BRB No. 07-0970

C.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 04/30/2008
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Dania Beach, Florida, for claimant.

Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order Granting Motion for Summary Decision (2007-LDA-00008) 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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 worked for employer in Tikrit, Iraq, as a labor foreman overseeing the construction of a military dining facility. On April 22, 2006, claimant sustained a work-related injury when he attempted to move a metal toolbox weighing approximately 100 to 150 pounds. Claimant was transferred to Kuwait for a medical evaluation and was diagnosed with a suspected scrotal hernia. Claimant was restricted from working, and it was recommended that he be sent to the United States for surgery.

After claimant's return to Seattle, Dr. Harmon diagnosed claimant with a left scrotal hernia and recommended that claimant undergo surgery to prevent possible entrapment of the colon. Claimant, however, did not do so. He testified that employer had not authorized the procedure and that he did not wish to pay his health insurance's $1,000 deductible and 20 percent co-payment for the surgery. On January 4, 2007, employer had claimant examined by Dr. Palermo, who diagnosed a work-related left inguinal hernia which requires surgery. On February 15, 2007, employer authorized surgery. CX 5.

Meanwhile, claimant filed a formal claim for benefits which proceeded to a formal hearing on February 27, 2007. The parties stipulated that claimant's condition remained temporary, that employer authorized surgery by a physician of claimant's choosing, that claimant's average weekly wage is $1,512.20, and that employer would pay temporary total disability benefits commencing January 4, 2007. The only issue remaining was whether claimant was entitled to temporary total disability benefits for the period from April 26, 2006 to January 3, 2007. Employer contended that claimant is not entitled to benefits because he failed to undergo surgery in a timely manner, and moreover, claimant did not establish his inability to perform his usual work.

The administrative law judge denied claimant's oral motion for summary decision without prejudice and proceeded with the hearing.[1] In her decision, the administrative law judge granted claimant's motion for summary decision, finding that claimant was temporarily totally disabled during the period in question. The uncontradicted medical evidence establishes that claimant was restricted from the physical activity that comprised his usual work, and moreover, employer fired claimant when he did not return

[1] At the close of the hearing at which evidence was admitted, claimant renewed his motion for summary decision. The administrative law judge deferred ruling on the motion and permitted the parties to submit briefs on the issue.

to work within 90 days. The administrative law judge also found that employer did not offer any evidence of suitable alternate employment.

The administrative law judge also rejected employer's contention that claimant's compensation should be suspended because claimant unreasonably refused to undergo medical care pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4). The administrative law judge found, *inter alia*, that employer did not authorize surgery until February 15, 2007, and that claimant is not required to "mitigate his damages" by undergoing surgery at his own expense.[2] The administrative law judge also found that a mitigation principle is inapplicable even assuming, *arguendo*, that claimant did not communicate effectively with employer's claims adjuster. Thus, the administrative law judge awarded claimant temporary total disability benefits, a Section 14(e) assessment on benefits due and unpaid from April 26 to May 20, 2006, and interest.

On appeal, employer contends that the administrative law judge erred in finding that claimant was totally disabled. Employer also contends that claimant's failure to communicate with employer caused the delay in authorization of medical treatment and that claimant thus failed to mitigate his damages such that benefits should be denied. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer first contends that the administrative law judge erred in failing to compare claimant's medical restrictions with the requirements of his usual work; employer contends that claimant could have performed his work, which was solely supervisory in nature. We reject this contention. Claimant testified that although he was not required to "pitch in" to help the workers he supervised, it was necessary to lift items in order to assist workers to "get the job done." Tr. at 64. Claimant also testified he regularly was required to bend and stoop as part of his supervisory duties. *Id.* at 65. The administrative law judge properly found that the medical evidence of record is uncontradicted that claimant was unable to perform these duties during the period in question.[3] Moreover, employer fired claimant because he was unable to work due to his

[2] The administrative law judge, citing *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989), stated that compensation cannot be suspended retroactively pursuant to Section 7(d)(4). This principle was overruled in *B.C. v. Int'l Marine Terminals*, 41 BRBS 101 (2007), subsequent to the issuance of the administrative law judge's decision in the instant case. Employer does not raise any issues on appeal concerning Section 7(d)(4), and thus this change in law does not affect the outcome of this case.

[3] On April 26, 2006, within days of his injury, Ms. Shiraishi, a nurse practitioner, explicitly restricted claimant from lifting, stooping, bending, kneeling and climbing. CX

injury, and thus claimant's usual work was unavailable to him. *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established his inability to perform his usual work. *See, e.g., Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989). As employer does not contest the finding that it did not establish the availability of suitable alternate employment, the administrative law judge properly found that claimant was totally disabled from April 26, 2006, through January 3, 2007. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Ceres Marines Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

Employer also contends that claimant did not mitigate his damages because he did not cooperate with its efforts to communicate with him. The administrative law judge found that nothing in the Act or its regulations requires claimant to mitigate his damages irrespective of whether claimant made it difficult for employer's claims adjuster to contact him.[4] The administrative law judge found that blame and fault are not factors relevant to entitlement to benefits under the Act, and she declined to apply to this case the Washington state cases cited by employer requiring mitigation in tort claims.

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3 at 47. Claimant testified that Mr. Donohue, a physician's assistant in Kuwait, restricted claimant from any type of work. Tr. at 38. Dr. Palermo stated that claimant was restricted from the date of injury from heavy lifting, stooping, bending, kneeling and climbing. CX 1 at 17-18, 22; CX 2.

[4] Claimant apparently does not have a permanent residence in the United States. He was staying with a friend in Seattle and was not permitted to use the landline telephone for long distance calls. The claims adjuster for carrier, AIG, is located in Dallas. Claimant testified that he told the claims adjuster to contact him by e-mail; claimant also had a voicemail service, but this appeared to be unreliable. Claimant asked the adjuster to provide a toll-free number that he could call, but this was not possible. The record contains many e-mails from claimant in May 2006 to various persons with AIG attempting to get authorization for medical treatment and reimbursement for $198 for his initial visit to Dr. Harmon. Claimant essentially was informed that he would have to pay for this himself or through a non-workers' compensation health plan, until he provided a medical report to AIG. Claimant responded that he could not get a report without paying, and that he was not inclined to pay for it out-of-pocket or with his private health insurance.

We reject employer's contentions that claimant failed to cooperate and that he had a duty to mitigate his damages. The documents submitted into evidence belie employer's contention that claimant did not cooperate with the claims adjuster. Rather, the e-mails from May 2006 suggest that claimant was aggressively seeking information about how to obtain reimbursement of his costs and authorization for recommended medical treatment. Employer's only allegation in this regard is that claimant would not communicate by telephone. This is not a basis for finding that claimant did not cooperate, as he provided a valid e-mail address to the claims adjuster. Moreover, claimant clearly requested authorization for medical treatment, which was declined by employer until claimant supported his claim with a report from a physician. The administrative law judge properly found that claimant is not required to incur costs for necessary medical treatment in order to have his claim processed by employer. Order at 11.

Assuming, *arguendo,* that claimant was not communicative, the administrative law judge properly declined to apply the holdings in two cases decided under Washington state law that a plaintiff in a tort suit is required to mitigate his damages. Order at 11. Employer provided no rationale to the administrative law judge, and does not do so on appeal, by which tort cases for damages under state law would be applicable to a no-fault workers' compensation statute such as the Longshore Act. *See* 33 U.S.C. §904(b). The Supreme Court of the United States has stated, "The [Act], like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a certain recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common-law defenses. . . ." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281, 14 BRBS 363, 368 (1980).

Employer has failed to demonstrate any error in the administrative law judge's award of temporary total disability benefits from April 26, 2006 through January 3, 2007. Accordingly, the administrative law judge's Order Granting Motion for Summary Decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge