



BRB No. 15-0087

FELIX AGUILAR)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MMKK, INCORPORATED d/b/a)	
WALTON BARGE TERMINAL)	
)	
and)	
)	
AMERICAN LONGSHORE MUTUAL)	DATE ISSUED: <u>Nov. 17, 2015</u>
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
TEXAS MUTUAL INSURANCE)	
COMPANY)	
)	
Carrier-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown, PC), Houston, Texas, for claimant.

Thomas J. Smith and Amanda Kurz Smith (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for employer and American Longshore Mutual Association, Limited.

Michael D. Williams, Micah A. Grodin and Jonathan A. Tweedy (Brown Sims), Houston, Texas, for employer and Texas Mutual Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

American Longshore Mutual Association (ALMA) appeals the Decision and Order (2013-LHC-00909, 00910) of Administrative Law Judge Clement J. Kennington 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back unloading pipe from a crane on April 26, 2010, during the course of his employment with employer. ALMA was the carrier on the risk at this time. Claimant was diagnosed with a lumbar strain and herniated discs at L3-4, L4-5 and L5-S1. CX 24. He was treated conservatively and released to regular duty on September 10, 2010. Claimant remained symptomatic, and he received epidural injections and pain management treatment until he underwent back surgery on May 31, 2012.¹ EX 28 at 10. As claimant's pain did not significantly improve post-surgery, he received an epidural injection on September 7, 2012, which relieved his ongoing symptoms. CX 22 at 10-11. After a work hardening program, claimant returned to work for employer in October 2012.² *See* CXs 20 at 1, 35. Claimant's pain worsened shortly thereafter, although he has continued working for employer. ALMA challenged its liability for claimant's ongoing medical treatment, alleging that claimant sustained an aggravating work injury during the period Texas Mutual Insurance Company (TMI) insured employer.³

In his decision, the administrative law judge found the credible evidence establishes that claimant's condition is the result of the natural progression of his April 26, 2010 work-related back injury, rather than the aggravation or acceleration of the initial injury due to his work for employer after October 2012, when TMI was the carrier on the risk. In reaching this conclusion, the administrative law judge credited claimant's testimony that he has performed only light-duty work since October 2012, and Dr. Barrash's opinion that claimant's present back condition is a result of the natural

¹ Dr. Jeffrey Wood performed a bilateral L5 decompression and bilateral partial laminectomy and decompression at L4 and S1. CXs 30, 43.

² ALMA paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from May 31, 2012 to October 1, 2012.

³ TMI assumed the risk on December 23, 2010. ALMA ex. (AX) 6.

progression of his April 26, 2010 work injury following unsuccessful conservative treatment and surgical procedures. The administrative law judge also found that the record contains no evidence that claimant sustained any additional trauma after his return to work in October 2012 which might have contributed, even in part, to claimant's current condition. Decision and Order at 13. The administrative law judge concluded that, "there is no evidence to indicate any additional damage to the underlying injury. Rather, the evidence indicates simply an increase in pain from the natural progression of the initial injury." *Id.* Accordingly, the administrative law judge found that ALMA remains liable for claimant's injury-related medical care. 33 U.S.C. §907(a).

ALMA appeals the administrative law judge's finding that it is the responsible carrier. Claimant and TMI filed separate response briefs, urging affirmance. ALMA filed a reply brief. TMI submitted a motion to accept its sur-reply brief. We grant TMI's motion and accept its sur-reply brief. 20 C.F.R. §802.215.

ALMA contends the administrative law judge erred by not addressing whether claimant sustained an aggravating injury during the period between his first return to work in September 2010 and his undergoing back surgery in May 2012. ALMA did not raise this issue before the administrative law judge. ALMA's opening statement at the hearing and its post-hearing brief addressed only whether claimant sustained an aggravating injury after he returned to work in October 2012. Tr. at 7-11; ALMA's Post-Hearing Brief at 10-14, 22-25. The Board generally will not address factual issues raised on appeal if they were not raised before the administrative law judge. *See, e.g., Turk v. E. Shore R.R. Inc.*, 34 BRBS 27 (2000); *see also Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008) (new issue would require remand for fact-finding); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982) (employer is not required to defend a claim that is not made); *Johnston v. Hayward Baker*, 48 BRBS 59 (2014). As ALMA has not provided any compelling reason why we should depart from this rule, we decline to address this issue. *Cf. Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001) (Board addresses question of law raised for the first time on appeal).

ALMA next challenges the administrative law judge's finding that claimant did not sustain an aggravating injury after his return to work in October 2012. Specifically, ALMA argues that the administrative law judge erred in finding that claimant performed only light-duty work, in crediting of Dr. Barrash's natural progression opinion, and in failing to conclude that the increase in claimant's pain symptoms establishes that he sustained a work-related second injury.

The rule for determining which carrier 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 carrier 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 carrier 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) (2^d Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). ALMA 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 F.App'x 547 (9th Cir. 2001). ALMA need establish only that, after TMI assumed coverage, claimant sustained an injury that aggravated, accelerated or combined with his prior back injury in order for TMI to be held liable for medical expenses incurred after the second injury. *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F.App'x 640 (9th Cir. 2010). If, however, claimant's disability is due to the natural progression of his April 2010 back injury, ALMA remains fully liable for claimant's 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).

In this case, ALMA did not argue that TMI was liable for medical benefits associated with any temporary aggravation of claimant's back condition; rather, ALMA sought to be completely discharged of its liability for claimant's work injury.⁴ *See*

⁴ 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 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). In other words, the work-related manifestation of symptoms of an underlying condition constitutes an "injury" under the Act. *Crum*, 738 F.2d at 478, 16 BRBS at 120-121(CRT); *Gardner*, 640 F.2d 1385, 13 BRBS 101; *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Thus, where claimant's work results in a temporary exacerbation of symptoms, the carrier at the time of the work events leading to this exacerbation is responsible for the resulting temporary disability. *See generally*

ALMA Post-Hearing Brief at 25. The administrative law judge found no evidence that claimant's condition worsened or was aggravated due to his continuing to work after October 2012. Decision and Order at 13. In its brief to the Board, ALMA quotes from the deposition testimony of Dr. Wood addressing whether claimant's post-October 2012 work activities aggravated his back symptoms. ALMA Br. at 33-34. A review of Dr. Wood's medical reports and deposition testimony, however, reveals that Dr. Wood did not opine that claimant's post-October 2012 employment aggravated his underlying back condition. See AXs 47 10-14, 22. The administrative law judge also found that "the evidence indicates simply an increase in pain from the natural progression of the initial injury." Decision and Order at 13. In this regard, Dr. Barrash unequivocally opined that claimant did not sustain a second injury from his post-October 2012 employment and that his pain and disability is a continuum of back pain because he never fully recovered from the initial injury and he experienced a poor result from the back surgery. EX 39 at 12-13. Moreover, Dr. Wood agreed with Dr. Barrash that claimant did not sustain an additional orthopedic injury after the April 2010 injury. AX 47 at 16. Dr. Wood wrote on November 11, 2013, that, "[I] strongly believe that there was no separate injury and that this is all related to his first injury." *Id.* at 57.

The administrative law judge addressed the issue of the responsible carrier 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 this 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); see Decision and Order at 12-13. 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 carrier to be held liable. It is insufficient to show merely that claimant's condition was symptomatic while TMI provided coverage. See *Delaware River Stevedores*, 279 F.3d at 242-243, 35 BRBS at 160-162(CRT). The administrative law judge rationally determined, based on the absence of medical evidence that claimant's underlying back condition was aggravated by his continuing to work, and on the unequivocal opinion of Dr. Barrash that claimant's back condition is due to the natural progression of the initial work injury on April 26, 2010, that ALMA is the responsible carrier for claimant work-related back condition.⁵ *Id.*, 279 F.3d at 236-239, 35 BRBS at

Delaware River Stevedores, Inc. v. Director, OWCP, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 308 (9th Cir. 1986).

⁵ Accordingly, we need not address ALMA's contentions that the administrative law judge erred in finding that claimant's work was "light duty" after October 2012. See Decision and Order at 13.

155-157(CRT). The administrative law judge's decision is supported by substantial evidence of record and therefore we affirm the administrative law judge's finding that ALMA is the carrier responsible for medical benefits related to claimant's back condition.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge