BRB No. 91-1241

THERMON PALMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DELAWARE OPERATING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of George G. Pierce, Administrative Law Judge, United States Department of Labor.

Aloysius J. Staud (Fine and Staud), Philadelphia, Pennsylvania, for claimant.

Clayton H. Thomas, Jr., Philadelphia, Pennsylvania, for self-insured employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order On Remand - Denying Benefits (86-LHC-234) of Administrative Law Judge George G. Pierce 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 findings of fact and conclusions of law of the administrative law judge if they 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).

This case is on appeal to the Board for the second time. While working for employer as a crane operator, claimant injured his back and neck on February 14, 1977, and allegedly on September 29, 1978, when he was pulling a large wheel which operated the boom. Employer voluntarily paid claimant temporary total disability benefits from February 15, 1977 to March 28, 1977, on which date claimant returned to work as a crane operator, although he continued to suffer low back pain, worked with restrictions, and occasionally

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

missed work due to back pain. Claimant has not returned to work since the September 1978

incident. Employer also voluntarily paid claimant temporary total disability benefits from September 30, 1978 to September 12, 1985, and medical expenses, but terminated benefits in September 1985 because claimant failed to obtain employer's written approval prior to entering into a third party settlement in a suit resulting from the 1977 injury.

In the original decision and order, relying in part on the opinions of Drs. Mandel and Okin, the administrative law judge found that the September 1978 incident was merely an exacerbation of the February 1977 injury, and therefore was not a new injury within the meaning of the Act. The administrative law judge further found that because claimant did not obtain employer's approval prior to entering into a third party settlement for the 1977 injury, Section 33(g), 33 U.S.C. §933(g), barred claimant from recovering benefits. The administrative law judge therefore denied claimant benefits. Claimant appealed to the Board, contending that the administrative law judge erred in failing to find that the September 1978 incident constituted a new injury, and that he, therefore, is entitled to benefits for disability resulting from this injury.

In *Palmer v. Delaware Operating Co.*, BRB No. 87-2801 (June 29, 1990)(unpublished), the Board held that the administrative law judge applied an erroneous legal standard in determining that the September 1978 incident was not a new injury because he found it was a "mere exacerbation" of the February 1977 injury. The Board stated that under the Act the aggravation or exacerbation of a prior injury constitutes a new injury which is separately compensable by the employer for whom the employee was working when reinjured. *See, e.g., Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1982). Moreover, the hastening or acceleration of a disability which would have happened anyway constitutes an aggravation, or a new injury. *See, e.g., Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). By contrast, an injury is considered the natural and unavoidable result of the original injury if the employee's ultimate condition following the second incident would have occurred regardless of the incident. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). The Board therefore remanded the case to the administrative law judge to apply the proper legal standard, noting that the opinions of Drs. Mandel and Okin that the September 1978 injury exacerbated the February 1977 injury suggest that the September 1978 injury was a new injury. The Board also stated, *inter alia*, that claimant performed many of the same tasks as he did prior to the February 1977 injury following that injury, but that after the September 1978 injury claimant never returned to work allegedly due to his back pain. The Board instructed the administrative law judge that if, on remand, he determined that the September 1978 injury is a separately compensable injury, he must determine whether claimant met the notice and filing requirements of Sections 12 and 13, 33 U.S.C. §§912, 913, the extent of claimant's disability under Section 8, 33 U.S.C. §908, and whether claimant is entitled to medical expenses.

In the Decision and Order on Remand, the administrative law judge, relying on claimant's hearing testimony and Dr. Mandel's opinion, which he credited over Dr. Okin's opinion, reaffirmed his finding that claimant did not suffer a new injury on September 29, 1978, and he denied benefits. The administrative law judge noted that following the February 1977 injury, claimant continued to experience back pain and missed work due to the pain, that he wore a back brace, and that he had to perform light duty work. The administrative law judge further noted that claimant's neck pain had progressively increased several weeks prior to the September 1978 injury, that on the morning of the September 1978 incident, claimant awoke with pain in his back and neck and reported such to his supervisor, and that claimant testified that when he turned the wheel, the pain increased and he had to stop working.

The administrative law judge found that Dr. Mandel concluded that no new or second injury occurred because claimant told him that while his pain worsened while turning the wheel, it was of the same character as what he already had, and that there was nothing different about it except it hurt more. The administrative law judge found that Dr. Okin's opinion lacked credibility because it was inconsistent in that in his deposition dated June 5, 1980, he stated that the September 1978 incident was an exacerbation of the first injury but in his deposition dated September 1986, he stated the September 1978 incident was a second injury. Decision and Order on Rem. at 4.

On appeal, claimant contends that Dr. Mandel's opinion that the September 1978 incident exacerbated the original injury supports a finding that the September 1978 incident was a new injury. Claimant contends that Dr. Mandel's definition of a new injury, *i.e.*, one that results from unusual circumstances or exhibits different symptoms from the original injury, is not consistent with the legal definition, and therefore the administrative law judge misconstrued Dr. Mandel's opinion. Claimant states that Dr. Okin's opinion establishes the September 1978 incident was a new injury, and contends it should be given more weight because he is the treating physician; claimant notes that Dr. Mandel first examined claimant in 1986. Employer responds, urging affirmance of the denial of benefits.

We hold that the administrative law judge erroneously determined that the September 29, 1978 incident does not constitute a new injury within the meaning of the Act. As the Board stated in its prior decision, the aggravation or exacerbation of a prior injury constitutes a new injury under the Act. *See, e.g., Lopez,* 23 BRBS at 297; *Kooley v. Marine Industries Northwest*, 22 BRBS 142, 146 (1989). Although Dr. Mandel stated that claimant did not suffer a new injury on September 29, 1978, Dr. Mandel defined a new injury as one that exhibits different symptoms from the first or is caused by unusual circumstances.[1] Emp. Ex. 12 at 4. These factors are not determinative of whether a new injury has occurred for purposes of the Act, as the aggravation rule applies if the prior injury is hastened by the subsequent event. *See generally Kooley*, 22 BRBS at 146. Moreover, Dr. Mandel testified that the September 1978 incident exacerbated the February 1977 injury which establishes that a new injury occurred within the meaning of the Act. *Id.* Furthermore, while Dr.

[1]We note that Dr. Mandel first examined claimant in 1986, and that he did not indicate he knew that claimant complained of neck pain following the 1978 incident.

Okin stated that claimant sustained a new injury on September 19, 1978 in a written report, in both his 1980 and 1986 depositions he consistently testified that claimant's September 1978 injury exacerbated the February 1977 injury, and he additionally noted that claimant sustained a new injury to his neck in September 1978. Cl. Ex. D, p. 14. Thus, his opinions are not contradictory, and the medical evidence as a whole establishes that the 1978 incident constitutes a second injury within the meaning of the Act. *Lopez*, 23 BRBS at 297-298.

The testimony of employer's insurance representative, Louis Grattic, that claimant informed him on September 29, 1978 that he was "just at the wheel and just couldn't make it," claimant's testimony that his condition worsened when he turned the wheel, and his assertion that he was unable to work after that incident also support a finding that his condition was aggravated. *Lopez*, 23 BRBS at 298. Although, as the administrative law judge noted, claimant had continuing pain and restrictions as a result of the 1977 injury, there is no evidence that claimant's disability is the natural progression of the 1977 injury, and would have occurred notwithstanding the 1978 work incident. As the evidence of record fails to support the administrative law judge's finding that claimant did not suffer a new injury on September 19, 1978, we reverse the administrative law judge's finding, and hold that claimant suffered a new injury on September 19, 1978 when he turned the wheel while working for employer. Accordingly, Section 33(g) does not bar claimant's recovery for benefits for disability resulting from the 1978 injury. We therefore vacate the denial of benefits, and we remand the case for the administrative law judge to determine if claimant met the filing and notice requirements of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, the extent of claimant's disability, if any, under Section 8, 33 U.S.C. §908, and whether claimant is entitled to medical expenses, 33 U.S.C. §907.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge