BRB Nos. 13-0555
and 13-0555A

GARY HORNER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CASCADE GENERAL/VIGOR INDUSTRIAL, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUTAL INDEMNITY ASSOCIATION, LTD.	)	DATE ISSUED: Aug. 21, 2014
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
AMERICAN HOME ASSURANCE/AI SURPLUS INSURANCE/CHARTIS/AIG WORLDSOURCE	)	
	)	
Carrier-Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock and James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer and Signal Mutual Indemnity Association, Ltd.

Stephen E. Verotsky (Sather Byerly & Holloway), Portland, Oregon, for employer and American Home Assurance/AI Surplus Insurance/Chartis/AIG Worldsource.

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

PER CURIAM:

Claimant appeals, and employer and Signal Mutual Indemnity Association (Signal), cross-appeal, the Decision and Order (2011-LHC-00425, 2012-LHC-00188, 2012-LHC-01236) of Administrative Law Judge Steven B. Berlin 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 had sustained right knee injuries prior to beginning work for employer as a marine machinist in 1998. On September 18, 2007, claimant fractured his right femur in the hip area during the course of his employment. He underwent surgery for this injury, which entailed insertion of a metal rod to stabilize the bone. Employer's carrier at that time, American Home Assurance/AI Surplus Insurance/Chartis/AIG Worldsource (Chartis), voluntarily paid claimant compensation and medical benefits under the Act. 33 U.S.C. §§907, 908;[1] *see* Decision and Order at 5. Claimant returned to work on April 16, 2008, at which time Signal was providing employer's insurance coverage under the Act. Claimant retired from full-time work in August 2008, but he continued working part-time for employer from August 2008 to April 2011.

In September 2010, claimant filed a claim under the Act against employer alleging that the residuals from the femur surgery caused increased pain in his right knee during work activities. Claimant sought to hold employer liable for recommended knee replacement surgery and benefits for disability caused by the surgery. In response to the claim, Chartis moved to join Signal to the proceedings on the ground that claimant's continued work activities after April 2008 aggravated claimant's condition such that Signal is the responsible carrier. Specifically, claimant sought compensation for temporary total disability from February 7, 2012, until the date he is released to return to work after knee replacement surgery, based on his average weekly wage of $1,654.47, calculated as of the date of the September 18, 2007 work injury. Based on medical advice, claimant underwent surgery on January 19, 2012 to remove the rod from his right leg; claimant could not undergo knee replacement surgery until this was accomplished.

[1] Chartis paid claimant temporary total disability benefits from September 19, 2007 through April 16, 2008, and permanent partial disability benefits for a five percent impairment to the leg. EX 2.

Chartis accepted liability for this procedure and additionally compensated claimant for temporary total disability from January 19 to February 6, 2012.[2]

In his decision, the administrative law judge rejected Signal's contention that claimant's September 23, 2010 claim was untimely filed. Decision and Order at 9-10. The administrative law judge found that claimant established a prima facie case of a cumulative trauma knee injury, which the carriers did not rebut. *Id*. at 11-12. The administrative law judge found that Signal is the responsible carrier because claimant's work after he returned to work in April 2008 aggravated his pre-existing right knee condition. *Id*. at 12-14. The administrative law judge found that the subsequent rod removal procedure in January 2012 was not an intervening cause of claimant's knee condition and thus did not make Chartis liable for benefits thereafter, as the procedure did not affect claimant's knee and claimant underwent the procedure only as a prerequisite for the knee replacement surgery. *Id*. at 14-15. The administrative law judge determined claimant's average weekly wage as of March 4, 2011, claimant's last day of work, as the last cumulative trauma occurred on this date. He calculated claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), by dividing by 52 his total earnings of $29,484.48 during the year preceding March 4, 2011, to derive an average weekly wage of $567.01. *Id*. at 15-16. The administrative law judge found, however, that claimant is not entitled to temporary total disability compensation commencing on February 7, 2012 since he had voluntarily retired from all work in March 2011; thus, claimant did not sustain a loss in wage-earning capacity due to his injury. *Id*. at 16-17. The administrative law judge awarded claimant medical benefits for his right knee condition, including knee replacement surgery, payable by Signal, and $171.26 for unreimbursed prescriptions and $35 for unreimbursed travel expenses related to the September 2007 right femur injury, payable by Chartis. *Id*. at 17.

On appeal, claimant challenges the administrative law judge's finding that he sustained an ongoing cumulative trauma injury to his knee through his last day of work, alleging his ongoing knee injury is due to the 2007 accident in which he broke his femur. Thus, claimant contends that Chartis is the responsible carrier and that his average weekly wage should be calculated as of the date of the 2007 injury. BRB No. 13-0555. Signal cross-appeals, challenging the administrative law judge's findings that the September 2010 claim for a work-related knee injury was timely filed and that it is the responsible carrier. BRB No. 13-0555A. Chartis responds, urging affirmance of the

[2] By letter dated April 23, 2014, claimant's attorney informed the Board of claimant's death on March 12, 2014. The Board is unable to ascertain from the pleadings whether claimant underwent knee replacement surgery and, if so, whether he had received a post-surgery rating of his knee impairment. Thus, we cannot ascertain if some of the issues raised on appeal are, in fact, moot.

administrative law judge's decision. Claimant filed a response to Signal's appeal and a reply to Chartis's response. Signal responded to claimant's appeal and replied to claimant's and Chartis's response briefs.

SECTION 13

In its cross-appeal, Signal contends that claimant's claim for disability due a work-related knee injury is time-barred under Section 13.[3] Signal asserts that claimant was aware of the full extent of a work-related knee condition in 2005, or at the latest by June 2008 when his knee pain plateaued after he returned to work, but he failed to file a claim until September 2010. In his decision, the administrative law judge found that claimant's injury involved cumulative trauma and that each work day, therefore, resulted in a new injury. Decision and Order at 9-10. The administrative law judge concluded that claimant's trauma continued until his last day of work in March 2011, and that the previously filed claim on September 23, 2010, therefore, was timely. *Id*. at 10.

Section 13(a) applies in traumatic injury cases and provides that the right to compensation shall be barred unless the claim is filed within one year of the time claimant is aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a);[4] *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held in *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459

[3] A claim for medical benefits is never time-barred. *See, e.g., Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994).

[4] Section 13(a) provides:

> Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore [sic] is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a).

U.S. 1034 (1982), that a claimant is not injured for purposes of commencing the Section 13(a) one-year statute of limitations until the claimant is reasonably aware of the full character, extent and impact of his work-related injury. *See also J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Abel*, 932 F.2d 819, 24 BRBS 130(CRT). Case law establishes that a claimant is not "aware" under this provision until he is aware or should have been aware of the full extent of his work-related condition and that it will likely impair his wage-earning capacity. *See Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *V.M.* [*Morgan*] *v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F.App'x 695 (9th Cir. 2010); *see also Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that the claim was timely filed.[5] *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *Morgan*, 42 BRBS 48. Thus, the burden is on Signal to produce substantial evidence that the claim was untimely filed, i.e., that claimant's date of awareness was more than one year prior to September 23, 2010. *Bath Iron Works Corp. v. U. S. Dep't of Labor* [*Knight*], 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). We reject Signal's contention of error, and affirm the conclusion that the claim was timely filed, albeit on a different ground than that stated by the administrative law judge.

Claimant's claim was filed against employer in September 2010 on the theory that claimant's work-related femur injury and surgery caused claimant's additional knee injury upon his return to work in April 2008. Claimant's claim was based on Dr. Vessely's May 2010 opinion that claimant had increased right knee symptomatology "because he is lurching more to the right side…" EX 8. This is the first medical evidence potentially linking claimant's increased knee pain to the 2007 accident, which is the basis on which claimant's claim was filed.[6] Claimant's claim was filed within one

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[5] Section 20(b) provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary--
>
> * * *
>
> (b) That sufficient notice of such claim has been given.

33 U.S.C. §920(b).

[6] Dr. Wells previously stated there was no relationship between claimant's hip surgery and his knee condition. EX 6.

year of this date, and before claimant sustained a loss of wage-earning capacity due to his injury. Therefore, the claim was timely filed. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991). In attempting to shift liability to Signal, Chartis raised the argument that it is not the responsible carrier because claimant's general working conditions continued to aggravate his knee. *See generally Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010). On Chartis's motion, the administrative law judge joined Signal to the proceedings; claimant did not file a claim against Signal on the ground of general working conditions. As it was not the basis of claimant's claim, Signal cannot argue that claimant should have filed his claim earlier based on his alleged awareness in 2005 of a relationship between his knee pain and his working conditions.[7] As Signal did not produce substantial evidence that claimant was aware or should have been aware of the relationship between his femur injury and his increased knee pain more than one year before September 23, 2010, it did not rebut the Section 20(b) presumption. Thus, claimant's claim was timely filed. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990).

RESPONSIBLE CARRIER

Claimant and Signal both contend the administrative law judge erred in finding Signal to be the responsible carrier. Claimant contends that the cause of his increased knee pain after April 1, 2008, was the residuals from the 2007 accident and surgery such that Chartis is the responsible carrier, and that the administrative law judge failed to address this issue. Signal contends that substantial evidence does not support the administrative law judge's finding that claimant's continued work aggravated his knee condition; Signal avers that claimant's need for knee surgery was due to the natural progression of claimant's pre-existing knee arthritis and/or to the effects of the 2007 injury, including the 2012 rod removal surgery.

The administrative law judge found that claimant established a prima facie case of a work-related right knee injury while Signal was the carrier on the risk based on evidence that he had increased knee pain at work after April 1, 2008. In finding Signal to be the responsible employer, the administrative law judge observed that Dr. Vessely did not address the issue of aggravation or acceleration, and thus found his opinion insufficient to establish that Signal is not the responsible employer. The administrative

[7] Signal's contention is based on Dr. Albright's treatment notes. The January 18, 2005 note states, "[H]e now complains of pain on the lateral side of his knee. It is worse at work. He works on concrete as a marine machinist. He stands all day." EX 3 at 3. The March 21, 2005 note states, "(claimant) has improvement with pain at work (due to knee brace). It still bothers him at the end of the day. However, his function is much improved." EX 5.

law judge also rejected Signal's contention that as claimant's knee condition was stable before the femur injury, that injury was the cause of claimant's knee pain thereafter. In this regard the administrative law judge observed that claimant's femur injury had stabilized before claimant returned to work and that claimant reported increased knee pain only upon his return to work activities. The administrative law judge relied on Dr. Wells's opinion that the femur injury did not aggravate or hasten claimant's degenerative arthritis and that claimant's work activities after April 2008 likely hastened or aggravated claimant's degenerative arthritis. *See* CX 16 at 51. The administrative law judge thus concluded that Chartis established it is not the responsible carrier and that Signal is the responsible carrier. Decision and Order at 14.

The rule for determining which carrier is liable for the totality of a claimant's disability in a case involving cumulative traumatic injuries is the same as the rule for ascertaining the responsible employer. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). Therefore, if the claimant's disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury, and, accordingly, the carrier at the time of that injury is responsible for the payment of benefits. If, on the other hand, a subsequent work injury aggravates, accelerates, or combines with the claimant's prior injury, resulting in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent carrier is fully liable.[8] *See 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). The aggravation rule applies even if the claimant sustained the greater part of his injury with a prior employer or carrier. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). The administrative law judge must weigh the relevant evidence as a whole to determine the responsible carrier; each carrier bears the burden of persuading the administrative law judge that it is not the liable entity. *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).

Claimant and Signal argue that the administrative law judge erred by not crediting Dr. Vessely's opinion that there was no further pathologic worsening of claimant's

[8] Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). It follows that the responsible carrier at the time of the aggravating injury is liable for the full disability. *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).

degenerative arthritis after claimant had been advised of the likely need for a total knee replacement and that claimant had increased knee symptomatology after he returned to work in April 2008 because he was lurching to the right due to the femur injury. EXs 3; 8 at 23-24; 9 at 26-27. Signal and claimant further argue there is not substantial evidence of record to establish that claimant's right knee condition worsened after April 2008 due to his return to work.

We reject the contention that the administrative law judge erred. The administrative law judge discussed *Price*, in which the Ninth Circuit addressed the responsible employer issue where claimant's surgery was scheduled, but had not occurred, prior to claimant's last employment. The court affirmed the administrative law judge's determination that claimant's last employer before his undergoing knee replacement surgery was liable, notwithstanding the fact that his employment that day did not affect the need for the already-scheduled knee replacement surgery because the administrative law judge credited evidence that claimant sustained some minor but permanent increase in his knee disability as a result of his employment that day. *Price*, 339 F.3d at 1107, 37 BRBS at 91(CRT). Therefore, the administrative law judge properly focused on whether claimant sustained an aggravating knee injury at work while Signal provided coverage. *Id.*; *see also Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Moreover, the contentions of claimant and Signal ignore the law that a claimant sustains a work-related injury if his work causes pain, irrespective of whether there is an underlying pathologic change in the condition. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

Claimant testified on deposition that, while he was recovering from his femur surgery, his knee was in constant pain, but was no better or worse than it previously had been. CX 22 at 18. After he returned to work in April 2008, claimant testified that his knee pain increased to a 9, on a scale of 1 to 10, over the course of about six weeks, and then "stayed the same." *Id.* at 20, 48. With respect to the medical evidence describing the effects on claimant's condition of his continued employment after April 2008, Dr. Vessely stated that, without diagnostic studies, he did not know whether claimant's working conditions after April 2008 aggravated his knee, from a pathologic standpoint. Dr. Vessely stated that usually there is no further acceleration to degenerative changes once a total knee replacement has been recommended.[9] EX 9 at 27. In his June 24, 2011, report, however, Dr. Vessely agreed that claimant had experienced symptoms of knee pain at work. *Id.* Dr. Wells opined there was no permanent impairment to the knee or

[9] Dr. Vessely also stated in his May 21, 2010 report, "(claimant) has had some increased symptomatology (since the femur injury) because he is lurching more to the right side, but no indications of an increased pathological condition." EX 8 at 24.

work restrictions due to the femur fracture and that claimant's post-April 2008 weight-bearing activities on the job worsened his right knee condition irrespective of the extent of his right knee impairment prior to April 2008, as bone deterioration can continue after the knee has reached a "bone on bone" stage. EXs 6 at 14-15; 13 at 63-65. The administrative law judge recognized that Dr. Wells's opinion was not given to a degree of medical certainty due to the absence of medical tests, but he found credible Dr. Wells's statement that "more probably than not somebody that's active and on their feet for prolonged periods of time, kneels, squats, pivots, turns, they will progress, and that's the general broad picture across the spectrum of degenerative arthritis of a weight-bearing joint." EX 13 at 66-67. Following his femur surgery, claimant returned to work on light duty for two weeks and then to his usual work. Claimant described his usual work as requiring heavy lifting, climbing, crawling, bending and kneeling. CX 22 at 8-10. Contrary to the contentions on appeal, claimant's strenuous working conditions and the opinion of Dr. Wells constitute substantial evidence that claimant sustained a aggravation of his right knee condition when Signal was on the risk from April 16, 2008, to March 4, 2011. The administrative law judge acted within his discretion in crediting the opinion of Dr. Wells over that of Dr. Vessely. *See*, *e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Thus, we affirm the administrative law judge's finding that Signal is the responsible carrier as it is rational, supported by substantial evidence and in accordance with law. *Price*, 339 F.3d at 1107, 37 BRBS at 91(CRT); *Buchanan*, 33 BRBS at 35; *see also Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

Signal further contends that the increase in claimant's knee symptoms after he underwent the rod removal procedure on January 19, 2012, shifted liability back to Chartis. Where there is a subsequent injury that is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, the liable employer or carrier is relieved of liability for that portion of disability attributable to the intervening cause. *See Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *see also Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 F. App'x 126 (5th Cir. 2002); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). In this case, the administrative law judge found unpersuasive claimant's testimony that he experienced an increase in symptoms and knee pain after undergoing this procedure. Decision and Order at 9, 15. The administrative law judge found claimant's testimony contradicted by the reports of his surgeon, Dr. Vande Zandschulp, who, 18 days post-surgery, released claimant for all activities other than contact sports. *Id*. at 15; *see* EX 13b. Moreover, the administrative law judge found that Dr. Vande Zandschulp did not note any complications or prescribe any preventative measures related to the knee. The administrative law judge also found, correctly, that the only medical reason for the rod removal procedure was to facilitate replacement of the right knee. *See* CX 15 at 49; EX 6 at 14-15. Accordingly, the administrative law judge

found the rod removal procedure related to the knee injury for which Signal is the responsible carrier. Decision and Order at 15.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge rationally relied on Dr. Vande Zandschulp's contemporaneous medical notes to find that the rod removal surgery did not increase claimant's knee symptomatology. Moreover, the rod removal surgery is not an intervening cause of any continued knee condition, as the surgery was undertaken solely as a predicate to total knee replacement surgery. CX 15 at 49; EX 6 at 14-15; *see generally Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Therefore, we reject Signal's contention that the rod removal surgery was an intervening cause of claimant's knee injury such that Chartis is liable for any disability and medical benefits due claimant.

DATE OF INJURY

Claimant argues there was no further worsening of his knee symptoms after September 17, 2007 or June 1, 2008, at the latest.[10] Therefore, claimant asserts that, as he had not voluntarily withdrawn from the workforce at this time, the administrative law judge erred in denying him additional total disability benefits. Claimant also asserts that the administrative law judge erred in calculating his average weekly wage as of his last day of employment, March 4, 2011, rather than as of September 17, 2007 or June 1, 2008.

Claimant's first contention rests on an erroneous legal assumption. Claimant's "date of injury" is not necessarily relevant to claimant's entitlement to disability benefits. Rather, under the Act, the issue is whether the work injury is the cause of claimant's disability. 33 U.S.C. §902(10).[11] Claimant sought disability benefits for the period

[10] The former date being the date of the work accident in which claimant broke his femur, and the latter being the date claimant testified his knee pain plateaued after he returned to work following his femur surgery.

[11] Section 2(10) of the Act states:

> "Disability means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same of any other employment: . . . .

commencing February 7, 2012, until he recovered from the anticipated knee replacement surgery. However, claimant had already left the workforce in March 2011, and claimant acknowledged to the administrative law judge that this was a "voluntary" decision, *i.e.*, not one made because of his knee condition. *See* Cl. Pre-Hearing Statement at 2; Cl. Closing Argument at 4-5.

The administrative law judge thus found that claimant retired from full-time employment in August 2008 for reasons unrelated to his knee injury. *See* CX 22 at 96-98, 100. Specifically, the administrative law judge found that, irrespective of his knee condition, claimant had been planning to take an early retirement at age 55 and that he did so in August 2008. CXs 19 at 65; 22 at 96-98. Additionally, the administrative law judge found that, under the retirement plan, claimant could, and in fact did, continue to perform limited longshore work. *Id*. at 97-99. The administrative law judge found that claimant's decision to fully retire in March 2011 also was unrelated to the knee injury because he stopped working based on a lack of night shift work and he refused to work the day shift. *See* CX 22 at 99-100. The administrative law judge also found pertinent that claimant had allowed his union membership to lapse and he had not sought other employment since he stopped working. *See* Tr. at 37; CX 22 at 100, 111-112. The administrative law judge found that, since claimant voluntarily left the workforce prior to undergoing the rod removal surgery at a time when he was still able to work, claimant incurred no wage loss due to his work injury and, therefore, he is not entitled to temporary total disability compensation. Decision and Order at 17.

The Board has previously discussed the effect of a claimant's retirement on his entitlement to benefits in a traumatic injury case. In *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001), the claimant suffered a traumatic knee injury, returned to light-duty work with his employer which was deemed suitable, and retired three years later by accepting the employer's early retirement package. After claimant's retirement, his knee condition worsened and his physician increased his impairment rating and later performed surgeries, rendering claimant totally disabled. The Board affirmed the administrative law judge's finding that the claimant's retirement was not due to his injury. Thus, his loss of wage-earning capacity was not caused by his injury, and, although he was entitled to an increased schedule award under 33 U.S.C. §908(c)(2), he was not entitled to permanent total disability benefits. *Id.*, 35 BRBS at 149-150;[12] *see also Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). Citing

[12] The Board explained that the claimant's entitlement to an increased schedule award put him on an equal footing with a voluntary retiree who becomes aware after his retirement of an occupational disease, as both types of claimants are compensated for the degree of physical impairment due to the work injury, but are not entitled to total disability benefits. *Hoffman*, 35 BRBS at 150; *see* 33 U.S.C. §§902(10), 908(c)(23). In

Hoffman, therefore, the administrative law judge properly found that claimant was not entitled to post-retirement compensation for temporary total disability as his retirement was not related to his knee condition. *See* Decision and Order at 16-17. Thus, we affirm the administrative law judge's denial of the claim for temporary total disability compensation after claimant voluntarily left the workforce as it is supported by substantial evidence and in accordance with law.

Although this issue may be moot in view of the denial of disability benefits, *see* n. 2 and 11, we also reject claimant's contention that the administrative law judge erred in calculating his average weekly wage with reference to March 4, 2011. A claimant's average weekly wage is calculated as of the "date of injury," and, in the case of a cumulative trauma injury, as here, the date of injury is the date of the last aggravation. *See generally Lopez v. Southern Stevedoring*, 23 BRBS 295 (1990); *see also Director, OWCP v. General Dynamics Corp.* [*Morales*], 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985) (absent evidence of aggravation, average weekly wage properly computed at time of injury and not at time of increased impairment rating). We have affirmed the administrative law judge's rational determination, based on Dr. Wells's opinion, that claimant's work continued to aggravate his knee condition until March 2011. Moreover, we have affirmed the finding that claimant voluntarily limited his work hours, and thus his wages, prior to March 2011 such that the knee injury did not cause any loss in wage-earning capacity. Therefore, we affirm the administrative law judge's calculation of claimant's average weekly wage based the wages he earned during the year preceding his last day of work on March 4, 2011.[13]

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this case, there is no evidence that claimant had a rated permanent partial impairment to his knee.

[13] The administrative law judge found this figure to be $567.01. The administrative law judge's calculation is not challenged on appeal.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge