BRB No. 11-0198

CLIFFORD A. OVERBY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 10/25/2011
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-0565) of Administrative Law Judge Kenneth A. Krantz 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 has worked for employer for approximately 30 years. Claimant worked 20 of those years in fueling inspection, which he performed within the main shipyard and involved pulling the old fuel, in the form of sticks of radioactive material, out of nuclear reactors on aircraft carriers and putting in new fuel. Claimant stated that when refueling jobs were being done he worked onboard ship for four to six months at a time, and that, in between fuelings, he worked in the shop in order to maintain his fueling

qualifications.[1] Claimant testified that the most physical aspect of this work involved climbing and descending 12-foot vertical ladders, making between 6 to 12 trips up and down multiple flights of ladders each night. Claimant alleged that he began to experience pain in both of his shoulders around 2003 which increased over time to the point that, in February 2008, he transferred from fueling to receipt inspection, a significantly less physically demanding job. The receipt inspection position, which involves inspecting parts that are installed in the nuclear systems on aircraft carriers, is performed in Copeland Park which is approximately 2.5 to 3 miles away from the shipyard gate. Claimant testified that while his shoulder pain decreased with the change in jobs, he nevertheless experienced a severe recurrence of pain on May 12, 2009, after handling some heavy fittings, a task that claimant described as one of the most strenuous aspects of receipt inspection.

On May 13, 2009, claimant sought treatment for his shoulders at employer's clinic. He ultimately was diagnosed with a completely severed muscle in his right shoulder which would require surgical repair. Dr. Wardell diagnosed bilateral wear-and-tear type rotator cuff tears and a right biceps tendon tear, and he performed surgery on claimant's right shoulder, treated claimant's left shoulder with a series of cortisone shots, and prescribed physical therapy. Following the surgery, Dr. Wardell opined that claimant's rotator cuff tear was a "degenerative type tear, probably not related to any acute trauma," with claimant's work onboard carriers serving as the most significant factor causing the tear. CX 21.

Claimant returned to work at the shop in February 2010, with light-duty restrictions, and is able to perform much of the same receipt inspection work that he did before. Claimant, however, cannot do the heaviest work, lift anything above his waist, or lift, push or pull more than ten pounds. Claimant filed a claim seeking benefits under the Act. Employer controverted the claim, asserting that the claim does not fall within the coverage of the Act because claimant's injury occurred at Copeland Park.[2] In his decision, the administrative law judge initially found that employer's shop at Copeland Park is not a covered situs, but that its shipyard is one pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). The administrative law judge found that claimant's shoulder injury, diagnosed on May 13, 2009, was a gradual and cumulative degenerative tear caused by his repetitive climbing activity, the natural progression of an injury that occurred while he

[1]Claimant stated that this involved making practice dry runs on a mock-up of a carrier. Claimant added that this work was similar to that which he performed on an actual carrier, but that it involved climbing fewer vertical ladders.

[2]Employer concedes that claimant was disabled by his injury from June 1, 2009 through August 23, 2009, and from November 23, 2009 through February 7, 2010.

was working in employer's shipyard. He, therefore, concluded that since the injury occurred at a covered situs, *i.e.*, the shipyard, claimant satisfied the situs test and thus, established that his claim falls within the coverage of the Act. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 1, 2009 through August 23, 2009, and from November 23, 2009 through February 7, 2010.

On appeal, employer contends claimant's injury occurred at Copeland Park and not at the shipyard and thus, it challenges the administrative law judge's finding that claimant's injury occurred on a covered situs and is compensable under the Act. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred in finding that claimant did not sustain a new injury on May 12, 2009, and that claimant's injury was due to the natural progression of an injury sustained during his work at its shipyard. Employer asserts that, contrary to the administrative law judge's finding, claimant's injury was the direct result of his work on May 12, 2009, and thus, it occurred at a non-covered facility, *i.e.*, the Copeland Park shop. Employer further argues that the only opinion which expresses the view that claimant's disabling injury was gradual and cumulative rather than a new occurrence on May 12, 2009, is based on a factually inaccurate description of the events leading up to claimant's visit to employer's clinic.[3] Employer therefore argues that the administrative law judge erred in crediting the opinion of Dr. Wardell.

Under the Act, an injury need not be traceable to a definite time, but can occur gradually over a period of time. *See* 33 U.S.C. §902(2); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). In this case, if claimant's injury is the result of a natural progression of an injury that occurred while he was working at employer's shipyard, *i.e.*, at a covered situs, and would have occurred whether or not he sustained a second injury at Copeland Park, *i.e.*, at a non-covered situs, liability for the disability must be assumed by employer pursuant to the provisions of the Act. *See generally Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). If, however, claimant's injury is the result of a new injury or aggravation sustained while he was working at Copeland Park, employer is relieved of liability under the Act for the portion of claimant's disability attributable to the injury sustained at the non-covered situs. *See generally Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989). An onset of complications from an initial injury may be found to be a

[3]Employer alleges that Dr. Wardell based his causation opinion on claimant's counsel's mischaracterization that claimant sought treatment because his shoulder problems "became sufficiently symptomatic" following 14 months of work in employer's warehouse, rather than as a result of the specific incident on May 12, 2009.

natural progression of the initial injury, rather than an aggravation or a new injury. *See Admiralty Coatings Corp v. Director, OWCP*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).[4]

Employer's contentions lack merit as substantial evidence supports the administrative law judge's conclusion that claimant's injuries were degenerative in nature and due to the natural progression of a condition caused by claimant's work at the shipyard. The administrative law judge found that Dr. Wardell's opinion is well-reasoned and documented. Dr. Wardell stated that he based his opinion that claimant's shoulder injury was a degenerative-type tear not related to any acute trauma but rather most significantly due to claimant's work onboard carriers, on the "historical review" presented by counsel's letter as well as his own "office notes,"[5] and the fact that he had, through the surgical procedure, the "opportunity to evaluate the rotator cuff directly." CXs 10, 21. The administrative law judge specifically found that there is nothing to suggest that Dr. Wardell's opinion was "improperly influenced" by claimant or his counsel, and the administrative law judge declined to assume that his uncontradicted medical opinion was inaccurate. Decision and Order at 7.

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[4]In *Emery*, 228 F.3d 513, 34 BRBS 91(CRT), the claimant developed a shoulder injury akin to a torn rotator cuff while working under a covered employer, Admiralty Coatings, in November 1994, and then moved to another employer, Main Industries, doing significantly lighter-duty work. Claimant thereafter initially reported having only light, infrequent shoulder pain, but he eventually felt significant pain and discomfort in his shoulder, which he connected to a recent incident in his employment with Main Industries, that ultimately led to a recommendation that he undergo surgery to repair his shoulder. Admiralty Coatings argued that the "aggravation rule" precluded its liability for claimant's pending shoulder surgery and resulting disability. The administrative law judge, however, rejected that position, finding that claimant's problems were the natural progression of the initial injury he sustained while employed with Admiralty Coatings, and that his work with Main Industries did not give rise to a supervening cause that would break the chain of relatedness between claimant's work with Admiralty Coatings and his required surgery. The Fourth Circuit affirmed the administrative law judge's finding that the credible evidence of record established that there was no second trauma but instead that there was simply an onset of complications from the first trauma. It, therefore, affirmed the administrative law judge's finding that Admiralty Coatings was responsible for claimant's benefits.

[5]Claimant stated that Dr. Wardell questioned him "intensely on what [claimant] had been doing the last 45 years," asking "all kinds of questions about how I worked, what I climbed, what I did, lifted, pulled and so forth," HT at 23, because the physician said that claimant's right shoulder muscle tear had to have happened over a period of several years.

The administrative law judge further found that Dr. Wardell's opinion is supported by employer's documentation of the accident and claimant's testimony. Specifically, the administrative law judge observed that the Accident Questionnaire completed by Mr. Lassiter on May 19, 2009, reflects that claimant "had no specific injury to either shoulder," but that claimant felt his pain resulted from his inspection of a pallet of 12 inch elbows.[6] EX 3. Additionally, the administrative law judge credited claimant's testimony that with regard to his shoulders: he "started having problems where [he] really noticed it about five years prior to" his transfer to the Copeland Park shop; he "would have problems with both shoulders" while onboard the ships; that "on the days that [he] would climb more, that [he] was more active, [he] would have more problems;" that his bilateral shoulder pain "seemed to increase over the years" while he worked onboard the ships; and that "it eased off" significantly to the point that he "was not having that much of a problem at all" after he moved to the Copeland Park shop because that position involved lighter work. Decision and Order at 8; HT at 16-17, 22-23, 27.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543, 21 BRBS 10, 15-16(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). In this case, the administrative law judge rationally credited claimant's testimony and the opinion of claimant's treating physician, Dr. Wardell, to find that claimant's injury was a degenerative type tear, probably not related to any acute trauma, but rather most significantly due to claimant's work for employer onboard carriers between 1992 and 2007. As the administrative law judge rationally found claimant's disabling injury was due to a natural progression and not an aggravation, the administrative law judge concluded that the site of the injury was the shipyard and not the shop at Copeland Park. As this finding is rational, supported by substantial evidence, and in accordance with law, it is affirmed. 33 U.S.C. §§902(2), 903(a); *see Admiralty Coatings Corp.*, 228 F.3d 513, 34 BRBS 91(CRT). Consequently, we affirm the administrative law judge's conclusions that claimant's claim falls under the coverage of the Act, and thus, that claimant is entitled to benefits.

[6]In addition, the first clinic note of May 13, 2009, contains the history that claimant's shoulder had bothered him in the past, EX 2, and the MRI reports of the right shoulder dated May 15, 2009, and left shoulder dated June 2, 2009, reveal "significant degenerative changes" within the shoulder joints. CXs 7-9.

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