BRB Nos. 02-226
and 02-226A

JOHN DAJNAK	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS	)	DATE ISSUED: Dec. 3, 2002
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
		DECISION and ORDER

Appeals of the Decision and Order and the Order Denying Claimant's Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and the Order Denying Claimant's Motion for Reconsideration of Administrative Law Judge Paul H. Teitler 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 if they are rational, supported by substantial evidence, and 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, on March 6, 2000, sustained a lower back injury during the course of his employment as a mechanic. Employer voluntarily paid claimant temporary total disability benefits from March 7, 2000 to September 4, 2000. Claimant returned to work for employer on September 12, and thereafter worked several days until September 21, when he was unable to complete his assigned job due to back pain. Claimant has not worked since that date. Thereafter, claimant sought continuing temporary total disability benefits under the Act. While employer conceded that claimant sustained a work-related injury on March 6 which resulted in total disability until September 4, 2000, employer contested entitlement to further compensation after that date. At the formal hearing held on June 21, 2001, the record was held open so that the depositions of Drs. Allen and Guttmann could be taken. Following Dr. Allen's deposition, claimant, as a protective measure in the event that any disability subsequent to September 21, 2000, was found to be due to an aggravation on that date of claimant's original work-related back injury, filed a new claim for compensation on July 9, 2001.

[1] At the hearing, the parties stipulated, *inter alia,* that claimant's average weekly wage is $585.

In a Decision and Order dated October 25, 2001, the administrative law judge initially determined that claimant sustained an exacerbation of his back condition on September 21, 2000 which prevented him from working until November 6, 2000, when he was able to perform light work for employer. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from September 22, 2000 to November 6, 2000, based upon his stipulated average weekly wage of $585. 33 U.S.C. §908(b). Thereafter, in an Order Denying Claimant's Motion for Reconsideration, the administrative law judge reaffirmed his finding that claimant was no longer entitled to compensation as of November 6, 2000.

On appeal, claimant challenges the administrative law judge's determination that he is not entitled to ongoing temporary total disability benefits. Claimant contends, in the alternative, that the administrative law judge erred in failing to award temporary total disability compensation until December 18, 2000. Employer, in its cross-appeal, challenges the administrative law judge's award of temporary total disability benefits for the period of September 22 to November 6, 2000. Claimant responds, urging affirmance of the administrative law judge's award for that period of time.

Initially, we address employer's appeal of the administrative law judge's award of temporary total disability benefits for the period of September 22 to November 6, 2000. Contending that any disability during this period was the result of an aggravation sustained on September 21, 2000, employer argues that the administrative law judge lacked jurisdiction to consider a claim for disability resulting from this aggravation. Employer acknowledges that because the same employer and insurance carrier were on the risk on both March 6 and September 21, 2000, employer would be liable for any disability resulting either from the natural progression of the original work-related injury or from a subsequent employment-related aggravation of claimant's condition. *See* Emp. brief at 3 n. 1. *See generally Delaware River Stevedores v. Director, Office of Workers' Compensation Programs [Loftus],* 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002). Employer avers, nonetheless, that affixing the date of injury for the period of disability from September 22, 2000 to November 6, 2000 is necessary for the determination of claimant's average weekly wage and, in the event that claimant should become permanently disabled, for the determination of employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. We disagree.

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[2] On reconsideration, the administrative law judge interpreted Dr. Guttmann's testimony regarding the timeframe in which claimant could return to work to mean that claimant was able to return to work for employer in *full-duty* capacity as of November 6, 2000.

First, employer does not directly challenge on appeal the administrative law judge's reliance on the stipulated average weekly wage of $585, nor does employer suggest that a different average weekly wage would apply if claimant's disability were to be found attributable to an aggravation sustained on September 21, 2000. Next, as claimant has not reached permanency and, indeed, has not been found to have any disability beyond November 6, 2000, any issues relevant to employer's inchoate entitlement to Section 8(f) relief are not ripe for adjudication. *See Parker v. Ingalls Shipbuilding, Inc.,* 28 BRBS 339 (1994). In addition, although employer avers that the administrative law judge decided the case as if he had the aggravation claim before him, we need not reach the question of whether the administrative law judge found that claimant's period of disability from September 22 to November 6, 2000 was the direct result of the initial March 6 work-related injury or the result of a work-related

[3] In this regard, we note that the alleged aggravation occurred in the same calendar year as the first injury, and there is no allegation that claimant's wages changed in the interim.

aggravation on September 21. As previously discussed, employer would be liable for disability benefits under either a theory of recovery based on the natural progression of claimant's March 6 injury or a theory based on a work-related aggravation on September 21. Employer does not assert that claimant was not temporarily totally disabled from September 22 to November 6, 2000. Moreover, employer does not contest that this period of disability was causally related to his employment with employer; on the facts presented, it is immaterial whether the disability was due to the March 6 injury or to a subsequent work-related aggravation. Therefore, as employer has not demonstrated reversible error, the administrative law judge's award of temporary total disability compensation from September 22 to November 6, 2000 is affirmed.

We next address claimant's contention that the administrative law judge erred in finding that claimant could return to his usual employment duties with employer as of November 6, 2000, and, thus, was not entitled to disability compensation after that date. Under the Act, claimant has the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56 (1985). In this regard, in order to establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual employment duties due to his work-related injury. *See, e.g., McCabe v. Sun Shipbuilding & Dry Dock Co.,* 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *Gacki v. Sea-Land Service, Inc.,* 33 BRBS 127 (1998).

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[4] We reject employer's contention that the administrative law judge lacked jurisdiction to adjudicate a claim for a work-related aggravation on September 21, 2000. Employer submitted to the administrative law judge a copy of the protective aggravation claim filed by claimant with the District Director on July 9, 2001. Moreover, employer, in its letter dated August 21, 2001, advised the administrative law judge that the issue of whether claimant had sustained an aggravation on September 21, 2000, had developed in the case. Where a new issue arises before the administrative law judge, he has the authority to consider it where, as here, the parties have notice. 20 C.F.R. §702.336. As employer had notice of the protective aggravation claim filed by claimant, declining to adjudicate the original claim and the aggravation claim together would have resulted in an unnecessary bifurcation of proceedings. *See Mikell v. Savannah Shipyard Co.,* 24 BRBS 100, 107 (1990). *See generally Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT)(1st Cir. 1999). In addition, under these circumstances, claimant could properly amend his original claim to allege an aggravating injury. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 613 n.2, 14 BRBS 631, 633 n. 2 (1982).

In the instant case, the administrative law judge considered the opinions of Drs. Allen and Guttmann, as well as claimant's testimony and the surveillance videotape submitted into evidence by employer, in assessing whether claimant remained disabled from his regular employment after November 6, 2000. In concluding that claimant's physical condition did not preclude him from returning to his usual employment duties as of this date, the administrative law judge credited the opinion of Dr. Guttmann over the contrary opinion of Dr. Allen, on the basis of Dr. Guttmann's superior credentials as a Board-certified orthopedic surgeon and because Dr. Guttmann's opinion was consistent with the surveillance videotape which the administrative law judge found demonstrated claimant performing daily activities with relative ease. *See* Decision and Order at 12-13. Dr. Guttmann, who examined claimant on October 23, 2000, stated that claimant would be able to return to his full duties within the next six weeks. *See* JX 19; EX 1 at 20. In contesting the administrative law judge's denial of continuing temporary total disability benefits, claimant does not directly challenge the administrative law judge's reliance on Dr. Guttmann's opinion that claimant could return to his usual work within the next six weeks. Rather, claimant avers that this case is controlled by the aggravation rule and the Board's decision in *Care v. Washington Metropolitan Area Transit Authority,* 21 BRBS 248 (1988), and that Dr. Guttmann's opinion establishes claimant's entitlement to benefits. *See* Clt's brief at 6-7. Claimant's argument, however, confuses the issue of the cause of claimant's condition with the issue of whether claimant has established a *prima facie* case of total disability. The administrative law judge in the instant case did not find that any back symptoms suffered by claimant after November 6, 2000 were not causally related to his employment. Rather, the administrative law judge found that, as of this date, claimant was no longer disabled by his work-related back condition. Thus, the discussion of the aggravation rule in the context of the causation issue presented in *Care* is inapposite to the case at bar.

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[5] In declining to find Dr. Allen's testimony that claimant is unable to return to his usual work to be persuasive, the administrative law judge observed that, unlike Dr. Guttmann, Dr. Allen is not Board-certified in any medical specialty and, further, that Dr. Allen did not provide meaningful comment regarding the depiction of claimant's physical activities on the surveillance videotapes. *See* Decision and Order at 12-13.

[6] Claimant's further reliance on the Board's decision in *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988) is illustrative of claimant's confusion of the issues of causation and disability. In *Cairns,* the Board's discussion of the aggravation rule related to the causation issue, *i.e.,* whether the claimant's underlying cardiac condition was aggravated by his employment. After holding that causation was established, the Board remanded the case for the administrative law judge to determine the nature and extent of disability caused by the claimant's work-related chest pains.

The *Care* case, however, also presented the issue of the extent of disability and, with respect to that issue, the Board reiterated the established principle that a physician's opinion that a claimant should not return to his usual work because that work would aggravate his condition may support a finding of total disability. *Care,* 21 BRBS 248. *See also Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991). In the instant case, Dr. Guttmann acknowledged that the more strenuous the activity in which claimant engaged, the greater risk of causing a temporary flareup of pain. *See* EX 1 at 28-29. However, unlike the physicians in *Care* who agreed that the claimant *should not* return to his usual work which would aggravate his condition, Dr. Guttmann did not state that claimant should avoid returning to his usual work because of the risk of re-injury. Rather, Dr. Guttmann stated on October 23, 2000, that claimant could return to his full duties within the next six weeks. It is well-established that an administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988), and he is not required to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). As the administrative law judge fully weighed the evidence and as the credited opinion of Dr. Guttmann, as supported by the surveillance videotape, provides substantial evidence to support his findings, we affirm the administrative law judge's conclusion that, as of November 6, 2000, claimant was able to return to his usual work. *See Wheeler,* 21 BRBS 33. Thus, we reject claimant's contention that the administrative law judge erred in failing to award continuing temporary total disability benefits.

We also reject claimant's alternative contention that the administrative law judge erred in failing to award temporary total disability compensation for the period from November 6, 2000 to December 18, 2000. *See* Clt's brief at 8. Claimant's assignment of error is directed to the administrative law judge's finding in his initial Decision and Order dated October 25, 2001, that claimant was able to perform light work as of November 6, 2000. *See* Decision and Order at 13. In making this argument, however, claimant ignores the administrative law judge's clarification of this issue on reconsideration. In his Order Denying Claimant's Motion for Reconsideration, the administrative law judge fully set out Dr. Guttmann's testimony regarding the time frame during which claimant would be able to return to full-duty capacity. The administrative law judge concluded, on the basis of Dr. Guttmann's testimony and the surveillance videotape, that claimant's ability to return to full duty began at the earlier end of the time frame prescribed by Dr. Guttmann for claimant's recovery. *See* Order on Recon. at 2. The Board is not empowered to disturb the reasonable inferences drawn by the administrative law judge merely on the basis that the evidence is susceptible to other inferences. *See, e.g., Norfolk Shipbuilding & Dry Dock Corp. v. Faulk,* 228 F.3d 378, 34 BRBS 71(CRT)(4th Cir. 2000). As the inferences drawn by the administrative law judge from Dr. Guttmann's testimony were reasonable, we affirm the administrative law judge's determination that claimant was able to return to full duty employment on November 6, 2000, and was not entitled to further compensation after that date.

Lastly, claimant's counsel has filed a petition for an attorney's fee for work performed in connection with claimant's appeal, BRB No. 02-226. Claimant has requested a fee of $1,125, representing 4.5 hours for preparation of his Petition for Review and supporting brief at the hourly rate of $250. As claimant was unsuccessful in his appeal to the Board, counsel is not entitled to a fee for the specific hours itemized in his fee petition, which represent services solely related to his unsuccessful appeal. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

[7] The administrative law judge interpreted Dr. Guttmann's testimony to mean that claimant was able to return to full-duty capacity at the end of two weeks from his October 23, 2000 evaluation at the earliest, *i.e.,* November 6, and at the end of six weeks at the latest, *i.e.*, December 4. *See* Order on Recon. at 2 n.1.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge