

THEODORE TAYLOR)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MAHER TERMINALS,)	
INCORPORATED)	DATE ISSUED: <u>July 26, 1999</u>
)	
Self-Insured)	
Employer-Respondent)	
)	
and)	
)	
CERES MARINE TERMINALS,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

William D. Kurtz (Verderaime & DuBois, P.A.), Baltimore, Maryland, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for Maher Terminals, Incorporated.

Thomas G. Young III (Young & Valkenet, L.L.C.), Baltimore, Maryland, for Ceres Marine Terminals, Incorporated.

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

SMITH, Administrative Appeals Judge:

Ceres Marine Terminals, Incorporated, appeals the Decision and Order on Remand (96-LHC-2139, 96-LHC-2141) of Administrative Law Judge Vivian Schreter-Murray 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time this case is before the Board. Claimant fractured his hip and injured his left leg on February 14, 1981, while working for Maher Terminals, Incorporated (Maher), when he fell 20 feet from a ship into the water, striking the side of a pier. He returned to longshore work on November 11, 1982. On November 8, 1982, pursuant to the parties' stipulations, the district director entered a compensation award in which Maher was to pay claimant temporary total disability benefits, followed by permanent partial disability compensation equivalent to a 53 percent loss of use of the left leg. On August 4, 1992, while working for Ceres Marine Terminals, Incorporated (Ceres), claimant was injured when the brakes of a car that he was driving up a ramp failed, causing the car to roll back down the ramp, striking other vehicles. Claimant, who has not returned to work since undergoing hip surgery on August 11, 1993, sought permanent total disability compensation and medical benefits under the Act, filing claims against both Maher and Ceres on May 21, 1996.

In her initial decision, the administrative law judge found that as claimant's left hip replacement and associated permanent total disability were the inevitable result of his 1981 hip fracture and related progressive post-traumatic osteoarthritis, Maher was liable as the responsible employer for claimant's benefits. The administrative law judge determined, however, that claimant had not sought modification within one year of the last payment of compensation under the district director's November 1982 compensation order, and finding such action required under Section 22 of the Act, 33 U.S.C. §922, in order for claimant to seek disability compensation from Maher, claimant's right to such compensation was time-barred. Inasmuch, however, as a claim for medical benefits is never untimely, the administrative law judge held Maher liable for past and future medical benefits relating to claimant's hip replacement.

On appeal, the Board reversed the administrative law judge's determination that Maher is liable as the responsible employer for payment of benefits to claimant, as that finding was not supported by substantial evidence and was not in accordance

with law. Specifically, in a majority opinion, the Board concluded that the administrative law judge failed to properly apply the aggravation rule by suggesting that it was necessary for claimant to prove that his hip condition was stable and asymptomatic prior to the 1992 injury at Ceres before Ceres could be held liable for claimant's benefits. Contrary to the administrative law judge's finding, the Board noted that the aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. See *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Thus, where a work-related injury accelerates a prior condition, hastening disability or death which would have happened anyway, it is compensable under the aggravation rule. See *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). Accordingly, the Board held that the administrative law judge erred in relying on 1982 medical opinions that claimant's hip injury would, with time, put him at substantial risk of requiring surgical intervention, as this evidence has no bearing on the question of whether claimant's pre-existing hip condition was aggravated by his 1992 work injury. Moreover, the Board held that the record overwhelmingly supports the aggravation theory. Specifically, the Board held that the administrative law judge mischaracterized the opinion of Dr. Halikman by selectively extracting statements relating to the severity of claimant's residuals from the 1981 injury while ignoring those portions of his reports which are consistent with aggravation. The Board also reversed the administrative law judge's discrediting of Dr. Lippman's opinion, holding that, contrary to the administrative law judge's determination, the timing of claimant's inability to work is a valid consideration for a medical expert in determining whether an injury had an aggravating effect on a prior condition.¹ The Board further noted that the record reflects that Dr. Lippman's opinion was based on his review of claimant's records, as well as his work history and examinations. Ultimately, the Board held that as the uncontradicted record establishes that claimant sustained an aggravating injury in August 1992, Ceres, and not Maher, is liable as the responsible employer. Thus, the Board remanded the case for consideration of all remaining issues, including claimant's entitlement to disability compensation and Ceres's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). *Taylor v. Maher Terminals, Inc.*, BRB Nos. 97-0839/A (March 18, 1998)(unpublished)(Brown, J., dissenting).²

¹Dr. Lippman based his opinion that the 1992 injury exacerbated claimant's pre-existing hip condition, in part, on the fact that claimant had worked before, but not after, the 1992 injury. Cl. Ex. 11(b).

²In his dissenting opinion, Judge Brown stated that the administrative law judge acted within her discretionary authority in discrediting Dr. Halikman's 1996 opinions that claimant's 1992 work accident contributed to his hip condition, and in

In her Decision and Order on Remand, the administrative law judge found that claimant was entitled to an award of permanent total disability compensation, payable by Ceres, commencing on August 4, 1992, and continuing. The administrative law judge also determined that Ceres was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act.

Ceres's sole contention on appeal is that the administrative law judge's original decision in the instant case was based on substantial evidence and should not have been reversed by the Board. In support of its argument, Ceres asserts that any error the administrative law judge may have committed in her first decision with regard to the aggravation rule was harmless, as the administrative law judge based her decision on evidentiary findings not involving construction of the aggravation rule. Ceres further argues that the Board improperly substituted its own judgment, with regard to the weighing of the evidence and credibility determinations, for that of the administrative law judge. Thus, Ceres requests that the Board overrule its March 18, 1998 Decision and Order in the instant case, vacate the administrative law judge's Decision and Order on Remand, and reinstate the administrative law judge's original decision. Claimant and Maher respond, urging affirmance of the administrative law judge's Decision and Order on Remand.

Pursuant to the law of the case doctrine, we will not reconsider the aggravation issue as it was fully addressed in our prior decision. The Board has held that it will adhere to its initial decision when a case is before it for a second time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. See *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Employer's contention on appeal does not fall within any of the exceptions to the law of the case doctrine. Rather, in its appeal of the administrative law judge's Decision and Order on Remand, employer avers no error on the part of the administrative law judge on

ultimately finding that claimant's hip surgery was due to the natural progression of his 1981 injury. *Taylor v. Maher Terminals, Inc.*, BRB Nos. 97-0839/A, slip op. at 10-11 (March 18, 1998)(Brown, J., dissenting).

remand, except that the administrative law judge followed the instructions of the Board in its previous decision. While the law of the case doctrine is not a rule of law, it is a discretionary rule of practice used to promote finality in the adjudication process, see *Williams*, 22 BRBS at 237, and acceptance of employer's request on appeal for the Board to reconsider its previous decision in the instant case would contravene this policy. Thus, as the administrative law judge's application of the aggravation rule, her weighing of the evidence and her credibility determinations have been previously decided by the Board, we hold that the prior decision constitutes the law of the case, and therefore, we reject employer's contention on appeal. See, e.g., *Ricks v. Temporary Employment Services, Inc.*, BRBS , BRB No. 98-1227, slip op. at 6 (June 8, 1999); *Schaubert v. Omega Service Industries, Inc.*, 32 BRBS 233, 234 (1998); *Doe v. Jarka Corp. of New England*, 21 BRBS 142, 144-145 (1988).

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

For the reasons stated in my prior opinion, I would hold that the administrative law judge properly held Maher was the responsible employer in her initial opinion.

JAMES F. BROWN
Administrative Appeals Judge