BRB No. 01-0498

CHARLES REINSMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	DATE ISSUED: Feb. 22, 2002
	)	
Employer/Carrier-Petitioners	)	
	)	
MATSON TERMINALS, INCORPORATED	)	
	)	
Self-insured Employer-Respondent	)	
	)	
EAGLE MARINE SERVICES, LIMITED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
CONTAINER STEVEDORING CORPORATION	)	
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Self-Insured Employer/Administrator-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and Decision and Order-

Denying Petition for Reconsideration, Denying Motion to Vacate Order and Denying Motion for Partial Correction of Order of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler Douglas Drachler & McKee, LLP), Seattle, Washington, for claimant.

Robert E. Babcock, Lake Oswego, Oregon, for Marine Terminals Corporation and Majestic Insurance Company.

Carl E. Forsberg and Brent T. Caldwell (Forsberg & Umlauf, P.S.), Seattle, Washington, for Matson Terminals, Incorporated and Eagle Marine Services, Limited.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Container Stevedoring Corporation and Crawford and Company.

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

PER CURIAM:

Marine Terminals Corporation (MTC) appeals the Decision and Order-Awarding Benefits and Decision and Order-Denying Petition for Reconsideration, Denying Motion to Vacate Order and Denying Motion for Partial Correction of Order (00-LHC-0704) of Administrative Law Judge David W. Di Nardi 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his right shoulder on August 30, 1994, during the course of his employment as a longshoreman. He returned to work on September 22, 1994, and was subsequently diagnosed with right shoulder impingement/subacromial bursitis. On August 25, 1997, claimant again injured his right shoulder during the course of his longshore employment as a driver for MTC. Claimant underwent a right shoulder arthroscopy and acromioplasty on December 31, 1997. Claimant was released to return to his usual employment on February 17, 1998. MTC voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from August 26, 1997, to February 16, 1998. Claimant returned to Dr. Peterson on July 1, 1999, complaining of pain in his right shoulder and that the shoulder locked when his arm was in an overhead position. Dr. Peterson recommended additional shoulder

surgery. Claimant resumed working until undergoing the surgery on June 5, 2000. Claimant had not returned to work as of the date of the formal hearing on October 16, 2000.

At the hearing, MTC controverted claimant's contention that his shoulder condition was caused solely by the August 25, 1997, work injury. MTC contended that Eagle Marine Services, as claimant's last longshore employer prior to his examination by Dr. Peterson on July 1, 1999, when he recommended that claimant undergo additional surgery, is the employer responsible for claimant's shoulder condition. MTC also joined Matson Terminals and Container Stevedoring on the basis that claimant was employed by these employers, as well as by Eagle Marine, during the two-week period prior to Dr. Peterson's examination of claimant's shoulder on July 1, 1999.

The administrative law judge found that MTC is the responsible employer, as he found that claimant's current shoulder condition is due to the August 1997 work injury. The administrative law judge found that claimant is unable to return to his usual employment, and that claimant's average weekly wage is $1,416.97. The administrative law judge ordered MTC to pay claimant continuing temporary total disability benefits from June 3, 2000, at the maximum compensation rate of $801.06 per week, as well as interest and all injury-related medical expenses.

On reconsideration, the administrative law judge corrected a factual error in his decision to reflect that claimant performed lashing work for Container Stevedoring during the two weeks prior to his July 1, 1999, examination by Dr. Peterson; however, the administrative law judge credited claimant's testimony that this lashing work for Container Stevedoring did not cause shoulder pain and discomfort as it was low-bar lashing. The administrative law judge rejected MTC's contention that claimant's subsequent employment with Container Stevedoring, Matson, and Eagle Marine shifts liability for claimant's disability from MTC. The administrative law judge found that claimant did not sustain discrete injuries with these subsequent employers, but only temporary flare-ups of claimant's shoulder condition, resulting from the August 25, 1997, work injury with MTC.[1]

[1]In his Decision and Order on Second Motion for Reconsideration issued on April 25, 2001, the administrative law judge addressed MTC's petition for Section 22 modification, 33 U.S.C. §922, of the award of continuing compensation. Based upon claimant's return to work on December 4, 2000, and the evidence regarding claimant's current earnings, the

On appeal, MTC challenges the administrative law judge's determination that it is the responsible employer. Claimant, Matson, Eagle Marine, and Container Stevedoring respond, urging affirmance of the administrative law judge's decision.

MTC argues that Eagle Marine is the responsible employer because it was claimant's last longshore employer prior to claimant's July 1, 1999, examination by Dr. Peterson at which time he recommended that claimant undergo additional shoulder surgery. MTC contends that claimant's work for Eagle Marine was painful, thus demonstrating that claimant sustained a new injury while in Eagle Marine's employ. MTC avers that claimant experienced work-related symptoms or flare-ups of his shoulder conditions on all days of work for every longshore employer, and that these flare-ups constitute "injuries" under the Act, requiring that Eagle Marine, as claimant's last employer, be held liable for claimant's disability compensation. Moreover, MTC argues that the administrative law judge applied an inapplicable legal standard in finding that claimant's shoulder condition on July 1, 1999, and subsequent surgery on June 5, 2000, was the natural and unavoidable consequence of claimant's August 25, 1997, work injury.

The responsible employer issue presented by the facts of the instant case is whether claimant's disability is due to the natural progression of the August 25, 1997, injury with MTC or is due instead to the aggravating or accelerating effects of a second injury with a subsequent employer; resolution of this issue, based upon the evidence of record, determines which employer is liable for the totality of claimant's disability. *Foundation Constructors, Inc. v. Director*, OWCP, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Buchanan v. Int'l Transportation Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom.*, *Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, No.99-70631 (9th Cir. Feb. 26, 2001). In the instant case, MTC need not establish that the injury claimant sustained in its employ played no role in claimant's ultimate disability in order to be absolved of liability. *Buchanan*, 33 BRBS at 36. It need establish only that claimant sustained an injury while working for a subsequent longshore employer that aggravated, accelerated or combined with his prior injury to result in claimant's disability in order for the subsequent employer to be held liable for claimant's disability. *Id.; see Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966).

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administrative law judge terminated claimant's entitlement to temporary total disability benefits as of December 3, 2000. This decision has not been appealed.

The administrative law judge found, based upon claimant's credible testimony, that claimant's shoulder pain and the locking he experienced in an overhead position remained constant after claimant returned to work in February 1998 following the first surgical procedure. Decision and Order at 20, 27. The administrative law judge further reasoned that claimant consistently maintained that his shoulder condition is related to the August 1997 work injury, notwithstanding that he might receive a higher compensation rate from a finding of a later date of injury. Finally, the administrative law judge credited the opinion of Dr. Peterson, claimant's treating physician, that the need for the second surgery was related solely to the August 1997 work injury,[2] and he rejected the opinion of Dr. McCollum that claimant sustained an aggravating injury through continued heavy work, on the basis that he examined claimant on only one occasion prior to the taking of his deposition. The administrative law judge thus concluded that the continued pain and locking represent temporary flare-ups of the condition resulting from the August 1997 work injury with MTC. On reconsideration, the administrative law judge specifically found that claimant's work activities prior to the second surgery did not aggravate, accelerate, or combine with claimant's August 1997 injury so as to shift liability from MTC to a subsequent employer.

[2]Dr. Peterson stated on October 25, 1999 that the need for the re-operation on claimant's shoulder "is a continuation of the previous problem," and "is a direct result of his previous industrial injury." CX 19 at 83.

We hold that the administrative law judge considered the issue of the responsible employer in this case in light of the proper law, *see Foundation Constructors, Inc*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311, and applied an appropriate evidentiary standard in reviewing the record as a whole on that issue. *Buchanan,* 33 BRBS at 35; *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc,* 32 BRBS 251(1998). Specifically, the administrative law judge properly considered whether claimant's current disability is due to the first injury sustained with MTC in 1997, or is due instead to the aggravating or accelerating effects of a subsequent work injury.[3] *See Foundation Constructors,* 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311. In weighing the record as a whole, the administrative law judge appropriately recognized that, in a traumatic injury case, the subsequent employment must contribute in some way to the resultant disability in order for subsequent employer to be held liable.[4] *See id.* It is insufficient to show merely that claimant's condition was symptomatic while he was working, nor was the administrative law judge required to find that claimant sustained a new injury with a subsequent employer based on this record. *See Delaware River Stevedores, Inc. v. Director, OWCP,* F.3d , 2002 WL 121580 (3d Cir. Jan. 30, 2002). In this case, the administrative law judge rationally determined, based on Dr. Peterson's opinion, that

[3]The aggravation rule provides where an employment injury aggravates, accelerates, or combines with a pre-existing impairment, the entire resultant disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982).

[4]MTC's reliance on a statement in *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), thus is misplaced. In *Port of Portland,* the claimant's hearing loss had two components: a work-related noise-induced loss and a loss due to presbycusis. In applying the aggravation rule to hold the responsible employer liable for claimant's entire hearing loss, the Ninth Circuit stated that the aggravation rule "does not require that the employment injury interact with the underlying condition itself to produce some worsening of the underlying impairment." *Id.,* 932 F.2d at 839, 24 BRBS 141(CRT). MTC thus contends that the administrative law judge herein erred in finding that a subsequent employer is not liable, as claimant's employment with subsequent employers did not worsen his condition. MTC's contention is rejected for two reasons. First, the *Port of Portland* court was addressing, in the part of the decision quoted above, the compensability of claimant's overall hearing loss and not the imposition of liability on a particular employer. Second, and more importantly, MTC fails to address the remaining portion of the court's discussion, which states that it is sufficient if the claimant's hearing loss due to noise *combines with* the age-related hearing loss in merely an additive way. *Id.*

claimant's shoulder pain and locking after he returned to work in February 1998 were symptoms of claimant's underlying shoulder condition caused by the 1997 injury, which the administrative law judge concluded are insufficient to shift liability from MTC to a subsequent employer. Moreover, we hold that any error in the administrative law judge's finding that claimant's shoulder condition is the "natural and unavoidable consequence" of claimant's 1997 injury with MTC, as opposed to resulting from the "natural progression" of claimant's injury with MTC, is harmless.[5] In his decision, the administrative law judge quoted the applicable "natural progression" standard stated in *Kelaita*, Decision and Order at 26, and the administrative law judge's determination that claimant's subsequent longshore employment did not aggravate, accelerate, or combine with claimant's 1997 injury to result in the disability claimed is supported by substantial evidence. *Kelaita*, 799 F.2d at 1311; *Siminiski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). Consequently, the administrative law judge's determination that MTC is liable for claimant's benefits is affirmed.

[5]For purposes of rebutting the Section 20(a) presumption linking claimant's injury to his employment in cases where employer asserts the occurrence of a subsequent event it alleges is an intervening cause of claimant's disability, employer must establish that the subsequent event was not the natural or unavoidable result of the initial work injury. *See, e.g., Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954). In such a case, unlike the instant case, in order to be relieved of liability the employer must establish that the initial work injury played no role in claimant's disability due to a subsequent event. *See Buchanan*, 33 BRBS at 36 n.7; *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc,* 31 BRBS 109 (1997).

Accordingly, the administrative law judge's Decision and Order -Awarding Benefits and Decision and Order-Denying Petition for Reconsideration, Denying Motion to Vacate Order and Denying Motion for Partial Correction of Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge