Issue Date: 29 January 2015 U.S. Department of LaborOffice of Administrative Law Judges
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CASE NO.: 2010-LHC-1263

OWCP NO.: 07-185692

IN THE MATTER OF

JOSEPH MEEKS,
Claimant

v.

BIS SALAMIS, INC.,
Employer

DECISION AND ORDER ON SECOND REMAND

BACKGROUND[1]

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act)[2] and the Outer Continental Shelf Lands Act[3] (OCSLA) brought by Claimant against Employer. On 10 Apr 09, about a month after starting to work for Employer as a sandblaster, Claimant was being transferred in a personnel basket when the basket flipped. Later that day, he was taken ashore and examined. He was released and, following a previously-scheduled break, returned to work for a short period. He stopped working and has not returned to any employment since. He filed a claim for compensation which was eventually considered at a formal hearing.

[1] The Board entered its own factual findings as to every contested issue except average weekly wage (AWW). The parties have since stipulated to AWW and as a result, compliance with the remand order itself would require no more than a perfunctory procedural background review, brief discussion, and final decretal order. However, since Employer stated that it will seek review in the Circuit Court, I have included by way of footnotes a more complete discussion in order to minimize the need for yet another remand to the trial level, in the event the Circuit vacates any part of the Board's ruling.
[2] 33 U.S.C. §§901-950.
[3] 43 U.S.C. §1331.

Claimant argued that he suffered back, neck, and dental injuries. He sought payment for past medical and dental treatment and an order for further treatment. He maintained he had not yet reached maximum medical improvement (MMI) and remained temporarily totally disabled with an AWW no less than $866.92.

Employer responded that Claimant was able to return to duty no later than 15 Apr 09,[4] suffered no period of disability, and required no medical care for any injury resulting from the incident on the rig on 10 Apr 09. Employer also argued that Claimant's AWW was $826.40.

INITIAL DECISION[5]

In the initial decision, I noted that there was clear evidence that Claimant had extensive degenerative spinal changes and multi-level lumbar and cervical spondylosis and herniation and stenosis, along with a missing #25 tooth and chipped #8 and #9 teeth. I also found that there was some sort of incident with the personnel basket in which the riders were tossed about. Thus, I found that there was an event at work and bodily harm.

I then noted Dr. Vanderweide's opinion that Claimant's preexisting spinal conditions were aggravated by his accident and Dr. Dent's opinion that Claimant's symptoms and injuries were a direct result of his work injury. However, I also found that those medical opinions had to have been based on Claimant's description of the incident on the rig and his subjective history of pain. I then explained that the evidence led me to conclude that he is totally unreliable and that any medical opinions relying on his subjective reports deserve almost no weight.

Consequently, I found the weight of the reliable evidence to show that his spinal problems were degenerative in origin and he suffered no new symptoms or aggravation (regardless of the cause) beyond the transient strain that was initially diagnosed. I noted the absence of any evidence of oral trauma at the time of the incident and found that when he came off of the basket, he did not have any broken teeth. I concluded that Claimant required only that medical treatment already provided by Employer, found he had suffered no disability, and denied his claim.

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[4] The parties stipulated that Claimant was paid through that date.
[5] *Meeks v. Bis Salamis, Inc.*, ALJ No. 2010-LHC-1263 (Sept. 19, 2011).

FIRST ORDER OF REMAND[6]

In considering Claimant's subsequent appeal, the Board conducted an extensive recitation of the evidence. It noted that "the administrative law judge found that 'there is little doubt' that *the work incident* occurred on April 10, 2009."[7] After reviewing my reasons for the dismissal, the Board affirmed the dismissal of the claim as to the broken teeth. However, it then cited the failure of the decision to properly address the presumption of causation,[8] particularly in light of the aggravation rule,[9] and remanded the case for me to correct that legal error as to the spinal injuries and lost tooth. The Board additionally entered its findings of fact that Claimant had requested authorization for surgery, that Employer refused to grant authorization, and that the back surgery was necessary.

DECISION ON FIRST REMAND

On remand, I explained that as I reviewed and weighed all of the evidence in the case, I found virtually no probative value in any uncorroborated testimony or statement made by Claimant or medical opinion based on his statements. I once again found that the only reliable evidence in the record were the observations, reports, and opinions that were not tainted by being based on the accuracy of what Claimant may have said, complained about, described, or reported. I then applied the section 20(a) presumption construct in light of my assessment of the evidence and the aggravation rule.

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[6] *Meeks v. Bis Salamis, Inc.*, BRB No. 12-0024 (Sept. 27, 2012).

[7] *Id.* at 3 (emphasis added). The exact language in my decision was "Indeed, there is little doubt that *something* happened on the rig in that the supervisor described an incident with the personnel basket in which employees, including Claimant, were tossed about." Initial Decision at 21(emphasis added).

Claimant testified at hearing that he was transferring from the rig to the boat in the personnel basket and was hurt when the basket collided with the boat and flipped. He stated that the impact was on his feet, throwing his bottom teeth into his top teeth. Medical records from a couple of days later note that Claimant said he had been tossed out of a personnel basket and fallen onto the deck, striking the bulwark with the side of his right shoulder. Later medical records indicate Claimant reported he fell ten feet and struck the deck.

Apart from Claimant's descriptions, the only other evidence of the 10 Apr 09 incident was the supervisor's statement. He reported that the seas were rough and that the boat captain said that the first load had taken a spill and were spooked, but OK. The supervisor added that after waiting 15 or 20 minutes, they started again and after the second or third man made it across, he saw a large swell pick up the boat and drop it on the landing. He then heard from behind him Claimant say his back was hurting and he needed to see a doctor ASAP. There was no evidence from anyone who actually saw Claimant fall.

Based on that evidence, and given Claimant's fundamental lack of credibility, I found the evidence sufficient only to establish that something happened in terms of a spill from the basket. I did not find that "the work incident" occurred as described by Claimant.

[8] *Id.* at 3; 33 U.S.C. §§920(a).

[9] *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999).

Specifically, I required Claimant to prove by a preponderance that he had a bodily harm and that something happened at work that could have caused the bodily harm.[10] When he carried that burden, Employer was then required to offer substantial evidence to rebut the presumption that the new or aggravated bodily harm was caused by the event at work. In the instances where Employer was able to do so, I reviewed the totality of the evidence to determine whether it was more likely than not that his harm was caused at work. Claimant bore the risk of non-persuasion in that final step.

I first found Claimant failed to establish the predicate for the 20(a) presumption as to the loose/lost tooth. However, I alternatively also found that even if the presumption was invoked, the record contained sufficient evidence to rebut it. Then, weighing the totality of the evidence as I found it to be reliable, I found as fact that it was more likely than not that Claimant did not lose tooth #25 as a result of the accident at work on 10 Apr 09, but rather the subsequent event or condition that broke teeth #8 and 9.[11]

I next found that the Claimant had extensive degenerative spinal changes, multilevel lumbar and cervical spondylosis, herniation, and stenosis, objectively identified by his doctors. However, I found that those conditions were preexisting and in order to establish the bodily harm that is one of the predicate elements of the 20(a) presumption, Claimant would have to show a new harm beyond his preexisting condition in the form of a new, aggravated, or more symptomatic condition.

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[10] Since the spinal harms were preexisting, Claimant had to show some aggravation or acceleration, however minor.

[11] I found that the inference that the subsequent event or condition that broke two of Claimant's teeth could have also knocked out another one was sufficient to rebut the presumption that it was knocked out by whatever happened on 10 Apr 09. Then I weighed all of the evidence, finding most probative: (1) the only fresh complaint of a problem with the tooth was Claimant's statement the next day that he thought he had a loose tooth; (2) the absence of any medical records indicating oral trauma; and (3) the first time Claimant sought treatment for the missing tooth was over a year later, when he also presented with two broken teeth. I concluded that while it may be possible that whatever caused Claimant to say he thought he had a loose tooth caused it to eventually fall out, it is much more likely that the same mechanism that broke two teeth also knocked out the missing one.

In that regard, I found the only new or aggravated harm that Claimant was able to credibly establish was a transient minor lumbar strain.[12] Continuing with the section 20(a) analysis, I found that such a strain could have been caused by the event on 10 Apr 09, as established by the credible evidence. With the presumption thus invoked, I found no evidence to rebut it and therefore found that Claimant suffered a minor lumbar strain on 10 Apr 09. However, I further found that he received all reasonable, appropriate, and necessary medical care and the strain did not prevent him from returning to work.

I also alternatively noted that even if Claimant had prevailed on the causation issue as to the more extensive spinal conditions, he would still have had the burden to establish he was unable to return to his original job. Again weighing what I considered to be the probative evidence in the case, I found that Claimant failed to carry his factual burden of proof that he could not return to his original job or is in pain.[13]

SECOND ORDER OF REMAND[14]

The Board began its ruling on Claimant's second appeal with an extensive evidentiary and procedural review. It noted that it was required to give deference to the fact finder and cannot reweigh evidence. However, it also cautioned that if factual findings are not supported by substantial evidence, they are subject to reversal. The Board then stated this was such a case, ruling that the "uncontradicted objective evidence" establishes that Claimant was disabled and required treatment for his neck, back, and dental injuries. It explained that Claimant's lack of credibility cannot prevent the application of the 20(a) presumption and since there was no evidence to rebut the presumption, he must prevail. In addition to reversing factual findings that were unsupported by the evidence, the Board also observed that the decision failed to provide any legal framework.

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[12] My assessment of the evidence was that the imaging studies all disclosed multiple spinal problems, but that they were preexisting. In the absence of any studies before 10 Apr 09, the medical opinions of an aggravation were based on Claimant's description of his fall and reports of pain, neither of which I found to be worthy of any weight. Consequently, I found Claimant was unable to show it was more likely than not that he had a harm (other than a transient strain) beyond what he brought to the job. In other words, beyond that strain, I found no credible evidence of any aggravation or increase in symptoms. Since there was no harm (aggravation) there was no need to determine if it could have been caused by the accident. The medical opinions that Claimant's complaints of pain could be explained by the history he gave them and are consistent with objective imaging are not dispositive evidence that either the reports or complaints are true.

[13] For the reasons fully explained in the initial opinion, I gave no weight to Claimant's testimony that he is unable to return to his original job. Moreover, my assessment of the medical evidence was that the reports and records of the doctors who opined that Claimant could not return to work cited Claimant's history and reports of pain. Given the absence of any objective imaging that showed signs of recent acute trauma, I concluded that those doctors assumed the honesty and accuracy of what Claimant told them in reaching their conclusions. Thus, the probative value of their opinions was limited to the reliability of what Claimant told them. Ultimately, the question of whether or not Claimant could go back to work came down to his credibility. I found that he had not proven that it was more likely than not that he was unable to return to his original job.

[14] *Meeks v. Bis Salamis, Inc.*, BRB No. 13-0478 (July 29, 2014).

The Board began its full review of the legal standard for the application of the 20(a) by emphasizing that it had found that the work accident unquestionably occurred.[15] It next observed that with the 20(a) presumption invoked, the burden shifted to Employer.

Turning specifically to the tooth, the Board connected the incident, the fresh report of a loose tooth, and a subsequent missing tooth to invoke the 20(a) presumption. It then reversed my alternative finding of rebuttal evidence as "purely speculative."[16] In the absence of rebuttal evidence, it found as a matter of law the missing tooth was caused by the work accident.

