BRB No. 09-0789

ROBERT MURPHY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRED WAHL CONSTRUCTION	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	DATE ISSUED: 06/23/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

J. Michael Casey, Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Seabright Insurance Company.

Richard A. Nielsen (Nielsen Shields, PLLC), Seattle, Washington, for American Longshore Mutual Association.

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

PER CURIAM:

Employer and Seabright Insurance Company (Seabright) appeal the Decision and Order (2008-LHC-00369, 00370) of Administrative Law Judge Russell D. Pulver 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 injured his back on July 31, 2003, during the course of his employment for employer as a pipefitter. He underwent surgery for a herniated disc at L1-2. Claimant returned to part-time light-duty work for employer on December 5, 2003. At claimant's request, he was released for full-duty work by Dr. Parvin on January 21, 2004. Claimant worked intermittently for employer from January 23 to February 13, 2004, when he stopped working due to back pain. He has not returned to work. Claimant filed a claim under the Act for the July 31, 2003 work injury. ALMAX at 1-6. American Longshore Mutual Association (ALMA) was the insurance carrier on the risk at the time of claimant's July 2003 work injury. Thereafter, employer obtained its longshore insurance from Seabright. ALMA filed a motion on January 4, 2007, to join Seabright to the proceedings. Claimant filed a claim against Seabright on February 8, 2007. SBIX 1. A hearing was held on August 11, 2008, on the issues of the nature and extent of claimant's work-related disability, the responsible carrier, the timeliness of claimant's notice and claim against Seabright, and the applicability of Section 8(f) relief, 33 U.S.C. §908(f).

In his decision, the administrative law judge found that claimant aggravated his back condition during his work from December 2003 to February 2004. The administrative law judge also found that claimant's pain-related psychological condition worsened following his return to work for employer in December 2003. Thus, the administrative law judge held that Seabright is the responsible carrier. The administrative law judge determined that Seabright did not establish it was prejudiced by claimant's late notice of injury. 33 U.S.C. §912(a), (d)(2). The administrative law judge also determined that claimant's back condition reached maximum medical improvement on July 10, 2008, that claimant is unable to return to work for employer as a pipefitter, and that there is no evidence of suitable alternate employment. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from February 13, 2004 to July 10, 2008, and for continuing permanent total disability thereafter. 33 U.S.C. §908(a), (b). The administrative law judge held that employer and Seabright are entitled to Section 8(f) relief from continuing compensation liability.

On appeal, Seabright contends the administrative law judge erred by failing to dismiss as untimely under Section 13 of the Act, 33 U.S.C. §913, the claim filed against it by claimant in February 2007. Seabright also contests its designation as the responsible carrier, contending the administrative law judge erred by crediting the opinion of claimant's current treating physician, Dr. Morgan, in finding that claimant's employment from December 2003 to February 2004 aggravated his July 2003 work injury. ALMA responds, urging affirmance of the administrative law judge's responsible carrier finding. Claimant responds that his claim against Seabright was timely filed. Claimant further responds that, if the administrative law judge erred in finding that claimant's back condition was aggravated by his return to work, ALMA is the responsible carrier since it was on the risk when he injured his back in July 2003. Seabright filed a reply brief.

Seabright contends the administrative law judge erred in failing to address its contention that claimant's claim is barred pursuant to Section 13(a). Section 13(a) applies in traumatic injury cases and provides that the right to compensation shall be barred unless the claim is filed within one year of the time claimant is aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). There is no dispute that claimant's initial claim for the July 2003 work injury, when ALMA was the responsible carrier, was timely filed pursuant to Section 13. Claimant filed a claim against Seabright on February 8, 2007. The administrative law judge did not address Seabright's contention that the claim filed against it was not timely under Section 13. *See* Tr. at 36; 33 U.S.C. §913(b)(1); Decision and Order at 52-53.

Any error in the administrative law judge's failure to address Seabright's Section 13 contention is harmless. Claimant was not required to file a claim naming Seabright as the responsible carrier once ALMA joined Seabright to the claim in January 2007; the documents surrounding Seabright's joinder to the claim are sufficient to fulfill the notice and claim requirements of Sections 12 and 13. *Reposky v. Int'l Transportation Services*, 40 BRBS 65 (2006). In *Reposky*, the claimant sustained three successive work-related injuries with three different longshore employers. The parties stipulated that notice and the claim were timely provided to the employer with whom claimant sustained her first work injury. The Board held that the time limitations in Sections 12 and 13 do not begin to run against any subsequent employers until the initial employer against which claimant timely filed was found not to be liable for claimant's benefits. *Reposky*, 40 BRBS at 68-69, *citing Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981). The employer and its carrier against whom a claimant files a claim must be able to join other potentially responsible employers or carriers in order to defend itself against the claim. *Id.* at 69.

In this case, it is undisputed that claimant timely filed a claim against employer with the district director for his July 31, 2003, back injury, which occurred when ALMA was on the risk. Claimant did not contend he sustained a subsequent aggravating injury while Seabright was on the risk. Rather, ALMA permissibly joined Seabright in January 2007, contending that Seabright is the responsible carrier based on claimant's aggravating his back condition after he returned to work in December 2003. Under these circumstances, claimant was not required to file a notice and claim under Sections 12 and 13 against Seabright. Claimant had previously filed a timely claim against employer. The decision of employer's carrier, ALMA, to join a subsequent carrier does not impose on claimant the obligation to file a claim against the subsequent carrier. *See also Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004) (Sections 12 and 13 do not bar insurance carrier's claims for reimbursement from another carrier). In the absence of any dispute that claimant timely filed a claim against employer for the July 2003 work injury, the requirements of Section 12 and 13 have been met.

Seabright next contends that the administrative law judge erred by crediting the opinion of Dr. Morgan, on the basis that she is claimant's current treating physician, to find that claimant's back condition was aggravated during the course of his employment from December 2003 to February 2004. Seabright thus contends the administrative law judge erred in finding it, rather than ALMA, is the responsible carrier. The determination of the responsible carrier in the case of multiple traumatic injuries turns on whether the claimant's disabling condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the carrier at the time of that injury is responsible for compensating the claimant for the entire disability. If claimant sustained a second injury which aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the carrier at the time of the second injury is liable for all medical expenses and compensation related thereto. *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); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Buchanan v. Int'l Transp. Serv.*, 33 BRBS 32 (1999), *aff'd mem.*, 7 F.App'x 547 (9th Cir. 2001).

Claimant reported increased back pain and weakness in his legs due to his return to work after December 5, 2003. CX 35 at 78. He requested that Dr. Parvin refer him for vocational rehabilitation. *Id.* at 79. In finding that claimant's back injury was aggravated by his employment from December 2003 to February 2004, the administrative law judge found that Dr. Morgan's opinion that this employment aggravated claimant's back condition "is entitled to *some* deference" pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert.*

denied, 528 U.S. 809 (1999). Decision and Order at 45. Dr. Morgan testified at her deposition that claimant's work in January and February 2004 accelerated, aggravated and exacerbated his back condition and that his symptomatology is much more severe than that which would have resulted from the normal passage of time.[1] CX 92 at 231-237. The administrative law judge discounted the opinion of Dr. Rosenbaum that claimant's back condition was not aggravated by his post-injury work for several reasons: he had examined claimant only once, prior to claimant's most recent MRI test; he had not addressed claimant's articular facet disease as a cause of his pain symptomatology; and his deposition testimony was evasive and equivocal.[2] Decision and Order at 44; *see* SBIX 11. The administrative law judge further found Dr. Morgan's opinion more credible than Dr. Rosenbaum's because she is a pain specialist. The administrative law judge found that Dr. Morgan, therefore, is better able to evaluate claimant's overall condition as it is back pain that prevents claimant from returning to work; Dr. Rosenbaum specializes in orthopedics. *Id.* at 45; *see* CX 78. SBIX 9. The administrative law judge also credited Dr. Clark's reading of an x-ray taken on January 20, 2004, as showing articular facet change at L5-S1, which was a new finding.[3] SBIX 8 at 139. Seabright contends the administrative law judge erred in affording any deference to Dr. Morgan's opinion merely because she is claimant's treating physician. Seabright contends Dr. Morgan did not begin to treat claimant until November 2007, and thus, her opinion as to any aggravation in 2003-2004 is not entitled to determinative weight.

In *Amos*, the United States Court of Appeals for the Ninth Circuit held that greater weight may be accorded to a treating physician's opinion regarding treatment options since he is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos*, 164 F.3d at 1054, 32 BRBS at 147(CRT). The court further held that, on the facts of that case, the administrative law judge was required to credit the claimant's treating physician about the recommended course of treatment since

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[1] Dr. Morgan also stated her disagreement with Dr. Rosenbaum's opinion that claimant's condition was the natural and unavoidable result of an underlying degenerative process. CX 92 at 249.

[2] Dr. Rosenbaum stated that claimant's current condition is the unavoidable consequence of claimant's 2000 and 2003 injuries and the resulting degenerative process. He stated claimant's work in 2004 played no significant contributing role in causing claimant's pain. EX 10 at 167. Dr. Rosenbaum also stated, however, that claimant's work "brought out" his symptoms. Dep. at 57.

[3] An x-ray taken on October 27, 2003, showed articular facet change at L4-5. CX 20 at 135. An x-ray from December 5, 2003 showed mild degenerative hypertrophy at L4-5 and L5-S1. *Id.* at 138.

his opinion is entitled to special deference and it was not shown by the testimony of other doctors to be unreasonable. The court's holding, therefore, is based on two factors: the doctor was the treating physician and the other medical evidence of record did not show his opinion to be unreasonable. Accordingly, in weighing a treating physician's opinion, the administrative law judge may accord determinative weight to the opinion but he also must consider its underlying rationale, as well as the other medical evidence of record. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Moreover, the administrative law judge is entitled to weigh conflicting evidence and to credit any opinion according to his judgment. *See generally Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979).

In this case, there is little contemporaneous medical evidence describing the effects of claimant's continued employment on his condition. Dr. Parvin, who treated claimant during this period, noted that claimant complained to him that working caused increased pain. CX 35 at 78. Dr. Parvin noted that claimant continued to have pain after he stopped working. Dr. Parvin did not give an opinion as to whether claimant's work from December 2003 to February 2004 aggravated claimant's condition. Thus, with regard to the responsible carrier issue, the administrative law judge was faced with evaluating the opinions of two physicians who first examined claimant more than three years after his employment had ended. The administrative law judge had the discretion to find Dr. Morgan's opinion more persuasive than Dr. Rosenbaum's on the issue of aggravation. *See generally Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). In addition to being claimant's treating physician for his back pain, the administrative law judge found her opinion supported by the January 2004 x-ray showing articular facet change at L5-S1. Seabright has failed to establish error in the administrative law judge's weighing of the conflicting testimony. Contrary to Seabright's contention, Dr. Morgan's opinion supports the finding that claimant's permanently disabling condition was aggravated by his work. Dr. Morgan stated that the exacerbation and acceleration of claimant's condition led to his inability to work and his "decompensated" state. CX 92 at 235, 238. The opinion of Dr. Morgan constitutes substantial evidence to support the administrative law judge's finding that Seabright is liable as the responsible carrier because it was on the risk from December 2003 to February 2004 when claimant sustained a permanent aggravation of his condition.[4] Thus,

[4] The administrative law judge further relied on the opinions of Drs. Rosenbaum and Morgan, as supported by that of Dr. Kurlychek and the observations of Dr. Vail, to find that claimant's psychological condition worsened as a result of his well-documented increase in pain after he returned to work in December 2003. December and Order at 45; *see* SBIX 11 at 45-46, 54; CXs 57 at 120; 84 at 169; 92 at 212-213. The administrative law judge's reliance on claimant's increasing psychological problems does not

the finding that Seabright is liable as the responsible carrier is affirmed. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, No. 08-72267, 2010 WL 1635023 (9th Cir. Apr. 23, 2010).

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

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independently support a finding that Seabright is the responsible carrier, as these problems could have been due to the natural progression of claimant's back condition.