No. 06-250

In the Supreme Court of the United States

OPERATORS AND CONSULTING SERVICES, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports an administrative law judge's finding that an employer and its insurer are liable under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, for an employee's disability because the disability was the natural progression of a traumatic injury the employee sustained while working for the employer and was not aggravated by any injury during later work for a second employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not published in the *Federal Reporter* but is reprinted in 170 Fed. Appx. 931. The decisions of the Benefits Review Board (Pet. App. 14-22) and administrative law judge (App., *infra*, 1a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2006. A petition for rehearing was denied on May 22, 2006 (Pet. App. 31-32). The petition for a writ of certiorari was filed on August 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in covered maritime employees' disability or death. 33 U.S.C. 902(3), 903. The Act defines "injury" to mean, in relevant part, an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. 902(2). "Disability" generally "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10).

The LHWCA makes "[e]very employer" liable for paying compensation to its employees for covered employment-related disabilities or death, "irrespective of fault as a cause for the injury." 33 U.S.C. 904(a) and (b); see 33 U.S.C. 908, 909. When more than one employer may be responsible for a work-related disability, the statute does not apportion liability among the employers. In cases involving traumatic injuries at more than one employer, a second or final employer is liable for the entire disability when "an employment injury worsens or combines with a preexisting impairment [or previous injury] to produce a disability greater than that which would have resulted from the employment injury alone." *Strachan Shipping Co.* v. *Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (en banc). See, *e.g.*, *Marinette Marine Corp.* v. *OWCP*, 431 F.3d 1032, 1034 (7th Cir. 2005); *Delaware River Stevedores, Inc.* v. *Director, OWCP*, 279 F.3d 233, 241 (3d Cir. 2002). If the disability results solely from the natural progression of a prior injury, however, courts impose full liability on the employer at the time of the prior injury. See, *e.g.*, *Admiralty Coatings Corp.* v. *Emery*, 228 F.3d 513, 517 (4th Cir. 2000).

2. On October 16, 1997, respondent James Morrison injured his back while working for petitioner Operators & Consulting Services (OCS) as a field mechanic on an offshore oil platform. Pet. App. 2-3, 15; App., *infra*, 3a. Morrison received medical treatment from a chiropractor from October 1997 until February 1998. Pet. App. 3, 15; App., *infra*, 4a. After the injury, he continued to work, initially at light duty, and then at his regular duties. Pet. App. 3, 15.

In May 1998, respondent Danos & Curole Marine Contractors took over the labor contract on the platform and retained Morrison as a field mechanic after he passed a pre-employment agility test. Pet. App. 3, 15-16; App., *infra*, 5a. Later that month, Morrison returned to the chiropractor, reporting not only lower back pain but also numbness and tingling pain in his left leg, symptoms which had first appeared in March 1998. Pet. App. 3, 16; App., *infra*, 5a, 20a. The chiropractor resumed treatment, and Morrison continued to work at several physically strenuous jobs, including a total engine overhaul in which he worked 15-16 hours a day for seven days. *Id.* at 5a. Morrison reported that his back pain increased following strenuous jobs but got better following rest. Pet. App. 4; App., *infra*, 5a.

In September 1998, the chiropractor referred Morrison to a neurosurgeon. Pet. App. 4, 16; App., *infra*, 6a. Morrison's back pain continued to increase, and he stopped working in September 1998. Danos & Curole terminated his employment in October 1998. *Ibid*. Morrison's condition continued to worsen after he stopped working, even without strenuous physical labor. Pet. App. 4; App., *infra*, 6a. After several more years of treatment, diagnostic tests revealed a disc herniation and nerve root impingement. Morrison underwent lum-

bar fusion surgery in July 2001. Pet. App. 4, 16; App., *infra*, 7a, 9a-11a. Although successful, the surgery left Morrison with an 18% whole body impairment and permanently limited him to light-duty work. Pet. App. 4; App., *infra*, 11a.

3. a. Morrison filed claims for disability compensation and medical expenses pursuant to the LHWCA, 33 U.S.C. 907, 908, against both employers. OCS agreed to pay the benefits, but claimed that Danos & Curole was liable for the full amount under the aggravation rule. At a formal administrative hearing held on January 23, 2003, the parties contested primarily the issue of which employer was liable. Pet. App. 5; App., *infra*, 2a-3a; see 33 U.S.C. 919(c) and (d). The administrative law judge (ALJ) concluded that OCS was liable because Morrison's disability was a natural progression of his October 1997 injury and not the result of any aggravation of that injury while working for Danos & Curole. App., *infra*, 23a.

The ALJ acknowledged that whether Morrison's disability was a natural progression or an aggravation was primarily a medical determination. App., *infra*, 3a. The ALJ credited Morrison's description of his symptoms and the testimony of the neurosurgeon and chiropractor that the disability resulted from a natural progression of Morrison's October 1997 injury. *Id*. at 20a-23a. In particular, the ALJ found that Morrison's new symptoms of left leg tingling—which commenced in March 1998, while Morrison was still employed by OCS—indicated that the October 1997 back injury had not resolved itself by the time he was employed with Danos & Curole. *Id*. at 12a, 20a. The ALJ also noted that Morrison sought treatment in May 1998, after he started working for Danos & Curole, because of continuing pain over the

preceding months. *Id*. at 20a. Although the ALJ noted that it was not possible to place a definitive date on the origin of Morrison's disc problem, *ibid*., the ALJ placed great weight on the neurosurgeon's statements that a back condition can deteriorate on its own, in spite of either work or rest, *id*. at 22a, and that Morrison's episodes of pain were most likely "flare-ups" not necessarily correlated with further physical damage, *id*. at 12a, 22a.

b. The Benefits Review Board (BRB or the Board) affirmed the ALJ's decision. Pet. App. 14-22. The Board concluded that the ALJ applied the correct legal standard in deciding whether employment at Danos & Curole aggravated Morrison' s October 1997 injury, and that the ALJ' s finding of no aggravation was supported by substantial evidence. *Id*. at 18-20; see 33 U.S.C. 921(b)(3).

c. The court of appeals affirmed.[*] Pet. App. 1-13. The court stated that "for the second or last employer to be liable" for an injury that occurred during earlier employment, "there must be evidence of additional trauma or damage that * * * occurred in the course of the second or last employment." *Id*. at 8 n.2. The court concluded that substantial evidence supported the ALJ's factual finding that Morrison's disability resulted from the natural progression of his October 1997 injury. *Id*. at 10-13. The court cited the equivocal medical testimony before the ALJ and concluded that the ALJ acted reasonably in crediting the doctors' ultimate conclusion

[*] A panel of the Fifth Circuit initially denied the petition for review without hearing argument. Pet. App. 23-29. The court subsequently vacated that judgment sua sponte and scheduled the case for argument. *Id*. at 30.

that there was no aggravation during Morrison's employment with Danos & Curole. *Id*. at 13.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioners do not dispute that they would be liable for benefits if Morrison's disability resulted from the natural progression of his October 1997 injury and not from an aggravation of that injury during subsequent employment. They argue, however, that the Fifth Circuit misapplied the test for determining aggravation by suggesting that aggravation requires a "traumatic event." Pet. 5.

Petitioners misconstrue the court of appeals' statement. After setting forth the general rule that "a second or final employer * * * is liable under the aggravation rule for the entire cost of an employee's disability if the preexisting impairment was aggravated during the course of the employee's second or final employment," Pet. App. 7, the court stated that aggravation must be shown by "evidence of *additional trauma or damage* that * * * occurred in the course of the second or last employment." *Id*. at 8 n.2 (emphasis added). "Additional trauma or damage" does not necessarily mean a single additional traumatic event. The damage can occur gradually. The Fifth Circuit's rule therefore is consistent with the rule applied in other circuits. See, *e.g.*, *Marinette Marine Corp.* v. *OWCP*, 431 F.3d 1032, 1035 (7th Cir. 2005); *Delaware River Stevedores, Inc.* v. *Director, OWCP*, 279 F.3d 233, 241-242 (3d Cir. 2002).

2. a. Substantial evidence supported the ALJ's factual finding that Morrison's disability resulted from the "natural progression" of his initial injury. Pet. App. 13; see 33 U.S.C. 921(b)(3) (stating that findings of fact are "conclusive if supported by substantial evidence in the record considered as a whole"). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). As the court of appeals noted, the medical evidence before the ALJ was equivocal. Pet. App. 10-12; see App., *infra*, 12a-13a. But Morrison's neurosurgeon made several statements that supported the ALJ's conclusion: that Morrison's condition was due to a natural progression, that a change in symptoms did not necessarily indicate a change in the underlying condition or further physical damage to the area, and that Morrison's pain could get worse over time without additional damage to the disc. App., *infra*, 12a-14a; see Pet. App. 11 n.3; see also *id*. at 12 n.4 (citing testimony of chiropractor). The ALJ also considered Morrison's own testimony and that of his chiropractor, and found them all consistent with the conclusion that Morrison's injury was not aggravated by his subsequent employment. App., *infra*, 20a-23a. Although a different factfinder may have credited different evidence to reach a different conclusion, the court of appeals correctly deferred to the ALJ's reasonable determination. See *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency' s finding from being supported by substantial evidence."); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 25 n.53 (D.C. Cir. 1976) (en banc).

b. Petitioners argue (Pet. 8-14) that the court of appeals' decision cannot be reconciled with four decisions of two other courts of appeals. Differences in the application of the "substantial evidence" test are highly fact-specific and rarely warrant this Court's review. This is especially so in a case like this one, in which the ALJ was called upon to weigh competing medical evidence and render a conclusion as to medical causation.

In any event, the cases petitioner cites are factually distinguishable. In each case, the court of appeals found substantial medical evidence that the second or final employment injury physically aggravated the underlying condition. In *Metropolitan Stevedore Co.* v. *Crescent Wharf & Warehouse Co.*, 339 F.3d 1102 (9th Cir. 2003), there was evidence that the employee experienced "gradual wearing away of the bone" every day he worked. *Id.* at 1105. In *Delaware River Stevedores*, the only credible medical evidence in the record suggested two distinct "injuries." 279 F.3d at 242. In *Foundation Constructors, Inc.* v. *Director, OWCP*, 950 F.2d 621 (9th Cir. 1991), the only testifying doctor who examined the employee stated that the additional strenuous work was "harmful," *id.* at 624, and other witnesses also attributed the injury to "cumulative trauma." *Ibid.* Finally, in *Kelaita* v. *Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), there was evidence that the employee's repetitive activity inflicted "cumulative trauma" that "aggravated the underlying injury." *Id.* at 1312. In this case, there was no direct evidence that repetitive activity at Danos & Curole caused further damage to Morrison's underlying injury. See App., *infra*, 23a. In the absence of such evidence, the ALJ could reasonably conclude, based on the doctors' testimony, that no aggravation took place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

[Seal Omitted]

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CASE NO.: 2002-LHC-952
OWCP NO.: 7-150544

IN THE MATTER OF JAMES MORRISON, CLAIMANT

v.

OPERATORS AND CONSULTING SERVICES, INC.,
EMPLOYER ZURICH AMERICAN INSURANCE CO.,
CARRIER DANOS & CUROLE MARINE CONTRACTS,
INC., EMPLOYER
AND
GRAY INSURANCE COMPANY, CARRIER

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April 16, 2003

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BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by James Morrison (Claimant) against Operators and Consulting Services, Inc. (Employer), Zurich American Insurance Co.(Carrier), Danos & Curole Marine Contracts, Inc.(Employer), and Gray Insurance Company (Carrier). The formal hearing was conducted at Metairie, Louisiana on January 23, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Operators and Consulting Services (OCS) DX 1-18 and Danos & Curole EX 1-9. This decision is based on the entire record.[2]

Basically, the only issue in this case is which of the two Employers is responsible for Claimant's medical expenses and disability compensation. The issue hinges on whether Claimant's condition is a result of a natural progression of his original injury, or an aggravation of that injury while working for the second employer. All other contested issues flow from the determination of which employer is responsible.[3] The parties have agreed

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[1] The parties were granted time post hearing to file briefs through March 14, 2003. Claimant's attorney did not file a brief.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Operators and Consulting Services's Exhibit- "DX __, pg.__"; and Danos & Curole's Exhibit- "EX __, pg.__".

[3] The other issues listed were 1) whether Claimant incurred an injury within the definition of the Act; 2) whether an employer/ employee relationship existed at the time of injury; and 3) whether the

that regardless of which Employer/Carrier is found liable the Claimant shall continue to receive compensation and medical benefits under the Act; provided, however, that if Danos & Curole is found to be responsible, then they will reimburse OCS for paid medical expenses according to the schedule provided by the District Director, regardless of the actual dollar amount paid by OCS (TR 104). Furthermore, the parties acknowledged that whether Claimant's condition was aggravated by continuing to work for Danos & Curole, or whether the condition would have naturally progressed in spite of his continued employment is primarily a medical determination (TR 96).

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant worked as a field mechanic for OCS, a labor pool which provided workers to an offshore platform owned and operated by Burlington Resources. As a field mechanic, Claimant was responsible for repairing and maintaining all the mechanical equipment of the Vermillion 4-12 platform, including refrigerators, doors, and air compressors (TR 29). Claimant was expected to carry two 35 lbs tool boxes and lift up to 75 lbs, but often had other people or machines to aid him. He was assigned 2 to 4 roustabouts who would help with anything needed. Claimant was assigned to a work schedule

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injury occurred in the scope and course of employment (TR 93). The issue of timely filing by the Claimant was not addressed by either of the briefs, and therefore, based on a discussion held at the formal hearing, I shall consider that issue to be abandoned (TR 105)

which required him to work seven days on the platform and then have seven days onshore to rest.

On October 16, 1997, Claimant was climbing a ladder to investigate a leak from the portable water tank, and while swinging his leg over a guard rail he felt an excruciating pain in his back. He explained that he was amazed he was able to descend from the ladder, and when he reached the deck he fell to the ground, which is how a co-worker found him (TR 70). Claimant did not work for the remainder of the day, and that evening took Motrin and Deep Heat for the pain and reported his injury to his supervisors. Claimant continued to work throughout his seven day hitch, however, he called his wife and had her make an appointment with a chiropractor for when he returned to the shore.

Dr. Karri Gramlich, a chiropractor, first treated Claimant from the week after his accident in October 1997 until February 1998, when she explained to Claimant that there was little else she could do to improve his condition, and he could return to work. Although Dr. Gramlich knew Claimant still complained of pain (TR 83), she released him and recommended that he return to her if the pain increased. Claimant testified that although his condition continued to deteriorate, he continued to perform all of his job duties on the platform, in spite of the pain (TR 72).

In May 1998, Burlington Resources, the operator of the platform, terminated their contract with OCS, and contracted with another labor pool, Danos & Curole, to provide laborers to the platform. Danos & Curole was interested in retaining Claimant as the field mechanic on the Vermillion 4-12 platform, and went through the process of formally hiring Claimant. As part of the

hiring process, Claimant underwent a pre-employment agility test. Martin Knijn, the physical therapist who performed the evaluation, was aware of Claimant's back injury, as well as the physical requirements of his job. Claimant explained that he did not find the test to be overly demanding (TR 77), and he did not report any complaints of pain or discomfort. Claimant was found to be in good health, and fully capable of performing his work on the platform, without any restrictions. Claimant was officially hired by Danos & Curole on May 8, 1998 (DX 9, TR 59). Shortly thereafter, on May 22, 1998, Claimant returned to Dr. Gramlich explaining that beginning in March 1998 he had developed some left leg pain, and it had worsened in the interim which prompted him to return to her care (TR 83).

Claimant agreed that after he was hired by Danos & Curole, he was involved in one of the most strenuous jobs required of a field mechanic, engine overhaul. He performed the overhaul on a White Superior engine on platform 625, with the help of another mechanic (TR 63-64). Claimant explained that he worked 15-16 hours a day for seven days, replacing the cylinders, lining, and bearings. Following that particular job, Claimant said that his pain increased (TR 65); however, Claimant testified that he did not think that there was any event after which his condition worsened, but rather that his back progressively "went down" (TR 82). Claimant clarified by saying that the harder he worked physically, the more the pain increased (TR65), however, he did not complain until he felt that he was doing more damage than he should be doing (TR 81). He never missed work until September 1998, because he felt he needed to make a living, and he hoped that his back problem would resolve itself.

In September 1998, Dr. Gramlich referred Claimant to a neurosurgeon, Dr. Andrew Wilson, explaining to Claimant that she was concerned about nerve damage due to a disc problem, indicated by the increased tingling that Claimant complained of in his legs and foot (TR 91). Claimant agreed that shortly before he went to see Dr. Wilson, he experienced a loss of sensation in his right leg (TR 67). Claimant stopped working in September 1998, and was terminated from the employment of Danos & Curole on October 22, 1998.

Claimant explained that in the months immediately following his October 16, 1997, accident, he continued to have symptoms, however, during his seven days off he would relax and avoid any activity (TR 74). He also continued to "work smart" and avoid unnecessary strains, which he explained he had done after the accident, while working for both OCS and Danos & Curole. Between September 1998, when Claimant stopped working on the Vermilion platform, and October 2001 Claimant testified that his condition continued to deteriorate in spite of the fact that he avoided any strenuous activity (TR 80). Claimant underwent back surgery on July 9, 2001 at levels L4-5. The surgery was a success and Claimant reached Maximum Medical Improvement on June 6, 2002.

The job description for a field mechanic is exhibit 4 of DX 14. The physical demands of the job as described by Danos & Curole are 1)occasionally lifting 50 lbs. in parts and tools, from the floor to the shoulder; 2)frequently lifting weights 50-75 lbs involving parts and tools, a vertical distance of floor to waist; 3) constant lifting is required of 50 lbs, specifically a tool box, a vertical distance of floor to waist; and 4) Occasionally

carrying 75 lbs is required, using two hands and traveling 25 ft.

Medical Evidence

Claimant was treated by Dr. Karri Gramlich from October 23, 1997 until February 5, 1998, when she released Claimant back to work. Claimant returned to Dr. Gramlich on May 22, 1998 and continued treating with her until September 1998, when he was referred to Dr. Andrew Wilson, a neurosurgeon, who continued to treat Claimant and eventually performed surgery in July 2001. Claimant also was evaluated by Dr. Anthony Ioppolo, in an effort to determine the condition of his back and necessity for surgery. Martin Knijn is a physical therapist who performed Claimant's pre-employment agility test for Danos & Curole on May 7, 1998. Claimant back condition reached Maximum Medical Improvement according to Dr. Wilson on June 6, 2002.

Dr. Karri Gramlich is a licenced chiropractor who typically treats conditions of the back, strains and subluxations. She first saw Claimant on October 23, 1997, with no referral from another physician. Claimant told her about the work place accident and the onset of pain, which Dr. Gramlich specifically noted was not radiating pain. In her examination she found tenderness in the lumbosacral area and into his hips. She diagnosed Claimant with a lumbar disk disorder which created swelling and was due to a traumatic event, as well as muscle spasms and subluxations, in which the vertebrae were misaligned at level L4. After treatment to realign the bones, Claimant reported relief the following day.

During the time Claimant was undergoing chiropractic treatment, Dr. Gramlich explained that she relied on Claimant to determine his own limitations and

restrictions. (DX 14, p. 19-20). Throughout December 1997, and January and February 1998, Claimant exhibited some soreness but no really disabling pain, and Dr. Gramlich noted that Claimant was improving and expressing no complaints. Claimant had complained on February 3, 1998 of some tingling in his right leg. On February 5, 1998, Dr. Gramlich released Claimant to return to work with no further treatment necessary. She explained that she felt Claimant's symptoms had resolved, and unless there was increased pain, that he could return to work without any further treatment by her. She explained that although Claimant still continued to experience stiffness in his lower back, there was no pain. Dr. Gramlich did not see Claimant again until May 22, 1998.

On May 22, 1998, Claimant returned to Dr. Gramlich complaining of the same type of pain, but also reported some new symptoms. He explained that there was a tingling in his left thigh, which had started in March 1998 and had gotten worse. Dr. Gramlich made every effort to treat Claimant, however, a constant mild pain persisted in spite of her efforts, and she recommended Claimant see a neurosurgeon, fearing that there might be nerve damage. In September 1998, Dr. Gramlich referred Claimant to Dr. Andrew Wilson, a neurosurgeon.

Dr. Gramlich's opined that the October 16, 1997, accident caused a disk injury which led to successive injuries. If it had not been for the October 1997 accident, she felt that Claimant would not have required surgery, however, she ultimately felt that Dr. Wilson was in a better position to make the determination. She explained that although symptoms may be relieved, the

underlying condition is not necessarily resolved (DX 14, p. 49). Dr. Gramlich never performed any diagnostic studies, and it is her professional opinion that Claimant herniated or damaged a disk in October 1997, however she was ultimately unsure (DX 14, p.52).

Dr. Andrew Wilson, a neurosurgeon, first saw Claimant on September 15, 1998, from a referral by Dr. Gramlich. His deposition is DX 12, and his records are DX 1. He obtained a history of Claimant's condition, and performed a physical exam. Dr. Wilson ordered the first in a series of diagnostic tests to evaluate the possibilities of compression versus gross instability of Claimant's discs. Claimant described to Dr. Wilson a course of waxing and waning pain. His back started hurting first, followed by leg pain, which was severe enough to prevent Claimant from sleeping. The left leg pain that onset in March 1998 did not respond to chiropractic treatment, and therefore, he was referred to Dr. Wilson.

On September 29, 1998, Claimant still complained of significant lower back pain radiating to the left lateral thigh, although his strength continued to be intact. The radiological studies had shown generalized osteoporosis in the lower thoracic and upper lumbar region with mild posterior bulging at L4-5 and L5-S1, slightly worse at L4-5. On the CT scan that followed the myelogram, there was a posterior central protrusion at L4-5 and mild generalized bulging at L5-S1 (DX1, p. 68). Dr. Wilson ordered further diagnostic tests to determine the etiology of Claimant's low back and left leg complaints, namely an MRI of the lumbar and thoracic spine.

On October 21, 1998, the MRI of the lumbar spine showed a herniated disc at L4-5 on the left, and

Claimant's symptoms were becoming compatible with an L5 radiculopathy, secondary to a L4-5 herniated disc. Dr. Wilson felt that Claimant could be a candidate for a decompression at L4-5. In November 1998, Claimant continued to receive treatment with Dr. Wilson, including epidural steroid injections, and other conservative measures.

On December 14, 1998, Dr. Wilson discussed the option of surgery as a last resort. The CT/myelogram of the lumbar spine showed a posterior central protrusion at L4-5, and mild generalized bulging at L5-S1. Dr. Wilson recommended a final CT/myelogram to determine if the L4-5 level had changed and worsened, and whether or not to include the L5-S1 level in the surgical options. The following week, on December 23, 1998, Claimant reported numbness in his right lower extremity, also in the L4-5, L5-S1 distribution. Dr. Wilson opined that here may have been either an increase in the size of the herniated disc, or an extruded fragment involving the right side. Claimant reported that his new right-sided symptoms began when he lifted a clothes basket on December 21, 1998 (DX 1, p. 60).

On January 20, 1999, Claimant reported to Dr. Wilson that he was doing worse than ever. Dr. Wilson noted that the radiological findings no longer showed a herniated disc, which appeared to simply be bulging, whereas before it had been herniated, and so he recommended further conservative measures. Dr. Wilson explained in his deposition that although radiographically it looked like the disc had improved, by Claimant's history he opined it was a continuation of the same problem. There were episodes in the continuum of

Claimant's illness when he got better, and times when he got worse (DX 12, p. 24).

On February 18, 2000, Dr. Wilson opined that the diagnostic tests revealed a progressive deterioration of findings, and because conservative treatment had not resulted in a significant relief in Claimant's pain, Dr. Wilson suggested an L4-5 fusion with decompression. Claimant returned to Dr. Wilson on January 25, 2001, complaining of continuing low back pain, but had also developed some weakness in the L4 and L5 myotomes, especially on the right side, as well as incontinence. Claimant continued to experience significant paraspinous and lumbosacral tenderness. Dr. Wilson recommended that Claimant get a second opinion on surgery.

Claimant underwent an L4-5 interbody fusion with pedicle fixation at Rapides Regional Medical facility on July 8, 2001. In the follow-up appointments, Dr. Wilson noted that Claimant was recovering well, and all diagnostic tests indicated that the fusion and accompanying hardware were in an excellent position. Claimant was very pleased with the results of his surgery (DX 1, p. 33). In October 2001, Dr. Wilson scheduled Claimant for physical therapy. On June 6, 2002, Dr. Wilson declared that Claimant was at Maximum Medical improvement , with a 18% whole body impairment due to the lumbar spine impairment, and he was further limited to only light duty work (DX1, p. 1)

In his deposition, Dr. Wilson explained that Claimant's complained of left leg tingling which began in March 1998 was due to a nerve root impingement which is usually caused by a herniated disc; however, he further explained that if there is was severe bulging and some compromised disc from degenerative changes in

the foramen, then there could have been radicular symptoms or leg pain. In other words, a bulging disc, although not actually herniated, could cause the nerve to be pinched. The fact that new symptoms appeared in March 1998, namely tingling in the left thigh, and not in the preceding months, was evidence of a continued progression of Claimant's problem. (DX 12, p. 82-83). In Dr. Wilson's opinion, Claimant condition was due to a natural progression; he had hurt himself in October 1997 and needed surgery in July 2001 (DX 12, p. 106).

Dr. Wilson was hesitant to state that from May 1998 until September 1998 continual loading of the spine caused an exacerbation, which caused Claimant to seek further medical care (DX 12, p. 98). He clarified that by saying that he viewed the pathology as a continuum, with symptoms that waxed and waned, but not the result of two injuries. However, based on the job description provided by Danos & Curole (DX 14, exhibit 4), Dr. Wilson agreed that the requirements of Claimant's job were sufficient to put a constant strain on a person's lower back. Dr. Wilson also remembered Claimant describing times when he had to wear a heavy tool belt or lift something heavy from a boat, or swing over and perform a task on the platform, and Claimant explained that it was killing his back to do "that stuff" (DX 12, p. 46). Dr. Wilson agreed that lifting heavy things with a compromised back could cause problems. However, Dr. Wilson explained that Claimant's complaints of pain were flare-ups of the condition that arose on October 16, 1997 (DX 12, p. 49). Dr. Wilson agreed that it was very possible, based on his experience as a neurosurgeon, that each flare-up experienced by Claimant between May 1998 and September 1998 would be a cumulative

trauma which aggravated claimant's back condition resulting in surgery (DX 12, p. 52).

Dr. Wilson was unable to make definitive statements as to Claimant's condition and whether surgery would have been necessary if he had stopped working after April 30, 1998. He explained that a change in symptoms does not indicate a change in the underlying condition. Simply because Claimant described further pain, does not mean that there was co-extensive further damage to the underlying condition. It might just mean there was a manifestation, not a worsening, of the problem (DX 12, p. 68).

In explaining the progression of Claimant's condition between 1998 and the surgery in 2001, Dr. Wilson said that clinically Claimant experienced chronic debilitating pain, and the entirety of Claimant's condition worsened, from the symptoms to the nerve impingement problems at L4-5. Dr. Wilson described the situation by saying that Claimant had hurt himself, and over a period of time it got much worse, finally getting to a point where he could no longer tolerate the pain. The radiographic findings showed why he was complaining of the radicular symptoms and experiencing pain. Dr. Wilson agreed that the herniation might have existed before he ever saw Claimant, but did not think Claimant herniated the disc on October 16, 1997 (DX 12, p. 72). He agreed it was possible that Claimant hurt himself after April 30, 1998, but he was not certain when the herniation occurred. [*sic*] (DX 12, p. 105, ll 14-16). There is no way to determine the chronology of the radiological findings because there were no diagnostic tests prior Claimant's work with Danos & Curole.

In relying on what Claimant told him, Dr. Wilson opined that Claimant got progressively worse over time (DX 12, p. 103), a little bit of waxing and waning in symptomology, but eventually the diagnostic tests and the symptoms fit together. Dr. Wilson opined that there was enough damage to the disc that caused him medically incalculable pain; and subsequently it got worse and worse over time.

Dr. Anthony Ioppolo is a board certified neurosurgeon who examined Claimant on behalf of OCS on three different occasions. He was retained by OCS to render a second opinion. Dr. Ioppolo first saw Claimant on November 24, 1998. After reviewing Claimant's medical history[4] and performing a physical examination, he opined that Claimant was magnifying his symptoms because the pain reported by Claimant did not correlate with the radiographic findings. He surmised that according to the CT/myelogram there was no nerve root impingement. He agreed that Claimant was capable of working at a medium duty job and had reached maximum medical improvement. Dr. Ioppolo did not think there was any need for surgery. Claimant completed a spinal program with one of Dr. Ioppolo's colleagues, Dr. Drape, from April through August 1999.

On March 9, 2000, Claimant reported to Dr. Ioppolo that his symptoms were much more severe than his last visit. He explained that there was pain down his left leg into his calf, and pain in the right leg ending at about the knee. Claimant also noted that he experienced sensory

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[4] In his medical history, Claimant reported to Dr. Ioppolo that he was required to carry two tool boxes each weighing 35 lbs, which was consistent with the job requirements of a maintenance mechanic (DX 13, p. 27).

loss in the large toe of his right foot. Dr. Ioppolo wrote in a letter following the visit in which he opined that Claimant was not an appropriate candidate for surgery because there was no evidence of a definitive disc rupture, and no obvious source of Claimant's left leg pain.

On October 29, 2001, Dr. Ioppolo noted that Claimant was three months post surgery, and Claimant felt that the pain was comparably intense post surgery as it had been before the surgery, however, he had not participated in any physical therapy or chiropractic care post surgery, nor had an MRI scan. Dr. Ioppolo felt that Claimant was not at maximum medical improvement, and would only be capable of light duty work (DX 2).

Dr. Ioppolo opined that the results of the pre-employment physical indicate that Claimant did not need surgery, due to the fact that Claimant's condition was improving. However, based on the complaints Claimant voiced during the November 1998 visit in his office, Dr. Ioppolo opined that Claimant's condition had deteriorated after the pre-employment evaluation in May 1998 (DX 13, p. 35). He further opined that if Claimant had stopped working on April 30, 1997, he would not have had to undergo surgery. (However, Dr. Ioppolo at no point believed that Claimant needed surgery, therefore, his opinion was not limited to April 30, 1997.)

Dr. Ioppolo explained that a natural progression has to be taken within the context also of what a patient is doing because conditions are synergistic, and obviously there is a high potential for an accelerated natural progression stress being placed on the lumbar spine (DX 13, p.47, ll. 8-14). Dr. Ioppolo also did not feel that there were any substantive changes in the diagnostic tests

from 1998 to 2000; although, the February 14, 2000, CT scan was described as noting degenerative changes worse at L4 but mainly on the right. Dr. Ioppolo explained that he looks at the whole situation, not strictly the diagnostic tests. Therefore, he still felt that there were no *significant* changes as far as the overall evaluation of the patient (DX 13, p. 49).

Dr. Ioppolo also stated that the onset of symptoms might not correlate with the actual inception of the problem, meaning that simply because a patient stated that there was an onset of pain this does not necessarily mean that the radiographic findings happened at the same point in time. There was a symptomatic deterioration, but nothing radiographically to corroborate Claimant's statements that he continued to feel more pain.

Martin Knijn is a physical therapist employed by Rehab Hospital of Lafayette HealthSouth, and hired by Danos & Curole to perform pre-employment evaluations in an effort to determine that each individual is physically capable of performing the requirements of their specific job. His deposition is DX 15, and his report is DX 11. Mr. Knijn explained that although Claimant mentioned his accident and back trouble, it was his impression that any problems were in the past and fairly minor (DX 15 p. 18). Claimant also signed a document at the conclusion of the session which attested that he had no ill effects or injury during the pre- placement evaluation.

The pre-employment agility test typically lasts 45-60 minutes, with each motion or tests lasting approximately 3-5 minutes. Mr. Knijn did not record any complaints of pain, which he opined meant that Claimant expressed no pain. Mr. Knijn also explained that the evaluation is

designed to test the maximum capabilities as oppose to abilities on a sustained basis. Although the test is designed for the capabilities of a maintenance mechanic, Mr. Knijn said that as to the realities of the job, and the physical effort needed he would defer to the opinion of someone who has performed work as a maintenance mechanic to answer the question of what they do for 12 hours a day. Claimant scored very well on the May 1998 test overall, performing all of the required activities and many within the 90th percentile of success. The back strength test lasted a total of 40 seconds, however, Mr. Knijn felt that it was an accurate judge of whether or not somebody had a healthy back, but not 100% accurate (DX 15, p. 61, ll 9).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP* v. *Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards* v. *Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the

Administrative Procedures Act. *Director, OWCP* v. *Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill* v. *Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens* v. *Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell* v. *Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James* v. *Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employers stipulated in Joint Exhibit 1 that an injury/accident occurred on October 16, 1997, during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant clearly injured his back while climbing over the rail of the portable water tank at work on October 16, 1997. The extent, duration and disabling effects of that injury, however, are in issue.

If Claimant's disability results from the natural progression of the first injury, then the claimant's employer/carrier at the time of the first injury is the responsible party. If the employment thereafter aggravates, accelerates, or combines with the earlier injury, resulting in Claimant's disability, he has sustained a new injury and the employer/carrier at that time is the party responsible for the payment of benefits thereafter. *Strachan Shipping Co.* v. *Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(en banc), *McKnight* v. *Carolina Shipping*, 32 BRBS 165, aff'd on recon. en banc, 32 BRBS 251 (1998). Section 20(a) of the Act, 33 U.S.C. §920(a), is inapplicable to a determination of the responsible party *Buchanan* v. *Int'l Transportation Services*, 31 BRBS 81 (1997).

In this instance, OCS (first employer) bears the burden of proving, without benefit of a further presumption, by a preponderance of the evidence that there was a new injury or aggravation during employment with Danos & Curole (second employer) in order to be relieved of liability as responsible parties. Danos & Curole, on the other hand, must prove that Claimant's condition is solely the result of the injury with OCS in order to escape liability. A determination as to which is liable requires the administrative law judge to weigh the evidence as a whole, and to arrive at a conclusion supported by substantial evidence, *Buchanan* v. *International Transportation Services*, 31 BRBS 81, 85 (1997).

Differentiating a natural progression from an aggravation revolves around whether the medical evidence submitted by the parties makes a clear delineation. The cause of a physical condition is a medical

question, and I must rely on the expertise of doctors to make such a determination. Because of the inability of medical experts to place a date on the radiological findings, I find it is not possible to say definitively when Claimant's underlying disk problem occurred. Instead I am left with a chronological history of symptoms, which may or may not follow the progression of the disc disease. Based on Dr. Wilson's and Dr. Gramlich's testimony, as well as Claimant's description of his symptoms, I determine that Claimant's disability is a result of his original injury on October 16, 1997.

Claimant testified that although he was released to work in February 1998 by Dr. Gramlich, he continued to experience symptoms of lower back pain. In March 1998 he began to experience tingling and numbness in his left thigh, a symptom that eventually caused him to return in May 1998 to Dr. Gramlich's care. There was no precipitating events during the weeks in May which he had worked for Danos & Curole that prompted him to return to a doctor's care, but rather because the pain had increased *over the preceding months*. Therefore, although he was not under the care of a physician in the months between February and May 1998, Claimant was by no means symptom free and in fact his pain worsened. Claimant testified that his back became progressively more painful, a deterioration that occurred *over time* (TR 65). Consequently, I do not find that Claimant's condition had resolved itself as his employment with OCS ended or that Claimant became symptomatic because of a new injury or aggravation following May 8, 1998.

Claimant explained that the pre-employment agility test, that OCS argues proved that Claimant's back had

resolved itself, was not strenuous enough to have actually prevented him from successfully completing the tasks identified. Even Martin Knijn, the physical therapist that administered the test, acknowledged that the test was designed to test capabilities, not sustained stress. Mr. Knijn also said he would defer to an individual who performed the actual job to determine whether the test was an accurate reflection of the stresses of the field mechanic position. In other words, Claimant's successful completion of the pre-employment evaluation is not evidence that he did not suffer from a back condition, but rather that he was capable of performing most of the tasks of his job for a limited amount of time. Therefore, I find that the pre-employment agility test in [*sic*] not evidence of a resolved back condition, but rather I credit Claimant's testimony that it was more akin to a light duty position than a diagnostic test of Clamant's disc condition.

OCS also relies on Claimant's statement that he was able to perform his job both before and after being hired by Danos & Curole, and that since his job was so physically demanding he must have, according to the hypothetical posed to Dr. Ioppolo, jeopardized his back. However, Claimant explained that the job description did not take into consideration the ways he "worked smart" as well as the plethora of help available on the platform. Claimant stated that the harder he worked the more his back hurt, but that during his 7 days of rest, the symptoms would abate. Also, Claimant explained that he could use various machines to perform the lifting identified by the job description, as well as utilizing the roustabouts who would carry his weighty tool boxes and help him on and off the platform. Therefore, although the job may have been physically de-

manding, it was not as demanding as the job description would appear. Claimant's continued work was not necessarily the reason his back condition worsened to the point of needing surgery. As Dr. Wilson explained, it is possible for a back condition to deteriorate on its own, in spite of either work or rest.

Claimant did not identify new symptoms that arose as a result of his work with Danos & Curole, but rather described a progressive deterioration of his health from October 16, 2997 [*sic*] and onwards, with some periods in which the pain abated and some periods when the symptoms would flare up, mainly when he worked more strenuously. Claimant testified that there was no aggravating event, and that if there was an onset of pain that occurred with a work-related activity that the pain was alleviated with rest. Claimant did not pinpoint a time in the months between May and September 1998 in which his back condition worsened, nor did his treating neurosurgeon record an particularly strenuous activity which caused his disc to further worsen.

Although Dr. Wilson considered the possibility that Claimant's job *may* have exacerbated his condition, he was not willing to make a definitive statement as to an aggravation or even cumulative trauma. Neither am I. Dr. Wilson was confident saying that it was simply a natural progression of the original injury, and Dr. Gramlich, who treated Claimant before and after his employment with Danos & Curole, felt too that Claimant's condition was the result of the original injury, and not an aggravation from Claimant's continued work following May 8, 1998.

OCS presents the possibility that with Claimant's tenuous back he must have injured it further while

performing his physically demanding job in the months following Danos & Curole's take over. However, that is not an argument that the evidence supports. Based on Dr. Wilson and Dr. Ioppolo's testimony, the nature of a back injury can be very fluid, and does not necessarily need aggravating events to progress to the point of either needing surgery or completely healing. Claimant's job with Danos & Curole, by his own testimony, was neither more or less strenuous, and therefore, he could have further strained his back during the work for OCS, as he developed left leg symptoms in March 1998, just as easily as he could have aggravated his back while working for Danos & Curole. Even after Claimant stopped working all together, he continued to have worsening symptoms which clearly were not the result of his duties as a field mechanic. In sum, I find that Claimant's injuries and resultant surgery are the consequence of his injury on October 16, 1997, and not the result of any continued employment with Danos & Curole.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Operators and Consulting Services, Inc. and its Carrier, Zurich American Insurance Co., remains wholly responsible for Claimant's injury sustained October 16, 1997, and the resulting disability compensation and medical costs which resulted therefrom;[5]

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[5] The parties have agreed that this is a dispute amongst employers and not a disagreement as to what is owed to the Claimant. Claimant's attorney was present at the formal hearing to represent his interests, and explained that Claimant's disability compensation and medical benefits he is receiving are acceptable, the issue simply being which

(2) The claim against Danos & Curole and its Carrier, Gray Insurance Co., is DENIED;

(3) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, responsible Employer/ Carrier shall have ten (10) days from receipt of the fee petition in which to file a response; and

(4) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 16th day of April, 2003, at Metairie, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

CRA:eam

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employer/carrier would be responsible to continue paying these benefits. (Tr. 18).