BRB No. 03-0825

GEORGIA FISHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	DATE ISSUED: Sept. 8, 2004
	)	
Employer/Carrier-Respondents	)	
	)	
CENTENNIAL STEVEDORING SERVICES	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Charles D. Naylor (Law Offices of Charles D. Naylor), San Pedro, California, for claimant-respondent.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi LLP), San Diego, California, for employer/carrier-respondents.

James P. Aleccia (Aleccia, Connor & Socha), Long Beach, California, for employer/carrier-petitioners.

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

PER CURIAM

Centennial Stevedoring Services (CSS) appeals the Decision and Order Awarding Benefits (2002-LHC-1791, 1792, 1793) of Administrative Law Judge Anne Beytin Torkington rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 sustained an injury to her right foot and right ankle while working for Marine Terminals Corporation (MTC) on February 21, 2001. Claimant was diagnosed with a severe right ankle sprain and was placed in a short walking cast. Upon removal of the cast, claimant testified to experiencing pain in her lower back and she associated such pain with her limping. Tr. at 10-24, 54. On June 1, 2001, claimant was released to light-duty longshore work and was placed on the casualty board. Claimant worked in a light-duty capacity until October 2, 2001; she continued to experience an increase in lower back and right hip pain. On October 3, 2001, claimant, as a result of her continued back and right hip pain, ended her employment off the casualty board.

On November 3, 2001, claimant returned to work out of economic necessity and continued to secure light-duty employment off the casualty board. Claimant continued in this employment until December 11, 2001. Claimant's last employment was on December 9-11, 2001, at which time she was employed as a dockman for CSS. Claimant underwent hip replacement surgery on February 19, 2002, and subsequently returned to light duty employment on August 2, 2002.

MTC voluntarily paid claimant temporary total disability benefits from February 22 through May 31, 2001, and from June 25 through July 13, 2001. Claimant thereafter filed three claims under the Act: one for the work-related injury to her right ankle/foot sustained while working for MTC on February 21, 2001; and a second and third claim alleging cumulative trauma injuries to her lower back, right hip and right ankle, while employed by MTC on October 2, 2001, and by CSS through December 11, 2001.

In his decision, the administrative law judge determined that claimant established a *prima facie* case that her right hip and low back injuries are causally connected to her accident at MTC and that claimant was therefore entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Decision and Order at 14-15. The administrative law judge further determined that MTC failed to establish rebuttal of the presumption, Decision and Order at 15-16, but that even if rebuttal were established the entirety of the evidence of record supports a finding that claimant's injuries are work-related. *Id.* The

administrative law judge further found, based on the entirety of the relevant evidence, that CSS is the responsible employer for all disability compensation and medical benefits incurred after December 11, 2001, as claimant aggravated her right hip and back during the three days she was employed by CSS. *Id*. Accordingly, the administrative law judge ordered MTC to pay claimant temporary total disability benefits for the periods of February 22 through May 31, 2001, from June 8 through June 25, 2001, and from October 3 through November 2, 2001. The administrative law judge further ordered MTC to pay claimant temporary partial disability benefits from June 1 through June 7, 2001, and from June 26 through October 3, 2001. CSS was ordered to pay claimant temporary total disability benefits from December 12, 2001 through August 2, 2002, and temporary partial disability benefits from August 2 through September 13, 2002, and continuing from that date for periods claimant is able to work. The administrative law judge further ordered MTC to pay all medical benefits related to claimant's right hip and lower back injuries from February 22 through December 11, 2001, and CSS to pay all medical benefits subsequent to that date and continuing.

On appeal, CSS challenges the administrative law judge's determination that it is the responsible employer for all disability and medical benefits owed after December 11, 2001. MTC responds and urges affirmance of the administrative law judge's Decision and Order. Claimant likewise responds, urging affirmance.

CSS asserts that the administrative law judge erred in according greatest weight to the opinions of Dr. London and finding that claimant aggravated her lower back and right hip during her three-day employment with CSS from December 9 through December 11, 2001. CSS avers that Dr. London's initial examination of claimant was on behalf of MTC, and that notwithstanding the physician's status as claimant's treating physician, Dr. London failed to author any opinions at the various stages of litigation following the initial injury. CSS argues that this failure to address the cause of claimant's injury renders Dr. London's testimony not credible and demonstrates bias in favor of MTC. CSS contends that the opinions of Dr. Delman are well-reasoned, as the physician had the benefit of reviewing the entirety of medical evidence, including the chart notes of Dr. London and the deposition and hearing testimony of claimant.

CSS further asserts that claimant failed to establish that she sustained a work-related injury while employed at CSS. CSS notes that claimant failed to report any work-related injury at that time nor did claimant advise Dr. London of any injury incurred while at CSS. CSS further argues that the record is devoid of any evidence of cumulative trauma attributable to claimant's three days of employment with CSS. CSS argues that claimant's employment at CSS did not aggravate, accelerate or combine with a prior injury to create the ultimate right hip and back disability, but that claimant's ultimate disability is the natural progression of claimant's initial injury incurred at MTC. Accordingly, CSS argues that MTC should be the liable employer in this case.

Lastly, CSS argues that MTC's failure to accept liability for claimant's right hip and lower back injuries created a dispute between employers that is "contrary to public policy." CSS Brief at 27. CSS contends that if MTC's carrier had authorized certain medical treatments, the instant claim would not have "evolved into a last responsible employer dispute." *Id.* CSS avers that there is substantial evidence that MTC's carrier should have accepted liability for claimant's right hip and lower back condition as being attributable to either the initial February 21, 2001 injury, or cumulative trauma through October 2, 2001. CSS argues that the purpose of the last employer rule, "to avoid difficulties and delays in securing timely and adequate compensation," CSS Brief at 30, is frustrated by employers "forc[ing] [claimant's] to return to work [in order] to obtain a last responsible employer defense." *Id*. CSS thus argues that the Board should vacate the finding that CSS is liable for benefits.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003) *pet. for cert. pending*, No. 03-1457 (Apr. 21, 2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *see also 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 Fed.Appx. 547 (9th Cir. 2001).

The Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)*; see also Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). Accordingly, in the case at bar, CSS must prove that claimant's disability is due solely to the natural progression of her initial injury in order to meet its burden of establishing that it is not the responsible employer. *See Buchanan*, 33 BRBS at 36; *see generally General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991).

The relevant evidence in this case consists of claimant's testimony regarding her condition, and the opinions of Dr. London, claimant's treating physician, Cl. Exs. 6, 9, 19, Dr. Miller, an orthopedic surgeon, MTC Exs. 9, 26, and Dr. Delman, also an orthopedic surgeon, CSS Exs. 4, 16. The administrative law judge initially discounted Dr. Miller's opinion, offered by MTC, as lacking a foundation, speculative and at times unreasonable. Decision and Order at 15-16. The administrative law judge found that Dr. London testified extensively that claimant aggravated her right hip and lower back condition by the walking, standing, bending and stooping required by her work off the casualty board.[1] In particular, the administrative law judge found that Dr. London opined that the work claimant performed during the time period between November 3 through December 11, 2001, including her three days of employment with CSS from December 9 to 11, 2001, aggravated claimant's right hip and back conditions. Cl. Ex. 19 at 21-24, 26, 32-34, 55-56, 95, 104. The administrative law judge further found that claimant testified that her symptoms increased greatly after working at CSS, and that she could no longer work after such employment. Tr. at 93-95, 129-130. As such, the administrative law judge determined that Dr. London's opinion, coupled with claimant's credible testimony that she could no longer work, had paralyzing pain in her right leg for the first time after December 11, 2001, and no longer could wait for hip replacement surgery, all support the conclusion that claimant's right hip injury, along with her low back injury, became worse as a result of her work for CSS. The administrative law judge thus concluded that claimant aggravated her right hip and lower back conditions while working for CSS. Decision and Order at 19.

In contrast, the administrative law judge accorded diminished weight to Dr. Delman's conclusion that claimant did not aggravate her right hip and lower back injuries while working for CSS, as his statement that claimant was "already substantially symptomatic prior" to the time that claimant worked for CSS, CSS Ex. 16 at 75, does not establish that claimant's symptoms did not increase after she worked at CSS for the three days in question. In particular, the administrative law judge found that claimant's testimony and the opinion of Dr. London explicitly support a finding that there was a substantial increase in claimant's symptomatology after her brief December 2001 stint with CSS. Moreover, the administrative law judge noted Dr. Delman's testimony that

[1] Specifically, the administrative law judge observed that Dr. London opined that the prolonged standing associated with claimant's post-February 21, 2001, injury work off the casualty board, "can cause the pressure of the ball against the degenerated cartilage to further wear that cartilage and further damage it causing a progression of the arthritis." Cl. Ex. 19 at 16. In addition, Dr. London opined that the regular bending and stooping required of the work off the casualty board would likewise aggravate or accelerate claimant's pre-existing conditions "because the degenerated cartilage is being exposed to stresses that can further wear away the cartilage." Cl. Ex. 19 at 17.

"prolonged standing, prolonged walking over a period of time can aggravate symptoms associated with hip arthritis," CSS Ex. 16 at 78-9, and observed that claimant's duties at CSS required that she engage in such activities. The administrative law judge therefore found that Dr. Delman did not "effectively rebut" the change in claimant's condition after her employment at CSS, which led to her inability to work and hip surgery. Decision and Order at 20.

We affirm the administrative law judge's determination that CSS is the responsible employer as it is rational and supported by substantial evidence. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT). Initially, we reject the contention of CSS that the opinion of Dr. Delman is entitled to greater weight than that of Dr. London as such an assertion is tantamount to a request that the Board reweigh the evidence of record, a role outside of the Board's scope of review. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *see generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Moreover, as the administrative law judge rationally inferred, Dr. Delman's opinion does not necessarily contradict the conclusion that claimant's work for CSS aggravated her right hip and back conditions. We thus hold that the administrative law judge rationally relied upon the opinion of Dr. London, in conjunction with claimant's relevant testimony, as support for a finding that claimant aggravated her lower back and right hip condition while employed with CSS. The administrative law judge rationally relied upon Dr. London's opinion as claimant's treating physician because the doctor treated claimant continuously since May 8, 2001. The administrative law judge rationally concluded that Dr. London had the greatest opportunity to observe claimant over the course of her treatment. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended* 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). We reject CSS's contention that Dr. London was not actually claimant's treating physician as claimant was initially sent to him by MTC. The record demonstrates, and the administrative law judge found, that while claimant was initially sent to Dr. London by MTC, claimant chose to remain with that physician, who treated her continuously thereafter and performed hip replacement surgery. Decision and Order at 20. Thus, the administrative law judge rationally concluded Dr. London was claimant's treating physician.

We further reject CSS's assertion that Dr. London was biased because the physician failed to provide an opinion as to the cause of claimant's injury until such a point when CSS could be held liable. The administrative law judge as trier-of-fact rationally found that the record evidence does not support a finding of bias on Dr. London's part, as the mere fact that the physician did not respond in a timely manner to questions about the cause of claimant's injury is an insufficient basis to establish bias. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert.*

denied, 372 U.S. 954 (1963). The administrative law judge specifically discussed this challenge to Dr. London's opinion, finding that while the record contains evidence that Dr. London did not respond to repeated requests for a causation opinion prior to the time of his deposition, the record contains no explanation for this oversight. Nevertheless, the administrative law judge concluded that Dr. London's testimony is the most reliable and least biased of the three physicians of record, as the record establishes that Dr. London provided claimant with excellent treatment, and his answers to the causation questions at deposition were precise, consistent and clear. Decision and Order at 20. We therefore affirm the administrative law judge's determinations that the opinions of Dr. London are entitled to the greatest weight. As the credited evidence establishes an aggravation to claimant's lower back and right hip condition while she was employed by CSS, the finding that CSS is the responsible employer is supported by substantial evidence. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

Lastly, we reject CSS's assertion that MTC forced claimant to return to work and that the "last responsible employer rule" serves as a reward for employers seeking to escape liability through such actions. Although the assignment of liability to CSS in this case under the "last employer rule" might seem harsh, as the Ninth Circuit observed in *Price*, there is inherent virtue in that rule since each employer subject to the Act "shares the risk that it will bear the burden of compensation at one point or another, even if it was not predominantly responsible for the compensable injury." *Price*, 339 F.3d at 1107, 37 BRBS at 92(CRT). As the administrative law judge considered the issue of the responsible employer in this case in light of the proper law, *see Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors, Inc*, 950 F.2d at 624, 25 BRBS at 75(CRT), and applied an appropriate evidentiary standard in reviewing the record as a whole on that issue, *Buchanan*, 33 BRBS 32, we affirm his determination that CSS is the last responsible employer. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Goldsmith*, 838 F.2d 1079, 21 BRBS 30(CRT).

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

SO ORDERED.

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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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BETTY JEAN HALL
Administrative Appeals Judge