U.S. Department of Labor

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

BRB No. 16-0128

KELLY ZARADNIK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: Sept. 22, 2017
	)	
THE DUTRA GROUP, INCORPORATED	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	ORDER on MOTION
Employer/Carrier-Petitioners	)	for RECONSIDERATION EN BANC

HALL, Chief Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration en banc of the Board's decision in *Zaradnik v. The Dutra Group, Inc.*, BRB No. 16-0128 (Dec. 9, 2016) (Boggs, J., concurring and dissenting) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a), (b). Claimant responds, urging rejection of employer's motion. We grant employer's motion for reconsideration en banc, but deny the relief requested.

In its motion for reconsideration, employer first asserts that the Board did not sufficiently address whether or not the last responsible employer rule espoused in *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), is the correct legal standard for use in this single injury, single covered employer case. Emp. Br. on Recon. at 6. We reject this contention.

The administrative law judge's discussion concerning the work-relatedness of claimant's orthopedic conditions exhibits a proper application of Section 20(a) of the Act. 33 U.S.C. §920(a). While the administrative law judge's discussion of the "Legal Standard" focused on *Price*, and specifically recited "the last employer rule," he nevertheless found that this case "does not involve the same last responsible employer issue as *Price*," because employer "is the only maritime employer involved." Decision and Order at 44-45. Noting that "*Price* is instructive on what constitutes

aggravation of cumulative trauma,"[1] the administrative law judge nonetheless properly applied the correct analysis in terms of the Section 20(a) presumption for determining whether an injury is causally related to employment. Decision and Order at 62-64. The Board previously held that the administrative law judge "rationally credited medical evidence that claimant's work for employer aggravated, accelerated and/or contributed to her orthopedic conditions," *Zaradnik*, slip op. at 8, and thus rejected employer's contention that the administrative law judge failed to place the burden on claimant of establishing the work-relatedness of her orthopedic conditions once the Section 20(a) presumption is invoked and rebutted. Consequently, we again hold that the administrative law judge did not err in addressing causation in this case.[2] *See* 33 U.S.C. §920(a); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

Employer next contends that the Board erred in affirming the administrative law judge's finding that a causal relationship exists between claimant's orthopedic conditions and her work for employer because there is a lack of objective evidence showing that claimant's orthopedic conditions actually worsened during her work for employer. Employer avers that the record establishes that claimant missed no time from work, made

[1]The "aggravation rule" states that an employer is liable for the claimant's full disability if the work-related injury aggravates, accelerates, or combines with a pre-existing condition to result in that disability; the relative contribution of the conditions is not weighed. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). The "aggravation rule" applies to both the causation inquiry and in identifying the responsible employer in traumatic injury cases. *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) (responsible employer); *Independent Stevedore Co.*, 357 F.2d 812 (causation).

[2]We reject as unfounded employer's concern that the Board's decision leaves open the possibility that the last employer rule may be applied as the causation standard in single employer cases. Both the Board's original decision, *Zaradnik*, slip op. at 7-8, and this order, *supra* at n. 1, elucidate the applicable causation law in a single covered employer case. Moreover, we reject employer's contention that *Kellison v. The Dutra Group, Inc.*, BRB No. 16-0242 (Feb. 21, 2017) (unpub.), appeal pending, No. 17-71143 (9th Cir.), is binding on the administrative law judge and/or Board, as the result in *Kellison* involved a different administrative law judge addressing different facts and different evidence. In additiona, different administrative law judges can reach different results on the same facts and evidence, and both decisions could be affirmable under the substantial evidence standard.

no complaints, sought no treatment, modified no activities, and would have continued working for employer but for the economic layoff, all of which serve as compelling evidence as to the lack of a causal connection between claimant's orthopedic conditions and her work for employer. We reject employer's contention.

The record in this case contains the opinions of Drs. Stark, Harrison, and Greenfield. Dr. Stark opined that "[e]ach anatomical area involvement including lower back, hips and hands were caused, aggravated or accelerated by work activities through her last day of work." CX 3. He added, "[t]here simply is no way of excluding the physical demands placed upon a pile driver/construction worker as having contributed to the hip arthritis. By this, I mean that if the work did not cause hip arthritis, it certainly aggravated and accelerated the condition." CX 7 at 6. Dr. Stark subsequently explained that he based this opinion on data and studies which show "that individuals who do a lot of heavy lifting or carrying have more advanced arthritis than those who don't, because those are aggravating or causative factors." CX 20, Dep. at 11. Dr. Stark admitted that he could not say that claimant's work caused her hip condition, "but I am certain that it aggravated it." *Id*. Dr. Harrison agreed with Dr. Stark's opinion that claimant's work activities contributed to the development of her injuries and specifically opined that claimant's "work [with employer] from July 23 through September 20, 2010, contributed to both her respiratory problems and cumulative injuries to the musculoskeletal system," i.e., hips, hands and back. CX 14. In contrast, Dr. Greenfield opined that claimant's orthopedic conditions are related to activities of daily living and the continuing trauma of her last non-covered employment with Stone & Webster (S & W). EX 3. Contrary to employer's contention, the opinions of Drs. Stark and Harrison, which the administrative law judge rationally credited over the opinion of Dr. Greenfield as "better reasoned," constitute substantial evidence establishing that claimant's orthopedic conditions are, in part, related to her work with employer. We thus reject employer's contentions that the Board erred in affirming the administrative law judge's finding that claimant's orthopedic conditions are work-related. *Zaradnik*, slip op. at 11-12.

Employer also contends the administrative law judge's finding that claimant's respiratory conditions are related to her work for employer should be vacated and the case remanded for a specific determination as to whether claimant's work for employer *actually* aggravated her underlying respiratory conditions. The administrative law judge, in addressing whether claimant's work with employer aggravated, accelerated and/or contributed to her underlying asthma/COPD, weighed the conflicting opinions of Drs. Harrison and Bressler. The administrative law judge, within his discretion, credited the opinion of Dr. Harrison that claimant's work for employer "contributed to the cumulative injury to her lung that occurred over the duration of her employment as a pile butt."[3] CX

[3]Dr. Harrison's opinion establishes that claimant's lung condition is related to her work for employer and thus is sufficient to meet claimant's burden of establishing on the

21, Dep. at 13. This statement by Dr. Harrison constitutes substantial evidence establishing a causal link between claimant's respiratory conditions and her work with employer sufficient to meet claimant's burden.[4] We thus reject employer's assertion of error with regard to the Board's affirmance of the administrative law judge's finding that claimant's respiratory conditions are work-related. *Zaradnik*, slip op. at 10.

Employer further contends the Board erred in affirming the administrative law judge's finding that claimant's subsequent work with S & W, a non-covered employer, is not an intervening cause of her bilateral hand condition. Employer avers the administrative law judge did not accurately address and weigh the opinion of Dr. Greenfield in relation to whether claimant's work at S & W alone caused her bilateral carpal tunnel syndrome.

The administrative law judge found, based on the opinions of Drs. Harrison and Greenfield, that claimant's carpal tunnel syndrome is likely due to her work both with employer and with S & W.[5] Dr. Harrison opined that claimant's work activities with employer contributed to the development of her carpal tunnel syndrome. CX 14. Dr. Greenfield opined that claimant's carpal tunnel syndrome was related to aging and smoking, Dr. Greenfield Dep. at 20, and added that "the type of tasks that she did working for S & W, where she was putting together steel-case cabinets would be an activity that would potentially aggravate her carpal tunnel." *Id.* This evidence, credited by the administrative law judge, constitutes substantial evidence that claimant's work for employer and subsequent work with S & W each contributed to her carpal tunnel syndrome. Due to the absence of evidence apportioning claimant's disability between

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record as a whole that her respiratory condition is related to her work for employer. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Thus, the finding that a causal relationship exists is not based on the "could" and/or "would" contribute standard that employer alleges was applied in this case.

[4]Upon further reflection, we agree with employer that the administrative law judge erred in finding that Dr. Bressler "effectively concedes" contribution. *Zaradnik*, slip op. at 10. However, the administrative law judge also gave greater weight to the opinion of Dr. Harrison that claimant's work for employer contributed to the cumulative injury to her lungs and found Dr. Bressler's opinion to the contrary to be unconvincing. *Id.* Thus, any inaccurate inferences drawn from Dr. Bressler's opinion are harmless error.

[5]The administrative law judge, on reconsideration, found that employer did not show that the later, intervening event caused the entirety of claimant's carpal tunnel injury. Order on Recon. at 6.

her covered and non-covered employment, the administrative law judge properly concluded that employer's intervening cause contention fails. *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997). He thus properly concluded that claimant's work with S & W after she left employer is not an intervening cause that relieves employer of its liability in this case. *See generally Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992). Consequently, there is no error in the Board's affirmance of the administrative law judge's finding that employer is liable for compensation relating to claimant's orthopedic injuries.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §§801.301(c), 802.407(d), 802.409. The Board's decision is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

For the reasons stated in my dissenting opinion in this case, I continue to respectfully dissent from my colleagues' decision to affirm the administrative law judge's findings that claimant's asthma/COPD is related to her work exposures with employer and that claimant's work with S & W after she left employer is not an intervening cause of claimant's bilateral hand condition. *See Zaradnik*, slip op. at 15-16. As discussed, I

would vacate the administrative law judge's findings on these issues and remand the case for the administrative law judge to make more specific findings of fact. With the exception of these issues, I concur with the majority's decision to affirm the Board's opinion.

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JUDITH S. BOGGS
Administrative Appeals Judge