BRB No. 10-0241

LORRAINE GONZALES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 09/30/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	
	)	
and	)	
	)	
METROPOLITAN RISK MANAGEMENT	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Marine Terminals Corporation's ("MTC") Motion for Reconsideration of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for Marine Terminals Corporation and Signal Mutual Indemnity Association.

Michael D. Doran (Samuelsen, Gonzalez, Valenzuela & Brown), San Pedro, California, for Metropolitan Stevedore Company and Metropolitan Risk Management.

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

PER CURIAM:

Marine Terminals Corporation (MTC) appeals the Decision and Order Awarding Benefits and the Order Denying Marine Terminals Corporation's ("MTC") Motion for Reconsideration (2008-LHC-1632, 2008-LHC-1633) of Administrative Law Judge Anne Beytin Torkington 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 working as a casual laborer/swingman for Metropolitan Stevedore Company (Metropolitan) on March 5, 2007, when she was hit in the forehead by a 200-pound crane bridle as she and her co-workers were unloading a banana boat. Claimant stated she felt stunned and developed a headache but continued working. On the same day, shortly after the first incident, claimant saw the bridle descending quickly towards a co-worker whom she managed to push out of the way. She stated she felt a pull in her shoulder during this second incident. Three people, including claimant, were taken by ambulance to the hospital following this incident. Claimant stated she worked for Metropolitan the next day, was scheduled off on March 7, and worked for MTC on March 8 and 9, 2007. Claimant performed heavy labor, such as stowing lash bars, turnbuckles and cones, and general clean up for MTC. She stated that she felt achy during and after work and that she woke up on March 10 with much worse pain. She went to the emergency room on March 11 with severe pain on the left side of her head and neck and her left shoulder. Cl. Ex. 16; MTC Ex. 14; Tr. at 34, 36, 40-41, 54-59, 63-67. Claimant was diagnosed with a neck sprain. Cl. Ex. 8. On March 13, she attempted to return to work for MTC but her pain was too severe. Decision and Order at 3-5; Cl. Ex. 16; Tr. at 45. Claimant has not worked since March 9, 2007, and she filed a claim for benefits against both employers.

The administrative law judge found that claimant was injured at work on March 5, 2007, and aggravated her condition while working for MTC on March 8 and 9. As MTC was her last covered employer, the administrative law judge found it liable for claimant's temporary total disability and medical benefits. Decision and Order at 28. The administrative law judge denied MTC's motion for reconsideration. MTC appeals, arguing that the administrative law judge erred in weighing the evidence and that she did not sufficiently explain her decision. Specifically, MTC contends the administrative law judge erred in finding it to be the responsible employer, arguing that there is no evidence

to support a finding of aggravation or permanent worsening of claimant's condition while she worked for MTC. Metropolitan responds, urging affirmance. We reject MTC's arguments.

In allocating liability between successive employers and carriers 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. *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); *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); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, No. 08-72267, 2010 WL 1635023 (9th Cir. Apr. 23, 2010). The administrative law judge must weigh the relevant evidence to determine if claimant's disability is the result of the natural progression of the original injury or is due to a new injury or an aggravation of the pre-existing condition with a subsequent covered 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).

In this case, the administrative law judge concluded that the "evidence as a whole shows that it is more likely than not that Claimant's condition was aggravated by the two days of work at MTC." Decision and Order at 28. She found that Dr. Capen provided the most credible opinion, as he is claimant's treating physician whose opinion is entitled to greater weight on that basis, he was in the best position to track claimant's condition, and he was the only physician to testify who had no bias toward either employer. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). The administrative law judge rejected the opinions of employers' experts, Drs. London and Rosenberg, because they stated claimant was not injured at all but, if she was, it was due to work at the other employer's facility. The administrative law judge found that their conclusions of "no injury" are not credible because they contradict more credible evidence of record. She also found the opinions of Drs. London and Rosenberg unpersuasive because she believed they were skewed so as to best support their respective clients.[1] The

[1]Dr. London, MTC's expert, concluded claimant suffered a cervical strain on March 5, 2007, and no injury on March 9, 2007. He stated that her activities on March 9 merely increased her symptoms but did no permanent worsening to the original injury, he could find no orthopedic reason for claimant's on-going symptoms, and he concluded claimant could return to work without restrictions. MTC Ex. 5. Dr. Rosenberg, Metropolitan's expert, stated that the March 5 incident caused only a limited injury to

administrative law judge concluded that claimant was injured on March 5, 2007, while working for Metropolitan and that her condition was aggravated by work for MTC on March 8 and 9, 2007. Decision and Order at 29-30.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, has considerable discretion in evaluating and weighing the evidence of record, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert.* denied, 372 U.S. 954 (1963); *John W. McGrath Corp. v.* Hughes, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, it was reasonable for the administrative law judge to reject the opinions of Drs. London and Rosenberg with regard to whether claimant suffered an injury and is disabled, as she found substantial evidence establishes that claimant was injured and is disabled. In addition to claimant's continued complaints of pain, Dr. Capen, claimant's treating physician, and Dr. Harris, who worked with Dr. Capen, diagnosed significant left shoulder impingement and cervical sprain/strain syndrome, left rotator cuff tendonitis and impingement syndrome, and cervical disc bulges at C3-4, C4-5 with protrusion at C5-6. Cl. Exs. 21, 24. Dr. Capen stated that claimant's incapacitating neck and shoulder pain, requiring surgery, and her positive MRI findings, keep her temporarily totally disabled.[2] Cl. Exs. 29, 40; Cl. Ex. 39 at 234-235. Moreover, it also was reasonable for the administrative law judge to reject Dr. Rosenberg's opinion that claimant had no injury at all because it was internally inconsistent with his later opinion that the most likely cause of claimant's shoulder problem was the repetitive activities on March 8 and 9, 2007. MTC Ex. 7; MTC Ex. 22 at 80-81, 90; Decision and Order at 23. Thus, substantial evidence supports the administrative law judge's finding that claimant suffered an injury and is disabled as a result. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

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claimant's forehead, from which she had completely recovered, and no injury to her neck or shoulder. He felt she was at a stationary condition within two weeks of March 5, 2007, and could return to work. MTC Ex. 7. Following a letter from Metropolitan's counsel, Dr. Rosenberg supplemented his opinion by stating that claimant's development of neck and left shoulder pain was due to trauma while employed at MTC. Emp. Ex. 11 at 318; MTC Ex. 22.

[2]Dr. Lipkowitz read the MRIs and found minimal disc bulging at C3-4 and C4-5, central posterior disc protrusion of 3mm at C5-6 which slightly indented the anterior thecal sac, and fluid signal indicating associated annular tear. MTC Ex. 8.

Further, the administrative law judge was well within her discretion in crediting Dr. Capen's opinion over those of employers' experts. Contrary to MTC's argument, which takes some of Dr. Capen's statements out of context, the administrative law judge addressed Dr. Capen's opinion as a whole. Dr. Capen opined that the most likely cause of the annular tear was claimant's March 5 injury and that claimant was able to perform other activities until March 9 when heavy activity made her pain and symptoms worse. Thus, he concluded that both incidents contributed to her neck and shoulder problems, and he estimated that two-thirds of claimant's condition should be attributed to the initial trauma and one-third to the aggravation on March 9. MTC Ex. 16 at 18-19, 29, 36, 38, 43-44, 46-47, 49. It was reasonable for the administrative law judge to rely on Dr. Capen's overall opinion that both incidents affected claimant's condition and her finding that claimant sustained an aggravation on March 9 is rational. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). As the administrative law judge rationally credited Dr. Capen's opinion, which establishes that an aggravation occurred while claimant was working for MTC on March 8 and 9, 2007, resulting in temporary total disability, we reject MTC's contention that it is not the responsible employer. We affirm the administrative law judge's finding that MTC is liable for claimant's temporary total disability and medical benefits.[3] *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT).

[3]We also reject MTC's assertion that the administrative law judge's decision does not comply with the Administrative Procedure Act. The administrative law judge's decision is over 31 pages long. She fully summarized the evidence, and she fully explained her reasons for accepting Dr. Capen's opinion. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Reconsideration are 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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REGINA C. McGRANERY
Administrative Appeals Judge