No. 15-1041

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERES MARINE TERMINALS, INC.,
Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
SAMUEL P. JACKSON,
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
GARY K. STEARMAN
Counsel for Appellate Litigation
MARK A. REINHALTER
Counsel for Longshore
SARAH M. HURLEY
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of Workers' Compensation Programs

TABLE OF CONTENTS

Page:

Page:

TABLE OF AUTHORITIES

CASES: **Page**:

CASES: **Page**:

CASES: **Page**:

CASES: **Page**:

CASES: **Page**:

STATUTES

Page:

REGULATIONS

Page:

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1041

CERES MARINE TERMINALS, INC.,
Petitioner
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
and
SAMUEL P. JACKSON,
Respondents

On Petition for Review of a Final Order of the Benefits Review Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case arises from a claim filed by Samuel P. Jackson (Jackson or Claimant) for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or Act). The Administrative Law Judge (ALJ) had jurisdiction to hear the claim under 33 U.S.C. § 919(c), (d). On November 13, 2013, ALJ Kenneth A. Krantz issued a Decision and Order granting Jackson's claim for compensation. Joint Appendix ("JA") 22.

Ceres Marine Terminals, Inc. (employer) filed a Notice of Appeal with the Benefits Review Board (Board) on December 2, 2013, within the thirty-day period provided by 33 U.S.C. § 921(a). *See* JA 3.[1] That appeal invoked the Board's review jurisdiction pursuant to 33 U.S.C. § 921(b)(3). The Board issued a final Decision and Order affirming the ALJ's decision on November 25, 2014. JA 6.

Employer, aggrieved by the Board's decision, filed a petition for review with this Court on January 9, 2015, within the sixty days allowed by 33 U.S.C. § 921(c). Court of appeals jurisdiction lies in the circuit in which the injury occurred. 33 U.S.C. § 921(c). Jackson's injury occurred in Virginia, within this Court's territorial jurisdiction. Accordingly, this Court has jurisdiction over this petition for review.

---

[1] For purposes of this jurisdictional summary, we refer to the Index of Documents prepared by the Board (JA 1-5) for document dates that do not otherwise appear in the Joint Appendix.

STATEMENT OF THE ISSUES

1. With limited exceptions not relevant here, the Longshore Act compensates covered maritime employees for all work-related injuries that result in disability. Without any statutory support and contrary to longstanding Longshore Act precedent, employer seeks to engraft upon the statutory scheme a zone of danger test, which would allow compensation for psychological injuries only when the injured worker is physically injured or threatened with the risk of bodily injury.

The first question presented is: will the Court depart from the statute and case law and adopt the zone of danger test?

2. Under section 7(e) of the Act, 33 U.S.C. § 907(e), a claimant may be required to undergo an independent medical examination. Neither Section 7(e) nor its legislative history delineates the weight to be accorded the opinion of the doctor conducting this examination.

The second question presented is: must the opinion of the doctor performing the independent medical examination be accorded dispositive or greater weight than the other medical

opinions of record, regardless of the underlying merit of the doctor's examination or opinion [2]

STATEMENT OF THE CASE

I. Statutory Background

The Longshore Act establishes "a comprehensive scheme" to provide certain and prompt, but limited, recovery to maritime employees who are injured on the job. *Roberts v. Sea-Land Serv., Inc.*, 132 S.Ct. 1350, 1354 (2012). As with most workers' compensation schemes, the Act represents a compromise between the interest of injured workers, who receive an immediate recovery without respect to fault,[3] and the interests of employers and insurers, who in turn receive "definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Electric Power Co. v. Director, OWCP*,

---

[2] Employer raises additional challenges to the ALJ's weighing of the conflicting medical evidence which are not addressed in this brief.

[3] The Act does not provide compensation for injuries caused solely by the employee's intoxication or "willful intention … to injure or kill himself or another." 33 U.S.C. § 903(c).

449 U.S. 268, 281 (1980). Examples of the Act's limits on employer liability include compensating injured employees at only two-thirds of the actual loss of their earnings, *id.* at 281-282, and placing a statutory cap on all compensation, 33 U.S.C. § 906(c), such that high wage earners' compensation is much less than their actual wages. *E.g.*, *Mulcare v. E.C. Ernst, Inc.*, 18 Ben. Rev. Bd. Serv. (MB) 158 (1986) (claimant's average weekly wage $1,097; weekly compensation $396).

An injured worker's claim against his employer for disability under the Act is governed by sections 4 and 5(a). 33 U.S.C. §§ 904, 905(a). These sections codify the compromise between employees and employers at the heart of workers' compensation: the certainty of benefits in exchange for tort immunity. S*ee WMATA v. Johnson*, 467 U.S. 925, 932 (1984). Claims by an injured worker against his employer are administratively processed, decided and initially appealed within the Labor Department, and then subject to court of appeals review under the Administrative Procedure Act. 33 U.S.C. §§ 919, 921.

In addition to granting a right to statutory compensation against an employer, the Act preserves an injured worker's right to seek damages in a negligence action against third parties, including the owner of a vessel on which he was injured. 33 U.S.C. §§ 905(b), 933; *see Howlett v. Barksdale Shipping Co., S.A.*, 512 U.S. 92, 96-97 (1994); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262-264 (1979). Because Congress did not specify the acts or omissions of the vessel owner that would constitute negligence, the contours of a vessel owner's duty to longshoremen are "left to be resolved through the 'application of accepted principles of tort law and the ordinary process of litigation.'" *Scindia Steam Navigation Co., Ltd., v. De Los Santos*, 451 U.S. 156, 165-166 (1981) citing S. REP. NO. 92-1125, p.11 (1972). Unlike claims for statutory compensation, which the Labor Department administers, third-party negligence actions under section 5(b) are brought in district court against the vessel's owner. 33 U.S.C. § 905(b).

To be entitled to compensation, a claimant must show that he has suffered a disabling occupational injury. 33 U.S.C. § 903(a);

Bath Iron Works Corp. v. White, 584 F.2d 569, 574 (1st Cir. 1978). The term "'injury' means accidental injury … arising out of and in the course of employment … ." 33 U.S.C. § 902(2). The injury must produce a "disability," which is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902(10).

The accidental injury need not be physical – the Act simply does not distinguish a psychological injury from a physiological one. *Urban Land Institute v. Garrell*, 346 F.Supp. 699, 701 (D.D.C. 1972). Thus, a psychological impairment, with or without an underlying physical harm, may be a compensable injury under the Act. *See Pedroza v. Benefits Review Board,* 624 F.3d 926, 931 (9th Cir. 2010); *Tampa Ship Repair & Dry Dock v. Director, OWCP*, 535 F.2d 936, 938 (5th Cir. 1976); *Urban Land Institute*, 346 F.Supp. at 701; s*ee, e.g., Director, OWCP v. Potomac Elec. Power Co. [Brannon]*, 607 F.2d 1378 (D.C. Cir. 1979); *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964).

II. Facts

A. The Fatal Accident

On March 28, 2011, Jackson, an employee of Ceres Marine Terminals, was operating a forklift on a pier in Portsmouth, Virginia, when he accidently struck and killed a co-worker, Paula Bellamy. JA 341, 489. At the time, Jackson was transporting barrels of container pins when he veered to the left to avoid being struck by a hustler truck that was backing up and carrying a 40 foot container.[4] JA 256, 342-344. When he veered, he hit Ms. Bellamy, who had her back towards him. JA 61. Jackson did not see Ms. Bellamy or know that he had hit her until another spotter

---

[4] "Hustlers" or "hustler trucks" carry shipping containers from the ship to a designated area in the terminal, where they are stored for further use or shipment. The trucks "are exactly like the tractor truck rigs used for overland transportation, except for the fact that they are not road worthy, *i.e.*, they do not comply with the Department of Transportation standards for vehicles operating on public highways." *Atl. Container Serv. v. Coleman*, 904 F.2d 611, 613 (11th Cir. 1990).

The "pins" are "twistlocks . . . that go in the corners of each of the containers so they can stack one on top of the other and hold them together." JA 256.

"hollered at me to let me know that I just ran over somebody." JA 61. He immediately got off his forklift to help extricate his co-worker who was pinned underneath his forklift with "[a] portion of her body . . . poking out." JA 62, 63. Another forklift driver drove over and, with his machine, raised the back end of Jackson's forklift. Jackson and others worked to free Ms. Bellamy from under his forklift. JA 63, 337. Her leg was wrapped around the axle of the forklift, and she was bleeding from her mouth. "Her arm was burned and pretty mangled, hanging off." JA 63. She was not moving at all. JA 65.

For about ten minutes, she lay there in full view, until emergency vehicles arrived. JA 64. Approximately one hundred people, including ambulance and fire truck personnel and Ceres Marine Terminals workers had gathered at the scene. JA 65. Jackson stood ten to fifteen feet away, with a clear view of his dying co-worker while she was removed and put in an ambulance. *Id.* Jackson spent the rest of the day reporting the accident to the Portsmouth Police Department, Virginia International Terminals

Police, the Occupational Safety and Health Administration, and Ceres Marine Terminals officials. JA 66-67.

B. The Medical Evidence

Jackson was evaluated by six physicians. Five physicians, including employer's, diagnosed Post-Traumatic Stress Disorder (PTSD) or a form of it and depression; one doctor, Dr. Mansheim, believed Jackson was a malingerer.

Dr. Stiles

Dr. Stiles, Jackson's family physician, saw him the day after the accident, and recorded that Jackson had been "acutely extremely upset, [but] is calmer now, is off of work and told to take his time coming back and get counseling before returning." JA 360. On May 25, 2011, the doctor reported that Jackson had "not returned to work yet, but feels he is ready to try." JA 357. On June 29, 2011, the doctor recorded that Jackson had become significantly worse and had become withdrawn, agitated and experienced frequent flashbacks to the scene of the accident, so that "[a]t this point he is having significant impairment and certainly not able to return to work at all." JA 354. Dr. Stiles

diagnosed PTSD and treated him for this condition through November, 2011. JA 346, 351, 353.

Dr. Griffin

Dr. Stiles referred Jackson to Dr. Gregory Griffin, a licensed clinical social worker, for counseling on April 6, 2011. *See* JA 449, 491. Jackson saw Dr. Griffin three times. JA 286. He recommended brief supportive crisis counseling and that Jackson not return to work for four to six weeks. He diagnosed Adjustment Reaction with Depressed Mood. JA 449. Jackson did not find Dr. Griffin helpful. JA 286.

Dr. Newfield

Dr. Newfield, a psychologist, began treating Jackson on July 11, 2011. JA 488E. Over the course of his treatment (2011-2013), Dr. Newfield usually saw Jackson on a weekly basis, JA 287, 449, 450, 456, although sometimes he saw him as often as twice a week, which was the case at the time of hearing. JA 70, 412. The doctor diagnosed PTSD, anxiety and depression. JA 456, 488A, 488B, 488D. On February 20, 2012, Dr. Newfield wrote that the goal was to bring Jackson's PTSD symptoms under control, but Jackson was

still experiencing extremely bad nightmares and levels of guilt, shame, and grief that prevented him from returning to work. JA 457. Dr. Newfield monitored Jackson for suicide as well. *Id.* A year later, on March 11, 2013, Dr. Newfield reported that Jackson's depression was getting more severe, that he was basically shutting out the world, and was very fearful of interacting with people. JA 401. On April 1, 2013, Dr. Newfield wrote that Jackson "was trying to resolve some of his issues in terms of relationships, the stress of the case that is coming up, his meetings with his attorney, and the overall continual impact of the death of another person that threatens to demolish him." JA 393. During April and May, 2013, Dr. Newfield recorded that Jackson's PTSD and depression continued to worsen. JA 379, 385.

Dr. Giorgi-Guarnieri

Dr. Giorgi-Guarnieri, a psychiatrist, began treating Jackson on November 14, 2011. JA 487. Dr. Giorgi-Guarnieri's treatment notes indicate that he saw Jackson every two to four weeks. JA 459, 461, 464. At the time of the hearing, Jackson was seeing Dr. Giorgi-Guarnieri every 14 days. JA 70. The doctor recorded that

Jackson had been battling depression and anxiety for the past seven months and suffered from flashbacks and nightmares. *Id.* On April 11, 2012, the doctor noted that Jackson was suffering from sleep disturbances, anger issues, and panic attacks. JA 480. A year later, on March 13, 2013, the doctor noted that Jackson's anxiety and depression was much worse. JA 459. The doctor continued to see Jackson for medication management. JA 152.

Dr. Thrasher

Dr. Thrasher, a psychiatrist retained by the employer, evaluated Jackson on September 14, 2011, and reviewed Jackson's medical records. JA 489. He noted that Jackson suffered from depressed mood, insomnia, poor concentration, forgetfulness, fatigue, nightmares and flashbacks of the accident, as well as "intense feelings of shame and guilt over the accident." JA 492, 493. He diagnosed PTSD and major depression, both of which he related to the March 28, 2011 accident. *Id.* The doctor stated that the severity of Jackson's depression and PTSD rendered him incapable of returning to the waterfront. *Id.* He advised that Jackson needed psychiatric consultation in addition to ongoing

psychotherapy with Dr. Newfield to help him overcome his PTSD. JA 494. The doctor stated that with aggressive psychiatric treatment and psychotherapy, Jackson might be able to return to work on the waterfront within six to twelve months. *Id.*

After reviewing updated medical records from Drs. Newfield and Giorgi-Guarnieri, Dr. Thrasher submitted a supplemental medical report on February 12, 2012, in which he stated that the anxiety associated with Jackson's PTSD could be sufficient "to account for his racing thoughts and labile mood."[5] EX 16. He recommended more aggressive targeting of Jackson's depressive symptoms and sleep disturbance.[6]

---

[5] In psychiatry, lability (the quality of being "labile") is defined as "emotional instability, rapidly changing emotions." *Dorland's Illustrated Medical Dictionary* 994 (32nd ed. 2012).

[6] Dr. Thrasher believed Jackson was under-medicated, and recommended a course of more aggressive psychotropic treatment. JA 494. As a result, employer requested an independent medical examination to determine if Jackson was receiving proper medical care, thus leading to Dr. Mansheim's examination.

Dr. Mansheim

Dr. Mansheim evaluated Jackson on November 15, 2012, and reviewed Jackson's medical records, as well as the results of a standardized "Personality Assessment Inventory" test. In his December 8, 2012 report, Dr. Mansheim reported that the diagnoses suggested by the computer-generated personality test results were extremely broad and suggested PTSD; Schizophrenia, Undifferentiated Type; and Major Depressive Disorder, Single Episode, Unspecified. JA 154. Jackson's responses to several test questions also suggested denial of drinking or drug use, a tendency to endorse items which presented an unfavorable impression or which represented extremely bizarre and unlikely symptoms, and a "malingering index [which] was in the clinical range." JA 154.

The doctor "rule[d] out the [PTSD] diagnosis because claimant "did not experience a threat to himself" and "was never in any danger" during the accident. *Id.* He also noted that Jackson demonstrated "significant evidence of malingering, attempting to appear more ill than actually the case …." JA 155. He further opined that "there is no objective evidence that Mr. Jackson is

unable, as a result of a psychiatric disorder, to engage in any every day or work-related activity in which he chooses to engage" and that there was "no psychiatric contraindication to vocational training and to employment …." *Id.* The doctor added that Jackson's need for medical care could be addressed by his primary care physician and there was no need for continued specialized psychiatric treatment. *Id.*

Dr. Mansheim was deposed on May 13, 2013. JA 170. The doctor stated that he was puzzled by the computer-generated test results because "[a] person that has undifferentiated schizophrenia wouldn't look anything like somebody with post-traumatic stress disorder." JA 193. He then gave four reasons why Jackson was not suffering from PTSD: (1) Jackson did not himself experience the possibility of death or serious injury; (2) Ms. Bellamy was merely a co-worker; (3) Jackson became aware of the accident only after he struck her; and (4) the DSM-IV TR requires consideration of the possibility malingering when "benefits or compensation" are at

stake, and the personality assessment showed malingering.[7] JA 195-196. In addition, the doctor explained why the sight of Ms. Bellamy's crushed body under Jackson's forklift was not traumatic enough to cause PTSD:

> I don't think it meets the criteria because it was a question of being upset by a scene which could only be described as disgusting. No one wants to see mangled bodies, but if everybody that presented with that sort of image were diagnosed with post-traumatic stress disorder, more than half the population would meet the criteria for the diagnosis.

JA 196.

Dr. Newfield's Supplemental Opinions

Dr. Newfield was shocked and greatly disturbed by the conclusions in Dr. Mansheim's December 8, 2012 report. JA 419. He pointed out that the Personality Assessment Inventory was a standardized, self-administered computer-scored test given without any assistance by a clinician. In any event, he explained that "the

---

[7] Dr. Mansheim explained that the DSM-IV TR is "the text revision of the Fourth Edition of the Diagnostic and Statistical Manual of the American Psychiatric Association which is the present program of diagnostic assessment that we use." JA 196. He agreed with (cont'd . . .)

test clearly agrees with the general consensus of most of the clinicians who were actually seeing [Jackson] that he suffers from PTSD and Major Depressive Disorder." JA 421. Dr. Newfield stated that there was no evidence that Jackson was engaging in drinking or illicit drug use, and he characterized Dr. Mansheim's suggestion that Jackson was malingering as "outrageous." JA 421, 422. Dr. Newfield reiterated that Jackson suffers from a very serious disorder after experiencing an intense trauma, "having been responsible for the death of another human being and he is suffering for this." JA 423. The doctor stressed that Jackson's symptomatology was consistent with PTSD and "every knowledgeable clinician has recognized and certified that." *Id.*

Dr. Newfield also responded to Dr. Mansheim's deposition testimony. JA 361. He disagreed with Dr. Mansheim that PTSD occurs only when the individual himself experiences death or serious injury. Dr. Newfield pointed out that the DSM-IV or V

(. . . cont'd)
counsel that the DSM is "sort of the Bible for psychiatrists making diagnostic judgments." *Id.*

"clearly states that a person need only be exposed to a traumatic event in which both the following must be present: 'That a person experienced, witnessed or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others', and that 'the person's experience involve[s] fear, helplessness or horror.'" JA 366. Thus, contrary to Dr. Mansheim's opinion, "the injury or experience does not have to be directed at the individual themselves, but can involve the experience of witnessing this happening to someone else." JA 367. In Dr. Newfield's opinion, "Dr. Mansheim is using a diagnostic criteria that is not part of the DSM-IV or V." *Id.*

Dr. Newfield also disagreed with Dr. Mansheim that PTSD can be ruled out because the accident did not involve someone close to Jackson. Dr. Newfield explained that the DSM-IV or V does not specify "closeness of the individual as a diagnostic rule-in or rule out," and "to say that just because this person was not related or a friend of Mr. Jackson's that therefore this cannot be PTSD is just

clinically wrong and does not follow the guidelines of the Diagnostic and Statistical Manual." JA 367.

Similarly, Dr. Newfield disagreed with Dr. Mansheim regarding the significance of the few second delay between the time of the accident and Jackson's awareness of it, stating "[a]s far as I can tell, from my understanding of the criteria, [the time difference] is not a rule-out in the DSM-IV or V." *Id.*

Finally, Dr. Newfield strongly disagreed with Dr. Mansheim's conclusion that the results of Jackson's Personality Assessment Inventory showed malingering. On the contrary, Dr. Newfield stated that the inventory merely flagged three answers that were in the malingering category, but these did not rise to the level of a possible diagnosis. JA 368.

In Dr. Newfield's view, Dr. Mansheim's statement that the sight of Ms. Bellamy's crushed, mangled body could not induce PTSD because then "more than half the population would meet the criteria of the diagnosis" vastly overstated the amount of people who have seen mangled bodies in real life, as opposed to on television or

in the movies. JA 369. Further, although Dr. Mansheim termed the accident scene as "disgusting," Dr. Newfield pointed out that

> [I]it is not up to the clinician to make the diagnostic decision about whether an event is "disgusting" enough to qualify for PTSD. Rather, this depends on the reaction of the individual to the event and how traumatizing the potential is based in how the person experiences it. This varies widely.

JA 369.

III. Decisions Below

A. The ALJ's Decision Awarding Benefits

In his November 13, 2013 decision, the ALJ rejected employer's "contention that a claimant cannot recover for psychological injury unless he sustains a physical injury or is placed in immediate risk of harm," *i.e.* the employee falls within the zone of danger. JA 44. The ALJ ruled that "[l]ongshore case law has established that a claimant can obtain benefits for a work-related psychological injury," and he declined "to carve out a negligence law based exception whereby claimants are not entitled to benefits if they are emotionally harmed without being physically harmed or threatened with physical harm." *Id.*

Addressing the medical evidence, the ALJ first refused, as contrary to Board precedent, to accord dispositive weight to the independent medical examiner's (Dr. Mansheim's) opinion. JA 46-47. He then weighed Dr. Mansheim's opinion against the contrary opinions of Dr. Newfield and Dr. Thrasher. The ALJ discredited Dr. Mansheim's opinion because the doctor merely "relied on a one hour interview, a standardized test …, and various medical records, whereas Dr. Newfield had observed Jackson's psychological status once or twice a week." *Id.* The ALJ also gave Dr. Mansheim's opinion less weight due to the doctor's unsubstantiated statement that "half the population has witnessed an image as traumatizing as a patient's first hand observation of a mangled body produced in an accident caused by that patient." JA 49. In the ALJ's view, "Dr. Mansheim's estimates on population experience raise concerns that his report is not well-reasoned and well-documented." *Id.* The ALJ also faulted Dr. Mansheim for his reliance on the computer–generated responses from the standardized Personality Assessment Inventory test because the doctor admitted that the test "hasn't really been interpreted" (JA 205) and the reliability of the test itself

had not been demonstrated. JA 50. The ALJ gave greater weight to Dr. Newfield's opinion because Dr. Newfield "had the benefit of observing claimant's condition over an extended period of time," and his "well-reasoned and well-documented letters and records indicate a more comprehensive understanding of claimant's psychological condition." JA 49. The ALJ also noted that Dr. Newfield's opinion was supported by Dr. Thrasher's opinion. The ALJ thus concluded "that Claimant is suffering from work-accident related PTSD." *Id.*

The ALJ also weighed the conflicting medical opinions regarding Jackson's ability to return to work. He credited Dr. Newfield and Dr. Thrasher's opinions that Jackson could not. JA 51. Again, the ALJ credited the treating professionals' opinions because Dr. Mansheim "spent only one hour with Claimant, relied heavily on a standardized test, and provided an opinion that was not well-documented." *Id.* Last, as the employer did not provide any evidence of suitable alternative employment, the ALJ ruled that Jackson was entitled to temporary total disability benefits. *Id.*

B. The Board's Affirmance

In its November 25, 2014 opinion, the Board rejected employer's invitation to adopt the zone of danger test. It ruled that the zone of danger test is a tort concept that has no place in the workers' compensation provisions of the Longshore Act. The Board further relied on "well-established [precedent] that work-related psychological impairment with or without underlying physical harm, may be compensable under the Act." JA 9-10 (citing *Pedroza v. Benefits Review Board*, 624 F.3d 926 (9th Cir. 2010); *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964)). And it found inapt case law applying the zone of danger test in other contexts, noting "the critical distinction between tort actions, which rely on fault and negligence principles, and workers' compensation claims, which are not governed by those principles." JA 10.

The Board then rejected employer's argument that the record evidence did not support a finding that Jackson suffers from PTSD as a result of the work accident. Like the ALJ, the Board rejected employer's contention that the independent medical examination opinion must be accorded dispositive, or special, weight, because it

was contrary to Board precedent. JA 12 (citing *Shell v. Teledyne Movible Offshore, Inc.*, 14 Ben. Rev. Bd. Serv. 585 (1984); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 Ben. Rev. Bd. Serv. 380 (1990)). It additionally observed that according the independent medical examiner greater weight would violate this Court's instruction that ALJs examine the logic of a physician's conclusions and the evidence upon which those conclusions are based, and evaluate the physician's opinion in light of the other evidence in the record. JA 13 (citing *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140 & n.5 (4th Cir. 1998), *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 441-42 & n.4 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 433 (4th Cir. 2003)).

Finally, the Board found no fault with the ALJ giving less weight to Dr. Mansheim's opinion based on the limited nature of the doctor's contact with Jackson, the doctor's reliance on an unsupported premise that half the population has seen mangled bodies, and the doctor's reliance on the computer-generated results

of a standardized test that had not been interpreted by a clinician. JA 14-15. The Board held that the ALJ reasonably accorded more weight to Dr. Newfield's opinion because it was supported by Dr. Thrasher's opinion and Jackson's consistent testimony. Therefore, the Board affirmed the ALJ's finding that Jackson sustained a compensable work-related injury. JA 15.

C. The Virginia Court of Appeals' Decision

In addition to filing a claim under the Longshore Act, Jackson filed a claim for Virginia state worker's compensation benefits for PTSD as a result of the accident. On March 17, 2015, the Court of Appeals of Virginia declined to adopt the zone of danger test under Virginia law. It held that "psychological injury must be causally related to either a physical injury or an obvious sudden shock or fright arising in the course of employment, without a specific requirement that claimant be placed at risk of harm." *Jackson v. Ceres Marine Terminals, Inc.*, 769 S.E.2d 276, 280 (Va. Ct. App. 2015). The court stressed that "[a]lthough a risk of harm to a claimant may be a factor in cases where the compensability of psychological injuries is evaluated, our Court has never held that

this factor is a requirement, and we decline to do so now." *Id.* The court thus reversed the decision by the Virginia Workers' Compensation Commission denying Jackson's claim and remanded the case for reconsideration under the correct legal standard.[8] *Id.* at 281.

SUMMARY OF THE ARGUMENT

It is well-established that psychological injuries, with or without actual or threatened underlying physical harm, are compensable under the Longshore Act. This Court must reject employer's attempt to graft on Congress' statutory scheme the common law and negligence-based requirement of actual or threatened underlying physical harm, the so-called "zone of danger" test. Employer's reliance on *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), which adopted the zone of danger test under

---

[8] Jackson's state worker's compensation claim is currently pending before a Virginia workers' compensation deputy commissioner. The Longshore Act does not permit a double recovery; any amounts employer pays on Jackson's state worker's compensation claim can be credited towards its Longshore Act liability. 33 U.S.C. 903(e). Typically, Longshore Act compensation is more generous than (cont'd . . .)

the Federal Employers' Liability Act (FELA), is unavailing because a FELA action is based on the common-law concepts of negligence and damages, unlike the Longshore Act which is a workers' compensation statute. In addition, the common law policy reasons for adopting the zone of danger test simply do not apply in the Longshore context. Finally, the few Longshore and maritime cases that apply the zone of danger test do so because they involve negligence and tort actions as well.

The Court should also reject employer's argument that an independent medical examiner's opinion must be afforded dispositive, or special, weight, regardless of its underlying merit. Neither the Act's statutory text, nor its legislative history, compels such a result. Rather, the independent medical examiner's opinion must face the same scrutiny given all other medical opinions: an examination of the logic of the physician's conclusions and an evaluation of the evidence upon which those conclusions are based

---

(. . . cont'd)
under state systems, so there would be only a partial offset or credit.

in light of the other evidence of record. *Carmines*, 138 F.3d at 140 and n.5.

STANDARD OF REVIEW

This Court reviews Board decisions for errors of law and to determine whether the Board adhered to the substantial evidence standard when reviewing ALJ fact findings. *Winn*, 326 F.3d at 430; *see Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Substantial evidence amounts to "more than a scintilla but less than a preponderance," and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Newport News Shipbuilding & Dry Dock v. Cherry*, 326 F.3d 449, 452 (4th Cir. 2003); *Winn*, 326 F.3d at 430; *Carmines*, 138 F.3d at 140.

This Court has emphasized the limited scope of appellate review of ALJ fact findings. *Ward*, 326 F.3d at 438; *Carmines*, 138 F.3d at 140; *Tann*, 841 F.2d at 543. "[T]he ALJ's findings 'may not be disregarded on the basis that other inferences might have been more reasonable.'" *Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 457 (4th Cir. 2003); *Tann*, 841 F.2d at

543. Rather, "deference must be given the fact-finder's inferences and credibility assessments." *Pounders*, 326 F.3d at 457; *Tann*, 841 F.2d at 543.

On issues of law, the Court exercises de novo review, subject to the deference accorded to the interpretations of the Director, Office of Workers' Compensation Programs, the administrator of the Longshore Act. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 294 (4th Cir. 2002).

ARGUMENT

I. The Longshore Act covers work-related psychological injuries even if there was no actual or threatened physical harm.

The overarching purpose of the Longshore Act is to compensate employees for diminished or lost wage-earning capacity attributable to work-related injuries. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 297 (1995). The Act does not distinguish between psychological and physical injuries, but broadly defines "injury," without limitation, as any "accidental injury or death arising out of and in the course of employment . . . .." 33 U.S.C. § 902(2). On its face, this language plainly covers

work-related psychological injuries. Employer, however, seeks to graft on the text an additional requirement -- that psychological injuries be accompanied by actual or threatened physical harm, namely, the zone of danger test.

Courts interpreting this provision, however, have never mandated actual or threatened physical harm to the claimant as a prerequisite for coverage of a work-related psychological injury. *American National Red Cross*, 327 F.2d 559; *Brannon*, 607 F.2d 1378; *ITT Industries v. S.K.*, 2011 WL 798464, at *13, No. 4:09-MC-348 (S.D. Tex. March 1, 2011) *affirming in pertinent part S.K. (Kamal) v. ITT Industries*, 43 Ben. Rev. Bd. Serv. 78, 79 n.1 (2009). Nor has the Board endorsed this limitation. Rather, it has held that psychological disabilities caused solely by stressful working conditions may be compensable. All that is required is that the psychological harm be caused by working conditions that the claimant finds stressful. *S.K.*, 43 Ben. Rev. Bd. Serv. at 79 n.1; *Marino v. Navy Exchange*, 20 Ben. Rev. Bd. Serv. 166, 168 (1988); *Sewell v. Noncommissioned Officers' Open Mess*, 32 Ben. Rev. Bd. Serv. 127, 128 (1997) aff'd on recon., 32 Ben. Rev. Bd. Serv. 134

(1998). *Accord Pedroza*, 624 F.3d at 932 (approving in *dicta* Board's *Marino* and *Sewell* doctrine providing compensation for psychological injuries due to stressful working conditions).[9]

Interposing a zone of danger test would also tamper with the Longshore Act's "comprehensive scheme," *Roberts v. Sea-Land Serv.,* 132 S.Ct. 1350, 1354 (2012), and impermissibly narrow the remedies created by Congress. In *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248 (4th Cir. 1982), this Court declined a similar attempt at circumscribing compensation, refusing to allow a defense (fraudulent misrepresentation) not found in section 903(c) of the Act. The *Hall* court stated in no uncertain terms that

> to engraft such an exception [for fraud] into the LHWCA would be to "amend a statute under the guise of 'statutory

---

[9] Employer asserts that *Pedroza*, *Marino*, and *Sewell* establish a "special rule for psychiatric injury." Pet. Br. at 38. But these cases denied compensation because the *cause* of the alleged injury -- a legitimate personnel decision -- simply was not actionable. As the Ninth Circuit explained: "Injuries resulting from legitimate personnel decisions are not caused by working conditions and they are not work-related." *Pedroza*, 624 F.3d at 931. Jackson's injury, of course, did not result from a personnel action, but rather, from a gruesome accident occurring in the course of his duties as a fork-lift operator while loading and unloading cargo vessels.

> interpretation,'" a task we are not at liberty to perform. [Citations omitted]. Given Congress' enunciation of specific limited exceptions to the general rule of compensation without regard to fault, it is well understood that we cannot supply additional exceptions. [Citations omitted].

674 F.2d at 251, quoting *Fedorenko v. United States*, 449 U.S. 490, 513, 514 n.35 (1981). Moreover, according to the Court, the mere existence of sound policy reasons favoring adoption of such a rule cannot justify rewriting the Act. 674 F.2d at 251-252. As the Supreme Court has admonished, if anomalies occur in the administration of the longshore program, it is for Congress, not the courts, to fix them. *Potomac Electric Power Co.*, 449 U.S. at 284. Finally, adding a new zone of danger test that would limit entitlement to compensation is inconsistent with the fundamental requirement that the Longshore Act be liberally construed. *Id.* at 281.

Workers' compensation for psychological injury precipitated by psychic trauma is also widely available nationwide. Twenty-nine jurisdictions allow it under their state workers' compensation statutes, while fifteen do not. 4 Larson's Workers' Compensation Law §§ 56.06[3],[4] (2014). Of the jurisdictions that allow it, some

require the injury to arise from a sudden stimulus; others require unusual stress; and still others require neither.[10] *Id.* at §§ 56.06[5],[6],[7]. Of the twenty-nine jurisdictions that compensate psychological injury, Larson has not identified any that requires the claimant to be within a zone of danger, and employer does not point to any in its brief.

Particularly significant, New York state workers' compensation law permits recovery for psychological injury precipitated by psychic trauma.[11] *Matter of Wolfe v. Sibley, Lindsay & Curr Co.*, 330 N.E.2d 603, 606-607 (N.Y. 1975) (observing that "there is nothing talismanic about physical impact" and that it is enough that the

---

[10] Larson includes Longshore Act claims among the group in which compensation is available regardless of whether the injury was caused by sudden stimulus or unusual stress. *Id.* at § 56.06[7].

[11] New York law is persuasive precedent in interpreting the Longshore Act because the Act was modeled on the New York workers' compensation statute. *See Potomac Electric Power Co.*, 449 U.S. at 275-76 n.13; *Barker v. U.S. Dep't of Labor*, 138 F.3d 431, 436 (1st Cir. 1998); *Claudio v. United States*, 907 F.Supp 581, 587 (E.D.N.Y. 1995). Like the Longshore Act, liability under the New York workers' compensation law is predicated on "accidental injur[y] arising out of and in the course of employment." New York Workers' Compensation Law § 2 (McKinney 2015).

claimant was an active participant in the tragedy and as a result suffered psychological disablement for which compensation is due);[12] *Wood v. Ladislaw Transit, Inc.*, 565 N.E.2d 1255, 1256 (N.Y. 1990) (by reason of her active participation in the events she witnessed, claimant suffered her own accidental injuries within the meaning of workers' compensation law); *Demperio v. Ononga County et al.*, __ N.Y.S.2d __, 126 A.D.3d 1250, 2015 WL 1334965 (N.Y. App. Div. 2015) (psychological injury caused by witnessing the aftermath of a suicide are compensable where the claimant was an active participant in the tragic events as opposed to a bystander).

Against this wealth of contrary precedent, employer asserts that Jackson's psychological impairment is not compensable

---

[12] *Wolfe* involved a claim for workers' compensation for the period during which the claimant, a secretary, was incapacitated by severe depression caused by the discovery of her immediate supervisor's body after he committed suicide. In the months leading up to the suicide, the claimant had noticed her supervisor's anxiety over his job performance and his deteriorating mental condition. He had confided in her about his fears and she had attempted to boost his morale and ease his burdens. On the day of the suicide, he told claimant over the intercom to call the police and then shot himself. Claimant was first to enter his office and discovered his body in a pool of blood. *See Wolfe*, 330 N.E.2d at 603-604.

because Jackson was never threatened with physical injury and was a "mere bystander." Pet. Br. at 35. Employer further blithely proclaims that "[w]itnessing someone else get hurt is simply not an injury."[13] *Id.* Employer is both factually and legally incorrect.

On the facts, Jackson was not a bystander; he was a prime actor in this tragedy. His forklift struck Ms. Bellamy, fatally injuring her; and he immediately assisted in trying to extricate her from under it. These facts alone support the compensability of his claim. *See Wolfe*, 330 N.E.2d at 607; *Pacatte v. Daughtery*, 537 N.E.2d 697(Ohio Ct. App. 1988) (bus driver's shock at seeing struck pedestrian under bus wheels direct and proximate cause of aggravation of pre-existing condition). Moreover, Jackson was in fact threatened with physical harm. Jackson hit Ms. Bellamy when he veered his forklift to avoid being hit by another truck. JA 342-

---

[13] The Veterans Administration would likely disagree with employer's assessment. See http://www.ptsd.va.gov/public/PTSD-overview/basics/what-is-ptsd.asp ("Posttraumatic Stress Disorder (PTSD) can occur after you have been through a traumatic event. A traumatic event is something terrible and scary that you see, hear about, or that happens to you.")

344. Thus, even under employer's proposed zone of danger test, Jackson is entitled to compensation.

Despite the lack of a factual predicate, employer attempts to make its case for the zone of danger test based on *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). *Consolidated Rail* addressed whether negligent infliction of emotional distress is actionable under FELA and, if so, under what circumstances. The Court allowed recovery for negligent infliction of emotional distress in cases where the claimant is in the zone of danger.[14] *Id.* at 544, 554.

In reaching this conclusion, however, the Court emphasized that FELA is not "a workers' compensation statute" that "'make[s]

---

[14] The Court reasoned that, when Congress enacted FELA in 1908, it intended to leave the common law intact except for explicit statutory exceptions. At that time, the right to recover for negligently inflicted emotional distress was well-established and the zone of danger test had been adopted by a significant number of jurisdictions and was recognized a progressive rule of liability. In view of FELA's broad remedial goals, the Court thus concluded that "it is reasonable to conclude that Congress intended the scope of the duty to avoid inflicting emotional distress under FELA to be coextensive with that established under the zone of danger test." *Id.* at 554-555.

the employer the insurer of the safety of his employees while they are on duty;'" instead, the Court explained "[t]he basis of [an employer's FELA] liability is his negligence, not the fact that injuries occur."[15] *Consolidated Rail*, 512 U.S. at 543; *see also Artis v. Norfolk & Western Ry Co.*, 204 F.3d 141, 145-146 (4th Cir. 2000). Because FELA was "'founded on common-law concepts of negligence and injury,'" and because FELA was "silent on the issue of negligent infliction of emotional distress," the Court accorded "great weight" to common law principles, which accordingly "play[ed] a significant role in [the Court's] decision." *Consolidated Rail*, 512 U.S. at 543 (internal quotations omitted); *id.* at 551

---

[15] The FELA provides in relevant part that "[e]very common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for injury or death in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. FELA places no limit on the amount of compensatory damages recoverable, *see Norfolk and Western Railway Co. v. Ayers*, 538 U.S. 135, 165-166 (2003); and the jury's determination of the amount of damages is otherwise inviolate, absent an award that is monstrously excessive or has no rational connection to the evidence. *Holmes v. Elgin, Joliet & Eastern Ry. Co.*, 18 F.3d 1393, 1395-96 (7th Cir. 1994). Punitive damages, however, are not allowed. *Waldman v. Burlington Northern Railroad Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987).

("common-law background of this right to recovery must play a vital role in giving content to the scope of an employer's duty under FELA"); *id.* at 557 ("Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and the common law restricts recovery. . . .").

Consolidated Rail thus drew a clear distinction between negligence suits based on the common law and workers' compensation claims. The zone of danger test, *Consolidated Rail* held, applies only to the former. By its terms, *Consolidated Rail* is thus inapplicable to Jackson's claim for workers' compensation benefits under the Longshore Act. *Cf. Pathfinder Company v. Industrial Commission*, 343 N.E.2d 913 (Ill. 1976) (whether employee with psychological injury from sudden workplace shock is entitled to state workers' compensation decided independently of common law tort holdings regarding negligent infliction of emotional distress).

Ignoring this critical distinction, employer then focuses on the policy grounds cited by *Consolidated Rail* for adopting the zone of danger test. In employer's view, permitting recovery under the

Longshore Act for psychological injuries where the employee is not injured or threatened with physical injury will lead to "a flood of trivial suits, the possibility of fraudulent claims that are difficult for juries or judges to detect, and the specter of unlimited and unpredictable liability." Pet. Br. at 35 quoting *Consolidated Rail*, 512 U.S. at 557. To avoid this apocalyptic scenario, employer urges adoption of the zone of danger test. Employer's fears are not well-founded.

First, the specter of unlimited and unpredictable liability does not loom over claims filed under the Longshore Act. Indeed, as discussed above at 4-5, *limited employer liability* is a hallmark of the program. As the Supreme Court has observed,

> [W]hile providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. *On the contrary, they provide employers with definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages.* None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of earnings. It is therefore not correct to interpret the Act as guaranteeing a completely

> adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers.

Potomac Electric Power Co., 449 U.S. at 281-282 (1980) (footnote omitted) (emphasis added); *accord Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 249-50 (4th Cir. 2004). In short, under the Longshore Act, employers relinquish common law tort defenses, such as the zone of danger test, in exchange for limited and predictable (*i.e.*, insurable) liability. *See Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983). By contrast, under FELA, an employer remains fully liable for damages resulting from its negligence.

Second, there is little chance that fraudulent claims will succeed under the Longshore Act. Administrative law judges, not juries composed of lay persons, make factual findings and credibility determinations, and weigh conflicting medical opinions. These ALJs have specialized experience in the field, and their very

expertise is one reason courts defer to their fact findings.[16] *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 391 (5th Cir. 1997).

Moreover, even if a fraudulent claim is awarded initially, compensation is paid periodically (biweekly), 33 U.S.C. § 914, and an employer, who believes an ALJ has been duped, can seek modification and have the claim reviewed for a mistake of fact or change in conditions. 33 U.S.C. § 922; *see Wheeler v. Newport News Shipbuilding & Dry Dock*, 637 F.3d 280, 286 (2011); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497 (4th Cir. 1999). This modification provision thus reflects an "interest in accuracy [that] trumps the interest in finality." *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 541 (7th Cir. 2002).

By contrast, a one-time lump-sum tort award for lost wages is

---

[16] Longshore claims are initially investigated by the district director, OWCP, who likewise has specialized experience dealing with Longshore claims. If the parties disagree with OWCP's assessment, the claim goes before an ALJ for adjudication. 33 U.S.C. § 919.

inherently speculative, involving an estimation of the difference between the earnings that a plaintiff would or could have received during his lifetime but for the harm and the earnings that he will probably now receive. It also depends on a jury, in whose predictions there is room for error. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 132-133 (1997) (discussing the difficulties of the one-time calculation of benefits according to the common law of torts).

Third, there has never been a flood of psychological injury cases in the longshore program, even though psychological impairments have been compensable for more than 50 years.[17] *See Hagen*, 327 F.2d. 559 (decided in 1964). Employer's fear "belongs to that genre of horribles that seems impressive in academic debate but has little relevance to real life." *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1364 (4th Cir. 1996) (en banc). In sum, the common law policies animating *Consolidated Rail* simply have no

---

[17] Nor has employer come close to proving fraud here. Five of six doctors – *including employer's own physician* -- believed Jackson's psychological impairment was real.

foothold in the longshore context, and certainly lack sufficient force to override the unqualified, plain statutory text.

Finally, employer contends that the zone of danger test has been applied in cases arising under section 905(b) of the Act, and under maritime law generally.[18] Pet. Br. at 38-39. But once again employer ignores the critical fact that all these cases sound in tort and negligence and apply common law principles of negligence law, as did *Consolidated Rail*. *Dierker v. Gypsum Transp., Ltd.*, 606 F.Supp. 566, 567 (E.D. La. 1985), (observing under Section 905(b), this is a "[n]egligence action" and "that vessel liability to § 905(b) plaintiffs turns on 'accepted principles of tort law'"); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 212 (5th Cir. 2013) (observing that causes of action were for "negligence, gross negligence, and wanton disregard for his safety … under general maritime law, or in

[18] As discussed above at 6, section 905(b) recognizes an employee's right to sue for damages and recover in full from a third party whose negligence causes disability or death for which compensation is payable under the Act. 33 U.S.C. § 933.

the alternative, under 33 U.S.C. § 905(b); *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) ("a maritime tort case" relying on "general principles of negligence law"); *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F.3d 1033, 1035 (9th Cir. 2010) (same). There is simply nothing in these decisions that suggest the zone of danger test should, or must be, grafted on the workers' compensation liability scheme established by Congress under the Longshore Act.

II. The ALJ did not err by declining to accord Dr. Mansheim's opinion dispositive weight.

Employer argues that Dr. Mansheim's opinion is entitled to dispositive weight because he was an independent medical examiner (IME). Pet. Br. at 39-41 citing 33 U.S.C. § 907(e). This argument, too, must be rejected. There is nothing in the plain language of the statute, or its legislative history, that indicates that Congress intended the section 7(e) IME's opinion to be binding on the parties.

Section 7(e) provides:

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or

> selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted. . . .

33 U.S.C. 907(e).[19]

Employer argues that the provision's legislative history indicates that Congress intended to follow *The Report of the National Commission on State Workmen's Compensation Laws* when it enacted this provision:

> S. 2318 also provides for a new procedure for obtaining impartial medical evaluations in contested cases. Either party may request an examination by a physician employed or selected by the Secretary and if either party is dissatisfied with the results of such examination may request a further examination by one or more other physicians employed or selected by the Secretary. . . . This procedure is similar to one which has worked successfully in New York and is

---

[19] DOL's regulation at 20 C.F.R. § 702.408 implements section 7(e) in substantially similar language. The regulation does not discuss the weight to be accorded the independent medical examiner's opinion, but states only that upon the district director's receipt of the report, "action appropriate therewith shall be taken." *Id.*

> consistent with the National Commission's recommendation urging a disability evaluation unit in workmen's compensation agencies.

S. REP. NO. 92-1125, at 16 (1972). Employer then cites the National Commission's report which states that "[t]he [opinions of independent experts] should be accepted as conclusions of fact and should be reviewed . . . only under the normal rules governing appellate courts in their review of fact determinations." *The Report of the National Commission on State Workmen's Compensation Laws*, July 1972, at 51.

The glaring flaw in employer's argument is that neither the legislative history, nor the National Commission's report, states that the IME's opinion is entitled to dispositive weight. On the contrary, the National Commission provides that the IME's opinion is to be reviewed by the "normal rules" of appellate review. Further, the language of the statute, by providing the opportunity for further medical examination and review if a party is dissatisfied with the IME's report, plainly indicates that the IME's opinion is not binding on the parties. In short, employer's argument that the IME's opinion is to be accorded dispositive weight is baseless, as the

Board has long held. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 Ben. Rev. Bd. Serv. 380, 387 (1990); *Shell v. Teledyne Movible Offshore, Inc.*, 14 Ben. Rev. Bd. Serv. 585, 589 (1981). In fact, employer's entire argument is based on the ALJ's reasoning in *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 21 Ben. Rev. Bd. Serv. 55, 58 (ALJ)(1988), which the Board expressly rejected on appeal. *Cotton*, 23 Ben. Rev. Bd. Serv. at 387.

Dr. Mansheim's opinion illustrates perfectly why an IME opinion should not be binding on the parties, but rather, must undergo the same scrutiny as other medical opinions -- an examination of the logic of the physician's conclusions and an evaluation of the evidence upon which their conclusions are based in light of the other evidence of record. *Carmines*, 138 F.3d at 140 and n.5. As the ALJ and the Board recognized, Dr. Mansheim's view was the direct opposite of every other expert in the record, including those experts who had been treating Jackson for years, and was based on unsupported assumptions and responses to a computer-generated test that had not been interpreted by a clinician.

Further, as Dr. Newfield pointed out, Dr. Mansheim's reasons for ruling out a diagnosis of PTSD in Jackson's case were not supported by the DSM-IV or V -- the diagnostic bible for mental health professionals. JA 196, 367. The ALJ, therefore, reasonably concluded that his opinion should be accorded little weight. *See Ward*, 326 F.3d at 440 n.3 (observing that "a physician's statement … is not conclusive of the ultimate fact in issue." [Citation omitted]). The ALJ's determination that Dr. Mansheim's opinion was worthy of little weight is supported by substantial evidence and should be affirmed.[20]

---

[20] It is ironic that in Argument I employer raises the specter of compensating fraudulent psychological injuries, yet advocates in Argument II an arbitrary rule requiring compensation decisions to be based on a single doctor's opinion (the IME), regardless of its underlying merit and persuasiveness.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

MARK A. REINHALTER
Counsel for Longshore

/s/ Sarah M. Hurley
SARAH M. HURLEY
Attorney
U.S. Department of Labor
Office of the Solicitor
Frances Perkins Building
Suite N-2117
200 Constitution Ave, N.W.
Washington, D.C. 20210
(202) 693-5650

Attorneys for the Director, Office of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) because it contains 9,321 words and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (14-point Bookman Old Style) using Microsoft Office Word 2007.

/s/ Sarah M. Hurley
Sarah M. Hurley
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2015, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and on the following:

Ira M. Steingold, Esq.
Steingold & Mendelson
1510 Breezeport Way, Suite 300
Suffolk, VA 23435

Lawrence P. Postol, Esq.
Seyfarth Shaw, L.L.P.
975 F Street N.W.
Washington, D.C. 20004-1454

/s/ Sarah M. Hurley
SARAH M. HURLEY
Attorney
U.S. Department of Labor