BRB Nos. 99-0782
and 99-0782A

IVAN KUHNHAUSEN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	DATE ISSUED: April 20, 2000
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
HALL- BUCK MARINE, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
AIG CLAIM SERVICES, INCORPORATED	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Amended Order on Reconsideration of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Gregory A. Bunnell and Meagan A. Flynn (Pozzi Wilson Atchinson L.L.P.), Portland, Oregon, for claimant.

John Dudrey (Williams, Frederickson & Littlefield, P.C.), Portland, Oregon, for Marine Terminals Corporation and Majestic Insurance Company.

Robert E. Babcock, Lake Oswego, Oregon, for Hall-Buck Marine, Incorporated.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, P.C.), Portland, Oregon, for Hall-Buck Marine, Incorporated and AIG Claim Services, Incorporated.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Marine Terminals Corporation (MTC) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits and Amended Order on Reconsideration (98-LHC-874, 98-LHC-1889) of Administrative Law Judge Henry B. Lasky rendered on claims 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, working as a crane operator for Hall-Buck Marine, Incorporated (Hall-Buck) on August 8, 1996, sustained a herniated disk at the L4-5 level and subsequently underwent two diskectomies performed by Dr. Bergquist on September 4, 1996, and on November 5, 1996. Dr. Bergquist released claimant for limited work on February 3, 1997, and to work without restrictions on June 2, 1997. Hall-Buck paid temporary total and temporary partial disability benefits for the corresponding periods of time. Claimant returned to work in accordance with Dr. Bergquist's opinion and continued to work throughout the balance of 1997.

On December 31, 1997, continued back and leg pain prompted claimant to visit Dr. Bergquist, who opined that claimant suffered from sciatica due to the recurrence of a disk herniation. An MRI on January 5, 1998, revealed that claimant sustained a recurrent disk protrusion at the L4-5 disk space on the left, leading to a third L4-5 diskectomy performed by Dr. Bergquist on January 27, 1998. Another MRI on April 20, 1998, prompted a fourth diskectomy at the L4-5 level, performed by Dr. Rosenbaum on July 27, 1998.

Claimant's relevant work history indicates that his last day of employment prior to his December 31, 1997, visit to Dr. Bergquist was with MTC, and that following that examination he worked for Hall-Buck on January 2, 1998, for MTC on January 3, 1998, and for Hall-Buck between January 6-9, 1998. Claimant thereafter filed claims against all employers for whom he worked during the period between February 3, 1997, through

January 9, 1998, the date claimant last worked.[1]

In his decision, the administrative law judge initially determined that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), and that Hall-Buck, the employer liable for benefits resulting from the 1996 injury, rebutted the presumption by establishing that claimant sustained a subsequent injury for another employer, namely with MTC in December 1997. Upon consideration of the record as a whole, the administrative law judge found that MTC is the responsible employer, as in all medical probability claimant's more recent reherniation occurred sometime on or before December 29, 1997. The administrative law judge therefore ordered MTC to pay claimant temporary total disability benefits from January 13, 1998, to the present and continuing at the maximum compensation rate of $670.65 per week, as well as all injury-related medical expenses. In an Amended Order on Reconsideration, the administrative law judge altered his decision to reflect that the compensation rate, as calculated by the district director, is to be based upon the appropriate average weekly wage when claimant was last employed by MTC on December 29, 1997, rather than on the stipulated average weekly wage at the time of the initial injury.

On appeal, MTC challenges the administrative law judge's determination that it is the responsible employer. Hall-Buck responds, urging affirmance. In his cross-appeal, claimant argues that the administrative law judge erred by refusing to set the compensation rate payable by MTC at $819.13.

MTC first argues that Hall-Buck, as the responsible employer at the time of the first disabling injury, remains liable for claimant's subsequent disability as there was no "intervening cause" which occurred during the time claimant worked in its employ. Specifically, MTC asserts that the holdings in *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954), and *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992), are relevant for determining the responsible employer in this case. Alternatively, MTC argues that Hall-Buck is liable as claimant's last maritime employer. MTC avers that the administrative law judge's finding that it is liable is based on the erroneous assumption that claimant's merely going to work and being in pain is sufficient for an "injury" to have occurred, and that if this is the test, then Hall-Buck is liable.

[1]In addition to Hall-Buck and MTC, claimant's employers during this period of time were Jones Oregon Stevedoring Company, Stevedoring Services of America, and Rogers Terminal & Shipping. At the hearing, only the claims against Hall-Buck and MTC remained viable as the parties unanimously agreed to dismiss all of the other employers.

The responsible employer issue presented by the facts of the instant case is whether claimant's disability is due to the natural progression of the first injury with Hall-Buck in 1996 or is due instead to the aggravating or accelerating effects of a second injury, and resolution of this issue, via a weighing of the evidence of record, determines which employer is liable for the totality of claimant's disability. *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); *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999). In the instant case, Hall-Buck 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*, 33 BRBS at 36. It need only establish that claimant sustained an injury while working for MTC that aggravated, accelerated or combined with his prior injury to result in claimant's disability in order for MTC to be liable for claimant's disability. *Id.; see Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Similarly, MTC can shift liability to Hall-Buck either by establishing that claimant's disability is due to the natural progression of the 1996 injury or by showing that claimant's employment with Hall-Buck subsequent to his employment with MTC aggravated his condition. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

In the instant case, the administrative law judge determined , based upon claimant's credible testimony, that he was in intense pain during his employment with MTC, particularly while working on the Hitachi Crane. The administrative law judge found, based in part on the medical opinions of Drs. Bergquist, Rosenbaum and Markham, that claimant sustained an aggravating or accelerating injury on or before December 29, 1997, his last date of employment with MTC, prior to the diagnosis of the third herniation on December 31, 1997.[2] The administrative law judge thereafter considered the issue of the responsible employer in this two injury case in light of the proper test, *see Foundation Constructors, Inc*, 950 F.2d at 621, 25 BRBS at 71 (CRT); *Kelaita*, 799 F.2d at 1308, and applied an appropriate evidentiary standard in reviewing the evidence as a whole on that issue. *Buchanan*, 33 BRBS at 35. Specifically, the administrative law judge properly considered whether claimant's current disability is due to the natural progression of the first injury

[2]Specifically, the administrative law judge found that Drs. Bergquist and Rosenbaum agreed that "activities" contributed to the pain experienced by claimant, in particular, activity-related contact between the nerve and the disk protusion with accompanying nerve inflammation, and that such effect could have been caused by claimant's Hitachi crane operation while working for MTC. The administrative law judge reasonably inferred that these "activities" included claimant's work activities as well as non-work activities. Moreover, the administrative law judge found that all three physicians, Drs. Bergquist, Rosenbaum and Markham, agreed that the third operation on January 27, 1998, was performed because of the results of the MRI on January 5, 1998, which merely confirmed the presence of the reherniation diagnosed by Dr. Bergquist on December 31, 1997.

sustained with Hall-Buck in 1996, or is due instead to the aggravating or accelerating effects of a subsequent work injury. *See Foundation Constructors, Inc*, 950 F.2d at 621, 25 BRBS at 71 (CRT); *Kelaita*, 799 F.2d at 1308. As such, we reject MTC's assertion that the decisions in *Cyr*, 211 F.2d at 454 and *Jones*, 977 F.2d at 1106, 26 BRBS at 64 (CRT), which pertain to situations where one covered employer seeks to be absolved of partial or total disability based on the occurrence of a subsequent event outside work or with a non-covered employer which it alleges is an intervening cause of claimant's disability, are applicable to the instant case. *See Buchanan*, 33 BRBS at 36 n. 7. Moreover, in weighing the record as a whole, the administrative law judge appropriately recognized that the last employer rule only necessitates that the subsequent injury contribute in some way to the resultant disability, and he determined after weighing the evidence of record that, in all medical probability, claimant's most recent herniation occurred while he was employed with MTC. As substantial evidence, *i.e.*, claimant's testimony regarding the heightened pain he experienced while operating the Hitachi crane for MTC and the medical opinions of Drs. Bergquist and Rosenbaum that the disk protusion could have been caused by claimant's Hitachi crane operation with MTC, supports the administrative law judge's conclusion that claimant's work at MTC aggravated his prior back injury, it is affirmed.[3]

Furthermore, we reject MTC's assertion that Hall-Buck is liable as claimant's last employer. In *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, emphasized the "onset of disability" as a key factor in assessing liability under the last employer rule. *Cordero*, 580 F. 2d at 1337, 8 BRBS at 749; *see also Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991). Specifically, the Ninth Circuit held that liability should fall on the employer "covering the risk at the time of the most recent injury that bears a casual [*sic*] relation to the disability." *Id.* In the instant case, the administrative law judge found that claimant's most recent herniation, diagnosed on December 31, 1997, and later confirmed by MRI dated January 5, 1998, most probably occurred as a result of claimant's operation of the Hitachi crane while working for MTC, and that his present disability is causally related to this event. The administrative law judge thus properly found that claimant's employment subsequent to December 31, 1997, is irrelevant to the claim herein, since based on the diagnosis, the reherniation necessarily occurred prior to that date. Thus, claimant's

[3]The administrative law judge stated that the medical opinions of record also could support the finding that claimant's December 1997 herniation would have occurred notwithstanding his work activities, but that his work activities increased his pain and contributed to his need for surgery.

subsequent employment could not have contributed in any way to the compensable injury, *i.e.*, claimant's third herniation of the L4-5 disk. *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT).

The administrative law judge's determination that claimant's employment with MTC aggravated or accelerated claimant's back condition is supported by substantial evidence, and MTC has failed to establish reversible error in the administrative law judge's weighing of the evidence of record. *Kelaita*, 799 F.2d at 419; *Buchanan*, 33 BRBS at 37. Moreover, MTC has not shown that claimant's subsequent employment contributed to claimant's disability. *See generally General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). Consequently, the administrative law judge's determination that MTC is liable for claimant's benefits from January 13, 1998, is affirmed.

Lastly, in response to claimant's protective cross-appeal, we note that the average weekly wage in this two injury case is properly calculated at the time of the aggravating injury, as the administrative law judge held on reconsideration. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). As the parties apparently agree that this decision entitles claimant to temporary total disability benefits at the rate of $819.13, it is not necessary to remand the case, as the district director may carry out any ministerial tasks required by the administrative law judge's award.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Amended Order on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge