

BRB Nos. 03-0414
and 03-0414A

RICHARD AVANT)	
)	
Claimant)	
Cross-Petitioner)	
)	
v.)	
)	
NATIONAL STEEL AND SHIPBUILDING)	
COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
SOUTHWEST MARINE, INCORPORATED)	DATE ISSUED: <u>MAR 8, 2004</u>
)	
and)	
)	
WARD NORTH AMERICA)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Respondents)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Roy Axelrod, Solana Beach, California, for National Steel & Shipbuilding Company.

Michael D. Doran (Samuelson, Gonzalez, Valenzuela & Brown), San Pedro, California, for Southwest Marine, Incorporated, and Ward North America.

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

PER CURIAM:

National Steel and Shipbuilding Company (NASSCO) and claimant appeal the Decision and Order and NASSCO appeals the Supplemental Decision and Order Awarding Attorney's Fees (2002-LHC-00936, 00937) 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right knee on October 20, 1995, during the course of his employment as a rigger trainee for NASSCO. Claimant was terminated by NASSCO on October 24, 1995, for violating its alcohol policy. Claimant returned to work as a rigger for Southwest Marine on September 28, 1996. Claimant injured his left shoulder during the course of his employment for Southwest Marine on May 5, 1997, and also alleged that his working conditions for Southwest Marine aggravated his knee problems. Claimant underwent left shoulder surgery in June 1997. He required additional shoulder surgery in February and April 1998. Claimant underwent right knee surgery on March 5, 1999, to repair a torn lateral meniscus. Subsequently, he underwent a total right knee replacement on October 22, 1999.

In his decision, the administrative law judge found that NASSCO is the responsible employer for claimant's 50 percent right knee impairment. 33 U.S.C. §908(c)(2), (19). The administrative law judge found that claimant's left shoulder injury reached maximum medical improvement on April 13, 2000, and that Southwest Marine is liable for permanent partial disability benefits of \$120 per week for this injury. 33 U.S.C. §908(c)(21). In his Supplemental Decision and Order, claimant's attorney was awarded a fee jointly payable by NASSCO and Southwest Marine of \$9,843.75, representing 43.75 hours at an hourly rate of \$225, plus costs of \$2,838.

On appeal, NASSCO and claimant contend that the administrative law judge erred by not applying the Section 20(a) presumption, 33 U.S.C. §920(a), to determine that Southwest Marine is the employer responsible for claimant's knee injury. They also contend the administrative law judge erred in crediting Dr. Davidson's testimony to find that claimant's right knee disability resulted from the natural progression of claimant's

pre-existing degenerative arthritis and the October 1995 injury with NASSCO.¹ NASSCO also appeals its liability for claimant's attorney's fee award. Southwest Marine responds, urging affirmance of the administrative law judge's decisions.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and 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); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); see also *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th Cir. 2001).

Thus, in order for Southwest Marine, the last employer, to meet its burden of establishing that NASSCO is the responsible employer, Southwest Marine must prove that claimant's disability is due solely to the natural progression of his initial knee injury with NASSCO. See *Buchanan*, 33 BRBS at 36; see generally *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). In order to have Southwest Marine to be held liable, NASSCO's burden is to establish that an injury or aggravation sustained in the course of claimant's subsequent work for Southwest Marine from September 1996 to May 1997 contributed to claimant's permanent disability. See *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). In each instance, the burden of NASSCO and Southwest Marine is to establish, by a preponderance of the evidence, that claimant's ultimate disability to his right knee is due to an injury with the other employer. See, e.g., *Price*, 339 F.3d at 1105, 37 BRBS at 90(CRT); *Kelaita v. Director, OWCP*, 950 F.2d 1308 (9th Cir. 1986). Contrary to the contention of NASSCO and claimant on appeal, the Section 20(a) presumption plays no role in this determination. *Buchanan*, 33 BRBS at 35. Section 20(a) aids a claimant in establishing

¹Claimant earned a higher average weekly wage with Southwest Marine than he did with NASSCO. Claimant thus has an interest in having Southwest Marine be found the responsible employer as he would receive greater compensation for his 50 percent permanent knee impairment. See 33 U.S.C. §908(c)(2), (19).

the compensability of his claim. *See generally U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 65 (1992). In this case, claimant is not seeking to establish that his knee injury is work-related, but that Southwest Marine, rather than NASSCO, is liable for the resulting permanent partial disability. Accordingly, we reject the contention that the administrative law judge erred by not applying the Section 20(a) presumption to determine the responsible employer for claimant's knee condition.

NASSCO and claimant next challenge the administrative law judge's crediting of Dr. Davidson's opinion. In his decision, the administrative law judge credited Dr. Davidson's deposition testimony that claimant sustained a meniscus tear during the course of his employment at NASSCO, which was superimposed on pre-existing degenerative arthritis. Decision and Order at 8. The administrative law judge further credited Dr. Davidson's opinion that claimant would have required arthroscopic surgery on the right knee in March 1999 and a total right knee replacement in October 1999 regardless of whether claimant had been employed by Southwest Marine or elsewhere. AX 8 at 7-12. Thus, the administrative law judge credited Dr. Davidson's conclusion that claimant's surgeries and resulting disability arose from the natural progression of his injury with NASSCO. AX 8 at 15-16, 18, 44-46, 51.

We agree with NASSCO and claimant that the administrative law judge's crediting of Dr. Davidson's testimony that claimant would have required knee surgery regardless of the effect on claimant's knee condition of his employment with Southwest Marine is not dispositive of the responsible employer issue. Subsequent to the issuance of the administrative law judge's decision, the Ninth Circuit addressed a case in which the claimant's surgery was scheduled, but had not occurred, prior to claimant's last employment. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003).² In *Price*, the court affirmed the administrative law judge's determination that claimant's last employer before his undergoing knee replacement surgery was liable, notwithstanding the fact that his employment that day did not affect the need for the already-scheduled knee replacement surgery because the administrative law judge credited evidence that claimant sustained some minor but permanent increase in his knee disability as a result of his employment that day. *Id.*, 339 F.3d at 1107, 37 BRBS at 91(CRT). Pursuant to *Price*, therefore, the relevant inquiry in this case is whether claimant's disability is due at least in part to an aggravating injury with Southwest Marine and Dr. Davidson's testimony that claimant would have required arthroscopic surgery and a total right knee replacement regardless of

²We accept NASSCO's filing on August 20, 2003, of the *Price* decision as supplemental authority.

his subsequent employment by Southwest Marine is not dispositive of this inquiry.³ *Id.*; *see also Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d 1308.

In further support of his finding that NASSCO is the responsible employer, the administrative law judge credited the initial medical reports of Dr. McSweeney, which attribute claimant's knee disability solely to his employment with NASSCO. Decision and Order at 8; *see* SX 4 at 18, 28, 39. The administrative law judge discredited the hearing testimony of Dr. McSweeney and the opinion of Dr. Fuller that claimant's knee condition was aggravated by his employment at Southwest Marine. The administrative law judge reasoned that the opinion of Dr. Fuller and the hearing testimony of Dr. McSweeney rely on claimant's assertions that his employment at Southwest Marine caused pain, swelling, and episodes of knee clicking and buckling; however, the administrative law judge found that the record does not corroborate claimant's assertions in this regard. Decision and Order at 8-9;⁴ *see* CX 10; NX 7 at 18-24; SXs 3, 4, 12. The

³The basis for Dr. Davidson's opinion that claimant's injury was due to the natural progression of the NASSCO injury was that the need for surgery was established prior to claimant's subsequent employment. The remainder of Dr. Davidson's deposition testimony does not definitively establish whether claimant's knee condition is due to the natural progression of his injury with NASSCO or is due to an aggravating injury at Southwest Marine. Dr. Davidson initially stated that there is no medical evidence that claimant's employment with Southwest Marine accelerated his degenerative arthritis or worsened his meniscus tear. AX 8 at 21-26. Subsequently, Dr. Davidson agreed that claimant's employment at Southwest Marine caused further tearing of the meniscus, which necessitated removing more of the meniscus when claimant underwent arthroscopic surgery, which procedure resulted in accelerating claimant's degenerative arthritis. AX 8 at 27. Dr. Davidson also opined that claimant's work activities as a rigger could aggravate a meniscus tear, and that while the tear will worsen due to the passage of time, greater meniscus degeneration will occur in a person engaged in heavy labor, like that of a rigger. AX 8 at 29-31. Finally, Dr. Davidson stated that he could not give a definite opinion as to whether or not claimant's employment with Southwest Marine worsened his degenerative arthritis and meniscus tear, due to the absence of objective evidence pertinent to this issue. AX 8 at 46-48; *see also* AX 8 at 22-23, 38.

⁴The administrative law judge noted that claimant only saw a doctor once about his knee while he was employed with Southwest Marine. The administrative law judge also found, through a discussion of various evidence and testimony, that claimant is not a reliable historian and that he cannot credit his testimony as to his physical complaints at any given time. Decision and Order at 9.

administrative law judge further rejected Dr. McSweeney's hearing testimony that his change of opinion is due to a new understanding of claimant's job duties as a rigger with Southwest Marine because his report of claimant's initial examination sets forth in detail claimant's job duties. *Compare* Tr. at 209-210 *with* SX 4 at 8.

These credibility determinations supporting the administrative law judge's conclusion that NASSCO is the responsible employer are not challenged on appeal. Moreover, the Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge provided a rational basis for finding Dr. McSweeney's testimony less persuasive than his medical reports linking claimant's knee condition solely to his employment with NASSCO, and for discrediting the medical opinion of Dr. Fuller. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, the administrative law judge's finding, based on the credited medical reports of Dr. McSweeney, that claimant's knee condition is due to the natural progression of his knee injury at NASSCO and that NASSCO is the responsible employer is supported by substantial evidence and is affirmed.⁵ *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Buchanan*, 33 BRBS 32.

NASSCO's only contention on appeal regarding the fee award of the administrative law judge is that its liability to pay half of the award should be vacated in the event the Board reverses the administrative law judge's finding that it is the responsible employer for claimant's knee condition. Inasmuch as we have affirmed the administrative law judge's responsible employer determination, we likewise affirm the fee award. 33 U.S.C. §928.

⁵Thus, we need not address the contentions of NASSCO and Southwest Marine regarding NASSCO's entitlement to reimbursement for benefits it paid to claimant.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge