BRB No. 07-0163

S.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 08/21/2007
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Petition for Reconsideration of Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker, LLC), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & Detroy, LLC), Portland, Maine, for self-insured employer.

Jean Shea Budrow (Black, Bynoe & Cetkovic), Boston, Massachusetts, for Liberty Mutual Insurance Company.

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

PER CURIAM:

Self-insured employer appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Petition for Reconsideration of Decision and Order Awarding Benefits (2005-LHC-00959 - 00965) of Administrative Law Judge Colleen A. Geraghty 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant commenced employment with employer as an outside machinist in April 1982. In 1985, claimant transferred to a maintenance position in employer's boiler room, which required climbing, kneeling and squatting. In March 1992, claimant began working as a pipefitter for employer, with job duties similar to those of his previous occupations. In 1997, claimant returned to his previous job in employer's boiler room. During this ten year period of employment, claimant filed multiple reports of injuries to his knees with employer; specifically, claimant claimed injuries to his knees on July 22, 1986, January 30, 1991, August 20, 1991, November 4, 1993, January 25, 1994, October 28, 1999, and June 1, 2002. Employer was insured by Liberty Mutual Insurance Company from March 1, 1981 through August 31, 1986, and was self-insured thereafter.

Following the initial July 22, 1986, work-incident, claimant underwent arthroscopic surgery on his right knee. Claimant thereafter returned to work with limitations placed on his climbing, kneeling, and prolonged standing. Claimant's restrictions were removed by his treating physician in September 1986. Claimant's subsequent symptoms resulted in the placement of similar restrictions in 1990. In 1987, claimant reported right knee swelling which he attributed to his employment duties. In March 1990, claimant was prescribed a patella brace for his knee. On April 19, 1991 and August 21, 1991, claimant underwent surgery on his left and right knees respectively. Throughout this period of time, claimant variously experienced swelling and soreness in his knees for which he sought medical treatment. Despite his continued symptoms, claimant continues to work for employer in its boiler room.

Claimant filed a claim under the Act against employer, averring that he is entitled to permanent partial disability benefits for impairments sustained to both of his knees as a result of the seven work-injuries which he reported to employer.[1]

[1] Although employer repeatedly references an alleged work-related injury which occurred in 1982, claimant's claim for benefits under the Act was based solely upon the seven distinct injuries which allegedly occurred between July 22, 1986, and June 1, 2002. *See* Claimant's post-hearing brief; Decision and Order at 5.

In her Decision and Order Awarding Benefits, the administrative law judge initially determined that claimant sustained work-related injuries on July 22, 1986, January 30, 1991, August 20, 1991, January 25, 1994, October 28, 1999, and June 1, 2002, that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer had not rebutted the presumption. Decision and Order at 13-20. The administrative law judge then determined that while claimant first injured his right knee on July 22, 1986, the work incidents of August 20, 1991, and January 25, 1994, aggravated that injury and either accelerated or combined with the initial injury to result in claimant's present right knee impairment. Similarly, the administrative law judge determined that claimant suffered an injury to his left knee on January 30, 1991, which was aggravated, accelerated, or combined with by claimant's subsequent October 28, 1999, and June 1, 2002, work injuries. As employer was self-insured at the time of the last aggravations on January 25, 1994, and June 1, 2002, the administrative law judge found employer to be responsible for the payment of claimant's benefits. *Id*. at 21. Next, the administrative law judge found that claimant reached maximum medical improvement as of March 30, 2004, and that claimant established that he has sustained a 15 percent impairment to each of his knees. Accordingly, the administrative law judge awarded claimant permanent partial disability benefits for a 15 percent impairment to each of his knees. 33 U.S.C. §908(c)(2). Employer's motion for reconsideration was denied by the administrative law judge.

On appeal, employer contends that the administrative law judge erred in determining that claimant sustained injuries while in its employ subsequent to 1982 and 1986, and that it is thus liable as a self-insurer for claimant's benefits under the Act. Alternatively, employer challenges the administrative law judge's decision holding it liable for the totality of claimant's disability. Claimant and Liberty Mutual Insurance Company respond, urging affirmance of the administrative law judge's decision in its entirety.

Employer contends that the administrative law judge erred in determining that claimant sustained injuries to his knees during the period of time that employer was self-insured; specifically, employer avers that claimant's present knee impairments are due to the natural progression of the knee injuries that he sustained in either 1982 or 1986, during which time employer was insured by Liberty Mutual Insurance Company. In support of its position on this issue, employer states that claimant's post-August 1986 employment could not have contributed to his present knee impairment since employer accommodated claimant's work restrictions following his July 1986 work-injury, claimant experienced knee symptoms during both work and non-work activities subsequent to July 1986, claimant did not relate specific incidents that caused his symptoms, and the medical evidence of record fails to support the administrative law judge's finding that specific injuries occurred to claimant's knees after July 1986. Employer's contentions are without merit.

In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer and carrier at the time of the original injury remain liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains an aggravation of the original injury, the employer and carrier at the time of the aggravation are liable for the entire disability resulting therefrom. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 125 S.Ct. 309 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005). Where claimant's work results in an exacerbation of his symptoms, the employer and carrier at the time of the work events resulting in the exacerbation are responsible for any resulting disability. *See generally Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Each employer or carrier has the burden of persuading the administrative law judge that the disability is the result of either the natural progression of the original injury or is the result of a new injury or an aggravation of the pre-existing condition with a subsequent covered employer or carrier.[2] *See McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007); *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed. Appx. 547 (9th Cir. 2001).

In the instant case, claimant alleged that he sustained multiple injuries to his left and right knees while working for employer. Regarding claimant's right knee, the administrative law judge found that while claimant first injured this knee on July 22, 1986, he thereafter sustained work-related aggravations to that knee on August 20, 1991 and January 25, 1994, which accelerated or combined with the initial injury to result in claimant's present condition. In rendering this determination regarding claimant's right knee, the administrative law judge found that, following the August 20, 1991, work-

[2] In this regard, a party need not establish any progression of an underlying condition; rather, an "aggravation" may occur where there is an increase in symptoms due to the claimant's employment. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardener v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). Thus, an injury has occurred if the employment aggravates the symptoms of the condition, *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986), and the onset of symptoms constitutes an injury within the meaning of the Act. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Gardner*, 640 F.2d 1385, 13 BRBS 101. That the symptoms could have developed anywhere does not negate the fact that the claimant's symptoms developed while he was working for his employer; if the work played any role in the manifestation of a symptom, any disability due to the symptom is compensable. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

incident, claimant treated with Dr. Giustra and underwent arthoscopic surgery for soreness, cracking, grinding, swelling, popping and pain in his right knee, [3] and that after falling at work on January 25, 1994, claimant was diagnosed with a contusion and abrasion of his knee and treated with ice and anti-inflamatory medication. Decision and Order at 16, 18, 21. Regarding claimant's left knee, the administrative law judge concluded that claimant sustained an initial injury to that extremity on January 30, 1991, and that claimant's left knee was thereafter aggravated by the work injuries which claimant sustained on October 28, 1999, and June 1, 2002. Specifically, regarding claimant's left knee, the administrative law judge found that claimant initially reported swelling and soreness of his left knee to employer on January 30, 1991, that claimant testified that his work activities made his knee sore, that Dr. Markellos opined that claimant's work duties were stressful on his knees and thus contributed to his left knee condition, and that Dr. Giustra diagnosed the onset of claimant's left knee pain as due to the overuse of claimant's knee. Next, the administrative law judge found that claimant credibly reported increased knee pain to employer on or about October 28, 1999, and on June 1, 2002.[4] Decision and Order at 15-16, 18-21.

The Board is not empowered to reweigh the medical evidence. *See, e.g., Mijanjos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Herein, the administrative law judge rationally rejected employer's assertion that claimant's post-August 1986 knee conditions were the result of the natural progression of his prior knee injuries when he credited claimant's testimony and reports of injury filed with employer, as supported by the overall testimony of Drs. Giustra, Markellos, and Avery, in determining that claimant sustained distinct traumatic injuries to his right knee on August 20, 1991, and January 25, 1994, which aggravated his July 22, 1986, work-related right knee condition, and to his left knee on October 28, 1999, and June 1, 2002, which aggravated his January 30, 1991, work-related left knee condition. We thus affirm the administrative law judge's finding that employer in its self-insured capacity is liable for the benefits due claimant under the Act, as it is supported by substantial evidence and

[3] Employer concedes that Dr. Guistra, in September 1991, opined that claimant's current employment contributed to his need for his April 1991 surgery, *see* Employer's brief at 14; additionally, Dr. Guistra stated that claimant's bilateral knee conditions "are related to his employment, but not completely attributable to his employment." *See* EX 36 at 188. Thereafter, in November 1998, Dr. Giustra diagnosed claimant's knee conditions as resulting from an "aggravation." *Id.* at 209; *see also* EX 36 at 228.

[4] Dr. Avery's August 19, 2002, office notes indicate that claimant reported that his knee symptoms occurred within the last couple of months. Additionally, Dr. Avery at this time found claimant's left knee to be radiographically worse than his right, a finding found by the administrative law judge to be significant since Dr. Avery had previously found claimant's right knee to have exhibited more advanced degenerative changes than his left knee. *See* Decision and Order at 20; CX 1.

consistent with law. *See Price*, 330 F.3d 1102, 37 BRBS 87(CRT); *Delaware River Stevedores*, 279 F.3d 233, 35 BRBS 154(CRT).

Alternatively, employer asserts it is not liable for the awarded benefits because the injuries occurring subsequent to August 1986 resulted in only temporary aggravations of conditions due to claimant's initial 1982 or 1986 work-injuries. In support of its contention, employer asserts that the degree of claimant's bilateral knee impairment diagnosed by Dr. Boucher in June 2005, must be attributed solely to claimant's July 1986 work injury since, it avers, claimant never recovered from that initial work-incident and Dr. Boucher described all of claimant's post-1986 work-incidents as only temporarily worsening claimant's knee conditions. We reject employer's assertions of error.

In the instant case, the credited medical evidence supports the conclusion that claimant's symptoms progressed during his sixteen years of employment with employer subsequent to August 1986, that claimant's restrictions post-1986 were removed, reinstated and increased, that claimant was prescribed a knee brace in 1990, and that claimant underwent two additional surgical procedures following the occurrence of post-August 1986 work-incidents. Based upon the totality of the record, the administrative law judge rationally determined that claimant sustained multiple bilateral knee injuries while working for employer and that, specifically, on January 25, 1994, claimant suffered an aggravation to his right knee, while on June 1, 2002, claimant suffered an aggravation to his left knee. As employer was self-insured at the time of these incidents, the administrative law judge rationally determined that employer was on the risk at these times, and his subsequent decision to rely upon the 15 percent impairment rating given to each of claimant's knees by Dr. Boucher on June 20, 2005, is unchallenged by employer on appeal. We reject employer's contention that this undisputed rating must be retroactively applied to an incident with occurred nineteen years previously, as employer has not established by substantial evidence that claimant's permanent disability is due to his initial injuries sustained in 1982 and 1986. In this regard, employer's reliance on Dr. Boucher's statement that claimant's subsequent work-injuries merely temporarily worsened claimant's knee conditions is misplaced since that physician, while opining that the multiple work-related incidents sustained by claimant subsequent to July 1986 did not significantly aggravate claimant's condition, stated that claimant's bilateral knee conditions are cumulative and that claimant's patella arthritis is due to his repetitive work-related kneeling on hard surfaces. *See* EX 38 at 256. Therefore, as employer has failed to demonstrate reversible error in the administrative law judge's decision below, we affirm her determination that employer is liable in its self-insured capacity for the totality of the benefits due claimant as a result of his bilateral knee impairments.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Denying Employer's Petition for Reconsideration of Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge