BRB No. 08-0497

L.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 03/27/2009
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order on Reconsideration (2006-LHC-1610, 2006-LHC-2146) of Administrative Law Judge Clement J. Kennington 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).[1] 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).

[1] The Board has received claimant's motion for oral argument in this case. 20 C.F.R. §802.305. As oral argument is not necessary for the disposition of this appeal, claimant's request is denied.

At issue in this case are two consolidated claims for injuries sustained by claimant while in the course of her employment as a first class electrician with employer. It is undisputed that on January 22, 2003, claimant sustained an injury to her lower back, for which a claim for benefits under the Act was filed. CXs 1, 4. Following this injury, claimant continued to work for employer with various work restrictions, CX 10, until July 15, 2003, when she was taken off work by Dr. Smith, her treating neurosurgeon. CX 11 at 9. On September 26, 2003, claimant underwent an L5-S1 left lumbar microdiscectomy, and on July 19, 2004, she underwent an L5-S1 bilateral lumbar decompression, discectomy and fusion. CX 11 at 16, 47-49. On December 28, 2004, Dr. Smith stated that claimant had reached maximum medical improvement and released her to return to work with restrictions. *Id.* at 60.

Employer voluntarily paid claimant temporary total disability benefits from July 16, 2003, to January 3, 2005, when she returned to work for employer in a modified position.[2] EXs 6, 7; Tr. at 64-67. From February 21, 2005 to June 6, 2005, claimant was off work as employer had no modified work available to her; employer paid claimant temporary total disability benefits during this period of time.[3] EXs 6, 7; EX 18 at 11; EX 21 at 14, 18-19. On June 6, 2005, claimant returned to work for employer in a modified position performing bench work in the electrical shop.[4] CX 30; EX 21 at 21-23. On August 22, 2005, claimant experienced pain in her lower and upper back, both hips, and right shoulder area while pulling pallets on a pallet jack from her work area to the shipping area, and she reported an injury to her supervisor that day.[5] CXs 1, 33; EX 21 at

[2] Upon her return to work, claimant was assigned to the IC hook up crew. After complaining that this job was incompatible with her restrictions, CX 11 at 61; EX 18 at 11; EX 21 at 1-11; Tr. at 63-66, claimant was briefly reassigned to temporary office work. EX 21 at 10, 12-14; Tr. at 66-67. At all times that claimant performed modified work for employer, she received the regular rate of pay for a first class electrician. EX 12; Tr. at 118.

[3] Employer, however, did not make its first payment until April 7, 2005, and did not pay interest on the late payment. EXs 6, 7.

[4] Joe Walker, a vocational consultant retained by the United States Department of Labor (DOL) to monitor claimant's return to work with employer, reported during this period that claimant complained to him of progressively worsening symptoms at work with periodic episodes of acute symptoms. EX 21 at 22-35.

[5] The following morning, claimant was seen by a medic at employer's medical facility and employer took claimant's recorded statement regarding her reported injury. CX 33; EX 21 at 36-37; Tr. at 71. On August 29, 2005, the shipyard closed down

36-37; Tr. at 70-71. On November 22, 2005, claimant filed a claim for her August 22, 2005, injury; employer did not accept the compensability of this claim, and the compensation it paid claimant following August 25, 2005, was based on her previous January 22, 2003, injury.[6]

On September 28, 2005, employer resumed compensation payments for claimant's January 22, 2003 injury as it did not have work within her restrictions available to her. Employer, however, did not pay claimant total disability benefits as it previously had done during the periods modified work was not available, but, rather, paid her permanent partial disability benefits based on a post-injury wage-earning capacity equal to the minimum wage rate. CX 31; EXs 6, 7, 21 at 40; *see* Emp. Resp. Br. at 5-6. Thereafter, employer obtained a labor market survey dated December 14, 2005, which identified several positions that were available as of the date of the survey and three additional positions that had been available on or about September 28, 2005. EX 20. Based on its alleged retrospective showing of suitable alternate employment as of September 28, 2005, employer concluded that claimant's wage-earning capacity was higher than the minimum wage rate upon which its permanent partial disability payments had been based; therefore, employer recouped its alleged overpayment of compensation by ceasing compensation payments for the period from February 23, 2006 to April 13, 2006. EX 7 at 3; *see* Emp. Br. at 6. Employer reinstated permanent partial disability benefits for the period from April 13, 2006 to November 7, 2006, and then terminated compensation on the basis that claimant failed to report back to work in a modified position with

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because of Hurricane Katrina. EX 21 at 37. On September 28, 2005, when the shipyard reopened, claimant reported back to work but was advised that no work was available within her restrictions. CX 31; EX 21 at 38; Tr. at 73-74.

[6] Claimant requested authorization for medical treatment of her August 22, 2005, injury by Drs. Lanni and Wu, who shared a practice in the Physical Medicine and Rehabilitation Department of Memorial Hospital at Gulfport. EX 14 at 24. Apparently, employer initially denied authorization and claimant, on her own initiative, began treatment on November 1, 2005 with Drs. Lanni and Wu for injuries to her lower and upper back and shoulder. CX 16; Tr. at 73. *See* Decision and Order at 5.

employer.[7] ALJX 1; EX 12. On January 15, 2007, claimant returned to modified work for employer,[8] and she continued such work as of the date of the hearing.[9]

In his Decision and Order, the administrative law judge found that claimant sustained work-related injuries on January 22, 2003, and August 22, 2005, but found that claimant's second injury was a temporary aggravation that resolved by November 28, 2005, and that this second injury did not increase claimant's work restrictions beyond those assigned after she reached maximum medical improvement on December 28, 2004, following her first injury. Decision and Order at 11, 13. The administrative law judge next found that claimant's modified work assignments with employer were not beyond her restrictions. *Id.* at 11, 15. With respect to claimant's January 22, 2003, injury, the administrative law judge found that she was entitled to temporary total disability benefits from July 16, 2003, to December 28, 2004, and to permanent total disability benefits from December 29, 2004, to January 3, 2005, and from February 21, 2005, to June 16, 2005. *Id.* at 14. He further found that claimant was entitled to permanent partial disability benefits from September 28, 2005, to February 22, 2006, and from April 13, 2006 to November 7, 2006, and that these benefits were to be calculated based upon an average weekly wage of $598.50[10] and a weekly post-injury wage-earning capacity of

[7] In declining to return to work on November 7, 2006, claimant relied on Dr. Wu's November 3, 2006 report stating that she was to remain off work pending a re-evaluation after completing a recommended series of thoracic facet joint steroid injections and caudal lumbar epidural steroid injections. CX 16 at 43-51, 55-56.

[8] On January 11, 2007, claimant obtained a form from Dr. Smith releasing her to return to work with the same restrictions that he had previously assigned on December 28, 2004, when she reached maximum medical improvement with respect to her first injury. CX 11 at 67; EX 21 at 51-53; Tr. at 77-78.

[9] For the first month following her return to work, claimant was assigned to IC hook-up, which was determined by Mr. Walker to be unsuitable. EX 21 at 51-59; Tr. at 78-79. From approximately February 20, 2007 to September 10, 2007, claimant was assigned to suitable light work performing "kitting" activity in the IC shop. EX 21 at 59-61; Tr. at 79-81. From September 10, 2007 to September 12, 2007, claimant was assigned to electronic hook-up work which was determined to be unsuitable for her; thereafter, she was assigned to light duty because of additional restrictions imposed following an injury sustained on September 12, 2007, which is the subject of a third claim which was not before the administrative law judge. EX 21 at 68-69; Tr. at 81-103.

[10] The administrative law judge observed that employer used the same average weekly wage of $598.50 for both injuries "since the second injury resulted in no loss of earnings and no residual limitations." Decision and Order at 16.

$320, which he determined by averaging the wages of the jobs identified in employer's labor market survey. *Id.* at 14-15. In awarding these benefits, the administrative law judge found that claimant could not rely on a provision in the collective bargaining agreement (CBA) between employer and her union which provided that her employment with employer would be terminated should she accept employment with another employer while she was on industrial leave of absence to excuse her from seeking suitable alternate employment during the periods that employer did not have modified work available for her to perform. *Id.* at 17. Lastly, the administrative law judge denied claimant's request for a *de minimis* award, and he found that employer is not responsible for the medical treatment provided by Drs. Lanni and Wu. *Id.* at 17-18. The administrative law judge therefore concluded that claimant is not entitled to any benefits in addition to those previously paid to her by employer. *Id.* at 19.[11]

Claimant appeals the administrative law judge's denial of her claim for additional disability and medical benefits.[12] Employer responds, urging affirmance.

We first consider claimant's argument that the administrative law judge erred in rejecting her contention that suitable alternate employment outside of employer's facility was not realistically available to her post-injury because of the contractual provisions of the CBA entered into between employer and her union. Specifically, claimant argued before the administrative law judge that employer could not establish the availability of suitable alternate employment with the positions identified in its labor market survey because the leave of absence provision of the CBA provided that her employment with employer would be subject to termination if she were to accept employment with another

[11] In a Decision and Order on Reconsideration, the administrative law judge granted claimant's requests to strike an inadvertent reference in his decision to another claimant and to strike all references to a third injury sustained by claimant on September 12, 2007, which is the subject of a separate claim not before the administrative law judge. The administrative law judge rejected the remaining arguments presented in claimant's motion for reconsideration and affirmed his initial decision.

[12] Claimant initially avers that the administrative law judge's Decision and Order fails to comport with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor on all the material issues of fact, law or discretion presented on the record." *See, e.g., H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). We agree that the administrative law judge did not provide a sufficient explanation of several of his findings on material issues, and we will address these deficiencies in our discussion of the administrative law judge's specific findings challenged by claimant on appeal.

employer while she was off work due to her work-related injuries.[13] In a single sentence, the administrative law judge rejected this argument, stating:

> Claimant cannot rely upon a collective bargaining agreement for her admitted failure to search for suitable alternative [employment] when out of work because a claimant may not turn down an otherwise suitable job merely because it did not provide the same kind of benefits as contained on [sic] past work with an employer. *Dove v. Southwest Marine of San Francisco,* 18 BRBS 139 (1986).

Decision and Order at 17. In support of her contention of error, claimant cites decisions in which two different administrative law judges found that this specific leave of absence provision of the CBA between employer[14] and claimant's union precludes employer from demonstrating the availability of suitable alternate employment with jobs outside employer's facility while the claimant remains on leave of absence status with employer. *N.W. v. Northrop Grumman Ship Systems, Inc.,* 2006-LHC-1241 (Aug. 17, 2007) (unpub.); *McGehee v. Northrop Grumman Ship Systems, Inc.*, 40 BRBS 5 (ALJ) (2006).[15] We agree with claimant that the administrative law judge erred in finding other suitable

[13] Article 1, Section 1(a), of the CBA provides that absences due to injury sustained at work of more than five working days are covered by a leave of absence. CX 27 at 4-5. Section 1(e) states: "should any employee engage in employment for another employer, such leave shall be considered as cancelled and the employee's services terminated." *Id.* at 5.

[14] The present case and the two administrative law judge decisions cited by claimant involve the same employer, and employer is represented by the same counsel in all three cases.

[15] The well-reasoned opinions in these cases are not binding on the Board, but are persuasive in reaching our decision in this case. In *N.W.* and *McGehee,* Administrative Law Judges Romero and Avery, respectively, found that the specific provision of the CBA at issue in this case rendered outside suitable alternate employment unavailable during periods in which the claimants were on leave of absence status as they would be subject to termination by employer. Thus, the claimants were entitled to permanent total disability benefits during those periods. In *N.W.*, Judge Romero found that the claimant's entitlement to permanent total disability benefits ended when he was recalled to modified work within employer's facility. In *McGehee,* Judge Avery found that the claimant's entitlement to permanent total disability benefits ended when her employment with employer was officially terminated and the CBA leave of absence provision no longer operated to prevent her from seeking outside employment.

alternate employment available to claimant when she was on leave of absence from employer, as the applicable contract provision precluded her taking other jobs without losing her job with employer, thus rendering work with other employers unavailable to claimant.

Initially, the Board's decision in *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986), relied upon by the administrative law judge in this case, does not address the issue or support the result he reached here. In *Dove*, the administrative law judge rejected claimant's assertion that he should not be required to accept a job that paid less than his previous salary and found that the employer's labor market survey established the existence of suitable alternate employment. The Board affirmed, specifically rejecting the claimant's contention that he was entitled to limit his employment prospects by refusing any job that paid less than his former wage. 18 BRBS at 141 n.1. In contrast to the instant case, the claimant in *Dove* was no longer employed by the employer, 18 BRBS at 140, and, thus, had no opportunity to perform modified work within the employer's facility at his previous rate of pay. Most importantly, in rejecting otherwise suitable jobs because they were lower-paying, the claimant in *Dove* acted entirely of his own volition, whereas in the present case, claimant's availability for outside employment is restricted by a contractual provision to which employer is a signatory. The present case thus does not involve a limitation on employability created by claimant, but one which is part of employer's contractual agreement. As claimant asserts, it would be incongruous to consider her to be available for alternate employment with other employers where the terms of the CBA negotiated between employer and her union provide that, should she engage in such outside employment, her employment with employer would be subject to termination. Under this set of circumstances, employer must bear responsibility for a contractual agreement into which it entered; thus, we hold that employer is not entitled to use evidence of jobs with other employers to demonstrate the availability of suitable alternate employment for a claimant who is on leave of absence due to a work injury under Article 14, Section 1(a), (e), of the CBA, where claimant has been and continues to be employed by employer in suitable employment when such work is available.

Although neither the Board nor the courts have previously addressed the precise issue raised by this appeal, the reasoning of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, in its decision in *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993), is instructive. In *Abbott*, both the Board and the Fifth Circuit upheld the administrative law judge's determination that the claimant could not realistically obtain otherwise suitable alternate jobs identified by the employer due to his participation in a

DOL-approved rehabilitation plan.[16] Acknowledging that the Act does not explicitly provide for the result reached in *Abbott*, the Fifth Circuit held that such result was consistent with the "Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, *to the greatest extent possible*, as productive members of the work force." *Abbott*, 40 F.3d at 127, 29 BRBS at 26(CRT) (emphasis added). The Fifth Circuit additionally stated that courts should not frustrate reasonable rehabilitation efforts that "result in lower total compensation liability for the employer and its insurers in the long run." 40 F.3d at 128, 29 BRBS at 27(CRT).

In the case before us, by retaining her employment status with employer, claimant has a higher wage-earning capacity than if she were to accept one of the lower-paying jobs in the labor market survey and her employment was terminated. Leaving the potential open for claimant to return to modified work for employer by placing her on leave of absence status when such work is unavailable not only complies with the CBA but also advances the goal of the Act to enable injured workers to resume productive employment to the greatest possible extent. *See Abbott*, 40 F.3d at 127, 29 BRBS at 26(CRT). Moreover, employer's long-term compensation liability is reduced where claimant remains able to resume work for employer at higher wages. *See id.*, 40 F.3d at 127-128, 29 BRBS at 26-27(CRT). To allow employer to use evidence of lower-paying jobs with other employers to establish the existence of suitable alternate employment where the terms of the CBA, to which employer is a signatory, provide that claimant would forfeit her employee status with employer by accepting such outside employment would undermine these statutory principles.

We therefore hold that where the CBA provides for claimant's termination if she accepts outside employment, such work is unavailable during the time claimant is on leave of absence status pursuant to the CBA and the potential exists for her to resume suitable work for employer. Alternate employment with other employers is not available to claimant where doing so would result in the termination of her employment with employer. *See generally Abbott*, 40 F.3d at 128, 29 BRBS at 26-27(CRT). Accordingly, we reverse the administrative law judge's determination to the contrary, and vacate his consequent finding that as of September 28, 2005, claimant was partially, rather than totally, disabled. We therefore modify the administrative law judge's decision to reflect

[16] In the present case, when claimant returned to work for employer with restrictions in January 2005, DOL assigned Joe Walker, a vocational rehabilitation counselor, to monitor her job performance in order to facilitate her satisfactory performance of modified work for employer. EX 21. *See* 33 U.S.C. §939; 20 C.F.R. §§702.501-702.508.

claimant's entitlement to permanent total disability compensation for the period of September 28, 2005, to November 7, 2006.[17]

Claimant next challenges the administrative law judge's finding that her modified work with employer was compatible with her restrictions; claimant, however, has not clearly explained how this assignment of error applies to the issue of the extent of her disability since she did not claim entitlement to compensation benefits for any periods while she was performing modified duty for employer. Claimant's contentions in this regard are relevant, however, to her contention that the administrative law judge erred in not making specific findings regarding claimant's entitlement to disability benefits from November 7, 2006, when employer recalled claimant to modified duty but she did not report to work based on the medical restrictions assigned by Dr. Wu, to January 15, 2007, when claimant returned to work. *See* footnotes 7 and 8, *supra*, and the discussion of the August 2005 injury, *infra.* An employer's offer of a suitable job within its own facility is sufficient to establish suitable alternate employment. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). In ascertaining the suitability of a job, the administrative law judge must compare the duties of the position with claimant's restrictions. *Stratton v. Weedon Eng. Co.*, 35 BRBS 1, 7 (2001) (*en banc*); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109, 112-113 (1998). As the administrative law judge did not specifically consider the issue of the suitability of the modified job offered by employer in light of the medical evidence regarding claimant's restrictions as of November 7, 2006, including Dr. Wu's reports, we must remand the case for him to reconsider claimant's entitlement to disability benefits during this period of time. *Id.*

Claimant also asserts that the administrative law judge erred in failing to address claimant's entitlement to interest on employer's late payment on April 7, 2005, of temporary total disability benefits for the period commencing on February 21, 2005. As interest on a disability award is mandatory, the administrative law judge on remand must make an assessment of interest on the late compensation payment for this period. *See, e.g., Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992).

Claimant argues that the administrative law judge erred in denying disability and medical benefits for her August 22, 2005, injury; these issues involve both questions regarding the causal relationship between claimant's condition and the August 22, 2005,

[17] In light of our reversal of the administrative law judge's finding that employer established the availability of suitable alternate employment with its labor market survey, we need not address claimant's additional arguments regarding the administrative law judge's failure to make adequate findings regarding suitable jobs in that labor market survey and claimant's resulting wage-earning capacity.

injury at work and the nature and extent of her alleged disability. Claimant has alleged that injuries to her lower and upper back and right shoulder sustained in the August 22, 2005, incident aggravated and combined with the lower back injuries sustained in her previous January 22, 2003, work-related accident to result in disability. The administrative law judge, however, summarily denied benefits for any injuries sustained on August 22, 2005, on the basis that this incident resulted only in a temporary aggravation of claimant's back condition which fully resolved by November 28, 2005. *See* Decision and Order at 11, 13. For the following reasons, we cannot affirm this decision, and therefore vacate the administrative law judge's denial of benefits for this injury. On remand, the administrative law judge must reconsider the issues relating to claimant's August 22, 2005, work injury.

The administrative law judge found that a second injury occurred on August 22, 2005, when claimant temporarily aggravated her lower back condition. Decision and Order at 11, 13. Claimant contends that the administrative law judge did not properly apply the aggravation rule to her pre-existing low back injury and did not apply the Section 20(a) presumption to the new injury to her thoracic spine and right shoulder that she alleged she sustained in the August 22, 2005, work incident. In this regard, it is well established that in determining whether a claimant's disabling condition is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case by demonstrating a harm and working conditions which could have caused it. Once the Section 20(a) presumption has been invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's conditions were not caused or aggravated by her employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Where aggravation of a pre-existing condition is at issue, employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[18] *See, e.g., Louisiana Ins. Guar. Ass'n v.*

[18] The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). This rule applies not only where the underlying condition itself is affected but also where the injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986) Whether the circumstances of a claimant's employment combine with the pre-existing condition so as to increase her symptoms to such a degree as to incapacitate her for any period of time or whether they actually alter the underlying process is not significant. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Moreover, the severity of a claimant's injury is not determinative of whether an aggravation occurred since even a minor incident can aggravate a pre-existing condition and impair a claimant's ability to work. *See, e.g.,*

Bunol, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Universal Mar. 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).

In this case, the administrative law judge credited claimant's assertion that she aggravated an underlying back condition on August 22, 2005. He summarily concluded that it resolved by November 2005 without permanent residuals and did not analyze the issue further. The administrative law judge thus did not properly apply the Section 20(a) presumption and determine whether claimant sustained the alleged new injuries to her thoracic spine and right shoulder, and he did not adequately discuss the record evidence relevant to claimant's condition. On remand, the administrative law judge must provide a reasoned discussion, consistent with the Section 20(a) presumption and the aggravation rule, addressing the evidence relevant both to the aggravation of claimant's pre-existing lower back condition and the new injuries to her thoracic spine, upper back, and right shoulder that she alleges resulted from the August 22, 2005, work-related incident.

With respect to the issue of disability related to the August 22, 2005, work-related incident, claimant is entitled to disability benefits for any period during which her work injury causes a total or partial loss of wage-earning capacity. *See generally Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 321, 31 BRBS 129(CRT) (5th Cir. 1997); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). In this regard, the administrative law judge found that claimant's August 22, 2005, injury had fully resolved by November 28, 2005, with no permanent residuals and that this injury did not increase her work restrictions beyond those imposed following her 2003 injury. Decision and Order at 11, 13. As previously discussed, however, the administrative law judge did not address evidence that claimant sustained a new injury to her upper back and right shoulder, and, thus, did not consider whether claimant suffered any disability resulting from these alleged injuries. Moreover, even if claimant sustained a temporary aggravation, she may be entitled to benefits for the period of the aggravation at a higher compensation rate.[19] The opinions of Drs. Smith and Wu, cited by the administrative law

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Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

[19] Thus, if, on remand, the administrative law judge finds claimant sustained any disability from the August 22, 2005, injury, he must make an average weekly wage determination for that injury. 33 U.S.C. §910. As the administrative law judge has not yet considered this issue, we will not address the parties' specific contentions on this issue. As it appears that the administrative law judge never ruled on claimant's pending

judge in support of his finding that claimant had no residuals from this incident after November 28, 2005, do not fully support the administrative law judge's conclusion.[20] Thus, on remand, the administrative law judge must consider whether claimant suffered any disability related to the August 22, 2005, work-related incident.

Claimant further challenges the administrative law judge's denial of medical benefits for treatment provided by Drs. Lanni and Wu for her August 22, 2005, work injury. The administrative law judge found that employer is not responsible for the treatment rendered by Drs. Lanni and Wu because claimant failed to show good cause for a change of physician. Decision and Order at 18. We agree with claimant that the administrative law judge erred in denying medical benefits on this basis. As the administrative law judge found that claimant sustained a second injury on August 22, 2005, she was entitled to a new choice of attending physician pursuant to Section 7(b) of

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motion to compel employer to produce wage information for similar workers pursuant to Section 10(b), he should make such a ruling on remand.

[20] Dr. Smith saw claimant on November 25, 2005, and in his office note of that date stated that claimant continued to experience lower back pain and that she had a new injury to her upper back and shoulder on August 22, 2005. CX 11 at 65. In his January 21, 2006, written response to questions regarding the alleged re-injury to claimant's *lower back* on August 22, 2005, Dr. Smith agreed that claimant's re-injury to her *lower back* was a temporary aggravation to her pre-existing condition, and that she was back to her pre-existing condition. EX 14 at 24-25. He did not, however, express an opinion at that time regarding any disability related to the alleged injury to claimant's upper back and shoulder. Dr. Smith saw claimant again on November 21, 2006, and noted that she had pain from the upper back downward. CX 11 at 66. On January 11, 2007, he released her to return to work with the same restrictions he had assigned on December 28, 2004. *Id.* at 67.

On November 3, 2006, Dr. Wu stated that he and Dr. Lanni had kept claimant off work since November 8, 2005, and that she remained temporarily totally disabled by her upper and lower back pain resulting from her January 22, 2003 and August 22, 2005 work injuries. CX 16 at 45-50. He noted that claimant's upper back pain was caused by thoracic facet syndrome and her lower back pain was caused by failed back surgery syndrome/post-lumbar laminectomy syndrome. *Id.* On December 11, 2006, Dr. Wu stated that claimant's pain from the above syndromes prevented her from returning to work within her prior restrictions and that "thoracic facet syndrome can be caused by injury which cause her upper back pain." EX 16.

the Act, 33 U.S.C. §907(b), for this injury.[21] *See* 20 C.F.R. §702.418. The fact that claimant chose Dr. Smith as her treating physician for her first injury did not deprive her of the right to select a different treating physician for any reasonable and necessary treatment resulting from the new injury. Thus, claimant's selection of Drs. Lanni and Wu for the treatment of her August 22, 2005, injury does not constitute a request for a change in physician pursuant to Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2). *See* 20 C.F.R. §§702.403, 702.406. On remand, therefore, the administrative law judge must specifically determine whether employer refused or neglected claimant's request for authorization of the medical services provided by Drs. Lanni and Wu. 33 U.S.C. §907(d); 20 C.F.R. §§702.418-702.421. *See* n.6, *supra; see also Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38, 40 (2002). He must further determine whether the treatment provided by these physicians thereafter, which claimant procured on her own initiative, was reasonable and necessary. 33 U.S.C. §907(a); 20 C.F.R. §§702.401(a), 702.402; *see, e.g., Weikert*, 36 BRBS at 40.

Lastly, claimant correctly contends that the administrative law judge erred in his consideration of claimant's entitlement to a *de minimis* award. A nominal award is appropriate where claimant has not established a present loss in wage-earning capacity, but has established that there is a significant possibility of future economic harm as a result of the injury. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In this case, the administrative law judge summarily denied claimant's claim for a *de minimis* award on the basis that claimant did not show a significant likelihood of diminished wage-earning capacity in the future due to either unstable post-injury employment or a worsening medical condition; however, the administrative law judge did not cite any evidence in support of his finding. Decision and Order at 17. Claimant asserts that record evidence that employer has been able to provide claimant with modified work only on a sporadic, intermittent basis demonstrates that her post-injury employment is unstable. Cl. Br. at 32. Claimant additionally contends that her performance of modified work has caused her to suffer aggravations and new injuries to other parts of her body. As the administrative law judge's conclusory finding is insufficient to support his conclusion that claimant failed to demonstrate a significant possibility of future economic harm, we must vacate his denial of a nominal

[21] In arguing that claimant was not entitled to a new choice of treating doctor, employer mischaracterizes the administrative law judge's finding of a temporary aggravation in 2005 as a finding that claimant did not sustain a new separate injury on August 22, 2005. *See* Emp. Resp. Br. at 36-37. An aggravation is a new injury under the Act. Moreover, even where a work-related injury does not entitle a claimant to disability benefits, the injury nonetheless may serve as the basis of an award of medical benefits. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

award. On remand, the administrative law judge must reconsider claimant's entitlement to a nominal award for both of her work-related injuries in accordance with the applicable legal standards. *See Rambo II*, 521 U.S. at 137-141, 31 BRBS at 60-62(CRT).

Accordingly, the administrative law judge's award of permanent partial disability benefits based on its labor market survey is vacated, and the decision is modified to reflect claimant's entitlement to permanent total disability benefits for the period of September 28, 2005, to November 7, 2006. The administrative law judge's finding that claimant is not entitled to disability benefits commencing November 7, 2006, is vacated, and the case is remanded for further consideration of claimant's entitlement to benefits for the period of November 7, 2006, to January 15, 2007, and for an award of interest for late compensation payments, consistent with this opinion. The administrative law judge's denial of disability and medical benefits for claimant's August 22, 2005, injury is vacated; on remand, the administrative law judge must address the causal relationship between claimant's conditions and that injury, as well as the nature and extent of disability, average weekly wage, and medical benefits related to that injury. The administrative law judge's denial of a *de minimis* award for both of claimant's injuries is also vacated; on remand, the administrative law judge must reconsider this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are 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