As to the spinal conditions, the Board ruled that "claimant unquestionably has physical harm beyond the transient strain, as demonstrated by objective medical tests and for which he underwent back surgery." It reviewed the medical evidence and determined since "there is no indication in these reports that the doctors' opinions are based solely on claimant's subjective complaints." Consequently, it ruled, the finding that the medical opinions were based solely on Claimant's subjective complaints and that Claimant had no harm beyond the transient strain must be reversed.[17]

The Board reiterated that the section 20(a) presumption applies to an aggravation of a preexisting condition, so long as a claimant establishes that his physical harm could have been aggravated by the work accident. It found that Claimant had done so through the medical opinions.[18] It then affirmed my provisional ruling that there was no rebuttal evidence, thereby disposing of the causation question in favor of Claimant.

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[15] There is no doubt that something happened on 10 Apr 09 and I so found. However, my review of the record found that there remains significant doubt as to the extent and nature of violence and trauma visited on each employee, particularly given Claimant's lack of credibility. *See* n.7.

[16] I reasoned that the trauma or condition that broke his teeth could have also knocked out a tooth. (See n. 11.) The Board found that reasoning to be pure speculation and insufficient to rebut the presumption.

[17] My application of the legal framework of section 20(a) was that Claimant had to show a harm separate from the preexisting condition. That harm need only be a very minor aggravation or acceleration/increase/precipitation of symptoms; however the burden was not on Employer to prove that Claimant did not have an aggravation of a preexisting condition, but rather on the Claimant to prove that he did. Claimant was obliged to show an aggravation or increase before it would be necessary to determine if there was evidence that the accident could have caused it. While the objective observations following the accident showed significant spinal problems, the record is clear that Claimant already had advanced degenerative changes. Those degenerative changes were not caused by the accident. Whether or not they were aggravated and began to cause Claimant more pain depends on his subjective reports. Clearly the doctors believed that what they saw in the images could have been aggravated by the event Claimant described to them. However, there were no pre-event images and his doctors took his history and considered his reports of pain in reaching their decisions. I do not find his reports of increased pain and disability to be credible. Based on that, I discounted the doctors' opinions and found no additional aggravation and no cause to determine if such an aggravation could have been caused by the work accident. Had I found Claimant to have increased pain or a worsened spinal condition (beyond the transient strain I did find), I would have, like the Board, found it could have been caused by the accident, invoked the presumption and found no evidence to rebut it.

[18] There is some indication in the remand orders that the proper legal standard is that if a claimant can show a pre-existing condition and a work event that could have aggravated it, he or she is entitled to a presumption that there was in fact an aggravation and has no further burden to show an actual aggravation in order to invoke the presumption. If that is the correct legal standard, I would have found for Claimant on causation.

Turning to medical care and nature and extent, the Board allowed that Claimant bore the burden of proving he could not return to his original job. It then reviewed the medical evidence and cited the multiple medical opinions that Claimant required medical care and was disabled. It noted that the denial was based on a finding that Claimant's complaints of pain were deserving of no weight and faulted the decision for failing to "reconcile [its] finding that claimant's complaints of pain were not believable with claimant's decision to undergo multi-level back surgery."[19] Concluding that I had impermissibly substituted my opinion for the physicians, it found that he carried that burden as of 2 Dec 09 and became temporarily totally disabled as of that date.[20]

In sum, the Board determined that there was no evidence that could support any finding other than (1) Claimant's lost tooth and both his back and neck conditions are a result of the accident at work on 10 Apr 09; (2) Claimant has been temporarily total disabled as a result since 2 Dec 09; and (3) Claimant is entitled to reasonable and necessary medical treatment for these injuries, to include the dental work for the missing tooth, the back surgery, and conservative treatment for the neck injury.

The Board did not enter findings as to AWW and remanded the case to adjudicate that sole issue and then issue an award consistent with its order.

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[19] In its first order of remand the Board neither discussed that specific evidentiary inference nor directed that the decision on remand address it. Nonetheless, the original denial clearly included the evidence that Claimant elected to have the surgery. The Board cited that as highly probative evidence adding credibility to his complaints. In most cases, I would find that equally probative. However, in the absence of an evidentiary rule that requires a mandatory presumption of credible complaints of pain whenever a patient seeks or consents to an invasive procedure, there must still be some cases where, in the view of the finder of fact, the overwhelming dishonesty of the patient outweighs what would otherwise be a natural and rational conclusion. For instance, a claimant who lives and functions with chronic preexisting pain may view an incident at work that does not aggravate his chronic pain as nonetheless an opportunity to convert it into work related pain, disability, and free medical care. That claimant might well decide to complain that the pain has become now intolerable and to undergo surgery.

[20] The doctors clearly issued their opinions based on the assumption that Claimant's history and reports were honest and accurate. My finding was totally to the contrary. As the Board noted and I recognized in my review of the evidence, the doctors also cited their objective tests. Nonetheless, there is no indication that any doctor would have reached the same conclusions based solely on that objective information and in the absence of what their patient told them. Thus, their opinions still depend on his credibility and I did not give them any weight. In doing so, I reached no medical opinion of my own, although I did decline to adopt their conclusion (or presumption) that Claimant was telling them the truth. I simply held against Claimant in those instances where he relied on their reports to carry his burden of proof.

However, had I given their opinions sufficient weight to find Claimant disabled at all, I would not have found, as the Board apparently did, that he could have returned to work following the accident and his condition somehow subsequently worsened such that he became disabled on 2 Dec 09. Had I credited his testimony or the doctor's reports, I would have found Claimant to have become temporarily totally disabled as of 16 Apr 09.

POST SECOND ORDER OF REMAND

Shortly after the issuance of the Board's order, I held a conference call and Claimant made a motion that I immediately issue a conforming compensation order, noting that it would agree to Employer's proffered AWW.[21] I denied the motion, since the time to appeal the Board's decision to the Circuit had not yet expired. Employer did subsequently appeal, but the Circuit refused to consider the appeal, ruling that without a compensation order, the case was not yet ripe. Claimant then repeated the motion, but I again denied it, as the case had not yet been returned to the jurisdiction of OALJ.

Immediately upon receipt of the case, I arranged a conference call during which the parties agreed to stipulate to Employer's proposed AWW. Claimant expressed some concerns that my order adequately address Employer's obligations in terms of medical care. Employer said it understood that it could no longer object on the basis of causation,[22] but was unwilling to waive any other possible objections or defenses. I told the parties that the best course to allow Claimant to finally receive the benefits ordered by the Board would be to issue an immediate compensation order consistent with the remand order. If disputes arose that were not related to causation or other issues not previously addressed by the Board, we could litigate them separately. The parties agreed to that approach and Employer agreed to accept Claimant's proposed AWW.

ORDER AND DECISION

1. Claimant injured his back, neck, and tooth on 10 Apr 9 while working for Employer under circumstances that come within the coverage of the Act.
2. His AWW at the time of the injury was $866.92.
3. Claimant became temporarily totally disabled from those injuries on 2 Dec 09 and remains so.
4. Employer shall pay Claimant temporarily total disability compensation from 2 Dec 09 to the present and continuing.
5. Employer shall pay Claimant for all past reasonable, appropriate, and necessary medical costs in accordance with Section 7.
6. Employer shall provide future reasonable, appropriate, and necessary medical care in accordance with Section 7, including dental work for the missing tooth, back surgery, and conservative treatment for the neck injury.

[21] Claimant expressed great frustration that he was having to wait for benefits that the Board had found he was entitled to as a matter of law. Since the Board ruled that there was no evidence in the record that would allow a reasonable finder of fact applying the correct legal standards to find for Employer, it was not clear why it did not enter what was essentially a directed verdict on the first remand.

[22] At least before me.

7. Employer shall receive credit for any compensation heretofore paid, as and when paid.[23] Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[24]
8. The District Director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.
9. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.[25] 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. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.

ORDERED this 29th day of January, 2015, at Covington, Louisiana.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
Administrative Law Judge

[23] Employer did pay Claimant weekly disability benefits of $620.56 from 1 Aug 11 to 2 Dec 12 and weekly partial disability benefits from 3 Dec 12 through the date of the hearing in the amount of $263.

[24] 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. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267, 271 (1984).

[25] 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, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.