U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 19-0119
and 0119A

JOHN MIKEN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 12/18/2019
	)	
ICTSI OREGON, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland Oregon, for claimant.

Stephen E. Verotsky (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

Alyssa George (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits (2015-LHC-01330) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law 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 injured his left knee on August 18, 2014, during the course of his employment for employer as a mechanic. He was diagnosed with a torn meniscus and underwent surgery on April 29, 2015. In May 2015, while he was walking with crutches, claimant injured his right shoulder when he fell in his yard. He underwent right shoulder surgery on October 28, 2015. Employer accepted liability for the left knee and right shoulder injuries and voluntarily paid claimant compensation for various periods of temporary total disability, as well as permanent partial disability for a seven percent left knee impairment. 33 U.S.C. §908(b), (c)(2). Employer suspended compensation for two periods due to claimant's failure to attend or complete employer-initiated medical examinations. 33 U.S.C. §907(d)(4). The parties disputed the nature and extent of claimant's right shoulder and left knee injuries, employer's liability for Section 14(e) assessments, 33 U.S.C. §914(e), and employer's suspension of compensation payments.

The administrative law judge determined claimant's left knee injury reached maximum medical improvement on October 15, 2015, with a seven percent permanent impairment. She found claimant's right shoulder injury reached maximum medical improvement on May 23, 2016, until he underwent a new course of treatment beginning July 20, 2016; the shoulder condition returned to permanency on April 24, 2017. Decision and Order at 85, 93-100, 110-113. The administrative law judge denied claimant temporary partial disability compensation, 33 U.S.C. §908(e), for seventeen days he was

absent from work from August 18 to September 25, 2014. *Id*. at 87-88. She found employer established the availability of suitable non-longshore employment as of February 16, 2017,[1] and suitable longshore employment from May 23, 2016 to February 2, 2017, when claimant underwent a right shoulder manipulation, and again from March 14, 2017. *Id*. at 89-92, 108-110. The administrative law judge rejected employer's contention that claimant is not entitled to an unscheduled permanent partial disability award for the secondary right shoulder injury. *Id*. at 101-103. She found employer established claimant could work three days a week as a longshore auto driver as of May 23, 2016, and is entitled to partial disability compensation based on a post-injury wage-earning capacity of $880.32. *Id*. at 118-121; *see* 33 U.S.C. §908(c) (21), (h). Under Section 7(d)(4), 33 U.S.C. §907(d)(4), the administrative law judge determined employer properly suspended its voluntary compensation payments from February 11 to July 14, 2015, and from September 17, 2016 to January 2, 2017, due to claimant's failure to attend or complete employer-initiated medical examinations.[2] *Id*. at 122-133. Finally, she rejected claimant's contention that he is entitled to a Section 14(e) assessment for disability compensation payable for each two-week period from January 6 to February 2, 2015. *Id*. at 135-138.

Claimant appeals the denial of Section 14(e) assessments, the denial of temporary partial disability compensation from August 18 to September 25, 2014, the suspension of compensation payments under Section 7(d)(4), and the findings that his right shoulder condition did not worsen until July 20, 2016 and the auto driving position was suitable longshore employment from July 12, 2016 to February 2, 2017 and from March 13 to April 24, 2017. BRB No. 19-0119. Employer responds, urging affirmance of the administrative law judge's findings on these issues. The Director, Office of Workers' Compensation Programs (the Director), responds that the denial of Section 14(e) assessments is in accordance with law. Claimant has filed a reply brief.

[1] The administrative law judge relied on employer's labor market survey to find two security guard positions and three parking lot attendant positions suitable. Decision and Order at 92.

[2] The administrative law judge awarded claimant various periods of temporary total and partial disability benefits, scheduled permanent partial disability benefits for the knee injury, and ongoing permanent partial disability benefits for the loss of wage-earning capacity due to the shoulder injury. 33 U.S.C. §908(a), (b), (c)(2), (c)(21), (h). She awarded reimbursement to the ILWU-PMA for amounts it paid for claimant's work-related injuries. Decision and Order at 143-146. The administrative law judge found that claimant's arm/hand/neck conditions are not work-related; these findings are not appealed.

Employer cross-appeals the administrative law judge's finding that claimant is entitled to an unscheduled award for his right shoulder injury concurrent with the scheduled award for his knee injury and her determination of claimant's post-injury wage-earning capacity. BRB No. 19-0119A. Claimant responds that employer's contentions are meritless. The Director responds that the administrative law judge's unscheduled award for the shoulder injury is in accordance with law.

Section 14(e)

Claimant challenges the timing of employer's voluntary payment of compensation: on January 28, 2015 for compensation accrued from January 6 to January 20, 2015; and on February 11, 2015 for compensation accrued from January 21 to February 2, 2015. Claimant avers he should receive payment no later than the last day of each two-week disability period. Therefore, he should have received payment for the first period by January 20, 2015, and for the second period by February 2, 2015. Claimant contends he is owed a ten percent assessment for seventeen days of compensation because employer's payment for the first period was received on January 28, 2015, and for the second period on February 11, 2015. The Director responds that no assessment is owed under Section 14(e) when employer makes payment within fourteen days after an installment of compensation becomes "due" on the last day of a two-week compensation period. She contends this application of Section 14(b), 33 U.S.C. §914(b), and 14(e) comports with the language of the statute and results in regular, semimonthly payments to claimant.

Section 14(b) states:

> The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter **compensation shall be paid in installments, semimonthly,** except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

33 U.S.C. §914(b) (emphasis added). Section 14(e) states:

> **If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section,** there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy

> commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e) (emphasis added).

The administrative law judge found that under Section 14(b), installments of compensation are "due" on a semimonthly basis and not on each day of the disability. Decision and Order at 137. Accordingly, she found the disputed payments in this case were "due" on the last day of a two-week period and that, pursuant to Section 14(e), employer thereafter had fourteen days to make a payment without being subjected to the ten percent assessment. She found claimant's contention that payments, in effect, become due on each day of a work-related disability and, in this case, no later than January 20 and February 2, 2015 for the two-week periods ending on those dates is inconsistent with Section 14(b) requiring semimonthly installment payments and Section 14(e) imposing an assessment only when an installment payment is not made within 14 days of its becoming due. *Id*. at 138. Therefore, the administrative law judge denied a Section 14(e) assessment.

We agree with the Director that the administrative law judge properly construed Section 14(b) and 14(e). *See generally Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012) (en banc). She accurately stated, contrary to claimant's contention, that Section 14(b) provides installments of compensation are "due" on a semimonthly basis, rather than daily. Section 14(e) provides that in order to avoid an additional assessment, the installment of compensation must be paid within fourteen days after it is "due." Thus, the administrative law judge properly construed the statute as permitting the employer up to fourteen days from the last day of a semimonthly period in which to pay its installment of compensation in order to avoid a Section 14(e) assessment. We thus affirm the denial of a Section 14(e) assessment.[3]

[3] We reject claimant's assertion that *Baldwin v. Healy-Kruse*, 6 BRBS 418 (1977) is supportive of his contention. In *Baldwin*, the claimant was injured on March 13, 1975. The Board held the employer had fourteen days from March 27, 1976, to make an *initial* payment to avoid a Section 14(e) assessment, i.e., fourteen days after its initial payment was due. *Baldwin*, 6 BRBS at 422. Similarly here, a Section 14(e) assessment is not owed if the installment payment is paid within fourteen days after the end of the semimonthly period, pursuant to Section 14(b). Moreover, we reject claimant's contention that he is entitled to interest on any Section 14(e) assessment as employer's compensation payments were not subject to assessment under Sections 14(b), (e).

Section 7(d)(4)

Claimant appeals the suspension of compensation pursuant to Section 7(d)(4), which provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4). Section 7(d)(4) sets forth a dual test for determining whether compensation payments may be suspended as a result of a claimant's failure to undergo an examination or treatment. *See, e.g., Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). Initially, the burden of proof is on employer to establish the claimant's refusal to undergo treatment is unreasonable. If employer meets this burden, the burden shifts to claimant to show that circumstances justified the refusal. For purposes of this test, the reasonableness of the claimant's refusal is an objective inquiry, while justification is a subjective inquiry focusing on the individual claimant. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

A. Suspension of Compensation from February 11 to July 14, 2015

In challenging the suspension of compensation from February 11 to July 14, 2015, claimant states the January 13, 2015 notice of an employer-initiated medical examination (EME) was deficient under 29 C.F.R. §18.62(a) because it was not delivered thirty days prior to the date of the February 11, 2015 EME, nor did the notice state the doctor's first name or the purpose of the examination. Claimant also avers the administrative law judge unreasonably found employer was entitled to suspend compensation until it received some indication from claimant that he would attend a rescheduled EME.

In response to claimant's objections to the suspension, the administrative law judge rejected claimant's reliance on Section 18.62(a) because this regulation did not take effect until June 18, 2015. Decision and Order at 125. She quoted from the regulation in effect on January 13, 2015, Section 18.19(c)(4), that notice shall "specify the time, place, manner, conditions, and scope of the . . . examination and the person or persons by whom it is to be made." 29 C.F.R. §18.19(c)(4) (2014). She found employer's notice "provided the essential information or that information was obvious from context." Decision and Order at 125. She noted claimant was off work in January 2015 due only to his left knee injury and the scope of the EME was to assess the extent of this injury. *Id*.

The administrative law judge found an ordinary person would have attended the EME and claimant's failure to attend was objectively unreasonable. Decision and Order at 126-127. She determined employer had been timely paying compensation voluntarily at the maximum compensation rate and the statute permits employer to have a physician of its choosing examine claimant. *Id*. She rejected claimant's contention that employer's notice was deficient because he had the date and time of the examination, the name and address of the physician, and its purpose was obvious from the circumstances of claimant being off work due to his left knee injury. *Id*. Moreover, she determined claimant and his attorney had ample time to request additional information; instead, claimant did not inform employer he would not attend, which required employer to pay a cancellation fee. *Id*. at 127.

The administrative law judge next addressed whether claimant's failure to attend the EME was subjectively reasonable. The administrative law judge rejected claimant's stated reasons for not attending,[4] Decision and Order at 127, and determined that his frustration over a missing compensation check[5] was not a subjectively reasonable basis to not attend the EME. *Id*. at 128. She concluded claimant deliberately provoked a controversy with employer, which she found "appears to have stemmed from a sense of entitlement and expectation that [employer] should simply take his word for it or a generalized ire at Employer and/or Carrier." *Id*.

The administrative law judge stated Section 7(d)(4) provides that the period of suspension lasts as long as the refusal continues. Decision and Order at 129. She determined the suspension would terminate at such time as claimant communicated with

[4] In addition to rejecting claimant's arguments that the notice was legally deficient, the administrative law judge rejected his additional reasons for not attending the EME. She found the examination was to take place in the same metropolitan area where claimant resided, that it is irrelevant claimant does not know the physician, and that claimant's satisfaction with his current physician misconstrues the point of an EME, which is to give employer an opportunity to have a physician of its choosing evaluate claimant's condition. Decision and Order at 127. She also found that his counsel's advice to not attend, by itself, does not lend merit to these otherwise inadequate justifications. *Id*.

[5] Claimant testified that he had problems receiving some of his compensation checks. The administrative law judge found the only check that was not cashed and had to be reissued was for November 16 – 29, 2014. She found the check was issued on December 17, 2014, but "was somehow lost and the problem was not that [employer] failed to make payment." The check was reissued on March 18, 2015, and cashed on April 2, 2015. Decision and Order at 13, 128.

employer that he was ready and willing to attend the EME, which did not occur in this case until July 15, 2015. *Id*. She found, given the expense of an EME or a cancellation fee, that employer had good reason not to reschedule the examination absent claimant's indicating he would attend. Accordingly, the administrative law judge found Section 7(d)(4) ceased to bar claimant's entitlement to compensation as of the time he attended an EME on July 15, 2015. *Id*.

We affirm the administrative law judge's suspension of compensation from February 11 to July 14, 2015. She rationally determined that employer's notice scheduling the EME contained sufficient information to alert claimant to the nature of the examination, and that claimant's counsel had ample time from the January 13, 2015 notice until the date of the scheduled EME to ask for clarification of any aspect of employer's notice.[6] Thus, claimant has not established error in the administrative law judge's finding that he unreasonably refused to undergo the EME. Moreover, the administrative law judge permissibly found employer was not obligated to reschedule the EME until it received assurance from claimant that he would attend. In this respect, the record is devoid of evidence indicating claimant agreed to attend prior to the date of the rescheduled EME. Accordingly, we affirm her determination that claimant was not entitled to have his compensation reinstated until he attended the July 14, 2015 EME, as it is rational, supported by substantial evidence and in accordance with law. *See B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007).

B. Suspension of Compensation from September 27, 2016 through January 2, 2017

Employer notified claimant of another EME for his left knee and right shoulder injuries, which was rescheduled at his request to September 27, 2016. Decision and Order at 129. He appeared but refused to complete the intake medical questionnaire or sign a consent form authorizing the EME physician, Dr. Swanson, to conduct a physical examination, conduct imaging studies and access and review his medical records.[7] Dr. Swanson, therefore, refused to examine claimant. On November 8, 2016, Administrative

[6] We note that this period of suspension commenced before the case was referred to the Office of Administrative Law Judges (OALJ) on June 5, 2015. Thus, arguably, the OALJ regulations at 29 C.F.R. Part 18 were not applicable at the time the EME was scheduled. Any error in the administrative law judge's application of Section 18.19(c)(4) is harmless as she properly relied on the dual test under Section 7(d)(4) for determining whether compensation payments may be suspended.

[7] Claimant does not contend the consent to review medical records is overbroad. *See generally Mugerwa v. Aegis Defense Services*, 52 BRBS 11 (2018), *recon. denied*, BRB No. 17- 0407 (Oct. 4, 2018).

Law Judge Dorsey issued an order compelling claimant to complete the questionnaire, sign the consent form, and consent to any x-ray studies that may be required. Claimant attended an EME with Drs. Swanson and Green on January 3, 2017. Employer suspended compensation from September 27, 2016 through January 2, 2017. On appeal, claimant contends he justifiably refused to attend the EME because he was asked to fill out paperwork without his attorney's prior review.

The administrative law judge rejected claimant's contention that he cannot be asked at an EME to complete paperwork his counsel did not pre-approve. Decision and Order at 131. She found that as employer's examining physician can ask claimant questions and examine him without counsel present, counsel's participation is not a prerequisite to claimant's filling out paperwork the physician requires. The administrative law judge determined claimant's refusal to complete Dr. Swanson's pre-examination medical questionnaire was objectively unreasonable. She found claimant was required to provide standard information most physicians request and that much of the requested data was already in his medical records. She found claimant is not entitled to decide the relevancy of the requested information and Dr. Swanson is allowed to obtain contemporaneous answers.

The administrative law judge also determined claimant's refusal to sign the consent form was unreasonable. Decision and Order at 132. She found the form "very clear," as it defines an EME and asked only that claimant authorize Dr. Swanson to examine him and review his medical records. The administrative law judge found that as claimant had previously undergone an EME and understood the process, he should have understood and signed the form. *Id*. She determined that, although prior EME physicians had tolerated claimant's noncooperation with completing pre-examination forms, Dr. Swanson was not obligated to do so. The administrative law judge concluded a reasonable person would have completed the forms and undergone the EME, rather than refusing to cooperate for "trivial reasons." *Id*. For essentially the same reasons, the administrative law judge determined claimant's refusal was not subjectively justified. She concluded employer properly suspended compensation as of September 17, 2016 and reinstated it when claimant completed the pre-examination paperwork and attended an EME on January 3, 2017.[8] *Id*. at 133.

[8] Claimant does not contend that, assuming employer properly suspended compensation, it should have resumed its payments at a date prior to the January 3, 2017 EME.

It is well-established that claimant cannot control the circumstances under which employer's physician will examine him unless his refusal to participate in the examination is subjectively reasonable. *Casbon*, 41 BRBS 101; *Dodd*, 36 BRBS 85; 33 U.S.C. §907(d)(4). In this case, claimant contends his refusal to complete the pre-examination documents Dr. Swanson required was justified because his counsel did not review them, the medical questionnaire was a de facto deposition or interrogatory, and the information that the questionnaire requested was irrelevant. We reject this contention, as the administrative law judge fully addressed it and claimant has not established error in her conclusions. The medical questionnaire requested claimant complete a pain chart and medical history, list current complaints, and record vocational, work, family medical and social histories. EX 158 at 401-403. The administrative law judge also accurately summarized the consent form. Decision and Order at 130; EX 158 at 400. She rationally found the medial questionnaire and consent form are standard documents, most of the requested medical information was already contained in his medical records, and the consent form was easily understood, particularly since claimant had previously undergone an EME. Therefore, we uphold her determination that claimant unjustifiably refused to be examined until employer had claimant's counsel preview the documents. *See Casbon*, 41 BRBS 101. Accordingly, we affirm the suspension of compensation from September 27, 2016 to January 2, 2017.

Claimant also contends the administrative law judge mistakenly commenced the suspension on September 17, 2016. Decision and Order at 133-134, 144. We correct this error, and we commence the suspension on the date of Dr. Swanson's scheduled examination on September 27, 2016. Tr. at 77-78; EXs 150, 151, 157. Accordingly, we modify the administrative law judge's Order to award claimant temporary partial disability from July 20 through September 26, 2016, at a rate of $1,247.91 per week. *See* Decision and Order at 144.

Temporary Partial Disability from August 19, 2014 to September 24, 2014

Claimant contends the administrative law judge erred in denying compensation from August 19 to September 24, 2014, as there is no evidence refuting his testimony that he occasionally missed work during this period to rest his left knee in hope that the pain would resolve. *See* Tr. at 60-61, 113. It is claimant's burden to establish he is disabled by his work injury. *See generally Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

The administrative law judge determined it is insufficient for claimant to show that he took time off because of the injury; he must show he was incapable of performing his usual employment because of that injury in order to be entitled to benefits. Decision and Order at 88. She found it undisputed that claimant did not see a physician during this period and no physician told him to stop working. *Id.* at 87; Tr. at 60-61; EX 73 at 241-

246. Moreover, she found claimant's retrospective accounts not credible.[9] *Id.*; *see* Decision and Order at 55-58. She found claimant was able to perform his job for continuous periods between August 19 and September 24, 2014, "including five days in a row with two days of 13 hours or more, a day off, a 12-hour shift, a holiday, and two days of over 13 hours of work," which is not indicative of an inability to perform the job. Decision and Order at 88. She also relied on claimant's not seeing a physician before September 24, 2014, and no physician opining retrospectively that he was unable to work during this period. Accordingly, the administrative law judge concluded claimant did not show he was unable to earn the same wages he earned prior to his work injury, he was not disabled, and he is not entitled to disability compensation during this period. *Id.*

In *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, stated "our court will interfere only where the credibility determinations conflict with the clear preponderance of the evidence, or where the determinations are inherently incredible or patently unreasonable." *Ogawa*, 608 F.3d at 642, 44 BRBS at 47(CRT); *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge is vested with the authority to make findings of fact and to draw rational inferences from the record; the Board may not substitute its views for those of the administrative law judge. *See, e.g., Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). In this case, based on the finding that claimant lacks credibility and the absence of supporting medical evidence or a physician's opinion that he missed work due to his knee injury, the administrative law judge rationally declined to give weight to claimant's testimony that because of his knee injury he missed seventeen days of work. Accordingly, we affirm the denial of temporary partial disability compensation as it is supported by substantial evidence.

[9] The administrative law judge determined claimant has limited credibility and gave his testimony only "some weight." Decision and Order at 55. She found claimant behaved over the course of the claim "in an overly calculated manner and impeded investigation." *Id.* In this regard, the administrative law judge found claimant has not been fully cooperative with any of the EMEs and determined "the derivative consequence of this pattern of behavior is that I do not trust Claimant's accounts, both to his doctors and at the hearing." *Id.* at 58.

Onset Date of Right Shoulder Temporary Disability

Claimant avers the administrative law judge erred in finding his right shoulder worsened on July 20, 2016, instead of July 12, 2016 per Dr. Wagner's opinion. We disagree.

The administrative law judge stated the parties agreed claimant's right shoulder injury reached maximum medical improvement on May 23, 2016; however, claimant alleged his disability became temporary again on July 12, 2016, when Dr. Wagner diagnosed a recurrence of adhesive capsulitis. Decision and Order at 81. The administrative law judge determined Dr. Wagner's July 12 report "does not mark a change in the nature of Claimant's disability," and his agreement in a letter claimant's counsel wrote on July 26, 2017, that the right shoulder was no longer stationary on July 12, 2016, was given "limited weight" in light of the circumstances under which it was generated. *Id.* at 82. The administrative law judge found the fact that no additional treatment was prescribed at that time is significant; rather, Dr. Wagner ordered an MRI for further investigation. *Id.*; *see* EX 142 at 374-375. Dr. Wagner's office contacted claimant on July 20, 2016, after the MRI was completed on July 13, 2016, and advised claimant to alter his physical therapy regimen to work more on his right shoulder range of motion. EX 147 at 382. Pursuant to *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016), the administrative law judge found claimant's disability became temporary once claimant was given a treatment plan for improving his right shoulder condition on July 20, 2016. Decision and Order at 83.

In *Carrion*, the Ninth Circuit stated the start of a new "healing period functions as a 'reset' button for a disability previously determined to be permanent." *Carrion*, 821 F.3d at 1173, 50 BRBS at 63(CRT) (quoting *Pacific Ship Repair & Fabrication, Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 1186, 46 BRBS 35, 37(CRT) (9th Cir. 2012)). Pursuant to this holding, the administrative law judge permissibly deferred re-categorizing claimant's disability from permanent to temporary until he was actually prescribed a treatment regimen for his adhesive capsulitis on July 20, 2016. *Carrion*, 821 F.3d at 1173, 50 BRBS at 63(CRT). Therefore, we affirm the administrative law judge's finding that the nature of claimant's shoulder disability changed from permanent to temporary on July 20, 2016, when he was provided with a course of treatment for the worsening of his shoulder condition.

Suitable Alternate Employment from July 12, 2016 to April 24, 2017

Claimant summarily contends he was unable to work as a longshore auto driver from the date his shoulder condition worsened in July 2016 until his treatment concluded on April 24, 2017. The administrative law judge rejected this contention, finding claimant

was not under any additional restrictions during this period that affected his ability to work as an auto driver. We affirm.

Although claimant's shoulder condition became more painful and required treatment in July 2016, he was not given any physical restrictions to his shoulder until he was taken off work for six weeks commencing February 2, 2017 when Dr. Wagner performed a shoulder manipulation under anesthesia.[10] Drs. Wagner (in July 2017) and Swanson (in January and October 2017) stated that claimant's then-current restrictions would have been those in effect from May 2016, except for the total disability period. EXs 194 at 811-813; 196 at 886-887. Dr. Wagner restricted claimant from climbing ladders, repetitive lifting, or lifting over twenty pounds above shoulder level. CX 12 at 39. Dr. Swanson opined that claimant should not perform repetitive lifting, or lifting over fifteen pounds above shoulder level. EX 185 at 744-745. The administrative law judge determined the driving jobs were compatible with these restrictions, a finding claimant does not challenge. Decision and Order at 108-109; Cl. Br. at 27. The administrative law judge found significant that, when claimant had an opportunity to depose Dr. Wagner, he did not elicit testimony indicating his right shoulder work restrictions in July 2016 were more significant. Decision and Order at 109. She thus concluded claimant was capable of working as an auto driver from May 23, 2016 to February 1, 2017, and from March 14, 2017 on. *Id*. at 109-110.

It is well-established that an administrative law judge is entitled to weigh the evidence and make reasonable inferences from the evidence. *See Ogawa*, 608 F.3d at 650, 44 BRBS at 49(CRT). The Board is not empowered to reweigh the evidence and must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g.*, *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). As the opinions of Drs. Wagner and Swanson support the administrative law judge's finding that claimant was capable of working as an auto driver from May 23, 2016 to February 1, 2017, and again from March 14, 2017 on, it is affirmed. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

[10] The administrative law judge relied on a work note in Dr. Wagner's records to find that claimant was unable to work between February 2 and March 13, 2017, and that his "off-work status" was not continued when he was examined by Dr. Wagner on March 14, 2017. Decision and Order at 109; CXs 10 at 34-36; 11 at 37; EX 168 at 481-482; *see* EX 174 at 682-683.

Unscheduled Permanent Partial Disability Award

Employer challenges the administrative law judge's finding that claimant is entitled to both a scheduled permanent partial disability award for his left knee injury and an unscheduled permanent partial disability award for his consequential right shoulder injury. Employer acknowledges the right shoulder injury occurred as a consequence of the work-related left knee injury, but contends it is not separately compensable. Employer avers *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985) and *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995) support its position.

We reject employer's contention. Consequential injuries are compensable under the Act. 33 U.S.C. §902(2); *Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017); *cf. Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454 (9th Cir. 1954) (secondary injury due to intervening cause is not compensable). The method of compensability of the initial injury determines the method by which the secondary injury is compensable. In *Long* and *Ward*, the claimants sustained non-scheduled work injuries which resulted in consequential injuries to scheduled body parts. In *Long*, the Ninth Circuit held that under such circumstances, the claimant cannot receive a scheduled award at all, as the schedule applies only when the work accident itself injured the scheduled body part. *Ward* followed this precedent in a case in which the claimant's work-related neck injury resulted in an arm/hand impairment. Critically, under such circumstances, the consequential injury is compensated in any loss of wage-earning capacity award under Section 8(c)(21), (h). *Long*, 767 F.2d at 1582, 17 BRBS at 152(CRT).

This case presents the "opposite" facts, and the Board's decision in *Bass v. Broadway Maint.*, 28 BRBS 11 (1984) is directly on point. Here, and in *Bass*, the work injury was to a scheduled member and it resulted in a consequential injury to a non-scheduled member. The Board held in *Bass* that under such circumstances, a claimant is entitled to a scheduled award for the anatomic impairment to the scheduled member and a Section 8(c)(21) award for the consequential injury to the unscheduled member based solely on the loss of wage-earning capacity caused by that consequential injury.[11]

Contrary to employer's contention, the administrative law judge correctly determined that *Bass* is directly on point and that claimant is entitled to a separate award

[11] Under such circumstances, the administrative law judge properly recognized that if the two awards run concurrently, the combination of the two awards cannot exceed the statutory maximum compensation rate for total disability. *See* Decision and Order at 134-135; *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999).

for his right shoulder injury based on his loss of wage-earning capacity due to this injury. Therefore, we affirm the unscheduled award for claimant's right shoulder injury as it is in accordance with law. *Bass*, 28 BRBS at 17-18.

Post-Injury Wage-Earning Capacity

Employer challenges the administrative law judge's determination that claimant has a residual wage-earning capacity of $880.32 per week based on her finding that claimant could work three days a week as an auto driver. Employer avers its evidence shows claimant could work 3.25 days a week, which corresponds to a residual wage-earning capacity of $953.68 per week.

An award for permanent partial disability in a case the schedule does not cover is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT). Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h).[12] The objective of this inquiry is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Petitt v. Sause Bros.*, 730 F.2d 1173, 47 BRBS 35(CRT) (9th Cir. 2013); *Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). An administrative law judge has significant discretion in determining a reasonable post-injury wage-earning capacity under Section 8(h). *See, e.g., Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

---

[12] Section 8(h) provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h) (emphasis in original).

The administrative law judge relied on raw data from PMA's dispatch records for auto driver positions from May 23, 2016 to October 13, 2017. Decision and Order at 119. She found claimant would have been able to work as an auto driver for 2.45 days per week during this period because PMA's records established B-registered or casual longshoremen were able to obtain work as an auto driver this many days per week, and claimant is A-registered and has seniority over these workers. *Id*. She found there were fifty-eight days when only A-registered longshoreman obtained work as an auto driver. She determined claimant would have worked an average of 3.25 days per week only if he had been selected to work as an auto driver on each of these fifty-eight days. However, the administrative law judge also noted the testimony of employer's vocational expert, Roy Katzen, that claimant would have been able to work at least three days a week, and she thus concluded employer established claimant would have worked an average of three days a week. *Id*.; Tr. at 145; EX 167 at 479-480.

The administrative law judge is vested with the authority to make findings of fact and to draw rational inferences from the record; the Board may not substitute its views for those of the administrative law judge. *See, e.g., Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). Mr. Katzen's testimony supports the administrative law judge's finding that claimant would not have obtained work as an auto driver on each of the fifty-eight days when only A-registered longshoreman had the seniority to work as an auto driver. Therefore, as PMA's dispatch records and Mr. Katzen's testimony support the administrative law judge's finding that claimant could work three days a week as an auto driver, we affirm her conclusion that claimant has a post-injury wage-earning capacity of $880.32. *See generally Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *Mangaliman*, 30 BRBS 39.

Accordingly, we modify the administrative law judge's Decision and Order Awarding Benefits to award claimant compensation for temporary partial disability for the period from July 20 through September 26, 2016. In all other respects, we affirm the administrative law judge's decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge