

BRB No. 99-1000

JAMES BLUE)
)
 Claimant)
)
 v.)
)
 CONTAINER STEVEDORING) DATE ISSUED: _____
 COMPANY)
)
 Self-Insured)
 Employer-Petitioner)
)
 and)
)
 STEVEDORING SERVICES)
 OF AMERICA)
)
 and)
)
 HOMEPORT INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Upon Remand (Awarding Benefits) of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Frank B. Hugg, San Francisco, California, for Container Stevedoring Company.

Laura G. Bruyneel (Law Offices of Bruyneel & Leichtnam), San Francisco, California, for Stevedoring Services of America and Homeport Insurance Company.

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

PER CURIAM:

Container Stevedoring Company (Container) appeals the Decision and Order Upon Remand (Awarding Benefits) (95-LHC-1764 and 96-LHC-1785) of Administrative Law Judge Thomas Schneider 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. Claimant was initially injured in September 1992 during the course of his employment with Stevedoring Services of America (SSA) when his jeep collided with an improperly parked container. As a result, he injured his neck, back and left wrist. In July 1993, claimant underwent neck surgery, and in June 1994, he returned to work. On February 28, 1995, during the course of his employment as a receiving/delivery clerk for Container, claimant stood, turned and stepped out of his booth when he felt a "pop" in his back. He has not returned to work since that date, and the issue before the administrative law judge was whether claimant's current disability is the result of the natural progression of the 1992 injury or is the result of an aggravation sustained in 1995.

The administrative law judge initially found that claimant is entitled to temporary total, permanent partial and permanent total disability benefits, commencing September 21, 1992, June 1, 1994, and March 1, 1995, respectively. After determining that the events of February 28, 1995, did not constitute either a continuing trauma or a second injury, the administrative law judge held SSA liable for claimant's compensation. SSA appealed the decision, and the Board vacated the administrative law judge's determination regarding the responsible employer and remanded the case for further consideration. *Blue v. Stevedoring Services of America*, BRB No. 97-992 (April 17, 1998).

The administrative law judge, on remand, held that claimant's condition was aggravated by the incident in 1995, finding himself compelled to do so in accordance with the Board's decision. Because he concluded that claimant's condition did not return to "base-line," he found that the aggravation was permanent. Decision and Order Upon Remand at 3-6. Based on his previous determination, which had been affirmed by the Board, the administrative law judge found that claimant became permanently totally disabled after February 28, 1995, and, on remand, he held Container liable for those benefits. The administrative law judge also held the Director, Office of Workers' Compensation Programs, bound by his stipulation that Container is entitled to Section 8(f), 33 U.S.C. §908(f), relief, if it applies for such relief. Decision and Order Upon Remand at 6.

Container appeals the decision, contending the administrative law judge erred in

holding it liable for claimant's permanent total disability benefits after February 28, 1995. It argues that it is not the responsible employer as no aggravation or second injury occurred on that date, that the administrative law judge did not consider and weigh all the relevant evidence which supports a finding that claimant's condition was caused by the natural progression of his original injury, and that, if it is liable for any benefits, it is only liable for compensation for a temporary exacerbation of claimant's condition. SSA responds, urging affirmance.

In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The later employer has the burden of persuading the administrative law judge that the disability is the result of the natural progression of the original injury, while the earlier employer has the burden of establishing that claimant's disability is the result of a new injury, or an aggravation of the pre-existing condition. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999). The determination as to which employer is liable requires an administrative law judge to weigh the relevant evidence. *Id.*

The Board held that the administrative law judge, in his first decision, did not consider all of the relevant evidence pertaining to the responsible employer issue. That is, although he credited evidence which supported a conclusion that claimant's condition was the result of the natural progression of the 1992 injury, he did not address the portions of those same opinions which stated that the 1995 incident had some affect on claimant's condition. The Board cited the evidence to which it referred, and remanded the case for the administrative law judge to reconsider all the relevant evidence and weigh it accordingly.¹ In this regard, the Board stated that Container must prove that claimant's condition is the result of the natural progression of his 1992 injury in order to be relieved of liability while, in order for it to be relieved of liability, SSA must prove there was a new injury or an aggravation in 1995. *Blue*, slip op. at 3-5.

¹The Board also stated that a claimant's inability to return to work is a valid consideration and that the severity of the second injury is not a determinative factor in assessing whether an aggravation occurred because even a "minor" injury can be aggravating. *Blue*, slip op. at 4. It then stated that the administrative law judge should "account for this evidence in his analysis regarding which employer is to be held liable for claimant's ongoing benefits." *Id.* at 5.

On remand, the administrative law judge found that an aggravation occurred in 1995; however, he did so without citing any evidence. Rather, he referred to the Board's decision and concluded he was "bound" and "compelled" by it to find an aggravation had occurred. Decision and Order Upon Remand at 3-4. Contrary to the administrative law judge's assertions, the Board vacated his initial decision for application of the aggravation rule, remanding the case for him to reconsider all the evidence in light of this rule. Although the Board cited evidence which supported a different result, the purpose of the remand was for the administrative law judge to discuss and weigh this evidence. The Board's decision did not require that the administrative law judge give particular evidence greater weight or find it more persuasive; it simply required that he fully weigh all of the relevant evidence, explain his reasoning and reach a result supported by substantial evidence. As the administrative law judge did not perform this function on remand, his determination must be vacated. Accordingly, we remand the case to the administrative law judge for consideration and weighing of all the evidence of record relevant to the issue of whether claimant's disability is the result of the natural progression of his 1992 injury, making SSA liable for benefits, or whether it is the result of a new injury or an aggravation of the prior condition in 1995, making Container liable for benefits. Inasmuch as there is evidence supporting both conclusions, the administrative law judge must weigh the evidence and determine which employer prevails.² See *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994); *Buchanan*, 33 BRBS at 37.

²We reject Container's argument that the Board's initial decision contained a conflict regarding the relevancy of claimant's testimony. In a notation in its first decision, *Blue*, slip op. at 5 n.2, the Board rejected SSA's challenge to the administrative law judge's decision to credit claimant's testimony. Additionally, the Board noted that claimant's testimony is irrelevant with regard to the issue of aggravation. That is not to say that the administrative law judge is not free to discuss and credit claimant's testimony regarding his symptoms before and after each incident. Rather, the Board was merely advising the administrative law judge that, in the context of resolving the *legal* issue of whether, *medically*, an aggravation occurred, a claimant's testimony is not dispositive.

Container also contends the administrative law judge erred in holding it liable for permanent total disability benefits after the February 1995 incident. Although the determination of which employer is ultimately liable for claimant's post-February 1995 benefits has not been ascertained, we reject Container's assertion that the administrative law judge's conclusion on the nature and extent of claimant's disability is unsupported by substantial evidence. The administrative law judge found, based on the opinions of Drs. Preininger, von Rogov, and Blackwell, that claimant is permanently totally disabled, as his condition was permanent and stable when they examined him after February 1995, and as they concluded that he was unable to return to his usual work. Decision and Order at 12; Decision and Order Upon Remand at 6; Cl. Ex. 11; Container Ex. 1; SSA Exs. 79-82, 86, 89, 95. In light of the evidence herein, it was not erroneous for the administrative law judge to re-adopt his prior finding and award claimant permanent total disability benefits. Because the administrative law judge's conclusion that claimant is currently permanently totally disabled is supported by substantial evidence, we affirm it. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Consequently, whichever employer is found liable for benefits for claimant's disability after February 28, 1995, is liable for permanent total disability benefits. *See generally Foundation Constructors*, 950 F.2d at 621, 25 BRBS at 71 (CRT).

Accordingly, the administrative law judge's conclusion that Container is the responsible employer is vacated, and the case is remanded for further consideration of that issue.³ In all other respects, the decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

³In light of our decision to vacate the administrative law judge's finding concerning the responsible employer, we need not address Container's argument that it is liable, at most, for benefits for a temporary exacerbation of claimant's condition. That issue should be addressed in concert with the responsible employer issue.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge