

BRB No. 14-0060

RICHARD MATZ)
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 Claimant)
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 v.)
)
 SHIPPERS STEVEDORING COMPANY) DATE ISSUED: Aug. 21, 2014
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 Self-Insured)
 Employer-Petitioner)
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 and)
)
 CERES MARINE TERMINAL)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Order Granting Partial Summary Decision and the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Michael D. Murphy (Sheehy, Ware & Pappas, P.C.), Houston, Texas, for Shippers Stevedoring Company.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for Ceres Marine Terminal.

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

PER CURIAM:

Shippers Stevedoring Company (SSC) appeals the Order Granting Partial Summary Decision and the Decision and Order (2012-LHC-01875) of Administrative Law Judge Larry W. Price 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 sustained a Grade IV SLAP tear of his right shoulder while working for Ceres Marine Terminal (Ceres) on October 28, 2011, and a second injury to his right shoulder on January 30, 2012, while climbing a ladder during his work for SSC. Claimant did not miss any work as a result of these injuries until June 8, 2012, when Dr. Flores performed surgery on claimant’s right shoulder. Drs. Likover, Whitsell and Flores opined that the January 30, 2012 injury aggravated and worsened claimant’s condition and contributed to his need for right shoulder surgery. Claimant filed a claim for benefits against Ceres, who moved to interplead SSC. Ceres and SSC thereafter filed motions for partial summary decision, each arguing that the other is liable for all benefits due claimant.

In his Order Granting Partial Summary Decision, the administrative law judge granted Ceres’s motion and denied SSC’s motion, finding that SSC is liable for all of claimant’s medical and disability benefits. Subsequently, the administrative law judge issued a Decision and Order wherein, based on the parties’ stipulations, he found claimant entitled to, and SSC liable for, temporary total disability benefits from June 8 through July 31, 2012, and medical benefits. 33 U.S.C. §§908(b), 907.

On appeal, SSC challenges the administrative law judge’s finding that it is liable for benefits. SSC contends that the aggravation rule is inapplicable in cases, like this one, where the first injury has not reached maximum medical improvement at the time of the second injury and the pending claim is for temporary disability benefits. Ceres responds, urging affirmance of the administrative law judge’s Order holding SSC liable. SSC filed a reply brief.

The administrative law judge applied the aggravation rule to the undisputed facts to find that SSC is liable for claimant’s disability and medical benefits. Specifically, the administrative law judge relied on the facts that: 1) claimant did not stop working following his October 28, 2011 right shoulder injury with Ceres; 2) Dr. Adickes gave claimant a full-duty work release as of November 21, 2011; 3) Dr. Likover opined, on December 11, 2011, that claimant did not need any further medical care; 4) claimant sustained a second right shoulder injury while working for SSC on January 30, 2012; and that 5) “all the doctors agree that the January 30, 2012 injury aggravated and worsened claimant’s condition and contributed to his need for surgery.” Order at 2. The administrative law judge thus found that the SSC injury combined with the prior Ceres injury to worsen claimant’s right shoulder condition, resulting in the need for surgery and the consequent disability. Accordingly, he concluded that the undisputed facts establish that SSC is the employer liable for all medical care and disability benefits after January 30, 2012.

It is a long-standing principle that, in cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether claimant's disabling condition is the result of the natural progression or aggravation of a prior injury. If claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and claimant's employer at that time is the liable employer. If, however, the subsequent injury aggravates, accelerates or combines with the earlier injury to result in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is responsible. *See, e.g., 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); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc).

SSC contends that the severity of claimant's SLAP tear resulting from the first accident demonstrates that claimant's condition was not at maximum medical improvement at the time of the second accident, and thus that it cannot be held liable for claimant's resulting condition. The administrative law judge properly rejected SSC's argument that the aggravation rule should not apply under these circumstances.¹ Specifically, the administrative law judge found the facts in this case are similar to those in *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). In *Price*, the claimant's condition had not reached maximum medical improvement following his first work-related knee injury and he continued to work even after he was scheduled for knee surgery. Based on the medical evidence that the claimant's last shift before surgery caused a minor, but permanent, increase in his knee disability, and increased the need for his surgery, the United States Court of Appeals for the Ninth Circuit affirmed the finding that claimant's employer on the last day of work was the responsible employer, even though claimant had worked only one day with that employer prior to his surgery. *Id.*, 339 F.2d at 1105, 37 BRBS at 90-91(CRT).

Similarly, in *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT), the claimant sustained a back injury in 1996 with one employer. He returned to work; modifications were made to his job to alleviate the claimant's pain. The claimant

¹SSC's contention that claimant was not at maximum medical improvement with regard to the right shoulder injury he sustained on October 28, 2011, at the time of his January 30, 2012 accident, is speculative. The undisputed fact, as described by the administrative law judge, is that claimant had been released to return to full-duty work without the need for further medical care prior to the date of the January 30, 2012 accident. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

continued to experience back pain which caused him to seek treatment and to take some time off work. From January to April 1988, the claimant worked a lot of overtime, which resulted in more severe pain; a different employer was operating the facility at this time. The claimant was off work due to his back pain from April 1998 until January 1999. The United States Court of Appeals for the Third Circuit held that the Board properly reversed the administrative law judge's determination that the first employer was liable for claimant's temporary total disability benefits for the 1998 period of disability. The court stated that the administrative law judge's conclusion was not supported by substantial evidence, as the record established that the claimant's work in early 1998 had aggravated his condition, which the administrative law judge had acknowledged. The court held that the Board properly determined that the administrative law judge erred in addressing whether the earlier injury was the "precipitant injury" rather than ascertaining whether the subsequent work aggravated or exacerbated the claimant's condition. Accordingly, the court affirmed the Board's determination that the claimant's second employer was liable for the temporary total disability benefits as a matter of law. *Id.*, 279 F.3d at 241-244, 35 BRBS at 161-162(CRT); *see also Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

In this case, the administrative law judge found that all of the physicians of record agreed that claimant sustained an aggravation injury as a result of the accident which occurred in the course of his work for SSC on January 30, 2012. Dr. Likover opined, in his May 17, 2012 report, that claimant's SLAP tear of his right shoulder "was substantially aggravated by his new work-related event [the January 30, 2012 accident]." EX 21. Dr. Whitsell opined, on October 24, 2012, that claimant's need for the June 8, 2012 right shoulder surgery and the resulting condition/impairment of his shoulder was significantly caused by the January 30, 2012 ladder climbing incident. Claimant's treating surgeon, Dr. Flores, opined that "both incidents likely caused the need for surgery," and that the "initial Ceres injury seemed to be limiting his ability to function and his [SSC] injury seemed to make that worse." EX 34. The opinions of Drs. Likover, Whitsell and Flores, that the January 30, 2012 accident aggravated and worsened claimant's condition and contributed to the need for the surgery, constitute substantial evidence in support of the administrative law judge's finding that claimant's accident with SSC aggravated, accelerated and/or combined with the injury claimant sustained while working for Ceres on October 28, 2011, to result in claimant's need for the June 8, 2012 surgical procedural and his resulting disability. We therefore affirm the administrative law judge's finding that SSC is the employer responsible for claimant's benefits. *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT). Moreover, we affirm the administrative law judge's Decision and Order dated November 22, 2013, as no party raises any error therein and since the administrative law judge's findings, that claimant is entitled to temporary total disability benefits from June 8, 2012 through July

31, 2012, based on an average weekly wage of \$1,509.46, plus medical benefits and an attorney's fee of \$10,250,² payable by SSC, are based on the parties' stipulations.³

Accordingly, the administrative law judge's Order Granting Partial Summary Decision and Decision and Order are affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²The administrative law judge explicitly noted that the parties, by correspondence dated November 13, 2013, reached an agreement on attorney's fees and expenses.

³SSC filed a notice of appeal of the administrative law judge's Decision and Order, in the event the Board agreed with its position on the responsible employer issue.