BRB No. 07-0115

T.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HORIZON LINES, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	DATE ISSUED: 07/31/2007
	)	
Employer/Carrier-Petitioners	)	
	)	
CSX LINES, LLC	)	
	)	
and	)	
	)	
GALLAGHER BASSETT SERVICES, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

David B. Condon (Welch & Condon), Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates P.S.), Seattle, Washington, for Horizon Lines, Incorporated and Signal Mutual Indemnity Association, Ltd.

Wayne P. Tate (Ostendorf, Tate, Barnett & Wells, L.L.P.), Rancho Santa Margarita, California, for CSX Lines, LLC and Gallagher Bassett Services, Incorporated.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer, Horizon Lines, Incorporated (Horizon) appeals the Decision and Order Awarding Benefits (2004-LHC-2539, 2006-LHC-0024) of Administrative Law Judge Russell D. Pulver 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 has been a longshoreman for approximately twenty-seven years. He worked as a teamster mechanic for CSX Lines, LLC (CSX), which was later acquired by Horizon. On October 10, 2002, claimant suffered an elbow injury while building a partition. Claimant sought treatment with Dr. Shek, an internist, on October 21, 2002. Dr. Shek diagnosed lateral epicondylitis and prescribed anti-inflammatory medication, ice and physical therapy. CSX Ex. 4. On November 13, 2002, claimant received a cortisone shot for his continuing pain. He returned to work at regular duty and did not miss any time from October 10, 2002 until March 2003. On March 2, 2003, claimant returned to Dr. Shek complaining of left elbow pain, and he received a second cortisone shot. Prior to claimant's visit to Dr. Shek on March 17, 2003, Horizon assumed ownership of the CSX terminal. On March 17, Dr. Shek opined that claimant's tendonitis had been exacerbated by his work. Claimant did not work from May 6, 2003 to May 23, 2003. On May 20, 2003, Dr. Shek noted that claimant's left elbow condition was better and permitted his return to work without restrictions. Claimant again sought treatment for continuing elbow pain on December 5, 2003. Dr. Shek opined that claimant's injury was made worse by the repetitive sweeping claimant performed at work, administered a third cortisone injection, and recommended light- duty work for two weeks. As claimant's condition did not improve, Dr. Shek referred claimant to Dr. Arntz, an orthopedic hand surgeon. Dr. Arntz performed surgery on claimant's elbow on July 15, 2004, and claimant returned to his regular duties on March 2, 2005. Claimant sought benefits under the Act.

In his decision, the administrative law judge found that claimant was temporarily totally disabled from December 19, 2003 until January 17, 2005, and temporarily partially disabled from January 17, 2005 until April 13, 2005, the date of maximum medical improvement. Thereafter, the administrative law judge found that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(1) of the Act, 33

U.S.C. §908(c)(1), for a seven percent impairment of the left upper extremity. The administrative law judge also found that Horizon is the responsible employer as claimant's elbow condition was aggravated by his work duties after Horizon assumed ownership of the terminal.

On appeal, Horizon contends that the administrative law judge erred in finding that it is the responsible employer as claimant's ultimate disability is the result of the natural progression of the injury claimant sustained in October 2002. CSX responds, urging affirmance of the administrative law judge's decision.[1]

The employer at the time of an initial traumatic injury remains liable for the full disability resulting from the natural progression of that injury. If, however, claimant's subsequent employment aggravates or accelerates claimant's condition resulting in disability, the subsequent employer is fully liable. *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); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998), *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997), *decision after remand*, 33 BRBS 32 (1999), *aff'd mem.*, No. 99-70631 (9th Cir. Feb. 26, 2001). Where claimant's work results in an exacerbation of symptoms, the employer at the time of the work events resulting in this exacerbation is responsible for any resulting disability caused thereby. *See generally Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Each employer bears the burden of establishing it is not the responsible employer. *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007).

In the present case, the record contains the medical reports of Drs. Shek, Arntz, and Marinow. Dr. Shek began treating claimant shortly after the work-related incident. On April 7, 2003, and December 5, 2003, Dr. Shek attributed claimant's increased pain to exacerbations caused by his employment. Dr. Arntz examined claimant in January 2004, opined that conservative measures were unlikely to have a significant impact, and recommended surgery to correct claimant's elbow condition. The surgery was performed on June 15, 2004, and claimant was released for work with restrictions on January 12, 2005. CSX Ex. 19. Employer requested that Dr. Marinow, an orthopedic surgeon, review the medical records and render an opinion regarding claimant's elbow condition. Dr. Marinow opined that claimant's left elbow lateral epicondylitis condition

[1] Claimant also responded, noting that the outcome of the appeal does not directly affect his entitlement to benefits, and thus he makes no further argument in favor of or against Horizon's appeal.

is not solely due to his work injury on October 10, 2002, but was aggravated by cumulative trauma from work duties which flared up in March 2003 and December 2003. Dr. Marinow opined that subsequent injuries produce "further microtears and inflammation resulting in tendonitis [which] are additive to cumulative injuries that further traumatize the injured body part, therefore resulting in a chronic condition from the subsequent and additive injuries…." Horizon Ex. 1.

The administrative law judge found that claimant returned to work following his initial injury and worked at full duty until March 2003. During this time, Horizon became his employer. As a result of increased pain in March 2003, claimant received additional treatment and was placed on several weeks of light-duty work. After claimant returned to work in May 2003, he did not seek treatment for pain in his elbow until December 2003. The administrative law judge discussed Dr. Marinow's opinion that it is medically reasonable and plausible that claimant's left elbow condition worsened due to repetitive stress and strain at work. Dr. Marinow opined that claimant's condition, which required surgery, is the result of cumulative trauma claimant suffered after he returned to work in May 2003. Horizon Ex. 1. Moreover, the administrative law judge found that this opinion is supported by Dr. Arntz's testimony that the most common cause of tendonitis is overuse due to a repetitive motion; Dr. Shek attributed claimant's worsened condition to repetitive sweeping at his job. Thus, contrary to Horizon's argument on appeal, the credited medical evidence establishes that claimant suffered an aggravation of his elbow symptoms, which required surgery and resulted in a permanent partial impairment of his elbow, while working for Horizon after March 2003.

The Board is not empowered to reweigh the medical evidence. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We affirm the administrative law judge's finding that Horizon is liable for the awarded disability and medical benefits as it is supported by substantial evidence and consistent with law. *See Price*, 330 F.3d 1102, 37 BRBS 87(CRT); *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT). Horizon did not submit evidence sufficient to persuade the administrative law judge that claimant's elbow surgery and resulting disability were due to the natural progression of the original work injury, *Buchanan*, 33 BRBS 32, and on appeal, it has failed to demonstrate reversible error in the administrative law judge's decision.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge