BRB No. 97-0992

JAMES BLUE	)	
	)	
Claimant	)	DATE ISSUED:
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
CONTAINER STEVEDORING COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Laura Bruyneel (Mullen and Filippi), San Francisco, California, for Stevedoring Services of America and Homeport Insurance Company.

Frank B. Hugg, San Francisco, California, for Container Stevedoring Company.

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

PER CURIAM:

Stevedoring Services of America (SSA) appeals the Decision and Order Awarding Benefits (95-LHC-1764, 95-LHC-1785) of Administrative Law Judge Thomas Schneider 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, on September 21, 1992, sustained acute cervical and thoracolumbar sprains while working for SSA; claimant subsequently underwent neck surgery and, in May 1994, was released to return to light duty work with restrictions on lifting, bending, twisting, sitting, and standing. Thereafter, on February 28, 1995, claimant experienced excruciating pain when he stepped down from the booth in which he was working as a receiving/delivery supervisor for Container Stevedoring Company (Container). Claimant immediately reported this incident to his supervisor, who allegedly prepared an injury report. Claimant has not returned to work since the date of this second incident.

In his Decision and Order, the administrative law judge found that claimant is entitled to temporary total disability benefits from September 21, 1992, to June 1994, permanent partial disability benefits from June 1, 1994, through February 28, 1995, and permanent total disability benefits thereafter. After further determining that the events of February 28, 1995, did not constitute either a continuing trauma or a second injury, the administrative law judge held SSA liable for claimant's compensation.

On appeal, SSA contends that the administrative law judge erred in his application of the aggravation rule; specifically, SSA challenges the administrative law judge's finding that it is the employer responsible for the payment of claimant's compensation. Container responds, urging affirmance of the administrative law judge's decision.

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, claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *See Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71

(CRT)(9th Cir. 1991); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Abbott v. Dillingham Marine & Manufacturing Co*., 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). This result follows from the aggravation rule, *see Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966), under which a claimant is compensated for the totality of his disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75 (CRT); *Abbott*, 14 BRBS at 453. In this case, therefore, SSA must prove that there was a new injury or aggravation during the course of claimant's employment with Container in order to be relieved of liability as the responsible employer, while Container must prove that claimant's condition is the result of the natural progression of the injury with SSA in order to escape liability. *See generally Buchanan v. International Transportation Services*, 31 BRBS 81 (1997). A determination as to which employer is liable requires that the administrative law judge weigh the relevant evidence. *Id.*

We hold that the administrative law judge, in determining that claimant's present disability is related to his initial injury while working for SSA, failed to properly apply the aggravation rule to the evidence of record. The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *O'Leary*, 352 F.2d at 812. Thus, where a work-related injury accelerates a prior condition, hastening disability or death which would have happened anyway, it is compensable under the aggravation rule. *See Fineman v. Newport News Shipbuilding & Dry Dock Co*., 27 BRBS 104 (1993). Moreover, the aggravation rule applies not only where the underlying condition itself is affected, but also where injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986). Thus, where a symptomatic, pre-existing condition is aggravated by a subsequent injury, the employer at the time of the second injury is nonetheless liable as the responsible employer. *See generally Kelaita v. Director, OWCP,* 799 F.2d 1038, 1311 (9th Cir. 1986). Whether the circumstances of a claimant's employment combined with the pre-existing condition so as to increase his symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event, his disability would result from the aggravation of his pre-existing condition. *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389, 13 BRBS 101, 106 (1st Cir. 1981), *aff'g* 11 BRBS 561 (1971); *see Gooden v. Director, OWCP*, __ F.3d ___, 1998 WL 78653 (5th Cir. Mar. 12, 1998).

In the instant case, in concluding that claimant's current disability is due to the natural progression of his 1992 injury, the administrative law judge found that the episode of February 28, 1995, constituted neither a second injury nor a continuing trauma and he stated that the fact that the incident in question fortuitously occurred

while claimant was present at Container's facility should not shift liability for claimant's benefits from SSA. *See* Decision and Order at 13-14. In rendering this determination, the administrative law judge relied on those parts of the opinions of Drs. Sanders, Ballance and Preininger that noted that the events of February 28, 1995, were of no medical importance or that they constituted only a temporary flare-up of claimant's condition. While a portion of Dr. Sanders' testimony may be interpreted as supporting a finding of natural progression, specifically Dr. Sanders' statement that he found it difficult to believe that the February 28, 1995, incident would worsen claimant's condition, *see* HT at 482, the administrative law judge failed to consider that each of the credited physicians also stated that the event experienced by claimant on February 28, 1995, affected in some way his pre-existing physical condition. Dr. Sanders, for example, additionally testified that something did in fact occur at that moment in 1995 and had it not taken place claimant may well have continued working.[1] *See* HT at 504. Similarly, Dr. Ballance opined that it was appropriate to describe what happened on February 28, 1995, as an aggravation, *id.* at 653-654, while Dr. Preininger stated that claimant experienced an acute episode which resulted in an exacerbation of his ongoing symptoms to the point where claimant could no longer work. *See id.* at 319.

[1]In rendering a determination of this issue, we note that the administrative law judge neither credited nor discredited the testimony of Dr. von Rogov, who opined that claimant's present disability arose out of the February 28, 1995 incident based on the fact that claimant had been able to work until the events of that day. *See* HT at 546-47. Moreover, Dr. Blackwell, to whom the administrative law judge gave less weight to the extent that his opinion conflicted with the opinion of Dr. Sanders, stated that an incident as described on February 28, 1995, could be construed as an aggravation and may be considered "that extra push to break the camel's back so to speak." *See* HT at 777. Based upon this statement, it would not appear that the opinions of Drs. Sanders and Blackwell are in fact inconsistent.

In holding that the administrative law judge erred in failing to properly apply the aggravation rule in the instant case, we initially note that the timing of a claimant's inability to work is a valid consideration in determining whether an injury had an aggravating effect on a prior condition since it is relevant in applying the aggravation rule, particularly as the rule applies where a prior condition is accelerated, resulting in disability earlier than otherwise may have occurred. *See Lopez v. Southern Stevedores*, 23 BRBS 290, 298 (1990). Thus, the severity of a claimant's second injury is not determinative of whether an aggravation occurred, since even a minor injury can aggravate a pre-existing condition or impair claimant's ability to work. *See, e.g., Foundation Constructors,* 950 F.2d at 621, 25 BRBS at 71 (CRT). *See, e.g., Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Gooden*, 1998 WL 78653*3. In the instant case, it is undisputed that claimant on February 28, 1995, sustained an incident at work of such severity that he immediately informed his supervisor. The record reflects that all of the physicians acknowledge that this incident affected in some way claimant's physical condition at the time it occurred. While an administrative law judge is free to accept or reject all or any part of the medical evidence, *see Perini v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), his reasons for selecting the evidence upon which he relies must be rational and he must correctly apply the law. In this case, in attributing claimant's current total disability to his 1992 work injury, the administrative law judge focused on the existence of a separate or distinct injury; in this regard, the administrative law judge's statement that nothing in particular happened on February 28, 1995, is directly contrary to the undisputed testimony of claimant that he experienced pain upon stepping down from his work booth. Additionally, the administrative law judge's conclusion that there was neither a continuing trauma nor a second injury fails to consider the application of the aggravation rule and thus his findings cannot be affirmed. *See generally Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 12 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

In addressing the evidence of record regarding the issue of which employer should be held liable for the payment of claimant's benefits, the administrative law judge also should consider whether the February 28, 1995, incident sustained by claimant while employed by Container caused a temporary aggravation or exacerbation of claimant's condition, which placed the risk on Container for the duration of that aggravation or exacerbation, after which time claimant returned to base-line and his condition naturally progressed to its present state. In any event, although the 1995 incident may have only exacerbated claimant's condition for a limited period of time and claimant's present condition may, in fact, be the natural result of his 1992 injury, the administrative law judge's conclusion regarding the party to be held liable for claimant's benefits rests upon an improper application of the aggravation rule. There is evidence of record which supports the conclusion that

claimant's current condition may be due, in part, to the February 28, 1995 incident, which aggravated his condition, increased his symptoms and resulted in his inability to work thereafter. On remand, the administrative law judge must account for this evidence in his analysis regarding which employer is to be held liable for claimant's ongoing benefits. Therefore, we vacate the administrative law judge's finding that SSA is liable as the responsible employer and the case is remanded to the administrative law judge for reconsideration of the issue under the proper legal standards.[2]

[2]We reject SSA's challenge to the administrative law judge's crediting of claimant's testimony concerning his physical condition prior to the February 28, 1995, incident. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 741 (5th Cir. 1962). Moreover, this testimony is not relevant to the issue of whether claimant's condition was aggravated by the 1995 incident.

Accordingly, the administrative law judge's finding that SSA is liable as the responsible employer is vacated and the case remanded for reconsideration of the issue under the proper legal standards consistent with this opinion. In all other respects, his Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge