U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 14 June 2017

CASE NO: 2014-LHC-01160
OWCP NO: 14-156217

In the Matter of:

ROGELIO HERNANDEZ-GARCIA,
Claimant,

v.

ICE FLOW, LLC dba NICHOLS BROTHERS,
Employer,

and

AMERICAN LONGSHORE MUTUAL ASS'N,
Carrier.

Appearances:

MATHEW S. SWEETING, Esq.
For the Claimant

NINA M. MITCHELL, Esq.
For the Employer/Carrier

Before:
CHRISTOPHER LARSEN
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS AFTER REMAND

This is a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq.* Mr. Rogelio Hernandez-Garcia seeks compensation and medical benefits from Ice Flow, LLC ("Employer") and American Longshore Mutual Association ("Carrier") for a work-related injury suffered on December 21, 2011.

I. PROCEDURAL HISTORY[1]

I held a formal hearing in this case on February 24 and 27, 2015 in Seattle, Washington, at which both parties had a full and fair opportunity to present evidence and argument as provided by law and applicable regulations. On September 16, 2015, I issued a decision awarding benefits to Mr. Hernandez-Garcia. On October 12, 2015, Mr. Hernandez-Garcia appealed the decision. The Board issued a decision on August 30, 2016, vacating my denial of disability and medical benefits to Mr. Hernandez-Garcia after November 29, 2012, and remanded the case back to me for further consideration. The Board held this Court failed to address all of the relevant evidence regarding Mr. Hernandez-Garcia's ability to return to work after November 29, 2012, and appropriately to decide whether Mr. Hernandez-Garcia was entitled to a second arthroscopic diagnostic surgery on his left knee.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each in arriving at this decision.

II. ISSUES

The issues to be addressed on remand include:

A. The nature and extent of Mr. Hernandez-Garcia's injuries sustained on December 21, 2011.
B. The extent, if any, to which the Mr. Hernandez-Garcia is entitled to medical benefits under the Act for those injuries.
C. The extent, if any, to which the Mr. Hernandez-Garcia is entitled to disability benefit under the Act for those injuries.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. GENERAL STANDARD

The Act must be construed liberally in favor of a claimant. *Voris v. Eikel*, 346 U.S. 328, 74 S. Ct. 88, 92 L. Ed. 5 (1953). The Benefits Review Board (Board or BRB) must affirm a decision if the findings of an Administrative Law Judge (ALJ) are supported by substantial evidence in the record considered as a whole, if they are rational, and if the decision is in accordance with law. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467, 88 S.

[1] I use these abbreviations: "TR" for the official hearing transcript; "CX" for a Claimant's exhibit; and, "EX" for an Employer's exhibit.

Ct. 1140, 1145, 20 L. Ed. 2d 30 (1968). Substantial evidence is "more than a mere scintilla," or "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Abosso v. D. C. Transit System, Inc.*, 7 BRBS 47 (1977).

As a trier-of-fact, an ALJ is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his or her own inferences and conclusions therefrom. *See, e.g., John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693, 695 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). It is solely within the discretion of the ALJ to accept or reject all or any part of any testimony according to his or her judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969); *Poole v. Nat. Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem.* 600 F.2d 280 (D.C. Cir. 1979).

In reviewing medical opinions of record, several considerations are relevant to the ALJ's determination of their probative value and relative evidentiary weight. Because an ALJ may accept or reject all or any part of a witness's testimony, the ALJ can base one finding on a physician's opinion and, then, on a different issue, find contrary to the same physician's opinion on that issue. *Pimpinella v. Univ. Maritime Serv., Inc.*, 27 BRBS 154 (1993). A judge is not bound to render an opinion consonant only with testimony of doctors if rational inferences lead in the other direction. *Avondale Indus., Inc. v. Dir., Office of Workers' Comp. Programs*, 977 F.2d 186, 189 (5th Cir. 1992); *Ennis v. O'Hearne*, 223 F.2d 755, 758 (4th Cir. 1955).

An ALJ must examine the logic of a physician's conclusions and the evidence upon which those conclusions are based, and evaluate the physician's opinion in light of the other evidence in the record. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 439 (4th Cir. 2003); *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014). A well-reasoned and documented opinion may be entitled to greater evidentiary weight. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014).

Medical opinions better supported by the objective evidence of record (e.g., medical tests, clinical findings) may be given greater weight. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Dir., OWCP*, 8 F.3d 34 (9th Cir. 1993). Where physicians of record disagree as to the applicable diagnostic criteria, or offer competing interpretation of objective criteria or medical data, the choice between the conflicting opinions is within ALJ's discretion, as long as it is supported by substantial evidence. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998). A medical opinion may be rejected if it has no clear basis, lacks an evidentiary foundation, or relies on a faulty factual premise. *Hice v. Dir., Office of Workers' Comp. Programs*, 48 F. Supp. 2d 501, 504 (D. Md. 1999); *Am. Grain Trimmers, Inc. v. Office of*

Workers' Comp. Programs, 181 F.3d 810, 814 (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). Whether a doctor is the claimant's treating physician is one factor to consider when resolving conflicts in medical opinion evidence. *Amos v. Dir., OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), reported at 1998 U.S. App. LEXIS 33883, *amended* 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). But the opinions of treating physicians are not accorded automatic deference. *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999).

B. NATURE OF DISABILITY

Section 8 of the LHWCA addresses compensation for disability. Section 2(10) of the Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment," except in cases involving awards to retirees with occupational diseases compensated under Section 8(c)(23), in which case it means "permanent impairment." 33 U.S.C. § 902(10). Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. The employee has the burden of establishing the nature and extent of disability. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

A disability can be either permanent or temporary. The date a claimant's disability reaches permanency is a question of fact determined solely by medical evidence without regard to a claimant's economic situation. *SGS Control Servs. v. Dir., Office of Worker's Comp. Programs, U.S. Dep't of Labor*, 86 F.3d 438, 443 (5th Cir. 1996); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Permanency is established as of the date the employee reaches "maximum medical improvement" ("MMI"). *See, e.g., Trask*, 17 BRBS 56; *Luce v. Bath Iron Works Corp.*, 12 BRBS 162 (1979); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979); *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977). An employee is permanently disabled if he has any residual disability after reaching MMI. *Id.* The ALJ may rely on a physician's opinion to establish the date of MMI. *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

In the original decision, I concluded Mr. Hernandez-Garcia reached maximum medical improvement on November 29, 2012, and his disability began on December 21, 2011. The board did not take issue with that aspect of the decision. But I did not address the question of Mr. Hernandez-Garcia's residual disability in the original decision.

The record indicates Mr. Hernandez-Garcia has no residual disability in the left knee due to a work-related injury. Dr. Theodore Becker conducted a Performance Based Physical Capacities Examination of Mr. Hernandez-Garcia on September 10, 2014 (EX 8). He concluded Mr. Hernandez-Garcia could perform full-time Medium/Medium+ category work according to the Dictionary of Occupational Titles without restriction (EX 8.267, 8.291). Vocational expert Neil Bennett, using Dr. Becker's conclusions and his own site visit to Nichols Brothers shipyard,

concluded Mr. Hernandez-Garcia could return to work at his job of inquiry as a Marine Painter (EX 18.566). 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). On April 11, 2012, Dr. Leavitt stated in his report Mr. Hernandez-Garcia's medical condition was unchanged and that he had nothing left to offer him (CX 5, p. 104 to 105).

While there is evidence to suggest Mr. Hernandez-Garcia possesses residual disability after November 29, 2012, I find it unpersuasive given either its reliance on Mr. Hernandez-Garcia's self-reported symptoms or, in the case of medical opinions, inadequate explanation. On April 11, 2012, Dr. Leavitt medically cleared Mr. Hernandez-Garcia to return to light-duty work, but he was to remain off work if light-duty work was not available (CX 5, p. 104). On November 29, 2012, and January 7, 2013, Dr. Leavitt checked boxes on the State of Washington Insurer Activity Prescription Forms indicating Mr. Hernandez-Garcia was prohibited from squatting, kneeling, or crawling, and was restricted to "seldom" climbing ladders (CX 3, at 89, 91). On April 18, 2013, Dr. Leavitt indicated Mr. Hernandez-Garcia could occasionally twist, bend/stoop, squat/kneel, and frequently stand/walk and climb (CX 5, p. 105).

However, Dr. Leavitt's opinion Mr. Hernandez-Garcia had no impairment in his left knee is in two actual reports complete with explanation which immediately followed an examination (CX 3, p. 87; CX 5, p. 104 to 105). Dr. Leavitt's limitations of Mr. Hernandez-Garcia's activity when filling out Washington Insurer Activity Prescription Forms contain no reasoning behind his prescription, making them less persuasive. When Dr. Leavitt released Mr. Hernandez-Garcia to light duty work on April 11, 2012, he was seeing Mr. Hernandez-Garcia entirely because of Mr. Hernandez-Garcia's subjective knee pain complaints. As reasoned above, Mr. Hernandez-Garcia is not a reliable witness. It is also a prescription pre-dating November 29, 2012. This prescription, based on Mr. Hernandez-Garcia's subjective complaints, therefore, does not help Mr. Hernandez-Garcia meet his burden of proving he suffered from residual disability after November 29, 2012. In addition, I find his reports which have actual reasoning and explanation more persuasive and reliable than a perfunctory insurance form without context.

Dr. Kinahan saw Mr. Hernandez-Garcia on March 7, 2013, when he refused to release Mr. Hernandez-Garcia to work and filled out his first Washington Insurer Activity Prescription form. Dr. Kinahan prohibited Mr. Hernandez-Garcia from squatting, kneeling, and crawling, and restricted him to "occasional" climbing ladders in the Washington Insurer Activity Prescription Form. (CX 4, 94, 95). Dr. Kinahan's accompanying written report relies on Mr. Hernandez-Garcia's subjective complaints and gait. As noted above, Mr. Hernandez-Garcia is not a trustworthy reporter of his symptoms. In addition, observations of his gait have been inconsistent (EX 14; EX 9; CX 3, p. 87; CX 5, p. 104 to 105; CX 8, p. 121). Dr. Kinahan's review of Mr. Hernandez-Garcia's x-ray could not find a problem which would explain Mr.

Hernandez-Garcia's symptoms and he believed his treatment up to that point was appropriate (CX 4, 94). Based on Mr. Hernandez-Garcia's self-reported symptoms, 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). Since Dr. Kinahan's opinion from March 7, 2013, relies on Mr. Hernandez-Garcia's subjective reports, which are inherently unreliable, I find that opinion unpersuasive. It does not demonstrate Mr. Hernandez-Garcia has residual disability.

Dr. Kinahan's April 2, 2013, report relied on Mr. Hernandez-Garcia's March 20, 2013, MR arthrogram to find abnormalities in Mr. Hernandez-Garcia's left knee which suggested a 1 cm nondisplaced horizontal cleavage tear at the junction of the posterior horn and the body of the medial meniscus. He recommended a second arthroscopic surgery on the left knee, though that would not guarantee success (CX 4, p. 97 to 99). Ultimately, however, Dr. Leavitt would conclude there was nothing he could do based on the MR arthrogram and decline to perform surgery, and Dr. Kinahan would defer to Dr. Leavitt on September 11, 2013 (CX 6, p. 107). This indicates Dr. Kinahan believed Mr. Hernandez-Garcia's treatment was complete. As to residual disability, Dr. Kinahan placed restrictions on Mr. Hernandez-Garcia on April 2, 2013, and September 11, 2013, based on Mr. Hernandez-Garcia's reports of his own symptoms. The April 2, 2013, and September 11, 2013, Washington Insurer Activity Prescription form continues the restrictions from the original March 7, 2013, form, but with the same problems; the form is conclusory (CX 5, p. 100; CX 6, p. 108). Therefore, his conclusions do not carry great weight and do not help Mr. Hernandez-Garcia meet his burden of proof.

On September 27, 2013, Dr. Skalley placed restrictions on Mr. Hernandez-Garcia and opined Mr. Hernandez-Garcia could perform modified duty through October 31, 2013, but he provides insufficient explanation. Dr. Skalley restricted Mr. Hernandez-Garcia to "seldom" climbing ladders and crawling, and to occasional standing/walking, twisting, bending, and squatting (CX 7, p. 109). However, the record only includes the Washington Insurer Activity Prescription Form Dr. Skalley filled out on behalf of Mr. Hernandez-Garcia. These forms simply require the doctor to check a series of boxes and sign. Dr. Skalley provides no explanation for his restrictions. Therefore, I find them unpersuasive.

Dr. Johnson, on April 9, 2014, placed restrictions on Mr. Hernandez-Garcia and approved only sedentary work, but relies on Mr. Hernandez-Garcia's subjective complaints and his own incomplete reasoning (CX 8, p. 123, 125). First, he relies on Mr. Hernandez-Garcia's reports of pain and descriptions of his own abilities (CX 8, p. 110). For example, Dr. Johnson said Mr. Hernandez-Garcia would not walk without a crutch (CX 8, p. 121). However, this Court, based on the *sub rosa* film and the report of others doctors, knows Mr. Hernandez-Garcia is capable of at least some walking without his crutch, indicating Dr. Johnson's opinion is based on Mr. Hernandez-Garcia's less-than-truthful report (EX 14; EX 9; CX 3, p. 87; CX 5, p. 104 to 105). In addition, Dr. Johnson, in arguing Mr. Hernandez-Garcia can perform only sedentary work,

does not specify the extent to which Mr. Hernandez-Garcia's limitations result from the left-knee injury, as compared to his other alleged injuries. Dr. Johnson's analysis includes alleged disabilities from Mr. Hernandez-Garcia's calves, knees, coccyx, and psyche (CX 8, p. 125). Only the left-knee injury is work-related. Therefore, Dr. Johnson's opinion does not show Mr. Hernandez-Garcia's left knee continues to cause any residual disability after November 29, 2012.

Finally, Dr. Billington, who examined him on Employer's behalf, stated on September 11, 2014, that Mr. Hernandez-Garcia has permanent restrictions against repetitive stooping, bending squatting, kneeling, crouching, and climbing ladders, but these were not due to his work injury (EX 3.202). These restrictions are due to his pre-existing degenerative knee condition (*Id.*). He also asserted Mr. Hernandez-Garcia's December 21, 2011, injury did not aggravate his pre-existing degenerative knee condition (EX 3.201 to 3.202). Therefore, even though Dr. Billington's opinion indicates Mr. Hernandez-Garcia may have residual disability, it does not help Mr. Hernandez-Garcia meet his burden of proving he has residual disability due to the work-related injury to his left knee.

Ultimately, Mr. Hernandez-Garcia fails to meet the burden of proving he is residually disabled after the November 29, 2012, date. Therefore, I find he was temporarily disabled from December 21, 2011, the date of injury, to November 29, 2012, the date of MMI. After November 29, 2012, he was no longer disabled because of a work-related injury.

C. EXTENT OF DISABILITY

To establish a *prima facie* case of total disability, Mr. Hernandez-Garcia must show he cannot return to his regular or usual employment due to his work-related injury. "Usual" employment involves the employee's regular duties at the time that he was injured. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). To determine whether a claimant has shown total disability, the ALJ must compare that claimant's medical restrictions with the specific physical requirements of his usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). A claimant's credible complaints of pain alone may be enough to meet this burden. *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

The Board orders this Court to reconsider whether Mr. Hernandez-Garcia can return to his usual employment after addressing all of the relevant evidence regarding his ability to work, including any evidence which contradicts this Court's original ruling that Mr. Hernandez-Garcia could return to his usual employment (Board Decision, p. 2 to 5). I must carefully consider all the evidence and compare it the requirements of Mr. Hernandez-Garcia's employment. After carefully considering this evidence, my opinion as to when Mr. Hernandez-Garcia was first unable to return to his usual employment remains unchanged. In the original decision I found

Mr. Hernandez-Garcia could not perform his usual employment from December 21, 2011, through November 29, 2012.

Mr. Hernandez-Garcia's usual employment as a marine painter required him to perform a variety of paint-related tasks. After interviewing Mr. Hernandez-Garcia and personally observing marine painters in action, vocational expert Neil Bennett reported Mr. Hernandez-Garcia's job duties included performing surface preparation with grinders and sandblasters; painting tanks, complex piping systems, side shells, hulls, decks, interior and exterior structures; mixing paint; operating airless and conventional sprayers; applying paint with brush and rollers; and spreading protective tarps and plastics (EX 18.563 to 18.564).

Nothing in the record explains how often Mr. Hernandez-Garcia needs to bend, walk, climb ladders, stand or sit during his usual employment. Since it is Mr. Hernandez-Garcia's burden to prove he cannot return to his usual employment, it is also his burden to demonstrate to this Court the physical requirements of his usual employment. This absence of more specific information forces the Court to guess based on a flimsy record the kind of physical activity these tasks involve. One can assume Mr. Hernandez-Garcia would need to stand, bend, and squat and climb ladders at least occasionally when performing the above-enumerated tasks.

Employer introduces evidence indicating Mr. Hernandez-Garcia was capable of returning to his usual employment as early as November 29, 2012. Theodore Becker, Ph.D., concluded Mr. Hernandez-Garcia was capable of full time Medium/Medium+ category work according to the Dictionary of Occupational Titles without restriction (EX 24, p. 9; EX 8.267, 8.291). Vocational expert Neil Bennett, using Dr. Becker's conclusions and his own site visit to Nichols Brothers shipyard, concluded Mr. Hernandez-Garcia could return to work as a marine painter (EX 18.566). 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). On April 11, 2012, Dr. Leavitt stated in his report that Mr. Hernandez-Garcia's medical condition was unchanged and that he had full range of motion in his left knee (CX 5, p. 104 to 105). Ultimately, this evidence indicates Mr. Hernandez-Garcia can return to his usual employment as a marine painter.

As reasoned above, Mr. Hernandez-Garcia has failed to meet the burden of proving he has residual disability from his December 21, 2011, injury. His own testimony about his pain and limitations is unreliable. The medical opinions, tainted by incomplete or absent reasoning, and based on Mr. Hernandez-Garcia's own unreliable reports of his symptoms, do not meet the burden of proving residual disability. The various restrictions Drs. Leavitt, Kinahan, Skalley, Johnson, and Billington placed on Mr. Hernandez-Garcia after November 29, 2012, as noted in detail above, were either placed without any justification, or based on his own unreliable subjective complaints. They are, therefore, not persuasive. Since Mr. Hernandez-Garcia has

failed to prove any residual disability after November 29, 2012, resulting from his December 21, 2011, injury, he has also failed to prove he cannot return to his usual employment after November 29, 2012. I conclude Mr. Hernandez-Garcia is not permanently disabled, either partially or totally, as the result of his work-related injury after November 29, 2012.

Ultimately, Mr. Hernandez-Garcia fails to meet the burden of proving he cannot return to work due to his December 2, 2011, injury after his November 29, 2012 MMI date. Mr. Hernandez-Garcia fails to prove any residual disability. Meanwhile, Dr. Leavitt's opinion, combined with Dr. Becker's analysis along with Employer's vocational expert, indicate Mr. Hernandez-Garcia could return to his usual employment as of November 29, 2012. Given Mr. Hernandez-Garcia's failure to establish any ongoing restrictions after November 29, 2012, I conclude he was no longer disabled after reaching MMI on November 29, 2012.

D. SECTION 7 MEDICAL BENEFITS

Under Section 7(a) of the Act, an employer must furnish such 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. 33 U.S.C. § 907(a); *see also* 20 C.F.R. §§ 702.401(a). As interpreted by the Board, in order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary for treatment of a work injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The term "necessary" refers to whether the medical care is appropriate for the injury. 20 C.F.R. § 702.402. Mr. Hernandez-Garcia has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-258 (1984). The Board held this Court did not address whether Mr. Hernandez-Garcia established the necessity of a second left knee diagnostic arthroscopy evaluation to diagnose and/or treat his knee injury and any resulting pain, noting Mr. Hernandez-Garcia might be entitled to medical benefits which are necessary as a result of an injury irrespective of disability status. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

Mr. Hernandez-Garcia believes he needs a second arthroscopic surgery to treat his work-related condition, but fails to meet his burden of proving the treatment is necessary. He underwent his first arthroscopic surgery on his left knee on April 30, 2012, and provides no convincing evidence a second surgery is necessary. 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. He opined Mr. Hernandez-Garcia did not sustain a torn meniscus (CX 3, p. 46,). In early January, 2013, Mr. Hernandez-Garcia allegedly contacted Whidbey Orthopedics for an appointment (CX 4, p. 92). After reviewing Mr. Hernandez-Garcia's orthopedic records and operative report, Dr. Livermore reportedly determined his general orthopedic practice had nothing further to offer Mr. Hernandez-Garcia and he suggested

Mr. Hernandez-Garcia contact a knee specialist (*Id.*). Dr. Leavitt referred Mr. Hernandez-Garcia to Dr. Kinahan for a second opinion. Dr. Kinahan recommended and referred Mr. Hernandez-Garcia for "an updated MRA of the lift knee" (CX 4, p. 93). On March 20, 2013, a left knee MRI arthrogram with contrast was taken and interpreted by Dr. Stambaugh as indicating a "1 cm nondisplaced horizontal cleavage tear junction of posterior horn and body medial meniscus," (CX 4, p. 97). After the arthrogram, Dr. Kinahan met with Mr. Hernandez-Garcia and suggested Mr. Hernandez-Garcia return to Dr. Leavitt "for a possible repeat arthroscopy and partial meniscectomy," (CX 4, p. 99). On April 18, 2013, Dr. Leavitt reviewed the March 20, 2013, MRI and stated he did not observe a tear and had nothing further to offer Mr. Hernandez-Garcia surgically. He suggested Mr. Hernandez-Garcia see a third physician (CX 5, p. 103). Three additional physicians interpreted Mr. Hernandez-Garcia's March 20, 2013, MRI. Dr. Serra opined there is a 90% to 95% probability of a tear, (TR 141 to 143). Dr. McFarland diagnosed no tear, but rather intra-substance degeneration, (TR 201 to 202); and Dr. Billington found no tear (CX 18, p. 171). On September 11, 2013, Dr. Kinahan agreed with Dr. Leavitt that surgery would not benefit Mr. Hernandez-Garcia (CX 6, p. 107). Finally, after Dr. Kinahan and Dr. Leavitt opined further surgery would be unnecessary, Dr. Johnson opined on April 9, 2014, that Mr. Hernandez-Garcia should undergo a diagnostic left knee arthroscopy which, if it revealed a meniscus tear, might lead to Mr. Hernandez-Garcia's requiring partial medial meniscectomy (CX 8, p. 125).

Out of all the physicians Mr. Hernandez-Garcia saw during this long narrative, Dr. Johnson stands alone in his opinion a second arthroscopic surgery on the left knee is necessary. Dr. Livermore, an orthopedist, believed he had nothing further to offer Mr. Hernandez-Garcia as of January, 2013. Dr. Leavitt did not believe further surgery would help Mr. Hernandez-Garcia on April 18, 2013. Dr. Kinahan, on September 11, 2013, ultimately agreed with Dr. Leavitt that further surgery would not benefit Mr. Hernandez-Garcia. The three additional physicians that interpreted Mr. Hernandez-Garcia's March 20, 2013, MRI, Dr. Serra, Dr. McFarland, and Dr. Billington, never concluded he needed a second arthroscopic surgery. Ultimately, only Dr. Johnson believes Mr. Hernandez-Garcia needs a second arthroscopic surgery.

First, Employer argues a second diagnostic arthroscopic evaluation of Mr. Hernandez-Garcia's left knee is unnecessary because if the meniscus tear in the left knee exists, it is unlikely the tear would be the cause of Mr. Hernandez-Garcia's complaints, assuming those complaints to be truthful. As Employer notes, radiologists frequently see asymptomatic meniscal tears (TR 215). Drs. Leavitt and Kinahan concluded Mr. Hernandez-Garcia required no further treatment after reviewing his 2013 MRI (CX 5, p. 103; CX 6, p. 107). The nature of the perceived tear and its stable appearance on the MRI and MRA weighs against surgical intervention (TR 213, 214; EX 2.161). The fragment Dr. Serra testified to requires no treatment, even if it does represent a tear, because its location renders it asymptomatic (TR 207 to 208). Dr. Billington explained Mr. Hernandez-Garcia's continued complaints of knee pain, assuming he actually has knee pain, are consistent with degenerative arthritis unrelated to his work injury (EX 25, p. 19, 23, 30).

Mr. Hernandez-Garcia, in his post hearing brief, relied on Dr. Johnson's opinion Dr. Leavitt could not possibly have probed the meniscus, the area where the tear was shown by the MRA, nor seen the tear (TR 84 to 86). Mr. Hernandez-Garcia goes as far to suggest Dr. Leavitt, Mr. Hernandez-Garcia's treating physician, falsified his operative report to cover up this allegedly-grievous error (Mr. Hernandez-Garcia's post-trial brief, p. 11). Therefore, according to Mr. Hernandez-Garcia, further arthroscopic evaluation is needed to confirm the existence of a tear. Mr. Hernandez-Garcia relies entirely on Dr. Johnson's opinion to argue the second arthroscopic evaluation is necessary.

My problem with Dr. Johnson's testimony remains the same. If Dr. Leavitt had made an obvious mistake, I would expect some mention of it in Dr. Johnson's report (CX 8). Nothing in the record besides Dr. Johnson's testimony criticizes Dr. Leavitt's procedure. If Dr. Johnson's opinion is not persuasive, I am forced to rely on Dr. Leavitt's assertion he performed the diagnostic arthroscopic evaluation correctly. Mr. Hernandez-Garcia introduces no evidence which justifies repeating the same procedure beyond Dr. Johnson's opinion. Therefore, Mr. Hernandez-Garcia fails to justify forcing Employer to repeat the same successful procedure. I once again rely on Dr. Leavitt's opinion that Mr. Hernandez-Garcia no longer needs treatment for his left knee based on his work-related injury.

Because Mr. Hernandez-Garcia's complaints of pain are not trustworthy, they are not useful, in my opinion, to justify further surgery. If his complaints of pain are dubious – and I find they are – it would be unreasonable to force Employer to pay for a new surgery based on those complaints, and those complaints do not prove the procedure is necessary.

Mr. Hernandez-Garcia does not provide sufficient evidence to indicate a second arthroscopic knee surgery is necessary, while Employer provides evidence indicating the surgery is unnecessary. Ultimately, Mr. Hernandez-Garcia fails to meet his burden. Since he fails to show a repeat arthroscopic surgery is reasonable and necessary, I find Employer does not need to pay for the procedure.

E. ATTORNEY'S FEES AND COSTS

Claimant's counsel is entitled to reasonable attorney fees and costs for benefits procured on Claimant's behalf. Counsel 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, Claimant's counsel 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.

The LHWCA prohibits the charging of a fee in the absence of an approved application.

IV. 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 Mr. Hernandez-Garcia 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 and Ice Floe, LLC, dba Nichols Brothers, will receive credit for all amount of compensation previously paid to Mr. Hernandez-Garcia, and all medical benefits previously provided to Mr. Hernandez-Garcia, as a result of his left-knee injury on December 21, 2011.
3. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.
4. Mr. Hernandez-Garcia's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Mr. Hernandez-Garcia and opposing counsel who shall have twenty (20) days from the receipt of such application to file any objections thereto.

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