BRB No. 08-0689

J.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIMENSIONS INTERNATIONAL	)	DATE ISSUED: 04/16/2009
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown PC), Houston, Texas, for claimant.

Keith L. Flicker and Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for Dimensions, International and ACE American Insurance Company.

Jerry R. McKenney and James L. Azzarello, Jr., (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for Service Employees International, Incorporated and Insurance Company of the State of Pennsylvania.

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

PER CURIAM:

Dimensions International (Dimensions) appeals the Decision and Order Awarding Benefits (2008-LDA-00052, 00053) of Administrative Law Judge Clement J. Kennington 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 Longshore Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

During 2003 and 2004, claimant was employed in Tikrit, Iraq, as a plumbing supervisor for Service Employees International, Incorporated (KBR).[1] On February 11, 2005, claimant was hired by Dimensions to work on the re-armoring of vehicles in Iraq. On September 4, 2005, claimant injured his back while installing a passenger blast pan on a vehicle. Following this work-related incident, claimant returned to the United States where a lumbar MRI revealed a disc protrusion at L5–S1. Claimant, who continued to experience back discomfort, was prescribed muscle relaxers as well as pain and sleeping medication by his treating physician, Dr. Chapman. On June 1, 2007, clamant underwent a functional capacities evaluation which revealed an ability to lift 50 pounds with pain. On June 6, 2007, following a physical examination which revealed a normal range of motion, claimant was released to return to full work duty.

Claimant subsequently sought employment with KBR and, after passing a physical examination performed on behalf of KBR, claimant signed an employment contract with KBR, with an effective date of June 20, 2007. KBR assigned claimant to work as a plumber in Bagram, Afghanistan. Claimant was therefore flown to Bagram

[1] Service Employees International, Incorporated is also known as Kellogg, Brown & Root. Throughout his Decision and Order Awarding Benefits, the administrative law judge used the abbreviation KBR when referring to this employer. For purposes of clarity and consistency this decision will also use the abbreviation KBR when referring to this employer.

Air Base, where he spent his first two days resting and attending meetings.[2] On June 23, 2007, claimant experienced severe back pain while bending over a pipe threading machine.[3] Claimant sought medical treatment within an hour of the onset of his back pain, was given an injection, and was assigned to quarters. KBR then returned claimant to the United States, where he arrived on July 1, 2007. On July 11, 2007, claimant, who continued to experience severe back pain, sought medical care with Dr. Chapman, who administered a trigger point injection to claimant's back, noted an increase in claimant's pain, and opined that claimant was suffering from back spasms with a 40 percent range of motion. Claimant then filed a claim for benefits under the Act.

In his Decision and Order, the administrative law judge determined that the immediate events leading up to and including claimant's June 23, 2007, work incident while operating a pipe threading machine in Afghanistan constituted a natural progression of claimant's September 4, 2005, work injury, and that, consequently, the June 23, 2007, work incident did not constitute a new injury or an aggravation of a pre-existing injury. Accordingly, the administrative law judge concluded that Dimensions is the employer responsible for the payment of benefits due claimant as a result of his back condition. The administrative law judge found claimant entitled to temporary total disability benefits, beginning on September 4, 2005, and continuing, as well as reimbursement for the costs of future medical expenses including a discogram and, if warranted, back surgery by Dr. Chapman.[4]

On appeal, Dimensions challenges the administrative law judge's finding that it is the employer responsible for the payment of any benefits due claimant as a result of claimant's June 23, 2007, work incident. Dimensions also contends that the administrative law judge erred in awarding claimant temporary total disability compensation during the period of claimant's employment with KBR commencing on June 20, 2007. KBR and claimant respond, urging affirmance.

---

[2] Claimant testified that he arrived in Afghanistan sore from the long airplane ride, and that sleeping on cots and walking over rough terrain after his arrival "bothered [him] a little bit." Tr. at 81.

[3] Claimant's work activities in utilizing the pipe threading machine included lifting a 10 to 12 foot length of inch-and-a-quarter pipe and bending over the machine while stabilizing the pipe in order to thread it. Tr. at 75.

[4] The parties stipulated that Dimensions, as a result of claimant's initial September 4, 2005, injury, had voluntarily paid claimant temporary total disability benefits during the period of October 1, 2005, to July 13, 2007.

In allocating liability between successive employers 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.[5] *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); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005). Where claimant's work results in an exacerbation of his symptoms, the employer at the time of the work events resulting in the exacerbation is responsible for any resulting disability. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *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).

In challenging the administrative law judge's finding that it is the employer responsible for the payment of claimant's benefits due under the Act, Dimensions assigns error to the determination that the testimony of Dr. Chapman establishes that claimant did not suffer a new injury while working for KBR in Afghanistan in June 2007. We agree that the administrative law judge's finding that Dimensions is the responsible employer cannot be affirmed.

After his September 4, 2005 injury with Dimensions, claimant was released on June 6, 2007, to return to work by Dr. Chapman, his treating physician. At this time, claimant's back had a normal range of motion. AIGX 32 at 18. On June 12, 2007, claimant underwent a pre-employment medical examination at the behest of KBR and was found to be "qualified" for employment. CX 34. Pursuant to his previous employment experience with KBR, claimant testified that he was aware of the duties of his new position and that the position for which he was hired by KBR in June 2007 was within his lifting restriction. Tr. at 63, 90–91, 99. Claimant further testified that while his airplane flight to Afghanistan, as well as walking on the difficult terrain and sleeping on a cot, resulted in a little soreness, it was not until he was working with the pipe threading machine on June 23, 2007, that his back began to hurt a lot. *Id*. at 78–79. Regarding this incident, claimant specifically testified that while he felt his pain level

[5] Under the aggravation rule, where the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *See Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986).

was a "five" before the injury, the pain he experienced while working over the pipe threading machine was between a "seven and nine," and resulted in claimant "looking like an 80-year-old man [with] tears running down my face." *Id.* at 81–83. Upon examining claimant on July 11, 2007, Dr. Chapman found claimant's range of motion reduced to 40 percent and he noted back spasms and an increase in claimant's pain. ACEX 2. Dr. Chapman stated that claimant was unable to work.

The administrative law judge stated he was convinced "by a preponderance of the evidence that [claimant's] June 23, 2007 incident did not constitute a new injury or aggravation of a pre-existing injury despite the fact that symptoms were increased over those immediately present before Claimant commenced working for KBR in June 2007" and that "[t]here is no credible medical evidence that the June 23, 2007 incident either aggravated or reinjured Claimant's back." Decision and Order at 13. After discussing Dr. Chapman's testimony regarding the difference between the terms "aggravation" and "exacerbation," the administrative law judge found that the "essence" of Dr. Chapman's testimony is that the immediate events leading up to and including the June 23, 2007, work incident constituted a natural progression of claimant's September 4, 2005, injury and that claimant did not sustain a new injury or an aggravation of his prior injury. *Id.* at 14. Thus, the administrative law judge held Dimensions liable for temporary total disability benefits beginning on September 4, 2005, as well as for the costs of future medical expenses incurred by claimant.

The administrative law judge's finding that Dimensions is the responsible employer rests on the opinion of Dr. Chapman, which is the only relevant medical evidence in the record. Dr. Chapman initially explained that claimant sustained an "exacerbation" of his prior condition while in Afghanistan, but that the pain claimant experienced is part of his old injury and is nothing new and therefore not an aggravation. ACEX 32 at 30. Dr. Chapman also stated that claimant had become symptomatic either as a consequence of events occurring overseas or that his increase in symptoms was "just an exacerbation." *Id.* at 35. Dr. Chapman acknowledged that his understanding of the term "exacerbation" was different than that under the Longshore Act, explaining that under Texas compensation law "aggravation" means that the employee has experienced a new injury unrelated to a prior condition, while "exacerbation would be a natural lifestyle occurrence due to the thing that you already have that will come and go that has nothing to do with something new and different that is significant." *Id.* at 35–37. When asked to assume that the conditions of claimant's employment with KBR in Afghanistan caused him to become symptomatic, Dr. Chapman responded in the affirmative when asked whether under the Longshore Act claimant sustained a new injury at that time. *Id.* at 36–38. After testifying that a temporary "flare-up" would not constitute a new injury under Texas law, but rather would be considered an exacerbation, Dr. Chapman was asked the following question:

Q: Would you find under this federal law that [claimant] did sustain an aggravation of the injury if aggravation equals exacerbation? . . .

A: Yeah, if the two equal each other then he did unless he just had a flare-up.

Id. at 38–39. When presented with case precedent establishing that a pre-existing condition may be aggravated by even a single day of work, thus making the last employer responsible for the payment of an employee's benefits, Dr. Chapman affirmatively stated that, under these circumstances, claimant's work with KBR would constitute an aggravation under the law.[6] *Id.* at 40-42.

The administrative law judge's finding that Dimensions is the responsible employer is not supported by substantial evidence, as his interpretation of Dr. Chapman's testimony is inconsistent with law. The Board is not empowered to reweigh the medical evidence, *see, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), but a decision that is not supported by substantial evidence or is inconsistent with law cannot be affirmed. *See generally Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT). In addressing the responsible employer issue, the administrative law judge concluded that "the essence of Dr. Chapman's testimony is that the immediate events leading up to and including the June 23, 2007 incident constituted a natural progression of Claimant's September 4, 2005 injury and not either a new injury or an aggravation of the old September 4, 2005 injury." Decision and Order at 14. The totality of Dr. Chapman's deposition testimony, however, does not support this conclusion. Although Dr. Chapman initially stated that claimant sustained an "exacerbation" and not a new injury on June 23, 2007, he later testified that this opinion was based on his understanding of the term "exacerbation" under Texas law. *See* ACEX 32 at 35–36. When informed by counsel that, under the Longshore Act, the terms aggravation and exacerbation are synonymous, Dr. Chapman

---

[6] Specifically, the following exchange occurred between Dimensions counsel and Dr. Chapman:

Q: Under these circumstances, based on your review of Mr. Holguin, would that fall under this proviso, that the last event at his last employer aggravated, accelerated or combined with his prior injury so as to cause his present status under this definition?

A: Yes.

ACEX 32 at 41-42.

revised his opinion to state that claimant's June 23, 2007, work incident aggravated his back condition. *Id.* at 38–39, 63.

An injury occurs within the meaning of the Act "if something unexpectedly goes wrong within the human frame." *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). An injury need not result from an unusual strain or stress. *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949). The work-related manifestation of symptoms constitutes an "injury" even if the underlying disease process is not affected. *Marinette Marine Corp.*,431 F.3d 1032, 39 BRBS 82(CRT); *Crum v. Gen. Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Thus, if a claimant's employment aggravates the symptoms of a pre-existing condition, an injury has occurred and the employer at the time of that aggravation is liable for any resulting disability. *Marinette Marine Corp.*, 431 F.3d 1032, 39 BRBS 82(CRT); *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT).

In this case, once Dr. Chapman was apprised of the legal standard applicable under the Act, he stated that claimant's condition was aggravated. The credited opinion of Dr. Chapman is susceptible only to the conclusion that claimant suffered an injury within the meaning of the Act while in the employ of KBR, as an aggravation of the symptoms of claimant's underlying back condition occurred while he was bending over a pipe threading machine on June 23, 2007. *Marinette Marine Corp.*, 431 F.3d 1032, 39 BRBS 82(CRT). Legally, therefore, claimant sustained an injury in KBR's employ. *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd*, 640 F.2d 383 (5th Cir. 1981) (table). Pursuant to the aggravation rule, KBR is liable for the disability due to this injury and due to the combined effect of this injury and the prior injury.[7] *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT); *Kelaita v. Triple A Machine Shop*, 799 F.2d 1308 (9th Cir. 1986). Accordingly, we reverse the administrative law judge's finding that Dimensions, claimant's employer at the time of the initial injury on September 4, 2005, is liable for claimant's disability and medical

[7] The facts presented simply do not support a conclusion that claimant sustained only a "flare up" after the second injury. It is true that in cases where claimant suffers a temporary "flare-up" after a second injury which returns to baseline after a short period, the second employer may be liable only for a short period, after which the liability of the employer at the time of the initial injury resumes. In this case, however, claimant was released to full duty with a full range of motion prior to the second injury. After that injury, Dr. Chapman found a reduced range of motion and concluded that claimant was unable to work, *see* ACEX 2, and claimant has not returned to work. Thus, the disability being compensated is due to the aggravation of claimant's condition. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

benefits, commencing June 23, 2007. *Price*, 330 F.3d 1102, 37 BRBS 87(CRT); *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT). KBR is liable for the disability benefits due claimant commencing June 23, 2007, as a matter of law. *See Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT); *Buchanan*, 33 BRBS 32. The case is remanded for the administrative law judge to address any unresolved issues resulting from this holding, such as the applicable average weekly wage.

Dimensions also contends the administrative law judge erred in awarding claimant temporary total disability benefits during the period he was employed by KBR without discussing the wages claimant earned during that period of time. We agree. Claimant worked for KBR for approximately two weeks in June 2007. The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). Where claimant's pain and limitations do not rise to this level, such factors are nonetheless relevant in determining his post-injury wage-earning capacity and may support an award of temporary partial disability under Section 8(e), (h), 33 U.S.C. §908(e), (h), which is calculated based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. *See Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

In his decision, the administrative law judge summarily awarded claimant ongoing temporary total disability benefits commencing September 4, 2005, the date of his first injury. Claimant commenced employment with KBR effective June 20, 2007, CX 17, and he received wages in the amount of $1,231.32, for the period of June 20 to July 1, 2007. KBRX 2. The administrative law judge did not address this evidence. Therefore, we must vacate the award of temporary total disability benefits during the period of claimant's employment with KBR in 2007. On remand, the administrative law judge should address, consistent with law, the benefits, if any, to which claimant is entitled during his period of employment with KBR.[8]

[8] As it relates to this issue, Dimension is potentially liable for benefits only from June 20 to 22, 2007, as a result of our holding regarding the responsible employer.

Accordingly, the administrative law judge's finding that Dimensions is liable for claimant's temporary total disability benefits commencing June 23, 2007, is reversed. We hold that KBR is the responsible employer for the payment of claimant's benefits as of that date as a matter of law. The case is remanded for the resolution of any issues remaining as a result of this holding. The administrative law judge's award of temporary total disability benefits during the period of claimant's employment with KBR during 2007 is vacated, and the case remanded for further consideration in accordance with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge