

MICHAEL R. BABINE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED: _____
)	
Self-Insured)	
Employer-Respondent)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Carrier-Respondent)	
)	
BIRMINGHAM FIRE INSURANCE)	
COMPANY)	
)	
Carrier-Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order - On Motion for Reconsideration of Joel F. Gardiner, and the Second Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judges, United States Department of Labor.

Gary A. Gabree (Stinson, Lupton, Weiss & Gabree, P.A.), Bath, Maine, for claimant.

Nelson J. Larkins (Prett, Flaerty, Beliveau & Pachios, L.L.C.), Portland, Maine, for Birmingham Fire Insurance Company.

Kevin M. Gillis (Trough, Heisler & Piampiano, P.A.), Portland, Maine, for Liberty Mutual Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order - On Motion for Reconsideration of Administrative Law Judge Joel F. Gardiner, and the Second Decision on Motion for Reconsideration of Administrative Law Judge David W. Di Nardi (96-LHC-1819, 96-LHC-1820, 96-LHC-1821, 96-LHC-1822, 96-LHC-1823, 96-LHC-1824) rendered on claims 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 the 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 sought disability compensation and medical benefits under the Act in connection with six traumatic knee injuries which he alleged occurred while he was working for employer. The injuries alleged include a March 19, 1981, bilateral knee injury, a July 15, 1982, right knee injury, an October 27, 1983, injury to the left knee, a June 9, 1987, injury to the left knee, an April 4, 1995, left knee injury, and a May 3, 1995, right knee injury. Claimant underwent exploratory surgery of the right knee following the alleged July 15, 1982, injury, and again underwent right knee surgery in July 1995. Following the 1995 surgery, claimant developed deep vein thrombosis and as a result remained out of work from July 5, 1995 until August 3, 1995. At the hearing before the administrative law judge, the parties stipulated that Liberty Mutual Insurance Company (Liberty Mutual) was the carrier on the risk from March 1, 1981 until August 31, 1986, that Birmingham Fire Insurance Company (Birmingham Fire) was on the risk from September 1, 1986 through August 31, 1988, and that employer has been self-insured since that time.

In his Decision and Order, the administrative law judge found initially that the disability claims for the injuries which occurred in 1981, 1982, 1983 and 1987 were time-barred under Section 13 of the Act, 33 U.S.C. §913. In addition, he found the two claims for the injuries alleged to have occurred in 1995 were not covered by the Act, as claimant's work at that time at employer's Hardings facility was not on a covered situs. Moreover, he determined that in any event, the record evidence reflected that claimant did not sustain new and discrete injuries in 1995; rather, he attributed claimant's increased symptoms at that time to the natural progression of his bilateral knee injuries in the 1980's. Noting, however, that a claim for medical benefits is never time-barred, the administrative law judge determined that Birmingham Fire was liable for medical expenses relating to the evaluation and treatment of claimant's left knee problems as he sustained an aggravation of his pre-existing knee problems while working for employer on June 9, 1987. Claimant's motion for reconsideration was summarily denied by the administrative law judge on November 22, 1996. Thereafter, claimant filed a second motion for reconsideration which, although entertained by a different administrative law judge, was also denied summarily on January 8, 1997.

On appeal, claimant contends that, although in his Decision and Order the administrative law judge acknowledged that claimant was seeking medical benefits in

connection with his right knee, he erred in failing to resolve this issue and the related issue of carrier liability. Claimant maintains that since the administrative law judge found in his initial Decision and Order that claimant's right knee problems are grounded in the July 15, 1982 injury, Liberty Mutual should have been deemed the carrier liable for these medical expenses, including those associated with his 1995 surgery, post-surgical thrombotic complications, and rehabilitation. In the alternative, claimant argues that the administrative law judge's decision is arguably subject to the interpretation that Birmingham Fire, the carrier on the risk at the time of claimant's June 8, 1987 injury is responsible for payment of all of claimant's medical bills, and asks that the Board clarify this determination. Birmingham Fire responds that inasmuch as claimant failed to establish a causal connection between his 1987 left knee injury and the right knee problems he experienced in 1995, and the record reflects that these problems relate back to the 1982 injury, the Board should either affirm the administrative law judge or remand for a determination that Liberty Mutual is the responsible carrier. Liberty Mutual also responds, urging the Board to affirm the administrative law judge's determination that it is not liable for any benefits in this case. Bath Iron Works Corporation has not responded in its self-insured capacity.

In allocating liability between two successive employers 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. 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 735 (1981). If, however, claimant sustains a subsequent injury which aggravates, accelerates or combines with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is liable for the entire disability. *Id.*, see also *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The aggravation rule applies even if the claimant does not incur the greater part of his injury with the subsequent employer. See generally *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991). Where a work-related injury is aggravated after the termination of covered longshore employment, employer is not liable for disability or medical treatment due solely to the aggravation. See *Leach v. Thompson's Dairy*, 13 BRBS 231 (1981).

We conclude that this case must be remanded because the issue of claimant's entitlement to medical expenses relating to his right knee and the carrier responsible for these benefits was raised below, but was not resolved by the administrative law judge. Although in his initial Decision and Order the administrative law judge made findings which appear to be relevant to the determination of which carrier should be held liable for claimant's right knee medical expenses, he entered no actual award, and his findings are conflicting. Initially, in his Decision and Order at 4, the administrative law judge noted that claimant has had ongoing problems with his right knee since the time of his July 15, 1982 injury. Thereafter, the administrative law judge stated that "the origin of the employee's right knee problems is clearly grounded in the July 15, 1982 injury," Decision and Order at 5. In addition, he characterized claimant's medical problems with his right knee after exercising in May 1995 as "an accident waiting to happen, and as the "inevitable sequelae of the serious injury he sustained in July of 1982." Decision and Order at 6. Later in the same

page of his Decision and Order, however, the administrative law judge stated that the most likely scenario regarding claimant's right knee is that he injured it on July 15, 1982, and subsequently aggravated that condition on numerous occasions, including while exercising on May 3, 1995. Moreover, the administrative law judge also stated that barring an affirmative defense the carrier responsible for claimant's July 15, 1982 right knee injury, *i.e.* , Liberty Mutual, should be held responsible for payment of the claim for temporary total disability benefits for the period following claimant's 1995 surgery.¹

In his Decision and Order at 14-15, in concluding that Liberty Mutual is not responsible for any benefits, the administrative law judge noted initially that there was no evidence that any injury occurred on October 27, 1983, as claimant alleged, and inferred that the problems he experienced at that time were due to overcompensating for the 1982 injury to his right knee. In addition, he determined that subsequent to Liberty Mutual's coverage, claimant sustained aggravating injuries in 1987 and 1995. In so concluding, the administrative law judge noted that following the June 1987 left knee injury claimant developed further left knee difficulties as the result of extensive stair climbing in 1995, and stated that it was because of these left knee difficulties that claimant was performing exercises for both knees which caused him to develop more severe problems with his right knee in 1995. Decision and Order at 14.

Finally, in determining that Bath Iron Works Corporation was not liable for any benefits in its self-insured capacity, the administrative law judge found that in addition to the fact that the alleged 1995 injuries did not occur on a covered situs, the medical evidence of record established that claimant's increase in symptoms in the left knee while climbing stairs in April 1995 and in the right knee while exercising in May 1995, resulted from the "natural progression of pre-existing pathology in both knees perhaps resulting from bilateral knee injuries in the 1980's." Decision and Order at 17. Inasmuch as the issue of claimant's entitlement to medical benefits for his right knee was raised below but was not resolved by the administrative law judge, and in view of the conflicting findings regarding this injury, we vacate his finding that Liberty Mutual is relieved of all liability and remand the case for the administrative law judge to make a specific determination regarding liability for medical treatment of claimant's right knee.

¹As discussed *supra*, the administrative law judge found employer's affirmative defense did, in fact, bar the disability claim.

Accordingly, the case is remanded for findings regarding liability for medical treatment for claimant's right knee consistent with this opinion. In all other respects, the administrative law judge's Decision and Order, Decision and Order - On Motion for Reconsideration, and Second Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge