

L.B.)
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 Claimant-Respondent)
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 v.)
)
 BRUSCO TUG & BARGE,) DATE ISSUED: 12/16/2008
 INCORPORATED)
)
 Employer)
)
 AIG CLAIMS SERVICES)
)
 Carrier-Petitioner)
)
 ALASKA NATIONAL INSURANCE)
 COMPANY)
)
 Carrier-Respondent)
) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee,
Administrative Law Judge, United States Department of Labor.

Derek B. Jacobson (McGuinn, Hillsman & Palefsky), San Francisco,
California, for claimant.

Michael D. Doran (Samuelson, Gonzalez, Valenzuela & Brown), San
Pedro, California, for AIG Claims Services.

Michael W. Thomas (Laughlin, Falbo, Levy & Moresi, LLP), San
Francisco, California, for Alaska National Insurance Company.

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

PER CURIAM:

AIG Claims Services (AIG) appeals the Decision and Order Awarding Benefits (2006-LHC-1470) 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).¹ 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole issue presented by this appeal is whether the administrative law judge erred in finding AIG to be the carrier responsible for the payment of claimant's temporary total disability and medical benefits. This case involves a claim for compensation under the Act for a specific injury to claimant's lower back sustained on June 23, 2004 in the course of his employment with employer and for cumulative trauma to his lower back sustained through February 22, 2005, his last day of employment with employer.²

On June 23, 2004, as claimant bent over to pick up a heavy piling, something "popped" in his back, and he experienced pain in his lower back and right leg. Tr. at 48-50, 84-86, 101; AIGX 1 at 59. At the time of the June 23, 2004 injury, Alaska National Insurance Company (ANIC) provided workers' compensation insurance coverage to employer, and it remained on the risk through December 31, 2004. Employer referred claimant to Dr. Telep, a Board-certified orthopedic surgeon, on June 28, 2004.³ Tr. at 57-

¹ We accept AIG's filing on July 8, 2008, of a supplemental brief and the unpublished decision of the United States Court of Appeals for the Ninth Circuit in *Manson Constr. Co. v. Brown*, No. 06-75824 (9th Cir. June 17, 2008). 20 C.F.R. §802.215.

² The claim for compensation under the Act filed by claimant originally included an additional injury to his lower back sustained on May 7, 2003 while in the course of his employment with employer. CX 8 at 148. Subsequently, claimant withdrew the claim regarding the May 7, 2003 injury as it appeared that coverage for that injury was under the Jones Act, 46 U.S.C. App. §688(a), rather than under the Longshore Act. CX 8 at 128A. The administrative law judge found that the May 7, 2003 injury was the first in a succession of work-related injuries causing claimant to experience continuing pain in his lower back and right leg. Decision and Order at 4-5.

³ Dr. Telep continued to treat claimant as of the date of the hearing, and examined him every two to four weeks. Tr. at 60, 76; CX 1; AIGX 3; ANICX 10.

58; AIGX 1 at 72, 74, 96; CX 1 at 1-8. Dr. Telep diagnosed claimant with lumbar spasm and released him to return to modified work, CX 1 at 6; on July 22, 2004, Dr. Telep released claimant to his regular work. CX 1 at 15-16.

Claimant testified that after his June 23, 2004 injury, he had difficulty performing his assigned work, specifying that bending, stooping and using his right leg to operate a foot brake were activities that caused him problems. Tr. at 60-61. He further testified that following his June 23, 2004 injury, his pre-existing lower back pain markedly worsened and he began to experience pain extending down his right leg into his foot. *Id.* at 60-61, 84-86; AIGX 1 at 68, 70-73, 75-78, 91-92. He indicated that his lower back and leg pain progressively worsened with the performance of his assigned job duties. Tr. at 61-65, 94-98; AIGX 1 at 76-79, 91-92.

On January 1, 2005, employer's workers' compensation insurance carrier changed from ANIC to AIG, and, thus, AIG was on the risk from that date through February 21, 2005, claimant's last day of work for employer. On January 4, 2005, claimant underwent an MRI of his lumbar spine, which was interpreted as showing a borderline bulged disc at L3-4; a mild disc protrusion at L4-5 with an associated annular tear with possible impingement on right L5 nerve root; mild disc extrusion at L5-S1 with possible impingement on S1 nerve root; slight posterior subluxation of L5 upon S1; and mild central canal stenosis at L4-5. CX 2. Claimant performed particularly heavy work from February 14 to February 17, 2005, when he was assigned to repair a large hole in a barge located in Collinsville.⁴ Tr. at 65; AIGX 15 at 587-588. He testified that after performing this work assignment, his back and leg pain got much worse. *Id.* at 68, 71; AIGX 1 at 120.

Claimant's last day of work for employer was February 21, 2005; at the end of the work day, he was told that he would be assigned to permanent work as a tugboat deck

⁴ This work assignment required claimant to cut a steel plate into two pieces weighing from 75 to 100 pounds each. He then dragged the piece of steel down one ramp and up another ramp and across a flat deck. Then he cut the steel plate into pieces and pushed them through a manhole in the barge. Tr. at 65-68, 100-101; AIGX 1 at 109-119, 122-124, 132-133.

engineer on a bridge project which was the only work employer had available for him.⁵ Tr. at 70, 90-91; AIGX 1 at 16-17, 21-22, 80, 83; AIGX 14 at 526-528, 556-557. On the same date, claimant saw Dr. Telep, who took him off work and placed him on temporary total disability.⁶ ANICX 10 at 49-51; AIGX 2 at 182-185; Tr. at 71-72, 88-89, 103; AIGX 1 at 79-82, 86-89.

Claimant has not worked since February 21, 2005. Tr. at 72. ANIC has voluntarily paid claimant compensation for temporary disability commencing February 22, 2005, as well as medical benefits. Decision and Order at 3; Tr. at 9-11.

In her Decision and Order, the administrative law judge found that claimant sustained work-related injuries on June 23, 2004 and in February 2005, that he has not yet reached maximum medical improvement, and that he has been totally disabled since February 22, 2005. Decision and Order at 18, 23-25. With respect to the responsible carrier issue, the administrative law judge found that claimant sustained cumulative trauma to his back from January 1, 2005 through February 21, 2005, and that “[t]his cumulative trauma aggravated and combined with his prior injuries to result in his present disability.” *Id.* at 22. The administrative law judge therefore found AIG liable to claimant for ongoing temporary total disability benefits commencing on February 22, 2005,⁷ and medical benefits. *Id.* at 22, 25. The administrative law judge further found AIG entitled to a Section 3(e), 33 U.S.C. §903(c), credit for compensation paid to claimant pursuant to the California workers’ compensation statute, and she found ANIC entitled to reimbursement from AIG for the benefits it paid to claimant. *Id.* at 24-25.

On appeal, AIG challenges the administrative law judge’s determination that it is the carrier responsible for the payment of claimant’s awarded benefits. ANIC and claimant have responded, urging affirmance.

⁵ Claimant, however, felt that he would not be physically capable of performing the strenuous labor required of a deck engineer on a permanent basis. Tr. at 70-71, 82-83; AIGX 1 at 16-27, 30-36.

⁶ Dr. Telep reported on February 21, 2005, that claimant was doing heavy work, that his right low back pain was much worse, and that he had spasm and limited range of motion on physical examination. ANICX 10 at 49-51; AIGX 2 at 182-185.

⁷ The award of temporary disability benefits was based on an average weekly wage of \$1,274.38, which the parties stipulated was claimant’s average weekly wage under Section 10(c), 33 U.S.C. §910(c), for the cumulative trauma injury through February 21, 2005. Decision and Order at 4, 25; Tr. at 13.

In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer and carrier at the time of the original injury remain 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 and carrier at the time of the aggravation are liable for the entire disability resulting therefrom. *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); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005). Where claimant's work results in an aggravation of his symptoms, the employer and carrier at the time of the work events resulting in this aggravation are responsible for any resulting disability.⁸ See *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). Each employer and carrier has the burden of persuading the administrative law judge that the disability is the result of either the natural progression of the original injury or is the result of a new injury or an aggravation of the pre-existing condition with a subsequent covered employer or carrier. See *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed. Appx. 547 (9th Cir. 2001).

In this case, AIG argues that the administrative law judge erroneously failed to determine whether claimant's ultimate disability was permanently worsened by the cumulative traumatic injury to his back sustained during the period in which AIG was on the risk.⁹ We disagree. In her decision, the administrative law judge specifically found that the cumulative trauma to claimant's back sustained during the course of his employment with employer from January 1, 2005 through February 21, 2005 "aggravated

⁸ Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). It is immaterial whether an aggravation caused an attack of symptoms severe enough to disable claimant or altered the underlying disease process; in either event, the disability results from the aggravation. *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389, 13 BRBS 101, 106 (1st Cir. 1981). It follows that the employer at the time of the aggravation is liable for the resulting disability.

⁹ AIG does not contest the administrative law judge's finding that claimant sustained an injury within the meaning of the Act while in the course of his employment during the period from January 1, 2005 through February 21, 2005. See AIG P/R and brief at 4, 15.

and combined with his prior injuries to result in his present disability.” Decision and Order at 22. Thus, contrary to AIG’s arguments on appeal, the administrative law judge applied the correct legal standard when considering whether the cumulative trauma to claimant’s back sustained during the period in which AIG was on the risk aggravated or combined with his previous back injuries to result in his present disability.¹⁰ *Id.*; *Price*, 339 F.3d at 1105, 37 BRBS at 90(CRT).

Alternatively, AIG contends that assuming that the Board deems that the administrative law judge did make a finding that claimant’s cumulative trauma to his back from January 1, 2005 through February 21, 2005 contributed to his resultant disability, such finding is not supported by substantive evidence. For the reasons that follow, we reject AIG’s contention. In her decision, the administrative law judge fully considered and weighed the medical evidence, as well as claimant’s testimony, relevant to the issue of whether claimant’s cumulative trauma contributed to his present, ongoing temporary total disability. Decision and Order at 4-17, 21-22. She relied on the opinions of Drs. Telep, Blum and Roberts, as supported by claimant’s reports of increased pain and discomfort in 2005, to conclude that the preponderance of the evidence establishes that the cumulative trauma sustained by claimant while AIG was on the risk aggravated and combined with his prior injuries to result in his present disability.¹¹ *Id.* at 21-22. In

¹⁰ Although the administrative law judge did not utilize the phrase “ultimate disability” used by the Ninth Circuit in *Price*, she properly considered, consistent with *Price*, whether claimant’s cumulative trauma contributed to his resultant disability. Decision and Order at 22. In this case, the administrative law judge found that as claimant has not yet reached maximum medical improvement, he is entitled to temporary total disability benefits. *Id.* at 23-24. AIG’s arguments on appeal appear to confuse the term “ultimate disability” with “permanent disability.” As the claimant in *Price* was found to be entitled to permanent partial disability benefits, the relevant inquiry in that case was whether the cumulative trauma sustained during the claimant’s employment with the second employer aggravated, accelerated or combined with his prior injury to create that resulting permanent partial disability, or “ultimate disability.” *Price*, 339 F.3d at 1105, 37 BRBS at 90(CRT). In this case, the responsible carrier determination turns on whether claimant’s present temporary total disability is at least partially the result of the cumulative trauma to his back sustained during the period in which AIG was on the risk, or put another way, whether that cumulative trauma aggravated, accelerated or combined with his previous back injuries to create his present temporary total disability. *Id.*

¹¹ The administrative law judge was not persuaded by Dr. Khasigian’s contrary opinion, observing that Dr. Khasigian examined claimant on only one occasion in August 2006, that he was alone in opining that claimant’s back condition is not work-related and

this regard, the administrative law judge specifically found that Dr. Telep's reports and deposition testimony reflect his opinion, to a reasonable degree of medical certainty, that claimant's cumulative trauma during January and February 2005 aggravated and contributed to the progression of his symptoms and to his disability.¹² *Id.* at 21; AIGX 2 at 194-196, 198-202, 207-209; CX 1 at 53. The administrative law judge further relied on Dr. Blum's opinion that the cumulative trauma sustained by claimant through February 21, 2005, along with his previous 2003 and 2004 specific injuries, contributed permanently to claimant's present back condition, causing him to continue to be temporarily, totally disabled. Decision and Order at 21; AIGX 17 at 654-655, 659-661, 665, 677; ANICX 31 at 31-34, 36-38; CX 6 at 117, 126-127. The administrative law judge also relied on Dr. Roberts's opinion that the cumulative trauma to claimant's discs through February 21, 2005 aggravated his pain and contributed to his overall disability. Decision and Order at 21; ANICX 32 at 11-18; CX 5 at 98. In addition, the administrative law judge credited claimant's reports of increased pain after his performance of heavy work in February 2005. Decision and Order at 21; Tr. at 65-68, 71, 87, 100-101; AIGX 1 at 109-113, 115-120; AIGX 2 at 177-180, 182-183; AIGX 3 at 362-363, 367; AIGX 15 at 587-588.

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); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). We reject AIG's contention that the administrative law judge erred in evaluating the evidence of record, as the administrative law judge drew rational inferences from the medical evidence and claimant's testimony and reasonably concluded that the preponderance of the evidence establishes that the cumulative trauma to claimant's back sustained while AIG was on the risk aggravated and combined with his previous injuries to result in his present disability.¹³ *See Price*, 330 F.3d 1102, 37 BRBS

that claimant does not have radiculopathy, and that his opinion was contrary to that of claimant's treating physician Dr. Telep. Decision and Order at 21-22; AIGXs 7, 18.

¹² The administrative law judge properly afforded special weight to Dr. Telep, claimant's treating physician, observing that he has examined claimant for the longest duration of time, including the period covering the injuries at issue in this case. Decision and Order at 19-20, 22; *see Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999).

¹³ AIG argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony, asserting that the evidence establishes that, during the period AIG was on the risk, claimant suffered only

87(CRT); *Lopez*, 39 BRBS at 89-90. AIG did not present evidence sufficient to persuade the administrative law judge that claimant's temporary total disability is due solely to the natural progression of his previous injuries, *see Buchanan*, 33 BRBS 32, and, on appeal, it has failed to demonstrate reversible error in the administrative law judge's determination that claimant's cumulative trauma while AIG was on the risk contributed to his present disability. *See Price*, 339 F.3d 1102, 37 BRBS 87(CRT); *Lopez*, 39 BRBS at 89-90. Accordingly, we affirm the administrative law judge's finding that AIG is the responsible carrier. *Id.*

Lastly, AIG avers that the administrative law judge erred in finding that it is responsible for reimbursing ANIC for any compensation and medical benefits paid to claimant, including compensation paid under the California workers' compensation statute. It is axiomatic that the administrative law judge has the authority to decide all issues integral to resolving the claimant's claim for compensation under the Act. 33 U.S.C. §919; *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001); *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990). Moreover, the administrative law judge may adjudicate insurance disputes that are necessary to resolve claimants' claims under the Act. *Barnes v. Alabama Dry Dock & Shipbuilding Co.*, 27 BRBS 188, 191 (1993); *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123, 126 (1984). The administrative law judge also has the authority to resolve related reimbursement claims. *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996); *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28, 33 n.7 (2007); *Schuchardt v. Dillingham Ship Repair*, 40 BRBS 1 (2005) (Order on Recon.); *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

We reject AIG's assertion that the administrative law judge's finding that it is liable for reimbursing ANIC for disability and medical benefits paid to claimant impermissibly preempts the California workers' compensation scheme. In view of the concurrent state and Longshore Act coverage of workers' compensation claims, *see generally* 33 U.S.C. §903(e); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1349, 27 BRBS 41, 47-48(CRT) (9th Cir. 1993), the administrative law judge acted within her authority in finding AIG liable for reimbursement pursuant to the Longshore Act.

temporary "flare-ups" of pain symptoms which had no effect on his ultimate disability. However, the competing characterization of the record evidence and assessment of the witnesses' credibility offered by AIG does not provide a basis for overturning the administrative law judge's credibility determinations and evaluations of the evidence which are rational and supported by the record. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

AIG asserts, in the alternative, that should the Board uphold the administrative law judge's authority to order reimbursement, AIG should not be held liable for reimbursement of compensation and medical benefits paid for periods prior to January 1, 2005, when AIG assumed the risk.¹⁴ AIG is correct that its liability for disability and medical benefits commences as of January 1, 2005, when its workers' compensation coverage for employer began, and, thus, it cannot be held liable for reimbursement of any expenses related to medical treatment provided before that time. *See Lopez*, 39 BRBS at 92. If at issue, liability for medical treatment prior to January 1, 2005 rests with ANIC, which was then on the risk. *Id.* We therefore modify the administrative law judge's Decision and Order to clarify that AIG is responsible for reimbursing ANIC for only those medical benefits that are related to medical treatment provided after December 31, 2004.¹⁵

¹⁴ ANIC is in agreement with AIG's position regarding the date that AIG's liability for reimbursement commences. *See* ANIC Response Brief at 10. ANIC observes, in this regard, that no disability benefits were paid for the period prior to January 1, 2005, and that it will not seek reimbursement of medical benefits paid prior to that date. *Id.*

¹⁵ As ANIC did not pay disability benefits for any period prior to January 1, 2005, the administrative law judge's order that AIG reimburse ANIC for compensation payments made by ANIC necessarily refers only to the period during which AIG was on the risk.

Accordingly, the administrative law judge's determination that AIG is the responsible carrier is modified to reflect that AIG's liability commences January 1, 2005. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge