BRB No. 06-0642

LEO OUTLAND	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
COOPER/T. SMITH STEVEDORING	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
UNIVERSAL MARITIME SERVICES	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS	)	DATE ISSUED: 03/21/2007
	)	
Self-Insured Employer-Respondent	)	
	)	
CP & O, LLC	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
P & O PORTS OF VIRGINIA	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
CERES MARINE TERMINALS	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Christopher J. Wiemken and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for Cooper/T. Smith Stevedoring.

F. Nash Bilisoly and Kimberly Herson Timms (Vandeventer Black LLP), Norfolk, Virginia, for Universal Maritime Services.

R. John Barrett (Vandeventer Black LLP), Norfolk, Virginia, for Virginia International Terminals.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for CP & O, LLC, and P & O Ports of Virginia.

Lawrence P. Postal (Seyfarth Shaw, LLP), Washington, D.C., for Ceres Marine Terminals.

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

PER CURIAM:

Cooper/T. Smith Stevedoring (CTS) appeals the Decision and Order (2005-LHC-01802, 01803, 01804, 01805, 01806, 01807) of Administrative Law Judge Daniel A. Sarno, Jr., 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 June 1, 2002, during the course of his employment for CTS as a longshoreman. CTS voluntarily paid claimant compensation for temporary total disability until he returned to longshore employment on March 20, 2003. Claimant was examined in August 2003 by Dr. Koen, who advised claimant to undergo back surgery. CTS refused to authorize the procedure based on the opinion of Dr. Ordonez that claimant could perform his usual employment. Claimant decided on his own to stop working for six months in December 2003 to relieve his back pain. Claimant returned to longshore employment in June 2004. He was examined for back pain by Dr. Koen shortly thereafter. Dr. Koen again recommended surgery. CTS scheduled claimant for a second opinion with Dr. Ordonez on November 3, 2004. Dr. Ordonez agreed that claimant's back condition required surgery, and he advised claimant to stop working. Dr. Koen operated on claimant's back on March 5, 2005. Claimant sought compensation for

temporary total disability from November 4, 2004, to September 6, 2005, and for temporary partial disability commencing September 7, 2005. Claimant filed claims for his back condition against CTS and his other longshore employers. The parties agreed that claimant is entitled to the compensation sought, but they disputed which employer is responsible for claimant's ongoing compensation and medical benefits.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his back condition to his employment with CP & O, which was the last longshore employer for which claimant worked in a position that could have aggravated his back condition. The administrative law judge found that the opinions of Drs. Pollack and Hunt are sufficient to rebut the presumption. The administrative law judge found that the record evidence, therefore, must be weighed as a whole to determine the responsible employer.[1] The administrative law judge found most credible the testimony of claimant and Dr. Pollack. The administrative law judge credited claimant's testimony that he was constantly in pain after his June 1, 2002, injury with CTS, until he underwent back surgery on March 5, 2005. The administrative law judge credited Dr. Pollack's testimony that claimant's work activities after June 1, 2002, did not change his underlying back condition. Moreover, the administrative law judge found significant the absence of any particular workplace incidents after June 1, 2002, that could indicate an aggravation of claimant's back condition. Based on this evidence, the administrative law judge concluded that claimant's back disability is due to the natural progression of his June 1, 2002, work injury with CTS, and that CTS therefore is the responsible employer.

On appeal, CTS challenges the administrative law judge's conclusion that it is the responsible employer. Universal Maritime Services, Virginia International Terminals, P & O Ports of Virginia (P & O), CP & O, and Ceres Marine Terminals respond, urging affirmance.

[1] Inasmuch as the administrative law judge weighed the evidence as a whole, the administrative law judge's error in applying the Section 20(a) presumption in determining the responsible employer is harmless. *See generally McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

CTS argues that the evidence establishes that claimant's back condition was aggravated by his longshore employment after he returned to work following his June 2002 injury. Specifically, CTS contends the administrative law judge erred by not crediting the uncontradicted evidence that claimant's work activities exacerbated his back pain, which, CTS contends, establishes that it is not the responsible employer.

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, a subsequent work 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 for any disability resulting therefrom. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *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); *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). CTS need not establish that the injury claimant sustained in its employ played no role in claimant's ultimate disability in order to be absolved of liability. *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). It need only establish that claimant sustained an injury while working for a subsequent employer that aggravated, accelerated or combined with his prior back injury to result in claimant's ultimate disability in order for CTS to be absolved of liability for the totality of claimant's disability. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). If, however, claimant's disability is due to the natural progression of his June 2002 back injury, CTS is fully liable for claimant's disability and medical benefits. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

The administrative law judge found, based upon the absence of any contrary evidence and claimant's credible testimony, that there was no specific incident which could indicate an aggravation of claimant's back condition after he returned to work from his initial back injury. Decision and Order at 20; *see* Tr. at 68. The administrative law judge also credited claimant's testimony that he was constantly in pain due to the everyday activities of life, including sleeping, after June 1, 2002, until he underwent surgery on March 5, 2005. Tr. at 56, 67. The administrative law judge credited Dr.

Pollack's testimony that claimant's work activities after June 1, 2002, did not in any way change claimant's underlying back condition. Tr. at 87-90. The administrative law judge rejected the opinion of Dr. Ordonez that claimant's work aggravated his condition, finding it conclusory and compromised by his not assigning work restrictions after his initial examination of claimant. The administrative law judge also found he could not attach any weight to the opinions of Drs. Bragg, Wagner, and Hunt because they too failed to provide a basis for their opinions.[2] Similarly, the administrative law judge rejected the opinion of Dr. Koen because he failed to explain how claimant's repetitive bending and twisting at work contributed to an aggravation of claimant's back condition. Moreover, the administrative law judge credited Dr. Pollack's testimony addressing his disagreement with Dr. Koen's opinion that claimant's work activities caused new objective findings of instability and mid-line back pain. Decision and Order at 22; *see* Tr. at 91-94. The administrative law judge concluded that claimant's disability would have occurred notwithstanding his return to work as a longshoreman following his initial work injury, that claimant did not sustain a work-related aggravation of that injury, and that claimant's disability is due to the natural progression of his June 2002 back injury with CTS.

We hold that the administrative law judge considered the issue of the responsible employer in this case in light of the proper law, *see Foundation Constructors, Inc*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), and applied an appropriate evidentiary standard in reviewing the record as a whole on that issue. *Siminski*, 35 BRBS at 138-139; *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251(1998). Specifically, the administrative law judge properly considered whether claimant's current disability is due to the first injury sustained with CTS in June 2002, or is due instead to the aggravating effects of any subsequent work injuries. *See Price*, 339 F.3d at 1104-1105, 37 BRBS at 91(CRT). In weighing the record as a whole, the administrative law judge appropriately recognized that, in a traumatic injury case, the subsequent employment must contribute in some way to the resultant disability in order for a subsequent employer to be held liable. *See id.* It is insufficient to show merely that claimant's condition was symptomatic while he was working, nor was the administrative law judge required to find that claimant sustained a new injury with a subsequent employer based on this record.[3] *See Delaware*

[2] Drs. Bragg and Wagner stated that claimant's various longshore activities contributed to the worsening of his condition. CTSXs 15, 16. Dr. Hunt stated that claimant's surgery in March 2005 was the result of the natural progression of claimant's condition. CP&OX 2-12.

[3] CTS correctly states that 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

River Stevedores, Inc., 279 F.3d at 242-243, 35 BRBS at 160-162(CRT). In this case, the administrative law judge rationally determined, based on claimant's testimony and Dr. Pollack's opinion, that claimant's back pain after he returned to work from his June 2002 injury were merely symptoms of claimant's underlying back condition caused by the 2002 injury, and did not contribute to claimant's undergoing back surgery in March 2005. In his decision, the administrative law judge quoted the applicable "natural progression" standard stated in *Kelaita*, 799 F.2d at 1311; Decision and Order at 17, and the administrative law judge's determination that claimant's subsequent longshore employment did not aggravate claimant's 2002 injury to result in the disability claimed is rational and supported by substantial evidence.[4] *Kelaita*, 799 F.2d at 1311; *McKnight*, 32 BRBS 165.

CTS next argues that the administrative law judge erred by failing to credit the opinion of Dr. Koen, claimant's treating physician. CTS contends that Dr. Koen is in the best position to understand claimant's medical condition, and that his opinion is

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474, 16 BRBS 115(CRT)(D.C. Cir. 1984); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). 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 any resulting temporary disability. *See Delaware River Stevedores, Inc.*, 279 F.3d at 242-243, 35 BRBS at 160-162(CRT). The administrative law judge explicitly credited Dr. Pollack's testimony that claimant's back pain was a continuation of symptomatology which began in June 2002 and was not due to an aggravation related to work activities. Decision and Order at 20. Thus, in this case, claimant's testimony as to the back pain he experienced after he returned to work following his June 2002 injury is insufficient, in itself, to confer liability on a subsequent employer. *See infra.*

[4] CTS argues, additionally, that the administrative law judge erred in failing to apply the last employer rule applicable to multiple, or cumulative, traumatic injury cases in a manner consistent with the Board's decision in *Taylor v. Maher Terminals, Inc*., BRB Nos. 97-839/A (March 18, 1998) (unpublished), *aff'd*, 217 F.3d 837 (4th Cir. June 27, 2000) (table). CTS's reliance on the unpublished Board decision in *Taylor* is misplaced, as that case turned on the administrative law judge's weighing of the specific evidence regarding the cause of that claimant's hip replacement surgery. The Board held in that case that the medical evidence supported the conclusion that the claimant's need for surgery was due to the subsequent injury, which aggravated his condition, increased his pain, and resulted in his inability to work thereafter. Moreover, as the Board regards its unpublished decisions as lacking precedential value, such decisions generally should not be cited or relied upon by parties in presenting their cases. *See Lopez v. Southern Stevedores,* 23 BRBS 295, 300 n.2 (1990).

supported by the opinions of Drs. Bragg, Wagner, and Ordonez. Contrary to CTS's assertions, the administrative law judge did not err in failing to accord determinative weight to the medical opinion of Dr. Koen; it is well established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but may instead draw his own inferences and conclusions from the evidence as he sees fit. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). CTS's assertion is tantamount to a request that the Board reweigh the evidence of record, a role outside of the Board's scope of review. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *see generally 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). Moreover, the administrative law judge rationally credited Dr. Pollack's testimony refuting, in depth, CTS's assertion that claimant's back symptomatology was aggravated by his work activities, Tr. at 88-93, 101-105, over the contrary opinions Drs. Koen, Bragg, Wagner, and Ordonez, which the administrative law judge rationally found failed to adequately state the bases for their opinions. CP &OX 11; CTSXs 13, 15, 16; *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Consequently, in light of the credited opinion of Dr. Pollack that the work performed by claimant after his June 2002 injury did not aggravate claimant's back condition, as well as claimant's corroborating testimony that he did not sustain any incidents after his return to work that could indicate an aggravation of his back condition, and his testimony that he was in constant pain after the June 2002 injury, we affirm the administrative law judge's finding that CTS is the responsible employer as it is supported by substantial evidence. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Siminski*, 35 BRBS 136.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge