

JACK J. HANSEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MARINE TERMINALS CORPORATION)	
)	
and)	
)	
HARTFORD ACCIDENT AND)	DATE ISSUED:
INDEMNITY COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
METROPOLITAN STEVEDORE)	
COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order After Remand of Administrative Law Judge James J. Butler, Administrative Law Judge, United States Department of Labor.

Jack J. Hansen, San Pedro, California, *pro se*.

David J. Schmit (Schmit, Morris, Bittner & Schmit), Oakland, California, for Marine Terminals Corporation and Hartford Accident and Indemnity Company.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order After Remand (80-LHC-1236, 80-LHC-1237) of Administrative Law Judge James J. Butler 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). The Board will review the administrative law judge's findings of fact and conclusions of law to determine 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).

Claimant injured his right foot while working for Marine Terminals on March 30, 1976. Claimant injured his neck on October 9, 1977 and his back on October 10, 1977 while working for Metropolitan Stevedore. Claimant reinjured his lower back on December 28, 1977, while working for Cooper Stevedores (Cooper). Claimant subsequently filed claims against both Marine Terminals and Metropolitan Stevedore, seeking compensation for the injuries to his foot, neck and back.

In the original Decision and Order, the administrative law judge denied claimant benefits for his back injury, finding that the December 1977 incident aggravated claimant's back condition, and that claimant was not entitled to benefits because he did not file a claim against Cooper. The administrative law judge found that claimant was entitled to a scheduled award pursuant to Section 8(c)(4), 33 U.S.C. §908(c)(4), for a 17.8 percent impairment due to the March 1976 foot injury sustained while working for Marine Terminals. Claimant filed a Motion for Reconsideration which the administrative law judge denied.

Claimant appealed the administrative law judge's decisions to the Board, contending that the administrative law judge erred in denying him compensation for his foot and October 1977 back and neck injuries, and in failing to discuss the relevant medical evidence of record. Metropolitan Stevedores responded, urging affirmance.

In *Hansen v. Marine Terminals Corp.*, BRB No. 87-332 (June 29, 1990)(unpublished), the Board stated that the administrative law judge's decision did not comply with the Administrative Procedure Act, 5 U.S.C. §557(C), as he failed to cite the evidence on which he relied in finding that claimant's disability resulted from an aggravation occurring in December 1977. The Board also stated that the administrative law judge erred in failing to consider that claimant's disability may have resulted from the natural progression of the 1976 foot injury or the October 1977 injuries or both. The Board therefore vacated the administrative law judge's decision and remanded the case to the administrative law judge. The Board held that even if claimant's disability resulted from an aggravation of claimant's back condition by the December 28, 1977 injury, Metropolitan Stevedore or Marine Terminals might be liable for benefits if claimant suffered a loss in wage-earning capacity as a result of the October 9 and 10, 1977 injuries or if the 1976 foot injury caused claimant's back problems.

In the Decision and Order After Remand, the administrative law judge reaffirmed the denial of compensation for the injuries occurring in October 1977. The administrative law judge found that claimant's testimony and the medical evidence, specifically Dr. Indeck's January 28, 1985 report and Dr. Alaia's October 31, 1977 report, demonstrate that claimant had no permanent disability due to these incidents. The administrative law judge stated that neither Dr. Indeck nor Dr. Alaia knew of claimant's December 28, 1977 injury, and the administrative law judge relied on claimant's testimony that the December 1977 injury at work seriously aggravated his neck and back condition to conclude that it was this last incident that caused claimant's disability. The administrative law judge further found that there was no contribution by claimant's 1976 foot injury to claimant's back condition based on Dr. Alaia's opinion that there was "minimal, if any" contribution. The

administrative law judge therefore concluded that claimant was not entitled to further benefits.

Claimant appeals the administrative law judge's Decision and Order After Remand. Marine Terminals responds, adopting by reference the administrative law judge's decision on remand.

We first address whether the administrative law judge properly determined that the December 1977 injury constituted an aggravation of claimant's back condition. In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). This result follows from the aggravation rule, which provides that where an employment-related injury aggravates, accelerates or combines with a pre-existing disease or condition, the entire resulting disability is compensable. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). The aggravation rule requires an employer to compensate the full extent of an employee's disability. *Kooley*, 22 BRBS at 146.

The administrative law judge's findings in his decision on remand that the December 1977 back injury claimant suffered while working for Cooper aggravated his prior back condition is supported by substantial evidence of record. Only two physicians of record, Dr. Kelley and Dr. Robboy, were informed of claimant's December 1977 back injury as well as his March 1976 and October 1977 injuries, and they apportioned claimant's permanent disability in part to the December 1977 injury.¹ That these doctors attributed claimant's back disability in part to the December 1977 injury supports the administrative law judge's finding that the December 1977 injury constituted an aggravation of claimant's back disability. The administrative law judge therefore properly determined that claimant is not entitled to compensation for the December 1977 back injury since he did not file a claim against Cooper.

Nonetheless, inasmuch as evidence of record could support a finding that claimant suffered a loss in wage-earning capacity due to his March 1976 or October 1977 injuries or both, prior to the occurrence of the December 1977 incident, the case must be remanded for the administrative law judge to make findings on this issue. The administrative law judge merely concluded that the occurrence of the last incident was the cause of claimant's "total disability" and he did not consider

¹Specifically, Dr. Kelley apportioned 20 percent of claimant's low back disability to the October 1977 injuries, 30 percent to the December 1977 injury, 40 percent to injuries claimant sustained in 1980 and 1982, and 10 percent to the 1976 foot injury. Emp. Ex. B at 8. Dr. Robboy apportioned 10 percent of claimant's back disability to gait problems associated with the March 1976 foot injury, 50 percent due to the October 1977 injuries, and 40 percent to the December 1977 injury and injuries claimant suffered in 1980 and 1982. Dr. Robboy's June 22, 1983 report.

whether claimant was disabled prior to the occurrence of the December 1977 incident. Under the rationale of *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980), claimant is entitled to compensation for a loss in wage-earning capacity due to a work-related injury even if he subsequently suffers an aggravation of that injury at work; in the appropriate case, two awards, running concurrently, may be issued to fully compensate claimant's loss in wage-earning capacity. *Id.* In this case, four doctors of record, Drs. Alaia, Kelley, Robboy and Hunt, attribute claimant's back disability in part to the change in his gait resulting from his March 1976 foot injury, and claimant testified he has limped since that injury. *See* Emp. Ex. B at 8; Emp. Ex. E at 10, 20; Cl. Ex. O. at 8; Cl. Ex. S at 9, 13; Dr. Robboy's June 22, 1983 report at 3. Further, Dr. Alaia testified that after the October 1977 back injuries claimant performed light duty work and never returned to unrestricted work. Cl. Ex. S at 42. The evidence of claimant's performance of restricted work after the October 1977 injuries in conjunction with the opinions that claimant is disabled in part due to the 1976 foot injury and the October 1977 injuries could establish that claimant suffered a loss in wage-earning capacity due to those injuries for which Marine Terminals or Metropolitan Stevedore or both could be liable, irrespective of the injury sustained in Cooper's employ in December 1977. *See generally* *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). On remand, the administrative law judge must determine whether claimant suffered a loss in wage-earning capacity due to his back condition resulting either from the March 1976 foot injury or the October 1977 injuries or both and if so, whether Marine Terminals or Metropolitan Stevedore or both are liable for partial disability benefits. *See* *Kooley*, 22 BRBS at 146; *see also* *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 200 (1989).

Accordingly, the administrative law judge's Decision and Order After Remand is affirmed in part and vacated in part, and the case is remanded for further consideration in a manner consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge