

DARRYLL LYONS)	
)	
Claimant)	
)	
v.)	
)	
EAGLE MARINE SERVICES)	DATE ISSUED: 12/01/2011
)	
Self-Insured)	
Employer-Petitioner)	
)	
and)	
)	
INTERNATIONAL TRANSPORTATION)	
SERVICES)	
)	
and)	
)	
AMERICAN LONGSHORE MUTUAL)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

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

James M. McAdams (Pierry & McAdams, LLP), San Pedro, California, for claimant.

Daniel F. Valenzuela (Samuelson, Gonzalez, Valenzuela & Brown), San Pedro, California, for Eagle Marine Services.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for International Transportation Services and American Longshore Mutual Association.

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

PER CURIAM:

Eagle Marine Services appeals the Decision and Order (2008-LHC-00419) 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 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.¹ 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured on January 9, 2005, when he was working as a hustler driver for Eagle Marine. He alleges he suffered injury to his back and lower extremities when the hustler's driver's seat, which would not lock into position, broke, causing him to "pop" his back and "mess up" his legs and back. Tr. at 41-42. Following this injury, Eagle Marine voluntarily paid claimant temporary total disability benefits from January 10, 2005, through February 24, 2006. EMS Ex. 11. Claimant was diagnosed with low back strain and radiculitis, and he complained of buckling knees, which often caused him to fall. Cl. Exs. 4, 9-10. Claimant remained out of work until he secured modified employment, at lower wages, on September 5, 2006. On March 25, 2007, while visiting his mother, claimant's knee gave out while he was descending stairs. He fell and suffered a torn meniscus. Cl. Exs. 65-66. Claimant ceased working on May 27, 2007, after working for International Transportation Services (ITS) as a yard clerk. Claimant filed claims against both employers, first contending his knee condition was the result of the initial injury in January 2005 with Eagle Marine and later contending it may also be due to cumulative trauma while working, ending with his employment with ITS.

The administrative law judge found that claimant's injury is compensable, and that all of claimant's injuries stemmed from the natural progression of the initial back injury. As Eagle Marine failed to demonstrate that claimant was injured on his last day of work while working for ITS, the administrative law judge found that Eagle Marine is the responsible employer. He awarded medical benefits, temporary total disability benefits from January 9, 2005, through September 4, 2006, temporary partial disability benefits from September, 5, 2006, through May 27, 2007, and temporary total disability benefits from May 28, 2007, and continuing. 33 U.S.C. §§907, 908(b), (e). The administrative law judge awarded a lien against claimant's benefits to the ILWU-PMA Welfare Fund pursuant to 33 U.S.C. §917. Decision and Order at 1-4, 35. Eagle Marine appeals the

¹By Order dated July 29, 2011, the Board reinstated this appeal on its docket following receipt of the record from the district director.

administrative law judge's finding that it is the employer responsible for claimant's benefits. ITS responds, urging affirmance.²

In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling 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 a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and the claimant's employer at that time is responsible. If, however, the subsequent injury aggravates, accelerates or combines with the earlier injury to result in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is responsible. *See, e.g., 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); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Thus, in a traumatic injury case with successive employers, each employer bears the burden of establishing that it is not responsible, *i.e.*, the first employer must prove a subsequent aggravation and the second employer must prove the condition is the result of a natural progression in order to avoid liability. *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997); *see Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *see also Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

The administrative law judge found that ITS established that claimant suffered no injury while working in its employ on May 27, 2007, and that claimant's condition is the result of the natural progression of his initial injury. The administrative law judge stated that he relied heavily on the opinion of Dr. Timothy Hunt – with the exception of Dr. Hunt's May 28, 2008, report which for the first time relates claimant's condition to cumulative trauma. Decision and Order at 27; Cl. Ex. 79. The administrative law judge rationally explained that he discredited this particular opinion of Dr. Hunt's because it contained an "element of advocacy" based on its timing, noting there was nothing objective in the previous medical reports to support a conclusion of cumulative trauma, especially as there was no evidence claimant that fell on his last day of work. Decision and Order at 27-29; Cl. Ex. 83 at 64-64, 72-73; Tr. at 67.

²No party challenges the award of benefits to claimant; consequently, the award of benefits is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Dr. Timothy Hunt began seeing claimant in January 2006 and became his orthopedic specialist and treating physician in October 2007. During this time, Dr. Hunt continually relied on claimant's statements that his condition related to the original 2005 injury. Cl. Exs. 83. In his May 28, 2008, report, Dr. Hunt indicates that claimant alleged he sustained cumulative trauma from May 27, 2006, through May 27, 2007. Cl. Ex. 79. As the administrative law judge noted, however, this was the first time cumulative trauma was mentioned, and he found that had Dr. Hunt believed that claimant's continued work was the cause of his condition, he would have so stated prior to May 28, 2008, which was six weeks before the hearing and when claimant filed his new cumulative trauma claim. Decision and Order at 28. Indeed, Dr. Hunt explained in his July 2008 deposition that the need for surgery on claimant's knee is due to the falls caused by his original injury. Cl. Ex. 83 at 30. He stated that claimant's original injury led to fatigue in the lower extremities and the result, knee buckling, is common with back injuries. Claimant's other physical problems, including shoulder, neck and elbow injuries, were the results of his numerous falls in part due to his buckling knees.³ Decision and Order at 26-30; *see* Cl. Exs. 75, 79, 83. As claimant had not reported knee buckling prior to the 2005 incident, it was reasonable for the administrative law judge to rely on Dr. Hunt's opinion that claimant's subsequent condition is related to the falls caused by the knee buckling, and hence, the original 2005 accident.

The administrative law judge is entitled to weigh the evidence and it is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The Board may not reweigh the evidence, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981), and or interfere with a rational inference even if there may be an alternate rational inference. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge rationally rejected one opinion of Dr. Hunt's, as it incorrectly noted that claimant fell on his last day of work, and as he stated for the first time that claimant's work may have caused cumulative trauma. The prior reports of Dr. Hunt indicated that claimant's later injuries were caused by his falls, which were the results of his knees buckling due to the work injury. Thus, substantial evidence supports the administrative law judge's finding that claimant's condition is the result of the natural progression of his original 2005 injury.

Moreover, contrary to Eagle Marine's argument, the administrative law judge rationally found that Dr. Delman's opinion does not support a finding that claimant's condition was aggravated by his continued work. *Id.* at 30. Rather, the administrative

³Dr. Hunt also attributed the falls to claimant's obesity, which was a pre-existing condition.

law judge found that Dr. Delman's opinion clearly demonstrates that claimant's falls at work were due to the buckling of his legs and then those falls resulted in aggravating his condition. EMS Ex. 7 at 85. Thus, Eagle Marine failed to establish that claimant's work with ITS aggravated his condition. As the record contains substantial evidence to support the finding that claimant's condition is the result of the natural progression of his initial injury with Eagle Marine, and as the administrative law judge rationally rejected the evidence to the contrary, we affirm the finding that Eagle Marine is the employer responsible for claimant's benefits. *Siminski*, 35 BRBS 136.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge