BRB No. 08-0837

G.F.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CSX LINES, INCORPORATED	)	DATE ISSUED: 06/24/2009
	)	
and	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
HORIZON LINES, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Supplemental Order Amending Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Wayne P. Tate and David Sire, Jr. (Ostendorf, Tate, Barnett & Wells, LLP), Rancho Santa Margarita, California, for CSX Lines, Incorporated and Lumbermen's Mutual Casualty Company.

Frank B. Hugg, Oakland, California, for Horizon Lines, LLC and Signal Mutual Indemnity Association, Limited.

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

PER CURIAM:

Employer, CSX Lines, Incorporated (CSX), appeals the Decision and Order Awarding Benefits and the Supplemental Order Amending Decision and Order Awarding Benefits (2007-LHC-0917) of Administrative Law Judge Gerald M. Etchingham 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).

On June 27, 2000, while working as a truck driver for CSX, claimant sustained a neck injury when he struck his head on the bottom of the mirror bracket of a truck parked next to his truck.[1] Tr. at 63-67, 128-130. The following day, claimant sought medical treatment and was diagnosed with a cervicothoracic strain, for which he underwent chiropractic treatment. HX 7.1-7.14. On August 31, 2000, claimant began treatment with Dr. Grant, a Board-certified orthopedic surgeon, and, on December 14, 2000, Dr. Grant performed an anterior cervical diskectomy and fusion at C5-6 and C6-7. HX 7.15-7.35. This surgery ultimately proved to be unsuccessful as the bone at C5-6 did not properly fuse.[2] HX 7.88-7.89. On July 1, 2002, Dr. Grant again performed surgery, this

[1] Claimant had sustained a prior work-related injury to his neck in 1982 or 1983, for which he underwent an anterior cervical fusion at C6-7. He was off work for a year and thereafter returned to his usual employment without any work restrictions. Tr. at 123-24, 349; HXs 1.19; 7.30.

[2] Despite his concerns about the slow progression of claimant's C5-6 interbody fusion bone, Dr. Grant released claimant to return to full-duty work on July 9, 2001, and claimant worked for CSX from that date through August 29, 2001. HXs 7.55-7.57; 9.11. On August 29, 2001, Dr. Grant stated that claimant's neck pain had flared up due to vibration and bouncing while driving the truck assigned to him by CSX which lacked a full air ride suspension. HX 7.60-7.62. Although both Dr. Grant and claimant's chiropractor requested that CSX provide claimant with the use of a full air ride suspension truck, claimant was not provided with such a truck during the time he was employed by CSX. Tr. at 133-135; HXs 8.2-8.4; 15 at 103-106, 108-109.

time consisting of a posterior augmentation, stabilization and fusion at C5-6 and C6-7. HX 7.91-7.101. Dr. Grant kept claimant off work, HX 7.105-7.111, until his May 27, 2003 visit, when he released claimant for a trial return to work.[3] Despite having advised Dr. Grant that he did not feel that he was physically able to return to work,[4] claimant returned to his former job on June 2, 2003. Although claimant's job duties remained the same, his employer was now Horizon Lines, LLC (Horizon), which had assumed ownership of the marine yard from CSX.[5] Tr. at 61-62, 83-84; HX 15 at 64-69, 114.

Dr. Grant kept claimant off work until April 8, 2002, when he released him for a trial return to full-duty work. HX 7.68-7.80. Claimant worked from that date until June 11, 2002, when he was taken off work by Dr. Grant because his symptoms indicated probable pseudoarthrosis, or nonunion, at C5-6, a condition that required surgery. HX 7.88-7.89.

[3] In his May 27, 2003 report, Dr. Grant stated that claimant has a permanent disability "precluding repetitive movements of the neck." HX 7.113. Acknowledging that claimant's job requires repetitive neck movement, Dr. Grant stated that claimant should be allowed to take frequent breaks if he develops neck stiffness or pain and that he should not perform repetitive overhead lifting activity. *Id.* Dr. Grant additionally stated as follows:

> The patient should consider a trial of return to work as a truck driver. However, if his symptoms do not allow him to complete an 8-hour day, then he should be considered a candidate for vocational rehabilitation and a Qualified Injured Worker. It is my impression the patient should be able to return to at least part time work as a truck driver.

Id.

[4] Claimant testified that he told Dr. Grant that he disagreed with the decision to release him to return to work because he was in severe pain; claimant estimated that at the time of his May 27, 2003, visit with Dr. Grant, his pain level was between 9 and 10. Tr. at 82-83, 138-142, 149-150, 322-323; HX 15 at 57-59, 79-80.

[5] Horizon could accommodate neither the work restrictions originally assigned by Dr. Grant on May 27, 2003, nor the additional restrictions he assigned on August 19, 2003. Tr. at 84-85, 91-92, 174-178, 192-194; HXs 7.113-7.118; 15 at 62, 101, 114, 117. On the basis of his seniority, however, claimant was provided with a full air ride suspension truck throughout his employment with Horizon. Tr. at 90-91, 135; HX 15 at 107, 120.

During the first week of claimant's employment with Horizon, claimant's intense pain[6] caused him to take days off; thereafter, claimant left work early on numerous occasions, and he averaged only two to three work days per week throughout the duration of his employment with Horizon.[7] Tr. at 72-73, 76-78, 85-89, 143, 151, 313-314; HX 15 at 81. Claimant's last day of work was on October 14, 2003, when his pain forced him to discontinue working.[8] Tr. at 59-61, 92-93.

On October 7, 2003, claimant filed a claim under the Act against CSX for a specific injury to his neck sustained on June 27, 2000,[9] and CSX controverted the claim, asserting that claimant aggravated his neck condition during his subsequent work for Horizon.[10] HXs 9.14-9.15, 9.50.

[6] Claimant testified that he believed that the increased neck pain that occurred during the performance of his work duties was attributable to his original June 2000 injury and to the surgery performed in July 2002. Tr. at 74, 163.

[7] Horizon's time records reflect that claimant worked 45 out of a possible 96 work days from June 2, 2003, through October 14, 2003, and that he took vacation and sick leave and floating holidays on the days he was unable to work. HX 10.

[8] Claimant took accrued leave until December 2003, when he realized that he would be unable to return to work and officially retired. Tr. at 93-100, 196-197. Claimant testified that at the time of his retirement in December 2003, his pain level was at the same level of 9 to 10 that it had been during his May 27, 2003, visit with Dr. Grant. Tr. at 144, 306. In his previous deposition testimony, claimant stated that in December 2003, his pain level was 7, which he noted was lower than the 9 to 10 level it had been in May 27, 2003, before he began work for Horizon. HX 115 at 79-80, 82, 119.

[9] CSX had made voluntary payments to claimant of temporary total disability benefits for this injury for the periods from June 28, 2000, to July 8, 2001, August 30, 2001, to April 7, 2002, and June 12, 2002, to June 1, 2003. HX 9.11.

[10] A separate claim against Horizon for an injury to claimant's right elbow sustained on July 17, 2003, was settled by claimant and Horizon and is not at issue in this appeal. *See* Decision and Order at 2; Tr. at 17-22.

In his Decision and Order Awarding Benefits, the administrative law judge found claimant entitled to temporary total disability benefits from June 20, 2000[11] through April 13, 2004, and to permanent total disability benefits thereafter. Decision and Order at 20-21, 27. After determining that claimant's disability is the result of the natural progression of the June 27, 2000 neck injury he sustained while working for CSX, the administrative law judge found CSX to be the sole responsible employer. *Id.* at 23-24. The administrative law judge further found that during the period of his employment with Horizon, claimant was totally disabled, working only through extraordinary effort. *Id.* at 25-26. The administrative law judge thus found that although claimant sustained a temporary exacerbation of his neck condition due to his work for Horizon, CSX was responsible for compensation for the time claimant missed work for Horizon. *Id.* The administrative law judge accordingly found CSX liable for the payment of all the benefits awarded to claimant.[12] *Id.* at 27.

On appeal, CSX challenges the administrative law judge's determination that it is the employer responsible for the payment of claimant's awarded benefits. Horizon responds, urging affirmance.

CSX contends that the administrative law judge's finding that claimant's disability is due to the natural progression of his June 2000 work-related neck injury is neither supported by substantial evidence nor consistent with applicable law. 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. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* [*Price*], 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*,

[11] We note that no party challenges on appeal the discrepancy between the June 20, 2000, commencement date for the administrative law judge's award of benefits and the June 27, 2000, date of claimant's work-related injury.

[12] In a Supplemental Order issued on September 4, 2008, the administrative law judge amended the original Decision and Order to reflect that the responsible employer is "CSX" rather than "CTS."

543 U.S. 940 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

In concluding that claimant's disability is due to the natural progression of his June 2000 neck injury, the administrative law judge found that claimant had a poor result from his July 2002 fusion surgery and had not recovered from his initial June 2000 work injury when he attempted to return to work for Horizon in June 2003. Decision and Order at 24. The administrative law judge further found that claimant's attempt to return to work was unsuccessful from the outset and that, a few months after claimant stopped working, his neck returned to the same condition it had been prior to his employment with Horizon. *Id.* In reaching these conclusions, the administrative law judge relied on claimant's testimony that he felt he was not able to work when Dr. Grant released him for a *trial* return to work on May 27, 2003, and on Dr. Grant's acknowledgement that claimant might not be able to fully perform his job duties. *Id.* at 5-6, 23-24; *see* footnotes 3 and 4, *supra*. Next, the administrative law judge credited claimant's testimony that by December 2003, his pain level had returned to the same level it had been immediately prior to his employment with Horizon, claimant's testimony attributing his neck pain to his June 2000 injury and surgeries, and claimant's testimony and Horizon's time records reflecting that claimant began to miss work due to his neck pain in his first week of employment with Horizon. Decision and Order at 6-10, 16, 23; *see* footnotes 6, 7 and 9, *supra*. The administrative law judge also relied on Dr. Schick's interpretation of claimant's x-rays and MRIs as demonstrating a progression in his cervical spinal condition from December 2000 through September 2002, but no worsening thereafter. Decision and Order at 11-13, 18, 23-24; Tr. at 218-220, 239, 243, 274-277; HX 3. The administrative law judge next cited medical reports indicating that by February 2004, claimant's loss of cervical range of motion was the same 25 percent as had been measured on May 27, 2003. Decision and Order at 5, 8, 24; HXs 7.112-7.113; 16 at 7, 21-22, 30-31. Lastly, the administrative law judge credited the opinion of Board-certified neurosurgeon Dr. Eyster that although claimant experienced temporary flare-ups while working for Horizon, that work did not cause any permanent aggravation of his neck condition.[13] Decision and Order at 10-11, 17-18, 24. The administrative law judge

[13] Dr. Eyster's opinion was based on his findings that claimant has done very poorly since his July 2002 surgery; that claimant was still in constant severe pain when he was released to return to work by Dr. Grant on May 27, 2003; that his chronic pain was briefly worse while working for Horizon; that his pain returned to the level it been prior to June 2003; and that there are no objective findings clinically, radiologically or by history to support a permanent aggravation resulting from his work for Horizon. Tr. at 352-353, 362-364, 367-375, 378-379, 386-388, 421, 426-429, 432; HX 1.

found that this evidence[14] outweighed the contrary opinion of Board-certified orthopedic surgeon Dr. Mandell that claimant suffered a minor aggravation of his cervical condition while working for Horizon.[15] Decision and Order at 14-15, 19, 24; HX 9; CSX 22 at 36-40, 49-50, 53-61, 64-65, 77-78.

In this case, the administrative law judge considered the issue of the responsible employer in light of the relevant law,[16] *see Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors, Inc.*, 950 F.2d 621, 25 BRBS 71(CRT), and applied an appropriate evidentiary standard in reviewing the record as a whole when addressing this issue. *See Siminiski v. Ceres Marine Terminals*, 35 BRBS 136, 138-139 (2001). It is well established that 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). We reject CSX's contention that the administrative law judge erred in evaluating the evidence of record, as the administrative law judge drew rational inferences from the medical evidence and claimant's testimony and reasonably concluded that the preponderance of the evidence establishes that claimant's disabling

[14] The administrative law judge additionally noted Dr. Thompson's testimony that no aggravation occurred, but accorded her opinion only moderate weight on the basis of some apparent equivocation in her testimony and her lack of familiarity with claimant's specific job duties. Decision and Order at 17, 24; HX 16 at 34, 38-40, 43, 53-54.

[15] The administrative law judge also cited Dr. Grant's assignment of additional work restrictions on August 19, 2003, as evidence of an aggravation with Horizon, but accorded this evidence only slight weight inasmuch as Dr. Grant considered claimant's return to work to be merely a "trial." Decision and Order at 7, 23-24; HX 7.112-7.113, 7.116.

[16] The administrative law judge appropriately recognized that, in a traumatic injury case, the subsequent employment must contribute in some way to the ultimate disability in order for a subsequent employer to be held liable. It is insufficient to show merely that claimant's condition was symptomatic while he was working for the subsequent employer. *See Price*, 339 F.3d at 1105, 37 BRBS at 90(CRT). In this case, the administrative law judge rationally determined, based on claimant's testimony and the medical evidence, that claimant had not recovered from his neck injury before returning to work in June 2003, and that, during the period that claimant worked for Horizon, he experienced only a temporary increase in pain symptoms which had no effect on his ultimate disability.

neck condition is due to the natural progression of his June 2000 injury.[17] *See Siminiski*, 35 BRBS at 139.

CSX further challenges the administrative law judge's determination that as claimant was totally disabled before beginning work with Horizon, CSX is liable to claimant for the payment of compensation for those days during which claimant's neck pain caused him to miss work with Horizon. The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence, although an award of total disability while working is the exception, rather than the rule. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006). In this case, although the

[17] CSX argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony, asserting that the evidence establishes that claimant's neck condition was aggravated by cumulative microtrauma sustained during the period that claimant worked for Horizon. The mere summary of evidence favorable to its position does not demonstrate error in the administrative law judge's findings. Therefore, we need not address CXS's arguments in detail as the competing characterization of the record evidence and assessment of the witnesses' credibility offered by CSX do not provide a basis for overturning the administrative law judge's credibility determinations and evaluations of the evidence which are rational and supported by the record. *See*, *e.g.*, *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

We reject, however, CSX's challenge to Dr. Eyster's opinion on the basis of the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993). Employer is not challenging the admissibility of Dr. Eyster's opinion, but the weight accorded it by the administrative law judge. *See Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997). Dr. Eyster's opinion does not rest solely on the portion of his testimony challenged on appeal by CSX regarding research on the effects of a cervical fusion on adjacent disks. *See* Tr. at 403-404. Rather, Dr. Eyster thoroughly discussed a number of other reasons that amply support his conclusion that claimant's work for Horizon did not cause a permanent aggravation of his neck condition. *See* n.14, *supra*. Thus, we hold that the administrative law judge rationally found Dr. Eyster's opinion to be more persuasive than the contrary opinion of Dr. Mandell. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT).

administrative law judge conducted a hybrid analysis when addressing this issue,[18] we affirm his conclusion that claimant was totally disabled while working for Horizon based on the administrative law judge's finding that claimant worked only with extraordinary effort and in spite of excruciating pain. *See* Decision and Order at 25-26.

In determining that claimant worked for Horizon only through "extraordinary effort," the administrative law judge credited claimant's testimony that any of his work activities could trigger pain and that he was forced to leave work early or take days off when his pain became too intense. Decision and Order at 26; Tr. at 72-73, 75-78. The administrative law judge further relied on claimant's testimony that on several occasions during his employment with Horizon, his pain level was 10, that toward the end of his employment, his pain level ranged from 7 to 10, and that he worked in spite of this intense pain because he felt he "had to try to get through" after being sent back to work by Dr. Grant. Decision and Order at 26; Tr. at 89. Noting that claimant worked only 45 days during a 96-day period and that claimant left work early on 10 of those days, the administrative law judge found that claimant's employment with Horizon lasted that long only because claimant "was able to use his copious leave time when the pain became intolerable." Decision and Order at 26; Tr. at 72-73, 76-78, 87, 143, 151, 164-165, 313-314; HXs 10; 15 at 81. As the evidence credited by the administrative law judge constitutes substantial evidence to support the administrative law judge's finding that claimant worked for Horizon only through extraordinary effort, we affirm the administrative law judge's finding that claimant was totally disabled during his employment with Horizon, *see Reposky*, 40 BRBS at 72-73, and that CSX is consequently responsible for the compensation awarded to claimant during those periods of time that claimant missed work with Horizon due to his neck condition.[19]

[18] We agree with CSX that the evidence in this case does not support a finding that Horizon was a "beneficent employer" or that claimant's work for Horizon represented "sheltered employment." *See Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

[19] Throughout its brief, CSX contends that claimant sustained a "flare-up" of his neck condition during his work for Horizon. It is true that in cases where claimant suffers a temporary "flare-up" after a second injury which returns to baseline after a short period, the second employer may be liable only for a short period, after which the liability of the employer at the time of the initial injury resumes. In this case, however, CSX's argument in this regard is moot in light of our affirmance of the administrative law judge's determination that claimant was totally disabled during his period of employment with Horizon.

In conclusion, we affirm the administrative law judge's finding that CSX is the responsible employer liable for all awarded benefits as it is supported by substantial evidence and consistent with the applicable legal principles. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge