



Issue Date: 19 September 2011

CASE NO.: 2010-LHC-1263

OWCP NO.: 07-185692

IN THE MATTER OF

**JOSEPH MEEKS,
Claimant**

v.

**BIS SALAMIS, INC.,
Employer**

APPEARANCES:

**LEWIS S. FLEISHMAN, ESQ.,
HAROLD J. EISENMAN, ESQ.,
On Behalf of the Claimant**

**THOMAS J. SMITH, ESQ.,
MARY LOU SUMMERVILLE, ESQ.,
On Behalf of the Employer**

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

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act)¹ and the Outer Continental Shelf Lands Act² (OCSLA) brought by Claimant against Employer.

On 8 Apr 10, the matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 17 Jun 11, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

¹ 33 U.S.C. §§901-950.

² 43 U.S.C. §1331 *et seq.*

My decision is based upon the entire record, which consists of the following:³

Witnesses

Claimant

Exhibits⁴

Joint Exhibit (JX) 1

Claimant's Exhibits (CX) 1, 3-35

Employer Exhibits (EX) 1-25⁵, 27-34

My findings and conclusions are based upon the evidence introduced and the arguments presented.

FACTUAL BACKGROUND

About a month after starting to work for Employer as a sandblaster on rigs over the Outer Continental Shelf, 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.

STIPULATIONS⁶

1. The incident Claimant alleges resulted in his injuries took place on an offshore platform on the Outer Continental Shelf on 10 Apr 09, in the course and scope of his employment, and during an Employer/Employee relationship.
2. There was timely notice, claim, and controversion.
3. Employer has provided no disability benefits, but did pay Claimant his salary from the date of injury through 15 Apr 09.
4. Employer has provided medical benefits totaling \$3,271.17.
5. An informal conference was held on 23 Mar 10.

³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ Counsel were cautioned that in the case of *in globo* or lengthy (more than 20 pages) exhibits and depositions of witnesses who also testify live, only those pages cited to in the brief or at hearing would be considered part of the record upon which the decision is based. (Tr.8). That limitation applied to CX-6, 9, 14, 15, 20- 22, 33, & 34 and EX-5, 6, 7, 9-13, 25, & 32.

⁵ EX-26, listed as x-rays in Employer's index, was never actually received.

⁶ JX-1, Tr. 10-20.

ISSUES & POSITIONS OF THE PARTIES

Claimant argues that he suffered, back, neck and dental injuries. He seeks payment for medical and dental treatment that he obtained and an order for further treatment. He maintains that he has not yet reached maximum medical improvement and is entitled to temporary total disability benefits from 19 May 09. He also argues that his average weekly wage was no less than \$866.92.

Employer responds that Claimant was able to return to duty no later than 15 Apr 09, suffered no period of disability and required no medical care for any injury resulting from the incident on the rig on 10 Apr 09. In the alternative, it suggests that Claimant's refusal to be seen by Dr. Likover entitled it to suspend medical benefits and that Claimant's average weekly wage was \$826.40.

LAW

While the Act is construed liberally in favor of the claimant,⁷ the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,⁸ which specifies that the proponent of a rule or position has the burden of proof.⁹

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."¹⁰ In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.¹¹ The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident that could have caused the harm occurred.¹²

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.¹³ These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.¹⁴ The presumption does not apply, however, to the issue of whether a physical harm or injury occurred¹⁵ and does not aid the claimant in establishing the nature and extent of disability.¹⁶ "Section 20(a) does not provide a

⁷ *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147 (D.C. Cir. 1967).

⁸ 5 U.S.C. § 556(d) (2010).

⁹ *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 281(1994).

¹⁰ 33 U.S.C. § 902(2) (2010).

¹¹ 33 U.S.C. § 920(a) (2010).

¹² *Gooden v. Dir., OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998).

¹³ *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981), *aff'd sub nom. Kelaita v. Dir., OWCP*, 799 F.2d 1308 (9th Cir. 1986).

¹⁴ *Stevens v. Tacoma Boat Bldg. Co.* 23 BRBS 191, 193 (1990).

¹⁵ *Devine v. Atl. Container Lines, G.I.F.*, 25 BRBS 15, 20 (1990) ("Claimant bears the burden of proving that he sustained a harm").

¹⁶ *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441, 443 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112, 119 (1979).

presumption of compensability or injury.”¹⁷ A claimant still must establish the existence of an injury.¹⁸

To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury.¹⁹ If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof shifts to employer to establish suitable alternative employment.²⁰

A 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.²¹ In evaluating evidence, the ALJ must determine the credibility and weight to be attached to the testimony of the medical witnesses and is entitled to deference in doing so.²² Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.²³ However, an ALJ is not bound by the opinion of one doctor and can rely on a medical evaluator’s opinion and evidence from the medical records over the opinion of the treating doctor.²⁴ Also, a claimant’s credibility may be relevant if doctors relied on what the claimant told them in developing their opinions.²⁵ “An ALJ may give less weight to a medical opinion that is based to a large extent on a claimant’s self-reports that have been properly discounted as incredible.”²⁶

EVIDENCE

Claimant testified at hearing and deposition in pertinent part that:²⁷

He has lived at 1415 Aldine Mail Route 1, Houston, Texas for five or six years. He has lived in Houston all his life and is married to Christy Meeks. They live with their daughter Courtney and granddaughter Krissa. When he was able to work, he was supporting them, but no longer can. His wife supports the family.

His first job was as a paperboy when he was probably eight years old. He was a dishwasher at about 14 and a printer at 17. He was a baker and went into construction as a carpenter and welder’s helper. He was a pipefitter, sandblaster, carpet layer and boilermaker. He worked on tugboats. They were physical jobs that he enjoyed. There

¹⁷ *Devine*, 25 BRBS at 19.

¹⁸ *Id.*

¹⁹ *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 91 (1984); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 342-43 (1988).

²⁰ *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

²¹ *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff’d sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359 (5th Cir. 1982).

²² *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2nd Cir. 1961); *Lennon v. Waterfront Transport*, 20 F.3d 658, 663 (5th Cir. 1994).

²³ *Butler v. Barnhart*, No. 03-31052, 99 Fed. Appx. 559, 560 (5th Cir. 2004); *see also Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000)(Social Security administrative law decision).

²⁴ *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997).

²⁵ *Houghton v. Marcom, Inc.*, (BRB Nos. 99-0809 and 99-1315)(April 25, 2000)(Unpublished).

²⁶ *Cunningham v. Astrue*, No. C10-1081-RAJ-BAT, 2011 WL 1154543, at *6 (W.D. Wash., 2011) (Social Security administrative law decision).

²⁷ Tr. 49-150; EX-6, 7 (as cited see n.4), 34.

were rolls of carpet he had to take up flights of stairs. Tile is very heavy and it was backbreaking work. The bags of sand were usually a hundred pounds. Buckets of paint were 80 or 90 pounds. The hose had 150 pounds of pressure on it, so it was heavy work. He took physicals for Employer in 2006 and March of 2009. He passed them both and had no restrictions or any complaints of back pain, neck pain, or pain down his leg.

In the year before he started back with Employer, he worked for about two months for IM Con, six to ten months with 5 B Towing, and did some carpet work. The carpet work petered out and he had been on unemployment for about a month when he went out on the rig for Employer in April 2009.

On 10 Apr 09, he was working for Employer as a sandblaster/painter on South Timbalier platform 54-G, an Exxon rig 150 miles off the coast of Louisiana on the Outer Continental Shelf. He thinks he was making \$16.00 per hour, but would not dispute it if the records said \$14.00. He was on a 14-on-and-seven-off schedule, working 84 hours during the weeks he was on. It was his first hitch and he thinks he had only worked maybe 10 days before the accident.

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. A deck hand on the boat freaked out when the basket almost hit him. There were three other people in the basket with him. They were James Gaiter, Louis, and one whose name he can't recall.

The first thing that he felt hurting was his neck and when he realized that he couldn't go back to work, his mouth was bleeding, and his back hurt. The impact was on his feet, and it threw his bottom teeth into his top teeth, busting two or three on the top and loosening one on the bottom.²⁸

He reported the incident to Brian Benoir, Employer's safety man. He also talked to Robert Finsel, one of the Exxon superintendents. He does not recall if he told Finsel that he had been hurt before but never got anything for it. Since he was complaining about the neck pain and couldn't continue to work, they put him on a spine board and called a helicopter. The helicopter flight back was probably about 45 minutes to an hour. It was a pretty long flight. The helicopter took him to the heliport and an ambulance took him to the hospital. He was not under any narcotic medications at that point. He told the ambulance staff where he was hurt. He doesn't recall if he mentioned his teeth. They did some X-rays at the first hospital and moved him to Terrebonne. At Terrebonne he was worried about his neck and back. After Terrebonne, Employer picked him up in the company van and took him to a hotel in Lafayette.

That Monday, Employer took him to their company doctor, Dr. Gidman, who had done the employment physicals. Dr. Gidman examined him while Joey Algood, a safety man for Employer, was in the room. He told the doctor that his feet were numb, his leg had pains up and down the sides, and he was hurting in his lower back. He did not mention

²⁸ CX-7.

his teeth. He saw Dr. Gidman maybe two times. Dr. Gidman gave him some kind of muscle relaxers and some pain pills and recommended two days of physical therapy.

Dr. Gidman had given him a light duty release, and he went to work in the office doing paperwork and physical therapy for about four or five days. He continued to receive full wages during that time and then was off for a period of time. He went home, since it was the end of his work period and he was hurting. He wanted to stay in bed and get some rest because he was getting worse.

He went to the physical therapy and described the kinds of pains and the problems he was having with his leg, but the physical therapist said that two days of therapy wouldn't help. The therapy hurt more than it helped. Dr. Gidman knew he was hurt, but kept insisting he to go back to work. Employer never sent him to a dentist to get his teeth looked at or fixed. To this day, they have never offered him any treatment on his mouth or teeth.

The day after his bottom tooth came out, he went to Dr. Um, a dentist in Houston. Dr. Um made a partial for the bottom and capped the teeth on the top, because he was having a lot of problems with biting. He also had exposed nerves on the top. He is done with Dr. Um now.

He does not recall going back to Dr. Gidman and being released to regular duty. He did have seven days regular break, though. When his break was over, he was asked if he wanted a light duty land job in Alabama and he was under the impression he was going to go to Alabama. It was going to be a few days before that job started, so they had him sweeping up around the shop and doing light duty. Then they told him they needed him out on another job. That's when he went out on the Shell job, but was only able to stay out there one week. He was paid his full wages during all that time.

He wanted to find a good doctor, so he asked his attorney and ended up with Dr. Esses, who is very good. The first appointment was 19 May 09, followed by one on 23 Jun 09. He complained to the doctor of pain in both legs. He did tell the doctor that two weeks before he had been bending over and pulling weeds, carrying his grandchild, working on a low fence, bending over in his truck, and driving. He wouldn't know why the doctor doesn't mention that anywhere. Up to April 2011, he never asked Employer to be seen by a doctor in Houston for his neck.

His next visit was on 24 Aug 09 and his wife went with him. They told the doctor that his legs had worsened and he was dragging his leg. He drags his right leg if he is walking and nobody is watching. Dr. Esses sent him for an MRI and gave him an injection, which didn't seem to help much. They also tried medication, but he was getting worse, limping more with more pain and numbness in his legs and feet.

He eventually had surgery on his lower back on 17 Sep 10. Dr. Esses operated on six levels. It helped some, but hasn't stopped the pain completely. He still drags his right leg a little. His neck was also bad and Dr. Esses was treating it. They tried an injection, but it didn't help, so now they are waiting to schedule neck surgery. His last visit with Dr.

Esses was about three weeks ago and he is going back after his hearing. He does not recall if Dr. Esses explained that he had significant conditions in his back even before this accident. The doctor did say something about arthritis in his back. He had never noticed it and never had any back problems.

He has been questioned under oath about his accident twice before. He knew he was supposed to tell the truth. The first was in July 2010 and was in connection with his third-party action. He testified at that time he had no memory problems and he maintains today that he doesn't have any. The second time he was questioned was a couple of months ago and he didn't have any memory problems then either. Before his back surgery, Employer hid someone around his house to videotape him.²⁹ He has seen the video and they show him picking up a puppy and his grandson, pulling a few weeds, and dragging some trash across to a dumpster, where a girl put it in the dumpster for him. There were three different periods that he was watched, 9 and 10 Jun 09, 13 and 15 Jul 09, and 5 and 6 Sep 09. He became aware of it on the last time and even looked over and waved. The videos do show what he was doing at the time. His pain has never been any lower than an eight of ten and he is in a lot of pain right now. He was in the same amount of pain when he was being videoed and the videos accurately show what he can do.

Since the accident, he hasn't been able to do any yard work and hasn't tried to do much of anything. He definitely could not pull weeds. In the July deposition he testified that he had been in bed for a year and since the accident, he has basically been in bed most of the time. Every one of the videos was in the morning and he was limping. The videos do show him moving around in his yard, getting in and out of his truck, and driving places.

He also testified in July that he had not been able to do any yard work. The videos in June and July appear to show him pulling weeds, cleaning up, and working on a garden, he was pulling a couple weeds. The September video shows him bent over and down on his hands and knees, pulling stuff up. He wouldn't call that gardening.

He also testified in July he didn't regularly lift anything heavier than a six-pack or a bag of ice. The June video shows him carrying a child, but the child weighed maybe 18 pounds at the time.

In May he testified that he had undergone an epidural steroid injection, but it hadn't done any good at all. He also again testified that he had been unable to do any gardening and pull any weeds and denied that he was able to carry his grandchild. Pulling a couple of weeds is not doing yard work and a bag of ice probably weighs more than that baby. He specifically denied doing any of those things in his previous testimony, but he did not lie when he was under oath. He didn't remember carrying his grandchild or pulling any weeds at all, but he doesn't have any trouble with his memory. He very recently had a chance to look at the videos and with his counsel now has different answers.³⁰

²⁹ EX-33.

³⁰ EX-34.

He was in pain and on Vicodin or morphine at the time. When he gave his deposition he didn't remember doing those things. The deposition helped refresh his memory of those events and he has amended his answers so that they are now consistent with his memory.

After the back surgery, he saw Dr. Vanderweide again at Employer's request. He may have also seen Dr. Likover. At no point before his surgery was he told that Employer was trying to get him to see a doctor before he had surgery. Other than when his attorney set it up, he never got any kind of notice from anybody that an appointment with Dr. Likover was scheduled. He never got any travel money to go see Dr. Likover. He has never refused to go see any doctor for Employer and had he been asked to go see Dr. Likover or Dr. Vanderweide, he would have.

His pain is presently at eight out of ten. He is always in pain. The medicine does not take it below an eight. The pain is in his lower back, neck, shoulders, arms, feet, toes, and butt. Dr. Esses referred him to Dr. Dent to help try manage the pain. He did not discuss his prior illegal drug use with Dr. Dent. He has also seen Dr. Dorsett, but they never discussed past drug use. He did not have to sign a contract with his pain management doctor about getting drugs from any other sources. Dr. Dent prescribes medications, patches, muscle relievers, and something to help him sleep because he doesn't ever sleep. The pain seems to be getting worse. He was on less powerful pain medications, but he told the doctors they just weren't working and he wanted stronger pain medication. He is now on morphine.

He has had discussions with Dr. Dorsett about his potential addiction to morphine, but they never discussed any prior drug problems. Maybe four months ago, he went to Dr. Dorsett and asked him if he had something else that wasn't quite as addictive because what he was taking wasn't really helping. They decided to go with some fentanyl patches, but they hardly worked at all. So, then they went with some kind of a new type of a pain drug. Those had a real bad withdrawal effect, so he went back on the morphine.

He could not get a job and hold a job. There times when he can't function because of the pain. He does not know when that's going to hit and the pain is going to get worse. It seems it gets real bad after riding in a car or at nighttime. It seems like he is in pain all the time. He could not do the work of a blaster/painter right now. They would not let him out on any job if he is on morphine, anyway.

Before April 2009, he had never injured his back or neck. He was in a motorcycle wreck in the mid-seventies, and had a head injury. He was in an automobile accident in 1980 and had to be taken to the hospital in an ambulance with a broken pelvis. He broke his toes and ribs. In the eighties, he cracked some bones in his right hand working on a tugboat. In the late eighties or early nineties, parasites went in through his fingernails because of the water in the ship channel. They attacked the bone and he had to have surgery. He was hurt again on the side of a tank when his hands were cut real bad falling off a tank. One time he twisted his ankle working for Employer and couldn't put his boot on the next day. He has had a couple of gunshot wounds, one in the mid-seventies and

one in 1985. One was in his leg. The other was in the abdomen and involved some very serious surgery and nine days of hospitalization. He hasn't forgotten that.

When he filled out the history for his physical for employer,³¹ he denied having any serious injuries. That was not the truth. He also denied having any illness, injury or claim arising out of his employment. That was not the truth.

He hasn't had any criminal problems since this incident occurred in April 2009, but when he was younger he experimented with some drugs. He was convicted in 1980 for meth. He has also had some misdemeanor charges since then. In about 2000 he had a misdemeanor drug charge. Then in 2006 he was accused of stealing an umbrella, even though he was innocent. He thinks he did 60 days of county jail on both of those last two. The charge on the umbrella was automobile burglary and to plead guilty he had to stand up in an open court and swear that he was guilty. That was a lie. It was easier to simply accept the guilty plea than to fight it.

On the meth charge, they had originally given him six years' probation, but he was arrested for some kind of domestic stuff. On the domestic thing he was convicted of kidnapping, and sentenced to six years. They reduced his sentence from the six years to three and he went ahead to prison for a three-year sentence, and was released in 13 months for good behavior.

In 2010 and 2011 he earned nothing. His tax returns for 2006, 2007, 2008, and 2009³² are correct. He made \$53,360.00 in 2006, \$67,144.00 in 2007, \$36,683 in 2008, and \$8,288.00 in 2009. The 2006, 2007, and 2008 figures are based on amended tax returns he filed in September of 2009,³³ after he filed his third party suit. Since about 2006 he and the IRS had been going back and forth about his tax returns. In 2006 they told him he would receive something from them, but if he didn't to just disregard the whole business. He continued to underreport his income. His 2006 original return reported income of \$17,953.00, but should have been \$51,121. The others were from 120 to 300 percent underreported. On his 2008 return he claimed Billy Tarpley as his dependent nephew. Tarpley is really his daughter's stepson.

He would like to go back to work and to be better. He was in really good shape before his accident. He has 13 grandchildren, is really family-oriented, and was able to play basketball. He has a basketball goal right in front of the house.

He originally said the injections never helped, but he changed his answer to be that he might have had a little relief for a day or two. Actually, they give him something to make him sleep, so he was in bed sleeping for two days after the injection. So, the injection did not help. But he changed his answer because it might have helped for a couple of days. It's not helping now.

³¹ EX-10 p. 61.

³² CX-8, 9.

³³ EX-20.

He originally said he could not help out around the house or do grocery shopping or anything like that. He changed his answer to he doesn't think he could. He may go with his wife grocery shopping, but he doesn't carry the groceries in or anything like that.

He originally said he could not do any yard work. He changed that to he could do some. He wouldn't say that pulling weeds is yard work. If he sees a little bit of grass growing someplace, he might bend down and get it, but he is in pain.

He did not change his answers because he saw the video and realized his first answers were not true. Really nothing has changed. They caught him picking up a couple of weeds and he wasn't doing yard work. He was dragging a bag across and had a girl put the bag in the dumpster for him. He said in his change that it has been a long time and he had thought about it some more after the deposition. The fact of the matter is, he saw himself doing it in surveillance and said, oh, they got me.

When he was asked in his depositions how he ended up with Dr. Esses, one time he said he could not remember and the other time he said his daughter told him about the doctor. Earlier today he said his lawyer recommended the doctor. Both statements are both true, because his lawyer recommended the doctor and his daughter looked the doctor up.

On 10 Apr 09, at Terrebonne Medical Center, Claimant told Employer's representative in pertinent part that:³⁴

He was earning \$14 per hour working fourteen-on and seven-off for Employer. He was in the basket when the bottom of the basket hit the deck and he fell out. At first he did not think he was hurt badly, but started to feel worse and decided he could not work. He hurt his back and neck. He also thought he had a loose tooth.

Robert Finsel stated in pertinent part that:³⁵

He was the supervisor and the seas were rough but the boat captain thought they could safely transfer and the decided to go ahead. After they started, he heard the boat captain say on the radio that the first load had taken a spill and were spooked, so maybe they should wait. He asked if the four people in the spill were OK, and they said they were. They waited 15 or 20 minutes and the boat captain said it would be safe to start again. They started up 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. While he walked with Claimant to the quarters to wait for the helicopter, Claimant said he had hurt before, but never got anything for it. Claimant complained about his neck and asked for pain medication. They asked Claimant if he wanted a neck brace and Claimant said he did. After he put it on, Claimant said it helped.

³⁴ EX-21.

³⁵ EX-22.

Lafourche Ambulance records state in pertinent part that:³⁶

Claimant was picked up at Primary Occupational Health at about 2 PM on 10 Apr 09. Claimant was on an x-ray table and the clinic staff advised he had degenerative changes and needed to be taken to Terrebonne General Medical Center. Claimant was anxious about being placed on spine board for transport and refused to allow his head to be immobilized. Claimant was taken to Terrebonne General Medical Center.

Terrebonne General Medical Center's records state in pertinent part that:³⁷

On 10 Apr 09, Claimant was admitted into the emergency room and reported he had fallen onto the deck of a boat and injured his neck and back. His airway and ENT were normal. Cervical images showed extensive degenerative changes and spondylosis and lower back images showed degenerative changes. The impression was neck and back strain. Claimant was given medication and released with instructions to limit activity, apply heat and ice, and follow up with his provider.

Acadiana Center for Orthopedic and Occupational Medicine's records state in pertinent part that:³⁸

On 4 Mar 09, Claimant had a pre-employment physical, reported that he had never had any major surgery or hospitalizations, and was found to be employable without restriction.

On 13 Apr 09, Claimant reported that he had been tossed out of a personnel basket and fallen onto the deck, striking the bulwark with the side of his right shoulder. Claimant complained of cramping and soreness in his lower back (9/10) and right leg, with moderate (8/10) neck symptoms. X-rays showed advanced degenerative changes. He concluded Claimant had multilevel lumbar and cervical spondylosis, prescribed medication and home physical therapy, limited Claimant to light duty, telling him to return in a week.

Claimant returned on 15 Apr 09, complained of leg cramps and numbness, and said he had been doing light duty at work, but his seven days off was starting. He started Claimant on outpatient physical therapy and told Claimant that after the normal seven-day break, he could return to regular work and that he would be seen again in May.

³⁶ EX-8.

³⁷ CX-14 (as cited, see n.4); EX-9 (as cited, see n.4).

³⁸ CX-15 (as cited, see n.4); EX-10 (as cited, see n.4).

Rosewood Rehabilitation records state in pertinent part that:³⁹

Claimant underwent physical therapy on 16 and 17 Apr 09. He reported feeling better but still stiff.

Memorial MRI & Diagnostics' records state in pertinent part that:⁴⁰

A 15 Jun 09 lumbar MRI showed herniation and stenosis at L4-5 and L5-S1 and stenosis at L1-2, L2-3, and L3-4. A cervical MRI showed herniation at C3-4 and herniation and stenosis at C4-5, C5-6, C6-7, and C7-T1. On 8 Jul 09, Claimant reported pain at 10/10 in his back, legs, and feet.

Dr. Stephen I. Esses' records state in pertinent part that:⁴¹

He is an orthopedic surgeon and first saw Claimant on 19 May 09. Claimant reported he had fallen ten feet out of a basket and suffered back, neck, and leg pain. He ordered MRI studies.

On 23 Jun 09, based on the MRI reports, he recommended steroid injections. Claimant returned on 21 Jul 09 and reported the injection only provided two days of relief. He reviewed the actual MRI films and recommended surgery. On 24 Aug 09, Claimant said there was a problem working out the insurance for the surgery and his leg was getting worse.

On 9 Nov 09, 14 Dec 09, 25 Jan 10, 8 Mar 10, and 12 Jun 10 Claimant reported continued back and leg pain and stated he was still unable to obtain insurance authorization for the surgery.

On 17 Sep 10, he performed surgery and found profound stenosis at L1 through S1, where he performed laminotomies and foraminotomies. On 4 Oct 10, Claimant reported his leg pain had resolved.

On 1 Nov 10, Claimant complained of neck pain radiating into the arms. He recommended a steroid injection. Claimant returned on 31 Jan 11 and reported the injection helped, but he still had significant neck pain radiating into the arms. He prescribed medication and physical therapy.

³⁹CX-16.

⁴⁰CX-17; EX-12 (as cited, see n.4)..

⁴¹ CX-18, 19, 20 (as cited, see n.4); EX-11(as cited, see n.4).

Dr. David Dent's records state in pertinent part that:⁴²

He is a pain management specialist who first saw Claimant on 2 Dec 09 on referral from Dr. Esses. Claimant reported having fallen 10 feet, striking the floor and injuring his low back, neck, and teeth. Claimant complained of pain radiating into the legs at 10/10 without medication, dropping to 9/10 with medication and said he had difficulty ambulating, cooking, cleaning, bathing, and dressing. Claimant did not disclose his arrests or legal problems or any prior medical or hospitalization history and denied that anyone ever suggested he had a drug or alcohol problem. He assessed Claimant as having lumbago, cervical facet syndrome, cervicgia, and cervical and lumber neuritis, reviewed and modified his medications, and restricted him from any work. He also noted that Claimant's symptoms and injuries were a direct result of his work injury.

Claimant returned on 30 Dec 09, 10 Jan 10, 27 Jan 10, 24 Feb 10, 24 Mar 10, 21 Apr 10, 14 Jul 10, 11 Aug 10, and 8 Sep 10 with some improvement on the medication and still waiting for approval for surgery. On 24 Feb 10 the assessment was modified to include herniated cervical and lumbar discs. On 11 Aug 10, Claimant reported his surgery would be done in the next two weeks and on 8 Sep 10 he reported it was scheduled for 17 Sep 10.

On 6 Oct 10, Claimant reported his lumbar surgery was done on 17 Sep 10, but still complained of pain up to 10/10. The medications were modified. On 3 Nov 10, Claimant reported he was pleased with the outcome of the surgery, but was having severe neck pain. He prescribed a low back brace for Claimant and adjusted the medications. On 30 Nov 10, Claimant continued to complain about his neck pain and a cervical steroid injection was scheduled. Claimant completed a questionnaire and indicated he had sometimes had legal problems, but had never been treated for or had anyone suggest he had a drug problem. On 7 Dec 10, the cervical steroid injection was performed. On 29 Dec 10, Claimant had a physical therapy treatment. On 26 Jan 11, Claimant said his pain was averaging 7/10 and that the injection had given him solid relief for a week at 30-40% relief.

On 15 Feb 11, he noted that the objective findings were consistent with the subjective complaints and concluded that Claimant would have low back pain for the rest of his life because of the delay in obtaining the surgery. He anticipated Claimant would require a spinal stimulator, and/or a morphine pump for the rest of his life and recommended physical and occupational therapy, a second and possible third cervical injection, psychotherapy, and medications. He recommended Claimant not take any job that requires climbing, stooping, squatting, lifting more than 20 pounds, or prolonged sitting or standing. He also noted flare ups would completely disable Claimant from time to time.

⁴² CX- 21, 22 (as cited, see n.4), 23, 24; EX-13 (as cited, see n.4).

On 24 Feb 11, and 24 Mar 11, and 18 Apr 11, Claimant reported no significant change and he recommended continued physical therapy and psychotherapy.

Dr. Larry Likover's records state in pertinent part that:⁴³

He is an orthopedic surgeon who examined and evaluated Claimant on 3 Mar 11. Claimant gave his accident and treatment history and reported continuing low back pain, which was improved by the surgery, but still remains. Claimant also reported that his neck hurts some, but said he hasn't decided on neck surgery. He looked at Claimant's MRI studies and concluded it would be several months before Claimant reached MMI for his lumbar injury. He also concluded that if the neck pain increased Claimant would be a surgical candidate, but for now, more conservative treatment was not unreasonable.

Dr. David G. Vanderweide's records state in pertinent part that:⁴⁴

He is an orthopedic surgeon who examined and evaluated Claimant on 28 Jul 10. Claimant gave his accident and treatment history, explaining that his attorney referred him to Dr. Esses. Claimant reported low back pain with pain and burning radiating into his feet. Claimant also reported minimal neck pain, but recent intermittent and transient pain in both arms. He reviewed Claimant's medical records and imaging studies.

He concluded that Claimant suffers from cervical spondylosis and lumbar stenosis with severe degenerative disk disease that Claimant's accident at work accelerated and aggravated the stenosis originally caused by the degenerative disease, and that surgical decompression was reasonable. He saw no reason for operative attention to the neck.

Claimant returned to him on 2 Mar 11, after having undergone lumbar surgery. Claimant reported his lower back pain was about 40% reduced and was at 6/10, but his neck pain was at 8/10, with no relief from injections. He reviewed the medical records and examined Claimant, concluding that he had cervical spondylosis and lumbar stenosis with degenerative disease. He was unable to explain Claimant's leg symptoms and believed the residual lumbar symptoms were secondary to Claimant's significant preexisting multilevel degenerative disc disease. He was also unable to explain Claimant's cervical complaints and saw no reason for cervical surgery. He concluded that Claimant was clearly addicted to narcotics, requires detoxification and behavioral therapy, and was unlikely to be pain-free or to return to normal.

Dr. Kwan Um's records state in pertinent part that:⁴⁵

He is a dentist who saw Claimant on 20 May 11. Claimant reported that he had sustained a trauma on a rig and knocked out #25 and chipped #8 and 9.

⁴³ CX-25, 26; EX-15, 16.

⁴⁴ CX-27-28; EX-14, 17, 18.

⁴⁵ CX-29, 30,31.

Surveillance video shows in pertinent part that:⁴⁶

On 9 Jun 10, Claimant walked outside a building, down some steps, walked to a pickup truck and leaned into the truck, and bent over at the waist on multiple occasions to pull weeds for a sustained period of more than a minute. He then walked to a store. He walked around for about three minutes carrying a small child on one side and stood while engaged in conversation for a period. He bent over at the waist to work on a stake and string, remaining so with his hands on his knees and just looking for a time. He did not show signs of pain.

On 13 Jul 10, Claimant stood while engaged in conversation for various periods, walked down a set of steps and down to a store, bent over at the waist to pick up an item, leaned over into a truck, and got into a truck and drove it.

On 15 Jul 10, Claimant walked around a truck and for more than ten minutes, pulled weeds, sometimes kneeling down and sometimes bending over at the waist, after which he walked around for a while, pulled more weeds, and then bent over to pick up a piece of lumber. He appeared to be slightly stiff at times when walking, but showed no notable discomfort.

On 5 Sep 10, Claimant bent over and knelt down and leaned into the cab of a truck. He walked around and down a set of steps and stood for an extended period.

On 6 Sep 09, Claimant walked around, bent over, squatted down, got on his knees to pick up a small dog, and dragged a small trash bag to a dumpster, where a man took it and threw it in. The man then looked at the camera and waved.

Linda Farris' reports state in pertinent part that:⁴⁷

She is a vocational rehabilitation counselor who met and interviewed Claimant on 13 Dec 10. She also reviewed his medical records and determined that although, based on his doctor's medical restrictions, he could not return to his original job, if he was medically cleared he would likely be able to return to light or sedentary work.

William Kramberg's reports state in pertinent part that:⁴⁸

He is a vocational rehabilitation counselor who met and interviewed Claimant on 5 Oct 10. He met Claimant again on 17 Jan 11 and administered vocational tests. He contacted Claimant by phone on 4 Apr 11. He also reviewed Claimant's medical and pay records. He has concluded that based on Claimant's chronic pain and persistent severe flare-ups, Claimant would be unable to work in any capacity.

⁴⁶ EX-33.

⁴⁷ CX-10; EX-23, 29.

⁴⁸ CX-12, 13.

Employer's Records show in pertinent part that:⁴⁹

Claimant applied to work for Employer on 1 Mar 09.

On 28 Aug 09, Claimant filed a civil suit in federal district court against Employer, KMJ Services, and Exxon Mobile.

E-mails between various counsel, filings, and rulings show in pertinent part:⁵⁰

On 11 May 10, Employer asked to schedule Claimant for an examination by Dr. Likover. Claimant's counsel answered that he wanted only one defense medical examination for all defendants in both the Longshore and third party cases. Employer responded that it did not believe it was bound to work with the third party defendants and was entitled to its own examination. Claimant's counsel replied that he did not want to get sandbagged with multiple defense medical opinions and expected Employer to coordinate with the other defense counsel. Employer noted that it had been dismissed from the third party suit and would not be working with the remaining defendants.

On 19 May 10, Claimant sought an agreement from the third party defense counsel. On 26 May 10, Employer informed Claimant's counsel that Dr. Likover would be available to examine Claimant on 3 Jun 10 or 10 Jun 10. Claimant's counsel responded that he would not agree to the examination until he could determine what the defendants in the third party case intended to do in regards to a medical examination. Employer answered that its right to a medical evaluation was unrelated to the third party case. Claimant's counsel forwarded the exchange to the third party defendants' counsel and asked for help.

On 2 Jun 10, Employer again sought Claimant's counsel to have Claimant examined by Dr. Likover and announced its intention to get an order to compel. Employer was informed by an assistant that Claimant's counsel was unavailable until the next week.

On 8 Jun 10, Employer again asked Claimant's counsel when Claimant would be available for an examination by Dr. Likover. Employer was informed by an assistant that Claimant's counsel was busy with depositions for the rest of the week.

On 11 Jun 10, Employer filed a motion to compel Claimant to submit to a medical examination. Claimant's counsel filed his opposition on 22 Jun 10. On 16 Jun 10, the remaining third party defense counsel sent a letter indicating that he was not opposed to agreeing to the use of a single defense medical examination in both cases, subject to an express agreement from all parties.

On 18 Jun 10, Employer again asked Claimant's counsel when Claimant would be available for an examination by Dr. Likover, so it could withdraw its motion to compel. Claimant's counsel responded that one of the third party defendants had not yet responded to his inquiry about their use of Dr. Likover and he would be forced to oppose

⁴⁹ EX-24, 25 (as cited, see n.4).

⁵⁰ EX-30, 31, 32 (as cited, see n.4).

the motion to compel. Employer once again expressed its position that discovery in the Longshore case did not depend on what was happening in a third party case and Claimant's counsel responded that he would be committing malpractice if he let the combined defense counsel in the cases use two different doctors to evaluate his client.

On 17 Sep 10, the motion to compel was granted and on 21 Sep 10, Claimant's counsel filed a motion for reconsideration, noting that on 28 Jul 10, Claimant underwent an evaluation by Dr. Vanderweide.

Claimant's pay, Social Security, and tax records show in pertinent part that:⁵¹

Year	SSA Earnings	Originally Filed 1040 Earnings	Amended 1040 Earnings
2006	50,936.02	17,953	51,121
2007	64,642.89	30,007	68,670
2008	34,685.00	9,940	43,909
2009	8,288.00 ⁵²	8,288.00	-

On 21 Sep 09, Claimant filed amended returns for 2006, 2007, and 2008. He admitted omitting more than \$37,000 on his 2006 return, \$32,000 on his 2007 return, and \$26,000 on his 2008 return. On his amended 2008 return, he claimed Billy Tarpley as his dependent nephew.

Department of Labor forms show in pertinent part:⁵³

On 18 Aug 09, Claimant filed a claim alleging he had been dropped from a personnel basket and three other men had fallen on top of him, injuring his back, neck, and mouth, and breaking and knocking out teeth.

ANALYSIS

The threshold burden is on Claimant to establish he is suffering from physical harm or pain and something happened on the rig that could have caused that harm or pain, whether directly or by way of aggravation of a preexisting condition. If he can do so in the absence of substantial contradictory evidence, his condition is presumed to be a result of his work. In that event, if Claimant can show he is unable to return to his original job, he is presumed totally disabled.

Claimant testified that the basket flipped, causing him to injure his neck and back, break two or three top teeth, and loosening one bottom tooth. 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.

⁵¹ CX-8, 9; EX-19, 20.

⁵² \$4,508.00 from Employer and \$3,780.00 from Five B's Towing.

⁵³ CX-5; EX-1, 27.

Moreover, the record also shows that Claimant's back has extensive degenerative changes and multilevel lumbar and cervical spondylosis, including herniation and stenosis at L4-5 and L5-S1; stenosis at L1-2, L2-3, and L3-4; herniation at C3-4; and herniation and stenosis at C4-5, C5-6, C6-7, and C7-T1. Similarly, the evidence includes a photograph of what Claimant testified were his broken teeth and a dental record in which Claimant reported that a trauma on a rig had knocked out #25 and chipped #8 and 9.

In addition, Dr. Vanderweide concluded that Claimant suffers from cervical spondylosis and lumbar stenosis with severe degenerative disk disease and that Claimant's accident at work accelerated and aggravated the stenosis originally caused by the degenerative disease. Dr. Dent assessed Claimant as having lumbago, cervical facet syndrome, cervicalgia, and cervical and lumber neuritis; reviewed and modified his medications; and restricted him from any work. He also noted that Claimant's symptoms and injuries were a direct result of his work injury.

However, those medical opinions were based in large part on the subjective reports and histories provided by Claimant to the treating physicians, making Claimant's honesty and credibility a crucial factor. Claimant's Counsel clearly anticipated that issue and argued that his client need not be a "choir boy" to be entitled to benefits under the Act, even citing a previous case⁵⁴ in which I awarded benefits to a Claimant who was incarcerated for an extended period between his injury and his hearing. Counsel is correct in that there is no legal basis for denying benefits to a claimant simply because he or she may have a criminal history. As in *Brooks*, I found the fact that this claimant has been jailed to be of little probative value.

The similarity ends there. In *Brooks*, I found the claimant to be a very credible witness. That is not true in this case. Claimant's demeanor during the hearing failed to create any confidence in the accuracy of his testimony or even his motivation to at least attempt to tell the truth. The surveillance video significantly contradicted his hearing and deposition testimony (which he amended after the fact to conform to what he had been observed doing). He filed false tax returns for a number of years, correcting them only when he needed to increase his earnings history for his tort lawsuit. He repeatedly submitted false answers to and withheld significant information from his employer and healthcare providers.

According to his supervisor, when he asked Claimant and the others in the basket after the spill, they all said they were OK. That is the most credible statement attributed to Claimant in the record. It was 15 or 20 minutes later when the operation resumed and a large swell dropped the boat that the Claimant said his back was hurting and he needed to see a doctor right away, adding shortly afterward that he had been hurt before, but never got anything for it.

In short, the record demonstrates that Claimant has a clear history of saying whatever he believes is in his financial best interests. Therefore, I give his testimony and any medical evidence based on his history or subjective reports almost no weight.

Consequently, while there is objective diagnostic evidence of herniations and stenosis in Claimant's back, the weight of the objective medical opinion is that they are degenerative in origin. The assessments that they were aggravated by a spill on the rig was based on the history

⁵⁴ *Brooks v. Loadmaster Derrick & Equipment* 2009-LHC-222 (ALJ 5 Feb 10).

and subjective reports of increased pain given by Claimant, who appears to be so inclined to exaggerate, fabricate, and omit for personal gain that he is essentially totally unreliable. As a result, those medical opinions are unreliable and insufficient to establish a new injury or aggravation of a preexisting condition.⁵⁵

The broken teeth alleged by Claimant would appear to be the injuries most easily identified as a direct result of the trauma and could at least in part substantiate the violence of the trauma he asserts he suffered in the spill and lead to his back and neck injuries. It seems likely, however, that a force strong enough to not only loosen but break teeth (as demonstrated in the photo offered by Claimant) would also involve some bleeding, swelling, or bruising. No oral or dental injuries were reported by the ambulance crew or medical staff at the emergency room. Although Claimant may have mentioned a loose tooth to Employer's representative at Terrebonne General Medical Center, it is reasonable to expect that he would have mentioned that he had broken teeth, if that was actually a result of the incident.

In sum, I find the credible evidence of the record insufficient to find that Claimant sustained any new injuries or aggravated any preexisting conditions beyond the transient strain that was initially diagnosed, and required only that medical treatment provided by Employer, and resulted in no loss of wages⁵⁶

ORDER AND DECISION

The Claim is **denied**.

ORDERED this 19th day of September, 2011 at Covington, Louisiana.

A

PATRICK M. ROSENOW
Administrative Law Judge

⁵⁵ Or that they could be a consequence of the fall, as Claimant described.

⁵⁶ This renders moot the issues of average weekly wage and refusal to submit to a medical examination. I also note that even if Claimant had been able to carry his burden that he suffered a significant fall and injured his back, neck, and teeth; based on his lack of credibility and the surveillance video, I would have found that he had not carried his burden to show he could not return to his original work.