BRB No. 07-0145

J.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EUREST SUPPORT SERVICE/COMPASS	)	DATE ISSUED: 07/26/2007
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Louis R. Koerner, Jr. (Koerner Law Firm), Houma, Louisiana, for claimant.

Michael W. Adley (Judice & Adley, APLC), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (2004-LHC-1464) of Administrative Law Judge Lee J. Romero, Jr., 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

[1] Claimant died on October 8, 2004, as a result of metastatic prostate cancer unrelated to this claim. His widow is pursuing his claim for disability and medical benefits.

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that he sustained an injury to his neck while working for employer on February 12, 2002. Claimant testified that he fell asleep while being transported by vessel to a production platform where he was to work for employer, and awoke with a "crook" and pain in his neck. Claimant continued to work until the following Sunday, February 17, 2002, when he called for relief because of his neck pain. Upon his return to the mainland, claimant took several days off and opted to self-treat his condition. At that time, Stolt Offshore, Incorporated (Stolt), a company for whom claimant also regularly worked, contacted him about another job. Claimant subsequently shipped out as a relief cook for Stolt on February 21, 2002, where he worked a 28-day hitch on three to five different vessels. He stated that his neck pain began to decrease during this stint with Stolt to the point where, afterwards, his neck was not hurting that much, if at all.

Following four days off, claimant took another cook job with Stolt aboard the vessel *Rover*. During this trip, claimant stated he again felt discomfort and pain in his neck as a result of an incident, which occurred sometime around April 10-15, 2002. Claimant stated that he felt discomfort while he was picking up groceries followed by a "shocking sensation" that went throughout his back and lasted about 45 seconds. Claimant informed the captain of the *Rover* of his condition, but he did not fill out an accident or injury report and again opted for self-treatment. Claimant remained on the vessel until the latter part of April 2002 when he left to attend seaman certification school in Morgan City, Louisiana. Three days into his training, Stolt called him for another job, which claimant declined because he was walking "wobbley" and with a limp and jerk in his leg.

Claimant sought medical treatment for his condition on or around May 10, 2002, and was subsequently diagnosed by Dr. Freiberg as having a compression of his cervical spinal cord. Dr. Freiberg then referred claimant to a neurosurgeon, Dr. Steck, who opined that claimant had progressive cervical myelopathy and cervical stenosis requiring surgery because these conditions were causing him to lose function of his hands and also causing deterioration of his gait. Dr. Steck performed surgery on claimant on June 5, 2002, and opined, on August 15, 2002, that claimant was unable to work and should be considered totally disabled for the remainder of the year until he progressed to solid arthrodesis. Based upon a hypothetical question which assumed events consistent with claimant's testimony about the two incidents, Dr. Steck affirmed that it was more probable than not that the second incident was an aggravator of claimant's previous injury sustained when claimant awoke with a stiff neck.

Claimant filed a civil suit for damages against Stolt, alleging he was involved in a disabling accident while in their employ. This case was ultimately settled, following mediation on August 19, 2003, for $85,000. Claimant also filed a claim for benefits under the Act against employer on July 17, 2003. In his decision, the administrative law judge found that claimant established a *prima facie* case and thus was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). He, however, concluded that employer is not responsible for claimant's disability since claimant's condition was accelerated and aggravated by the "shocking sensation" incident in April 2002, while claimant was working with Stolt. The administrative law judge therefore dismissed claimant's claim against employer. Consequently, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant argues that the administrative law judge erred by relying on Dr. Steck's testimony and in rejecting Dr. Freiberg's testimony regarding the underlying cause of claimant's disability. Claimant contends that Dr. Freiberg's opinion that claimant's condition essentially began as a disc rupture as of the February 12, 2002, injury which got progressively worse due to the second injury, is not sufficient to establish that the second injury was an aggravation of the first. Claimant further argues that, pursuant to *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003), the administrative law judge erred in severing the liability of employer.

In cases under the Act involving multiple traumatic injuries, the determination of the employer responsible for the payment of claimant's benefits turns on whether the claimant's condition is the result of the natural progression of a work-related injury or an aggravation of that injury. If the claimant's disability resulted from the natural progression of the initial injury, then the claimant's employer at the time of that injury is the employer responsible for compensating the claimant for the entire disability. If, on the other hand, the conditions of employment with a subsequent employer aggravated, accelerated, or combined with the earlier injury, resulting in the claimant's disability, the employer at the time of the second injury is liable for all medical expenses and compensation related thereto. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub. nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001). In this case, there is no claim against the second employer.

The administrative law judge found that claimant's testimony portrays an individual whose initial neck pain from the February 12, 2002, incident with employer

was steadily improving up to the time of the second incident. In this regard, claimant testified that prior to his initial stint with Stolt, he was "beginning to feel a little better," EX 1, Dep. at 45-46, and that upon his actual return to work with Stolt, the pain "wasn't as intense . . . it wasn't as bad at all." *Id.* at 46. Claimant added that over the course of that first 28-day stint with Stolt, "the pain started to decrease," although "it was still there but not as intense." *Id.* at 52. He further noted that immediately following that tour he could not "remember the neck hurting [him] hardly at all," *id.* at 55, and that during the four days between his two hitches with Stolt his neck pain was to the point where it "wasn't about nothing," because "it was going away."[2] *id.* at 53, 54. Claimant maintained that this decreased pain prompted him to take the second tour with Stolt. *Id.* Moreover, the administrative law judge found that claimant had been "actively and gainfully employed by Stolt and had worked almost two full hitches of 28-day periods each," prior to the April incident. Decision and Order at 20.

The physicians' reports also support the administrative law judge's finding that claimant's disabling condition was significantly aggravated by the Stolt incident. Dr. Steck stated that the crew boat incident and the "shocking sensation" incident were both related to claimant's pre-existing cervical stenosis as "it's the same pathological condition for each set of symptoms." EX 2 at 34. He added that the initial crew boat incident, regardless of the possibility of another injury or aggravation during the second "shocking sensation" incident, could have led to the same symptoms. *Id.* at 35. Nonetheless, based on a hypothetical question, which accurately detailed the facts regarding claimant's two work incidents, *i.e.*, one with employer and one with Stolt, *id.* at 30-32, Dr. Steck opined that the "description of the strike, the electrical-type shock and the fairly rapid deterioration suggest that [the Stolt] incident . . . worsened his condition and further aggravated his pre-existing arthritic condition in his neck." *Id*. at 33. As the administrative law judge found, Dr. Freiberg did not provide a specific opinion regarding the cause of claimant's condition. In this regard, Dr. Freiberg testified that he did not remember claimant ever telling him about the two incidents that claimant incurred while at work, EX 3 at 12, that he could not state whether claimant's symptoms were related to a specific accident or injury, *id.* at 9, and moreover, that he "didn't really form an

[2] This testimony is contrary to the underlying belief of Dr. Freiberg that claimant "had gradual development of problems during the last couple of months" after the February 12, 2002, work incident. This, coupled with the fact that Dr. Freiberg does not provide a specific opinion on causation, supports the administrative law judge's decision to accord diminished weight to his opinion. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

opinion" as to whether claimant's ruptured cervical discs and resulting spine compression were due to trauma or the degenerative process. *Id.* at 11. However, based on the same hypothetical situation, Dr. Freiberg stated that claimant "probably had a ruptured disc on February 12th and that it got worse from the second injury, it re-ruptured or the rupture extended." *Id.* at 15-16. Upon further questioning, Dr. Freiberg clarified that the disc rupture of February 12th "was not healed when the second incident occurred," such that the second incident made it worse. *Id.* at 18. Dr. Freiberg further stated that claimant's disc rupture "could have progressed to that severe state without the second accident," but that "it seems based on whatever the theoretical history that was provided, that the second accident did make it worse." *Id.* at 20.

It is within the administrative law judge's authority to determine the weight to be accorded the evidence of record, including the opinions of the medical experts. *Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). In this instant case the administrative law judge rationally determined from claimant's deposition testimony and the opinions of Drs. Freiberg and Steck that the initial injury which claimant sustained as a result of his February 12, 2002, incident with employer involved a temporary aggravation of claimant's underlying cervical stenosis which had fully resolved itself by the time of the second incident with Stolt, and that that second "shocking sensation" incident resulted in an aggravation of claimant's underlying condition. Thus, substantial evidence supports the administrative law judge's finding that claimant's disabling cervical condition was due to an acceleration and/or aggravation of his pre-existing stenosis condition while working for Stolt in April 2002 and that, consequently, employer is not liable for claimant's subsequent disabling condition. *Marinette Marine Corp.*, 431 F.3d 1032 39 BRBS 82(CRT).

We reject claimant's contention that the administrative law judge erred in finding the decision in *New Haven Terminal Corp. v. Lake,* 337 F.3d 261, 37 BRBS 73(CRT), inapplicable to the facts in this case. In *New Haven,* the claimant was injured at work in 1993 and again in 1997, after a different employer had taken over the operation of the terminal. Claimant reached a settlement with the second employer but pursued his claim against the first employer for disability due to the 1993 injury. After holding that the evidence established that claimant remained disabled due to the first injury at the time of the second injury, the court concluded that the first employer was not entitled to use the second, aggravating injury as a defense to its continuing liability for the disability due to the initial injury.[3] In the present case, however, the administrative law judge found that

[3] The court further stated that, where possible, the claimant should recover from the second employer in accordance with the "last employer rule." However, where claimant cannot do so due to a settlement with the second employer, recovery from the

claimant had essentially recovered from the injury he sustained in February 2002 by the time of the second incident with Stolt. This finding is supported by substantial evidence, as claimant "was actively and gainfully employed by Stolt and had worked almost two full hitches of 28-day periods each" prior to the time of the April 2002, "shocking sensation" incident. Decision and Order at 20. Thus, in contrast to *New Haven*, claimant had no ongoing disability at the time of the second injury, and his disability is wholly attributable to that injury.[4] Employer cannot be held liable for disability attributable to the later injury. *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Therefore, as it is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that employer is not liable for benefits under the Act.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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first employer is permissible if claimant has acted in good faith and has not manipulated the aggravation rule. The court thus remanded the case for findings as to whether the settlement with the second employer in fact compensated claimant for the loss in wage-earning capacity from both injuries. If so, claimant could not obtain a double recovery. In this respect, the result in *New Haven* is similar to that in cases allowing concurrent awards from different employers in multi-injury cases on appropriate facts. *See, e.g., Stevedoring Services of America v. Price*, 382 F.3d 1878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

[4] Similarly, the administrative law judge properly found the non-precedential opinion in *Operators & Consulting Services, Inc. v. Director, OWCP*, 170 Fed.Appx. 931 (5th Cir. 2006), to be "inapposite and not instructive" since the claimant's disability and condition therein was "wholly attributable to the natural progression of his original injury." Decision and Order at 20.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge