



BRB Nos. 15-0493  
and 15-0493A

JAMES FULBROOK	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PORTS AMERICA, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY,	)	DATE ISSUED: <u>June 21, 2016</u>
INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
NEW YORK CONTAINER TERMINAL	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order on Reconsideration of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Andrew R. Topazio (Marciano & Topazio), Union, New Jersey, for claimant.

Christopher J. Field (Field & Kawczynski, LLC), South Amboy, New Jersey, for Ports America, Incorporated and Ports Insurance Company, Incorporated.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Ports America, Incorporated (Ports America) cross-appeals, the Decision and Order and the Decision and Order on Reconsideration of Administrative Law Judge Lystra A. Harris 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 if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In 1997, claimant commenced employment with New York Container Terminal (New York Container) as a longshoreman. In this capacity, claimant performed a variety of duties, including driving a hustler or top loader, working with container locking gear, and loading and unloading trucks. On January 23, 2012, claimant sustained an injury to his back while picking up a brake shoe. Following this incident, claimant was taken to the hospital for medical treatment; thereafter, claimant underwent medical care for approximately two months. On March 19, 2012, claimant returned to work as a longshoreman at New York Container, and worked approximately 60 to 70 hours per week.

In late May 2012, claimant voluntarily transferred to Ports America's car ship terminal, located in New Jersey; claimant's job was to drive cars on and off ships. Claimant testified that his decision to remove himself from New York Container's employment list was a financial one; specifically, claimant testified that although his transfer resulted in a loss of seniority, all of the work was going "to the Jersey side." *See* Tr. at 55, 99-100. On June 4, 2012, while in Ports America's employ, claimant experienced back pain while reaching into the glove box of an automobile. Claimant has subsequently treated for back pain and has not returned to gainful employment. Ports America voluntarily paid claimant temporary partial disability compensation from June 5 to September 20, 2012, and temporary total disability compensation from March 21 to April 17, 2013. 33 U.S.C. §§908(b), (e). Claimant filed a claim against both employers. CXs 1, 10; JXs 1, 2; Tr. at 6-7.

In her Decision and Order, the administrative law judge found that claimant sustained a work-related injury to his back while working for New York Container on January 23, 2012, and that the June 4, 2012 work incident at Ports America aggravated, accelerated, or combined with claimant's first injury to result in his present disability. Thus, the administrative law judge held Ports America liable for any benefits due claimant under the Act as of June 4, 2012. Next, the administrative law judge found that claimant did not establish that he is incapable of resuming his usual employment duties as a car ship driver with Ports America; consequently, the administrative law judge denied claimant's claim for temporary total disability benefits. The administrative law judge awarded claimant medical benefits for his June 4, 2014 injury, payable by Ports America. As it pertains to the issues on appeal, the administrative law judge denied claimant's motion for reconsideration on the issue of his disability status following each injury.

On appeal, claimant challenges the administrative law judge's denial of his claim for disability benefits after each injury. Ports America responds, urging affirmance of the denial of the disability claim against it. BRB No. 15-0493. In its cross-appeal, Ports America challenges the administrative law judge's finding that it is the employer responsible for the payment of any benefits due claimant subsequent to June 4, 2012. BRB No. 15-0493A. New York Container has not responded to either appeal.

### **RESPONSIBLE EMPLOYER**

Ports America challenges the administrative law judge's determination that it, rather than New York Container, is the employer responsible for any benefits due claimant under the Act subsequent to June 4, 2012. BRB No. 15-0493A. Ports America asserts that claimant's condition is due to the natural progression of his January 2012 injury with New York Container and that the evidence of record fails to establish that claimant's physical condition worsened due to the June 4, 2012 incident with Ports America. We reject this contention of error.

In allocating liability between successive employers in cases involving traumatic injury, the employer at the time of the original injury remains 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 at the time of the aggravation is liable for the entire disability resulting therefrom.<sup>1</sup> *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2<sup>d</sup> Cir. 2002); *see also Metropolitan Stevedore Co. v. Crescent*

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<sup>1</sup> Under the aggravation rule, where the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *See Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (en banc).

*Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9<sup>th</sup> Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9<sup>th</sup> Cir. 2010). Where claimant's work results in an exacerbation of his symptoms, the employer at the time of the work events resulting in the exacerbation is responsible for any resulting disability. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7<sup>th</sup> Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3<sup>d</sup> Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986); *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 F. App'x 547 (9<sup>th</sup> Cir. 2001).

In this case, substantial evidence supports the administrative law judge's finding that the work incident of June 4, 2012, aggravated or combined with claimant's pre-existing back condition to result in claimant's present medical condition. In her decision, the administrative law judge discussed claimant's testimony at length and found that claimant was able to work without pain upon his return to work on March 19, 2012, up to the time of the June 4, 2012 incident. The administrative law judge further found that Dr. Michelsen, claimant's treating Board-certified orthopedic surgeon, opined that claimant's June 4, 2012 work injury aggravated his initial injury and, in combination with that injury, resulted in his present disability. In this regard, the administrative law judge found that Dr. Michelsen examined claimant on numerous occasions following the June 4, 2012, injury, and that his opinion is based both on the history he obtained from claimant and his review of the medical reports concerning claimant's condition. *See* Decision and Order at 9, 14-18; CX 54 at 24.

It is well established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and may draw inferences therefrom. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961); *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). The Board may not disregard the administrative law judge's findings on the ground that other inferences might have been drawn from the evidence. *See, e.g., Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 35 BRBS 35(CRT) (1<sup>st</sup> Cir. 2001); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4<sup>th</sup> Cir. 1988). In this case, the administrative law judge rationally relied on claimant's testimony regarding his ability to work after March 19, 2012 and the opinion of Dr. Michelsen to find that claimant's June 4, 2012, work injury aggravated, accelerated, or combined with his prior injury resulting in his present medical condition. As the administrative law judge's finding is supported by substantial evidence and consistent with law, we affirm the administrative law judge's finding that Ports America is liable for any benefits due claimant as of June 4, 2012. *See Delaware River Stevedores, Inc.*, 279 F.3d 233, 35 BRBS 154(CRT); *Buchanan*, 33 BRBS 32.

## EXTENT OF DISABILITY

In order to establish a prima facie case of total disability, claimant bears the burden of establishing that he cannot return to his usual employment due to his work-related injury. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2<sup>d</sup> Cir. 1991); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). Claimant's usual employment is that which he was performing at the time of his injury. *See Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

In his appeal, BRB No. 15-0493, claimant initially contends that his usual employment duties as a longshoreman involved many different jobs; consequently, claimant avers the administrative law judge erred in finding that his usual employment at the time of his June 4, 2012 work injury was that of a car driver. *See Decision and Order at 24.* We disagree. At the hearing, claimant testified that, in late May 2012, he intentionally initiated a transfer from New York Container, located on Staten Island, to the car ship terminal operated by Ports America, located in New Jersey, for economic reasons. Specifically, claimant testified that work was becoming slower with New York Container and, although he lost his seniority in making this transfer, "if you wanted to make any kind of money, you pretty much had to be on the Jersey side." *See Tr. at 55, 100.* As claimant's testimony establishes that he intentionally changed his employment situation in late May 2012, claimant has not established any error in the administrative law judge's finding that claimant's usual employment at the time of his June 4, 2012, injury was that of a car driver. *See Manigault*, 22 BRBS 332; *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Accordingly, we reject claimant's contention of error and affirm the administrative law judge's finding on this issue.

Next, claimant challenges the administrative law judge's finding that he did not meet his burden of establishing that, due to his injury, he is incapable performing the duties of a car ship driver with Ports America. *See Decision and Order at 24-25; Decision and Order on Recon. at 4.* In support of his assertion of error, claimant avers that his testimony and that of Dr. Michelsen, in conjunction with his prescribed use of narcotic medication, is sufficient to establish that he is incapable of operating a motor vehicle and that, consequently, he established his prima facie case.

We reject claimant's contention. In finding that claimant did not make his prima facie case, the administrative law judge found that Dr. Michelsen, while stating that claimant is disabled from performing a job requiring significant bending and lifting, did not offer an opinion regarding claimant's ability to work as a car driver. Moreover, the administrative law judge found that Dr. Michelsen's statement that claimant would be unable to sit or stand for long periods is not specific as he did not delineate restrictions on

those activities.<sup>2</sup> Decision and Order at 24-25. Similarly, the administrative law judge found that the opinion of Dr. Magliato does not convey specific knowledge of the duties of a car driver, and that Dr. Merola examined claimant prior to the occurrence of the June 4, 2012 work injury. *Id.* In considering claimant's testimony, the administrative law judge, while crediting claimant's statements that he experiences pain, found that the overall evidence fails to demonstrate that this pain prevents claimant from engaging in his usual work. The administrative law judge noted claimant's testimony that he drives to his medical appointments; in this regard, the administrative law judge specifically found that while claimant expressed concern about his use of narcotic medication, there is no medical evidence in the record that driving is contraindicated due to claimant's medication use. *Id.* at 25. The administrative law judge thus concluded that claimant did not establish that he is restricted from driving or sitting for the time required to perform the duties of a car driver. *Id.*

Claimant's arguments on appeal regarding his inability to perform the duties of a car driver, in effect, ask the Board to reweigh the evidence, which the Board is not empowered to do. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5<sup>th</sup> Cir. 1991). The administrative law judge fully addressed the evidence on this issue and her conclusion that claimant failed to meet his burden of proving that he is incapable of performing his usual work as a car driver is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's denial of disability compensation for the June 4, 2012 injury. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9<sup>th</sup> Cir. 1990).

Claimant also contends the administrative law judge erred in denying disability benefits for the January 23, 2012 injury. We agree that the administrative law judge's conclusion cannot be affirmed and that the case must be remanded for further findings. Although claimant filed a claim for benefits against New York Container for the work injury he sustained on January 23, 2012, *see* CXs 1, 10; JXs 1, 2; Tr. at 6-7, the administrative law judge addressed only claimant's ability to return to work following the June 4, 2012 work injury with Ports America. *See* Decision and Order at 22-25; Decision and Order on Recon. at 3. The administrative law judge did not address claimant's claim for disability benefits for the period before he returned to work with New York Container

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<sup>2</sup> While Dr. Michelsen, in a report dated June 14, 2012, opined that claimant was "at this time disabled from his job which requires significant bending and lifting," *see* CX 47, the administrative law judge found that the record contains no evidence that the duties of a car driver require bending or lifting. Decision and Order at 24.

on March 19, 2012.<sup>3</sup> *See* CX 9. We therefore vacate the administrative law judge's denial of disability benefits for the period of January 24 through March 18, 2012. We remand the case for the administrative law judge to address whether claimant established that his January 23, 2012 injury prevented him from performing his usual work, i.e., the work he performed for New York Container, prior to March 19, 2012. *See* CXs 19-29; *Wheeler*, 39 BRBS 49; *Manigault*, 22 BRBS 332.

Accordingly, the administrative law judge's denial of compensation from January 24 through March 18, 2012, is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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<sup>3</sup> The administrative law judge found that a work related injury occurred in January 2012, and held New York Container liable for medical benefits for the January 2012 injury. Decision and Order at 20, 27. As it relates to disability benefits for the January 2012 injury, the administrative law judge summarily rejected claimant's claim, but did not explain the basis for her determination as required by the Administrative Procedure Act. Decision and Order at 28; Decision and Order on Recon. at 3. *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A).