

**U.S. Department of Labor**

Office of Administrative Law Judges  
5100 Village Walk, Suite 200  
Covington, Louisiana 70433-2846

(985) 809-5173  
(985) 893-7351 (FAX)



**Issue Date: 26 June 2012**

**Case No.: 2011-LHC-01398**

**OWCP No.: 07-189756**

**In the Matter of:**

**RICKIE DECUIR,  
Claimant**

**v.**

**PERFORMANCE AIR SERVICES, LLC,  
Employer**

**and**

**LOUISIANA WORKERS' COMP. CORP.,  
Carrier**

**APPEARANCES:**

**LEONARD A. WASHOFSKY, ESQ.**  
On Behalf of the Claimant

**DAVID K. JOHNSON, 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),<sup>1</sup> as extended by the Outer Continental Shelf Lands Act,<sup>2</sup> brought by Claimant against Employer. The matter was referred to the Office of Administrative Law Judges for a formal hearing on 2 May 11. All parties were represented by counsel. On 8 Feb 12, 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.

My decision is based upon the entire record, which consists of the following:<sup>3</sup>

Witness Testimony of  
Claimant

Exhibits<sup>4</sup>  
Claimant's Exhibits (CX) 1-6  
Employer's Exhibits (EX) 1-6

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

## **FACTUAL BACKGROUND**

Claimant was employed as an offshore crane operator. He alleges he slipped on 4 Feb 10 while getting out of a crane and fell on his left knee.

## **STIPULATIONS**<sup>5</sup>

1. If Claimant was injured as he alleges, the injury arose out of and in the course of employment with Employer, during their employer/employee relationship, under conditions that bring it within the coverage of the Act.
2. There was timely claim and controversion.
3. An informal conference was held 10 Feb 11.
4. Claimant's average weekly wage was \$1,048.68.

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<sup>1</sup> 33 U.S.C. §§901 *et seq.*

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

<sup>3</sup> 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.

<sup>4</sup> Counsel were cautioned that since a number of exhibits (specifically CX-5 and EX-1) appeared to be *en globo* collections of records, counsel must cite during the hearing or in their post hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based.

<sup>5</sup> Tr. 8-16.

5. Claimant has not worked in any capacity since 20 Mar 10.
6. Claimant continued to work for approximately two months following the alleged accident, and after he reported it to Employer was paid wages in lieu of compensation at the rate of \$654 per week, through 26 Sep 10.

## **ISSUES IN DISPUTE & POSITIONS OF THE PARTIES**

Claimant alleges he injured his knee at work on 4 Feb 10. He concedes he was able to work for a period immediately following, but argues that he later became temporarily totally disabled and remains so. He seeks temporary total disability benefits from 26 Sep 10 and medical benefits. Employer disputes that the initial injury occurred and in the alternative argues Claimant had fully recovered and suffered no disability by 30 Jul 10.

Though the parties did not agree on the matter of maximum medical improvement at the hearing, Employer stated in brief that they stipulated Claimant had not reached MMI. Claimant did not make the same claim, but seeks further medical treatment. I will assume for the purposes of this order that the matter of whether or not Claimant has reached MMI is not being litigated.

## **LAW**

### Causation

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of and in the course of employment[.]”<sup>6</sup> In the absence of substantial evidence to the contrary, it is presumed the claim of an employee comes within the provisions of the Act.<sup>7</sup> The presumption takes effect once a claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.<sup>8</sup>

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.<sup>9</sup> These two elements establish a *prima facie* case of a compensable injury supporting a claim for compensation.<sup>10</sup>

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<sup>6</sup> 33 U.S.C. §902(2).

<sup>7</sup> *Id.* at §920(a).

<sup>8</sup> *Gooden v. Dir., OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998).

<sup>9</sup> *Id.*, citing *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).

<sup>10</sup> *Id.*

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 and the invocation of the Section 20(a) presumption.<sup>11</sup> The presumption does not apply, however, to the issue of whether physical harm or injury occurred<sup>12</sup> and does not aid the claimant in establishing the nature and extent of disability.<sup>13</sup>

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence that the claimant's condition was not caused by his working conditions, nor was it aggravated, accelerated, or rendered symptomatic by them.<sup>14</sup> "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.<sup>15</sup> The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).<sup>16</sup> When the claimant alleges aggravation of or contribution to a preexisting condition, the employer has to establish that the claimant's condition was not caused or aggravated by that employment.<sup>17</sup> Employers accept their employees with the frailties and conditions that predispose them to bodily injury.<sup>18</sup> The testimony of a physician that no relationship exists between an injury and claimant's employment, however, may be sufficient to rebut the presumption.<sup>19</sup> The Board has held that unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption.<sup>20</sup>

To establish the injury is work-related, the claimant does not have to prove the employment-related dangers or exposures were the sole or even predominant cause of his injury.<sup>21</sup> "Under the 'aggravation rule,' where an employment-related injury combines with, or contributes to, a preexisting impairment or underlying condition, the entire resulting disability is compensable and the relative contributions of the work-related

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<sup>11</sup> 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).

<sup>12</sup> *Devine v. Atl. Container Lines, G.I.E.*, 25 BRBS 15, 19 (1990).

<sup>13</sup> *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441, 443 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112, 119 (1979).

<sup>14</sup> See *Gooden*, 135 F.3d at 1068; *Conoco, Inc. v. Dir. [Prewitt]*, 194 F.3d 684, 690 (5th Cir. 1999), *citing Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).

<sup>15</sup> *Avondale Indus. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988), *citing Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988); *see also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").

<sup>16</sup> See *Smith v. Sealand Terminal, Incl.*, 14 BRBS 844, 845-46 (1982).

<sup>17</sup> *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

<sup>18</sup> *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-48 (D.C. Cir. 1967).

<sup>19</sup> See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129-30 (1984).

<sup>20</sup> *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 15, 20 (1995).

<sup>21</sup> See *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966).

injury and the preexisting condition are not weighed to determine claimant's entitlement."<sup>22</sup>

The mere existence of a prior injury does not establish that the current condition is a result of that injury or that the preexisting condition was not aggravated by the work accident.<sup>23</sup> "Whether circumstances of...employment combined with [a claimant's] disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his existing condition."<sup>24</sup>

Once an employer offers sufficient evidence to rebut the presumption, it is overcome and no longer controls the outcome of the case.<sup>25</sup> If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.<sup>26</sup>

### Nature and Extent

Once it is determined that a claimant suffered a compensable injury, the burden of proving the nature and extent of his disability rests with him.<sup>27</sup> The question of extent of disability is an economic as well as a medical concept.<sup>28</sup> Total disability is the complete inability to earn pre-injury wages in the same work as at the time of injury or in any other employment. 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. "Usual" employment is the claimant's regular duties at the time of injury. In this case, the claimant does not need to establish that he cannot return to any employment at this point, only that he cannot return to his former employment.<sup>29</sup>

Because the Act does not provide a set standard for determining the extent of disability, the degree of disability is determined on the basis of several factors, including physical condition, age, education, employment history, rehabilitative potential, and availability of work a claimant can perform.<sup>30</sup> The claimant's credible complaints of pain alone may be enough to meet his burden, but a judge may find that an employee can do

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<sup>22</sup> *Johnson v. Ingalls Shipbuilding, Inc.*, 22 BRBS 160, 162 (1989), citing *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

<sup>23</sup> *Banks v. Service Employers Int'l, Inc.*, (Unpublished) BRB No. 06-0486 (March 14, 2007).

<sup>24</sup> *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981).

<sup>25</sup> *Noble Drilling Co. v. Drake*, 795 F.2d at 481.

<sup>26</sup> *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997).

<sup>27</sup> *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

<sup>28</sup> *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 842 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

<sup>29</sup> *Elliott v. C&P Tel. Co.*, 16 BRBS 89, 91 (1984).

<sup>30</sup> *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1037-38 (5th Cir. 1981).

his usual work despite complaints of pain, numbness, weakness, and others when a doctor finds no functional impairment.<sup>31</sup>

If the claimant can establish a *prima facie* case of total disability, the burden of proof shifts to the employer to establish that suitable alternative employment exists, and that the claimant is capable of performing it.<sup>32</sup> The trier of fact may rely on testimony of vocational counselors to establish the existence of suitable jobs.<sup>33</sup> If the vocational expert is uncertain, however, about whether the positions he identified are compatible with the claimant's physical and mental abilities, the employer's burden is not met.<sup>34</sup>

### Notice

Section 12(a) of the Act provides:

Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment[.]<sup>35</sup>

The Act also provides that in the absence of substantial evidence to the contrary, it is presumed the claimant gave proper notice to his employer.<sup>36</sup> Failure to provide timely notice may bar a claim, unless excused under Section 12(d), which provides that failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period or that it was not prejudiced by the failure to give timely notice.<sup>37</sup>

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<sup>31</sup> *Devor v. Dept. of the Army et al.*, 41 BRBS 77, 78 (2007); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 896-97 (1981).

<sup>32</sup> *Turner*, 661 F.2d at 1039.

<sup>33</sup> *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985).

<sup>34</sup> *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991).

<sup>35</sup> 33 U.S.C. §912(a).

<sup>36</sup> 33 U.S.C. §920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

<sup>37</sup> 33 U.S.C. §912(d)(1)-(2); *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989).

## EVIDENCE

*Claimant testified in hearing in pertinent part that:*<sup>38</sup>

He was born 2 Jul 52 and graduated from high school. He has spent his entire work life as a crane operator on and offshore. Offshore cranes are hydraulic, and have an accelerator on the floor and a swing brake. Friction cranes, which he operated 95% of the time, have sets of brakes on the floor that act as a free fall mechanism to stop the load from coming down. He was operating mostly with his right leg, sometimes with his left leg, pressing the brakes on the floor.

He worked for Employer's Winch Division for about 13 months. A normal shift was 14 days on, 14 days off. Sometimes the jobs finished early. When the job was finished, he was sent home. The shifts varied substantially. He was paid for the actual time worked rather than 40 hours a week. In an 18-hour day, he got paid for 18 hours, even if some portion of that day might be spent just sitting in the crane waiting for something to happen.

On 4 Feb 10, he was on platform South Timbalier 308 in the Gulf of Mexico. Apache was the general contractor and it was Apache's rig. He had been working on that rig since the prior Saturday on a one-week shift. He was the only employee of Employer on the rig.

He had just finished running his crane. He stopped what he was doing, shut the crane down, opened the door, and stood on the step. He started to walk off the step when someone called his name. When he looked to see who was calling, the edge of his heel caught the rubber coating that was on the step of the crane and threw him forward. He landed on his left knee, hitting a piece of flat board that's at the bottom of every hand rail offshore. It's known as a kick plate and it stops objects from being kicked overboard. He knew immediately he was injured and was helped straight into the medic's office. Mr. Edward Hollingsworth was the medic. They made an accident report and the medic put medicine and a band aid on the leg where it was cut.

He also reported the injury to Jesse Randall, who was the consultant on that particular job. He did not report it to anyone in Employer's service at that time. He thought they were supposed to take a copy of the accident report and fax it to Employer, but he now knows that they did not. There was no more work to do that day, so he sat in the break room for the rest of the afternoon. He continued to work aboard that rig and completed his hitch on 7 Feb 10. He did his normal duties and

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<sup>38</sup> Tr. 21-73.

did not get any further treatment from the medic or the first aid kit aboard the rig. He did have further problems with his knee, but was able to operate the crane as required. He never went for more treatment or asked to be sent in.

He worked two more hitches after the one where he hurt his knee. After 7 Feb 10, he was off about two weeks. The next job was Ship Show and he did the normal crane work on it for a seven-day hitch. He was off again for two weeks. His last day of work was when he finished a shift on 20 Mar 10. There was no modification of his job during that six-week period. He may have climbed in and out of the crane 20 times in a day or two times in a day. His job duties during the last six weeks of his employment were precisely the same. He was able to do all those job duties, but had difficulty climbing in and out of a crane. He has not worked at all since 20 Mar 10.

When he came in on 20 Mar 10, he didn't report his injury because he was scared for his job. He had heard horror stories of people getting hurt and being fired. He was raised in a Catholic school to tough things out. He tried to keep working as long as he could.

The knee kept getting worse and by April he couldn't take the pain from his everyday activities anymore, so he reported it to Employer. He knew Employer did not know about the injury, and he reported it to Blaine Landry, who is in charge of Human Resources. At that time, he had not had any medical attention.

The first medical attention he had for the knee injury was from his family practitioner, Dr. Elias, on 15 Apr 10. Dr. Elias had treated him before for a boil on his knee. He told Dr. Elias he had been hurt on his offshore job. The doctor recommended an MRI, which was done on 16 Apr 10. He knew that he had a sprained posterior cruciate ligament (PCL) and chondromalacia patella. After the MRI, Dr. Elias told him to quit his activities and rest his knee. He can't quit his activities. He knew he couldn't go back to the crane.

Employer sent him to Dr. Bernard on 28 Apr 10. Dr. Bernard had an assistant, Mr. Broussard, in the room while examining him. Dr. Bernard said there was basically nothing wrong with the knee and measured it for swelling. When he said he was in pain and thought he couldn't perform his job anymore, the doctor said he didn't have an instrument to measure pain and walked out. They told him to take Aleve, apply heat, do exercises, and return on 19 May 10.

He didn't understand why he had to go back if they thought nothing was wrong with him. When he returned, both Dr. Bernard and Mr. Broussard were there again. Dr. Bernard didn't have the MRI film the first time, but said he had now looked at it. He told the doctor he was in pain and tried to demonstrate the

problems he had standing up after he stooped to the floor. The doctor did not recommend any treatment and said he could go back to work. They did not have any conversation about Employer or him being hostile with Employer. In fact, he got along just fine with his boss.

At that time, he was receiving 40-hour-a-week wages. He didn't tell Employer anything. They never asked if he was ready to go back to work or offered anything.

Employer sent him to Dr. Duval after it asked him if he knew of any orthopedic surgeons that he could choose. He didn't, so they chose Dr. Duval. Both Dr. Bernard and Dr. Duval are orthopedic surgeons.

When he saw Dr. Duval, he was accompanied by Ricky Escon, Employer's safety coordinator. He had never met him before. Dr. Duval examined his knee. He again tried to demonstrate that to come up from a stooped position, he needed assistance. The doctor looked like he wasn't interested and spoke mostly to the safety coordinator, saying "what are we going to do with him? Let's just send him back offshore and on his days off, we'll give him physical therapy." He asked Dr. Duval why he was ignoring him, but the doctor didn't answer. He did two weeks of physical therapy after that, but it didn't help. Dr. Duval said he could go back to work as a crane operator.

He went back to Dr. Bernard's office for a go-back-to-work physical, but failed it. Part of the physical was to stoop down, pick up a tool box, climb a ladder, come back down with the tool box, and do different types of maneuvers, and he couldn't do that. He thinks it was in July sometime.

Also sometime in July, he changed the belt on his dryer and had to stoop down and get into position to work, making his knee swell again. He can't remember the exact date, but he also went to his mom's house and cleaned out underneath her fig tree. He had to get on his knees and crawl around. His knee swelled up again and after that is when the knee started trying to dislocate and pop. It would pop every once in a while, but mostly it was after he worked under her fig tree that it really started. On 30 Jul 10, he went to see Dr. Elias again, who cautioned him not to perform that type of activity. That was the last time he saw any doctor or had any treatment for his knee until he saw Dr. Ritter in 2011. During that time, he was paid by Employer on a 40-hour-per-week basis and had health insurance. He went to a masseuse and had therapy with an acupuncturist to help the pain in his knee.

He tried to get an appointment with a Dr. Sinac in Iberia. They asked if it was a work-related injury and if LWCC was paying for it. When he said no, they said they had to charge \$900.00 for one visit. They had to act as if it was being paid by LWCC. He did not ever go to Charity Hospital.

At the end of September or beginning of October, he got a letter from Employer that they were offering Cobra insurance. He called the secretary, who said they could no longer afford to pay his health insurance and were offering the Cobra. They were taking him off the payroll at the end of September. When he asked if he had a job here anymore, she didn't answer, but just explained that they could no longer afford to pay his health insurance.

In November 2010, he received a letter saying that all correspondence should be directed to LWCC. That's when he filed his claim and retained counsel. He was allowed to see Dr. Ritter on 14 Mar 11 as his choice of orthopedic surgeon. He told her what had happened to him and she did a physical examination. She recommended more physical therapy, two or three times a week for four to six weeks, and said he could go back to work, but with some restrictions on his activities. He has not been back to her. He could not follow her restrictions and still do his original job.

The problems he had that she was talking about were climbing a ladder or climbing stairs to get in and out of the crane. That is what was putting the stress on his knee and causing the aggravation and the pain. There may be slack time during the day when he is not doing anything. There may be times where a boat pulls up to the platform and he is called to go out, get in the crane, climb a set of stairs then climb a ladder with about 20 rungs on it, get into the crane, perform the job, climb back down the ladder, and then climb back down the stairs. That could be required anywhere from ten to fifteen times a day, or maybe just twice a day. It just depended on what was going on. There is normally only one crane operator.

No one has recommended surgery for his knee. The last doctor he saw, at the walk-in clinic, suspected there might be more damage than originally thought and recommended another MRI, which is scheduled for tomorrow. He's doing all that on his own.

Since April 2010, he has not worked. He took care of his mom for about a year before she passed, from about September 2010 to March of 2011. He exercises his knee when he gets a chance. He has not tried to go back to running a crane or look for any kind of work. His knee doesn't swell as badly as it used to, but he still can't stoop to the floor and stand up on his own. He realized he couldn't go back

to doing the crane work after he reported the injury to his boss, because it was getting progressively worse. He probably could do some other kind of work.

***Medical records from Dr. Gerald Elias state in pertinent part:***<sup>39</sup>

He is a family medicine doctor and saw Claimant on 26 Oct 06, 27 Aug 09, 25 Sep 09, 28 Oct 09, and 2 Nov 09, for various problems unrelated to his current injury, including a boil on the left knee.

Claimant returned to him on 15 Apr 10 with complaints of left knee pain at seven out of ten that traveled to his upper thigh and an unstable feeling when he tried to bend. Claimant stated the left knee pain began with direct trauma while at work, when he tripped and struck his knee on a metal bar as he was coming down some steps. He diagnosed a left anterior knee contusion and ordered an MRI for the left knee to rule out a ligament or meniscal tear. The MRI report noted mild tri-compartment degenerative changes including chondromalacia patella, minimal edema in the lateral tibial plateau which was likely reactive, and a PCL sprain.

On 30 Jul 10, Claimant reported he was still out of work and did not think he could return. He diagnosed left knee pain and a PCL sprain according to the 16 Apr 10 MRI, as well as degenerative changes due to age. He recommended avoiding re-injury by not kneeling, getting physical therapy three times a week for four to six weeks, and repeating an MRI of the left knee. It appeared that some minor events, like fixing a belt on his washing machine in a crouched position at home, seemed to have strained Claimant's knee even more.

***Dr. Douglas Bernard testified in deposition and his records state in pertinent part:***<sup>40</sup>

He is board-certified in orthopedics and saw Claimant at the request of Employer on 28 Apr 10 and 19 May 10. On Claimant's first visit, he reviewed Claimant's X-rays, went over his MRI report, and examined him cursorily. His physician's assistant, Harold Broussard, did most of the work.

Claimant told him he had injured his knee in February getting out of a crane, when he slipped forward and hit it on a metal bar. Claimant said he continued working and did not seek immediate medical attention. Claimant was unsure if he had actually reported it or if he was really having any significant trouble. Claimant stated he continued to have pain and some problems with squatting and rising from a squatting position, which became worse over time. Claimant said he also

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<sup>39</sup> EX-2.

<sup>40</sup> EX-4, 6.

had trouble keeping his knee either flexed or extended for too long a period of time.

He noted some generalized degenerative changes in Claimant's knee. Claimant did not have clinical evidence of any specific tears in his meniscus or PCL. Claimant had no swelling, warmth, or instability. He had a completely normal examination, with full range of motion. He noted mild crepitus of the left knee, which is a common degenerative condition. Claimant had good extension, but reported some pain with full flexion. Claimant did not complain that his knee was giving out on him.

He diagnosed Claimant with a contusion, or bruise of his left knee, on the lower part of his kneecap. The mechanism of injury for that would be unlikely to cause any internal derangement of the knee. He told Claimant to take Aleve, use heat, and do exercises. He felt Claimant could return to regular duties.

Whenever someone first goes back to work, he likes to see them in two to three weeks to make sure they're doing okay. He released Claimant to go back to work, then saw him again on 19 May 10, for a longer period of time. He was able to review the MRI films at that time, but found no change in his previous diagnosis. There was no evidence of an injury or a problem with the PCL, other than some mild degenerative changes. The MRI was done a little over two months after the injury. If Claimant had a torn PCL or something like that, he would be able to tell, because it wouldn't have healed in that period of time. An MRI report from 16 Apr 10 noted mild tri-compartment degenerative changes, including chondromalacia patella and a PCL sprain, but he did not find a PCL sprain based on his physical examination, and did not see it on the MRI, either.

He found some old abscesses or pimples on the patella, but those were not part of the current complaint. Claimant's thighs and calves were also symmetric, indicating no atrophy, which he would expect to see if there had been significant injury. He felt Claimant could return to his regular work duties, and that no further treatment was needed. Claimant told him he had not been released, and had read his MRI report, and was concerned that he had sprained a ligament of the knee. He noted that Claimant was a bit hostile in the interview, and told him to return in three to four weeks. Claimant did not return to his office.

He found no evidence of patellofemoral malalignment. The first line of the MRI report states the patella is normally seated within the trochlear groove. He reviewed a doctor's report from 28 Dec 11, in which the Claimant was assessed to have knee joint pain and was given an injection of cortisone. He did not see any evidence Claimant needed that treatment.

Based on his examination and review of diagnostic studies, there is no objective evidence of a left knee injury. There is no basis upon which he would assign him any kind of impairment rating, and there is no restriction he would place upon him returning to work. He didn't prescribe any physical therapy; his physician's assistant showed Claimant some exercises to do.

***Dr. Michael Duval testified in deposition and his records state in pertinent part:***<sup>41</sup>

He is board-certified in orthopedic surgery and sports medicine. He examined Claimant on 8 Jun 10 at the request of Employer. Claimant arrived in his office complaining of pain in his left knee, and described an accident on 10 Feb 10 where he slipped getting out of a crane and struck his knee on a flat bar. Claimant reported constant aching that increased with increased activity, instability, and catching. He had a small laceration on the inferior pole of the patella where he hit his knee, which was healed. Claimant had some knee swelling, but no stiffness; he was able to straighten the knee, had no intermittent knee locking, no clicking sensation, and his knee joint did not feel loose. Claimant's biggest complaint was having weakness in his left lower extremity, and he worried about being able to perform his job.

Claimant was knock-kneed, which means he was more prone to patellofemoral nonalignment. Claimant did have a patellofemoral tracking problem, which is a congenital condition rather than a traumatic one. He reviewed the report from the 16 Apr 10 MRI, which stated that the patella was normally seated within the trochlear groove, but a MRI is done with the knee in full extension, which means it can't be used to assess patella tracking. The imaging showed no significant structural pathology.

Claimant presented with an abnormality in his gait and complained of instability in his left leg. He did not find any clinical evidence of instability in his examination. The X-rays he took did not show any evidence of osteoarticular abnormalities. He concluded Claimant had patellar chondromalacia, which is a symptomatic anterior knee pain, or pain in the patella. Chondromalacia is a term used to describe the articular cartilage breakdown on the backside of the patella, which can be degenerative. It can be rendered symptomatic by trauma. What he thinks is that Claimant started out with a contusion to his knee and because of inactivity and the fact that he wasn't treated aggressively with physical therapy, he developed some weakness in his leg that made the situation a little worse. Claimant had some early arthritic/preexisting degenerative changes show up on his MRI, but that didn't surprise him because Claimant is 57.

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<sup>41</sup> EX-3, 5.

At the time of examination, he did not feel that Claimant had any kind of impairment in his knee, or disability that would prevent him from being a crane operator. He thought a couple of weeks of work conditioning should get him back to his pre-injury state and saw no reason why he couldn't continue his regular job activities. He looked at CX-6, a MRI dated 9 Feb 12, and noted essentially no differences from the previous MRI and his examination. There may be a small lateral meniscal cyst that's developed, but that's not something he would relate to a knee injury in 2010. The most common cysts are degenerative, form as a result of osteoarthritis, and don't require surgical repair.

The MRI also states there is a signal change in the posterior horn of the medial meniscus that is worrisome for tear. One would have to see if the MRI findings correlate with his physical exam, because you don't operate solely based on an MRI report. When he examined Claimant, there was no medial compartment pain. He had anterior knee pain, but that didn't warrant an arthroscopic exam of his knee.

He reviewed Dr. Bernard's report, which stated there could be a possible mild PCL strain, but Dr. Bernard felt that was an old finding and he did not see any posterior instability. He can't say why a possible PCL strain was even mentioned.

He found Claimant was suffering from the effects of a contusion to his patella, and felt he needed some work hardening physical therapy to get over its effects and get him back to his pre-injury status. If he was treating Claimant, he probably would have restricted the amount of climbing he did in a given day while he was undergoing rehab. If he had to climb a flight of stairs twice a day to get into his crane, he would have cleared him to do that right away. If his job involved repetitive stair climbing, all day long, he would probably have had him go through the conditioning with the anticipation he'd get full clearance after that course of therapy.

Claimant attended physical therapy ten times between 10 Jun and 23 Jun 10. Claimant worked hard in therapy, but exhibited persistent difficulty with squatting beyond 90 knee flexion and was unable to lift from the floor due to the same. Claimant reported posterior knee discomfort when lifting more than 50 pounds. He was able to perform 10 repetitions of 3-step ladder climb and 10 repetitions of short stair climbing with good tolerance.

***Medical records of Dr. Therese Ritter state in pertinent part:***<sup>42</sup>

Claimant self-referred to her for left knee pain and was seen 14 Mar 11. Claimant reported an incident in which he fell from a crane step onto a flat bar kick plate, landing on his left knee, immediately causing him a small laceration and pain, but with no immediate swelling. Claimant reported finishing his shift and hitch and continuing to work until April 2010, when he reported the fall because his knee pain continued to bother him with work activities involving climbing stairs and ladders and using his left leg on the crane brakes. Claimant kept himself out of work after April 2010 because he reported feeling he was unable to do the climbing and repetitive things.

Claimant stated the physical therapy he attended did not help him much. He was released to work but kept himself out. Claimant joined a gym to exercise on his own in March 2010, before he reported the injury, until January 2011.

Claimant reported that his pain starts on the outside of his left knee and wraps around the back of it. He did not report locking, but said it swelled at times when he does a lot of bending. He said it gave way at times, primarily when he was walking down steps, but that he had not fallen. Claimant reported that when the weather was hot, the pain would radiate all the way down to his left ankle. If he used it too much, the pain radiated from his left knee all the way up to his left hip and groin. Claimant stated his knee started popping in August 2010. Things that made his pain worse included walking, after 15 to 20 minutes, standing, after five minutes, and walking down steps or down a ladder. Bending, stooping, and getting up from a kneeling or seated position also tended to increase his pain. Medication sometimes took the edge away, but it always came back. Acupuncture helped for two to three days, as did cold or hot packs and massage therapy. His average pain level was two to six, the worst was six to seven out of ten.

He told her 90% of the work done with the legs in the crane is with the right leg, but the 10% that is done with the left leg is more high pressure, strenuous pushing. He said they do have some cranes where the accelerator is operated with the left to right leg and that is really low impact and not significantly problematic for him. He said the crane work with his arms is not a problem, but climbing up and down stairs and ladders and the strenuous brake were his biggest concerns after the injury.

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<sup>42</sup> CX-1.

On physical examination, Claimant's gait was steady and non-antalgic, but he did keep his left knee in a slightly-flexed position with his gait. He had some mild varus about the left knee, no significant edema, no warmth or redness, and no significant lower extremity atrophy.

With palpation of the right knee, Claimant had mild pain over the anterior knee just inferior to the patella, but on the left knee he complained of pain much more so over the anterior left knee than over the medial or lateral knee with palpation. His lower extremity strength was normal and equal bilaterally.

She concurred with Dr. Bernard and Dr. Duval that most of Claimant's symptomatology is likely due to some patellofemoral dysfunction and malalignment. She recommended starting him on Mobic, getting him a patellofemoral knee brace, and getting him started again on physical therapy three times a week for four to six weeks. General leg strengthening and reconditioning would also likely help him from a symptomatic standpoint.

From a return-to-work standpoint, she recommended he limit his climbing in and out of a crane to one time every 30 minutes because of his feelings of instability when he is coming down steps or ladders. She thought he would be able to climb in and out, but not repetitively within a short period of time. Also, Claimant should not have to do any left leg brake or leg-press activity that is high-impact because of his increased pain complaints. Those complaints are likely due to the patellofemoral dysfunction causing the pain when he does those activities. She thought it would be OK for him to use a left-leg accelerator, since he reported that was not high-pressure activity and was less problematic for him. Other than those things, she thought he could return to operating the cranes.

She explained all of that to Claimant and wanted to see him back in six weeks to see how he was doing. Depending on that, she would make a decision on whether another knee MRI needs to be done, but she wanted to start with a course of conservative treatment.

***Records from Iberia Therapy Services, LLC state in pertinent part:***<sup>43</sup>

Claimant was seen 14 Mar 11 for left knee pain with patellofemoral tracking problems. He was prescribed exercises to be performed three times per week for four to six weeks.

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<sup>43</sup> CX-2.

***Medical records from Dr. Victor Jackson state in pertinent part:***<sup>44</sup>

Claimant was seen 28 Dec 11 and reported that his left knee pain was becoming unbearable, traveling from his knee to his ankle and up to his sciatic nerve. Claimant reported persistent pain in all positions, that he was unable to return to standing from a kneeling position without assistance, and that it swelled occasionally.

Review of Claimant's musculoskeletal system showed minimal edema medially on his left knee, no erythema, no crepitus, good MCL and LCL stability, and no patellar ballotment. The assessment was knee joint pain. The treatment plan was an injection of methylprednisolone acetate, Tramadol for pain, and MRIs of his lower extremities.

Claimant was seen 19 Jan 12 and complained of left knee pain, swelling, stiffness, and lower back pain. Claimant was taking Tramadol for his pain. Claimant's knees showed abnormalities, including swelling and instability. In his left knee, pain was elicited by motion and tenderness observed on ambulation. He wanted to rule out a torn meniscus in the right knee, and he diagnosed Claimant with knee joint pain and lower back pain. His plan was to give Claimant a Toradol injection.

***A MRI report of Claimant's lower extremity joints from LSU Medical Center states in pertinent part:***<sup>45</sup>

The MRI was completed 9 Feb 12. The findings indicated normal bone marrow signal, intact ACL, probable upper posterior cruciate ligament cyst, intact collateral ligaments, horizontal signal changes throughout anterior horn, body segment, and posterior horn lateral meniscus consistent with intrameniscal cyst, tiny lateral parameniscal cyst component noted, globular signal change with inferior articular surface extension posterior horn medial meniscus worrisome for tear, small joint effusion. There was some mild degradation of lateral compartment hyaline articular cartilage consistent with osteoarthritic change.

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<sup>44</sup> CX-3.

<sup>45</sup> CX-6.

***Employer's payroll records state in pertinent part:***<sup>46</sup>

Claimant worked a total of 96 hours between 1 and 7 Feb 10, 113 hours between 15 and 22 Feb 10, and 112 hours between 13 and 20 Mar 10.

Claimant worked 80 hours per pay period for 14 pay periods between 29 Mar 10 and 26 Sep 10 at a rate of \$23 per hour regular time and \$34.50 per hour for overtime.

Claimant requested 40 hours off starting 5 Apr 10 and ending 11 Apr 10 for vacation. Claimant requested mileage reimbursement for 170 miles of travel on 7 Feb 10, 190 miles of travel on 22 Feb 10, and for 170 miles of travel on 13 Mar 10 and 20 Mar 10.

**ANALYSIS**

In the absence of a stipulation, the initial question is whether Claimant actually fell and sustained any trauma to his knee on 4 Feb 10, as he alleges. Claimant's testimony and his consistent narrative to his doctors comprise the only evidence of that trauma. Claimant's uncontradicted testimony is sufficient to establish that he fell as he exited the crane that day, landed on his left knee, and caused a small laceration to his lower kneecap.

The next question is whether Claimant has suffered from a knee injury or condition. He testified that he has pain that limits his activities. His family doctor diagnosed left knee pain and a PCL sprain. The MRI report noted mild tri-compartment degenerative changes including chondromalacia patella, minimal edema in the lateral tibial plateau which was likely reactive, and a PCL sprain.

However, Dr. Bernard found no objective evidence of a knee injury beyond a bruise. He noted that there were some generalized degenerative changes in Claimant's knee, but no clinical evidence of any specific tears in his meniscus or PCL. Similarly, Dr. Duval determined Claimant had a congenital patellofemoral tracking problem and patellar chondromalacia, but no evidence of osteoarticular abnormalities. Dr. Ritter concurred with Dr. Bernard and Dr. Duval that most of Claimant's symptomatology is likely due to some patellofemoral dysfunction and malalignment. Dr. Jackson wanted to rule out a torn meniscus in the right knee, and diagnosed Claimant with knee joint pain.

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<sup>46</sup> CX-4; EX-1 (as cited, see n. 4).

Based on the weight of the evidence, I find that Claimant was able to show that he has a knee injury or condition. In order for him to invoke the presumption of causation he needed only to connect the fall and the condition. Dr. Duval's opinion that chondromalacia can be rendered symptomatic by trauma was sufficient to do that. Accordingly, I find that Claimant has established a *prima facie* case that his knee injury was precipitated by his fall at work and invoked the presumption of causation, placing the burden on Employer to present substantial evidence in rebuttal.

Claimant testified that sometime in July 2010, he exacerbated his knee problems by crouching to repair his dryer, and by doing yard work that required him to place stress on his knees. His treating family physician, Dr. Elias, stated that he felt some part of Claimant's condition was a result of these intervening events.

Claimant testified that after the fall, he was able to continue working until the end of his hitch a few days later, and that he completed two full hitches after that before he determined he could no longer work as a crane operator because of his injured knee. During this time, he was completing his regular duties, which entailed climbing in and out of the crane as necessary. Aside from allegedly visiting the on-board medic immediately after the fall, Claimant did not seek any medical treatment for his knee until the middle of April, more than two months after the initial injury. Claimant testified that though he knew immediately that he had injured his knee, he worked until the pain became unbearable.

Dr. Elias diagnosed Claimant with a left knee contusion, or bruise, and a PCL strain, which he identified as a result of a 16 Apr 10 MRI report stating the same. He did not make a recommendation about returning to work, though he noted Claimant felt he could not. He urged physical therapy. Dr. Bernard and Dr. Duval firmly stated that aside from some degenerative changes to the knee due to age, Claimant suffered no objective injury. The doctors bolstered their physical exams with imaging and found no instability, no locking of the joint, no looseness, and no atrophy that would signal a more serious injury. Dr. Bernard found no clinical evidence of a PCL injury, and could not see any evidence of the same when he reviewed the 16 Apr 10 MRI. Dr. Bernard found no evidence that Claimant had any patellofemoral malalignment, but Dr. Duval thought Claimant was knock-kneed. He diagnosed Claimant with patellar chondromalacia, or breakdown in the cartilage on the back of the patella. His assessment was that Claimant was genetically predisposed to this condition, and that the contusion and resulting inactivity caused some leg weakness that made the situation "a little worse."

Dr. Duval was also perplexed as to why the initial MRI report noted a PCL strain, because he found no clinical indications of such. Neither doctor found evidence of any ligament damage; both diagnosed Claimant with a bruised kneecap and recommended he return to his work as a crane operator. Given Claimant's age, Dr. Duval did not think his condition was surprising or that it should impair his return to work as a crane operator.

Nearly a year later, Claimant's choice of doctor, Dr. Ritter, agreed that Claimant's symptoms were likely due to his patellar malalignment. She thought Claimant could return to work as a crane operator with some restrictions, and wanted him to return to physical therapy.

The medical records and testimony of the orthopedic doctors suffice to rebut the Section 20(a) presumption. Employer has presented substantial evidence that Claimant's existing knee problems are the result of a genetic condition, natural, age-related degeneration, and non-work-related activities, rather than a result of his fall and bruised kneecap. Therefore, I find that the presumption was rebutted and the evidence must be weighed as a whole.

The weight of the evidence is that Claimant did injure or aggravate his knee while working on 4 Feb 10. However, it also shows that the injury was a relatively mild one that had mostly resolved by the time he first sought medical treatment for it. Claimant continued to work for six weeks after the fall, and testified that he was able to perform all his crane operator duties. He did not seek medical attention until more than two months after the fall, and when he did, the overwhelming weight of the medical evidence suggests the effect of the fall was minimal and most likely was totally overcome by supervening events.

In the absence of any evidence of suitable alternative employment, if Claimant can sustain his initial burden of showing he was unable to return to his original job, because of his work injury, he is presumed totally disabled.

Despite a note on the 16 Apr 10 MRI report, there was no clinical evidence that Claimant injured any ligaments in the fall. Instead, the evidence shows that at worst, the fall caused some bruising and necessitated some work-hardening physical therapy before Claimant could return to his job as a crane operator.

The doctors who examined Claimant were unanimous in finding that any other knee problems were due to age-related degeneration and Claimant's knock-kneed genetic condition. Moreover, Claimant likely caused greater damage to his knee while working at home in July 2010, in crouching and crawling positions, than he did by falling at work. Claimant testified these home activities caused his knee to swell up, and that it started popping and dislocating after that. Dr. Elias—who saw Claimant both before and after these activities—agreed that some part of Claimant's condition was due to them rather than the fall at work. Dr. Bernard testified that a direct impact like a fall would not cause internal derangement of the knee.

Nevertheless, Dr. Duval did place some work restrictions on Claimant when he saw him in June of 2010. He testified that if he was Claimant's treating doctor, he would have restricted the amount of climbing in and out of the crane that Claimant could do. He thought that a few weeks of work hardening therapy could get Claimant back to work with no restrictions. Claimant attended physical therapy between 10 and 23 Jun 10. Though he testified that it did not help him much, the report from the physical therapist indicated Claimant performed well and that his only trouble was that which he consistently reported: persistent difficulty with squatting and rising from the floor. He performed well on the stair-climbing exercises. I find Dr. Duval's assessment of Claimant's capabilities was persuasive and that he was able to return to his original job after completing physical therapy on 23 Jun 10.

Claimant insists that he is unable to return to work as a crane operator. After 23 Jun 10, however, Claimant's non-work status was purely self-enforced, based on his feeling that he would have trouble climbing in and out of the crane. None of the doctors who examined or treated him felt his condition would prevent his full return. Claimant's main physical limitation appears to be his difficulty in returning to standing from a squatting position, a problem which was not tied to the work injury, and which does not appear to prevent him from performing his duties as a crane operator.

Claimant also testified that between the date of injury and the date he reported it, his left knee became progressively more painful. He stated that he failed a return-to-work physical, but there were no records corroborating that, and the weight of the medical evidence suggests that Claimant's symptoms from the fall were resolved by 23 Jun 10 at the latest. Any problems after that date were attributable to Claimant's home activities and to his age-related and genetic predisposition to knee injury.

Consequently I find that as of 23 Jun 10, Claimant is no longer able to sustain his burden and establish that it was more likely than not that he was unable to return to his original job. Claimant was therefore temporarily totally disabled from 21 Mar 10 to 23 Jun 10 because of the effects of falling on his left knee at work on 4 Feb 10. As of 23 Jun 10, he no longer suffered any disability.

#### Notice

Claimant testified that he did not give Employer notice of his 4 Feb 10 injury until approximately two months later. The parties did not stipulate to timely notice, but neither did Employer argue that it was prejudiced as a result of Claimant's late notice. There is no evidence in the record suggesting that Claimant's failure to notify Employer of his fall within the prescribed 30 days caused any prejudice.

## ORDER AND DECISION

1. Claimant fell at work on 4 Feb 10, striking his left kneecap and causing a small laceration and bruise.
2. Claimant's average weekly wage at that time was \$1,048.68.
3. Claimant was temporarily totally disabled as a result of the work injury from 21 Mar 10 to 23 Jun 10.
4. Employer shall pay temporary total disability compensation for that period based on Claimant's average weekly wage.
5. As of 24 Jun 10, Claimant no longer sustained any disability related to the 4 Feb 10 injury.
6. Employer shall pay all reasonable, appropriate, and necessary Section 7 medical expenses related to Claimant's 4 Feb 10 injury.
7. Employer shall receive credit for any compensation heretofore paid, as and when paid. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.<sup>47</sup>
8. The District Director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

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<sup>47</sup> 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).

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.<sup>48</sup> 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 26<sup>th</sup> day of June, 2012 at Covington, Louisiana.

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

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<sup>48</sup> 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.