BRB No. 93-0937

PATRICK JON ABARE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY RESALE ACTIVITY/ NAVAL STATION	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Arthur Roth, Miami, Florida, for claimant.

Eugene L. Chrzanowkski (Littler, Mendelson, Fastiff & Tichy), Long Beach, California, for employer/carrier.[1]

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2746) of Administrative Law Judge Robert G. Mahony 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 findings of fact and the 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 November 25, 1987, claimant suffered a left knee injury while working for employer as a maintenance worker. Claimant received treatment by Drs. Kent and Thornton. Dr. Kent found that

[1]By letter dated August 16, 1995, counsel for employer/carrier advised the Board that Crawford and Company had replaced Gates McDonald and Company as the third party administrator for employer in this matter.

claimant reached maximum medical improvement with a 5 percent permanent partial impairment on January 16, 1989, and Dr. Thornton found that claimant reached maximum medical improvement with a 15 percent permanent impairment of the left knee on February 4, 1989. Employer's Exhibits 7, 15. Dr. Kent opined on January 16, 1989 that claimant was able to return to his usual and customary occupational duties with employer. Employer's Exhibit 15. Dr. Thornton, however, found on February 24, 1989 that claimant was unable to perform his usual work duties as he was precluded from repetitive bending, squatting, climbing, and prolonged standing and walking. Employer's Exhibit 8. Employer voluntarily paid claimant temporary total disability compensation from the date of his injury until February 25, 1989.

After relocating to Florida, claimant began working as a yardman with Scotty's Lumber Yard in November 1989, which required that he help customers, load vehicles, stock materials, run a fork lift, and perform general maintenance tasks; claimant conceded this position did not fit within Dr. Thornton's recommended restrictions. Claimant sought additional treatment from Drs. Lockwood and Benevides subsequent to his employment at Scotty's. On May 14, 1990, Dr. Benevides found that claimant was working at Scotty's doing lifting and climbing, and that the pain in his knee was aggravated by excessive activity, especially climbing. Claimant's Exhibit 4. In October 1990, Dr. Benevides referred claimant to Dr. Casola who performed a diagnostic arthroscopy which revealed Grade III chrondomalacia of the lateral femoral condyle and medial patella facet. Claimant resigned from the position in August 1990 under physician's orders. Claimant's Exhibit 25. On February 1, 1991, Dr. Benevides released claimant to return to work and on April 29, 1991, rated claimant as having a 14 percent impairment of the left lower extremity or a 6 percent whole body impairment. On February 11, 1992, however, Dr. Benevides opined that claimant suffered a 46 percent impairment of the left lower extremity, or a 16 percent whole body impairment. Claimant's Exhibit 24; Employer's Exhibit 13.

Claimant sought total disability compensation from the date of injury through February 1992, with the exception of the period of his employment with Scotty's, continuing medical expenses, and permanent partial disability compensation for a 46 percent permanent partial impairment based on the February 1992 opinion of Dr. Benevides. Employer responded that claimant's scheduled award of permanent disability under the schedule should not exceed 15 percent, that the claim for additional total disability compensation should be denied, and that it is not liable for Dr. Casola's surgical expenses because the surgery was necessitated by an intervening cause, *i.e.*, an aggravation of his condition by his work at Scotty's.

In his Decision and Order, the administrative law judge, finding Dr. Thornton's opinion more persuasive than that of Drs. Kent or Benevides, awarded claimant permanent partial disability compensation for a 15 percent permanent impairment of the left leg under the schedule, 33 U.S.C. §908(c)(2),(19), commencing February 4, 1989. Crediting Dr. Benevides's May 14, 1990, opinion and claimant's testimony, the administrative law judge determined that claimant was not entitled to additional total disability compensation or medical expenses incurred after November 1989 payable by employer as the deterioration of claimant's knee condition thereafter was due to the subsequent aggravation by claimant's employment at Scotty's and not the natural progression of the initial work

injury. By Order dated December 21, 1992, the administrative law judge denied claimant's motion for reconsideration.

Claimant appeals, arguing that the administrative law judge erred in determining that his work at Scotty's was an intervening cause which served to relieve employer of liability where there is no evidence establishing that claimant suffered an accidental injury at Scotty's and where claimant's subsequent employment performing work outside his restrictions was occasioned by economic necessity. Claimant asserts that employer should be held liable for temporary total disability compensation from at least August 1990, and probably from May 1989 until October 1991, and future causally-related medical care. Employer responds, urging affirmance.

We initially reject claimant's contention that the administrative law judge erred in finding that employer is not liable for medical expenses or disability compensation subsequent to November 1989 based on the absence of a subsequent accidental injury occurring while claimant was working for Scotty's. It is well-established under the Act that in determining employer's liability in the case of multiple traumatic injuries, aggravations of the primary injury caused by working conditions existing in subsequent employment constitute new injuries; the previous employer is not liable for disability attributable to these subsequent aggravations. *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *see also Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), *aff'g Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984). Thus, there is no need for a new accidental injury, where, as here, there is evidence that working conditions in the subsequent employment aggravated the prior injury.[2]

In the present case, the administrative law judge concluded that claimant aggravated his prior injury based on Dr. Benevides's May 14, 1990, opinion that claimant's duties at Scotty's included lifting and climbing, and that the pain claimant experienced in his knee is aggravated by excessive activity, especially climbing. Claimant's Exhibit 4. In addition, the administrative law judge credited claimant's hearing testimony which indicated that he made his knee condition worse by working for Scotty's performing work outside of Dr. Thornton's restrictions. Tr. at 24-25. Inasmuch as the administrative law judge's aggravation finding is rational and supported by substantial evidence, we affirm the administrative law judge's determination that the employer is not liable for disability compensation or medical expenses incurred subsequent to November 1989. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

[2]The fact that claimant may not have a remedy against Scotty's under the Florida statute, which according to claimant only recognizes accidental injuries, is irrelevant to the determination of whether employer is liable under the Longshore Act.

Although the administrative law judge properly found that employer was not liable for compensation or medical expenses after November 1989 based on the subsequent aggravation of his work at Scotty's, claimant correctly contends that the administrative law judge did not consider claimant's entitlement to additional total disability compensation prior to that date. The administrative law judge credited Dr. Thornton's February 4, 1989, opinion indicating that claimant reached maximum medical improvement in February 1989 and was entitled to compensation for a 15 percent permanent physical impairment, but did not address Dr. Thornton's February 24, 1989, opinion that claimant was unable to perform his usual employment.[3] If credited, this portion of Dr. Thornton's opinion would establish claimant's *prima facie* case of total disability, and claimant would be entitled to total disability compensation until the date suitable alternate employment was demonstrated. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). As the administrative law judge did not address this issue, the case must be remanded for reconsideration of the extent of claimant's disability between February and November 1989 when he obtained employment at Scotty's. Accordingly, the administrative law judge's finding that claimant's scheduled permanent partial disability award commenced February 4, 1989, is vacated, and the case is remanded for him to reconsider the extent of claimant's permanent disability for the period between February and November 1989.

Accordingly, the administrative law judge's finding regarding the onset date of permanent partial disability is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[3]On February 24, 1989, Dr. Thornton indicated that "claimant's employment as a maintenance worker at the Navy Exchange requires a wide variety of different tasks which . . . . he will not be able to perform.... because of his inability to squat completely and because of his marked discomfort in the left knee." In addition, Dr. Thornton noted that claimant's knee condition will preclude his performing repetitive bending, climbing and squatting, as well as prolonged standing and walking. Employer's Exhibit 8.