U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0144

ALAN L. MAUK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CASCADE GENERAL	)	DATE ISSUED: Nov. 18, 2016
	)	
and	)	
	)	
AIG	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Theodore P. Heus (Preston Bunnell, LLP), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer and AIG.

Robert E. Babcock and James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer and Signal Mutual Indemnity Association, Limited.

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

PER CURIAM:

Employer and its carrier, AIG, appeal the Decision and Order Denying Benefits (2013-LHC-01201) of Administrative Law Judge William Dorsey 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant started working for employer in 1997 as a machinist. Later that year, claimant became a pipefitter, which required lifting heavy objects and overhead work. AX 143 at 372-373, 378, 383. Claimant stated that he sustained a number of right shoulder injuries over the course of his employment for employer. *See* Tr. at 30. Claimant was laid off by employer in February 2008 due to limitations related to his knees,[1] and subsequently obtained work with non-covered employers. Tr. at 33-34; AX 84 at 184. Claimant returned to work for employer for 11 shifts between April and June 2009.[2] SX 10. Claimant obtained non-covered employment in June 2010 with Harder Mechanical Contractors (Harder). Claimant's shoulder "locked" when he lifted a 15-pound item at Harder in November 2011, which caused him "enormous pain." AX 143 at 431-432. Claimant subsequently worked intermittently for Harder at light-duty due to his shoulder pain until he was laid-off on December 14, 2011, because of a reduction-in-force. AX 143 at 433-435; SX 7 at 154. An MRI of claimant's right shoulder conducted on March 29, 2012, showed, inter alia, a rotator cuff tear, a partial tear of the subscapularis, and arthrosis. AX 127 at 312-313. Claimant underwent shoulder surgery on April 10, 2012. AX 129 at 321. He filed a claim under the Act against employer the next day. SX 11 at 185.

The parties stipulated that AIG provided employer's insurance coverage until March 31, 2008, and that employer was insured by Signal Mutual Indemnity Association (Signal) as of April 1, 2008, and during claimant's employment with employer in 2009. Decision and Order at 2. In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his shoulder condition is due to his employment with employer while each carrier provided coverage and that the carriers rebutted the presumption. *Id.* at 19-21. The administrative law judge weighed the evidence as a whole and found that claimant's work for employer while AIG

[1] Claimant's right knee condition had required a meniscectomy in 2006. AXs 50, 57 at 134.

[2] Claimant also worked a shift on July 23, 2009, when he took a certification test. Tr. at 54.

was the insurer contributed to claimant's shoulder injury, but that his work for employer in 2009 did not aggravate or accelerate claimant's work-related shoulder condition. *Id*. at 22-27. Thus, the administrative law judge found that AIG is the responsible carrier under the Act. The administrative law judge also found that claimant's subsequent injury with Harder was not an intervening cause of claimant's disability that relieved AIG of liability. *Id*. at 27-29. The administrative law judge awarded claimant temporary total disability benefits payable by AIG, 33 U.S.C. §908(b), from December 18, 2011, until employer showed the availability of suitable alternate employment on June 20, 2012. The administrative law judge found that claimant is not entitled to further compensation thereafter, because he did not sustain a loss of wage-earning capacity.[3] *See* 33 U.S.C. §908(c)(21), (h).

AIG appeals the administrative law judge's responsible carrier finding, contending that Signal is the liable carrier. Alternatively, AIG contends that claimant's non-covered injury with Harder is the cause of claimant's disability, relieving it of liability under the Act. Signal responds, urging affirmance of the administrative law judge's responsible carrier finding. Claimant responds, urging affirmance of the administrative law judge's decision in all respects.[4] AIG filed a reply brief.

RESPONSIBLE CARRIER

AIG contends that the opinions of Drs. Geddes, Switlyk, Shia and Vessely attribute claimant's shoulder condition, in part, to a work-related aggravation resulting from his 11 shifts of work for employer in 2009 while Signal provided employer's insurance coverage.[5] More specifically, AIG avers that claimant's testimony and Dr. Geddes's deposition testimony support the conclusion that claimant aggravated his shoulder condition from brazing in 2009.[6]

[3] The administrative law judge found that claimant's average weekly wage was $327.78 and that employer established claimant has a residual wage-earning capacity of $460 per week. Decision and Order at 35-38.

[4] Claimant filed a cross-appeal, which the Board dismissed as untimely in an Order issued on July 12, 2016.

[5] AIG does not challenge the administrative law judge's finding that claimant injured his shoulder during his employment with employer while AIG was on the risk

[6] Brazing involves sealing with silver two pieces of non-ferrous metal. Tr. at 47-48.

In cases involving multiple traumatic injuries, the determination of the responsible carrier turns on whether the claimant's disabling condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability results from the natural progression of a prior injury then the carrier at the time of that injury is responsible. If, however, a subsequent injury aggravates, accelerates, or combines with, the earlier injury to result in the claimant's disability, then the carrier at the time of the second injury is responsible for claimant's entire resulting disability. *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); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

Dr. Geddes testified at his deposition that climbing ladders, twisting and turning, and carrying supplies and tanks involve movement of the shoulder joint that could contribute to its degeneration. AX 145 at 554-556, 569. Claimant testified at his deposition that his usual work as a pipefitter included climbing ladders and he testified at the hearing that he had to move equipment and pick-up tools while brazing. AX 143 at 416; Tr. at 65-67. However, claimant testified at the hearing that he did not have to climb ladders during his 11 shifts for employer in 2009. Tr. at 66; AX 143 at 418. Moreover, claimant's testimony that he had to lift and carry tools in 2009, Tr. at 65, is insufficiently descriptive to establish error in the administrative law judge's failure to find that this testimony establishes that claimant's 2009 employment in fact aggravated his shoulder condition. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Moreover, the administrative law judge rationally found that claimant's 11 shifts of work in 2009, which involved brazing and supervising, involved less demanding work than had claimant's work as a pipefitter from 1997 to 2008.[7] The opinions of Drs. Switlyk and Shia do not specifically address whether claimant's work duties in 2009 aggravated his shoulder condition.[8] *See* AXs 148, 149**.** The administrative law judge rationally found that Dr. Vessely's testimony failed to specifically address how, in his opinion, claimant's brazing work for employer in 2009 aggravated his shoulder

[7] Claimant testified that he did not have to work overhead, and there was minimal use of the shoulder as he did most of the brazing work with his hands at shoulder height with elbows tucked down and in toward his torso. Tr. at 48-50.

[8] Dr. Switlyk based his opinion that claimant's work contributed to his shoulder condition on claimant's "history as a pipefitter," AX 148, and Dr. Shia opined that claimant's "work over the years was a contributing factor" to claimant's requiring treatment and surgery. AX 149.

condition,[9] whereas Dr. Geddes explained why there was no contribution from that employment.[10] AX 145 at 565-566; SX 31 at 308; Decision and Order at 24. Substantial evidence of record supports the administrative law judge's finding that claimant's employment with employer in 2009 did not aggravate or contribute to his pre-existing shoulder problem. Tr. at 48-50; AX 145 at 554-556, 565, 569; SX 31 at 308. Thus, as claimant injured his shoulder at work for employer while AIG was on the risk, we affirm the finding that AIG is the responsible carrier under the Act. *See* AXs 145 at 554-556, 569, 148, 149; n.5, *supra*.

INTERVENING CAUSE

AIG argues, in the alternative, that claimant sustained an intervening injury while working for Harder which severed the causal connection between his covered longshore employment and his disabling injury. AIG avers that the incident at Harder caused claimant to stop working due to his shoulder condition and to require surgery. Thus, AIG avers that the Harder injury is the cause of claimant's disability notwithstanding that the injuries at employer contributed to claimant's shoulder pathology.[11]

If a claimant with a work-related injury sustains a subsequent injury that is not covered by the Act, the responsible employer/carrier is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. 33 U.S.C. §902(2); *see J.T.* [*Tracy*] *v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case*

[9] Accordingly, we need not address the administrative law judge's finding that Dr. Vessely's opinion was based, in part, on his misunderstanding of *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).

[10] Dr. Geddes based his opinion on claimant's description of his brazing work. SX 31 at 308.

[11] AIG avers that the decision of the United States Court of Appeals for the Ninth Circuit in *Kealoha v. Director, OWCP*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013), supports its contention that the Harder injury broke the casual link between claimant's right shoulder injury with employer and his ultimate disability such that it no longer is the responsible carrier. As this case does not involve an issue of a "willful intention" by claimant to injure himself, pursuant to 33 U.S.C. §903(c), the administrative law judge did not err in finding *Kealoha* inapposite to the determination of whether claimant's subsequent injury with Harder relieved AIG of liability under the Act. *See* Decision and Order at 29.

Found. v. Tracy, 696 F 3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Where the subsequent disability is not the natural or unavoidable result of the work injury, but is the result of an intervening cause, the responsible employer/carrier is relieved of liability for the disability attributable to the intervening cause. *Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454 (9th Cir. 1954); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Marsala v. Triple A South*, 14 BRBS 39 (1981). The covered employer remains liable for any disability due to the covered work injury, and is absolved of all liability for further benefits only if the subsequent injury is the sole cause of claimant's disability. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2010). It is the responsible carrier's burden to establish what portion of the disability is due to the intervening cause; otherwise, the responsible carrier remains liable for the entire disability. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

In his decision, the administrative law judge discussed claimant's deposition testimony that his shoulder condition was "fine" and did not interfere with his ability to work before the November 2011 injury at Harder and the evidence that, before he was laid off by Harder on December 14, 2011, claimant sought shoulder treatment, excused absences and work restrictions from Dr. Geddes. Decision and Order at 28. The administrative law judge found that liability "would almost certainly shift" from AIG to Harder under the last responsible employer rule if Harder were a maritime employer. *Id.* However, because "[w]ork at Cascade contributed in some way to [claimant's] ultimate disability," *Id.* at 28, AIG had to show what portion of claimant's disabling shoulder condition is attributable to the Harder injury in order to decrease its liability. Finding that AIG presented no such evidence, the administrative law judge held AIG fully liable for claimant's disabling shoulder condition. *Id.* at 28-29.

Although the administrative law judge accurately stated the law applicable to the resolution of the intervening cause issue, we cannot affirm his conclusion that AIG is fully liable for claimant's disability benefits because the administrative law judge did not address and weigh all relevant evidence in terms of whether claimant's entire disability is attributable to the Harder injury. In this regard, a functional capacity examination in April 2009, after claimant stopped working as a pipefitter, concluded that claimant was capable generally of heavy-duty work and specifically of working as a pipefitter. AX 114. Dr. Geddes's notes between 2009 and November 2011 do not show any significant shoulder treatment. AXs 110-113, 115-117. Claimant testified at his deposition that his shoulder was "fine" and that he was able to work full-time at Harder until November 2011, when his shoulder "locked" and he had "enormous" pain. AX 143 at 432. An MRI of claimant's right shoulder conducted on March 29, 2012, showed, inter alia, a rotator cuff tear, a partial tear of the subscapularis, and arthrosis, and claimant underwent right shoulder surgery in April 2012. AX 127 at 312-313. Dr. Vessely opined that the Harder

injury affected claimant's physical capabilities, in that it caused him to stop working, and contributed to his pre-existing shoulder pathology.[12] AX 146 at 3. Dr. Vessely stated that the Harder injury led to "a definite change" in claimant's physical capabilities and to the need for surgery. AX 147 at 15.

The administrative law judge also did not address Dr. Geddes's opinion in this section of his decision. Dr. Geddes examined claimant on December 8, 2011, after the incident at Harder. Claimant complained of moderate, increasing shoulder pain. AX 118.[13] In July 2012, Dr. Geddes opined that claimant's work "in the past definitely play[ed] a role in the development of his recently diagnosed and surgically repaired rotator cuff problems." AX 137 at 338; *see also* CX 12.

As the administrative law judge did not address and weigh this evidence in relation to whether the November 2011 injury at Harder alone caused claimant's *disability*, we must remand the case for further findings.[14] Because claimant was not disabled prior to the Harder incident, the proper inquiry is whether claimant's injury at Harder and the resulting disability are due to the natural progression of the work-related injury with employer, or whether the disabling injury is due to an "intervening cause" injury at Harder. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). The administrative law judge is the fact-finder and he must discuss the relevant evidence and explain what evidence he credits and how it supports his legal conclusion on this issue. *See generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Thus, we vacate the administrative law judge's finding that AIG is liable for claimant's disability benefits, and we remand this case for the administrative law judge to make specific findings on the intervening cause issue.

[12] Dr. Shia also noted worsening in claimant's condition after the Harder incident. AX 128.

[13] Dr. Geddes wrote a letter to Harder on December 8, 2011, stating that claimant has recurrent shoulder problems that are not related to his present employment. He stated claimant had a "flare up this week, and could not work." AX 119.

[14] The administrative law judge correctly noted that there is no evidence specifically apportioning claimant's disability among various causes.

Accordingly, the administrative law judge's finding that AIG did not establish that claimant's disability is due to the work injury at Harder is vacated, and the case is remanded for further findings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge