BRB No. 10-0109

RAMON C. VASQUEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SIGNAL INTERNATIONAL, L.L.C.	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED.	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DATE ISSUED: 08/31/2010
MARINE CONTRACTING GROUP, L.L.C.	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Henry B. Zuber, III (Zuber Law Firm, L.L.C.), Ocean Springs, Mississippi, for claimant.

Alan G. Brackett and Jon B. Robinson (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for Signal International/carrier.

Douglas L. Brown (Brady, Radcliff and Brown, L.L.P.), Mobile, Alabama, for Marine Contracting Group/carrier.

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

PER CURIAM:

Signal International (Signal, employer) appeals the Decision and Order (2009-LHC-00081) of Administrative Law Judge C. Richard Avery 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 was injured on January 11, 2008, when an angle iron fell and hit the back of his head/hard hat while he was working for Signal. Claimant was diagnosed with an acute neck strain. X-rays were normal, but the company doctor, Dr. Cooper, recommended light-duty or sedentary work and physical therapy. In March 2008, claimant was hired by Marine Contracting Group (MCG), a personnel company, and was assigned as a shipfitter first class with C&G Boat Works (C&G). He worked until May 4, 2008, when, he stated, he could no longer tolerate the neck and shoulder pain he was experiencing. Claimant filed a claim for compensation against Signal in May 2008, claiming injuries to his head, neck, shoulder, knees and hands. Cl. Ex. 2; *see also* Tr. at 26-31.

The administrative law judge found that Signal did not dispute the occurrence of the January 11, 2008, injury, and, thus, concluded that the Section 20(a), 33 U.S.C. §920(a), presumption is invoked and not rebutted. Decision and Order at 7. The administrative law judge credited claimant's physician, Dr. Millette, in determining that claimant's condition has not reached maximum medical improvement, that he has established a *prima facie* case of total disability, and that he needs additional treatment before he can return to work. With regard to the responsible employer issue, the administrative law judge found that claimant did not report either an injury or an aggravation while working for MCG/C&G, and he credited claimant's testimony that the shipfitter work there was lighter duty than the work he had performed at Signal; therefore, the administrative law judge concluded that Signal is liable for benefits. The administrative law judge also found that claimant's average weekly wage is $1,049.61, and he is entitled to the medical treatment recommended by Dr. Millette. Decision and Order at 7-12. Accordingly, the administrative law judge held Signal liable for temporary total disability benefits, medical benefits, interest and an attorney's fee. Signal appeals the administrative law judge's decision. MCG and claimant respond, urging affirmance.

Signal first contends the administrative law judge erred in awarding claimant total disability benefits. Specifically, Signal argues that the administrative law judge erred in not crediting the testimony of its vocational expert, Ms. Seyler. Ms. Seyler relied on the findings of all of the doctors who examined claimant to arrive at conclusions regarding claimant's employability. She stated that if claimant is found to be capable of full-duty work, pursuant to Signal's expert, Dr. Petersen, Emp. Ex. 10, then he could return to his usual work. Alternatively, she concluded that if claimant is capable of sedentary or light-duty work, there are jobs available paying $6.55 - $9.00 per hour that he could perform. Emp. Ex. 13. Thus, Signal argues that claimant is not totally disabled.

A claimant bears the burden of establishing the extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity. In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Dr. Millette, claimant's choice of physician, stated that claimant needed a McKenzie assessment and treatment from a specialized therapist for his facet joint syndrome before he could return to any work. If given this treatment, Dr. Millette opined that claimant could return to some form of light-duty work in two months. Dr. Millette stated that even sedentary work, prior to McKenzie treatment, could result in an aggravation and that it would be premature to determine his work abilities before that treatment occurred. Cl. Ex. 5 at 9, 11, 14, 17-20, 26. As the administrative law judge rationally credited Dr. Millette's opinion that claimant is not able to return to any work, his finding that claimant is totally disabled is supported by substantial evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). Therefore, we reject Signal's argument that claimant is not entitled to total disability benefits.

Signal also contends the administrative law judge erred in refusing to join C&G to this claim and, therefore, in finding it to be the responsible employer. It contends its investigation was hindered by its inability to conduct discovery and gather information from C&G.[1] This case was originally to be heard in February 2009; however, the administrative law judge postponed the hearing and permitted MCG to be made a party to this claim in February 2009 after claimant revealed his employment with them in his deposition. Cl. Exs. 4, 27; Emp. Ex. 7. Signal then submitted interrogatories to MCG,

[1]Signal wanted to learn the details of claimant's job duties, the working conditions, and whether he had or reported any injury at C&G. Signal Brief at 15.

and MCG identified C&G as claimant's shipyard employer in its answers filed on May 7, 2009. Emp. Ex. 5. Signal immediately requested it be allowed to depose C&G employees, but the administrative law judge declined to join C&G as a party to this case, postpone the hearing, or hold the record open for submission of post-hearing depositions. Tr. at 16, 21-23. The administrative law judge reasoned that claimant's injury had occurred in January 2008, the case had been referred to the Office of Administrative Law Judges in October 2008, counsel for Signal noticed his appearance in December 2008, and the original hearing, which was postponed at Signal's request, was scheduled for February 2009. The administrative law judge added that he was unwilling to postpone the hearing again due to the hardship to claimant. Tr. at 21-23. The administrative law judge also noted that MCG stated it would assume liability for benefits if C&G was found to be the responsible employer; thus, the administrative law judge stated that the joinder of C&G was unnecessary. Tr. at 67. We agree with Signal that the administrative law judge should have joined C&G as a party to this case.

Section 702.333 of the regulations, 20 C.F.R. §702.333, provides that the necessary parties to a formal hearing include "the claimant and the employer or insurance carrier." The Board has held that potentially liable employers should be included in the administrative process, as failure to include them would render any decision regarding their liability non-binding. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006) (sequential traumatic injuries; employer may defend against liability by joining a subsequent employer);[2] *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986) (occupational disease case required inclusion of two subsequent employers where exposure to injurious stimuli was possible); *see also Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994) (administrative law judge has authority to join relevant party to case to properly resolve claim); *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986) (administrative law judge erred in failing to resolve the disputed last responsible carrier issue); *compare with Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) (no party attempted to join subsequent employer, Boeing, to case, as it is not covered by the LHWCA).

Signal sought to join C&G as a party immediately after learning of claimant's employment with C&G.[3] Moreover, although MCG stated it would assume any liability

[2]In *Reposky*, in discussing the timeliness of the claim filed against the subsequent employer, the Board stated: "[i]n cases involving sequential traumatic injuries, as well as in occupational disease cases, the employer against whom a claimant files her claim must be able to join other potentially responsible employers in order to defend itself against the claim." *Reposky*, 40 BRBS at 69.

[3]The administrative law judge found that claimant did not fail to inform Signal about his employment with C&G. Decision and Order at 8 n.8. Contrary to this conclusion, the memorandum of the informal conference, dated July 16, 2008, indicates

C&G ultimately may have, it also stated that it was unable to answer many of the questions to which Signal's attorney sought answers in discovery.[4] All potentially liable employers should be included in the administrative process, *Reposky*, 40 BRBS 65, and Section 702.338, 20 C.F.R. §702.338, requires the administrative law judge to "inquire fully into the matters" and "receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." As evidence from claimant's employment with C&G, a potentially liable employer, is relevant to the responsible employer issue, and as Signal timely moved to join C&G, it was erroneous for the administrative law judge to deny Signal's motion to join C&G as a party to this case. *Sans*, 19 BRBS at 28; *Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982); *Gray & Co., Inc. v. Highlands Ins. Co.*, 9 BRBS 424 (1978); 20 C.F.R. §702.338 (hearings should be attended by the parties, their representatives and "such other persons as the administrative law judge deems necessary and proper"). Therefore, we vacate the administrative law judge's denial of joinder and remand the case for the administrative law judge to join C&G, to allow for discovery, and to reconsider the responsible employer issue.[5] Although we remand the case for additional proceedings, we affirm the

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claimant stated he had not worked since January 18, 2008, when he last worked for Signal. Cl. Ex. 1; Emp. Ex. 8. His answers to interrogatories, filed January 19, 2009, and his deposition in February 2009, first revealed that he had worked for MCG in March and April 2008. Emp. Exs. 3, 4. Therefore, claimant did not reveal his subsequent employment until late in the proceedings.

[4]MCG explained that it did not conduct a pre-employment physical examination and that claimant did not request light-duty work. It also stated that it does not control the work details of the employees it assigns to shipyards, that those details are controlled by the shipyards, and that there is no light-duty employment in the shipyards. Emp. Ex. 5. Further, C&G's counsel indicated, after it filed a motion to quash Signal's request for depositions, that a fitter's duties are the same at C&G as they are at Signal; thus, there could be evidence from C&G that contradicts claimant's testimony regarding the level of his post-injury work. Jt. Ex. 2 at 8; Emp. Ex. 17.

[5]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, the claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Signal contends the administrative law judge erred in not addressing the medical evidence which establishes that claimant's complaints changed from right-sided complaints after the injury with Signal to left-sided complaints following employment

administrative law judge's award of benefits and hold that Signal remains liable for the payment of claimant's benefits unless and until such time as liability is assigned to another employer. *Schuchardt v. Dillingham Ship Repair*, 40 BRBS 1, *modifying on recon.* 39 BRBS 64 (2005), *aff'd mem. sub nom. Dillingham Ship Repair v. U.S. Dep't of Labor*, 320 F. App'x 585 (9th Cir. 2009). If another employer is held liable, then Signal would be entitled to reimbursement for benefits paid. *Id.*

Accordingly, the administrative law judge's Decision and Order is affirmed in part and the case is remanded for the administrative law judge to join C&G to the case, the parties to conduct additional discovery, and the administrative law judge to reconsider the issue of the responsible employer.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

with C&G. The administrative law judge should address this contention on remand in conjunction with any new evidence developed as a result of C&G's joinder.