BRB No. 13-0088

ROBERT AMEZCUA	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
YUSEN TERMINALS	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
SSA MARINE TERMINALS	)	DATE ISSUED: 11/14/2013
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

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

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for SSA Marine Terminals and Homeport Insurance Company.

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

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

PER CURAIM:

SSA Marine Terminals (SSA) appeals the Decision and Order Awarding Compensation Benefits and Order Following Reconsideration (2010-LHC-01960, 2011-LHC-01012) of Administrative Law Judge Richard M. Clark 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 right knee on January 9, 2009, when he slipped descending a railcar ladder during the course of his employment as a longshoreman for Yusen Terminals (Yusen). Claimant was diagnosed with, inter alia, a torn ACL and a torn medial meniscus. Despite his injury, claimant worked a total of nine shifts from January 12 to January 22, 2009. On claimant's last day, he worked a full shift for SSA driving a Utility Tractor Removal (UTR) truck, which required that he climb two steps to the truck cab. Claimant stated that he stopped working after this shift due to "extreme" right knee pain. SSAX 20 at 59. Claimant underwent right knee surgery on February 9, 2009, which was performed by Dr. Delman. He underwent a second right knee surgery on September 25, 2009, and a third knee surgery on October 8, 2010, which were performed by Dr. Kharzai. Claimant was released for work on January 14, 2011, and he returned to longshore employment the next day. Yusen contended that SSA was the employer responsible for claimant's compensation benefits on the basis that claimant's knee condition was aggravated at work on January 22, 2009.

In his decision, the administrative law judge found that claimant aggravated his ACL and meniscus tears on his last day of work for SSA, such that SSA is the responsible employer. Decision and Order at 19-23. The administrative law judge found that Yusen established the availability of suitable alternate employment from June 8, 2010, until the date of claimant's third surgery on October 8, 2010; thereafter, Yusen established that claimant could have returned to alternate work on January 5, 2011. *Id*. at 24-30. SSA was, therefore, ordered to pay claimant compensation for temporary total disability from January 23, 2009 to June 7, 2010, temporary partial disability from June 8, 2010 to October 7, 2010, temporary total disability from October 8, 2010 to January 4, 2011, and temporary partial disability from January 5 to January 14, 2011. *Id*. at 32; *see* 33 U.S.C. §908(b), (e). On reconsideration, the administrative law judge rejected SSA's contentions that he erred in finding that claimant sustained a second work injury on January 22, 2011, and by crediting the opinion of Dr. Sisto over that of Dr. Delman. Order Following Reconsideration at 2-5.

On appeal, SSA challenges the administrative law judge's finding that it is the employer liable for claimant's compensation and medical benefits. Specifically, SSA

contends the evidence establishes that claimant's right knee condition is the natural or unavoidable result of his January 9, 2009 work injury with Yusen, and it challenges the administrative law judge's finding that claimant aggravated his right knee during the course of his employment with it on January 22, 2009. Yusen responds, urging affirmance of the administrative law judge's decision. SSA filed a reply brief.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that, in allocating liability between successive employers and carriers in cases involving traumatic injury, 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.[1] *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); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). The Ninth Circuit has emphasized 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, if claimant's disability in this case is due, at least in part, to an injury sustained on January 22, 2009, which aggravated, accelerated, or combined with claimant's prior injury with Yusen, thus resulting in claimant's ultimate disability, SSA is the liable employer. *See Buchanan v. Int'l Transp. Services*, 33 BRBS 32, 36 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, 7 F. App'x 547 (9th Cir. 2001); *see generally General Ship Serv. v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). If, however, claimant's disability is due to the natural progression of his January 9, 2009 right knee injury, Yusen is fully liable for claimant's disability and medical benefits. *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

[1]Under the aggravation rule, where the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc).

In this case, the administrative law judge was faced with evaluating the opinions of two physicians: Dr. Delman, who performed claimant's first knee surgery in February 2009 and treated claimant for the first six months after his work injury with Yusen,[2] and Dr. Sisto, who evaluated claimant in March, July and December 2010. CXs 4, 12. The administrative law judge credited Dr. Sisto's opinion that claimant sustained an aggravating injury at SSA in the form of microscopic tearing of the ACL and meniscus, as Dr. Sisto "propound[ed] persuasively that claimant could not have continued to work, walk and otherwise live his life [after the initial injury] without causing an aggravation to his injured knee." Decision and Order at 21; *see* YXs 32 at 8; 52 at 15-16, 54-62, 66. Dr. Sisto based his opinion on the increase in claimant's pain and swelling over his final three shifts of work and on the fact that claimant could no longer work after his final shift. In contrast, Dr. Delman opined that there was no aggravation to claimant's right knee as a result of his working for SSA absent information from claimant that his knee condition worsened after the injury with Yusen.[3] CX 4 at 25A. The administrative law judge found that, unlike Dr. Sisto, Dr. Delman was not aware, and failed to account for, all of claimant's symptoms at the time he left work after his last shift for SSA on January 22, 2009. The administrative law judge had the discretion to find Dr. Sisto's opinion more persuasive than Dr. Delman's on the issue of aggravation. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Accordingly, as the administrative law judge weighed the underlying rationale for the opinions of Drs. Sisto and Delman, and rationally found Dr. Sisto's opinion more persuasive, we affirm his finding. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).[4]

The administrative law judge also found that the facts in this case are "nearly identical" to those in *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). In that case, the claimant continued to work after he was scheduled for knee surgery. Based on the medical evidence that the claimant's last shift before surgery caused a minor but permanent

[2]Claimant's subsequent treating physician, Dr. Kharzai, did not address whether claimant's employment with SSA contributed to his disabling knee condition.

[3]The administrative law judge also found that Dr. Delman's opinion was offered in a series of letters and he was not subject to cross-examination. Decision and Order at 21.

[4]These cases provide that in weighing a treating physician's opinion, the administrative law judge may accord determinative weight to the opinion but he also must consider its underlying rationale, as well as the other medical evidence of record. *Monta*, 39 BRBS at 107-108; *Brown*, 34 BRBS at 200-201. In this case, the administrative law judge utilized this analysis in finding more credible the opinion of the non-treating physician, Dr. Sisto.

increase in his knee disability, and increased the need for his surgery, the Ninth Circuit affirmed the finding that claimant's employer on the last day of work was the responsible employer, even though claimant had worked only one day with that employer prior to his surgery. *Price*, 339 F.2d at 1105, 37 BRBS at 90-91(CRT). The administrative law judge in this case credited claimant's hearing and deposition testimony and the opinion of Dr. Sisto to similarly conclude that claimant's pain on his last shift for SSA was due to the aggravation of his right knee condition. Decision and Order at 23; *see* Tr. at 55, 60-62, 71-76, SSAX 20 at 58-59; YX 52 at 16-19. The administrative law judge specifically credited claimant's testimony that his knee pain and swelling increased over the course of his final three work shifts and Dr. Sisto's opinion that claimant had sustained further microscopic tearing of his ACL and meniscus at work on January 22, 2009, which the administrative law judge found incorporates the "objective and subjective indications of worsening described by claimant," and is "compelling and persuasive." Decision and Order at 23; *see* YX 52 at 16-19.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and to draw his own inferences therefrom; he has the prerogative to credit one medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences might appear to be more reasonable. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). In this case, substantial evidence supports the administrative law judge finding that claimant experienced a worsening of pain and swelling over his final three shifts to the point he had to stop working following his last shift with SSA, crediting Dr. Sisto's opinion that claimant had further microscopic tearing of his ACL and meniscus at work on January 22, 2009, and finding less persuasive Dr. Delman's opinion because he did not address the effect of claimant's subjective complaints. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, the administrative law judge's findings that claimant's knee condition is due to an aggravation on his last day of employment at SSA on January 22, 2009, and that, therefore, SSA is the employer responsible for claimant's compensation benefits are affirmed. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Buchanan*, 33 BRBS 32.

Accordingly, the administrative law judge's Decision and Order Awarding Compensation Benefits and Order Following Reconsideration are 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