BRB No. 12-0562

PATRICK GRIERSON Claimant-Respondent v. MARINE TERMINALS CORPORATION and MAJESTIC INSURANCE COMPANY and TECHNOLOGY INSURANCE COMPANY Employer/Carriers-Petitioners WILLAMETTE STEVEDORING COMPANY, LIMITED LIABILITY COMPANY and LIBERTY NORTWEST INSURANCE CORPORTATION Employer/Carrier-Respondents KINDER MORGAN, INCORPORATED and ACE USA INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: 06/18/2013

and)
)
ILWU-PMA WELFARE PLAN)
)
Intervenor-Respondent) DECISION and ORDER

Appeal of the Decision and Order Awarding Claimant Permanent Total Disability and Medical Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

J. Michael Casey, Portland, Oregon, for claimant.

Robert E. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for Marine Terminals Corporation, Majestic Insurance Corporation and Technology Insurance Company.

Thomas J. Smith and Mary Lou Summerville (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for Kinder Morgan, Incorporated and ACE USA Insurance Company.

John Dudrey (Williams Frederickson, LLC), Portland, Oregon, for Willamette Stevedoring Company, Limited Liability Company and Liberty Northwest Insurance Corporation.

Shawn C. Groff and Estelle Pae Huerta (Leonard Carder, LLP), Oakland, California, for intervenor.

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

PER CURIAM:

Marine Terminals Corporation and its carriers (MTC) appeal the Decision and Order Awarding Claimant Permanent Total Disability and Medical Benefits (2009-LHC-01976, 2010-LHC-01361) of Administrative Law Judge William Dorsey rendered on claims 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 suffered a head injury on June 25, 2001, while working for MTC when a falling lashing bar struck him on the head. Tr. at 31. Since the accident, claimant reported that he experiences daily episodes of dizziness, vertigo, and difficulties with short term memory, concentration, and multitasking. Claimant returned to part-time work on the waterfront on September 1, 2003, for various employers. Claimant's coworkers testified that he was not the same after the accident; he forgot things and would have to be reminded several times before he would do a task. During this time, claimant experienced chronic fatigue, vertigo, and headaches; claimant testified he was often so fatigued that he had to sit in his car for 15-20 minutes after work before being able to drive home. Tr. at 41, 124-125, 137. On December 4, 2006, Dr. Lee, claimant's treating physician, authorized a six-week work break for claimant to "get[] stabilized again on medications" after claimant reported he felt unsafe to work.[1] CX 136A. Claimant testified that he had hoped to return to work, but his condition did not improve significantly after his complications from medications subsided, and he did not feel sufficiently safe to work on the waterfront. Tr. at 47-51. Claimant's last day of longshore employment was December 2, 2006.[2]

Claimant filed a claim under the Act on October 21, 2002.[3] CX 75. Based on the opinions of Drs. Lee, Crossen, Wong-Ngan, and Turco, the administrative law judge found that claimant suffered traumatic brain injuries in his 2001 accident that left him with diminished intellectual functioning, episodes of central-origin vertigo, exhaustion, and short-term memory and focus problems.[4] Decision and Order at 46-47. Despite

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[1]Claimant reported to Dr. Lee that he was experiencing greater anxiety and depression as a result of recent changes to his medications and that he felt overwhelmed "with everything," including work and the death of a friend. CX 136A.

[2]Claimant was last employed by Kinder Morgan, although he had also worked for Willamette Stevedoring in November 2006.

[3]MTC initially paid benefits without a claim for compensation from the date of injury, but MTC controverted ongoing benefits on October 17, 2002, based on the September 12, 2002, evaluations of Drs. Denekas and Davies. CX 73; MX 5, 24.

[4]Specifically, the administrative law judge found that the diagnoses of a brain injury are reasoned and supported because, as Dr. Wong-Ngan explained, nearly all of claimant's psychological testing during the last 10 years showed that claimant functions in the low-average to average range, but with particularly severe impairments to his working memory and processing speed; this is consistent with a traumatic brain injury because claimant scored dramatically better in some areas than others. Decision and Order at 47; Tr. at 255-58. By contrast, the administrative law judge found the opinions of Drs. Denekas and Davies, that claimant has no psychological impairment attributable to the 2001 injury, are unpersuasive because Dr. Denekas did not evaluate claimant's

claimant's having worked on a part-time basis for over three years post-injury, the administrative law judge found his impairments to be disabling based on claimant's testimony and the opinions of his coworkers and physicians that the symptoms he suffered made him unsafe to work on the waterfront. *Id*. at 49-50; Tr. at 47-48, 219, 223-229, 275-278, 337, 376. The administrative law judge further found: that claimant did not suffer an aggravation injury during his post-injury employment; that his condition is the result of the natural progression of the brain injury attributable to the June 25, 2001, work accident; claimant was totally disabled when he left work; and his condition reached maximum medical improvement on October 5, 2007. Accordingly, the administrative law judge found that MTC is the responsible employer, and awarded claimant temporary total disability benefits from June 26, 2001 to September 1, 2003; temporary partial disability benefits from September 2, 2003 to December 3, 2006; temporary total disability benefits from December 4, 2006 until October 4, 2007; and permanent total disability benefits from October 5, 2007, forward.[5] Decision and Order at 45, 51-58; *see* 33 U.S.C. §908(a), (b), (e).

On appeal, MTC contends the administrative law judge erred in failing to address its argument that claimant voluntarily left longshore employment and therefore is not entitled to total disability benefits, and in finding that claimant's disability is the result of the natural progression of the 2001 brain injury he suffered while working for MTC. Claimant, Willamette Stevedoring and the ILWU-PMA Welfare Plan respond, in separate briefs, urging affirmance of the administrative law judge's Decision and Order. Kinder Morgan responds in support of the administrative law judge's responsible employer finding, but notes its agreement with MTC's argument that claimant voluntarily stopped working. MTC filed a consolidated reply brief.

MTC asserts the administrative law judge erred in failing to address its argument that claimant voluntarily retired and his award thus should be limited to partial disability compensation. Specifically, MTC argued before the administrative law judge that claimant voluntarily left work in December 2006 to care for his father, who needed 24-hour care, and because claimant realized that his combined union pension and social security benefits would provide more income than continued employment would provide. MTC Post Hr. Br. at 31-35. We reject MTC's assertion of error as there is no dispute that

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neuropsychological functioning and the record does not support Dr. Davies's belief that claimant was malingering or suffering from a somatoform disorder. Decision and Order at 48; Tr. at 266-267, 401. MTC does not challenge the weighing of the evidence or these findings, and they are affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[5]The parties stipulated that the ILWU-PMA Welfare Plan has a lien on benefits owed claimant pursuant to Section 17 of the Act, 33 U.S.C. §917.

claimant suffered a traumatic injury before retiring. Contrary to MTC's assertion, the voluntary/involuntary retirement analysis is limited to occupational disease cases. 33 U.S.C. §908(a), (b), (c), (e); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).[6] In a traumatic injury case, however, the relevant inquiry is whether a claimant's return to his usual work is precluded by his work injury. *Harmon*, 31 BRBS at 48. If the claimant establishes an inability to return to his usual work, the burden shifts to his employer to establish the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The administrative law judge addressed this inquiry on the record as a whole, finding that claimant, here, is unable to safely perform his usual employment or any post-injury work on the waterfront due to symptoms caused by brain injuries suffered in the 2001 work accident. Decision and Order at 46-50. This finding is supported by the opinions of Drs. Lee, Crossen, Wong-Ngan, and Turco, who attributed claimant's neuropsychological impairments to his 2001 work accident, the testimony of claimant's coworkers and physicians, who stated that the symptoms claimant complains of make it unsafe for him to work on the waterfront, claimant's own testimony that he left work in 2006 and did not return because his symptoms made him feel unsafe to work,[7] and Dr. Lee's authorization of a six-week work break for claimant to adjust to a change in medication that he was taking because of his work injury. Tr. at 43-51, 219, 223-229, 275-278, 301-302, 312-324, 337, 371, 376, 385; CX 20, 21, 27, 136A; MX 23, 24. Further, as no employer proffered evidence of suitable alternate employment outside of longshoring, the administrative law judge properly found claimant entitled to total disability benefits. *Harmon*, 31 BRBS at 48; *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT). Therefore, as it rational, supported by substantial evidence, and in accordance with law, we affirm the award of total disability benefits commencing December 4, 2006.

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[6]In *Harmon*, the Board noted that an inquiry into the retirement status of a claimant is relevant only when the claimant has an occupational disease, as the 1984 Amendments to the Act provide a formerly unavailable remedy to retirees whose occupational disease manifests itself after retirement. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d); *Harmon*, 31 BRBS at 48. Thus, the retiree provisions were added to expand the disability benefits available to retired workers with occupational diseases.

[7]The administrative law judge acted within his discretion in finding claimant's testimony credible, given the medical evidence indicating that claimant was not malingering and the testimony of his physicians and coworkers that the symptoms he reported make him unsafe to work. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

MTC also contends the administrative law judge erred in finding that claimant's current disability is the result of the natural progression of his June 25, 2001 injury and, therefore, in holding it liable for claimant's continuing benefits and medical expenses. It argues that the administrative law judge erred in his application of the aggravation rule and, therefore, in failing to find Kinder Morgan, the employer for whom claimant last worked, liable for claimant's benefits. In a responsible employer case where the claimant has sustained a traumatic injury, the issue is whether a claimant's disability is due to the natural progression of his initial work injury or is due instead to the aggravating or accelerating effects of a second injury. If the claimant's disability results from the natural progression of the prior injury and would have occurred notwithstanding any subsequent injury, then the employer at the time of the prior injury is responsible. If, however, the claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *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).

MTC correctly notes that an increase in symptoms due to the claimant's employment constitutes an "injury" under the Act regardless of any change in underlying condition. *See, e.g., Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). However, the compensability of this claim has already been established. Thus, contrary to MTC's assertion, the administrative law judge correctly recognized that the issue in this responsible employer case is whether claimant's disabling symptoms are due solely to his 2001 work injury or whether claimant's subsequent employment caused or contributed to the onset of his disability. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). The administrative law judge found that, although claimant experienced symptoms of vertigo and chronic fatigue during his employment from 2003 to 2006, claimant's work activities did not cause the onset of symptoms or contribute to his disability; rather, claimant was already symptomatic from his vertigo and chronic fatigue-inducing brain injury prior to that employment and he merely experienced these symptoms while working, but not because of his work. The administrative law judge credited the opinions of Drs. Lee, Wong-Ngan, and Turco, that claimant's symptoms were caused by his underlying brain injury and that claimant's return to work did not aggravate or affect his condition.[8] Further,

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[8]Dr. Lee testified that she saw claimant's vertigo as an underlying condition that might be triggered by certain activities, such as crane work, or bending over, but that was not actually aggravated by those activities. Dr. Lee testified that claimant reached an endurance plateau on October 31, 2006. CX 23 at 29, 49. Dr. Wong-Ngan explained that, although claimant's work exposed him to large amounts of unfiltered stimuli, she did not believe that exposure aggravated his injury; claimant's will to persevere in spite

although claimant testified that one of the reasons he left work in 2006 was because he realized his symptoms made it unsafe for him to work, Tr. at 47-51, the administrative law judge found this realization did not support finding an "aggravation" had occurred because the realization stemmed from claimant's greater awareness of his preexisting disability. Decision and Order at 51-54. Therefore, as all of the doctors who diagnosed a neuropsychological impairment concluded that claimant did not suffer an aggravation at work, and at most there was a temporary triggering of the symptoms he had all along following the June 15, 2001, injury, the administrative law judge rationally found claimant's disability is due to the natural progression of the 2001 brain injury he suffered while working for MTC in 2001.[9] *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). We therefore affirm the administrative law judge's finding that MTC is the responsible employer.[10] *Buchanan v. Int'l Transp. Serv.*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Serv. v. Kaiser Permanente Hospital, Inc.*, 7 F. App'x 547 (9th Cir. 2001).

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of his limitations diminished as he came to terms with the full extent of his limitations. Dr. Turco explained that claimant may have been less able to continue to challenge himself beyond his capabilities over time, but that does not reflect his underlying condition changed in any appreciable way. His ability to persevere may have eroded over time as his experience made him more aware of his limitations, but his underlying condition was unaffected. MX 23 at 58-61, 100, 108; Tr. at 301-302, 312-324, 369-371, 385.

[9]Contrary to MTC's assertion, the holdings in *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Crum v. Gen. Adjustment Bureau*, 737 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Oberts v. McDonnell Douglas Serv.*, BRB Nos. 05-0445/A (Feb 15, 2006) (unpub.), do not support its contention that the administrative law judge erred, as each of these cases recognizes a compensable injury where the claimant's work effected a change in the claimant's disability status.

[10]We reject MTC's argument that the administrative law judge erred in failing to find depression played a role in claimant's disability such that a later employer is liable. Contrary to MTC's assertion, substantial evidence supports the administrative law judge's finding that claimant's depression was not "part of the reason [claimant] cannot return to work at this time," Decision and Order at 55, as no physician opined that claimant could not work due to his depression. Moreover, to the extent MTC suggests that depression is a symptom of a second injury, it also points out in its brief on appeal that the physicians, who stated an opinion as to the source of claimant's depression, opined it was a response to claimant's medical and cognitive conditions caused by the 2001 brain injury. MTC Br. at 16.

Accordingly, the administrative law judge's Decision and Order Awarding Claimant Permanent Total Disability and Medical Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge