BRB No. 12-0306

ERIC LENTZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 01/29/2013
	)	
Employer/Carrier-Respondent	)	
	)	
MCCABE, HAMILTON AND RENNY COMPANY, LIMITED	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision Dismissing McCabe of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim and John C. Gibson (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Richard C. Wootton and Galin G. Luk (Cox, Wootton, Griffin, Hansen & Poulos, L.L.P.), San Francisco, California, for McCabe/Seabright.

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

PER CURIAM:

Claimant appeals the Order Granting Motion for Summary Decision Dismissing McCabe (2011-LHC-01948) of Administrative Law Judge Jennifer Gee 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 has been a long-term employee of McCabe, Hamilton & Renny (McCabe), a stevedoring contractor. He testified by deposition that McCabe pays his wages and controls his leave. However, he also testified that the majority of his work has been for Matson Terminals on Matson property. On November 8-9, 2010, claimant was working the night-shift as a loaned employee to Matson.[1] Both claimant and Matson confirm this. Claimant stated he was driving a truck, which aggravated both his upper back pain and a limpoma growth on his back. He filed claims against both employers. McCabe moved to be dismissed from the case, arguing it is not the responsible employer. Matson filed a letter in support of that motion, stating it was not defending the claim on a "responsible employer" ground but on the ground that claimant's condition is not work-related.

The administrative law judge granted McCabe's motion for summary decision. She found that claimant did not offer any persuasive argument to counter McCabe's evidence that claimant worked for Matson on the date of the alleged injury. Specifically, the administrative law judge found that claimant did not deny he worked for Matson under its control on the date of the alleged injury. The administrative law judge also found that claimant did not offer any evidence to counter Ms. Foreman's affidavit concerning the labor loan agreement (LLA), *see* n.1, *supra,* or establish the significance of McCabe's failure to offer a written copy of the LLA in support of its motion for summary decision. The administrative law judge concluded that there are no disputed material facts as to McCabe, as claimant alleged he was injured on a particular date while working for Matson under its control. Accordingly, she found that claimant was a borrowed employee of Matson's at the time of his alleged injury. As Matson accepted responsibility if the injury is otherwise compensable, the administrative law judge

[1]McCabe offered an affidavit from its Director of Human Resources, Ms. Foreman, who declared that, under the terms of the labor loan agreement (LLA), McCabe sends workers to Matson. The workers' work is controlled by Matson, and Matson pays McCabe the value of the workers' wages and benefits. McCabe, in turn, pays the workers their wages. Ms. Foreman declared that claimant worked for Matson on the November 8-9, 2010 shift.

granted McCabe's motion for summary decision and dismissed it from the case.[2] Additionally, the administrative law judge prospectively limited counsel's fee for the work performed in relation to McCabe's participation in this case.

Claimant appeals the administrative law judge's Order dismissing McCabe from the case. He also challenges the administrative law judge's prospective denial of certain attorney's fees. McCabe responds, urging affirmance of its dismissal from the case.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40(c), 18.41(a). For the reasons below, we conclude that the administrative law judge properly granted McCabe's motion for summary decision.

It is axiomatic under the Act that the aggravation of a prior condition constitutes a new injury and liability therefor must be assumed by the employer for whom the claimant was working at the time the aggravation occurred. *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); *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem.*, No. 81-7801 (9th Cir. 1982). It also is a general principle of workers' compensation law that, if a claimant is injured while working for a borrowing employer which has control over his work, the borrowing employer is liable for the payment of the claimant's benefits. *See, e.g., Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006); *Fitzgerald v. Stevedoring Services of America*, 34 BRBS 202 (2001). In this case, neither employer disputes claimant's allegation that an injury occurred on November 9, 2010, and the administrative law judge properly found that claimant did not deny he was working for Matson under its control on that date.

[2]Specifically, the administrative law judge additionally rejected claimant's arguments that the following allegations raise a genuine issue of material fact requiring denial of McCabe's motion for summary decision: 1) that two types of injuries are involved – traumatic and cumulative – so both employers should remain in the case; 2) that McCabe always paid claimant's wages; and 3) that the LLA violates the Longshore Act as well as claimant's due process and equal protection rights because it confuses the employee as to which is the liable employer. Order at 4-5. The administrative law judge found that claimant's counsel was well aware of the LLA from at least one prior case. *Id.* at 3-4.

Indeed, Matson acknowledged its liability if the injury is otherwise compensable. Although McCabe is claimant's "nominal" employer, it cannot be held liable for the payment of claimant's benefits for the alleged November 9, 2010, injury, as the injury occurred with Matson, the borrowing employer who is liable for any compensable injury occurring on the date in question.[3] *Id.; see also Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). Therefore, claimant is not deprived of a potentially responsible employer upon McCabe's dismissal, and we reject claimant's due process contention.[4]

The administrative law judge concluded that McCabe's evidence demonstrates that claimant was a borrowed employee working for Matson at the time of his alleged injury, and that claimant failed to identify any genuine issues of *material* fact involving McCabe. This finding is rational, supported by substantial evidence, and in accordance with law. Therefore, we affirm the administrative law judge's dismissal of McCabe. *See, e.g., Smith v. Labor Finders*, 46 BRBS 35 (2012); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd mem. sub nom. Villaverde v. Director, OWCP*, 335 F.App'x 79 (2d Cir. 2009).

Claimant also contends the administrative law judge erred in prospectively limiting his attorney's fee by ordering a minimal fee, or no fee, for work performed against McCabe.[5] He argues that the administrative law judge erred in addressing this issue, as it was not raised in the motion for summary decision, and, as she may not be the judge who decides the case on the merits, she lacks authority to prospectively restrict counsel's fee award. Although, as claimant asserts, McCabe did not raise this issue in its

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[3]Claimant's argument that McCabe must remain in the case because his injury is "cumulative" is incorrect. Only the last covered employer may be held liable under the aggravation rule. *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); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Thus, despite any previous work-related contribution to claimant's ultimate condition, McCabe cannot be held liable for the alleged aggravation/injury on November 9, 2010, as claimant did not work under McCabe's control that day.

[4]Thus, in view of the "borrowed employee doctrine," claimant has not persuasively argued that the administrative law judge erred in finding that he failed to demonstrate the significance of the absence of the written LLA. *See generally Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003).

[5]As we have affirmed the dismissal of McCabe from the case, claimant's alternate position that Matson, who agreed with McCabe's position, should be held liable for counsel's fee for the work involving McCabe if McCabe remains in the case, is moot.

motion, the administrative law judge's dismissal of McCabe is final, and her order to limit counsel's fee is legally correct. That is, claimant was unsuccessful in opposing McCabe's dismissal from the case; therefore, his attorney is not entitled to a fee paid by employer for work on that severable, unsuccessful, issue. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *Terrell v. Washington Metro. Area Transit Auth.*, 36 BRBS 69 (2002) (order), *modified on other grounds on recon.*, 36 BRBS 133 (2002) (McGranery, J., concurring). Insofar as the administrative law judge's order regarding an attorney's fee relates solely to counsel's work on the issue of McCabe's participation in the case, we affirm the denial of an attorney's fee. All other issues involving counsel's fee, if one is awarded, are to be addressed by the administrative law judge following the decision on the merits of the case and the submission of a complete fee petition. 33 U.S.C. §928; 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Order Granting Motion for Summary Decision Dismissing McCabe is affirmed. The administrative law judge's finding as to counsel's fee is affirmed as limited above.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge