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Office of Administrative Law Judges
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CASE NOS.: 2005-LHC-02151
2005-LHC-02152
2005-LHC-02153
2005-LHC-02154

OWCP NOS.: 01-160323
01-139166
01-140057
01-161117

In the Matter of

N.D.[1]
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

Appearances:

Robert Keville, Esq., Suisman, Shapiro, Wool, Brennan, Grey & Greenburg, New London, Connecticut, for the Claimant

Edward Murphy, Esq., Morrison & Mahoney, Boston, Massachusetts, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

1 In accordance with Claimant Name Policy, which became effective on August 1, 2006, the Office of Administrative Law Judges uses a Claimant's initials in published decisions in lieu of the Claimant's full name. *See* Mem. From C.J. John M. Vittone, ALJ, Claimant Name Policy (July 3, 2006) *available at* http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

This matter arises from four claims for worker's compensation benefits filed by N.D. (the "Claimant") against his former employer, the Electric Boat Corporation ("Electric Boat" or the "Employer") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "Act" or the "LHWCA"). Pursuant to Section 7 of the Act, the Claimant seeks medical benefits based on additional injuries to his left knee and a left flank hernia. 33 U.S.C. § 907. The Employer denies liability for these conditions, and the parties were unable to resolve the issues raised by the claims during informal proceedings below before the District Director for the Office of Workers' Compensation Programs ("OWCP"). Consequently, the District Director referred the claim for medical care to Office of Administrative Law Judges ("OALJ") for a formal hearing pursuant to section 19(d) of the LHWCA.

A hearing was conducted before me in New London, Connecticut on December 20, 2005, at which time all parties were afforded the opportunity to present evidence and oral argument. The Hearing Transcript is referred to herein as ("TR"). The Claimant appeared at the hearing represented by counsel and an appearance was made by counsel on behalf of the Employer. Stipulations were admitted into the record as Joint Exhibit ("JX") 1. TR 15. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-20 and Employer's Exhibits ("EX") 1-8. TR 12-13. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-10. TR 6-9. After the hearing, the parties filed briefs. The Claimant's brief is untitled, and is referred to herein as Cl's Br. The Employer's Post Hearing Memorandum of Electric Boat Corp. is referred to herein as Emp's Br. The record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their arguments, I have concluded that the Claimant established that Electric Boat is liable for his left flank hernia, but has not established that he is entitled to have Electric Boat provide for his medical expenses for his left knee injury. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties have stipulated to the following for all alleged injuries:

1. the LHWCA applies to the claims;
2. the injuries occurred at Groton, Connecticut;
3. the Claimant provided timely notice of his medical requirements;
4. the claims were timely filed;
5. the Notice of Controversion was timely filed;
6. the weekly compensation rate is $759.86
7. the Claimant is totally, permanently disabled as decided by previous litigation.

JX1. These stipulations are fully supported by the evidence of record, and I adopt them as my findings. The only issue presented for adjudication is whether the Claimant's left knee condition and left knee hernia arose out of and in the course of the Claimant's employment as defined by the Act.

III. Findings of Fact and Conclusions of Law

The Claimant, who Electric Boat employed as a painter, suffered a series of work-related injuries that led to an award of benefits for total, permanent disability. N.D. v. General Dynamics Corp, Case Nos. 2000-LHC-0832, 2000-LHC-2738, 2000-LHC-2739 (2001) (unpublished). Pursuant to Section 7 of the Act, the Claimant seeks medical benefits based on additional injuries to his left knee and a left flank hernia. 33 U.S.C. § 907. The Employer denies liability for these conditions, and the parties were unable to resolve the issues raised by the claims during informal proceedings below before the District Director for the Office of Workers' Compensation Programs ("OWCP"). Consequently, the District Director referred the claim for medical care to Office of Administrative Law Judges ("OALJ") for a formal hearing pursuant to section 19(d) of the LHWCA. Pursuant to notice, a hearing was convened in New London, Connecticut on December 20, 2005, at which time both parties were afforded an opportunity to introduce evidence and argument in support of their positions. TR 6-15.

A. Background And Claimant's Testimony

The Claimant, a 73 year old man with a high school education and an employment history of manual labor, immigrated to the United States in December of 1949. He worked as a machinist and a hairdresser, and served as a United State Marine before working for Electric Boat from May of 1983 until June 17, 1997. *N.D.* at 4-5. He was diagnosed with an injured right knee and shoulder, carpal tunnel syndrome, and coronary artery disease. *Id.* at 13. Those diagnoses led to the Claimant's total and permanent disability as of January 8, 1998, and he has been receiving disability benefits since that time. *Id.* at 32.

At the December, 2005 hearing, the Claimant testified that even though the majority of the treatment for his left knee and left flank hernia injuries happened after he left Electric Boat, both injuries arose out of his employment. TR at 30-31. The Claimant repeatedly slipped several rungs down ladders, injuring his left knee. *Id.* at 34. He also fell while exiting a boat; his previously injured right knee collapsed, and when he fell he injured his left knee. *Id.* at 35-36. The Claimant had surgery and other treatment for his left knee on an ongoing basis, and paid out of pocket for that treatment. *Id.* at 41-43.

The Claimant also testified that he injured his left flank while carrying 50-pound buckets of paint, causing a left flank hernia that was aggravated by other work-related activities, such as lifting, pushing, pulling, and carrying. TR at 45-46, 52. He did not report the injury immediately because he feared for his job, but did eventually tell an Electric Boat physician. *Id.* at 47. At that time, the Electric Boat physician thought the hernia was "unusual," but did acknowledge that there was an injury. *Id.* at 48. The Claimant did not seek treatment at that time as he feared he would be terminated. *Id.* at 49. After leaving his employment at Electric Boat, he sought treatment at a Veteran's Administration Hospital, and underwent two rounds of surgery, which he paid for out of pocket. *Id.* at 50-52.

B. Medical Opinions

1. Electric Boat's Records

Electric Boat's records indicate that the Claimant did fall from a ladder and hurt his left knee in 1989. CX 1 at 1. Electric Boat's records also confirm that the Claimant did suffer from a hernia on his left side in August of 1985. CX 2 at 1. The records also show that the Claimant suffered from a hernia on his right side on September 19, 1985. The records indicate that on October 21, 1985, an Electric Boat doctor believed that there was no evidence that the hernia was work-related, however that particular record is ambiguous as to whether the doctor was referring to the left or right side hernia. *Id.* at 12.

2. Dr. Carlow

Dr. Steven B. Carlow, M.D., first examined the Claimant on November 1, 1996. CX 4 at 49. Dr. Carlow's qualifications and Board certification have been stipulated by the parties. CX 20 at 167. Dr. Carlow diagnosed the Claimant's right knee as disabled, and ordered surgery, which went well and without complications. CX 4 at 47. The first time Dr. Carlow reports a problem with the Claimant's left knee is on May 13, 2003; his report from that date states that the Claimant had long-standing problems with the left knee that were work related, but that the Claimant may have twisted his left knee five weeks before the report date. *Id.* at 27. Dr. Carlow reports "a popliteal mass, suggestive of a Baker's cyst . . . marked tenderness . . . significant arthritic changes and involvement of the patellofemoral joint as well as significant loss of the medial joint space." *Id.* Dr. Carlow removed 40 cc of fluid that was not "purulent or cloudy," and gave the Claimant an injection of Depo-Medrol, Marcaine, and Lidocaine. *Id.* Dr. Carlow operated on the Claimant's left knee on December 19, 2003; the surgery went well and the Claimant recovered well. CX 9 at 76-77. Dr. Carlow reports that to "a high degree of medical probability," the damage to the Claimant's knee was "made substantially worse secondary to his severe right knee degenerative changes, causing increasing stress on the left knee." CX 4 at 24.

3. Dr. Derby

Dr. James H. Derby, M.D., first examined the patient on December 12, 1994, and reports that the Claimant injured his right knee on November 5, 1994. CX 5 at 53. On December 14, 1995, Dr. Derby reports that in addition to the right knee problem, the Claimant had a degenerative condition in his right shoulder. *Id.* at 52. Dr. Derby continued to treat the Claimant's right knee and shoulder until April 17, 1995, with the Claimant making good progress up until that time. *Id.* at 52-50. Dr. Derby thus confirms the other opinions on the Claimant's right knee injury, but does not mention either the left flank hernia or any problems with the Claimant's left knee. *Id.*

4. Dr. Jones

During January of 1992, Dr. William N. Jones, M.D., treated the Claimant for an injury to his left shoulder. CX 6. The Claimant fell and grabbed a pipe; Dr. Jones gave him steroid and anti-inflammatory injections, as well as pain medication. *Id.* at 55.

5. Dr. Clement

Dr. Ronald E. Clement, M.D., first examined the Claimant on February 28, 2002, and diagnosed a left flank hernia. CX 7 at 65. Dr. Clement proceeded with surgery on March 13, 2002, and the Claimant recovered well. *Id.* at 64. Unfortunately, the surgery did not repair the hernia, and had to be attempted a second time on October 30, 2002. *Id.* at 63. The second surgery was successful, and the Claimant recovered well. *Id.* at 60. On June 2, 2004, Dr. Clement reported that "based on a reasonable degree of medical probability given [the Claimant's] employment with Electric Boat, the hernia was either caused or exacerbated by his employment. *Id.* at 59. However, on August 7, 2004, Dr. Clement reported that the left flank hernia was unrelated to any prior work-related injury, and that as the Claimant had no specific injury to the area, it was unlikely to be related to the Claimant's employment by Electric Boat. *Id.* at 58. Dr. Clement further states that a hernia can develop from "recurrent repetitive tension to the abdominal wall." *Id.* In a letter dated September 13, 2004, Dr. Clement attempted to clarify, indicating that the Claimant's left flank hernia is unrelated to any prior injury, but may be related to the Claimant's employment if he was exposed to "recurrent repetitive tension to the abdominal wall." *Id.* at 56.

6. Dr. Willetts

Dr. Philo F. Willetts, M.D., is a Board Certified Orthopedic Surgeon, with nearly 30 years of experience. EX 3 at 30. In his deposition, Dr. Willetts states that he examined the Claimant on September 3, 1999, and at that time the Claimant's "left knee examination was normal." CX 19 at 145. Dr. Willetts' report dated September 3, 1999 is focused on the Claimant's right knee injury, with scant mention of either the left knee injury or the left flank hernia. EX 2. He does mention that the Claimant denied any left knee problems at that time, and that the left knee "was entirely unremarkable." *Id.* at 17, 21. Dr. Willetts also examined the Claimant on May 19, 2005, specifically in reference to the Claimant's left knee injury. EX 1 at 1. Dr. Willetts reports that the Claimant does not remember when his left knee was first injured, and that the Claimant urged him to rely on the medical records. *Id.*

Dr. Willetts diagnosis for the Claimant's left knee is of a "[p]ossible twisting injury . . . approximately April, 2003, with no specific recollected left knee injury . . . and [d]egenerative arthritis . . . status post arthroscopic partial medial meniscectomy and debridement." *Id.* at 9. Dr. Willetts reports that "[t]he current left knee complaints are not related to [the Claimant's] work . . .there is no credible evidence that there was any documented left knee injury at Electric Boat . . . ." *Id.* at 10. Dr. Willetts also reports that the Claimant's work did not aggravate his symptoms; rather his symptoms are best "explained on the basis of a slowly evolving degenerative arthritis over several years in a man in his 70's." *Id.* Dr. Willetts position is that

the Claimant had asymptomatic degenerative arthritis in both knees, which was aggravated in his right knee by a work-related injury, but occurred without any aggravation in his left knee. *Id.* at 10-11.

7. Dr. Giacchetto

Dr. John J. Giacchetto, M.D., examined the Claimant on June 1, 1998. EX 4 at 1. Dr. Giacchetto's report confirms the previous opinions on the Claimant's right knee injury, but does not mention either the left flank hernia or any problems with the Claimant's left knee. *Id.*

8. Dr. Coletti

Dr. David E. Coletti, M.D., is a Board certified surgeon with eight years of experience as an attending surgeon. Dr. Coletti first examined the Claimant on October 12, 2004. EX 6 at 73. He confirmed the diagnosis made by Dr. Clement, and confirmed that both surgeries were necessary. *Id.* While Dr. Coletti did indicate that the left flank hernia by itself was not disabling, he did not provide an opinion as to its cause. *Id.* at 74.

C. Electric Boat's liability for the Claimant's left flank hernia and left knee injury

1. The controlling law.

Section 7(a) of the LHWCA provides that an "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 regulations implementing section 7(a) provide that medical care includes "laboratory, x-ray, and other technical services . . . recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. § 702.401. An employer must provide medical services for all legitimate consequences of a compensable injury, even if the consequences are attributed to a chosen physician's lack of skill or erroneous judgment; *Lindsay v. George Wash. Univ.*, 279 F.2d 819, 820 (D.C. Cir. 1960); but an intervening cause, including an employee's own deliberate misconduct, "may sever the causal connection between an original work-related injury and subsequent consequences a worker may suffer." *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051 (5th Cir. 1983) referencing 1 A. Larson, The Law of Workmen's Compensation § 1300 (1980) ("When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."). The burden is on the Claimant to establish that medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). *See also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-280 (1994). A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Turner v. Chesapeake and Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). If medical treatment is in part necessitated by a work-related condition, the entire cost of the treatment is

compensable. *Turner*, 16 BRBS at 258. *See also Kelley v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988).

In order to show that an injury is compensable, the Claimant must present sufficient evidence to establish a *prima facie* case that the injury arose out of his employment, creating a presumption of causation. 33 U.S.C. § 920(a). To invoke the presumption, the Claimant must show "(1) [he] suffered a harm and (2) that conditions existed at work, or an accident occurred at work, that could have caused or aggravated or accelerated the condition." *Conoco, Inc. v Dir., OWCP*, 194 F.3d 684, 687 (5th Cir. 1999). Once a claimant has invoked the Section 20(a) presumption, in order to avoid liability an employer must respond with substantial evidence that the harm suffered was not work related. *Volpe v. Northeast Marine Terminals*, 671 F2d 697, 701 (2nd Cir 1981) (*Volpe*). If the Employer is able to rebut the presumption, the court must weigh all of the evidence to determine whether the injury was work related. *John W. McGrath Corp. v. Hughes*, 264 F2d 314, 317 (2nd Cir. 1959), cert. denied, 360 U.S. 931 (1959).

2. The left flank hernia.

The Claimant has testified, and the Employer's records confirm, that he injured his left flank while carrying 50-pound buckets of paint, causing a left flank hernia that was aggravated by other work-related activities, such as lifting, pushing, pulling, and carrying. I therefore find that the Claimant has invoked the Section 20(a) presumption that his left flank hernia is compensable. The Employer provided no significant medical evidence showing that the Claimant's left flank hernia was not work-related. In its post-hearing brief, the Employer asserts that the lapse of 19 years between the Claimant's alleged injury and the hernia is enough to prevent the court from inferring a causal relationship. Emp.'s Br. at 7. The Employer cites *Todd Shipyards Corp. v. Donavan*, 300 F2d 742 (5th Cir. 1962), a case where the Court decided a mixed question of "fact, medical opinion and inference" in favor of the claimant by considering the "common sense of the situation" even when the claimant did not present medical evidence conclusively proving his claim. *Todd Shipyards Corp.* at 742. However, that case does not help the Employer as the *Todd* Court, construing the Act liberally, was properly drawing an inference for the Claimant. *Id.* at 745. Although Todd states that the court should look to the "common sense of the situation," it is inappropriate to draw a negative inference against the Claimant once he has invoked the Section 20(a) presumption. Rather, the Employer must present some sort of medical evidence rebutting the presumption. *Volpe* at 701, s*ee also Bridier v. Alabaman Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995). Dr. Coletti's report merely affirms the Claimant's injury, it does not give his opinion on causation. Although the Electric Boat records assert that one of the Claimant's two hernias was not work-related, a mere assertion without any supporting rationale is not substantial evidence that rebuts the Section 20(a) presumption. I therefore find that the Claimant is entitled to payment for all reasonable and necessary medical care required for treatment of his left flank hernia. In the alternative, if the Employer has rebutted the presumption, on weighing the evidence it is clear that Dr. Clement's theory of causation is credible and not matched by any opposing medical opinion. Therefore, the Claimant's evidence strongly outweighs the Employer's, and as the Claimant has established by a preponderance of the evidence that his left flank hernia was work-related, the Employer is liable. As all the medical experts have agreed that the Claimant's treatment so far has been

reasonable and necessary, I therefore find that Electric Boat is liable for past, as well as ongoing treatment.

3. The left knee injury.

The Claimant testified that he repeatedly slipped down ladders, thus injuring his left knee while working for Electric Boat. He further testified that left knee injury was a result of his right knee injury as his collapsing right knee caused him to twist or bump his left knee. As the Claimant has shown his left knee is damaged and that conditions existed at his place of employment that either caused or could have caused that harm, I find that he has invoked the Section 20(a) presumption. The Employer submitted the opinion of Dr. Willetts, who examined the Claimant and his medical history. Based on his review of the Claimant's medical records and an examination, Dr. Willetts believes that the left knee injury is best "explained on the basis of a slowly evolving degenerative arthritis" that is unrelated to the Claimant's work. I therefore find that the Employer has successfully rebutted the Section 20(a) presumption with substantial evidence, so I turn to the weight of the evidence.

The Claimant relies on the opinion of Dr. Carlow, who treated the Claimant and carried out the surgery on the Claimant's left knee. Cl.'s Br. at 2. Dr. Carlow's position is that the damage to the Claimant's right knee aggravated the arthritis in the Claimant's left knee. The Employer relies on the opinion of Dr. Willetts, who examined the Claimant and reviewed the records. Emp.'s Br. at 4-5. During the exam, the Claimant admitted that he has a poor memory, and he specifically instructed Dr. Willetts that the medical records are more reliable then his memory. Dr. Willetts position is that the left knee arthritis is not work-related. The Claimant first complained of left knee problems after he finished his employment with Electric Boat. While the Claimant may have suffered left knee injuries while working for the Employer, there is no evidence that any of those injuries aggravated the Claimant's arthritis. As the Employer points out, there is no credible medical evidence that the Claimant did changed his gait in reaction either to the right knee injury that led to his disability, or in reaction to any of his left knee injuries. This undermines Dr. Carlow's theory that the Claimant's right knee injury caused him to favor his left knee. *Id.* at 5. Furthermore, even when the Claimant's left knee was painful enough to require surgery, he was unable to point to any specific traumatic incident that triggered the problem, making Dr. Willetts' "degenerative arthritis" theory stronger. I therefore find that Dr. Willetts' position is more credible and conclude that a preponderance of the evidence establishes that the Claimant's left knee injury is not work related. Thus Electric Boat is not liable.

IV. Order

Based on the foregoing findings of fact and conclusions of law, the claim of N.D. for medical care pursuant to 33 U.S.C. § 907 is **DENIED** with respect to the left knee injury and **GRANTED** with respect to the left flank hernia. Accordingly, the following order is entered:

(1) Electric Boat Corporation shall (a) provide the Claimant N. D. with all appropriate medical care for his left flank hernia, and (b) pay any and all outstanding bills for such care; and

(2) The Claimant's attorneys shall have 30 days from the date this decision and order is filed with the District Director to submit a fully supported and fully documented application for an award of attorney's fees pursuant to 33 U.S.C. § 928, and the Respondent Employer and Carrier shall have 15 days following receipt of the fee application to file any objections.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts