BRB No. 98-0864

MICHAEL W. SLATON Claimant v. NAJAN CONTRACTORS, INCORPORATED and MS CASUALTY INSURANCE COMPANY Employer/Carrier-Respondents and INGALLS SHIPBUILDING, INCORPORATED Self-Insured Employer-Petitioner	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

John S. Gonzalez (Daniel, Coker, Horton & Bell, P.A.), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer Ingalls Shipbuilding, Incorporated (Ingalls) appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees (96-LHC-269, 97-LHC-978) of Administrative Law Judge C. Richard Avery rendered on claims 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 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 sustained a serious injury to his left knee in 1974 as a result of a football accident. Ingalls stipulated that claimant, an electrician, re-injured this knee in a work-related accident in 1987, resulting in surgery and a permanent partial disability of 30 percent to his leg for which Ingalls paid compensation and medical benefits. 33 U.S.C. §§907, 908(c)(2). Claimant worked for various employers after his injury precluded his return to Ingalls, and in January 1994 he began employment with Najan Contractors, Incorporated (Najan) as a maintenance electrician. Over the next nine months, he gradually increased his hours from 40 to 70 hours per week. When claimant sought medical treatment in September 1994 for increased pain and swelling in his left knee, which he attributed to the increased walking and standing at Najan, Ingalls, who had been paying claimant's medical benefits under Section 7 of the Act, 33 U.S.C. §907, refused to continue paying his medical benefits. Thereafter, in March 1995, claimant filed claims against both Ingalls and Najan seeking medical benefits, including proposed surgery, total disability during his convalescence, and partial disability compensation thereafter for his reduced earning capacity as a self-employed auto mechanic.

The administrative law judge found that Ingalls is the employer solely responsible for claimant's medical benefits under Section 7, as he found that the current condition of claimant's knee is due to the natural progression of the injury claimant sustained in 1987 with Ingalls.[1] In a supplemental decision, the

[1]The administrative law judge denied claimant's claim for partial disability

administrative law judge awarded claimant an attorney's fee of $3,250, payable by Ingalls.

On appeal, Ingalls contends that the administrative law judge erred in finding it is the responsible employer. Najan responds, urging affirmance. In its supplemental appeal, Ingalls states that in the event the Board finds it is not the responsible employer, it cannot be held liable for the awarded attorney's fee. Claimant has not filed a brief on appeal.

We agree with Ingalls that the administrative law judge erred in finding it to be the responsible employer. In a case involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's condition is the result of the natural progression or aggravation of a prior injury. If the claimant's disability results from the natural progression of the first injury, then the claimant's employer at the time of the first injury is the responsible employer. If his employment thereafter aggravates, accelerates or combines with the earlier injury, resulting in the claimant's disability, claimant has sustained a new injury and the employer at that time is the employer responsible for the payment of benefits thereafter. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Section 20(a) of the Act, 33 U.S.C. §920(a), is inapplicable to a determination of the responsible employer. *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997); *see also Lins v. Ingalls Shipbuilding, Inc.,* 26 BRBS 62 (1992). The first employer bears the burden of proving that there was a new injury or aggravation with the second employer in

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benefits, finding that claimant did not have an increase in his impairment rating. Although the administrative law judge properly noted that claimant's sole recovery for a partial disability to the knee is under the schedule, *see Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), the administrative law judge nonetheless found that claimant has no loss in wage-earning capacity due to his knee injury. Decision and Order at 18. These findings are unchallenged on appeal.

order to be relieved of its liability as responsible employer. The second employer, on the other hand, must prove that claimant's condition is solely the result of the injury with the first employer in order to escape liability. A determination as to which employer is liable requires the administrative law judge to weigh the evidence as a whole, and to arrive at a conclusion supported by substantial evidence. *Id.*

In the instant case, the administrative law judge correctly invoked the Section 20(a) presumption in favor of claimant in addressing the issue of whether claimant sustained an injury while in the employ of Najan. *See generally Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986). The administrative law judge, however, incorrectly relieved Najan of liability by finding it rebutted the Section 20(a) presumption with regard to the issue of whether claimant's injury is the result of the natural progression of the 1987 injury or is the result of the conditions of claimant's employment with Najan. *Buchanan*, 31 BRBS at 84. This analysis would have constituted harmless error had the administrative law judge weighed the evidence as a whole in a proper manner.

We hold, however, that the evidence of record cannot support the administrative law judge's conclusion that claimant's condition is the result of the 1987 injury. Initially, we hold that the administrative law judge did rationally discredit the opinion of Dr. Barnes that the employment at Najan aggravated claimant's pre-existing condition. In noting that Dr. Barnes' testimony was "somewhat tarnished," the administrative law judge rejected the ultimate opinion of Dr. Barnes that claimant aggravated his left knee while at work at Najan, since he found that Dr. Barnes had a limited involvement with claimant and since the doctor inexplicably signed an affidavit initially in which he agreed that no part of claimant's disability was attributable to the work at Najan. *See* Decision and Order at 16; Najan Ex. 4, 6. This determination is within the administrative law judge's discretion as the trier-of-fact. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). Inasmuch as the administrative law judge's finding is rational, we affirm the administrative law judge's finding that Dr. Barnes' opinion is insufficient to establish Najan's liability as the responsible employer.

We further hold, however, that the administrative law judge's treatment of the opinions of Drs. Enger and Zarzour cannot stand. The administrative law judge irrationally relied on the opinion of Dr. Enger to find that claimant's condition following his employment with Najan is the result of the natural progression of claimant's 1987 injury. Dr. Enger was claimant's treating physician for over 17 years. He performed all of claimant's left knee surgeries, and he stated as early as 1983 that claimant had degenerative arthritis. He stated on several occasions that

claimant's left knee would naturally degenerate to the point where it required a total knee replacement. *See, e.g.,* Cl. Ex 7. Dr. Enger, however, was deceased at the time claimant's employment with Najan began to bother his knees. Dr. Enger obviously was unavailable to examine claimant or to offer an opinion regarding the effect of claimant's employment at Najan on claimant's pre-existing 1987 work-related injury to his left knee. His opinion, therefore, cannot establish that claimant's employment with Najan did not aggravate or accelerate claimant's knee condition. Consequently, we reverse the administrative law judge's reliance on Dr. Enger's opinion, and we hold that his opinion is insufficient to establish that claimant's present condition is the natural progression of claimant's 1987 work-related injury at Ingalls.

Moreover, the administrative law judge erred in finding Dr. Zarzour's 1995 opinion insufficient to establish that claimant sustained a new injury or aggravation while working for Najan. Decision and Order at 17 at n 7. In office notes dated June 5, 1995, Dr. Zarzour stated that "it is of note that claimant hurt his knee at work this past year while walking, and developed pain in it." The doctor's report then states, "He has an original football injury and then documentation of a reinjury in 1987 and then an *exacerbation* in this past year." Ing. Ex. 8 at 4 (emphasis added). Thus, the only remaining opinion of record rendered after claimant's employment with Najan, that of Dr. Zarzour, supports the conclusion that claimant's pre-existing condition was aggravated by his employment at Najan. Given this evidence and the complete absence of substantial evidence attributing claimant's condition to the natural progression of his prior injury, we hold that Najan is the responsible employer as a matter of law. *See, e.g., Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986)*;*

Lopez v. Southern Stevedores, 23 BRBS 295 (1990). Accordingly, we reverse the administrative law judge's finding that Ingalls is the responsible employer, and we hold that Najan is liable for claimant's medical benefits and for his attorney's fee.

In view of our holding, Ingalls' alternative contention that claimant's intentional violation of his work restrictions over several years constituted an intervening cause which severed the causal connection between claimant's 1987 work-related injury and claimant's current knee injury is not dispositive. Nevertheless, we affirm the administrative law judge conclusion that claimant's subsequent work at Najan was not an irresponsible and intentional act constituting an intervening cause sufficient to relieve Ingalls of liability, as it is rational, supported by the medical evidence he cited, and in accordance with law. *See Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT)(7th Cir.1992).

Accordingly, the administrative law judge's finding that Ingalls is the responsible employer is reversed, and his decision is modified to hold Najan liable for the payment of medical benefits and the attorney's fee awarded by the administrative law judge.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge