



**Issue Date: 18 June 2013**

**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 REMAND**

**BACKGROUND**

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act)<sup>1</sup> and the Outer Continental Shelf Lands Act<sup>2</sup> (OCSLA) brought by Claimant against Employer. About a month after starting to work for Employer as a sandblaster, Claimant was being transferred in a personnel basket on 10 Apr 09 when the basket flipped and he was thrown. Later that day he was taken ashore by helicopter 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.

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 and remained temporarily totally disabled with an average weekly wage no less than \$866.92.

Employer responded that Claimant was able to return to duty no later than 15 Apr 09,<sup>3</sup> 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 refusal to be seen by Dr. Likover entitled it in any case to suspend medical benefits and that his average weekly wage was \$826.40.

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<sup>1</sup> 33 U.S.C. §§901-950.

<sup>2</sup> 43 U.S.C. §1331 *et seq.*

<sup>3</sup> The parties stipulated that Claimant was paid through that date.

## INITIAL DECISION<sup>4</sup>

I found that there was an incident with the personnel basket in which Claimant was riding. I also found Claimant had extensive degenerative spinal changes and multilevel lumbar and cervical spondylosis and herniation and stenosis, along with a missing #25 tooth and chipped #8 and #9 teeth.

I noted that Dr. Vanderweide opined that Claimant's preexisting cervical spondylosis and lumbar stenosis with severe degenerative disk disease was aggravated by Claimant's accident at work and that Dr. Dent thought Claimant's symptoms and injuries were a direct result of his work injury and restricted Claimant from any work.

However, I also found that those medical opinions had to have been based on Claimant's description of the incident on the rig and the history of pain that he provided. I then explained that Claimant's demeanor during the hearing and the array of evidence that impeached his testimony led me to conclude that he is totally unreliable and to give any medical evidence that relied on the accuracy or honesty of his history or subjective reports of symptoms almost no weight.<sup>5</sup>

Consequently, while there was objective diagnostic evidence of herniations and stenosis in Claimant's back, I found the weight of the objective medical opinion is that they are degenerative in origin and that contrary to his complaints and testimony he did not suffer an increase in pain or symptoms beyond the transient strain that was initially diagnosed. I also found that contrary to his testimony, 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.

## ORDER OF REMAND<sup>6</sup>

In considering Claimant's subsequent appeal, the Board found that the initial decision failed to properly address the presumption of causation.<sup>7</sup> As to the alleged dental injuries, the Board noted that the inferences regarding the broken teeth were rational, but remanded the case for proper consideration of the compensability of the loose tooth. The Board also remanded the case to address whether the Section 20(a) presumption applies to Claimant's back and neck conditions, particularly in light of the aggravation rule. In anticipation of a possible ruling for Claimant on the fact of injury and causation, the Board additionally pointed out that Claimant had requested authorization for surgery, Employer refused to grant authorization, and while there is conflicting evidence on the necessity of neck surgery, there is no evidence that the back surgery was unnecessary.

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<sup>4</sup> *Meeks v. Bis Salamis, Inc.*, ALJ No. 2010-LHC-1263 (Sept. 19, 2011).

<sup>5</sup> In more than 15 years as an administrative and criminal trial judge, I cannot recall any witness being less credible than Claimant.

<sup>6</sup> *Meeks v. Bis Salamis, Inc.*, BRB No. 12-0024 (Sept. 27, 2012).

<sup>7</sup> *Id.* at \*3; 33 U.S.C. §§920(a).

## POSITIONS ON REMAND

The parties agreed that it was unnecessary to reopen the evidentiary record and that they would submit briefs on the issues specified in the order of remand. Claimant simply argues that the evidence showed that he had dental, cervical, and lumbar injuries; that all of them could have been caused by the incident in the basket; and that he is therefore entitled to the presumption of causation. He then argues that there was no rebutting evidence offered by Employer and his injuries were therefore caused by the incident in the basket.

Employer maintains that Claimant failed to establish the predicate for the invocation of the presumption, because he failed to establish that he suffered an injury. Without the benefit of a presumption, Employer argues, Claimant carries the burden of proving causation by a preponderance of the evidence, which he failed to do.

## DISCUSSION

The Section 20(a) presumption of causation applies when a claimant establishes that he sustained a harm or aggravation of a preexisting condition and that an accident occurred that could have caused the harm or aggravation.<sup>8</sup> However, there is no presumption of the existence of a harm or aggravation and a claimant carries the burden to establish them by a preponderance of the evidence.<sup>9</sup> A claimant may be found so lacking in credibility that his testimony fails to establish the occurrence of an injury.<sup>10</sup>

In this case, I found Claimant to be such an unreliable witness and dishonest individual that his testimony and the opinions and reports of the doctors who relied on what he told them had virtually no probative value or evidentiary weight. Therefore, 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.

As a result, I find that the only relevant facts that are established as more likely than not are: Claimant was involved in an incident where he was tossed about in a personnel basket, but reported he was OK when asked. Later, after the boat dropped he complained about his back and said that although he had been hurt before, he never got anything for it. The only reliable medical information that is not based on Claimant's reports of pain is that (1) Claimant had preexisting cervical spondylosis and lumbar stenosis with severe degenerative disk disease and (2) On 20 May 09, Claimant had a missing #25 tooth and chipped #8 and #9 teeth.

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<sup>8</sup> See *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, (5<sup>th</sup> Cir. 2000); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); see also *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982).

<sup>9</sup> *Devine v. Atl. Container Lines, G.I.F.*, 25 BRBS 15, 20 (1990).

<sup>10</sup> *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

### *Dental Injuries*

Although both parties addressed all of Claimant's alleged dental injuries in their post-remand briefs, the Board appears to have affirmed the original denial finding as to the broken teeth and remanded only the loose tooth.

We cannot affirm the administrative law judge's denial of benefits for all the claimed dental injuries, as he did not discuss the evidence and his findings in terms of the Section 20(a) presumption. . . . In this regard, the administrative law judge acknowledged that claimant complained contemporaneously with the accident of a loose tooth. Specifically, in a statement to employer's investigator the day after the incident, claimant stated, that "I think I got a loose tooth" in the accident. The administrative law [sic] found claimant would have mentioned broken teeth at that time as well had he actually broken them at this time. While the administrative law judge's inferences regarding the broken teeth are rational, he did not address the work-relatedness of the loose tooth of which claimant complained right after the accident, consistent with Section 20(a).<sup>11</sup>

Since no one suggested any of the dental injuries ever prevented Claimant from returning to his original job, a loose tooth does not implicate any disability liability. Moreover, there is no indication that Claimant sought any care for a loose tooth. There was treatment for a lost tooth, however, and that presents the real question, which is whether the absence of the #25 tooth that was observed by Dr. Ulm on 20 May 09 was caused by what happened to Claimant on 9 Apr 09. There is no direct evidence other than Claimant that connects what he said he thought was a loose tooth to the missing #25 almost six weeks later. Accordingly, I find he has failed to establish the predicate for the 20(a) presumption as to the lost tooth.

However, even if the presumption was invoked, I find the record contains sufficient evidence to rebut it. I found that the incident on 9 Apr 09 did not cause the chipped teeth.<sup>12</sup> Whatever intervening trauma that caused teeth #8 and #9 to be chipped could have, and more probably than not, given their proximity, did also cause the loss of #25.<sup>13</sup> Thus, any presumption would have been rebutted and the totality of the evidence established that Claimant did not lose #25 as a result of anything that happened at work on 9 Apr 09. Accordingly the dental claim is denied.

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<sup>11</sup> *Meeks*, BRB No. 12-0024 at \*3 (emphasis added and citations omitted).

<sup>12</sup> Although there was some suggestion that other pain could have confused or distracted Claimant, I find it unlikely that he would have noticed and reported a loose tooth but not noticed or reported two chipped front teeth and one missing front tooth.

<sup>13</sup> I contacted counsel for both sides by telephone to tell them I intended to take judicial notice that the #8 and 9 teeth are the upper front teeth and the #25 is the lower front tooth immediately below #9. Counsel stated that they had no objection.

### *Spinal Injuries*

There is no question that on 9 Apr 09, Claimant had extensive preexisting degenerative spinal changes, multilevel lumbar and cervical spondylosis, herniation, and stenosis. Moreover, an employer is liable for work activities that aggravate preexisting conditions or cause them to become symptomatic. Nevertheless, before a claimant can benefit from the presumption of causation, he carries the burden to establish a harm. In this case the harm that he must establish is that his preexisting condition was aggravated or became symptomatic, regardless of the cause.

The only “harm” that Claimant was able to establish was the lumbar strain for which he was treated and from which he was released to full duty.<sup>14</sup> Given the finding of that harm, and that the 9 Apr 09 incident could have caused that harm, the presumption as to the strain applies. Employer does not suggest that there is any evidence to rebut the presumption and I find that Claimant suffered a minor lumbar strain on 9 Apr 09, for which he received all reasonable, appropriate, and necessary care, and from which he sustained no loss of wages or wage earning capacity.

Claimant argues that he established much more extensive “harms” and that his preexisting condition was aggravated and became more limiting and painful. He points to the opinions of the doctors to corroborate his testimony. However, the doctors’ opinions were all based on what Claimant told them and the record clearly establishes that Claimant would tell them whatever he thinks works best for him. Accordingly, I give their reports that he is suffering pain as a result of his spinal condition no weight. Consequently, I find Claimant failed to establish any harm beyond the strain and is not entitled to any presumption in that regard. For the same reasons, I find that he failed to establish by a preponderance of the evidence that he suffered anything beyond the previously discussed strain as a result of his work on 9 Apr 09.

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<sup>14</sup> It is significant that the doctor who made that diagnosis and treated him noted the inconsistencies in Claimant’s presentation and apparently gave much less weight to Claimant’s subjective reports and history. Thus I gave that opinion slightly more weight.

However, in the event that the presumption was raised, there was no evidence to rebut it. In that event Claimant would still have had the burden to establish he was unable to return to his original job. Because of his total lack of credibility and because any medical opinions that he could not return to work relied on his reports of pain, I would have found that he had not carried that burden and was not disabled. The same analysis applies to medical care that was provided or recommended to treat his pain. His doctors assumed his subjective complaints of pain were and are valid. I make no such assumptions, but rather consider the complaints in the context of the entire record and the evidence of his credibility. He has failed to prove that it is more likely than not that he cannot return to his original job or is in pain.

**ORDER AND DECISION**

The Claim is denied.

**ORDERED** this 18<sup>th</sup> day of June, 2013 at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Administrative Law Judge**