

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 27 November 2012

CASE NO.: 2012-LHC-00370
OWCP NO.: 01-171550

In the Matter of:

MICHAEL A. GAUDIANO,
Claimant,

v.

ELECTRIC BOAT CORPORATION,
Employer/Self-Insured.

Before: Timothy J. McGrath, Administrative Law Judge

Appearances:

Lance G. Proctor, Esq., Lance G. Proctor, LLC, Westerly, RI for the Claimant

Edward W. Murphy, Esq., Morrison Mahoney, LLP, Boston, MA for the Employer

DECISION AND ORDER DENYING COMPENSATION

I. Statement of the Case

This proceeding arises from a claim brought by Michael Gaudiano (“Gaudiano” or “Claimant”) against Electric Boat Corporation (“EBC” or “Employer”) for compensation under the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 901 et seq. (the “Act”). Pursuant to section 19(d) of the Act, I commenced a formal evidentiary hearing on April 25, 2012 in New London, Connecticut. *See* 33 U.S.C. § 919(d). The parties were represented by counsel and official documents were admitted without objection as Administrative Law Judge Exhibits (“ALJX”) 1-4. The parties’ agreed upon stipulations were admitted without objection as Joint Exhibit (“JX”) 1. At the hearing I heard testimony from the Claimant, and the parties’

documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-28 and Employer's Exhibits ("EX") 1-6. The hearing Transcript is referred to herein as "TR." On April 27, 2012, I issued a Briefing Order and left the record open until July 15, 2012 to allow for the post-trial deposition of Dr. Joseph Lifrak. The Claimant's post-hearing brief ("Cl. Br.") was filed on July 30, 2012 and the Employer's post-hearing brief ("Er. Br.") was filed on August 6, 2012. The record is now closed.

II. Stipulations and Issues Presented

The parties have stipulated to the following facts: (1) The Act applies to this case; (2) The disputed injury occurred on 8/3/2010; (3) The injury occurred in North Kingston, Rhode Island; (4) Claimant's right knee injury arose out of and in the course of his employment; (5) There was an employer/employee relationship at the time of the injuries; (6) The notice of controversion was timely filed; (7) An informal conference was conducted on September 21, 2011; (8) The average weekly wage for Claimant's left knee injury is \$1,250.00; (9) Claimant was temporarily totally disabled from January 13, 2011 to June 6, 2011 as a result of his left knee injury; and (10) Claimant was receiving compensation from EBC for his right knee at the time of the hearing. *See JX 1.* The unresolved issues to be adjudicated are (1) whether Claimant's claim is barred for failure to satisfy the section 12 notice requirement, and (2) causation for the left knee injury and resulting total knee replacement.¹ *See id.*

Upon consideration of the evidence and arguments presented I find that Claimant's claim is not barred for failure to provide timely notice as there was no prejudice to Employer and, furthermore, that Claimant has failed to meet his burden of establishing causation and is therefore not entitled to compensation under the Act. My findings of fact and conclusions of law are set out below.

III. Factual Summary

A. Employment History

Claimant Michael Gaudiano is a sixty-two year old male standing five feet, nine inches tall and weighing approximately two hundred ninety pounds. TR 51. Prior to his employment at EBC, Gaudiano worked in the concrete industry as a form setter. *Id.* Gaudiano initially began working for EBC in 1983. *Id.* Prior to his work at EBC, Gaudiano had no history of knee

¹ Employer initially listed "credits" as a disputed issue; however, Employer waived the credit issue in its post-hearing brief because the Claimant did not receive compensation for the closed period of benefits beginning January 13, 2011 through June 6, 2011. Er. Br., 2 n.1.

injuries. TR 23. Sometime between 1983 and 1984, he was transferred from the flooring department at EBC to a shipfitter position. TR 25. Claimant testified that his duties as a shipfitter were very physically demanding and monotonous. TR 26. Gaudio's work required him to crawl on his hands and knees, kneel for prolonged periods of time, climb ladders and stairs while carrying heavy equipment, squat, stand for several hours at a time, and walk lengthy distances many times each day. TR 25-34. Claimant further testified that EBC never provided him with properly fitting knee pads and failed to offer him a protective kneeling pad until 2006 or 2007. TR 29.

Gaudio testified that in performing his job duties he frequently struck his knees on different objects while setting foundations and entering and exiting the ballast tanks. TR 37. When asked by counsel whether he reported these frequent knocks and strikes, Claimant responded that he did report injuries to the dispensary, but not a minor bump or bruise. TR 38. Claimant testified that during his probationary period he reported every injury and when he later asked for a reassessment raise his dispensary reports were used against him and viewed in a negative light. *Id.* After his negative experience when requesting a reassessment raise, Gaudio "got the impression [EBC] really [does not] want you to go unless you need it" and stopped reporting minor injuries. *Id.* However, he did visit the dispensary on several occasions during his employment with EBC, most frequently to relate injuries or pain involving his right knee. *See* CX 7.

B. Claimant's Left Knee Injuries

Gaudio's first documented injury to his left knee occurred in December 2002. TR 40-41. On direct examination, Claimant testified that he had been on the floor on his hands and knees and upon standing found he was unable walk. TR 41. Claimant further testified his injury "could have" occurred at work, but he did not report an injury to the EBC dispensary. *Id.* During cross-examination at the hearing, Gaudio acknowledged that at his deposition he stated that the injury occurred while he was at home, not at work. TR 53. Dr. Franklin Mirrer, Claimant's orthopedic surgeon, in his examination report from January 2, 2003, noted that Gaudio developed spontaneous severe pain in his knee on December 12, 2002, but could not detail the exact etiology of the injury. CX 3-2. Furthermore, Gaudio's injury reports to EBC in December 2002 clearly state he reported a "not work related incident" that "occurred at home." CX 7-7.

Further examination of Gaudiano's left knee after his December 2002 injury revealed a torn meniscus. CX 3-10 to -12. On February 19, 2003, Dr. Mirrer performed a left knee arthroscopy to correct the meniscal tear. *Id.* On August 3, 2011, Gaudiano met with his second-level supervisor, Dick Phillips, for a safety meeting. TR 39. Phillips noticed that Gaudiano limped at work every day and wanted to know whether it was an old injury. TR 39. On August 16, 2011 Claimant filed a LS Form 201, "Notice of Employee's Injury or Death" ("Notice of Injury") citing an injury occurring on August 3, 2010. CX 2. Claimant also filed a LS Form 203, "Employee's Claim for Compensation" ("Claim for Compensation") on August 16, 2011, again citing the August 3, 2010 injury. CX 1. Gaudiano did not produce any EBC dispensary reports for August 2010, nor has he submitted any medical reports from August 2010 to evidence this date of injury. *See* CX 3 - CX 8. Gaudiano does submit a medical report dated September 22, 2010, indicating he was evaluated by Dr. Mirrer for intermittent left knee pain that was growing more severe. CX 3-37. In the September 22, 2010 report, Dr. Mirrer states that Gaudiano informed him the pain, though not of any specific etiology, was the result of a work injury that occurred several years before. *Id.*

In light of Gaudiano's history of prior corrective procedures, Dr. Mirrer recommended a total left knee replacement. *Id.* The total left knee replacement was subsequently performed by Dr. Joseph Noonan on January 13, 2011. CX 11-1. Dr. Noonan noted in his medical report that Gaudiano "denie[d] any specific injury to the left knee." CX 8-1.

Claimant is seeking temporary total disability compensation for his left knee injury for a closed period of time beginning January 13, 2011 and continuing through and including June 6, 2011. JX 1.

C. Claimant's Right Knee Injuries

Although Claimant's right knee injuries are not directly at issue in this claim, Gaudiano alleges those injuries have harmed his left knee. It is therefore instructive to document his history of right knee injuries. Gaudiano testified he developed "house-maid knee," a swelling of the bursa in his right knee, shortly after the start of his employment at EBC. TR 36; CX 7-1. Claimant subsequently injured his right knee on or about March 30, 1987 in a work-related incident. CX 7-2. In 1998, Dr. Vincent Yakavanis performed an arthroscopic debridement to address chronic pain in Gaudiano's right knee. CX 4-3 to -4. On or about August 31, 2005 Claimant again injured his right knee, noticing sharp pain when standing up at work. CX 7-11.

Gaudio was evaluated by Dr. Mirrer who subsequently performed a right knee arthroscopy on October 19, 2005 to repair a tear in his meniscus. CX 3-26 to -27. On or about January 20, 2012, Claimant had a total right knee replacement. EX 2-3.

IV. Analysis

A. Section 12 Notice Requirement

Section 12 of the Act requires “notice of injury or death in respect of which compensation is payable under this Act shall be given [to the employer and deputy commissioner] 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.” 33 U.S.C. § 912(a). Section 12 further provides an exception for “occupational disease which does not immediately result in a disability or death,” allowing notice to be given to the employer and deputy commissioner “within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.” *Id.*

In the absence of substantial evidence to the contrary, it is presumed under Section 20(b) that the employer has been given sufficient notice pursuant to Section 12. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). An objection for failure to timely notice must be raised before the first hearing of a claim for compensation based on the injury or the objection is waived. 33 U.S.C. § 912(d).

Employer raised failure to provide notice at the first hearing on this matter. *See* JX 1. Claimant submitted his Notice of Injury and Claim for Compensation on August 16, 2011, citing August 3, 2010 as his date of injury. CX 1; CX 2. The period from Gaudio’s injury to the Employer’s date of notice is in excess of both the thirty day period for notice of a traumatic injury and the one year period for notice of an occupational disease. *See* 33 U.S.C. § 912(a). Claimant failed to address Employer’s Section 12 arguments at hearing or in Claimant’s Post-Trial Brief. *See* TR; Cl. Br. Claimant has provided no reasonable excuse for his failure to timely notice EBC. Therefore, on the face of the documents before me, I find Gaudio failed to establish timely notice of his injury to Employer.

Failure to provide timely notice as required under Section 12(a) bars a claim under the Act unless: (1) the employer had knowledge of the injury or death; or (2) the employer has not been prejudiced by failure to give such notice. 33 U.S.C. § 912(d). Additionally, failure to give notice does not bar a claim if notice was given to a management official of the employer, and the employer was not prejudiced by claimant's failure to provide notice to the designated responsible official. *Id.* In refuting knowledge of the injury or death, an employer can establish it did not have knowledge of the claimant's injury, or of the work-relatedness of that injury. *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991). An employer demonstrates prejudice by offering substantial evidence that it was unable to effectively investigate the nature and extent of the alleged illness or to provide proper attention to address or mitigate the injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). Mere allegations of difficulty in investigating a claim are not sufficient to establish prejudice. *Williams v. Nicole Enters.*, 21 BRBS 164 (1988).

Gaudio appears to have chosen August 3, 2010 as his date of injury based on Dick Phillips' safety meeting concerning Gaudio's limping at work. *See* TR 39. Neither Claimant nor Employer provided evidence as to what management officer was the designated responsible official to receive notice of injury at EBC. As a supervisor, Phillips is a company officer sufficiently embedded in Employer's management hierarchy to imbue knowledge of Gaudio's injury to EBC. Although Phillips' knowledge of Gaudio's limp is sufficient to impart knowledge of Claimant's injuries to EBC, Gaudio told Phillips that the limp was not work-related and therefore EBC lacked the requisite knowledge of the work-relatedness of Claimant's injuries. Therefore, Claimant's failure to notice is not excused by EBC's knowledge of the injury.

EBC alleges the prejudice associated with Gaudio's failure to provide notice of his injury is severe because Claimant is now unable to recall many details of his unreported traumas and because it is not possible to investigate and verify Claimant's allegations of unreported past traumas. Er. Br. 15. EBC further claims it could have taken steps to mitigate Gaudio's harm if he had provided timely notice of his alleged injuries. Er. Br. 16. EBC has failed to provide substantial evidence of prejudice resulting from Gaudio's failure to timely notice. EBC, through Phillips, initiated safety discussions with Gaudio about his physical condition; indicating that EBC had knowledge of Gaudio's physical difficulties and limitations and the

opportunity to address them if necessary. TR 39. Furthermore, Gaudio's claim is for cumulative minor traumas which are alleged to have occurred in the day-to-day completion of his job duties. See Cl. Br. 15. EBC had knowledge of Gaudio's numerous injuries and difficulties concerning his right knee and did not make any significant changes to his job duties until required to do so by his physician. See CX 3. Thus, there is no reason to believe that EBC was prejudiced for not receiving proper notice concerning Claimant's left knee injuries.

As such, I find that Gaudio's claim is not barred for failure to provide notice to Employer within 30 days of his alleged injury because EBC failed to offer substantial evidence of prejudice.

B. Causation of Left Knee Injury and Subsequent Total Knee Replacement and Period of Disability

1. Claimant's *Prima Facie* Case

A claimant seeking workers' compensation benefits under the Act must establish that he suffered an "accidental injury . . . arising out of and in the course of employment." 33 U.S.C. § 902(2). A claimant is entitled to the presumption that his injuries are work-related if he can establish a *prima facie* case showing that he: 1) suffered some harm or pain; and 2) that an accident occurred or conditions existed at his place of employment which could have caused the harm or pain. 33 U.S.C. § 920(a); *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 53 (1st Cir. 2010). Upon establishing a *prima facie* case, the Section 20(a) presumption applies and "the claimant is not required to show a causal connection between the harm and his working conditions, but rather must show only that the harm could have been caused by his working conditions." *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004). Furthermore, the physical harm need not be the sole cause of the injury; it is sufficient for the harm to aggravate a previously existing condition. *Id.*; see *Gardner v. Dir., OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981) (holding that aggravation of claimant's symptoms from a previously existing condition was compensable under the Act); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986) ("[W]here an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable.").

Claimant contends that his severe left knee arthritis and subsequent total left knee replacement are not the result of a single traumatic injury to his left knee, but rather the result of an accumulation of minor traumas suffered to his left knee in the course of his employment at EBC. TR 20. Gaudio asserts that the physical requirements of his duties as a shipfitter; including kneeling, climbing, squatting, standing, walking, and carrying heavy equipment, were sufficient to cause or aggravate his knee condition. See TR 25-34. Claimant includes in his exhibits numerous studies and reports indicating that the type of work common to shipfitters correlates with a greater risk of developing osteoarthritis of the knee. See CX 12 – CX 25.

Claimant also documents a history of injuries to his left knee beginning on or about December 12, 2002. See CX 3. In a report dated January 2, 2003, Dr. Mirrer noted that Gaudio presented with spontaneous severe pain in his left knee of an unknown etiology, likely the result of a degenerative tear in his meniscus. CX 3-2. On February 19, 2003, Dr. Mirrer performed an arthroscopy with tear debridement of Gaudio's left knee to repair the meniscus. CX 5-3. Dr. Mirrer cleared Claimant to return to work on April 28, 2003 at full duty with no restrictions. CX 3-18. On September 22, 2010 Claimant returned to Dr. Mirrer complaining of severe pain in his left knee. CX 3-37. Upon evaluation of Claimant's left knee, Dr. Mirrer noted moderate to severe tricompartmental arthritis in both knees and "significant and extensive osteoarthritic changes in the knee relating back to work-related injuries in the past." CX 3-37. Dr. Mirrer recommended Claimant undergo a left total knee replacement. *Id.* The total left knee replacement was subsequently performed by Dr. Noonan on January 13, 2011. CX 11-1.

Given the intensely physical nature of Gaudio's work and his documented history of left knee injuries, I find that Claimant has successfully met his *prima facie* case and shown that he suffered an injury that could have been caused in the course of his employment at EBC. Claimant is entitled to the Section 20(a) presumption that his injury is work-related.

2. Employer's Rebuttal

Once a *prima facie* case is established and the Section 20(a) presumption is applied, the burden shifts to the employer to rebut the presumption with substantial evidence that the claimant's injury was not caused or aggravated by his employment. *Fields*, 599 F.3d at 53. At the rebuttal stage, the employer bears only a burden of production, not persuasion. *Rainey v. Dir., OWCP*, 517 F.3d 632, 637 (2d Cir. 2008). Evidence is "substantial" if it is the kind that a

reasonable mind might accept as adequate to support a finding that the workplace conditions did not cause the injury. *Preston*, 380 F.3d at 605 n.2; *Rainey*, 517 F.3d at 637.

Under the substantial evidence standard, an employer does not have to exclude any possibility of a causal connection to employment; it is enough that it produce medical evidence of “reasonable probabilities” demonstrating lack of causation. *Bath Iron Works Corp. v. Dir., OWCP*, 137 F.3d 673, 675 (1st Cir. 1998); see *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003) (rejecting requirement that an employer “rule out” causation or submit “unequivocal” or “specific and comprehensive” evidence to rebut the presumption and reaffirming that “the evidentiary standard for rebutting the [Section] 20(a) presumption is the minimal requirement that an employer submit only ‘substantial evidence to contrary’”). An employer may sufficiently rebut the presumption by introducing testimony of a physician who unequivocally states with a reasonable degree of medical certainty that the harm suffered by the claimant is not related to his employment or working conditions. *O’Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000). When an employer offers sufficient evidence to rebut the presumption, only then is the presumption overcome. *Conoco, Inc. v. Dir., OWCP*, 194 F.3d 684, 690 (5th Cir. 1999) (citing *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986)).

EBC does not contest that Gaudio suffered an injury to his left knee in December of 2002, and record of such an injury can be found in EBC medical dispensary reports. See CX 7-7. However, EBC asserts that Gaudio’s December 2002 left knee injury did not occur in the course of his employment, and was therefore not work-related. TR 53. EBC presents medical reports from independent medical examiner Dr. Joseph Lifrak, finding to a reasonable degree of medical certainty that Claimant’s “left knee osteoarthritis is not related to any work related injury and therefore, is not a work-related problem and the resultant total knee replacement is also not work related.” EX 1 at 1. At his deposition, Dr. Lifrak testified that

Mr. Gaudio clearly has risk factors for a knee arthritis. He is obese, he has a varus alignment of his knee which means he is bowlegged, he had a meniscus tear and part of his meniscus taken out in the surgery by Dr. Mirrer in 2003 from an injury that clearly was not work related [I]n my opinion if Mr. Gaudio worked at a desk job his whole life as a secretary and had the same history otherwise, he would have in my opinion had arthritis in his knee.

EX 7 at 18-19.

EBC, through the testimony and reports of Dr. Lifrak, has provided substantial evidence demonstrating a lack of causation and thus successfully rebuts Claimant's Section 20(a) presumption of work-relatedness. As such, I must now weigh the evidence offered by the two parties to determine whether Claimant has sufficiently borne his burden of proving, by a preponderance of the evidence that his left knee arthritis and subsequent total left knee replacement arose out of the conditions of his employment.

3. Weighing the Evidence

When the Section 20(a) presumption is rebutted, there is no longer a presumption of work-relatedness and I must weigh all of the evidence as a whole and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Rainey*, 517 F.3d at 634; *Sprague v. Dir.*, *OWCP*, 688 F.2d 862, 865 (1st Cir. 1982); *Volpe v. Ne. Marine Terminals*, 671 F.2d 697, 700 (2d Cir. 1982); *Bolden*, BRB No. 01-0693, PDF at 4; *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18, 20 (1995). Claimant ultimately bears the burden of persuasion in establishing causation based upon the record as a whole, and he meets this burden only if a preponderance of the evidence establishes the requisite causal connection. *See Dir.*, *OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-80 (1994); *Rainey*, 517 F.3d at 634.

In evaluating the evidence, the administrative law judge is entitled to weigh the medical evidence and draw inferences there from, but the judge is not bound to accept the opinion or theory of any particular medical expert. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his or her judgment. *Poole v. Nat'l Steel & Shipbuilding Co.*, 11 BRBS 390, 395-96 (1979); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

Claimant contends his left knee arthritis and subsequent total left knee replacement was the direct result of cumulative injuries brought about by his daily work routine at EBC. TR 20. However, I find that Claimant fails to establish by a preponderance of the evidence that his left knee arthritis and subsequent left knee replacement were causally related to his work at EBC.

Gaudio's first documented injury to his left knee occurred on January 12, 2002. TR 40-41. Claimant was on his hands and knees and upon standing found he was unable to walk. TR 41. Gaudio testified during direct examination that his injury "may" have occurred at

work, but that he did not file any report with EBC. *Id.* However, during cross-examination Gaudiano admitted that during his deposition he described the injury as occurring at home. TR 53. Claimant did in fact report this left knee injury to the EBC medical dispensary, and a report from the dispensary dated January 2, 2003 indicates that Claimant complained of a “not work related incident [that] occurred at home” causing “stiffness in left knee and progressive pain.” CX 7-7. During his initial examination of Gaudiano’s left knee on January 2, 2003, Dr. Mirrer noted the injury was of an unknown etiology. CX 3-2. A subsequent report from the EBC medical dispensary on April 28, 2003, indicates that Claimant was out of work due to a left knee arthroscopy. CX 7-8. The report states the arthroscopy was “not related to job function” but “[r]ather, a chronic condition which worsened over time.” *Id.* Given Claimant’s inconsistency regarding the etiology of the December 2002 left knee injury and the clarity of EBC’s medical dispensary reports, I find the December 2002 left knee injury was not work-related.

Claimant does not rely solely on the December 2002 left knee injury as causative of his left knee condition and resultant total knee replacement. *See* TR 20. Claimant alleges the type of the work required of a shipfitter, in itself, was causative of his left knee injury. *Id.* Gaudiano describes his work at EBC as being “a heavy physical type” of labor. TR 26. Gaudiano testified that on any given day he would be required to kneel for extended periods of time, frequently climb up and down ladders while carrying heavy equipment, crawl on his hands and knees, work in confined areas, squat, walk, and stand for several hours at a time. TR 25-34. Gaudiano also testified he would strike some part of his body “every time” he went in and out of the ballast tanks. TR 37. Despite the physical nature of his work, Gaudiano claims EBC never provided him with properly fitting knee pads and it was not until 2006 or 2007 that he received a protective kneeling pad. TR 29.

Claimant provides no less than ten separate studies to support his claim that the daily work required of a shipfitter caused a cumulative injury to his left knee. *See* CX 13 – CX 20; CX 23, CX 25 – CX 26. Claimant’s reliance on these studies alone, without any supporting authority to prove causation, is misplaced for several reasons. First, the studies are not presented with any expert authority to assist in their interpretation and authentication. Without an expert to detail the methodology and validity of these studies I can give them little weight in this matter. I am persuaded by Employer’s independent medical examiner, Dr. Lifrak, that the studies are not of “Level 1” quality and thus do not provide sufficiently definitive and reliable data. *See* EX 7-

37. I also agree with Dr. Lifrak that many of the studies appear methodologically unsound and produce inconsistent and flawed results. *See* EX 7-29 through -34.

Second, the studies, on their own, make no claim that Gaudiano's specific left knee arthritis and subsequent total knee replacement were, in fact, caused or aggravated by the work he performed at EBC. Viewed in the light most favorable, the studies at best indicate that individuals in a wide variety of professions requiring kneeling, squatting, crouching, lifting, standing and walking are at a higher risk of arthritis development than individuals not in such professions; however correlation is no substitute for causation. Gaudiano has offered no evidence to show the alleged increased risk for osteoarthritis faced by shipfitters in general has in fact played a contributing factor to his development of osteoarthritis in particular.

Lastly, Claimant's reliance on these studies is misplaced because they lend equally strong, if not greater support to EBC's claim that Gaudiano's knee injuries are the result of his own physical predisposition to osteoarthritis rather than the work he performed at EBC. Several of Claimant's studies point to nonoccupational factors likely to increase Gaudiano's risk for osteoarthritis development and progression. *See* CX 14 – CX 18. Claimant's studies indicate secondary osteoarthritis may be the result of "a normal concentration of force across an abnormal joint" such as a varus deformity, CX 14-9, and further, obesity, knee alignment, and acute joint injury and joint deformity are all local biomechanical risk factors. CX 14-12. Obesity is "not merely the consequence of" osteoarthritis, but it is a "risk factor" for development of the disease. CX 15-5.

Other "[e]stablished risk factors [for osteoarthritis] include older age, female sex, evidence of [osteoarthritis] in other joints, obesity, and previous injury or surgery of the knee." CX 16-1. Nonoccupational risk factors for osteoarthritis include age, obesity, previous trauma, previous meniscectomy or meniscus injury. CX 17-5. Additionally, one study found "men who had to stand a lot at work had a 60% lower risk of knee [osteoarthritis] than the men in sedentary work," and "lifting shows no association" with the risk of osteoarthritis development. CX 18-3. Furthermore, Dr. Lifrak's deposition testimony supports the relevancy of these nonoccupational factors to Gaudiano's injury: Obesity, female sex, prior trauma, leg alignment, and prior surgeries to the knee are all risk factors for osteoarthritis. EX 7-8. Furthermore, Dr. Lifrak specifically linked Gaudiano's nonoccupational risk factors to the development of his osteoarthritis. EX 7-17 (finding that there were "multiple factors" leading to Claimant's

osteoarthritis, “including his weight and his alignment of his leg, but having part of his meniscus taken out certainly contributed”).

Claimant also gives great weight to Dr. Mirrer’s letter to Attorney Schavone confirming that Gaudiano’s “work at Electric Boat for the last 30 years did contribute to his arthritis development.” CX 3-40. Dr. Mirrer also testified that Gaudiano’s work at EBC “certainly would have aggravated [his] condition, or at least made the condition painful.” CX 9-22. However, I give no weight to Dr. Mirrer’s correspondence to Attorney Schavone because even assuming that Dr. Mirrer is in fact referring to Claimant’s knees, there is ambiguity as to whether Dr. Mirrer was referring to Gaudiano’s left or right knee; such a distinction is crucial. *See* CX 3-40. The letter sent by Attorney Schavone dated September 29, 2009 is not provided for context and Dr. Mirrer may be referring to Gaudiano’s right knee osteoarthritis which is not in dispute. *See* JX-1. As such, I must disregard Dr. Mirrer’s letter.

Furthermore, Dr. Mirrer’s opinion, while worthy of deference in regards to the diagnosis and treatment of Claimant’s injury, is of little value regarding the etiology of Claimant’s knee injuries. Dr. Mirrer’s opinion as to causation is mere speculation. Dr. Mirrer’s reports from 2003 indicate Claimant’s left knee injury presented with no conclusive etiology. CX 3-2. Although Dr. Mirrer continued to conduct examinations and surgical procedures on Claimant’s right knee several times after Gaudiano’s 2002 left knee injury, he did not see Gaudiano for left knee pain again until 2010. *See* CX 3. On September 22, 2010 Gaudiano saw Dr. Mirrer complaining of left knee pain that had no specific etiology but which Gaudiano indicated was the result of a work injury that occurred several years before. CX 3-37. Gaudiano has offered no evidence to this Court demonstrating that he ever suffered a particular and identifiable traumatic work-related injury to his left knee. Gaudiano has only documented his December 2002 injury, which I have determined was not work-related. Gaudiano did, however, suffer identifiable, work-related injuries to his right knee that were treated by Dr. Mirrer. As such, I find it likely that Dr. Mirrer is convoluting Claimant’s history of work-related injuries to his right knee with Claimant’s left knee injury history, and as such can give little credence to his definitive stance on causation.

Additionally, Claimant cannot rely on Dr. Mirrer’s testimony to support a cumulative injury because Dr. Mirrer does not indicate with any specificity why Gaudiano’s work, absent an identifiable severe trauma, would cause or aggravate his left knee injury. In his deposition, Dr.

Mirrer stated that he's "not really an expert to give you a didactic opinion of all the ideologies of osteoarthritis" and that he was only presenting a "brief background." CX 9-29. Dr. Mirrer did not reference the studies and observations Claimant entered into evidence regarding the impact of kneeling, squatting, standing, walking, crawling, and lifting on the development of osteoarthritis. See CX 9. Furthermore, when asked whether such activities were likely to cause, aggravate, or accelerate the osteoarthritic process in the knees, Dr. Mirrer replied only that "they certainly wouldn't help out the situation." CX 9-21.

Given Dr. Mirrer's unreliability as to the specific causation of Gaudiano's left knee injury and general vagueness and noncommittal stance on the occupational factors alleged to increase osteoarthritis risk, I find little support for Claimant's assertion that the nature of his work at EBC resulted in a cumulative traumatic injury to his left knee.

In contrast to Dr. Mirrer, Dr. Lifrak, an American Board of Orthopaedic Surgery certified orthopedist and graduate of the Brown University Program of Medicine, after reviewing Gaudiano's medical history and performing his own examination, stated with a reasonable degree of medical certainty that Claimant's knee injuries were not the result of his employment at EBC. EX 1-1. Dr. Lifrak identified several osteoarthritis risk factors that Claimant presents. Dr. Lifrak indicated Claimant's obesity, varus deformity, prior left knee trauma, and prior left knee surgery all contributed to Claimant's osteoarthritis development and progression. EX 7-17. Dr. Lifrak further asserted Claimant would still have developed osteoarthritis even if he had performed a sedentary job all of his life. EX 7-19. Dr. Lifrak stated his experience in treating osteoarthritis patients led him to believe that an arthritic injury to one knee did not necessarily cause or aggravate the development of osteoarthritis in the other knee. EX 7-21.

Lastly, Gaudiano looks to the decision in *Lupinacci v. Electric Boat Corp.*, ALJ No. 2010-LHC-02112 (Dec. 6, 2011), as being dispositive and on point in this matter. Claimant's reliance on *Lupinacci* is misplaced for the same weaknesses examined above. In *Lupinacci*, Administrative Law Judge Calianos found the claimant's medical examiner to be reliable and persuasive regarding the connection between the claimant's duties at EBC and his development of osteoarthritis. Specifically, Judge Calianos found "Dr. Willets laid out a credible and comprehensive summary of the case and provided a detailed analysis of the effect of Lupinacci's work activities on his development of knee osteoarthritis." *Lupinacci*, 2010-LHC-02112, PDF at 9. No such analysis was performed by Claimant in this case. Gaudiano merely submitted

several studies alleging correlation between osteoarthritis and occupations involving kneeling, squatting, and crawling. Dr. Mirrer, unlike Dr. Willets in *Lupinacci*, did not provide any analysis of Gaudiano's work activities and provided no credible connection between Claimant's job duties and osteoarthritis development. Though both Gaudiano and the claimant in *Lupinacci* suffered from osteoarthritis of the knees, the resemblance of their respective cases goes no further.

For all the reasons above, I find that Gaudiano's left knee arthritis and subsequent left knee replacement were not work-related, and therefore, EBC is not responsible for compensating Claimant during the period of total temporary disability following his left knee replacement. Based on the foregoing, Gaudiano's claim against EBC is **DISMISSED**².

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

² Attorney Proctor prematurely filed his attorney fee petition on August 6, 2012. Given my decision in this matter that petition is denied as moot.