay $2,700 for massage therapy services performed by Ms. Whalen between November 1995 and April 1996. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment ... medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's

[1]According to Dr. Kober, claimant could sit, stand or walk for 6 hours a day basically continuously, lift up to 10 pounds zero to 30 percent of the time, bend and squat frequently, could not crawl or climb, could only perform lifting over shoulder level zero to thirty-three percent of the time, and could perform no pushing or pulling. In addition, Dr. Kober opined that claimant had mild restrictions regarding driving. CX-23 at 14-15.

[2]In addition, claimant testified that she performed some consulting work after she was laid off. Tr. at 73.

authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Employer initially argues that the administrative law judge erred in awarding reimbursement of these expenses because massage therapy is not compensable medical treatment under the Act. The administrative law judge, however, rationally found that the question of whether massage therapy is a "medical" treatment covered under the Act is largely irrelevant, as the Board held in *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978), that Section 7(a) also provides for "*other* attendance or treatment." (emphasis added). *See also Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989) (cost of modifying home to accommodate disability); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984) (biofeedback treatment prescribed by physician covered; claimant does not have to show it is medically accepted). In addition, the administrative law judge rationally found that this treatment was necessary based on the fact that it had been prescribed by Dr. Bernauer, claimant's treating physician. Dr. Bernauer opined that it would provide temporary as well as long term relief in that it promotes healing to the muscles, which allows a patient to recuperate faster, and that it was his belief that claimant was improving with the therapy. The administrative law judge also noted that claimant testified that the therapy has given her more relief than anything else, and that it got her to where she was walking and relieved her of her headaches.

Employer also reiterates the argument made below that the $2,700 in massage therapy costs claimed were excessive, particularly when viewed in light of the $1,800 in physical therapy costs incurred from March to April 1996. The administrative law judge, however, also considered this argument below and rationally rejected it based on his crediting of claimant's and Dr. Bernauer's testimony. Tr. at 93; CX-20 at 17-20. Inasmuch as the administrative law judge's findings regarding the compensability, reasonableness, and necessity of the deep massage therapy treatment are rational and supported by substantial evidence, his determination that employer is liable for $2,700 in medical expenses for this treatment is affirmed. *See Day v. Ship Shape Maintenance Co.,* 16 BRBS 38 (1983).

Employer also appeals the administrative law judge's Supplemental Decision and Order Granting Attorney Fees. Claimant's attorney submitted a fee petition seeking approval of attorney's fees for services rendered between July 21, 1994, and December 10, 1996, requesting $18,815 for 188.15 hours of legal services at $100 per hour, plus $7,310.82 in expenses. Employer filed objections. In a Supplemental Decision and Order Granting Attorney Fees dated April 8, 1997, after considering employer's objections, the administrative law judge awarded claimant's counsel a fee of $17,240, representing 172.4 hours of services at $100 per hour and $6, 674.41 in expenses, disallowing the 15.30 hours of services and $131.41 in costs incurred prior to the referral of the case to the Office of Administrative Law Judges on February 24, 1995.

On appeal, employer argues that any award is premature, as the ultimate "extent of recovery" is unknown, citing *Hensley v. Eckerhart,* 461 U.S. 424 (1983), *Farrar v. Hobby,* 506 U.S. 103 (1992), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Inasmuch, however, as employer's only objections

before the administrative law judge dealt with the compensability of various costs and the hourly rate, we decline to address this argument which employer has raised for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) *(en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the administrative law judge's award of continuing temporary total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects the administrative law judge's Decision and Order, and Supplemental Decision and Order Granting Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge