BRB No. 10-0723

HAROLD WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REYES CONSTRUCTION, INCORPORATED	)	
	)	
and	)	
	)	
VIRGINIA SURETY COMPANY, INCORPORATED	)	DATE ISSUED: 09/23/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Amended Decision and Order Correcting *Errata* and Denying Employer's Petition for Reconsideration of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Robert L. Kelley, Camarillo, California, for claimant.

George L. Brummer (Hanna, Brophy, MacLean, McAleer & Jensen), Los Angeles, California, for self-insured employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Amended Decision and Order Correcting *Errata* and Denying Employer's Petition for Reconsideration (2008-LHC-02056) of Administrative Law Judge Anne Beytin Torkington 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 sustained injuries as a result of a slip and fall accident while working for employer as an operating engineer on February 16, 2005. Dr. Mazurek initially diagnosed a severe right ankle sprain and a proximal right fibula fracture. Claimant, however, continued to work for employer, with the exception of the period from March 14 through March 23, 2005, until May 28, 2005, which was his last day of work.[1] Claimant thereafter was diagnosed with tears of the lateral and medial meniscus of the right knee, prompting Dr. Menninger to perform surgery on September 26, 2005. In his post-operative report, Dr. Menninger noted that, in addition to right ankle and knee pain, claimant complained of left knee and low back pain, which claimant believed was secondary to his altered gait. CX 46 at 139. On January 12, 2006, Dr. Rosco diagnosed a proximal right fibula fracture, a right knee sprain with a complex tear of the medial meniscus, left knee, lumbar and right elbow sprains, and a right ankle rotational deformity. CX 65 at 751. Claimant's continued complaints of pain led Dr. Menninger to perform arthroscopic surgery on claimant's right ankle on August 16, 2006, and right elbow surgeries on February 5, 2007, and November 28, 2007. CX 61 at 346, 367-369, 373.

Claimant filed a claim under the Act seeking compensation and medical benefits related to the February 16, 2005, work accident for injuries to his right knee, leg, ankle, elbow, low back, head and neck. Employer contested the claim, contending that only claimant's right lower extremity was injured in the fall; employer also requested Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f).

[1]Claimant testified that he stopped working because Dr. Mazurek told him not to work because his leg was broken. Tr. at 66-67.

In her decision, the administrative law judge found claimant entitled to the Section 20(a) presumption for the claimed injuries. 33 U.S.C. §920(a) The administrative law judge found that employer did not rebut the presumption with respect to the right leg, knee and ankle injuries, and, assuming, *arguendo*, that rebuttal was established, claimant proved by a preponderance of the evidence that these injuries are compensable. Decision and Order at 27-28. The administrative law judge found that employer established rebuttal of the presumption with respect to the right elbow, low back, head and neck injuries and that, based on the record as whole, claimant proved that his right elbow and low back conditions are related to the work accident. *Id*. at 28-31. The administrative law judge found that claimant could not perform his usual employment from March 14 to 23, 2005, and from August 30, 2005, to the present, and that employer did not establish the availability of suitable alternate employment. *Id*. at 32-34. She, therefore, awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from March 14 to March 23, 2005, and from August 30, 2005, to January 11, 2007, and for permanent total disability thereafter,[2] 33 U.S.C. §908(a), as well as medical benefits for his work-related injuries. Employer's request for Section 8(f) relief was denied. The administrative law judge also denied employer's motion for reconsideration, including its argument that she erred in issuing her decision while its petitions to reopen the record, to admit new evidence, and to bar the claim under Section 33(g), 33 U.S.C. §933(g), were pending.

On appeal, employer challenges the administrative law judge's finding that claimant's injuries to body parts other than the right fibula are work-related. Employer also challenges the findings regarding claimant's disability, the average weekly wage calculation, the denial of Section 8(f) relief, and her denial of its post-hearing motion to reopen the record and conduct a hearing to resolve the applicability of Section 33(g). Claimant responds, urging affirmance of the award of compensation and medical benefits. The Director, Office of Workers' Compensation Programs responds, urging affirmance of the denial of Section 8(f) relief.

After full consideration of employer's arguments on appeal and the evidence of record, we reject employer's contentions and affirm the administrative law judge's award of benefits as it is supported by substantial evidence and in accordance with law. *O'Keeffe*, 380 U.S. 359.

[2]The administrative law judge determined that claimant reached maximum medical improvement with regard to his right knee and ankle injuries on January 12, 2007, and with regard to his right elbow injury on February 26, 2008. Decision and Order at 31-32.

Addressing the cause of claimant's injuries, the administrative law judge found that the contemporaneous medical evidence, on which employer relies on appeal, does not establish the lack of a causal nexus between the right knee and ankle injuries and the work accident. Specifically, the administrative law judge found that the medical records from the first three months after the work injury indicate injury to the right knee and ankle. CXs 46 at 136, 61 at 403, 443, 447, 486-488, 64 at 653. Moreover, the administrative law judge found that employer did not present any expert medical opinion disputing that claimant's right knee and ankle injuries are related to the work accident and that none of the medical reports supports this conclusion. Decision and Order at 27-28. In contrast, the administrative law judge found that Drs. Menninger, Capen and Rosco opined that claimant's right knee and ankle injuries are work-related. *Id*.; *see* CXs 18 at 27, 68 at 20, 75; EX 1 at 13-15. The administrative law judge rationally concluded that employer, therefore, did not rebut the Section 20(a) presumption with respect to claimant's right ankle and knee injuries. Based on the absence of any medical opinion that claimant's right ankle and knee injuries were not caused by the work accident and the contemporaneous medical evidence of injury to these body parts, the administrative law judge's finding that employer did not establish rebuttal in terms of these injuries is supported by substantial evidence and, thus, is affirmed. *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem.*, 8 F.3d 29 (9th Cir. 1993).

The administrative law judge next found, with regard to claimant's right elbow and low back conditions, that claimant was entitled to the Section 20(a) presumption, and that employer established rebuttal thereof. Examining the evidence based on the record as a whole, the administrative law judge credited Dr. Capen's uncontradicted opinion that claimant sustained a non-disabling work-related orthopedic right elbow injury that deteriorated over time, as supported by the opinions of Drs. Menninger and Rosco tying claimant's right elbow condition to his work accident, to find that claimant's right elbow condition is work-related. *See* CXs 18 at 25-27, 65 at 751, 68 at 14-15, 20; EX 1 at 7, 13-14. As for the back injury, the administrative law judge credited the diagnoses of Drs. Menninger and Rosco to find that claimant developed an altered gait because of his right leg, knee and ankle injuries, which caused a lumbosacral strain/sprain. *See* CXs 27 at 96, 65 at 677; EX 1 at 12-15. The administrative law judge found that this diagnosis is consistent with observations noted in the medical records of Drs. Menninger, Mazurek, and Capen, *see* CXs 18 at 21-22, 46 at 139, 64 at 614, 65 at 678, 691, and that imaging studies showing degenerative disc disease did not establish that this condition is the cause of claimant's low back pain nor is there any medical opinion supporting this conclusion. Moreover, the administrative law judge found that the record does not establish that claimant's degenerative condition became symptomatic due to the work accident. The administrative law judge's findings are rational and supported by substantial evidence.

Therefore, we affirm her determination, based on the record as a whole, that claimant sustained a right elbow and low back sprain/strain as a result of the February 16, 2005, accident. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

Employer next challenges the administrative law judge's award of compensation commencing August 30, 2005.[3] The administrative law judge rationally credited Dr. Menninger's testimony that claimant was unable to perform his usual work as of August 30, 2005. Decision and Order at 34; *see* CXs 65 at 685, 68 at 15-16. Additionally, she found that after Dr. Menninger recommended restrictions against climbing, jumping and prolonged standing in November 2005, no doctor opined that claimant was capable of returning to his usual employment and that all doctors imposed work restrictions on walking, standing and climbing activities that preclude claimant's usual performance of work duties.[4] Decision and Order at 34; CXs 27 at 97, 31 at 103, 33 at 107, 65 at 679, 685, 718-719, 66 at 23, 68 at 27-37; EX 1 at 14. The administrative law judge rationally credited the opinions of Drs. Menninger, Rosco and Capen, and concluded that, as of August 30, 2005, claimant cannot return to work as an operating engineer.[5] *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Delay*, 31 BRBS 197; *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). Accordingly, we affirm this finding as it is supported by substantial evidence.

---

[3]Employer does not challenge the temporary total disability award for the period from March 14 to March 23, 2005, pursuant to Dr. Mazurek's recommendation on March 14, 2005, that claimant not work for a month and employer's employment records, which indicate that claimant did not work until March 24, 2005, when Dr. Mazurek released claimant to return to work. *See* Decision and Order at 33; *see also* CXs 64 at 623, 65 at 655; EX 4.

[4]Dr. Rosco opined in his August 1, 2006, report that he did not believe claimant could return to his usual work, and, in his March 15, 2007, report he opined that claimant "could never resume" his usual work. EX 1 at 6, 13-14. Dr. Capen opined in his January 2, 2008, report that claimant is not capable of any employment given the "significant abnormalities involving his right knee, right ankle and right elbow." CX 18 at 31.

[5]In reaching this conclusion, the administrative law judge also correctly found irrelevant the parties' stipulation that claimant was capable of performing his usual work until May 28, 2005, as the issue is whether claimant could return to his usual employment after August 30, 2005, when Dr. Menninger first imposed restrictions. *See Williams v. Marine Terminals Corp.*, 8 BRBS 201 (1978), *aff'd mem.*, 624 F.2d 192 (9th Cir. 1980) (table).

Employer does not challenge the administrative law judge's finding that it did not establish the availability of suitable alternate employment after August 30, 2005, and this finding is, therefore, affirmed. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Employer instead asserts that claimant never attempted to return to work for employer after May 28, 2005. It is well established, however, that claimant's duty to show reasonable diligence in attempting to secure suitable work does not displace employer's initial burden of establishing the availability of suitable alternate employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *see Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT). Therefore, the administrative law judge properly concluded that claimant is entitled to benefits for total disability, and we affirm the award of total disability compensation from August 30, 2005.[6] *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).

We next address employer's contention concerning the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c). Initially, we reject employer's contention that the administrative law judge should have calculated claimant's average weekly wage under Section 10(a), 33 U.S.C. §910(a), as the record establishes that claimant, who testified that he worked seven days a week for employer, Tr. at 81, is neither a 5-day nor 6-day per week worker, an essential prerequisite for application of that provision. 33 U.S.C. §§910(a), (c); *see Duhagon v. Metropolitan Stevedoring Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Pursuant to Section 10(c), the administrative law judge, in order to factor in the intermittent nature of claimant's employment, multiplied claimant's average weekly wage during the 18 weeks he worked for employer prior to the work injury, $2,282.08, by the 187 weeks claimant actually worked from 2000 to February 13, 2005, and divided that sum of $426,750.83 by the total number of weeks during this period, 267, to derive an average weekly wage of $1,598.32. Decision and Order at 38. As the administrative law judge's calculation of average weekly wage under Section 10(c) accounts for claimant's work history of intermittent employment and reasonably approximates his annual earning capacity at the time of injury, we affirm the

[6]Employer further challenges the administrative law judge's award of compensation for permanent total disability, contending that claimant is limited to permanent partial disability awards under the schedule for his work-related right lower extremity and elbow injuries, since he had no permanent disability attributable to his back condition and his other work injuries fall under the schedule. *See* 33 U.S.C. §908(c)(1)-(19). However, in cases where claimant is permanently totally disabled, the schedule set forth in Section 8(c) does not apply. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n. 17, 14 BRBS 363, 366 n. 17 (1980); *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

administrative law judge's finding, as it is rational and supported by substantial evidence. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

Employer contends the administrative law judge erred in denying its claim for Section 8(f) relief. We reject this contention. The administrative law judge found that evidence of pre-existing osteophytes and degenerative changes in claimant's right ankle establish a manifest pre-existing permanent partial disability. Nonetheless, she also found that the opinion of Dr. Rosco, that 10 percent of claimant's current disability is due to his pre-existing condition, and of Dr. Menninger, that claimant's pre-existing degenerative changes combined with the work injury to increase his overall disability, cannot establish the contribution element, as neither physician addressed whether claimant's February 16, 2005, accident alone would not have resulted in his permanent total disability. Decision and Order at 40-41; *see FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989). This finding is supported by substantial evidence and in accordance with law. Accordingly, we affirm the administrative law judge's denial of Section 8(f) relief. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994).

Lastly, we reject employer's contention that claimant's entitlement to compensation is barred under Section 33(g) of the Act, 33 U.S.C. §933(g).[7] On August 16, 2010, a civil mediation was held with regard to claimant's third-party claim against Manson Construction Company and its carrier, Virginia Surety Company, wherein it was agreed that the civil case would be settled for a total of $200,000, if, and only if, employer and its carrier, also Virginia Surety, provided prior written approval of the third-party agreement in accordance with Section 33(g)(1) of the Act.[8] 33 U.S.C. §933(g)(1). Pursuant to this, claimant's counsel subsequently submitted to the Office of Workers' Compensation Programs two Form LS-33s, Approval of Compromise of Third

[7]Section 33(g)(1) states that if the person entitled to compensation enters into a third-party settlement for less than his compensation entitlement, the employer is liable for compensation "only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed." 33 U.S.C. §933(g)(1).

[8]Employer has not disputed that final execution of the third-party settlement agreement was contingent upon employer and its carrier providing prior written approval of that agreement. Rather, it argues that the lack of direct involvement by employer's counsel in the execution of the LS-33 forms, rendered them incomplete. *See infra.*

Person Cause of Action. These LS-33 forms stated that the action was settled for a gross amount of $200,000 and a net amount of $111,516.57 and were signed by employer's Vice-President of Operations and Virginia Surety's Vice-President of Claims. *See* Employer's Motion to Reopen the Record and to Admit Newly Discovered Evidence at exs. b,c. The administrative law judge found that Section 33(g)(1) does not bar the claim as the prior written approval requirement was satisfied. The executed LS-33 forms in this case establish that employer and its carrier gave consent to the third-party settlement in accordance with Section 33(g)(1). We reject employer's contention that the individuals who signed the form did not have authority to do so. The signatories are Vice-Presidents of their respective companies and employer gives no reason as to why these officials lacked authority to sign the consent forms. Accordingly, we affirm the administrative law judge's finding that Section 33(g) does not bar claimant's entitlement to benefits under the Act.[9] *See* 33 U.S.C. §933(g)(1); *see generally Mapp v. Transocean Offshore, USA, Inc.*, 38 BRBS 43 (2004); *Meaux v. Franks Casing Crew & Rental Tools, Inc.*, 35 BRBS 17 (2001).

Accordingly, the administrative law judge's Decision and Order and Amended Decision and Order Correcting *Errata* and Denying Employer's Petition for Reconsideration are affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9]The administrative law judge did not abuse her discretion by refusing to reopen the record on this issue, as she had the pertinent information already before her at the time she reached the conclusion that Section 33(g)(1) is not applicable. 20 C.F.R. §702.338; *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989).