

JAMES BLUE)
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 Claimant)
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 v.)
)
 CONTAINER STEVEDORING) DATE ISSUED: 03/30/2006
 COMPANY)
)
 Self-Insured)
 Employer-Petitioner)
)
 and)
)
 STEVEDORING SERVICES)
 OF AMERICA)
)
 and)
)
 HOMEPORT INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Part-In-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William Dorsey,
Administrative Law Judge, United States Department of Labor.

Frank B. Hugg, Oakland, California, for Container Stevedoring Company.
Laura G. Bruyneel (Bruyneel & Leichtnam, LLP), San Francisco,
California, for Stevedoring Services of America and Homeport Insurance
Company.

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

PER CURIAM:

Container Stevedoring Company (Container) appeals the Decision and Order Awarding Benefits (95-LHC-1764 and 96-LHC-1785) of Administrative Law Judge William Dorsey 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).

This is the third time that this case is before the Board. To briefly reiterate the facts, claimant initially injured his neck, back and left wrist in September 1992 during the course of his employment as a clerk with Stevedoring Services of America (SSA). 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. Claimant thereafter required additional surgery, and he has not returned to work. Before the administrative law judge, the parties presented for adjudication the issue of whether claimant's current disability is the result of the natural progression of his 1992 injury or is the result of an aggravation sustained in 1995.

In the initial Decision and Order, Administrative Law Judge Schneider 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, when claimant was employed by Container, did not constitute either a continuing trauma or a second injury, Judge Schneider held SSA liable for claimant's compensation. SSA appealed this decision to the Board, which 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 (Apr. 17, 1998)(unpub.)(*Blue I*).

On remand, Judge Schneider held that claimant's condition was aggravated by the work-incident which claimant sustained in 1995, finding himself compelled to do so in accordance with the Board's decision in *Blue I*. The administrative law judge rejected Container's argument that claimant's condition returned to "baseline" following his February 28, 1995, injury, finding that claimant never returned to his pre-February 28, 1995, condition; the administrative law judge thus determined that claimant became

permanently disabled as of that date. Accordingly, based upon his previous determination which had been affirmed by the Board, the administrative law judge once again found that claimant became permanently totally disabled after February 28, 1995, and he held Container liable for those benefits. Container appealed this decision to the Board, contending that the administrative law judge erred in holding it liable for claimant's permanent total disability benefits after February 28, 1995. In its second decision, the Board affirmed the administrative law judge's finding that claimant is currently permanently totally disabled. The Board additionally determined that the administrative law judge on remand had found that an aggravation occurred in 1995 without citing any evidence. The Board therefore vacated the administrative law judge's responsible employer finding and remanded the case for the administrative law judge to weigh 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. *Blue v. Container Stevedoring Co.*, BRB No. 99-1000 (Jun. 23, 2000)(unpub.)(*Blue II*).

As Judge Schneider had retired, the case on remand was reassigned to Administrative Law Judge Dorsey (the administrative law judge). In his Decision and Order Awarding Benefits, the administrative law judge found that Container is the responsible employer since claimant's present disability stems from the injury claimant sustained while working for Container on February 28, 1995. Next, the administrative law judge declined Container's invitation to determine a new date of maximum medical improvement, finding that this issue had previously been addressed, appealed and affirmed by the Board. Accordingly, the administrative law judge ordered Container to pay claimant ongoing permanent total disability compensation as of March 1, 1995. In a Decision and Order on Reconsideration, the administrative law judge granted Container relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), and ordered Container to reimburse SSA for the payments that SSA made to claimant. The administrative law judge subsequently denied Container's second motion for reconsideration.

On appeal, Container challenges the administrative law judge's finding that it is the employer responsible for the payment of benefits to claimant subsequent to February 28, 1995. SSA responds, urging affirmance of the administrative law judge's decision.

Container initially contends that the issue of whether claimant's February 28, 1995 work-incident constituted an "injury" was correctly decided by Judge Schneider in his initial Decision and Order; Container, therefore, requests that the Board rescind its first decision in this case and reinstate Judge Schneider's Decision and Order holding SSA responsible for the payment of claimant's benefits. The issue of whether claimant's February 28, 1995, work-incident constituted an injury such that the party responsible for the subsequent payment of benefits under the Act was called into question was thoroughly considered and addressed by the Board in its initial decision, and its prior

determination on this issue constitutes the law of the case.¹ See *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000); *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Container has raised no basis for the Board to depart from this doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. See *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Accordingly, Container's contention that the Board should rescind its initial decision and reinstate Judge Schneider's decision holding SSA liable for claimant's benefits is rejected.

Container next contends that the administrative law judge erred in holding it liable for permanent total disability benefits since, it asserts, claimant's present disability is due to the natural progression of the injury that claimant sustained while he was employed by SSA in 1992. In support of its appeal, Container avers that the administrative law judge held it to an impossible legal standard when determining the employer responsible for claimant's benefits, that the administrative law judge's findings are unsupported by the record, and that the administrative law judge's credibility determinations cannot be affirmed.

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*, 125 S.Ct. 309 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *see also Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th Cir. 2001). The Ninth Circuit has

¹ As the Board stated in its previous decision, it is undisputed that claimant on February 28, 1995, sustained an incident at work of such severity that he immediately informed his supervisor and that all of the physicians of record acknowledge that this incident affected in some way claimant's physical condition at the time it occurred. See *Blue I*, slip op. at 4.

further held that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). Accordingly, in the case at bar, Container must prove that claimant's disability is due solely to the natural progression of his prior injury in order to meet its burden of establishing that it is not the responsible employer. *See Lopez v. Stevedoring Serv. of America*, 39 BRBS 85 (2005); *Buchanan*, 33 BRBS at 36; *see generally General Ship Serv. v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991).

After addressing in detail the voluminous record compiled in this case,² the administrative law judge determined that claimant's present disability arises from the work-related injury that he sustained while employed by Container on February 28, 1995. In rendering this determination, the administrative law judge found that claimant's ability to seek and obtain employment on a regular basis between his return to work on June 1, 1994 and February 28, 1995, during which period claimant was not prescribed pain medication, indicated that claimant's prior medical condition had stabilized. Decision and Order at 11-14. The administrative law judge further found that claimant's symptoms following his February 28, 1995, work-incident were so severe that he immediately informed his supervisor, left work, and has been precluded from returning to work since that date. *Id.* In addition, the administrative law judge found that the credited testimony of Drs. Blackwell, von Rogov, Ballance and Sanders support a finding that claimant's disability subsequent to February 28, 1995, stems from the work-incident that he sustained on that day. *Id.* Specifically, the administrative law judge found that Dr. Blackwell opined that both claimant's 1992 and 1995 work injuries contributed to his degenerative disc disease and resulting spinal stenosis, that claimant's medical records establish that his disease process accelerated after his February 28, 1995, work-injury, and that this subsequent incident caused anatomical and physiological changes which represented an acceleration of claimant's spinal degenerative disc disease. *See* Sept. 11, 2002 Tr. at 492-496, 548, 771-772. Dr. von Rogov similarly testified that claimant's present disability was not due to the natural progression of his 1992 injury; rather, Dr. von Rogov opined that claimant on February 28, 1995, sustained an aggravation of his underlying back condition since the incident occurring on that date accelerated claimant's degenerative disc disease and contributed to his spinal stenosis. *Id.* at 585-598. Dr. Ballance, after testifying that claimant's February 28, 1995, work-incident and

² Over its lifetime, this case has apparently involved eight days of hearings at the administrative law judge level and the submission into the record of approximately 100 exhibits.

subsequent symptomatology could be appropriately characterized as an aggravation, opined that the effects of both claimant's 1992 and 1995 work incidents combined to result in the disability that claimant has experienced after February 28, 1995. *See* Feb. 6, 1997 Tr. at 623, 651-654, 691. Dr. Sanders, in May 1994, released claimant to return to work with lifting restrictions. In contrast, the administrative law judge declined to rely upon the testimony of Dr. Preininger that claimant's February 28, 1995, work-incident could not be characterized as an injury because an ordinary activity of daily living brought it about, the precipitating event was modest, and claimant experienced similar symptoms since his original injury in 1992; in this regard, the administrative law judge, *inter alia*, noted that Dr. Preininger's definitions were inconsistent with the Act's aggravation rule since the severity of an event does not determine whether or not that event aggravated a pre-existing condition. *Id.* at 10-11.

Container's contentions that the administrative law judge erred in crediting claimant's subjective complaints subsequent to the occurrence of the February 28, 1995, work-incident, and that the administrative law judge improperly inferred that claimant's pre-existing medical condition had stabilized prior to the occurrence of that work-incident, are without merit. It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). Therefore, the Board will not reweigh the evidence of record, since that role is outside of the Board's scope of review, *see generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); rather, the Board may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). The administrative law judge, while acknowledging his doubts regarding claimant's subjective complaints of pain during the period November 1993 until his return to work on June 1, 1994, credited claimant's testimony regarding the increased pain which he experienced following the February 28, 1995, work-incident. In this regard, the administrative law judge determined that claimant experienced pain of a severity that required him to leave work and not return and that, thus, claimant's condition changed for the worse as a result of the February 28, 1995, work-incident. Moreover, the administrative law judge rationally concluded that Dr. Sanders's release of claimant to return to work, claimant's regular and continuous employment from June 1, 1994 until February 28, 1995, and claimant's lack of prescribed pain medication during this period, considered together, constitute powerful objective evidence that claimant's condition had stabilized prior to his February 28, 1995, work-incident. As these findings are rational and supported by substantial evidence, they are affirmed.

Container additionally asserts that the administrative law judge erred in evaluating the medical evidence of record. We reject Container's contentions of error, as the administrative law judge rationally gave greater weight to the opinions of Drs. Blackwell, von Rogov, Ballance and Sanders that claimant's present disability stems from his February 28, 1995, work-incident. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Consequently, in light of these credited medical opinions, which constitute substantial evidence in support of the administrative law judge's determination that claimant's February 28, 1995, work-injury aggravated and combined with claimant's pre-existing condition to result in his present disability, as well as claimant's corroborating testimony that the incident resulted in his having to leave work never to return, we affirm the administrative law judge's finding that Container is the responsible employer. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez*, 39 BRBS 85.

Lastly, Container challenges the administrative law judge's award of ongoing permanent total disability benefits to claimant. The issue of the nature and extent of claimant's disability was addressed by Judge Schneider in his initial decision. Based upon the opinions of Drs. Blackwell, von Rogov and Preininger, as well as claimant's testimony, Judge Schneider determined that claimant was permanently totally disabled as of March 1, 1995. Following the initial remand, Judge Schneider adopted his prior determination that claimant was permanently totally disabled. As this finding was supported by substantial evidence, it was affirmed by the Board. *Blue II*, slip op. at 4-5. Accordingly, as this issue was addressed by the previous administrative law judge on two occasions and affirmed by the Board in its prior decision, we reject Container's contention of error and we affirm the administrative law judge's award of permanent total disability compensation to claimant.³

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

SO ORDERED.

³ Container's contention that the administrative law judge imposed upon it an "impossible legal standard" when he defined the issue before him as whether claimant sustained a temporary aggravation of his condition on February 28, 1995, lasting to the date of maximum medical improvement on March 1, 1995, is also without merit. A review of the administrative law judge's 15 page Decision and Order reveals that the administrative law judge thoroughly addressed the issue of the employer responsible for the benefits due claimant as a result of his present and ongoing work-related disability.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge