U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0564
and 18-0564A

JOHN HIDELL)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
) DATE ISSUED: 05/31/2019
DUWAMISH SHIPYARD,)
INCORPORATED)
)
and)
)
SEABRIGHT INSURANCE COMPANY)
)
Employer/Carrier-Respondents)
Cross-Respondents)
)
DUWAMISH MARINE SERVICES, LLC)
)
and)
)
COMMERCE AND INDUSTRY)
INSURANCE COMPANY (AIG))
)
Employer/Carrier-Respondents)
Cross-Petitioners)
)
DUWAMISH MARINE SERVICES, LLC)
)
and)
)
SEABRIGHT INSURANCE COMPANY)
(ENSTAR))
)

Employer/Carrier-Respondents	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Amie C. Peters and Amanda E. Peters (Blue Water Legal, PLLC), Edmonds, Washington, for claimant.

Raymond H. Warns, Jr., and Dana O'Day-Senior (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for Duwamish Shipyard, Incorporated and Seabright Insurance Company.

Michael J. Godfrey (Sather, Byerly & Holloway, LLP), Portland, Oregon, for Duwamish Marine Services, LLC, and Commerce and Industry Insurance Company (AIG).

Nina M. Mitchell (Nicoll Black & Feig), Seattle, Washington, for Duwamish Marine Services, LLC, and Seabright Insurance Company (Enstar).

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Duwamish Marine Services and Commerce and Industry Insurance Company (DMS/AIG) cross-appeals, the Decision and Order Awarding Compensation and Benefits (2015-LHC-01883) of Administrative Law Judge Richard M. Clark rendered on a claim filed pursuant to 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 rational, supported by substantial evidence, and 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 worked for Duwamish Shipyard, Incorporated (DSI), from April 1980 to May 13, 2007. In March 2005, he injured his left knee during the course of his employment as a shipfitter foreman. He underwent a meniscectomy on September 2, 2005. Seabright Exhibit (SX) 11 at 180-181. DSI, and its insurer, Seabright Insurance Company (DSI/Seabright), paid claimant temporary total disability and permanent partial disability compensation and medical benefits. SX 1 at 2-4. He underwent a second meniscectomy

on August 17, 2006, for which DSI/Seabright again accepted liability and paid compensation.[1] SX 1 at 5-7.

DSI went out of business on May 13, 2007. Tr. at 54. Claimant and a partner purchased some of the shipyard's assets and opened Duwamish Marine Services, LLC (DMS). DMS obtained coverage from AIG from May 14, 2007 to May 13, 2010, and again commencing May 14, 2013. DMS/AIG (AX) 1. Seabright Insurance Company (DMS/Seabright) provided coverage to DMS from May 14, 2010 to May 13, 2013. *See* Tr. at 38.

Claimant periodically saw Dr. Stickney after his 2006 knee surgery for effusion and discomfort. CX 1 at 40-51. On December 11, 2013, Dr. Stickney performed a total left knee replacement. *Id.* at 62-63. DSI/Seabright paid claimant compensation for temporary total disability from December 9, 2013 to March 30, 2014, and permanent partial disability for a 25 percent impairment of the left lower extremity. SX 1 at 9-11. On January 29, 2015, Dr. Stickney opined that claimant has a 50 percent permanent partial disability. CX 1 at 76-78. The parties disputed the extent of claimant's knee impairment. DSI also disputed its designation as the responsible employer/carrier and filed a motion to join DMS and its carriers to the case. By Order issued November 2, 2016, Administrative Law Judge Larsen joined DMS/Seabright and DMS/AIG to the claim. AX 4.

The issues before Administrative Law Judge Clark (the administrative law judge) were: the extent of claimant's left knee impairment, the date of maximum medical improvement, and the responsible employer/carrier. Decision and Order at 4. The administrative law judge found that claimant performed physical work as a co-owner of DMS and that the opinions of Drs. Stickney and Toomey establish he performed physical activities while AIG provided coverage after May 13, 2013, which aggravated his left knee condition and contributed to the need for surgery. *Id*. at 15. Accordingly, the administrative law judge found that DMS/AIG is the responsible employer/carrier based on the aggravation rule. *Id*. at 16.

The administrative law judge relied on Dr. Stickney's opinion to find claimant's left knee was at maximum medical improvement on August 25, 2014. Decision and Order at 17. However, he credited the impairment rating of Dr. Toomey to find that claimant has a 25 percent impairment of the left lower extremity. *Id*. at 18-19. The administrative law judge found DMS/AIG entitled to a credit for prior compensation paid by DSI/Seabright for a five percent permanent impairment. *Id*. at 21. He also determined that DSI/Seabright

[1] The district director issued stipulated compensation awards in 2006 and 2007 for periods of disability following both surgeries. SX 4.

is entitled to reimbursement from DMS/AIG for its payments to claimant for the December 2013 surgery and resulting disability.[2] *Id*. at 22.

On appeal, claimant challenges the admission into evidence of Dr. Toomey's deposition and the administrative law judge's finding that he has a 25 percent left knee impairment. BRB No. 18-0564. DSI/Seabright and DMS/AIG respond that these determinations should be affirmed. Claimant filed a reply brief. DMS/AIG cross-appeals the administrative law judge's findings that it is the responsible employer/carrier and that it must reimburse DSI/Seabright for the compensation and medical benefits paid commencing in December 2013. BRB No. 18-0564A. Claimant, DSI/Seabright and DMS/Seabright filed response briefs, urging affirmance. DMS/AIG filed a reply to DSI/Seabright's response. DSI/Seabright filed a brief in agreement with claimant's response brief.

BRB No. 18- 0564

Claimant argues that Dr. Toomey's August 11, 2016 deposition was improperly admitted into evidence at the formal hearing. He contends the deposition was taken solely for purposes of discovery and admission of the deposition denied him an opportunity to fully cross-examine Dr. Toomey about new evidence presented to him at the deposition and other evidence later obtained through discovery. Claimant asserts that this is prejudicial error because DSI's counsel had previously indicated that Dr. Toomey would testify at the hearing and then was unavailable to do so.

Dr. Toomey examined claimant on behalf of DSI on December 23, 2014. SX 6. He was deposed at claimant's request on August 11, 2016. SX 8. The parties' attorneys discussed at the hearing claimant's motion to exclude Dr. Toomey's deposition based on his unavailability to appear at the hearing. Tr. at 16-21. In his decision, the administrative law judge found that claimant was not prejudiced by the admission of Dr. Toomey's deposition because claimant's counsel had the opportunity to question Dr. Toomey at the deposition. Moreover, he found that claimant had eight months after the August 2016 deposition to conduct further discovery related to information obtained at Dr. Toomey's deposition, including time after DMS was joined to the case. Thus, he denied the motion to exclude the deposition. Decision and Order at 3.

[2] The administrative law judge found that DSI/Seabright voluntarily paid claimant temporary total disability compensation from December 9, 2013 to March 30, 2014, and advance permanent partial disability compensation totaling $14,571.38. Decision and Order at 22.

We reject claimant's contention of error. An administrative law judge has great discretion concerning the admission or exclusion of evidence and any such decisions are reversible only if the challenging party shows them to be arbitrary, capricious, based on an abuse of discretion or contrary to law. *See, e.g., Collins v. Elec. Boat Corp.*, 45 BRBS 79 (2011); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the [administrative law judge] shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

33 U.S.C. §923(a); *see* 20 C.F.R. §702.339; *see also* 33 U.S.C. §919(d); 20 C.F.R. §702.338 ("The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters").[3] The right to procedural due process in an administrative proceeding encompasses a party's "meaningful opportunity to present [its] case." *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970).

Claimant has not established that he was denied due process of law or that the administrative law judge abused his discretion in admitting Dr. Toomey's deposition. Claimant examined Dr. Toomey at his deposition after he authored his medical report. Dr. Toomey did not provide any additional evidence in this case. Thus, claimant was afforded all process that was legally due. *Richardson v. Perales*, 402 U.S. 389 (1971). In addition, claimant had ample opportunity to conduct further discovery before the hearing. *See G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem. sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011). Moreover, Dr. Toomey's opinion clearly is "relevant evidence" and thus was properly admitted in the absence of a due process violation. *See Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS

[3] The Rules of Practice and Procedure before the Office of Administrative Law Judges define "relevant evidence" as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. §18.401.

147 (1997). Therefore, we affirm the administrative law judge's denial of claimant's motion to exclude Dr. Toomey's deposition.[4]

Claimant also challenges the finding that he has a 25 percent impairment of the left leg. The administrative law judge found that Dr. Stickney's 50 percent impairment rating "is suspect because he did not strictly adhere to the prescribed formula of the 5th Edition of the Guides and did not use the table in the Guides to calculate claimant's impairment rating as is required." Decision and Order at 18.[5] He also found Dr. Stickney's report "did not contain a thorough explanation of his findings or a well-explained conclusion." *Id*. In contrast, he found Dr. Toomey performed a thorough examination, opined that claimant had a good surgical outcome, and based his 25 percent impairment rating on weakness in the left quadriceps, absence of malalignment, and excellent function. *Id*.; SX 6 at 99. The administrative law judge concluded that Dr. Toomey's opinion "is better supported by the evidence and he followed the most current version of the Guides to reach his conclusions. Dr. Stickney used the outdated Fifth Edition, did not follow the protocols outlined in the Guides and did not offer the same thoughtful, well-reasoned opinion offered by Dr. Toomey."[6] *Id*. Accordingly, the administrative law judge concluded that claimant has a 25 percent left lower extremity impairment. *Id*.

An award of permanent partial disability benefits for a scheduled member is predicated solely on the existence of a permanent anatomical impairment to a member listed in the schedule, and economic loss is not considered in determining an impairment rating under the schedule. *Soliman v. Global Terminal & Container Service, Inc.*, 47 BRBS 1, 2 (2013); *see also Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). In assessing the extent of claimant's disability in a scheduled injury case other than hearing loss, an administrative law judge is not bound by

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[4] Ideally, the administrative law judge would have resolved this evidentiary issue prior to the decision on the merits, *see generally L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-57 (2008) (en banc), but claimant was not precluded from requesting the opportunity to obtain additional post-hearing information from Dr. Toomey.

[5] Referring to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereinafter AMA *Guides*).

[6] The administrative law judge stated that Dr. Stickney appeared to prefer the Fifth Edition because he was not familiar with the methodology of the Sixth Edition and he appeared to rely on his own experience over strict adherence to the Fifth Edition. Decision and Order at 19.

any particular standard or formula. *See, e.g., King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Services, Inc*., 27 BRBS 154 (1993). Although the Act does not require impairment ratings to be made pursuant to the AMA *Guides* in this type of case, the administrative law judge may, nevertheless, rely on medical opinions that rate a claimant's impairment under these criteria, as it is a standard medical reference. *See Pisaturo v. Logistec, Inc.*, 49 BRBS 77 (2015); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

We reject claimant's allegations of error, as the administrative law judge fully summarized the doctors' opinions and detailed his reasoning for finding Dr. Toomey's impairment rating more reliable than Dr. Stickney's. *See* Decision and Order at 7-8, 11-12, 18-19. Contrary to claimant's contention, his analysis comports with the Administrative Procedure Act, 5 U.S.C. §557.[7] *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Moreover, the administrative law judge is tasked with weighing the evidence and drawing inferences and conclusions based on that evidence. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The Board may not reweigh the evidence or disregard an administrative law judge's findings merely because other inferences could have been drawn. *See generally Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Pittman Mech. Contractors, Inc. v. Director, OWCP* [*Simonds*], 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The administrative law judge permissibly credited Dr. Toomey's impairment rating on the bases that Dr. Stickney did not strictly adhere to the formula prescribed in the Fifth Edition and Dr. Toomey's rating under the Sixth Edition was better supported by his

[7] The administrative law judge's rationale in relying on an opinion given under the Sixth Edition shows he was fully cognizant of the assertions claimant made in his post-hearing brief concerning the criticisms of the Sixth Edition and the evidence he offered in support of those contentions. Decision and Order at 18-19; *see* Cl. Post-Hearing Br. at 12-14; CXs 8, 9. The administrative law judge properly stated he was not required to apply the Sixth Edition, but he permissibly chose to do so because it is more "state of the medical art" and Dr. Stickney did not explain, other than his familiarity with using the Fifth Edition, why a rating under the Fifth Edition is superior. Decision and Order at 19. Thus, we need not further address claimant's contentions regarding the relative merits of the Fifth and Sixth Editions as the administrative law judge acted within his discretion in finding Dr. Toomey's evaluation under the Sixth Edition to be the "most supported in the record." *Id*.

evaluation of the objective medical data.[8] Decision and Order at 11, 18-19; *see generally Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Cotton*, 34 BRBS 88. This determination is well within his discretion and supported by substantial evidence. Accordingly, we affirm the administrative law judge's award of compensation for a 25 percent impairment of the left leg. *King*, 904 F.2d 17, 23 BRBS 85(CRT).

BRB No. 18-0564A

DMS/AIG contends that claimant's left knee symptoms were a consequence of the natural progression of his 2005 work injury for which DSI is solely liable. It avers the Section 20(a) presumption, 33 U.S.C. §920(a), applies to determine the responsible employer/carrier and that the presumption was not invoked against it.

The administrative law judge stated that the Section 20(a) presumption plays no role in determining the responsible employer/carrier in this case. Decision and Order at 14. He found the preponderance of the evidence establishes that claimant performed physical work at DMS. *Id.* He relied on the opinions of Drs. Stickney and Toomey to conclude that, "Claimant engaged in significant work at DMS that aggravated, accelerated, exacerbated, or contributed to a worsening of his left knee" until December 9, 2013, during AIG's period of coverage. *Id*. at 16. Accordingly, the administrative law judge concluded that DMS/AIG is the responsible employer/carrier.

Assuming, arguendo, that the Section 20(a) presumption is applicable against DMS/AIG in this case, we reject the contention that there is insufficient evidence to invoke

[8] Contrary to claimant's contention, the administrative law judge was not required to rely on Dr. Stickney's impairment rating because he is claimant's treating physician. In weighing a treating physician's opinion, the administrative law judge should consider its underlying rationale, as well as the other medical evidence of record. *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). In this case, the issue does not involve medical care, *see Amos*, 153 F.3d at 1054, 32 BRBS at 147-148(CRT), and the administrative law judge permissibly found that, "even though he is not the treating doctor," Dr. Toomey's 25 percent impairment rating based on the most current version of the AMA *Guides* is better supported by the evidence. Decision and Order at 18; *see generally Duhagon v. Metropolitan Stevedore Co*., 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

the presumption against it.[9] In determining whether claimant's work aggravated his knee condition at DMS, the administrative law judge relied on claimant's deposition testimony that he demonstrated shipfitting and performed such work as needed, and that he spent two hours a day on vessels delivering parts, climbing stairs and ladders, and walking on uneven surfaces.[10] SX 11 at 188-189, 192, 195-196 (pp. 72, 74-75, 87, 100-101). The administrative law judge also relied on Dr. Stickney's office notes that claimant's work required him to climb stairs and ladders, twist, place weight on his knee, and stand for long periods of time.[11] CX 1 at 40-58. Thus, substantial evidence supports the findings as to claimant's work duties after AIG's coverage commenced on May 14, 2013. Taking into account Dr. Stickney's opinion, these duties could have aggravated claimant's pre-existing knee problem and thus the evidence is sufficient to establish a prima facie case against DMS/AIG. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

[9] In this case, claimant did not make a claim against DMS. Claimant filed a claim against DSI and opposed DSI's motion to join DMS and its carriers.

[10] AIG avers that the job analysis provided by Neil Bennett, a rehabilitation counselor, was inaccurate. *See* SXs 7, 10. The administrative law judge agreed; he found "claimant established that Mr. Bennett's job analysis reports were an inaccurate reflection of his work duties" and, therefore, "gave little weight to Mr. Bennett's job analysis." Decision and Order at 12. Moreover, we reject AIG's contention that Dr. Toomey's testimony was not credible because he opined that claimant's work would aggravate his arthritis only if he performed the heavy work described in Mr. Bennett's report. The administrative law judge found Dr. Toomey's opinion credible about the physical activities that could aggravate claimant's knee, which were climbing ladders or stairs multiple times a day, occasionally lifting 50 pounds, and frequently lifting 25 pounds for two or more hours a week, which are activities in which claimant engaged. *Id.* at 16; SX 8 at 131-134, 136.

[11] With respect to the period AIG provided coverage after May 14, 2013, Dr. Stickney noted on October 7, 2013, that claimant cannot climb ladders, takes steps one at a time, and walks peg-legged. CX 1 at 47. On November 4, 2013, Dr. Stickney reiterated these findings and stated, "[H]e works on a job going up and down working around tugboats." *Id*. at 51. On December 9, 2013, Dr. Stickney noted that claimant does "a lot of activity on uneven surfaces," and "works on barges, up and down ladders." *Id*. at 58.

With respect to the responsible employer/carrier issue, the Ninth Circuit has stated:

> What this court . . . calls the last employer rule or aggravation rule . . . is actually a different test from the last employer rule applied in occupational disease cases. The rule applied in injury or cumulative trauma cases involves an analysis of whether the claimant's disability is the result of a natural progression of an injury that occurred at an earlier employer, or was aggravated or accelerated by conditions at a later employer. It would be irrational to attempt such an analysis without consideration of the evidence regarding working conditions at *both* employers, and thus a simultaneous analysis is called for in injury cases.

Albina Engine & Machine v. Director, OWCP, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010). Thus, the employer/carrier at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer/carrier on the risk at the time of the aggravation is liable for the entire disability resulting therefrom. *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). Therefore, Seabright and AIG each had the burden to show that claimant's disabling injury was not due to its employment during the period it provided coverage to DSI or DMS. *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 F. App'x 547 (9th Cir. 2001).

After finding that claimant performed physical work at DMS, the administrative law judge found that the opinions of Drs. Stickney and Toomey establish that these work activities aggravated claimant's left knee condition while AIG provided coverage after May 14, 2013. Decision and Order at 15. The administrative law judge relied on Dr. Stickney's deposition testimony that claimant's work activities aggravated his left knee arthritis by causing swelling, aching or discomfort and that his arthritis may not have progressed so quickly if he had a desk job. *Id*. at 16; *see* CX 13 at 461-462 (pp. 31-37). The administrative law judge also relied on Dr. Toomey's deposition testimony that performing physical activity, such as climbing ladders or stairs, occasionally lifting 50 pounds, and frequently lifting 25 pounds for two or more hours a week could aggravate claimant's left knee degenerative disease. *Id*.; *see* SX 8 at 131-134 (pp. 18-32).

The record contains substantial evidence supporting the administrative law judge's determination that claimant's knee disability is, in part, the result of aggravation or acceleration due to his continued employment at DMS after May 14, 2013, and is not due solely to the natural progression of his original 2005 knee injury and the two meniscectomies. Thus, we affirm that finding. *Kelaita v. Director, OWCP*, 799 F.2d 1308

(9th Cir. 1986); *see Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). As claimant's aggravation continued after May 13, 2013, when AIG was on the risk, the administrative law judge properly held AIG liable for claimant's disability benefits and medical care after that date. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). Accordingly, we affirm the administrative law judge's conclusion that DMS/AIG is the responsible employer/carrier.

DSM/AIG next challenges the administrative law judge's order that it reimburse DSI/Seabright for compensation it voluntarily paid claimant after December 9, 2013. DSM/AIG avers that DSI/Seabright was under no obligation under the Act to make those payments, as claimant's disability occurred more than one year after the last payment of compensation under the 2007 Compensation Order. DMS/AIG thus avers that any claim for benefits was untimely under Section 22 of the Act, 33 U.S.C. §922, and DSI/Seabright's waiver of this defense cannot be imputed to it because it was not a party to the case at that time. *See* SXs 1 at 6-7; 4 at 65-66.

We reject DMS/AIG's contention that it is not liable to DSI/Seabright for two reasons. First, as claimant and DSI aver, DMS/AIG did not raise a defense based on Section 22 before the administrative law judge. In fact, it appeared to concede its inapplicability by stating "Modification rights expired January 31, 2008 but were revived when Duwamish Shipyard, Inc. paid TTD from December 9, 2013 through March 20, 2014." DMS/AIG Amended Prehearing Statement at 6 (Mar. 20, 2017). In addition, DMS/AIG did not address DSI/Seabright's reimbursement claim in its post-hearing pleadings. DMS/AIG cannot raise this reimbursement issue for the first time on appeal. *See, e.g., Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

Second, claimant's work-related aggravation while DMS/AIG was on the risk as of May 14, 2013, is a new injury pursuant to the aggravation rule, to which Section 22 is not applicable. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999); *see also Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). In this respect, DMS/AIG noted that Sections 12 and 13 are "Not applicable. Order of Joinder," DMS/AIG Amended Pretrial Statement at 1 (Mar. 20, 2017), so any timeliness defense based on these sections is waived as well. *See also* 33 U.S.C. §913(b)(1) (timeliness contentions must be raised at the first hearing). Therefore, we affirm the administrative law judge's order that DMS/AIG

reimburse DSI/Seabright for the disability payments it made to claimant for the aggravating injury that occurred after May 14, 2013.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge