BRB No. 08-0729

K.S.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BIG ISLAND STEVEDORING, INCORPORATED	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 05/20/2009
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
BREWER ENVIRONMENTAL INDUSTRIES, LLC	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Supplemental Order Denying Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for Big Island Stevedoring, Incorporated and Signal Mutual Indemnity Association, Limited.

Richard C. Wooton (Cox, Wooton, Griffin, Hansen & Poulos, LLP), San Francisco, California, for Brewer Environmental Industries, LLC and Seabright Insurance Company.

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

PER CURIAM:

Employer, Big Island Stevedoring, Incorporated (BIS), appeals the Decision and Order Awarding Benefits and the Supplemental Order Denying Motion for Reconsideration (2007-LHC-0044, 2007-LHC-0045) of Administrative Law Judge Gerald M. Etchingham 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).

On November 10, 2004,[1] while working as a longshore laborer for Brewer Environmental Industries, LLC (Brewer), claimant injured his lower back when he pulled on a rope line while tying up a barge; he experienced immediate pain, which he described as a "zinging sensation," in his lower back as well as pain radiating down his right leg.[2] Tr. at 79-82, 106. The following day, claimant's pain worsened and he sought medical treatment with Dr. Ekecheku. Tr. at 106-107. On Dr. Ekecheku's referral, claimant saw Dr. Blum, a Board-certified orthopedic surgeon, on November 17, 2004. Tr. at 107; EX 14 at 100566-100567. Dr. Blum reported that claimant's x-rays revealed degenerative disc disease at L4-5; he recommended a course of treatment that included physical therapy and the use of Anexsia and Naproxen,[3] and kept claimant off work.[4] EX 14 at

[1]Although some of the medical reports and deposition testimony refer to the date of injury as November 8, 2004 or November 9, 2004, the parties stipulated, and the administrative law judge found, that claimant's injury occurred shortly after midnight on November 10, 2004. *See* Decision and Order at 2, 12 n.4; Tr. at 32-33.

[2] Claimant had sustained prior work-related injuries to his lower back in 1995, 1997 and 1999, and had pre-existing degenerative disc disease at the L4-5 and L5-S1 levels. RX 18; Tr. at 87, 97-106.

[3] Anexsia is a prescription narcotic pain reliever and Naproxen, also referred to by the brand name Aleve, is an over-the-counter medication used to treat both pain and inflammation. *See* RX 15 at 314-315.

[4] On Dr. Blum's order, an MRI of claimant's lumbar spine was performed on November 21, 2004, which showed degenerative changes and an annular bulge at L4-5 and a minimal annular bulge at L5-S1. EX 14 at 100568-100569; CX 33 at 15-17.

100567; CX 33 at 10-13, 22-23. On November 29, 2004, Dr. Blum stated that claimant had not yet recovered from his November [10,] 2004 injury, which he diagnosed as a combination of muscle strain and an irritation to an arthritic area of his spine, and he opined that claimant's degenerative disc disease, as shown on his MRI, is most likely the result of his years of hard work as a longshoreman. EX 14 at 100571; CX 33 at 23-28, 44-45. Dr. Blum anticipated that, with the benefit of physical therapy,[5] claimant would be able to return to restricted work on December 20, 2004. EX 14 at 100571; CX 33 at 24-26. In a report following his December 22, 2004 examination of claimant, Dr. Blum stated that claimant's "back is feeling better but not all better." EX 14 at 100586. Noting that light-duty work was not available to claimant, Dr. Blum released him to return to full duty on January 3, 2005, with the recommendation that he continue physical therapy. EX 14 at 100586; CX 33 at 14-15.

Claimant returned to full-duty work for Brewer on January 3, 2005, performing the same heavy physical labor he had done prior to his November 10, 2004 injury. Tr. at 149, 203-205; RX 13 at 128-133, 136-137. Claimant testified that after returning to work, he experienced constant dull back pain that was worse on the days he worked. Tr. at 81-82, 88; RX 13 at 133-134, 139-141. On February 1, 2005, claimant's employer changed when Brewer was purchased by Matson Terminals and was renamed Big Island Stevedoring, Inc., *see* Tr. at 43; BIS br. at 2 n.3; claimant's job duties, however, remained the same, RX 13 at 145-146, 156. On February 18, 2005, Dr. Blum reported that claimant's work was causing him to experience increased chronic pain and fatigue, and recommended that claimant continue physical therapy and reduce his work schedule from 6 or 7 days per week to 5 days per week. EX 14 at 100598; CX 33 at 17-18, 32-33, 37, 49. On March 18, 2005, Dr. Blum recorded a new complaint of pain radiating into claimant's left leg, in addition to his chronic low back pain. EX 14 at 10064; CX 33 at 37-38. After noting that claimant's back had become too painful for him to complete a work day during the previous week, Dr. Blum took claimant off work until March 22, 2005, and indicated for the first time that vocational rehabilitation might be indicated.[6]

[5] In her initial evaluation of claimant on December 10, 2004, claimant's physical therapist, Carol Myrianthis, reported that claimant complained of level 10 lower back pain that radiated into his right foot. EX 14 at 100582. She subsequently reported that as of her December 23, 2004 re-evaluation, claimant's pain level varied from 2 to 5 and that he was able to lift up to 50 pounds from 6 inches off the floor and 30 pounds overhead. *Id.* at 100591.

[6] On deposition, Dr. Blum stated that the first time he noted a positive seated straight leg raising test was during his examination of claimant on March 18, 2005; the previous two seated straight leg raising tests performed by Dr. Blum on November 17, 2004 and December 22, 2004 were negative. CX 33 at 38-39, 56; EX 14 at 100567, 100586, 100604. Dr. Blum acknowledged that claimant's physical therapist had recorded

EX 14 at 100604; CX 33 at 38-40, 49. In a March 28, 2005 referral letter to orthopedic surgeon Dr. Smith, Dr. Blum requested a surgical consultation for claimant.[7] EX 14 at 10069. On April 11, 2005, Dr. Blum gave claimant a new prescription for Anexsia, noting that the last prescription had lasted for five months, and he reiterated that vocational rehabilitation should be arranged. *Id.* at 100618.

The last day claimant worked for BIS was on May 21, 2005; specifically, claimant testified that after working a half day, he realized that he had "had enough" and was no longer able to do the things he could formerly do.[8] Tr. at 163-165, 186-188. On May 23, 2005, Dr. Blum took claimant off work, having noted his inability to complete his work day on May 21, 2005; Dr. Blum also commented that claimant had used up his supply of Anexsia, and the prescription was being refilled. EX 14 at 100632; CX 33 at 42, 60-61. Dr. Blum last saw claimant on August 31, 2005, and recommended that claimant undergo the surgery proposed by Dr. Smith. CXs 23 at 39; 33 at 21. On November 1, 2007,

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a positive supine straight leg raising test and a negative seated straight leg raising test on December 20, 2004. CX 33 at 56-57; EX 14 at 100582.

[7] The referral to Dr. Smith was made because Dr. Blum no longer performed spine surgery. CX 33 at 7-8, 55. Dr. Blum stated that it was not until after his examination of claimant on March 18, 2005 that it became apparent that a referral to a spine surgeon was warranted; at the time of claimant's December 22, 2004 and February 18, 2005 visits, Dr. Blum did not see the need to make such a referral. CX 33 at 20-21, 30-33, 36-37, 40-41.

Dr. Smith examined claimant on April 18, 2005, and noted that claimant had low back pain with bilateral radiation, and that his level of pain ranged from 7 to 10. RX 7. Dr. Smith interpreted claimant's November 24, 2004 MRI as showing severe disc degeneration at the L4-5 level, and recommended that claimant undergo a spinal fusion. *Id.; see also* CX 33 at 41.

[8] Claimant testified that at the time of his return to work on January 3, 2005, he had constant low back pain but wanted to see whether he would be able to work; he stated that he stopped working on May 21, 2005, because he no longer could endure the pain that he had consistently experienced since his November 10, 2004, work-related injury. Tr. at 185-188, 190-192. Claimant further testified that about three days after he stopped working in May 2005, his pain returned to the same level it had been on January 2, 2005, and he expressed his belief that the work he performed during 2005 did not cause any permanent change in his low back pain. Tr. at 85-86.

claimant underwent a spinal fusion at L4-5 and L5-S1 performed by Dr. Delamarter.[9] CX 31 at 97D.

Claimant filed a claim under the Act against Brewer for a specific injury to his back sustained on November 10, 2004, CX 1, and a claim against BIS for cumulative trauma to his back sustained from January 3, 2005 to May 21, 2005. CX 4.[10] The sole issue presented at the formal hearing was the determination of the employer responsible for claimant's disability and medical benefits. Decision and Order at 2, 24.

In his Decision and Order, the administrative law judge determined that claimant's work for BIS in 2005 aggravated and combined with his pre-existing low back condition to result in his present disability. Decision and Order at 27. The administrative law judge therefore found BIS to be responsible for the payment of ongoing temporary total disability benefits commencing on May 21, 2005, and medical benefits, and ordered BIS to reimburse Brewer for any disability benefits and medical expenses it paid to claimant for the period after BIS became claimant's employer.[11] *Id.* at 27-28.

On appeal, BIS challenges the administrative law judge's determination that it is the employer responsible for the payment of claimant's awarded benefits. Brewer responds, urging affirmance.

In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer and carrier at the time of the original injury remain liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer and carrier at the time of the aggravation are liable for the entire disability resulting therefrom. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339

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[9] Because Dr. Smith had moved away, claimant sought a consultation, and possible treatment, with Dr. London, an orthopedic surgeon. Tr. at 83-84; RX 19 at 15-18. Dr. London examined claimant on December 21, 2006, reviewed his medical records, RX 11, and referred claimant to Dr. Delamarter for surgery. Tr. at 84; CX 31 at 93.

[10] Both Brewer and BIS voluntarily paid claimant compensation for temporary total disability benefits for various periods, as well as medical benefits. CXs 11-15, 26.

[11] On July 9, 2008, the administrative law judge issued a Supplemental Order Denying Motion for Reconsideration, which pertained to a provision in his initial Decision and Order that is not at issue in the present appeal.

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); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005). Where claimant's work results in an aggravation of his symptoms, the employer and carrier at the time of the work events resulting in this aggravation are responsible for any resulting disability.[12] *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores 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 and carrier has the burden of persuading the administrative law judge that the disability is the result of either the natural progression of the original injury or is the result of a new injury or an aggravation of the pre-existing condition with a subsequent covered employer or carrier. *See 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).

In this case, BIS contends that the administrative law judge's finding that claimant's work for BIS in 2005 aggravated and combined with his prior back injury to result in his present disability is not supported by substantial evidence.[13] For the reasons that follow, we reject BIS's allegation of error. The administrative law judge addressed in detail the extensive record in this case, and he fully considered and weighed the medical evidence, as well as claimant's testimony, relevant to the issue of whether cumulative trauma experienced by claimant during his period of employment with BIS contributed to his present, ongoing temporary total disability. Decision and Order at 4-27. The administrative law judge relied on the opinions of Drs. Scarpino and Mauro in concluding that the preponderance of the evidence established that the heavy work performed by claimant for BIS in 2005 aggravated and combined with his prior back condition to result in his present disability. Decision and Order at 13-17, 21-22, 26-27. In this regard, the administrative law judge credited Dr. Scarpino's opinion that

[12] Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). It is immaterial whether an aggravation caused an attack of symptoms severe enough to disable claimant or altered the underlying disease process; in either event, the disability results from the aggravation. *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389, 13 BRBS 101, 106 (1st Cir. 1981). It follows that the employer at the time of the aggravation is liable for the resulting disability.

[13] BIS avers on appeal, as it did below, that claimant's work for BIS caused only a temporary increase in pain while he was working and did not permanently worsen his low back condition.

claimant's back condition substantially and permanently worsened as the result of his work activities through May 21, 2005. Decision and Order at 13-15, 21; EXs 5; 12 at 36-50, 115-120, 128-130, 140-142, 153-154, 160-165. The administrative law judge further credited Dr. Mauro's opinion that claimant's work activities for BIS after February 1, 2005, permanently worsened his pre-existing degenerative disc disease. Decision and Order at 15-17, 21-22; EXs 6; 13 at 13-15, 26-35, 60, 69-72, 88. In contrast, the administrative law judge found the testimony of Drs. Blum, London, Davenport, and Hendrickson, that claimant's employment duties for BIS in 2005 did not permanently aggravate or worsen his pre-existing lower back condition, to be unconvincing. Decision and Order at 10-13, 17-24; EX 14; CX 33; RXs 9, 10, 11, 15, 16, 19. The administrative law judge determined in this regard that the opinions of Drs. Scarpino and Mauro were more persuasive than the contrary medical opinions because they are consistent with claimant's objective test results, symptoms and level of functionality as recorded in the contemporaneous medical and physical therapy records.[14] Decision and Order at 21-24, 26-27.

It is well established that 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). We reject BIS's contention that the administrative law judge erred in evaluating the evidence of record, as the administrative law judge drew rational inferences from the medical evidence and claimant's testimony and reasonably concluded that the preponderance of the evidence establishes that the cumulative trauma to claimant's back sustained while working for BIS in 2005 permanently aggravated his pre-existing degenerative disc disease to result in his present disability.[15] *See Price*, 330

[14] After thoroughly discussing claimant's hearing and deposition testimony, the administrative law judge found that such testimony was inconsistent and was contradicted by the medical reports of record, and that because claimant was not a reliable historian, his testimony regarding his physical complaints at any given time could not be credited. Tr. at 85-86, 88, 94-95, 121-122, 139-140, 146-149, 151-156, 182-185 190-192, 199, 210; RX 13 at 110-112, 121-126, 133-134, 145-149, 151-152, 157-158, 165-166, 168.

[15] BIS argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony, asserting that the evidence establishes that during the period that claimant worked for BIS, he experienced only a temporary increase in pain symptoms which had no effect on his ultimate disability. We need not address BIS's arguments in detail as the competing characterization of the record evidence and assessment of the witnesses' credibility

F.3d 1102, 37 BRBS 87(CRT); *Lopez*, 39 BRBS at 89-90. It was not unreasonable for the administrative law judge to find, based on substantial evidence, that claimant's performance of heavy work for a period of nearly four months after BIS became his employer permanently aggravated his longstanding pre-existing degenerative disc disease. *Id.* In this regard, the administrative law judge rationally credited record evidence that on February 25, 2005 and thereafter, claimant reported radicular pain in his left leg that had not been present following his November 10, 2004 injury. Decision and Order at 26-27. The administrative law judge further credited evidence that surgery was not recommended until March 2005, and that after ceasing work on May 21, 2005, claimant's functional ability was never restored to the level it had been as of December 2004. *Id.* As correctly found by the administrative law judge, claimant is not a medical expert and cannot be expected to be aware of all the ways in which his condition could be aggravated or worsened by his work with BIS in 2005. Decision and Order at 20. Thus, the administrative law judge was not required to credit claimant's belief that his back condition was not aggravated by his employment duties with BIS in 2005. Moreover, contrary to BIS's arguments on appeal, the administrative law judge did not err in deciding not to give dispositive weight to the opinions of claimant's treating physicians. Although an administrative law judge may give special weight to a treating physician's opinion, *see Amos v. Director, OWCP*, 153 F.3d 1051, *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), he is not required to credit such an opinion where there is contrary probative evidence in the record.[16] *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997). Rather, the administrative law judge, as the factfinder, is entitled to determine the weight to be accorded to the medical evidence of record. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). In the case before us, the administrative law judge provided a rational basis for finding the opinions of Drs. Scarpino and Mauro to be more persuasive than the contrary medical opinions of record.

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offered by BIS do not provide a basis for overturning the administrative law judge's credibility determinations and evaluations of the evidence which are rational and supported by the record. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

[16] In this case, the administrative law judge appropriately acknowledged Dr. Blum's status as claimant's treating physician. Decision and Order at 10, 22. Moreover, contrary to BIS's arguments on appeal, the administrative law judge rationally determined that because Dr. London saw claimant on only a single occasion, his opinion was not entitled to the special weight afforded to treating physicians who have had the opportunity to observe the claimant's condition over an extended period of time. Decision and Order at 22. *See Amos*, 153 F.3d 1051.

BIS did not present evidence sufficient to persuade the administrative law judge that claimant's temporary total disability is due solely to the natural progression of his previous injuries, *see Buchanan,* 33 BRBS 32, and, on appeal, it has failed to demonstrate reversible error in the administrative law judge's determination that claimant's cumulative trauma while working for BIS in 2005 contributed to his present disability.[17] *See Price,* 339 F.3d 1102, 37 BRBS 87(CRT); *Lopez,* 39 BRBS at 89-90. Accordingly, we affirm the administrative law judge's finding that BIS is the responsible employer. *Id.*

Accordingly, the administrative law judge's Decision and Order and Supplemental Order Denying Motion for Reconsideration are 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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JUDITH S. BOGGS
Administrative Appeals Judge

[17] The administrative law judge found, in the alternative, that the substantial conflicting evidence in this case could be considered to be in equipoise with neither Brewer nor BIS persuading him that its evidence was entitled to greater weight; the administrative law judge thus found, on this alternative basis, that liability is assigned to BIS as the later employer. Decision and Order at 27. The alternative basis provided by the administrative law judge for assigning liability to BIS may also be affirmed, as it is rational, supported by substantial evidence, and in accordance with the applicable legal principles. *See Buchanan,* 33 BRBS at 36.