BRB No. 11-0573

FRANK NUNZIO LACANFORA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINAL EAST, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 04/09/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
P & O PORTS OF BALTIMORE, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Medical Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Mark C. Miller (Law Office of William J. Blondell, Jr., Chartered), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for Marine Terminal East, Incorporated and Signal Mutual Indemnity Association, Limited.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for P & O Ports of Baltimore, Incorporated and Ports Insurance Company.

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

PER CURIAM:

Marine Terminal East, Incorporated (employer), appeals the Decision and Order Granting Medical Benefits (2009-LHC-972, 2009-LHC-1432, 2009-LHC-1433) of Administrative Law Judge Linda S. Chapman 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 was involved in three separate accidents in the course of his work as a longshoreman; two, which occurred on August 7, 2004, and August 1, 2005, while he was employed by P & O Ports Baltimore (POP), and a third, which occurred on March 8, 2008, while he was working for employer. Claimant alleged injuries to his shoulders and knees as a result of the August 7, 2004, and August 1, 2005, accidents for which POP paid compensation. *See* POPXs 2, 3. Claimant, who received treatment for his injuries from Dr. Pollak, stated that despite persistent shoulder and right knee pain, he continued to perform his usual work as a longshoreman following these incidents. On March 8, 2008, claimant sustained injuries to his right shoulder and allegedly to his right knee when, in the course of his work for employer, he transferred himself from the cargo ship upon which he had been working onto a tugboat which had been sent to offload longshoremen.[1] Claimant stated that he had difficulty making the transfer and, after having put significant weight and pressure on his right leg to keep from falling into the water, he ultimately was able to board the tugboat after two gentlemen pulled him aboard by his right arm. Employer accepted liability for claimant's right shoulder injury and paid temporary total disability and medical benefits relating to that specific injury,

[1]Claimant was offloading automobiles from a ship at employer's facility when a storm arose, prompting the release of the ship, with claimant and other longshoremen still aboard, from the dock into the Baltimore Harbor to "go out and float." HT at 44. After several hours, a tugboat was dispatched to the ship to offload the stranded longshoremen. HT at 45.

including those involved with the surgical repair of claimant's right rotator cuff. Employer, however, refused to authorize treatment for claimant's alleged right knee injury, which subsequently worsened to the point that Dr. Hinton recommended an arthroscopic surgical procedure, which the physician performed on October 29, 2009. Claimant filed a claim against employer seeking benefits for injuries arising from the March 8, 2008, accident, and shortly thereafter sought to join POP to the proceedings.

On August 12, 2009, the administrative law judge issued an order consolidating claimant's claims against employer and POP. In November 2009, the parties stipulated that employer and POP would split the cost of the arthroscopic procedure recommended and performed by Dr. Hinton on October 29, 2009, and pay claimant 60 days of temporary total disability benefits following the surgical procedure. The parties also agreed that if one employer was later held liable, that employer would reimburse the other for these costs. On September 13, 2010, claimant informed the administrative law judge that his right knee problem had not been alleviated by the arthroscopic procedure and that Dr. Hinton was now recommending total knee replacement surgery. As neither employer agreed to pay for that procedure, claimant requested that the administrative law judge move forward with his claim.

In her decision, the administrative law judge found that claimant provided timely notice to employer of his injury under Section 12, 33 U.S.C. §912, and that the claim was timely filed under Section 13, 33 U.S.C. §913. The administrative law judge next found, with regard to claimant's right knee condition, that claimant is entitled to the Section 20(a) presumption, and that employer did not establish rebuttal thereof. She thus found that claimant injured his right knee while working for employer on March 8, 2008, and that this injury aggravated his underlying right knee condition and accelerated claimant's need for arthroscopic and, subsequently, total knee replacement, surgery. Pursuant to these findings, the administrative law judge concluded that employer is liable for any benefits due claimant under the Act. In particular, the administrative law judge ordered employer to provide claimant with all medical benefits associated with the medical treatment recommended by Dr. Hinton, *i.e.*, total knee replacement surgery. 33 U.S.C. §907(a).

On appeal, employer challenges the administrative law judge's finding that it is responsible for the payment of any benefits associated with claimant's post-March 8, 2008, right knee condition. POP and claimant each respond, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in finding claimant entitled to the Section 20(a) presumption that his present right knee condition is due to the March 8, 2008, work injury as claimant did not file a claim against it for any right knee injury.

Alternatively, employer argues that Dr. Cohen's opinion, that claimant's right knee condition is solely attributable to progressive osteoarthritis and that the March 8, 2008, work accident did not in any way worsen that condition or necessitate surgical intervention, is sufficient to rebut the presumption and to establish, based on the record as a whole, that there is no causal connection between claimant's present right knee condition and his work accident of March 8, 2008.

In establishing that an injury is work-related, a claimant is aided by Section 20(a) which provides a presumed causal nexus between the injury and the employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm alleged. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge explicitly rejected employer's contention that the Section 20(a) presumption did not apply because claimant's formal claim form did not reference a right knee injury.[2] Decision and Order at 35-38, n. 23 at 38. The administrative law judge rejected employer's argument in terms of the timeliness provisions of Sections 12(a) and 13(a) of the Act, 33 U.S.C. §§912(a), 913(a), noting that claimant, through the filing of his accident report and the specific statements made in his February 24, 2009, LS-18 pre-hearing statement, provided employer with timely notice of the alleged right knee injury, as well as the claim for benefits for such a condition.[3] Decision and Order n. 23 at 38.

[2]The administrative law judge's decision reveals that she thoroughly discussed and analyzed the evidence of record, Decision and Order at 3-37, and adequately explained her rationale for rejecting employer's arguments that claimant's alleged failure to file a timely claim for benefits relating to the knee injury sustained as a result of the March 8, 2008, work accident precludes his entitlement to benefits. Decision and Order at 37-39. Thus, contrary to employer's argument, the administrative law judge's analysis of this particular issue, as well as her decision in general, comports with the Administrative Procedure Act. *See generally H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

[3]Specifically, the administrative law judge found that while claimant's April 25, 2008, claim form does not mention a right knee injury, his February 24, 2009, LS-18 pre-hearing statement unambiguously states that he is seeking temporary total disability benefits and authorization for medical treatment on his right knee – specifically, "surgery as recommended by Dr. Hinton." Decision and Order at 36, citing ALJX 6. Additionally, the administrative law judge found that even if claimant's accident report, which he filed with employer on the date of the injury, did not specifically address his right knee injury, it nevertheless provided employer with sufficient notice to investigate the circumstances surrounding the March 8, 2008, tugboat incident and the potential aggravating injuries that claimant may have sustained. *See U.S. Industries/Federal Sheet Metal, Inc., v.*

The administrative law judge also correctly noted that claimant's claim for medical benefits can never be time-barred. *See Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (*en banc*); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Moreover, employer had more than adequate notice that claimant was claiming he injured his knee in March 2008 by virtue of the agreement in November 2009 between employer and POP to pay for claimant's arthroscopic surgery. Thus, employer cannot claim the Section 20(a) presumption is inapplicable on this basis.

On the merits, the administrative law judge rationally found that claimant's accident while working for employer on March 8, 2008, could have contributed to claimant's current right knee condition. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). In this regard, the administrative law judge relied on claimant's testimony that he sustained a twisting injury as a result of the March 8, 2008, work incident which caused additional pain and increased symptoms in his right knee. The administrative law judge also relied on the opinions of Drs. Hinton and Pollak that the "load and twist" injury claimant sustained on March 8, 2008, aggravated his pre-existing right knee condition. Thus, the administrative law judge found that claimant is entitled to the Section 20(a) presumption linking his present right knee condition to the March 8, 2008, work incident with employer. As the administrative law judge's findings are rational, supported by substantial evidence, and in accordance with law, they are affirmed. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see generally Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not related to his employment. In a case such as this where claimant had a pre-existing knee condition, employer also must establish that the employment did not aggravate claimant's condition.[4] *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43

Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998)(discussing the liberality with which pleadings can be amended). Moreover, the administrative law judge found that employer was not prejudiced by any late notice of a knee injury because the record reveals that the records of Canton Occupational Medical Services describing claimant's knee pain in March 2008 were sent to employee's representative. *See* MTC EX 5.

[4]Pursuant to the aggravation rule, employer is liable for the entire resultant disability if a work injury aggravates, accelerates or combines with a pre-existing condition. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982).

BRBS 67(CRT) (4th Cir. 2009); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). If the administrative law judge finds the Section 20(a) presumption rebutted, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

We need not address employer's contention that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption in this case. Assuming, *arguendo*, the administrative law judge erred in finding Dr. Cohen's opinion insufficient to rebut the Section 20(a) presumption, any error is harmless as the administrative law judge's finding that the preponderance of the evidence demonstrates that claimant injured his right knee while working for employer on March 8, 2008, and that this injury aggravated his underlying right knee condition and thus accelerated his need for arthroscopic and ultimately, right knee replacement, surgery, is supported by substantial evidence. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see* Decision and Order at 44 n. 26. In reaching this conclusion, the administrative law judge relied on claimant's consistent testimony that the March 8, 2008, work incident caused an increase in his right knee symptoms, and the opinions of Drs. Hinton and Pollak, who each opined that the March 8, 2008, work incident aggravated and exacerbated claimant's underlying right knee condition. CX 3; CX 6 at 20-21, 51-52, 59, 65; POP EX 20 at 30-34. In contrast, the administrative law judge accorded diminished weight to Dr. Cohen's opinion because it is largely premised on the physician's belief that claimant did not notice any additional knee pain until ten days after incident, a conclusion the administrative law judge found was not supported by the record.[5]

[5]While Dr. Cohen opined that the absence of reported symptoms for ten days indicates the lack of a causal connection between the March 8, 2008, work incident and claimant's injury, Drs. Hinton and Pollak each stated that that factor, if true, is too negligible to alter their opinions. Specifically, Dr. Pollak stated, "it's too coincidental to say that ten days after this incident, not having had knee problems – or not having had need for treatment for knee problems for almost a year prior [to the March 8, 2008, accident]," that those symptoms are not related to that specific work accident. POPX 20 at 34-35. Similarly, Dr. Hinton stated that while the lack of reported complaints to a physician for ten days "indicates that there was no fracture or major new traumatic injury to his knee," it is not unusual for it to take a week or so for a patient to notice a change in the condition of his knee. CX 6 at 41-42. Additionally, both physicians stated, as the administrative law judge observed, that claimant's torn rotator cuff may have distracted him from immediately recognizing an increase in his right knee symptoms. POPX 20 at 48; CX 6 at 41-42.

The administrative law judge is entitled to weigh the evidence and to draw her own inferences and conclusions therefrom; the Board may not reweigh the evidence. *See generally Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2001). In this regard, the administrative law judge rationally found that claimant's testimony and the opinions of Drs. Hinton and Pollak establish a causal connection between claimant's March 8, 2008, work accident and his present right knee condition. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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 403 (2d Cir. 1961). Thus, as it is supported by substantial evidence of record, we affirm the administrative law judge's finding that claimant sustained a compensable knee injury while working for employer on March 8, 2008.

Moreover, we affirm the administrative law judge's determination that employer is responsible for claimant's arthroscopic and knee replacement surgeries, as it is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §907(a); *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 517, 34 BRBS 91, 94(CRT) (4th Cir. 2000). The administrative law judge rationally credited the opinion of Dr. Pollak, as supported by that of Dr. Hinton, that the March 8, 2008, accident aggravated claimant's underlying osteoarthritic right knee condition and necessitated both surgical procedures.[6] Employer, therefore, is liable for the necessary medical treatment caused by the aggravating injury, even if that injury is not the primary cause of the condition. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

[6]Thus, we reject employer's argument that claimant, at most, sustained only a temporary aggravation of his right knee condition as a result of the March 8, 2008, incident which fully resolved shortly thereafter. The administrative law judge rationally rejected this contention which was based on Dr. Cohen's opinion. The administrative law judge rationally relied on the opinions of Drs. Hinton and Pollak, that the March 8, 2008, work accident accelerated the need for claimant's total knee replacement surgery. CX 6 at 38-39, POPX 20 at 41. In this regard, the administrative law judge noted that although Dr. Hinton, unlike Dr. Pollak, appeared to waver in his opinion as to the relationship between claimant's knee condition and the work incident, she rationally found that when considered as a whole, Dr. Hinton opined that the March 2008 incident probably exacerbated claimant's underlying arthritis. Decision and Order at 43 n.25.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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