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Issue Date: 16 September 2015

CASE NO.: 2014-LHC-01160

OWCP NO.: 14-156217

In the Matter of:

ROGELIO HERNANDEZ-GARCIA,
Claimant,

vs.

ICE FLOE, LLC, dba NICHOLS BROTHERS,
Employer,

and

AMERICAN LONGSHORE MUTUAL ASSOCIATION,
Carrier.

APPEARANCES:

MATTHEW S. SWEETING, Esq.
For the Claimant

NINA M. MITCHELL, Esq.
For the Employer

Before: CHRISTOPHER LARSEN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901, *et seq.*, hereinafter referred to as

the "Act." I convened a formal hearing in this matter in Seattle, Washington, on February 24 and 27, 2015. At the hearing, the parties had a full and fair opportunity to present evidence and argument. I received into evidence Claimant's Exhibits ("CX") 1 through 20, with the exception of Exhibit 2, page 23; and I also received in evidence Respondents' Exhibits ("RX") 1 through 26.

The claimant, Rogelio Hernandez-Garcia, born March 4, 1970, was forty-four years old at the time of the hearing. He was employed at Nichols Brothers as a painter and a painter's helper. On November 2, 2011, he was injured in an accident at work, although the extent of his injuries on that day is disputed. The parties agree he injured his left knee, but differ as to whether he injured his right knee. He contends he is entitled to additional disability benefits and medical benefits under the Act.

No one but Mr. Hernandez-Garcia witnessed the accident on November 2, 2011. In Respondents' view, he is not a credible witness in his own behalf. Consequently, Respondents urge me to question his uncorroborated testimony in this case wherever it occurs (*see* Employer/Carrier's Post Trial Brief, pp. 6-11).

I. STIPULATIONS

The parties stipulate, and I find:

A. The claimant is covered by the Act, which applies to this proceeding.

B. The claimant and the employer were in an employer-employee relationship at the relevant times.

C. The claimant was injured in the course and scope of his employment on November 2, 2011.

D. The claimant's average weekly wage ("AWW") is $1,090.56.

II. ISSUES

A. Whether the claimant gave timely notice of his November 2, 2011, injuries.

B. The extent of claimant's injuries sustained on November 2, 2011.

C. The extent, if any, to which the claimant is entitled to medical benefits under the Act for those injuries.

D. The extent, if any, to which the claimant is entitled to disability benefits under the Act for those injuries.

A. Claimant's Report of Injury Was Untimely, but Not Prejudicial

At the hearing, Mr. Hernandez-Garcia testified he was injured at work on November 2, 2011, when a steel shelf he was removing fell on him. The shelf hit him on the left knee, and then on the right knee. Thereafter, when replacing the shelf with the help of a co-worker called "Scotty," Mr. Hernandez-Garcia fell and hit his "backside:"

> Q: Could you describe how the injury happened?
>
> A: It was – I was standing there in front of it, when it came down and hit me on the knee – pointing to the left knee – and then here – pointing to the right knee. And it hit me in the hand, I don't know which hand. It was bleeding, it was gashed.
>
> INTERPRETER: The Interpreter would like to ask for a clarification. Excuse me, the Interpreter would like to correct.
>
> THE WITNESS: The other guy that was working, I don't know his real name, but we called him Scotty, he is the one that was injured in the hand and was bleeding. He helped me to lift the – he helped me to lift it off of me. And when we were putting it back, that's when I fell and hit my backside there in the little tail.
>
> MR. SWEETING: Okay.
>
> BY MR. SWEETING:
>
> Q: Did the – when the shelving fell, did it knock you over?
>
> A: Oh, if it had fallen over, all the way to the ground, we never could have lifted it up. It just kind of came on me, just that's all.
>
> Q: And then, as I understand what you said, after you were able to push it off of you, you fell. And why did you fall?
>
> A: I just fell back for an instant, as if like I'd fainted or something. It was like I fainted, but just for a moment, then I regained consciousness. And I felt my pain in my knee, and then I just fell down again.
>
> MR. SWEETING: I don't believe any of the records indicate that you fainted. And I'd like you to double-check with what

he's talking about, to see if you've got – if the translation is correct, because it's not consistent with the records that I've seen.

INTERPRETER: Okay.

JUDGE LARSEN: Well, why don't you ask a question?

BY MR. SWEETING:

Q: Are you sure that you fainted and actually blacked out, when the shelving fell on your right leg and left leg?

A: It fell on the left first and then on the right.

INTERPRETER: I'm going to repeat the question.

THE WITNESS: I never put it in any of the reports, because I was ashamed. Then I talked about it later to the insurance investigator and Dr. Leavitt. I believe the name of the investigator was Vito Villacorta.

MR. SWEETING: All right.

(TR p.246, line 22 – p. 248, line 17).[1]

Under Section 12(a) of the Act, Mr. Hernandez-Garcia was generally obligated to report his injuries within thirty days.

1. Claimant Reported the Accident on December 20, 2011

The earliest *written* report of this accident is dated December 21, 2011, and indicates that the employer first learned of the accident the previous day, December 20, at 11:00 a.m. It further describes the "Nature of Injury" as "Left knee was struck by object" (CX 1, p. 2). Other references in this document, and the accompanying witness statement ("Employee's Report of Injury," CX 1, p. 1), refer to the shelf falling on a "knee," without specifying which knee.

[1] This exchange illustrates one of the central problems in this case: Mr. Hernandez-Garcia's propensity for circumlocution. Here, Mr. Hernandez-Garcia, testifying through an interpreter to overcome the language barrier, represented by counsel, and asked, by his own lawyer, what ought to have been one of the most easily-anticipated questions of the entire hearing, manages to confuse everyone with his answer. He seems for a time to claim an injury which in fact happened to someone else, and, to his own counsel's astonishment, he testifies he fainted at the time of the accident, and claims to have disclosed that detail previously to Dr. Leavitt and to an insurance investigator. It is not surprising that Respondents complain "of claimant's embellishment of his alleged injury on subsequent retellings" (Employer/Carrier's Post Trial Brief, p. 7, line 6; pp. 6-9).

Mr. Hernandez-Garcia first sought medical treatment for his injuries on or about December 21, 2012 (RX 253, lines 9-13):

> Q: What I'm asking you about is what are the conditions you were seeking treatment for, when you went to the hospital?
>
> A: For the knee, for the knees, just for the knees.
>
> Q: Was it for both knees?
>
> A: I think so. I don't remember well, but I think so.[2]

(TR p. 254, lines 7-12).

The earliest *written* report specifying an injury to the *right* knee specifically is dated February 2, 2012 (CX 1, p. 4), and, on February 10, 2012, the employer signed a Notice of Controversion acknowledging Mr. Hernandez-Garcia was entitled to medical treatment for his *left* knee, but contesting "any claim for a right knee injury" (CX 1, p. 5).

Mark Jackson, Mr. Hernandez-Garcia's supervisor at the time of the injury, testified at the hearing that Mr. Hernandez-Garcia made no oral report to him of any injuries whatsoever until December 20, 2011 (TR p. 110, line 10 – p. 111, line 25; RX 12, p. 345). At the hearing, Mr. Hernandez-Garcia testified he spoke to Mr. Jackson's assistant, a man named Lehman, in November, 2011, to report his accident:

> Q: During November of 2011, did you talk to Mark Jackson about the fact that you were hurt on November 2nd, 2011?
>
> A: Between the 2nd of November and when?
>
> Q: During the month of November, only?
>
> A: I hardly ever talk to him. We'd say hello together. I just saw him at work and we would just say hello to each other. I talked with his assistant, whose name is Lehman, but not much.
>
> Q: Did he – did you talk to Lehman about the fact that you were injured on November 2nd, during the month of November?

[2] Records from the Providence Regional Medical Center indicate Mr. Hernandez-Garcia complained only of left knee pain, and was treated only for the left knee. He reported he had injured his left knee at work about one month earlier (CX 2, pp. 14, 26).

> A: Yeah, but they don't pay attention there. They didn't pay attention. They don't pay attention there, even when I went to the doctor and they wouldn't give me the papers. They don't care there.

(TR p. 250, line 23 – p. 251, line 14.)

But Mr. Hernandez-Garcia later testified that he did not remember reporting the accident to *any* supervisor during the month of November, 2011:

> Q: Is it correct that you do not remember reporting your work accident or other injury to any supervisor at Nichols Brothers, during the month of November?
>
> A: No, because we did the report right away and then they said they didn't put the date, and there wasn't a date there. And so I don't remember.
>
> Q: Is it your testimony that you reported your work injury or accident to a supervisor at Nicholas Brothers, in November?
>
> A: No. In November, I don't remember, my head isn't good, I don't remember.

(TR p. 266, line 16 – p. 267, line 1). Likewise, asked whether he had told Mr. Jackson of the accident at any time during the month of November, 2011, Mr. Hernandez-Garcia originally replied "I hardly ever talk to him. We never talked, even before, didn't talk" (TR p. 264, lines 12-15), but later specifically testified he did not remember whether he had told Mr. Jackson (TR p. 266, lines 2-14).[3]

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[3] Employer/Carrier interprets Mr. Hernandez-Garcia's testimony at TR p. 264, lines 12-15, as an unqualified admission that he never told Mr. Jackson about the November, 2011, accident (Employer/Carrier's Post Trial Brief, p. 10, lines 1-2). What is more, in Employer/Carrier's view, that unqualified admission directly contradicts an unqualified statement at deposition that Mr. Hernandez-Garcia *had* told Mr. Jackson about the accident (Employer/Carrier's Post Trial Brief, p. 10, lines 2-12; *see also* RX 26, p. 22, lines 7-16). In both cases, I believe Employer/Carrier underestimates the inherent ambiguity in Mr. Hernandez-Garcia's inclination to logorrhea. All of the parties agree Mr. Hernandez-Garcia talked to Mr. Jackson about the accident *eventually*; indeed, he and Mr. Jackson worked on written reports about the accident in December, 2011. I conclude that what Mr. Hernandez-Garcia said at the hearing, notwithstanding some confusing asides, was that *he did not remember* whether he told Mr. Jackson, or any other supervisor, about the November 2, 2011, accident within thirty days of the event; that is, he might have done so, and then again, he might not have. I conclude that what he said at the deposition was that he *did* tell Mr. Jackson about the November 2, 2011, accident, but he did not remember *when* he told Mr. Jackson about it. It is at least *possible* to understand the two statements as consistent, a possibility to which Employer/Carrier does not admit. Still, this illustrates again the problem with Mr. Hernandez-Garcia's testimony: his answers are almost always susceptible to multiple interpretations, allowing the litigants to hear the same words and reach opposing conclusions.

Taking all of this testimony into account, I conclude Mr. Hernandez-Garcia did not give notice of his November 2, 2011, accident until December 20, 2011. Although, at the hearing, he originally testified he had told a man named Lehman about the accident, Mr. Hernandez-Garcia later contradicted that statement, testifying he had no memory of telling anyone.

In the meantime, there were other significant developments. On December 15, 2011, the employer notified Mr. Hernandez-Garcia, using a standard Social Security Administration form in Spanish, that his Social Security number did not match the number holder's name or date of birth as shown on Social Security Administration records (RX 12, pp. 354-359). The form directed Mr. Hernandez-Garcia to go to a Social Security office within eight federal working days to resolve the discrepancy (RX 12, pp. 355, 358). Ultimately, the discrepancy was not resolved, and on January 3, 2012, Employer terminated Mr. Hernandez-Garcia for his inability to provide proof of eligibility to work in the United States (RX 12, pp. 360-361).

2. Claimant's Injuries Were Not Apparent Before His Report

In Mr. Hernandez-Garcia's view, the problem with his Social Security number was a pretext. "They were using it as an excuse to get rid of me," he testified at the hearing, "because I didn't – I couldn't work. I wasn't producing" (TR, p. 275, lines 5-7).[4] Earlier, he had explained

> Q: During the last two months of employment, were you concerned that, as a result of this injury, you were going to be fired?
>
> A: Yeah, of course, because when you get hurt there's – if someone gets hurt, they lay them off and then they never get back to work.
>
> Q: Did he know of people, during the seven years – I'm sorry – I'll rephrase that.
>
> Rogelio, during the seven years or so that you worked at Nichols Brothers, did you know people that got hurt and were never allowed to come back to work, that were laid off?

[4] On this point, I conclude Mr. Hernandez-Garcia was wrong. Instead, I accept the testimony of Employer's Human Resource and Training Director, Jonathan Hefflinger, who testified that Mr. Hernandez-Garcia was one of 149 employees whose Social Security numbers were submitted to the Department of Homeland Security for verification through the "e-Verify" system in December, 2011 (TR p. 341, line 25 – p. 344, line 22). Since 2011, three employees, including Mr. Hernandez-Garcia, have been terminated because of their immigration status (TR p. 359, lines 8-15).

A: No, because I don't talk to people. I don't know English[5] and I didn't talk to them. There was this one guy who I saw, who was a big guy, stronger than I am, he came from the Army and they laid him off and didn't say why, and he never came back.

Q: Was he injured?

A: No. He never had an accident. They laid him off. They changed his work. He worked really hard.

Q: During the last two months that you worked at Nichols Brothers, did your injuries worsen?

A: Yeah, they went from bad to worse.

(TR p. 251, line 15 – p. 252, line 12). And he testified

Q: At the time you were asked about your paperwork, in December of 2011, you said that it was after your injury. Were people aware that you had been hurt, by the time you were asked about your paperwork, in the yard?

A: Yeah, everybody knew.

Q: How did they know?

A: Everybody saw me walking and they asked me why I was walking. And before I was walking fine and I worked fast, and then was hardly walking at all.

Q: When – the date of injury has been designated as November 2nd, 2011. When, after that date, would you say that it was obvious to people that saw you, that you were hurt – how long?

A: Could you ask again? I didn't understand it.

Q: Yeah, I'll try to. The date of injury is November 2nd, 2011. How long after the injury would you say that people were

[5] This was one of several times at the hearing when Mr. Hernandez-Garcia reaffirmed he does not speak English (*see* TR p. 253, lines 19-20; p. 263, line 24; p. 271, lines 20-21; p. 274, line 2). Since an interpreter was present at the hearing, his inability to speak English should not have prejudiced him in any way. Yet Mr. Hernandez-Garcia admittedly learned some English in school (TR, p. 274, lines 2-3), and first came to the United States twenty years ago (TR, p. 241, lines 6-7; TR, p. 37, lines 6-24). What is more, his supervisor, Mark Jackson, testified that Mr. Hernandez-Garcia "understands English. He understands my instructions," although Mr. Jackson would use an interpreter for more complicated matters (TR, p. 108, line 14 – p. 109, line 1).

> aware that you had been hurt, because you weren't able to walk properly?
>
> INTERPRETER: Could you repeat the last bit about walking – weren't able to walk – is that correct?
>
> BY MR. SWEETING:
>
> Q: When you weren't able to work properly?
>
> A: After the accident?
>
> Q: Yes.
>
> A: I still don't understand.
>
> Q: Let me ask it this way. The injury occurred on November 2nd, 2011, were you unable to walk as quickly and walk properly immediately after the accident?
>
> A: Yes, I could, but just very slowly. There was a lot of pain in the knee, it was like blinding. Touching, just barely touching, like I was hit with a baseball bat. Just a pillow, for example.

(TR, p. 245 line 1 – p. 246, line 7).[6]

This testimony is potentially relevant to the issue of timely notice. Mr. Hernandez-Garcia suggests his condition worsened between November, 2011, and the end of the year; and he feared termination because he "couldn't work" and "wasn't producing." I could possibly infer from this testimony that it was apparent to his co-workers and supervisors that he had been injured.[7] But the only co-worker or supervisor to address that point was Mr. Jackson:

> Q: . . . if Mr. Hernandez had indicated that he had ongoing knee pain and was limping around the shipyard, after that work incident, would you have considered that something that had been reported?
>
> A: I would have questioned him, yes. But I didn't see any of that. Rogelio – I'm going to use his name, that's what we call

[6] I have parsed this circumlocution as carefully as I know how, and I am still uncertain as to how soon after November 2, 2011, Mr. Hernandez-Garcia believes a third party would have noticed changes in Mr. Hernandez-Garcia's gait. But he testifies that, at some time before he stopped working, his co-workers asked him about the way he was walking.

[7] The thirty-day time limit of Section 12(a) does not apply if the Employer has actual knowledge of the injury during the filing period. Section 12(d).

him, Rogelio – Rogelio has – walks, at work, at a faster pace than normal. He just, he walks, you know – and if he was limping or hurt, I would have noticed that, because that's just the way he walks. And I didn't indicate any of that, the whole time, in any of the couple of months after that, at all.

Q: Yeah. If you had seen him limping around the shipyard during November and December, prior to reporting the injury, what would you have done?

A: Take him to the safety office. I would turn him right over to the safety office and let them, you know, let them do their job.

Q: And during this period of time, was he like – did you notice him slowing down at work?

A: Not at all.

Q: Did you hear him complaining about knee pain?

A: Nope.

(TR p. 113, line 6 – p. 114, line 3). Additionally,

Q: So, I take it the reason Rogelio was still there, is because he was a good worker?

A: Oh, absolutely.

Q: You wanted to keep him?

A: Oh, absolutely, absolutely. He really was a great worker.

Q: So, on November 3rd, the day after this happened, was Mr. Rogelio sandblasting?

A: I'd have to look back at the budgets. I mean I think that job lasted – I'm going off memory here from a long – I think the job, just helping them out, lasted two or three days. Because all we did was move these things, move these brackets, shelving brackets in, and we just welded them down, that's all we did.

Q: Do you have any idea whether during the rest of his tenure working from Nichols Brothers, during that seven weeks or so, while he continued working, whether he did any sandblasting?

> A: Yes, I would have to say, because he was one of my main sandblasters.
>
> Q: And was he painting?
>
> A: Yeah, everybody paints and sandblasted. We all intermixed in the whole – it's everybody mixes the whole thing. Rogelio didn't do a lot of spraying, but he did a lot of brushing and rolling. Like I say, he was my main sandblaster. He was an animal – he was – just go, go, go.

(TR, p. 122, line 6 – p. 123, line 6). Even after the November 2, 2011, accident, Mr. Jackson "didn't see anything happen, you know, any change in [Mr. Hernandez-Garcia's] work habits, let's put it that way. Sorry, I'm a little nervous. I'm just trying to find the right words here. I didn't see any indication from his work habits, at all. I mean he went right back to sandblasting and painting. And sandblasting is a very physical job, you're lugging around a 200-pound hose, you know, I mean you're dragging it around, and it's very physical. And Rogelio was one of the best ones at it" (TR, p. 118, lines 13-22). Mr. Jackson met with his work crew every morning (TR p. 109, line 20 – p. 110, line 4).

I find Mr. Jackson's testimony credible, and more persuasive than Mr. Hernandez-Garcia's speculation that his employer might fire him for decreased productivity after the November 2, 2011, accident, or his vague indications that co-workers asked him "why [he] was walking" (TR, p. 245, lines 7-9). Mr. Hernandez-Garcia continued to work after the accident, and worked regular hours thereafter until his employment ended (TR, p. 248, line 19 – p. 250, line 1). During that time his supervisor observed no change in Mr. Hernandez-Garcia's productivity or work habits, and credibly testified he would have taken further action if he had.

3. Prejudice

Mr. Hernandez-Garcia reported his accident forty-four days after it occurred, outside of the thirty-day limit set forth in Section 12(a) of the Act. Nevertheless, under Section 12(d) of the Act, his claim is not barred unless the delay in reporting caused prejudice to the Employer. Neither party directly addresses the question of prejudice. To be sure, Respondents attack Mr. Hernandez-Garcia's credibility, arguing that his injuries in the accident were limited to the left knee, and that he added other physical complaints in subsequent retellings of his story (Employer/Carrier's Post Trial Brief, pp. 6-9). But this does not show prejudice arising from late reporting. A dishonest claimant could report an accident the very same day it happened, and invent new complaints later, without affecting the timeliness of his or her original report. And when one injury arises out of an accident that has been reported, a claimant does not have to give separate notice of other injuries resulting from the same incident. *Thompson* v. *Lockheed Shipbuilding & Construction Co.*, 21 BRBS

94 (1988). Since no prejudice to Respondents is apparent from the record in Mr. Hernandez-Garcia's failure to meet the Section 12(a) deadline, his tardiness does not bar his complaint. 33 U.S.C. §912, subsection (d).

B. Claimant Injured His Left Knee on November 2, 2011

According to Mr. Hernandez-Garcia, he injured his left knee, his right knee, and his "little tail" or "backside" when the accident occurred (TR p.246, line 22 – p. 248, line 17). Even if, as Respondents contend, his report of the accident omitted any reference to right-knee or tailbone injury (Employer/Carrier's Post Trial Brief, p. 6), the omission is not fatal under *Thompson* v. *Lockheed Shipbuilding & Construction Co.*, *supra*, so long as those injuries in fact were caused by the November 2, 2011, accident. Respondents argue they were not, urging me to conclude they were "embellishments" Mr. Hernandez-Garcia made up after the fact (Employer/Carrier's Post Trial Brief, pp. 6-9).

A claimant must establish a *prima facie* case under the Act by proving that he or she suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. It is the claimant's burden to establish each element of the *prima facie* case by affirmative proof. The Section 20(a) presumption does not apply to the issue of whether a physical injury occurred in the first place. *Murphy* v. *SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd. mem.* 600 F.2d 280 (D.C. Cir. 1979); *see Kooley* v. *Marine Industries Northwest*, 22 BRBS 142 (1989). An ALJ may properly discredit the credibility of a claimant's testimony and conclude that the evidence fails to establish the occurrence of an injury. *Mackey* v. *Marine Terminals Corp.*, 21 BRBS 129 (1988).

Respondents have acknowledged the left-knee injury, but argue Mr. Hernandez-Garcia first claimed a right-knee injury on February 2, 2012 (RX 1, p. 3), and first mentioned a fall on April 9, 2014 (CX 8, p. 111) (Employer/Carrier's Post Trial Brief, p. 7). In Respondents' view, Mr. Hernandez-Garcia's testimony is the only evidence that those later-mentioned injuries have anything to do with the November 2, 2011, accident (*see* TR p. 89, line 16 – p. 90, line 7), and Mr. Hernandez-Garcia is not a credible witness.

I have already discussed several instances in which Mr. Hernandez-Garcia's testimony was ambiguous, inconsistent, or both. Here is another, in which Respondents' counsel asks Mr. Hernandez-Garcia about the Spanish-language Social Security form, RX 12, p. 355:

> Q: Is that your signature?
>
> A: I think so.
>
> Q: And when did you sign this form?

A: I don't remember. I don't know much about paperwork. In Nichols, they gave me papers and I signed them.

Q: Did you date this form?

A: I probably signed and dated it, but the papers, I don't remember anything. I just went and worked, and when they ask me to sign papers, I sign them. I don't know nothing about – I don't know anything about paperwork. I'm good for working and I get to work, but when it comes to papers, I don't know anything about them. I don't have a good head for papers. And I don't understand English. They taught me in school, but nothing stuck.

Q: Is Exhibit 12.355 written in Spanish?

A: Yes, it's in Spanish, *I understand everything* (emphasis added).

Q: So, by December 15th, you knew that Nichols Brothers had learned the Social Security number, you provided, might belong to someone else?

A: I always reported – I always worked with that number and I always reported my income to the IRS. And they assigned me – in immigration – they gave me an I-10 number, to report my taxes. They gave me an I-10 – Interpreter correction – they gave me an I-10 number to report my tax money, report my income. And I've reported everything I've earned.

Q: On December 15th, 2011, you know that Nichols Brothers had found out about a problem with your Social Security number, isn't that correct?

MR. SWEETING: I'm going to object to the question.

A: Not that I know of.

MR. SWEETING: Your Honor, the form is in Spanish. I don't speak Spanish. I don't know that that's what this form says.

JUDGE LARSEN: Well, if it's not, he can tell us.

MR. SWEETING: Well, I know, but she's going directly to the form.

> JUDGE LARSEN: She's asking him a question independently of the form.
>
> MR. SWEETING: Okay.
>
> THE WITNESS: They were using it as an excuse to get rid of me, because I didn't – I couldn't work. I wasn't producing.

(TR, p. 273, line 14 – p. 275, line 7). During this entire exchange, the closest Mr. Hernandez-Garcia comes to a responsive answer is "I think so" when authenticating his signature, and "Not that I know of" when asked if there was a problem with his Social Security number – the latter an implausible response from a witness who testified just moments earlier that he understood "everything" in the Spanish-language Social Security notice form. He does, however, attempt to change the subject three times: once to discuss his unfamiliarity with paperwork generally, once to assure the court that he reported his earnings to the IRS, and once to accuse Respondents of using his immigration status as a pretext to fire him because he was too badly-injured to keep working. Forthrightness seems never to be the hallmark of Mr. Hernandez-Garcia's statements under oath.

At the risk of gilding the lily, here is another example:

> Q: Mr. Hernandez, are you able to sweep with a broom, at your home?
>
> A: Yes, but very little. But if it's in the video, I don't know how it got there, because I don't sweep very much. If I spilled something, I might have cleaned it up. And I don't know how the guy that filmed that, got that. He watched me for hours and that's all he filmed, when I grabbed the girl and swept. Why did he just pick that little bit?
>
> Q: Are you able to use a broom to sweep at your wife's taco truck?
>
> A: I just did it once or twice, it was a soda spilled and I used it to cleanup. And then a flower pot broke, and I cleaned that up. It was the only time I did it.

(TR p. 268, line 23 – p. 264, line 10). To me, it is at least curious that Mr. Hernandez-Garcia would launch into a detailed discussion of a surveillance video that nobody had asked him about.

I conclude Mr. Hernandez-Garcia, for whatever reason, is not a reliable witness. For that reason, the timing of his right-knee and tailbone complaints troubles me. He did not report his injury until *after* he knew his employer had learned of a

problem with his Social Security number, and he did not mention an injury to his right knee, or to his tailbone, or his back, until after he had been terminated for inability to provide proof of eligibility to work – that is, after his family was reeling financially from his loss of work (TR p. 40, lines 14-21; p. 42, line 18 – p. 44, line 2; p. 262, line 23 – p. 263, line 18). The only corroboration in the record for the notion that Mr. Hernandez-Garcia injured some other part of his body, other than the left knee, in the November 2, 2011, accident, is this testimony of his wife, Irene Ramirez-Espana:

> Q: When your husband was injured, in November of 2011, did you observe how he was doing physically?
>
> A: Yes.
>
> Q: And at that point, at the time of the injury, can you describe the difficulties that he was having, physically?
>
> A: Yeah. When he came home from work, he was tired. He was going to see if – he had like pain in his left knee, he was just basically come to home real tired.
>
> Q: Did he describe to you what body parts he had hurt?
>
> A: Yeah, he right away told me about his knee and about his tail bone, and his low back.
>
> Q: When you saw him at home walking, was he limping?
>
> A: He was walking not in a straight, he was complaining about pain.
>
> Q: During the seven weeks or so that he continued working at Nichols Brothers, after his injury, did you observe that he seemed to be getting worse?
>
> A: Yes.

(TR, p. 41, lines 5-22). This is the full extent of her testimony on the subject. She indicates injury to a "knee." She says her husband told her "about his tail bone, and his low back," but she does not say *what* he told her – for example, that he had hurt them in the November 2, 2011, accident – and she does not say *when* he told her, other than to describe it as "right away." I could infer that "right away" means "immediately after the November 2, 2011, accident," but I would have to do that in the light of Mr. Jackson's credible testimony that there was no apparent change in Mr. Hernandez-Garcia's gait, or his ability to work, from November 2, 2011, until the end of that year.

I conclude Mr. Hernandez-Garcia in fact injured his left knee at work on November 2, 2011. I conclude the evidence does not show he injured his right knee, or any other part of his body, at that time.

C. Claimant Is Entitled to Medical Benefits for the Left Knee Through November 29, 2012

Because Mr. Hernandez-Garcia injured his left knee in a work-related accident, he is entitled, under Section 7 of the Act, to such reasonable and necessary medical surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require. The burden is on the claimant to establish the necessity of treatment. *Schoen* v. *U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler* v. *Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Ballesteros* v. *Willamette Western Corp.*, 20 BRBS 184 (1988).

After reporting the injury, Mr. Hernandez-Garcia sought treatment on December 21, 2011, at the Providence Regional Medical Center. A x-ray of the left knee showed mild medial and patellofemoral compartment degenerative joint disease (CX 2, pp. 19, 24), and he was discharged with a diagnosis of internal derangement of the knee NOS (CX 2, p. 14). Thereafter, Mr. Hernandez-Garcia followed up with Shane C. Leavitt, M.D., who, on January 13, 2012, recommended an MRI of the knee (CX 2, p. 32). The MRI, performed on March 26, 2012, indicated an intrasubstance degenerative signal at the posterior horn and body of the medial meniscus, without a definite tear (CX 2, p. 37). On April 30, 2012, Dr. Leavitt performed a left-knee medial femoral condyle microfracture chondroplasty, an arthroscopic surgery to, among other things, evaluate the meniscus for a tear. Dr. Leavitt debrided the knee but found no meniscal tear (CX 3, p. 46). By June 8, 2012, the doctor advised Mr. Hernandez-Garcia to begin weight-bearing on the left leg as tolerated (CX 3, pp. 52-53). On July 26, 2012, Dr. Leavitt recommended continued physical therapy, and a home exercise program including range-of-motion exercises, with instructions to "start bearing more weight on [Mr. Hernandez-Garcia's] left lower extremity" (CX 3, p. 56).

On October 2, 2012, Dr. Leavitt signed a report written to an insurance company claims adjuster, indicating that Mr. Hernandez Garcia should have recovered from his surgery by then, but had not. "The surgery went well, nothing unusual. The pain cannot be explained postop objectively. Patient is delaying his own recovery by hanging on to crutches so long. Dr. & PT told him to get off of crutches, RH won't do it." The doctor also indicated, "Based on the surgery and what was found and repaired, this patient should be almost through with rehab and back to work by now. Doctor is frustrated with patient lack of participation in his recovery" (CX 3, p. 75). On November 29, 2012, Dr. Leavitt concluded Mr. Hernandez-Garcia had reached maximum medical improvement, with a 0% impairment of the knee joint, full range of motion, no muscular deficits; nor any atrophy of the quadriceps (CX 3,

p. 87). Thereafter, Mr. Hernandez-Garcia apparently contacted Whidbey Orthopedics for an appointment, and met with Dr. Livermore, who reportedly had nothing further to offer the patient (CX 4, p. 92).

On March 8, 2013, Peter J. Kinahan examined Mr. Hernandez-Garcia. He reported full range of motion in Mr. Hernandez-Garcia's bilateral hips, knees, ankles, and feet, and opined his medical care up to that point had been "adequate" and "appropriate." Dr. Kinahan opined Mr. Hernandez-Garcia might have "degenerative arthritis of the knee, which has been lit-up by the injury" (CX 4, p. 94). A March 20, 2013, left-knee MRI arthrogram suggested a 1 cm nondisplaced horizontal cleavage tear at the junction of the posterior horn and the body of the medial meniscus (CX 4, p. 97). On April 9, 2013, Dr. Kinahan suggested Mr. Hernandez-Garcia return to Dr. Leavitt "for a possible repeat arthroscopy and partial meniscectomy" (CX 4, p. 99). On April 18, Dr. Leavitt reviewed the March 20, 2013, arthrogram and saw no medial meniscus tears. Concluding there was nothing more he could do for the patient, Dr. Leavitt advised Mr. Hernandez-Garcia to obtain a third opinion on his knee (CX 5, p. 103). Mr. Hernandez-Garcia returned to Dr. Kinahan, who, on September 11, 2013, likewise concluded he had nothing more to offer the patient. Dr. Kinahan – who, contrary to Dr. Leavitt, concluded Mr. Hernandez-Garcia had a horizontal cleavage tear of the meniscus in the left knee – agreed with Dr. Leavitt that further surgery would not help (CX 6, p. 107).

Mr. Hernandez-Garcia, on the other hand, contends he has not reached maximum medical improvement. This places him in the unusual position of needing to discredit the opinion of his own treating doctor. His primary attack on Dr. Leavitt comes in the form of the opinions of his expert witness, H. Richard Johnson, M.D., whose written report is in evidence (CX 8) along with his hearing testimony (TR, pp. 50-102). In his report, Dr. Johnson concluded, *inter alia*, that Mr. Hernandez-Garcia "[a]t the least . . . needs a diagnostic left knee arthroscopy, and, depending, on the findings, may require a partial medial menisectomy" (CX 8, p. 125). At the hearing, Dr. Johnson testified that Dr. Leavitt, during the April 30, 2012, arthroscopy, could not possibly have seen the posterior horn of the medial meniscus, because Dr. Leavitt, according to his surgical records, did not make a separate more posterial medial incision, but visualized the meniscus only through the medial portal, and probed it only through the lateral portal. Accordingly, Dr. Leavitt, in Dr. Johnson's view, had insufficient reason to conclude the medial meniscus was not torn (TR p. 84, line 23 – p. 86, line 16).

Of course, as claimant himself recognizes, this claim does not depend on whether Mr. Hernandez-Garcia has a torn meniscus (TR p. 19, lines 8-15). Nevertheless, the record is replete with conflicting evidence on the question of whether the March 20, 2013, MRI arthrogram shows such a tear. In the opinion of Alexander Serra, M.D., it is more than 90% probable that it does (TR, p. 141, line 1 – p. 143, line 13). In the opinion of Joel McFarland, M.D., it does not (TR, p. 201, line 11 – p. 203, line 4). As set forth above, in the opinion of Dr. Leavitt, it does not; in the

opinion of Dr. Kinahan, it does. The quarrel on this issue, while largely irrelevant, serves two purposes. First, a tear, if it is actually present, might lend objective support to Mr. Hernandez-Garcia's subjective complaints – support which, in the light of his own confusing testimony, would be valuable to his claim. Second, the meniscal-tear issue opens the door for Dr. Johnson to attack Dr. Leavitt's surgical technique by suggesting the April 30, 2012, arthroscopic procedure was inadequate, and does not support Dr. Leavitt's conclusion that the meniscus is not torn. I consider each of these arguments in turn.

If I were to accept Dr. Serra's testimony that the probability of a tear is 90% or more, Mr. Hernandez-Garcia would succeed in his first purpose. The reason he does not is because Dr. Serra's testimony is not the only evidence in the record. What the record, taken as a whole, shows most convincingly is that competent doctors do not agree on the significance of the March, 2013, MRI arthrogram. Drs. Serra, Johnson, and Kinahan think it shows a tear, while Drs. Leavitt, McFarland (TR p.201, line 11- p. 203, line 4), and Billington (CX 18, internal page 8, line 9 – internal page 10, line 17), think it does not. What is more, the medical testimony is virtually unanimous on the best method for resolving this ambiguity: a properly-performed arthroscopic inspection of the meniscus (TR, p. 66, line 16 – p. 67, line 16; p. 174, line 16 – p. 176, line 11; p. 220, lines 3-13) – which brings us to the second purpose for the quarrel.

Dr. Johnson's criticism of Dr. Leavitt's arthroscopic surgery – that Dr. Leavitt failed to open a portal in the knee that was essential to the procedure – introduces an exciting whiff of malfeasance into the case. It sounds like a truly obvious, basic mistake, and therefore a *stupid* one. What is more, if Dr. Leavitt in fact made such a stupid mistake, the outcome of the procedure – which the doctors unanimously agree ought to have resolved the ambiguity – is discredited. The force of this argument, to say nothing of its emotional appeal, is proportional to the obviousness of this error. The more obvious the blunder, the more likely Dr. Leavitt is a chowderhead, and the more Mr. Hernandez-Garcia appears as an innocent victim.

The problem I have with Dr. Johnson's testimony is this. If Dr. Leavitt had made an obvious mistake, I would expect some mention of it in Dr. Johnson's report (CX 8). After all, before preparing that report, Dr. Johnson reviewed Dr. Leavitt's operative report of the diagnostic arthroscopy (CX 8, p. 112), which indicates "[s]tandard anteromedial and anterolateral arthroscopic portals were done" (CX 3, p. 46). Yet I search CX 8 in vain for any suggestion that Dr. Leavitt ought to have opened a more posterior medial incision, or that his failure to do so calls the resulting diagnosis into question. On the contrary, the only reason Dr. Johnson advances in CX 8 for questioning Dr. Leavitt's result is that Mr. Hernandez-Garcia continued to complain of pain and knee dysfunction even after the procedure. Not until Dr. Johnson took the stand at the hearing did he suggest there was any flaw in Dr. Leavitt's procedure. What is more, none of the other medical experts in this case, regardless of which party retained them, has independently criticized Dr. Leavitt's

procedure in the same way. Neither did Dr. Kinahan. If the procedure was botched, its failure is apparent only to Dr. Johnson, and it was only apparent to him after considerable reflection on information that had been in his possession since April, 2014. For all of these reasons, Dr. Johnson's opinion is not persuasive.

Instead, I rely on Dr. Leavitt's opinion that Mr. Hernandez-Garcia had reached maximum medical improvement on November 29, 2012. Dr. Kinahan supports this conclusion with his opinion that further treatment would not be helpful (CX 6, p. 107).

D. Claimant Was Temporarily, But Is Not Permanently, Disabled

To establish disability, Mr. Hernandez-Garcia must show he cannot return to his former employment because of an industrial injury. Once he makes that showing, the burden shifts to Respondents to show he can perform suitable alternative employment. *Hawaii Stevedores, Inc.* v. *Ogawa*, 608 F.3d 642, 652.

1. The Period of Temporary Total Disability

With respect to temporary disability, Respondents conceded in their Pre-Hearing Statement dated January 26, 2015, that Mr. Hernandez-Garcia was temporarily totally disabled from March 29, 2012, through November 29, 2012. In his own Pre-Hearing Statement dated January 22, 2015, Mr. Hernandez-Garcia contends his temporary total disability began on December 21, 2011. Since I have concluded Mr. Hernandez-Garcia reached maximum medical improvement on November 29, 2012, there is no question as to when his temporary total disability ended. The only question is when it began.

December 21, 2011, was the date Mr. Hernandez-Garcia reported the November 2, 2011, accident, and the date he first sought treatment for his left knee (CX 2, p. 14). It was, at least approximately, the last date on which, according to his hearing testimony, he actually worked at his former job (TR p. 250, lines 9-13). On January 2 or 3, his employment was terminated for reasons unrelated to the injury (TR p. 250, lines 14-17). On March 29, 2012 – the date Respondents acknowledge the beginning of temporary total disability – is the date Mr. Hernandez-Garcia agreed to surgery (CX 2, p. 39).

The burden of showing he could not perform his usual work from December 21, 2011, through March 28, 2012, rests upon Mr. Hernandez-Garcia. The medical records during this period are unclear. For example, the doctor who examined Mr. Hernandez-Garcia on December 21, 2011, indicated an x-ray of the left knee was normal; and there was no evidence of joint instability, swelling, erythema, or localized heat suggestive of a septic joint (CX 2, p. 14), but did not release him to return to work until January 13, 2012, and recommended modified duty from January 14, 2012, until February 14, 2012 (CX 2, p. 23). Dr. Leavitt appears to have released Mr. Hernandez-Garcia to return to work on December 27, 2011 (CX 2, p. 30), de-

spite having prescribed Vicodin for him (CX 2, p. 29). I resolve this ambiguity in Mr. Hernandez-Garcia's favor. After all, Respondents acknowledge his left-knee injury, for which he ultimately underwent surgery; they can hardly be heard to complain that the entire claim was an elaborate hoax. It may be that his doctors were cautious, and less skeptical of Mr. Hernandez-Garcia's history then than Respondents are today. But even so, it would have been reasonable to avoid further strain to the injured knee until doctors felt they understood the extent of the damage. I conclude Mr. Hernandez-Garcia became temporarily totally disabled on December 21, 2011.

2. Claimant Is Not Permanently Disabled

For permanent disability beginning on November 29, 2012, Mr. Hernandez-Garcia does not make the necessary showing. Apart from his own unreliable testimony, and medical opinions based on his unreliable reports of his injury and his history, there is nothing in the record before me to suggest he could not perform his old job at Nichols Brothers after he reached maximum medical improvement. What is more, vocational expert Neil Bennett, relying on a report of Theodore Becker, Ph.D. (RX 8, pp. 267, 291), concludes he can (RX 18, p. 566). I conclude Mr. Hernandez-Garcia is not permanently disabled, either partially or totally, as the result of his work-related injury of November 2, 2011.

III. CONCLUSIONS

Mr. Hernandez-Garcia injured his left knee in a work-related accident on or about November 2, 2011. As a result of that accident, he was temporarily totally disabled from December 21, 2011, until November 29, 2012, when he reached maximum medical improvement. Upon reaching maximum medical improvement, he was able to perform his usual work.

IV. ATTORNEY FEES AND COSTS

If claimant's counsel, Mr. Sweeting, contends he is entitled to an award of attorney fees and costs, he must file a fee petition under 20 C.F.R. §702.132 within 21 days of the date the District Director serves this order. Employer/Carrier must file its objections within 14 days of service of the fee petition. Within 14 days of service of those objections, the parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections. Both parties are charged with the duty to arrange the meeting. Within seven days of the meeting, Mr. Sweeting must file a report identifying the objections that have been resolved, the objections that have been narrowed, and the objections which remain unresolved. The report may also reply to any unresolved objections.

ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, I issue this compensation order. The District Director will administratively perform the specific dollar computations of the award.

1. American Longshore Mutual Association or Ice Floe, LLC, dba Nichols Brothers, must pay the claimant compensation for his temporary total disability from December 21, 2011, until November 29, 2012, the date of maximum medical improvement.

2. American Longshore Mutual Association or Ice Floe, LLC, dba Nichols Brothers, must pay, under Section 7 of the Act, for such reasonable, appropriate, and necessary medical care as claimant received for his left-knee injury from December 21, 2011, until November 29, 2012.

3. American Longshore Mutual Association and Ice Floe, LLC, dba Nichols Brothers, will receive credit for all amount of compensation previously paid to claimant, and all medical benefits previously provided to claimant, as a result of his left-knee injury on November 2, 2011.

4. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

Digitally signed by John C. Larsen
DN: CN=John C. Larsen,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

CHRISTOPHER LARSEN
Administrative Law Judge