

BRB No. 97-0588

WILLIAM E. CHANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order of Sheldon R. Lipson, Administrative Law Judge, United States Department of Labor.

Michael C. Eisenstein, Baltimore, Maryland, for claimant.

Richard W. Scheiner (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order (94-LHC-2116) of Administrative Law Judge Sheldon R. Lipson 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On January 31, 1994, while working for employer as a tower crane operator, claimant was injured when he slipped and fell several feet while climbing into the cab of his crane. After receiving treatment at Eastern Industrial Medical Center for a contusion and sprain of the right side of the neck and right upper back, claimant was released to return to light duty work. Claimant's Exhibit 11; Transcript at 45-47. Approximately one month later, claimant sneezed while driving, and thereafter experienced increased pain in the same general area of his spine he had injured previously. On June 24, 1994, claimant underwent a right C6-7 partial discectomy and foraminotomy. Claimant's Exhibit 5-C. Employer did not voluntarily pay any benefits. Claimant sought medical benefits under the Act for treatment rendered in connection with his cervical disc herniation as well as temporary total disability benefits for the period in which he was recovering from his surgery.

At the hearing before the administrative law judge, claimant conceded that he suffered from degenerative problems with his spine but attributed his cervical disk herniation and the resultant surgery to his January 21, 1994, work-related accident. Employer contended that claimant's herniated cervical disk resulted from the February 1994 sneezing episode which brought about changes in the cervical spine which had already been compromised by claimant's pre-existing spondylosis and stenosis, and was not related in any way to his industrial injury.

After evaluating the evidence, the administrative law judge determined that the rupture and herniation of claimant's cervical disk was caused by his fall at work on January 31, 1994, and accordingly held employer liable for reasonable and necessary medical expenses. The administrative law judge, however, failed to address claimant's claim for temporary total disability compensation. Claimant thereafter filed a Motion for Reconsideration in which he asked the administrative law judge to correct his "inadvertent omission." On December 20, 1996, the administrative law judge issued an Order summarily denying claimant's Motion, stating that "it contains nothing not previously considered."

On appeal, claimant argues that the administrative law judge erred in failing to address the issue of whether claimant is temporarily totally disabled as a result of the work-related accident. Claimant initially asked that the Board issue a decision awarding temporary total disability benefits from April 28, 1994 through October 1, 1994 based on the administrative law judge's crediting of Dr. Jamaris's testimony. Thereafter, however, claimant filed a Petition for Remand, contending that the case should be remanded for the administrative law judge to address this issue. Employer responds, arguing that as the administrative law judge carefully weighed all the evidence and found that claimant failed to prove his claim for temporary total disability benefits, both in his Decision and Order and in his Order on reconsideration, the Board should affirm his findings. In the alternative, employer contends that if the Board finds that the administrative law judge failed to properly address claimant's entitlement to temporary total disability benefits, the case must be remanded for the administrative law judge's consideration of this issue.

Our review of the record reflects that claimant's entitlement to temporary total disability compensation was raised below but never considered by the administrative law judge. See Transcript at 15-16; Claimant's LS-18. We further note that in finding that claimant's cervical disc herniation was work-related, the administrative law judge accorded determinative weight to the medical opinion of Dr. Jamaris, the Board-certified neurosurgeon who performed claimant's surgery.<sup>1</sup> Dr. Jamaris opined in his August 13, 1994, deposition that claimant has been temporarily totally disabled because of his work-related injury since April 28, 1994, Claimant's Exhibit 6 at 48, and indicated in his August 25, 1994, medical report that claimant was convalescing well from his surgery and could return to full work status on October 1, 1994. Thus, this credited medical opinion does support claimant's claim for temporary total disability compensation. Inasmuch, however, as the Board has no *de novo* review authority, *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994), and the Administrative Procedure Act mandates that decisions rendered by the administrative law judge include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record," 5 U.S.C. §557(c)(3)(A), claimant's motion for remand is granted and the case is remanded for the administrative law judge to consider this issue. See generally *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994).

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<sup>1</sup>In weighing the relevant evidence, the administrative law judge found that Dr. Folgueras's objectivity was in serious question due to his hostility toward claimants and claimant's attorney, a finding which is supported by the record. See, e.g., Employer's Exhibit 14, at 30-31. In addition, the administrative law judge found that the opinions of Dr. Folgueras and Dr. Wenzlaf were entitled to little weight as they both appeared to have underestimated the extent of the injury, even when confronted with the objective test results. Moreover, he found that Dr. Wenzlaff's abandonment of the theory that all of claimant's problems were in his mind came too late to inspire confidence in his ability to determine the cause of claimant's disc rupture. See Decision and Order at 12.

Accordingly, the case is remanded for consideration of claimant's entitlement to temporary total disability compensation consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge