



BRB Nos. 16-0148
and 16-0402

FAIRY JENKINS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PORTS AMERICA, INCORPORATED)	
)	
and)	
)	
PORTS INSURANCE COMPANY,)	
INCORPORATED)	
)	DATE ISSUED: <u>Nov. 23, 2016</u>
Employer/Carrier-)	
Petitioners)	
)	
YUSEN TERMINALS, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	
)	
ILWU-PMA WELFARE PLAN)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Decision and Order Awarding Compensation and Benefits
and the Attorney Fee Order of Richard M. Clark, Administrative Law
Judge, United States Department of Labor.

Mario Cruz (Cantrell Green), Long Beach, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for Ports America, Incorporated and Ports Insurance Company, Incorporated.

Arthur A. Leonard (Aleccia & Mitani), Long Beach, California, for Yusen Terminals, Incorporated and Signal Mutual Indemnity Association.

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

PER CURIAM:

Ports America, Incorporated (Ports America) appeals the Decision and Order Awarding Compensation and Benefits and the Attorney Fee Order (2013-LHC-00815) of Administrative Law Judge Richard M. Clark 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 rational, supported by substantial evidence, and 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 allegedly sustained injuries to her neck, shoulder, low back and right knee in a work-related incident at Yusen Terminals (Yusen) on August 13, 2010; prior to this incident, claimant had been diagnosed with arthritis in both knees and her spine, and had had surgery on her right knee in 2003. On August 16, 2010, Dr. London diagnosed cervical and thoracolumbar straining injuries related to the work accident, but stated claimant most likely did not sustain an injury to her right knee in this incident. Dr. London recommended that for three weeks claimant avoid lifting, carrying, pushing, or pulling loads over 25 pounds or engaging in repeated bending. YX 4. On August 25, 2010, claimant's treating physician, Dr. Nutig, diagnosed claimant with sprain/strain injuries of her thoracic, lumbar and cervical spine. Dr. Nutig placed claimant on temporary total disability until January 4, 2011, when he released her to return to work without restrictions. CX 33. Claimant, however, stopped working again on January 19, 2011, due to severe pain allegedly related to her August 13, 2010 work injuries. Claimant returned to work on May 3, 2011, but stated that she continued to experience bilateral knee pain associated with her August 2010 work accident. Nonetheless, claimant worked as a UTR driver for various employers until September 25, 2011, when she began taking only marine clerk jobs pursuant to an ADA accommodation. Claimant continued to take jobs as a marine clerk, including positions with Ports America, until February 3, 2014, when she stopped working due to an unrelated injury from a car accident.

On December 10, 2010, claimant filed a claim under the Act against Yusen, alleging she sustained injuries to her neck, shoulders, low back and right knee while working as a UTR driver at Yusen on August 13, 2010. YX 1. Claimant subsequently amended her claim to allege that her left knee arthritis was aggravated by this work incident. Yusen controverted the claim and subsequently moved that Ports America be joined as a party to the claim based on medical opinions that claimant's continued work aggravated her bilateral knee condition. By Order dated December 9, 2013, Administrative Law Judge Jennifer Gee granted Yusen's motion. Subsequently, a formal hearing was held before Administrative Law Judge Richard M. Clark (the administrative law judge).

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), against Yusen with regard to the right knee, neck, shoulders and low back injuries allegedly sustained in the August 2010 accident, and against Ports America with regard to her bilateral knee pain as a result of continued cumulative trauma. The administrative law judge found that Yusen rebutted the Section 20(a) presumption with respect to claimant's shoulder and right knee injuries. The administrative law judge found that Yusen did not rebut the presumption with respect to claimant's neck and back injuries. Decision and Order at 14-15. The administrative law judge found that Ports America rebutted the Section 20(a) presumption with respect to claimant's bilateral knee complaints. *Id.* at 15. Evaluating the evidence as a whole, the administrative law judge found that claimant established that she sustained work-related injuries to her right knee, neck, shoulders and low back in the incident at Yusen on August 13, 2010, and that she also experienced cumulative trauma to both knees by continuing to work as a marine clerk, including with Ports America on November 15, 2012. *Id.* at 15-19.

Finding that claimant's bilateral knee arthritis worsened due to her continued employment following her August 13, 2010 work accident and up to and including November 16, 2012, the date on which Dr. Capen found claimant reached maximum medical improvement and gave impairment ratings to each of claimant's knees, the administrative law judge found Ports America liable for the scheduled permanent partial disability awards for claimant's knees. Decision and Order at 22. He otherwise found Yusen liable for any periods of temporary total disability to which claimant is entitled prior to November 16, 2012. *Id.* Accordingly, the administrative law judge awarded claimant temporary total disability benefits, payable by Yusen, from August 17, 2010 through January 11, 2011. 33 U.S.C. §908(b). The administrative law judge awarded claimant consecutive, permanent partial disability scheduled awards, payable by Ports America, for a 26 percent right knee impairment and 16 percent left knee impairment.¹

¹On November 16, 2012, Dr. Capen stated claimant has a 20 percent left knee impairment and a 25 percent right knee impairment pursuant to the American Medical

33 U.S.C. §908(c)(2), (22). The administrative law judge also found that Yusen is liable for claimant's medical benefits for her neck, shoulder and low back injuries, and for her knee injury prior to November 15, 2012. 33 U.S.C. §907(a). The administrative law judge found that Ports America is liable for medical benefits for claimant's knee bilateral injuries after November 14, 2012. 33 U.S.C. §907(a). The administrative law judge found that the ILWU-PMA Welfare Plan is entitled to a lien against disability benefits payable to claimant, 33 U.S.C. §917, and that Yusen and Ports America are not entitled to Section 8(f) relief, 33 U.S.C. §908(f).

Claimant's counsel subsequently requested an attorney's fee totaling \$76,192.78, representing 171.4 hours of attorney work at an hourly rate of \$400, 27.1 hours of paralegal work at an hourly rate of \$100, plus expenses of \$4,922.78. Employer filed objections to the fee petition. In his Attorney Fee Order, the administrative law judge, after making reductions in the hourly rate for attorney work and the hours for both attorney and paralegal work, awarded counsel a fee totaling \$60,464.70, payable by Yusen (liable for \$9,577.61) and Ports America (liable for \$50,887.09).

On appeal, Ports America challenges the administrative law judge's conclusion that it is the employer responsible for the payment of claimant's scheduled awards and medical benefits for claimant's bilateral knee condition. Yusen responds, urging, affirmance of the administrative law judge's decision.² BRB No. 16-0148. Ports America also challenges the administrative law judge's award of an attorney's fee, asserting, specifically, that if its appeal in BRB No. 16-0148 is successful, the administrative law judge's award of an attorney's fee, payable by Ports America, must be vacated. Claimant responds, urging affirmance of the administrative law judge's Attorney Fee Order. BRB No. 16-0402.

Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (5th ed. 2000). CX 35. On August 19, 2014, Dr. Delman agreed with the impairment assessments under the Fifth Edition, *see* PX 1 at 36-37; YX 21 at 26-27, but stated that claimant has a 16 percent left knee impairment and a 26 percent right knee impairment pursuant to the Sixth Edition of the AMA *Guides*. PX 1 at 37; YX 21 at 27. The administrative law judge awarded benefits based on the Sixth Edition ratings, as they reflect the "state of the medical art." Decision and Order at 28-29.

²The administrative law judge's findings with respect to Yusen's liability and that claimant has a 26 percent right knee impairment and 16 percent left knee impairment are affirmed as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 47 (2007).

Ports America contends that there is no legal or factual basis for holding it liable for claimant's benefits simply because she last worked for Ports America prior to November 16, 2012, when Dr. Capen first assigned permanent impairment ratings for claimant's knees. Ports America maintains that pursuant to *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004), the responsible employer is the last employer whose employment contributed to claimant's disabling condition. Ports America contends that because the credited evidence establishes that the occupational trauma to claimant's knees continued after November 15, 2012, when claimant worked for other employers, it cannot be liable as the last employer to contribute to claimant's condition. Ports American thus avers that the case should be remanded for "determination of the responsible employer."

In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability results from the natural progression of a prior injury, then the prior injury is compensable, and the claimant's employer at that time is responsible for claimant's disability. If, however, the subsequent injury aggravates, accelerates or combines with the earlier injury to result in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully responsible for the resultant disability. *See, e.g., Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors, Inc. 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). The aggravation rule applies even if the claimant sustained the greater part of her injury with a prior employer. *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT). The administrative law judge must weigh the relevant evidence as a whole to determine the responsible employer. *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 (9th Cir. 2001).

We reject Ports America's contentions that the administrative law judge erred and that the case should be remanded. We observe that there are only two employers joined to this action – Yusen and Ports America. There is no challenge on appeal to the administrative law judge's finding that claimant has a work-related bilateral knee condition. Therefore, one of these two employers must be liable for claimant's disability and medical benefits. *See Buchanan*, 33 BRBS at 36 (the last employer is liable if none of the employers' evidence persuades the administrative law judge as to the identity of the responsible employer); *see generally Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). The fact that claimant continued to work for other employers is immaterial, as no other employers have been joined to the claim. *See generally Lopez v. Stevedoring Services of America*,

39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010). In addition, we reject Ports America's contention that the Ninth Circuit's decision in *Price* requires a break in or cessation of employment before the responsible employer can be identified. The facts in *Price* were that the claimant continued to work until he had surgery for his work injury and filed a claim for benefits after the surgery. *Price*, 339 F.3d at 1104, 37 BRBS 90(CRT). The case does not require that the determination of the responsible employer in a cumulative trauma case be deferred until there is a break in employment. The administrative law judge correctly observed that claimant should not have to bear the expense of medical treatment for her work injuries until there is a break in employment. *See* Decision and Order at 25. Claimant is entitled to medical benefits for her work injury from the responsible employer notwithstanding the possibility that her continued employment might be aggravating her condition. *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000) (noting the propriety of ongoing awards and stating that Section 22 of the Act, 33 U.S.C. §922, provides the mechanism for altering decisions).

Moreover, Ports America does not contest the administrative law judge's finding that claimant's continued employment after the August 2010 Yusen incident aggravated claimant's knee arthritis and accelerated the progression of her condition. *See* Decision and Order at 18-22.³ Nor does Ports America contend that claimant's knee impairments

³The administrative law judge found Dr. London opined that claimant's bilateral knee arthritis progressed between 2010 and 2012, and that claimant's work activities as a marine clerk contributed to, and would continue to contribute to, the progression of her arthritis. Tr. at 120-121; 132-143; YX 4 at 11. He also found Dr. Capen agreed that claimant's bilateral knee condition worsened after her August 13, 2010 work accident and that her work activities probably contributed to the worsening of that condition, depending on the amount of standing and walking involved with her work. CX 35 at 45. The administrative law judge found Dr. Capen stated that standing, walking, and getting in and out of trucks while working as a marine clerk contributed, even in a minor way, to the progression of claimant's bilateral knee arthritis. *Id.* at 46. In contrast, the administrative law judge found Dr. Delman opined, based on claimant's statements regarding her knee pain and her ability to work, that continuous trauma did not play a role in claimant's disability. PX 1 at 37. The administrative law judge noted, however, that Dr. Delman acknowledged that claimant's work activities could have played some role in accelerating the progression of claimant's arthritic symptoms. YX 21 at 17-18; *see* Decision and Order at 18-22.

The administrative law judge rationally credited the opinions of Drs. London and Capen over that of Dr. Delman. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Thus, substantial evidence supports the administrative law judge's finding that claimant's bilateral knee arthritis worsened during the period

are due solely to the natural progression of the injuries claimant sustained with Yusen in August 2010. Because claimant's condition was last aggravated by her work for Ports America on November 15, 2012, prior to the date claimant's knees were rated with a permanent impairment, the administrative law judge properly assigned full liability for medical benefits and the scheduled awards to Ports America. *Buchanan*, 33 BRBS 32.

In this respect, we agree with Yusen that this case bears some similarities to *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). In *Port of Portland*, the claimant was exposed to noise in his employment from 1970-1979; on June 11, 1981, with Brady-Hamilton; on June 19, 1981, with Jones Oregon; and on June 26, 1981, for Port of Portland. The claimant underwent audiometric testing on June 22, 1981 that showed an 8.75 percent hearing impairment. The claimant's attorney received the audiometric report on July 6, 1981.

The administrative law judge, in *Port of Portland*, assigned liability to Jones Oregon because it was the last employer to employ the claimant prior to the audiogram. On appeal, the Board stated that the claimant's "date of awareness," which under 33 U.S.C. §908(c)(13)(D) was July 6, 1981, governed the determination of the responsible employer. The Board thus held that Port of Portland was liable as claimant's last employer to expose claimant to noise prior to July 6, 1981.

The Ninth Circuit reversed the Board's decision on this issue, holding that the administrative law judge had properly assigned liability to Jones Oregon. *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143-144(CRT). Relying on *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the court stated that there must be a rational connection between the noise exposure and the disability being compensated. The court stated that because the audiogram measuring the claimant's impairment was administered four days before he worked for Port of Portland, "it is factually impossible for [the claimant's] employment with Port of Portland . . . to have contributed in any way to [the] hearing loss. *Port of Portland*, 932 F.2d at 140, 24 BRBS at 143(CRT).⁴ The court also stated that, "[t]he fact

following her August 13, 2010 accident up to and including November 16, 2012, the date Dr. Capen found her condition to be at maximum medical improvement and provided impairment ratings. *See generally Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010).

⁴The court further stated that the claimant's "date of awareness" under Section 8(c)(13)(D) is not relevant to the determination of the responsible employer. *Port of Portland*, 932 F.2d at 141, 24 BRBS at 144(CRT); *see Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992).

that [the claimant] may have experienced subsequent exposure to industrial noise while working for Port of Portland is irrelevant because no part of the claim is based on any such exposure.” *Id.*, 932 F.2d at 141, 24 BRBS at 143(CRT).

Although hearing loss is an occupational disease to which the “exposure” rule of *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2^d Cir.), *cert. denied*, 350 U.S. 913 (1955) applies in determining the responsible employer, *see Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT), the logic of *Port of Portland* is equally applicable, that is, liability on Ports America for claimant’s scheduled awards in this case assures there is a “rational connection” between claimant’s disability and the conditions of employment that contributed to that disability. Dr. Capen gave claimant permanent impairment ratings on November 16, 2012, and the administrative law judge found that claimant’s last employment that aggravated her condition prior to that date was with Ports America on November 15, 2012.⁵ Therefore, as the administrative law judge’s finding that Ports America is the employer liable for claimant’s scheduled disability awards is rational, supported by substantial evidence and in accordance with law, it is affirmed. *See, e.g., Reposky v. Int’l Transp. Services*, 40 BRBS 65 (2006); *Lopez*, 39 BRBS 85; *Buchanan*, 33 BRBS 32. As a consequence, we affirm the administrative law judge’s finding that Ports America is liable for the awarded attorney’s fee.

⁵The impairment ratings Dr. Delman gave in 2014 under the Sixth Edition of the *AMA Guides* were extrapolated from the results given by Dr. Capen in November 2012 under the Fifth Edition of the *AMA Guides*. *See* YX 21 at 26-27.

Accordingly, the administrative law judge's Decision and Order Awarding Compensation and Benefits and Attorney Fee Order are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge