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Case No.: 2001-LHC-3172
2001-LHC-3173
2001-LHC-3174
2001-LHC-3175

OWCP No.: 18-74990
18-75500
18-76106
18-76400

In the matter of:

MICHAEL LEE,
Claimant,
v.

BAY CITY MARINE/ MAJESTIC INSURANCE COMPANY
Employer/Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. § 901 et seq. This proceeding arises from a claim filed by Michael Lee ("Claimant") against Bay City Marine, Inc. ("Employer"). Employer is insured by Majestic Insurance Company ("Insurer").

Claimant was employed as an outside rigger with Bay City Marine. Claimant testified that he has been employed by Employer a number of times, but was most recently hired by Employer in 1999. Claimant has filed four separate claims alleging industrial injuries while employed during this current period of employment with Employer. A hearing was held before the undersigned on July

16, 2002 through July 18, 2002 in San Diego, California. Although both parties were given the opportunity to submit post trial briefs, both Claimant and Respondent chose to rely on the hearing transcript rather than to submit briefs.

I. Stipulations

Employer and Claimant stipulated to and I find the following facts:

1) That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2) Claimant was previously employed by Bay City Marine.

3) Claimant has an average weekly wage of $501.40 per week, pursuant to Section 10.

4) Claimant has an appropriate weekly compensation rate for total disability of $334.36 per week.

5) Claimant has sustained a binaural hearing loss on an industrial basis.

II. Issues

1) Whether, under Section 12 of the Act, Employer was given proper notice of Claimant's injuries;

2) Whether, under Section 13 of the Act, Employer was given proper notice of Claimant's injuries;

3) Whether Claimant is entitled to the Section 20(a) presumption under the Act for each of his claims;

4) The nature and extent of Claimant's disability;

5) Whether Claimant sustained a compensable psychiatric injury or aggravation resulting from a work accident which entitles the Claimant to medical and/or income benefits;

6) Whether Claimant has proven that a hearing aid is a necessary and reasonable medical expense.

III. Factual History of Claimant's Injuries[1]

Claimant's responsibilities as an outside rigger involved a substantial amount of physical activity. According to an On-Site Job Analysis administered on May 9, 2002 by Ms. Lisa A. Cirulli, a rehabilitation counselor, Claimant's position is summarized as

> General maintenance contract with military–pulling/ overhauling pumps and valves, repairing water tight doors and miscellaneous crane and rigging. Also, during "slow times" employees may do general maintenance and repair of crane and equipment.

(EX-O). According to Ms. Cirulli, Claimant's occupation requires frequent bending and stooping, squatting and crouching, as well as frequent climbing. In addition, the report noted that Claimant's position as a rigger also involved a measurable amount of twisting of the back and twisting the neck upward, downward and side to side. Ms. Cirulli's report noted that Claimant's occupation requires frequent lifting and carrying of objects of varying weights for varying amounts of distances. (EX-O).

Claimant described crane rigging at Bay City Marine as a very physical occupation. Claimant testified

> Well, you have to hook up a load that the crane is going to lift. You swing it, you catch loads, you rig the gear. You're bending over, your pushing, bending, stooping, pulling, twisting as you catch the loads and set them on the deck or onto a truck. And you're always jumping on and off a piece of equipment, getting on or off of it.
>
> You have to be in pretty good physical shape to it [sic]. I mean, you know, it's strenuous.

(Tr. 52). In sum, Claimant's occupation as a rigger involves a multitude of tasks that require a great deal of physical stamina and strength.

The exact dates of Claimant's alleged injuries are unclear and vary throughout the record. The first injury while at work

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[1]The following abbreviations will be used as citations to the record:

Tr. - Transcript of the Hearing;
EX - Employer Exhibits;
CX- Claimant's Exhibits.

occurred when Claimant was involved in a motor vehicle accident in October of 1999. Claimant argues that the impact from the accident resulted in a neck injury. Claimant testified that he was driving a small manual transmission pick-up truck behind a crane, and rear-ended the crane twice when the crane stopped abruptly. (Tr. 154). Claimant stated that he was traveling approximately 10 to 15 miles an hour when his vehicle hit the rear of the 30-ton crane. Claimant stated that the truck that he was operating was not equipped with a seatbelt that operated properly, and when the truck made contact with the crane, he struck his chest on the steering wheel and his forehead on the windshield of the vehicle. (Tr. 155). Immediately after the first point of impact, Claimant stated his foot slipped off the clutch of the vehicle, causing the truck to lurch toward the crane again, resulting in a second impact with the crane. Claimant stated that his chest again hit the steering wheel of the truck. (Tr. 155). Claimant also stated

> [M]y chest was bruised a little bit but that was about it. I didn't, at the time I didn't feel like I needed medical attention or nothing, so I continued working.

(Tr. 157). Claimant also had difficulty remembering whether he suffered from a bump on his forehead or a cut on his lip. (Tr. 157).

Claimant testified that at the hearing that one of his supervisors, Mr. John Worel, witnessed the accident. (Tr. 156). Claimant also stated that the same day of the accident he told another supervisor, Charlie Johnson, that he had been involved in an accident. John Worel was driving the crane at the time, and also testified that the incident had occurred. (Tr. 253). Mr. Worel testified that he did not notice any blood or bumps on Claimant's forehead when Claimant exited the truck. (Tr. 154). Mr. Worel also stated that Claimant noted that he was not injured and that Claimant did not mention to Mr. Worel how he had been thrown into the steering wheel twice during the impact because the seatbelt had malfunctioned. (Tr. 254).

There is no evidence in the record of Claimant receiving any specific medical care for the crane accident. In fact, the next report of any medical care administered to Claimant was for a spider bite on January 10, 2000. (Tr. 158). The next documented report of Claimant receiving medical attention is dated July 17, 2000. Claimant filed notice of a claim of injury by filing an LS-203 on February 6, 2001. (EX-F).

The second injury Claimant alleges occurred at work occurred

while he was working on a pin table. Claimant filed an LS-203 on February 6, 2001. (EX-F). The exact date of Claimant's injury is unclear, although Claimant's LS-203 form states that the accident occurred on January 1, 2000. (EX-F).

Claimant described a pin table as a large structure which is used to mount fixtures to in order to administer different pull and stress tests. (Tr. 55). Claimant testified that in order to attach an item to the pin table, someone would have to crawl under the pin table, and anchor the fixture to the deck of the pin table. (Tr. 55). Claimant further stated that one of the responsibilities of his job required him to slide underneath the pin table and attach the fixtures to the pin table. (Tr. 56). He testified that to do so required him to place himself in awkward positions, reaching and looking overhead while applying force with a large wrench tightening nuts and bolts. (Tr. 56). Claimant also explained that on at least one instance, he experienced a burning sensation on his right arm. Claimant stated

> I was outstretched, tightening the nut, and I felt a burning sensation go up my arm and around my back into my neck as I was pulling. And I dropped the wrench. And at first I thought it was–I just kind of assumed I had a muscle spasm or something. I didn't really, you know, assess what happened, basically.

(Tr. 58). Claimant testified that he continued working after the pin table incident for a number of weeks, and stated that he began to have physical problems performing his job in February, March or April of that same year. (Tr. 59). Claimant stated that his first symptoms consisted of dropping items that he had been carrying in his right hand. (Tr. 60). Claimant testified that he then began to suffer from pain in his arm and shoulders, and stated that the more he worked, the worse his symptoms became, until he sought medical treatment. (Tr. 61). He testified that certain types of work seemed to exacerbate his condition. He stated

> If I was working with the crane, pulling the loads and looking up and stuff like that, it seemed like I started getting headaches really bad by looking up at an angle or down or turning my neck to the side and watch the loads go by and stuff.
>
> But I didn't–it seemed like when I was working with a crane, doing that kind of work, it made it–it worsened my, the condition I had.

(Tr. 61).

Claimant stated that when his symptoms worsened, he began to complain to his supervisors, including Charlie Johnson, when he arrived at work. Claimant testified

> I would come in every morning and I'd set [sic] there with Charlie Johnson, my supervisor, and John Worel, and I'd say, 'There's something wrong with me, and I can't figure out what it is. I can't–I don't know what –you know, I got a problem with my arm, it's really bothering me, dropping things.' And I had a problem with my vision, it's getting blurry. And they said, oh, it's just my old age."

(Tr. 62). Mr. Johnson corroborated Claimant's testimony, stating,

> He complained about it pretty much for about eight months to a year before I found out that it was work-related, or he felt it was work-related.

(Tr. 189). In addition, another supervisor, John Worel, testified that he remembered Claimant complaining at work about pains in his shoulder and his neck. (Tr. 255).

Claimant also filed a claim alleging cumulative injuries up through Claimant's last date of employment. According to the form LS-203 submitted to the OWCP, Claimant filed a claim alleging neck, head, back and bilateral upper extremity injuries. (EX-F). The LS-203 was filed on February 6, 2001. Claimant alleges that he suffers from a herniated disk and a degenerative disease in the spine. Claimant alleges that the injuries that occurred were caused or aggravated by the repetitive nature of Claimant's occupation. Claimant's counsel also argues that Claimant's impact with the crane acted as a shearing force, which began a deterioration of Claimant's spine. (Tr. 22).

Claimant is also alleging a psychiatric/ depression claim as a compensable consequence of his alleged orthopedic injuries. Claimant argues that he is temporarily totally disabled on a psychiatric basis. (Tr. 23). He argues that he suffers from anxiety and depression, and has problems with anger management. (Tr. 23-24). Many of Claimant's alleged psychiatric problems predated his injuries at Bay City. According to Dr. Dores, a physician who examined Claimant's psychiatric state, Claimant suffers from major depressive disorder and a pre-existing schizotypal-personality disorder that Dr. Dores feels has been aggravated by Claimant's medical problems and treatment. Employer argues that Claimant first sought treatment for his alleged psychiatric symptoms in March 2002, and that none of Claimant's

treating physicians at Kaiser opined that his psychiatric symptoms were industry related. Employer also notes that Claimant suffers from several delusions, such as a belief that he can put his hand through solid objects, and such delusions are cause to question the credibility of Claimant. (Tr. 34).

IV. Claimant's Course of Treatment, Medical Testimony and Evidence

According to Claimant, his conditions became worse, until on July 25, 2000, Claimant went for treatment of his shoulder pain at the group medical carrier, Kaiser Permanente. (EX-T). The physician who treated Claimant diagnosed him with bursitis and administered injections into his shoulder. Claimant stated that the injection helped for a few days and then the pain in his shoulder returned. Claimant returned to Kaiser on August 25, 2000 and received another injection. Claimant also testified that it was around this period of time that he began to miss work frequently. (Tr. 67). Claimant testified that he began to suffer from blurry vision and severe headaches that sometimes lasted for days. (Tr. 67). He also stated that his headaches appeared to be associated with his position as a rigger, and testified

> The more I used my head by looking up or down or to the sides, it would–I would get a headache probably that night prior if I–it would take like four hours for them to hit me if I used a lot of motion with my neck and my head.

(Tr. 68). At that point, Claimant testified, he was dissatisfied with the treatment that he had received at Kaiser, and sought medical treatment with Dr. Randall Labrum, a chiropractor in San Diego who specializes in work-related injuries.

Claimant first visited Dr. Labrum on October 9, 2000. (Tr. 75). In the initial forms filled out by Claimant, Dr. Labrum noted that Claimant indicated that his symptoms were work-related, and that he had been injured while at work on June 12, 1999. Upon meeting with Claimant, Dr. Labrum noted that Claimant reported problems with his neck and shoulders, and complained of pain and stiffness, especially when looking upward. (Tr. 75-76). Dr. Labrum testified that he performed an examination on Claimant, and also administered an x-ray. Dr. Labrum stated that as a result of his examination, he opined

> There's x-ray evidence that he had some disk disease and subluxations of the lower cervical spine. Neurologically those would correlate with the arm and

> shoulder and neck symptoms, which is a brachial neuritis category of a problem.

(Tr. 77). Dr. Labrum stated that he treated Claimant by manipulating the spine in order to decompress the disk and joint surfaces. (Tr. 78). Dr. Labrum stated that the primary purpose of the treatment was to manipulate the area in the lower cervical spine and to decompress the disks so that the cervical fluid is able to move back in place. (Tr. 83). Dr. Labrum testified that a great majority of his patients who suffer from diskogenic disk disease respond favorably to such manipulation, but that some patients do not respond to chiropractic treatment and turn to surgery. (Tr. 84).

December 18, 2000 was the last day that Claimant actually worked for Employer. (Tr. 110).

On December 21, 2000, after a series of treatments, Dr. Labrum advised Claimant to limit any work to light duty, and to limit his work to eye-level activity. Dr. Labrum stated that prolonged extension of the neck and head causes excessive compressive forces on the cervical disks and is detrimental to Claimant's medical condition. (Tr. 80). On December 26, 2000, Claimant returned to work after the holiday season, and complained to his supervisors, Mr. Hayes and Mr. Johnson, stating that he thought that his shoulder pain was work-related. (Tr. 202). Claimant was immediately sent to Dr. Alex Han, a doctor at South Coast Medical Clinic, for treatment. (Tr. 18).

Dr. Han treated Claimant on December 26 and December 27, 2000, and January 3, 2001. (Tr. 18 & CX-15). Treatment by Dr. Han consisted of x-rays, prescribing of medications, physical therapy, and providing Claimant with a return to light-duty work slip. (Tr. 18 & CX-15). Mr. Johnson, one of Claimant's supervisors, testified that supplying light-duty work for its employees was very difficult and rare. (Tr. 203). In addition, Mr. Johnson testified that the type of work that Claimant was skilled in doing was mainly heavy-duty mechanic work. (Tr. 203). Claimant testified that he spoke with his supervisors about the possibility of light-duty work, and was told that there was no such work available at Bay City Marine. (Tr. 120).

Claimant's counsel stated in his opening argument that on January 3, 2001, Dr. Han requested authorization from the insurance company to refer Claimant to an orthopedic surgeon. According to Claimant's counsel, Claimant was told by Insurer to leave Dr. Han's office, and Insurer formally denied Claimant's claims. (Tr. 18). Claimant stated

> I asked Marcie from Majestic Insurance Company why I was–what was the problem with their wanting me to leave the office. And she said that Dr. Han had told her that it was a recent injury and that I probably didn't do it at work.
>
> And so they–well, they didn't give me any more medical treatment. They told me to leave, so I left and went back and reported that, what had happened, to Charlie and Fred Hayes.

(Tr. 121). At that point, Claimant testified that he spoke with his supervisors, who advised Claimant to resolve his medical problems before further injuring himself by working at Bay City Marine. (Tr. 121). Claimant stated that on January 18, 2001 he then went to his group heath carrier, Kaiser, and was treated by Dr. Tooler who administered an MRI on February 7, 2001. (Tr. 121). The MRI report states
that some of Claimant's spinal disks are narrowing. The report states

> C5-6: There is posterior disc/osteophyte complex which is effacing the anterior subarachnoid space but not significantly deforming cord. This is causing mild to moderate narrowing of the right intervertebral foramina. The AP dimensions of the bony canal measures approximately 10 mm.
>
> C6-7: There is similar posterior disc/osteophyte complex causing relative narrowing of the AP dimension of the canal, approximately 10 mm. This is causing minimal narrowing of the right foramina.
>
> IMPRESSION: POSTERIOR DISC/OSTEOPHYTE COMPLEX CAUSING NARROWING OF THE AP DIMENSION OF THE CANAL AT C5-6 AND C6-7 WITH MINIMAL TO MODERATE NARROWING OF THE RIGHT FORAMINA AT THESE LEVELS.

(Ex-FF). Claimant's counsel stated in his opening statement that Claimant was dissatisfied with the treatment that he had received, and returned to Dr. Labrum on March 15, 2001. (Tr. 19 & 82).

Claimant had last visited Dr. Labrum's office in December 2000. (Tr. 82). It is interesting to note that Claimant filed his claims for worker's compensation in February 2001, approximately one month before resuming treatment with Dr. Labrum.

In his opening statement, Claimant's counsel stated that at this point, Claimant was referred to Dr. Goetz, a Physical Medicine physician, by his group health carrier. Dr. Goetz examined Claimant on July 30, 2001, and noted in his report that Claimant complained of continuous pain down the right arm and numbness in the right thumb and index finger, and intermittent pain in his third, fourth and fifth fingers on his left hand. (EX-U). Dr. Goetz stated in his report

> At this time, I think the patient is experiencing radicular pain but it does appear that the degree of his limitations are out of proportion to the physical findings.

(EX-U). Later in the report, Dr. Goetz stated that Claimant

> Does have degenerative changes on his MRI but I doubt that our neurosurgery department will consider a diskectomy or fusion; nevertheless, I would at least like to get their opinion.

(EX-U). Dr. Goetz then referred Claimant to Dr. Mastrodimos, a neurosurgeon. (Tr. 19).

Claimant first met with Dr. Mastrodimos on August 28, 2001. (Tr. 19). Dr. Mastrodimos's reports states Claimant was offered a C5-6, 6-7 anterior diskectomy with fusion and plate fixation. (EX-U). The report states

> The patient is advised that this operation is intended to hopefully partially or completely alleviate the lancinating-type pain that goes down his right arm. There is very little expectation that it will improve his primary neck pain. There is no expectation that he will have any significant relief of his headaches or in his direct shoulder pain, and he was advised that he will need followup through his primary care physician or neurology for his headaches and further workup, and he may require an orthopedic referral for what appears to be right-sided primary joint pathology. The risks, benefits and alternatives were discussed in detail with the patient, and he appears to understand.

(EX-U). The record reflects that Claimant underwent diskectomy fusion surgery on October 10, 2001, (EX-U). Following the surgery Claimant testified that

> I got my grip to where my arm wasn't bothering me as much. And basically it helped me out a lot, you know. But I still have problems with my neck and up in here (indicating). But my arm seems to be better, I couldn't pick nothing up. I couldn't even hold a cup of coffee before.

(Tr. 125). Claimant again returned to treatment with Dr. Labrum following surgery. Dr. Labrum testified that he continued to treat Claimant until March 20, 2002. (Tr. 82 & 86).

According to medical reports, in March 2002, Claimant also began seeking psychological and psychiatric counseling at Kaiser for depression and anxiety as a result of his physical injuries, his continuing pain, and his inability to work. Claimant was prescribed antidepressant medications and referred to psychological counseling. According to a report dated June 7, 2002, Claimant continues to take psychiatric medications and counseling. (CX-19, p. B-16).

A. Claimant's Alleged Neck and Back Injuries

Claimant's counsel presented the testimony of Dr. John Seelig, a physician who specializes in neurological surgery, who testified that he believed Claimant's work activities influenced Claimant's cervical problems. (Tr. 382). In deposition testimony, Dr. Seelig opined that Claimant had a degenerative disk disease in the cervical spine that could have been accelerated by the accidents Claimant alleges occurred while at work, as well as by the cumulative effects of Claimant's occupation as a rigger. (CX-21). Dr. Seelig stated at the hearing

> It appears that the crane accident led to some abnormal forces being generated in his neck via the fact that he struck his head, his right side of his forehead, just around his hairline, where he developed a bump or a cephalhematoma, whatever you want to call it, a bruise, and also on his lip, that his head was somewhat turned, and he struck his head with the crane accident with his head tilted.
>
> At that point I would say that he had enough force to disrupt the annulus. I'm not saying that there may not be some mild degenerative disk–degenerative disease

> in the spine. I don't know that. But he's had no history whatsoever of that with all the testimony and all the documents.
>
> And in fact at that point it wasn't till the second problem, when he was working under the pin table hyperextended, where he felt the twinge in his neck and then down his arm such that he dropped the wrench when the pin table accident occurred. He almost felt–he had blurred vision, headache, and the like of symptoms that would indicate, even to the chiropractor, Dr. Labrum, who saw him four or five times later on, that indeed he had a cervical radiculopathy as a result of that maneuver.
>
> So I think the crane incident precipitated some shearing forces of the annulus, of the disk, to the point where gravity and further work, particularly this pin incident, led to further demise of the disk, the disk space and the disk material such that he developed a radiculopathy.

(Tr. 382-83). Dr. Seelig also stated that Claimant's work activities in general are also a cause of Claimant's cervical radicular syndrome. (Tr. 381). In fact, Dr. Seelig testified in his deposition that he believes that Claimant's medical condition could have developed simply by the nature of Claimant's occupation. (CX-21). According to Dr. Seelig, Claimant's work as a rigger involves twisting, turning and hyperextension of the neck, and could have resulted in a herniated disk. (CX-21). Dr. Seelig testified that he had formulated his medical opinion based on reviewing Claimant's medical records, the MRI films, a job analysis of Claimant's position as a rigger, as well as depositions. (Tr. 412). However, Dr. Seelig admitted that he did not personally examine Claimant, due to an unrelated car accident that forced Dr. Seelig to stop performing surgeries. (Tr. 412).

Employer presented the testimony of Dr. Richard Greenfield, an orthopedic surgeon who at the time of his testimony stated that he dealt frequently with upper, middle, and lower back problems on a routine basis. (Tr. 279). Dr. Greenfield reviewed several medical reports regarding Claimant's medical history and treatment, and also performed an extensive examination of Claimant on July 3, 2001. Dr. Greenfield testified as to Dr. Seelig's opinion and deposition testimony, stating

> Well, first of all, that all his problems are related to Bay City Marine would be the overall conclusion of Dr. Seelig. He opines that the motor

> vehicular accident was sufficiently traumatic that it produced rupturing or tearing of the ligaments in the cervical spine which therefore permitted the disks to herniate, to become symptomatic, and to require surgical intervention.

(Tr. 307). Dr. Greenfield also commented on Dr. Seelig's conclusions regarding Claimant's first accident regarding the crane. Dr. Greenfield stated

> I would respectfully and categorically disagree with Dr. Seelig, particularly in listening to the first part of the explanation, saying that the motor vehicle accident could have done any harm and that the rest of the job just continued it. He indicates the motor vehicular accident was the prime problem.
>
> We're talking about an accident where Mr. Lee has told you there's $500 damage to the car, that he's hit a crane twice, that he hits his chest on the steering wheel and his head on the neck [sic]. It's talked about as a 10-mile-and-hour accident, an accident where he does not require emergent medical care, he does not require urgent medical care, and in fact did not appear to seek any medical care, my best review of records, for about 10 months after the accident.

(Tr. 308). In addition, Dr. Greenfield stated that the force that Claimant experienced during the crane accident was similar to forces that are experienced in our daily lives, such as jumping off two steps and landing on one's feet, or the impact of bumper cars at a fair. (Tr. 308). Dr. Greenfield further stated

> I'm just trying to give you some idea of the forces we're speaking about, and saying with reasonable medical probability a 10-mile-an-hour collision would not be enough to rupture ligaments nor would it be enough to herniate a disk nor would it be enough to produce any soft or hard tissue injuries that would probably even require medical care. In this case, he did not seek medical care. And as we get into the diagnostic studies, I think we'll find that there weren't any damages that could have occurred in this accident.

(Tr. 309).

Dr. Greenfield also testified that regarding the pin table

accident, he had difficulty understanding how it would be possible to sustain a neck injury by pulling a wrench. (Tr. 296). In addition, Dr. Greenfield testified that Claimant's description of what occurred while working on the pin table, assuming it occurred, would most likely be a muscle strain. (Tr. 327). Dr. Greenfield stated

> We know we don't have a muscle rupture because we would have certainly picked this up on the EMG. You would have muscle that was dysfunctional, you would have had atrophy. He would have been able to palpate the defect, and it's not there. So you're talking about a muscle strain, which is essentially pulling on a muscle. You can have an electric burning feeling if you pull too hard.
>
> I'm sure we've all lifted something too heavy or pulled on something too hard and had a real zinger of a pain, but they go away pretty quickly. Conservative supportive care, if any, over a couple of weeks is usually enough.

Dr. Greenfield also testified that in his opinion, Claimant's pin table accident could not have caused a herniated disk. (Tr. 328).

Dr. Greenfield also testified as to Claimant's cumulative trauma claim up through December 18, 2000. Dr. Greenfield testified

> In regards to cervical spine, I can find no evidence that at the time he was stopping work that there were any injuries to his neck. He does have a degenerative condition there, which is not uncommon, which would not have produced any symptomology, limitations, nor required any interventional treatment, whether it be fusion, injections or anything else.

(Tr. 329). He further opined

> In regards to the right shoulder, I believe that it's probable that he has suffered from a recurrent bursitis. We described that before. And I certainly think that his job as a rigger could have given him right shoulder bursitis or tendinitis.

(Tr. 329). However, on cross-examination, Dr. Greenfield admitted that Claimant's occupation as a rigger places more wear

on a person's skeleton, and that Claimant's physical demands at his work, which include prolonged neck extension, could progress Claimant's degenerative condition in his spine. (Tr. 341). In fact, Dr. Greenfield seemed to offer conflicting testimony. He testified

> I certainly think that some of the wear and tear on the disk spaces could be related to working as a rigger. But I also think that the degenerative changes that we saw on his x-rays and from the MRIs certainly fit well within what I would expect if I had a hundred people at his age from all occupations, that 50 percent of them would have that degree of wear.
>
> So I don't see particularly it's accelerated wear on the disk spaces. And I certainly don't see any pathologic process on the disk space which is what I think is important here. There may be some loss of height in the disks but I don't believe that in and of itself produced any symptomology.

(Tr. 341). Dr. Greenfield clarified his position by stating that, although Claimant did have some disk space narrowing, many persons of Claimant's age have the same MRI and x-ray results that reveal disk narrowing, and exhibit no symptoms. (Tr. 345). Dr. Greenfield testified that simply because Claimant exhibits evidence of disk narrowing, it should not be assumed that Claimant suffers from an ongoing degenerative process. (Tr. 346). Dr. Greenfield also opined that many patients who suffer from radicular symptoms as a result of diskogenic disk disease at C5-6 and C6-7 do not report having headaches as one of those symptoms.

B. Claimant's Alleged Aggravation of His Psychiatric Condition

Claimant presented the deposition testimony of Dr. Paul Alan Dores, who specializes in several fields of psychology, including forensic psychology, primarily in the field of disability evaluations. (CX-19, p. 7). Dr. Dores stated that he had examined Claimant on one occasion on May 31, 2002. (CX-19, p. 10). After interviewing Claimant for approximately two and one- half hours, Dr. Dores issued a report that same day. (CX-19, p. 11). According to Dr. Dores, Claimant's demeanor during the examination was defensive and agitated. (CX-19, p. 11).

After administering a variety of tests, Dr. Dores diagnosed Claimant as suffering from a schizotypal personality disorder.

(CX-19, B-15). Essential features of this disorder include "a pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationship as well as by cognitive or perceptual distortions and eccentricities of behavior. This pattern begins by early adulthood and is present in a variety of contexts." (CX-19, B-15). Such a disorder is also marked by paranoia and suspicion of others. (CX-19, B-15).

Claimant also recounted to Dr. Dores his psychiatric history, and Dr. Dores noted that Claimant had not sought psychological treatment for most of his life. (CX-19, p. 43). According to Dr. Dores, some of these delusions consist of Claimant believing he can influence other people's thoughts, believing that if he dreams of an occurrence three times, the event will occur, and believing that he has the ability to put his hands through solid objects. (CX-19, p. 49). Dr. Dores remarked that Claimant had recounted several instances in his past where Claimant suffered from psychiatric delusions and never received professional treatment. Dr. Dores stated

> It doesn't surprise me, because I believe that what Mr. Lee has done all is life is to create a lifestyle that allowed him to live with his personality disorder successfully. He created a very limited and very narrow lifestyle that allowed him to function, given the very clear impairments that he had.
>
> And I think in large part the reason that it's coming out now is because the circumstances of the last couple of years, including what happened at work, have aggravated those–that psychological predisposition to an extent that he can't function anymore.

(CX-19, p. 45).

Dr. Dores diagnosed Claimant with having a longstanding schizotypal personality disorder that has been aggravated in recent years. (CX-19, p. 50). Dr. Dores's conclusions are as follows

> I believe that it was an accumulation of events in his life that included the damage to his home in the desert; the loss of his relationship; apparently the loss of substantial amounts of money as a result of that relationship break-up; his psychological response to injuries which, as I wrote in my report, apparently resulted from workplace exposure–that is not a conclusion that is mine to make–that the accumulation of emotional

> stresses in Mr. Lee's life in 1999, 2000, and 2001, aggravated his preexisting and longstanding personality disorder, increasing his anxiety, his suspiciousness, his social withdrawal, and creating depressive symptomology that rises to the level of a major depressive disorder.

(CX-19, p. 52). Dr. Dores further noted that Claimant's recent surgery and the possibility that he may suffer long-term physical disability exacerbated Claimant's already vulnerable mental state. (CX-19, p. 53). Dr. Dores noted in his report

> Mr. Lee told me that he does not feel at this time that he can return to work, both because of his continuing physical symptoms and his perception that he is deteriorating mentally. Mr. Lee told me that he has difficulty maintaining his anger, that he cannot remember things well, and that he is frequently depressed and worried. Mr. lee told me that he feels that something bad is going to happen to him psychologically, and he acknowledged suicidal ideation, with no current plan or intent.

(CX-19, p. B-5). Claimant also reported to Dr. Dores that he was apprehensive about working and interacting with people, because he frequently distrusts them. (CX-19, p. B-5).

Dr. Dores stated that he believed that Claimant was not capable of participating in vocational training due to his anxiety and depression and believes that Claimant is psychologically disabled. (CX-19, p. 73-74, 80). He also stated that he believed that Claimant has become more anxious, more angry, and less capable of controlling his emotions as a result of his injuries. (CX-19, p. 81).

In concluding his medical report, Dr. Dores opined that Claimant has "suffered from an aggravation of a preexisting, longstanding Schizotypal Personality Disorder (301.22, DSM-IV-TR) as well as a Major Depressive Disorder, NOS (311.00, DSM-IV-TR), as a result of an accumulation of events which occurred in his life beginning in 1999." (CX-19, p. B-16). He also noted in his report that he believed that Claimant was temporarily totally disabled on a psychological basis since March 2002, when he first sought medical treatment for his psychological problems at Kaiser. (CX-19, p. B-17).

Employer presented the testimony and medical repot of Dr. Steven Ornish, a psychiatrist, who attempted to examine Claimant's psychological state on June 21, 2002. (EX-B). According to the

medical report, dated June 25, 2002, Claimant became agitated and aborted the interview after one-half hour. (EX-B). Dr. Ornish reported that Claimant was irritable, agitated and peppered the interview with vulgarities. (EX-B). Dr. Ornish asked Claimant whether he needed to stop the interview, and Claimant indicated that he did. Therefore, Dr. Ornish was unable to give a full report. However, based on the short interview with Claimant and records forwarded to Dr. Ornish, he was able to submit a limited report documenting his preliminary findings. (EX-B).

Dr. Ornish reported that he found there was evidence in the tests that Dr. Dores administered that Claimant was consciously and deliberately fabricating a variety of psychotic and delusional symptoms. (EX-B). Dr. Ornish specifically noted that one of Claimant's test scores that resulted in an unusually high score indicated that Claimant was over-endorsing rare symptoms. (EX-B). Dr. Ornish also noted that Claimant's delusions change from examiner to examiner, and stated

> If Mr. Lee was having *bona fide* delusions, you would expect them to be fixed and not change from examiner to examiner. For example, Mr. Lee told the Kaiser social worker, Ms. Reinhardt, that two years ago he saw a transparent leprechaun on a television set. However, Mr. Lee told Dr. Dores that about ten years ago, he awoke in his home in the desert to see a transparent figure of a leprechaun standing in his trailer. Mr. Lee told Dr. Gaudet and Ms. Reinhardt that he saw a UFO over a power plant. Mr. Lee told Dr. Dores that at age 17 he saw a "*black time portal*" and two years later saw a UFO while sailing near Catalina island.

(EX-B). Dr. Ornish also noted that the "X-files" type of delusions that Claimant describes are typical of feigning psychotic symptoms. Dr. Ornish further reported

> It would also be unusual for Mr. Lee to be forty-nine and have these longstanding, bizarre delusions which only recently have come to the attention of the mental health profession in the context of a litigated workers' compensation claim.

(EX-B). However, Dr. Ornish did note that Claimant's recurrent irritability, pressured speech, and tangential, rambling thoughts are consistent from examiner to examiner, and perhaps were evidence of genuine psychiatric symptoms. (EX-B). He also noted

> In summary, while it is possible that Mr. Lee's

> orthopedic problems, alleged chronic pain, cervical fusion surgery on 10/10/01, and psychosocial problems caused Mr. Lee's alleged depression, the exact nature and extent of Mr. Lee's past and present emotional state are made obscure by both his deceptive reporting of his subjective experiences and his exaggeration and fabrication of psychiatric symptoms. I concur with Dr. Dores that there would be a basis for apportionment should there be a finding of permanent, partial, psychiatric disability.

(EX-B). It should be noted that Claimant's counsel offered to schedule another meeting between Claimant and Dr. Ornish, but Dr. Ornish declined based on concerns for his own personal safety.

V. Timeliness of Reporting, Sections 12 and 13.

Employer contends that Claimant failed to report his claims in a timely fashion as required by Section 12 of the Act. Under Section 12 of the Act, notice of all claims must be within 30 days after the date of injury, or from the date Claimant became aware, or should have become aware of the relationship between the injury and employment.

Employer also argues that both the crane accident that occurred on October 18, 1999 and the pin table accident, which occurred on or about January 2000, were in violation of Sections 12 and 13 of the Act. Employer argues that no claim was presented until February 6, 2001, well over one year from the date of injury, and therefore those claims should be time barred.

Section 12(a) of the Act provides that notice of an injury or death for which compensation is payable must be given 30 days after injury or death, or within 30 days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment.[2]

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[2]Section 12(a) of the Act provides:

(a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee or

Although it is Claimant's burden to establish timely notice, under Shaller v. Cramp Shipbuilding and Drydock, 23 BRBS 140 (1989), it is presumed under Section 20(b) that Employer has been given sufficient notice under Section 12.

Under Section 12(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of the injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and the employment. Bivens v. Newport News Shipbuilding & Dry Dock Co. 23 BRBS 233 (1990). Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period (Section 12(d)(1)) or that the employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34 (1989).

Claimant alleges that he sustained injuries while at work on October 18, 1999 and approximately January 2000. However, Claimant argues that it was not until he received treatment for his ailments that he realized that the physical problems he suffered from may be work-related. It is noted in the record that the first time that Claimant received treatment for his shoulder pain was July 25, 2000 at Kaiser, but it was not until October 9, 2000 when Claimant visited Dr. Labrum that Claimant alleged that the pain in his neck and shoulder may be work-related and due to those specific accidents. (EX-T). Based on this evidence, I find that Claimant did not give timely notice of his injuries related to these specific accidents. Because the undersigned deems these two injuries to be untimely, they will not be considered.

Claimant also alleges that he suffered injuries to his neck and shoulder due to the repetitive stressful nature of Claimant’s occupation as a rigger. Claimant’s last day of work was December 18, 2000. Claimant stated that he arrived at work on December 26, 2000 and complained to his supervisors that his shoulder pain may

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claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

be work-related. Claimant had visited Dr. Labrum on several occasions and had been advised to restrict his work to light duty by the time he told Employer on December 26, 2000 that his injuries were work-related. I find that at this point in time, Claimant had received medical advice that his injuries may have been caused by repetitive work, and that there existed a relationship between the injury and the employment. Therefore, I find that Claimant's December 26, 2000 statements that his injuries were work-related constituted timely notice under Section 12(a) of the Act.[3]

Employer also argues that Claimant failed to give timely notice pursuant to Section 13 of the Act.[4] Section 13(a) states that, except as otherwise provided in the section, the right to compensation for disability shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. Claimant filed his claims February 6, 2001.

Because I find that Claimant believed that the pin table

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[3] It is relevant to note that were I to have found that proper notice was not given to Employer, Claimant's failure to give Employer timely notice of his injury pursuant to Section 12(a) of the Act is excused, because Employer has not established that it was prejudiced by the failure to give proper notice. 33 U.S.C. §§ 912(d); Bustillo v. Southwest Marine, Inc., 33 BRBS 15 (1999). In Bustillo, the Benefits Review Board stated, "Prejudice under Section 12(d)(2) is established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. Bustillo, 33 BRBS at 16, 17; See Kashuba v. Legion Ins. Co., 139 F.3d 1273, 32 BRBS 62 (9th Cir. 1998); cert. denied 119 S. Ct. 866 (1999).

[4] Section 13(a) of the Act provides:

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

accident and the crane accident were perhaps the cause of Claimant's neck and back aches when he first went for treatment at Dr. Labrum's office on October 9, 2000, I find that the February 6, 2001 filing of both claims timely under Section 13(a). In addition, because I find that Claimant was aware that his condition may be the result of repetitive work by December 2000, the February 6, 2001 filing was timely pursuant to Section 13 of the Act.

VI. Section 20(a) Presumption

In the instant case Claimant has claimed injuries to his neck and back, aggravation of his psychiatric condition, as well as hearing loss. Each of these injuries must be treated separately under the Act.

Section 2(2) of the Act defines injury as

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of employment or as naturally or unavoidably results from such accidental injury, and included an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S. C. § 902(2). The statute clearly states that the injury to the employee must arise out of employment and in the course of employment. A work-related aggravation of a pre-existing condition is an "injury" under Section 2(2) of the Act. Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom., Gardner v. Director, OWCP, 640 F. 2d 1385 (1st Cir. 1981); Preziosi v. Controlled Industries, 22 BRBS 160 (1989). In addition, the Benefits Review Board has also held that the term "injury" includes the aggravation or acceleration of a pre-existing non-work-related condition or the combination of work-and non-work-related conditions.

Section 20 of the Act provides that "[in] any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary–(a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920. However, before the Administrative Law Judge may properly apply the Section 20(a) presumption, the Claimant must establish a *prima facie* case by proving that he suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. Murphy v. SCA/ Shayne Bros., 7 BRBS 309 (1977); Kelaita v. Triple A Mach. Shop. 13 BRBS 326 (1981); See U.S. Industries/ Federal

Sheet Metal v. Director. OWCP (Riley), 455 U.S. 608, 14 BRBS 631, 633 (1982). It is the Claimant's burden to establish each element of his *prima facie* case by affirmative proof. See Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989). In presenting his case, the Claimant is not required to introduce affirmative medical evidence that the working conditions that existed in fact caused his harm. See U.S. Industries, 455 U.S. 608. Rather, the Claimant has the burden of establishing only that:

(1) the Claimant sustained physical harm or pain, and

(2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain.

Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Strachan Shipping v. Nash, 782 F.2d 513 (5th Cir. 1986); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966). Once the Claimant establishes this *prima facie* case, under Section 20(a) it is presumed that the Claimant's injury or death arose out of employment.

To rebut the presumption, Employer must present specific and comprehensive medical evidence proving the absence of, or severing, the connection between such harm and employment or working conditions. Parsons Corp. v. Director, OWCP (Gunter), 619 F. 2d 38, 41, 12 BRBS 234 (9th Cir. 1980). Employer must produce facts, not speculation, to overcome the presumption of compensability, and reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created in Section 20(a). An employer can only rebut the Section 20(a) presumption by producing substantial evidence that the employment conditions did not cause the claimant's injury. Horton v. General Dynamics Corp., 20 BRBS 99, 103 (1987). "Substantial evidence" for purposes of rebutting the Section 20(a) presumption is evidence that a reasonable mind might accept as adequate to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982); Parsons Corp., 619 F.2d at 41 (9th Cir. 1980).

In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. See Stevens v. Todd Pac. Shipyards, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), aff'd mem., 722 F.2d 747 (9th Cir. 1983), cert. denied, 467 U.S. 1243 (1984).

Rather, the testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). If the Administrative Law Judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. See Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

A. Claimant's Neck and Back Claims

In satisfying the first prong of the test, it is clear that the vast medical evidence and reports offered by both Claimant and Respondent reveal that Claimant in fact suffers from degenerative disk disease. In addition, the testimonies of both Drs. Seelig and Greenfield both noted that Claimant suffers from a degenerative condition. Therefore, I find that Claimant has established a the first prong of his *prima facie* case by affirmative proof.

In satisfying the second prong of the *prima facie* case, I find that based on Claimant's testimony as to the conditions at work and the Job Analysis submitted into evidence, there exist conditions that could have caused or aggravated Claimant's neck and back injuries. (EX-O). In addition, both Drs. Seelig and Greenfield noted that Claimant's occupation as a rigger could aggravate or accelerate the degenerative condition in his spine. Therefore, I find that Claimant has established the second prong of the *prima facie* case. Because Claimant has established the *prima facie* case, I find that Claimant is entitled to the Section 20(a) presumption that Claimant's injury or aggravation arose out of employment.

In attempting to rebut the Section 20(a) presumption, Employer presented the testimony of Dr. Greenfield, who opined that although Claimant did have evidence of disk space narrowing, such narrowing is typical of persons Claimant's age and normally produces no symptomology. (*See* Section IV,A, *supra* & Tr. 345). In addition, Dr. Greenfield strongly disagreed with the testimony of Dr. Seelig, who had testified that the crane accident was sufficiently traumatic to produce rupturing of the cervical spine. According to Dr. Greenfield, the impact of such an accident is too minor to act as a shearing force on one's spine. Dr. Greenfield also opined that Claimant's description of what occurred under the pin table was most likely a muscle strain which would have resolved itself quickly.

I find that Dr. Greenfield's testimony constitutes insufficient evidence to rebut the Section 20(a) presumption of causation. I find that Dr. Greenfield's testimony to consist mainly of speculation and hypothetical probabilities, and fails to sever the causal connection that Claimant's condition is work related. As the Board stated in Accord Smith v. Sealand Terminal, mere hypothetical probabilities are insufficient to rebut Section 20(a). Accord Smith, 14 BRBS 844 (1982). I find that Dr. Greenfield was unable to offer concrete evidence that industry-related causation did not exist, but rather speculated that many persons Claimant's age experienced disk spacing without symptomalogy.

In addition, Dr. Greenfield also testified that "some of the wear and tear on the disk spaces could be related to working as a rigger." (Tr. 341). Such a statement, and similar statements made

by Dr. Greenfield are relevant in determining whether Employer has rebutted the Section 20(a) presumption by severing the connection between Claimant's injury and the working conditions at Bay City. Dr. Greenfield's main argument was that even though Claimant's occupation placed added stress on Claimant's skeleton, it was unlikely that such disk spacing caused Claimant's pain. (Tr. 346). I find that such testimony suggesting that Claimant's condition could be work-related, as well as the speculative and equivocal nature of Dr. Greenfield's testimony, to be insufficient to rebut the Section 20(a) presumption.

B. Psychiatric Injury/ Aggravation

Claimant has also alleged an aggravation of his schizotypal personality disorder, as well as depression and anxiety, resulting from his physical injuries and his inability to work.

A psychological impairment can be an injury under the Act if it is work-related. Director, OWCP v. Potomac Elec. Power Co. (Brannon), 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (work injury results in psychological problems, leading to suicide); Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984) (benefits allowed for depression due to work-related disability); Whittington v. National Bank, 12 BRBS 439 (1980) (remand to determine whether stress and pressure at work aggravated psychiatric condition); Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979) (although claimant's anxiety condition is not an occupational disease, it is compensable as an accidental injury). The aggravation of a preexisting psychological problem also constitutes an injury. Turner, 16 BRBS at 257.

Dr. Dores reported that he believed that Claimant suffered from schizotypal personality disorder that has become aggravated by Claimant's physical pain and his inability to work. Claimant told Dr. Dores that he believed he was deteriorating mentally, and Dr. Dores noted that Claimant's personality disorder was aggravated by increased anxiety, suspiciousness, social withdrawal and depression since the injury. Dr. Dores and Dr. Ornish both noted that Claimant acted apprehensive during their interviews. It is also relevant to note that Claimant had not received psychiatric treatment until after Claimant ceased working and began litigation for benefits. (CX-19, p. B-17).

Based on this evidence, Claimant has established a *prima facie* case for psychological aggravation. Because Claimant has established the *prima facie* case, I find that Claimant is entitled to the Section 20(a) presumption that Claimant's aggravation of his psychological condition arose out of employment. The Employer now bears the burden of rebutting the presumption.

Claimant presented the testimony of Dr. Ornish, who reviewed Dr. Dores's report, but could not complete an interview with Claimant due to his agitated nature. Dr. Ornish speculated that Claimant could have fabricated, and noted several inconsistencies in Dr. Dores's test results which reflect exaggerated responses. Dr. Ornish also noted that it was abnormal for Claimant's delusions to be addressed so late in Claimant's life, and only in the context of litigation.

However, in the context of rebutting the Section 20(a) presumption, I find that Dr. Ornish's testimony is inadequate evidence to sever the presumption that Claimant's aggravated mental state is at least in part due to his work-related injury. Dr. Ornish was unable to complete and examination of Claimant, and therefore stated in his report, "I regret that I was unable to complete the evaulation or address the usual medical-legal issues more definitively." (EX-B). Dr. Ornish admitted in his report that he was only capable of delivering a "limited report" that documented his "preliminary findings." I find that such a report is not sufficient to rebut the Section 20(a) presumption, and that Employer failed to present substantial evidence that the employment conditions did not cause the claimant's injury. "Substantial evidence" for purposes of rebutting the Section 20(a) presumption is evidence that a reasonable mind might accept as adequate to support a conclusion. Parsons Corp., 619 F.2d at 41 (9th Cir. 1980); Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). Therefore, Employer has failed to rebut the Section 20(a) presumption that Claimant's psychological aggravation is work-related.

C. Hearing Loss

The parties have stipulated that Claimant suffers an industry related hearing loss. This injury will only be discussed *infra*, regarding necessity of medical benefits.

VII. The Nature and Extent of Claimant's Disability.

Claimant seeks compensation for temporary total disability resulting from his injury. Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept and the burden of proving the nature and extent of disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980). Disability is defined in the Act as

> incapacity because of an injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such terms shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10 (d)(2) [33 U.S.C. § 910(d)(2)].

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely waits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F. 2d 649 (5th Cir. 1968). Therefore, in order for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Disability requires a causal connection between a worker's physical injury and his inability to obtain work. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984).

A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. Leech v. Service Engineering Co., 15 BRBS 18 (1982); Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446 (1981).

A. Nature of Claimant's Injury

Dr. Seelig stated that another neurosurgeon who had treated Claimant, Dr. Tantuwaya, was concerned that Claimant's surgery may not have fused properly. Dr. Seelig stated

> Dr. Tantuwaya feels that he probably needs a cervical myelogram with a delayed CAT scan in order to better elucidate, number one, does he have any continued nerve impingement. It could be some posterior impingement. He may need posterior decompression. Number two, does he have a pseudoarthrosis. Psuedoarthrosis means that the fusion did not take.
>
> And I would defer to those examination before I could mention if he needs anything further. However, let's say he has fused, he has this continued disability. He may need future care in that after you fuse two areas in the spine, you can develop over time wearing out of the disk above and below those fusions.

(Tr. 397). Regarding Claimant's psychological condition, Dr. Dores reported that Claimant has not reached maximum medical improvement at this time. (CX-19, B-17). Dr. Dores specifically recommended that Claimant be treated with a more aggressive psychopharmacological treatment. Based on these testimonies and the medical reports, I find that Claimant's condition has not stabilized, and therefore find that he is temporarily disabled.

B. Extent of Claimant's Injury

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1986); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, Claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliot v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

In determining the extent of a claimant's disability, the judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). A claimant's credible testimony on the existence of disability, even without objective medical evidence, may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that the claimant can perform certain types of work activity. Ruiz v. Universal Maritime Service Corp., 8 BRBS 451, 454(1978); Eller & Co. v. Golden, 620 F.2d 71 (5th Cir. 1980).

At this initial stage, Claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment, Elliot v. C & P Tel. Co., 16 BRBS 89 (1984). If the Claimant can meet this burden, then he has proven that he is totally disabled. "Usual" employment means the Claimant's regular duties at the time he was injured. The Benefits Review Board has held that a doctor's opinion that an employee's return to work would aggravate his condition could support a finding of total disability. Care v. Washington Metropolitan Area Transit Auth., 21 BRBS 248 (1988); See also Boone Newport News Shipbuilding and Dry Dock Co., 21 BRBS 1 (1988); Lobue v. Army & Air Force Exchange Service, 15 BRBS 407 (1983).

As discussed *supra* in Section III of this opinion, Claimant's occupation as a rigger was a physically stressful occupation. Both Dr. Labrum and Dr. Seelig noted that Claimant was to restrict his work to that of light duty. (Tr. 398). Dr. Seelig stated

> I certainly agree that he can't do any overhead work, looking up, twisting of his neck, repeated flexion, extension of his neck.
>
> There should probably be no lifting of over–well, you know, I haven't personally checked his grip strength so I don't know what that is. But repeated gripping may be a problem and it may put more stress on his neck as he tries to overcome his weakness. So you have to look at that as a permanent issue.
>
> And I think that driving is also a bad thing in the condition of the forklift where the the man has to look behind himself all the time. That type of work–he needs to work looking forward. Ergonomically, he needs to have an arrangement that is at eye level, and not working overhead.

(Tr. 398 & 79). Claimant also testified that his condition became worse when he was performing his job, especially when he was looking up and turning his head from side to side.

Dr. Dores reported that from a psychological standpoint, Claimant's recurrent issues with anxiety, depression and anger management preclude any return to Claimant's former employment. Dr. Dores stated

> I understand that Mr. Lee may not be able to return to his usual and customary employment because of his physical condition. However, even if Mr. Lee is found to be a Qualified Injured Worker, unable to his usual and customary occupation, and eligible for vocational rehabilitation, the kinds of jobs at which he could be successful are very limited. Throughout his life, as a result of his longstanding personality dysfunction, Mr. Lee has found a limited number of very specific kinds of jobs which he has been able to do without interference from his longstanding personality dysfunction. Those jobs have been largely physical jobs, mostly involving outside work, and those which do not require Mr. Lee to interact substantially with other people.

(CX-19, p. B-17). Based on the recommendations of Drs. Labrum, Seelig and Dores, the Job Analysis on the record which highlights the physical demands of being a rigger, as well as Claimant's own testimony, I find that Claimant cannot return to his former position as a rigger. Given the persuasiveness of these medical reports and testimony, I find that the Claimant has met his *prima facie* burden of proving that he would not be able to return to his original employment.

VIII. Suitable Alternate Employment

Once the Claimant established his *prima facie* case of total disability, the burden shifts to the Employer to establish suitable alternate employment for the Claimant. Suitable alternate employment are job opportunities that are within the geographical area that the Claimant is capable of performing, considering his age, education, work experience and physical restrictions, and that Claimant would secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet the burden of proving suitable alternate employment by identifying specific jobs in close proximity to the place which are available for the Claimant. See Royce v. Erich Construction Co., 17 BRBS 157, 158-59 (1985).

Employer has not presented any evidence or arguments proving suitable alternate employment available for Claimant. Employer can meet the burden of proving suitable alternate employment by identifying specific jobs in close proximity to the place which are available for the Claimant. See Royce v. Erich Construction Co., 17 BRBS 157, 158-59 (1985). Since Employer has made no showing of suitable alternate employment, Employer has not rebutted Claimant's *prima facie* case. Therefore, I find that Claimant is temporarily totally disabled.

IX. Claimant's Hearing Loss and Medical Benefits

Although it has been stipulated that Claimant suffered from a work-related hearing loss, no rating has been established. Dr. Smith examined Claimant but the audiogram is not part of CX-16. Dr. Goodman supplied audiometric results. (CX-17). Under the AMA guides there is a 4.7% binaural hearing loss. However, no compensation is payable while Lee receives temporary total.

Therefore, the only issue to be determined on this matter is whether Claimant requires the use of a hearing aid. Claimant presented the report of Dr. Geoffrey A. Smith, who reported after examining Claimant that Claimant has "bilateral high frequency neurosensory hearing loss, with secondary tinitus." (CX-16). Dr. Smith also reported that Claimant is an appropriate candidate for a hearing aid. (CX-16).

Employer presented the report of Dr. Paul Goodman, who also examined and tested Claimant and noted that Claimant suffers from "bilateral hearing loss with secondary hearing loss." (CX-17). Dr. Goodman also stated

> Presently, I do not feel that Mr. Lee needs hearing amplification. However, as this may be necessary in the future, he should have his hearing re-checked every

two to three year, if he returns to working in a noisy environment.

(CX-17). Because causation is not at issue regarding Claimant's hearing loss, he is eligible in principle for medical benefits for his hearing loss.

Where a claimant has demonstrated that he has suffered from a compensable injury under the Act, the employer is required to furnish medical, surgical and other attendant benefits and treatment for as long as the nature of the recovery process requires. 33 U.S.C. §§ 907. The claimant must establish that medical expenses are related to the compensable injury and are reasonable and necessary. Pardee v. Army Force Exchange Service, 3 BRBS 1130 (1981); Pernell v. Capital Hill Masonry, 11 BRBS 532, 539 (1979). The medical expenses are assessable against the employer so long as they are related to the compensable injury. See Pardee, 3 BRBS at 1130. The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Claimant bears the burden of proving the necessity of any proposed treatment. Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996). When the parties dispute whether treatment is necessary and reasonable is a question of fact for the administrative law judge.

I find that Claimant has not proven that a hearing aid is a necessity at this point in time. While Drs. Goodman and Smith agreed that Claimant has some hearing loss, Claimant has not presented evidence that convinces the undersigned that a hearing aid is necessary at this juncture. Claimant is, however, entitled to medical benefits as to his hearing loss and tinitus, which includes regular examinations to determine whether a hearing aid is necessary at a later date.

X. Order

Accordingly, it is hereby ORDERED that:

1) Employer, Bay City Marine, is hereby ordered to pay Claimant, Michael Lee, temporary total disability at the compensation rate of $334.36 per week., from December 18, 2000 and continuing. Employer shall receive credit for any compensation already paid;

2) Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

3) Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed on the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

4) Within thirty (30) days receipt of this decision and order, Claimant's attorney shall file a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty (20) to respond thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AM
Newport News, Virginia