BRB Nos. 05-0731
and 05-0731A

WILLIAM B. KEALOHA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LEEWARD MARINE, INCORPORATED	)	DATE ISSUED: 05/31/2006
	)	
and	)	
	)	
HAWAII EMPLOYERS MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
Cross-Petitioners	)	DECISION and ORDER

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

Joshua T. Gillelan II (Longshore Claimants' National Law Center Service), Washington, D.C., and Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Thomas C. Fitzhugh III, Bradley T. Soshea, and Nicholas W. Earles (Fitzhugh, Elliot & Ammerman, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Amended Decision and Order Awarding Medical Benefits (2003-LHC-2564) of Administrative Law Judge Jennifer Gee 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 fell approximately 25 to 50 feet while working for employer on September 4, 2001, and he was diagnosed with a rib fracture of his tenth rib, a right scapula fracture, a scalp laceration, and an abrasion on his left flank area, as well as pain in his thoracic spine, lumbar spine and left knee. Dr. Yu released claimant to return to light duty work as of September 17, 2001, and then to his regular duty as of September 23, 2001. Employer, however, did not have any light-duty work available, prompting its voluntary payment of temporary total disability benefits from September 4, 2001, until claimant's return to full duty on September 24, 2001.

Upon his return, claimant began working more hours, including overtime, and thus earned more money than he had prior to his September 4, 2001, accident. He continued to work for employer until November 27, 2001, when he left, because work "got slow," for a steady position as a parts assembler with Abe's Auto Recycling (Abe's). Hearing Transcript (HT) at 390, 396-97. Dr. Yee subsequently removed claimant from work as of October 27, 2002, but released him to return to full-duty work as of December 11, 2002, concluding that "apparently the patient's injuries have healed."[1] CX 7. Claimant returned to his position at Abe's until February 8, 2003. CX 19. On that date, he attempted to take his own life by shooting himself in the head causing extensive injuries. EX 172. Claimant subsequently sought disability and medical benefits related to his suicide attempt and resulting injuries.

In her amended decision,[2] the administrative law judge found that employer has paid claimant benefits for all appropriate periods during which he could not work because of his original work injuries, *i.e.*, September 4, 2001, through September 23, 2001, and from October 27, 2002, through December 11, 2002. The administrative law

[1] Employer voluntarily paid temporary total disability benefits from October 27, 2002, until December 11, 2002.

[2] The administrative law judge issued her original Decision and Order Awarding Medical Benefits on April 13, 2005. Employer filed a petition for reconsideration accompanied by evidence of its payment of certain medical charges it had been previously ordered to pay by the administrative law judge. In an order dated May 25, 2005, the administrative law judge granted employer's petition with regard to certain medical bills, and admitted the new evidence into the record. As a result, she issued an Amended Decision and Order Awarding Medical Benefits which, with the exception of a modification to reflect employer's payment of certain medical charges that she had previously ordered employer to pay, replicates her original decision verbatim.

judge determined, however, that as claimant's suicide attempt did not constitute a natural and unavoidable result of the September 4, 2001, work injury, his resulting injuries are not work-related. In the alternative, the administrative law judge determined that as claimant willfully intended to take his own life on February 8, 2003, Section 3(c), 33 U.S.C. §903(c), bars his claim for benefits related to that event. The administrative law judge found claimant entitled to medical treatment for his work-related left knee condition, including payment of certain unpaid medical bills related to such treatment. The administrative law judge also found that employer is not liable for an additional ten percent assessment on the temporary total disability benefits, pursuant to Section 14(e), 33 U.S.C. §914(e). Lastly, the administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), as there is no finding that claimant's sustained a permanent disability as a result of his September 4, 2001, work-related injury.

On appeal, claimant challenges the administrative law judge's denial of benefits for the injuries resulting from claimant's February 8, 2003, suicide attempt. Claimant also challenges the administrative law judge's calculation of his average weekly wage, and the denial of a Section 14(e) assessment. Employer responds, urging affirmance. In its cross-appeal, employer challenges the administrative law judge's findings that it is liable for a medical bill to Waianae Coast Comprehensive Clinic, as well as an attorney's fee to claimant's counsel for services performed in this case. Claimant responds, urging affirmance.

Causation

Claimant argues that the administrative law judge's denial of benefits for injuries related to his February 8, 2003, suicide attempt is based on an incorrect legal standard regarding causation. Specifically, claimant contends that the administrative law judge erred by requiring claimant to establish that his September 4, 2001, work accident "alone" led to his February 8, 2003, suicide attempt, as the appropriate standard merely requires that the original work injury be a cause of the subsequent suicide attempt.

An injury is compensable under the Act if it arises out of and in the course of employment. 33 U.S.C. §902(2). In establishing that an injury is causally related to employment, claimant is aided by the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Once the Section 20(a) presumption has been invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition is not related to his employment. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must

establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[3] *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Moreover, employer is liable for any sequela of the work injury, *i.e.*, employer is liable if the work injury caused or aggravated claimant's psychological condition, leading to a suicide attempt. *See generally Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989).

We agree with claimant that the administrative law judge applied incorrect legal standards in addressing whether claimant's suicide attempt was due at least in part to the work injury. In this regard, the administrative law judge stated: 1) that "there is no evidence of *any unusual stress* caused by the litigation," Decision and Order at 13 (emphasis added); 2) that the anxiety which claimant felt from his pending deposition "is a stressor that will be experienced *by anyone* who has never been involved in litigation," Decision and Order at 13 (emphasis added); 3) that "I am not persuaded that it was the litigation of this case, *alone*, that led to the suicide attempt," Decision and Order at 13 (emphasis added); and 4) that "although the litigation process *may have contributed to claimant's overall stress and instability*, there is substantial evidence that there were other longstanding and more significant stresses in claimant's life," Decision and Order at 14 (emphasis added). In contrast to the administrative law judge's decision, claimant is not required to show unusually stressful conditions, in this case prompted by claimant's work injury, in order to establish a *prima facie* case. *Sewell v. Noncommissioned Officers Open Mess*, 32 BRBS 127 (1997), *reconsideration en banc denied*, 32 BRBS 127 (1998). Even where stress caused by work is relatively mild, the claimant may recover if a resultant injury and disability occur. *Sewell*, 32 BRBS 127; *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); 1B Larson's Workers' Compensation Law, section 42.25 (f), (g). That anxiety, or any other condition, can be experienced by anyone is also not relevant, as the issue involves the effect of working conditions on this claimant, and employer takes its employees as he finds them with any pre-existing frailties. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1988).

Under the well-established aggravation rule, therefore, the administrative law judge erred in focusing on whether claimant's fall at work or related stress was the "sole" cause of claimant's psychological condition and suicide attempt. The appropriate legal standard is whether claimant's work was "a" cause of the psychological condition which led to the suicide attempt, not "the" cause of the condition. *Konno*, 28 BRBS 57; *see generally Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (work injury results in psychological problems, leading to suicide). In

---

[3] The administrative law judge's finding, as supported by the opinions of Drs. Roth and Bussey, that "the stresses that prompted claimant's suicide attempt existed before his September 4, 2001, fall," Decision and Order at 20, necessarily requires a consideration as to whether claimant's September 4, 2001, work injury aggravated or contributed to his pre-existing condition.

this regard, the administrative law judge erred in applying the standard in *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954), to require that claimant's injuries from his suicide attempt must be the natural and unavoidable result of his September 4, 2001, fall. Decision and Order at 20. *Cyr* involved an injury resulting when a claimant with an injured leg chose to climb a ladder, resulting in further injuries. The issue thus concerned the appropriate standard where there is an unrelated intervening cause of injury. In the present case, the issue concerns whether claimant's psychological condition and related suicide attempt arose out of his employment. Under the aggravation rule, this standard may be met if the work injury aggravated claimant's psychological condition and his psychological condition then led to his attempted suicide.

For these reasons, we must vacate the administrative law judge's finding that claimant's suicide attempt was not related to the work injury and remand the case for further consideration of this issue. *See generally Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998). On remand, the administrative law judge must address the issue of whether claimant's February 8, 2003, suicide attempt is related to his work for employer pursuant to the appropriate standard under Section 20(a) of the Act. Specifically, as the administrative law judge properly invoked Section 20(a), on remand she must reconsider whether employer introduced substantial evidence to establish rebuttal of Section 20(a) under the aggravation rule, which requires consideration of whether claimant's work injury aggravated his psychological condition. If rebuttal is established, the presumption drops from the case and the administrative law judge must resolve the issue of causation on the evidence of record as a whole, with claimant bearing the ultimate burden of persuasion. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If on remand the administrative law judge determines that claimant's February 8, 2003, suicide attempt is not causally related to his work injury, then claimant is not entitled to benefits related to that incident. However, as the administrative law judge, after applying the appropriate standard, may determine that claimant's suicide attempt was related to his work injury, we will address claimant's contentions regarding the administrative law judge's findings at Section 3(c).

Section 3(c)

Claimant asserts that the administrative law judge's denial of compensation for claimant's suicide attempt under Section 3(c) is erroneous. Specifically, claimant contends that the administrative law judge committed legal error in that she did not address the effect of the presumption at Section 20(d) of the Act, 33 U.S.C. §920(d), nor did she address the relevant standard of willfulness.

Section 3(c) sets forth the following exclusion from coverage for an employee's disability resulting from an injury arising under the Act:

> No compensation shall be payable if the injury was occasioned . . . by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. §903(c). Section 20(d) of the Act affords a claimant the benefit of the presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. §920(d). The Section 20(d) presumption complements the Section 3(c) inquiry into whether the injury was occasioned by claimant's willful intention to injure himself. *Maddon v. Western Asbestos Co.*, 23 BRBS 55, 61 (1989). Specifically, where a claimant's suicide attempt is not due to a "willful intent" to kill oneself but results from an irresistible suicidal impulse resulting from a work-related condition, Section 3(c) does not bar the compensation claim. *See Potomac Elec. Power Co.*, 607 F.2d 1378, 10 BRBS 1048; *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951); *see also Terminal Shipping Co. v. Traynor*, 243 F.Supp. 915 (D.Md. 1965); *Konno*, 28 BRBS 57.

In the instant case, the administrative law judge found that while Drs. Roth and Bussey each opined that claimant exhibited behavior suggesting that his suicide attempt may have been an instance of impulse dyscontrol, "there is ample evidence that the claimant did not experience impulse dyscontrol, but rather, that he planned and intended to kill himself." Decision and Order at 21. The administrative law judge concluded that claimant's actions before and on February 8, 2003, reveal that he had been planning and thinking about killing himself prior to the moment he shot himself. She thus rejected claimant's theory that the suicide attempt was an instance of impulse dyscontrol and concluded that Section 3(c) bars claimant's claim for benefits related to his February 8, 2003, suicide attempt because he intended to kill himself.

The administrative law judge is entitled to weigh the evidence of record and she need not credit the opinion of any particular medical examiner. *Walker v. Rothschild Int'l Stevedoring Co.,* 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975). Nonetheless, we cannot affirm the administrative law judge's conclusion, as she did not address, or afford claimant the benefit of, the Section 20(d) presumption in discussing Section 3(c). Section 20(d) places on employer the burden to establish that claimant willfully intended to kill himself. Additionally, the administrative law judge did not specifically address the "willfulness" of claimant's actions leading up to his suicide attempt on February 8, 2003. In particular, the administrative law judge's analysis is flawed as, in contrast to her consideration of this issue, evidence of the planning of claimant's suicide attempt alone is not enough to show "willful" intent. The key factor is whether the evidence of record establishes that claimant's psychological condition led to the impulse to commit suicide, *i.e.*, whether claimant's illness was so severe that he was unable to form the willful intent to act. *See generally Voris*, 190 F.2d 929; *Konno*, 28 BRBS 57; *Maddon*, 23 BRBS 55.

The administrative law judge also mischaracterized Dr. Roth's overall opinion regarding claimant's intent in making his suicide attempt. In her recitation of the

evidence, the administrative law judge acknowledged Dr. Roth's statement that claimant "impulsively shot himself" as a result of increased depression, anxiety, and frustration arising from his September 4, 2001, work injuries. She relied however on Dr. Roth's statement that claimant, on the day of his suicide attempt, was coming to a "resolution of no longer – definitely not any longer wanting to live," as evidence that claimant exhibited a willful intent to commit suicide on February 8, 2003. Amended Decision and Order at 21-22. A review of the record, however, reveals that this assessment of Dr. Roth's opinion is not accurate, as he made repeated statements at deposition indicating that he believed claimant's suicide attempt was an impulsive, rather than premeditated, act.[4]

Therefore, we must vacate the administrative law judge's finding that Section 3(c) bars claimant's claim as she did not completely apply the appropriate standard, and we remand this case for further consideration. On remand, the administrative law judge must afford claimant the benefit of the Section 20(d) presumption, and render findings in terms of whether employer established that claimant's actions, in attempting suicide on February 8, 2003, were "willful." In this regard, the administrative law judge must determine whether claimant was capable of forming the willful intent to commit suicide given his psychological condition. In making this determination, the administrative law judge should fully and accurately address the opinions of Drs. Roth and Bussey. *See* n. 4 *supra*.

Average Weekly Wage

Claimant asserts, citing *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), that the administrative law judge erred in rejecting his proposed average weekly wage figure which was based on his earnings with employer both before and after the September 4, 2001, injury. Claimant contends the circumstances in this case, *i.e.*, that claimant had only briefly worked for employer pre-injury and his post-injury employment resulted in higher wages, warrant such a consideration in the calculation of that figure.

---

[4] Dr. Roth's statements include: "I do see what he did as more of an impulsive act as opposed to premeditated, you know, planned in the strict sense." EX 41, Dep. at 145. "I think there was impulsivity involved" as "the guy's wanting out, and I see him as not making this decision with any kind of, you know, significant premeditation, so there's an element of what I'm calling impulsivity with regards to that shooting." *Id.* at 164-65. Claimant was "impulsively intent upon killing himself, as opposed to, you know, like intent upon killing himself." *Id.* at 169. "It wasn't like premeditated or having thought it out in intending to kill himself." *Id.* at 169-70.

The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury.[5] *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). In the instant case, the administrative law judge found that since claimant's work for employer was intermittent, all 22 weeks preceding the September 4, 2001, injury were relevant to calculating his pre-injury average weekly wage. The administrative law judge then took claimant's earnings during that period, $4,578.75, and divided that figure by the corresponding 22 weeks, to conclude that claimant's pre-injury average weekly wage was $208.13.

The record herein reveals that claimant's earnings increased substantially upon his return to work on September 24, 2001. Specifically, as the administrative law judge observed, he "earned gross weekly wages of $790, $775, and $857.50 within the first 2 months of returning to work with employer *after* the fall." Decision and Order at 5 (emphasis in original). In contrast, the administrative law judge found that "in the 22 weeks *before* his fall, the claimant's highest gross weekly wage was $589.50." *Id.* The increase in claimant's average weekly wage, post-injury, was attributed to the fact that after returning to work, "claimant took opportunities to work overtime." *Id.* The administrative law judge, however, summarily rejected the use of claimant's post-injury earnings "because average weekly wage for benefits is not based on post-injury wages." Decision and Order at 27.

In *Palacios*, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, held that under Section 10(c), "a determination of earning capacity does not preclude consideration of circumstances existing after the date of injury where previous earnings of the disabled employee do not realistically reflect his or her true earning potential." *Palacios*, 633 F.2d at 843, 12 BRBS at 808. The court added that in determining earning capacity under Section 10(c), it is necessary to consider claimant's "ability, willingness, and opportunity to work." *Id.* As the administrative law judge did not analyze this issue, we vacate her average weekly wage determination and remand for further consideration as to whether claimant's post-injury earnings for employer should be considered in calculating his average weekly wage. *See generally Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319, 322 (D.C. Cir. 1986); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sub nom., Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 14(e)

Claimant contends that the administrative law judge erred in denying an assessment under Section 14(e) of the Act, on benefits employer paid for the period of

[5] Section 10(c) applies if Sections 10(a) or 10(b), 33 U.S.C. §910(a), (b), cannot be reasonably or fairly applied. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). No party contends that Section 10(a) or Section 10(b) applies in the instant case.

total disability spanning October 27, 2002, through December 11, 2002, or at least through November 20, 2002. Claimant argues that the administrative law judge incorrectly considered the relevance of when employer first became aware of claimant's claim for compensation for the period in question.

Section 14(e) mandates that if an employer fails to pay benefits in accordance with Section 14(b) or to timely controvert the claim in accordance with Section 14(d), then it shall be liable for a 10 percent assessment added to unpaid installments of compensation. *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). Where an employer has been making voluntary compensation payments under the Act, the previously injured employee returns to his job, and employer terminates payments, a notice of controversion need not be filed by employer until 14 days after the date that the dispute arises over additional compensation. *DeNoble v. Maritime Transportation Management, Inc.*, 12 BRBS 29 (1980); *Lozupone v. Stephano Lozupone and Sons*, 12 BRBS 148 (1979); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); *see also Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3rd Cir. 1978). It is necessary, therefore, to know the date when the dispute over additional compensation arose between the parties. *See Caraballo v. Northeast Marine Terminal Co., Inc.*, 11 BRBS 514 (1979).

In addressing claimant's entitlement to a Section 14(e) assessment for the period of compensation spanning October 27, 2002, through December 11, 2002, the administrative law judge initially acknowledged that there was a delay in payment of claimant's benefits for the period between October 27, 2002, through December 11, 2002, and that claimant was not fully compensated for that period until August 20, 2003. The administrative law judge found, however, that there is no evidence that employer was aware of claimant's claim for compensation for the period between October 27, 2002, and December 11, 2002, until the date of the informal conference on November 20, 2002, at which time it challenged the claim. The administrative law judge thus found that there was no failure by employer to controvert the claim in a timely fashion and thus she concluded that claimant is not entitled to a Section 14(e) assessment on the temporary total disability benefits for the period in question.

As claimant contends, the administrative law judge's discussion of Section 14(e) in terms of employer's awareness of the claim for additional benefits is incorrect, as the pertinent date in this case is the date the dispute over additional compensation arose between the parties rather than when claimant filed his claim. *Caraballo*, 11 BRBS 514. Nonetheless, any error in this regard is harmless, as the dates coincide. Claimant left employer for a position with Abe's on November 27, 2001. Claimant continued at Abe's until Dr. Yee removed him from work beginning on October 27, 2002, and ending on December 11, 2002. Given that claimant no longer worked for employer at this time, there is evidence that employer did not become aware of the new controversy until November 20, 2002, the date of the informal conference. Employer had no reason to know of claimant's treatment with Dr. Yee, since it had previously authorized claimant to

see Dr. Yu for any further treatment resulting from his September 4, 2001, fall. Furthermore, claimant's claim form dated March 3, 2002, which is the underlying documentation leading up to the November 20, 2002, informal conference, could not have addressed claimant's subsequent period of total disability between October 27, 2002, and December 11, 2002. CX 1. Thus, it was not until the informal conference that employer became aware that there was a dispute regarding additional total disability compensation for the period commencing on October 27, 2002. At that time, employer indicated that it had "insufficient medical information available to fairly evaluate whether the current temporary total disability" is due to the September 4, 2001, injury, and the district director observed that "carrier will not accept temporary total disability" without further records. *Id.* This supports the administrative law judge's finding that employer "challenged the claim" at the time of the informal conference. Decision and Order at 24. The administrative law judge's reference to employer's knowledge of the claim is therefore harmless error since the facts establish that employer was not aware of a controversy over additional benefits until the informal conference.

Moreover, employer's liability for a Section 14(e) assessment terminates on the date the Department of Labor knew of the facts that a proper notice of a controversy would have revealed. *See National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979). The latest date for such knowledge is the date of the informal conference. *Id.*; *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). Thus, given that employer's date of awareness regarding the controversy over additional benefits coincides with the date of the informal conference, employer cannot be held for a Section 14(e) assessment. *Id.* We therefore affirm the administrative law judge's denial of a Section 14(e) assessment for the period claimant was entitled to total disability benefits from October 27, 2002, through December 11, 2002.

Medical Benefits

In its cross-appeal, employer argues that the administrative law judge erroneously ordered it to pay the Waianae Clinic bill and interest on that bill. Employer maintains that at the time of the hearing, the bill was no longer outstanding since the Waianae Clinic had already written off that expense. Employer additionally contends that claimant did not put forth any evidence to establish that the services underlying that bill were reasonable or necessary, or that claimant sought prior authorization from employer for the treatment in question.

In her original decision, the administrative law judge found employer liable for a number of unpaid medical bills for claimant's treatment following his September 4, 2001, fall, including a bill for a September 10, 2001, evaluation by Dr. Murray at the Waianae Coast Comprehensive Clinic (Waianae Clinic). CX 14. On reconsideration, employer submitted documentation of prior payment with regard to a number of the bills, prompting the administrative law judge to modify her original decision to reflect the payments. The administrative law judge, however, rejected employer's assertion that it

could not be liable for the Waianae Clinic charge as Dr. Roth testified that the Waianae Clinic had written off the bill only after waiting unsuccessfully for a year for payment. The administrative law judge thus found that as the services were provided to claimant in conjunction with his September 4, 2001, work injury, and since the bill was unpaid at the time of the hearing, she would not modify her prior order regarding employer's liability for that particular bill. The administrative law judge further ordered, pursuant to *Hunt v. Director*, *OWCP,* 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), that employer pay interest on this past due bill.

As the administrative law judge determined, employer's characterization of the Waianae Clinic bill as "no longer outstanding" is not relevant to the issue of whether employer remains liable for its payment. Section 7(a), 33 U.S.C. §907(a), requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a); *see generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). The fact that the medical provider has "written off" the proposed bill does not alter employer's duty to pay "all reasonable and necessary medical expenses arising from a work-related injury." 33 U.S.C. §907(a). In this case, employer admitted that it had not paid this bill at the time of the hearing, and the administrative law judge, based on Dr. Roth's testimony, rationally rejected employer's position that the bill had not been paid because it was never sent to them. Amended Decision and Order at 25-26.

Regarding the services rendered, the administrative law judge, in her order on reconsideration, determined that these "services were provided to the claimant in conjunction with his injury," and the record supports the reasonableness and necessity of the services in question. Order on Reconsideration at 1. Specifically, Dr. Murray's notes from September 10, 2001, reveal that claimant was discharged from the Queen's Medical Center on September 7, 2001, following treatment for his fall at work, and "instructed to f/u [follow-up] here." EX 100. Dr. Murray explicitly added, in his deposition testimony, that this follow-up treatment was reasonable and appropriate given the severity of his injury. CX 17, Dep. at 32, 34. As such, claimant's visit to Dr. Murray was a reasonable and necessary part of his recovery from his work-related fall. *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In light of this, the administrative law judge's order that employer pay the outstanding bill for services rendered at the Waianae Clinic on September 10, 2001, with interest, is affirmed. *Id.; Hunt*, 999 F.2d 419, 27 BRBS 84(CRT).

Attorney's Fee

Employer argues that there is no basis for an award of an attorney's fee by the administrative law judge. Employer maintains that neither of the administrative law judge's awards in this case, *i.e.*, her award of future medical benefits relating to the September 4, 2001, work injury and her award of a payment of a $106.34 (with interest $119.13) charge for medical services, can support an attorney's fee award. Moreover, employer contends that claimant's "success" in obtaining the payment of that one

medical bill is not a "successful prosecution" of his claim for purposes of Section 28 of the Act, 33 U.S.C. §928.

The administrative law judge has not yet awarded any attorney's fees in this case. She stated only that claimant's counsel could file a fee petition, thereby making employer's contention relating to an attorney's fee premature. Claimant has, to this point, met with some success on the contested medical bill, rendering employer liable for an attorney's fee. *See generally Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Nonetheless, as the issues of claimant's entitlement to benefits for his injuries related to his February 8, 2003, suicide attempt and his average weekly wage have been remanded, the amount of an award in this case is not yet settled. Following the administrative law judge's disposition of this case on remand, claimant's counsel may submit an attorney's fee petition for work performed in this case as previously instructed by the administrative law judge. However, the amount of any attorney's fee must reflect the degree of success achieved by claimant. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, the administrative law judge's finding that claimant is not entitled to benefits related to his February 8, 2003, suicide attempt, and calculation of claimant's average weekly wage are vacated, and this case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's decision is affirmed.

SO ORDERED.

____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

____
ROY P. SMITH
Administrative Appeals Judge

____
BETTY JEAN HALL
Administrative Appeals Judge