



BRB No. 15-0477

LARRY D. BARWICK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CASCADE GENERAL)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: <u>May 13, 2016</u>
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-Petitioners)	
)	
and)	
)	
AIG/CHARTIS)	
)	
Employer/Carrier-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Richard A. Mann (Brownstein Rask, LLP), Portland, Oregon, for claimant.

Robert E. Babcock and James R. Babcock (Holmes Weddle & Barcott), Lake Oswego, Oregon, for employer and Signal Mutual Indemnity Association, Limited.

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

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Employer Cascade General and carrier Signal Mutual Indemnity Association (Signal) appeal the Decision and Order (2013-LHC-01342) of Administrative Law Judge Steven B. Berlin 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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On October 23, 2007, claimant sustained an injury to his left elbow when a cable broke, and struck his arm. The next day, claimant was diagnosed with an elbow contusion and hematoma and was placed on light duty. AIG, employer's carrier on the risk on the date of this injury, paid claimant compensation for one day of missed work. Claimant, who had previously undergone a surgical procedure on his left shoulder in 2004, subsequently sought treatment for complaints of left shoulder pain. A November 2007 MRI revealed a labral tear and, while a left shoulder arthroscopy was scheduled, claimant did not undergo the procedure.

On April 1, 2008, Signal became employer's insurance carrier. Claimant continued to experience left shoulder pain while working for employer and a November 5, 2008 MRI revealed increased labral tearing and degenerative changes in claimant's left shoulder. On November 5, 2008, claimant filed a claim for benefits alleging that his work activities with employer aggravated his left shoulder condition. Claimant continued to work for employer, during which time he testified he dislocated his left shoulder on multiple occasions, until March 13, 2009 when an economic layoff occurred. Claimant treated with a number of physicians and, on August 11, 2010, underwent total shoulder replacement surgery.¹ Claimant's shoulder remained symptomatic following this

¹ On February 22, 2010, Administrative Law Judge Pulver issued an Order Approving Stipulation, Awarding Benefits, Attorney's Fees & Remanding to OWCP, prospectively awarding claimant benefits pursuant to his approval of the parties' "Interim Agreement." *See* EX 8. The parties' "Interim Agreement" called for each carrier to pay half of claimant's temporary total disability benefits commencing the day claimant underwent shoulder surgery. The carrier ultimately found responsible agreed to repay the other carrier. *See* EXs 5, 7.

procedure and, on January 31, 2011, he underwent a debridement and manipulation of his left shoulder. Further surgery was recommended later in 2011, which claimant declined to undergo.

In his Decision and Order, the administrative law judge found that claimant's shoulder condition is related to his employment with employer, and that the exertions required of claimant's employment after Signal assumed the risk contributed to, accelerated, or aggravated that condition. Thus, the administrative law judge held Signal liable, as employer's carrier during claimant's last period of employment with employer, for the benefits due claimant. Next, the administrative law judge found that claimant's condition reached maximum medical improvement on April 9, 2012, and that, although the parties stipulated claimant cannot return to his usual work as a machinist, employer established the availability of suitable alternate employment as of February 24, 2014. Consequently, the administrative law judge awarded claimant temporary total disability benefits from August 11, 2010 through April 8, 2012, permanent total disability benefits from April 9, 2012 through February 23, 2014, and ongoing permanent partial disability benefits from February 24, 2014, payable by Signal. The administrative law judge found Signal entitled to Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f).

On appeal, Signal challenges the administrative law judge's findings that it is the carrier responsible for the payment of benefits due claimant and that it did not establish the availability of suitable alternate employment prior to February 24, 2014. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety. AIG also responds, urging affirmance of the administrative law judge's responsible carrier finding, but adopting Signal's "analysis and argument" with respect to the issue of the availability of suitable alternate employment. Signal filed a reply brief.

Responsible Carrier

Signal challenges the administrative law judge's determination that it, rather than AIG, is responsible for the payment of benefits due claimant under the Act. Specifically, Signal asserts the administrative law judge erred in crediting claimant's testimony regarding his employment activities subsequent to his October 23, 2007 work injury, and in finding that claimant's continued employment duties accelerated or aggravated his shoulder condition. We reject these contentions of error.

The determination of the responsible carrier, in the case of multiple traumatic injuries, turns on whether the claimant's condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability results from the natural progression of his initial injury, the carrier at the time of that injury is responsible for compensating the claimant for the entire disability. If there is a second injury which

aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the carrier at the time of the second injury is liable for all medical expenses and compensation related thereto.² *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem. sub nom. SSA Marine v. Lopez*, 377 F.App'x 640 (9th Cir. 2010); *see also Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004).

The administrative law judge found that claimant's testimony and the opinions of Drs. Treible and Wells establish that claimant's continued employment activities aggravated or accelerated his degenerative shoulder condition, and that, consequently, Signal, employer's carrier as of April 1, 2008, is responsible for the payment of benefits due claimant after that date. In this regard, the administrative law judge discussed claimant's testimony at length and found that although claimant, in an attempt to continue working, might not have disclosed the totality of his symptoms to his treating physicians, claimant credibly testified that he experienced continued dislocations of his shoulder into 2009 while he was performing his work duties. Decision and Order at 5, 14-15;³ *see* Tr. at 77, 122-123, 128-130, 133-136, 139-141, 143-144, 149-150, 152-156 (claimant's description of the work incidents that caused his shoulder to dislocate). The administrative law judge further found that Dr. Treible opined that claimant's work-related dislocations contributed to the worsening of his shoulder condition, *see* EXs 36 at 263; 37 at 297, and that Dr. Wells similarly opined that claimant's work accelerated the arthritic degeneration of his shoulder, *see* EXs 27 at 183; 44 at 394. *See* Decision and Order at 11-12, 18. Both physicians stated that claimant's 2010 x-ray showed deterioration since the 2008 MRI, and that claimant's work in 2008 and 2009 contributed to the worsening condition.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the

² Under the aggravation rule, when the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. The relative contribution of the pre-existing condition and the aggravating injury are not weighed. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

³ The administrative law judge discussed at length the inconsistencies and omissions in claimant's report of his symptoms to his physicians. The administrative law judge concluded that claimant's reports to his physicians tended to minimize his condition, and that, moreover, claimant had no incentive to tailor his complaints to implicate one carrier or the other. Decision and Order at 14-15.

record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The administrative law judge is entitled to determine the credibility of a witness's testimony. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge rationally relied on claimant's testimony regarding his employment activities following the October 23, 2007 incident and the opinions of Drs. Treible and Wells to find that claimant's work after Signal became employer's carrier contributed to or accelerated the deterioration of claimant's shoulder condition. As the administrative law judge's finding is supported by substantial evidence and consistent with law, we affirm the administrative law judge's finding that Signal is liable for the benefits due claimant under the Act and must reimburse AIG in accordance with the parties' agreement. *See n. 1, supra; Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 F.App'x 547 (9th Cir. 2001).

Suitable Alternate Employment

Signal next contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment prior to February 24, 2014; specifically, Signal asserts that it established the availability of machinist work in July 2013 and January 2014 that claimant was capable of performing. These jobs paid higher wages than the jobs the administrative law judge found suitable for claimant; thus, Signal contends claimant has a greater post-injury wage-earning capacity.

Where, as in this case, claimant has established his inability to return to his usual work due to his injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish that suitable work is realistically and regularly available to claimant in his community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). The administrative law judge found that the machinist positions identified by employer's vocational expert, Dennis Funk, are not suitable for claimant. The administrative law judge found, however, that employer did identify suitable positions as of February 24, 2014.⁴ *See* Decision and Order at 21-30. The administrative

⁴ The administrative law judge found positions as a parking lot cashier, security guard, lottery attendant, security and parking lot attendant, and video rental clerk to be suitable for and available to claimant. *See* Decision and Order at 27-30. The

law judge therefore found that claimant's permanent disability became partial on that date. *Id.* at 31.

Signal contends the administrative law judge erred in disqualifying all of the identified machinist positions based on Dr. Lorber's opinion that claimant should not work around dangerous machinery due to his use of Percocet. Acknowledging that the administrative law judge identified other bases for disqualifying three of the machinist positions, Signal asserts the administrative law judge erred in finding the machinist positions identified with Stanley Hydraulic Tool and Western Machine Works are unsuitable for claimant. *Id.* at 9-10. Signal contends the evidence demonstrates that claimant's use of Percocet does not prevent him from safely performing machinist work.

We reject Signal's contention, as it has not demonstrated error in the administrative law judge's finding that machinist work involves "dangerous machinery," *i.e.*, lathes and drill presses, and is therefore unsuitable for claimant. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). In January 2014, Dr. Lorber stated that claimant's use of Percocet precludes him from operating hazardous machinery. EX 51 at 460. Dr. Bald reached the same conclusion. EX 33 at 217. The administrative law judge addressed the suitability of each position identified by employer⁵ and found: (1) the machinist positions at Stanley Hydraulic Tool and Western Machine Works require the operation of lathes and drill presses;⁶ (2) lathes and drill presses are "hazardous machinery;" and (3) as claimant cannot work around hazardous equipment, these positions are unsuitable for claimant. Decision and Order at 14-15, 25-26.

These findings are rational and supported by substantial evidence. The parties stipulated that claimant is incapable of resuming his usual employment duties with

administrative law judge found that claimant did not diligently seek suitable, available work and thus is partially disabled.

⁵ Signal identified machinist positions with Oregon Screw Products, Warn Industries, Boeing, Stanley Hydraulic Tool and Western Machine Works. The administrative law judge addressed at length the first three machinist positions, and Signal does not assert error in his determination that these positions are not suitable for claimant on grounds other than the dangerous nature of the machinery. *See* Decision and Order at 26; Signal Br. at 9-10.

⁶ The machinist positions identified with Stanley Hydraulic Tool and Western Tool Works are required to operate lathes, drill presses, mills, grinders, vertical and horizontal machines. EX 45 at 423-424.

employer as a machinist, Tr. at 9, a position which claimant testified involved working with lathes 65 percent of the time.⁷ *Id.* at 138-139; *see Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998) (administrative law judge found that post-injury jobs involving claimant's pre-injury duties are not suitable alternate employment). Moreover, the administrative law judge rationally relied on the opinions of Dr. Lorber and Dr. Bald that claimant's use of Percocet places claimant and others at risk if he were to operate dangerous machinery. EX 51; *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

The administrative law judge is entitled to determine the weight to be accorded to the evidence of record; thus, that other physicians opined claimant can work safely while taking Percocet does not demonstrate error in the administrative law judge's conclusion. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); EX 44 at 394; Tr. at 165-166. As the administrative law judge's finding that the machinist positions at Stanley Hydraulic Tool and Western Tool Works are unsuitable for claimant is rational and supported by substantial evidence, we affirm the administrative law judge's finding that these two positions do not establish the availability of suitable alternate employment. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). Therefore, we affirm the administrative law judge's award of permanent partial disability compensation commencing February 24, 2014, based on a post-injury wage-earning capacity of \$334.80 per week. 33 U.S.C. §908(c)(21), (h).

⁷ The administrative law judge found claimant to be:
[L]imited to occasional reaching, handling, grasping, and manipulation of tools and objects of any weight if his left upper extremity is extended in front of him at waist level, unsupported. He can lift no more than 20 pounds occasionally if his left arm is needed for the lifting, but can do so only if he can keep his elbows at his sides. . . . He cannot lift with his left arm alone unless he can accomplish the lift with a curling motion only.

Decision and Order at 21.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge