BRB No. 11-0586

JEFFERY GLADNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN CIVIL CONSTRUCTORS	)	
	)	
Employer	)	
	)	
and	)	
	)	
ALASKA NATIONAL INSURANCE COMPANY	)	DATE ISSUED: 03/29/2012
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
ARCH c/o GALLAGHER BASSETT SERVICES	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

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

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

John J. Rabalais and Janice B. Unland (Rabalais, Unland & Lorio), Covington, Louisiana, for American Civil Constructors and Arch c/o Gallagher Bassett Services.

Richard A. Nielsen (Nielsen Shields, PLLC), Seattle, Washington, for American Civil Constructors and Alaska National Insurance Company.

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

PER CURIAM:

Employer and its carrier, Arch c/o Gallagher Bassett Services (Arch), appeal the Decision and Order (2009-LHC-1208, 2009-LHC-1209) 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a pile buck welder for employer. On April 20, 2006, while trying to avoid an incoming swell of water in his float, claimant climbed a ladder and rammed his head into the top of a form. Tr. at 29-30. He sustained an injury to his cervical spine. Claimant continued to work, but experienced worsening symptoms. On his doctor's advice, he underwent a two-level cervical fusion at C3-5 in November 2006 and was disabled for five months while recuperating. CX 2-3. He returned to work on April 2, 2007, without restrictions, but he began to experience increasing neck pain that worsened over time. Tr. at 32; Alaska EX 14 at 104. Although he received permanent work restrictions on December 3, 2007 and March 14, 2008, claimant continued to perform his heavy-duty work, and his pain continued to worsen.[1] Tr. at 37-40; CX 7 at 98-99; Alaska EX 14 at 96. Dr. O'Bara removed claimant from work on October 26, 2008, and claimant has not returned to work since then.[2] Tr. at 41; Alaska EX 13 at 70. Claimant had additional neck surgery on January 28, 2010, at C5-7. Alaska EX 17 at 120-21. Claimant filed a claim for benefits on February 8, 2009. CX 1 at 10.

On March 1, 2008, employer changed longshore carriers from Alaska National Insurance Company (Alaska National) to Arch. Alaska National paid claimant temporary total disability compensation from November 9, 2006 through April 1, 2007, and September 1, 2009 through March 1, 2010, and it paid some of claimant's medical expenses between 2008 and 2010. Arch has provided no compensation or medical

[1]As a pile buck welder for employer, claimant built barges and bridges, cut piles with cutting torches and chain saws, welded, and did carpentry and demolition work. Tr. at 29. The administrative law judge found that "[a]ll of this was heavy construction." Decision and Order at 4.

[2]The parties stipulated at the hearing that claimant's last day of work was October 26, 2008, and the administrative law judge accepted the parties' stipulation. Decision and Order at 7; Tr. at 5.

benefits. The parties stipulated that employer is liable for claimant's temporary total disability and medical benefits. The sole dispute before the administrative law judge was whether claimant was disabled as a result of the natural progression of his April 20, 2006, injury sustained while employer was insured by Alaska National, such that Alaska National is liable for all of claimant's benefits, or whether claimant is disabled as a result of a cumulative aggravation or new injury while employer was insured by Arch, such that Arch is liable for all claimant's injury-related benefits and medical expenses after its assumption of the risk. Finding claimant's total disability is at least, in part, due to his daily work after Arch assumed the risk, the administrative law judge found that Arch is liable for compensation and medical benefits from the date it began coverage. Consequently, the administrative law judge ordered Arch to reimburse Alaska National for all medical expenses and compensation benefits paid to claimant on or after March 1, 2008, plus interest, and to pay claimant ongoing temporary total disability compensation and medical benefits from October 27, 2008, with interest on past-due benefits.

Arch appeals the administrative law judge's Decision and Order; claimant and Alaska National respond, urging affirmance. Arch contends the administrative law judge erred in finding that claimant sustained a work-related aggravation to his cervical spine, such that it is the responsible carrier. Arch maintains that claimant's current cervical condition results from the natural progression of the April 20, 2006, injury.

The rule for determining which carrier is liable for the totality of a claimant's disability in a case involving cumulative traumatic injuries is the same as the rule for ascertaining the responsible employer. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). Therefore, 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 carrier 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 the claimant's prior injury, resulting in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent carrier is fully liable. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 125 U.S. 309 (2009); *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 F. App'x. 547 (9th Cir. 2001). A subsequent carrier may be found responsible for an employee's benefits even when the aggravating injury is not the primary factor in the

claimant's resultant disability.[3] *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)*; see also Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

Based on the evidence of record as a whole, the administrative law judge found that "[c]laimant's ongoing, daily exertions at work aggravated the [cervical] condition that he had following the initial injury."[4] Decision and Order at 16. In so finding, the administrative law judge relied on claimant's testimony that, upon returning to work in April 2007 his neck "felt pretty good," but from December 2007 until October 2008 he experienced increased neck pain that progressively worsened with his usual work activities.[5] Tr. at 32-33, 37-38; Alaska EX 14 at 92. The administrative law judge found claimant's testimony supported by his consistent reports to employer, physical therapists, and doctors of increased symptoms concurrent with his ongoing exertions. Decision and Order at 14; *see* Tr. at 32-33, 38, 42; CX 7 at 98-99; EX 14 at 92; EX 16 at 108-112. In addition, the administrative law judge found that Dr. Smythies's opinion supported a finding that claimant's worsening condition was consistent with a new neck injury related to his continued exertions at work.[6] Although Dr. O'Bara initially related claimant's

[3]The underlying theme of Arch's responsible employer argument is that a finding of liability is unfair because it has not been established that claimant's disabling condition was predominantly caused by Arch. However, such contention was specifically rejected by the Ninth Circuit. *See Price*, 339 F.3d at 1107, 37 BRBS at 92(CRT); *see also Foundation Constructors*, 950 F.2d at 623, 25 BRBS at 75(CRT).

[4]As the administrative law judge fully weighed the evidence as a whole, we need not address Arch's contentions concerning Section 20(a), 33 U.S.C. §920(a). *See generally Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

[5]Claimant testified to performing the regular heavy demands of his job despite work restrictions imposed in December 2007 and March 2008, because "the job had to be done . . . there was nobody else there to do the job but me and it had to be done." Tr. at 41. He further testified that by October 2008, it was getting more difficult to work due to increased neck pain. He testified to experiencing neck pain when welding, pushing or lifting heavy materials, and wearing his welding hood. Tr. at 36-39.

[6]Dr. Smythies stated that if claimant's 2006 surgery resulted in a successful fusion, which in fact it did, claimant's symptoms could be explained by a new injury related to his continued work. *Id*. at 178, 187-88.

condition to his 2006 surgery, Dr. O'Bara later retracted this opinion and deferred to the opinion of Dr. Smythies.[7] Thus, the administrative law judge found that Dr. O'Bara's opinion does not support a finding that claimant's condition was due to a natural progression of his 2006 injury. *See Buchanan*, 33 BRBS at 36; Decision and Order at 15.

Contrary to Arch's assertion, substantial evidence supports the administrative law judge's rational finding that claimant's cervical condition was aggravated by his continued work. The administrative law judge found that the record establishes that claimant's two level disc degeneration at C5-7 was mild-to-moderate in 2006; he needed surgery at these levels in 2008 and had a 2010 postoperative diagnosis of "severe" degeneration.[8] CX 6 at 88, 89, 93; CX 8 at 139. Further, the administrative law judge rationally found claimant's complaints of pain with ongoing work exertions to be credible as they were consistent with his reports to employer, physical therapists, and doctors. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert.*

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[7]Dr. O'Bara initially opined, based on a November 8, 2008, CT scan, that claimant's increasing symptoms were due to a pseudarthrosis, *i.e.*, a failed fusion surgery. Tr. at 95-96. Dr. O'Bara stated that claimant's work activities did not aggravate, accelerate, or worsen his cervical condition, because, as of December 12, 2008, Dr. O'Bara had not seen any acute or sudden changes in claimant's cervical presentation, and claimant had not reported any new injuries to him. Tr. at 100; Arch EX 22 at 13. However, upon learning at the hearing that Dr. Schlitt's January 28, 2010, fusion surgery revealed that claimant's prior fusion surgery was successful but there was further degeneration of discs adjacent to the original fusion site, Dr. O'Bara conceded that claimant's heavy work might have caused the increased disc degeneration, additionally stating that he would defer to Dr. Smythies as to whether it was the probable cause of claimant's cervical injuries. Tr. at 112, 121.

[8]Prior to claimant's 2006 fusion surgery, Dr. Hayne interpreted an MRI as showing disc bulges and mild-to-moderate disc space narrowing at C5-6 and C6-7. CX 8 at 139. Based on this same MRI, Dr. Schlitt recommended a two level fusion at C3-5 only. CX 6 at 88. Dr. Smythies performed a two-level fusion at C3-5 in 2006, and his postoperative diagnosis does not confirm the presence of degeneration at C5-7. EX 12 at 4. Regardless of any inconsistency in the evidence as to the existence of mild-to-moderate degeneration at C5-7, no physician recommended surgery at these levels in 2006; rather, Dr. Schlitt first recommended a fusion surgery at C5-6 on December 15, 2008, based on his review of claimant's September 9, 2008, MRI and November 10, 2008, CT scan. CX 6 at 89. Further, upon performing this surgery on January 27, 2010, Dr. Schlitt rendered a postoperative diagnosis of "severe [degenerative disc disease] C5-6, C6-7." *Id*. at 93.

denied, 440 U.S. 911 (1979). Although Arch challenges claimant's credibility on the ground that claimant simultaneously obtained narcotic pain relievers from more than one doctor, the administrative law judge addressed this contention and rationally found that claimant's credibility was not undermined as there was no evidence of addictive behavior or malingering, noting that claimant was fully willing and able to return to work after his surgery in early 2007. Decision and Order at 14; *Cordero*, 580 F.2d 1331, 8 BRBS 744.

Consequently, in light of the objective evidence of increased disc degeneration, the opinions of Dr. Smythies that claimant's condition is related to his ongoing exertions at work, and claimant's credible testimony linking his worsening symptoms to his work, we affirm the administrative law judge's finding that Arch is the responsible carrier as it supported by substantial evidence. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge