BRB No. 08-0843

D. G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	DATE ISSUED: 07/28/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL IMDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Motion for Modification of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

John Dudrey (Williams Frederickson, LLC), Portland, Oregon, for Stevedoring Services of America and Homeport Insurance Company.

Robert E. Babcock, Lake Oswego, Oregon, for Marine Terminals Corporation and Signal Mutual Indemnity Association.

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

PER CURIAM:

Stevedoring Services of America (SSA) appeals the Decision and Order Granting Claimant's Motion for Modification (2006-LHC-01796, 2007-LHC-01393) of Administrative Law Judge Anne Beytin Torkington 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, while working a "rail job" for employer on July 21, 1997, sustained an injury to his lower back. As a result, claimant underwent a second operation on his lower back, *i.e.*, decompressive lumbar surgery, on September 26, 1997.[1] Claimant was released to return to work on June 21, 1999, with a 50-pound lifting restriction. Employer voluntarily paid temporary total disability benefits from July 21, 1997 until June 20, 1999, based on the statutory maximum rate of $801.06. 33 U.S.C. §§906(b)(1), 908(b). Claimant thereafter filed a claim seeking permanent partial disability benefits from June 20, 1999, based on an average weekly wage of $1,463.42. Employer controverted the claim, arguing that claimant's average weekly wage is $1,193.42.

In her initial decision, the administrative law judge determined, pursuant to Section 10(a), 33 U.S.C. §910(a), that claimant's pre-injury average weekly wage was $1,335.05, and that his post-injury wage-earning capacity, pursuant to Section 8(h), 33 U.S.C. §908(h), is $635.82. Accordingly, she awarded claimant temporary total disability benefits for the period from July 21, 1997 until June 20, 1999, at the maximum rate of $801.06 per week, 33 U.S.C. §906(b)(1), and permanent partial disability benefits to commence thereafter at a rate of $466.18 per week. 33 U.S.C. §908(c)(21), (h).

Employer appealed the administrative law judge's average weekly wage calculation and claimant cross-appealed her determination regarding his post-injury wage-earning capacity. The Board affirmed the administrative law judge's decision. [*D.G.*] *v. Stevedoring Services of America*, BRB Nos. 02-0616/A (May 20, 2003) (unpublished).

On March 29, 2006, claimant filed a motion for modification, 33 U.S.C. §922, alleging a change of condition in that he is now unable to work. Claimant sought compensation under the Act for permanent total disability. 333 U.S.C. §908(a). On January 17, 2007, an order was issued granting SSA's motion to join Marine Terminals

[1] Claimant previously had back surgery in 1989 following an industrial accident while working at a feed mill.

Corporation (MTC). Claimant was employed by MTC for his last two days of longshore employment, November 20 and 21, 2005. Claimant applied for a disability retirement from longshore employment in April 2006. SSA asserted that MTC is the employer responsible for claimant's continuing benefits under the Act.

In her decision on modification, the administrative law judge found that claimant met his burden of showing that his back condition worsened after the date of her initial decision in May 2002, resulting in his retirement in April 2006. The administrative law judge found that claimant worked fewer hours after May 2002 due to an increase in his pain, use of narcotic pain medication, and work limitations, which decreased the number and types of suitable longshore jobs he could perform. The administrative law judge found that claimant currently is unable to perform any longshore work due to his reliance on narcotic medication for back pain. The administrative law judge also found that claimant is unable to work in non-longshore employment because he is not physically capable of working full time. Accordingly, the administrative law judge awarded claimant compensation for permanent total disability. The administrative law judge found SSA is the employer responsible for claimant's benefits under the Act, after determining that claimant had not aggravated his back condition during his last two days of longshore employment with MTC. The administrative law judge awarded claimant compensation for permanent total disability at the rate of $890.03 per week from November 22, 2005, payable by SSA.

On appeal, SSA challenges the administrative law judge's responsible employer finding and her calculation of claimant's compensation rate. MTC responds, urging affirmance of the administrative law judge's responsible employer finding. Claimant responds in support of the administrative law judge's decision on modification.

SSA contends the administrative law judge erred by not addressing whether claimant's work for MTC and other longshore employers in August through November 2005 aggravated his back condition. SSA asserts that claimant's specific duties for MTC as a crane chaser during this period caused back pain and worsened his symptoms, and that claimant's work for MTC in September 2005 as an extra man exceeded the work limitations which Dr. Brodsky testified were necessary to avoid aggravating his back symptomatology. Thus, SSA contends that MTC is the responsible employer.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this 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, 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, the subsequent injury is the compensable injury and the subsequent employer is fully liable. *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); *see also Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th Cir. 2001). 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). Accordingly, if claimant's disability is due, at least in part, to a subsequent injury, which aggravated, accelerated, or combined with claimant's prior injury with SSA, thus resulting in claimant's ultimate disability, the subsequent employer is liable. *See Buchanan*, 33 BRBS at 36; *see generally General Ship Serv. v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). If, however, claimant's disability is due to the natural progression of his July 1997 back injury, SSA is fully liable for claimant's disability and medical benefits. *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

We reject SSA's contention that the administrative law judge erred in addressing only whether claimant's employment with MTC on November 20 and 21, 2005 aggravated his condition and resulted in disability. Although SSA correctly asserts that it was not required to join all of claimant's longshore employers for the period between August and November 2005, SSA is the employer claimed against by claimant. Thus, it was SSA's burden to show that some subsequent employment aggravated claimant's condition resulting in disability in order to shift liability. *See General Ship Serv.*, 938 F.2d at 961-962, 25 BRBS at 25(CRT); *K.M. v. Lockheed Shipbuilding*, 42 BRBS 105 (2008); *see also Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). Accordingly, as SSA did not join any other potentially responsible employers during the period from August to November 2005, the administrative law judge properly focused on claimant's employment on his last two days of longshore work, which was for MTC, to determine if SSA established that MTC is the employer responsible for claimant's benefits under the Act. Moreover, SSA's Post-Hearing Brief and Reply Brief, filed with the administrative law judge, did not assert that liability should be shifted to MTC based on all of claimant's longshore employment

ending in November 2005, nor did SSA seek reconsideration of the administrative law judge's decision on this basis.

In addition, substantial evidence supports the administrative law judge's finding that there is no credible medical evidence to establish that claimant's condition was aggravated during his two days of work in November 2005 as a crane chaser for MTC.[2] The administrative law judge credited evidence that the crane chaser job is the easiest on the waterfront. Tr. at 43-44, 57, 94; CX 45 at 220-223, 257. She also credited the opinion of Dr. Rosenbaum, SSA's medical expert, who opined that crane chaser is the only longshore job within claimant's work limitations, as well as the opinion of claimant's treating physician, Dr. Brodsky, that claimant did not aggravate his back condition working as a crane chaser for MTC in November 2005.[3] *See* Tr. at 166-167; CX 43 at 165, 189. The administrative law judge credited claimant's testimony that he worked four hours on and four hours off on November 20 and 21, 2005, and that he did not "twitch" or "tweak" his back during this period. Tr. at 110. The administrative law judge also discussed SSA's argument relating claimant's employment in November 2005 for Jones Stevedoring as a slingman, for Roger's Terminal as an extra man on a wheat ship, and for MTC as a crane chaser to Dr. Brodsky's notes on November 9, 2005, that claimant reported his back had worsened for no particular reason, and on December 9, 2005, that claimant reported he is "considering retirement from his job which aggravates his back." Decision and Order at 30-31; *see* SX 6 at 74-75. The administrative law judge found that there is no evidence to tie these statements to claimant's last two days of longshore work and that "aggravation" when used by a layperson has no meaning "besides the very broad vernacular." Decision and Order at 31. Thus, she declined to draw the legal conclusion from claimant's statements to Dr. Brodsky that MTC is liable based on claimant's last two days of work.

The administrative law judge credited the September 7, 2006 report of Dr. Rosenbaum that there is no objective evidence of progression in claimant's back

[2] The administrative law judge summarized claimant's testimony that the job duties of crane chasing or "extra man" had no more effect on his back than "any other daily life activity." Decision and Order at 6; Tr. at 113-114.

[3] The administrative law judge quoted Dr. Brodsky's testimony that working as a crane chaser would not have affected claimant's back condition as the physical work required "seems more like an activity of routine living." Decision and Order at 15; CX 43 at 165. Dr. Brodsky also testified at his deposition that working as a crane chaser would not contribute to claimant's pain symptomatology. CX 43 at 188-189.

condition since he underwent surgery in September 1997, nor is there evidence of a new injury or aggravation, although claimant did report a subjective increase in his symptoms. SX 4 at 4. The administrative law judge noted that Dr. Rosenbaum did not give claimant's work as a causative factor in the increase in claimant's self-assessment of his back pain. Tr. at 177-178. The administrative law judge concluded from this testimony that Dr. Rosenbaum did not relate claimant's increased pain to his employment and, therefore, that Dr. Rosenbaum did not relate claimant's pain complaints to his employment by MTC. Decision and Order at 30. The administrative law judge rejected SSA's reliance on *Price*, 339 F.3d 1102, 37 BRBS 89(CRT), as support for its position as in *Price*, there was medical evidence of a permanent, although minor, physical change to claimant's knee through his last day of work sufficient to support a finding of aggravation, whereas in this case, there was no evidence of even microscopic changes. *Id*. Finally, the administrative law judge credited claimant's testimony that he has not had a work injury since 2002. Tr. at 109.

SSA does not specifically challenge the findings that claimant's employment for MTC on November 20 and 21, 2005, did not contribute to claimant's permanent total disability. Moreover, 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). As the administrative law judge's finding that SSA is the employer responsible for claimant's benefits under the Act is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Buchanan*, 33 BRBS 32.

SSA also appeals the administrative law judge's finding that claimant is entitled to compensation for permanent total disability at a rate of $890.03 per week beginning on November 22, 2005. SSA acknowledges that the awarded compensation rate is two-thirds of claimant's average weekly wage of $1,335.05 at the time of his July 21, 1997, work injury. However, SSA contends that claimant's compensation rate is limited to the maximum compensation rate in effect on the date of claimant's work injury of $801.06.[4]

In this case, claimant was first awarded disability benefits commencing in 1997, and he had been receiving compensation for permanent partial disability since June 21,

[4] Claimant responds that SSA did not raise this issue below and thus cannot raise it for the first time on appeal. We reject this contention. The administrative law judge did not address this issue in her decision but merely entered an order awarding benefits at the rate of $890.03 per week. Employer may challenge this award on appeal.

1999, when he was awarded compensation for permanent total disability in November 2005. Thus, he was neither newly awarded compensation nor currently receiving compensation for permanent total disability when a new maximum rate became applicable in October 2005. *See* 33 U.S.C. §906(b), (c).[5] Accordingly, the applicable statutory maximum rate in effect when he was first awarded compensation in 1997 of $801.06 remains applicable. *Estate of C.H. v. Chevron U.S.A., Inc.*, ___ BRBS ___, BRB No. 08-0531 (March 13, 2009); *Reposky v. Int'l Transp. Services,* 40 BRBS 65 (2006). However, as of October 1, 2006, claimant is entitled to the new statutory maximum of $1,114.44, since on that date he was "currently receiving" compensation for permanent total disability. Because this rate is higher than claimant's compensation rate of $890.03, he is entitled to his full weekly rate beginning on October 1, 2006. Thereafter, claimant is entitled to annual Section 10(f) adjustments each subsequent October 1. 33 U.S.C. §910(f).

[5] Section 6(c) provides that determinations under subsection (b)(3), which provides for the calculation of a new maximum rate each October 1, apply to those "currently receiving compensation for permanent total disability or death benefits during such period as well as those newly awarded compensation during such period." 33 U.S.C. §906(c).

Accordingly, the administrative law judge's finding that SSA is the employer responsible for claimant's disability benefits under the Act is affirmed. Claimant's compensation rate is modified to provide for permanent total disability compensation of $801.06 per week from November 22, 2005, to September 30, 2006, and to his full compensation rate of $890.03, as of October 1, 2006, subject to Section 10(f) adjustments. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge