

JOHNNY D. BONVILLAIN)
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 Claimant)
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 v.)
)
 BOLLINGER SHIPYARDS,) DATE ISSUED: Apr. 22, 2014
 INCORPORATED)
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 Employer)
)
 and)
)
 AMERICAN LONGSHORE MUTUAL)
 ASSOCIATION, LIMITED)
)
 Carrier-Petitioner)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION, LIMITED)
)
 Carrier-Respondent) DECISION and ORDER

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

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett, LLC), New
Orleans, Louisiana, for employer and American Longshore Mutual
Association, Limited.

Scott A. Soule and Josephine A. Hood (Blue Williams, L.L.P.), Metairie,
Louisiana, for employer and Signal Mutual Indemnity Association,
Limited.

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

PER CURIAM:

Employer and carrier American Longshore Mutual Association (ALMA) appeal the Decision and Order (2013-LHC-00129, 2013-LHC-00130) 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 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).

The underlying facts of this case are not in dispute. On May 13, 2009, while working as a welder for employer, claimant injured his neck throwing scrap metal into a dumpster. Subsequently, claimant complained of symptoms of right-sided neck pain, right shoulder pain, and intrascapular pain, which progressively worsened despite conservative care. Claimant was diagnosed with a C6-7 cervical disc herniation, spondylosis, and degenerative disc disease, and, on April 6, 2010, Dr. Aswathi performed discectomy and fusion surgery. Following surgery, claimant continued to have a sore neck and he underwent physical therapy for six weeks. Claimant initially returned to light-duty work, but on August 2, 2010, he returned to full-duty work without restrictions, continuing until August 28, 2010, when he hit his head on a suspended light fixture. Claimant testified that his head was knocked backwards and that he felt a shocking feeling in his neck accompanied by a sharp and constant pain in the middle of the neck. Cl. Dep. at 23-28. Claimant described the pain as different from that he had experienced previously, as it produced considerable soreness and a pinching sensation with numbness in his arms. *Id.* at 34. Dr. Aswathi returned claimant to light-duty work on September 2, 2010. Because diagnostic testing failed to explain claimant's upper thoracic pain, and because a CT scan showed an incomplete fusion at C6-7 (a pseudoarthrosis), Dr. Aswathi opined that claimant's fusion surgery never fully healed and that the majority of claimant's symptoms were mechanical, possibly secondary to the pseudoarthrosis. Aswathi Dep. at 12-19. On March 7, 2012, Dr. Aswathi surgically placed rods in claimant's neck to stiffen the neck to allow the fusion to heal. Cl. Dep. at 28-32, 35. Claimant has not returned to work since his second neck surgery.

The only issue presented to the administrative law judge was whether Signal Mutual Indemnity Association (Signal), the carrier on the risk at the time of the August 2010 incident, or whether ALMA, the carrier on the risk at the time of the initial injury in May 2009, is liable for claimant's benefits. Based on Dr. Aswathi's opinion, the administrative law judge found that claimant's current condition results from the natural progression of his initial injury, such that ALMA is liable for claimant's benefits. The administrative law judge ordered ALMA to reimburse Signal for benefits paid to claimant. ALMA appeals this decision, asserting that the August 2010 incident

aggravated claimant's underlying pseudoarthrosis such that Signal is the responsible carrier. Signal responds, urging affirmance of the administrative law judge's decision.

Initially, we note that ALMA's appeal is of a non-final order, in that the administrative law judge addressed only the responsible carrier issue and neither awarded nor denied benefits to claimant. See 33 U.S.C. §919(c); *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999); 20 C.F.R. §702.348. The Board ordinarily does not accept interlocutory appeals, since entertaining such appeals encourages piecemeal litigation. See *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174, 176 (1985). Nevertheless, the Board has the discretion to address appeals of non-final orders as it is not bound by formal rules of procedure. 33 U.S.C. §923(a); see, e.g., *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, recon. denied, 42 BRBS 46 (2008); *Hardgrove v. Coast Guard Exchange System*, 37 BRBS 21 (2003); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). In this case, the parties appear to agree that claimant is entitled to the total disability benefits that Signal has been paying and thus we will review the administrative law judge's decision.¹ *Jackson v. Straus Systems, Inc.*, 21 BRBS 266 (1988).

In cases involving multiple traumatic injuries, the determination of the responsible carrier turns on whether the claimant's disabling condition is the result of the natural progression or an aggravation of a prior injury. If the claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the carrier on the risk at the time of the prior injury is responsible. 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 carrier is responsible for any resulting disability. See, e.g., *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) (3^d Cir. 2002); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd mem. sub nom. Employers National Ins. Co. v. Equitable Shipyards, Inc.*, 640 F.2d 383 (5th Cir. 1981) (table).

Dr. Aswathi provided the only medical opinion relevant to the responsible carrier issue. He stated that the symptoms claimant suffered after the August 2010 accident were due to the pseudoarthrosis resulting from his original injury. Aswathi Dep. at 19. Although he stated that the August 2010 event "appears" to have "aggravated

¹ The carriers appear to concede that claimant's treating physician has not released him to work and that claimant is entitled to total disability benefits as of August 28, 2010, which Signal has been paying. However, there are no stipulations as to these facts.

[claimant's] underlying [pseudoarthrosis]" by manifesting pain symptoms not present prior to that date, Dr. Aswathi also stated that claimant's pseudoarthrosis is unrelated to the August 2010 accident and that such events do not cause or accelerate pseudoarthrosis. *Id.* at 17, 20-21, 28. Further, Dr. Aswathi stated that the recommended refusion surgery was necessary to correct the failed fusion/pseudoarthrosis and that claimant's post-August 2010 symptoms did not contribute to the need for surgery. *Id.* at 22-23. Thus, although symptoms appeared after the 2010 incident, the administrative law judge credited Dr. Aswathi's opinion that the symptoms and need for additional surgery were related to the 2009 injury and the failed surgery therefor. The administrative law judge thus concluded that ALMA is the liable carrier.

Based on this evidence, the administrative law judge rationally found that claimant's current disabling condition is the result of the natural progression of his original injury. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). The administrative law judge has the authority to weigh the evidence and draw his own inferences therefrom. That other inferences could have been drawn from Dr. Aswathi's opinion does not establish error in the administrative law judge's conclusion. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995); *see also Pool Co. v. Cooper*, 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001). Thus, as it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that claimant's disabling condition results from the natural progression of his May 13, 2009 injury and subsequent failed fusion surgery. As ALMA was on the risk at this time, we affirm the administrative law judge's finding that it is the carrier liable for claimant's benefits. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

Accordingly, we affirm the administrative law judge's finding that ALMA is the responsible carrier. The case is remanded to the administrative law judge for further proceedings necessary to the entry of an award or denial of benefits. 33 U.S.C. §919(c); *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011); *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge