U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0364

KEITH H. STAMPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON UNITED TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	DATE ISSUED: 09/09/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Carrier-Respondent	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Matthew Sweeting, Tacoma, Washington, for Claimant.

Alan G. Brackett and Derek W. O'Conner (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for Employer/American Longshore Mutual Association, Limited.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for Employer/Signal Mutual Indemnity Association, Limited.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier, American Longshore Mutual Association, Ltd. (Alma), appeal Administrative Law Judge Richard M. Clark's Decision and Order Awarding Benefits (2017-LHC-01556, 01557) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his neck on April 17, 2016, in a motor vehicle accident during the course of his employment for Employer as a hustler driver. Alma provided insurance coverage for Employer at this time, and it voluntarily paid Claimant compensation from April 20, 2016.[1] Dr. Donald Lambe examined Claimant at Alma's request on October 25, 2016. He opined Claimant temporarily aggravated his pre-existing cervical degenerative disc disease and could return to work without restriction. CX 7 at 215-216. Based on Dr. Lambe's opinion, Alma controverted Claimant's entitlement to continuing compensation and medical benefits on December 15, 2016. CX 1 at 5. Claimant returned to work for Employer for eight shifts from January 3 to January 16, 2017, but reported to his treating physician, Dr. John Blair, that the work aggravated his neck injury.[2] Signal Mutual Indemnity Association, Ltd. (Signal), was the carrier on the risk at this time. Claimant filed a claim under the Act on February 1, 2017, for his April 2016 work injury. *Id.* at 7. Alma controverted on the basis that Claimant's return to work in January 2017, while

[1] Claimant returned to work on April 18 and 19, 2016, but stopped working due to continuing neck pain. CX 3 at 20; SX 10 at 438.

[2] The administrative law judge found Claimant returned to work out of financial necessity when Alma informed him it was terminating his benefits. Decision and Order at 37.

Signal provided coverage, aggravated his condition. *Id.* at 8. Claimant filed a second claim alleging Signal is the responsible carrier for his neck condition. CX 2 at 11. Signal controverted this claim. *Id.* at 13.

In his decision, the administrative law judge determined Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that his current neck condition is related to both his April 2016 work injury and his work in January 2017. He found Alma did not rebut the presumption that Claimant's cervical condition is related, in part, to his April 2016 work injury. Decision and Order at 34. The administrative law judge found Signal rebutted the Section 20(a) presumption that Claimant's work in January 2017 contributed to his current neck condition, but it did not rebut the presumption Claimant sustained a temporary aggravation. *Id*. at 35-36. He stated Alma and Signal, therefore, have the burden of proving Claimant's current neck disability is due to the injury he sustained while the other carrier was on the risk. *Id*. at 36.

After weighing the evidence, the administrative law judge found Claimant's work in January 2017 temporarily aggravated but did not alter his underlying cervical condition; i.e., he determined there is no evidence of objective changes or new diagnoses. Decision and Order at 38. Accordingly, the administrative law judge concluded Alma did not show Claimant's ongoing cervical condition is related to his return to work in January 2017 and Signal established Claimant's work in January 2017 did not contribute to Claimant's cervical condition as of June 27, 2017, based on the opinion of Dr. Theresa McFarland.[3] *Id*. at 40.

[3] The administrative law judge found Signal liable for medical benefits caused by the temporary exacerbation from January 16 to June 26, 2017, and Alma liable for medical benefits from April 17, 2016 to January 16, 2017, and from June 27, 2017 and continuing, as well as for continuing compensation from May 20, 2016. Decision and Order at 40, 49. He rejected Signal's contention that Claimant did not provide it timely notice of his injury. Decision and Order at 29; *see* 33 U.S.C. §912. He determined Claimant's neck disability remains temporary as no physician has opined he has reached maximum medical improvement. Decision and Order at 41. He found Claimant has remained totally disabled since April 20, 2016, because his work for Employer is not suitable. *Id*. at 44. He determined Claimant's average weekly wage is $1,897.58. *Id*. at 47; *see* 33 U.S.C. §910(c). The administrative law judge found the ILWU-PMA Welfare Plan entitled to reimbursement of $52,000 from Alma for periods it paid Claimant disability compensation.

On appeal, Alma challenges the administrative law judge's finding it is the responsible carrier as of June 27, 2017.[4] Signal and Claimant respond, urging affirmance.

Alma avers the administrative law judge's conclusion is erroneous because the evidence establishes Claimant aggravated his neck condition when he returned to work in January 2017 when Signal was on the risk and there is no evidence this aggravation resolved. Alma argues its contention is further supported by comparing Claimant's December 13, 2016 functional capacity exam (FCE), which concluded he could return to his usual work, with his April 12, 2018 FCE, which stated he is limited to light to sedentary employment. We disagree.

The "aggravation rule" states an employer is liable for the claimant's full disability if a work-related injury aggravates, accelerates, or combines with a pre-existing injury or condition to result in that disability; the relative contribution of the conditions is not weighed. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). The aggravation rule applies to both the causation inquiry and in identifying the responsible employer or carrier in traumatic injury cases. *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) (responsible employer); *Independent Stevedore Co.*, 357 F.2d 812 (causation); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011) (responsible carrier).

With respect to the responsible employer and carrier in traumatic injury cases such as this one, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated:

> What this court . . . calls the last employer rule or aggravation rule . . . is actually a different test from the last employer rule applied in occupational disease cases. The rule applied in injury or cumulative trauma cases involves an analysis of whether the claimant's disability is the result of a natural progression of an injury that occurred at an earlier employer, or was aggravated or accelerated by conditions at a later employer. It would be irrational to attempt such an analysis without consideration of the evidence

[4] Alma does not challenge the administrative law judge's finding that Claimant is entitled to compensation for temporary total disability from April 20, 2016. *See* Decision and Order at 47. Thus, we affirm this finding. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

> regarding working conditions at *both* employers, and thus a simultaneous analysis is called for in injury cases.

Albina Engine & Machine v. Director, OWCP, 627 F.3d 1293, 1302, 44 BRBS 89, 93(CRT) (9th Cir. 2010). Thus, the employer/carrier 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/carrier on the risk at the time of the aggravation is liable for the entire disability resulting from it. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT) (2004). Therefore, Alma and Signal each had the burden to show Claimant's disabling neck injury was not due to his injury that occurred during the period it provided coverage for Employer.[5] *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 F. App'x 547 (9th Cir. 2001).

After finding Signal rebutted the Section 20(a) presumption that Claimant's January 2017 employment contributed to his current neck condition, the administrative law judge stated Alma and Signal agreed the relevant legal question is whether this employment contributed to Claimant's ongoing neck disability. Decision and Order at 37. The administrative law judge found "the important factual question" is whether there was a continuing alteration in symptoms after Claimant's work for Employer in January 2017 or "a return to baseline." *Id*. at 38. The administrative law judge noted Claimant's hearing testimony that he thought his neck had worsened and he wore a neck brace more often. On the other hand, "he was also clear" his neck pain has been consistent since the April 2016 accident; it was "difficult" for him to recall subtle changes in pain over time; and his perception of worsening could have been due to his not receiving proper treatment or to deconditioning. *Id*. at 28-29, 37, 42-44; SX 10 at 441, 445. The administrative law judge also found Claimant's complaints to his physicians indicate only a temporary aggravation of his pain symptomology. Decision and Order at 38. From December 20, 2016 to June

[5] Regarding the temporary aggravation of Claimant's neck condition in January 2017 while Signal was on the risk, if the work played any role in the manifestation of a symptom, any disability due to the symptom is compensable. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Moreover, the occurrence of an unusual event is unnecessary if the conditions of employment caused the claimant to become symptomatic. *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); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984).

27, 2017, Claimant rated his neck pain as between a 3 or 4 out of 10 and the physicians' notes after June 27, 2017, do not attribute Claimant's neck pain to his work in January 2017 but to the April 2016 accident. *Id*.; *see* CXs 11 at 315, 317, 320, 325, 334, 339; 14 at 386.

The administrative law judge determined the medical opinion evidence also supports Signal's burden of proving Claimant sustained only a temporary aggravation of his neck injury in January 2017. Decision and Order at 39. He found Claimant's treating physicians sometimes referred to his sustaining an aggravation, but at other times they denied there was a new injury. *Id*.; *compare* CX 10 at 285 *with* CX 11 at 313. The administrative law judge did not give the physicians' conclusions that Claimant had sustained an aggravating injury in January 2017 "any significant weight" as those medical conclusions were not intended to satisfy the requirements of the legal definition for a permanent aggravation so as to shift liability from Alma to Signal. Decision and Order at 39. He determined the treating physicians did not alter their diagnoses and recommendations in any significant way after Claimant's period of employment in January 2017 and over time this work was a non-factor to them. *Id*.

The administrative law judge also considered two causation opinions of record. Dr. Jonathan Ritson reviewed Claimant's records and examined him at his request. He did not specifically address whether Claimant aggravated his neck when he returned to work in January 2017; instead, he linked Claimant's current cervical condition solely to the April 2016 accident without reference to his return to work. Decision and Order at 39-40; CX 13 at 383. Dr. McFarland reviewed Claimant's records on Signal's behalf and directly addressed the aggravation/exacerbation question; she opined Claimant's return to work in January 2017 caused only a temporary flare-up of pain that had fully resolved by June 27, 2017.[6] Decision and Order at 40; SX 8 at 426-428.

The administrative law judge declined to find Claimant's increased work restrictions in the April 2018 FCE determinative, as compared to those in the December 2016 FCE.[7] He found the increased restrictions in the April 2018 FCE are attributable to

[6] The administrative law judge found Alma did not produce any medical opinion to support its contention that Claimant's January 2017 employment contributed to his current neck condition, despite having ample opportunity to do so. He noted Alma did not rely on Dr. Lambe's opinion that the April 2016 accident only temporarily aggravated a pre-existing neck condition. Decision and Order at 40; *see* CX 1 at 8.

[7] The results of the December 2016 FCE determined Claimant could work full time and was not restricted from sitting, standing or walking. Claimant was limited from frequent neck twisting, reaching waist to shoulder, working above shoulder level, and crawling. He could occasionally lift, carry or push 50-65 pounds and frequently lift, carry

several factors: Claimant exerted maximum effort in December 2016 but was more protective of his neck in April 2018; Claimant had experienced long-term deconditioning by April 2018; and Claimant's perception of his disability increased over time. Decision and Order at 40. He found these conclusions supported by the occupational therapist's report and Dr. Ritson's agreement that deconditioning played a role in the results. Decision and Order at 40; CXs 12 at 350, 13 at 383-385. Christina Casady, the occupational therapist who administered the 2018 FCE, stated Claimant gave "variable effort" and "failed" to give maximum voluntary effort on all elements. CX 12 at 350, 352. Dr. Ritson reported "significant work decondition evident" on the 2018 FCE. CX 13 at 385. Thus, the administrative law judge found the 2018 FCE evidence does not establish Claimant's January 2017 work activity is the cause of his ongoing neck complaints. Based on the foregoing, the administrative law judge concluded Alma is the responsible carrier because Claimant's January 2017 work activity caused only a temporary aggravation from January 16 to June 27, 2017. Decision and Order at 40.

The administrative law judge, as the fact-finder, is entitled to determine the weight to accord to the evidence of record, address the credibility and sufficiency of any testimony, and make reasonable inferences.[8] *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997). The Board is not empowered to reweigh the evidence even if it is susceptible to other findings and inferences, but must accept the administrative law judge's rational inferences and findings of fact when supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

Contrary to Alma's contention, the administrative law judge set forth and applied applicable law in concluding Signal established Claimant's work in January 2017 did not

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or push 25-35 pounds. CX 9 at 245-246. The April 2018 FCE stated Claimant is limited to light to sedentary work. It specifically restricted him from lifting over 20 pounds, sitting, walking and standing longer than 45 minutes, bending, twisting, climbing, crawling, and reaching above his shoulders more than occasionally, and seldom bending, twisting and turning his neck. CX 12 at 349-352.

[8] Alma avers the administrative law judge impermissibly rejected Claimant's testimony that he aggravated his neck condition. Contrary to Alma's contention, the administrative law judge is entitled to weigh the evidence and to draw his own inferences therefrom. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618, 33 BRBS 1, 3(CRT) (9th Cir. 1999); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

contribute "in any way" to Claimant's ongoing cervical condition and disability as of June 27, 2017. *Albina Engine*, 627 F.3d at 1304, 44 BRBS at 93-94(CRT); *Buchanan*, 33 BRBS at 35-36; Decision and Order at 31-32, 37, 40. He rationally determined from the record evidence that Claimant's testimony does not support either Alma's or Signal's positions, that the contemporaneous medical records are more supportive of Signal's position, and that the medical opinion evidence "clearly favored" finding only a resolved temporary aggravation resulting from Claimant's employment in January 2017. Moreover, the administrative law judge rationally rejected Alma's reliance on the work restrictions in the April 2018 FCE. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). Therefore, as it is supported by substantial evidence of record, we affirm the administrative law judge's finding that Claimant sustained only a temporary aggravation of his neck condition while working for Employer in January 2017 and that Alma is liable for Claimant's ongoing compensation from April 20, 2016, and medical benefits from April 17, 2016 to January 16, 2017 and ongoing as of June 27, 2017. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *Siminski*, 35 BRBS 136.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge