U.S. Department of Labor

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Issue Date: 14 November 2005

Case No.: 2005-LHC-01405

OWCP No: 02-138387

In the Matter of

ALEJANDRO SIBAJA ESPINOZA
Claimant

v.

EAST COAST CRANE COMPANY
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.
Carrier

Appearances:

Jorden N. Pedersen, Jr., Esquire
For Claimant

Christopher J. Field, Esquire
For Employer and Carrier

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("The Act"), 33 U.S.C. § 901 *et seq.*

This matter was transferred to the Office of Administrative Law Judges by letter dated April 8, 2005, and was assigned to me on May 13. The hearing was held on July 14, 2005, in New York, New York, at which time all parties were given the opportunity to present evidence and oral argument.[1] Following the hearing, the record was left open for sixty days for the

[1] The transcript of the hearing consists of 72 pages and will be cited as "Tr. at --."

submission of additional evidence. Upon Claimant's request for additional time, the deadline was extended until September 30, and post-trial briefs were to be filed by October 15.[2] This decision is rendered after careful consideration of the complete record,[3] the arguments of the parties and the applicable law. .

STIPULATIONS AND ISSUES

The parties stipulate and I find that:

1. The parties are subject to the Act.

2. An employee/employer relationship existed on September 2, 2004, the date of the alleged injury.

3. The average weekly wage is $1,000.00.[4]

4. Claimant was paid temporary total disability from November 11, 2004 until December 13, 2004 for five weeks, at a rate of $261.79 for a total of $1,308.95.

(Tr. at 5).

Claimant seeks temporary total disability benefits commencing November 11, 2004. However, the parties have presented for my resolution only the very narrow issue of whether a workplace accident actually occurred. (Tr. at 6).[5]

SUMMARY OF THE EVIDENCE

Claimant was the only witness to testify at the formal hearing. The medical evidence submitted by Claimant includes: reports of Dr. Warren Bleiweiss (CX-2), an MRI report (CX-3), the report of Dr. Mark Pillon (CX-7), progress notes of Dr. Steven Nehmer (CX-9), the report of Dr. Mitchell Steinway (CX-15), the opinion of Dr. Andrew Merola (CX-4, CX-6, CX-8) and records of Overlook Hospital (CX-14). Claimant also offered Form LS-203 into evidence (CX-1), as well as the correspondence between Lamorte Burns & Company and Claimant's treating physician (CX-5, CX-10, CX-11). The statement of Mr. David Wamsley was submitted into

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[2] These briefs were received on October 17, 2005. Claimant's brief will be cited as "CB at --." Employer's brief will be cited as "EB at --."

[3] At the hearing, Claimant submitted 16 exhibits. They were accepted into evidence and will be cited as "CX-1" through "CX-16." Employer submitted nine exhibits, which were accepted into evidence and will be cited as "EX-1" through "EX-9."

[4] The parties indicated at the hearing in this matter that they would attempt to resolve the issue of average weekly wage and entered into this stipulation post-hearing.

[5] Employer's counsel stated at the hearing, "if Your Honor concludes that there was an accident, I think it is clear that we would be forced to authorize medical treatment, and pay the comp[ensation]." (Tr. at 7).

evidence by Claimant (CX-13) as well as Claimant's earning statements for 2003 and 2004 (CX-16).

Employer offered forms LS-202, 206, 207 and 208 into evidence (EX-1 through EX-6). In addition, Employer submitted the report of Dr. Michael Bercik (EX-7), the records associated with Claimant's pending New Jersey claim (EX-8) and the transcript of Claimant's deposition testimony (EX-9). Following the hearing, Employer offered the deposition testimony of James Sake (EX-10) and the time sheet of Mr. David Wamsley for the pay period beginning August 30, 2004 (EX-11).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

Claimant's Testimony

At the hearing, Claimant testified that he was born in Costa Rica and moved to the United States after the fifth grade. (Tr. at 11). He received vocational training to be an ironworker and is a union apprentice. (Tr. at 12). Claimant received his work assignments through his union hall. In August of 2004, he was assigned to work for Employer, where he did a variety of jobs, including grinding, gunning up,[6] lifting and climbing. (Tr. at 15-17).

Claimant testified that his injury occurred while working on a crane. According to the testimony, the boom had just been raised. While working with Dave Wamsley, Claimant went inside to look for bolts. It was dark, and Claimant fell when he went to step onto metal grating, which unbeknownst to him, had been removed. When he fell, he hit his back on a thick metal rib that would usually hold the grate and hit his shoulder on the steel wall. (Tr. at 20-21). Claimant believes electricians who were working in the area likely removed the grates in order to install cables. (Tr. at 22). According to Claimant's testimony, Mr. Wamsley was behind him when Claimant fell. (Tr. at 22).

According to Claimant's testimony, following the accident, he said he was fine because he was only an apprentice and did not want to appear weak. (Tr. at 24-25). He reported the accident only because Mr. Wamsley convinced him to. He reported it the same day to his shop steward, Jimmy Sake. He continued working and did not see a doctor right away. (Tr. at 25). Claimant testified that he was very bruised and approximately a week later, when the soreness went away, he began to feel a pinch in his lower back. (Tr. at 25-26). He took over-the-counter pain relievers but the pain kept getting worse and began radiating down his right leg.

When asked whether he continued performing his normal duties, which consisted of hard labor, Claimant replied:

[6] According to Claimant, "gunning up" involves placing a hydraulic gun, weighing up to 100 pounds, on top of a bolt to tighten it to a specific pressure. (Tr. at 16).

> I kept doing the work until I think somebody, you know, looked and said this guy is really hurting, and then they gave me the lighter duty. But for the few weeks I was doing the same type of job.

(Tr. at 26). According to Claimant, he was limping, which would have allowed others to see he was hurt. (Tr. at 26).

When his pain finally prevented him from doing his job, he went to see a doctor. (Tr. at 27). He eventually saw Dr. Bleiweiss on October 28, 2004. An MRI was performed. Claimant then saw Dr. Bercik at the request of the Carrier. Claimant was also treated by Dr. Nehmer. Dr. Nehmer referred Claimant to Dr. Pillon for epidural injections. (Tr. at 28-29).

At the time of the hearing, Claimant's chief complaint was pain, numbness and dysfunction of his right leg causing him problems when he walks. He also complained of muscle spasms and pain across his back. (Tr. at 33).

As to a prior history of back pain, Claimant testified that he was involved in a work-related accident on February 26, 2003, in which he injured his lower back. He continued working after that accident but stopped working on July 28, 2003, when the problems worsened. (Tr. at 35-36). An MRI performed after that accident showed a herniated disc in Claimant's lower back. However, according to Claimant's testimony, by the time he began working for Employer in August of 2004, he was not having any problems with his back. (Tr. at 37).

As to the date the accident occurred, Claimant was asked at the hearing if it occurred on September 2. He replied:

> It sounds right. As I said, I did, I told everybody what happened but the official written report that was given to me by the Department of Labor by my steward was not done that same day the accident occurred. So to the best of my knowledge, I looked at my pay stubs and figured out the date that happened.

(Tr. at 19).

On cross-examination, Claimant testified that while working for Employer he had the least amount of seniority of all of the workers, which made Claimant feel added pressure. (Tr. at 40). Claimant admitted that he worked more overtime than ever between August and November of 2004. (Tr. at 43). He also classified the job that he did for employer as busy and testified that he was working hard while assigned to that job site. (Tr. at 43).

Claimant was asked whether he could recall the nature of the duties he performed or whether he was working regular or light duty on the days immediately following his October 28 visit with Dr. Bleiweiss, and responded in the negative to both inquiries. However, he then testified as follows:

Q. Do you have any recollection of working light duty during that timeframe?
A. Yes
Q. What did you do in your light-duty job?
A. We had to move the, we were working like in front of the cranes on the sea, and there was another job going on I was working too, and we had to get out of there. We had to move our trailers. We had to move the containers where we, you know, where we ate and we stored our stuff. So we had to move all that stuff over there to a new side.

(Tr. at 47). Claimant also testified that he was picking up garbage using a forklift. According to his own testimony, Claimant never went back to his regular duties after beginning to perform these lighter jobs. (Tr. at 48). However, he was never specifically told that he was being removed from the gunning up job. (Tr. at 50).

Regarding Mr. Wamsley, Claimant testified that he was a substitute worker who would come in for a day or two at a time. (Tr. at 49). Mr. Wamsley was present on the date Claimant fell and he witnessed the fall, according to Claimant. (Tr. at 55). He did not have a chance before the hearing to read Mr. Wamsley's statement, but when it was read to him, Claimant admitted that Mr. Wamsley's account conflicted with his own. (Tr. at 61-62). Claimant also testified that he would not be surprised if Mr. Wamsley did not work on September 2, 2004, because Claimant is not even sure that the accident occurred on September 2, 2004, as that was just his best estimate of when the accident occurred. (Tr. at 65).

Claimant was never involved in a motor vehicle accident while working for Employer. (Tr. at 66). When Claimant was asked in general about a motor vehicle accident that occurred in September of 2004, his response was "I don't know what you're talking about." (Tr. at 66-67). Claimant later testified that he did not have an automobile accident in September of 2004, but he did wake up one morning in August to find his windshield broken. (Tr. at 68).

Medical Reports of Dr. Bleiweiss

Dr. Bleiweiss examined Claimant in October of 2004, at which time he described Claimant's history as "unremarkable," but notes Claimant's involvement in a car accident in 1999 which he was not injured in. (CX-2). Dr. Bleiweiss saw Claimant again on November 11, 2004. At that time, Dr. Bleiweiss diagnosed Claimant with a herniated disc at the L5-S1 level and myofascial pain. He recommended a series of 3 epidural steroid injections, prescribed Flexoril and recommended that Claimant remain out of work approximately 4 weeks. (CX-2).

MRI Report

According to the MRI report, the MRI showed "degenerative disc changes at L5-S1" and "Small right posterior paracentral disc herniation at L5-S1 which appears to touch and displace the forming right S1 nerve root within the spinal canal." (CX-3).

Medical Report of Dr. Mark Pillon

Dr. Pillon saw Claimant on February 7, 2005, at which time he recalled previously treating Claimant for lumbar radiculopathy at L5-S1, which Claimant stated had been symptom free prior to September of 2004. Dr. Pillon reported that he did not notice any abnormalities in Claimant's gait. He did however note that Claimant experienced pain with right straight leg raising test and his strength appeared to be diminished in the right leg when compared to the left. Dr. Pillon opined that Claimant's pain was most likely due to lumbosacral radiculopathy and recommended treatment with epidural steroid injections. (CX-7).

Medical Report of Dr. Steven Nehmer

Dr. Nehmer saw Claimant on December 14, 2004, at which time Claimant complained of mid and low back pain. Dr. Nehmer noted a history of L5-S1 herniation two years prior, which had improved with epidurals and therapy. Dr. Nehmer noted tenderness in the right sciatic notch, limited range of motion in Claimant's back and positive straight leg raising test. He recommended lumbar epidural injections and estimated that Claimant would be able to return to work on January 24, 2005. Dr. Nehmer examined Claimant again on December 22, 2004, at which time Claimant complained of upper back pain. Dr. Nehmer noted tenderness in the dorsal area. He prescribed Flexeril and Tylenol with codeine. (CX-9).

Medical Report of Dr. Mitchell Steinway

Dr. Steinway's report indicates that Claimant reported being in a motor vehicle accident in 1999, however, Claimant told Dr. Steinway that he was not injured in that accident and did not receive any medical treatment as a result of it. Dr. Steinway's report also indicates that Claimant was involved in a work-related accident in February of 2003, resulting in a herniated disc at the L5-S1 level. Claimant reported receiving three epidural injections and subsequently reaching full recovery in his leg and a minimum of 95 percent recovery in his back.

Dr. Steinway opined that the alleged accident aggravated and accelerated the disc herniation sustained as a result of the February 2003 accident. He also opined that Claimant was in need of additional treatment including an EMG/NCV study of both legs, and eventually could require surgery. (CX-15).

Opinion of Dr. Andrew Merola

According to a January 10, 2005 letter from the Office of Workers' Compensation Programs ("OWCP"), Dr. Merola's opinion was that Claimant was unable to return to work and was in need of additional medical treatment. (CX-4). On February 2, 2005, another letter was sent from OWCP to the Carrier stating that it was recommended that compensation continue being paid to Claimant and that Claimant be authorized to receive the indicated medical treatment. Attached to this letter is Dr. Merola's report. In his report, Dr. Merola recommended that Claimant undergo epidural steroid injections to the lower back followed by a physical therapy program. He also noted a prior history of low back pain, which occurred 2 years prior. (CX-6). A February 10, 2005 letter from OWCP to the Carrier states that according to Dr.

Merola's handwritten notes, Claimant was totally disabled for an approximate period of 3 months. (CX-8).

Medical Reports of Overlook Hospital

The records of Overlook Hospital[7] indicate that Claimant went to the emergency room at approximately 3 a.m. on April 29, 2005. (CX-14). These records show that Claimant indicated that he has a herniated disc and was on disability. However, several pages later, these records indicate that Claimant has a herniated disc post-motor vehicle accident of September, 2004. (CX-14). In addition, a member of the hospital's staff made the following notation in Claimant's records, "patient lying on stretcher quietly reading the Bible. Upon my arrival started to writhe with pain." (CX-14).

LS-203 Employee's Claim for Compensation

The LS-203, which is signed by Claimant and dated December 23, 2004, states the date of injury was September 2, 2004. It describes the accident in the following manner, "While working inside the boom, installing new crane, stepped in hole." Claimant reported injuries to the arm, upper and lower back and legs on this form. (CX-1).

Correspondence between Lamorte Burns and Dr. Nehmer

On January 20, 2005, Lamorte Burns & Company ("Lamorte"), the authorized representative of Employer, sent a memorandum to Dr. Nehmer, authorizing Claimant "to undergo lumbar epidural steroid injections." (CX-5). On February 16, 2005, Lamorte sent another memorandum to Dr. Nehmer, which authorized Claimant to have a third epidural steroid injection. (CX-10). However, the very next day, Lamorte sent a final memorandum which stated, "effective immediately, no further treatment is authorized. Please note that we will be paying for the first and second lumbar epidurals, but the third epidural is not authorized." (CX-11).

Statement of David Wamsley

Mr. Wamsley prepared a written statement on April 8, 2005. In it, he stated that he is an ironworker and was working for Employer in early September of 2005 assembling cranes. According to Mr. Wamsley's statement, approximately one week after he began this job for Employer, he and Claimant were working in the leg of the crane. Since there were not grates to walk on, the men were forced to walk on metal ribs. He was standing next to Claimant when Claimant stepped on a rib and suddenly fell. Claimant complained of back pain following the fall but continued to work, according to Mr. Wamsley's statement. (CX-13).

[7] Only portions of these records are legible.

U.S. Department of Labor Forms

On Form LS-202, submitted into evidence by Employer, Claimant described the alleged accident in the following way:

> I was working inside one of the porter beams on a ZPMC crane tighting [sic] bolts. I was just busy working and the electricians were working close to us, I turned around and thinking there was metal [grating] on the floor like I saw a few moments ago I put my foot down and as I [did] there wasn't any metal [grating]. It was too late I lost balance and [fell]. The electricians had to move a piece of the metal [grating] and I didn't notice.

(EX-1).

Report of Dr. Michael Bercik

According to Dr. Bercik's November 19, 2004 report, Claimant stated that he was injured at work on September 2, 2004, when he fell inside a crane, landing on a metal strut. According to this report, Claimant denied any previous injury to his neck or lower back. Dr. Bercik reported that his physical exam revealed no deformity or swelling, no muscle spasm and no decrease in the range of motion of the lumbosacral spine. Dr. Bercik did note an uneven gait and "subjective tenderness on palpation of the paravertebral musculature." (EX-7). Dr. Bercik reviewed the MRI films and did not detect any disc herniations, rather he noted "disc degeneration with bulging at L5-S1."

According to Dr. Bercik's report, there were some physical findings to correlate with Claimant's complaints of the work injury of September 2, 2004. He recommended the steroid injections be stopped and replaced by physical therapy, medication and visits to an orthopedic surgeon. Dr. Bercik also opined that the lack of treatment between the date of the injury and October 28, 2004 "raises a serious question about the causal relationship between an injury on 9/2/04 and the current condition of the patient." (EX-7). Dr. Bercik also opined that "there are a number of inconsistencies between the symptoms, examination findings and the MRI study abnormalities." (EX-7). None the less, Dr. Bercik opined that medical treatment was appropriate, although he found Claimant was able to return to work without restriction. (EX-7).

Deposition Testimony of Claimant

In relevant part, Claimant's deposition testimony stated that he did not know Mr. Wamsley prior to working with him for Employer, although they were members of the same union. (EX-9 at 16-17).

Regarding how the accident occurred, Claimant testified that electricians had to remove the metal grates to set up cables. He also indicated that prior to falling, he walked past the site of his eventual injury and the metal grates were in place. However, after walking to the other side, to legs 1 and 2, looking for bolts, he proceeded to the boom. According to Claimant's

testimony, he approached slowly, touching the wall because there was no light in the boom. (EX-9 at 25).

The following exchange took place between Employer's counsel and Claimant:

> Q. How much time elapsed between when you were in there initially and when you had come back from looking for bolts?
> A. I'd say maybe two to three minutes. I went in the other side, didn't, didn't see them because that was the legs that, the day before that I had been in. So I came back where I first saw the electricians and then, you know, I had a few bolts on my bag on top of being a hundred pound tool belt, and I just, I just, I went to step, I just fell.

(EX-9 at 25-26).

Regarding being assigned a lighter duty position, Claimant testified that although he thought he was intentionally given lighter duties, he did not discuss the change with anyone and did not know who made the decision. The following exchange took place:

> Q. How did it happen? I mean you showed up one day?
> A. One day they said, "You go on the ground."
> Q. And you don't know how or why?
> A. No.

(EX-9 at 44-45).

Deposition Testimony of Mr. Sake

The deposition testimony of James Sake, the shop steward, was introduced into evidence by Employer. Mr. Sake testified that the responsibilities of a shop steward include keeping track of man-hours, ensuring the union rules are followed and ensuring safety. (EX-10 at 5). When an accident occurs on the job, the shop steward takes the accident report. (EX-10 at 5-6).

Mr. Sake recalled Claimant coming to him at lunch one day and advising him "that he stepped into a hole and hit his hip." (EX-10 at 7-8). Mr. Sake was unable to recall the date of this oral report and testified further that when asked whether he wanted to file an accident report, Claimant said he would wait to see how he felt. According to Mr. Sake, it was a week later when Claimant came back and asked to file the accident report. (EX-10 at 8). Mr. Sake testified that on the day that Claimant allegedly fell, he had a slight limp and was holding his hip. (EX-10 at 10).

Mr. Sake testified that Claimant was never given light-duty work and that Employer does not have light-duty work. He admitted, however, that Claimant, as an apprentice, "did some apprentice things," including locking up the trailer and getting ice for the workers' Gatorade. (EX-10 at 11). He also admitted that although the job at Employer's work site did not end until

November 5, the bolting up was finished a week or longer before that date. (EX-10 at 11-12). Those responsible for bolting up, including Claimant, were moved to other jobs before being laid off on November 6. (EX-10 at 13). According to Mr. Sake's testimony, these jobs were on the ground, and from that point, the bolting-up gang remained working on the ground until they were laid off. (EX-10 at 15). Mr. Sake recalled Claimant working a variety of jobs during this period and specifically remembered Claimant working with a welder one day and cleaning up the job site on another day. (EX-10 at 15). Later, Mr. Sake conceded that there may be some light activities or light jobs that are done in conjunction with ironworking. (EX-10 at 20).

When asked whether he ever noticed a difference in Claimant's tendencies when he knew someone was watching him opposed to when he did not think anyone was looking, Mr. Sake responded that Claimant once began to limp after noticing that Mr. Sake was looking at him. (EX-10 at 14).

Payroll Records

Employer submitted payroll records kept for Mr. Wamsley, indicating that Mr. Wamsley did not work for Employer on Thursday, September 2, 2004. Mr. Wamsley did work on Friday and Saturday, September 3 and 4. (EX-11).

B. Discussion

In order to establish a *prima facie* case, Claimant must establish that he suffered a physical harm and that conditions existed at work which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once the *prima facie* case has been established, Claimant is entitled to the rebuttable presumption that the injury was caused by Claimant's employment. 33 U.S.C. §920(a).

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment. *See* 33 U.S.C. §902(2). Also, if an employment injury aggravates, exacerbates, accelerates, contributes to or combines with a previous infirmity, disease, or underlying condition, the resultant disability is compensable. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir., 1968); *Independent Stevedore Company v. O'Leary*, 357 F.2d 812; *Tasinski v. ITO Corporation of Baltimore*, 7 BRBS 1012, BRB Nos. 77-27/A (1978); *Jacobs v. WMATA*, 7 BRBS 421 BRB No. 77-116 (1978); *Corcoran v. Preferred Stone Setting*, 12 BRBS 201, BRB No. 78-528 (1980).

Employer admits that Claimant suffers a lower back problem and that the injury has thus been established. (EB at 5). As discussed above then, the only issue presented for my resolution is the factual issue of whether a workplace accident occurred in September of 2004. I find that it did, and that the § 20(a) presumption is invoked despite Employer's argument to the contrary. Employer argues that although Claimant has offered evidence to support his allegation that an

accident did occur at work, Claimant's story is not believable and the evidence therefore fails to establish a prima facie case.[8] (EB at 6).

Employer makes several arguments, which I will address one at a time, as to why I should not credit Claimant's account of the alleged accident.

Claimant was involved in an auto accident in September of 2004.

Employer alleges that "After many months of 'successfully' burying the truth, a late night visit to an emergency room found Claimant sufficiently off-guard such that the true cause of his lower back problems emerged." (EB at 9). However, I note that although the hospital records do in one place link Claimant's herniated disc to a September, 2004 motor vehicle accident, in another place these same records seem to link the herniated disc with the fact that Claimant was "on disability." In addition, I note that this is not the only mention of an automobile accident in the record. Claimant reported to his treating physicians that he was involved in an automobile accident in 1999, but was not injured as a result of that accident. Also, when asked at the formal hearing in this matter, Claimant specifically denied any involvement in a motor vehicle accident in September of 2004, but did credibly state that he woke up one day in August of 2004 to find his windshield broken.

The single mention of this automobile accident does not cause me to doubt that Claimant was injured while working for Employer in the manner he alleges. This reference to such automobile accident conflicts with the other evidence of record but was specifically and credibly denied by Claimant.

Claimant's inability to provide a consistent account of the accident.

Employer alleges that Claimant's account of the accident changed several times and therefore should be regarded as deceitful or fabricated. (EB at 10). Specifically, Employer notes inconsistencies regarding the electricians, the approximate time of the fall, the eyewitness and the manner in which Claimant entered the boom. (EB at 10-12).

Regarding the electricians, Employer argues that "the LS-202 implies that Claimant was working right next to the electrician whereas Claimant's testimony at deposition and trial suggest that the electricians were in an entirely different area." (EB at 12). The LS-202 states "the electricians were working close to us." (EX-1). Claimant's deposition testimony indicated that he was in the areas where he fell just minutes before, and the gratings were still in place at that time. Likewise, Claimant's testimony at the hearing again indicated that the last time he had been in the part of the boom where he fell, the electricians had not yet removed the metal grating.

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[8] Employer argues that the § 20(a) presumption should not attach since "the administrative law judge retains sufficient discretionary authority as the finder-of fact to deny a claim even in the presence of superficially-adequate prima facie allegations if he does not credit those allegations as worthy of belief." Employer cites *Bolden v. GATX Terminals Corp.*, 30 BRBS 71 (1996) in support of this argument.

This testimony suggests to me that the electricians were working in the same area as Claimant at the same time.

In addition, Employer states that it was not explained why the electricians were working in the dark. To the contrary, Claimant did in fact testify at his deposition that they had completed raising the boom the day before his accident but "there was no electricity in the building." (EX-9 at 24).

Regarding the time of the fall, Employer argues that in one version of the events, Claimant recalled falling shortly before a 9 a.m. coffee break, yet in another version "Claimant is up on the crane for mere minutes before he falls—in an area that 3 minutes prior had been noted as having metal grating." (EB at 12). I must assume that Employer is referring to Claimant's testimony at the hearing opposed to his testimony at deposition. At the hearing, Claimant indicated it was almost time for a coffee break when the accident occurred. (Tr. at 20). At the deposition, Claimant indicated that 2 to 3 minutes had elapsed between the time he initially was in the area where he fell and when he returned to discover the metal grating had been removed. (EX-9 at 26). A similar account was given by Claimant when he completed the LS-202, in which he indicated he believed there to be metal grating on the floor as there was "a few moments" before. (EX-1). It seems to me that Employer misconstrued Claimant's deposition testimony to indicate how far into the workday the accident occurred when in actuality, Claimant was referring to how much time had elapsed in which the electricians could have removed the metal grating.

Employer also argues that Claimant's statement is inconsistent with the eyewitness statement provided by Mr. Wamsley. More specifically, Employer points out that one account of the events places Mr. Wamsley, the eyewitness, next to Claimant while another account places him behind Claimant. (EB at 10). Claimant's testimony given at the hearing in this matter does in fact indicate that Mr. Wamsley was behind him when Claimant fell. (Tr. at 22). Mr. Wamsley's statement, on the other hand, indicates that he was standing next to Claimant. (CX-13). I find it insignificant that Claimant recalls Mr. Wamsley being behind him while Mr. Wamsley recalls being beside Claimant. This minor detail does not cause me to call Claimant's credibility into question.

In addition, Employer argues that one of these gentleman reports that they were working in the boom while the other reports that they were working in the legs of the crane. I find it irrelevant that Mr. Wamsley's statement indicates "we were working together in the leg of a crane" (CX-13), since Claimant indicated they were in fact working on the bolts around the leg and he went inside the boom to look for additional bolts. (Tr. at 20). Although Mr. Wamsley's recollection of the events does not appear completely accurate, I do not find that these minor inaccuracies cast doubt on Claimant's version of the events.

Finally, Employer questions Claimant's conflicting testimony regarding the manner in which he entered the boom. Employer indicates that one account "implied" Claimant entered the boom carefully "because he was uncertain whether the grates were present," while in another account, Claimant testified that he knew the grates were there. (EB at 12). At deposition, Claimant testified that he "walked slowly because there was no lights." (EX-9 at 25). At the

hearing Claimant testified, "I had been there and I knew the metal grating was there, and they didn't tell us anything. It was dark and I didn't see." (Tr. at 20). So contrary to Employer's assertion, Claimant did not testify that he proceeded cautiously because he did not know whether the grates were present. Instead, Claimant testified that he was exercising caution because it was dark. Moreover, in the account where Claimant testified that he knew the grates were there, he reiterated that there were no lights on inside the boom.

Based on the foregoing, I disagree with Employer's assertion that Claimant's accounts of the accident are fatally inconsistent. Claimant was called upon several times to explain the incident and gave a consistent version of events each time. Thus, I do not doubt the workplace accident occurred as Claimant alleges despite Employer's attempt to have me find fatal inconsistencies where none exist.

Additional Problems with the Eyewitness

As noted above, Employer points to the statement of eyewitness David Wamsley in an attempt to question Claimant's credibility. However, Employer goes on to devote an entire section of its brief to argue that "Claimant's failure to call Wamsley as a witness, coupled with instances of suspect truthfulness, render this claim subject to dismissal." First, I note that Claimant did not call Mr. Wamsley as a witness, for whatever reason, but did introduce his written statement into evidence. Employer did not object to this statement being accepted into evidence and did not attempt to secure Mr. Wamsley's live testimony. Claimant cannot be faulted simply for failing to offer a third-party's testimony.

Next, Employer notes that Mr. Wamsley was not employed on September 2, 2004, the date which Employer labels "the alleged accident date." (EB at 13). Employer admits that the date of the injury was listed as September 3, 2004 in the report of Dr. Bleiweiss dated October 28, 2004.[9] However, Employer argues that the LS-202 lists the date as September 2, 2004 and this form is "roughly contemporaneous with the alleged event, [and] is more accurate." (EB at 14). First, I note the LS-202 was signed by Employer's agent but the agent did not date it as required to do in block 39. However, based on Mr. Sake's testimony, I do not doubt that it was filed closer in time to the alleged accident than Dr. Bleiweiss' report. However, Mr. Sake testified that he was unable to recall the date on which Claimant reported the accident to him (EX-10 at 8), whereas Claimant testified that he made a verbal report of the accident on the day it occurred. Looking at the LS-202 in conjunction with this testimony, it is not clear whether the accident occurred on September 2, which the LS-202 lists as the date of the accident, or on September 3, which is listed as the date the accident was first reported.

In addition, there is other evidence of record tending to establish that Claimant was unsure of the actual date of the injury. At the July 14, 2005 hearing, Claimant was asked

[9] Despite this admission, in another section of its brief, Employer refers to Claimant's assertions that the accident may not have occurred exactly on September 2 as a "new assertion" that would be raised in Claimant's closing argument. (EB at 4). However, it was obvious long before Claimant submitted his closing argument that he was unsure of the precise date on which the accident occurred.

whether the accident occurred on September 2, to which he responded, "It sounds right...the official written report...was not done the same day the accident occurred. So to the best of my knowledge, I looked at my pay stubs and figured out the date that happened." (Tr. at 19). On cross-examination, he was asked if he would be surprised to learn that Mr. Wamsley did not work for Employer on September 2, 2004, to which he responded that he would not be because September 2 was simply his best estimate of when the accident took place. (Tr. at 65).

Although Mr. Wamsley did not work for Employer on September 2, 2004, he did work for Employer on September 3, 2004. I accept September 3 as the date of the accident since Claimant admittedly was not sure that September 2 was the exact date, and since there is other evidence of record which suggests that the accident actually occurred on September 3.[10]

Finally, Employer again points out the discrepancies between Claimant and Mr. Wamsley's accounts of the events allegedly leading to Claimant's injury. Mr. Wamsley, as noted above, indicated that he and Claimant were working together in the leg of the crane. He further stated that there were no grates to walk on, forcing the pair to walk on the metal ribs in order to do their job. According to Mr. Wamsley's account, Claimant fell while walking on the metal ribs. (CX-13). Although this account does differ from Claimant's account of the events, I must note that Claimant also indicated that they were working on the bolts around each leg of the crane and that on one side, the metal grating was absent, forcing them to walk on "the ridge." (Tr. at 20). I can therefore see how Mr. Wamsley may have gotten confused when attempting to recall the events surrounding Claimant's accident. Again, although Claimant's story differs from Mr. Wamsley's, the two recollections are not so different as to indicate that the whole thing was fabricated, as Employer would have me believe.

Additional Arguments Advanced in Support of Employer's Position

Employer makes several additional arguments that it feels "support both reasonable conclusions and reasonable inferences that Claimant's conduct has been of questionable bearing." (EB at 15).

First, Employer notes that Claimant worked everyday, including overtime, from the time of the accident until he was laid off from this job. This fact is not contested by Claimant but rather explained by him. Both Claimant and Mr. Sake's testimony indicates that immediately after the accident Claimant was not in a substantial amount of pain and in fact, he told Mr. Sake that he would wait to see how he felt before filling out an accident report. (Tr. at 24-26; EX-10). In addition, Claimant indicated that he continued working because he was only an apprentice and did not want to appear weak. (Tr. at 24-25).

Next, Employer argues that not only did Claimant work every day, but he performed hard labor. Although Mr. Sake did testify that there were no light duty jobs available, he admitted that because Claimant was an apprentice, he often had to do odd jobs, such as retrieve ice for the

[10] In addition, the very fact that Mr. Wamsley did not work for Employer on September 2, but did work for Employer on September 3, leads me to conclude that the accident occurred on September 3, 2004. I do not doubt that Mr. Wamsley did in fact witness the accident.

employees' Gatorade. (EX-10 at 11). In addition, Mr. Sake admitted that although the job was not complete until November 5, 2004, Claimant's gang had finished the bolting-up process before that and were reassigned. (EX-10 at 13). Mr. Sake confirmed that this reassignment translated to working on the ground. (EX-10 at 15). This is consistent with Claimant's testimony that at some point, he began doing odd jobs such as picking up garbage with a forklift and moving trailers and never returned to his regular duties. (Tr. at 47-49). In addition, Claimant indicated that no-one ever told him that he was being changed to light duty or why his assignments had changed, but instead he was just given different assignments for the duration of the job. When viewing Mr. Sake's testimony in light of Claimant's testimony, it becomes clear that Claimant was reassigned simply because the bolting-up process was complete, and it was merely coincidence that the duties were lighter.

Next, Employer points out that Claimant failed to advise Drs. Bleiweiss and Bercik of his history of lower back problems, despite the fact that he was treated for the problem and filed a workers' compensation claim in relation to it. (EB at 16). Claimant admitted at the hearing in this matter that he was injured at work in February of 2003. In addition, he made Dr. Pillon, Dr. Steinway, Dr. Merola and Overlook Hospital aware of his prior history of back pain/herniated disc. It is unclear why he did not report this history to Dr. Bleiweiss and Dr. Bercik despite having reported it on several other occasions. However, it does not cause me to find that Claimant did not have an accident while working for Employer in September of 2004. In essence, Claimant may well have misconstrued a change of job duties for Employer's convenience as a kind deed by someone who noticed he was hurting.

Finally, Employer argues that Claimant exaggerated his symptoms and the amount of pain he was in, "suggesting a purposeful attempt to manipulate the claims and legal process herein." (EB at 16). The records of Overlook Hospital do suggest that Claimant exaggerated his level of pain. Similarly, Mr. Sake did testify that Claimant began limping only after becoming aware of Mr. Sake's presence. While these incidents may be relevant to determining the nature and extent of Claimant's injury, they have no bearing on the issue to be resolved herein--whether Claimant actually fell at work in September of 2004.

In sum, Claimant has clearly established a *prima facie* case. His testimony indicates that he entered a dark boom and fell when attempting to take a step, since the metal grates had been removed, essentially leaving a gap in the floor. Mr. Wamsley's testimony, although it admittedly does not exactly match Claimant's account of the events, corroborates that Claimant fell while walking in an area where there was no metal grating. In addition, Mr. Sake, the shop steward, did not testify that he doubted Claimant when Claimant first made a verbal report of the accident, rather he testified that Claimant was limping and holding his hip. Thus, I find that Claimant has invoked the § 20(a) presumption.

Once the claimant has invoked the §20(a) presumption, the employer may rebut it upon a showing of substantial countervailing evidence which proves that the injury was not causally connected to the claimant's employment. 33 U.S.C. §920; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), *cert denied*, 429 U.S. 820 (1976). If the employer is able to do so, the issue of causation must be resolved on the record as a whole. *Frye v. Potomac Electric Power Company*, 21 BRBS 194, 196 (1988).

Employer offers no additional argument as to what evidence would rebut Claimant's *prima facie* case, but instead, relies on its aforementioned arguments. I find it unnecessary to address every argument again. The mention of a September 2004 car accident, found in the records of Overlook Hospital, along with the earnings statement showing that Mr. Wamsley was not employed on September 2, 2004, are the only pieces of evidence tending to prove that the injury was not related to Claimant's employment. However, in considering all of the evidence of record, I find that the mention of the car accident is contrary to the other evidence of record and apparently a mistake. I also find that Claimant's injury likely occurred on September 3, rather than September 2, 2004. Therefore, even if these two pieces of evidence can be considered "substantial countervailing evidence" sufficient to rebut the § 20(a) presumption, based on the record as a whole, I find that Claimant has established that his injury resulted from an accident he sustained while working for Employer.

CONCLUSION

Claimant has established that he was injured while working for Employer.

ORDER

The parties requested that I resolve only the factual issue of whether Claimant was involved in a workplace accident in September of 2004, and have assured me that the matter will be finally resolved at that point. (Tr. at 7). Accordingly, no compensation order is entered herein, and the parties shall, on or before twenty (20) days hereof, report as to the final resolution of this case, so as to permit closure hereof.

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey