BRB Nos. 97-839
and 97-839A

THEODORE TAYLOR	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MAHER TERMINALS, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
and	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

William D. Kurtz (Verderaime & DuBois, P.A.), Baltimore, Maryland, for claimant.

Christopher Field (Gallagher & Field), Jersey City, New Jersey, for Maher Terminals, Incorporated.

Thomas G. Young III (Young & Valkenet, L.L.C.), Baltimore, Maryland, for Ceres Terminals, Incorporated.

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

SMITH, Administrative Appeals Judge:

Claimant and Maher Terminals, Incorporated, appeal the Decision and Order (96-LHC-2139, 96-LHC-2141) of Administrative Law Judge Vivian Schreter-Murray 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). 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 fractured his hip and injured his left leg on February 14, 1981, while working for Maher Terminals, Incorporated (Maher), when he fell 20 feet from a ship into the water, striking the side of the pier. He returned to longshore work on November 11, 1982. On November 8, 1982, pursuant to the parties' stipulations, the district director entered a compensation award in which Maher was to pay claimant temporary total disability benefits, followed by permanent partial disability compensation equivalent to a 53 percent loss of use of the left leg. On August 4, 1992, while working for Ceres Terminals, Incorporated (Ceres), claimant was injured when the brakes of a car that he was driving up a ramp failed, causing the car to roll back down the ramp, striking other vehicles.[1] Claimant, who has not returned to work since undergoing hip surgery on August 11, 1993, sought permanent total disability compensation and medical benefits under the Act, filing claims against both Maher and Ceres on May 21, 1996.

The administrative law judge found that as claimant's left hip replacement and associated permanent total disability were the inevitable result of his 1981 hip fracture and related progressive post-traumatic osteoarthritis, Maher was liable as the responsible employer for claimant's benefits. The administrative law judge determined, however, that claimant had not sought modification within one year of the last payment of compensation under the district director's November 1982 compensation order, and finding such action required under Section 22 of the Act, 33 U.S.C. §922, in order for claimant to seek disability compensation from Maher, claimant's right to such compensation was time-barred. Inasmuch, however, as a claim for medical benefits is never untimely, the administrative law judge held Maher liable for past and future medical benefits relating to claimant's hip replacement.

[1]Claimant sustained a low back and elbow injury on May 8, 1991, while working for ITO Corporation. This claim was settled and is not at issue here.

On appeal, claimant and Maher argue that in determining that his hip surgery and resultant permanent total disability are due to the natural progression of the 1981 injury, the administrative law judge applied an erroneous legal standard. In addition, they aver that the administrative law judge improperly discredited the unanimous medical opinions of the three orthopedic surgeons of record, Drs. Halikman, Cohen, and Lippman, all of whom found claimant's 1992 injury aggravated claimant's condition, and erred in choosing instead to accord determinative weight to small portions of the reports of Dr. Halikman and opinions of other physicians who had not seen claimant for more than 10 years. Claimant and Maher assert that because the preponderance of the credible evidence of record establishes that claimant's August 4, 1992, work accident aggravated pre-existing conditions in claimant's hip and back, Ceres is liable for both permanent total disability compensation and medical benefits.[2] Maher also asserts that the administrative law judge properly found that the claim for compensation benefits against it is time-barred by Section 22 of the Act.[3] Ceres responds, urging affirmance.

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, *see Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), under which a claimant is compensated for the totality of his disability. *See Foundation Constructors,* 950 F.2d at 624, 25 BRBS at 75 (CRT); *Abbott*, 14 BRBS at 453. In this case, therefore, Maher must prove by a preponderance of the evidence that there was a new injury or aggravation with Ceres in order to be relieved of liability as the responsible employer, while Ceres must prove that claimant's condition is the result of the natural progression of the injury with Maher in order to escape liability. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276, 28 BRBS 43, 46 (CRT) (1994). A determination as to which employer is liable requires that the administrative law judge weigh the relevant evidence. *See generally Buchanan v. International Transportation Services,* 31 BRBS 81 (1997).[4]

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[2]Maher requested that claimant's Petition for Review and supporting brief and Maher's Closing Argument submitted to the administrative law judge be incorporated by reference into its appeal to the Board.

[3]As claimant has not appealed the administrative law judge's finding that the claim for disability compensation against Maher is time-barred, we will not address this issue.

[4]The parties do not analyze the issues here in terms of the Section 20(a) presumption, 33 U.S.C. §920(a), and it is not necessary that we address it. We note, however, that claimant is aided by the presumption in proving causation with regard to each work injury asserted. Employer may rebut it by proving claimant's injury is not work-related

and may also escape liability by proving another employer is responsible . *See Avondale Industries, Inc. v. Director, OWCP,* 977 F.2d 186, 26 BRBS 111(CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP,* 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). The administrative law judge here erred in finding Section 20(a) was not invoked, as the occurrence of the accidents at Ceres and Maher are uncontested, and claimant clearly sustained harm. As is clear from the discussion, *infra*, Section 20(a) would not alter the outcome of this case.

We reverse the administrative law judge's determination that Maher is liable as the responsible employer for payment of benefits, as it is not supported by substantial evidence or in accordance with law. Initially, as claimant and Maher aver, the administrative law judge articulated an erroneous legal standard in suggesting that it was necessary for claimant to prove that the condition of his hip was stable and asymptomatic after November 11, 1982, until the August 4, 1992, industrial accident aggravated his underlying hip condition before Ceres could be held liable for claimant's benefits. *See* Decision and Order at 2. Where a symptomatic, pre-existing condition is aggravated by a subsequent injury, the employer at the time of the second injury is nonetheless liable as the responsible employer. *See generally Kelaita v. Director, OWCP*, 799 F.2d 1038, 1311 (9th Cir. 1986).

In concluding that claimant's hip surgery and resultant disability are due to his 1981 work injury, the administrative law judge failed to properly apply the aggravation rule to the evidence in the record. The aggravation rule provides that where an injury at work aggravates, accelerates or combines with a prior condition, the entire resultant disability is compensable. *O'Leary,* 352 F.2d at 812. Thus, where a work-related injury accelerates a prior condition, hastening disability or death which would have happened anyway, it is compensable under the aggravation rule. *See Fineman v. Newport News Shipbuilding & Dry Dock Co.,* 27 BRBS 104 (1993) ("to hasten death is to cause it"). Moreover, the aggravation rule applies not only where the underlying condition itself is affected, but also where injury "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986). Thus, whether "the circumstances of [claimant's] employment combined with his disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event, his disability would result from the aggravation of his pre-existing condition." *Gardner v. Director, OWCP,* 640 F.2d 1385, 1389, 13 BRBS 101, 106 (1st Cir. 1981), *aff'g* 11 BRBS 5561 (1979). *See Gooden v. Director, OWCP,* ____ F.3d ___, 1998 WL 78653 (5th Cir. 1998). In this case, it is apparent from the administrative law judge's discussion that she did not properly apply the aggravation rule.

In finding that claimant's hip surgery and resultant disability were due to the natural progression of his 1981 work injury, the administrative law judge initially relied upon claimant's testimony that he "never was exactly pain free" since the 1981 hip injury, Tr. at 39, the 1982 prediction of Drs. Fulton and Wenzlaff that claimant's hip injury would, with time, increasingly limit his ambulation and put him at substantial risk of requiring surgical intervention, and claimant's August 24, 1982, x-rays which showed a collapse of a portion of the femoral head, and a potential compromise of the blood supply, creating the potential for necrosis. This evidence establishes only that the hip surgery claimant ultimately underwent in 1993 was foreseeable. However, it has no bearing on the question of whether claimant's pre-existing hip condition, or the symptoms of this condition, were aggravated by his August 1992 work injury, resulting in the claimant's surgery and ultimate disability.

Following his 1981 injury, claimant returned to work as a longshoreman without

restriction and, except for a period of disability after an unrelated 1991 injury, worked for the next decade until the August 4, 1992, injury. Although he testified that he experienced pain during this time, it is an uncontroverted fact that claimant worked full-time without restriction until his 1992 injury. This fact is illustrated by the January 17, 1992, report of Dr. Halikman, releasing claimant after his 1991 injury. Noting claimant was "aware of ongoing back and left leg pain," the doctor stated that as long as claimant took prescribed medication he had little problem and that claimant was working at his full regular duties. Ceres EX Vol. II, 6.[5] He continued to do so until the August 4, 1992 injury.

Following this injury, claimant was treated by Dr. Halikman, whose numerous reports are in the record. The record also contains the reports of Drs. Cohen and Lippman. All three doctors gave opinions that claimant's hip condition was aggravated by the 1992 injury. In order to reach her result, the administrative law judge here discredited Drs. Cohen and Lippman and discounted Dr. Halikman's reports supporting aggravation, choosing instead selective portions of his reports which she viewed as supporting her natural progression theory. Far from demonstrating overwhelmingly that claimant's surgery was due to the natural progression of his prior injury, the record in fact overwhelmingly supports aggravation.

With regard to the opinions of each doctor, we first hold that the administrative law judge could properly reject the opinion of Dr. Cohen for the reason that it was based on an erroneous history.[6] However, in further discussing Dr. Cohen's opinion in the context of the record, the administrative law judge relied on findings which are not supported by the record. The administrative law judge stated that claimant did not report any hip pain referable to the August 4, 1992, accident at the time of the accident, or at any other subsequent time during 1992, and inferred that because claimant did not seek significant medical attention for 15 days prior to seeing Dr. Halikman on August 19, 1992, he did not sustain any serious injury in the 1992 accident. Decision and Order at 7. In addition, she stated that when Dr. Halikman examined claimant after the accident on August 19, 1992,

[5]Many of the same reports, particularly those of Dr. Halikman, were submitted by all parties. For convenience, this decision will cite the copy of Dr. Halikman's reports submitted by Ceres.

[6]The administrative law judge found that while Dr. Cohen believed that claimant was asymptomatic between 1982 and 1992, the record reflected that he had ongoing left leg complaints. Moreover, she found that Dr. Cohen was mistaken regarding the severity of the August 1992 work accident in that he erroneously believed that claimant required back surgery and, in addition, was unaware of claimant's 1991 accident. However, Dr. Cohen testified that his opinion that the 1992 accident caused claimant's deterioration did not change upon learning that claimant did not have back surgery in 1992. Tr. at 89-94. Dr. Cohen also opined that claimant's hip surgery was not necessary, and the administrative law judge rejected this opinion in favor of contrary medical evidence. This finding is not challenged on appeal.

he diagnosed only a cervical and lumbar strain superimposed on pre-existing cervical and lumbar degenerative arthritis with no muscle spasm, contusions, lacerations, or any other findings indicative of any significant impact to the left hip. *Id.* These findings are not, however, supported by the evidence, specifically, the August 19, 1992, report of Dr. Halikman.

Initially, the severity of claimant's 1992 work injury is not determinative of whether an aggravation occurred, since even a minor injury can aggravate a pre-existing condition or impair claimant's ability to work particularly where, as here, the employee has pre-existing frailties which predispose him to bodily harm. *See, e.g., Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968). Moreover, contrary to the administrative law judge's statements, Dr. Halikman's August 19, 1992, report reflects that claimant complained of pain in his lower back and left leg, describing his increased pain after the 1992 injury. The report specifically describes testing revealing pain and a diminished range of motion in claimant's left hip. Ceres EX Vol. II, 7. Moreover, the 1992 reports of Dr. Halikman are replete with discussion of claimant's left leg pain, which was related to his left hip. In a September 25, 1992, report Dr. Halikman discussed claimant's back pain and post-traumatic arthritis of the left hip. The report states that claimant "feels that his left leg pain is worse," and, while he was having problems with his lower back and left leg prior to the August 1992 accident, "he feels that the most recent accident has aggravated his discomfort." The doctor diagnosed degenerative lumbar disc disease and post-traumatic arthritis of his left hip. Dr. Halikman stated that "these problems were significant and were limiting the patient's ability to work prior to the most recent accident. Now, as a result of the accident of August 4, 1992, he states that he is not able to work at all. It must be recognized that the vast majority of this patient's problems are pre-existing in nature." *Id.* Moreover, in a June 4, 1993, report Dr. Halikman specifically stated that when he saw claimant on August 19, 1992, he had severe problems with his left hip and that it was the doctor's opinion that claimant had not been able to work relative to his left hip since that time. Ceres EX Vol. II, 13.

Thus, contrary to the administrative law judge's statements, it is apparent that claimant's hip problem was of immediate concern to his treating physician after the 1992 accident. Significantly, in discussing the September 25, 1992, report above, the administrative law judge quoted only the language referring to claimant's problems prior to the work accident, omitting the following sentences describing claimant's total inability to work since the accident and finding the "majority" of his problems are pre-existing, as well as the prior statement regarding aggravation of claimant's discomfort in the last accident. These omissions are significant, as they are not inconsistent with aggravation, yet the administrative law judge relies on Dr. Halikman's reports from this time period to support her natural progression theory and as a basis for discounting his 1996 reports which explicitly discuss aggravation.

In attributing claimant's need for hip replacement surgery and his resultant disability to the 1981 work injury, the administrative law judge described Dr. Halikman's reports between August 19, 1992, and June 4, 1993, as opining that claimant's post-traumatic

osteoarthritis, chronic left hip pain, and need for hip replacement surgery date back to his 1981 injury, and are unrelated to his 1992 work injury. *See* Ceres EX Vol. II, 9,11, 13. With regard to Dr. Halikman's reports of June and October 1996, which explicitly discuss aggravation, the administrative law judge stated that "a few letters" to various persons[7] are "superficially suggestive of a change of opinion.... but on close analysis it is clear he still finds that it is the 'hip fracture which resulted in the total hip replacement' or more precisely the resultant, post-traumatic osteoarthritic process that progressed over the intervening decade to an advanced stage culminating in destruction of the left hip in June 1993." Decision and Order at 5. The administrative law judge then determined that the "entire relevant medical record, including Dr. Halikman's 1993 pre-operative diagnosis and surgical report supports no other cause or basis for the left hip replacement ...." *Id*. She further concluded, however, that even if Dr. Halikman's 1996 letters were interpreted as indicating a change in his opinion, such changed opinion would not be credible in light of his prior inconsistent opinions in 1992 and 1993, which she determined were supported by the relevant evidentiary record. Decision and Order at 5-6. Accordingly, she accepted Dr. Halikman's initial opinion. While recognizing that Drs. Cohen and Lippman had also issued reports attributing claimant's hip problems to his 1992 work injury, she determined that Dr. Cohen's testimony was not credible because he had relied on an erroneous medical history, as discussed, and rejected both Dr. Cohen's and Dr. Lippman's opinions as inadequately reasoned. Decision and Order at 6, 8. Thus, the administrative law judge's determination that claimant's hip replacement was reasonable and necessary treatment of a condition wholly and directly attributable to progressive post-traumatic osteoarthritis resulting from his 1981 industrial injury is supported only the by 1982 medical evidence and Dr. Halikman's 1992-1993 reports.

After review of the record as a whole, it is apparent that this evidence is insufficient to support her conclusion. The administrative law judge's interpretation of Dr. Halikman's 1996 opinions as representing a change of opinion from his 1992 and 1993 reports is simply inconsistent with the reports themselves when reviewed in their entirety. In his reports dating back to August 1992, Dr. Halikman consistently stated that the majority of claimant's hip complaints pre-existed the 1992 injury but that claimant experienced increased symptomology following the 1992 work accident which ultimately resulted in his inability to work and his hip replacement surgery. The findings in the 1992-1993 reports are not inconsistent with the aggravation rule, nor are they inconsistent with the later reports. On May 20, 1996, in response to a question from an insurance adjustor, Dr. Halikman stated that claimant's disability is due primarily to his prior hip fracture and that the subsequent injury is a contributing factor, although not responsible for the majority of his disability. Ceres EX Vol. II, 28. This opinion is similar to that in the September 25, 1992, report. Moreover, in his June 28, 1996, report, Dr. Halikman explicitly stated that his view

[7]All of the medical reports in this case are letters to various people. Thus, if Dr. Halikman's 1992-1993 writings are properly recognized as medical reports, the 1996 documents must be similarly described.

had not changed, explaining:

> the primary cause of his hip replacement was the fracture sustained in 1980. Post-traumatic arthritis of the left hip developed. He had pain in his lower back and left leg prior to the accident of August 1992 at which time his symptoms worsened. That latter condition aggravated his discomfort....Please refer to report prepared by me dated 9-25-92 and 5-21-93. My opinions are unchanged.

Ceres EX Vol II, 30. In his October 22, 1996, report, Dr. Halikman further explained that the lower back, sacroiliac joint and hip joint are a linked system. The limited motion of claimant's back resulting from the 1992 accident put more of his walking motion on his hip, which in turn made his hip pain more prevalent and ultimately resulted in his need for hip replacement surgery. Ceres EX Vol. II, 31. In addition, Dr. Halikman stated that although claimant had not given a history of a direct injury involving his left hip in 1992, it was apparent from talking with him that his hip pain worsened afterwards, necessitating the surgery. *Id.* This report is thus also consistent with the 1992 and 1993 reports describing claimant's increased pain after the most recent accident.

In interpreting Dr. Halikman's 1992 and 1993 opinions as supporting the conclusion that claimant's hip surgery resulted solely from the 1981 work injury, the administrative law judge selectively extracted statements relating to the severity of claimant's residuals following the 1981 injury while ignoring those portions of the early reports consistent with aggravation. Inasmuch as Dr. Halikman's 1992 and 1993 reports when read as a whole do not rule out aggravation, and in fact are consistent with his 1996 opinions directly relating claimant's need for hip replacement surgery in part to the aggravating 1992 work injury,[8] the administrative law judge's reliance on this evidence to conclude that claimant's

[8]In his December 17, 1992, report suggesting that claimant consider undergoing hip replacement surgery, Dr. Halikman stated that claimant has "post-traumatic arthritis of his left hip dating to an accident of 1980" and that "this is a significant problem which does not relate to the injuries in question." This report is the strongest evidence supporting the administrative law judge. However, standing alone it cannot rationally be viewed as providing substantial evidence sufficient to support the administrative law judge's conclusion that Maher is liable as the responsible employer, given Dr. Halikman's

1981 work injury was the sole cause of his need for surgery cannot be affirmed. To the extent that the administrative law judge determined that Dr. Halikman's 1996 reports support the view that claimant's 1981 hip fracture resulted in the surgery, her conclusion is contradicted by the reports themselves and by the aggravation rule, which applies where claimant's symptoms are exacerbative. *See Gardner,* 640 F.2d at 1389, 13 BRBS at 106. As the 1996 reports explicitly relate claimant's need for surgery and inability to work in part to the August 1992 work injury, they can only support application of the aggravation rule.

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subsequent statements in his 1996 reports and references to his earlier opinions as well as the other 1992-1993 reports.

Finally, we agree with claimant and Maher that the administrative law judge erred in discounting Dr. Lippman's November 1996 opinion that the 1992 work accident exacerbated his 1991 back symptoms and an underlying hip injury, resulting in his need for a total hip arthroplasty. CX II(b). The administrative law judge discounted this opinion as unreasoned, purportedly because Dr. Lippman did not explicitly explain why he believed that claimant's condition had been exacerbated by the 1992 injury. The administrative law judge noted that the opinion was apparently based on the stated fact that claimant had worked before, but not after the August 4, 1992, injury. The timing of a claimant's inability to work, however, is clearly a valid consideration for a medical expert in determining whether an injury had an aggravating effect on a prior condition. Moreover, it is relevant in applying the aggravation rule, particularly as the rule applies where a prior condition is accelerated, resulting in surgery and disability earlier than otherwise may have been necessary. *See Lopez v. Southern Stevedores,* 23 BRBS 290, 298 (1990). In addition, the record reflects that Dr. Lippman's opinion was based on his review of claimant's records, as well as his work history and examinations.[9] Dr. Lippman thus clearly had an adequate basis to offer an opinion on causation. Accordingly, we reverse the administrative law judge's discrediting of Dr. Lippman's opinion.

In conclusion, the administrative law judge's decision cannot be affirmed because it is not supported by substantial evidence. The opinions of Dr. Halikman and Dr. Lippman support the conclusion that claimant's need for hip surgery was due in part to the 1992 accident, which aggravated his condition, increased his pain and resulted in his inability to work thereafter. *See Goins v. Noble Drilling Corp.*, 397 F.2d 393 (5th Cir. 1968). Accordingly, we reverse the the administrative law judge's finding that Maher is liable as the responsible employer and hold that, as the uncontradicted record before us establishes that claimant sustained an aggravating injury in August 1992, Ceres is liable as the responsible employer in the present case. In light of our holding that Ceres is liable as the responsible employer, the case is remanded for consideration of all remaining issues, including claimant's entitlement to disability compensation and Ceres's entitlement to Section 8(f) relief.

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[9]Dr. Lippman saw claimant on two occasions, in December 1992 and in November 1996. His 1996 report discusses findings upon examination and x-ray and concludes:

> the patient was seen in consultation. The findings are as noted above. His submitted medical records were reviewed. His work history was reviewed. He worked from the 1991 accident up until the 1992 accident. Subsequent to the accident of August 4, 1992, he has been unable to work. This August 4, 1992, accident resulted in an exacerbation of his 1991 back symptoms and exacerbated an underlying hip injury. This resulted in the need for a total hip arthroplasty. His current situation is such that he is not fit for duty. This situation is not expected to change in the future. He should be considered at a point of total and permanent disability.

CX 11(b).

Accordingly, the administrative law judge's finding that Maher is liable as the responsible employer is reversed, and her Decision and Order is modified to reflect that Ceres is liable as the responsible employer. In all other respects, her Decision and Order is affirmed. The case is remanded for consideration of all remaining issues

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

I would affirm the administrative law judge's determination that Maher is liable as the responsible employer for payment of claimant's medical benefits. I agree with the majority that the administrative law judge articulated an erroneous legal standard in suggesting that it was necessary for claimant to prove that the condition of his hip was stable and asymptomatic after November 11, 1982, until the August 4, 1992, industrial accident aggravated his underlying hip condition before Ceres could be held liable for claimant's benefits. *See* Decision and Order at 2. I would conclude, however, that any error she may have made in this regard is harmless because her analysis of the responsible employer issue is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe,* 380 U.S. at 359. While the majority criticizes the administrative law judge for selective crediting of the relevant medical evidence, it is well established that the weighing of the evidence is solely within the purview of the administrative law judge who is free to accept or reject all or any part of any medical evidence as he or she sees fit. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

In concluding that claimant's hip surgery and resultant disability were due to the natural progression of his 1981 work injury, the administrative law judge in the present case relied upon claimant's testimony that he "never was exactly pain free" since the 1981 hip injury, Tr. at 39, the 1982 prediction of Drs. Fulton and Wenzlaff that claimant's hip injury would, with time, increasingly limit his ambulation and put him at substantial risk of requiring surgical intervention, and claimant's August 24, 1982, x-rays which showed a collapse of a portion of the femoral head, and a potential compromise of the blood supply,

creating the potential for necrosis. Moreover, she noted that claimant did not report any hip pain referable to the August 4, 1992, accident at the time of the accident, or at any other subsequent time during 1992, and inferred that because claimant did not seek significant medical attention for 15 days prior to seeing Dr. Halikman on August 19, 1992, he did not sustain any serious injury in the 1992 accident. In addition, she stated that when Dr. Halikman examined claimant after the accident on August 19, 1992, he diagnosed only a cervical and lumbar strain superimposed on pre-existing cervical and lumbar degenerative arthritis with no muscle spasm, contusions, lacerations, or any other findings indicative of any significant impact to the left hip. Finally, she found that between August 19, 1992, and June 4, 1993, Dr. Halikman provided a number of opinions stating that claimant's post-traumatic osteoarthritis, chronic left hip pain, and need for hip replacement surgery date back to his 1981 injury, and are unrelated to his 1992 work injury. *See* CX 9h; Ceres EX Vol. II, 9, 11, 13.

Contrary to the majority's opinion, in determining that claimant's hip surgery was due to the natural progression of his 1981 injury rather than the 1992 injury, the administrative law judge neither ignored nor improperly discredited the medical opinions of Drs. Halikman, Cohen, and Lippman Rather, acting within her discretionary authority, she concluded that Dr. Halikman's 1996 opinions relating claimant's hip pain to an altered gait resulting from injury to his back resulting from the August 1992 work accident were not credible because they were inconsistent with his initial 1992 and 1993 opinions, as well as with the contemporaneous medical evidence in the record which supported his initial determination.

While the majority interprets Dr. Halikman's 1992 and 1993 opinions as consistent with his 1996 opinions, the August 19, 1992, September 25, 1992 and May 7, 1993, and June 4, 1993 opinions are sufficiently ambiguous that it cannot be said that the administrative law judge's alternate interpretation of this evidence was erroneous.[10] Where, as here, the facts in a case could support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and is not to be disturbed even where the Board views the interpretation of the evidence made by the administrative law judge as unpalatable. *See Burns v. Director, OWCP*, 41 F.3d 1555, 1564-65, 29 BRBS 28, 41,42 (CRT)(D.C. Cir. 1994). Moreover, in his December 17, 1992, report, Dr. Halikman specifically opined that claimant's post-traumatic arthritis of the left hip dated back to his initial accident and was not related to his subsequent 1991 and 1992 injuries. Ceres EX Vol. II, 9. Finally, while the severity of the 1992 injury and claimant's failure to complain of a direct injury to his hip when he saw Dr. Halikman on August 19, 1992, are not in and of themselves determinative of whether claimant sustained an aggravating injury while working for Ceres, the administrative law judge's consideration of

[10]For example, while the majority interprets a June 4, 1993, letter written by Dr. Halikman to an insurance adjuster in which he states that claimant had severe problems with his hip when he saw him on August 19, 1992 and that claimant has not been able to work relative to his hip since that time as supportive of a finding of an aggravating injury with Ceres, this report is silent as to whether the problems Dr. Halikman observed were causally related to the 1981 or 1992 work injuries.

these factors in attempting to identify the responsible employer and in assessing the credibility of Dr. Halikman's 1996 opinions relating claimant's hip surgery in part to the 1992 work injury was neither irrational nor improper. *See generally Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994). Similarly, her decision to discredit Dr. Cohen's testimony because he relied on an erroneous medical history and to discredit Dr. Lippman's opinion based on his failure to adequately detail the rationale underlying his opinion were also proper exercises of her discretionary authority. *See generally Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994).

Because the administrative law judge's determination that claimant's hip surgery and resultant disability are due to the natural progression of his 1981 injury is supported by substantial evidence and is premised on rational credibility determinations, I would affirm her finding that Maher is the responsible employer liable for the payment of claimant's past and future medical benefits. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). I therefore dissent.

JAMES F. BROWN
Administrative Appeals Judge