BRB No. 00-1017

WILLIAM G. PRICE	)	
	)	
Claimant	)	
v.	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	DATED ISSUED: July 16, 2001
	)	
Self-Insured Employer-Petitioner	)	
	)	
CRESCENT WHARF & WAREHOUSE COMPANY/ STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
CRESCENT CITY MARINE WAYS & DRY DOCK COMPANY	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	

PASHA MARITIME SERVICES	)	
	)	
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
Employers/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United Sates Department of Labor.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for Metropolitan Stevedore Company.

Eric A. Dupree and Christopher M. Galichon (Dupree Galichon & Associates), San Diego, California, for Crescent Wharf & Warehouse Company/Stevedoring Services of America and Homeport Insurance Company.

Norman Cole, Salem, Oregon, for Crescent City Marine Ways & Dry Dock Company and SAIF Corporation.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Metropolitan Stevedore Company (Metropolitan) appeals the Decision and Order Awarding Benefits (99-LHC-2826, 99-LHC-2827) of Administrative Law Judge Paul A. Mapes 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 conclusions of law of the administrative law judge which 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).

The sole issue presented by this appeal is whether the administrative law judge erred in finding Metropolitan to be the employer liable for the payment of compensation benefits to claimant for disability resulting from cumulative bilateral knee trauma sustained in the course of claimant's longshore employment. Claimant worked as a mechanic for twenty-one years for Marine Terminals, during which time he began to experience difficulties with his knees. After Marine Terminals closed its San Diego facilities in 1986 or 1987, claimant began to obtain longshore jobs from his union hiring hall's Hold Board. Because some of these jobs exacerbated claimant's knee problems, claimant transferred to the hiring hall's Lift Board in 1990, where he could obtain employment in a less strenuous job as a forklift operator for longshore employers. *See* Tr. at 58-62. Claimant's knee problems continued, however, and were treated by his private health care provider, Kaiser Permanente (Kaiser). *See* Tr. at 62-64; CXS 4, 5, 6, 7. On September 23, 1993, Kaiser orthopedic surgeon Dr. Simpson, having noted that claimant's x-rays revealed medial joint line collapse and varus alignment, reported that claimant would need a total bilateral knee replacement when he felt ready to undergo such surgery. CX 9. At the recommendation of his physicians at Kaiser, claimant elected to have a series of cortisone injections in an attempt to postpone surgery for as long as possible. *See* Tr. at 64-65; CX 10, 11, 12, 13, 14. Thereafter, claimant's knee pain continued to worsen and claimant advised a Kaiser orthopedic surgeon, Dr. Williams, on December 16, 1994, that he was ready to undergo bilateral knee replacement surgery.[1] *See* Tr. at 67-68; CX 15. Claimant's knee surgery was not scheduled until after his Kaiser physicians ascertained that his cardiac status was stable enough for him to undergo such surgery. *See* Tr. at 69; CX 16. During an April 18, 1995, appointment with Dr. Williams, claimant signed a consent form for a bilateral total knee replacement to be performed on April 24, 1995. During that visit, Dr. Williams conducted a pre-operative physical examination and interpreted x-rays as showing bilateral genu varum, complete loss of medial joint line space with secondary flattening, sclerosis, and other osteoarthritic changes.[2] CX 17. Claimant's last day of

[1]Claimant continued to obtain jobs with various longshore employers through the hiring hall's Lift Board on a regular basis from 1990 up to the date of his knee surgery. *See* Tr. at 65-72. His last employer prior to his December 16, 1994, appointment with Dr. Williams, at which he expressed his desire for surgery, was Crescent Wharf & Warehouse Company (Crescent Wharf), which employed him as a lift truck operator on December 4, 1994. PAX 7 at 58.

[2]Claimant's last employer prior to his April 18, 1995 pre-operative examination and consent to surgery was Crescent Wharf, which employed him as a lift truck operator on April 17, 1995. PAX 7 at 53.

employment before his surgery was April 22, 1995, when he worked for Metropolitan as a forklift operator. PAX 7 at 53. In testifying regarding his work duties on April 22, claimant stated that he used gas and brake pedals to operate the forklift and mounted and dismounted the forklift between 6 to 12 times during his eight-hour shift. He further testified, as to his April 22 workday, that his knee condition worsened as the day wore on.[3] *See* Tr. at 73-75; CCMX 2 at 26. On April 24, 1995, Dr. Williams performed bilateral total knee replacement surgery; Dr. Williams stated that his surgical observations were consistent with the April 18, 1995 x-ray findings. CX 18; PAX 4 at 23-24.

Claimant filed a claim under the Act against Metropolitan for disability due to cumulative trauma to both knees. MSX 1, 2, 3. Subsequently, claimant filed additional claims against Crescent Wharf, Marine Terminals, Pasha Maritime Services (Pasha), and Crescent City Marine Ways (Crescent City).[4] SSAX 6; CCMX 37, 38.

In his Decision and Order Awarding Benefits, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that he suffered a work-related injury while employed by Metropolitan on April 22, 1995, and that Metropolitan rebutted the presumption with the opinion of Dr. London. Decision and Order at 9. Upon consideration of the record as a whole, the administrative law judge concluded that claimant established that he suffered an injury during the course of his employment with Metropolitan on April 22, 1995. Decision and Order at 9-10. The administrative law judge next determined that claimant's employment with Metropolitan on April 22 aggravated his prior knee condition to result in his disability, and, accordingly, found Metropolitan to be the responsible employer. Decision and Order at 10-12. Next, the administrative law judge found that claimant was entitled to temporary total disability

[3]Claimant also testified, regarding his work in general, that his knees usually hurt more by the end of each work day, and that his knee condition was progressively worsening. *See* Tr. at 73, 77.

[4]Following claimant's knee surgery, he was off work until November 8, 1995, when he returned to full-time longshore employment. *See* Tr. at 76; CCMX 1 at 7. He retired from longshore employment in January 1997. *See* CCMX 1 at 11; CCMX 43 at 162.

benefits from April 24, 1995 through November 5, 1995, 33 U.S.C. §908(b), and to permanent partial disability benefits commencing February 29, 1996, 33 U.S.C. §908(c)(2), (19). Having found Metropolitan entitled to Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability, the administrative law judge ordered Metropolitan to pay claimant temporary total disability benefits from April 24, 1995 through November 5, 1995, and permanent partial disability benefits commencing February 29, 1996 and for the following 104 weeks, as well as any future injury-related medical expenses. Lastly, the administrative law judge ordered the Special Fund to pay claimant permanent partial disability benefits beginning 104 weeks from February 29, 1996, and for the following 109.12 weeks.

On appeal, Metropolitan challenges the administrative law judge's determination that it is the responsible employer. Crescent Wharf and Crescent City have each filed response briefs, urging affirmance of the administrative law judge's responsible employer determination.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury and accordingly the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624, 25 BRBS 71, 75(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 950 F.2d 1308, 1311 (9th Cir. 1986); *see also Buchanan v. Int'l Transportation Services*, 33 BRBS 32, 35 (1999), *aff'd mem. sub nom. Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219-220 (1991). The Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In the instant case, Metropolitan contests its designation as the responsible employer on the basis that there was no causal relationship between claimant's employment with

Metropolitan and the resultant disability for which claimant sought compensation.[5] Specifically, Metropolitan argues that it cannot be held responsible for claimant's benefits in the case at bar since any injury occurring during the course of claimant's employment with Metropolitan did not hasten the date of claimant's knee replacement surgery, did not alter the nature of the surgical procedure, did not lengthen the period of post-surgical temporary disability, and did not increase the extent of claimant's permanent partial disability. In their respective response briefs, both Crescent Wharf and Crescent City argue, to the contrary, that the administrative law judge properly found Metropolitan to be the responsible employer on the basis of evidence that claimant's work activities for Metropolitan on April 22, 1995, caused a permanent increase in the extent of claimant's disability and need for surgery.

Initially, we note that Metropolitan, in order to meet its burden of establishing that it is not the responsible employer, must prove that claimant's disability is due solely to the natural progression of his initial injury. *See Buchanan,* 33 BRBS at 36; *see generally General Ship Service v. Director, OWCP [Barnes],* 938 F.2d 960, 25 BRBS 22(CRT)(9th Cir. 1991). Thus, if the evidence of record establishes that the injury or aggravation sustained in the course of claimant's work for Metropolitan on April 22, 1995 contributed in some way to claimant's resultant disability, Metropolitan would properly be found to be the responsible employer. *See Foundation Constructors,* 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co.,* 357 F.2d 812.

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[6]Metropolitan argues, additionally, that the administrative law judge erred in failing to apply the last employer rule applicable to multiple, or cumulative, traumatic injury cases in a manner consistent with the Board's decision in *Kuhnhausen v. Marine Terminals Corp.*, BRB Nos. 99-0782/A (April 20, 2000)(unpublished). Metropolitan's reliance on the unpublished Board decision in *Kuhnhausen* is misplaced, as that case turned on the administrative law judge's weighing of the specific evidence regarding the cause of claimant's disk herniation. Moreover, as the Board regards its unpublished decisions as lacking precedential value, such decisions generally should not be cited or relied upon by parties in presenting their cases. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990).

In the case at bar, the administrative law judge, having weighed the relevant evidence, credited the opinions of Drs. Levine, Greenfield and Williams that each day of work by claimant, including his last day of employment on April 22, 1995, caused some permanent loss of bone and cartilage from claimant's knees, thus increasing claimant's varus deformity, or bowleggedness, and pain. Decision and Order at 9-10. The administrative law judge also considered Dr. London's contrary opinion that claimant's work activities after April 18, 1995, did not increase claimant's pre-surgery impairment, but found it less persuasive than the opinions of the aforementioned physicians. In this regard, the administrative law judge was not persuaded by Dr. London's opinion that the sclerotic condition of claimant's knee bones as of April 18, 1995, would have prevented further bone erosion after that date, as that opinion was contradicted by the testimony of Drs. Williams and Levine that a depression had been carved into claimant's knee bones by the time of his surgery and that even sclerotic bone can be worn away, increasing varus deformity. *Id.* at 10. The administrative law judge concluded that the preponderance of the evidence establishes that a work-related aggravation of claimant's knee condition on April 22, 1995 contributed to claimant's decreased ability to ambulate and, thus, increased the extent of his disability. *Id.* Moreover, the administrative law judge, having credited the medical testimony of record supporting the conclusion that the progressive loss of bone and cartilage in claimant's knees increased his pain and that the timing of knee replacement surgery is dependent on when the patient is no longer able to tolerate his pain,[6] concluded that the loss of bone that occurred on claimant's last day of work with Metropolitan marginally increased his need for surgery. *Id.*

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT)(D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT)(9th Cir. 1988). In this case, the administrative law judge provided a rational basis for finding Dr. London's testimony less persuasive than the opinions of Drs. Levine, Greenfield and Williams. The credited opinions of these physicians provide substantial evidence to support the administrative law judge's ultimate determination that the employment-related aggravation suffered by claimant on April 22, 1995, caused some increase, however minor, in the extent of claimant's disability and need for surgery as of claimant's last date of employment at Metropolitan. *See Buchanan,* 33 BRBS 32. Thus, we reject Metropolitan's argument that neither of the aforementioned factual findings of the administrative law judge is rational or

[7]The administrative law judge noted, in this regard, that even Dr. London conceded that pain is the most common indication for knee replacement surgery. Decision and Order at 10.

supported by substantial evidence.[7]

We further reject Metropolitan's legal challenge to its designation as the responsible employer, which is premised on its position that it cannot be held liable for compensation since claimant's employment with Metropolitan did not affect his post-surgery disability and claimant had elected to undergo the surgery prior to this job. The administrative law judge found that the weight of the medical evidence supports Metropolitan's assertion that any aggravation that occurred in the course of claimant's April 22, 1995 employment with Metropolitan did not hasten claimant's surgery, lengthen his period of post-surgery temporary disability, or increase the extent of claimant's permanent partial disability. The administrative law judge concluded nonetheless that this finding does not provide a basis for relieving Metropolitan of liability for claimant's compensation. Decision and Order at 11-12. We affirm the administrative law judge's conclusion of law, as it is consistent with the applicable legal principles enunciated by the Ninth Circuit with respect to cumulative traumatic injury cases. The administrative law judge correctly recognized that in cumulative traumatic injury cases, the responsible employer is the employer at the time of the last injury to contribute to the claimant's ultimate disability. *See* Decision and Order at 6-7; *Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311. *See also Steed*, 25 BRBS at 219-220. As the aggravation sustained by claimant in the course of his employment with Metropolitan on April 22, 1995, contributed to claimant's disability as of that date, Metropolitan was properly found by the administrative law judge to be the responsible employer. The compensable injury forming the basis of the claim is the last work-related injury to contribute to claimant's disability. *See Steed*, 25 BRBS at 220.

[8]We need not specifically address each of the arguments made in Metropolitan's reply brief regarding the administrative law judge's evaluation of the evidence inasmuch as the Board may neither substitute its views for those of the administrative law judge nor reweigh the evidence. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999). Here, the administrative law judge acted within his prerogative in crediting one witness's testimony over that of another, the administrative law judge drew reasonable inferences from the testimony, and the administrative law judge's findings are supported by substantial evidence. *Id.*

Based on these findings, the administrative law judge properly rejected the notion that the fact that the surgery was scheduled before claimant's April 22 job with Metropolitan meant that this work did not bear a "rational relationship" to claimant's disability. As the administrative law judge found, Metropolitan is assuming that the surgery, rather than claimant's work injuries, caused his disability. In fact, claimant's knee replacement surgery actually reduced the extent of his permanent disability, and the compensable residual disability can only be attributed to the cumulative work injuries. Decision and Order at 11. The administrative law judge correctly noted that had claimant elected to retire on April 24, 1995, instead of undergoing surgery, Metropolitan, as claimant's employer at the time of the last injury to contribute to claimant's disability, would have been liable for claimant's compensation. *See* Decision and Order at 12. We agree with the administrative law judge's analysis and his conclusion that the fact that claimant's disability following the knee replacement was not increased by virtue of the work-related aggravation on April 22, 1995, is not determinative of the responsible employer identification. Whether or not surgery was performed, claimant's disability as of his last day of employment on April 22, 1995, increased as a result of the aggravation to his knee condition that occurred on that date. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311. Thus, as the administrative law judge's conclusion that Metropolitan is the responsible employer is supported by substantial evidence and consistent with the applicable law governing the responsible employer determination in cumulative traumatic injury cases, it is affirmed. *Id.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge