BRB Nos. 14-0124
and 14-0124A

ANTHONY K. WALLACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: Nov. 20, 2014
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
	)	
TARTAN TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
PORTS AMERICA, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Compensation and Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Patrick M. Wysong (Berman, Sobin, Gross, Feldman & Darby, L.L.P.), Towson, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for Ceres Marine Terminals, Inc.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for Tartan Terminals, Inc. and American Longshore Mutual Association.

Christopher J. Field (Field, Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for Ports America, Inc., and Ports Insurance, Inc.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Ceres Marine Terminals appeals the Decision and Order Awarding Compensation and Benefits (2013-LHC-01282, 01283) of Administrative Law Judge Stephen R. Henley 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).

On September 25, 2010, claimant was working as a longshoreman for Tartan Terminals (Tartan) when he injured his back by stepping into a hole. Tartan paid claimant temporary total disability benefits from September 27 through December 3, 2010, and from December 17, 2010, through April 11, 2011, when he was released to return to work without restrictions. Claimant thereafter worked for various employers. On November 13, 2011, claimant worked for Ceres Marine Terminals (Ceres), lifting and throwing luggage. He stated that this work caused pain in his back, and he went to the

hospital for treatment on November 16 and 19. Claimant worked for Ports America on November 14 and 17, 2011, directing traffic. TR at 27-57. Claimant filed a claim for benefits on September 26, 2012, and he underwent low back surgery, a laminectomy and fusion at L3-L4 and L4-L5, in November 2012. CX 10; EXs 1, 57.

The parties stipulated to the compensability of claimant's injury, but contested which employer is the responsible employer. The administrative law judge found that Ceres is the responsible employer, as the evidence establishes that the 2011 injury aggravated, accelerated, or combined with the 2010 condition to result in claimant's disability and need for surgery; the administrative law judge thus rejected Ceres's argument that claimant's condition is the natural progression of his 2010 injury. Decision and Order at 13-15. The administrative law judge awarded claimant temporary total disability from November 18, 2011 to January 22, 2013, and medical benefits payable by Ceres. *Id*. at 3, 16. Ceres appeals the finding that it is the responsible employer. Tartan, Ports America, and claimant respond to the appeal, urging affirmance.[1] BRB No. 14-0124. The Director, Office of Workers' Compensation Programs (the Director), cross-appeals, and Ceres responds, in partial agreement with the Director. BRB No. 14-0124A.

We shall first address the Director's cross-appeal. In identifying the positions of the parties, the administrative law judge stated that the district director had previously denied Ceres's application for Section 8(f), 33 U.S.C. §908(f), relief because the application did not establish that claimant has a permanent impairment. The administrative law judge stated that, in a supplement to the application dated July 11, 2013, Ceres acknowledged the claim was for temporary total disability benefits and, thus, that its Section 8(f) application was probably premature. The administrative law judge denied the application for Section 8(f) relief because there was no allegation that claimant's disability is permanent. Decision and Order at 5. However, in a footnote, the administrative law judge also stated that the record contains evidence that claimant's condition had reached maximum medical improvement. The administrative law judge further stated that, if and when it is established that claimant has a compensable permanent disability of at least 104 weeks, "it appears the Special Fund would then be responsible" pursuant to Section 8(f) for either paying claimant or for reimbursing Ceres because Ceres would be able to show that claimant's condition was not the result of the 2011 injury alone. *Id*. at n.7. As Section 8(f) relief does not apply to cases involving temporary disabilities, *Pacific Ship Repair & Fabrication Inc. v. Director, OWCP* [*Benge*], 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012); *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985), the administrative law judge properly

[1] The administrative law judge found that claimant's subsequent work directing traffic for Ports America did not aggravate his back condition. No party disputes this finding.

denied Section 8(f) relief on this basis, and as the Section 8(f) issue was not fully litigated, it was improper for the administrative law judge to suggest that Section 8(f) would be applicable in this case. Accordingly, we strike footnote 7 of the administrative law judge's decision.

Turning now to the appeal by Ceres, it contends the administrative law judge erred in holding it liable for claimant's disability and surgery, as claimant's disability is the natural result of claimant's 2010 injury with Tartan. It asserts that the incident at its facility in 2011 did not cause a permanent change to claimant's existing back condition; thus, at most, it may be held liable for benefits for a temporary exacerbation.

In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling condition is the result of the natural progression or an aggravation of a prior injury. If the claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, the prior injury is the compensable injury and the claimant's employer at that time is responsible. If, however, the subsequent injury aggravates, accelerates, or combines with the earlier injury to result in the claimant's disability, the subsequent injury is the compensable injury and the subsequent employer is responsible. *See*, *e.g.*, *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *see generally Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998) (aggravation rule).

In this case, there are conflicting medical opinions regarding the effect of the Ceres incident on claimant's back condition. Contrary to employer's assertions, the administrative law judge addressed the relevant evidence, rationally assessed the credibility and weight to be given to the opinions, and explained his reasons for concluding that the injury at Ceres aggravated the prior back condition. Specifically, the administrative law judge found that Dr. Gordon had released claimant to return to work in April 2011 with no restrictions. Although claimant did not return to Tartan because he felt he could not perform the work there, he worked 117 days between April and September 2011 as a longshoreman for other employers. In October 2011, he worked 21 days, and in November, he worked 13 days before he could no longer work due to the onset of back pain following the work at Ceres. Decision and Order at 8-9; TXs 11, 12, 23. The administrative law judge rationally rejected claimant's statements at the hearing which contradicted his statements and actions which were contemporaneous with the injury. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Specifically, he found that claimant's assertion that the pain was no worse after November 13, 2011, than it had been before his work at Ceres was belied by his statements to hospital personnel on November 16 and 19,

2011, that he had recently experienced severe back pain after lifting heavy objects. TXs 4-5; TR at 35-37, 56.[2] Thus, the administrative law judge credited the contemporaneous statements to find that claimant had an onset of severe pain as a result of his work for Ceres. Decision and Order at 14.

The administrative law judge also credited Dr. Cohen's opinion that the 2011 incident aggravated claimant's back condition, rejecting Ceres's assertion that Dr. Cohen's opinion should not be credited because he changed it. The administrative law judge explained that claimant had withheld information from Dr. Cohen, leading him to erroneously conclude that the 2010 injury was the cause of claimant's current pain. When Dr. Cohen learned of the 2011 injury, he concluded that the luggage lifting caused the type of injury that combined with claimant's prior condition and resulted in his disability and his need for back surgery. Decision and Order at 15; TXs 1, 24.[3] Moreover, although Drs. Pollak and Matz stated that the lifting of heavy luggage did not result in a major change to claimant's back condition, the administrative law judge noted that their focus was, improperly, on how badly the 2011 incident had aggravated claimant's condition as opposed to whether it had aggravated the condition at all. Decision and Order at 15. CXs 3-4, 61; EXs 59, 68.

As the administrative law judge properly stated, under the aggravation rule, a second injury need only aggravate, exacerbate, or combine with a prior condition and result in a disability to be compensable. There is no requirement that the second injury fundamentally or permanently alter the underlying condition, as a worsening of a claimant's symptoms is sufficient. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005). As the record contains substantial evidence supporting the administrative law judge's finding that the injury in 2011 aggravated and/or combined with claimant's back condition following his 2010 injury at Tartan, resulting in his disability and the need for surgery, we affirm the finding that Ceres is responsible for benefits related to claimant's back condition following the November

[2] Claimant testified that he did not intend to file a claim against Ceres because he had been in pain since the back injury at Tartan. TR at 56. The administrative law judge found that claimant's average weekly wage was higher at Tartan such that claimant was understandably reluctant to attribute his pain to the work at Ceres. Decision and Order at 3, 14; JX 1.

[3] Dr. Cohen explained that he relied on a combination of factors in rendering his opinion, including a comparison of MRI exam results in which the more recent MRIs revealed new findings not found in the December 2010 MRI. TXs 8-9, 24. He stated that the more recent exams, dated December 2011 and October 2012, revealed a disc herniation at L4-5, a pars fracture, and anterolisthesis. TX 24.

2011 incident. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Accordingly, footnote 7 of the administrative law judge's Decision and Order is stricken. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge