BRB Nos. 00-691
and 00-691A

JAMES LOFTUS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN STEVEDORES	)	DATE ISSUED: March 12, 2001
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DELAWARE RIVER STEVEDORES	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Eugene Mattioni and Francis X. Kelly (Mattioni, Ltd.), Philadelphia, Pennsylvania, for Southern Stevedores.

Stephen M. Calder (Palmer, Biezup & Henderson, LLP), Philadelphia, Pennsylvania, for Delaware River Stevedores.

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

PER CURIAM:

Southern Stevedores appeals, and claimant cross-appeals, the Decision and Order (99-LHC-1008, 99-LHC-1608) of Administrative Law Judge Ralph A. Romano 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).[1] 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).

Claimant was employed by Southern Stevedores when he injured his back on September 30, 1996. He was diagnosed with a low back sprain, and was released in December 1996 for full duty. While occasionally seeking treatment for back pain, he continued to work until May 20, 1998, when he stopped working because the pain was "unbearable." At the time he left longshore employment, he was working for Delaware River Stevedores (DRS). Claimant returned to his regular duties on January 21, 1999. He sought temporary total and temporary partial disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant established that he had sustained a work-related injury and awarded temporary total disability benefits for the periods sought. The administrative law judge also found that the record does not establish that upon his return to work, claimant was unable to earn the wages he earned prior to the injury, and thus no temporary partial disability benefits were awarded. The administrative law judge found that Southern Stevedores is the employer responsible for the benefits awarded, as claimant continued to work from the date of the 1996 injury without recovery or resolution until the pain became unbearable.[2]

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[1]Southern Stevedores filed a Notice of Appeal of the District Director's Attorney Fee Determination, BRB No. 00-1052, which was consolidated with the appeals in BRB Nos. 00-691 and 00-691A. However, by letter dated October 11, 2000, Southern Stevedores withdrew its appeal of the District Director's Attorney Fee Determination. Thus, the Board severed employer's appeal designated BRB No. 00-1052 and dismissed the appeal in that case. *See* Order dated October 26, 2000.

[2]The administrative law judge summarily denied motions for reconsideration filed by claimant and Southern Stevedores, by Order dated March 1, 2000.

On appeal, Southern Stevedores contends that the administrative law judge erred in finding it to be the responsible employer for the period of temporary total disability from April 21, 1998 to January 20, 1999, as claimant suffered a second distinct injury in 1998 that forced him to leave work, and thus, his employer at that time, DRS, is liable for benefits. DRS and claimant respond, urging affirmance of the administrative law judge's finding that Southern Stevedores is responsible for the temporary total disability benefits. On cross-appeal, claimant contends that the administrative law judge erred in finding that he is not entitled to either continuing temporary partial disability benefits or temporary partial disability benefits from January 21, 1999 until May 18, 1999, the date claimant asserts he was released by Dr. Lefkoe to perform overtime work. Southern Stevedores and DRS respond, urging affirmance of the administrative law judge's finding as the evidence establishes that claimant does not work overtime for reasons unrelated to his back condition.

Southern Stevedores contends on appeal that the administrative law judge erred in finding it responsible for the period of disability beginning in April 1998, as claimant suffered a new injury at that time while in the employ of DRS. Although the employer at the time of an initial traumatic injury remains liable for the full disability resulting from the natural progression of that injury, if claimant's subsequent employment aggravates or accelerates claimant's condition resulting in disability, the subsequent employer is fully liable. *Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *McKnight v. Carolina Shipping Co.,* 32 BRBS 165 (1998), *aff'd on recon. en banc,* 32 BRBS 251 (1998); *Buchanan v. International Transportation Services,* 31 BRBS 81 (1997), *decision after remand,* 33 BRBS 32 (1999), *aff'd mem,* No. 99-70631 (9th Cir. Feb. 26, 2001). If the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act. *See Crum v. General Adjustment Bureau,* 738 F.2d 474, 16 BRBS 115(CRT)(D.C. Cir. 1984); *Gardner v. Director, OWCP,* 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In other words, the work-related manifestation of symptoms of an underlying condition constitutes an "injury" under the Act. *Crum*, 738 F.2d at 478, 16 BRBS at 120-121(CRT); *Gardner,* 640 F.2d 1385, 13 BRBS 101; *Pittman v. Jeffboat, Inc.,* 18 BRBS 212 (1986). Thus, where claimant's work results in a temporary exacerbation of symptoms, the employer at the time of the work events leading to this exacerbation is responsible for the resulting temporary total disability. *See generally Kelaita v. Director, OWCP*, 799 F.2d 308 (9th Cir. 1986). Southern Stevedores does not dispute the fact that claimant was injured while in its employ on September 30, 1996. However, it alleges that claimant's condition resolved and he was able to return to work until he became disabled due to his work with DRS.

In the present case, the record contains evidence that claimant was able to return to his regular duties as of December 1996, following the original injury. He continued to complain of back pain and sought treatment after his return to work, and it is undisputed that claimant's

back condition had not resolved. Claimant testified, however, that he was able to work from December 1996 because the pain "wasn't crippling." H. Tr. at 90. Claimant began working for DRS in September 1997. He stated that beginning in January 1998, he started working very hard and long hours, *e.g.*, 14-16 hour days, until he left in April 1998, when the pain became unbearable. H. Tr. at 90. Dr. Guttman opined that the excessive hours claimant worked from January through April 1998 caused him to have excessive pain and an aggravation of his symptoms. SS Exhibit 22 at 61-62. In addition, Dr. Lefkoe opined that long hours with repetitive bending, stooping and twisting could aggravate claimant' condition, Cl. Ex. 12 at 42-43, but only temporarily, *id*. at 66. Moreover, Dr. Lee opined that increased physical activity could have increased claimant's symptoms and that long heavy work can exacerbate the condition. DRS Ex. 11 at 26.

In finding that claimant sustained a work-related injury resulting in a period of temporary total disability, the administrative law judge stated that the fact that claimant "sustained a work-related injury on September 30, 1996, and/or that his continued work activity aggravated his low back impairment, is amply and preponderantly medically demonstrated in this record." Decision and Order at 5. The administrative law judge held Southern Stevedores liable for these benefits on the basis that the evidence establishes that "while the episode of extra heavy work exertion while Claimant was employed at DRS in January through April 1998 may well have furthered his low back pain, the initial precipitant event of symptom manifestation on September 30, 1996 was the discrete event which ultimately eventuated and progressed to the final debilitating event of late April-May 1998 requiring the suspension of work activity." Decision and Order at 6. However, neither statement answers the question presented herein. The fact that the earlier injury was the "precipitant event" is not determinative, particularly since the administrative law judge found that claimant's heavy work at DRS may well have furthered claimant's back pain. The latter statement is sufficient to establish that claimant's condition was aggravated or exacerbated, and thus that DRS is responsible for claimant's temporary total disability.

In awarding claimant temporary total disability benefits, the administrative law judge relied on the medical opinions of Drs. Lefkoe and Guttman, which establish that claimant's employment with DRS aggravated claimant's symptoms, resulting in increased pain. There is no contrary evidence. Thus, as the credited medical evidence establishes that claimant suffered at least a temporary aggravation of the symptoms of his underlying back condition due to the increased hours and exertion while working for DRS from January to April 1998, and that this aggravation was the cause of temporary total disability from May 1998 to January 20, 1999, we reverse the administrative law judge's finding that Southern Stevedores, claimant's employer at the time of the initial injury in September 1996, is liable for this period of benefits. *Crum*, 738 F.2d at 478, 16 BRBS at 120-121 (CRT). Therefore, we hold that DRS is liable for claimant's temporary total disability benefits for the period from May 1998 to January 20, 1999, as a matter of law. *See Buchanan*, 33 BRBS 32.

On cross-appeal, claimant contends that the administrative law judge erred in determining that he refused available overtime from DRS, and thus, that he is not entitled to temporary partial disability benefits. In addition, claimant contends that the administrative law judge erred in failing to award him temporary partial disability benefits from January 21, 1999 until May 18, 1999, the date he was released by Dr. Lefkoe to perform overtime. DRS responds, noting that claimant testified he is able to perform overtime, but prefers to go to the gym after his shift is over. Southern Stevedores responds, noting that claimant had the burden of proof, and that claimant's evidence establishes that the lack of overtime was due to changes in the business, and that he was capable of working overtime if he had so desired.

The Board has held that a claimant must establish that, absent his injury, he would have worked available overtime. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989). In the instant case, the administrative law judge found that there is "no evidence that employer would not permit claimant to work overtime, nor that, if he wished, he could not avail himself of overtime." Decision and Order at 5. Moreover, he found that the "record simply does not establish that since January 21, 1999 and due to his work injury Claimant is unable to earn wages he would have earned prior to the injury." Decision and Order at 6.

In May 1999, Dr. Lefkoe recommended that claimant continue with his present exercise program and noted that claimant would continue working with light duty restrictions and that he may work overtime if those restrictions are continued. Cl. Ex. 1. Dr. Lefkoe testified that while he had released claimant to work with restrictions in January 1999, he had not restricted claimant from working overtime, Cl. Ex. 12 at 24, and stated, "at no time did I limit him to eight hours," Cl. Ex. 12 at 50. Moreover, claimant testified that he could have worked overtime with DRS if he had wanted to, and that this was true at the time of his return in January 1999. H. Tr. at 116-117. Therefore, as the administrative law judge's finding that the record does not establish that, absent his injury, claimant would have worked available overtime is supported by substantial evidence, we affirm the administrative law judge's denial of temporary partial disability benefits.[3]

[3]Therefore, we deny claimant's request for an attorney's fee in the amount of $750 for services performed before the Board. *See generally Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997)(Order).

Accordingly, the administrative law judge's decision finding that Southern Stevedores is liable for claimant's period of temporary total disability benefits from May 1998 to January 20, 1999, is reversed, and we hold that DRS is the responsible employer for this period of disability as a matter of law. The administrative law judge's finding that claimant is not entitled to temporary partial disability benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge