BRB Nos. 11-0227
and 11-0279

MARCEDA MILLER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 12/09/2011
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
GULF TERMINALS INTERNATIONAL	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order, the Order Granting Gulf Terminal's Motion to Admit Post Hearing Trial Exhibit and Denying Ceres Marine Terminal's Motion to Depose Witness, and the Order Denying Motion to Reconsider of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for Gulf Terminals International and Signal Mutual Indemnity Association, Limited.

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

PER CURIAM:

Ceres Marine Terminals, Incorporated (Ceres) appeals the Decision and Order, the Order Granting Gulf Terminal's Motion to Admit Post Hearing Trial Exhibit and Denying Ceres Marine Terminal's Motion to Depose Witness, and the Order Denying Motion to Reconsider (2009-LHC-0408) of Administrative Law Judge Stuart A. Levin 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).

On September 28, 2007, claimant stepped on a lashing belt and fell while working aboard a ship for Ceres. Ceres originally accepted liability and paid disability benefits; however, it later contested liability, asserting that claimant's injury was due to the natural progression of a March 6, 2007, injury[1] or was aggravated by claimant's subsequent work for Gulf Terminals International (Gulf).[2] A January 26, 2008, MRI revealed a meniscus tear in claimant's left knee, and Dr. Murphy scheduled surgery for March 2008. Because Ceres would not authorize the surgery, it was canceled, and, despite her condition, claimant continued to work. On January 12, 2009, claimant worked for Gulf for four hours driving cars off a ship. Claimant underwent surgery on January 26, 2009, to repair the torn meniscus. Following surgery, claimant developed a serious infection. She was treated with antibiotics, and on February 27, 2009, she had a septic knee debridement. Her condition continued to deteriorate, and she underwent a total left knee replacement on December 15, 2009. Claimant returned to work on March 26, 2010.

Claimant filed a claim for benefits against Ceres. Ceres moved to interplead Gulf, arguing that it was responsible as it was claimant's last employer prior to her surgery. The administrative law judge granted Ceres's motion. The employers agreed that whichever of them was found liable is also responsible for disability and medical benefits related to the left knee condition. The parties agreed that claimant's average weekly wage at the time of the 2007 injury was $712.77 and, as of January 12, 2009, was $1,000.96.

[1]On April 25, 2007, Dr. Murphy performed surgery on claimant's left knee for a non-work-related injury. Claimant returned to full duty on July 30, 2007. Decision and Order at 2.

[2]Claimant worked for a number of employers following her September 2007 injury; however, Gulf was her last employer before she underwent knee surgery on January 26, 2009. Cl. Ex. 7.

The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption against Ceres because claimant established that her knee injury could have resulted from the fall at Ceres's facility in September 2007. Decision and Order at 8. He found that none of the medical opinions was sufficient to rebut the presumed work-relatedness of the injury. In further addressing rebuttal, the administrative law judge addressed Ceres's argument that claimant's injury was aggravated by her work for Gulf on January 12, 2009. He found that claimant worked for Gulf for four hours, her work was not of the type that would cause her knee condition to be aggravated, and there was no evidence of any traumatic incidents, pain, swelling, or aggravation associated with her work that day. Decision and Order at 11-13. The administrative law judge also credited Dr. Murphy's opinion that the torn meniscus, which required surgery, was related to the September 2007 fall, and Dr. Whitaker's opinion that claimant's work from September 29, 2007, through January 12, 2009, did not aggravate and worsen her condition or contribute to the need for the surgery. The administrative law judge found that neither doctor opined that claimant's last day of work aggravated her condition. Decision and Order at 14-19. Accordingly, the administrative law judge found that Gulf showed that claimant's employment on January 12, 2009, did not aggravate her left knee condition, and that Ceres did not prove the contrary, as a preponderance of the evidence established that claimant's condition resulted from the natural progression of her 2007 work injury. The administrative law judge thus concluded that Ceres is liable for benefits as the responsible employer. Decision and Order at 20-21. Ceres appeals this finding, and Gulf responds, urging affirmance. BRB No. 11-0227.

After the hearing and prior to rendering his decision on the merits, the administrative law judge issued an Order dated July 6, 2010, permitting Gulf to submit a post-hearing opinion of Dr. Whitaker which Ceres had not submitted into evidence and to which Ceres objected. The administrative law judge found that Ceres had waived any privilege attached to this letter and that it had a duty to supplement the discovery with this letter. Further, the administrative law judge denied Ceres's request to depose Dr. Whitaker, as Dr. Whitaker was Ceres's own expert and as he found that Ceres opted to conceal the report rather than comply with "due process procedures." Order at 5. The administrative law judge denied Ceres's motion for reconsideration, providing further reasons why Ceres was not entitled to have its motion granted. Ceres appeals, and Gulf responds, urging affirmance. BRB No. 11-0279.

Admission of Evidence/Due Process

Ceres first contends the administrative law judge erred in allowing the post-hearing admission of Gulf Exhibit 47. Ceres asserts that the administrative law judge denied it due process of law by allowing Gulf to submit the document when no discovery request had been made and by refusing to allow it to depose the author of the report or

submit rebuttal evidence. We reject Ceres's arguments and affirm the administrative law judge's Orders, as Ceres has shown no abuse of discretion in this case.

Gulf Exhibit 47 is a copy of the third page of a May 10, 2010, letter from Ceres's attorney to Dr. Whitaker, Ceres's expert, containing Dr. Whitaker's response to a question regarding the cause of claimant's condition.[3] In the letter, Ceres's counsel asked Dr. Whitaker whether he agreed with Dr. Murphy's opinion that claimant's work from September 29, 2007, to January 12, 2009, aggravated her knee condition and contributed to the need for surgery in January 2009.[4] On May 20, 2010, Dr. Whitaker responded. He checked "no" and explained:

> This can not be definitively stated. My impression is that the patella injury is what led to further surgery (arthroscopy) which would have led to Sx [surgery] for persistent symptoms regardless of her occupation.

Gulf Ex. 47. Ceres received this response on May 21, 2010. Subsequent to the hearing on May 25, 2010, Gulf moved to submit this letter into evidence. The administrative law judge granted Gulf's motion and denied Ceres's motion to depose Dr. Whitaker or submit a report it later obtained from him.

Dr. Whitaker first examined claimant on March 24, 2009, and his report dated March 25, 2009, was submitted into evidence by all three parties. Cl. Ex. 4; Emp. Ex. 19; Gulf Ex. 33. Dr. Whitaker indicated he would need the pictures from both the April 2007 surgery and the January 2009 surgery before he could render any opinion on the cause of claimant's knee condition. In his May 21, 2009, report to Ceres's nurse case manager, Dr. Whitaker stated that claimant's complaints were consistent with the pictures from the January 2009 surgery showing meniscus tears and a synovial fold. Cl. Ex. 4; Emp. Ex. 19; Gulf Ex. 34. Dr. Whitaker next assessed claimant on July 9, 2009. In his report dated July 10, 2009, he was concerned with the continued complaints of pain and her deteriorated condition, and he noted that claimant was scheduled to have a total knee replacement. Cl. Ex. 4; Emp. Ex. 27. On December 15, 2009, the nurse case manager sent Dr. Whitaker copies of pictures from claimant's 2007 surgery, at Ceres's counsel's request, asking him to render an opinion on aggravation/natural progression. Gulf Ex. 41. On December 23, 2009, Dr. Whitaker wrote that he had reviewed the photos and noted no significant pathology in April 2007 but there was additional pathology in January 2009 including meniscus issues that are not "wear and tear." He also stated that the problems with the patellofemoral joint and the chondral pathology were not simple

[3]The record does not reflect how Gulf obtained a copy of this document.

[4]This is not an accurate summary of Dr. Murphy's opinion. *See* discussion *infra*.

progressions of disease. Rather, he concluded that claimant's September 2007 fall aggravated her prior condition, and that the surgery and subsequent infection led to a rapid progression of her arthritic disease. Ceres did not submit either the December 15, 2009, request letter or the December 23, 2009, report into evidence, but claimant and Gulf did. Cl. Ex. 4; Gulf Ex. 42.

At the hearing, counsel for Ceres told the administrative law judge that Dr. Murphy had testified in his deposition that claimant's continued work was an aggravating factor, "[a]nd no doctors disagreed with that." Tr. at 39. The administrative law judge noted that this statement was made despite Ceres's counsel having received Dr. Whitaker's note, which showed disagreement with aggravation as a cause, four days before the hearing. Order on Recon. at 5; Order at 4. The administrative law judge concluded that it was wrong for Ceres to conceal this document, as it had submitted prior letters from Dr. Whitaker, in one of which the doctor acknowledged he could not render an opinion on the cause of claimant's condition without further information. The administrative law judge found that because the issue was one of causation raised by Ceres, it waived any privilege attached to this document, as the opinion rendered in the document is material to the issue, and Ceres cannot pick and choose which opinion of its expert it will use. Order at 2-3. Further, the administrative law judge found that Ceres had a duty to supplement Dr. Whitaker's expert opinion under Section 18.16(b)(2), 29 C.F.R. §18.16(b)(2). As Ceres did not fulfill its duty to supplement or file a protective order seeking to protect the document as attorney work product, the administrative law judge found that Ceres's decision to conceal the document meant it "elected to forego the due process procedures afforded by the Rules and proceed instead as though the document did not exist." Order at 5. Accordingly, the administrative law judge concluded that Ceres waived its right to depose the doctor when it opted to conceal, rather than address, the opinion letter.[5] *Id.*

Section 18.1(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules), 29 C.F.R. §18.1(a), provides that the Federal Rules of Civil Procedure (FRCP) apply in cases before the Office of Administrative Law Judges (OALJ) when the statute in issue, its implementing regulations, or the OALJ Rules do not provide for a particular situation.

[5]In its motion for reconsideration of the order, Ceres also moved to re-open the record to submit a June 29, 2010, letter, memorializing a conversation with Dr. Whitaker, and signed by Dr. Whitaker on July 6, 2010. The administrative law judge denied the motion to re-open the record and excluded Emp. Ex. 36. Decision and Order at 7 n.2; Order on Recon. at 5-6. He found that the letter is merely new documentation based on evidence that was available prior to the hearing, and there was no excuse for Ceres's failure to obtain this opinion from its expert prior to the hearing. Order on Recon. at 6.

Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989). There is no provision in the Act or its regulations specifically addressing the admission of evidence. However, Section 23(a) of the Act, 33 U.S.C. §923(a), states that in conducting a hearing, the administrative law judge is not bound by common law or statutory rules of evidence or procedure but may conduct the hearing "in such manner as to best ascertain the rights of the parties." *See also* 20 C.F.R. §702.339. Thus, the administrative law judge has great discretion concerning the admission of evidence, *Hughes v. Bethlehem Steel Corp*., 17 BRBS 153, 155 n.1 (1985), and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

Ceres first contends the letter in question is protected work product pursuant to FRCP 26(b)(4)(C).[6] The administrative law judge specifically found that Ceres waived this privilege because it identified Dr. Whitaker as its expert and submitted his May 21, 2009, opinion into evidence in lieu his testimony. As the administrative law judge found that the May 20, 2010, opinion addressed the very issue raised by Ceres, the cause of claimant's condition, he concluded that the letter cannot be protected by privilege. Order at 3; *see Cox v. Administrator U. S. Steel & Carnegie*, 17 F.3d 1386, *modified on other grounds on reh'g*, 30 F.3d 1347 (11th Cir. 1994).[7] The administrative law judge found that to allow Ceres to claim privilege would be to allow it to "rely upon portions of its expert's opinion that benefit it" rather than to require it to fully disclose earlier or later opinions that may shed light or add context to the issue at hand. Order at 3.

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[6]Rule 26(b)(4)(C) provides:

> (C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
>
> (i) relate to compensation for the expert's study or testimony;
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

[7]The doctrine is to be used as a shield, not a sword. *Cox*, 17 F.3d at 1417 (quoting *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987).

The administrative law judge also found that Ceres's reliance on *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982), was misplaced. Although *Sprague* also involved a doctor's answer written in response to an attorney's question, the doctor testified at the hearing in *Sprague*, and the administrative law judge therein found that the letter contained no additional information than what had been stated in testimony.[8] Here, however, Dr. Whitaker did not testify, so his opinion could be gleaned only from his reports and correspondence. It was, therefore, rational for the administrative law judge to have found that Ceres waived its right to consider the letter privileged work product, despite the fact that it may have been originally written in preparation for litigation, as the letter reflects Dr. Whitaker's opinion on the cause of claimant's condition. Ceres has not shown there was an abuse of discretion in finding the privilege waived. *See Oneida, Ltd. v. United States*, 43 Fed. Cl. 611 (1999) (core work product provided to a testifying expert is discoverable unless it has no bearing on opinion expert is likely to give); *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611 (D.N.J. 1989) (draft of doctor's report prepared by attorney and endorsed by doctor not protected work product).

Ceres also contends that, even if the letter was not privileged work product, it was not obligated to reveal the letter or submit it into evidence because there was no discovery request that covered this letter, as Gulf did not request discovery, and claimant's March 2009 discovery request was improperly labeled and did not encompass the letter. Ceres argues that it provided no answers to claimant's discovery request because discovery is not proper before the Office of Workers' Compensation Programs, and, thus, it was under no obligation to supplement what it had not provided. Ceres asserts that the system is adversarial and as there was no discovery request which covered the May 2010 letter, it was under no duty to offer a document which might hurt its case.

[8]In *Sprague*, the claimant sought access to a letter written by Dr. Dominici to the employer's attorney. She believed that the letter contained factual information about her husband's medical condition and was vital to establishing causation. She also believed it may have contained statements which would have provided a basis for impeaching Dr. Dominici's testimony. After reviewing the letter *in camera*, the court held that the letter was produced in anticipation of litigation and was privileged work product. It also held that neither of the claimant's assertions about the letter was true. Although the court did not address whether having the doctor testify constituted a waiver of the privilege as that issue was not previously developed, it held that the claimant obtained the substantial equivalent of the letter by virtue of Dr. Dominici's testimony and, thus, she did not establish a "substantial need" for the letter. Accordingly, the court affirmed the finding that the claimant was not entitled access to the letter which was work product prepared for litigation.

Contrary to Ceres's argument, the administrative law judge rationally found that it had a duty to supplement the evidence – whether or not there was an encompassing discovery request. Presuming claimant's March 2009 request covered Dr. Whitaker's letter, Ceres had a duty to supplement pursuant to 29 C.F.R. §18.16(b)(2). Section 18.16(b)(2) provides that if a party responds to a request for discovery, he is under a duty to supplement the response if he knows that the response is "no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." 29 C.F.R. §18.16(b)(2); *see* Order at 3-4. Thus, if Ceres responded to claimant's discovery request as the administrative law judge stated it did,[9] Ceres had a duty to amend its response with the letter it obtained which demonstrated an opinion different from one previously expressed. 29 C.F.R. §18.16(b)(2).

However, even if, as Ceres asserts, it did not respond to claimant's request for discovery, it had a duty to submit the letter under FRCP Rule 26, and the administrative law judge acknowledged this in his order. Order at 3 n.2. Rule 26(a) sets forth disclosures that are required even "without awaiting a discovery request." These include providing the other parties with the name and contact information "of each individual likely to have discoverable information" as well as a copy of the documents that will be used to support the claims or defenses made. Rule 26(a) requires a written report to be included with an expert witness's information, and the report must include "a complete statement of all opinions the witness will express and the basis and reasons for them." The administrative law judge found that Ceres submitted Dr. Whitaker's reports in lieu of his expert testimony at the hearing, thereby rendering "him the equivalent of a testifying medical expert." Order at 3 (citing *Richardson v. Perales*, 402 U.S. 389 (1971)). Rule 26(e)(1) requires supplemental information when disclosures have been made under Rule 26(a) and states:

> A party who has made a disclosure under Rule 26(a) – or who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its disclosure or response:
>
> (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

FRCP Rule 26(e)(1)(A). Thus, if employer's disclosure of Dr. Whitaker and his opinion was made pursuant to Rule 26(a), then Rule 26(e) requires a supplemental disclosure if the initial one was later found to be incomplete or incorrect and not otherwise known to

[9]This cannot be verified, as neither the request nor any response is in the record.

the other parties. FRCP Rule 26(e)(1)(A). As Dr. Whitaker's May 2010 opinion completed and clarified his December 2009 report, and as no other party was aware of this letter until Gulf discovered and submitted it, the administrative law judge properly admitted it into evidence.

Thus, although Dr. Whitaker's May 20, 2010, opinion was not available at the time of claimant's March 2009 discovery request, by virtue of either Rule 26(e) or Section 18.16(b)(2), Ceres had a duty to supplement Dr. Whitaker's opinion. Moreover, as the Act provides that an administrative law judge may conduct the hearing "in such manner as to best ascertain the rights of the parties," and as the administrative law judge is permitted to draw an adverse inference against a party who fails to submit evidence within its control, we hold that, based on the facts of this case, the administrative law judge rationally found that Ceres was required to supplement the record with Dr. Whitaker's May 2010 opinion on a material issue. 33 U.S.C. §923(a); *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516 (6th Cir. 2008); *see also Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982) (an employer had the claimant examined by its choice of physician and failed to submit doctor's report); 20 C.F.R. §702.339. Accordingly, we affirm the administrative law judge's decision to admit Gulf Exhibit 47 into evidence, as Ceres has not demonstrated an abuse of the administrative law judge's discretion. *See Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19 (S.D.N.Y. 1995) (a party cannot trim his duty of disclosure to suit his own view of what might be relevant to his adversary); *see also Lawyer Disciplinary Board v. Smoot*, __ S.E.2d __, No. 34724, 2010 WL 4679256 (W.Va. 2010) (attorney who intentionally submitted only part of a doctor's report to opposing party suffered sanctions for violating rules).

Ceres next contends the administrative law judge denied it due process by denying it the opportunity to submit rebuttal evidence or depose Dr. Whitaker post-hearing, as it did not have sufficient time after receiving Dr. Whitaker's opinion of May 20, 2010, to do so. The administrative law judge found that Ceres could have deposed or consulted with Dr. Whitaker at any time at its discretion. Because Ceres failed to supplement the record with Dr. Whitaker's pre-hearing May 2010 opinion, and because until Gulf obtained a copy of the letter, Ceres was the only one that knew of its existence and intended to conceal it, the administrative law judge found that Ceres, by failing to supplement or request a protective order, "elected to forego the due process procedures" and, hence, is not entitled to an "absolute" right to depose its expert. Order at 5. Further, on reconsideration, the administrative law judge denied Ceres's request to re-open the record for submission of Dr. Whitaker's June 9, 2010, endorsement of counsel's letter memorializing their discussion, which also addressed the cause of claimant's condition. Order on Recon. at 5-6.

On reconsideration, the administrative law judge clearly acknowledged his obligation to inquire fully into the issues of the case, 20 C.F.R. §702.338. However, he also acknowledged that "the duty to inquire is not boundless," and he found that Ceres's arguments in support of the submission of post-hearing evidence were unpersuasive. Order on Recon. at 7. Specifically, the administrative law judge cited *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987), wherein the Board held that it is not an abuse of discretion to deny a request to hold the record open where the employer failed to exercise due diligence in obtaining evidence prior to the hearing. As the administrative law judge found, Ceres long had access to Dr. Whitaker and could have deposed him or obtained further written reports clarifying his opinion at any time before the hearing. *See also Richardson*, 402 U.S. 389; *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989).

The administrative law judge's conclusion is rational. Dr. Whitaker's December 2009 opinion, rendered months before the hearing, suggested that claimant's work injury was the cause of her condition. Ceres could have sought clarification then. Moreover, Ceres had possession of the May 2010 letter in question and it did not request a post-hearing deposition until Gulf sought to admit the letter into evidence.[10] As Dr. Whitaker was Ceres's expert whom it could have deposed or obtained a clarifying opinion from at any time prior to the hearing, Ceres has not shown that the administrative law judge denied it due process or abused his discretion in denying it the opportunity to "rebut" its expert's opinion. *See generally Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Admin.*, 495 F.2d 975 (D.C. Cir. 1974); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Therefore, we affirm the administrative law judge's decision to deny Ceres's request to submit post-hearing evidence in "rebuttal" of its expert's statement.

[10]Ceres also asserts on appeal that the May 20, 2010, opinion is not contrary to any of Dr. Whitaker's earlier opinions, so it adds nothing to the case. If that is so, there would have been no need to conceal it or to seek post-hearing clarification.

Responsible Employer

Ceres contends the administrative law judge erred in finding it to be the responsible employer and in failing to find that claimant's condition was aggravated by her work between September 29, 2007, and January 12, 2009.[11] It argues that the administrative law judge failed to apply the Section 20(a) presumption against Gulf. Specifically, it argues that the presumption should have applied against Gulf first, as it was the most recent employer, pursuant to *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010). We reject Ceres's contention of error.

In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling condition is the result of the natural progression or 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 prior injury is compensable and the claimant's employer at that time 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 employer is responsible. *See, e.g., 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). Thus, in a traumatic injury case with successive employers, each employer bears the burden of establishing that it is not responsible, *i.e.*, the first employer must prove a subsequent aggravation and the second employer must prove the condition is the result of a natural progression in order to avoid liability. *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997); *see 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) (3d Cir. 2002); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

[11]A review of claimant's employment records establishes that claimant worked for multiple employers following her September 2007 injury. Cl. Ex. 7. However, prior to working for Gulf on January 12, 2009, claimant worked for Ceres on January 6, 2009. Even though Ceres asserts that claimant's continued employment over the years aggravated her knee condition, only aggravation from her work on January 12, 2009, with Gulf, could relieve Ceres of liability.

After applying the Section 20(a) presumption against Ceres, and in addressing aggravation, the administrative law judge found that Ceres may not invoke the Section 20(a) presumption against Gulf pursuant to *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992), and *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997). Although he did not apply Section 20(a) to Gulf, the administrative law judge stated that the evidence related to Gulf would be considered first, and he set forth the applicable law and addressed all the relevant evidence. Decision and Order at 10-11.[12] The administrative law judge found that the brevity of claimant's last day at Gulf, alone, was not "illuminating" as to the cause of her condition. Thus, he was unwilling to relieve Gulf of liability on this basis. He also declined to adopt the premise that Ceres's denial of treatment automatically rendered claimant's condition the result of a natural progression and not an aggravating injury. Decision and Order at 11-13. However, the administrative law judge found credible claimant's testimony that, on January 12, 2009, while driving cars off ships for Gulf, she suffered no incident, accident, discomfort, pain or swelling. Claimant also credibly testified that driving was not the type of work which caused her discomfort and pain; rather, it was the spotter work which caused the most pain, and that work was not performed for Gulf but had been performed for Ceres. The administrative law judge also credited Dr. Murphy who specifically stated that the meniscus tear was directly attributable to the September 28, 2007, injury and would not have healed without surgery. Further, although Dr. Murphy stated that claimant's post-injury work "aggravated" her condition, the administrative law judge found that Dr. Murphy reasonably explained that continued work could have caused pain because of the way the torn meniscus was rubbing; however, the rubbing did not cause additional damage and there was no evidence of "wear and tear" damage. The administrative law judge credited Dr. Murphy's statement that he performed surgery to repair the damaged meniscus and found there was also chondromalacia damage but that this was the result of a previous problem, and not anything additional caused by work after the September 2007 injury. Emp. Ex. 31 at 12, 17-18, 26-31. Moreover, the administrative law judge

[12]The administrative law judge cited *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007), for the rule that each employer bears the burden of showing that it did not last expose the employee to injurious stimuli and that this is accomplished by applying the burden of proof sequentially in reverse chronological order. However, *McAllister*, which actually provided that employers must simultaneously establish they are not liable, but which was reversed by *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010), applies to cases involving occupational diseases and not to traumatic injuries. The United States Court of Appeals for the Ninth Circuit held that the claimant in an occupational disease case must invoke the Section 20(a) presumption against all employers against whom a claim is filed, and the administrative law judge must determine which employer is liable, in sequential order, beginning with the last employer.

found that neither Dr. Murphy nor Dr. Whitaker opined that claimant's four hours of work on January 12, 2009, contributed to the need for surgery or worsened her condition. Decision and Order at 14-15. Dr. Whitaker stated that claimant would have needed the surgery for her persistent symptoms regardless of her work. Gulf Ex. 47.

The administrative law judge found that the record as a whole "fails to demonstrate" that claimant had an actual worsening of her knee condition due to her employment on January 12, 2009. Decision and Order at 19-20. He also found that there was no evidence of pain flare-up on that last day of work and, thus, that her employment with Gulf did not cause an aggravation of her condition. Consequently, the administrative law judge concluded that the preponderance of the evidence shows that claimant suffered from complications related to the natural progression of her untreated torn meniscus, caused by the September 2007 injury, making Ceres the responsible employer. Decision and Order at 20.

Substantial evidence of record supports the administrative law judge's conclusion. *See Marinette Marine*, 431 F.3d 1032, 39 BRBS 82(CRT). The administrative law judge rationally credited claimant's testimony and the reports of Drs. Murphy and Whitaker in support of his findings that claimant's left knee condition was caused by the natural progression of the injury at Ceres and that nothing occurred at Gulf on January 12, 2009, that aggravated or exacerbated claimant's knee condition or her need for surgery.[13] *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *Siminski*, 35 BRBS 136; *McKnight*, 32 BRBS 165. Therefore, we affirm the administrative law judge's finding that Ceres is the responsible employer. *McKnight*, 32 BRBS 165.

[13]Contrary to Ceres's argument, *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), is distinguishable, as the medical evidence in that case established that the claimant's single day of employment prior to a pre-scheduled surgery caused a minor but permanent increase in disability as well as in the need for surgery.

Accordingly, the administrative law judge's Decision and Order, the Order Granting Gulf Terminal's Motion to Admit Post Hearing Trial Exhibit and Denying Ceres Marine Terminal's Motion to Depose Witness, and the Order Denying Motion to Reconsider are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge