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Ron Gurka, Regional ESA Counselor
U. S. Department of Labor
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Office of the Solicitor

A copy was also mailed by regular mail to the following:

Judge DANIEL A. SARNO, JR., Office of Administrative Law Judges, U.S. Department of Labor, Newport News, Virginia 23606

B. E. Voultsides, District Director
Fifth Compensation District
U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

CERTIFICATE OF FILING AND SERVICE

I certify that on April 21, 2006, the foregoing DECISION AND ORDER of the Administrative Law Judge was filed in the office of the District Director, Fifth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Leo Outland
5116 Old Pughsville Road
Chesapeake, Virginia 23323
Claimant

ALMA Claims
% FARA Inc.
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Metairie, Louisiana 70002
Self-Insured Employer/Insurance Carrier for Cooper T. Smith Stevedoring

Gregory E. Camden, Esquire
Montagna, Klein & Camden, L. L.P.
425 Monticello Avenue
Norfolk, Virginia 23510
Representative for Employee

Gerard E. W. Voyer, Esquire
Taylor & Walker
P O Box 3490
Norfolk, Virginia 23510
Representative for Cooper T. Smith Stevedoring

P & O Ports, Virginia
Attn.: Mr. Ernest Wessel
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Baltimore, Maryland 21224
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Ceres Terminals
Risk Management Regional Office
Attn.: Ms. Kirby Ford
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Charleston, South Carolina 29492
Representative for Ceres Terminals

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

April 21, 2006

Case No: 5-114096, 5-120343, 5-120344, 5-120345, 5-120346, 5-120347

Leo Outland

v.

Cooper T. Smith Stevedoring, Universal Maritime Services, Virginia International Terminals Inc., Ceres Terminals, P & O Ports Virginia, and CP & O LLC

Leo Outland
ALMA Claims % FARA, Inc.
Gregory E. Camden, Esquire
Gerard E. W. Voyer, Esquire
Ernest Wessel for P & O Ports Virginia & CP & O, LLC
Christopher J. Field, Esquire
Christopher Hedrick, Esquire
Kirby Ford for Ceres Terminals
Burton Lynn for Virginia International Terminals, Inc.
Marsha Townsend for Universal Maritime Services
R. John Barrett, Esquire
F. Nash Bilisoly, Esquire
Ron Gurka, Esquire

The enclosed **DECISION AND ORDER** of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have been dated and filed in the District Director's office. Procedures for appealing are described on the attached.

The employer/insurance carrier is hereby advised that if the Order awards compensation benefits, the filing of an appeal does not relieve that part of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional twenty percent (20%) is added to the amount of compensation due if not paid within ten (10) days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, Suite 757, 1111 - 20th Street, N.W., Washington, D.C., 20036.

Sincerely,

B. E. Voultsides
District Director

Enclosures

BEV/RED/dm

LS-20

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED

A petition for reconsideration of a decision and order must be filed with the Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C., 20210, within ten (10) days from the date the District Director files the decision and order in his/her office.dm

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D.C., within thirty (30) days from the date upon which a decision and order has been filed in the Office of the District Director, or within thirty (30) days from the date final action is taken on a timely petition for reconsideration. If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal or protective appeal by filing a notice of appeal within fourteen (14) days of the date on which the first notice of appeal was filed or within the thirty (30) day period described above, whichever period expires last. A copy shall be served upon the District Director and on all parties by the party who files a notice of appeal. Proof of service shall be included with the notice of appeal.

The date compensation is due is the date the District Director files the decision and order in his/her office.

LS-20 (2)

dm

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 19 April 2006

Case No: 2005-LHC-1802
OWCP No: 5-114096

In the Matter of:

LEO OUTLAND

v.

COOPER T. SMITH STEVEDORING,
Employer.

Case No: 2005-LHC-1803
OWCP No: 5-120343

In the Matter of:

LEO OUTLAND

v.

UNIVERSAL MARITIME SERVICES,
Employer.

Case No: 2005-LHC-1804
OWCP No: 5-120344

In the Matter of:

LEO OUTLAND
Claimant,
v.

CERES MARINE TERMINALS,
Employer.

Case No: 2005-LHC-1805
OWCP No: 5-120345

In the Matter of:

LEO OUTLAND
Claimant,
v.

VIRGINIA INTERNAL TERMINALS,
Employer.

Case No: 2005-LHC-1806
OWCP No: 5-120346

In the Matter of:

LEO OUTLAND,
Claimant,

v.

P&O PORTS OF VIRGINIA,
Employer.

Case No: 2005-LHC-1807
OWCP No: 5-120347

In the Matter of:

LEO OUTLAND,
Claimant,
v.

CP&O,
Employer.

Before:
Daniel A. Sarno, Jr.
Administrative Law Judge

Appearances:
Gregory Camden, Esq., for Claimant
Christopher Wiemken, Esq., for Cooper T. Smith
F, Nash Bilisoly, Esq. for Universal Maritime Service
R. John Barrett, Esq., for Virginia Internal Terminals
Lawrence Postol, Esq., for Ceres Marine Terminals
Christopher Fields, Esq., for P&O
Christopher Hedrick, Esq., for CP&O

DECISION AND ORDER

This proceeding arises under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), as amended, 33 U.S.C. §§ 901, *et seq.* Claimant, Leo Outland, was injured in the course of his employment at Cooper T. Stevedoring, ("CTS.") on June 1, 2002. The question presented is whether Claimant's disability beginning November 3, 2004, is a natural progression of his June 1, 2002, work injury at CTS or whether his disability is the consequence of an aggravation and acceleration of a pre-existing condition. Claimant and CTS contend that Claimant's job duties as a general longshoreman aggravated his condition, and therefore, CP&O, as Claimant's last employer, is responsible for his present condition. CP&O, joined by P&O Ports of Virginia ("P&O"), Ceres Marine Terminals ("Ceres"), Virginia International Terminals ("VIT"), and Universal Marine Systems ("UMS"), maintains that Claimant's disability is the natural progression of the June 1, 2002, injury and not any subsequent aggravating incidents. For the reasons which follow, I find and conclude that Claimant's condition is due to the natural progression of his June 1, 2002, work injury.

A formal hearing was held on November 1, 2005, in Newport News, Virginia, in which all parties were in attendance. The following exhibits were submitted by the parties: Claimant, Exhibits 1 through 7, CTS, Exhibits 1 through 21; UMS Exhibits 1 through 18; P&O/CP&O Exhibits 1 through 16; VIT Exhibits 1 through 4; and Ceres, Exhibits 1 through 22.[1] All exhibits were received into evidence without objection. All parties filed post-hearing briefs. 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.

ISSUE

1. Did Claimant suffer a disability as the result of a permanent aggravation of his June 1, 2002, injury?

2. If there was a permanent aggravation of Claimant's June 1, 2002, work injury, who is the responsible employer?

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[1] The following abbreviations will be used as citations to the record:
CX – Claimant's Exhibit
CTS – Cooper T. Smith Exhibit
UMS – Universal Maritime Services Exhibit
VIT – Virginia International Terminals Exhibit
Ceres – Ceres Marine Terminals Exhibit
CP&O/P&O – Joint P&O and CP&O Exhibit
Tr. - Transcript of November 1, 2005 hearing

STIPULATIONS

1. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

2. Claimant alleges an injury to his back on June 1, 2002, while employed at Cooper T. Smith Stevedoring.

3. Claimant further alleges an aggravation to his back from employment on the waterfront subsequent to June 1, 2002, with a date of diagnosis of February 5, 2005.

4. A timely notice of injury was given by Claimant to Cooper T. Smith Corporation.

5. A timely claim for compensation was filed by Claimant.

6. Cooper T. Smith Corporation filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion.

7. Claimant's average weekly wage at the time of the June 1, 2002, injury was $912.01, resulting in a compensation rate of $ 608.01.

8. Cooper T. Smith Corporation has paid Claimant benefits on the June 1, 2002, injury as documented on the attached LS-208 dated February 10, 2005.

9. Claimant agrees that as of September 7, 2005, he has a wage earning capacity of $380.00 per week on the open market.

10. The parties agree that since November 4, 2004, Claimant has been unable to return to his regular and usual employment as a longshoreman.

BACKGROUND AND CHRONOLOGY

On June 1, 2002, Claimant was working as a general longshoreman for CTS. He was injured when he fell into a hole on the ship after a forklift driver inadvertently shifted forward instead of reverse and Claimant attempted to move out of the forklift's path. Claimant was out of work until March 20, 2003, when he was released to full-duty work.[2] When Claimant returned to work, he attempted to retake the crane operator test but failed. Because he was unable to work as a crane operator, Claimant continued to work as a general longshoreman.

Claimant continued to experience pain, and was referred to Dr. Koen in August 2003. Dr. Koen recommended that Claimant undergo back surgery. CTS then sent Claimant to Dr. Ordonez for evaluation of whether surgery was needed. Dr. Ordonez disagreed with Dr. Koen's

[2] There is a factual issue which pertains to Claimant's release to full-duty work, which is explored in detail in the Discussion portion of this Decision and Order.

recommendation for surgery and advised Claimant he could return to full-duty work. Claimant then attempted to obtain coverage for the surgery through his own insurance carrier, but the carrier would not approve the surgery because it was a worker's compensation injury.

Claimant continued working until December 2003. Due to the intense pain he was experiencing, Claimant decided to take himself out of work for a period of six months. Claimant received neither wages nor worker's compensation benefits during this time. Claimant hoped that resting for this period of time would relieve his symptoms and allow him to work unhindered.

Claimant returned to work in June 2004. His return to work was motivated by his desire to work the minimum hours required to qualify for health insurance and vacation days. After two weeks of work, Claimant returned to Dr. Koen because his pain level was unbearable. Dr. Koen again recommended surgery, and CTS again scheduled a second opinion with Dr. Ordonez. When Dr. Ordonez examined Claimant on November 3, 2004, he agreed that Claimant needed surgery and felt it was necessary to immediately take Claimant out of work. On March 5, 2005, Dr. Koen performed surgery on Claimant's back.

Claimant is seeking temporary total disability benefits from November 4, 2004, through September 6, 2005, and temporary partial disability benefits from September 7, 2005, through the present and continuing.

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is a resident of Suffolk, Virginia and a member of the International Longshoreman's Association ("ILA"). Claimant has been a member of ILA for 16 years. (Tr. 37). In June 2002, Claimant performed various waterfront jobs as a longshoreman, including working as a crane operator, hustler driver, deckman, and slinger. (Tr. 37). As a slinger, Claimant communicates with the crane operators and removes or inserts pins into the containers as they come up. The pins weigh about 12-15 pounds are about 3-4 inches in diameter. (Tr. 39). Claimant also worked as a crane operator. (Tr. 41). Claimant operated cranes called transtainers in which he would sit about 100 feet off the ground and would use the controls to pick up loose boxes and discharge them. (Tr. 41). Prior to June 2002, Claimant had been certified to work as a crane operater. Up to June 2002, Claimant had not experienced any problems in passing the crane operatee test. (Tr. 42). In June 2002, Claimant earned $22 an hour during regular hours. (Tr. 43). If a longshoreman worked past lunch (12 noon) or worked past 5 o'clock in the evening, he was paid overtime hours. (Tr. 43).

On June 2, 2002, Claimant was injured while working for CTS. (Tr. 45). Claimant was working on a plywood ship in an area known as the hole of the ship. Claimant noted that he and the others had worked about 15 hours on that particular job, and everyone was tired. (Tr. 45). A forklift operator was taking the shoes out, which are steel plates measuring about 10 feet wide, 20 feet long, and about 1.2 inch thick of metal. The forklift picks them up, during which the

general longshoremen such as Claimant sweep them, and then lowers back down. Claimant stated that the particular forklift driver at that time picked up several shoes instead of one, and then moved forward instead of reverse. (Tr. 45). As the forklift moved forward, it headed towards Claimant. As Claimant tried to get out of the way of the forklift, he stepped back and fell in the hole. (Tr. 45, 47). Claimant fell approximately 7 feet and hit his back and his hip on some of the freight still in the hole. Claimant was taken to Norfolk General Hospital and then was referred to Dr. Wagner, an orthopedist physician. (Tr. 46). Claimant was instructed to take some medication and do some therapy. (Tr. 47).

Claimant returned back to work in March 2003. (Tr. 48). Claimant was required to take the crane operator equivalency test[3], and when he took it and failed it, VIT told him he could not work as a crane operator. Claimant was required to take the test because crane operators are required to recertify every two years. (Tr. 49). Claimant stated that while attempting the test, he was sitting in the crane, bent over and trying to drive. He explained that this position must be maintained sometimes for up to one and one-half hours depending on a particular job. (Tr. 49). Claimant's back and hip began to hurt him. The floor of a crane is made of glass, and the driver is required to bend over and look below, essentially between his legs, to view the ground below him. (Tr. 49). Claimant recalls that he took the crane operator test twice. After he failed it the first time, he consulted with the union, which persuaded VIT to give Claimant another chance to retest. (Tr. 50). Claimant attempted the test again, but was still unable to pass it. (Tr. 50). Claimant then proceeded to accept jobs as a general longshoreman, as VIT would not permit him to drive the crane. Claimant preferred to work as a crane operator because it paid better wages and it was physically less demanding on him. (Tr. 48).

During the summer of 2003, Claimant would attempt to take deckman or slinger jobs when they were available. (Tr. 50). Claimant could not accept hustler jobs because they were physically impossible: the jarring and shaking that he experienced would cause him too much pain. (Tr. 50). Claimant also could not go out on plywood ships or rubber boats, nor could Claimant work on a Ro-Ro (roll-on, roll-off) because he wasn't physically able to perform the job. (Tr. 50). Claimant described the duties required of a general longshoreman. (Tr. 61). As a general longshoreman, Claimant would remove or take off twist locks. (Tr. 62). The twist locks weighed approximately 15 or 20 pounds. (Tr. 62). A truck with a container on it would roll up to Claimant's location. Claimant would be standing on one corner, and would have to go over to a box, bend over, pick up a twist lock, and walk back to the container. Claimant was required to perform this task repeatedly throughout the course of a day, depending on the number of containers that were on a ship. (Tr. 62). Claimant experienced back pain and left leg pain during this task. (Tr. 62). Claimant generally felt worse after working for a day than he did when he began his workday. (Tr. 63).

In the summer of 2003, Claimant was referred to Dr. Koen by Dr. Wagner. (Tr. 51) In August 2003, Dr. Koen recommended that Claimant have back surgery. Claimant recalls that Dr. Koen noted a bulge and possible fracture at Claimant's L-5/S-1 disc. (Tr. 51). Claimant wanted to have the surgery and submitted paperwork to CTS. (Tr. 51).

---

[3] Claimant had previously (pre-injury) taken the crane operator test and passed. However, he testified that it is required for employees to be recertified every two years, and at that particular time, Claimant's recertification was due.

Shortly thereafter, in September 2003, CTS sent Claimant to see Dr. Ordonez. (Tr. 52). Dr. Ordonez asked Claimant what type of work he did, and Claimant replied that he was a crane operator, although Claimant also did all kinds of general longshore work. (Tr. 53). Dr. Ordonez released Claimant back to work, and because Claimant did not want to get fired from his job, he heeded the doctor's release. Claimant received a slip from Dr. Ordonez that released him to full-duty work. (Tr. 53). Claimant stated that it was his belief, based on the paper he received from Dr. Ordonez, that he was released to do any job as a general longshoreman. (Tr. 71). Claimant did not recall Dr. Ordonez telling him that he was restricted from any particular activities such as no bending, twisting or heavy lifting. (Tr. 73). Claimant testified that when Dr. Ordonez told him he could go back to work, he went back because he didn't want to get fired. (Tr. 53).

Claimant stated that CTS denied his request for surgery. As a result of his pain, Claimant described his mood during this time as short-tempered. Claimant explained that between the pain and the medications, he couldn't sleep or lay or sit down. He attempted to obtain the surgery through his personal insurance. However, Claimant's personal insurance denied the surgery because, in their opinion, the injury was the result of an on-the-job injury. (Tr. 52). Claimant then decided he would sell some property he owned to come up with the money for the surgery.

Claimant continued to perform general longshore work since he was unable to work as a crane operator. (Tr. 53). Claimant stated that without repetitive bending, twisting or heavy lifting, there is not way to perform the jobs of a general longshoreman. (Tr. 74). Upon questioning by the undersigned, Claimant also stated that the job of crane operator required repetitive bending in that the operator must bend over to be able to see between his legs. (Tr. 74). Claimant noted that his back pain became progressively worse from the date of injury onward. (Tr. 75). Claimant could not identify any other incident that happened while he was working for any employers other than CTS which he could describe as a work accident. (Tr. 75).

After working a full-day on December 29, 2003, Claimant decided that perhaps the best thing for his body and pain would be to take a rest. (Tr. 54). Thus, Claimant decided he would take personal leave for a period of time in hopes of allowing his body time to heal. This was a period of personal leave for which Claimant was not paid.[4] (Tr. 54). During this period of time, Claimant would soak in a jacuzzi and get massages, hoping that these actions would help relieve the pain. Claimant did not see a doctor, although he continued to receive medications. (Tr. 54). After 6 months, Claimant returned to work on June 20, 2004. (Tr. 54). Claimant testified that his motivation for returning to work was to work the specified number of hours required to qualify for various benefits such as medical insurance, vacation pay, holiday pay, etc. (Tr. 55). Once again, Claimant tried to work as a crane operator. When he was unable again to perform the crane operator job, he took whatever longshore jobs which were available. (Tr. 54).

[4] It appears from CTS-2 (LS-208 dated February 10, 2005) that CTS has since voluntarily paid Claimant temporary partial disability at the rate of $304 per week for the period of December 30, 2003 through June 19, 2004. Despite this voluntary payment of compensation, the significance of Claimant's personal period of leave was that it was not ordered or sanctioned by any of his treating physicians.

When Claimant returned to work, his felt his condition was worsening. (Tr. 55). He returned to Dr. Koen after working for only seven (7) days. Dr. Koen again recommended surgery. (Tr. 79). CTS again refused to authorize the surgery. (Tr. 55). In November 2004, CTS sent Claimant to see Dr. Ordonez again. In the period between Claimant's visit to Dr. Koen and the visit to Dr. Ordonez, Claimant continued to work. (Tr. 55). After examining Claimant on November 4, 2003, Dr. Ordonez told Claimant that he needed to have the surgery. Claimant informed Dr. Ordonez that he wanted Dr. Koen to perform the surgery. Dr. Ordonez also told Claimant to stop working immediately. Dr. Ordonez warned Claimant that if he did not stop working, Claimant was at risk to become paralyzed. (Tr. 56).

Claimant stated that Dr. Koen performed the surgery, and that in Claimant's opinion, it was very successful. Although Claimant still experiences some problems, he described his result as such: "if it don't get nary another day better, I was a hundred percent better than I was." (Tr. 56). As of September 7, 2005, Claimant was released by Dr. Koen to light-duty work with restrictions. Claimant is unable to perform any type of longshore work with the restrictions that Dr. Koen has assigned. Claimant described those restrictions as no bending, squatting, heavy lifting, climbing, etc. (Tr. 57).

Claimant testified that he never experienced pain in any new locations than he initially did when he was injured on June 1, 2002. (Tr. 66). From the date of injury, Claimant began to experience numbness and pain radiating from his lower back and left hip into his left leg. (Tr. 66). Claimant noted that this numbness and pain worsened over time. (Tr. 66). Claimant noted that during the first period in which he didn't work, from Jun 1, 2002 to March 23, 2003, he continued to experience pain just from the regular activities of everyday living. (Tr. 67). Claimant stated that no other event occurred between June 1, 2002 and November 4, 2004 for which he felt it necessary to visit the employer's infirmary. (Tr. 68).

Drs. Winfired Bragg and John S. Wagner

Drs. Bragg and Wagner are doctors from Orthopaedic Associates of Virginia. Dr. Bragg initially treated Claimant on June 3, 2002. (CX 8). Dr. Bragg examined Claimant and reviewed his x-rays taken on June 1, 2002. Dr. Bragg diagnosed Claimant with a left sciatica and prescribed him a Medrol Dosepak. Claimant was instructed to start physical therapy and stay out of work until he returned for follow-up in one week. (CX 8). When Claimant returned on June 11, 2002, he reported that he was feeling better and wanted to return to his job as a crane operator. (CP&O/P&O 15-16). Dr. Bragg released Claimant to full-duty.

Dr. Wagner initially treated Claimant for his June 1, 2002, injury on June 25, 2002. (CTS 16). Dr. Wagner noted that an MRI in July 2002 revealed letter interval change on Claimant's back from an MRI taken on December 11, 2001.[5] Dr. Wagner wrote that Claimant experienced a flare up of pain since returning to work two weeks earlier. (CP&O/P&O 5-13). Claimant was instructed to stay out of work for ten (10) days and continue with physical therapy on a daily basis. (Id.). On July 9, 2002, Dr. Wagner ordered an MRI scan of Claimant's

[5] The December 11, 2001 MRI was taken in response to a previous work-injury.

lumbosacral spine to rule out L5-S1 disk problems. (CP&O/P&O 5-12). Dr. Wagner reviewed Claimant's MRI scan on July 23, 2002. (5-11). He noted

> [Claimant's] MRI scan reveals a mild central disc bulge with partial annular tear of L5 S1. This may have changed somewhat from his December MRI in that there was no annular tear. . . .

(CP&O/P&O 5-11).

Claimant returned to Dr. Wagner on April 2, 2003. (CP&O/P&O 5-9). Dr. Wagner reported that Claimant had participated in an FCE which was "up to 66%". (CP&O/P&O 5-9). Dr. Wagner also noted that Claimant reported a problem when driving a crane; Dr. Wagner wrote "[Claimant] does have a sitting problem." Dr. Wagner also noted Claimant's interest in returning to work as soon as possible. After examination, Dr. Wagner returned Claimant with no restrictions.

Claimant returned to Dr. Wagner on May 9, 2003, with complaints of buttock pain and left hip pain. Dr. Wagner ordered a bone scan to rule out a stress fracture, and prescribed medications to help Claimant with pain. (CP&O/P&O 5-8).

On May 19, 2003, Claimant returned to Dr. Wagner with complaints of significant buttock pain. (CP&O/P&O 5-7). Dr. Wagner informed Claimant that his full body bone scan revealed no abnormalities. Dr. Wagner stated that he had very little to offer Claimant, and he recommended that Claimant return to Dr. Koen for "further elucidation".

On March 5, 2005, Dr. Wagner authored a letter to CTS' counsel in reference to Claimant's condition. After summarizing Claimant's medical history[6], Dr. Wagner concluded that "Mr. Outland's problems are due to multiple returns to work and increasing injury to his back." (CTS 16).

Dr. Bragg also authored an opinion letter at the request of CTS. After reviewing Claimant's records, Dr. Bragg concluded

> [A]fter reviewing the outline of [Claimant's] jobs as well as a review of the job descriptions with each of the jobs listed enclosed [*sic*] in the printout, it is my opinion with a reasonable degree of certainty that the physical demands of these jobs repetitive bending, twisting, and lifting contributed to further worsening of his low back pain. . . . Based upon the various activities of which [Claimant] participated in ranging from a general longshoreman to crane operator, training gangwayman, slinger/spotter, deck man/windeman, lasher and break bulk slinger, it is my opinion to a reasonable degree of certainty that these prolonged and repetitive activities would affect his injury.

(CTS 15).

[6] Although Dr. Wagner wrote a two-page summary of Claimant's condition and treatment, it is unclear which records he actually consulted as he failed to state ...).

Functional Capacity Examination

At the request of CTS, Claimant underwent a Functional Capacity Examination ("FCE") on March 5-6, 2003. (CTS 21). Claimant was observed to function at a

> "medium to medium-heavy physical demand level safely and productively on day one. End of day two assessment found reduced pace and productivity following no clear physiological pattern or biomechanical pattern." (CTS 21)

Claimant was found to have demonstrated the ability to effectively meet the critical demands of his employment as a crane operator with consideration for weight distribution/shifting over the right side to enhance static positional tolerance. (CTS 21).

Dr. Joseph L. Koen

Dr. Koen began treating Claimant for the June 1, 2002, work injury on August 7, 2002. (CX 10). Dr. Koen noted that Claimant tried physical therapy but received no benefit. (*Id.*). Dr. Koen stated that Claimant's MRI of the lumbar spine from June 10, 2002 revealed a central disc bulge at L5-S1; Dr. Koen also believed that there was likely a far lateral, small disc protrusion on the left at the L4-5 level. Dr. Koen recommended that Claimant try epidural injections for a period of time. Claimant was released to work with restrictions, including no bending or straining of the lumbar spine; no heavy lifting or carrying exceeding 25 pounds, and no sitting for more than one hour. (CP&O/P&O 1-119). Dr. Koen referred Claimant to SpineWorks in December 2002 for evaluation and treatment of luumbosacral strain. (CP&O/P&O 1-111).

Claimant was seen by Dr. Koen for a follow-up appointment on August 6, 2003. (CX 12). Dr. Koen examined Claimant and reviewed his myelogram and CT scan, which showed a disc bulge at L5-S1, and some retrolisthesis of L5 on S1. Dr. Koen offered Claimant an exploration and foraminotomy at left L5-S1, with possible discectomy. He noted that Claimant has had persistent symptoms despite extensive conservative management. Claimant was advised to consider the situation before getting back in touch with Dr. Koen's offices. (CX 12).

Claimant returned to Dr. Koen in July 26, 2004. (CX 13). Dr. Koen noted that Claimant was unable to do his job as a crane operator because of too much pain. Claimant presented with similar complaints as he did before. Dr. Koen did note that Claimant presented with one new symptom which consisted of more midline low back pain. Dr. Koen recommended an updated MRI scan and lumbar flexion and extensions. Claimant had an MRI of the lumbar spine taken on August 30, 2004. (CX 14). The interpreting radiologist noted that

> At L5-S1 disc height is preserved. Disc is moderately desicated. There is a small central disc protrusion, possibly classifiable as a bulging disc with partial annular tearing, extending into the epidural fat anterior to the thecal sac. Nerve roots

> appear unaffected. Facets appear normal. Other levels appear normal. ... **Comparison of the present study with the archived digital images of the previous examination performed here July 10, 2002 shows, allowing for difference in technique, little interval change.**

(CX 14) (Emphasis in original).

Dr. Koen followed up with Claimant on September 15, 2004. (CX 15). Dr. Koen noted that ,Claimant, was experiencing, more episodic low back pain, ,especially with ,movement. Dr. Koen recommended that Claimant undergo an L5-S1 interbody fusion, pedicle screw stabilization, and arthrodesis. The notes acknowledge that Claimant was interested in proceeding with that type of procedure. (CX 15). On November 24, 2005, Dr. Koen again saw Claimant for a follow-up. At this point, Claimant had received a second opinion from Dr. Ordonez, who concurred that lumbar fusion was recommended for Claimant's condition. (CP&O/P&O 1-13).

Claimant saw Dr. Koen for a preoperative conference on February 23, 2005. Dr. Koen noted that Claimant

> [c]ontinued to be symptomatic with back pain and radiation down the left side. Again, [Claimant] has been found to have instability at L5/Si with moderate degeneration of that segment, and partially concordant discogenic pain. He has failed conservation measures.

(CPO/P&O 1-10).

Dr. Koen performed Claimant's surgery on March 5, 2005. (CP&O/P&O 1-72). In follow-up visits in April and June 2005, Claimant reported that he had some stiffness in his back, but that his low back pain was much better. (CP&O/P&O 1-7, 1-9). On September 7, 2005, Dr. Koen released Claimant to work with the following restrictions:

> no bending or straining of the lumbar spine; no working overhead; no working floor level or in cramped crawling or squatting positions, no heavy lifting or carrying exceeding 10-15 pounds, no operating heavy equipment of motor vehicles other than commuting to and from work, no sitting for more than one hour, to be followed by a 10 minute break for position change and relaxation.

(CPO/P&O 1-3). On September 28, 2006, Dr. Koen indicated that Claimant would not reach maximum medical improvement until at least March 2006. (CP&O/P&O 1-6).

At the request of different parties to this proceeding, Dr. Koen offered several opinions regarding the causal link between Claimant's disability and his work activities. Dr. Koen first responded to a request from CTS' counsel. Dr. Koen summarized Claimant's back pain history and resulting surgery in a letter dated February 3, 2005. He wrote:

> On August 6, 2003, I had offered a foraminotomy at left L5-S1 with possible discectomy as a surgical; treatment for Mr. Outland. Subsequent to that, he had returned to work in various capacities, at times involving significant amounts of

> lifting, bending, and twisting as a longshoreman. I saw him thereafter in follow-up on July 26, 2004. At that time, he had new symptoms including more midline low back pain which was not a prominent feature of his symptom complex before. He continued to attempt working but his episodic back pain had become more prominent and more frequent. This was especially noted with movement. His back pain has become intractable with continued radiation into the left hip and buttock with similar, though lesser, symptoms on the right side.
>
> At this point, I have recommended a more significant operation including lumbar laminectomy, posterior lumbar interbody fusion, pedicle screw stabilization, and arthrodesis.
>
> In my opinion, the repetitive bending and twisting mentioned above contributed to further worsening of the L5-S1 segment and increasing low back pain. [Claimant] has also had partially concordant pain on provocative discography and has some instability at L5-S1 as well.

(CPO/P&O EX 1-12).

Additionally, counsel for Ceres sent Dr. Koen a letter with several questions regarding Claimant's disability. In response to the first question, Dr. Koen stated that there was new objective pathology in Claimant's back since 2002. He supported his answer by noting that

> Lumbar x-rays 8/25/04 showed posterior displacement of L5 on S, by 0.5cm with clear instability on flexor/extension; 11/20/02 x-rays "no abnormalities" per radiologist; MRI 8/30/2004 continued dessication of L5S, disc.

(CPO/P&O 1-1).

Next, Dr. Koen was asked whether he would agree that

> [G]iven Cooper T. Smith's refusal of surgery, forcing Mr. Outland back to work, that Mr. Outland's current condition is a natural progression of his June 1, 2002 injury with Cooper T. Smith, and his current condition is what you would have expected as a natural progression of the June 1, 2002 injury, given the refusal to authorize the surgery and thus Mr. Outland being forced to continue to work?

(CPO/P&O 1-2) (Emphasis in original).

Dr. Koen responded that Claimant's condition is a natural progression of his 2002 injury. (*Id.*)

Finally, CTS requested Dr. Koen's opinion of Dr. Hunt's report, who opined that Claimant did not suffer an aggravation or exacerbation of his June 1, 2002 injury as a result of his ongoing employment. (CTS 13). In an October 7, 2005 letter, Dr. Koen disagreed from Dr. Hunt's assessment, and reasserted his belief that Claimant developed more significant and centralized low back pain after his continued working. (CTS 13). Dr. Koen also stated that Claimant's work activities after April 9, 2003 contributed to Claimant's need for the surgery that

he underwent on March 5, 2005. Dr. Koen wrote that Claimant's continued work activities as a longshoreman after April 9, 2003 aggravated and/or exacerbated the problems Claimant had with his back. (CTS 13).

Dr. Thomas E. Hunt

Dr. Hunt is board-certified orthopedic surgeon who was requested by P&O to review the history and medical records of Claimant's work-injury. (CP&O/P&O 2-1). Dr. Hunt reviewed Claimant's records and films from his numerous physicians and authored a report on September 28, 2005. (*Id.*). After summarizing Claimant's records in a twelve (12) page report, Dr. Hunt reached several conclusions regarding Claimant's condition. He noted that Claimant's detailed work history and exhaustive diagnostic/therapeutic evaluation conducted over a period of more than two (2) years disclosed no objective evidence of Claimant having sustained any trauma subsequent to June 1, 2002. (EX 2-11). Finally, Dr. Hunt found no evidence that Claimant sustained an aggravation or exacerbation of his June 1, 2002, injury as a result of ongoing employment. Instead, Dr. Hunt concluded that Claimant's March 4, 2005, surgery was the result of a natural progression of Claimant's ongoing and persistent complaints. (CP&O/P&O 2-12).

Dr. B. Joseph Ordonez

Claimant was seen by Dr. Ordonez for a neurosurgical consultation on September 10, 2003. (CP&O/P&O 4-6). Dr. Ordonez evaluated Claimant and reviewed various studies and films. Dr. Ordonez concluded that Claimant's extensive work-up failed to reveal evidence for lumbar radiculopathy. (CP&O/P&O 4-7). He further stated that he was only able to elicit tenderness in Claimant's periformis fossa on the left; he recommended that Claimant undergo further EMG/NCV studies with particular interest to this region. Dr. Ordonez added a muscle relaxant to Claimant's medical regimen and instructed that Claimant return about complete of his EMG/NCV study. (CP&O/P&O 4-7).

Claimant was next seen by Dr. Ordonez on October 22, 2003. (CP&O/P&O 4-5). Claimant reported that he had improved but continued to have pain similar to the pain he described during his previous visit. Examination of Claimant was unchanged from the previous visit. Dr. Ordonez advised Claimant to pursue treatment with Advanced Pain Management and return for treatment on an as-needed basis. In his notes, Dr. Ordonez wrote that he "cleared [Claimant] to work as a crane operator." Claimant was given a note in which he was allowed to return to full-time work with no heavy-lifting. (CP&O/P&O 4-2).

Dr. Ordonez treated Claimant again on November 3, 2004. (CP&O/P&O 4-3). Claimant reported that he was initially able to return to work following his last visit with Dr. Ordonez in October 2003. However, Claimant's pain began to progressively worsen and by July 2004, he presented to Dr. Koen for further evaluation of his symptoms. Dr. Ordonez examined Claimant and reviewed his film and test results. Dr. Ordonez noted that "there are no significant changes from his previous MRI study." A review of Claimant's July 2003 CT/myleogram of lumbar spine revealed a diffuse disc bulge at L5-S1 level. Dr. Ordonez concluded that Claimant was a failure of conservative management and has continued to have progressive symptoms. Dr.

Ordonez agreed with Dr. Koen's recommendation that Claimant undergo L5-S1 laminectomy followed by L5-S1 discectomy and interbody fusion. Dr. Ordonez took Claimant out of work until decisions could be made regarding further treatment. CP&O/P&O 4-4).

On February 1, 2005, in a letter to counsel for CTS, Dr. Ordonez wrote that he would have imposed restrictions on Claimant had been asked to fully address job restrictions at a previous date. Specifically, Dr. Ordonez wrote

> In the past, I have been asked to address [Claimant's] ability to perform his duties as a **crane operator** and had concurred with the F.C.E. of 3/6/03. Had I been asked to fully address job restrictions, I would have included **no repetitive bending, twisting, or heavy lifting.** I believe the repetitive bending, twisting and lifting of his current position has serve [*sic*] to aggravate his condition and has resulted in his current need for the proposed lumbar spinal surgery.

(CP&O/P&O 4-1). (Emphasis in original).

Dr. Andrew Pollak

Dr. Pollak is an orthopedic surgeon currently employed by the Maryland School of Medicine at the R. Adams Cowley Shock Trauma Center in Baltimore, Maryland. (Tr. 81). Dr. Pollak described the Shock Trauma Center as a state-designated referral center for spine and spinal cord injuries. EMS providers and trauma centers throughout Maryland refer inpatients with spine and spinal cord injuries to this center for treatment. In his capacity at the Shock Trauma Center, Dr. Pollak sees patients who have a variety of injuries, including nerve root injuries, spleen injuries, spinal column injuries, and complete spinal cord injuries and paralysis. (Tr. 82). Dr. Pollak previously worked as an associate team physician for the Baltimore Ravens. In that capacity, Dr. Pollak evaluated back injuries for NFL athletes, which Dr. Pollak described as a common injury. Dr. Pollak attended college and medical school at Northwestern University in Chicago, Illinois. He then completed his internship and residency at Case Western Reserve University in Cleveland, Ohio. (Tr. 83). Additionally, Dr. Pollak completed a fellowship in orthopedic trauma at that University of California at Davis Medical Center. Dr. Pollak is board certified and recertified. (Tr. 84).[7]

At the request of P&O/CP&O, Dr. Pollak was asked to review the medical records of Claimant. He reviewed various records, including those from Drs. Ordonez, Wagner, Bragg, Gershon and Koen. He also reviewed physical therapy records, cardiology records, MRIs, CT-scans, and other studies and reports from radiologists. (Tr. 85). Having reviewed these extensive records, Dr. Pollak formed an opinion within a reasonable degree of medical probability as to what caused Claimant's need for the back surgery performed on March 4, 2005. (Tr. 87). Dr. Pollak opined that Claimant's need for surgery was caused by his work-injury of June 1, 2002. He stated that Claimant was asymptomatic prior to this time and constantly symptomatic thereafter. (Tr. 87). Dr. Pollak explained that Claimant had symptoms which worsened with activity and seemed to improve with rest, but did not improve to the point that

[7] Dr. Pollak also discussed his various professional memberships and professorships; however, the parties stipulated that Dr. Pollak is an expert in his field so additional discussion of these qualifications is not necessary.

Claimant was asymptomatic. (Tr. 87) He also stated that Claimant's workplace activity did not change, in any way, the underlying condition after June 1, 2002. (Tr. 87). Instead, the continued activity after June 1, 2002 made Claimant's symptoms worse and resulted in Claimant experiencing more pain. (Tr. 87).

During his testimony, Dr. Pollak discussed the differences between micro-trauma and macro-trauma. Dr. Pollak explained that macro-trauma is a larger episode of visible injury, whereas micro-trauma is continuing ongoing injury to joints or body parts. In this case, Dr. Pollak explained that if the parties were attempting to implicate repetitive activity in the workplace, the trauma would be characterized as a micro-trauma, because there is no major additional injury (a macro-trauma) which occurred after June 1, 2002. However, Dr. Pollak found no evidence in Claimant's records of a worsening condition consistent with a micro-trauma. He offered examples of things which would signify a worsening condition, such as progressive osteocyte formation or progressive additional bone formation. (Tr. 88). Dr. Pollak explained that these types of substantial degenerative changes would increase the amount of pressure on the nerve roots around it; however, this was not present in Claimant's case. (Tr. 88). Dr. Pollak concluded that there was no permanent aggravation of Claimant's condition after June 1, 2002.

Dr. Pollak also discussed the surgery originally proposed by Dr. Koen as well as the surgery which was actually performed on Claimant.[8] Dr. Koen's August 2003 notes reported a finding of retrolisthesis at L5-S1, which Dr. Pollak described as a sign of instability in the spine at that particular level (L5-S1). (Tr. 91). Specifically, Dr. Koen's notes proposed an "exploration foramen root on the left at L-5/S-1 with possible discectomy". (Tr. 91). Dr. Pollak stated that this type of surgery would not, in and of itself, have been appropriate given Claimant's particular findings. He explained that this procedure would have addressed Claimant's back and hip pain and leg numbness, but it would not have solved the problem with instability. (Tr. 91). In sum, Dr. Pollak explained that this procedure would amount to performing a decompression without fusion. (Tr. 92). However, Dr. Pollak stated that the surgery that was ultimately performed by Dr. Koen was appropriate given the particular findings of Claimant's lower back. (Tr. 92).

Dr. Pollak appeared neither surprised nor concerned at the inconsistency between Dr. Koen's findings and the surgery he proposed in August 2003. Dr. Pollak explained that as a physician, he has had similar experiences in which the surgery he proposes early on in the treatment process does not necessarily indicate the precise procedure that he will actually perform. He explained:

> When I looked at that inconsistency, I go back to [Dr. Koen's] note, and [Dr. Koen's] note on that date is very brief, and I've been in that situation myself, you're seeing a patient in the office and you're kind of leaning towards a surgical procedure and you're saying, come back again and we'll talk more about it when it's time to proceed with the surgery, that definition of the procedure that's going

[8] Dr. Pollak compared the initial proposed surgery with the surgery actually performed by Dr. Koen because CTS argued that the differences between these procedures is further evidence of an aggravation of Claimant's June 1, 2002 injury. See CTS Brief at 16; CTS 11-001.

> to be performed is not always the exact description of the procedure you intend to perform. So, I took it as [Dr. Koen] being a little bit brief at that point and not really describing he intended to do a fusion. Because in that context of instability that he himself describes, it just wouldn't make sense to just do the decompression and not the fusion.

(Tr. 92).

Dr. Pollak also responded to a report from Dr. Koen which stated that the ultimate need for fusion was the result of instability, which was a new objective finding. (Tr. 93). Dr. Pollak disagreed with Dr. Koen's opinion; he noted that Dr. Koen's notes from 2003 describe instability, as well as the 2003 reports of the radiologist. Thus, Dr. Pollak concluded that there were not new objective findings of instability in 2004. (Tr. 93).

In addition to his testimony at the formal hearing, Dr. Pollak also prepared a lengthy report regarding Claimant's condition. (CP&O/P&O 3-1). The purpose of this report, as stated by Dr. Pollak, was to review medical records and provide opinions regarding Claimant's need for surgery and the causal relationship between the need for the surgery, the June 1, 2002 workplace incident, and Claimant's ongoing employment after June 1, 2002. (CP&O/P&O 3-1). Dr. Pollak prepared this report on September 21, 2005 at the request of P&O.

Dr. Pollak reviewed all of Claimant's medical records which related to his June 1, 2002 injury. Eleven pages of Dr. Pollak's 12-page report summarize Claimant's extensive medical records, films, and diagnostic tests. (CP&O/P&O 3-1 through 3-11). In his assessment, Dr. Pollak noted that despite some change in the quality and location of pain which Claimant experienced over time, there was no documentation that major change in the nature of the symptoms occurred. (CP&O/P&O 3-12). Additionally, Dr. Pollak stated that Claimant's MRI dated September 14, 2004 indicated little change relative to the study dated July 10, 2002 by report. (CP&O/P&O 3-12). Dr. Pollak concluded that

> [Claimant's] fall injury of June 1, 2002, more likely than not caused the injury to the claimant's lumbar spine that resulted in the onset of symptoms of left-sided low back and buttock pain that persisted through the time of the surgical procedure of March 4, 2005. I do not believe that any activity subsequent to the reference workplace incident of June 1, 2002, contributed to the claimant's ongoing lumbar spine and left buttock symptoms to any greater degree than normal daily activity would have.

(CP&O/P&O 3-11 to 3-12).

DISCUSSION

In a situation where the claimant has potentially suffered aggravated injuries, the Act's "last responsible employer rule" is applied. Under this rule, a single employer can be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for different employers. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). The rule is designed to avoid the

expense and complications that would be inherent in any effort to apportion liability among employers according to their individual contributions to a worker's disability. *Id.* at 1336; *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955). The rule is applied as follows:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.

Foundation Constructors v. Director, OWCP, 950 F.2d 621, 624 (9th Cir. 199l), quoting *Kelaita v. Director*, OWCP, 799 F.2d 1308, 1311 (9th Cir. 1986). When an employment injury aggravates, accelerates or combines with a pre-existing condition to result in a new disability, the entire resulting disability is compensable by the employer liable for the "new" or aggravating injury. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. (Price)*, 339 F.3d 1102, 1105 (9th Cir. 2003); *Bath Iron Works Corp. v. Director, O.W.C.P.*, 244 F.3d 222, 228 (1st Cir. 2001) (*citing Foundation Constructors, Inc. v. Director, O.W.C.P.*, 950 F.2d 621, 624 (9th Cir. 1991)). When the disability is the result of the natural progression of the prior injury and would have occurred notwithstanding the subsequent injury, the previous employer remains liable for the permanent disability, although the employer responsible for a subsequent injury may be responsible for a period of temporary disability. *Id.*

In order for an aggravation to occur under the Act, an injury does not have to actually alter the underlying disease process. Instead, the Board has held that an aggravation also occurs where an injury "aggravates the symptoms of the process." *Taylor v. Maher Terminals, Inc*, BRB Nos. 97-839 and 97-839A (March 18, 1998), *aff'd Ceres Marine Terminals, Inc. v. Taylor*, (4th Cir. June 27, 2000), *citing Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986). Where "the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act." *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999), aff'd mem. No. 99-70631 (9th Cir. 2001).

The Board has stated that resolution of the issue of who is the responsible employer involves weighing the evidence of record. The Board has likened the burdens of the employers as a burden of persuasion rather than production, as "each employer bears the burden of persuading the fact finder, by a preponderance of the evidence, that the claimant's disability is due to the injury with the other employer." *Buchanan*, 33 BRBS at 36. The initial burden of persuasion is on the later employer to establish that claimant's disability is due solely to the natural progression of the initial injury. *Id.* Moreover, the Section 20(a) presumption cannot be invoked by one employer against another in a case when there is a dispute concerning the identity of the responsible employer. *Buchanan*, 33 BRBS at 35.

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment

conditions or a work accident occurred which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pac. Shipyards Corp*, 25 BRBS 140, 144 (1991). The purpose of Section 20(a) is to aid the claimant in establishing the compensability of his claim. *See generally U.S. Industries/Federal Sheet Metal v. Director*, OWCP, 455 US 608, 14 BRBS 631 (1982). The compensability of Claimant's claim is at issue in this case only with regard to Claimant's allegation of an aggravation of his June 1, 2002 work injury.[9] Claimant contends that his continued work as a general longshoreman – especially the heavy lifting, bending and twisting - aggravated his back condition and accelerated his need for surgery. As CP&O was the last employer to expose Claimant to such stimuli, Claimant argues that CP&O is the responsible employer.

In support of his argument, Claimant testified that as a general longshoreman, he was required to pick up 10-15 pound pins and affix them to containers. This type of activity required that he continuously bend, twist and lift heavy items. Additionally, Claimant submits the opinions of Drs. Koen, Ordonez, Bragg and Wagner, who opined that these activities contributed to a worsening of his back condition. (CTS 11-1). I find Claimant has shown that he sustained a harm and that working conditions existed which could have aggravated or accelerated his condition. Accordingly, Claimant is entitled to the Section 20(a) presumption.

The burden then shifts to the relevant employer to show rebut the presumption with substantial countervailing evidence. Accordingly, CP&O must show that Claimant's disability is not the result of an aggravation that he sustained while employed by CP&O. CP&O argues that Claimant's disability is the result of the natural progression of his June 1, 2002 injury while employed by CTS. In support of its argument, CP&O offered the opinions of Drs. Pollak and Hunt. Dr. Pollak authored a detailed report regarding Claimant's treatment; he also testified at the formal hearing. Dr. Pollak testified that the activities in which Claimant engaged as a general longshoreman did not cause any permanent change in his underlying condition. Dr. Pollak explained that the natural progression of Claimant's injury would result in increased nerve root irritation and therefore increased pain, radiation, and numbness with increased activity. Dr. Pollak emphasized that "increased activity" could consist of "anything", including activities of daily living. Dr. Hunt also opined that Claimant's work activities as a longshoreman did not aggravate or exacerbate his back injury. Given this evidence, I find that CP&O has presented substantial countervailing evidence sufficient to rebut the Section 20(a) presumption and to sever the causal connection between Claimant's disability and the conditions of his employment at CP&O.

Thus, the presumption falls out and the evidence must be weighed as a whole to determine whether Claimant's disability is the result of a natural progression or an aggravation of his June 1, 2002 work injury. Resolution of this issue will determine which party is the responsible employer. Because this case involves six separate employers, I will briefly outline the arguments of each employer before weighing the evidence as a whole.

CTS contends that Claimant's disability is the result of his continued work as a longshoreman, and thus should be found to constitute an "aggravation" under the Act. After

[9] There is no issue of compensability of Claimant's June 1, 2002 injury as CTS has voluntary paid compensation to Claimant on this injury. Thus, the injury is deemed compensable under the Act.

Claimant was released to full-duty, Claimant continued to work as a longshoreman, which included jobs as a general longshoreman, a slinger, and a gangway man. Claimant's various duties required that he repeatedly bend over, pick up heavy pins, and affix them to containers. CTS argues that these job duties increased the pain in Claimant's back and resulted in pain in his leg. (Tr. 62). CTS also argues that during the six-month period in which Claimant went out of work on his own to allow himself time to heal, Claimant did not seek any medical treatment. CTS also cites Claimant's testimony that "...laying around kind of seemed like I, you know, got stronger. I wasn't working and it seemed to get better." (Tr. 77). As further evidence of aggravation, CTS notes that Claimant sought medical treatment from Dr. Koen only a few days after he returned to work in June 2004. (Tr. 79). In support of its position that Claimant suffered an aggravation, CTS submits the opinions of Drs. Bragg, Wagner, Ordonez, and Koen.

UMS argues that it cannot be held responsible for Claimant's disability because it was neither the first employer nor the last employer and Claimant sustained no intervening injury or permanent aggravation while employed at UMS. Additionally, UMS contends that Claimant's disability is the result of a natural progression of his June 1, 2002 injury.

VIT contends that regardless of whether the court finds that Claimant's disability is the result of an aggravation or a natural progression, it is not liable. In support of this position, VIT notes that Claimant did not work for it at any time between the two recommended surgery dates (August 2003 and September 2004). Additionally, VIT argues that the work Claimant performed on October 24 and 27, 2004 was not strenuous labor and therefore could not have aggravated Claimant's condition. Finally, VIT submits that notwithstanding these arguments, Claimant worked for four (4) other maritime employers after his employment with VIT before he ultimately left work on November 4, 2004.

Ceres agrees with CP&O/ P&O's position that Claimant's disability is solely due to Claimant's June 1, 2002, work injury at CTS. In support of its position, Ceres also subscribes to Dr. Pollak's opinion that Claimant suffered no aggravation as a result of his continued work as a general longshoreman.

P&O and CP&O submitted a joint brief in this case and contend, as detailed above, that Claimant's disability is solely the result of a natural progression of his June 1, 2002 work injury.[10]

[10] P&O and CP&O also argue, in the alternative, that Claimant's disability is the result of CTS improperly returning Claimant to full-duty work following his June 1, 2002 work injury. Specifically, P&O and CP&O contend that after March 2003, Claimant never worked in suitable alternate employment within his physical capabilities due to the failure of the FCE and Dr. Ordonez to properly instruct Claimant on the nature and extent of his restrictions. As noted in the Summary of the Evidence, Dr. Ordonez backdated restrictions for Claimant in February 2005; the nature of these restrictions would have surely precluded Claimant from performing the typical jobs of a general longshoreman. Thus, P&O and CP&O argue that it is improper for CTS to argue that Claimant suffered an aggravation as a result of his general longshoreman duties when this work was clearly not suitable alternate employment for Claimant given his restrictions. Because I have found that Claimant's disability is the result of a natural progression of his June 1, 2002 work injury, it is not necessary to delve into CTS' role in the issue of Claimant's improperly issued work restrictions.

In weighing the evidence submitted by all parties, I find that Claimant's disability is the result of the natural progression of his June 1, 2002 work-injury. Although the parties submitted numerous medical opinions on this issue, I find many of the opinions unsupported or conclusory. However, I find both Claimant's and Dr. Pollak's testimony credible and supported by the evidence of record. This evidence establishes that Claimant's disability is neither the result of his work activities "aggravating the symptoms of the process" nor did his work activities "alter the underlying process". *See Taylor, supra.*

As an initial matter, it is noteworthy that the record is devoid of any particular workplace incidents which could indicate an aggravation of Claimant's condition. The absence of this type of evidence is supported by Claimant's testimony that he did not visit any employer's infirmary in the period of time between his return to work on and through November 3, 2004. (Tr. 68).[11] Thus, it is evident that a "macro-trauma", as explained by Dr. Pollak, did not occur in this case after Claimant's initial work-injury on June 1, 2002.

The record reflects that Claimant was initially injured on June 1, 2002, while working for CTS. After conservative treatment, Claimant was released to full-duty work as a crane operator in March 2003. Thereafter, Claimant worked intermittently through November 3, 2004. During this period of time, the record establishes that Claimant suffered continuous and progressively worsening pain. (Tr. 75). Despite CTS' efforts to identify Claimant's longshore work duties as the cause of his disability, Claimant credibly testified that he was constantly in pain from June 1, 2002 until he underwent surgery in March 2005. Claimant specifically noted that he experienced pain and was generally uncomfortable merely from the everyday activities of life. (Tr. 67). For example, Claimant testified that he could be sleeping in bed and would wake up in pain if he rolled over to his left side. (Tr. 56). Dr. Pollak corroborated this testimony by noting that Claimant was asymptomatic prior to June 1, 2002, and constantly symptomatic thereafter. (Tr. 87). Dr. Pollak explained that Claimant had symptoms which worsened with activity and seemed to improve with rest, but did not improve to the point that Claimant was asymptomatic. (Tr. 87)

Dr. Pollak testified that Claimant's work place activity did not change, in any way, Claimant's underlying condition after June 1, 2002. (Tr. 87). He explained that continued irritation of Claimant's nerve root would lead to a worsening of symptoms and would consequently cause Claimant more pain; this testimony corroborated Claimant's testimony of progressively worsening pain. Additionally, Dr. Pollak stated that any type of day-to-day activities could irritate the nerve root. (Tr. 102). He emphasized that Claimant's condition would be irritated by *any* activity in which Claimant was required to exert himself; the evidence shows that Claimant experienced pain even during physical therapy. (Tr. 105). Despite CTS' contention that it was Claimant's repeated work activities which led to an increase in Claimant's pain, Dr. Pollak's credible testimony establishes that any activity would cause an increase in symptoms of Claimant's condition. Moreover, I find Dr. Pollak's thorough explanation of macro and micro trauma very persuasive in understanding Claimant's underlying condition. Dr. Pollak convincingly testified that Claimant's x-ray and MRI films failed to show any evidence of micro-trauma, which would serve as evidence that Claimant's repetitive work activities caused an aggravation of his back injury.

[11] Although the occurrence of an actual "incident" is not a prerequisite for a court to find that an aggravation occurred, it is an important fact to consider when weighing the evidence of record.

In contrast to the credible testimony of Claimant and Dr. Pollak, I find the opinion of Dr. Ordonez not credible. Dr. Ordonez opined that "the repetitive bending, twisting and lifting of [Claimant's] current position has serve [sic] to aggravate his condition and has resulted in his current need for the proposed lumbar spinal surgery." (CP&O/P&O 4-1). First, Dr. Ordonez does not explain *how* Claimant's continued work activities served to aggravate his condition and resulted in Claimant's need for the proposed lumbar surgery." *Id.* Notwithstanding Dr. Ordonez's conclusory opinion, I also find that Dr. Ordonez's statements on this issue are compromised by his errors in assigning the appropriate work restrictions. It is of considerable concern to this court that Dr. Ordonez, as CTS' chosen independent medical examiner, admittedly did not issue timely work restrictions for Claimant given his injury and condition at that time. Given this significant error of judgment, I am unable to lend any credibility to the opinion of Dr. Ordonez.

Additionally, I am unable to attach any weight to the reports of Drs. Bragg, Wagner, and Hunt because they fail to provide a basis for their opinions. The reports of Drs. Bragg and Wagner, submitted by CTS, merely conclude a causal connection between Claimant's disability and his work activities. I am unable to give much weight to the opinions of these physicians because they again fail to provide a basis for how Claimant's work activities as a general longshoreman contributed to a worsening and/or aggravation of his back injury. *See Cotton v. Army & Air Force Exchange Svcs.*, 34 BRBS 88 (2000) (it is within the ALJ's discretion to give more weight to the opinion of a doctor who was able to provide an explanation for the claimant's pain.). Similarly, CP&O submitted the report of Dr. Hunt, who concluded that there was "no evidence of Mr. Outland having sustained any aggravation or exacerbation of his complaint as a result of his ongoing employment. The performance of the March 4, 2005 surgery clearly appears to have been because of a natural progression associated with Mr. Outland's ongoing and persistent complaints." (CP&O/P&O 2-12). Unlike Dr. Pollak, Dr. Hunt failed to explain a basis for *how* Claimant's condition would naturally progress and *why* his work activities would have no aggravating or exacerbating effect on his condition.

Additionally, Dr. Koen, who served as Claimant's treating physician, offered three opinions. First, in a February 3, 2005, letter from CTS' counsel, Dr. Koen opined that the midline pain and instability observed in Claimant's back in 2004 were new objective findings. (CTS 11). Dr. Koen cited the repetitive bending and twisting of Claimant's work as a general longshoreman as the cause for worsening of his back condition. Dr. Koen also stated that this worsening resulted in the need for a more "significant" operation than the surgery which he originally proposed in August 2003. (CTS 11). Then, on March 16, 2005, in response to a request from Ceres' counsel, Dr. Koen again indicated that new pathology, including signs of clear instability, were revealed on Claimant's lumbar x-rays from August 25, 2004.[12] (CTS 12). Dr. Koen noted that per the radiologist's reports, Claimant's November 20, 2002 x-rays showed "no abnormalities". Moreover, when asked whether, given CTS' refusal of surgery which forced Claimant back to work, Claimant's current condition is the natural progression of his June 1, 2002 injury, Dr. Koen answered "yes". (CX 21). Finally, on October 7, 2005, CTS sent Dr. Koen a report that had been authored by Dr. Hunt, who opined that Claimant did not suffer an aggravation or exacerbation of his June 1, 2002 injury as a result of his ongoing employment.

[12] Dr. Koen signed off on this opinion in another letter dated June 28, 2005. (CX 21).

(CTS 13). Dr. Koen disagreed with Dr. Hunt's assessment, and reasserted his belief that Claimant developed more significant and centralized low back pain after his continued working. (CTS 13). Dr. Koen also stated that Claimant's work activities as a longshoreman after April 9, 2003 aggravated and/or exacerbated the problems Claimant had with his back and contributed to Claimant's need for the surgery that he underwent on March 4, 2005. (CTS 13).

Despite CP&O's contention that Dr. Koen "flip-flopped" his opinion, I do not find that Dr. Koen's various opinions are inherently contradictory. After careful review, it is clear that his March 16, 2005 opinion in which he uses the term "natural progression" is contingent on the facts that CTS denied Claimant's first request for surgery and Claimant's "forced return" to work. Thus, Dr. Koen's opinions on the issue of natural progression/aggravation are not contradictory. However, like the other opinions in this case, Dr. Koen also failed to explain how Claimant's repetitive on-the-job bending and twisting contributed to an aggravation of his condition.

Additionally, Dr. Pollak persuasively explained that physician notes which appear early on in the pre-operative process do not always sufficiently outline the type and extent of surgical procedure that a doctor will ultimately perform. Thus, the fact that Dr. Koen performed a different and more extensive procedure than he initially suggested to Claimant is not substantive evidence that Claimant's condition was aggravated by his work activities and resulted, therefore, in the need for a more extensive procedure.

Finally, Dr. Pollak disagreed with Dr. Koen's opinion that Claimant's work activities had manifested into new objective findings in the form of instability and mid-line back pain. Dr. Pollak referenced Dr. Koen's office note of August 8, 2003 describing retrolisthesis; Dr. Pollak explained to the court that retrolisthesis is a form of instability, and in his opinion, any instability in the spine is an abnormal finding.

CONCLUSION

The weight of the evidence establishes that Claimant did not sustain an aggravation of his June 1, 2002 work injury. Instead, the credible testimony of Claimant and Dr. Pollak support a finding that Claimant's disability is the result of a natural progression of his June 1, 2002, injury. Having thoroughly reviewed the evidence of record, I find that Claimant's disability would have occurred notwithstanding his return to work as a general longshoreman. This evidence shows that Claimant had constant and progressively worsening pain following his injury on June 1, 2002. Although Claimant's pain would vary depending on his level of activity, the record unequivocally establishes that Claimant experienced constant pain until his surgery in March 2005. Unlike other cases in which the judge found an aggravation based on the claimants experience of period flare-ups of pain, Claimant's pain was constant following the occurrence of the June 1, 2002 injury. *See e.g. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Delaware River Stevedores, Inc. v. Director, OWCP and Southern Stevedores, Inc.*, 279 F.3d 233, 35 BRBS 154 (3d Cir. 2002). The evidence clearly shows that Claimant was unable to perform *any* work or activity without experiencing pain from the time of his injury in June 2002. When Claimant initially returned to work in 2003, he failed the crane operator test as a result of his pain. Claimant tried to take other jobs which were not so physically demanding; however,

Claimant found himself unable to perform certain jobs at all and required pain pills prior to beginning his work day for those few general longshoreman jobs that he could somewhat tolerate. Even with medication, Claimant still experienced constant pain for which he sought constant medical assistance. There is no evidence that any activity or event occurred following Claimant's return to work on March 2003 which resulted in an aggravation or exacerbation of his condition. In contrast, the evidence clearly establishes that Claimant's disability is the result of the natural progression of his June 1, 2002 injury. Accordingly, CTS, as Claimant's employer on June 1, 2002, is the responsible employer.

ORDER

It is hereby ORDERED that

1. Claimant's request for an award of temporary total disability compensation is GRANTED.

2. Claimant is entitled to an award of temporary total disability compensation in the amount of $ 608.01 per week for the period of November 4, 2004, through September 6, 2005.

3. Claimant is entitled to an award of temporary partial disability compensation in the amount of $354.64 per week beginning September 7, 2005, through the present and continuing. [13]

4. Cooper T. Smith is entitled to credit for voluntary payments already made to Claimant.

5. Cooper T. Smith is responsible for medical treatment for Claimant's work injuries in accordance with Section 7 of the Act.

6. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

7. All computations are subject to verification by the District Director.

[13] $912.01 (Claimant's AWW at time of June 1, 2002 injury) - $380.00 (Claimant's wage earning capacity as of September 7, 2005) = $532.01. $532.01 x 66 2/3 = $354.64

8. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

SO ORDERED.

Daniel A. Sarno, Jr.

Daniel A. Sarno, Jr.
Administrative Law Judge