

CLIFTON A. PERTUIT

Claimant

v.

LOUISIANA DOCK
COMPANY, INCORPORATED

Self-Insured
Employer-Petitioner

NATIONAL MAINTENANCE AND
REPAIR, INCORPORATED

and

SIGNAL MUTUAL INDEMNITY
ASSOCIATION, LIMITED

Employer/Carrier-
Respondents

DATE ISSUED: May 29, 2003

DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor. R. Scott Jenkins (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for Louisiana Dock Company, Incorporated. Maurice E. Bostick (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for National Maintenance and Repair, Incorporated and Signal Mutual Indemnity Association. Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Louisiana Dock Company, Incorporated (Louisiana Dock), appeals the

Decision and Order (2001-LHC-878, 2671) of Administrative Law Judge C. Richard Avery 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 injured his back on May 16, 1989, lifting a propeller cone during the course of his employment with Louisiana Dock. Claimant underwent back surgery by Dr. Zeringue to repair a herniated disc at L5/S1. Employer voluntarily paid compensation under the Act for temporary total disability, 33 U.S.C. §908(b), from May 21, 1989, to May 13, 1990, when claimant returned to work for Louisiana Dock. Dr. Zeringue restricted claimant from bending at the waist and from lifting more than 15 to 20 pounds. Claimant was promoted to head of the propeller shop in 1990; however, he was assigned other duties when propeller work was unavailable. Claimant began treating with Dr. Bendrick on December 18, 1998. Dr. Bendrick reported that claimant's back condition worsened slightly during the course of 1999, and worsened significantly from January to March 2000. On May 15, 2000, Louisiana Dock sold its facility to National Maintenance and Repair, Incorporated (National Maintenance). Claimant's last day of work was July 7, 2000. After examining claimant on July 18, 2000, Dr. Bendrick opined that claimant was unfit for any work due to his deteriorating back condition and increasing back pain. Claimant filed a claim for compensation; neither Louisiana Dock nor National Maintenance paid claimant compensation or medical benefits, as each employer contended the other was the responsible employer.

In his decision, the administrative law judge found that claimant's back condition resulted from the natural progression of his initial May 16, 1989, work injury, and that claimant did not permanently aggravate his back condition during the course of his employment for National Maintenance from May 15 to July 7, 2000. Accordingly, the administrative law judge found Louisiana Dock to be the employer responsible for claimant's compensation and medical benefits under the Act. The administrative law judge found that claimant is incapable of working, but that claimant's back condition has not reached maximum medical improvement because further surgery is possible. In the alternative, the administrative law judge rejected the evidence of suitable alternate employment. He awarded claimant continuing compensation for temporary total disability from July 8, 2000. Finally, the administrative law judge determined that the applicable average weekly wage is \$657.37, which was claimant's average weekly wage at the date of his May 16, 1989, work injury with Louisiana Dock.

On appeal, Louisiana Dock challenges the administrative law judge's

responsible employer determination. Louisiana Dock argues that National Maintenance, as claimant's last employer before July 18, 2000, when Dr. Bendrick opined that claimant was unable to work due to his back condition, is liable for claimant's subsequent disability. Louisiana Dock contends that claimant's employment with National Maintenance aggravated claimant's condition. Moreover, Louisiana Dock asserts that the holding in *Delaware River Stevedores, Inc., v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002), is relevant to determining the responsible employer in this case. National Maintenance responds, urging affirmance. Claimant has not responded to this appeal.

The responsible employer issue presented by the facts of this case is whether claimant's disability is due to the natural progression of the first injury with Louisiana Dock in 1989, or is due instead to the aggravating or accelerating effects of a second injury occurring during the course of claimant's employment with National Maintenance. *Foundation Constructors 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); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). Louisiana Dock need not establish that the injury claimant sustained in its employ played no role in claimant's ultimate disability in order to be absolved of liability. *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). It need only establish that claimant sustained an injury while working for National Maintenance that aggravated, accelerated or combined with his prior back injury to result in claimant's ultimate disability in order for National Maintenance to be liable for the totality of claimant's disability. *Id* If, however, claimant's disability is due to the natural progression of his May 1989 back injury, Louisiana Dock is liable for claimant's disability and medical benefits. See generally *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

In this case, the administrative law judge found that claimant's totally disabling back condition is the result of the natural progression of the May 1989 work injury, which injury was not permanently aggravated by claimant's employment with National Maintenance from May 15 to July 8, 2000. In reaching this determination, the administrative law judge acknowledged that there is evidence of record that could support holding either employer liable, but he credited claimant's testimony that his job duties for Louisiana Dock during the months prior to May 15, 2000, were outdoors because of a lack of propeller work, and that these duties exceeded his work restrictions. Tr. at 78-83. The administrative law judge also credited claimant's testimony that there was no work accident or aggravation of his back condition during the course of his employment for National Maintenance, nor did his underlying back pain worsen. Tr. at 69, 79-80. The administrative law judge credited the opinion of claimant's treating physician, Dr. Bendrick, that claimant's back condition deteriorated markedly in March 2000. LD 12 at 36-38, 68-69. In this regard, Dr. Bendrick testified in his disposition that claimant began having mechanical back

pain in March 2000, and that his opinion in July 2000 that claimant is totally disabled was based on claimant's mechanical back pain symptomatology. LD 12 at 38-39, 55, 68-69. The administrative law judge found Dr. Bendrick's opinion that claimant's back condition resulted from the natural progression of his May 1989 back injury the most convincing and supported by the opinion of Dr. Applebaum. LDs 12 at 57-58, 70-73; 16 at 17-18, 27-28. The administrative law judge rejected the opinion of Dr. Pisarello that claimant's condition was aggravated during the course of his employment with National Maintenance, because he found more credible the opinion of claimant's treating physician, Dr. Bendrick. See generally *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). The administrative law judge rejected the assertion of Louisiana Dock that the decision in *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002), mandates a conclusion that National Maintenance is the responsible employer, finding that unlike the claimant in *Delaware River Stevedores*, claimant herein did not sustain flare-ups of pain during his employment with the later employer. See Tr. at 79-80. Thus, the administrative law judge found that Louisiana Dock failed to establish that claimant's employment with National Maintenance caused claimant to re-injure his back or to permanently aggravate his back condition. The administrative law judge's determination that claimant's back disability is due to the natural progression of his May 1989 work injury with Louisiana Dock is rational and supported by substantial evidence, and Louisiana Dock has failed to establish reversible error in the administrative law judge's weighing of the evidence of record. *Kelaita*, 799 F.2d at 1312; *Siminski*, 35 BRBS at 139. Claimant's testimony and the medical opinions credited support the administrative law judge's conclusion that claimant's disabling back condition is due to the natural progression of his 1989 work injury. We reject Louisiana Dock's assertion that, pursuant to *Delaware River Stevedores*, claimant's experiencing back pain during the course of his employment with National Maintenance is sufficient to shift liability from Louisiana Dock to National Maintenance. In weighing the record as a whole, the administrative law judge appropriately recognized that, in a traumatic injury case, the subsequent employment must contribute in some way to the resultant disability in order for the subsequent employer to be held liable. See *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311. It is insufficient for Louisiana Dock to show merely that claimant's condition was symptomatic during the course of his employment with National Maintenance; the administrative law judge was not required to find that claimant sustained a new injury with National Maintenance based on this record. The administrative law judge rationally distinguished claimant's back condition herein from the facts presented in *Delaware River Stevedores*, wherein the claimant sustained distinct flare-ups of his back condition during the course of his employment with the subsequent employer that precipitated periods of temporary

total disability. See *Delaware River Stevedores*, 279 F.3d at 242, 35 BRBS at 161(CRT). In this case, the administrative law judge credited claimant's testimony and found that claimant did not sustain an accident, incident or aggravation while working for National Maintenance, and that his underlying back pain did not worsen. Tr. at 69, 79-80. Consequently, as it is rational, supported by substantial evidence, and in accordance with law, the administrative law judge's finding that Louisiana Dock is liable for claimant's compensation and medical benefits commencing July 8, 2000, is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge