BRB Nos. 12-0209
and 12-0209A

FRANCES BARRETTO	)	
	)	
Claimant- Cross-Petitioner	)	
	)	
v.	)	
	)	
PORTS AMERICA	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY INCORPORATED	)	DATE ISSUED: 01/24/2013
	)	
Employer/Carrier- Petitioners Cross-Respondents	)	
	)	
PACIFIC RO-RO / WALLENIUS / WILHELMSON	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION c/o AMERICA EQUITY RISK SERVICES	)	
	)	
Employer/Carrier- Respondents Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Denying Compensation of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Henry M. Adelson, Camarillo, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for Ports America and Ports Insurance Company.

Katherine F. Theofel, James E. Chapman, and Jerry L. Shindelbower (Finnegan, Marks, Theofel & Desmond P.C.), San Francisco, California, for Pacific Ro-Ro and American Longshore Mutual Association.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Ports America appeals, and claimant cross-appeals, the Decision and Order Denying Compensation (2010-LHC-01508) of Administrative Law Judge Richard M. Clark 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 injured her back while working for Pacific Ro-Ro (Pac Ro) on October 17, 2007, when she slipped and fell down a stairway. Tr. at 53, 87-88. The following day, Dr. Rosenberg released claimant to work without restrictions. PAX 20 at 17. Claimant returned to work, but suffered continuous neck, shoulder, and back pain. On August 28, 2008, at a follow-up consultation for her continuing pain, Dr. Nelson recommended surgery, but claimant declined surgery at that time. PRX A at 5; PAX 26 at 34, 37. Claimant continued to work through the fall of 2008, despite her back pain.

On October 6, 2008, claimant worked for Ports America operating a forklift inside the hold of a ship. Claimant testified that, by the end of her shift that day, her back pain

had worsened; she has not worked since that day.[1] PRX B at 5; Tr. at 61-67, 85. Claimant filed claims against both employers under the Act and under the California Workers' Compensation Act.

On February 23, 2010, pursuant to a Joint Stipulation and Order issued by the California Workers' Compensation Appeals Board, Pac Ro, "without admitting liability and reserving all defenses," authorized claimant's back surgery and agreed to pay her temporary total disability benefits at the state weekly compensation rate of $881.66 from October 15, 2009, until she "is declared permanent and stationary."[2] PAX 17.

On June 3, 2011, a week before the hearing under the Act, claimant and Ports America entered into a Section 8(i), 33 U.S.C. §908(i), settlement, wherein Ports America agreed to pay claimant $145,000 for disability compensation and $5,000 for medical benefits to resolve her claim.[3] Nevertheless, the hearing proceeded because Pac Ro sought reimbursement from Ports America for the payments it made to claimant under state law if it were found not to be the responsible employer under the Act. Although the parties stipulated that claimant had an employment relationship with both Pac Ro and Ports America, that she suffered a work-related injury, and that she is entitled to compensation and medical benefits under the Act for her disability, they disputed whether an aggravating injury occurred on October 6, 2008, while claimant worked for Ports America, and whether Pac Ro should be reimbursed for its prior payments.

The administrative law judge found that claimant sustained an aggravating injury with Ports America on October 6, 2008, such that Ports America is the responsible employer and is liable for all compensation and benefits subsequent to October 6, 2008. Decision and Order at 12-16. Because Ports America and claimant entered into a Section 8(i) settlement agreement, the administrative law judge did not address the nature and extent of claimant's disability, as he found Ports America's liability was discharged by the approved settlement. *Id*. at 16. However, the administrative law judge determined that Ports America must reimburse Pac Ro for disability compensation and medical benefits it paid to claimant under the state law subsequent to October 6, 2008. *Id*. at 18.

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[1]Dr. Nelson performed back surgery on claimant on April 19, 2010. PRX C at 4; Tr. at 57. He opined that claimant's condition reached maximum medical improvement on April 22, 2011. PRX C at 4.

[2]Claimant's compensation under the Act would have been paid at the rate of $1,160.36 per week, the maximum rate in effect on the date of her October 17, 2007, injury with Pac Ro. Dir. Br. at 4 n.3; 33 U.S.C. §906(b), (c).

[3]The administrative law judge approved the Section 8(i) settlement between claimant and Ports America on June 28, 2011.

Ports America appeals the administrative law judge's reimbursement order, contending he lacks authority under the Act to order reimbursement in this case. Claimant cross-appeals, contending that the administrative law judge erred in finding Ports America to be the responsible employer under the Act, and in failing to address claimant's right to future medical care under Section 7 of the Act, 33 U.S.C. §907(a). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reverse the administrative law judge's reimbursement order.[4] Pac Ro replies to the Director's response, urging the Board to affirm the administrative law judge's findings that Ports America is the responsible employer, and that Pac Ro is entitled to reimbursement from Ports America. Claimant replies to Pac Ro's reply, addressing only Pac Ro's obligation to abide by the state workers' compensation stipulation order and to continue paying medical benefits.

We shall first address claimant's cross-appeal. Claimant contends the administrative law judge erred in finding Ports America to be the responsible employer. Specifically, claimant asserts the administrative law judge erred in finding that claimant suffered an aggravation of her prior back condition on October 6, 2008. She contends her condition is the result of the natural progression of her October 17, 2007, injury while working for Pac Ro. We disagree.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom.[5] *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); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F. App'x 640 (9th Cir. 2010). An aggravation need not change the claimant's underlying pathology. *Price*, 339 F.3d 1102, 37 BRBS

[4]The Director declined to offer her position on the responsible employer issue. In a footnote in her brief, the Director summarily agrees with claimant that the case should be remanded for findings regarding claimant's entitlement to future medical care under Section 7.

[5]Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *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); *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986).

89(CRT); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *see also Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If a claimant's work results in an aggravation of her symptoms, that is sufficient to constitute a compensable injury, and the employer and carrier at the time of the work events resulting in this aggravation are responsible for any resulting disability. *See, e.g., Delaware River Stevedores v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita*, 799 F.2d 1308. In this case, the evidence credited by the administrative law judge constitutes substantial evidence supporting the finding that claimant's symptoms were aggravated by her work for Ports America on October 6, 2008. *See* PRX C at 3-4, 8, 11-12 (Dr. Nelson's opinon); PRX D at 21 (Dr. Delman's opinion). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the finding that Ports America is the responsible employer under the Act.[6] *Foundation Constructors*, 950 F.3d at 624-625, 25 BRBS at 75(CRT).

Claimant also asserts that the administrative law judge failed to address her right to future medical care under Section 7 of the Act, arguing that Pac Ro should be held liable for medical benefits, given her settlement agreement with Ports America and Pac Ro's continuing responsibility under the California stipulation order. We reject claimant's assertion. Ports America, the responsible employer under the Act, settled with claimant, and its liability for further disability and medical benefits under the Act has been discharged. 33 U.S.C. §908(i)(3); *see Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71(1989); *see generally Sears v. Norquest-Seafoods*, 40 BRBS 51 (2006). The controlling law of the Ninth Circuit makes clear that the imposition of liability on a later employer through application of the aggravation rule immunizes an earlier employer from liability for any combined disability and for medical expenses incurred after the subsequent injury. *See, e.g., Price*, 339 F.3d at 1104-1105, 39 BRBS at 90(CRT); *Kelaita*, 799 F.2d at 1310; *Lopez*, 39 BRBS at 91-92. Pac Ro is not the responsible employer under the Act, and thus it cannot be held liable for future medical care under the Act. *Id*. To the extent claimant argues Pac Ro has continuing liability under state law, she must pursue this contention in the state forum; the Board and the administrative law judge are without authority to rule on the implications of the state order. *See generally Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 462, 35 BRBS 92, 98(CRT) (5th Cir. 2001) (administrative law judge's authority is limited to adjudicating only those issues that are "integral to deciding the compensation claim").

[6]We also affirm the administrative law judge's finding that the settlement with Ports America discharged its liability for further disability and medical benefits under the Act as the settlement was not appealed and is final.

Finally, we address Ports America's challenge to the administrative law judge's order that it must reimburse Pac Ro for benefits it paid claimant under California workers' compensation law. The administrative law judge found that Section 3(e) of the Act, 33 U.S.C. §903(e), requires that Ports America reimburse Pac Ro "because, pursuant to the credit doctrine, Pac Ro's payments to [c]laimant 'shall be credited' against zero, its liability in this case." Decision and Order at 18. The administrative law judge further explained that, pursuant to Section 19 of the Act, 33 U.S.C. §919, as well as the decisions in *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *modified in part on recon.*, 40 BRBS 1 (2005), and *Total Marine Services, Inc. v. Director, OWCP [Arabie]*, 87 F.3d 774, 30 BRBS 62(CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996), he was authorized to order reimbursement because "a sufficient nexus exists between [c]laimant's compensation claim and Pac Ro's request for reimbursement because the issue of reimbursement depends on the result of [c]laimant's compensation claim against Pac Ro." *Id*. at 17. Ports America and the Director assert that the administrative law judge erred in ordering reimbursement in this case. We agree.

Section 3(e) provides that:

> Nothwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law . . . shall be credited *against any liability imposed by this chapter*.

33 U.S.C §903(e) (emphasis added). As the plain language of Section 3(e) provides a credit against liability imposed under the Act and does not address reimbursements to non-liable employers, Section 3(e) does not provide the statutory authority for Ports America to reimburse Pac Ro for the benefits it paid claimant. As Pac Ro has no liability under the Act, Section 3(e) cannot apply to extend a credit to it. *See generally D'Errico v. General Dynamics Corp.*, 996 F.2d 205, 27 BRBS 24(CRT) (1st Cir. 1993); *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992; *Omar v. Al Masar Trans. Co.*, 46 BRBS 21 (2012); *Mabile v. Swiftshops, Inc.*, 38 BRBS 19 (2004)(no credit to an employer when it has no liability under the Act). As Section 3(e) is wholly inapplicable to this case, the administrative law judge erred in relying on it to order Ports America to reimburse Pac Ro.[7]

In addition, neither Section 19(a) nor applicable case precedent authorizes reimbursement in this case. Section 19(a) confers authority on an administrative law judge to hear and determine all "questions in respect of [a] claim [filed under the Act]."

[7]The Ninth Circuit's decision in *E.P. Paup Co. v. Director, OWCP [McDougall]*, 999 F.2d 1341, 1351, 27 BRBS 41, 50(CRT) (9th Cir. 1993), is distinguishable as it involved a Washington state statutory reimbursement provision in a non-concurrent jurisdiction state.

33 U.S.C §919(a). Thus, an administrative law judge's authority is limited to adjudicating only those issues "invol[ving] the claimant's entitlement to benefits or the question who, under the LHWCA, is responsible for paying those benefits." *See Ricks*, 261 F.3d at 462-63, 35 BRBS at 97-98(CRT).[8] Here, because Ports America and Pac Ro stipulated that claimant is entitled to benefits under the Act, the only question before the administrative law judge was which employer is liable for payment of those benefits. The administrative law judge resolved this question by applying the last employer rule, under which he rationally found Ports America liable. On the facts of this case, no further questions in respect of claimant's claim existed.

Case precedent recognizes an administrative law judge's authority to order a responsible employer to reimburse a non-liable employer for benefits it erroneously paid. *Arabie*, 87 F.3d 774, 30 BRBS 62(CRT); *Schuchardt*, 40 BRBS 1; *Kirkpatrick v. B.B. I. Inc.*, 39 BRBS 69 (2005). These cases are distinguishable from this case, however, because all benefits paid by the non-liable employers were paid under the Act, and, thus, were "questions in respect of [the] claim[s]" under Section 19(a). *Id.* As Pac Ro paid benefits under only the California law, pursuant to a stipulated order issued by the California Worker's Compensation Appeals Board, any question involving reimbursement of those benefits is, exclusively, a state law issue to be addressed by that forum.[9] *See Ricks*, 261 F.3d at 462-63, 35 BRBS at 97-98(CRT). We, therefore, reverse the administrative law judge's order that Ports America reimburse Pac Ro.

[8]In *Ricks*, the United States Court of Appeals for the Fifth Circuit determined that an administrative law judge exceeded his authority under Section 19(a) by ordering a lending employer to reimburse the borrowing/liable employer for the benefits it was obligated to pay claimant under the Act, pursuant to an indemnity agreement between the employers, because such contract dispute was not "in respect of" the claim under the Act. *Ricks*, 261 F.3d at 463, 35 BRBS at 97-98(CRT); *see also Equitable Equipment Co. v. Director, OWCP [Jourdan]*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999), *aff'g* 32 BRBS 200 (1998).

[9]Moreover, the reimbursement order assumes that Pac Ro has no liability to claimant under the state act, which may not be the case. The authority to resolve this issue rests only with the state forum.

Accordingly, the administrative law judge's order that Ports America reimburse Pac Ro is reversed. In all other respects, the administrative law judge's Decision and Order Denying Compensation is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge