

WILLARD PARKER)
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 Claimant-Respondent)
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 v.)
)
 MOON ENGINEERING,)
 INCORPORATED)
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 and)
)
 VIRGINIA PROPERTY AND) DATE ISSUED: MAR 17, 2004
 CASUALTY GUARANTY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order Granting the Claim for Authorization for a Left Knee Replacement of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein and Charlene Parker Brown (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

F. Nash Bilisoly (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer Moon Engineering, Inc. (Moon) appeals the Decision and Order Granting the Claim for Authorization for a Left Knee Replacement (00-LHC-1743) of Administrative Law Judge Richard K. Malamphy 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, a boilermaker, sustained a torn lateral meniscus on November 29, 1981, when he fell and twisted his left knee in the course of his employment with Moon. On April 26, 1982, claimant underwent an open partial lateral meniscectomy of his left knee. Moon voluntarily paid claimant temporary total disability benefits for various periods and medical benefits, and thereafter paid compensation for a ten percent permanent partial disability to claimant’s left lower extremity. 33 U.S.C. §§908(b), (c)(2); 907. Following recovery from his surgery, claimant returned to his regular duty as a boilermaker with Moon, which he thereafter performed until being laid off in 1990. In 1992, claimant began working as a boilermaker for Metro Machine Corporation (Metro). On May 6, 1994, while in the course of his employment with Metro, claimant slipped and twisted his left knee. After obtaining medical treatment, claimant returned to work for Metro, but he continued to experience problems with his left knee. Severe arthritis and a tear in the portion of claimant’s lateral meniscus cartilage that was remaining after his previous knee surgery were found during arthroscopic surgery performed by Dr. Cohn on February 27, 1995, and, thus, an arthroscopic partial lateral meniscectomy was performed. After making an unsuccessful attempt to return to his regular employment duties with Metro, claimant was assigned work restrictions by Dr. Cohn. Claimant worked within these restrictions inside Metro’s boiler shop until 1998 when his employment was terminated because of work restrictions resulting from a 1993 arm injury. During the period in which claimant worked in Metro’s boiler shop, he continued to experience left knee problems and, in 1997, both Drs. Cohn and Wagner recommended that claimant undergo a total left knee replacement.

In 1999, claimant and Metro entered into a settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), for both claimant’s 1993 arm injury and his 1994 left knee injury; under the terms of this agreement, claimant received \$100,000 for both disability and the medical expenses resulting from these injuries. Thereafter, claimant sought medical benefits under Section 7 of the Act, 33 U.S.C. §907, averring that his need for a total left knee replacement is causally related to the November 29, 1981, injury that he sustained while working for Moon and that, therefore, Moon is responsible for providing claimant with that surgery.

In his Decision and Order, the administrative law judge determined that claimant’s need for a total left knee replacement resulted from the natural progression of his 1981 knee injury, and not from an aggravation by his subsequent work-related injury. The administrative law judge thus found Moon to be the responsible employer and ordered Moon to provide appropriate medical care for claimant’s left knee condition.

On appeal, Moon challenges the administrative law judge’s responsible employer determination on the basis that it is inconsistent with the principles embodied in the last employer and aggravation rules, that it is not adequately explained, and that it is not

supported by substantial evidence. Claimant responds, urging affirmance of the administrative law judge's determination that Moon is liable for his medical expenses as the responsible employer.

In determining the responsible employer in the case of multiple traumatic injuries, if the disability results from the natural progression of an initial 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, a 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. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002); *Buchanan v. Int'l Transportation 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). *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 517, 34 BRBS 91, 94(CRT)(4th Cir. 2000). Where, as here, the existence of work-related injuries with two potentially liable covered employers is established, the determination of the employer responsible for medical benefits turns on whether the claimant's disability, and associated need for medical treatment, is due to the natural progression of the first work-related injury or is due instead to the aggravating or accelerating effects of the second work-related injury. *See Buchanan*, 33 BRBS at 35-36. Thus, where the claim for medical benefits is made against the first employer, as is the case here, that employer, in order to be relieved of liability, must establish that the claimant's subsequent injury with another employer aggravated, accelerated or combined with the claimant's prior injury to result in his disability.¹ *Id.*

¹ The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the present case arises, has reserved the question of whether an employer may avail itself of the aggravation rule as a defense against liability as responsible employer. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 517 n.4, 34 BRBS 91, 94 n.4(CRT) (4th Cir. 2000). In *Admiralty Coatings*, the court concluded that the finding that claimant's shoulder condition was the result of the natural progression of an injury sustained in its employ was supported by substantial evidence and thus did not need to address whether a subsequent aggravation with another employer would relieve employer of liability where no claim was filed against the subsequent employer. The court noted, however, that the Ninth Circuit approved the "defensive" use of the aggravation rule by an employer in its decision in *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1310 (9th Cir. 1986). *See also New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2^d Cir. 2003) (where a claimant cannot recover under the Act from the last employer because of a settlement, he may recover from an earlier employer where he has acted in good faith and has not manipulated the aggravation rule).

In the instant case, Moon argues on appeal that the administrative law judge's responsible employer determination disregards the foregoing legal principles and lacks a sufficient explanation of the reasoning underlying that finding. Specifically, Moon avers that the administrative law judge failed to address the deposition testimony by Drs. Cohn and Seitz, wherein those physicians testified that claimant's 1994 injury *accelerated* claimant's need for knee replacement surgery. We agree that the administrative law judge's Decision and Order lacks an adequate discussion of the rationale for the administrative law judge's responsible employer determination. The administrative law judge's Decision and Order first sets out the medical evidence relevant to the question of whether Moon is the employer responsible for providing claimant with left knee replacement surgery. *See* Decision and Order at 3-8. The Decision and Order next summarizes the parties' positions regarding the responsible employer issue and the Board's holding in *Buchanan*. *See id.* at 8-9. The administrative law judge then concluded that Moon is the responsible employer on the basis of findings set forth in their entirety as follows:

It is understood that there was an injury at Metro and that this required surgery. In addition, the Claimant was later restricted to light duty due to the second injury. However, the physicians in this case have rendered consistent opinions. They stated, in essence, that the old damage noted at the time of the second surgery was so extensive that it would clearly lead to the necessity of a joint replacement at this time. These opinions support natural progression of the first injury rather than aggravation by the second injury.

Decision and Order at 10.

We cannot affirm this conclusion, as it is not clear that the administrative law judge adequately considered the principle that where a subsequent work-related injury permanently affects or accelerates the effects of a prior condition, the subsequent employer is responsible. *See Metropolitan Stevedore*, 339 F.3d 1102, 37 BRBS 89(CRT); *Delaware River Stevedores*, 279 F.3d at 241-242, 35 BRBS at 160-161(CRT); *Price*, 36 BRBS at 61. Although the administrative law judge accurately summarized the medical evidence in his "Evaluation of the Evidence," Decision and Order at 3-8, he made no mention of the deposition testimony of Drs. Cohn and Seitz that claimant's need

for a total left knee replacement was accelerated by his 1994 knee injury² in the cursory discussion explaining his responsible employer determination. Decision and Order at 10. Rather, the administrative law judge made the conclusory finding that the medical opinions of record were in agreement that the damage to claimant's knee caused by the 1981 injury was so extensive that it would necessitate knee replacement surgery "*at this time.*" (emphasis supplied). *Id.* at 10. The administrative law judge thus did not address the testimony by Drs. Cohn and Seitz that claimant's 1994 injury accelerated his need for a total knee replacement, which conflicts with the administrative law judge's ultimate conclusion that the timing of the required surgery was unaffected by claimant's 1994 injury.³ Thus, we are unable to conclude whether the administrative law judge simply overlooked relevant evidence or failed to state that he did not credit it.

² Dr. Cohn testified that claimant's original November 29, 1981 injury was the major factor in the development of the severe arthritis in his left knee and in his need for a total knee replacement and that claimant's subsequent injury on May 6, 1994 contributed to both the arthritis and the need for surgical knee replacement. EX 6 at 13-15. Dr. Cohn specifically stated that the 1994 injury caused the "arthritis he already has to progress at a faster rate and may indeed have caused some arthritis on its own." EX 6 at 13. Acknowledging that the original injury was the major factor, Dr. Cohn testified that "the 1994 injury where he said he twisted it at work would have caused that to progress at a faster rate." EX 6 at 15.

Dr. Seitz concurred that claimant's symptoms were "primarily related" to his 1981 injury. EX 7 at 7. While Dr. Seitz initially testified that he did not believe that claimant's 1994 injury was a "significant factor" in the development of his degenerative arthritis, however, he later stated his agreement with Dr. Cohn's opinion that the 1994 injury did aggravate claimant's knee and was a contributing factor to the need for the total knee replacement. EX 6 at 14. Dr. Seitz later reiterated his opinion that the primary cause of claimant's knee condition was the 1981 injury. EX 7 at 14-15. Dr. Seitz added, however, that in light of evidence that following claimant's open knee surgery in 1982, he did not experience difficulties with his knee until twisting his knee on May 6, 1994, it was his opinion that the 1994 injury "contributed, to some degree, to his problem [a]nd probably necessitated the knee replacement being done earlier than it would otherwise have been done." EX 7 at 15. Dr. Seitz testified that claimant definitely would have needed a total knee replacement as a result of his 1981 injury, even had the 1994 injury never occurred, adding that " I think that the injury he had in May of 1994 probably accelerated that need a bit." EX 7 at 17.

³ Even where there is credited medical testimony that claimant's 1981 injury would have necessitated eventual knee replacement surgery even if the 1994 injury had never occurred, such evidence does not necessarily compel the administrative law judge to conclude that claimant's *present* need for a knee replacement resulted from the natural progression of his 1981 injury in light of the presence of medical testimony that

The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A),⁴ requires that an administrative law judge's decision must include a discussion of the reasons for his findings and conclusions. *See See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 384, 28 BRBS 96, 106(CRT)(4th Cir. 1994). As the administrative law judge's conclusory finding is insufficient to establish that his responsible employer determination is based on a full evaluation of the evidence in accordance with legal holdings, we vacate this determination and remand the case for further consideration of this issue. On remand, the administrative law judge must consider and discuss all of the medical evidence⁵ relevant to this issue and evaluate it in light of the applicable legal standards. *See Delaware River Stevedores*, 279 F.3d at 241-242, 35 BRBS at 160-161(CRT); *Price*, 36 BRBS at 61.

claimant's 1994 injury accelerated both the deterioration of claimant's knee and his need for surgery. *See Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002).

⁴ The Administrative Procedure Act 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." 5 U.S.C. §557(c)(3)(A). The Board consistently has held, in this regard, that an administrative law judge must independently analyze and discuss the evidence, and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See, e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112, 118 n.9 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001).

⁵ On remand, the administrative law judge may also consider the opinion of Dr. Blasdell in his evaluation of the medical evidence relevant to the issue of whether claimant's need for knee replacement surgery is due to the natural progression of claimant's 1981 injury or is due instead to the aggravating or accelerating effects of his 1994 injury.

Accordingly, the Decision and Order of the administrative law judge is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge