BRB Nos. 11-0749,
11-0749A and 11-0749B

JOHN A. RONNE	)	
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
ACE/ESIS	)	DATE ISSUED: 07/26/2012
	)	
Employer/Carrier-Respondents Cross-Petitioners A	)	
	)	
ROGERS TERMINAL & SHIPPING, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent Cross-Petitioner B	)	
	)	
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	

Party-in-Interest) DECISION and ORDER

Appeals of the Decision and Order Awarding Compensation and Medical Benefits and the Order on Reconsideration of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Mark K. Conley (Slagle Morgan LLP), Seattle, Washington, for Kinder Morgan Bulk Terminals, Incorporated, and ACE/ESIS.

Raymond H. Warns, Jr. and Megan Larrondo (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for Rogers Terminal & Shipping, Incorporated.

James McCurdy (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for Jones Stevedoring Company.

Shawn C. Groff and Estelle Pae Huerta (Leonard Carder, LLP), Oakland, California, for the ILWU-PMA Welfare Plan.

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

PER CURIAM:

Claimant appeals, and Kinder Morgan Bulk Terminals, Incorporated (Kinder) and Rogers Terminal & Shipping, Incorporated (Rogers) cross-appeal, the Decision and Order Awarding Compensation and Medical Benefits and the Order on Reconsideration (2008-LHC-01961, 2009-LHC-00205, 2009-LHC-01524, 2010-LHC-00624) of Administrative Law Judge Richard M. Clark 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). The Board 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 worked as a longshoreman from 1953 until December 2007. Claimant injured his right knee on May 30, 2004, while working for Jones Stevedoring Company (Jones). He underwent arthroscopic surgery on August 11, 2004, and subsequently returned to work, but he continued to experience right knee pain. CX 121 at 554-556; HT at 94. Claimant underwent a second arthroscopic right knee surgery on May 17, 2006.

His last two work shifts prior to this surgery were for Rogers. CX 1 at 19. Dr. Weintraub released claimant to return to work with restrictions against "physical work" such as lifting, carrying, squatting, and climbing. CXs 38 at 66, 121 at 517. Subsequently, Dr. Weintraub recommended a total knee replacement, which claimant had not undergone. CX 54 at 89, 95.

On September 26, 2006, claimant complained of left hip pain due to an altered gait related to his right knee condition. CX 37 at 64. On October 23, 2006, claimant worked for Kinder. His shift involved climbing stairs, ladders and inclines. Claimant subsequently completed an accident report in which he stated that this activity aggravated left hip and back conditions. CX 40 at 68. Dr. Weintraub examined claimant on November 21, 2006. CX 45 at 76. He diagnosed a mild back strain and degenerative arthritis of the left hip secondary to claimant's breaking his acetabulum in 1958. Dr. Weintraub re-examined claimant's back and left hip on March 6, 2007. He recommended that claimant undergo a total left hip replacement. CX 57 at 92. Claimant underwent left hip replacement surgery in July 2007, CX 69 at 113-114; he returned to work on October 19, 2007, and continued working until December 19, 2007. CX 1 at 21. Claimant alleged that this work caused further hip pain. Prior to the onset of his right knee, left hip and back conditions, claimant was diagnosed with vertebrobasilar insufficiency (VBI). Claimant alleged that his work caused this condition to become symptomatic.

Claimant filed a claim for compensation for his right knee injury while he was employed at Jones, and claims for left hip and back conditions and for VBI for which claimant alleged that Kinder was the responsible employer. Rogers was joined by Kinder as a potentially responsible employer. The administrative law judge allowed the ILWU-PMA Welfare Plan (the Plan) to intervene. The Plan sought a lien on any award due to its prior payment to claimant of disability and medical benefits.

In his decision, the administrative law judge found that claimant's right knee, back and left hip conditions are related to his longshore employment, but that claimant failed to establish a prima facie case that his VBI is related to his work. The administrative law judge found Jones to be the employer responsible for claimant's August 11, 2004, knee surgery and for temporary total disability, 33 U.S.C. §908(b), from July 13 to November 26, 2004, and for a 10 percent permanent partial disability, 33 U.S.C. §908(c)(2). The administrative law judge found Rogers to be the employer responsible for claimant's temporary total disability following his second right knee surgery from May 17 to October 6, 2006, and for a 25 percent permanent partial disability. The administrative law judge found that Kinder is the employer responsible for a 55 percent permanent partial disability for claimant's right knee condition as it employed claimant on the last day he worked on December 19, 2007. The administrative law judge found Kinder is not

liable for claimant's left hip injury, notwithstanding that claimant last worked two shifts for it prior to stopping work on October 25, 2006, and undergoing left hip replacement surgery in July 2007 because he found that claimant's left hip condition is due to the natural progression of a 1958 hip injury. The administrative law judge found that Kinder is the employer responsible for claimant's back condition following his October 23, 2006, work shift and that, consequently, claimant is entitled to temporary total disability benefits from October 25, 2006 to June 19, 2007. The administrative law judge found, however, that claimant is not entitled to compensation for permanent total disability, 33 U.S.C. §908(a), after he stopped working on December 19, 2007, as claimant did not establish that his work-related right knee condition alone prevents his return to work. Decision and Order at 47.

The administrative law judge used claimant's wages from the 174 days he worked during the year preceding his first knee surgery on August 11, 2004, to determine claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), as $2,267. The administrative law judge found that this average weekly wage further represents claimant's wage-earning capacity from 2004 through 2007 when adjusted by the yearly percentage increase in the national average weekly wage. *Id*. at 50. The administrative law judge rejected the requests for Section 8(f) relief, 33 U.S.C. §908(f), submitted by Kinder and Rogers on the basis that neither employer is liable for a period of permanent partial disability benefits greater than 104 weeks. *Id*. at 52. The administrative law judge found the Plan entitled to a lien totaling $134,134 for disability benefits paid to claimant for his right knee condition and $1,121 in medical expenses. *Id*. at 52-53. The administrative law judge denied a lien for amounts paid for claimant's VBI and left hip conditions as the former condition is not compensable and no joined employer is responsible for the latter condition.

The administrative law judge denied the motions for reconsideration filed by claimant, Kinder and Rogers, but granted the Plan's motion to correct the amount of its lien from $134,134 to $102,544. The administrative law judge also agreed that lien amounts of $74,932.14 and $27,611.86 related to claimant's respective knee injuries with Kinder and Rogers should be paid by them directly to the Plan, and that he erred by ordering these employers to pay claimant.

Claimant, Kinder, and Rogers each appeal the administrative law judge's decisions. Each has filed a response brief to the other appeals. In addition, Jones Stevedoring and the Plan have filed response briefs urging rejection of the appeals as it affects their interests.

PERMANENT TOTAL DISABILITY

Claimant contends that he is totally disabled due to the combination of his work-related knee injury and his left hip condition and that the administrative law judge erred in denying him total disability benefits. BRB No. 11-0749. In his decision, the administrative law judge concluded that, since claimant must demonstrate that he is totally disabled due to his work-related knee condition alone, he is entitled only to a permanent partial disability award for his right knee.[1] Decision and Order at 47. On reconsideration, the administrative law judge rejected claimant's contention that, pursuant to *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), a permanent total disability award is in order. The administrative law judge, citing *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453 (1981), *aff'd mem.*, No. 81-7801 (9th Cir. 1982), stated that since the aggravation rule does not apply to separate and unrelated injuries but is limited to re-injury of a pre-existing condition, claimant is not entitled to compensation for permanent total disability based on the combined disability from his pre-existing hip condition and work-related right knee injury. Order on Recon. at 3.

It is claimant's burden to establish his inability to perform his usual work due to his work injuries. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). The administrative law judge found that claimant's knee injury, as well as his symptoms of hip pain at work from October to December 2007, are work-related. The administrative law judge, however, did not explicitly address the circumstances under which claimant stopped working in December 2007. Claimant testified that he left longshore employment, based on the recommendation of Dr. Weintraub, due to a combination of left hip and right knee pain that was aggravated by his working conditions. HT at 112-114, 128-129; *see also* CX 121 at 38-39. Dr. Gibbs testified by deposition that claimant told him at an office visit on December 5, 2007, that he had intended to continue working until July 2008.[2] CX 117 at 403-404. The administrative law judge found that claimant

[1]The administrative law judge found claimant entitled to, and Kinder liable for, a scheduled award based on a 55 percent permanent partial impairment of the right knee. 33 U.S.C. §908(c)(2).

[2]In its response brief, Kinder contends that there was no need for the administrative law judge to address claimant's alleged permanent total disability, since claimant voluntarily retired due to totally disabling non-work-related VBI. If claimant's departure is due solely to considerations other than the work injury, his retirement is voluntary and claimant is limited to a permanent partial disability award based on his degree of permanent physical impairment. 33 U.S.C. §902(10); *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins.*

established work-related left hip and right knee injuries in December 2007 based on the temporary aggravation of his hip symptomatology and permanent aggravation of his right knee condition from his employment for Kinder prior to stopping work on December 19, 2007. Decision and Order at 32-35. Once the administrative law judge found that claimant sustained hip and knee injuries at Kinder in December 2007, he was required to address whether claimant established his inability to return to work due to these work injuries. *See generally Padilla*, 34 BRBS 49. Accordingly, we vacate the administrative law judge's finding that claimant is not entitled to compensation for permanent total disability, and we remand the case for the administrative law judge to address this issue. Specifically, the administrative law judge must determine whether claimant was unable to continue in his usual employment due to either his work-related left hip or right knee conditions or due a combination of these conditions. *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Upon such a showing and in the absence of any evidence of record of suitable alternate employment, claimant would be entitled to continuing compensation for total disability. *See generally Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Moreover, the administrative law judge misstated the law when he found that claimant is not entitled to permanent total disability because the aggravation rule applies only when the pre-existing and aggravating injuries are to the same body part. In *Love v. W. M. Schlosser Co.*, 9 BRBS 749 (1978), the Board reversed a permanent partial disability award and awarded permanent total disability compensation where the administrative law judge had limited the application of the aggravation rule to related conditions. The claimant was entitled to compensation for permanent total disability due to the combination of his work-related knee injury and unrelated pre-existing conditions. *Love*, 9 BRBS at 752-753. This statement of law has subsequently been applied by the United States Court of Appeals for the Sixth Circuit in *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998), wherein the court affirmed a permanent total disability award based on multiple pre-existing conditions and injuries and a work-related back injury, and by the Board in *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990). As claimant asserted in his motion for reconsideration to the administrative law judge, it is well-established that the employment-related injury need

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Guar. Ass'n v. Director, OWCP, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). In this case, there is no evidence that claimant stopped working in December 2007 due to VBI. Instead, claimant stated his intention to Dr. Gibbs on December 5, 2007, to continue working, he reported no VBI episodes during the previous four to five months, and, based on the absence of episodes and fewer symptoms, Dr. Gibbs stated in December 2007 that the VBI was "clinically better." CX 117 at 403-404, 413. Therefore, there is not substantial evidence that claimant "voluntarily" retired due to non-work-related VBI.

not be the sole cause, or primary factor, in a disability for compensation purposes, *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984); *Haynes v. Washington Metropolitan Area Transit Authority*, 7 BRBS 891 (1978); it is sufficient if the employment injury aggravates, accelerates, or combines with, a prior disease or infirmity to result in disability, *O'Leary*, 357 F.2d 812; *Marko*, 23 BRBS 353. On remand, the administrative law judge must address in accordance with these principles whether claimant has established his inability to return to his usual work due to his work injuries.[3]

RESPONSIBLE EMPLOYER

Hip Surgery and Resulting Disability

Claimant contends the administrative law judge erred by finding that Kinder is not liable for his left hip surgery and resulting disability. BRB No. 11-0749. Claimant contends that the administrative law judge's finding that claimant established work-related hip injuries with Kinder in 2006 and 2007 mandates a conclusion that it is liable for claimant's hip surgery.

The rule for determining the responsible employer for the totality of a claimant's disability in a case involving cumulative traumatic injuries is well established. If the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury, and, accordingly, the employer at the time of that injury is liable for any benefits due. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with the claimant's prior injury, resulting in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004; *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). A subsequent employer may be found responsible for an employee's benefits even when the aggravating injury is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *O'Leary*, 357 F.2d 812*; see also Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Abbott*, 14 BRBS 453.

[3]The administrative law judge also must address Kinder's request for Section 8(f) relief if it is found liable for permanent disability benefits for more than 104 weeks.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). Claimant did not work between October 23, 2006, and the date of his hip replacement surgery in July 2007. The administrative law judge rationally credited the opinion of claimant's treating physician, Dr. Weintraub, that claimant's hip condition was exactly the same on September 26, 2006 and on March 3, 2007, as supported by the opinion of Dr. Fuller that claimant did not damage his hip while working at Kinder, the x-ray evidence, and claimant's previous complaints of hip pain[4] to find that claimant did not permanently aggravate his hip condition during the discrete period of employment with Kinder in October 2006. Thus, as substantial evidence supports the administrative law judge's determination that claimant did not sustain an employment-related aggravation of his hip condition during the course of his employment for Kinder on October 23 and 24, 2006, *see Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, 7 F.App'x 547 (9th Cir. 2001), we affirm the administrative law judge's finding that Kinder is not liable for claimant's hip replacement surgery in July 2007.

Second Knee Surgery and Permanent Partial Disability

Rogers appeals the administrative law judge's finding that it is the employer responsible for claimant's temporary total disability from May 17 to October 6, 2006, following his second right knee surgery and for a 25 percent permanent partial disability. BRB No. 11-0749B. Rogers contends that it rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), and that, based on the record as a whole, claimant failed to establish a connection between his employment with Rogers and the subsequent period of temporary total disability. Rogers argues that either Jones is liable for the surgery and disability on a natural progression theory or Kinder should be held liable for the totality of claimant's right knee condition as claimant last sustained a knee injury in its employ.

In his decision, the administrative law judge found that claimant established he sustained a work-related knee injury at Jones on May 30, 2004, at Rogers on May 15 and 16, 2006, at Kinder on October 23, 2006, and during his last work shifts at Kinder in December 2007. The administrative law judge found that no employer rebutted the

[4]The administrative law judge found that the medical records show that claimant had complained of hip pain prior to his 2006 and 2007 shifts at Kinder; specifically, in 2000, and "off and on" since the hip fracture in 1958. CXs 42 at 71, 112 at 336. Thus, claimant's complaint of pain in 2006 and 2007 was not a new symptom.

Section 20(a) presumption. Decision and Order at 31-33. Specifically, the administrative law judge found that Rogers "does not dispute claimant's testimony of having endured constant discomfort in association with weight-bearing activities since his first knee surgery in 2004." *Id*. at 33; HT at 97-98, 133. On reconsideration, the administrative law judge stated that, under *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010), Rogers must present substantial evidence to rebut the Section 20(a) presumption with regard to the totality of claimant's covered employment and not just his shifts with Rogers. Order at 6. He thus found that as claimant testified that his knee bothered him while he worked for Rogers, the Section 20(a) presumption was not rebutted.

The administrative law judge further found Rogers to be the employer responsible for claimant's second knee surgery on May 17, 2006, and the resulting disability based on claimant's testimony that he engaged in weight-bearing activities during his two shifts for Rogers prior to undergoing this surgery and the opinions of Drs. Weintraub and Coletti that these activities contributed to the need for this surgery. Decision and Order at 40; CXs 119 at 444, 449-450, 121 at 511. The administrative law judge rejected Rogers' contention that the surgery was due to the natural progression of the injury with Jones or that Kinder should be liable for any disability related to the cumulative trauma that existed at the time of claimant's second knee surgery.

We need not address Rogers' contentions concerning the scope of the Section 20(a) presumption in this case because substantial evidence supports the administrative law judge's finding that claimant's employment with Rogers on May 15-16, 2006, contributed to claimant's need for surgery. The administrative law judge credited the opinions of Drs. Weintraub and Coletti that the foreman work performed by claimant for Rogers on May 15 and 16, 2006, contributed to the progression of claimant's knee condition and to his need for surgery. The administrative law judge also relied on claimant's testimony that he had increased symptoms and pain while working in that capacity. As this employment aggravated claimant's condition, Jones cannot be held liable on a natural progression theory. *See Price*, 339 F.3d 1102, 57 BRBS 89(CRT). Moreover, the administrative law judge properly rejected Rogers' contention that Kinder is the responsible employer since it last employed claimant. In *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.*, 377 F. App'x 640 (9th Cir. 2010), the Board held that the responsible employer is not liable for medical treatment provided prior to the time it employed the claimant as there must be a rational connection between the employment and the resulting injury for which benefits are sought. *Lopez*, 39 BRBS at 92, (citing *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) and *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 840, 24 BRBS 137, 142-143(CRT) (9th Cir. 1991)). In this case, claimant sought compensation and medical benefits for his May 17, 2006, knee surgery,

which arose prior to the periods the administrative law judge found aggravation of claimant's knee condition at Kinder in October 2006 and December 2007. As there is no connection in this case between this May 2006 surgery and claimant's subsequent employment at Kinder in October 2006 and December 2007, it cannot be the employer responsible for compensation and medical benefits related to this surgery. *See Ronne I*, 932 F.2d at 840, 24 BRBS at 142-143(CRT). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that Rogers is the employer responsible for compensation and medical benefits related to the May 17, 2006, knee surgery. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT).

AVERAGE WEEKLY WAGE

Kinder appeals the administrative law judge's average weekly wage findings with respect to awards post-dating the award for the 2004 injury. BRB No. 11-0749A. Kinder contends that the administrative law judge erred by using claimant's earnings during the year prior to his undergoing surgery on August 11, 2004, to determine his average weekly wage for subsequent injuries.[5]

Applying Section 10(c),[6] the administrative law judge found that claimant's total earnings during the year prior to August 11, 2004, divided by 52, produce an average weekly wage of $2,267 and that this average weekly wage "reasonably represents" claimant's wage-earning capacity for claimant's various periods of disability from 2004 to 2007 "when adjusted by an annual increase in the NAWW." Decision and Order at 50.[7]

[5]We reject the contention of Kinder and Rogers that claimant was totally disabled by his VBI as of this time and thus had an average weekly wage of zero. *See* n.2, *supra.*

[6]The administrative law judge properly found that neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), applies in this case. *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

[7]The administrative law judge concluded, "[T]hese rates result in the following average weekly wages: $2,303 as of October 1, 2004, due to a 1.59 percent increase on this date; $2,361 as of October 1, 2005, due to a 2.53 percent increase on this date; $2,451 as of October 1, 2006, due to a 3.80 percent increase on this date; and $2,552 as of October 1, 2007, due to a 4.12 percent increase on this date." Decision and Order at 50.

On reconsideration, the administrative law judge rejected Kinder's contention that, pursuant to *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000), the average weekly wage used to calculate its liability should have been determined as of the time of claimant's third knee injury on December 19, 2007. The administrative law judge found that *Ronne II* is inapplicable since claimant continued working after his first knee injury and that *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), is applicable, since claimant was not disabled until after the date of his May 2004 knee injury. Moreover, the administrative law judge found that, under *Bonner v. Nat'l Steel & Shipbuilding Co.*, 600 F.2d 1288 (9th Cir. 1979), he has broad discretion to base claimant's average weekly wage in December 2007 on claimant's earnings during the year preceding his undergoing knee surgery on August 11, 2004. *Id*.

We agree with Kinder that the administrative law judge erred by basing his average weekly wage calculations on claimant's earnings prior to his August 2004 right knee surgery. *Johnson* is applicable in latent injury cases, and not, as here, where claimant sustained two work-related aggravations of a non-latent injury. *Ronne II*, 192 F.3d 933, 33 BRBS 143(CRT). Thus, benefits for claimant's disabling back injury in 2006 should be based on claimant's average weekly wage at the time of the 2006 back injury. *Id.* Moreover, the Board has stated that in cases involving multiple injuries arising under the schedule claimant's average weekly wage should be based on his average weekly wage at the time of each injury.[8] In *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003), the Board held that, pursuant to *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir.2002), the claimant, who had filed a claim for hearing loss measured in 1995, and a second claim against a subsequent employer for additional hearing loss measured in 1998, was entitled to two awards payable by each employer. The Board stated that the subsequent

[8]Similarly, for non-scheduled injuries, it is well established that where an employee sustains an injury which aggravates a prior condition, his average weekly wage for the resulting disability is based on his earnings at the time of the aggravation, which usually is the claimant's residual wage-earning capacity after the initial work injury. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *see also Ronne II*, 192 F.3d 933, 33 BRBS 143(CRT). In *Brady-Hamilton Stevedore Co. v. Director, OWCP [Anderson]*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995), the Ninth Circuit adopted the methodology used in *Hastings*. *Id.*, 58 F.3d at 421, 29 BRBS at 102(CRT). Under appropriate circumstances, a claimant with two non-scheduled injuries is entitled to concurrent awards. *Id.*

employer's liability is based on the average weekly wage at the time of the aggravating injury, and that it is entitled to a credit for the amount paid by the first employer. *Giacalone*, 37 BRBS at 90; *see also Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd in pert. part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989) (claimant entitled to an award for second left knee injury based on the average weekly wage at the time of the subsequent injury). Accordingly, in this case, claimant's average weekly wage at the time of his second knee injury with Rogers should have been calculated under Section 10 at the time of that injury on May 16, 2006, and not based on an adjusted average weekly wage calculated with reference to his wages at the time he underwent surgery for the first knee injury on August 11, 2004. Similarly, Kinder correctly argues that claimant's average weekly wage at the time of his third knee injury on December 19, 2007, should have been calculated under Section 10 at the time of that injury. *See generally Anderson v. Todd Shipyards, Inc.*, 13 BRBS 593 (1981); *see also New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir.1997) (noting absence of substantial evidence for administrative law judge's decision to skip over three years' wages immediately preceding injury). Therefore, we vacate the administrative law judge's average weekly wage findings from October 1, 2004, forward and we remand the case for the administrative law judge to redetermine claimant's average weekly wage at the date of his May 2006 knee injury with Rogers, at the date of his October 2006 back injury with Kinder, and at the date of his December 2007 knee and hip injuries with Kinder. *See generally Anderson*, 58 F.3d 419, 29 BRBS 101(CRT); *Hastings*, 628 F.2d 85, 14 BRBS 345; *Giacalone*, 37 BRBS 87.

CREDIT DOCTRINE

Claimant challenges the administrative law judge's application of the credit doctrine on a percentage basis, rather than based on the dollar amount of the prior award(s). The "credit doctrine" was developed to preclude double recovery under the schedule where a claimant has had prior injuries to the same part of the body which were already compensated. In cases under the schedule where the claimant had a prior injury that had already been compensated, and a subsequent injury results in increased disability to the scheduled body part, employer is liable only for the increased disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 522, 18 BRBS 45, 55(CRT) (5th Cir. 1986) (en banc). The subsequent employer receives a credit for the actual dollar amount of compensation paid for the prior injury rather than for the prior percentage of impairment so as to avoid derogation of the aggravation rule. *Giacalone*, 37 BRBS at 90; *see Brown*, 868 F.2d 759, 22 BRBS 47(CRT); *see also Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2nd Cir. 1993).

In this case, the administrative law judge did not properly apply the credit doctrine. The administrative law judge found Jones liable for a 10 percent permanent impairment for the May 30, 2004, right knee injury and ordered Jones to pay claimant for 28.8 weeks (288 x .10). Decision and Order at 44-47, 53; *see* 33 U.S.C. §908(c)(2), (19). The administrative law judge found Rogers liable for a 15 percent permanent impairment disability for the May 16, 2006, right knee injury (25% impairment at time of second surgery less 10% impairment from May 30, 2004, injury) and ordered Rogers to pay claimant for 43.2 weeks (288 x .15). The administrative law judge then found Kinder liable for a 30 percent permanent impairment for the December 19, 2007, right knee injury (55% impairment less 25% impairment from prior injuries) and ordered Kinder to pay claimant for 86.4 weeks (288 x .30).

The administrative law judge erred by giving Rogers and Kinder a credit for the percentage of impairment paid by the prior employer(s) rather than for the actual dollar amounts paid to claimant by Rogers and Kinder. Accordingly, the permanent partial disability awards payable by Rogers and Kinder are vacated. On remand, Rogers is liable for a 25 percent permanent impairment for the second knee injury payable at the average weekly wage the administrative law judge finds applicable. Rogers is entitled to a dollar for dollar credit for the amount paid by Jones for the initial 10 percent permanent partial disability ($29,686.46 = 28.8 weeks x $1,030.78). *See Brown*, 868 F.2d 763-764, 22 BRBS at 51-52(CRT). Kinder is liable for a 55 percent permanent impairment for the third knee injury payable at the average weekly wage the administrative law judge finds applicable. Kinder is entitled to a dollar for dollar credit for the actual amounts previously paid by Jones for the initial 10 percent permanent partial disability and Rogers for the subsequent 25 percent permanent partial disability.[9] *Id*.

SECTION 17

Rogers argues that the administrative law judge erred by failing to analyze whether the Plan followed the procedural requirements for perfecting a lien against it. Specifically, the Plan did not file an application for a lien against Rogers with the district

[9]Rogers asserts that its permanent partial disability liability for claimant's knee impairment should be reduced if claimant is awarded permanent total disability compensation from December 19, 2007. Petition for Review at 41-43. Rogers was found liable for 43.2 weeks of permanent partial disability compensation commencing October 6, 2006. Any permanent total disability award in this case would not commence until over a year later on December 20, 2007, when claimant stopped working. Accordingly, this assertion is meritless.

director. In his order, the administrative law judge directed claimant to repay the Plan for money received from Rogers.[10] Order on Recon. at 8.

Section 17 of the Act states:

> Where a trust fund which complies with section 186(c) of Title 29 established pursuant to a collective-bargaining agreement in effect between an employer and an employee covered under this chapter has paid disability benefits to an employee which the employee is legally obligated to repay by reason of his entitlement to compensation under this chapter or under a settlement, the Secretary shall authorize a lien on such compensation in favor of the trust fund for the amount of such payments.

33 U.S.C. §917. The implementing regulation states that "An application for such a lien shall be filed on behalf of the trust fund with the district director," 20 C.F.R. §702.162(b)(1), and further provides that the district director is to take specified action on the lien claim. 20 C.F.R. §702.162(c)-(j). If neither the compensation claim nor the lien claim is contested, the district director is to enter an order awarding benefits and to notify the parties "of the amount of the lien and manner in which it is to be paid." 20 C.F.R. §702.162(d). If the compensation claim and/or the lien claim is contested, the case is to be transferred to the Office of Administrative Law Judges (OALJ); the administrative law judge is to rule on the application for a lien. 20 C.F.R. §702.162(e)-(g).

In this case, claimant filed a claim against Jones for his work injuries. Kinder was joined by Jones. After the claim was transferred to the OALJ, Rogers was joined by Kinder as a party. The Plan filed a lien application with the district director naming Jones that conformed with Section 702.162.

[10]In its motion for reconsideration, the Plan asserted that it had a lien against Kinder totaling $74,932.14 and a lien against Rogers totaling $27,611.86. In his Order, the administrative law judge accepted the Plan's calculations and stated that Kinder had overpaid the Plan by paying it $76,267.04. The administrative law judge, therefore, ordered claimant to reimburse the Plan $26,276.96, rather than $27,611.86. Order at 8. Accordingly, Rogers does not have any financial interest in having the Plan's lien voided.

The Board has stated that Section 702.162(c) provides that only the claimant may dispute "the right of the trust fund to the lien or the amount stated," 20 C.F.R. §702.162(c), thus, the employer did not have any right to challenge the propriety of the Section 17 liens. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, 7 n.16 (2009), *clarified on other grounds on recon.*, 43 BRBS 115 (2009). Similarly, in this case, Rogers does not have standing to challenge the Plan's lien on Rogers' compensation liability to claimant. There is no financial effect on Rogers as claimant was ordered to repay the Plan's lien. *See* n.13, *supra*. Accordingly, Rogers' contention that it was denied due process because the Plan did not file an application for a lien with the district director naming it as a potentially responsible employer is rejected.

Accordingly, the administrative law judge's decisions are vacated as stated herein, and the case is remanded for further proceedings in accordance with this opinion. The administrative law judge shall determine, pursuant to the applicable law: claimant's entitlement to compensation for permanent total disability after he stopped working on December 19, 2007; his average weekly wage at the time of his May 2006 knee injury with Rogers, the October 2006 back injury with Kinder, and the December 2007 knee and hip injuries with Kinder; and the dollar amount of the credit due Rogers and Kinder for the percentage of impairment paid by the prior employer(s) for claimant's work-related knee impairment. In all other respects, the administrative law judge's decisions are affirmed.

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