U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 May 2004

CASE NO.: 2003-LHC-317

OWCP NO.: 07-163917

IN THE MATTER OF:

RICHARD J. CULLY

Claimant

v.

PREMIER INDUSTRIES, INC.

Employer

and

LIBERTY MUTUAL INSURANCE COMPANY

Carrier

APPEARANCES:

BILLY WRIGHT HILLEREN, ESQ.

For The Claimant

SCOTT B. KIEFER, ESQ.
JAMES F. SCOTT, III, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

(herein the Act), brought by Richard J. Cully (Claimant) against Premier Industries, Inc. (Employer) and Liberty Mutual Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on September 26, 2003, in Mobile, Alabama. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 30 exhibits, Employer/Carrier proffered 31 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on November 17, 2003. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1; TR. 30-36), and I find that:

1. An "incident" occurred on February 16, 2002.

2. The "incident" occurred in the course and scope of employment. (Tr. 32).

3. There existed an employee-employer relationship at the time of the incident.

4. Employer/Carrier's Notice of Controversion dated June 27, 2002 was received by Department of Labor (DOL) on October 5, 2002.

5. An informal conference before the District Director was held on October 10, 2002.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr._____ ; Claimant's Exhibits: CX-_____; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

6. Claimant received no disability compensation benefits post-injury.

7. Medical benefits for one evaluation by Claimant's choice of orthopedist were paid pursuant to Section 7 of the Act.[2]

II. ISSUES

The unresolved issues presented by the parties are (JX-1; TR. 30-36):

1. Causation of Claimant's back, neck, shoulder, and hip complaints.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Claimant's average weekly wage.

5. Whether Claimant timely notified Employer of his injury pursuant to Section 12 of the Act.

6. Entitlement to and authorization for medical care and services.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born in 1948. He served in the United States Navy during the Vietnam War from 1965 through 1969. At some point, he was diagnosed with post-traumatic stress disorder related to his military experience. He obtained his GED in 1975 or 1976 and struggled with alcoholism through 2001, when he successfully underwent a Department of Veterans Affairs (VA)

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[2] Dr. Zarzour, who Claimant contends is his choice of physician despite initially treating with Drs. West and Cockrell, apparently provided a total of $416.00 in medical services. (CX-19, p. 5).

alcoholism treatment program. He no longer drinks alcohol. (Tr. 53-58).

Claimant sustained injuries in a 1970 train accident and a 1971 motorcycle accident. In the train accident, he severely injured his left arm and elbow, which recovered completely. He estimated his left arm was "better" than his right arm. In the motorcycle accident, he injured his back, which required chiropractic treatment. His injuries did not prevent him from working. He also sustained an injury aboard a boat during the 1980s, when he broke three ribs and suffered a collapsed lung.[3] The injuries completely healed and did not interfere with his duties as a rigger for Employer. (Tr. 60-62; EX-21, pp. 5-7; EX-22, pp. 6-53).

Claimant worked in various occupations throughout his life. His more recent employment included an occupation with duties as a spray painter, boom truck operator and crane operator as needed by "Gary L. Skipper of Gulf Coast Enterprises" from 1998 through 2001, when Mr. Skipper retired and terminated Gulf Coast Enterprises. (Tr. 58-64).

In July 2001, Claimant was hired by Tye Poole as a rigger for Employer. His job was a heavy-duty job which required occasional lifting of up to 100 pounds, frequent lifting of up to 50 pounds and constant lifting of up to 20 pounds. He was originally required to work onshore at Employer's Venice, Louisiana, facility, but was later assigned offshore duties in February 2002. He was physically asymptomatic when he was hired and experienced no physical problems performing his duties through the point at which he was assigned offshore work. He did not recall ever complaining of any shoulder injuries near the time he departed for offshore service. (Tr. 64-68; CX-11; EX-11).

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[3] An undated "Complaint under the Jones Act and General Maritime Law" against Nelson Marine, Inc. and other defendants indicates Claimant averred "his ribs were broken, his lungs were damaged, he has suffered much physical pain and will continue to suffer same in the future; he has incurred medical bills and will incur medical bills . . . " arising out of a June 29, 1988 injury aboard a motor vessel on which he was working. A pre-trial order indicates Claimant's matter was being considered in an Expedited Case Management System in the Circuit Court of Mobile, County, Alabama on April 25, 1990. (EX-15, pp. 13-20).

In February 2002, Claimant traveled to a platform owned by British Petroleum (BP). There, he continued working as a rigger for Employer, which contracted with BP mainly to extend a deck on the platform. He was also required to replace valves in addition to his rigging duties. (Tr. 68-69).

Claimant stated he became involved in a work accident when he was pulling heavy cables aboard the platform. Due to the weight of the cables, he was walking with his head down when he struck a piece of scaffolding with his head. Although he was wearing a hardhat, the force of the impact "jammed my neck, and it just felt like electricity." Claimant indicated he was momentarily dazed by the impact, which was forceful enough to cause him to fall backward and strike his hip and shoulder against an "air tugger" before he "eventually ended up on the deck." (Tr. 69-71).

According to Claimant, Richard Stage, who was Employer's general foreman, was nearby when the accident occurred. Mr. Stage immediately approached Claimant to determine whether Claimant was injured. When Claimant informed Mr. Stage he was in pain, Mr. Stage directed Claimant to "just sit there a minute and get yourself together." Claimant did not tell Mr. Stage which part of his body was injured. (Tr. 71-72, 74).

Shortly thereafter, Mr. Stage again asked Claimant how he was feeling, and Claimant again stated he was hurt, but did not indicate which part of his body was injured. Claimant did not request medical treatment from Mr. Stage because he thought he would naturally recover. Mr. Stage assigned Claimant to fire watch duty for the remainder the day. Claimant described fire watch as a job which is not strenuous and which involves mostly sitting and watching for an outbreak of fire. He remained on fire watch for approximately four hours until the end of his shift. On the following morning, he reported to Mr. Stage that he continued feeling "pretty rough [and] banged up;" however, he could not recall informing Mr. Stage which part of his body was injured. He was again assigned to fire watch duty. (Tr. 72-74).

At some point, Claimant met with Mr. Stage to complete an accident report. He reported he could complete the remainder of his offshore stint, despite feeling "banged up" and "hurting." He did not request medical treatment from Mr. Stage because he expected to recover. (Tr. 74-75).

On the following day, Claimant returned to his regular rigging job, which he performed for the four or five day remainder of his offshore stint; however, Claimant stated he "wasn't really putting a lot of effort into it like I normally do." He told Ernie Simmons, a crane operator, that he injured his neck and right shoulder, which was becoming worse. He requested Mr. Simmons to lower the ball of the crane so that he could perform his duties as a rigger without lifting. Mr. Simmons complied with Claimant's request and also provided some over-the-counter pain relievers. (Tr. 74-76).

After he returned home from the offshore job, Claimant relaxed at home for 12 or 13 days while he awaited a new job assignment. Pain in his neck, right shoulder, lower back and right hip increased. Claimant did not request medical treatment because he continued to believe his condition would naturally improve. Mr. Poole called Claimant about a job with another employer, Laredo Construction, Inc. Claimant informed Mr. Poole that he did not want to accept the job until his shoulder improved, but Mr. Poole indicated he wanted Claimant to take the job as a favor for Mr. Poole's friend at Laredo. Mr. Poole assured Claimant that the Laredo job would not require lifting; rather, Claimant would only be "sitting down, tending to divers." (Tr. 76-81).

Claimant assumed that Mr. Poole knew his shoulder complaints were work-related because he called Mr. Poole around March 8, 2002, to arrange a doctor's appointment for his shoulder complaints before departing for the Laredo job. Claimant was aware Mr. Stage's incident report did not discuss any shoulder injury. He concluded he was the only person who reported his shoulder injury to Mr. Poole, but could not remember what he told Mr. Poole. (Tr. 81-83, 86; CX-30, p. 2).

When Claimant, who had no particular doctor in mind, called Mr. Poole to request medical treatment for his shoulder, Mr. Poole transferred him to Jesse Clark, Employer's "safety man" who worked at the same location as Mr. Poole. Mr. Clark refused to authorize medical treatment because approximately one month had passed since the occurrence of the incident and Claimant's request for medical treatment. (Tr. 83-86).

Claimant began working for Laredo around March 10, 2002. He performed no rigging or welding duties.[4] He was not required

[4] According to an "Employee Status Report," Claimant was hired as a welder by Laredo on March 11, 2002. (EX-13, p. 3).

to lift anything, but was only required to open valves or move oxygen bottles. Otherwise, he was "just sitting and watching for 12 hours a day." His right shoulder worsened to the point that he had to quit the Laredo job before its conclusion. He reported to "them" that "I had to go because my arm was – I had to see about my arm, it was giving me terrible grief." He did not identify which Laredo representative he told about his right arm pain, but noted his pain "started at home, really. I was getting to a point where it was hard to even tuck in my shirt around my back. While I was with Laredo, it became worse." (Tr. 86-69).

Before he left the Laredo location, Claimant contacted his companion, Myra Silloway, to contact Mr. Poole or Mr. Clark to arrange "an appointment to get my shoulder back in place." He was sure Ms. Silloway reached Mr. Poole and Mr. Clark. Shortly after he returned, Claimant personally contacted Messrs. Poole and Clark for medical authorization to treat his right shoulder. Mr. Poole directed Claimant to Mr. Clark, who refused to authorize Claimant's request for shoulder complaints because of the length of time which had passed since Claimant's incident aboard the BP rig. At some point, Mr. Poole asked Claimant when he would return to work, and Claimant replied he would return to work "when I get my arm fixed." (Tr. 86-92).

Claimant arranged medical treatment under an insurance plan he was provided through his employment with Employer. The insurance plan provided a limited selection of physicians from which to choose, and Claimant chose Dr. West, with whom he did not actually want to treat.[5] He reported pain in his neck, lower back, right hip and right shoulder, but Dr. West referred him to Dr. Cockrell to treat his chief complaint, which was his right arm and shoulder. Dr. Cockrell recommended physical therapy, which improved his arm and shoulder. When Claimant returned to Dr. West for ongoing neck and back complaints, Dr. West was skeptical of his complaints because Dr. West did not recall Claimant reporting any neck and back complaints.[6] (Tr. 92-94).

At some point, Claimant was notified his insurance coverage lapsed. Consequently, he sought treatment at the VA Medical

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[5] On September 17, 2002 and July 1, 2003, Claimant requested treatment with Dr. Zarzour. (CX-25, pp. 3-4).

[6] Claimant first treated with Dr. West on April 22, 2002, when Dr. West's records indicate Claimant did not report neck pain. (CX-26, pp. 10-12, 20, 47-49; EX-17, p. 1; EX-19).

Center (VAMC). Shortly thereafter, he obtained an attorney who advised that he was entitled to his choice of physician. He chose Dr. Zarzour, an orthopedic specialist, but Employer refused to authorize the treatment. Employer eventually approved one evaluation by Dr. Zarzour, but denied further treatment with Dr. Zarzour. Claimant was forced to continue treating through the VA system with Dr. Rosa, his primary care doctor. He was prescribed pain medication, which was later denied pursuant to government policy because of positive results on drug screenings indicating Claimant used marijuana. (Tr. 94-97).

Claimant acknowledged a March 11, 2002 pre-employment "Certificate of Medical Examination" which he signed without reading before beginning work with Laredo. The report indicated Claimant was released to work without restrictions. Claimant also acknowledged a March 11, 2002 employment application which he was "sure" he read "if he marked it." He was unaware of the meaning of the phrase "essential functions of a position" in a section of the employment application in which he marked an affirmative answer to a question asking if he was capable of performing the "essential functions of positions in the fleet" which may require working in extreme conditions, repetitive standing, walking, lifting 50 pounds or more, pushing, pulling, climbing ladders, crawling, bending, stooping, reaching, crouching, squatting, kneeling, hearing, speaking and seeing. (Tr. 97-98; EX-13, pp. 18, 22).

Claimant testified he desired to return to work, but was unable to perform his rigging duties after his job injury due to neck, back and hip pain. (Tr. 99).

On cross-examination, Claimant admitted he was off work for approximately one year and a half following an injury before 2002 in which he fell from an upper deck of a motor vessel and sustained three broken ribs and a collapsed lung. He also admitted back injuries in a motorcycle accident in which he "struck the top of a pine tree and drove off a cliff." He was also injured when he drove his car into a train. (Tr. 99-107).

Claimant testified he began working with Employer in July 2001. He acknowledged a July 20, 2001 "Second Injury Fund Questionnaire," in which he indicated he presently had or has had arthritis, but did not identify which body part was arthritic. In the questionnaire, Claimant reported he sustained no previous knee, neck, shoulder or back injuries. He also acknowledged a July 20, 2001 "General Physical Form," in which

he reported successfully completing an alcohol abuse program. Claimant indicated he never used nor was presently using narcotic drugs. Claimant also disclosed an arthritis condition, although it did not identify which area of his body was arthritic. (Tr. 107-111; EX-6, pp. 13-14).

Claimant stated he earned $10.00 hourly during the 22 days he lived and worked aboard an offshore rig for Laredo. He recalled pulling on hoses and oiling pumps for Laredo. He generally testified that he reported physical problems to co-Laredo workers "from the captain down," but could not specifically identify any co-workers with whom he reported any physical complaints. (Tr. 111-112, 121-122).

Claimant admitted not asking for medical treatment from any co-workers aboard the BP platform while he worked for Employer. He sustained no bruises, cuts or swelling with any part of his body in the February 2002 incident. He remained on the BP platform until the termination of his usual job at which he returned on the third day following his incident. (Tr. 112-113).

Claimant agreed he never received any medical treatment until he returned from the Laredo job. Before he went to work at Laredo, he "made no effort to get any medical treatment." He reported no injury while working for Employer to anybody at Laredo when he applied for the Laredo job. While he worked at Laredo, Claimant admitted receiving no complaints, reprimands or disciplinary actions for failing to perform his job duties. (Tr. 113-115).

Claimant recalled Dr. Cockrell diagnosed a torn rotator cuff. His testimony would not change if Dr. Cockrell testified MRI results indicated Claimant's shoulder was normal. He admitted his medical treatment at the VAMC was free of charge, except for medications. (Tr. 114-115).

Claimant affirmed the truthfulness of his July 29, 2003 deposition testimony in which he denied any ongoing physical complaints following his motorcycle accident and before he worked for Employer. He noted he might have experienced brief aches or pains, but nothing of a lasting nature. (Tr. 115-117; EX-25, pp. 109-114).

However, Claimant acknowledged a May 9, 2001 VAMC record indicating he reported right hip, lower back and right shoulder complaints which he suffered for "years." According to the

report, Claimant stated acetaminophen was not helpful for his complaints, and his hip pain was worse with standing and trying to raise his leg.[7] Claimant, who indicated his memory was not adversely affected by any events or medications, conceded he in fact reported these complaints to the VAMC nurse. (Tr. 117-122).

Claimant admitted he understood and was familiar with the meaning of pushing, pulling, climbing ladders, crawling, bending, stooping, reaching, crouching, squatting and kneeling, although he might not understand what the phrase "essential functions" means. (Tr. 122-123).

Myra Silloway

Ms. Silloway, Claimant's companion who has resided with Claimant since 1990, testified Claimant was asymptomatic and did not experience any neck, shoulder, back or hip problems since he began working for Employer in 2001 until the February 2002 incident. Ever since the incident, Claimant has experienced hip problems, which cause him to limp or nearly fall to his knees. He also has suffered from neck, shoulder and lower back problems. (Tr. 125-128).

Ms. Silloway became aware of Claimant's work incident when he called her from the platform on the following day. He reported pain, which he described as electricity, in his neck through his entire body. After Claimant returned home, he was unable to perform any household activities or hobbies. He also experienced problems dressing due to right shoulder pain. Claimant cannot do anything, including sitting or lying down, for any extended length of time without pain. He cannot lift heavy loads. (Tr. 128-130, 139).

After Claimant accepted employment on another job for Laredo, he called Ms. Silloway and complained of ongoing pain which worsened. He asked her to contact Mr. Poole to arrange an appointment with a physician. On March 26, 2002, Ms. Silloway called Mr. Poole to request medical authorization from Mr. Poole, who directed her to call Mr. Clark. She obtained Mr. Clark's number from Mr. Poole's office and called Mr. Clark on April 5, 2002, to request medical authorization, but was told by

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[7] On May 10, 2001, Claimant also reported "a chronic medical problem (LOWER BACK PAIN) that interferes with his life." (EX-18, p. 69).

Mr. Clark to have Claimant contact Mr. Poole when Claimant returned from the Laredo job.[8] (Tr. 130-138).

On cross-examination, Ms. Silloway acknowledged her earlier deposition testimony indicating she could not recall whether Claimant contacted her from the BP platform where he experienced his incident.[9] However, she explained that she suffered a panic attack during the deposition which caused her some confusion. Upon further reflection after the deposition, she remembered Claimant contacted her from the platform. Consequently, she testified her deposition testimony was inaccurate. (Tr. 139-143).

Ms. Silloway, who stated she was confused due to a panic attack at the hearing, recalled that Claimant contacted Laredo Construction about a job after his February 2002 incident. She was not sure if Claimant disclosed his neck, shoulder, back and hip complaints to a Laredo representative.[10] She remembered Claimant unsuccessfully requested medical treatment after discussing his physical complaints with Mr. Poole, but was unsure when the discussion occurred. Ms. Silloway reviewed her

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[8] Ms. Silloway acknowledged telephone statements in which she identified specific entries as calls made from her telephone number to Mr. Poole and Mr. Clark at various times before and after Claimant's incident. After reviewing the statements, she noted that she first contacted Mr. Poole on March 26, 2002. The first time she contacted Mr. Clark was on April 5, 2002. (Tr. 132-138; CX-30).

[9] On September 26, 2003, Ms. Silloway was deposed. She stated, "It kind of seems like he called me from the platform . . . and I'm thinking that there was one or two times that he used somebody else's cellphone to call me, but I can't be sure." She added, "I don't know if he called me from the platform or after he left the platform and before he came home . . . ." According to Ms. Silloway, Claimant was wearing a hard hat when he struck his head on a piece of scaffolding while carrying some pipe. The impact "knocked him backwards over some pipe." At some point, Claimant told Ms. Silloway that he experienced pain in his neck, shoulder, back, right hip and right shoulder which he indicated were problematic "immediately after the incident." (EX-32, pp. 12-13, 16-18).

[10] At her deposition, Ms. Silloway testified she was present when Claimant called a Laredo representative and disclosed his shoulder, neck, back and hip complaints. (EX-32, p. 24).

telephone statement, but could not recall each specific telephone call to Mr. Poole. She indicated she would never have represented to Mr. Poole or to Mr. Clark that she was Claimant's wife. (Tr. 143-154).

On re-direct examination, Ms. Silloway acknowledged her deposition testimony indicating she was confused regarding specific dates of telephone calls. She described communication problems which were problematic for her during the deposition, which was taken via telephone and which involved approximately five individuals at different locations on the same call. She also indicated she suffered from an anxiety disorder and was experiencing physical side-effects from medications she was taking while recovering from surgery at that time. (Tr. 154-157; EX-32, pp. 39-41).

On further questioning, Ms. Silloway indicated she contacted Mr. Poole after Claimant called her from the Laredo job requesting medical attention for various physical complaints, including his shoulder. Mr. Poole directed Ms. Silloway to have Claimant contact Mr. Poole upon Claimant's return from the Laredo job. Upon Claimant's return, Ms. Silloway called Mr. Poole, who again directed Ms. Silloway to have Claimant call him. At some point, Ms. Silloway also contacted Mr. Clark, but could not recall what Mr. Clark told her. She indicated she was confused during her earlier hearing testimony when she stated Mr. Clark directed her back to Mr. Poole. She appeared to indicate Mr. Clark may have refused medical authorization to her on the phone; however, she stated Mr. Clark's refusal might have been her recollection of Claimant's discussion with Mr. Clark. (Tr. 158-164).

Ernest Simmons

Mr. Simmons testified he was working as a crane operator for Employer during February 2002 when Claimant's incident occurred. He did not see the incident, but heard co-workers discussing the event. Prior to the event, he recalled Claimant capably performing his job as a rigger. At some point after the event, Claimant returned to his usual job as a rigger and did not experience any problems performing the job, which included hooking baskets to the crane. (Tr. 197-201).

Mr. Simmons did not recall Claimant complaining of any physical problems, including any problems associated with his arm or shoulder, after the February 2002 incident. However, Claimant complained of such injuries **prior to** his incident on

the way to the BP platform, when the crew was awaiting departure on a boat. Claimant never told Mr. Simmons he sustained an injury while working for Employer at the platform during February 2002. Mr. Simmons could not recall lowering the ball of the crane down for Claimant to reach it easily. He could not remember giving Claimant medications. Had Claimant requested medications, Mr. Simmons would have provided "Orudis KT," which is a form of aspirin that Mr. Simmons keeps in his workbag. (Tr. 201-203, 207-208).

On cross-examination, Mr. Simmons recalled that Mr. Stage assigned Claimant to fire watch after the February 2002 incident to keep "him from having to use his arm" if Claimant had problems with his arm. He noted riggers were commonly assigned fire watch after incidents occurred. Prior to the February 2002 incident, Claimant capably performed his job as a rigger. If Claimant would have requested lowering the ball of the crane, Mr. Simmons would have complied. (Tr. 204-207).

Richard P. Stage

On September 8, 2003, the parties deposed Mr. Stage via telephone. Mr. Stage was on location in Nigeria, Africa, for another employer. During February 2002, Mr. Stage was Employer's offshore superintendent at the platform where Claimant experienced his incident. Mr. Stage testified Claimant ran into scaffolding and fell backwards onto a steel deck. Claimant remained on the deck for "a few seconds until we got him up." Mr. Stage offered medical treatment, but Claimant refused.[11] Mr. Stage assigned Claimant to fire watch after his incident because Mr. Stage "thought he was an accident waiting to happen." He explained he did not place Claimant on fire watch because of an injury; rather, he was concerned about Claimant's "clumsiness" because he observed Claimant fall on two prior occasions when Claimant slipped on mud and tripped over an extension cord. (EX-30, pp. 5-10, 14).

According to Mr. Stage, Claimant returned to regular duty

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[11] On February 16, 2002, Mr. Stage prepared a "Significant Near Miss Report" in which he noted Claimant "fell down. Asked [sic] if he was alright, he said he was." (EX-1). On February 17, 2002, a "GoM HSE Incident Report," which was completed by "Monty Brooks," indicates an incident occurred when Claimant walked into a scaffold leg. The incident was designated as a "First Aid or recordable injury without hospitalization" which involved no medical treatment. (EX-2).

after remaining on fire watch for two days. Mr. Stage observed Claimant capably perform his regular duties, including lifting materials and placing them in baskets to load boats. Claimant remained on the platform through the conclusion of his job, which involved remaining on the platform to off-load materials to boats for two days after Mr. Stage left the platform. Mr. Stage was unaware of any reports that Claimant experienced any problems finishing his job in Mr. Stage's absence during the last two days he was aboard the platform. (EX-30, pp. 10-12).

Claimant never reported any physical problems or complaints to Mr. Stage after his February 2002 incident. Claimant never indicated to Mr. Stage that he experienced difficulties performing his job after the February 2002 incident. Likewise, none of Claimant's co-workers reported to Mr. Stage that Claimant experienced physical difficulties or was otherwise impaired from capably performing his job. Mr. Stage first became aware Claimant was claiming a February 2002 injury "about a month or so" later. (EX-30, pp. 12-14).

On cross-examination, Mr. Stage indicated he witnessed Claimant's incident, which occurred before approximately six other workers. Mr. Stage interviewed Claimant within five minutes after the incident and prepared a near-miss report, which was used during morning safety meetings to notify other workers of "potential hazards in the work area." Mr. Stage did not prepare near-miss reports on the two prior occasions in which he observed Claimant fall because he did not think drilling mud on a deck or an extension cord stretched across a deck were potential hazards. (EX-1; EX-30, pp. 14-23).

Mr. Stage again testified his decision to place Claimant on fire watch was motivated by his observation of Claimant's clumsiness. Had Claimant reported any injury, Mr. Stage would have removed Claimant from duty and sent him ashore for medical treatment. Mr. Stage recalled asking Claimant "many times" if there was an injury, but Claimant replied he was not injured. According to Mr. Stage, there are no "in-between circumstances" where somebody is "shaken up" and placed on fire watch to "give the guy a chance to rest a little while and get himself composed." Mr. Stage never told Claimant that he placed Claimant on fire watch duty to make sure Claimant was physically uninjured. (EX-30, pp. 18-21, 26).

Mr. Stage recalled discussing Claimant's incident with Mr. Clark, who received a facsimile of the near-miss report. Mr. Stage was unsure of the exact date, but noted Mr. Clark informed

him that Claimant was claiming an injury. Approximately two weeks later, Mr. Stage discussed Claimant's incident with Mr. Simmons, the crane operator. Together, they recalled Claimant "stayed till the end of the job and laid out all the materials and equipment on the boat." Mr. Stage acknowledged his April 8, 2002 signed statement describing Claimant's incident. He could not recall the circumstances of the statement, nor whether anybody asked him to prepare the statement. Mr. Stage could not recall where he was in April 2002. (EX-30, pp. 23-27).

On further examination, Mr. Stage testified he prepared the near-miss report and a similar report for British Petroleum, who owned the platform where Claimant's incident occurred. If Claimant reported soreness following his incident, Mr. Stage would have arranged for helicopter transportation to take Claimant ashore for medical attention. Mr. Stage explained a "first respondent," who was an individual trained in emergency medical situations, was available aboard the platform when Claimant was injured. The first respondent could have provided medical treatment if Claimant did not need to be flown off of the platform; however, Claimant refused medical treatment. Although Mr. Stage has some latitude in making vocational decisions, he stated he is not authorized to assign individuals light duty in response to work incidents or accidents. (EX-30, pp. 27-29).

Kenneth Perkins

Mr. Perkins is currently employed by Employer as an operator. During February 2002, he was working for Employer as a rigger on the same shift as Claimant when Claimant sustained his accident. Mr. Perkins, who was five to six feet from the incident when it occurred, observed Claimant fall to the deck and land on his hand, which "broke the fall." Claimant remained on the ground for two minutes then got "right back on up" and returned to work. Mr. Perkins did not see Claimant hit his shoulder or back during the incident, which occurred quickly. He recalled that Claimant "said he was alright, and went right back to work" when two or three co-workers asked Claimant if he was hurt. (Tr. 226-228).

After the incident, Mr. Perkins could not recall Claimant being assigned to a fire watch job. He remembered that Claimant returned to his regular job duties which were not problematic. Claimant helped a crane operator by signaling to him and attaching cables while moving baskets. Claimant did not complain to Mr. Perkins of any physical problems nor did he

appear to experience any physical problems at any time after the incident. Mr. Perkins has not spoken to Claimant since the incident. (Tr. 228-232).

On cross-examination, Mr. Perkins acknowledged a written statement which was prepared by Mr. Stage and signed by Mr. Perkins on April 8, 2002. Mr. Perkins did not provide the factual basis for the statement, which was based on Mr. Stage's understanding of the incident. Mr. Perkins did not read the statement, but the statement was read aloud by Mr. Stage to Mr. Perkins and two other co-workers before Mr. Perkins signed the statement. Mr. Perkins indicated he signed the statement to indicate he witnessed Mr. Stage writing the statement. Mr. Perkins could not confirm or deny an indication in the written statement that Claimant "broke most of his fall by hanging onto a tugger that was near him," but he affirmed a report in the statement that Claimant replied he was "alright" when Mr. Stage inquired of his status after the incident. (Tr. 232-242; CX-8, p. 3).

Tye Poole

Mr. Poole testified he was Employer's general manager at its facility in Venice, Louisiana, in February 2002. He understood Claimant did not reside in state when he hired Claimant as a rigger for Employer. According to Mr. Poole, out-of-state riggers were not on any fixed job schedule; rather, they would be contacted for jobs as needed on various locations. If jobs concluded, out-of-state workers generally returned home to await calls to return to work at other jobs. If there were no available jobs with Employer, the workers might find employment with other employers, or Mr. Poole might help them find other employment. Claimant did not return to work with Employer following February 2002. (Tr. 209-212).

At some point after February 2002, Mr. Poole was contacted by "Carlos Cane," his friend at Laredo Construction, which needed riggers and other workers for a job in Florida. Mr. Poole discussed the Laredo job with Claimant approximately twice via telephone. Mr. Poole denied Claimant's testimony that he discussed any physical complaints with Claimant when they discussed the Laredo job. Rather, he testified Claimant never reported any physical problems related to his February 2002 incident during conversations about the Laredo job. Otherwise, Mr. Poole explained he "never" would have recommended Claimant to Mr. Cane. During the interim period of time after Employer's February 2002 job ended through the time when Mr. Poole

contacted Claimant to discuss the Laredo job, Mr. Poole was not contacted by Claimant or Ms. Silloway. (Tr. 212-215, 220).

Mr. Poole was generally familiar with the type of construction services Laredo performed and the types of workers it needed, but did not know the specific details of the Laredo job. Nevertheless, Mr. Poole refuted as "totally false" Ms. Silloway's testimony that he informed Claimant the Laredo job was an easy job. Likewise, he denied Claimant's testimony that he described Laredo's job as merely tending to divers because he was unaware Laredo employed divers. He also denied Claimant's testimony that he asked Claimant to accept employment with Laredo "as a favor." (Tr. 215-216, 219).

After Claimant began working on the Laredo job, Mr. Cane followed-up with Mr. Poole, as Mr. Cane usually did, to discuss Laredo's projects related to Mr. Poole's employee referrals. Mr. Cane never reported any complaints with Claimant's work, nor did he report receiving any physical complaints by Claimant, who capably performed his job. (Tr. 216-219).

After the Laredo job concluded, Claimant called Mr. Poole, seeking medical treatment for a shoulder injury which Claimant related to his February 2002 incident. He did not report any other physical complaints related to his February 2002 incident. Mr. Poole informed Claimant that he did not have authority to authorize medical treatment and directed Claimant to contact Employer's safety director, Jesse Clark. Mr. Poole subsequently called Mr. Clark to inform him that Claimant reported an injury. After Mr. Poole advised Claimant to contact Mr. Clark, Claimant contacted Mr. Poole approximately three more times. Claimant's "wife" contacted Mr. Poole approximately two times as well. Mr. Poole explained to Claimant's wife that he could not authorize Claimant's medical treatment and that she needed to contact Mr. Clark. (Tr. 216-218).

At the time, Mr. Pool and Mr. Clark were in two separate buildings in two different cities. Each office maintained its own phone number, and there was no way to transfer a call between the offices. (Tr. 219-220).

On cross-examination, Mr. Poole indicated Claimant performed offshore and onshore work for Employer. Claimant was a good, dependable worker who he favorably reviewed in performance evaluations. Prior to the February 2002 incident, Claimant capably performed his rigging duties. After the

February 2002 incident, Mr. Poole expected Claimant to return to Employer's jobs should any opportunities arise. (Tr. 221-225).

Jesse Clark

Jesse Clark, Employer's safety director during February 2002, testified he was responsible for receiving and investigating incident reports. Employer maintained an on-the-job injury policy which was communicated to its employees and which required documentation of any accident, regardless of the magnitude of injury. During the evening of Claimant's incident, Mr. Stage called Mr. Clark to inform him of the occurrence of the incident and that associated documentation would be forthcoming. Mr. Stage indicated there was no injury. On the following morning, Mr. Stage transmitted documentation, which Mr. Clark placed into a file after preparing an LS-202. Mr. Clark took no further action because he was unaware of any injury.[12] (Tr. 167-172; EX-1; EX-2; EX-3).

Mr. Clark became aware Claimant was claiming a February 16, 2002 injury when Claimant called him in mid-April 2002 to report a right shoulder injury. Other than the shoulder complaint, Claimant did not report any problems with any parts of his body. Prior to the mid-April telephone call, Mr. Clark was not aware Claimant requested medical treatment from any of Employer's employees. Mr. Clark investigated Claimant's file, obtained co-workers' statements and discussed the matter with Mr. Stage, but could not determine whether Claimant actually sustained an injury while working for Employer. Consequently,

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[12] According to Mr. Clark's February 16, 2002 LS-202, which is entitled "**Employer's First Report of Injury** or Occupational Illness," Claimant was involved in an **accident** on February 16, 2002, when he was walking on a platform deck and "bumped his hardhat on frame [sic] of scaffold and fell on same level," but "**no injuries** were reported." Medical attention was authorized, but "[Claimant] chose not to seek medical services. He said he was okay." (CX-2; EX-4).

On June 1, 2002, Claimant filed a Claim for Compensation in which he described "loss of mobility in **right shoulder**, catch in **right hip**, **neck** catch & pain – jammed neck" as the nature of his injury. Employer/Carrier submitted a copy of a June 27, 2002 Notice of Controversion which they claim was forwarded to DOL on June 27, 2002; however, there is no indication its Notice of Controversion was ever received and filed by DOL prior to the informal conference. (CX-1; EX-5).

he forwarded Claimant's file to Carrier for follow-up consideration. Mr. Clark took no further action after he contacted Carrier and forwarded the contents of his files to Carrier. (Tr. 172-177, 194).

Mr. Clark indicated he could authorize medical treatment, and would generally authorize such treatment upon the occurrence of "a definite situation that we had an injury from an accident" or under emergency circumstances. Mr. Clark refused to authorize medical treatment in favor of forwarding Claimant's matter to Carrier because no injury was reported in Claimant's documentation and because the first report of any injury was received six weeks after the occurrence of Claimant's incident. Mr. Clark indicated Mr. Stage could also authorize medical treatment and could have "absolutely" sent Claimant ashore if Claimant reported an injury to Mr. Stage. (Tr. 177-180).

On cross-examination, Mr. Clark generally agreed with reports that Claimant ran into a scaffold leg, fell back and landed on his hip. He agreed with the characterization of Claimant's incident as described in his reports as a "near-miss," which involved no first-aid treatment. From talking with Mr. Stage after receiving Claimant's incident reports, Mr. Clark understood Claimant refused medical treatment which was offered at the time of incident because "he said he did not have an injury, he didn't need to go in" for medical treatment. (Tr. 180-187; CX-7, p. 1; EX-1; EX-2).

Mr. Clark explained he did not authorize Claimant's requested medical treatment when Claimant eventually requested it "a couple of months later" because Mr. Clark perceived Claimant's incident as "an incident without injury" based on reports and co-workers' statements. Mr. Clark indicated he was not a medical specialist, but noted he could refuse medical authorization without being a physician. He added, "I have yet to have any person say that [Claimant] ever said he was hurt or bruised. He completed eight more days of service on that job until it was completed, and then he came in and he left and went to Alabama, and the next time I heard from him was six weeks later when he called." Mr. Clark was unaware whether anybody ever approved any medical treatment for Claimant as a result of his incident. (Tr. 187-193).

On further questioning, Mr. Clark indicated he received statements from a total of four or five co-workers after Claimant contacted him seeking medical treatment, but he could not recall which workers he contacted. (Tr. 194-197).

The Medical Evidence

Department of Veterans Affairs Medical Center

On April 18, 2001, Claimant was admitted to the Department of Veterans Affairs Medical Center (VAMC) for depression and alcohol abuse. He also complained of occasional left arm numbness. He was diagnosed with depression, left arm pain and "possible cervical nerve compression." According to a cervical spine notation in a progress report, disc space was narrowing at C3-C4 on the left side. On April 19, 2001, a VAMC progress report includes a pain assessment which attributes "approximately 1/10" of Claimant's pain to "his right shoulder pain," while a "review of systems" entry describes "left shoulder pain intermittent for the past year." Claimant also reported several broken ribs and associated right-sided pain from injuries sustained "over the years." (EX-18, pp. 17, 23-24).

On April 20, 2001, Claimant complained of intense pain in his right side related to a rib. On April 27, 2001, Claimant reported pain in his left shoulder, which Claimant indicated was a "pinched nerve." On May 2, 2001, Claimant was discharged with no physical activity restrictions to a domiciliary Substance Abuse Intensive Outpatient Treatment (SAIOP) program. On May 3, 2001, Claimant presented to a domiciliary for admission into the SAIOP program. He was diagnosed with alcohol and tobacco dependence, degenerative joint disease, chronic obstructive pulmonary disease and depression. (EX-18, pp. 23-24, 39, 50).

On May 9, 2001, a "sick call" progress report reveals Claimant reported pain occurring "for years" in his "right hip, lower back & right shoulder." He approximated his pain as a "9 'when my hip catches.'" "Nothing" reportedly alleviated his pain, which was exacerbated by sitting, "lifting [his] leg, sudden movements, [and] walking sometimes." He reported acetaminophen was not helpful and that he was taking "nothing" for his ongoing pain. He was assessed with probable degenerative joint disease and warned against the use of acetaminophen in consideration of his damaged liver. Chest X-rays were normal, except for a small lung nodule. Hip and back X-rays were ordered. (EX-18, pp. 62-64).

On May 10, 2001, Claimant reported he "has experienced lower back pain for the past six years." He considered

treatment for his medical problems to be "extremely important." His pain was approximated as "0" on a scale of "0 thru 10." He reported a car accident involving a train in the 1970s, when doctors considered removing his damaged left arm but opted to repair it instead. X-rays of his hip and back "secondary to arthritic type pains" were "pending." (EX-18, pp. 69, 78-81).

On June 14, 2001, Claimant was discharged from the domiciliary SAIOP program. The discharge reports do not indicate whether Claimant ever underwent hip and back X-rays previously ordered. On December 26, 2001, Claimant reported on a telephonic follow-up interview that he was previously hospitalized four times for medical problems, although the circumstances of his medical problems were not reported. He complained of increasing problems with "one of his feet." (EX-18, pp. 112-123).

James L. West, III, M.D.

On August 13, 2003, the parties deposed Dr. West, who has practiced for approximately 20 years in the specialty of orthopedic surgery. He is Board-certified in orthopedics and also completed a "spine fellowship." He specializes in spinal treatment. (CX-26, pp. 7-8).

On April 22, 2002, Dr. West initially treated Claimant, who reported "pain in his right shoulder with a lesser pain in his right hand." Claimant "perhaps" reported "a little bit [of pain] into his trapezius, but the chief complaint was his shoulder and hip." He did not report any neck pain.[13] Dr. West suspected a shoulder injury and referred Claimant to Dr. Cockrell, who specializes in shoulders. In May 2002, Dr. Cockrell ordered an MRI, which was "deemed as normal," indicating Claimant "did not have any significant internal

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[13] On April 22, 2002, Claimant completed a back questionnaire in which he identified pain only in his right hip. He approximated the pain as a "9." He reported his pain started "After accident in March," when he indicated he was "working" when the pain started. He reported he did not "ever have pain in [his] neck, back or hips," nor did he ever sustain injuries to those areas. He marked an "X," which designates painful areas according to the questionnaire, at the front and back of his right shoulder and right hip. He marked an "O," which designates numbness according to the questionnaire, at the front and back of his right arm near the center of his forearm through his right thumb. (CX-26, pp. 47-49).

derangement of the shoulder." At some point, Claimant began reporting cervical complaints to Dr. Cockrell, who referred Claimant back to Dr. West's care on July 1, 2002. (EX-17, p. 1; EX-19; CX-26, pp. 10-12, 20).

On July 8, 2002, Dr. West treated Claimant for cervical complaints. Claimant did not report any shoulder complaints.[14] X-rays indicated mild degenerative cervical changes without any other significant abnormality. Dr. West explained to Claimant that his cervical complaints were likely unrelated to his job injury because the complaints did not manifest concurrently with the job injury. Dr. West recommended physical therapy which Claimant underwent for his neck. (CX-26, pp. 12-15).

On August 22, 2002, Claimant reported he was "slightly better," but desired to remain off work for one week to "see if that would help his neck pain." Dr. West complied with Claimant's request and restricted Claimant from working for one week. On September 18, 2002, Claimant returned for a follow-up visit at which he reported "a greater number of complaints, including his back and shoulder." His hip, which had been asymptomatic for some time, was again painful. Claimant "was concerned because he didn't feel like much was being done to help him." Dr. West explained to Claimant that his neck and hip complaints were due to degenerative changes, while his shoulder complaints were previously treated by a specialist. Claimant indicated he treat with the VA system. (CX-26, pp. 14-15).

Claimant returned for an evaluation on July 30, 2003. He reported cervical pain as well as thoracolumbar pain and pain

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[14] In his July 8, 2002 back questionnaire, Claimant identified pain in his back, neck and right hip but did not identify the approximate severity of his pain. He again denied prior pain or injuries with his neck, back or hips. He reported that he was "fine until accident [sic] happened. Yard work, etc." A notation also indicates Claimant "ran into scaffolding" while dragging a cable with his head down," and was subsequently out of work. Elsewhere in the questionnaire, Claimant indicated "100%" of his pain was in his back. He marked an "X," which designates pain according to the report, at the back of his neck and below the back of his neck. He marked an "O," which designates numbness according to the report, at the back of both arms at the elbow and wrist. (CX-26, pp. 50, 52).

into the right hip; however, he reported no shoulder pain.[15] Dr. West opined it is "clear that his thoracolumbar symptoms are not specifically related to the work-related injury, in that he did not have them when he was seen in July of 2002." He concluded Claimant's cervical complaints were not related to the February 2002 incident, but were related to non-occupational degenerative changes. Likewise, he related Claimant's right hip pain to degenerative arthritis, which was unrelated to the February 2002 job injury. (EX-23; CX-26, pp. 15-16).

Dr. West also opined Claimant could not return to heavy labor. However, any restriction against returning to heavy labor was unrelated to the February 2002 incident; rather, "this is related to his cervical degenerative disc problem and to his previous motorcycle accident, his previous spinal injury, as well as the arthritis in his right hip." He concluded Claimant did not suffer any "significant impairment" from his job injury, noting that Claimant's original complaints of right hip and right shoulder pain apparently resolved. (CX-26, pp. 16-17).

On cross-examination, Dr. West indicated Claimant did not provide many details of his job injury at his initial April 22, 2002 visit. When Claimant returned on July 8, 2002, he completed a "Back Questionnaire," in which he identified his back, neck and right hip as painful areas. Claimant indicated his injury occurred following some "yard work, et cetera." Dr. West discussed Claimant's condition and noted Claimant ran into a scaffolding at work while dragging a cable. (CX-26, pp. 20-

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[15] In his July 30, 2002 back questionnaire, Claimant identified his back, neck and right hip as painful areas. He approximated the pain in his back as a "6," and the pain in his neck as a "5." Without medications, he estimated his pain was "9-10." He did not approximate the pain in his right hip. He reported his pain started upon the occurrence of a February 2002 offshore accident in which his pain "started small – then constant pain." He indicated his pain "just continued getting worse" and culminated in his present condition on July 30, 2002. He reported a 1970 motorcycle accident in which he injured his back and also affirmatively indicated experiencing prior back pain. Elsewhere in his questionnaire, he placed an "X" at the back of his neck, three locations across the back of his shoulders, three locations at his lower back and one location at the back of his right hip. He also placed an "X" at the front of his right hip. He approximated "90%" of his pain was back pain, while "10%" of his pain was leg pain. (EX-17, pp. 17-19).

22, 25).

Dr. West opined an accident such as that which Claimant described "potentially could cause damage" to the neck, back, right shoulder and right hip or aggravate an underlying degenerative condition. However, based on Claimant's "specific case and the history as I have it and the exams that I have done, my opinion is that the natural history is not altered by his injury." He concluded there was no change in Claimant's symptoms as a result of his February 2002 injury based on the variability of Claimant's complaints and reports of pain and in consideration of Claimant's pre-existing degenerative problems and prior non-occupational injuries, including a motorcycle accident. (CX-26, pp. 26-27, 37-38).

Dr. West admitted he had no medical records indicating Claimant sought treatment for back, shoulder, hip or neck complaints prior to February 2002. Assuming Claimant did not need medical treatment for such complaints prior to February 2002 and also assuming Claimant capably performed his rigger job prior to his February 2002 injury, Dr. West opined it was not more likely that the February 2002 injury caused Claimant's symptoms. He explained that the variability of Claimant's complaints and inconsistency of his history, which included complaints related to "yard work," militated against a conclusion that Claimant suffered a specific, isolated injury. He related Claimant's hip and neck complaints to his non-occupational degenerative arthritis. (CX-26, pp. 27-38).

Dr. West opined Dr. Cockrell's June 10, 2002 report that Claimant was "still having a little neck and interscapular pain" indicated Dr. Cockrell was aware of cervical complaints before June 10, 2002. Dr. West explained his opinions would not change in consideration of Dr. Cockrell's June 10, 2002 entry, because the entry merely reflects Claimant's intermittent, inconsistent and variable cervical symptoms which were not his chief complaint "on many visits." He indicated pain diagrams are provided for patients to indicate which parts of their bodies are painful to encourage patients to accurately identify which anatomical areas are problematic. On April 22, 2002, Claimant diagrammed shoulder and hip pain, but identified no neck complaints. On July 8, 2002, Claimant identified neck complaints, but no shoulder or hip complaints; however, Claimant identified pain in his hip on a back questionnaire. (EX-17, p. 5; CX-26, pp. 19-20, 30-31).

Dr. West recommended Claimant should increase his physical activity because he has developed a sedentary lifestyle that will result in greater symptoms. Although Claimant told Dr. West about a prior motorcycle accident, he did not provide a history of injuries including a fall in which he sustained broken ribs and a collapsed lung or a train accident in which he sustained a broken arm and crushed elbow. (CX-26, pp. 39-41).

James Michael Cockrell, M.D.

On September 12, 2003, Dr. Cockrell was deposed by the parties. Dr. Cockrell is Board-certified in orthopedic surgery and specializes in knees and shoulders. He treated Claimant for shoulder complaints upon Dr. West's referral. He would defer to Dr. West's diagnosis and treatment related to other parts of Claimant's body other than his shoulder. (CX-27, pp. 6-9).

On April 24, 2002, he initially treated Claimant. He did not recall taking Claimant's history, which is not uncommon when he takes referrals. Upon physical examination, Claimant reported he was unable to raise his right arm above his shoulder. Dr. Cockrell was concerned Claimant may have suffered a rotator cuff injury and ordered an MRI. Dr. Cockrell offered no other recommendations at the time. On May 13, 2002, after Claimant failed to arrive for a May 8, 2002 follow-up appointment, Claimant returned with his MRI results which were essentially normal. Dr. Cockrell found no objective evidence supporting Claimant's subjective complaints of right arm pain. Dr. Cockrell prescribed Darvocet and recommended physical therapy. (CX-27, pp. 9-12, 16).

On May 27, 2002, Claimant reported improvement with physical therapy. On June 10, 2002, he reported continued improvement with physical therapy, but also reported neck pain. Dr. Cockrell ordered a neck MRI, which revealed mild degenerative changes of an arthritic nature. Dr. Cockrell asked the physical therapist to include neck therapy on future visits scheduled for Claimant's shoulder. Dr. Cockrell stated he would have recorded earlier neck complaints in his chart if Claimant had been reporting such complaints. On July 1, 2002, Claimant returned with continued shoulder improvement and ongoing neck complaints. Dr. Cockrell concluded no further shoulder treatment was necessary and referred Claimant back to Dr. West for neck problems. (CX-27, pp. 12-15).

Dr. Cockrell opined Claimant had no shoulder impairment when he last treated Claimant on July 1, 2002. He opined there

was no objective evidence supporting Claimant's shoulder pain. Dr. Cockrell opined Claimant's shoulder complaints were related to a February 2002 injury "based on [Claimant's] word;" however, he concluded there was no objective evidence supporting the occurrence of a shoulder injury. Dr. Cockrell opined Claimant's shoulder condition could have been the natural result of aging or from "overuse," such as "working out in the yard." Based on Claimant's age and history of past medical trauma and heavy labor, Dr. Cockrell opined Claimant's shoulder pain could have developed in the absence of any trauma. If Claimant reported to the VAMC that he experienced shoulder pain prior to his treatment of Claimant, Dr. Cockrell opined Claimant's shoulder complaints could be the result of an ongoing degenerative process. (CX-27, pp. 15-20).

On cross-examination, Dr. Cockrell opined Claimant's range of motion limitations on physical examination were accurate, unless Claimant "was doing a really good job of faking." He always gives his patients the benefit of the doubt. He noted there were no degenerative changes related to aging or heavy work present on Claimant's shoulder MRI, which was normal. He did not recall Claimant reporting neck complaints prior to June 10, 2002, nor could he explain his June 10, 2002 report that Claimant was "still having" neck pain on June 10, 2002. He noted Claimant's June 10, 2002 neck X-rays revealed minimal degenerative changes. He did not recall Claimant ever reporting any hip problems. (CX-27, pp. 20-30).

Dr. Cockrell acknowledged a July 1, 2002 work restriction indicating Claimant was off work until Dr. West evaluated him. He could not recall whether he assessed Claimant's work status prior to July 1, 2002; however, based on Claimant's abilities upon physical examination, Dr. Cockrell opined Claimant was unable to perform heavy labor from the time of his April 24, 2002 visit through July 1, 2002. He opined Claimant's shoulder pain was causally related to a February 2002 accident "just going by what I have." (CX-27, pp. 30-33, 40).

On further examination, Dr. Cockrell indicated his July 1, 2002 work restriction was related to Claimant's neck complaints, because his shoulder resolved and required no further treatment. According to Dr. Cockrell, who again noted Claimant's MRI was normal, any significant trauma would probably "show up" on an MRI. Without MRI evidence indicating degenerative changes, he opined Claimant's complaints of pain limited his range of motion. (CX-27, pp. 33-36).

Healthsouth of Mobile Physical Therapy

On May 13, 2002, Dr. Cockrell referred Claimant to physical therapy at Healthsouth of Mobile for "cuff tendinitis/hip pain." After Claimant began physical therapy on May 15, 2002, his pain, stiffness and ranges of motion in his hip and shoulder generally improved. The physical therapist was "pleased with [Claimant's] progress," which improved to the point at which Claimant tolerated overhead activities. On June 7, 2002, the physical therapist recommended Claimant's discharge within two weeks. (EX-16, pp. 1-35).

On June 12, 2002, in addition to physical therapy for his shoulder and hip, Claimant began receiving physical therapy for cervical complaints and diagnoses of degenerative joint disease and osteoarthritis in the cervical area. His pain, stiffness and ranges of motion generally improved through June 24, 2002, when he was discharged due to "insurance visit limitations;" however, Claimant reported some pain in his left shoulder while laying supine on June 21 and 24, 2002. (EX-16, pp. 36-59).

Dr. Michael Abele, M.D.

On August 8, 2002, Claimant contacted the VAMC by telephone to be "re-established" for treatment because he "no longer has a job or insurance." He reported that he was "involved in a [motor vehicle accident] in [the] past and has lots of back pain." (EX-18, pp. 123-124).

On August 13, 2002, Claimant was treated by Dr. Abele, whose credentials are not of record. Claimant reported neck and right hip pain following a February 2002 job injury, which initially caused pain in his right shoulder as well. His right shoulder pain "improved significantly," but his neck and right hip pain worsened. Claimant estimated his pain as a "6." He had prescriptions for Darvocet and Mobic, but was unable to fill them for financial reasons. He was trying to get coverage under the Act. Physical examination revealed "some diffuse tenderness and muscle spasm over the cervical spine, with no definite point tenderness." (EX-18, pp. 124-129).

Dr. Abele diagnosed Claimant with "neck pain following history of an axial type of neck injury, rule out cervical disc herniation" and "right hip pain following work-related injury, probably musculoskeletal in origin." He recommended obtaining a right hip X-ray and a cervical MRI of the neck. He prescribed a cervical collar, which was to be used for two weeks, and

medication including Ibuprofen and Lortab. He also diagnosed depression, for which he referred Claimant to a Mental Health Clinic (MHC). He directed Claimant to return for a follow-up evaluation "in two months' time" to review the results of imaging studies and his clinical course of treatment. (EX-18, p. 130).

Dr. Abele issued work restrictions indicating Claimant suffered injuries at work in February 2002. Because "he is currently suffering from severe neck as well as right hip pain," Claimant was restricted from lifting more than ten pounds and prolonged standing, walking or running, pending further evaluation. (EX-18, pp. 127).

On October 3, 2002, pursuant to Dr. Abele's referral, Claimant presented at an MHC with complaints of recurrent symptoms of depression, which he experienced since a "young age." He again reported a February 2002 job injury which caused ongoing pain in his neck, back, hips and shoulders. He described frustration over ongoing financial problems and a compensation claim dispute under the Act. (EX-18, pp. 131-138).

Lenore L. Rosa, M.D.

On September 10, 2003, Dr. Rosa was deposed by the parties. She is Board-certified in internal medicine. She does not perform or otherwise specialize in neurology or orthopedics. At the time of her deposition, Dr. Rosa practiced at the VAMC in Mobile, Alabama, where she had practiced medicine for approximately one year. (CX-29, pp. 6-9, 81-83).

Dr. Rosa has treated Claimant since October 15, 2002. She did not know why Claimant's first contact with her was not until October 15, 2002. Her records indicated Claimant requested a Lortab prescription by telephone from the VAMC on October 3, 2002. She was generally aware Claimant visited the VAMC on prior occasions, but had no records of those visits. (CX-29, pp. 15-17).

On October 15, 2002, Claimant reported to Dr. Rosa that he suffered from chronic low back pain, which indicated to Dr. Rosa that Claimant's low back condition predated February 2002. Claimant reported a February 2002 injury, but did not describe a 1998 injury aboard a motor vessel. Likewise, Claimant did not discuss a motorcycle accident which caused back complaints or a vehicular train accident in which his arm was seriously fractured. Claimant reported pain in the neck, low back and

right shoulder. Although he described a hip injury in his February 2002 accident, he did not complain of hip pain at his October 15, 2002 visit.[16] (CX-29, pp. 17-20).

Dr. Rosa acknowledged a "question mark" in her notes regarding Claimant's description of physical therapy for a torn rotator cuff following his February 2002 injury. She explained that Claimant denied wearing a sling, which would be atypical for a rotator cuff injury which would typically involve immobilization with a sling. (CX-29, pp. 20-21).

On physical examination, Dr. Rosa found no loss of muscle mass in Claimant's right shoulder or clavicular area where atrophy due to nerve damage might be expected. Such a finding could indicate Claimant's shoulder was not immobilized and that it was being used. She found no tenderness to shoulder palpation and "could not find any objective evidence that there had been a rotator cuff injury, or that there was currently an injury." She diagnosed chronic neck and shoulder pain because Claimant's symptoms were ongoing for several months. (CX-29, pp. 21-22; EX-18, p. 140).

On November 15, 2002, Claimant returned with complaints of ongoing pain. He underwent a November 7, 2002 cervical MRI revealing posterior disc bulging at C3 through C6 and foraminal narrowing bilaterally at C5 and C6. Such narrowing might indicate nerve impingement which can "absolutely" develop as a degenerative process. Although the MRI revealed no evidence of disc herniation, Dr. Rosa reported a diagnosis of cervical disc herniation. She guessed that "technically, I could have put

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[16] On October 15, 2002, the VAMC records indicate Claimant presented with complaints of chronic cervical and lumbar pain, which he estimated as a "7." Claimant reported to Dr. Rosa a history of a job injury in which he fell down and "tore his right rotator cuff and hurt his right hip" after walking into scaffolding. Although he described undergoing physical therapy for two months for his torn rotator cuff, he did not report wearing a sling, which Dr. Rosa noted with a "question mark." He complained of occasionally experiencing tingling in his entire right arm. He also reported bilateral flank pain which he apparently experienced for approximately four weeks. Likewise, he reported chronic low back pain "over the last month or so." Motrin and Lortab were helping. Claimant indicated he had "been seen and imaged by Dr. West, orthopedist, had an MRI and has a bulging disc 'somewhere.'" (EX-18, pp. 138-140).

bulge." She increased Claimant's pain medication and recommended a pain management service and neurosurgical evaluation. (CX-29, pp. 22-26; EX-18, pp. 140-142).

On December 17, 2002, Claimant returned with complaints of pain in his upper and lower back.[17] Physical examination revealed muscle spasm and tenderness along the lower back. Straight-leg raising tests were negative, indicating Claimant probably did not suffer from a bulging disc or pressure on the sciatic nerve. Dr. Rosa's assessment included the "recent development" of low back pain, which was based on Claimant's report that he experienced low back pain for three months. She also diagnosed cervical radiculopathy. (CX-29, pp. 26-30; EX-18, pp. 147-148).

Dr. Rosa acknowledged an "addendum" entry related to the December 17, 2002 treatment indicating Claimant's recent drug screen revealed opiates and cannabinoids, or marijuana. Pursuant to VAMC policy, Dr. Rosa informed Claimant that she would discontinue Claimant's prescription pain medication in favor of over-the-counter medications such as Ibuprofen.[18] (CX-29, pp. 30-32; EX-18, pp. 147-148).

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[17] On December 17, 2002, the VAMC records indicated Claimant reported back pain, which increased over the prior two or three days and which was estimated by Claimant as "10, severe." Claimant, who was unable to sit or stand erect due to pain, desired a TENS unit. He reported he was out of Lortab, which he was previously using four times daily. He indicated his lower back pain was greater than his upper back, which was still painful. Dr. Rosa noted Claimant's lower back pain "has been present for three months or so, although he hasn't mentioned it before." EX-18, pp. 146-147).

[18] On January 8, 2003, Dr. Rosa reviewed Claimant's drug screen results, which were positive for opiates and cannabinoids. She also reviewed Dr. West's records related to Claimant's "neck, shoulder and hip complaints." She found the records were "informative regarding the changing location and quality of his pain." Dr. Rosa noted Dr. West concluded Claimant's neck and hip pain were the result of degenerative joint disease rather than an occupational injury of the right shoulder, "which of note, was worked up with MRI and found to be normal." (EX-18, p. 148-149).

On January 31, 2003, February 25, 2003, April 22, 2003, May 13, 2003 and May 15, 2003, Claimant requested Lortab, which was refused. He was prescribed Motrin by Dr. Rosa, who was concerned about Claimant's potential abuse of controlled substances that are potentially addictive. Claimant, whose drug screens were positive on numerous occasions, eventually underwent substance abuse counseling while under Dr. Rosa's care.[19] (CX-29, pp. 32-37, 40-42; EX-18, pp. 149-150, 153).

On April 3, 2003, Dr. Rosa reviewed Claimant's January 2003 lumbar MRI, which revealed degenerative disc disease at L5-S1 and osteophytes, indicating arthritis which appeared worse on the left side. A mild disc bulge at L4-L5 causing mild effacement of the thecal sac was evident with hypertrophy of the L4-L5 facets. The degenerative changes appeared to be the result of natural causes unrelated to an acute injury. (CX-29, pp. 37-41).

On July 1, 2003, Dr. Rosa evaluated Claimant, who requested a letter stating she "was treating him for pain and that he said he could not go back to work because he was in too much pain." Dr. Rosa diagnosed "chronic pain with disc bulging," and provided a letter "to whom it may concern" indicating Claimant was under her care for chronic neck and back pain. She noted bulging discs were found in Claimant's neck and lower back. Claimant was "reportedly" in too much pain to perform his duties as a rigger. Accordingly, Dr. Rosa reported she was referring Claimant to an interventional pain management specialist. Dr. Rosa was unaware of Claimant's job duties as a rigger. (CX-17, p. 175; CX-29, pp. 41-45).

According to Dr. Rosa, Claimant's neck and back problems were the result of natural degenerative processes which are "very common" and unrelated to any trauma. She understood Dr. West's records to indicate that Dr. West opined Claimant's neck and hip pain were due to degenerative joint disease rather than a traumatic injury. Based on her physical examinations and

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[19] On March 12, 2003, Claimant treated with an addiction therapist, Scott Statham, whose credentials are not of record, for a substance abuse consultation regarding marijuana dependence. He reported serious cervical and lumbar disc disease and ongoing severe pain most of the time. On March 25, 2003, Claimant treated with Dr. Marrieth G. Rubio, whose credentials are not of record. Dr. Rubio reported neck pain and hip arthralgia. Physical examination revealed neck and back pain. (EX-18, pp. 155-157).

findings, she would not disagree with Dr. West's conclusions in his deposition that Claimant's cervical symptoms, thoracolumbar pain and pain into the right hip were unrelated to a February 2002 injury. Likewise, she would not disagree with Dr. West's opinion that any physical restrictions against returning to heavy labor were related to natural degenerative changes unrelated to a February 2002 job injury. Dr. Rosa would defer to Dr. West, who treated Claimant "much more proximate to the event than I did." (CX-29, pp. 26, 32-33, 44-50, 52).

Dr. Rosa had no opinion whether Claimant reached maximum medical improvement because Claimant did not follow-up with her referrals to neurosurgeons, a pain management clinic or interventional pain management programs. She noted Claimant did not report any shoulder complaints to her in July 2003. (CX-29, pp. 50-52).

On cross-examination, Dr. Rosa indicated she was unaware that the VA was seeking reimbursement for medical benefits related to a February 2002 injury under circumstances suggesting a compensable injury pursuant to compensation law.[20] She was unaware of the reimbursement process. She opined Claimant's degenerative conditions occurred prior to February 2002. She would not dispute medical records indicating Claimant did not complain of pain on June 14, 2001 and on December 26, 2001. (CX-29, pp. 54-57).

Dr. Rosa indicated Claimant complained of neck pain, occasional tingling in his right arm and low back pain on October 15, 2002, when he described his job injury that resulted in a torn rotator cuff and right hip injury. She had no reason to believe Claimant was not experiencing pain or neck and back palpation during physical examination. Such pain could have been related to bruises, muscle spasms, pulled muscles or stiffness from obesity, although Claimant is not obese. The degenerative changes seen in Claimant's December 2002 and January 2003 MRIs would not produce the tenderness elicited in Dr. Rosa's examinations, although they might be responsible for paresthesias which Claimant reported occasionally in his right arm. (CX-29, pp. 57-61).

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[20] On July 31, 2003, the VA notified Claimant it was seeking reimbursement for medical treatment which were allegedly related to Claimant's job injury that occurred on or about February 20, 2002. (CX-18).

Dr. Rosa read an August 13, 2002 report from Dr. Abele, a temporary physician at the VAMC, indicating Claimant described a February 2002 job injury in which he sustained significant neck, right shoulder and right hip pain after he struck his head against scaffolding with such severity that he fell sideways and struck his hip and shoulder against another heavy object. She did not recall Claimant stating he "fell over an object and hit his hip on an object, but opined the August 13, 2002 history was generally consistent with the history she received on October 15, 2002. Dr. Rosa opined Dr. Abele's restrictions against returning to heavy labor pending further evaluation would "probably be appropriate," but she would not defer to his opinions. When she examined Claimant on October 15, 2002, Dr. Rosa opined Claimant experienced pain that could be treated with Lortab, which Claimant apparently had been prescribed in the past. (CX-29, pp. 61-66).

Dr. Rosa's opinion that Claimant's complaints were unrelated to a traumatic injury was not affected by the description of injury and the prior occasions on which Claimant did not report pain. She stated, "Having a zero out of ten pain score on two discreet occasions would not mean that he didn't have pain at any time between those or prior to those occasions. Those may have been days that he was not having pain because he had taken pain medication." She opined Claimant may have had pain prior to the injury he sustained in February 2002. (CX-29, pp. 66-69).

Dr. Rosa could not relate Claimant's complaints of pain to the objective X-ray and MRI data. She explained that paresthesias would be consistent with nerve impingement or a bulging cervical disc, but the other back complaints were not consistent with the MRI findings. She opined the mechanics of a traumatic injury could cause symptoms, but did not cause the symptoms she observed. She noted Claimant's pain between the shoulder blades occurred in an area of the thoracic spine rather than the cervical spine and could not relate that pain to a cervical injury; however, she noted she is not a neurosurgeon or orthopedic specialist. (CX-29, pp. 69-72).

Dr. Rosa opined Claimant had "legitimate pain that he said was controlled by narcotic pain medications;" however, according to VAMC policy there is a concern that patients abusing illegal substances may likewise abuse controlled substances which are dangerous if taken inappropriately. Dr. Rosa was unaware of Claimant's current status as far as his most recent drug

screens.[21] Dr. Rosa indicated Claimant was scheduled for an appointment with a pain management clinic on August 21, 2003, to be considered for narcotic pain medication, but failed to arrive at his appointment. Another appointment was scheduled for October 2003. (CX-29, pp. 72-77).

In July 2003, Dr. Rosa recommended interventional pain management and a physical therapy consultation for a TENS unit. Dr. Rosa expected to follow-up with Claimant at some point, but did not have records indicating any upcoming scheduled appointments. (CX-29, pp. 77-78).

Robert J. Zarzour, M.D.

On September 11, 2003, the parties deposed Dr. Zarzour, a

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[21] On April 15, 2003, Claimant underwent a Substance Abuse Intensive Outpatient Program Screening in which he reported his desire to resolve his marijuana abuse. He reported chronic neck and back pain that interferes with his life; however, he did not describe a job injury. (EX-18, pp. 159-167).

On April 22, 2003, Claimant treated with Theodore F. Ramsey, a physician's assistant whose credentials are not of record. He reported ongoing neck and shoulder pain and low back pain which traveled up both sides of his back. He desired pain medication for his pain, which he estimated was an "8." It was reported that he signed a "narcotics contract" and underwent two negative drug screens since his medication refills were discontinued following a positive drug screen. He underwent another drug screen on April 22, 2003, but the results were not reported. His prescription for pain medication was renewed. (EX-18, pp. 167-169).

On May 13, 2003, Claimant underwent another drug screen after Mr. Statham reported Claimant's April 22, 2003 drug screen was positive for marijuana. On the same day, Claimant presented for treatment with physician's assistant Ramsey for ongoing lower back pain and pain in between his shoulders. He requested pain medication, but was directed to await the results of his drug screen. On May 15, 2003, Mr. Statham reported Claimant's May 13, 2003 drug screen was negative. On the same day, Claimant treated with physician's assistant Ramsey for complaints of "continued back pain," which Claimant estimated as an "8." Mr. Ramsey refused Claimant's request for additional pain medication and notified Claimant of his appeal rights. (EX-18, pp. 169-175).

Board-certified orthopedic surgeon who evaluated Claimant once on July 21, 2003, at the request of Claimant's attorney. Claimant reported a February 2002 injury for which he was treated by Drs. West and Cockrell. He indicated he fell after running into a scaffold and suffered pain in his neck, back and right shoulder. Dr. Zarzour could not recall Claimant reporting striking anything as he fell. (CX-28, pp. 5-8; EX-24).

At the evaluation, Claimant reported his shoulder was not problematic. Claimant reported he had not received any physical therapy for his neck or back complaints. Claimant reported a left-arm injury related to a train wreck, but did not report an injury involving multiple broken ribs and a collapsed lung aboard a motor vessel. Likewise, Claimant did not report a motorcycle accident in which he ran into a tree and sustained a lower back injury. Claimant indicated he was unable to return to work following his February 2002 job injury. (CX-28, pp. 8-11).

Upon physical examination, Claimant exhibited limitation of cervical motion. He expressed pain upon a Spurling maneuver, which involves extending the neck and pushing down on the head at the same time. He reported pain on palpation of his lower back. He was neurologically intact, "which means that his nerves and muscles were working in his arms and legs." Claimant's pains on palpation and during the Spurling maneuver were subjective complaints. His pain on straight-leg raising tests was also a subjective complaint. There were no objective findings upon physical examination. (CX-28, pp. 11-13).

Dr. Zarzour reviewed Claimant's MRI films and reports which revealed bulging at C5-C6 and L5-S1. Given Claimant's age and history of heavy labor and multiple traumatic injuries, Dr. Zarzour was not surprised by the MRI results. He opined it is "impossible" to determine whether middle-aged patients' complaints of pain and complementary MRI abnormalities are related to an acute traumatic event or from "wear and tear." Because he cannot determine the origin of complaints, he primarily relies on the history a patient provides. Dr. Zarzour recommended new cervical and lumbar MRIs because his MRI technology was superior; although he admitted his own images would not necessarily be better than those previously obtained. He also recommended MRIs because Claimant's symptoms increased. (CX-28, pp. 13-16; EX-24).

Dr. Zarzour recommended physical therapy for Claimant's back and neck. Assuming Claimant underwent a "legitimate course

of physical therapy for a few weeks or more, [Dr. Zarzour] would not recommend any more." Dr. Zarzour prescribed Lortab with one refill. He was unaware Claimant underwent drug screens which revealed positive results. He would not recommend surgery based on his physical examination of Claimant and upon his review of Claimant's MRIs. (CX-28, pp. 16-17).

Dr. Zarzour opined, based solely on Claimant's history, that Claimant sustained injuries to his right hip, lower back, neck and shoulder in February 2002 would not necessarily change if medical reports indicated Claimant suffered from chronic back complaints and years of right hip, lower back and shoulder pain. He explained that Claimant could have suffered from prior conditions, but the February 2002 accident could have worsened his condition. (CX-28, pp. 17-20).

Dr. Zarzour never reviewed the entirety of Dr. West's records, which were not provided to him for review. He would not "totally defer" to Dr. West's opinions, but opined Dr. West "certainly has an advantage of seeing [Claimant] sooner more times." He had "no basis" to disagree with Dr. West's deposition opinion that Claimant's cervical complaints are "more degenerative in nature and not related to a specific injury that occurred in February 2002. Likewise, he had "no basis to disagree" with Dr. West's deposition opinion that Claimant's physical impairments and resulting physical restrictions and limitations were not "specifically related to an isolated event or his work-related injury." In consideration of Dr. West's treatment of Claimant, Dr. Zarzour agreed with Dr. West's assessment indicating any impairment to any part of Claimant's body was unrelated to his February 2002 injury. He is familiar with Dr. West and has no reason to doubt his recommendations or opinions. (CX-28, pp. 20-25).

Dr. Zarzour was unable to offer an opinion on maximum medical improvement, but noted Claimant's condition "certainly . . . reached a plateau where it's not changing." He recommended another MRI to eliminate the possibility that Claimant's bulging discs had become herniated. Assuming another MRI revealed the same results as those previously established, Dr. Zarzour opined Claimant could return to work, but would defer to a functional capacity evaluation to determine the level of work at which Claimant could return. He noted Claimant's age and other non-occupational factors could restrict him from returning to work. (CX-28, pp. 25-29).

On cross-examination, Dr. Zarzour opined a detailed August 13, 2002 history of injury that Claimant reported to Dr. Abele was generally consistent with the brief history he received from Claimant. He opined the mechanics of the injury as described would be consistent with complaints of pain in the neck, lower back and hip. He opined Claimant's November 2002 and January 2003 MRIs were not inconsistent with Claimant's job injury as described by Claimant. Likewise, he opined Claimant's limited range of cervical motion and hip pain on rotation were consistent with the injury as described. He also opined Claimant's positive straight-leg raising results and pain during a Spurling maneuver were consistent with the described injury. (CX-28, pp. 29-36).

Dr. Zarzour recommended MRIs, a follow-up examination and epidural injections, but was unaware whether permission was sought by his office to approve any of his recommendations. He also recommended Claimant remain off work pending further evaluation. He recommended a functional capacity evaluation upon the completion of his other recommendations. (CX-28, pp. 36-39, 42-44; EX-24, p. 2).

Based on a heavy-duty description of Claimant's rigging duties, Dr. Zarzour opined Claimant could not return to that job. Assuming Claimant capably performed his job for eight months without incident or complaint, Dr. Zarzour opined the February 2002 injury caused Claimant's increase in symptoms, but he did not know whether Claimant's injury is the reason for his present complaints. He opined the injury is "at least part of the reason [Claimant] cannot work at this time." (CX-28, pp. 38-42).

On further examination, Dr. Zarzour opined that arthritis, disc problems and infections could cause the positive results demonstrated during the Spurling maneuver. He indicated Claimant's MRIs revealed degenerative processes in the back and neck. Osteophytes reported in Claimant's lumbar MRI are caused by a degenerative process "like arthritis." He reiterated he could not determine whether Claimant's MRI results were caused by a traumatic incident. (CX-28, pp. 44-47).

Radiological Evidence

On May 6, 2002, an MRI of Claimant's right shoulder revealed "[n]o evidence of rotator cuff tendinosis or tear, [n]o

findings of bursal fluid or bursitis." No labral abnormality[22] was seen. (CX-15, pp. 2-3; EX-19).

On November 7, 2002, a cervical MRI revealed evidence of posterior disc bulging at C3 through C6. Foraminal narrowing bilaterally at C5-C6 were interpreted as "the most prominent findings." There did "not appear to be any critical stenosis of the central canal. (CX-16, p. 2; EX-20, p. 1).

On January 28, 2003, a lumbar MRI revealed no fractures, subluxation or abnormal bone marrow signal. "Advanced degenerative disc space narrowing with associated prominent osteophytes, . . . greater to the left of midline," were noted at L5-S1. The osteophytes were in "close proximity to the left-sided exiting nerve root," while the foramina were "widely patent." A mild disc bulge and moderate degenerative hypertrophy were reported at L4-5, where mild effacement of the ventral thecal sac was noted. Claimant's MRI results at L2-L3 were within normal limits. (CX-16, p. 3; EX-20, p. 2).

The Contentions of the Parties

Claimant contends that he injured his right shoulder, neck, back, and right hip on February 16, 2002, when he hit his head on a scaffold and struck his right shoulder, right hip and posterior against an air tugger and a steel deck. He argues his testimony should be deemed credible despite various inconsistencies. He claims his supervisor, Mr. Stage, witnessed the accident and assigned him to a lighter-duty fire watch job after preparing a report. He avers his average weekly wage should be calculated under Section 10(c) of the Act. Because he earned $22,321.87 in 30.5 weeks with Employer, he contends his average weekly wage is $731.83. He claims his disability status is temporary total because he cannot return to his prior occupation as a rigger and because he has not reached maximum medical improvement. He argues Employer generally provided no medical or compensation benefits under the Act.

Claimant contends Dr. Robert Zarzour should be considered his treating physician because he was compelled to choose Drs. West and Cockrell under his private insurance plan, which was terminated during treatment. He contends he timely notified Employer of his injury. Assuming **arguendo** that various reports

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[22] A labrum is a fibrous ring of cartilage attached to the rim of a joint. Merriam-Webster's Medical Dictionary 359 (Roger W. Pease, Jr. ed., Merriam-Webster 1995).

of an injury or a "near miss" did not provide sufficient notice to Employer, Claimant argues untimely notice did not prejudice Employer under Section 12(d)(2) of the Act. He has sought treatment with the VA which has filed a claim for reimbursement. He argues penalties, interest and an attorney's fee are appropriate.

Employer/Carrier contend no accident occurred and disputes Claimant's alleged disability and impairment. They argue Claimant's testimony is not credible nor supported by the other witnesses and medical evidence. They aver they were prejudiced by Claimant's failure to timely file a notice of accident or injury because they were prevented from participating in Claimant's medical care, if any was necessary, immediately following the alleged injuries.

Assuming **arguendo** that Claimant could establish a compensable injury, Employer/Carrier argue his average weekly wage should be calculated under Section 10(c) of the Act. They contend Claimant's average annual earnings during the five-year period preceding Claimant's injury were $21,341.04. Based on a 52-week year, Employer argues Claimant's average weekly wage should be calculated as $410.40. Employer contends a 52-week year is an appropriate consideration because they should not be liable for Claimant's alcoholism and voluntary failure to seek employment during 2001. Alternatively, they contend Claimant's pre-injury earnings with Employer alone could form the basis of a reasonable average weekly wage determination. Accordingly, they argue Claimant's average weekly wage could be calculated as $431.54, which represents Claimant's approximate pre-injury earnings of $22,440.00 divided by 52, which is an appropriate denominator because Claimant voluntarily removed himself from work in 2001.

Employer/Carrier concede no LS-207 appeared in DOL's administrative file at the time of informal conference on October 10, 2002. However, they contend no penalties are due because they originally forwarded a Notice of Controversion, which was prepared on June 27, 2002, to DOL in June 2002. They aver their failure to file a Notice of Controversion or tender compensation should be excused because DOL's failure to file the June 27, 2002 Notice of Controversion was a condition over which Employer/Carrier had no control.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

Claimant's burden of persuasion rests principally upon his testimony. His testimony regarding events which are germane to a resolution of the instant matter was not generally corroborated by the testimony of other witnesses nor supported in the record. It was at times contradictory, vacillating, and presented in an inconsistent manner. I found Claimant generally less impressive as a witness in terms of confidence, forthrightness and overall bearing on the witness stand, which

detracts from his demeanor and believability. Accordingly, I was not favorably impressed with Claimant's testimony.

Claimant's testimony that he did not discuss prior injuries with co-workers before his job incident is inconsistent with Mr. Simmons's testimony that Claimant reported ongoing shoulder injuries enroute to the BP platform. Mr. Simmons credibly explained that he recalled the circumstances of Claimant's prior reports of pain because the crew was compelled to wait together for an extended period of time prior to departing for the BP platform. Although Mr. Simmons's testimony is not entirely clear which injuries Claimant may have reported, his testimony undermines the persuasiveness of Claimant's testimony that he reported no prior physical complaints to any co-workers.

Claimant testified he reported being "banged up" and "hurting" on multiple occasions to Mr. Stage, yet candidly conceded he could not recall reporting which body parts, if any, were specifically injured. His testimony that he reported physical complaints following his incident is contradicted by Mr. Stage's testimony and "near miss report" that Claimant reported he was "alright" following the February 2002 incident. His testimony is further contradicted by Mr. Stage's testimony that Claimant would have been flown ashore or treated by a first respondent attendant aboard the platform had he reported soreness. Likewise, his testimony that he reported neck and right shoulder injuries to Mr. Simmons is contradicted by Mr. Simmons's testimony that Claimant did not describe any such injuries after the incident.

Mr. Stage's evidence that Claimant reported he was "alright" post-incident is supported by the testimony of witnesses who were on the BP platform when Claimant struck the scaffolding. Likewise, Mr. Stage's testimony that Claimant reported he was "alright" is generally supported by Claimant's admission that he requested no medical treatment from any co-workers aboard the BP platform at any time.

Moreover, Mr. Stage's testimony that Claimant was "alright" is generally consistent with Claimant's admissions that he sustained no bruises, cuts or swelling to any part of his body in the February 2002 incident and that he was able to return to his usual job, which he successfully performed through its completion. Although there is some disagreement among Mr. Stage, Claimant and Mr. Simmons regarding Mr. Stage's motivation for assigning Claimant to fire watch after his incident, there is no dispute that Claimant returned to his prior job on the

third day following his incident and remained at that job until it concluded. Of the witnesses who discussed the decision to place Claimant on fire watch, I find Mr. Stage's testimony is more persuasive insofar as he is in the best position to understand his motivation for placing Claimant on fire watch duty. He credibly stated his decision was unrelated to Claimant's complaints of pain.

Assuming **arguendo** that Mr. Stage placed Claimant on fire watch duty to insure Claimant was not injured, as suggested by the testimony of Claimant and Mr. Simmons, Claimant would return from fire watch duty to his regular duties if there were no problems as a result of his incident. Consequently, Mr. Stage's decision to return Claimant to his regular occupation arguably supports a conclusion that Claimant was asymptomatic when he returned to his usual occupation after briefly working the fire watch job.

Claimant's testimony that he returned to his former job only at reduced effort because of ongoing physical difficulties is diminished by the unanimous testimony of his co-workers who testified he capably returned to his job without physical complaints. Mr. Simmons could not recall Claimant appearing to have any difficulty performing his usual job, which is consistent with Mr. Perkins's testimony that Claimant did not appear to experience any physical difficulties post-incident and with Mr. Stage's testimony that none of Claimant's co-workers reported Claimant experiencing physical difficulties or appearing impaired from capably performing his job.

Claimant's testimony that he requested Mr. Simmons to lower the ball of a crane to accommodate lifting restrictions related to injuries sustained in the incident is inconsistent with Mr. Simmons's recollection that Claimant did not complain of any physical problems after the incident. Claimant's testimony also lacks support in Mr. Perkins's failure to recall lowering the ball of a crane to accommodate Claimant's lifting restrictions. Similarly, Claimant's testimony that he obtained medication from Mr. Simmons is not supported by Mr. Simmons, who failed to recall providing medication to Claimant.

Claimant's testimony that he reported a shoulder injury to Mr. Poole when Mr. Poole contacted him about the Laredo job is contrary to Mr. Poole's testimony that no such report was made. Further, Mr. Poole's credible explanation that he would not have recommended Claimant for the Laredo job had he known Claimant sustained an injury at the BP platform detracts from Claimant's

explanation of events. Claimant's assumption that Mr. Poole knew he sustained a work-related shoulder injury because Claimant requested medical treatment for his shoulder injury prior to departing for the Laredo job is undermined by Claimant's later concession that he "made no effort to get any medical treatment" before he went to work for Laredo.

Claimant's original testimony that he contacted Mr. Poole before departing for the Laredo job is somewhat consistent with Ms. Silloway's hearing testimony. However, the persuasiveness of Ms. Silloway's testimony that Claimant contacted her from the BP platform and later requested medical treatment before departing for the Laredo job is eroded by her admitted confusion regarding the events and conversations at issue. Her hearing testimony that Claimant contacted her from the BP platform diverged from her deposition testimony in which she also expressed confusion over the underlying events in this matter. Claimant described contacting Ms. Silloway from the Laredo job offshore, but did not indicate he contacted her from the BP platform, arguably supporting a conclusion Ms. Silloway was confused regarding which platform Claimant was on when he contacted her to request medical treatment on his behalf when he returned to shore.

Likewise, Ms. Silloway's testimony is inconsistent with Mr. Poole's testimony that neither Claimant nor Ms. Silloway contacted him regarding medical treatment prior to Claimant's departure for the Laredo job. Her testimony is also inconsistent with Mr. Clark's testimony that he was not contacted about Claimant's alleged injury until mid-April 2002, after Claimant returned from the Laredo job. Her understanding of factual events is contrary to Claimant's later admission that he did not request medical treatment prior to leaving for the Laredo job.

Although there are phone bills indicating some telephone calls may have been made by Claimant and Ms. Silloway to Messrs. Poole and Clark at various times in March 2002 and April 2002, there is insufficient evidence establishing the substance of the phone calls or whether Claimant requested medical treatment prior to departing for the Laredo job. Accordingly, I find Ms. Silloway's testimony is generally not helpful in establishing Claimant reported any injuries to her from the BP platform or that Claimant requested medical treatment before departing for the Laredo job.

Claimant's testimony that he was hired to perform light duties as a diver tender by Laredo is not supported by his employee status report indicating he was hired as a welder by Laredo and other application documents indicating he might be required by Laredo to perform a variety of physical maneuvers, including squatting, bending, crawling, kneeling, climbing and lifting weights in excess of fifty pounds. Claimant's failure to produce any witnesses or other supporting evidence establishing the physical demands of the Laredo job further attenuates his description of the Laredo job.

Claimant's testimony that Mr. Poole asked him to accept the Laredo job as a favor despite reports of a shoulder injury was refuted by Mr. Poole, who credibly indicated he would never have referred an injured employee to a Laredo job. Likewise, Claimant's statement that Mr. Poole told him the Laredo job was an easy job tending to divers was denied as totally false" by Mr. Poole, who indicated he was unaware Laredo employed divers.

Claimant's testimony that he reported shoulder pain to many Laredo representatives while on the Laredo job is belied by his failure to recall any individual with whom he made a complaint. His recollection that he left the Laredo job before its completion after telling Laredo representatives that he must leave the Laredo job to seek medical treatment for his right arm is likewise blemished by his failure to identify the individuals with whom he reported his desire to terminate his job. His testimony is further diminished by Mr. Poole's testimony that he often talked with the supervisor of the Laredo job, but never received any reports that Claimant expressed physical complaints or that Claimant could not capably perform his job. Mr. Poole's testimony is generally consistent with Claimant's admission that he never received any disciplinary actions, complaints or reprimands for failing to perform the Laredo job. Accordingly, I find Claimant's testimony that he reported any ongoing physical complaints at the Laredo job is simply too attenuated and unsupported to offer much probative value.

Moreover, Claimant candidly stated that the right shoulder complaints he reported at the Laredo job began "at home" and became worse on the Laredo job, which is contrary to his testimony that his right arm pain began on the BP platform and became worse at home. His inconsistent testimony regarding where and when his shoulder pain began further detracts from his overall credibility as a witness.

Claimant's testimony that he reported right shoulder pain to Messrs. Poole and Clark is generally consistent with their testimony that he only reported complaints related to his right shoulder; however, Claimant's explanation that his telephone call was transferred by Mr. Poole to Jesse Clark, who worked at the same location as Mr. Poole, is inconsistent with Mr. Poole's statement that such transfers were not possible between their offices, which were located in different towns. Further, Claimant originally testified reporting shoulder pain only when he contacted Mr. Poole, but later stated he told Mr. Poole that "most" of his pain was in his shoulder, arguably indicating he may have reported more than shoulder pain to Mr. Poole. Claimant's vacillation on which areas of his body were reportedly painful undermines the persuasiveness of his testimony regarding which anatomical areas he reported as painful when he eventually contacted Messrs. Poole and Clark, who agree he only reported right shoulder pain.

Claimant's testimony generally indicating he reported cervical complaints as well as shoulder complaints upon treatment with Drs. West and Cockrell is inconsistent with their testimony and records. Dr. West's evidence indicates Claimant, who did not report neck or back complaints, reported right shoulder and right hip pain with possible pain into his right hand when he first treated Claimant on April 22, 2002 and referred him to Dr. Cockrell for shoulder complaints. Dr. Cockrell's evidence indicates Claimant reported shoulder complaints upon his initial treatment of Claimant, who did not report neck complaints until June 10, 2002.

Claimant argues Dr. Cockrell's June 10, 2002 entry that he was "still having neck pain" supports his testimony that he was reporting neck pain concurrently with his shoulder complaints while he received medical treatment from Drs. Cockrell and West. However, Dr. Cockrell's testimony that he would record neck complaints when they occurred and that he could not recall any neck complaints prior to June 10, 2002, does not support Claimant's testimony that he reported concurrent neck complaints when he was treated for his shoulder. In the absence of any supporting evidence that Claimant reported neck complaints prior to June 10, 2002, I find Dr. Cockrell's failure to recall why he noted Claimant was "still having" neck pain on June 10, 2002 is not persuasive in establishing Claimant reported work-related neck complaints concurrently with shoulder complaints.

Similarly, Claimant's August 13, 2002 report to Dr. Abele indicating ongoing neck and shoulder injuries following his

February 2002 incident is inconsistent with his August 8, 2002 report to Dr. Abele's office that he experienced "lots of back pain" following a prior motor vehicle accident. His August 13, 2002 report to Dr. Abele is also inconsistent with his medical records related to treatment by Drs. West and Cockrell, which generally indicate he complained of no neck injuries until June 10, 2002.

Notably, Claimant has failed to adequately explain why he repeatedly testified in deposition and at the hearing that he experienced no prior ongoing symptoms, while he actually reported to the VAMC less than two months before working for Employer that he experienced right hip, lower back and right shoulder complaints which bothered him for "years." Similarly, his deposition and hearing testimony overlooked his May 10, 2001 VAMC record indicating he reported a six-year history of back pain, which was described as a "chronic medical problem (LOWER BACK PAIN) that interferes with his life."

Claimant argues the VAMC records and his contrary hearing testimony should be ignored because he capably worked for Employer from July 2001 until his incident aboard the BP platform. His argument presupposes he sustained a February 2002 job injury which disabled him from capably returning to his prior occupation. As discussed below, Claimant's disability related to his February 2002 job injury is not established in the record. Claimant's argument overlooks his burden of establishing an injury and consequent disability related to the February 2002 incident. As noted above, his burden rests principally upon his testimony, which was not favorably impressive for the reasons generally described above. Consequently, I find Claimant's argument that his VAMC records and contrary hearing testimony should be ignored is not persuasive.

Moreover, Claimant contends entries in the VAMC records indicating he reported no pain on two dates prior to working for Employer establish he was asymptomatic prior to working for Employer. However, Dr. Rosa persuasively explained such entries are not dispositive of Claimant's condition prior to working for Employer. Dr. Rosa's opinion that Claimant may have had pain prior to his work with Employer is supported by Claimant's May 9 and 10, 2001 VAMC medical reports of chronic back pain and pain in the right shoulder, neck and right hip for "years."

Lastly, Claimant argues his incorrect entries on employment applications indicating he sustained no prior back injuries

should not detract from his overall credibility. While I agree incorrect entries on employment applications are not necessarily determinative of an individual's credibility under appropriate circumstances as discussed in Kubin, supra, I find Claimant's inconsistencies, contradictory and vacillating testimony elsewhere in this matter do not support a favorable conclusion that his testimony is credible. Accordingly, I find his testimony is neither credible nor reliable in establishing the matters which are germane to his claim.

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> 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-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he 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. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends that he injured his right shoulder, neck, back, and right hip on February 16, 2002, when he hit his head on a scaffold and struck his right shoulder, right hip and posterior against an air tugger and a steel deck. While there

is some variance among witnesses regarding the exact specifics of Claimant's injury, there is generally no dispute Claimant struck his head, which was protected by a hardhat, against a scaffolding and subsequently fell while he was working.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Employer/Carrier offer a compelling argument that Claimant has not invoked the Section 20(a) presumption of compensability based on Claimant's complaints of pain and his alleged reports of pain to co-workers that have been found not credible. Nevertheless, there are some degenerative changes which have appeared on radiological examination in addition to Claimant's complaints which Dr. West opined could have been caused by Claimant's incident as described. Likewise, there is evidence that Dr. Cockrell related Claimant's shoulder complaints to his incident as described by Claimant. Similarly, the opinions of Drs. Abele, Rosa and Zarzour indicate Claimant's incident, as described by Claimant, could cause symptoms which Claimant reported. Further, the medical opinions of record generally indicate Claimant is unable to return to heavy duty labor.

Accordingly, despite Claimant's unpersuasive testimony, there is objective evidence indicating he suffers from a physical harm. Despite Employer/Carrier's recalcitrance in characterizing Claimant's "incident" as an "accident," there is positive evidence that the "incident," as described by Claimant, could have caused the complaints he reported.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain, and that his working conditions and activities on February 16, 2002, could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working

conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). 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).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an 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. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer/Carrier produced affirmative evidence establishing Claimant, despite his denial, reported ongoing chronic complaints prior to his job injury. Further, Employer/Carrier produced the medical opinion of Dr. West, who opined Claimant's job injury neither caused Claimant's symptoms nor aggravated his underlying degenerative complaints which are not occupationally related. Accordingly, Employer/Carrier have successfully rebutted the Section 20(a) presumption under the Act, and a resolution must be made based on weighing the entire record as a whole.

3. Weighing the Entire Record

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physician rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

1. Claimant's Neck, Right Hip and Back Complaints

In this matter, Dr. West initially treated Claimant on April 22, 2002, and continued treating Claimant through July 8, 2002 for his alleged work-related complaints. I find his opinions are generally more persuasive, well-reasoned and supported by the record than the other physicians' opinions of record.

Dr. West's opinion that Claimant's neck, right hip and back conditions were the result of natural degenerative changes consistent with Claimant's age, non-occupational cervical degenerative disc problem, a previous motorcycle accident, a previous non-occupational spinal injury and non-occupational arthritis in Claimant's right hip rather than a result of his job injury is persuasive. Dr. Cockrell deferred to Dr. West's opinions regarding those areas of Claimant's body. Likewise, Dr. Rosa deferred to Dr. West's opinions and would not disagree with Dr. West's opinion that Claimant's cervical symptoms, thoracolumbar pain and pain into the right hip were unrelated to his job injury.

Although Dr. Zarzour would not "totally defer" to Dr. West's opinions, he conceded Dr. West "certainly had an advantage" due to Dr. West's numerous treatments, which occurred more proximately to the occurrence of Claimant's job injury than Dr. Zarzour's single evaluation, which occurred approximately seventeen months post-injury. Dr. Zarzour clearly admitted he had "no basis to disagree" with Dr. West's opinions that Claimant's symptoms were degenerative in nature and unrelated to any specific occurrence in February 2002. He also candidly agreed with Dr. West's opinion that any impairment to any part of Claimant's body was unrelated to his job injury.

To the extent Dr. Zarzour would not "totally defer" to Dr. West by his opinion that Claimant's complaints may be related to his job injury, I find his opinion is neither well-reasoned nor persuasive. Dr. Zarzour's opinion was based solely on the history reported by Claimant, whose testimony and reports of pain have previously been found not credible or reliable in establishing his complaints are related to his job injury.

Dr. Abele opined Claimant's cervical complaints were related to an axial type injury, while his hip complaints were also related to the job injury. Dr. Abele, whose qualifications are not of record, was not deposed by the parties to explain the medical basis for his opinion. Notably, Dr. Rosa, who treated Claimant after Dr. Abele and who was deposed by the parties, would not defer to Dr. Abele's opinions. Her opinion that Claimant's complaints were unrelated to a traumatic injury undermines Dr. Abele's reported medical opinion. Accordingly, I find Dr. Abele's medical opinion is entitled to little probative value.

Claimant avers Dr. West's medical opinion should be discounted because Dr. West erroneously opined Claimant's

complaints were inconsistent and varied on multiple follow-up visits after April 22, 2002, when Claimant reported only shoulder pain, hip pain and possible pain into his hand. As noted above, there is inadequate evidence establishing Claimant reported any cervical complaints to any physicians prior to June 10, 2002. Although Claimant contends Dr. Cockrell's note that he was "still having" neck pain establishes he reported neck pain prior to that date, there is no indication when Claimant reported such complaints to Dr. Cockrell anywhere in the record prior to June 10, 2002.

Moreover, as noted above, Dr. Cockrell indicated he would have recorded cervical complaints as Claimant reported them and could not recall why he reported Claimant was "still having" cervical complaints on June 10, 2002. Further, he could not recall Claimant reporting neck complaints prior to June 10, 2002. Consequently, I find Claimant's reliance on Dr. Cockrell's notation unpersuasive in establishing Claimant reported ongoing neck complaints to any physician prior to June 10, 2002.[23]

Notably, Dr. Cockrell treated Claimant on April 24, 2002, May 13, 2002 and May 27, 2002, but never reported neck complaints. Assuming **arguendo** that Claimant reported neck complaints to Dr. Cockrell prior to June 10, 2002, his complaints were ostensibly reported after Dr. West's April 22, 2002 treatment, which is consistent with Dr. West's opinion that Claimant reported different complaints at different times on follow-up visits.

Likewise, Claimant argues Dr. West's medical opinion should be discounted because Claimant's July 8, 2002 back questionnaire indicates Claimant reported back, neck and right hip pain. On July 8, 2002, Claimant also provided a pain diagram which indicates he experienced "100%" of his pain in his back, but only two areas near his neck were painful, while he experienced numbness in his arms bilaterally. Accordingly, on July 8, 2002, Claimant apparently reported inconsistent complaints in his back questionnaire which is generally consistent with Dr. West's opinion that Claimant's subjective complaints varied.

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[23] It is noted that Claimant's June 1, 2002 Claim for Compensation indicates neck, right shoulder and right hip complaints. However, it is also noted Claimant's Claim for Compensation does not describe back complaints.

Further, Claimant's reports of pain and history of pain and injuries on July 8, 2002 and later on July 30, 2003, vary from the complaints and history of pain and injuries reported on August 22, 2002, which is generally consistent with Dr. West's opinion that Claimant's complaints were inconsistent and varied on follow-up visits. Consequently, I find Claimant's inconsistent reports of pain and numbness in a July 8, 2002 back questionnaire is not persuasive in establishing Dr. West's opinion that Claimant's complaints of pain were inconsistent and varied on subsequent visits should be discounted.

In addition to his persuasive opinion that Claimant's complaints were related to ongoing non-occupational degenerative changes, Dr. West persuasively opined Claimant's ongoing degenerative conditions were not aggravated by his job injury. As noted above, Drs. Cockrell and Rosa deferred to Dr. West's opinions. Although Dr. Zarzour noted Claimant's job accident could have aggravated or worsened an underlying condition, Dr. Zarzour did not adequately explain how the accident could have aggravated or worsened an underlying condition.

As noted above, Dr. Zarzour relied on Claimant's reports of his accident and complaints, which are not credible or reliable in establishing the circumstances of his condition. Moreover, Dr. Zarzour, who opined it was impossible to determine whether Claimant's condition was the result of a traumatic injury, offered vacillating testimony. He opined Claimant's job injury was "at least part of the reason" Claimant could not return to work, yet elsewhere agreed with Dr. West that impairments to any part of Claimant's body were unrelated to his February 2002 injury. His concession that Dr. West had an "advantage" in proximate multiple treatments of Claimant further detracts from the persuasiveness of his opinion that Claimant could have aggravated his condition as a result of his job injury.

Accordingly, based on a review of the entire record, I find Claimant failed to establish his neck, back and right hip complaints were caused by his job injury or that his condition is the result of an aggravation of his underlying degenerative changes related to his age, history of non-occupational accidents and non-occupational arthritic changes.

2. Claimant's Right Shoulder Injury

At first blush, Claimant's right shoulder injury appears more likely related to his job injury, based upon the opinion of Dr. Cockrell, to whom Dr. West referred Claimant. Dr. Cockrell

opined that Claimant's shoulder injury, which resolved by July 1, 2002, was occupationally related; however, his opinion is not well-reasoned. He clearly indicated he "always" gives patients the benefit of the doubt. He candidly indicated there were no objective results supporting Claimant's subjective complaints of right shoulder pain. Likewise, he conceded his opinion was "based on [Claimant's] word."

As noted above, Claimant's testimony is not credible or reliable in establishing the circumstances of his condition, which diminishes Dr. Cockrell's opinion, who was "just going by what I have." By Claimant's own testimony and medical history, his right shoulder condition was either the result of: (1) chronic pain which pre-existed his job injury and was ongoing for "years" prior to May 9, 2001; (2) the job injury; (3) possible arthritis; or (4) something that began "at home" before departing for the Laredo job, where it became worse.

Dr. Cockrell's opinion that Claimant's right shoulder condition could be the result of natural processes which could have developed in the absence of any traumatic injury undermines his conclusion that Claimant's condition was occupationally related. Further, his opinion that Claimant's condition could be the result of an ongoing degenerative process if Claimant previously reported shoulder complaints to the VAMC undermines his opinion that Claimant's shoulder complaints are work-related when considered in light of the VAMC records indicating Claimant in fact reported shoulder pain prior to his treatment of Claimant.

Accordingly, I find Dr. Cockrell's opinion is not persuasive in establishing Claimant's shoulder condition, which resolved by July 1, 2002, is work-related. Rather, I am persuaded by Dr. West's opinion that, although the mechanics of an injury described by Claimant could generally cause symptoms to his right shoulder, right hip, neck and back, Claimant's natural history was not altered or aggravated by his job injury. For the reasons generally discussed above, I find Dr. West's medical opinions are superior to those of Drs. Abele, Rosa and Zarzour.

Lastly, it is noted that Dr. West opined that "some" of Claimant's pain was related to his job injury; however, Dr. West's opinion on Claimant's pain, without greater specificity, is not persuasive in establishing Claimant's subjective complaints of pain were in fact related to his job injury. As noted above, Claimant's subjective complaints of pain were not

supported by any objective evidence. His testimony is neither credible nor reliable in establishing the circumstances of his condition. Moreover, his testimony and medical records indicate his pain could be the result of multiple causes which pre-dated Dr. West's treatment. Further, Dr. West indicated he received no history from Claimant regarding Claimant's train wreck and boat accident, which arguably support Dr. West's conclusions elsewhere that Claimant's condition is the result of age, non-occupational injuries and degenerative changes.

Assuming **arguendo** the record established "some" of Claimant's pain during Dr. West's treatment was work-related, I find Dr. West's opinion that Claimant experienced some work-related pain without any impairments or disabilities from the job injury establishes Claimant possibly sustained a temporary exacerbation of pain with no ongoing occupationally-related impairments or disabilities. Because Claimant's complaints of pain have been found unreliable to establish the events of his job injury and resulting symptoms, the entire record must be considered to establish what, if anything, Claimant's job injury caused.

At best, Claimant experienced some pain which may have warranted his use of Mr. Simmons's over-the-counter pain medication; however, Mr. Simmons cannot recall providing the medication to Claimant. Nevertheless, it is undisputed Claimant returned to his former occupation, which he capably performed through the conclusion of the job. Although there is some disagreement over whether Claimant requested Mr. Simmons to accommodate self-imposed lifting restrictions, the preponderance of record evidence supports a conclusion Claimant did not report any post-injury physical complaints or otherwise seek medical treatment for his symptoms through the conclusion of his job for Employer, as noted above. Accordingly, there is inadequate evidence establishing Claimant returned to his prior occupation only through extreme hardship or pain.

Thereafter, Claimant returned to the Laredo job, possibly as a welder performing heavy-duty work. There is no indication he experienced any difficulties with the Laredo job or ever complained to any Laredo employee about any physical symptoms. Likewise, there is no evidence that Claimant reported to any Laredo employee that he suffered from any ongoing physical problems related to his prior work with Employer. Consequently, there is inadequate evidence establishing Claimant returned to work at Laredo under extreme hardship or pain.

On the other hand, there is affirmative evidence from Dr. West that Claimant's natural condition was not altered by his job injury, which also did not aggravate an underlying condition. Moreover, Dr. West opined that any disability Claimant suffers is unrelated to his job injury. As noted above, Dr. West's opinion is persuasive, well-reasoned and supported by the record. Accordingly, there may be evidence Claimant suffered some temporary work-related pain, which is notably without supporting objective medical evidence; however, there is inadequate evidence establishing his pain precluded his return to work, aggravated an underlying condition or otherwise caused his disability from returning to work.

In consideration of the foregoing, I find Claimant failed to establish his right shoulder condition was related to his job injury. Although the record establishes Claimant might not return to his prior occupation, his disability appears related to aging and non-occupational degenerative changes and accidents unrelated to his job injury, which did not aggravate his condition, as discussed above. A conclusion that Claimant failed to establish a compensable injury pretermits discussion of the remaining disputed issues.

Notably, a finding that Claimant's condition is unrelated to his job injury arguably supports a conclusion that the VA reimbursement request is without merit insofar as the VA seeks reimbursement for medical treatment allegedly related to Claimant's job injury. Consequently, it appears Claimant may be able to return to the VAMC to continue treating for his condition, for which he received medical attention from the VAMC prior to his work with Employer.

ATTORNEY'S FEES

In order for a fee to be awarded pursuant to Section 28(a), the claimant's attorney must engage in a "successful prosecution" of the claim. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982); Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89 (1993); Harms v. Stevedoring Servs. of America, 25 BRBS 375 (1992); Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992). No award of attorney's fees for services to the Claimant is made herein because Claimant was unsuccessful on the litigated issues.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Claimant's claim is hereby **DENIED.**

ORDERED this 6th day of May, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge