U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 December 2005

CASE NO.: 2004-LHC-1339

OWCP NO.: 08-119557

IN THE MATTER OF:

ROY A. MCCOLLOUGH

Claimant

v.

FRIEDE GOLDMAN/HALTER

Employer

and

RELIANCE NATIONAL INDEMNITY CO.

Carrier

APPEARANCES:

JOHN D. MCELROY, ESQ.
ED W. BARTON, ESQ.
For The Claimant

J. LOUIS GIBBENS, ESQ.
For The Employer/Carrier

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

DECISION AND ORDER

This is a Section 22 modification claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Roy A. McCollough

(Claimant) against Friede Goldman/Halter (Employer) and Reliance National Indemnity Co. (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 May 18, 2005, in Orange, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 25 exhibits, Employer/Carrier proffered 10 exhibits which were admitted into evidence along with one Joint Exhibit.[1] This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. 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), and I find:

1. That the Claimant was injured on March 20, 2001.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on March 20, 2001.

5. That Employer/Carrier did not file a Notice of Controversion.

6. That an informal conference before the District Director was held on May 15, 2003.

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[1] Post-hearing, Employer/Carrier submitted Claimant's records from the Social Security Administration as EX-10. Without objections from Claimant, the record is hereby re-opened and EX-10 is received into the record.

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

7. That Claimant received temporary total disability benefits from March 21, 2001 through the present at a compensation rate of $375.55 per week for a total of $80,167.58.

8. That Claimant's average weekly wage at the time of injury was $563.33.

9. That medical benefits for Claimant have been paid in the amount of $16,107.75 pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Entitlement to and authorization for medical care and services, including compensability of right knee treatment, further treatment of the left knee, cervical spine and lumbar spine, and payment of medical bills and mileage.

2. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

Background

On June 4, 2003, the undersigned issued a Decision and Order Awarding Benefits finding that Claimant was entitled to temporary total disability compensation benefits and reasonable and necessary medical care for injuries suffered from his work injury. I specifically found that Employer/Carrier had denied Claimant reasonable and necessary medical treatment. (CX-2, p. 25). It was further concluded that Dr. Ghadially had rationally recommended additional diagnostic tests to include a cervical myelogram, a lumbar MRI and left knee MRI, as well as epidural injections of the cervical and lumbar spines. (CX-2, p. 26).

It was also found that Claimant was entitled to reimbursement of out-of-pocket expenses including two $75.00 visits to Dr. Ghadially and mileage expenses for 3,875 miles at .36 cents per mile or $1,395.00 incurred seeking medical care. It was concluded that VAMC had not intervened in this matter but the U.S. Government would be entitled to reimbursement for

medical services provided by the VA hospital. (CX-2, pp. 26-27 n. 31).

The Testimonial Evidence

Claimant

Claimant testified that after the first formal hearing he underwent the diagnostic tests for his "[left and right] knees, my lower back and neck" ordered by Dr. Ghadially. (Tr. 14-15). He stated that both knees had tears and surgery was recommended. He had surgery on his right knee although Carrier did not authorize the surgery. (Tr. 15).

Dr. Ghadially informed Claimant that he wanted to try a series of shots for his lower back to determine if shots would provide significant relief. If not, fusion surgery would be the next available option. Claimant testified that he wanted Carrier to authorize the epidural steroid injections which have been previously denied. If the injections are unsuccessful, he would like to undergo fusion surgery "to get me out of some this pain." (Tr. 15-16).

Claimant testified that Dr. Ghadially recommended shots for his neck which has a bulging disc. (Tr. 16). No other options for the neck were discussed with Claimant. (Tr. 17).

He stated that surgery to his left and right knees has alleviated the daily "locking" and lessened the pain in his knees. (Tr. 17). The knee surgeries have not lessen the pain in his lower back. (Tr. 18).

He was able to have knee surgeries through Medicare after being awarded Social Security Disability benefits. (Tr. 18). He stated that Social Security overpaid benefits and is now withholding benefits and Medicare coverage until January 2009. (Tr. 19).

He also has medical coverage through the Veteran's Administration, but does not see the same doctor each visit. He would rather treat with Dr. Ghadially who is a specialist. (Tr. 20-21).

Accordingly to Claimant, his job accident impacted his "knees" and head. He tore his pants on his left knee. He reported problems only with his left knee when initially seeking medical care after the accident because it was bothering him the

"worst." (Tr. 21). Claimant stated he started having problems with his right knee after the accident and reported his problems to Dr. Ghadially. Dr. Ghadially informed him that he had "put all my weight over on my right side and that was what was causing my problems with my right knee." (Tr. 22). Claimant did not have surgery on his left knee for three years after the accident and favored his "left knee that whole time." (Tr. 22).

Claimant testified that he underwent physical therapy with Dr. Denham, a chiropractor, based on the recommendation of Dr. Ghadially. He did not treat with Dr. Denham for spinal manipulation. Medical bills for his two knee surgeries and care from Dr. Denham have not all been paid. (Tr. 22-23). He has also incurred more mileage expenses since the first hearing, which have been submitted to Carrier but not paid. (Tr. 23-24).

Claimant testified his left knee "pains me if I stand up and walk too much, and it's giving out . . . it threw me down the other day. It just gives way, gives loose." He stated his right knee does not give way, but hurts him. It hurts more when he puts weight on it. He sits with his legs extended because when he "keeps them folded up they go to bothering me" after 30 minutes. (Tr. 25-26).

He testified that his low back pain radiates down his legs past his knees. He is unable to "stoop over and do like I did before." He has sharp shooting pain that some times radiates in his shoulders. He takes Darvocet and Flereril for the pain and rests off and on all day. (Tr. 26-27).

He has tried to do normal activities but is limited in what he can do, such as mowing the grass and "keeping my place up." (Tr. 27). He has engaged in his hobbies, hunting and fishing occasionally, but is limited in his activity. He has tried to follow Dr. Ghadially's recommendations and has not done anything that exceeded his recommendations. He is still under Dr. Ghadially's care and has not been released to return to work. (Tr. 28-29). He stated he could not return to his former job in his current condition.

Claimant testified that he had no problems with his knees, back or neck before his job accident and did not seek medical treatment for such problems before his accident. He admitted he has gained weight (around 50 pounds) since his accident which he attributes to not working or moving around. (Tr. 30-31).

On cross-examination, Claimant acknowledged that Dr. Ghadially advised that losing weight would help him. (Tr. 31). He affirmed that Dr. Ghadially had told him not to stoop, bend or do any lifting. (Tr. 32). He also told Claimant that walking would be good for him which he does, but not every day. He can walk a block or block and one-half and then has to rest. (Tr. 33).

The overpayment by Social Security amounted to about $14,000.00. Claimant did not know who "misfigured" the amount which caused the overpayment.

He affirmed his knees are better since the surgeries, but not "completely well." (Tr. 36). He stated that Dr. Ghadially has not told him when he will be fully recovered from his knee surgeries. He also had a "grinding," in addition to pain, in his right knee which has been alleviated by the surgery. Dr. Ghadially has not told him anything about his continued knee pain problems. (Tr. 37-38). He indicated his "giving way" in his left knee began about three months before the instant hearing. (Tr. 38).

The Medical Evidence

I have reviewed and considered the medical evidence summarized in the Decision and Order of June 4, 2003. Only medical evidence generated after the first Decision and Order will be treated in this modification Decision.

Dr. James A. Ghadially

Dr. Ghadially, who is a board-certified orthopedic surgeon, was deposed by the parties on August 11, 2004. (CX-3, p. 4). Dr. Ghadially has treated Claimant since April 12, 2001, at which time Claimant complained of head, neck, bilateral arm, lower back and knee pain. (CX-2, p. 11). Prior to the undersigned's Decision and Order of June 4, 2003, Dr. Ghadially had last seen Claimant on February 14, 2003 and evaluated and diagnosed him with neck, lower back and bilateral knee pain. (CX-2, p. 13).

The diagnostic testing recommended by Dr. Ghadially on June 21, 2001, which was found to be reasonable and necessary, to include a cervical myelogram, lumbar and left knee MRIs and epidural blocks, was authorized and achieved after the Decision and Order. (CX-3, p. 5).

The left knee MRIs of August 21, 2003 and September 25, 2003, revealed a torn medial meniscus, posterior horn which can cause locking, swelling, giving way and eventually arthritis and instability in the knee. Claimant suffered from weakness, locking, giving way and pain before his arthroscopic surgery. Dr. Ghadially requested authorization from Carrier to conduct an arthroscopy of the left knee on November 14, 2003. Dr. Ghadially testified to his knowledge the request has never been approved. (CX-3, pp. 6-7; CX-4, pp. 60-61, 72). Dr. Ghadially has related and I have previously found that Claimant's left knee injury was work-related having been caused by his March 20, 2001 job accident. (CX-3, p. 8).

Dr. Ghadially testified that Claimant was also complaining of locking, limping, swelling and giving way of his right knee in June 2003. Dr. Ghadially opined that the symptoms were caused by a torn meniscus of the right knee. (CX-3, p. 9). He further opined that, in all reasonable medical probability, Claimant's right knee problems are related to his job accident. Although Claimant's main injury was to his left knee, he favored his right knee and "ended up making his right knee worse." He opined that, but for the delay in treatment for the left knee, the right knee would not be in its current condition as of June 2003. (CX-3, pp. 10-11).

An MRI was performed on the right knee on September 25, 2003, which revealed a complex tear of the posterior horn of the medial meniscus. (CX-4, pp. 62-63). He requested authorization from Carrier for surgery on the right knee on October 3, 2003, which was denied as not related to the job accident and noncompensable. The surgery was performed under Medicare with a declaration that it was felt to be accident or work-related but had been denied by Carrier. (CX-3, pp. 11-12). Dr. Ghadially also testified that it is reasonable that the right knee was injured or aggravated in the job accident or "resulted from this long period of not being able to walk normally" (with a brace on his left knee). (CX-3, p. 13).

Dr. Ghadially testified that Claimant had a severe bilateral neuroforaminal stenosis at C5-6 and C6-7 which is a compression of the nerves at that level. The cervical condition was pre-existing but aggravated by his work injury. The post-decisional cervical myelogram was performed on August 21, 2003, which confirmed the compression at both levels. (CX-4, pp. 75-76). Treatment is dependent on Claimant's pain tolerance level. Dr. Ghadially testified he is a candidate for a posterior neuroforaminal decompression at the affected levels. Epidural

injections for the cervical area were requested of Carrier on December 18, 2002, but he had no record of approval. (CX-3, pp. 13-15; CX-4, pp. 49-51). Dr. Ghadially testified that epidural injections are a conservative modality which he seeks to exhaust before recommending surgery. He currently recommends one epidural steroid injection to determine if it will provide relief or help, and if not successful, Claimant must either live with the cervical pain or undergo a posterior neuroforaminal decompression. (CX-3, p. 16). Such surgery would alleviate posterior neck pain, some shoulder pain and arm pain and numbness. (CX-3, p. 18). Claimant's cervical condition has not improved or deteriorated since June 2003. His cervical condition has contributed to Claimant's inability to return to his former job.

Regarding the delay in Claimant's diagnostic studies and ultimate surgeries, Dr. Ghadially testified that a delay in relieving nerve-root compression can cause permanent nerve damage that will not be relieved by surgery and the eventual outcome will be poorer and Claimant's ability to return to his previous employment will be reduced. (CX-3, p. 19).

He further stated that low back surgery is not preferred when problems exist in hips and knees, because "if you get the people walking properly, the pain decreases in their back and they can live with their back pain" without surgery. (CX-3, pp. 19-20). He tries to limit the number and amount of surgery, operating on the knees first which is "simple, low complications and cheap . . . may save a potentially disabling back surgery." (CX-3, p. 20).

Claimant's lumbar x-rays show instability and disc protrusions at the L4-5 and L5-S1 levels which are touching the nerve roots. (CX-3, p. 21). Such nerve compression can cause leg, thigh and buttock pain which is consistent with Claimant's complaints. Claimant's lumbar condition has remained the same since June 2003 and also contributes to his inability to return to work. (CX-3, p. 22). Claimant's lumbar myelogram of August 21, 2003, confirmed the above condition for which he was given an epidural steroid injection on September 18, 2003, that provided temporary relief. On November 15, 2004, another lumbar epidural block was administered with 80% improvement. (CX-3, p. 23; CX-4, pp. 65-66, 73-74; CX-7, pp. 1-2, 4-5).

Dr. Ghadially expressed an opinion that he wants "to start from the bottom up . . . the knees needed addressing first." (CX-3, p. 23). Once his knee conditions resolve, Claimant has

several options available. He can stay the way he is and restrict his activity level, have a two-level lumbar fusion or consider a spinal cord stimulator trial, which covers up pain rather than fixes the problem, according to Dr. Ghadially. The first and third options would allow Claimant "most likely" to return to a heavier level of activity than if he had a fusion, but realistically the fusion is more likely to occur than the other two because of the degree of Claimant's instability. (CX-3, p. 24). Dr. Ghadially opined that the instability in Claimant's lumbar area is caused by a combination of pre-existing degenerative change and the disc injury from his March 2001 job accident which aggravated the pre-existing condition. (CX-3, p. 25).

Regarding lumbar surgery, Dr. Ghadially testified that his opinion differs from Dr. Haig, who no longer performs surgery, in that Dr. Haig does not think surgery will return Claimant to his prior heavy duty labor and thus surgery is "not worthwhile doing." Dr. Ghadially stated relief of pain is more a quality of life choice and if Claimant feels he needs a reduction in pain for quality of life, it is a worthwhile goal. Dr. Ghadially opined that he is not stating Claimant absolutely needs surgery, but in all medical probability, he would benefit from it. (CX-3, p. 26). Either the spinal cord stimulator or lumbar surgery would be a necessary procedure if the knee surgeries do not resolve Claimant's back problem. (CX-3, p. 27).

Claimant continued to present with similar ongoing pain complaints and symptoms of the neck, back and both knees throughout 2003 and 2004. Dr. Ghadially performed arthroscopic surgery on Claimant's left knee on June 7, 2004, to repair a complex tear of the medial meniscus. He found a "divot" in the cartilage which occurs from the meniscus being ground into the articular surface. (CX-3, pp. 28-29; CX-9, pp. 12-14; CX-4, pp. 6-9). Claimant is doing better since the surgery. Dr. Ghadially was unable to obtain authorization for the right knee surgery, however the surgery was performed under Medicare on September 29, 2004. (CX-3, pp. 30-31; CX-17, pp. 1-2).

Dr. Ghadially opined that Claimant does not manifest any kind of symptom magnification or functional overlay. (CX-3, p. 32). After Claimant recovers from his knee surgeries, Dr. Ghadially will decide whether to do any back or cervical surgery. (CX-3, p. 33). He does not know whether any irreparable injury has been caused by the delay in cervical or

back surgery. (CX-3, p. 34). His records do not show a worsening of the back or neck. (CX-3, p. 36).

Dr. Ghadially was aware that Claimant did not mention his right knee problem until at least ten months after his job accident. However, based on the history Claimant provided, the fact that his left knee was untreated and the right knee became symptomatic as he had an abnormal gait, Dr. Ghadially reasoned "it is not an unreasonable medical approach or opinion to believe that this is related to the fact that his left knee was not treated promptly and therefore this is . . . at least the injury was a producing cause of this right knee problem." Claimant was putting more weight on his right knee than he ordinarily would. (CX-3, p. 37). The fact that Claimant weighs over 300 pounds is not a positive thing according to Dr. Ghadially and may have made his right knee worse than it might otherwise have been. Claimant would be at maximum medical improvement six to twelve weeks after his right knee surgery at which time it can be determined whether he is able to function adequately with his spinal complaints as they are or whether he can wait longer to do something about his neck and back. (CX-3, pp. 38-39).

On December 19, 2003, after reviewing Dr. Haig's October 15, 2003 report (EX-4, pp. 2-3), Dr. Ghadially opined that Dr. Haig failed to perform a neurological examination of the back or neck. He also did not evaluate the knees. Dr. Ghadially noted that Dr. Haig did not address or mention Claimant's mechanical back instability at L4-5 and failed to appropriately evaluate Claimant's cervical spine "having ignored his knee complete (sic)." (CX-7, p. 48). He observed that Dr. Haig attached significance to Claimant's being "overweight," however Dr. Ghadially noted that no peer review literature related knee changes to a patient's weight and that such a theory is "not generally accepted or understood as being the cause of these changes within the orthopedic community." (CX-7, p. 49).

Dr. Martin R. Haig

On October 26, 2004, the parties deposed Dr. Haig, who was offered as an expert in the field of orthopedic surgery. (EX-9). Dr. Haig testified that the March 20, 2001 accident contributed nothing to Claimant's knee condition because when he first evaluated Claimant on April 20, 2001, he had no knee complaints. He maintains Claimant complained to Dr. Denman "later on" that he injured his knee in the fall. He was surprised when Claimant complained of knee complaints upon re-

examination one or two years later. (EX-9, p. 12). In deposition, he recommended that Claimant's knee should be left alone and let him get well, take a lighter job and lose weight. (EX-9, p. 10).

However, Dr. Haig confirmed that he was provided with Dr. Denham's initial report of March 23, 2001, when he first examined Claimant. He acknowledged that Claimant had complained of left knee pain to Dr. Denham **before** he saw Dr. Haig. (EX-9, p. 12; CX-19, p. 1).

Dr. Haig affirmed that a torn meniscus, which is not a normal knee condition, was reported on MRIs and is a condition which is appropriate for surgery. He would have been more conservative with a heavyset individual like Claimant before he proceeded with surgery, but agreed the three year period from injury to surgery was an appropriate period of time to determine whether or not the torn meniscus would cause continued pain and discomfort. (EX-9, p. 13). He agreed that a torn meniscus can be caused by trauma. (EX-9, p. 14). He also agreed that Claimant was overweight before his job injury. He confirmed that if Dr. Ghadially found locking in Claimant's knee upon examination it would be consistent with a torn meniscus. (EX-9, p. 15).

Dr. Haig agreed that if Claimant was not complaining about pain in his knees before his job accident, but had knee complaints a day after his fall or a month after the fall, the accident aggravated his underlying arthritic condition. He also believed that if Claimant's pre-existing degenerative cervical and back conditions were not symptomatic before the job accident they were aggravated by the March 2001 job injury. (EX-9, p. 17).

He testified he would not find it plausible that a man of Claimant's age and weight, doing the type of work he did all his life, would not have had pain in his neck, back and knees given the extent of arthritis present at the time of his job injury. He acknowledged however that he does not know if Claimant had prior backaches. (EX-9, p. 19).

Dr. Haig did not personally review the September 25, 2003 left knee MRI, but felt Claimant had arthritis and did not think there would be any need for any surgery to the left knee. (EX-9, p. 6). He considered body weight to be a problem in Claimant's condition because it causes degenerative arthritis of the knee which wears out by carrying too much weight. (EX-9, p.

8). He opined that maximum medical improvement takes one year from knee surgery which involves scraping an arthritic cartilage as opposed to six to eight weeks for removing a torn cartilage. (EX-9, pp. 8-9).

Dr. Haig examined Claimant on October 13, 2003, after the first Decision and Order, for a "complete orthopedic evaluation of his neck, low back and knees." (EX-4). His review of his past records revealed Claimant was seen in April 2001 complaining only of back pain, whereas, neck pain was also indicated in Dr. Haig's April 2001 report. Dr. Haig examined Claimant's neck and back, but there is no indication his knees were examined. He attributed Claimant's continued symptoms to his age and being overweight. He saw no reason why Claimant could not do medium or light work, and, if well motivated, probably heavy work. He opined no surgery was indicated. (EX-4, pp. 2-3).

In an undated letter to Counsel for Employer/Carrier, Dr. Haig opined, after receiving Dr. Ghadially's operative report of Claimant's right knee conducted in September 2004, that Claimant probably had arthritis in his right knee due to his weight; that the right knee was not injured in his job accident of March 20, 2001; was not insulted or aggravated later by favoring it; and was "worn out due to his weight and these finding (sic) would have been there without any accident." (EX-4, p. 1).

The Contentions of the Parties

Claimant contends that he is entitled to medical treatment pursuant to Section 7 of the Act for all reasonable and necessary medical expenses related to his job injury of March 20, 2001. Specifically, he contends he is entitled to medical care and treatment by Dr. James A. Ghadially to include left knee arthroscopy, right knee arthroscopy, epidural steroid injections of the lumbar and cervical spine, a spinal cord stimulator for his lumbar spine if he so chooses, or alternatively fusion of his lumbar spine at the L4-5 and L5-S1 levels, and posterior neuroforaminal decompression of the cervical spine as recommended by Dr. Ghadially. Claimant also seeks a determination that the right knee condition is compensable as related to the job accident or as a residual of injuries from the job accident.

Further, Claimant asserts he is entitled to reimbursement of his out-of-pocket expenses, including mileage reimbursement of $1,813.20 for mileage incurred since May 18, 2004. He

contends that Employer/Carrier is responsible for medical bills incurred by Claimant to the following health providers: Health & Medical Practice Associates in the amount of $1,550.15; Fannin Street Imaging for $2,320.00; East Side Surgery for $10,000.00; Accident & Injury Center for $2,154.00; and Dr. John Q Adams for $730.00.

Employer/Carrier contend Dr. Ghadially deposed that he had no intention of doing anything with regard to Claimant's back and neck until he reached MMI for his knees. They rely upon the opinion of Dr. Haig that Claimant's right knee is not work-related because not timely reported or is caused by a degenerative process. They argue Claimant has misrepresented facts to Social Security, his physicians and to the undersigned regarding his activities and physical abilities. They also aver that Claimant seeks to personally recover for medical benefits previously paid by Social Security, the VA or Medicare for which only the U.S. Government is subrogated.

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, 651 F.2d 898, 900, 14 BRBS 63 (CRT) (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Applicability of Section 22 Modification

Section 22 of the Act provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Incorporated, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. Id. at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of res judicata, and to allow the fact-finder to consider any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g denied, 404 U.S. 1053 (1972). An administrative law judge, as trier of fact, has broad discretion to modify a compensation order. Id.

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding. O'Keefe, at 255. The scope of modification based on a mistake in fact is not limited to any particular kinds of factual

errors. See Rambo I, at 295; Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 465, 88 S.Ct. 1140, 1144 (1968). However, it is clear that while an administrative law judge has the authority to reopen a case based on any mistake in fact, the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. Kinlaw v. Stevens Shipping and Terminal Company, 33 BRBS 68, 72 (1999). A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making. O'Keefe, supra; see also General Dynamics Corp. v. Director, OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Modification based upon a change in conditions or circumstances has also been interpreted broadly. Rambo I, at 296. There are two recurring economic changes that permit a modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable alternative are not suitable, or (2) the employer contends that suitable alternative employment has become available. Blake v. Ceres, Inc., 19 BRBS 219 (1987). A change in a claimant's earning capacity qualifies as a change in conditions under the Act. Rambo I, at 296. Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. See Rambo I, 515 U.S. at 296, 30 BRBS at 3 (CRT); Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998); Vasquez, 23 BRBS at 431.

However, Section 22 is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation strategy/tactics, errors or misjudgments of counsel. General Dynamics Corp. v. Director, OWCP [Woodberry], supra; McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Delay v. Jones Washington Stevedoring Company, supra, at 204.

The U. S. Department of Labor (DOL) has consistently advanced a view that Section 22 articulates a preference for accuracy over finality in judicial decision making. See Kinlaw, at 71; Old Ben Coal Company v. Director, OWCP [Hilliard], 292 F.3d 533, 36 BRBS 35, 40-41 (CRT)(7th Cir. 2001). DOL has maintained in other modification proceedings that as Section 22 was intended to broadly vitiate ordinary res judicata principles, the interest in "getting it right," even belatedly,

will almost invariably outweigh the interest in finality. Kinlaw, at 71.

B. The Threshold Requirement under Section 22 of the Act

I find Claimant has met the threshold requirement for modification under Section 22 of the Act by presenting evidence of a change in his physical condition. Subsequent to the issuance of the original Decision and Order in this matter, Claimant underwent diagnostic testing and two knee surgeries. He has not been placed at MMI since the surgeries. I find this sufficient to constitute a change in Claimant's physical condition. Consequently, I find and conclude that Claimant has presented new information to warrant consideration of modification under Section 22 of the Act.

Therefore, balancing the need to render justice under the Act against the need for finality in decision making, I hereby grant Claimant's motion and reopen the record to consider modification of the prior Decision and Order.

C. Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. 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 or symptoms. 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).

It is also noted that 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, 538 U.S. 822, 830, 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 physicians 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).

I again find Claimant's testimony credible and generally straight-forward. Although there are inconsistencies, I find them to be insubstantial when viewed in the over-all factual scenario of this matter. Employer/Carrier rely upon his Social Security records as a basis for arguing against Claimant's credibility. My view of those records is discussed below.

Social Security Administration Records

Employer/Carrier proffered 12 pages of the records received from the Social Security Administration (SSA) (EX-10). It is noted that the entire submittal from SSA consisted of 382 pages. In brief, Employer/Carrier argue that Claimant misrepresented his compensation rate from workers' compensation which caused an overpayment by SSA.

The Determination of Benefit Recomputation Adjustment and/or Recalculation issued by SSA dated July 8, 2004, reflects a workers' compensation offset applies and that Claimant was overpaid "because the WC rate was higher than what he alleged." Since the past due benefits covers a period from 02/2002-04/2004, arguably the claim for disability before SSA was filed in February 2002. At that time, Claimant was being paid indemnity benefits in the amount of $466.92 every two weeks. (See CX-23, p. 1; EX-6, pp. 4-6).

Average weekly wage was an issue before the undersigned in the first Decision and order which resulted in a finding that Claimant's average weekly wage was $563.33. (CX-2, p. 22). Claimant began receiving an increased workers' compensation indemnity bi-weekly rate on June 24, 2003 of $751.10. (EX-6, p. 4). Clearly, the 2004 determination of SSA corrected an erroneous payment of disability benefits. However, based on the record, I do not impute any wrongdoing to Claimant since he reported his correct workers' compensation rate in his February 2002 SSA claim. In view of the foregoing chronology, it is likely SSA paid greater disability benefits based on an offset of the lower compensation rate being paid by Employer/Carrier than the correct rate derived from the decisional average weekly wage. (EX-10, p. 1; CX-23, pp. 6-12).

In an effort to further attack Claimant's credibility, Employer/Carrier refer to various SSA records consisting of one-page medical snippets from providers who have provided otherwise

complete medical records or none at all. The medical progress record of June 4, 2002, wherein it is noted that Claimant has had knee pain for "several years," appears to be inconsistent with Claimant's testimony that he had no knee pain before his job accident. (EX-10, p. 6). This note is one year and three months after the job accident. I am not persuaded that Claimant's history as recorded contradicts his testimony since he related an injury and no mention of his pre-injury condition is noted. I find Claimant's October 16, 2002 medical record of complaints after a camping trip is not inconsistent with his testimony that he engages in hobbies to include fishing and hunting. (EX-10, p. 5). Contrary to Employer/Carrier's allegations, page seven of EX-10 is not "incompatible" nor does it relate at all to pre-accident knee pain, but rather to an April 30, 2002 adjustment of his knee orthosis. (EX-10, p. 7).

Employer/Carrier's reliance on page eight of EX-10 as contradictory of Claimant's testimony is misplaced. Although the progress note reflects Claimant reported walking two miles daily and exercising with weights, the note is dated April 19, 2002, three years earlier than his testimony that he currently walks one to one and one-half blocks. If page nine of EX-10 represents nutritional instructions given in April 2002, Claimant testified he had not received such instruction. Page 11 of EX-10, which was printed on April 22, 2003 and is not a report of that date, notes Claimant went hunting and "walked a lot." It is a progress note of December 19 (of a year which is obliterated by a hole-punch) that detracts from the significance of Employer/Carrier's argument regarding inconsistencies in Claimant's testimony since the timing of such report is undeterminable from the record.

Although inconsistencies exist in the above medical snippets with Claimant's record testimony of May 18, 2005, I find they are not substantial or significant enough to discredit Claimant's otherwise credible testimony.

D. The Compensable Right Knee 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'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, Dr. Ghadially opined that Claimant's right knee had a complex tear of the meniscus and in all reasonable medical probability was related to his job accident. He further opined that the right knee condition was the result of the job injury or aggravated in the job accident or resulted from the delay in treatment for the left knee. He concluded that, but for the delay in the treatment of the left knee, Claimant's right knee would not have worsened to its current condition.

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 on March 20, 2001, and that his working conditions and activities on that date could have caused the harm or pain in his right knee or his right knee condition resulted indirectly from the accident 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 caused 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 recognized that 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.

Employer/Carrier place reliance on the conclusions of Dr. Haig who opined that the job accident contributed nothing to Claimant's knee condition. He further opined that Claimant "probably" had pre-existing arthritis and that his age and weight were aggravating factors in Claimant's right knee wearing out and causing pain. He opined that the right knee was not injured in the job accident, nor was it insulted or aggravated later by favoring it. Based on the foregoing, I find that Dr. Haig's opinion is sufficient to rebut the invocation of the Section 20(a) presumption.

3. Conclusion or Weighing All the Evidence

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.

Considering the competing opinions of Drs. Ghadially and Haig, I accord more probative weight and value to Dr. Ghadially's opinion as Claimant's treating physician. His opinions are rationally based and reasoned, fully supported by numerous examinations and evaluations, multiple diagnostic tests and two surgical procedures. Although Dr. Haig examined Claimant on two occasions, his testimony, opinions and records are not always congruent.

Dr. Haig's testimony that Claimant only complained about knee problems after being examined in April 2001 is clearly belied by the records of Dr. Denham who examined Claimant before Dr. Haig. Although he attributes Claimant's right knee problems to age and weight, he contradictorily acknowledges that if Claimant had no complaints before his March 2001 job accident and complained of knee problems within one month thereafter, the accident aggravated his underlying aggravated condition. Dr. Haig affirmed that he did not review the diagnostic tests ordered by Dr. Ghadially. It was the opinion of Dr. Ghadially

that no peer review literature attributes knee changes to a patient's weight and that such a theory is generally not accepted in the orthopedic community.

Moreover, Dr. Haig's opinion about causation relating to the right knee was offered presumably after October 13, 2003, when he conducted his last evaluation of Claimant, but did not examine his knees. His conclusions that the right knee was not injured in the job accident, or insulted or aggravated or worsened by favoring it, lack any substantiation, are unexplained and thus, I find, are unreasoned.

I find, based on Dr. Ghadially's better reasoned opinions, that Claimant's right knee condition was directly related or indirectly related to his job accident. Nevertheless, I find and conclude it is compensable for which Employer/Carrier are liable.

Even if Claimant's age and body weight were factors in the deterioration of his right knee condition, they were only contributory in part, at best, given the condition of his left knee which was caused by the job accident. Dr. Ghadially attributed the deterioration of the right knee condition to residuals emanating from his favoring the knee during the delayed treatment of the left knee. The delay is directly attributable to Employer/Carrier's failure to authorize diagnostic testing and reasonable and necessary surgery, as discussed more fully below.

E. Nature and Extent of Disability

I previously found that Claimant suffered from compensable injuries and was temporarily totally disabled and entitled to disability compensation. The present record only serves to reinforce that earlier finding and conclusion. Accordingly, I find and conclude that Claimant continues to be totally disabled.

F. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record.

Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, there is no evidence that Claimant has reached maximum medical improvement. He underwent knee surgeries in June and September 2004 and has not been medically released by Dr. Ghadially. No physician has rendered an opinion, based on a reasoned evaluation of Claimant, that he has reached maximum medical improvement. Dr. Haig opined that MMI would not be reached for at least one year after the surgical procedure to Claimant's right knee. Accordingly, based on the instant record, I find and conclude that Claimant continues to be temporarily totally disabled and entitled to continued disability compensation benefits.

G. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but

only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982).

All of the above has happened in this case. Claimant has established a **prima facie** case for compensable medical treatment for his **left knee, right knee, lower back and neck** based on the qualified opinion of Dr. Ghadially. Authorization was sought from Employer/Carrier for medical care, diagnostic testing, and surgeries for the left and right knees, which requests were either denied or ignored. I find and conclude Employer/Carrier were extended an opportunity to provide care for Claimant and refused to authorize treatment or neglected to provide treatment.

Claimant subsequently procured surgical procedures from a source which is not liable in this case, the U.S. Government-either through SSA (Medicare) or VAMC, and upon a proper intervention or request for reimbursement, must be reimbursed by

Employer/Carrier for the costs and expenses related to such medical services. I find and conclude that the medical care procured and surgeries performed by Dr. Ghadially were reasonable and necessary treatment for Claimant's injuries and its residuals for which Employer/Carrier are responsible.

I also find it necessary to detail the future course of medical treatment in this claim, to avoid piecemeal litigation over every stage of the medical needs of Claimant, as follows:

(1) Medical Care for Claimant's Knees

Claimant is limited in his activities and restricted in stooping, bending and lifting and is unable to perform his former job. Since Dr. Ghadially has not rendered an opinion that Claimant has reached maximum medical improvement of his left and right knee conditions, any continued care ordered by Dr. Ghadially, which is appropriate, reasonable and necessary must be provided by Employer/Carrier.

Employer/Carrier are responsible for all medical costs, expenses and bills associated with the surgeries to the left and right knees and any mileage expenses incurred, or to be incurred, by Claimant in procuring such care and treatment at rates authorized by the Internal Revenue Service (IRS).

(2) Claimant's Lower Back Condition

Dr. Ghadially opined that Claimant has disc protrusions at L4-5 and L5-S1 with instability. Such conditions can cause leg, thigh and buttock pain which is consistent with Claimant's complaints and symptomatology. I find and conclude, based on the record evidence, that Claimant's lower back condition was caused or aggravated by his job accident.

Once resolution of Claimant's knee conditions is achieved, his options are to tolerate the lower back pain, attempt a trial of a spinal cord stimulator, or undergo a two-level lumbar fusion. Each is considered a progressive approach to Claimant's lower back condition. If Claimant elects to have the spinal cord stimulator procedure or, alternatively, a fusion, either is considered reasonable and necessary and the responsibility of the Employer/Carrier.

All costs and expenses, including mileage incurred or to be incurred by Claimant at a rate authorized by IRS, associated

with obtaining continued lower back medical care and treatment are the responsibility of Employer/Carrier.

(3) Claimant's Cervical Condition

Dr. Ghadially opined that Claimant has severe bilateral neuroforaminal stenosis at the C5-6 and C6-7 levels which was pre-existing, but aggravated by his job accident. Thus, I find and conclude that Claimant's cervical condition is work-related and the responsibility of the Employer/Carrier. His current cervical condition contributes to his inability to return to work according to Dr. Ghadially.

Prospective treatment is dependent on Claimant's tolerance of cervical pain. Dr. Ghadially recommended an epidural injection in December 2002 which was never approved. He continues to recommend at least one epidural injection in an effort to alleviate Claimant's neck pain. If the epidural injection is not successful, Dr. Ghadially has opined that Claimant is a candidate for posterior neuroforaminal decompression surgery. I find and conclude the epidural injection and decompression surgery are reasonable and necessary progressive treatment approaches to Claimant's cervical condition.

All costs and expenses, including mileage incurred or to be incurred by Claimant at a rate authorized by IRS, associated with obtaining continued cervical care and treatment are the responsibility of the Employer/Carrier.

(4) Reimbursement of Medical Costs and Mileage

Employer/Carrier are responsible for mileage expenses incurred by Claimant as set forth in CX-21 and summarized at page 1 for a total of $1,813.20 representing 1870 miles in 2003 at .36 cents per mile ($673.20) and 3040 miles in 2004 at 37.5 cents per mile ($1,140.00).

Claimant seeks recovery, reimbursement or payment of $423.89 due to Doctors Hospital-Parkway which is Employer/Carrier's responsibility. (CX-11). It is represented that Medicare paid the remaining $13,415.61 for left knee surgery caused by a work-related accident, which is also the responsibility of Employer/Carrier, and, upon an intervention by the U. S. Government to recover such an amount, is obligated to reimburse Medicare. (CX-10).

Claimant seeks recovery, reimbursement or payment of $133.04 due Gulf Coast Orthopedic & Spine (Dr. Ghadially's office) for services rendered which is Employer/Carrier's responsibility. (CX-8). An amount of $5,493.00 is reflected as the responsibility of the insurance carrier, which is also the liability of Employer/Carrier and not Medicare. (CX-8, p. 1).

Claimant seeks recovery, reimbursement or payment of $1,550.15 due to Health & Medical Practice Associates (Dr. Denham's office) for physical therapy associated with his work-related injury which is the responsibility of Employer/Carrier. (CX-13).

Employer/Carrier are also responsible for the billings of $2,320.00 from Fannin Street Imaging for MRIs and x-rays of Claimant's work-related knee injuries. (CX-14).

Claimant represents that he incurred a bill for $10,000.00 from East Side Surgery Center, Inc. for his work-related right knee surgery, however Medicare is shown to be the insurance carrier. There is no evidence that Claimant paid this bill, which is the responsibility of the Employer/Carrier and not Medicare. (CX-18).

Claimant seeks recovery, reimbursement or payment of $2,154.00 due to Accident & Injury Center for physical therapy, diagnostic services and other medical services associated with his work-related injuries which is the responsibility of Employer/Carrier. (CX-20).

Claimant also seeks recovery, reimbursement or payment of $33.91 due to John Q. Adams for anesthesiology services for his work-related right knee surgery, which is the responsibility of Employer/Carrier. (CX-22).

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board

concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[3] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Claimant's Request for Section 22 Modification is hereby **GRANTED.**

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[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 23, 2004**, the date this matter was referred from the District Director.

2. Employer/Carrier shall continue to pay Claimant compensation for temporary total disability from March 21, 2001 to present and continuing based on Claimant's average weekly wage of $563.33, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 20, 2001, work injury, including treatment and care for his left knee, right knee, lower back and neck, pursuant to the provisions of Section 7 of the Act.

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 21st day of December, 2005, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge