BRB No. 03-0708

ROBERT KEYES, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAM MARINE, INCORPORATED	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	DATE ISSUED: July 16, 2004
	)	
Employer/Carrier-Petitioner	)	
	)	
P&T INSULATION COMPANY	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY (MISSISSIPPI INSURANCE GUARANTY ASSOCIATION, SUCCESSOR-IN-INTEREST)	)	
	)	
Employer/Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Administrative Law Judge, United States Department of Labor.

Michael J. McElhaney, Jr. and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-LHC-3332 and 2003-LHC-0536) of Administrative Law Judge Lee J. Romero awarding benefits on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 sustained a back injury while working for employer, Ham Marine, Inc., as a painter's helper on May 5, 1999. He immediately went to a hospital, was prescribed medication, and commenced treatment with Dr. Fineburg, who prescribed additional medication and physical therapy. Claimant was permitted to return to work in a light-duty capacity. Employer, however, could not provide claimant with a light-duty job and thus claimant returned to his usual job, but performed it at a light-duty pace. On May 19, 1999, claimant was terminated by employer for unacceptable production. Hearing Transcript at 108. Claimant continued to receive physical therapy until August 1999, at which point he went to work for P&T Insulation Company (P&T). Claimant remained at P&T until March 3, 2000, when he was terminated. While working for P&T, claimant allegedly sustained an increase of pain. In March 2000, claimant underwent surgical treatment on his back with Dr. McCloskey. In October 2000, claimant suffered a hip injury after a fall unrelated to his employment. Subsequently, in March 2001, claimant was involved in an automobile accident, also unrelated to his employment, in which he injured his shoulder. Claimant underwent further surgery with Dr. McCloskey in December 2000 and December 2001. Claimant has not worked in any capacity since this most recent surgery.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to the claimed injury with employer, but further found that employer established rebuttal thereof by producing substantial evidence in the form of Dr. Fineburg's opinion that claimant suffered an aggravation or new injury while employed by P&T. Decision and Order at 37-39. Considering the evidence as a whole, the administrative law judge concluded that claimant established that his ongoing back condition was caused by his work-related injury with employer. Decision and Order at 39-43.

Further, the administrative law judge found that because the record failed to establish the existence of work-related injuries with more than one employer, employer is liable for the entirety of claimant's condition subsequent to his work injury. Decision and Order at 44. The administrative law judge found that, while claimant suffered both a

hip injury and automobile accident subsequent to his workplace injury and there was substantial evidence that such injuries worsened his condition, the record failed to establish the extent to which these intervening causes "overpowered or nullified" claimant's original condition due to his work injury and subsequent surgery. The administrative law judge found that the record provided no basis upon which to apportion disability between claimant's initial compensable injury and his subsequent injuries and thus found employer liable for claimant's entire disability. Decision and Order at 44-47. The administrative law judge therefore awarded claimant temporary total disability benefits May 5, 1999, through August 30, 1999, and from March 4, 2000, through September 18, 2000, and permanent total disability benefits from September 19, 2000, and continuing.[1] The administrative law judge further found, pursuant to Section 7(a) of the Act, 33 U.S.C. §907, that while employer was responsible for all reasonable, appropriate and necessary medical expenses pursuant to claimant's work-related injury, it was not liable for claimant's surgical treatment subsequent to his reaching maximum medical improvement on September 19, 2000, after his initial surgery. In this regard, the administrative law judge credited Dr. McCloskey's opinion that claimant's second and third surgeries were related to his subsequent hip injury and car accident. Decision and Order at 57-60. Lastly, the administrative law judge determined that employer was not entitled to Section 8(f) relief, 33 U.S.C. §908(f), as it failed to demonstrate that claimant suffered from a pre-existing permanent partial disability which was manifest to employer. Decision and Order at 60-62.

On appeal, employer challenges the administrative law judge's determination that claimant did not sustain a second injury at P&T or subsequent injuries constituting an intervening cause relieving it of liability. Employer also challenges the administrative law judge's evaluation of the medical evidence. No other briefs have been filed in this case.

Employer asserts that the administrative law judge erred in determining that claimant did not suffer an aggravation or exacerbation of his back condition while employed at P &T sufficient to relieve employer of liability and to support the liability of P&T. Employer specifically argues that claimant's testimony and the opinions of all of the physicians establish a worsening of claimant's condition during his employment with P&T. Employer further asserts that the administrative law judge applied the wrong standard in evaluating the alleged intervening causes of disability, as its burden is to demonstrate that claimant's subsequent injury established a worsening of his initial injury

[1] From August 31, 1999, through March 3, 2000, the term of his employment with P&T, the administrative law judge found claimant's condition to constitute temporary partial disability, but concluded that the claimant demonstrated no loss in wage-earning capacity. Decision and Order at 47-55.

rather than the "overpowering" and "nullifying" standard relied upon by the administrative law judge. Employer asserts that claimant's October, 2000, hip injury and March, 2001, automobile accident constitute intervening causes terminating its liability. Accordingly, employer seeks remand for application of the correct standard.

Employer's initial contention regarding claimant's alleged injury at P&T raises issues concerning causation and the responsible employer. In cases under the Act involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant=s condition is the result of the natural progression or an aggravation of a prior injury. If the claimant=s disability resulted from the natural progression of the initial injury, then the claimant=s employer at the time of that injury is the employer responsible for compensating the claimant for the entire disability. If there is a second work-related injury which aggravates, accelerates or combines with the earlier injury, resulting in the claimant=s disability, the employer at the time of the second injury is liable for all medical expenses and compensation related thereto.[2] *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Siminiski 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); *Buchanan v. International Transportation Services*, 31 BRBS 81 (1997); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff=d mem.*, No. 81-7801 (9th Cir. 1982).

In the instant case, the administrative law judge concluded that the record fails to establish a second workplace injury aggravating, accelerating or combining with the initial injury during the time of claimant's employment with P&T. The administrative law judge found that claimant's "persuasiveness and credibility" regarding any alleged injury at P&T was undercut by inconsistent and uncorroborated testimony. Decision and Order at 38. Specifically, the administrative law judge found that claimant failed to report any history of injury with P&T to his treating physicians or indicate the presence

[2] Contrary to employer's contention, the administrative law judge did not apply an incorrect standard in discussing claimant's work at P&T, but fully addressed the evidence relevant to aggravation or natural progression. Moreover, he did not cite the "overpowering and nullifying" language disputed by employer when he addressed the alleged injury at P&T, but rather, when he addressed employer's arguments regarding subsequent non-work injuries alleged as intervening causes. Decision and Order at 46. *See* discussion, *infra.*

of any such injury in his first deposition.[3] He also found that claimant's testimony regarding increased pain was undermined by the persuasive testimony of his supervisor at P&T, Mr. Dixon, that claimant worked without any complications or difficulties. The administrative law judge thus concluded that claimant failed to suffer a harm or pain from any particular accident or establish working conditions and activities on any occasion sufficient to establish a workplace injury. Decision and Order at 38.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge here has thoroughly reviewed claimant's testimony, both at the hearing and at deposition, as well as the medical opinion evidence and concluded that claimant failed to establish a workplace injury at P&T, we affirm the finding as supported by substantial evidence.

In this regard, employer also argues that in considering the evidence of record, the administrative law judge erred in discounting the testimony of claimant's treating physicians, Drs. Fineburg and McCloskey, and treating physical therapist, Mr. Ball, in favor of the opinion of a reviewing physician, Dr. Bazzone. Employer argues that while Dr. Bazzone is a "well-known neurosurgeon," the physician did not personally examine, treat or evaluate claimant, and the administrative law judge erred in finding that his opinion that claimant's herniated disc was the result of the workplace accident at employer, Employer's Exhibit 33, was the most credible of record. Employer argues that the contrary opinions of Drs. Fineburg and McCloskey and Mr. Ball, that there was an

[3] The administrative law judge found that in his initial deposition of August 15, 2000 claimant related his back condition entirely to his injury with employer, but was silent as to any work history and job description with P&T. Employer's Exhibit 19 at 11-14, 15-18. In a second deposition of August 10, 2001, claimant indicated that he worked at P&T, described the work as "light duty" and made no mention of a specific accident or aggravation to his initial injury. Employer's Exhibit 20 at 48-54. Later at the hearing, claimant testified that he carried 100 lb. boxes of Kaylo while employed at P&T. Hearing Transcript at 87-88. The administrative law judge concluded that this "evolving testimonial job description" rendered his testimony regarding a workplace injury at P&T "unpersuasive." Decision and Order at 33.

aggravation or worsening of claimant's condition during his employment with P&T, were entitled to as much if not greater weight than Dr. Bazzone's opinion.

Contrary to employer's assertion, the mere fact that a certain physician examined or treated claimant does not entitle that physician's opinion to mechanical deference. *See Calbeck*, 306 F.2d 693. In the instant case, the administrative law judge found Dr. McCloskey's opinion that "something happened" during claimant's employment with P&T and Dr. Fineburg's conclusion that claimant was pain-free when he went to work at P&T were unsupported by the record as the physicians could not identify any injury or accident claimant suffered at P&T which caused an increase in claimant's symptoms or pain. Decision and Order at 40-41. Further, the administrative law judge found that Dr. Bazzone "clearly and unequivocally" opined that claimant's condition arose out of his employment with employer only. Decision and Order at 42. As the administrative law judge was entitled to credit Dr. Bazzone, his opinion provides substantial evidence supporting the administrative law judge's conclusion. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Thus, we affirm the administrative law judge's determination that employer is the responsible employer, as it is supported by substantial evidence.

Employer may also be relieved of liability for disability benefits and medical treatment if it establishes that claimant sustained a subsequent injury or aggravation which is not a natural or unavoidable result of the work injury but is an intervening cause of his disability.[4] *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 Fed.Appx 126 (5th Cir. 2002)(table); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has articulated two standards as to what constitutes an intervening cause. *See Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998)(noting the tension between the two standards). In *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929, 934 (5th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952), the court stated that a supervening cause must be an influence originating entirely outside of employment which "overpowers and nullifies" the initial injury. In *Mississippi v. Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on other grounds on reh'g*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981), however, the court stated that an injury is compensable "if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." *Id.*, 637 F.2d at 1000, 12 BRBS at 974; *see also Bludworth*

[4] The administrative law judge found that claimant's surgeries after September 2000, were due to the intervening injuries and thus not compensable. This finding is not challenged on appeal and is affirmed.

Shipyard, Inc. v. Lira, 700 F.2d 1046, 15 BRBS 120(CRT)(5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 19 BRBS 63(CRT) (5th Cir. 1981). Under either standard, employer is relieved of liability for that portion of claimant's disability which is attributable to the intervening cause. However, if a portion of claimant's disability is due to the initial work event and there is no evidence apportioning the disability due to the subsequent event, employer may remain fully liable. *See Plappert*, 31 BRBS at 110.

In the instant case, the administrative law judge found that claimant's hip injury and automobile accident resulted from falling and third party negligence, respectively, and that there was no evidence showing that such injuries were work-related; thus they were potential intervening causes of claimant's disability. The administrative law judge further found that there was substantial evidence that these injuries worsened claimant's condition. However, he found that the record did not establish the extent to which the intervening causes worsened claimant's condition, as the record evidence failed to establish the amount of worsening attributable to the subsequent injuries. The administrative law judge found Dr. McCloskey's testimony "unpersuasive" in establishing apportionment of claimant's disability,[5] and further found that the vocational evidence failed to establish the extent to which claimant's status could have been worsened by his hip injury and car accident. We affirm the administrative law judge's finding as employer cites no evidence that claimant recovered from his work injury or that his subsequent disability is wholly due to the effects of intervening injuries. As employer remains liable for the disability due to the work injury, we reject employer's assertions and hold that the administrative law judge rationally concluded that employer failed to establish that claimant's subsequent injuries worsened his condition in a manner sufficient to relieve employer of all liability.[6] *See Lira*, 700 F.2d 1046, 15 BRBS 120(CRT).

[5] The administrative law judge found that Dr. McCloskey assigned claimant a 5 percent impairment from his job injury, but also opined that the job injury resulted in 50 percent of claimant's total 15 percent impairment. Decision and Order at 46.

[6] While, as employer notes, the administrative law judge did cite the "overpowering and nullifying" language to support his finding that employer failed to establish an intervening cause, Decision and Order at 46, we reject employer's assertion that the administrative law judge applied the wrong standard, as the administrative law judge specifically found that he could not determine the degree of worsening established by the intervening cause. This conclusion complies with the proper standard. *See Bludworth Shipyard, Inc., v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge