BRB No. 89-1539

BEVERLY E. GLASCOCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OTTENBERG'S BAKERY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
GREAT AMERICAN INSURANCE COMPANY	)	
	)	
and	)	
	)	
LUMBERMENS MUTUAL CASUALTY COMPANY	)	
	)	
and	)	
	)	
HARTFORD ACCIDENT & INDEMNITY COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carriers-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim Without Prejudice of Samuel B. Groner, Administrative Law Judge, United States Department of Labor.

Eric M. May, Washington, D.C., for claimant.

E. Joseph Fitzpatrick, Jr. (Ward, Klein & Miller), Gaithersburg, Maryland, for Great American Insurance Company.

Marvin L. Andersen (Law Offices of Nancy L. Harrison), Annapolis, Maryland, for

Lumbermens Mutual Casualty Company.

Bonnie J. Brownell (McChesney, Duncan & Dale, P.C.), Washington, D.C., for Hartford Accident & Indemnity Company.

Robert P. Scanlon (Andrew & Quinn), Rockville, Maryland, for Liberty Mutual Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order Dismissing Claim Without Prejudice (85-DCW-314, 315) of Administrative Law Judge Samuel B. Groner 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*. (1982) (the Longshore Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the 1928 Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a route salesman/truck driver for employer from 1956 until 1984. In this capacity, claimant delivered bread to employer's customers, which required him to carry trays of bread weighing as much as 20 to 30 pounds. In May 1969, claimant suffered a work-related injury to his left knee, and thereafter underwent a medial meniscectomy, causing him to miss approximately two months of work; employer voluntarily paid temporary total disability benefits from May 5, 1969 to July 6, 1969. Although his left knee continued to cause him pain, claimant returned to work in July 1969.

Claimant testified that, in the fall of 1979, his knee pain intensified after his delivery route was changed by employer; specifically, employer added additional customers to claimant's delivery route which required claimant to do more walking and climbing of steps while carrying the aforementioned trays of bread. Similarly, in 1982, employer added additional customers to claimant's route which required even more walking and climbing; claimant testified that after these additional customers were added in 1982, his knee pain again worsened. In February 1984, Dr. Martin performed an arthroscope on claimant's knee, and informed him that his work activities may have aggravated his prior knee condition. Claimant stopped working due to his knee pain on March 28, 1984 and, in May 1984, underwent an upper tibial osteotomy on his left knee. Claimant thereafter filed a claim for permanent total disability benefits under the 1928 Act in June 1984. In December 1984, Dr. Mess performed an arthrotomy and, in 1986, claimant underwent a total knee replacement.

In his Decision and Order, the administrative law judge treated claimant's injury as an

occupational disease and found that his date of injury was the date of his last exposure, *i.e.*, the date of his retirement, March 28, 1984. Because this date is after July 26, 1982, the effective date of the new District of Columbia Workers' Compensation Act, the administrative law judge found that he lacked jurisdiction under the 1928 Act and dismissed the case.

On appeal, claimant contends that the administrative law judge erred in finding that he did not have jurisdiction to adjudicate this claim under the 1928 Act. Specifically, claimant asserts that the administrative law judge erred in concluding that claimant's knee condition constitutes an occupational disease and, thus, in denying the claim for a lack of jurisdiction, since, claimant alleges, his current knee condition is due either to his 1969 injury, or to an aggravation of his knee caused by the additional customers added to his delivery route in 1979. In separately filed response briefs, Great American Insurance Company, Lumbermens Mutual Casualty Company, and Hartford Accident & Indemnity Company each urge affirmance of the administrative law judge's dismissal of the case. In contrast, Liberty Mutual Insurance Company, employer's liability carrier since July 1, 1982, asserts that the administrative law judge erred in failing to consider whether claimant's current knee condition is due to his 1969 injury and urges reversal of the administrative law judge's dismissal of the claim.

Initially, we agree with claimant that the administrative law judge erred in treating his knee condition as an occupational disease. In *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989), the Board held that the claimant's synovitis of the knee, an arthritic condition aggravated by repeated bending, stooping and climbing on the job, was not an occupational disease because there was no evidence that synovitis is an inherent hazard to others in employment similar to that of claimant; rather, claimant's synovitis was unique to him. *Gencarelle*, 22 BRBS at 173. The Board noted that an injury may occur over a gradual period of employment and still be construed as accidental. *Id.*; *see also Pittman v. Jeffboat Inc.*, 18 BRBS 212 (1986). The United States Court of Appeals for the Second Circuit affirmed the Board's holding that claimant's synovitis was an accidental injury and not an occupational disease, reasoning that because bending, stooping and climbing are common to many occupations and to life in general, the claimant's condition was not "peculiar to" his employment. *Gencarelle*, 892 F.2d at 177-178, 23 BRBS at 19-20 (CRT).[1]

[1]Generally, there are two characteristics of an occupational disease: 1) an inherent hazard of continued exposure to conditions of a particular employment; and 2) gradual rather than sudden onset. 1B A. Larson, *Workmen's Compensation Law*, §41.31 (1987); *Gencarelle*, 22 BRBS at 173.

Similarly, in *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991), the Board held that a claimant's lumbar stenosis, which was aggravated by the walking and standing required of him during the course of his employment duties, was a gradual work-related accidental injury and not an occupational disease, noting that walking and standing are not peculiar to claimant's employment, nor was there any evidence that others in employment similar to claimant's develop lumbar stenosis. *Steed*, 25 BRBS at 215; *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989).

Applying the holdings in *Gencarelle* and *Steed* to the uncontroverted medical evidence and relevant facts in the instant case, we agree with claimant's contention that the administrative law judge erred in characterizing claimant's knee condition as an occupational disease; specifically, as in *Steed*, we note that walking and climbing stairs are not peculiar to claimant's employment, nor does the record contain evidence that others in employment similar to that of claimant develop knee difficulties. Accordingly, we vacate the administrative law judge's finding that claimant's knee condition is an occupational disease and hold, as a matter of law, that claimant sustained a gradual, work-related accidental injury. *See Steed*, 25 BRBS at 210; *Pittman*, 18 BRBS at 212.

Next, claimant, supported by Liberty Mutual, contends that his claim for compensation arises under the 1928 Act. The 1928 Act extends the provisions of the Longshore Act to injuries and deaths arising out of employment in the District of Columbia prior to July 26, 1982. In 1979, the government of the District of Columbia repealed the 1928 Act and enacted its own workers' compensation law, which thereafter became effective on July 26, 1982. *See* District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code §301 *et seq*. (the 1979 Act). Thus, injuries to employees in the District of Columbia occurring prior to July 26, 1982, the effective date of the 1979 Act, are covered by the 1928 Act.

Although claimant's disability did not commence until 1984, after the effective date of the 1979 Act, coverage under the 1928 Act is not determined by the onset of disability; rather, a claimant is afforded coverage under the 1928 Act if he is injured while engaged in covered employment. *See Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69 (CRT)(D.C. Cir. 1990).[2] *See generally Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.

[2]Contrary to the assertions of Lumbermens Mutual Casualty and Hartford Accident & Indemnity, the holding of the United States Court of Appeals for the District of Columbia in *Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71, 23 BRBS 69 (CRT)(D.C. Cir. 1990), does not mandate a different result in this case. In *Gardner*, the court held that the date of manifestation of an occupational disease is the date of injury, which is determinative in deciding whether the 1928 Act or the 1979 Act applies. In contrast to *Gardner*, however, claimant in the present case sustained a gradual accidental injury, not an occupational disease; thus, *Gardner* is not dispositive of the issue presented on appeal before us. *See also Shea, S&M Ball Co. v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT)(D.C. Cir. 1991) (holding that a claim for death benefits, like a claim for disability benefits, is rooted in the employment injury). In a case involving traumatic injury, the inquiry involves determining whether the disability is the result of the natural progression of the 1969 injury,

1981). It is well established that an aggravation of a pre-existing condition may constitute an injury. *See Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984). Furthermore, an injury includes one occurring gradually as a result of continuing exposure to conditions of employment, and it is sufficient if the employment aggravates the symptoms of the process. *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). In this case, it is uncontroverted that claimant was covered under the 1928 Act at the time of his initial work-related injury in 1969, as well as in 1979 when his knee first began to worsen after his work activities were increased. All of the physicians of record who comment upon the etiology of claimant's current knee condition agree that that condition is attributable, at least in part, to claimant's 1969 work-related injury. *See* Dr. Mess' September 12, 1984 report, Great American Ex. 10; Dr. Marcolin's February 26, 1985 report, Hartford Ex. 1; Dr. Gordon's June 6, 1986 report, Great American Ex. 14; Dr. Gordon depo. at 20-21. Thus, as claimant sustained two work-related injuries prior to 1982 which could have caused his disability, *i.e.*, the initial 1969 injury and the aggravation due to his 1979 change in his delivery route, we reverse the administrative law judge's determination that the instant claim does not arise under the 1928 Act, and we remand the case for a consideration of the merits of claimant's claim for compensation.[3]

Accordingly, the administrative law judge's Decision and Order is reversed, and the case remanded for consideration of claimant's entitlement to disability benefits.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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the 1979 aggravation, or a post-1982 aggravation. Only if claimant's disability were due to the post-1982 aggravation, would claimant's remedy lie under the 1979 Act. *See generally Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991).

[3]On remand, the administrative law judge must determine which injury caused claimant's disability in order to resolve the contested issues.