

JAMES MORRISON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
OPERATORS AND CONSULTING)	
SERVICES, INCORPORATED)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	DATE ISSUED: <u>May 14, 2004</u>
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DANOS & CUROLE MARINE)	
CONTRACTORS, INCORPORATED)	
)	
and)	
)	
THE GRAY INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

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

Joseph B. Guilbeau and Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for Operators and Consulting Services, Inc. and Zurich American Insurance Company.

Douglass M. Moragas, Harahan, Louisiana, for Danos & Curole Marine Contractors, Inc. and the Gray Insurance Company.

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

PER CURIAM:

Operators and Consulting Services, Inc. (OCS) appeals the Decision and Order (2002-LHC-0952) 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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 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, during the course of his employment as a field mechanic for OCS, injured his back on October 16, 1997, while working on an offshore platform.¹ After returning to shore, claimant obtained chiropractic treatment from Dr. Gramlich. Thereafter, claimant worked a few hitches of light duty work, and then resumed his regular duties on the platform, although he continued to experience back pain. Dr. Gramlich treated claimant until February 1998, when he had reached a plateau in his recovery and the doctor advised him to return to her if his pain worsened. DX 14 at 24-25, 39; Tr. at 34-36, 53-55, 72, 82-83. In May 1998, Burlington Resources, the platform operator, terminated its contract with OCS, and contracted with Danos & Curole Marine Contractors, Inc. (Danos) to provide workers for the platform. After successfully completing a pre-employment agility test, claimant was hired by Danos on May 8, 1998, to perform the same duties as a field mechanic that he had previously performed for OCS. DXS 9; 15; Tr. at 37-38, 42-45, 59-63, 68-69. In May 1998, claimant returned to Dr. Gramlich because of numbness and tingling in his left leg, symptoms which had worsened since they first developed in March 1998. DX 14 at 25-26, 37, 44-47; Tr. at 36, 45, 57-58, 72-73, 83. Dr. Gramlich resumed treatment of claimant, but when his continued back pain and left leg symptoms had not resolved by September 1998, she referred him to Dr. Wilson, a neurosurgeon. DX 14 at 24-27, 38-39, 43-47; Tr. at 39, 65-66, 73, 90. After initiating treatment with Dr. Wilson on September 15, 1998, claimant stopped working and was terminated by Danos on October 22, 1998. DXS 1; 12 at 8; Tr. at 39-40, 65, 78, 85. Because a series of diagnostic tests revealed a disc herniation and nerve root impingement, and claimant's complaints of pain worsened, Dr. Wilson performed a lumbar fusion on July 9, 2001. DXS 1; 12. Claimant filed claims under the Act against both OCS and Danos. EX 9. Although OCS voluntarily paid claimant temporary total disability compensation from September 23, 1998 to June 5, 2002, and thereafter permanent partial disability and medical benefits, *see* JX 1; DX 6; Tr. at 20, it asserted that Danos should be held liable for all disability and medical benefits due

¹ Claimant testified that in order to climb down a ladder from the top of a water tank to the platform below, he had to swing his leg over a tall guardrail on the water tank; as he did so he felt an excruciating pain in his lower back. He took the rest of the day off, and thereafter performed light duty for the remainder of his seven-day hitch on the platform. *See* Tr. at 32-33, 52-53, 69-71.

claimant on the basis that claimant's work for Danos aggravated his initial injury, resulting in his disability. The sole issue presented at the formal hearing was the determination of the employer responsible for claimant's disability and medical benefits. Decision and Order at 2; JX 1.

In his Decision and Order, the administrative law judge determined that claimant's disabling back condition resulted from the natural progression of his October 16, 1997 injury with OCS. The administrative law judge thus found OCS to be responsible for all disability and medical benefits due claimant.

On appeal, OCS challenges the administrative law judge's responsible employer determination. Danos responds, urging affirmance of the administrative law judge's decision in its entirety.

OCS essentially argues on appeal that the administrative law judge erred in failing to find that claimant's underlying back condition was aggravated by his employment duties with Danos. In cases under the Act involving multiple traumatic injuries, the determination of the employer responsible for the payment of claimant's benefits turns on whether the claimant's condition is the result of the natural progression or an aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the claimant's employer at the time of that injury is the employer responsible for compensating the claimant for the entire disability. If, on the other hand, the conditions of employment with a subsequent employer aggravated, accelerated, or combined with the earlier injury, resulting in the claimant's disability, the employer at the time of the second injury is liable for all medical expenses and compensation related thereto. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

In seeking to overturn the administrative law judge's responsible employer determination, OCS initially argues that the administrative law judge erred in concluding that claimant's initial injury was not aggravated by his subsequent employment with Danos on the basis that claimant did not sustain a specific traumatic accident while working for Danos.² OCS br. at 16-18. Contrary to OCS's assertion, however, a review

² OCS correctly notes that the issue of whether claimant would have required back surgery regardless of his work at Danos is not dispositive of the responsible employer issue. *See* OCS br. at 17; *Price*, 339 F.3d at 1107, 37 BRBS at 91(CRT). The administrative law judge, however, did not base his responsible employer determination on a finding that claimant eventually would have required surgery notwithstanding his employment with Danos. Similarly, OCS asserts that a second injury need not be the *primary* factor in the resultant disability and that the fact that the initial injury was the precipitant event is not determinative of the responsible employer. *See* OCS P/R at 18;

of the administrative law judge's decision reveals that the administrative law judge applied the correct legal standard when considering whether claimant's ongoing work performance with Danos aggravated or combined with his prior back injury to create his ultimate disability.³ Decision and Order at 15-16; *Price*, 339 F.3d at 1105, 37 BRBS at 90(CRT). Accordingly, we reject OCS's initial allegation of error.

OCS next contends that the administrative law judge's responsible employer determination is not supported by substantial evidence. We disagree. In determining that claimant's present disability is the result of the natural progression of his October 16, 1997, original injury, the administrative law judge credited the testimony of Drs. Wilson and Gramlich, as well as claimant's testimony regarding his symptoms and work activities. Decision and Order at 14-16. The administrative law judge found that claimant's condition had not resolved at the time he began working for Danos and that claimant did not become symptomatic because of an aggravation occurring as a result of his employment with Danos. The administrative law judge credited claimant's testimony that his back condition progressively deteriorated from the time of his initial injury on October 16, 1997, that he continued to experience lower back pain in February 1998, and that he first experienced left leg symptoms in March 1998, prior to the date he commenced work for Danos. Decision and Order at 14-15; DX 14 at 24-26, 37, 44-47; Tr. at 34-36, 45, 53-58, 65, 72-74, 80-85. The administrative law judge next determined that claimant's successful completion of Danos's pre-employment agility test did not

Delaware River Stevedores, Inc., 279 F.3d at 243, 35 BRBS at 161(CRT); *Foundation Constructors, Inc.*, 950 F.2d at 624, 25 BRBS at 75(CRT). The administrative law judge in the instant case, however, did not base his responsible employer determination on these factors.

³ OCS correctly states that the aggravation of an underlying condition need not be produced by an identifiable traumatic incident, but may be caused by cumulative trauma resulting from work activities or conditions. See OCS br. at 17-18; *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). OCS similarly argues that the evidence in the instant case that claimant's symptoms were temporarily exacerbated by his performance of strenuous work for Danos, is sufficient to hold Danos liable as responsible employer. See OCS br. at 20-21. However, the fact that the claimant sustained a temporary exacerbation with a subsequent employer is not determinative of the responsible employer issue. Rather, in cases involving multiple traumatic injuries, the responsible employer determination depends on the cause of the claimant's *ultimate disability*; only if the disability is at least partially the result of trauma sustained in employment with a subsequent employer is the subsequent employer liable. See *Price*, 339 F.3d at 1105, 37 BRBS at 90(CRT). If, on the other hand, the ultimate disability results from the natural progression of the initial injury, and not from any subsequent trauma, the first employer remains liable. *Id.*

establish that his back condition had resolved by May 1998, having inferred from the testimony of claimant and Mr. Knijn, the physical therapist who administered the test, that claimant's successful completion of the test demonstrated only that claimant was capable of performing most of his job duties for a limited amount of time. Decision and Order at 15; Tr. at 60-62, 68-69, 77, 85-87; DXS 11, 15. Moreover, the administrative law judge fully considered claimant's testimony regarding his work duties at Danos, finding that such testimony did not demonstrate that claimant's disabling back condition was the result of an aggravation sustained in the performance of his work at Danos.⁴ Decision and Order at 15-16. Lastly, the administrative law judge credited the opinions of claimant's treating physicians, Dr. Wilson, a neurosurgeon, and Dr. Gramlich, a chiropractor, which he found constituted substantial evidence supporting his determination that claimant's disabling back condition is the result of the natural progression of his October 16, 1997 injury.⁵ Decision and Order at 16; DXS 12 at 68-71, 76-77, 80-86, 97-98, 101-106; 14 at 39-41, 49, 52.

Although OCS argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony, we conclude that the competing characterization of the record evidence and assessment of the witnesses' credibility offered by OCS does not provide a basis for overturning the administrative law judge's credibility determinations and evaluation of the evidence. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and has considerable discretion in evaluating the evidence of record. *See*

⁴ The administrative law judge credited claimant's testimony that he "worked smart" and availed himself of help from other employees and machines in performing jobs involving lifting and other physical demands. Decision and Order at 15; Tr. at 43-46, 49-51, 75-78, 81.

⁵ Citing Dr. Wilson's deposition testimony indicating that claimant's flare-ups represented cumulative trauma which aggravated claimant's back condition, OCS assigns error to the administrative law judge's finding that Dr. Wilson's opinion supports a finding that claimant's disability is the result of the natural progression of his initial injury. OCS br. at 25; DX 12 at 52, 68, 97-98. The administrative law judge, however, explicitly recognized that Dr. Wilson acknowledged the possibility that claimant's work for Danos may have exacerbated his condition, but the administrative law judge found that Dr. Wilson's testimony, considered in its entirety, reflected his opinion that claimant's condition was the result of the natural progression of his initial injury. Decision and Order at 7-10, 16.

OCS further avers that Dr. Ioppolo's opinion supports a finding that claimant's condition was exacerbated by his employment with Danos. OCS br. at 25; DX 13 at 39-40, 46-47, 84. However, Dr. Ioppolo also testified that it was equally probable that claimant's back condition was the result of natural progression of the initial injury. DX 13 at 80-81.

James J. Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT)(5th Cir. 1995). As the administrative law judge's assessment of the credibility of each of these witnesses and his inferences drawn from the record evidence are rational, they are affirmed. *Id.* We hold that the administrative law judge's finding that claimant's disabling back condition is due to the natural progression of his October 16, 1997 injury at OCS and that OCS is the responsible employer is supported by substantial evidence and is consistent with the applicable legal principles and is therefore affirmed. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge