HYPOTHETICAL FOR "MOCK SECOND INJURY FUND CONFERENCE" NOVEMBER 2024 DUAL MEETING

James Lupton v. Pyramid Industries, Claim Petitions: CP 2022-6000; D/A 02/01/2020 and CP 2022-6001; denied OE (01/01/2018 – 03/01/2022) same body parts (01/01/2018 – 03/01/2022).

BACKGROUND (Prior to compensable accident of 02/01/2020)

Petitioner, James Lupton is a laborer who is 67 years of age having been born February 1, 1957. He is 5 foot 8 inches and 285 pounds. He has fluctuated between 250 and 315 pounds most of his adult life. He is married with two adult children. He graduated high school. He has worked in manual labor all of his life. He was employed as a laborer for the Respondent which is a machine part manufacturing company. The petitioner has been employed there for 30 years [March 1, 1992 through March 1, 2022] as a warehouse laborer which has always been a very physically demanding job. He typically worked 8 hours a day, 5 days per week at $35.00 per hour by the time he suffered a compensable accident on February 1, 2020 (CP 2022-6001). At least 50% of a typical day involved him operating a forklift moving pallets of various sized machinery parts each weighing up to 500 pounds. A "typical" pallet load would weigh between 500 and 1000 pounds. Most of the machine parts were contained in reinforced cardboard containers or boxes depending upon size and weight. The parts were received from various manufacturing plants and stored for shipment to various third parties including manufacturers and distributors. The fork lift operation involved taking pallets from trailer trucks and temporarily storing them for reloading back onto trailer trucks for further shipments. There was also a fairly significant amount of relocation of pallets throughout the massive warehouse floor which was primarily a very large storage facility where 50 employees were customarily employed. Approximately 40% of the time he was moving equipment on and off pallets. Most of that time involved moving relatively "lighter boxes" by hand. Generally these would be boxes that did not weigh more than 100 pounds. All boxes weighed at least 10 pounds. There were also manual dollies and hand trucks that were utilized as part of this process. There were often teams of three to five people working together when moving heavier product which required multiple people to lift, carry and/or push a product for either movement, stacking and/or unstacking. Only about 10% of the day was sedentary in nature. This would involve mostly sitting and checking various codes and scanning various products. Most shifts were 8 hours with a half hour for lunch.

5% of any given day would involve significant climbing onto and on top of pallet stacks which involved climbing ladders or of petitioner actually climbing up on the pallet stacks which individually could be up to 10 feet high depending on the product which was stacked. The overall operation was extremely organized with a basic flurry of activity on a continuous daily basis. The plant worked two 8 hour shifts and the petitioner would often work on Saturdays in addition to his 8 hours per day, 5 days (Monday – Friday) per week.

The petitioner's primary job was movement of merchandise as above described. His job duties regularly involved significant pushing; pulling; lifting; reaching; carrying; bending at the waist [forward flexion with and without weight]; twisting at the waist; climbing; squatting and kneeling. His job description manual required an ability to "routinely" lift 100 pounds at a time. A number of times per day he would have to push with all of his force (bent over at the waist) while using his shoulders and arms to push a particular piece of heavy merchandise into proper position. At times he would brace his back against other merchandise and press on an adjacent pallet with both of his outstretched feet as hard as he could in order to exert sufficient bodily force to move a piece of product weighing well over 500 pounds a few inches for proper placement. These types of activities were routinely performed over his entire period of employment. He was one of the most senior employees employed by Pyramid Industries in this particular warehouse. Over the last 2 years of his employment the employer began utilizing "robots" to assist with many of these tasks but his particular team of "by hand" floor people mostly performed these personal physically exertional operations when not otherwise operating various types of forklifts. Surprisingly he never had a Workers' Compensation claim other than the two claims he filed which represents this fact pattern.

Prior to his accident of February 1, 2020, he had a number of diagnoses beyond his morbid adult obesity. He had chronic high blood pressure from 1999 to date with various types of medication management. For the past 15 years he was an insulin dependent diabetic and had an extreme difficult time controlling his weight despite the use of numerous medications. He had been a one pack per day smoker for the past 20 years. He had been diagnosed with chronic obstructive pulmonary disease 15 years ago and had abnormal pulmonary function studies for the past five years and was diagnosed as having moderate to severe asthma. On March 1, 2015 he underwent bilateral carpal tunnel decompressions [non-compensable for which he lost approximately six weeks of total time from work]. He had longstanding chronic intermittent neck and low back pain for which he treated with a chiropractor [Dr. Eugene Bell] for the past 10 years at least once a month primarily for preventative "maintenance". He had a few spiked periods of neck and/or low back pain. Dr. Bell had him undergo a July 1, 2012 neck and low back MRI which indicated bulging degenerative disc disease at C4-T1 and L4-S1; with no protrusions or herniations. Two additional MRI's were performed on August 5, 2018. They demonstrated degenerative disc disease at C3-T1 with disc protrusions at C4-6 and a small herniation at C6-7; and bulging disc pathology at L3-S1 with protrusion at L3-4 and two small herniations at L4-5 and L5-S1. None of the chiropractic or primary records up until that point in time ever indicated any cervical or lumbosacral radiculopathies.

The petitioner rarely missed time from work. He was proud of being able to own his home outright and to afford college tuition for both of his children. He was considered one of the hardest working people in the warehouse. He was held in high regard by management. However, as the years went on he began feeling that the job was becoming increasingly difficult for him. He was fatiguing more easily. He felt an overall diminishment of strength and was beginning to develop increased pain in his neck and low back where he had to start restricting the amount of repetitive exertion which he was routinely performing. He began declining "routine" overtime. He chalked all of this up to the aging process. No physician had ever suggested that he discontinue employment or that his job was taking a toll on him. He took great pride in keeping up with "the younger generation" at work. His chiropractor had prescribed various types of medications including prescription strength Tylenol and Advil for neck pain and low back pain when needed. He was an anti-drug person. He never took any type of narcotics. He had a boat and routinely enjoyed fishing on a lake during the summer months but he was significantly reducing this type of summer time activity as of the summer of 2017 because he simply didn't feel stable enough to be out in the water. By that time, he was beginning to have slight intermittent radiating pain from the beltline down each of his legs to just above each knee and he was developing cervical pain radiating pain down both arms to almost the elbow. He was more symptomatic on his right side than his left. He was right hand/arm dominant.

COMPENSABLE ACCIDENT 02/01/2020

The compensable accident occurred on respondent's premises on February 1, 2020 when the petitioner was driving a forklift and a co-worker driving another forklift moving a full heavy pallet negligently ran into his forklift striking the petitioner's forklift on the petitioner's left side [essentially a broadside 90 degree impact] causing the petitioner to be ejected to the right side which in turn caused the petitioner to strike the concrete floor in a twisted fashion as he was attempting to reach out to brace his fall which in turn caused a significant trauma to basically his entire right side. He was essentially ejected sideways from his forklift. His right arm dislocated with a comminuted fracture of the humeral head with rotator cuff tear and further internal shoulder derangement with non-operated cervical spine pain with bilateral cervical radiculopathies. His right patella also suffered a fracture/dislocation with an ACL tear. There was low back trauma with right sided radiation of pain for which a diagnosis of significant right sided disc herniation was made by MRI study. The petitioner had multiple contusions on the right side of his body. Only the right shoulder and right upper arm were surgically repaired in the initial in patient admission which was February 1, 2020 through February 7, 2020. The petitioner was then readmitted March 1, 2020 for an open reduction internal fixation of the right knee with anterior cruciate ligament repair.

The petitioner had a chronic significant antalgic gait ever since the accident happened which is well documented in all the records. He was also developing increasing low back pain with radiation down both legs, more right sided than left. He had had an initial assessment by a neurosurgeon immediately prior to his right knee surgery. It was felt that any treatment to the low back would be deferred subject to the petitioner's post-surgical recovery from the right knee repair. Ultimately the petitioner was released to resume "light duty" employment on November 1, 2020. He had persistent cervical spine pain but it was considered less significant than his low back presentation.

This was the longest the petitioner had ever been out of work for any medical condition. Because of his seniority he was still on the floor but he was avoiding most of the severe exertional duties because he was simply incapable of performing the same due to the severity of the surgical residuals involving his right upper extremity and shoulder together with his right leg and increasing chronic pain in the low back with radiation into both legs and increasing pain in his right groin. This had been noted in the records of the orthopedic surgeon who repaired his right knee and in the physical therapy records. It seemed like as he got more into rehabilitative exercises as part of the formal physical therapy, the more the petitioner was experiencing back pain; radiating pain down the leg and increasing pain in his right groin. He had been checked for a hernia which was negative.

The petitioner continued to work for approximately six months. The winter months were very hard on his body. It was decided by the petitioner's neurosurgeon that he needed to undergo instrumented fusion at the L5-S1 level for significant herniation which surgery was performed on April 1, 2021. The petitioner was then out of work from April 1, 2021 through August 1, 2021 at which time he was deemed MMI. By that time he had a permanent light duty restriction of lifting no more than 20 pounds, standing no more than one hour without an opportunity to sit. At that point in time the petitioner was entitled to a private plan disability pension or a maximum rate service pension. He wanted to work until March 1, 2022 at which time he would have worked exactly 30 years with the company.

A special position was created for the petitioner where a golf cart was provided for him to get around the large floor for the purpose of doing inventory ticketing which was done by a hand- held electronic scanner.

While this was a much easier position than previous "light duty" that he performed between November 1, 2020 and April 1, 2021, it was also causing increasing pain in the petitioner's right lower extremity with a significant continued altered gait associated with the right knee injury/repair and the persistent overall [though reduced] low back radiculopathy. However his right groin pain was increasing. He felt enhanced pain every time he stepped in and out of the golf cart and every time he ascended or descended stairs. The petitioner calculated that he was getting onto and off of the cart an average of 40 times per day while at work. By January 2, 2022 he decided that he would go back to his knee surgeon. The surgeon advised him his knee functionality would "take time" but it was "good"

that he was exercising. He was cautioned not to "overdo it". He asked if he ever had his hip checked anytime since this accident happened in view of the significant fall being right-sided and the general problem areas inclusive of his right shoulder; right lower back and right knee. Based on the clinical examination he felt that there was a more significant internal issue with the hip than there was a radicular component coming from the back. He prescribed an x-ray [unauthorized] and it was determined that the petitioner had significant osteoarthritic disease in the right hip which was not present in the left hip by comparative studies. This was his first ever hip X-ray. A referral was made by the knee surgeon to Dr. Timothy Albert, a highly qualified and well-respected hip surgeon. The petitioner was seen within a few weeks and provided Dr. Albert an accurate history basically recounting the manner of the trauma itself with the significant exertional activities that he was performing after the trauma, prioritizing of the right shoulder and right knee and thereafter the significance of the substantial gait alteration of the right leg with an ever increasing right groin pain presentation immediately following the accident but slowly but surely increasing in severity over time.

Dr. Albert explained to the petitioner that the x-rays demonstrated severe osteoarthritis with loss of the articular space, osteophyte formation and sclerosis. The petitioner only had a 30 degree external rotation and 0 degree internal rotation. By the time he was seeing Dr. Albert he had a significant gait disturbance with a severe limp which was getting worse.

Dr. Albert talked about potential cortisone injections which only would be a "band aid". The petitioner explained that his overall situation was becoming intolerable. His stiffness was increasing in the joint itself. He had limited range of motion. He was having increase in pain with limited walking and stair climbing.

It was Dr. Albert's opinion that hip replacement surgery would be elective in the sense that it could definitely be done, but it was petitioner's option on when or if it should be done. Ultimately the petitioner underwent a right hip replacement utilizing private insurance on March 2, 2022. His last day of employment was March 1, 2022. He never resumed employment. Following the hip replacement surgery the severity of his groin pain was reduced, but he continued to have fairly significant pain in the hip joint itself with no meaningful correction of his altered gait which he felt was actually a consequence of his low back; right hip and right knee.

He opted to take his service pension. Materially it didn't make a difference. It was more a matter of pride.

Following the petitioner's right hip arthroplasty his severe groin pain became less severe. However his overall hip dysfunction with continued gait issues and limited ability to stand and place any significant exertion on his right lower extremity resulted in his being incapable of performing even the more reduced "sheltered" duties that were being offered to him.

His personal life was completely sedentary. He continued only to take over the counter medications (for his alleged compensable conditions) but all of his prior physical activities had fully ended such as fishing; playing pickleball, and walking any distance more than a few blocks. He sold his boat. He discontinued his chiropractic management. It was too painful. He stopped driving an automobile because he didn't feel confident enough with movements of his right leg on the accelerator and brake pedals. He had received Social Security disability within six months following his last date of employment. For purpose of this hypothetical it may be assumed that overall this petitioner is incapable of any sustained gainful employment when all of his medical conditions are considered. The focus is the relative liability between the parties especially with respect to the "denied" right hip component (and the options and issues it presents). All of the petitioner's preexisting internal medical conditions have persisted. His morbid obesity increased 30 lbs. from the date of his accident to now (285 to 315 pounds). He felt he had no choice other then taking an "involuntary" service retirement pension.

This hypothetical plus attachments will provide the total basis for a Mock Second Injury Fund conference. See attached "Pleadings/Roles/Miscellaneous Conditions."

PLEADINGS

CP 2022-6000; D/A 02/01/2020 – Employers National Insurance (coverage 03/01/2019 – 02/28/2020) – J. Smith-Attorney – right shoulder; right arm; right leg, low back and right hip

CP 2022-6001; OE 01/01/2018 – 03/01/2022 – right shoulder; right arm; right leg; low back and right hip

Carriers for Respondent with Coverage Dates

- Comp Control Insurance 03/2017 – 02/28/2019 – R. Jones - Attorney
- Employers National Insurance 03/01/2019 – 02/28/2020 – J. Smith - Attorney
- Premium Plus Insurance 03/01/2020 – 03/01/2022 – T. Austin

ROLES

- N. Rivers – Judge
- C. Riggs – Fund DAG
- T. Hart – Petitioner attorney
- J. Smith – Respondent attorney 02/01/2020 accident and OD coverage 03/01/2019 – 02/28/2020
- R. Jones – Respondent attorney OE only 03/01/2017 – 02/28/2019
- T. Austin – Respondent attorney OE only 03/01/2020 – 03/01/2022

MISCELLANEOUS CONSIDERATIONS

- Medical on petitioner's "non-compensable" hip was fully paid by the petitioner's wife's private insurance $125,000.00. No "formal" lien has been asserted.
- All evaluating physicians find significant orthopedic and/or neurologic clinical findings in their respective reports regarding the petitioner's right shoulder; right leg; low back and right hip.
- Petitioner's permanency report [Dr. T. Clark of 07/01/2023] concludes petitioner is 100% permanently and totally disabled when all "compensable and preexisting disabilities are considered". He finds ratings of 60% permanent partial total of the right shoulder/right arm; 66 2/3% of the right leg regarding the petitioner's knee repair; 66 2/3% permanent partial total for instrumented fusion [overall "greater"]; 66 2/3% permanent partial total right hip replacement with labral tear "related to the compensable accident, occupational exposure and altered gait associated with the petitioner's right knee repair".
- The Respondent's permanency report regarding the compensable accident [Dr. A. Dean of 06/30/2023] concludes 15% permanent partial total regarding the petitioner's right shoulder/right arm; 20% right leg; 20% low back; 15% right hip "regardless of cause". The doctor "questions" "compensable causality" based upon the "absence of the timely diagnosis of internal derangement of the right hip".
- The Respondent's permanency report regarding occupational [Dr. M. Hall of 05/20/2023] concludes no estimate of disability offered regarding occupational exposure based on the physician's "net" opinion that the petitioner's "occupational exposure subsequent to the compensable accident of March 1, 2020 was insufficient to be a material contributing factor to either causation, aggravation, acceleration and/or exacerbation of the right hip". The doctor does not offer the relevant etiologic considerations.
- Treating right hip surgeon [Dr. B. Wells of 08/01/2022] concludes that the petitioner's need for right hip surgery has "three primary etiologic considerations; his significant osteoarthritis had progressively worsened; the right hip trauma associated with the compensable accident; and the petitioner's altered gait associated with the petitioner's compensable right knee injury and secondarily referable to the radiculopathy associated with his lumbosacral fusion surgery." He did not address the significance of the occupational exposure per se.