BRB No. 92-1677

JOHN SELVAGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RYAN-WALSH STEVEDORING COMPANY	)	
	)	
and	)	
	)	
EMPLOYERS NATIONAL INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
I.T.O. CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Marcus J. Poulliard (Seelig, Cosse', Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

Robert C. Leininger, Metairie, Louisiana, for Ryan-Walsh Stevedoring Company and Employer's National Insurance Company.

Cornelius V. Gallagher (Linden & Gallagher), New York, New York, for I.T.O Corporation.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

I.T.O. Corporation (I.T.O.) appeals the Decision and Order (91-LHC-0425, 0426) of Administrative Law Judge Kenneth A. Jennings awarding benefits 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On January 27, 1986, while working as a flagman for Ryan-Walsh Stevedoring Company (hereinafter Ryan-Walsh), claimant tripped on an elevated twist lock, hurting his knees, elbows and back. Claimant completed work that day and worked for two more days, at which time he began to experience tightening and stiffness in his back and also trouble bending. He reported these symptoms to his foreman who sent him to Waterfront Employment for therapy. Claimant was later sent to see Dr. Axelrod, who excused claimant from work for 2-3 weeks. Hearing Transcript at 24-25.

Claimant testified that although he returned to work as a flagman, his back problems persisted. Claimant's foreman at that time, Mr. Cole, accommodated claimant by allowing him to perform only those activities which claimant felt he was capable of completing and asked the remaining members of the crew to "pick up the slack." When his back problems persisted, claimant returned to Dr. Axelrod, who referred him to Dr. Soboloff. Hearing Transcript at 25-26. In a report dated February 25, 1986, Dr. Soboloff diagnosed a moderate lumbosacral strain with evidence of a contusion and a low grade synovitis of the right knee. Dr. Soboloff administered medication and referred claimant back to Dr. Axelrod for physical therapy for 1 to 2 weeks, indicating that "at the discretion of Dr. Axelrod, claimant can be returned to gainful employment." C-1; I-2. In a report dated March 12, 1986, Dr. Soboloff indicated that although claimant was improving, his knee continued to bother him. Dr. Soboloff prescribed one week of physical therapy after which claimant was released to return to work for a three week trial. C-2; RW-14. Upon claimant's return to Dr. Axelrod's office, he was completely discharged from treatment and allowed to return to work without restriction by Dr. Ewin. RW-15. Claimant did not return to work until March 25, 1986 after which he worked continuously until mid-August, 1986. I-11; RW-15.

On August 18, 1986, claimant was employed by I.T.O. and was assigned to a ship's hold throwing sacks, a job he had not performed since prior to his January 27, 1986, injury. Claimant testified that he aggravated his back performing this duty, and that he completed the day and began to work the next day, but could not complete work the following day because of continued back pain. Hearing Transcript at 29-30. The record indicates that claimant saw Dr. Soboloff on August 29, 1986 and reported the August 18th incident. Dr. Soboloff opined that claimant could return to the duties of a flagman, hook-on man, or a forklift operator, but should not be required to work in the hold of a ship. Hearing Transcript at 30-31; I-5; C-5. Although claimant attempted to resume his duties as a flagman, claimant indicated that he was unable to do so because his back continued to bother him. Thereafter, the record reflects that claimant worked only sporadically. Shortly after the August 1986, incident, in September 1986, claimant experienced back pain while operating a robot for Ryan-Walsh, and later on November 1987, while performing lifting. On January 3, 1989, when

Dr. Soboloff became ill, claimant was examined by Dr. Cary who diagnosed an aggravation of a pre-existing lumbosacral condition for which claimant had been treated by Dr. Soboloff and a fresh lumbosacral strain superimposed on very minimal degenerative changes compatible with age. C-6; W-16.

Dr. Hoerner, who became claimant's physician of choice in 1987 had an EMG and nerve conduction study performed on September 1, 1987, which revealed a questionable delayed left heel reflex which he felt could be secondary to a left S-1 nerve root lesion. C-8, C-12. Claimant saw Dr. Hoerner again on October 12, 1987, and concluded that claimant could return to light duty work but should avoid heavy lifting. C-8. Claimant saw Dr. Hoerner again on November 2, 1987, reporting that he had returned to work; however, he was required to lift some sacks which caused his back pain to become aggravated. Dr. Hoerner advised claimant to continue with exercises and medication and indicated that claimant could return to light work, but should avoid heavy lifting. C-8. A November 30, 1987, MRI revealed a degenerative protruding disk at L4-L5, with some herniation noted at L5-S1. C-13. Ryan-Walsh voluntarily paid claimant temporary total disability from February 24, 1986 until March 24, 1986 and a portion of claimant's medical expenses. Claimant, who has not returned to gainful employment since the November 30, 1987, MRI, filed claims against both Ryan-Walsh and I.T.O. seeking permanent total disability compensation.

Although Ryan-Walsh stipulated that claimant sustained an injury while working in its employ on January 27, 1986, the issues of whether claimant sustained an injury while working for I.T.O. on August 18, 1986, the nature and extent of claimant's disability, medical benefits, the responsible employer, and entitlement to 33 U.S.C. §908(f) relief remained in dispute. The administrative law judge determined that claimant sustained a work-related aggravation of the January 27, 1986, injury with Ryan-Walsh while throwing sacks for I.T.O. on August 18, 1986, and that the subsequent back problems he experienced thereafter in September and November 1987 were merely exacerbations of that injury. Accordingly, the administrative law judge determined that pursuant to the aggravation rule, I.T.O. was liable for all disability benefits and medical expenses subsequent to the August 19, 1986, aggravating injury. Based on wage records submitted by claimant, and the parties' agreement that claimant's condition did not reach maximum medical improvement until December 11, 1989, the administrative law judge determined that Ryan-Walsh's liability was limited to temporary partial disability from January 28, 1986 until the August 18, 1986, injury based on the difference between his $697.05 pre-injury average weekly wage and his post-injury wage-earning capacity of $592 per week and medical expenses incurred during this same period. With respect to I.T.O.'s liability, the administrative law judge determined that although Dr. Hoerner's testimony established that claimant is no longer capable of performing his former work, claimant was limited to permanent partial disability inasmuch as I.T.O.'s vocational expert had identified the availability of suitable alternate employment which paid an average of $4.48 per hour and claimant had not exhibited diligence in seeking alternate work. Accordingly, I.T.O. was held liable for temporary total disability from August 19, 1986 until December 11, 1989, and permanent partial disability benefits thereafter based on the difference between his $687.05 average weekly wage and the post-injury wage-earning capacity established by the vocational testimony of $179.20 per week. In addition, I.T.O. was awarded Section 8(f) relief.

I.T.O. appeals the administrative law judge's determination that it is liable for claimant's permanent disability benefits, arguing that the August 18, 1986, injury was merely a temporary aggravation of the January 27, 1986 injury, and that claimant's permanent disability is the result of a series of aggravations of the January 27, 1986, injury after his return to work in September 1986, the last of which occurred on or about November 2, 1987, while claimant was working for Ryan-Walsh. I.T.O. further contends that the administrative law judge erred in ordering I.T.O. to compensate claimant on the basis of an average weekly wage of $697.05 inasmuch as the parties stipulated that claimant had an average weekly wage of $592 in the 52-week period prior to the August 18, 1986, work injury. Ryan-Walsh responds that I.T.O.'s argument regarding liability for claimant's permanent disability compensation should be summarily dismissed because it has failed to raise an appealable issue or alternatively that the administrative law judge's findings regarding I.T.O.'s liability should be affirmed. Claimant also responds, urging affirmance.

After review of the administrative law judge's Decision and Order in light of the record evidence, we affirm the administrative law judge's determination that I.T.O. is responsible for claimant's permanent disability benefits. In allocating liability among successive employers and carriers in the case of multiple or cumulative traumatic injuries, if the disability resulted from the natural progression of the initial injury and would have occurred notwithstanding the subsequent injury, then employer at the time of the initial injury is liable for the entire resultant disability. If, however, claimant sustains an aggravation of the initial injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *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); *Lopez v. Southern Stevedores,* 23 BRBS 295 (1990).

In the present case, the administrative law judge rationally found that claimant sustained an aggravation of the January 27, 1986, work injury on August 18, 1986 based on the sharp decline reflected in claimant's wage records and claimant's sporadic employment history thereafter. I.T.O. argues that the administrative law judge's reliance on the difference between claimant's earnings after the January 1986 accident and the August 1986 accident is misplaced because claimant's reduction in wages after the August 1986 aggravation was the direct result of claimant's inability to obtain informal concessions from his gang and not the result of increased symptoms or objective findings referable to the August 1986 aggravation. We reject this argument as the administrative law judge considered and rationally determined based on testimony provided by claimant, Hearing Transcript at 43-44, as well as the medical opinion of Dr. Hoerner, *see* discussion *infra*, that claimant's inability to fully return to work after the August 18, 1986 incident was due to his physical impairment as well as a change to a less lenient foreman and crew.[1]

I.T.O.'s arguments that claimant's permanent disability is attributable to subsequent

[1]Although I.T.O. argues that the only reason claimant was able to have such high earnings between January 1986 and August 1986 was because of accommodations made by his prior foreman, the record reflects that claimant's foreman died in April 1986. Hearing Transcript at 28.

aggravations after he returned to work following the August 18, 1986, work injury is also rejected. The administrative law judge reasonably determined that the pain episodes claimant subsequently experienced while operating a robot in September 1986 and while lifting on November 2, 1987 were irrelevant to the responsible employer determination based on the fact that Dr. Hoerner, who was aware of these incidents, nonetheless attributed claimant's disability only to the January 27, 1986 and August 18, 1986, injuries. Decision and Order at 14-17; RW-10, dep. at 39-40. Moreover, the administrative law judge rationally deduced that because the EMG and nerve conduction studies which Dr. Hoerner performed on September 1, 1987 demonstrated a possible delayed left heel reflex, which Dr. Hoerner indicated was consistent with the protruding and herniated disks subsequently revealed on the November 30, 1987, MRI, the damage to claimant's back preceded the November 2, 1987, incident. Although Dr. Cary opined that each of the incidents was a self-limiting aggravation of a pre-existing degenerative condition related to claimant's prior December 1985 work injury with Ryan-Walsh, and that after he recovered from the August 1986 incident, his condition returned to what it was prior thereto, the administrative law judge acted within his discretion in determining that Dr. Cary's opinion was inconsistent with the record and therefore incredible. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). Inasmuch as Dr. Hoerner's opinion in conjunction with claimant's wage records provide substantial evidence to support the administrative law judge's finding that claimant sustained an aggravating injury while working for I.T.O. on August 18, 1986, we reject I.T.O.'s responsible employer argument and affirm the administrative law judge's determination that I.T.O. is liable for claimant's disability and medical benefits as of that date. *See generally Kelaita*, 799 F.2d at 1308 (1984).

While I.T.O. is the employer responsible for claimant's disability due to and following the August 1986 injury, we agree with I.T.O. that it is not liable for benefits based on claimant's average weekly wage in the 52-week period preceding January 27, 1986. Where claimant sustains an aggravation of a prior injury, the aggravation is a new injury, and claimant's average weekly wage is calculated at that time. *See Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). In the present case, the administrative law judge accepted the parties' stipulations that claimant's average weekly wage was $697.05 in the year preceding January 1986 and $592 in the year preceding August 1986. He found that claimant sustained a loss in wage-earning capacity in the period between the two injuries, based on this difference, and held Ryan-Walsh liable for temporary partial disability benefits based on this loss. After finding I.T.O. liable for benefits following the August 1986 injury, the administrative law judge terminated Ryan-Walsh's liability, but held I.T.O. liable based on the average weekly wage at the time of the first injury. I.T.O., however, is liable for benefits based on claimant's average weekly wage at the time of the second injury, $592. According to the administrative law judge's findings, this average weekly wage was reduced due to economic loss from the first injury. In such a case, the first employer, Ryan-Walsh, may remain concurrently liable for any permanent loss in wage-earning capacity resulting from the first injury. *See generally I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989); *Hastings*, 628 F.2d at 85, 14 BRBS at 345. The case is remanded for reconsideration of this issue by the administrative law judge.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and modified in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge