BRB Nos. 06-0675
and 06-0675A

PERRY W. TAYLOR	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BERRY BROTHERS GENERAL CONTRACTORS, INCORPORATED	)	DATE ISSUED: 04/26/2007
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Lawrence N. Curtis (Lawrence N. Curtis, LTD), Lafayette, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli, Freeman & Whiteley), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (2005-LHC-1891) 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 findings of fact and conclusions of law of the administrative law judge which 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, a welder, suffered an injury to his right knee when the catwalk on which he was working flipped over on April 7, 2004; claimant continued working both the day of his injury and the following day. He was off work for the following two weeks because there was no work available for him, but he returned to his regular job until he sought medical help for knee pain on June 8, 2004. Dr. Fitter removed claimant from work until June 22, 2004, when he was released to return to his usual job without restrictions. Claimant has worked for several employers since this injury but continues to experience knee pain and to periodically seek medical help for this pain.

In his Decision and Order, the administrative law judge found that claimant's current condition is the result of the natural progression of his work injury. Accordingly, he awarded claimant compensation for temporary total disability from June 8 to June 22, 2004, the only period of time during which claimant was medically restricted from working. The administrative law judge also awarded claimant medical benefits related to his knee condition, including the surgery recommended by Dr. Blanda.

Employer and claimant appeal this decision. Employer contends that the administrative law judge erred in finding that it is the responsible employer; employer contends claimant's subsequent employment aggravated his condition, relieving it of liability. Claimant responds, urging affirmance of the administrative law judge's finding. In his appeal, claimant contends that the administrative law judge erred in awarding benefits for only a two-week period.

The employer at the time of an initial traumatic injury remains liable for the full disability resulting from the natural progression of that injury. If, however, claimant's condition is aggravated or accelerated by his subsequent employment, the subsequent employer is fully liable for the resulting disability and medical benefits. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). In this case, claimant was not employed elsewhere prior to the period of disability awarded by the administrative law judge, and the administrative law judge found that employer is liable for claimant's medical benefits post-dating claimant's employment with employer as his knee condition is the result of the natural progression of his work injury.[1] Decision and Order at 13-17.

[1] Prior to the hearing, the administrative law judge issued an Order denying employer's motion to join claimant's subsequent employers to the proceedings.

Employer contends that claimant was released to full-duty work by Dr. Fitter on June 22, 2004, and that, thereafter, while employed by other employers, claimant engaged in work activities that aggravated his right knee condition. Employer contends that Drs. Fitter and Blanda opined that claimant's condition was accelerated by these job activities. Employer also avers that the administrative law judge erred in relying on the absence of a subsequent, single incident at a later employer as evidence of the natural progression of claimant's condition.

We reject employer's contention, and we affirm the administrative law judge's finding that claimant's condition results from the natural progression of his work injury. The administrative law judge rationally relied on claimant's testimony that his pain re-appeared when he stopped taking Vioxx, and that the pain waxes and wanes without regard to any particular activity. HT at 22-23; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's finding that claimant's injury never healed and that the pain was masked by the medication is supported by medical records indicating consistent pain in the same location. EX 12 at 7, 10.

Moreover, we reject employer's contention that the opinions of Drs. Fitter and Blanda definitively establish that claimant's subsequent employment aggravated claimant's condition. Although both Drs. Fitter and Blanda stated that the deep knee bends, squatting and bending that are part of claimant's usual job duties could degenerate his condition, *see* EX 4 at 12, 15, 19-20; EX 5 at 8-9, they both also stated that his current condition could be the natural progression of his original injury. *See* EX 4 at 39, 43; EX 5 at 10, 14. From this evidence, the administrative law judge was entitled to find that employer did not establish that claimant's knee condition actually was aggravated by his subsequent employment. Thus, unlike the situation in *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 534 U.S. 940 (2004), in which the physicians of record opined that the claimant's condition was aggravated by work on his last day of work before surgery, neither physician in this case stated that claimant's knee in fact worsened due to his subsequent employment or quantified any damage due to the subsequent work activities. EX 4 at 11; EX 5 at 4. Although claimant suffers greater or lesser pain in his daily activities, the administrative law judge rationally found that the pain itself has been consistent since claimant stopped taking Vioxx. HT at 25, 27.

It is well established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge is entitled to weigh the evidence and to draw inferences therefrom. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 493 (2d Cir. 1961). Based on this record, the administrative law

judge rationally concluded that employer did not establish that claimant's knee condition was aggravated by his subsequent employment. As substantial evidence supports the administrative law judge's finding that claimant's condition is due to the natural progression of his work injury, we affirm that finding. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Thus, we affirm the finding that employer is the responsible employer.

On cross-appeal, claimant contends that the administrative law judge erred in not awarding him compensation for temporary total disability continuously from the date of his injury. Claimant states only that he worked in "substantial pain because of economic necessity" such that he is entitled to total disability benefits. Claimant fails to adequately address this issue or to raise error in the administrative law judge's finding that claimant's disability was limited to a two-week period. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); 20 C.F.R. §802.211(b).[2] Moreover, we note that in instances in which a claimant's continued work is not performed through extraordinary effort or in excruciating pain, a finding of total disability is not warranted. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 216 (1989). In this case, the administrative law judge noted that no physician removed claimant from work or provided physical restrictions and that claimant himself testified that his pain was not to such a degree that it prohibited his performing his work. Decision and Order at 19; HT at 22. Thus, the administrative law judge committed no error in finding that claimant suffered no compensable disability after June 22, 2004.

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

SO ORDERED.

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[2] The regulations state, in pertinent part:

> Each petition for review shall be accompanied by a supporting brief…which: Specifically states the issues to be considered by the Board: presents…an argument with respect to each issue presented with references [to the record]; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b).

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge