

JOHN RUSSIAN )  
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 Claimant )  
 )  
 v. )  
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 NOVOLOG BUCKS COUNTY )  
 )  
 and )  
 )  
 SIGNAL MUTUAL INDEMNITY ) DATE ISSUED: 05/22/2007  
 ASSOCIATION, LIMITED )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 KINDER MORGAN, INCOPORATED )  
 )  
 and )  
 )  
 ACE USA )  
 )  
 Employer/Carrier- ) DECISION and ORDER  
 Respondents )

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

Eugene Mattioni and Francis X. Kelly (Mattioni, Ltd.), Philadelphia, Pennsylvania, for Novolog Bucks County/Signal Mutual Indemnity Association, Limited.

Thomas J. Smith and James L. Azzarello, Jr. (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for Kinder Morgan, Incorporated/Ace USA.

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

PER CURIAM:

Novolog Bucks County (NBC) appeals the Decision and Order (2006-LHC-00049, 00050) 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). 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 left knee on May 31, 2004, during the course of his employment for NBC at the Ferris Hills facility. On August 26, 2004, claimant was released to return to work by his treating physician, Dr. Eingorn. Subsequently, Kinder Morgan, Incorporated (KMI), acquired the Ferris Hills facility in December 2004. Tr. 85-86. Claimant was reexamined by Dr. Eingorn for left knee pain on June 7, 2005. Dr. Eingorn recommended surgery, which claimant underwent on December 2, 2005. Claimant had not returned to work as of the hearing on January 16, 2006. The sole issue before the administrative law judge was the identity of the employer responsible for claimant's compensation and medical benefits.

In his decision, the administrative law judge found that NBC is the responsible employer. The administrative law judge found that claimant would have undergone surgery for his left knee condition in 2004 but for the pending transfer of the Ferris Hills facility from NBC to KMI, and that claimant never recovered from his work injury with NBC. The administrative law judge credited claimant's testimony that he returned to work in August 2004 because he believed that KMI would retain only NBC employees who were working full-time on the date it purchased the facility. The administrative law judge found the opinions of Drs. Eingorn and Lefkoe and the MRI test results support his conclusion that claimant's knee condition is due to the natural progression of his May 31, 2004, work injury with NBC.

On appeal, NBC challenges the administrative law judge's finding that it is the responsible employer. NBC argues that, pursuant to *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3<sup>d</sup> Cir. 2002), KMI is the responsible employer, inasmuch as claimant sustained a flare-up of knee symptoms and lost time from work during the course of his employment with KMI. NBC contends that the administrative law judge erred by finding *Delaware River Stevedores* distinguishable from this case. KMI responds, urging affirmance.

The rule for determining which employer is liable for the totality of claimant's disability in a case involving a traumatic injury 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 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. *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT); *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7<sup>th</sup> Cir. 2005); *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9<sup>th</sup> Cir. 2003), *cert. denied*, 543 U.S. 940 (2004). NBC 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 (9<sup>th</sup> Cir. 2001). In order for NBC to be absolved of liability for the totality of claimant's disability, it need establish only that while working for KMI claimant sustained an injury that aggravated, accelerated or combined with his prior knee injury to result in claimant's ultimate disability. *Id.* If, however, claimant's disability is due to the natural progression of his May 2004 knee injury, NBC is liable for claimant's disability and medical benefits. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9<sup>th</sup> Cir. 1991); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

The administrative law judge credited claimant's testimony that he stopped treatment for his knee condition in August 2004 and misled his doctors as to the severity of his symptoms in order to be released to return to work, because he feared losing his job if he did not return to work prior to KMI's acquiring the Ferris Hills facility. Tr. at 36-37, 43; NBCX 1 at 72-75. The administrative law judge found that claimant had not recovered from his knee injury before he returned to work, and that, thereafter, he worked in constant pain. Tr. at 38-42. The administrative law judge found that the similarity in MRI test results taken in June 2004 and June 2005 support the conclusion that claimant's knee condition was the result of the natural progression of the work injury with NBC. KMIX 5 at 4-8. The administrative law judge found, based on the opinions of Drs. Eingorn and Newman in August 2004 that claimant would need surgery if his knee pain recurred, that claimant should have undergone knee surgery prior to his returning to work in August 2004 since his knee pain had not resolved. KMIX 4 at 4; NBCX 15 at 2.

The administrative law judge also determined that the deposition testimony and reports of Drs. Eingorn and Lefkoe support his conclusion that NBC is the responsible employer notwithstanding their opinions that claimant's knee condition was aggravated by his employment with KMI, as the administrative law judge found these opinions were based on mistaken assumptions of fact. Specifically, Dr. Eingorn noted that claimant did not report knee locking prior to June 2005, but the administrative law judge found that

claimant had reported this symptom to his physicians at Novacare a week prior to his release to work on August 26, 2004. KMIXs 5 at 16, 6 at 15. However, Dr. Eingorn also opined that it was “more likely than not” that claimant’s disability is a result of the natural progression of the May 2004 work injury; his reports and deposition testimony label claimant’s injury as a degenerative condition, and he opined that the June 2005 MRI results show “a progression of that [initial] meniscus tear.” KMIX 4 at 4, 7, 13; NBCX 3 at 41-42, 51-52, 63-64. The administrative law judge found that Dr. Lefkoe changed his initial opinion that claimant’s symptoms were related to the May 2004 injury after being misled to believe that claimant had no symptoms when he returned to work in August 2004. NBCX 5 at 28-29. When Dr. Lefkoe was asked to assume that claimant’s knee pain never resolved, he affirmed his initial conclusion that the MRI findings represent the natural history of a meniscal tear which was never operated on. *Id.*; *see also* KMIX 7 at 5-6.

We hold that the administrative law judge considered the issue of the responsible employer in this case in light of the relevant law, *see Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT); *Foundation Constructors, Inc.*, 950 F.2d 621, 25 BRBS 71(CRT), 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). 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. It is insufficient to show merely that claimant’s condition was symptomatic while he was working for the subsequent employer. *See Delaware River Stevedores*, 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 the medical evidence, that claimant had not recovered from his knee injury before returning to work in August 2004. Thus, the administrative law judge rationally found this case distinguishable from *Delaware River Stevedores* on the basis that the claimant therein had recovered from his previous back injury prior to sustaining an aggravation of his back condition with a subsequent employer. *See Delaware River Stevedores*, 279 F.3d at 236-239, 35 BRBS at 155-157(CRT).

The administrative law judge is entitled to weigh the evidence and draw inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). Thus, the administrative law judge rationally relied on those portions of the opinions of Drs. Eingorn and Lefkoe that support a finding that claimant’s knee condition is due to the natural progression of his May 2004 injury. *Siminski*, 35 BRBS at 139. As substantial evidence supports the administrative law judge’s determination that claimant’s subsequent employment with KMI did not aggravate his May 2004 injury to result in the disability claimed, we affirm the finding that NBC is liable for claimant’s

benefits. *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9<sup>th</sup> Cir. 1986); *McKnight*, 32 BRBS 165.

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