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OALJ CASE No: 2009-LHC-01200, -01201, -01492
OWCP CASE No: 13-104998, -092938, -105668

In the Matter of:

ROBERT CARRION,
Claimant,

v.

SSA MARINE TERMINALS, LLC,
Employer,

and

HOMEPORT INSURANCE COMPANY,
Carrier,

and

MATSON TERMINALS, INC.,
Permissibly Self-insured Employer.

Appearances: Eric Dupree, Esq.
For the Claimant

Frank Hugg, Esq.
For Matson

Judith Leichtnam, Esq.
For SSA Marine Terminals LLC/ Homeport

The first Order Denying Reconsideration (initial reconsideration) is withdrawn and this order is substituted, in response to the District Director's Motion for Reconsideration/Modification and the related filing the parties directed to that initial reconsideration. The initial reconsideration addressed a motion SSAT had filed, which asked me to alter the Decision and Order. My initial reconsideration erroneously stated that Homeport insured both Matson and SSA, when it insured only SSA. This

Amended Order Denying Reconsideration and its caption have been adjusted to clarify that Homeport never insured Matson. This doesn't change the analysis. The pivotal fact—that the Claimant was never put on notice that he had a cumulative trauma claim against SSAT until 2008—remains unchanged.

Amended Order Denying Reconsideration

SSA Marine Terminals, LLC (SSAT) and its compensation carrier Homeport Insurance Company moved for reconsideration of the Decision and Order dated November 9, 2011. I reject the argument that the claim against them is time barred under § 13(a) of the Longshore Act.

Matson, who is permissibly self-insured, decided it would no longer authorize medical care in late 2007, after providing medical care to the Claimant for decades for a 1987 injury to his right knee while employed there. Matson asserted that cumulative trauma the Claimant suffered before he retired in 2002, while he was working for SSAT, shifted liability for the knee condition to SSAT and its carrier Homeport. Prompted by this denial of care, the Claimant filed cumulative trauma claims shortly thereafter against both Matson and SSAT. SSAT and Homeport allege the cumulative trauma claim against them hadn't been filed within the statutory limitations period, so they owed neither care nor compensation.

The Claimant didn't realize he suffered cumulative trauma to his knee during his work at SSAT until September 2008, when he read the report of Matson's orthopedic examiner, which provided reasoned medical analysis to support Matson's argument. The Claimant wasn't aware of the medical relationship between his knee condition and his ongoing work at SSAT earlier, nor should he have been. He knew Matson denied his care in October 2007, but a denial by Matson's claims examiner isn't determinative, and he acted promptly after he learned Matson's position. In short, the Claimant did nothing wrong; he filed his claims promptly after learning of Matson's decision, within the available limitations period.

I. Analysis

The serious right knee injury¹ the Claimant suffered working for Matson in 1987 kept him from working for six months. His knee has required ongoing medical care ever since. Stipulations to resolve that

¹ The surgeon who repaired the torn meniscus in 1987 thought it best not to attempt to repair the anterior cruciate ligament. SSAT Ex. 25 at 141.

original compensation claim against Matson left his § 7 medical benefits open. His treating doctor told him as early as 1992 that with age, his injured knee would likely require replacement.² He slipped on oil in 1994 at Matson, injuring his right knee again. Matson provided medical care and paid him disability benefits for lost work a second time.³ His doctor considered but rejected the idea of replacing the injured knee then.⁴ Even after the Claimant retired his orthopedist continued to follow the condition of the right knee, visits Matson authorized.

As the Claimant continued to work after his second knee injury, his employer changed: in 1999, Matson transferred operation of the facility where the Claimant worked to SSAT, which retained Matson's former employees.

Over time x-rays showed how the Claimant's right knee joint deteriorated from his physically demanding work. The medial joint space in the right knee was completely gone by August 1999—an indication that all cartilage had been lost and the knee joint was grinding bone on bone.⁵ By 2000 a knee replacement again was considered, but the decision was not to do it yet. The Claimant retired in February 2002, prompted by persistent knee pain, more onerous job responsibilities, and the Claimant's eligibility for a regular (i.e., non-disability) retirement.

After the Claimant retired, Matson continued to honor claims for § 7 medical benefits for the 1987 industrial knee injury and the 1994 reinjury. But in 2007, Matson abruptly changed course. Out of the blue Matson said SSAT—rather than Matson—was responsible for the medical care.⁶

Matson's changed position allows it to avoid paying for the knee replacement surgery the Claimant needs due to his work-related traumatic injuries. SSAT and Homeport want to avoid paying anything because they assert the Claimant waited too long to file his claim against them. SSAT and Homeport controvert compensation benefits too. SSAT and Homeport can't predicate the defense on a total failure to have filed any claim; their arguments turns on when the Claimant needed to file a third claim—one specifying harm suffered while he worked for SSAT.

² Decision and Order of Nov. 9, 2011 at 8.

³ Matson Ex. 6.2–6.3.

⁴ Matson Ex. 3.9.

⁵ Decision and Order of Nov. 9, 2011 at 9.

⁶ *Id.* at 11.

Homeport and its insured SSAT think it's a shame that the Claimant didn't file a cumulative trauma claim against SSAT by the time he retired in 2002—before he actually needed the knee replacement surgery. But now they say they owe nothing, because he ought to have realized when he retired in 2002 he had an “economic loss” and so should have filed an injury claim against SSAT. In their view, his failure to have filed a cumulative trauma claim after retirement, within the one year claims period set by § 13(a), exonerates them. I can't agree.

As the Decision and Order explained, when he left work the Claimant knew Matson was paying for his visits to his orthopedist to follow the condition of his knee, care that endured and included his orthopedic examination on March 23, 2002, shortly after his retirement.⁷ He had every reason to believe that if it got so bad that a knee replacement became necessary, it would be done on an industrial basis—as the result of his 1987 and 1994 traumatic knee injuries at Matson—and no reason to believe otherwise.

He did file an unrelated post-retirement claim for hearing loss in 2003. The lawyer handling the hearing loss claim had no reason to investigate or file a cumulative trauma claim for the knee. At that time, Matson hadn't claimed that the liability for the knee condition had shifted to SSAT. It had paid for the Claimant's 2002 visit to the orthopedist who continued to follow the condition of his knee.

Matson authorized another visit to the orthopedist in 2006—but then didn't pay for it.⁸ The Claimant only learned this a year later, when he tried to arrange for a follow-up appointment in October 2007.⁹ The orthopedist asked the Claimant to make good on the year-old debt.¹⁰ The situation led him to return to the lawyer who had handled his hearing loss claim.¹¹ That lawyer filed a claim against Matson in late February 2008 for the right knee injury; a few days later on March 3, 2008 he filed a cumulative trauma claim against SSAT for ongoing trauma to the right knee that his work had caused up to the day he retired in 2002, and another claim against Matson alleging cumulative trauma to his right knee through August 1999 (around the time Matson transferred operations of the facility to SSAT).

I don't believe that when he retired in 2002, the Claimant subjectively understood he had a cumulative trauma injury to his

⁷ Matson Ex. 3.21.

⁸ Decision and Order of Nov. 9, 2011 at 11.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

knee, an injury distinct from the traumatic right knee injuries he suffered in 1987 and 1994 working at Matson. Hindsight shows that the additional heavy work the Claimant did up to the day he retired further eroded his knee cartilage. Those steeped in the decisional law under the Longshore Act (like Matson, or Homeport's claims staff) may know that the incremental erosion or worsening of a knee condition can be the basis for a cumulative trauma claim that would shift liability to a later employer. No lay person would, and this Claimant didn't.

His failure to have filed a cumulative trauma claim when he retired in 2002 was objectively reasonable too. SSAT's medical expert at trial, orthopedic surgeon Peter von Rogov, M.D., wrote in his medical report that the Claimant's initial 1987 injury and the way it had been surgically repaired "would have led to a total right knee replacement even with only sedentary activities."¹² The von Rogov report served as the underpinning for SSAT's argument that any knee replacement surgery would be part of the natural progression of the 1987 traumatic injury at Matson, for which Matson should remain liable. While questioned at trial Dr. von Rogov changed his view, when he acknowledged a chassis mechanic's work was so heavy it would have aggravated and accelerated the degenerative processes in the Claimant's knee.¹³ Under the "natural progression" theory Dr. von Rogov first had espoused, there would have been no reason for the Claimant ever to file a third, cumulative trauma claim against SSAT.

The von Rogov report shows it was objectively reasonable for the Claimant to believe, at the time he retired, that he had suffered only traumatic knee injuries at Matson 1987 and 1994. These injuries had led to the two compensation claims Matson continued to handle until October 2007, when the Claimant first learned of a dispute.

Matson initiated the cumulative trauma issue in October 2007 when it denied the Claimant authorization to see his orthopedist under the traumatic injury claims that had been the basis for all the orthopedic care for his right knee since the injuries at Matson in 1987 and 1994. Only after Matson sent him to see its defense evaluator, orthopedist James Stark, M.D., in early September 2008, did a physician's report give him (or anyone at Matson) an objective medical basis to connect the dots about cumulative trauma. After analysis of the records and a physical examination, Dr. Stark concluded the Claimant's right knee worsened as "the result of natural progression of

¹² *Id.* at 16 (quoting the medical report).

¹³ *Id.* at 17.

degenerative arthritis and also of cumulative trauma at work.”¹⁴ His opinion supported Matson’s contentions, and put the Claimant on notice that he had suffered cumulative work trauma. Therefore the § 13(a) limitations period began to run in September 2008, after the Claimant had already filed his claim.

An argument that Matson’s 2007 denial of care controls the date when the Claimant became “aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury . . . and the employment” for the purposes of § 13(a) would fail because it focuses on what Matson’s claims staff believed, not on what the Claimant knew. And it would get SSAT nowhere, because the claim was filed within a year of Matson’s refusal to authorize the 2007 visit to the treating orthopedist. SSAT and Homeport have crafted a more far-reaching argument. They want to bar the claim because it wasn’t filed against SSAT within a year of the Claimant’s retirement in 2002—while Matson was still providing him medical care for his knee under the 1987 and 1994 traumatic work injury claims.

They argue that a report Dr. Stark wrote on Matson’s behalf in September 2008 can’t be what prompted the Claimant to file his cumulative trauma claim against SSAT much earlier, on March 3, 2008.¹⁵ And it wasn’t. SSAT and Homeport go wrong as they try to reason backward. They argue that the Claimant was so impaired by his knee condition that he decided to retire in 2002 (earlier than he otherwise would have), so he must have realized by 2002 that his knee injury was reducing his earnings. This awareness of a reduction in his earning power should, in SSAT’s view, have led the Claimant to file a cumulative trauma claim against SSAT by the time he retired in 2002.

This argument depends on substituting the words “economic impact” or “decrease in earning power” for the term “injury” in the statutory text of § 13(a). Preferring to deal with the language Congress enacted, I decline SSAT’s invitation to rewrite the Longshore Act.

SSAT and Homeport attach no legal significance to the fact that Matson waited until October 2007¹⁶ to disclaim liability, well after the Claimant retired. Until Matson refused to authorize the 2007 visit to his treating orthopedist, the Claimant had no objective reason to

¹⁴ Matson Ex. 1.4.

¹⁵ *See* the LS- 203 filed against SSAT on March 3, 2008 found at SSAT Ex. 8, at pg. 46, as well as stipulated fact 4 in the Decision and Order of Nov. 9, 2011 at page 5, fn. 19.

¹⁶ It was only in about October 2007 that the Claimant learned Matson hadn’t paid for his 2006 visit to his orthopedist, Dr. Caldwell. Matson initially had authorized the 2006 visit under his enduring claims that arose from his 1987 and 1994 traumatic knee injuries at Matson. Decision and Order of Nov. 9, 2011 at 11.

believe he had suffered a new injury after 1994. He had worked at the same location doing the same jobs. He was aware he had suffered two traumatic knee injuries at Matson so serious that a knee replacement was eventually in the offing, and his interactions with Matson after his 2002 retirement through October 2007 were consistent with what he knew.¹⁷

When a worker suffers a traumatic injury (a back sprain, for example, or a broken bone) usually the injury has an obvious link to work. The Claimant promptly filed claims for his 1987 and 1994 knee injuries at Matson. A medical report that links the injury and the work is the usual trigger for the one year period § 13(a) gives a worker to file a cumulative trauma claim. SSAT and Homeport don't contend that any medical report in the period from 2002 to 2007 made the Claimant aware that his knee condition resulted from cumulative trauma. But as they point out, a medical report isn't the only thing that might put a worker on notice that he or she has a workers' compensation claim; if the Claimant knows or should have known his injury was work-related, the limitations period is triggered.¹⁸

As described above, the Claimant didn't know and shouldn't have known in 2002 that he had sustained a distinct cumulative trauma injury while he worked for SSAT. What matters most is this: no medical report put the Claimant on notice that he had suffered a work-related cumulative trauma injury until he received Dr. Stark's report in 2008. Given the medical evidence offered at trial, the Claimant's actions were subjectively and objectively reasonable.

Matson's denial of authorization in October 2007 prompted him to file the cumulative trauma claims. That doesn't mean he knew or should have known in October 2007 that he really *had* suffered another injury at that time. He acted with appropriate caution—caution amply justified by this creative attempt to avoid liability.

I adhere to the view that the Claimant was unaware of any reasoned medical opinion that linked his continued work at SSAT to the need for knee replacement surgery until he received Dr. Stark's report in the fall of 2008. That report gave the Claimant the basis to understand the “full character, extent and impact of the harm done”¹⁹ to his injured knee by his work at SSAT up through the day he retired. Because the Claimant had already filed his suit against SSAT at that time, his claim was timely under § 13(a).

¹⁷ Decision and Order of Nov. 9, 2011 at 11.

¹⁸ *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234 (3rd Cir. 1979).

¹⁹ *Abel v. Director, OWCP*, 932 F.2d 819, 820 (9th Cir. 1991).

Moreover, as described in the original decision, the absence of a cumulative trauma claim until early 2008 did not prevent Homeport from looking into a claim for medical care. Even if the claim had been untimely there wasn't any prejudice.

II. Order

The defense SSAT and Homeport have raised to the claim based on § 13(a) of the Longshore Act is rejected, and the motion for reconsideration is denied.

A

William Dorsey

ADMINISTRATIVE LAW JUDGE

San Francisco, California