U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0016

KENNETH D. WILLSEY, JR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES	)	
	)	DATE ISSUED: Aug. 31, 2016
Self-Insured	)	
Employer-Petitioner	)	
	)	
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Raymond H. Warns, Jr. (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for Eagle Marine Services.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for Jones Stevedoring Company.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Eagle Marine Services (Eagle Marine) appeals the Decision and Order Awarding Benefits (2013-LHC-01284, 2013-LHC-01285, 2013-LHC-01286) of Administrative Law Judge William Dorsey 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 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).

Claimant has worked as a longshoreman since the 1970s. JEX 47 at 4.[1] He has had knee problems since the 1990s.[2] In August and September 2011, claimant saw his family doctor, Dr. Ongkeko, for knee pain. JEXs 15-16. X-rays revealed moderate patellofemoral and tri-compartmental narrowing in his knees, and Dr. Ongkeko diagnosed osteoarthritis. EEX 4; JEX 16. Dr. Ongkeko referred claimant to Dr. Jany, an orthopedic surgeon, and, at his appointment on November 7, 2011, claimant complained of pain in both knees. An MRI on November 14, 2011, revealed a torn left medial meniscus, requiring arthroscopy, and an arthritic right knee that was just "wearing out," requiring a total knee replacement. EEX 5; JEXs 18-22. Claimant declined surgery at that time and continued working. EEX 5. On November 16, 2011, claimant returned to Dr. Ongkeko, again complaining of knee pain. EEX 4; JEX 21.

Claimant worked for Jones Stevedoring on November 18, 2011, and allegedly injured both knees when he slipped and twisted, or "did the splits," while stepping out of a truck onto a wet dock. Claimant filed an accident report that day, but continued working; Jones Stevedoring filed its first report of injury on November 22, 2011. EEXs 1-2. Claimant continued to obtain work out of the union hall, working not only for Jones Stevedoring, but also for other companies during the next two weeks. On December 1, 2011, claimant worked for Eagle Marine as a hold man, which required walking, standing, and bending during an 8-hour shift. Claimant stopped working after that shift, stating that his knees were not getting better and that he no longer wanted to deal with the pain. JEX 47 at 64-68. Jones Stevedoring filed a second report of injury on December 5, 2011, noting that claimant ceased working on December 1. JEX 33. Claimant went to the emergency room for knee pain on December 28, 2011, and reported the November 2011 injury as a cause of his pain. Dr. Nanda, the emergency room doctor, kept claimant out of work and referred him to Dr. Whitney, an orthopedic surgeon. JEXs 23-24.

Claimant began seeing Dr. Whitney in January 2012. After undergoing surgeries performed by Dr. Whitney in February and March 2012 (left arthroscopy/medial meniscectomy and right full replacement, respectively),[3] claimant filed two claims for

[1] EEX refers to Eagle Marine's exhibits; JEX refers to Jones Stevedoring's exhibits.

[2] Claimant underwent a right arthroscopic medial meniscectomy in the early 1990s and was found to have a 10 percent permanent impairment to his right lower extremity. Decision and Order at 5-6; JEXs 4, 7. Claimant was diagnosed with post-surgical arthritis or osteoarthritis in his right knee in 2010. Decision and Order at 6; JEX 15.

[3] Claimant considered the surgeries successful, as he returned to work on June 22, 2012. Decision and Order at 10; JEX 47 at 24.

compensation. He filed one claim against Jones Stevedoring, identifying the date of injury as November 18, 2011, and another claim against both Jones Stevedoring and Eagle Marine for progressive wear and tear of both knees, identifying the date of injury as December 1, 2011, when he stopped working. JEX 38. Claimant and the employers entered into stipulations, accepted by the administrative law judge, which resolved all issues except that of the responsible employer.[4] Decision and Order at 2-5; JEX 46.

The administrative law judge set forth the law for determining the responsible employer in cases of traumatic injuries, discussed how it applies in the case of an aggravating injury, and addressed the decision of the United States Court of Appeals for the Ninth Circuit 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), finding it to be very similar to this case. Decision and Order at 10-11. The administrative law judge found that the opinion of Dr. Puziss, who opined that all of claimant's work, including the work after November 18, 2011, contributed to or aggravated his knee condition, was sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption against Eagle Marine. Decision and Order at 12-14; JEX 44, 50. He then found that the opinion of Dr. Burns, who opined that there is no evidence of aggravation to claimant's knee from his work for Eagle Marine on December 1, 2011, constituted substantial evidence rebutting the presumption. Decision and Order at 18. In weighing the evidence as a whole, the administrative law judge rejected Dr. Burns's opinion, finding it unconvincing and inconsistent with *Price*, and he gave greater weight to the opinions of Drs. Puziss and Whitney. Based on that evidence, the administrative law judge found that claimant sustained an aggravating injury while working for Eagle Marine on December 1, 2011, and that Eagle Marine, therefore, is the responsible employer. *Id.* at 18-21.

Eagle Marine appeals the administrative law judge's decision, contending he did not apply the last employer rule properly. In this regard, Eagle Marine asserts that: *Price* is not applicable because there are significant factual differences between the two cases; the administrative law judge erred by addressing the responsible employer issue in sequence beginning with the last employer rather than considering the employers'

[4] The employers did not explicitly stipulate to work-related injuries; however, they accepted liability in that they agreed to pay claimant a lump sum for temporary total and permanent partial disability benefits and medical transportation costs. They agreed to reimburse the ILWU-PMA Welfare Indemnity Plan for benefits paid to claimant, and they agreed to split liability for claimant's attorney's fee. Decision and Order at 2-5; JEX 46. The employer found liable is to reimburse the non-liable employer for benefits paid to claimant.

positions simultaneously; and the administrative law judge's conclusion is not supported by substantial evidence. Jones Stevedoring responds, asserting the administrative law judge applied the proper legal standards and that his decision is supported by substantial evidence of record. Eagle Marine filed a reply brief in support of its appeal.

In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling condition is the result of either the natural progression or the 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, the employer at the time of the prior injury is responsible. If, however, a subsequent injury aggravates, accelerates, or combines with the earlier injury to result in the claimant's disability, the employer at the time of the subsequent injury is responsible. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The administrative law judge must weigh all relevant evidence to determine whether the claimant's disabling injury is due to the natural progression of the earlier injury or the aggravation thereof with a subsequent employer.[5] *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997), and 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); *see Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010) (distinguishing the responsible employer analysis in occupational disease case).

In *Price*, the Ninth Circuit affirmed the Board's holding that Metropolitan, the employer at the time of an aggravating injury, was the responsible employer in a case in

[5] We reject Eagle Marine's argument that the administrative law judge did not conduct a proper Section 20(a), 33 U.S.C. §920(a), analysis in this case. Section 20(a) applies to the issue of whether a claimant has a work-related injury. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). In light of the parties' stipulations, the work-relatedness of claimant's injuries was not before the administrative law judge; the only remaining issue was which employer is liable for claimant's benefits. Section 20(a) does not aid either employer in proving which is liable. *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). Moreover, as it pertains to Eagle Marine, the administrative law judge applied the Section 20(a) presumption, found that Eagle Marine rebutted it with the opinion of Dr. Burns, and proceeded to weigh the evidence as a whole. *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997), and 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).

which the claimant had knee surgery on April 24, 1995, and his last employment prior to knee surgery was with Metropolitan on April 22, 1995. The claimant had sustained cumulative trauma to his knee during years of employment with multiple employers, and the surgery had been scheduled in December 1994 while he was employed by a different employer. The claimant worked only one day for Metropolitan prior to his surgery. Based on medical evidence relied upon by the administrative law judge that the claimant's employment with Metropolitan caused a minor but permanent increase in the extent of his disability and increased his need for surgery, the court affirmed the finding that Metropolitan, the employer at the time of the aggravating injury, was the responsible employer, notwithstanding that the surgery had already been scheduled.[6] *Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

Eagle Marine contends the facts in this case are distinguishable from those in *Price,* and, thus, the administrative law judge erred in finding it to be liable merely because it was the last employer. Specifically, Eagle Marine contends the distinctions serve to preclude its liability under *Price* because they support a natural progression finding, and to extend the holding of *Price* to cover the facts herein would amount to holding the last employer liable under a rule of strict liability. We reject Eagle Marine's assertion that the administrative law judge erred in holding it liable.

First, this case is similar to *Price* in that the need for surgery, arguably, was established before the work injuries. The arthroscopic surgery on claimant's left knee and full-replacement surgery on claimant's right knee had been recommended prior to claimant's last day of work at Eagle Marine, December 1, 2011, as well as before the fall at Jones Stevedoring on November 18, 2011.[7] EEX 5; JEXs 19-22. Additionally, similar

[6] Similar to one of Eagle Marine's arguments here, the Ninth Circuit rejected the contention that the last employer prior to the date surgery is determined to be necessary should be held liable, finding that such an inquiry is not as straightforward as it may seem. The Ninth Circuit noted that any "unfairness" of its holding is mitigated by the spreading of the risk through mandatory insurance and the potential availability of Special Fund relief to the last employer. *Price*, 339 F.3d at 1107, 37 BRBS at 92(CRT). The court has stated that the last employer rule "works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time." *Foundation Constructors,* 950 F.2d at 623, 25 BRBS at 74(CRT) (internal quotation marks omitted).

[7] Unlike *Price,* however, claimant's surgery had not been scheduled prior to his employment with either Jones Stevedoring or Eagle Marine. Claimant declined the recommended surgery in November 2011 but agreed to it when recommended by Dr. Whitney on January 13, 2012. EEX 7.

to *Price*, a doctor opined that activities during one day of work contributed to the claimant's disability. The differences, as Eagle Marine correctly notes, are that this case involves a specific traumatic injury followed by a cumulative trauma injury, whereas *Price* involved only cumulative trauma injuries, and that the claimant in *Price* alleged increased pain with continuing work, whereas claimant here testified that the fall on November 18, 2011, caused increased knee pain, but that continued work thereafter did not further increase his pain, JEX 47 at 67.

Contrary to Eagle Marine's contention, however, it is not material that claimant claimed both a specific traumatic injury and a cumulative trauma injury. The legal inquiry concerning the responsible employer is the same in all cases not involving an occupational disease: is the claimant's disabling condition due to the natural progression of a prior work injury, or is it due, at least in part, to a subsequent aggravating injury with a later, or the last, employer? *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). Thus, in ascertaining the liable employer, a cumulative trauma injury is treated the same as a discrete traumatic injury. *Id.*; *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem*., 377 F.App'x 640 (9th Cir. 2010). The aggravation rule applies "even though the worker did not incur the greater part of his injury with that particular employer." *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT) (internal quotation marks omitted). Moreover, claimant's testimony that his pain did not increase after November 18, 2011, while relevant, is not necessarily determinative of the natural progression/aggravation inquiry. Rather, the administrative law judge must resolve the issue by weighing all the relevant evidence, of which a claimant's testimony may constitute only a part. *Buchanan*,31 BRBS 81. As the factual distinctions between *Price* and this case are not legally significant, the administrative law judge properly relied on the legal framework set out in *Price*.

Further, the administrative law judge did not mechanically hold the last employer liable by following *Price*. Rather, here, as in *Price*, the issue is factual,[8] and the administrative law judge, as the fact-finder, is entitled to determine the weight to be accorded to the evidence of record, to address the credibility and sufficiency of any testimony, and to make the choice among reasonable inferences. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *Buchanan*, 31 BRBS 81. Provided his

[8] Contrary to Eagle Marine's assertion, this is a fact-and-evidence-specific issue. Thus, other cases, such as *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006), where the Board affirmed findings of no aggravation, are not controlling because they were based on whether substantial evidence supported the administrative law judges' findings; they were not resolved as a matter of law.

interpretation of the evidence is rational and supported by substantial evidence, it must be affirmed, even if other interpretations or inferences could have been reached. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

In this case, the administrative law judge addressed the relevant evidence as a whole to determine if claimant's disabling bilateral knee condition is due to the natural progression of the November 2011 injury or to an aggravation of claimant's knee condition that occurred during his last day of work on December 1, 2011. The administrative law judge gave greater weight to the opinions of Drs. Puziss and Whitney to conclude that claimant's degenerative knee condition, which included arthritis, was due, at least in part, to his work activities on every day of work after November 18, 2011, including on December 1, 2011, when claimant worked for Eagle Marine. Decision and Order at 19.

Dr. Puziss stated that claimant's work for Eagle Marine on December 1, 2011, "did contribute, aggravate, and accelerate both his bilateral knee conditions, leading to his surgeries, even though such contribution was very small or subclinical." JEX 44 at 95. Dr. Puziss explained in his deposition that, with a degenerative knee condition like claimant's, every step can result in molecular or microscopic differences, even without added pain, that cannot be measured clinically on a day-to-day basis. JEX 50 at 11-15, 20-21, 26-28; *see also* JEX 44. Dr. Whitney agreed that lack of evidence of a worsening condition on a clinical level does not rule out changes that occur on a subclinical level and that claimant's condition has been a slow progression affected by all his work activities, including walking and standing, activities required of claimant's work on December 1, 2011. JEX 48 at 11-13, 17 30-31, 41; *see also* JEX 40. The administrative law judge gave greater weight to these opinions than to that of Dr. Burns and concluded they supported a finding that claimant's work with Eagle Marine contributed to the deteriorating condition of claimant's knees. Therefore, the administrative law judge rationally found that Jones Stevedoring established that an aggravation occurred while claimant worked for Eagle Marine on December 1, 2011, making Eagle Marine the responsible employer.[9]

[9] We reject Eagle Marine's contention that the opinion of Dr. Burns requires a finding that Jones Stevedoring is liable for claimant's benefits. Dr. Burns did not explicitly opine that claimant's condition is the natural progression of any injury that occurred on November 18, 2011, with Jones Stevedoring; he merely concluded there was no aggravation on December 1 and that the pathology of claimant's knees was set before December 1, 2011. EEX 8; EEX 12 at 27-28, 32. More importantly, the administrative law judge found Dr. Burns's opinion unconvincing and gave it less weight because Dr.

The administrative law judge's finding is supported by substantial evidence of record. Therefore we affirm his finding that Eagle Marine is the responsible employer. *Price*, 339 F.3d at 1106, 37 BRBS at 92(CRT); *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Siminski*, 35 BRBS 136; *Buchanan*, 33 BRBS 32.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

Burns fundamentally disagreed with Drs. Puziss and Whitney, whom he credited, on how osteoarthritis progresses, *i.e.*, on whether physical activity is a factor. Decision and Order at 20. In reviewing findings of fact, the Board may not reweigh the evidence, but may only inquire into the existence of substantial evidence to support the findings. *South Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table).