COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

December 2, 2016

Suffolk, ss.

Docket No. CR-13-186

AUGUST LOURA, Petitioner

v.

TAUNTON RETIREMENT BOARD, Respondent

DECISION

Appearance for Petitioner:

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Appearance for Respondent:

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Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

The petitioner, a former municipal water system maintenance worker, prevails on his accidental disability retirement benefits claim pursuant to M.G.L. c. 32, § 7(1), by proving that his likely-permanent disability from performing the essential duties of his job was caused by on-the-job exposure to an "identifiable condition" not common to a great many occupations that, over time, exacerbated his underlying degenerative spinal condition.

After eight years on the job with no history of lower back pain, the petitioner sustained a thoracic strain on August 20, 2009 while moving a heavy pipe cutter out of the way of a backhoe that was backfilling a trench. Although that strain resolved over time, the petitioner also experienced increasing lower left back pain radiating through the hip and into the lower left leg that precluded the heavy lifting critical to performing his job, and he could not return to work. A lumbar spine MRI taken in early January 2010 revealed an underlying progressive spondyloarthropathy and lumbar degenerative disk disease. In his subsequent accidental disability retirement application, the petitioner asserted that his disability was caused either by the August 20, 2009 injury or by on-the-job exposure to an identifiable condition not common to a great many occupations or to daily life— regularly lifting and moving heavy pipes and machinery, and installing and maintaining municipal water system components, that in turn required bending, lifting and kneeling in confined quarters such as trenches, mostly outdoors, day or night, and regardless of the weather—that exacerbated his underlying spinal deterioration over time. A regional medical panel comprising three orthopedic surgeons answered in the affirmative as to the petitioner's disability and its likely permanence, and a majority of the panel members answered in the affirmative as to causation—whether the disability might be the natural and proximate cause of the job-related injury or "hazard undergone" that he claimed. In response to questions by the retirement board, one of the two panel members comprising this majority as to the causation issue opined that the petitioner's disability was not causally related to a single event such as moving the pipe cutter on August 20, 2009. The retirement board perceived this as a change in the panel majority's answer as to causation from an affirmative to a negative one, and on this ground alone it denied the petitioner's accidental disability retirement application.

The panel member's clarification eliminated the "single-injury" hypothesis as the basis for the majority affirmative answer as to causation. However, there remained a majority affirmative panel answer as to causation based upon the hypothesis of cumulative injury caused by an identifiable work-related condition. The panel members were aware of this alternative hypothesis from the materials the retirement board sent them for review, which included his accidental disability retirement application, and it was therefore properly before the panel. The panel's affirmative answers are supported by the medical records, and, as to causation, are consistent with the frequency and intensity of the physical effort required to perform the petitioner's essential job duties. Based upon the medical panel's persuasive affirmative answers as to disability, its likely permanence, and causation based upon the identifiable condition/gradual deterioration causation hypothesis, and the remainder of the medical and non-medical evidence that I review here *de novo*, the petitioner has shown by a preponderance of the evidence that he is entitled to accidental disability retirement benefits.

Background

Petitioner August Loura, a water system maintenance worker employed by the City of Taunton, Massachusetts Department of Public Works, appeals, pursuant to M.G.L. c. 32, § 16(4), from the March 15, 2013 decision of the Taunton Retirement Board denying his application for accidental disability retirement benefits pursuant to M.G.L. c. 32, § 7(1).

Mr. Loura claims that he was permanently disabled from performing the essential duties of his position as a water department maintenance man as the result of "his years of heavy, repetitive, and cumulative trauma to his back while working for the City of Taunton, as well as the specific, final injury he sustained on August 20, 2009" to his lower back and thoracic spine when he moved a heavy pipe cutter out of the way of a backhoe while the crew to which he was assigned was attempting to repair a water main break. (Petitioner's Pre-Hearing Memorandum, Jan. 7, 2015, at 1-2 para. 2, and at 3 para. 6, referencing Exh. P11: Application of August Loura for Disability Retirement, June 5, 2012.) A regional medical panel comprising three orthopedic surgeons (Dr. Robert J. Nicoletta, Dr. Ronald E. Rosenthal, and Dr. Victor A. Conforti) was convened to examine Mr. Loura and issue a certificate as to whether he was incapable of performing the essential duties of his job as a result of an injury to his back sustained on the job, whether that incapacity (if present) was likely to be permanent, and, if so, whether the injury that permanent incapacity was "such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which" Mr. Loura claimed an accidental disability retirement. *See* M.G.L. c. 32, §§ 6(3)(a) and 7(1). All three panel members agreed that he was physically incapable of performing

the essential, heavy-lifting, duties of his job, and that the disability was likely to be permanent. Two of the three panel members concluded that Mr. Loura's disability was causally related to a job-related injury. After the Board requested clarification, Dr. Nicoletta, one of the panel members who had responded in the affirmative as to causation, clarified his answer by stating that Mr. Loura's disability related to his underlying progressive spondyloarthropathy and lumbar degenerative disk disease, rather than to a single injury such as the strain he sustained on August 20, 2009 while moving the pipe cutter. He did not state, however, that he had changed his affirmative answer as to causation or, more specifically, that he had ruled out Mr. Loura's years of heavy, repetitive and strenuous work as a water system maintenance worker as having exacerbated his progressive spondyloarthropathy amd degenerative disk disease, a causation hypothesis Mr. Loura had asserted as an alternative to causation due to the injury he sustained while moving the pipe cutter on August 20, 2009. Nonetheless, the board perceived the panel's majority answer as to causation as having changed from the affirmative to the negative, based upon Dr. Nicoletta's clarification. Based solely upon this perceived negative panel majority answer as to causation, the board denied Mr. Loura's accidental disability retirement application. Mr. Loura filed a timely appeal challenging this denial on March 26, 2013 with the Contributory Retirement Appeal Board, which transferred the matter to the Division of Administrative Law Appeals (DALA) for adjudication.

Mr. Loura claims on appeal that Dr. Nicoletta did not change his affirmative answer as to causation and, therefore, neither did the panel's majority affirmative answer. As a result, he argues, the Board's denial of his accidental disability retirement application based solely upon its perception of a negative panel majority answer as to causation was error. In the alternative, he argues that if the

panel member majority answer as to causation did indeed change from an affirmative to a negative one, the two physicians comprising the panel's new negative majority erred by confining their analysis of causation to the August 20, 2009 injury, and should have also considered his cumulative work trauma claim—a lumbar spine injury, documented in Mr. Loura's medical records, caused by the heavy lifting, stopping, bending, kneeling, and working in cramped, tight and awkward positions over many years of work that his job had required. (Exh 1:Appeal dated Mar. 26, 2013; Loura prehearing memorandum (Jan. 7, 2015) at 3, para. 8, at 4, paras. 15 and 16, and at 5, paras. 22-23.) The retirement board counters that the medical panel had only the single-injury causation hypothesis before it, and that as a result, its affirmative majority answer as to causation changed to a majority negative answer when Dr. Nicoletta clarified his answer. In the alternative, the board argues that Mr. Loura identified no job-related "identifiable condition" that caused his disability, as the lifting, bending and kneeling required to perform his water system maintenance work were common or necessary to many occupations.

Both parties filed prehearing memoranda in early 2015. I held a hearing at DALA on August 5, 2015. Mr. Loura was the sole witness to testify. I made a digital recording of the hearing. To assist them in preparing post-hearing memoranda, the parties' counsel arranged for the preparation of a paper transcript from the digital hearing recording by Registered Professional Reporter Raymond F. Catuogno, Sr., of Catuogno Court Reporting and StenTel Transcription in Springfield, Massachusetts.[1]

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[1]/ This transcript is dated September 18, 2015. I cite to it using the abbreviation "Tr," followed by the relevant page number(s).

During the hearing, I admitted into evidence Mr. Loura's 17 exhibits (Exhs. P1-P17) and the board's 11 exhibits (Exhs. R1-R11). Only one of these exhibits prompted an objection—Exh. R11, a video, without sound, that was one of the City of Taunton's exhibits in a hearing before the Department of Industrial Accidents on Mr. Loura's Workmen's Compensation claim (*see* Exh. P-16). According to the board, the video shows Mr. Loura playing congas while standing for approximately one hour during a performance of a local band known as "Let It Ride" at a venue in Taunton on March 8, 2013. This exhibit was offered by Board counsel during his cross-examination of Mr. Loura. (Tr. 59.) Mr. Loura objected to this exhibit as to its reliability and relevance, particularly because the person who recorded the video did not testify, the video was "spliced together" so as not to show times during the performance when Mr. Loura was seated, the video was introduced during the Worker's Compensation proceeding as to a different issue (the extent of Mr. Loura's disability) and would therefore be "out of context" in this retirement appeal, and because the video was not among the materials that the medical panel members reviewed. (*See* Tr. 63, 71-72.) Following argument by counsel, and testimony by Mr. Loura, regarding the video and the performance it showed at least in part (Tr. 63-73), I noted Mr. Loura's objections to the video and admitted it for what it was worth with respect to the issues raised here and witness credibility, with its evidentiary weight (if any) to be determined subsequently. (Tr. 73-74.)

Both parties presented closing arguments and filed post-hearing memoranda.[2]

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[2]/ The Board filed its post-hearing memorandum on October 9, 2015. (Bd. post-hearing mem.) Mr. Loura filed his post-hearing memorandum initially on October 12, 2015, but filed a revised post-hearing memorandum on October 13, 2015. (Loura rev. post-hearing mem.)

Findings of Fact

a. The Parties

1. Petitioner August Loura, currently 59 years old, was employed by the City of Taunton Department of Public Works (Taunton DPW) as a maintenance man between July 30, 2001, when he was 44, and January 29, 2010, when he was 53.

2. Respondent Taunton Retirement Board administers the City of Taunton Contributory Retirement System, one of the Commonwealth's 104 separate public pension systems. As a Taunton Department of Public Works (Taunton DPW) employee, Mr. Loura was a member of the City of Taunton Contributory Retirement System, and was therefore a "member in service" per M.G.L. c. 32, § 1.

b. Work and Medical History Prior to the August 20, 2009 Injury

3. Before working for the Taunton DPW, Mr. Loura performed vinyl siding work for various contractors between 1980 and 1993, loaded and unloaded trucks and performed general clean-up work for a manufacturer of plastic supermarket bags, between 1993 and 1995, and installed doors, and vinyl siding and trim, in Virginia between 1995 and 2000, which involved constant standing and moving, lifting 50-60 pounds of materials at times, and some climbing. (Exh. P11: (Disability Retirement Application dated June 5, 2012, at 3; P16: *Loura v. City of Taunton*, D.I.A. # 022863-09, Decision (Mass. Dep't of Industrial Accidents, Div. of Dispute Resolution, Jul. 31,

2014) at 4.) Decision of Department of Industrial Accidents Administrative Judge re Mr. Loura's Worker's Compensation Claim, July 31, 2014, at 4.)

4. The record presents scant medical history for Mr. Loura before he began employment with Taunton DPW at the end of July 2001. It comprises a single medical record—for an esophagogastroduodenoscopy performed on May 22, 2001, when Mr. Loura was 44, by Dr. Mark A. Robbin at Sturdy Memorial Hospital in Attleboro, Massachusetts. This exploratory procedure was related to Mr. Loura's gastric reflux disease and his complaint of substernal pain, trouble swallowing solids and regurgitation despite his use of a proton pump inhibitor. The records of this visit listed Mr. Loura's occupation as self-employed carpenter, gave his past medical history as "[n]eck injury causing him to be disabled," and reported his social history as "[n]onsmoker, not married, disabled construction worker." The procedure revealed no significant abnormality, and Dr. Robbin concluded that Mr. Loura should be maintained on Protonix and followed. (Exh. 5.)

5. Shortly afterward, Mr. Loura applied for employment with Taunton DPW. Following a physical examination on June 25, 2001, during which he denied a history of back trouble or any other disorders, he was cleared for DPW work without restriction on June 25, 2001. (Exh. P10: attached Report of physical examination dated June 25, 2001, at 17-18.)

6. Mr. Loura began his employment at Taunton DPW on July 30, 2001. He worked initially as a highway maintenance worker for nearly two years (between July 30, 2001 and July 23, 2003), and then as a water system maintenance worker for more than eight years until August 20, 2009, when he was last able to perform the duties of that position. (Exh. P10 at 3.)

7. When Mr. Loura worked as a highway maintenance worker in Taunton DPW's street

department, he performed semi-skilled outdoors work to construct road and sidewalk surfaces, including excavating, grading, patching, raking asphalt, and minor cement work. He also installed, repaired and replaced manhole structures, drains and culverts, and removed snow and ice during the winter. This work required heavy lifting, and climbing stairs and ladders, as well as the use of a jackhammer, mechanical tamper, sidewalk roller (weighing under one ton), and assisting in the performance of major cement work such as constructing new sidewalks and installing new retaining walls. (Loura direct testimony; Exh. P10: Taunton DPW's Statement Pertaining to Mr. Loura's Application for Disability Retirement, dated July 2, 2012, at 3; and attached request for transfer from position as Taunton DPW highway maintenance worker to Taunton DPW water supply maintenance worker, dated July 21, 2003, at 15-16.)

8. On July 21, 2003, Mr. Loura applied for an internal transfer of position within Taunton DPW, from highway maintenance worker in the DPW's street department, to water system maintenance worker in its water division. (Exh. P10.) Taunton DPW granted this transfer request.

(a) As a Taunton DPW water system maintenance worker, Mr. Loura performed skilled or semi-skilled, and heavy labor-intensive, manual work in the construction, operation and maintenance of the city's water system, including work on reservoirs, water gates, water mains and connectors, and, more specifically, repairing water main breaks and leaks, and running new water systems into residences and commercial buildings. This work included, laying and connecting service pipes with street mains and meters, locating and repairing water leaks, installing fire hydrants, operating water gates, trenching for water supply pipe repair or replacement, replacing water supply pipes from basements to sidewalks, pulling new service pipes from basements to a

trench in the street (to avoid digging trenches through yards), turning on water for new service installations, installing, repairing and testing water meters on a part-time basis, operating related motor equipment, and inspecting the work of other laborers and maintenance workers at a lower skill level to insure that it conformed to job specifications. Performing these essential job duties required cutting pavement and pipe, preparing pipe trenches, and removing and installing pipe in trenches using power and pneumatic tools, particularly jackhammers, which were used to break into the ground through paved or concreted surfaces so that trenches could be dug. To perform these duties, a water system maintenance worker needed to able to bend and to climb ladders frequently, and to be able to lift 50 pounds overhead. Repairing water main breaks and leaks always required work in outdoor trenches. Other work performed by a water system maintenance worker often required work in outdoor trenches. (Loura direct testimony, Tr. 12-13; Exh. 2: Job Description, Water System Maintenance Man, City of Taunton, Massachusetts (undated); Exh. P10.)

(b) In performing this work, Mr. Loura used heavy ½ to ¾ inch thick cable, as well as pipe and pipe couplings, hand tools that each weighed 5-10 pounds such as wrenches and shovels, and pipe cutters that weighed as much as 100 pounds and required two men to lift and move. He was mostly on his knees, and bending, on mud and rocks in tight places, mostly in trenches that were approximately three feet wide and 6-8 feet deep. (Loura direct testimony, Tr. 12-13; Exh. P10 at 3; Exh. P11 (Mr. Loura's application for disability retirement, dated June 5, 2012) at 2.)

(c) Mr. Loura performed this work daily during his regular five-day work week, and on days not included in the regular work week when he was called in to perform emergency water maintenance work. He was, thus, on call 24 hours each day, seven days per week, to perform this

work, both regularly and as emergencies arose. On whatever day Mr. Loura performed it, this work was mostly outside, during all four seasons, during the day and at night, and regardless of the weather. On every day he performed this work outdoors, which was on most of his work days, Mr. Loura lifted earth, rocks, and sections of pipe, in addition to the heavy equipment and hand tools he used. Work on pipe installation and pipe breaks generally required 4-10 hours of shoveling, and sometimes more. He lifted heavy tools, equipment, materials such as pipe, and rocks and earth (including wet earth, when it was or had been raining) every day he worked outdoors. Shoveling rocks and earth meant moving and lifting approximately 10-20 pounds per shovel load, usually in a trench in a bent-over position. With some exceptions, and depending upon what work needed to be done, Mr. Loura performed this type of heavy manual work typically for 6-10 hours daily during the regular work week, and also when he was called to work after his regular hours. (Loura direct testimony, Tr. 13-18; Exh. P10 at 3; Exh. P11 at 2.)

9. On October 27, 2008, Mr. Loura, who was 51 at the time and was working as a water system maintenance worker, visited the Emergency Care Center at Sturdy Memorial Hospital complaining of neck pain. He was examined by Dr. Mark McGuire, whose emergency care report related a history of chronic neck pain and a history of a bulging disk in his neck, and a current complaint that the neck was sore to the touch and with movement, both of which had worsened during the previous 48 hours. Mr. Loura denied any new, direct trauma to the neck area, but related that he had “an exertional job where he could have potentially exacerbated some of his muscular issues.” He denied any urinary symptoms, any numbness or tingling or weakness radiating down either arm, and any associated headache, chest pain, difficulty breathing, or similar pain in the past.

Although the records for this hospital visit showed Mr. Loura's employment with the Taunton "Water Department," Dr. McGuire's report did not discuss Mr. Loura's specific tasks or the heavy lifting he was required to perform. Dr. McGuire performed a neurological examination, which was normal; his impression was that Mr. Loura had chronic neck discomfort, with no serious etiology such as atypical cardiac or cerebrovascular presentation, and no "life-threatening emergent process regarding the neck." He recommended that Mr. Loura be discharged with analgesics to relieve his neck pain and return to be rechecked if he had worsening pain, numbness or weakness. (Exh. R5 at 19-24.)

c. The August 20, 2009 Injury

10. On August 20, 2009, between 2:30 and 3:30 p.m., Mr. Loura was working at a Taunton DPW Water Department job site at Pleadwell Street, where he and the crew he was working with were repairing a water main break. Two other men were working at hydrants, one was operating a truck, and another was operating a backhoe to backfill a trench. Mr. Loura saw the backhoe moving along "pretty quick" and also saw a pipe cutter in the backhoe's path. Although he knew that moving a 100-pound pipe cutter required assistance, and there were workers other than the backhoe operator he might have been able to call upon for assistance, Mr. Loura perceived that he needed to move the heavy tool out of the way of the backhoe quickly in order to avoid an accident. To do so, he picked the pipe cutter up and threw it over. He had moved the pipe cutter

once in the water department workshop, but never in the field. Mr. Loura felt a click or snap, and pain, in the area of his middle and lower back, at or near the spine. He had never experienced this pain before. He returned to the DPW workshop after the injury but was unable to work further on that day, and was unable to perform any of his essential duties as of August 24, 2009. (Loura direct testimony, Tr.18-19, 26; Loura cross-examination, Tr. 27-29; Exh. P10 at 12; Exh. P11 (Mr. Loura's application for disability retirement, dated June 5, 2012) at 4-5; Exh. P16 at 4-5.)

11. Mr. Loura filed a report of his August 20, 2009 injury incident with the Taunton DPW Human Resources Department on August 27, 2009. In it, he stated that he was injured when he twisted while lifting a pipe cutter that would be usually be lifted by two persons without twisting, and "felt pain around lungs on left back and front," and he described the injury as to his "left mid back/chest/ribs." (Exh. P10 at 12.)

d. Post-Injury Assessment, Care and MRIs: August 2009-February 2010

i. Sturdy Memorial Hospital: Dr. Quinn, Physical Therapy

12. On August 26, 2009, Mr. Loura was examined by Dr. Christopher Quinn at Sturdy Memorial Hospital in Attleboro, Massachusetts. (Exh. P1 at 1 and 9.) Dr. Quinn diagnosed a thoracic strain, and referred Mr. Loura to the hospital's physical therapy department for evaluation and then physical therapy 2-3 times per week. (Exh. P1 at 1.) Dr. Quinn prepared a "work status report" on which he recorded his thoracic strain diagnosis. He also stated in the report that Mr.

Loura was unable to work between August 24 and 28, 2009, and that between August 28 and September 1, 2009 (when Loura was next scheduled to see Dr. Quinn) his work needed to be modified or restricted so that he performed no lifting, carrying, pushing or pulling over 5 pounds, and did not climb ladders. (Exh. P1 at 9.)

13. During the August 26, 2009 visit to Sturdy Memorial Hospital, Mr. Loura completed a health questionnaire form (Exh. P1 at 2-3) on which he described his injury as "left mid back in lung area pulled muscle," and that it had occurred "at work moving piece of machinery." (Exh. P1 at 2.) He also described the pain by circling the word "ache," one of seven choices on the form (the others were "Sharp," "dull," "tingling," "Throb," "burning" and "numbness," none of which were circled.) (*Id.*) Mr. Loura also stated on the form (with a check mark) that he was out of work due to this problem. The form included a diagram showing a generic frontal and rear view of the human body; on the rear view, Mr. Loura circled the area on the left side between the left buttock and the mid back. (*Id.*)

14. Sturdy Memorial Hospital's physical therapy department evaluated Mr. Loura the next day, August 27, 2009, and a physical therapist prepared a written report of this initial evaluation. (Exh. P1 at 4-8.)

(a) The physical therapist's August 27, 2009 report gave the reason for the evaluation as "thoracic strain" with an onset date of August 20, 2009. It described Mr. Loura's work for the water department as involving "heavy type work outdoors." Next to "PMH" (presumably, past

medical history), the report stated "chronic LBP" (lower back pain) and neck." It gave the location of Mr. Loura's current pain as "low thoracic L (presumably, left side)." (Exh. P1 at 4.)

(b) Testing of Mr. Loura's range of motion, strength, flexibility and joint mobility revealed that trunk flexion and extension to be within normal limits (WNL), as was his hamstring flexibility on both the left and right sides. However, sideways bending was limited to 23 degrees on the left side before Mr. Loura felt pain (in contrast, he could bend 34 degrees on the right side), and rotation on both the right and left sides produced pain at 30 degrees. In addition, trunk strength on the right side was noted to be a low value (3) within the "fair" range (3-5), with pain noted. Mid and upper thoracic mobility was noted as decreased. (Exh. P1 at 4.) Mr. Loura reported increased pain when turning around, inability to lift heavy objects, and sleeping problems after his August 20, 2009 injury. (Exh. P1 at 5.)

(c) The physical therapist's August 27, 2009 report included a "problem list" with four items, each of which had a corresponding "Rx":

> 1. Left thoracic pain (6-7 out of ten), for which Mr. Loura was started on "U.S." (Presumably, ultrasound) and given exercises to do;
>
> 2. Decreased range of motion in the trunk, left shoulder and left hip, for which Mr. Loujra was started on a home exercise program (HEP) to increase flexibility;
>
> 3. Decreased functional strength of the trunk and left lower extremity, for which Mr. Loura was given flexiblility exercises to do; and
>
> 4. Decreased ADLs (presumably, "activities of daily living"), including decreased ability to do heavy lifting and turn the trunk, and sleep, for which the physical therapist added strengthening, conditioning and body mechanics instruction.

(d) The August 27, 2009 physical therapy evaluation report listed short-term goals (to be reached in 2 week) as decreasing pain by 50 percent, increasing trunk, shoulder and hip range of motion, and performing a full home exercise program. It listed long-term goals(to be reached in 3-4 weeks) as normal strength, full range of motion, and increased activities of daily living. (Exh. P1 at 5.)

15. Mr. Loura was scheduled for six physical therapy sessions at the Sturdy Memorial Hospital Physical Therapy Department. He attended two of them (on September 3 and 15, 2009) and either cancelled due to illness or did not appear for the others (on September 9, 11, 17 and 22, 2009). The Physical Therapy Department's final notes, dated September 30, 2009, show, as the treatment plan, "ul, trunk ROM" (apparently, upper left, trunk range of motion), and "NU STEPS, UBC, N + MOB," apparently references to stretches related to the upper body or back, and related mobility issues. They also state that "nothing else" was scheduled for Mr. Loura. (Exh. P1 at 10-17.)

ii. Morton Hospital Physical Therapy

16. Mr. Loura was seen at Morton Hospital's Occupational Health Services in Taunton, Massachusetts on August 28, 2009. The record of this evaluation, prepared by nurse practitioner Cheryl Bliss, relates Mr. Loura's description of having "twisted" while moving a pipe cutter on August 20, 2009 and having "felt pain a couple of days later in his left middle back area," which continued and felt to be "a 5 on a scale of 0 to 10," and resulted in tightness, and for which he was

receiving physical therapy. The record also states that Mr. Loura denied numbness or tingling in his legs. A physical examination revealed positive tenderness along the left thoracic muscle area and tightness, but no tenderness along the disc area. Mr. Loura was assessed as having a left thoracic muscle strain, for which he was to continue taking Flexeril 10 mg daily at bedtime, apply Tiger Balm to the affected area and use heat, and continue physical therapy at the hospital and return to Occupational Services in a week. (Exh. P2 at 2.)

17. Mr. Loura appeared for a followup evaluation at Morton Hospital's Occupational Health Services on September 11, 2009. At that time, he was receiving physical therapy twice each week and was "doing home stretches" and applying heat as needed. He continued to feel discomfort and complained occasionally of numbness and tingling down to his left fingers. A physical examination revealed continuing tenderness in the left thoracic muscle area, but with a decrease in tightness, and, as well, that Mr. Loura had full range of motion, and normal sensation in the left hand. The assessment was a left trapezius muscle strain and left thoracic muscle strain. The plan was for Mr. Loura to be followed by Dr. Quinn at Sturdy Memorial Hospital, and to continue taking Flexeril as prescribed and to use Tiger Balm and heat as needed. (Exh. P2 at 3.)

iii. Thoracic Spine MRI

18. On September 24, 2009, Dr. Wesley Rosario performed a magnetic resonance imaging (MRI) of Mr. Loura's thoracic spine at Sturdy Memorial Hospital at Dr. Quinn's request,

based upon Mr. Loura's continuing back pain, and prepared a report of his observations and findings. (Exh. (1 at 18-19.) The report described Mr. Loura's clinical history as "[b]ack pain and neck pain radiating to both shoulders." Dr. Rosario found a well-aligned spine with "varying degrees of degenerative disc disease primarily with bulges and some protrusions," the most pronounced of which was at T7-8, where there was "broad-based protrusion more eccentric to the left that abuts but does not compress the cord." The report also noted "circumferential bulging with slight left-sided protrusions noted at T4-5, T5-6 and T6-7," with inundation of the subarahcnoid space at these levels of the thoracic spine "without directly abutting the cord," and, as well, "several discogenic changes especially at T4-5 and . . . C6-7." Dr. Rosario's impression was:

> [m]ild to moderate degenerative disc disease but without evidence of disc herniation. There is slight cord contact in the neutral position at the T8-9 level central and slightly eccentric to the left without compression, No cord signal abnormality is noted."

(Exh. P1 at 18.)

iv. Further Evaluation at Sturdy Memorial and MGH

19. Mr. Loura was evaluated further at Sturdy Memorial Hospital's Occupational Health Services Department on October 2, 2009 and November 6, 2009. He reported continuing pain during both evaluations, as well as (on October 2, 2009) "occasional hand tingling and numbness in the left side," and (on November 6, 2009), "numbness around [the] left hip and thigh area," soreness in both shoulders, and "the areas of discomfort . . . mov[ing] in different sections up his back producing

soreness and pain." Nurse practitioner Cheryl Bliss noted tenderness along the left thoracic area on both dates. Her report of the October 2, 2016 evaluation noted the thoracic MRI findings of mild to moderate degenerative disk disease in the T4-5 and C6-7 areas. Her assessment of Mr. Loura's condition remained, as it had been during the initial occupational health services evaluation on August 28, 2009, a left thoracic strain, and the plan was for Mr. Loura to continue taking Flexeril 10 mg/day before sleep, and over-the-counter Advil as needed, and to use Tiger Balm for muscle tightness. (Exh. P2 at 4-6.)

20. On October 15, 2009, Mr. Loura presented at Massachusetts General Hospital's Emergency Services Department in Boston, complaining of pain in his upper and lower back and his left leg. According to notes prepared by the attending physician who saw him, Dr. Jacob Chapman, Mr. Loura stated that he was unable to work on account of his August 20, 2009 injury and had obtained no relief from physical therapy, and he also requested that an MRI be performed. Following a physical examination, he was discharged with instructions for back pain and advised to consult with his primary care physician the same day for the evaluation of his chronic pain. (Loura cross-examination, Tr. 31-32; Exh. P3.)

v. Assessment by Primary Care Physician Dr. Zullo

21. On December 29, 2009, Mr. Loura was examined by Dr. Mark Zullo, a primary care physician with a family practice specialty, at Norton Medical Center in Norton, Massachusetts, who

had not seen Mr. Loura for four years. (Exh P4 (Dr. Zullo's notes of the December 29, 2009 examination), and Exh. P11 at 22 (reference to Dr. Zullo in Mr. Loura's disability retirement application).)

(a) Dr. Zullo's notes also state that Mr. Loura's "current issues" dated back to his August 20, 2009 injury and the resulting thoracic injury diagnosed by Dr. Quinn, for which physical therapy was only "somewhat" helpful, and that in the interim, while Mr. Loura was receiving workmen's compensation benefits, he had experienced increased back pain radiating into the left anterior thigh region, as well as progressively-worsening bilateral shoulder pain that he had not experienced when he stopped working in August 2009, and some bilateral knee pain. The back pain and shoulder pain were giving him the most trouble. Mr. Loura told Dr. Zullo that he had been cleared by the nurse practitioner overseeing his physical therapy to return to work, but subject to lifting limitations (no more than 20 pounds, according to Dr. Zullo's notes) that could not be accommodated in his line of work at the water department. (Exh. P4 at 1.)

(b) Dr. Zullo's physical examination revealed tenderness over both the anterior shoulder and the rotator cuff region bilaterally, more so on the left side, and pain with flexion and extension of the shoulder and internal/external rotation. Examination of the back revealed tenderness over the lower thoracic and lumbar paraspinal region, and some tenderness over the lumbar spine. Straight leg raising produced back and thigh pain at 45 degrees on the left. Strength and reflexes were intact in the lower extremities bilaterally. (*Id*. at 1-2.)

(c) Dr. Zullo's assessment was back pain with radiculopathy and bilateral shoulder pain. He ordered a lumbar spine MRI for Mr. Loura, referred him to an orthopedist (unnamed) regarding his shoulder symptoms, scheduled blood testing including screening to rule out inflammatory arthritis and lyme disease, and scheduled Mr. Loura to be rechecked during his upcoming physical examination (with Dr. Zullo) in February 2010. (*Id*. at 2.)

22. The results of the blood laboratory panels that Dr. Zullo ordered were negative for inflammatory arthritis and lyme disease. (Exh. P4 at 12.)

vi. Lumbar Spine MRI

23. On January 5, 2010, Dr. Jill E. Saunders performed the magnetic resonance imaging of Mr. Loura's lumbar spine that Dr. Zullo had ordered.

(a) Dr. Saunders related the history supporting the need for the MRI as "[w]orsening of the lower back pain with radicular pain into the left thigh for 2-3 months," and noted that no prior study (meaning, presumably, a lumbar spine MRI) was available for comparison with the MRI she performed, although she reviewed the September 25, 2009 thoracic spine MRI (*see* Finding 18) for correlative purposes. Her history did not mention the injury Mr. Loura sustained on August 20, 2009 while moving the pipe cutter.

(b) Dr. Saunders's impression was that the lumbar spine MRI showed "degenerative spondyloarthropathy of the lumbar spine with most prominent changes at the L5-S1 level where there

is grade 1 spondylolisthesis."[3] Dr. Saunders observed "degenerative changes of the posterior

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[3]/ Spondylolisthesis ("slipped disk)" is a condition of the spine in which one of the vertebra slips forward or backward relative to the next vertebra. It can cause lower back or leg pain, hamstring tightness, and numbness or tingling in the legs. *See* http://www.medicinenet.com/spondylolisthesis/article.htm, and its the link to "What causes spondylolisthesis?" http://www.medicinenet.com/spondylolisthesis/page2.htm

There are five major types of spondylolisthesis. Two types, isthmic spondylolisthesis and degenerative spondylolisthesis, are of particular interest here. Isthmic spondylolisthesis is:

> a defect in the portion of the vertebra called the pars interarticularis. If there is a defect without a slip, the condition is called spondylolysis. Isthmic spondylolisthesis can be caused by repetitive trauma and is more common in athletes exposed to hyperextension motions, including gymnasts and football linemen.

Degenerative spondylolisthesis:

> occurs due to arthritic changes in the joints of the vertebrae due to cartilage degeneration and is acquired later in life. Degenerative spondylolisthesis is more common in older patients.

Id. Other types are dysplastic spondylolisthesis "caused by a [congenital] defect in the formation of part of the vertebra called the facet that allows it to slip forward;" traumatic spondylolisthesis, which "is due to direct trauma or injury to the vertebrae, which "can be caused by a fracture of the pedicle, lamina, or facet joints that allows the front portion of the vertebra to slip forward with respect to the back portion of the vertebra." and pathologic spondylolisthesis," which is caused by "a defect in the bone caused by abnormal bone, such as from a tumor." *Id*.

Spondylolisthesis is described according to its grade of severity. Grade 1 is the least advanced stage of this condition; grade 5 is the most advanced stage. The grading is based upon the degree to which one vertebra (one of the 33 bones of the spinal column) has slipped forward over the vertebra beneath it. In grade 1 spondylolisthesis, 25 percent of the vertebra has slipped forward over the vertebra beneath it. The percentage of slippage increases by 25 percent per grade through grade 4—thus, 50 percent forward slippage defines grade 2 spondylolisthesis, 75 percent forward slippage defines grade 3, and 100 percent forward slippage defines grade 4—and the complete falling off of a vertebral body defines grade 5. *See* Rodts, M., DNP, and Silveri, Christopher P., M.D., FAAOS, *Spondylolisthesis: Back Condition and Treatment* at: http://www.spineuniverse.com/conditions/spondylolisthesis/spondylolisthesis-back-condition-treatment.

elements" at L5-S1, including "an uncovering of the disc due to the spondylolisthesis," and, at the lateral aspect of the left spinal foramen, disc material that "appears to contact and may irritate the exiting L5 nerve root," and a "similar appearance on the right." She also observed "narrowing of the left lateral recess at L3-4 where disc material appears to contact and may irritate the descending L4 nerve root." Dr. Saunders also noted "degenerative changes at posterior elements at both of these levels." She observed, at L4-5, "degenerative hypertrophic changes with associated elements which cause mild bilateral forminal narrowing," but found "no clear evidence for nerve root impingement" at that level of the lumbar spine. Finally, Dr. Saunders noted "degenerative changes of the SI (sacroiliac) joints bilaterally."[4] (Exh. P1 at 20-21.)

e. Workers' Compensation and Related Disability Evaluations

24. Mr. Loura did not return to work after August 20, 2009. Effective January 29, 2010,

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[4]/The sacroiliac (SI) joint:

> connects the sacrum (triangular bone at the bottom of the spine) with the pelvis (iliac bone that is part of the hip joint) on each side of the lower spine. It transmits all the forces of the upper body to the pelvis and legs . . . Sacroiliac joint pain typically results in pain on one side very low in the back or in the buttocks. Another term for sacroiliac joint pain is sacroiliitis, a term that describes inflammation in the joint.

Ullrich, Peter F., M.D., *Sacroiliac Joint Anatomy*, at http://www.spine-health.com/conditions/spine-anatomy/sacroiliac-joint-anatomy . SI joint problems may be a cause of low back pain, and SI involvement may be suggested by symptoms other than low back pain, such as "[p]ain in the thigh and/or buttock, and possibly pain that radiates down the sciatic nerve," that is "more commonly experienced on one side of the body . . . ." *Id*.

the Taunton DPW Water Division terminated Mr. Loura's employment based upon his "past time and attendance records," including a May 23, 2008 suspension letter regarding an unauthorized absence on June 20, 2008, and a July 18, 2008 suspension letter regarding sick time abuse," and also because he did not appear for hearings the Water Division's Supervisor of Water held, apparently regarding those time and attendance issues, on January 21 and 25, 2010, or respond to a January 19, 2010 letter that the Supervisor sent him, ostensibly regarding the forthcoming hearings. (Ex. P10 at 14.)

25. Before he sought accidental disability retirement benefits related to his August 20, 2009 injury, Mr. Loura sought (as was his right) workers' compensation benefits for his related disability. Relative to that claim, he was examined and assessed by his primary care physician and several orthopedic surgeons between early 2010 and early 2013 with respect to his claimed disability, and its extent.

(a) By agreement, Mr. Loura received workers' compensation benefits from the City of Taunton for a partial disability sustained as a result of the "industrial injury" he sustained on August 20, 2009, as follows:

> (i) Pursuant to M.G.L. c. 152, § 34, payments for total incapacity for the period August 24, 2009 to April 15, 2010;[5]

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[5]/ On September 17, 2009, he began receiving Workers Compensation benefits related to his August 20, 2009 injury at the rate of $279.08 per week. (Exh. P10 at 8; P11 at 7.)

> (ii) Pursuant to M.G.L. c. 152, § 35, maximum temporary partial disability benefits for the period April 16, 2010 to April 20, 2010; and
>
> (iii) Pursuant to M.G.L. c. 152, § 35, compensation for partial incapacity pursuant for the period beginning April 21, 2011.

(Exh. P16: *Loura v. City of Taunton*, D.I.A. # 022863-09, Decision at 3-4 (Mass. Dep't of Industrial Accidents, Div. of Dispute Resolution, Jul. 31, 2014).)

(b) In 2012, Mr. Loura filed a claim with the Department of Industrial Accidents (DIA) in which he sought further workers' compensation benefits for total incapacity, pursuant to M.G.L. c. 152, § 34, for the period since July 21, 2012, or, in the alternative, temporary and partial disability benefits pursuant to M.G.L. c. 152, § 35 for the period since July 16, 2012. (Exh. P16 at 2-3.) In contesting these workers' compensation benefits claims, Taunton raised as issues (among other things) Mr. Loura's disability and its extent. (*Id*. at 3.) On November 19, 2012, a Department of Industrial Accidents Administrative Judge issued an order denying the requested benefits, which Mr. Loura timely appealed. (*Id*. at 2.) Before the matter proceeded to a hearing at the Department, between December 13, 2013 and July 21, 2014 (*see* Exh. P13), Mr. Loura was examined by several physicians whose findings and assessments regarding his disability and its extent would factor into the Department's decision of his claim for further workers' compensation benefits. Those examinations were performed:

> On Mr. Loura's behalf, by Dr. Zullo, on January 18, 2010 (Exh. P4 at 12), and by orthopedic surgeon Dr. John Doherty, on April 15, 2010 (Exh. R7);
>
> On behalf of Taunton, by orthopedic surgeons Dr. James Leffers, on April 27, 2010 (Exh.

R8), and Dr. Gilbert Shapiro, on July 16, 2012 (Exh. R9); and

By impartial physicians on behalf of the Department of Industrial Accidents, orthopedic surgeons Dr. James S. Broome on June 17, 2010, and Dr. Peter A. Pizzarello, on February 6, 2013 (Exh. 15).

i. Dr. Zullo's assessment (January 18, 2010)

26. Dr. Zullo prepared a "to whom it may concern" letter, dated January 18, 2010, in which he described Mr. Loura's lumbar spine MRI as showing "degenerative spondylosis of the lumbar spine with most prominent changes at the L5-S1 level where there was grade 1 spondylolisthesis," and in which he concluded that Mr. Loura "suffers from back pain with radicular symptoms that seem to be related to the work related injury back in August [2009," and that "[g]iven his degree of pain he is currently disabled." Dr. Zullo also did not think that Mr. Loura's shoulder issues were related to the August 2009 work injury. (Exh. P4 at 12.)

ii. Dr. Doherty's assessment (April 15, 2010)

27. On April 15, 2010, Dr. John Doherty, Jr., an orthopedic surgeon, assessed Mr. Loura's ongoing lumbar and thoracic problems, and prepared a report of his examination. (Exh. R7.)[6]

(a) *History and medical records review*. Dr. Doherty's history noted the pain Mr.

[6]/ Although the record does not make the purpose of Dr. Doherty's examination clear, it appears that the examination was performed at the behest of an attorney relative to Mr. Loura's workers' compensation benefits claim.

Loura experienced after lifting the pipe cutting machine on August 20, 2009, which he described to the doctor as having been located at the junction of the thoracic and lumbar spine as well as in the lower lumbar spine area. The history also noted that Mr. Loura's thoracic spine MRI "revealed mild to moderate degenerative disk disease but no acute herniation," and that the MRI of his lumbar spine, where he experienced most of his pain, "revealed grade 1 spondylolisthesis of L5 and S1 with an element of a fragment in the left neural foramen where disk material appeared to contact the existing L5 nerve root." Dr. Doherty also noted that more recently, Mr. Loura had "developed pain across his shoulders and into his neck, which does not seem related to his original injury."

(b) *Physical examination*. Dr. Doherty's physical examination of Mr. Loura revealed joint movement limitations and related pain. The range of motion of the hip joints was slightly limited on internal rotation to the left. There was pain, during straight leg raising, over the trochanteric bursa (the fluid filled sac at the outside point of the hip known as the greater trochanter). Hip rotation also caused pain over the bursa, as did elevation of the left leg. The lumber sacral area was tender over the L5-S1 interspace; and there was marked tenderness over the left trochanteric bursa of the left femur. Dr. Doherty found a good range of motion in Mr. Loura's cervical spine with no neurological abnormalities, and shoulder range of motion was slightly limited, especially as to elevation, with pain complaints.

(c) *Assessment*. Dr. Doherty's opinion as to injury and causation was that Mr. Loura appeared to have sustained a lower back strain as a result of the lifting incident on August 20, 2009,

and that, for lack of any prior back problems shown by the medical records or related by Mr. Loura, the lifting incident was "the major cause of his present impairment and disability for a laboring job." (Exh. R7 at 2.) It was also Dr. Doherty's opinion that Mr. Loura's trochanteric bursitis could be due to his abnormal gait or to the August 2009 lifting incident, but needed to be treated before he could return to work. As to the extent of disability, it was Dr. Doherty's opinion that because Mr. Loura was only 52, he might recover sufficiently to return to work as a laborer in the water department if he was seen at a pain clinic "and appropriate injections were performed into the area of maximum tenderness and a good physical therapy exercising program was performed." However, as of April 16, 2010, when Dr. Doherty examined Mr. Loura, Mr. Loura could only return "to a job that consists of no repeated bending, no climbing in and out of ditches, no climbing up ladders, no shoveling, and no lifting greater than 20 pounds," and, therefore, he was, and had been since the August 20, 2009 injury, disabled as to water department work. (*Id.*)

iii. Dr. Leffers's assessment (April 27, 2010)

28. On April 27, 2010, Dr. James Leffers, an orthopedic surgeon, examined Mr. Loura on behalf of BME Gateway, and prepared a report of his examination. (Exh. R8.)[7]

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[7]/ Dr. Leffers' report of this examination (Exh. R8) refers to Mr. Loura as "claimant," to the City of Taunton as "insured," and the "date of loss" as 8/20/2009. BME Gateway's business includes, among other things, arranging independent medical examinations of claimants on behalf of insurers. *See, e.g.*, *Kaplan v. Arbella Mutual Ins. Co.*, 2009 Mass. App. Div. 308, __ N.E.2d __ , 2009 WL 5070228 at *1 (2009). Therefore, although the record does not make the purpose of Dr. Leffers's examination clear, it

(a) *History and medical records review.* Dr. Leffers found it significant that the medical records did not mention low back pain for nearly two months after Mr. Loura's August 20, 2009 injury. In the section of his report entitled "history of present illness," Dr. Leffers related that on August 20, 2009, while he was performing work for the Taunton water department, Mr. Loura "was bent over and was lifting a pipe cutter and was trying to toss this object to the right so he had it with his arms grasped and twisted his torso to the right to release it," and then noted "some pain in what was documented to the left intrascapular area" (the area between the shoulder blades) when he was checked at "Occupational Health Services." (Exh. R8; Leffers report at 4.) Referring to the history Mr. Loura related to him during the examination, Dr. Leffers described him as "somewhat of a poor historian," since he appeared to date his left-sided lower back pain to the August 20, 2009 injury, but the medical records, including the Sturdy Memorial Hospital physical therapy records, did not mention low back pain until nearly two months after the injury occurred. (*Id.*) Dr. Leffers noted that the September 24, 2009 MRI (*see* Finding 18) revealed moderate degenerative disk disease at T4-5 and C6-7 and a small protrusion at the T7-8 area, and had generated an assessment of a left thoracic strain, also without mentioning low back pain. (*Id.*, Leffers report at 1-2, and at 3.) Dr. Leffers also criticized Dr. Zullo's assessment of back pain with radiculopathy on December 29, 2009 without the benefit, at that time, of a physical examination or imaging documenting the

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appears that the examination was performed at the behest of Taunton's workmen's compensation insurance carrier relative to Mr. Loura's workmen's compensation benefits claim.

existence of a "pathologic abnormality of a nerve root." (*Id*. at 2.)

(b) *Physical examination*. Dr. Leffers's physical examination of Mr. Loura revealed, in his view, "a well developed, well nourished male in no acute distress." (Exh. R8 at 4.) He noted that Mr. Loura, who was 5 feet 9 inches tall and weighed 202 pounds, moved about the office "adequately well," but that he had "a slight limp favoring the left lower extremity," and had direct discomfort in the left gluteal region when the gluteal muscles were pressed up against the posterior pelvic wall, and the gluteal pain limited Mr. Loura's forward flexion. Dr. Leffers found a non-tender sacroiliac joint, low back and left intrascapular area. Lumbar extension was "normal and not significantly uncomfortable." Although tilting the lumbar spine to the left was more uncomfortable for Mr. Loura than was tilting it to the right, the left tilt appeared to be "near normal," as was trunk rotation. (*Id*.) Dr. Leffers found that Mr. Loura had "normal strength of all muscle groups in the left lower extremity" and "basically normal hip range of motion on the left," which "exclude[d] primary hip arthritis as a source of discomfort." He also found no sensory deficits in the left lower extremity. (*Id*.)

(c) *Assessment*. Based upon the medical records he reviewed and the physical examination he performed, Dr. Leffers's diagnosis was:

> "1. Infrascapular strain on the left, resolved. 2. Left low back pain, minor, unrelated. 3. Left gluteal pain, moderate to major with left anterior thigh referral, unrelated, and his prognosis was "[g]ood for infrascapular strain."

(*Id.*)[8] As to causation, it was Dr. Leffers's opinion that what he characterized as Mr. Loura's "resolved" infrascapular strain on the left (the thoracic strain) was related to his August 20, 2009 injury; however, the medical records did not mention left gluteal pain during the two months following the injury, and it was "surprising . . . that if this was present to a significant degree" that Mr. Loura "would not have mentioned it" to his caregivers during that time "for documentation as a significant problem." (*Id.* at 5.) Dr. Leffers therefore believed it was "more likely than not that the left gluteal, left anterior thigh pain has not come from the work incident." (*Id.*) Although he viewed the January 2010 lumbar MRI as having been a medically reasonable procedure on account of Mr. Loura's symptoms at the time, it did not show that the August 20, 2009 injury caused these symptoms. (*Id.* at 5-6.) In short, Dr. Leffers found insufficient medical evidence that Mr. Loura's current lower back and leg complaints were related to the August 20, 2009 injury, although his report neither identified nor suggested any other origin for them. (*Id.*) As to disability, it was Dr. Leffers's opinion that Mr. Loura was "currently able to perform his duties" as a water system maintenance worker, "based on his resolved parathoracic strain." Because he found them insufficiently related, medically, to the August 20, 2009 injury, Dr. Leffers expressed no opinion as to whether Mr. Loura's lower back and related leg pain prevented him from performing those duties. (*Id.* at 6.)

8/ "Infrascapular" refers to the area of the back lateral to the vertebral region and beneath the shoulder blade. *See* http://www.medilexicon.com/medicaldictionary.php?t=77173

iv. Dr. Broome's assessment (June 17, 2010)

29. On June 17, 2010, Dr. James S. Broome, an orthopedic surgeon, performed an independent medical evaluation of Mr. Loura related to his workers' compensation benefits claim, and prepared a report that he forwarded to the Massachusetts Department of Industrial Accidents Impartial Unit. (Exh. P5.)

(a) *History and medical records review*. Dr. Broome described Mr. Loura's most recent work as employment by the Taunton water department as a maintenance man who worked with water mains for ten years, dealing with water main breaks, leaks and renewals, and with hydrant problems, and that on August 20, 2009, he was dealing with a water main break that involved "exceedingly heavy" work. (Exh. P5 at 3.) Dr. Broome found evidence in the medical records of left hip pain and lower left trunk involvement, and Mr. Loura's complaints about this type of pain, soon after the August 20, 2009 injury. Based upon Mr. Loura's description, Dr. Broome understood that the injury occurred while he was "lifting a pipe cutter and attempting to toss it to his right." His "major complaints" at the time were "chest wall pain and thoracic spine pain," and, in addition, "most of the attention" he received from physical therapy beginning August 27, 2009 "revolved around his thoracic complaints." (*Id*. at 1.) However, Dr. Broome found it significant that according to the physical therapy intake note of August 27, 2009. Mr. Loura's problems included, in addition to thoracic complaints, "left shoulder and left hip pain, diminished strength of his trunk and the left lower extremity, difficulty turning his trunk, and difficulties occasioned by heavy lifting," and the

doctor concluded that "this injury of 08/20/09 included more than the thoracic complaint." (*Id*. at 1 and 4.) In reviewing Mr. Loura's records from Sturdy Memorial Hospital, including the notes of the thoracic MRI and records from Drs. Zullo, Doherty and Leffers, Dr. Broome noted that although the assessment was a thoracic sprain through early October 2009, as of October 20, 2009 Mr. Loura was complaining of pain in his back and left buttock that radiated into his left leg and awakened him, similar to the pain he related on August 27, 2009, and that as of October 20, 2009, "[h]is primary complaint . . . had shifted to his lumbar area, buttock pain, and left anterior thigh radiation of his pain." (*Id*. at 4.) Dr. Broome noted that the January 2010 lumbar spine MRI showed "possible irritation of the left L5 nerve root at L3-L4 and degenerative changes at L4, L5 and L5-S1 related to common degenerative changes." (*Id*. at 5.) He also noted Dr. Leffers's opinion that Mr. Loura had an infrascapular strain on the left side that had resolved, and that his low back and left gluteal pain were "unrelated" to his August 20, 2009 injury, but added that Dr. Leffers had reached this conclusion "even though" these pains were noted on August 27, 2009 as part of Mr. Loura's intake complaint (*id*. at 5.)

(b) *Physical examination*. Dr. Broome found discernable medical conditions on Mr. Loura's left side, from the shoulder to the knee, that he viewed as related to Mr. Loura's continuing pain in these areas. Mr. Loura's complaints when Dr. Broome examined him on June 17, 2010 were "left shoulder, low back, hip and left upper extremity pain." (*Id*. at 1.) Dr. Broome noted that Dr. Zullo was treating Mr. Loura for "low back and left-sided hip pain, pain which goes down into his

left leg," and shoulder pain as well, and that Dr. Zullo was prescribing a muscle relaxant and antianxiety medicine. (*Id*. at 3.) Dr. Broome noted that Mr. Loura walked with a limp favoring the left side, and that his shoulders were not leveled, with the left shoulder lower than the right when he walked and sat. He also noted that Mr. Loura was bow-legged, with the left knee being more bowed than the right (a "varus deformity") and, in addition, Mr. Loura had a 10 degree chronic flexion contracture. He had full range of motion of the right shoulder, but, at the left shoulder, only 30 degrees of active range of motion, full forward flexion passively, and 60 degrees of active abduction, with internal rotation equal to that of the right shoulder. Mr. Loura was able to dress and undress without assistance, had full range of motion of the cervical spine, and "minor loss of lordosis" (loss of normal inward curvature of the lumbar and cervical spine regions), was able to walk on his toes and heels with good balance, and could bend forward and bring his fingertips as far as his knees, but he could not fully extend his left knee. Dr. Broome also noted a spasm in the left paraspinous muscles in the lumbar area. There were no obtainable ankle or knee jerks. There was visible and palpable atrophy of the left lower calf and thigh. Dr. Broome found that the distance from the superior pole of the patella to the right thigh was 1½ inches more than the same measurement on the left side at a similar location, and the circumference of his left calf was less than that of the right calf. Dr. Broome also noted tenderness about the medial aspect of Mr. Loura's right knee, greater trochanteric hip pain to palpation on the left side, and left sciatic notch pain, but no detectable loss of sensation or vibratory sense in the lower extremities. (*Id*. at 5.)

(c) *Assessment*. Dr. Broome concluded that Mr. Loura was partially and temporarily medically disabled as a result of medical conditions that were causally connected to the August 20, 2009 injury and the nature of his work at the Water Department over many years. His report stated:

> My assessment based upon a reasonable degree of medical certainty is that this man has several problems, which were documented on 08/27/09, after an injury, which initially caused him thoracic pain. Other components of his injury of 08/20/09 are documented [to] have been present and notable at his intake into the health care system on 08/27/09. [My] diagnosis is that of left shoulder pain, degenerative disc disease in the lumbar spine, osteoarthrosis of both knees, and left greater trochanteric pain related to bursal pain or disruption of the gluteus medius tendon of insertion. I believe he has a causal connection of these medical conditions found on examination with the history of injury provided to me and the nature of work he performed over a long period of time. The reason for the causal relationship opinion is his history and clinical findings and medical records. It is my opinion that the employee is medically disabled and temporarily and partially so. He has physical limitations as to his ability to lift, stand, sit, and push or pull for any length of time beyond the activities of daily living. It is not my opinion that he represents a medical end result.

(Exh. 5 at 6.)

v. Dr. Shapiro's assessment (July 16, 2012)

30. Dr. Gilbert Shapiro, an orthopedic surgeon, examined Mr. Loura on July 16, 2012. Dr. Shapiro performed an independent medical examination related to Mr. Loura's workers' compensation benefits claim on July 16, 2012, and prepared a report of the examination on the same date. (Exh. R9.)[9]

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[9]/ The report was addressed to "FutureComp/ TD Insurance, referenced the City of Taunton as "insured," and also referenced an insurance claim number. Therefore, although the record does not make the purpose of Dr. Leffers's examination clear, it appears that the examination was performed at the

(a) *History and medical records review.* Dr. Shapiro described Mr. Loura's most recent work as employment by the Taunton water department for ten years, performing maintenance work that required heavy shoveling using a jackhammer, as well as lighter types of work that required he be in "sometimes awkward positions." Mr. Loura told him that he injured his back on August 20, 2009 when he twisted while moving a pipe cutter to avoid a backhoe that was in the area." He denied having back problems prior to this injury. (Exh. R9 at 1, 2.) Dr. Shapiro described Mr. Loura as "inconsistent as to his medical treatment," and described the physical therapy he received as having "made him worse." In reviewing the medical records, the doctor found a reference to "back pain" in the Massachusetts General Hospital notes regarding his October 15, 2009 appearance there. (*See* Finding 19 above.) It is unclear from Dr. Shapiro's report whether he mentioned this record because he did not find, or have before him for review, any earlier medical record mentioning Mr. Loura's back pain, such as the August 27, 2009 Sturdy Memorial Hospital physical therapy assessment report (*see* Finding 13). Dr. Shapiro described subsequent injections, all epidural except for one in the sacroiliac joint region, that, according to Mr. Loura, "didn't seem to work." (Exh. R9 at 2.) Dr. Shapiro described what the September 24, 2009 thoracic spine MRI showed as "[m]ild to moderate degenerative disc disease but without evidence of disc herniation," and what the January 2, 2010 lumbar spine MRI showed as "degenerative spondyloarthropathy of

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behest of Taunton's workmen's compensation insurance carrier relative to Mr. Loura's workmen's compensation benefits claim.

the lumbar spine with most prominent changes at the L5-SI level where there is grade 1 spondylolisthesis," as well as "changes at L4-5 and at 2-3 and 3-4 mid narrowing of the left foramina at those levels." (*Id*. at 3.) He described Dr. Doherty's April 16, 2010 report as presenting a diagnosis of "low back strain," and Dr. Leffers's April 27, 2010 report as "not[ing] an impression of infrascapular strain, left low back pain, minor unrelated left gluteal pain to left anterior thigh unrelated." Dr. Shapiro described Dr. Broome's report of his impartial examination on June 17, 2010 as relating "a diagnosis of initial thoracic pain, left shoulder pain, degenerative lumbar disc disease, oasteoarthritic knees and left greater trochanteric bursistis," although Dr. Shapiro did not include in this description Dr. Broome's opinion as to causation (*see* Finding 25(d) above). (*Id*. at 3.)

(b) *Physical examination*. Mr. Loura's complaints, when Dr. Shapiro examined him, were "pain about the left buttock to the outer aspect of the left hip and radiation to the anterior thigh and then medially as well as down the lateral aspect of the left calf," with no associated numbness, and no urinary or bowel disturbances. His current treatment was with a TENS (transcutaneous electrical nerve stimulation) unit and medications, including muscle relaxants, soma and Flexeril (and formerly, Vicodin, which he no longer took) as analgesics, as well as Tylenol and Klonepin. (*Id*. at 2.) Mr. Loura was able to move about the examination room "quite readily," with normal heel-and-toe walking, and he was able to squat normally. He had "no particular pain" over the sacroiliac joints, but did have "pain to the left of the midline over the left ilium and left sciatic notch

tenderness." Dr. Shapiro noted "50% normal range of lumbosacral motion," reversing lumbar lordotic curve on flexion, and 50% of normal extension and lateral bends. Mr. Loura's hips moved "equally with some restrictions of internal rotation." He noted "tenderness over the outer aspect of the greater trochanter" (the two knobs at the top of the femur, to which the muscles between the thigh and pelvis are attached). He observed "equal but diminished" knee and ankle reflexes, no muscular atrophy about the calves, no weakness or dorsiflexion of the foot and toes, and no sensory abnormalities. (*Id*. at 2-3.)

(c) *Assessment*. Dr. Shapiro concluded that Mr. Loura's August 20, 2009 injury had aggravated preexisting degenerative conditions in his lumbar spine. Based upon his evaluation of Mr. Loura, his diagnosis was "lumbar spondylosis with degenerative disc disease predominantly L5-S1 and left sciatica." As to causation, it was Dr. Shapiro's opinion that:

> Mr. Loura has MRI documented preexisting degenerative changes in [his] lumbar spine. This, by history, was aggravated in the twisting injury of August 20, 2009...
>
> The present complaints of low back pain and left leg radiation are consistent with the twisting injury and lifting along with the preexisting degenerative changes in the lumbar spine.

(*Id*. at 4.) As to disability, Dr. Shapiro concluded that although Mr Loura would be able to sit, stand and walk and use his upper extremities without restriction, he would be unable "to be in awkward positions" or to squat and lift above 40 pounds," and that he could return to a full-time position within these restrictions. He opined that "[t]he predominant reason for those restrictions is his preexisting degenerative changes." Dr. Shapiro noted that Mr. Loura was able to live at home, take

care of his house, and drive, and that his present regimen of medications and the TENS unit "was appropriate along with an exercise regime." That said, Mr. Loura's disability appeared to be permanent. In Dr. Shapiro's opinion, there had been, since the August 20, 2009 injury, "minimal improvement despite good conservative medical treatment including epidural injections." Dr. Shapiro believed that Mr. Loura had:

> reached a medical end result in terms of the aggravation caused by the injury reported. His current status is due to the pre-existing degenerative changes in his lumbar spine.

(*Id*. at 4.)

31. On February 6, 2013, orthopedic surgeon Dr. Peter A. Pizzarello examined Mr. Loura relative to the Department of Industrial Accidents hearing on his workers' compensation insurance claim, and prepared a report of his findings and conclusions. (Exh. 15.) Based upon the history of the August 20, 2009 injury that Mr. Loura gave him, the medical records he reviewed, including the MRI results showing "degenerative changes in [Mr. Loura's back," and the physical examination he performed, Dr. Pizzarello stated in his report that:

> [Mr. Loura's] diagnosis is thoracic back pain and low back pain with left-sided radiculopathic findings and left-sided paracervical tenderness related to his lifting/twisting injury of 08/20/2009. The reason for the causal relationship is predicated upon the history given by the patient. The patient is, in my opinion, permanently partially impaired. He should avoid excessive bending, lifting, stooping, pushing and/or pulling and he should have a weight restriction of 20 pounds. Prior to any consideration of work, he should have a course of work hardening. . . . It is my opinion that this gentleman is at an end result . . . .

(Exh. 15 at 3.)

f. Further Treatment and Evaluation: 2010-2012

32. On August 4, 2010, Mr. Loura saw Dr. Zullo for the first time since December 2009, prior to the lumbar spine MRI, suggesting that there was no followup physical examination in February 2010. The purpose of the visit was to complete forms Mr. Loura needed to document his disability for a loan payment deferral application. Dr. Zullo's record for the visit relates that Mr. Loura's worker's compensation benefit payments had resumed based upon Dr. Broome's examination, and that he continued to have lower back pain radiating into the left hip and as far down as the knee, as well as shoulder pain. He also noted a lipoma on Mr. Loura's right shoulder, which was unsymptomatic, and elevated blood pressure. (Exh. 4 at 13.)

33. On August 31, 2010, Mr. Loura was examined by Dr. Nina S. Janatpour at Sturdy Memorial Hospital relative to his complaints of pain in the left lower back, left hip and left lower extremity. She noted "an approximately 1 year history of low back pain, left hip pain, and left lower extremity pain following a work-related injury," followed by "physical therapy and occupational therapy with minimal benefit." She also noted that the lumbar MRI findings "support a lumbar radiculopathy as well as spondylolisthesis of the lumbar spine," as well as "disease in the sacroiliac joints," which was further supported by physical examination findings of tenderness in the left sacroiliac joint. Dr. Janatpour thought that Mr. Loura "may also have left greater trochanteric bursitis that may be contributing to his overall pain as well." She believed that Mr. Loura "would

benefit most from a lumbar steroid injection," and asked him to return for this procedure. Based upon his response to this injection, Dr. Janatpour anticipated repeating the epidural injections, or trying a left sacroiliac joint injection, a series of left medial branch blocks, and/or a left greater trochanteric bursal injection. She started Mr. Loura on gabapentin, initially 100 mg nightly, to "address the neuropathic component of his symptoms." (Exh. P6 at 1-5.)

34. Mr. Loura had the lumbar spidural steroid injection on October 1, 2010, but afterward reported to Dr. Janatpour, during a followup examination on October 21, 2010, that "he got approximately 50% pain relief that lasted for just over 1 week before the pains started to gradually return," and he was complaining of "a constant aching pain in the low back and hip area with occasional sharp pains into the hip and pain radiating into his lower left extremity with a cramping sensation in his calf as well as tingling in his left lower extremity" that increased with most activities but alleviated by rest and heat. Dr. Janatpour found significant tenderness over the left sacroiliac joint, and mild tenderness over the right sacroiliac joint, and mild tenderness only to deep palpation over the left greater trochanter. She planned to alternate lumbar epidural steroid injections and sacroiliac joint injections under fluoroscopy, to determine which gave him greater and longer-lasting relief. Mr. Loura declined additional neuropathic pain medications so he could see how he responded to the injections. (Exh. P6 at 6-9).

35. Dr. Janatpour administered the sacroiliac joint injections under fluroscopy to Mr. Loura on November 12, 2010. (Exh. P7 at 5-8.) During a followup visit on December 15, 2010, Mr.

Loura told Dr. Janatpour that he had “very short-lived pain relief from his sacroliac joint injection,” and “received greater benefit and longer lasting benefit from the lumbar epidural steroid injections.” Dr. Janatpour’s impression was that “the majority of his pain [was] radicular in nature,” and that he would therefore obtain more pain relief from a second, and then possibly a third and fourth, lumbar epidural steroid injection. (Exh. P6 at 10-13.)

36. On February 1, 2011, at Sturdy Memorial Hospital, Dr. Do Chan administered Mr. Loura’s second lumbar epidural steroid injection into the foraminal area (the opening at the side of the spine where there is a nerve root—in this case, in the middle of the L5 foramen). Mr. Loura was to be followed at the hospital in approximately 4-6 weeks. (Exh. P7 at 10-11.)

37. Mr. Loura saw Dr. Zullo on April 19, 2011. Dr. Zullo noted that Mr. Loura was now experiencing more pain in the right shoulder than the left shoulder, and that the shoulder hurt with overhead arm motions. Mr. Loura’s worker’s compensation case was scheduled for a hearing on the following day. Dr. Zullo’s note related that Mr. Loura wanted mostly to discuss the shoulder issue “and see how his Worker’s Compensation case may pertain to his shoulders.” Dr. Zullo suspected that the shoulder might indicate “a long term issue going on here,” and suggested to Mr. Loura that he “wait to see what the outcome of the hearing is tomorrow,” since “[p]ending that hearing he will likely need to see orthopedics to get further evaluation and treatment of his shoulder issues.” Dr. Zullo also noted that Mr. Loura had an elevated blood pressure (162/110). (Exh. 4 at 16-18.)

38. Mr. Loura was followed on April 25, 2011 Dr. Sergei Margulian at Sturdy Memorial

Hospital's pain management center. Dr. Margulian noted Mr. Loura's current complaint of continuing lower back pain, radiating into the left lower extremity down to the foot. Based upon Mr. Loura's description, Dr. Margulian noted the pain as "sharp and shooting, positive for numbness in the toes of the left foot." Mr. Loura told him that the second lumbar epidural steroid injection had given him 25 percent pain relief for 5-6 days. Dr. Margulian gave Mr. Loura a choice of trying an additional transforminal epidural steroid injection at a lower level, L5-S1, or consulting with a neurosurgeon or spinal orthopedic surgeon. Mr. Loura chose the additional injection. (Exh. P6 at 14-15.)

39. Mr. Loura was scheduled for an additional left L5-S1 transforminal epidural steroid injection on October 20, 2011. On that day, he appeared at Sturdy Memorial Hospital's pain management center complaining of significantly increased, and nearly constant, low back and left thigh pain radiating into the left leg, all the way down to the left front and heel of the left foot, as well as neck and left chest pain starting from the neck and continuing around the rib under his left arm. Mr. Loura refused to proceed with the injection or with a physical examination, and instead requested cervical, thoracic and lumbar spine MRIs, for which Dr. Margulian wrote an order. Dr. Margulian also requested that Dr. Zullo see Mr. Loura to evaluated his left chest pain. (Exh. P6 at 20-21.)

40. Mr. Loura was seen next at Sturdy Memorial Hospital's pain management center on December 8, 2011. The notes for this visit state that the MRIs for which Dr. Margulian had written

an order on October 20, 2011 "are still currently pending," although they do not state why that was. The notes state next that Mr. Loura had "really had no relief from any of the injections" given to him, and that there was "not really anything else" the pain management center could offer him. The nurse practitioners who wrote and signed the note suggested he consider a referral to another specialist such as a neurologist. (Exh. P6 at 23-24.)

41. Dr. Margulian saw Mr. Loura several more times at Sturdy Memorial Hospital after the pain management center concluded that it had no effective interventional pain management therapy to offer him. After examining Mr. Loura on February 9, 2012 and finding no significant changes in his pain complaints (other than that Mr. Loura reported it was "worse in the morning with stiffness bending forward and backward"), Dr. Margulian determined that he would fit him for a TENS (transcutaneous electrical nerve stimulation) unit. (Exh. P6 at 25-27.) Mr. Loura was fitted for the TENS unit on March 14, 2012, and was to be followed in 4-6 weeks to determine whether the unit was working to manage his pain. (Exh. P6 at 29-30.) On April 25, 2012, Dr. Margulian examined Mr. Loura, who said he was using the TENS unit daily for about 120 minutes, during which time his pain diminished approximately 60 percent, but that after using the unit, pain relief lasted about an hour and then the pain returned fully, and that the pain in the left hip was where the pain was the worst. Dr. Margulian was particularly concerned with Mr. Loura's blood pressure, which was 188/99, and that because this put him at high risk for heart attack and strike, he needed to be seen in the hospital's emergency room (which Mr. Loura declined to do), or see his primary

care physician. Dr. Margulian also advised Mr. Loura to continue using the TENS unit. (Exh. 6 at 31-32.)

g. Accidental Disability Retirement Application

42. On June 5, 2012, Mr. Loura filed an application for disability retirement with the Taunton Retirement System. (Exh. P11 at 1-18.)

(a) In this application, Mr. Loura identified his work as that of a water department maintenance person (*Id*. at 3);

(b) He identified the duties he was required to perform in this position as working "all over the City of Taunton on a daily basis," (*id*. at 5) "in the trenches repairing water main breaks and leaks," "putting new water systems into residences and commercial buildings," and using a jackhammer "to break into the ground for the operators [of excavation equipment] to dig the trench" (*id*. at 2, 3); he estimated that he worked in trenches performing these tasks approximately three times per week (*id*. at 2); described the trench work as strenuous, as it was done in "tight" spaces that were "full of dirt, rocks, mud and water," and as requiring, on his part, heavy lifting, stooping, bending, being on his knees in awkward positions (*id*. at 5); and stated that when he was not working in trenches, he was repairing leaks and water meters "which was also rigorous work" (*id*. at 2, 5);

(c) Mr. Loura checked both "Personal Injury" and "Hazard" as the reasons he was claiming to be disabled, and described "the personal injury he sustained or the hazard to which he

was exposed" based upon which he sought an accidental disability retirement as having occurred on "[a]ll dates of employment up to and including a specific injury on August 20, 2009 up to [his] last day of work approximately August 20, 2009 due to repetitive use and strenuous work activity" (*id*. at 5), and described his injuries as "repetitive" and caused by the work he performed daily "including but not limited to jackhammering, shoveling, welding pipes, cutting pipes, fitting pipes in street trenches," and specifically, on August 20, 2009, "moving a pipe cutter." (*Id*. at 6.)

(d) Mr. Loura stated the medical reason for his disability retirement application as "injury to back, thoracic spine, [i]njury to shoulders, both knees, bursal pain related to trochanteric pain, and injury to gluteus medius tendon," and stated that as a result of his disability, he ceased being able to perform all of the essential duties of his position on August 24, 2009. (*Id*. at 2.)

43. Mr. Loura submitted a statement dated April 23, 2012 by his treating physician, Dr. Zullo, in support of his accidental disability retirement application, on a form prescribed by the Public Employee Retirement Administration Commission (PERAC). (Exh. P11 at 19-22.) In this statement, Dr. Zullo described Mr. Loura's job title as "Water/Sewer Dept worker," and stated that although he did not review his job duties, Mr. Loura was physically incapable of performing the essential duties of his job because he could not perform duties involving lifting, bending, reaching or squatting. (*Id*. at 20.) Dr. Zullo stated his diagnosis of Mr. Loura's condition to be "lumbar back pain with radiculopathy" and "sacroiliitis," based upon the 2010 MRI showing "degenerative spondylopathy." (*Id*.). He noted that Mr. Loura had "no prior history of significant back injury," that

his condition had not changed in the past year, and that neither injections administered at Sturdy Memorial Hospital's pain clinic nor medications nor other "multiple appropriate therapies" had brought about any improvement for Mr. Loura during the 2 ½ years since he became disabled. (*Id.* at 21.) The final question on the physician's statement form was "[u]pon weighing the medical influence described, is it more likely that the disability was caused by the job-related personal injury or hazard undergone, or the non-work related event or circumstance or condition?" Dr. Zullo's response was :"Job-related personal injury." (*Id.*)

44. Dr. Zullo did not change his opinion as to disability, its permanence or its job-related causation. In a letter to the Taunton Contributory Retirement System dated October 25, 2012, Dr. Zullo stated his opinion that Mr. Loura was disabled from performing his job duties. He wrote, in pertinent part, that:

> Given Mr. Loura's ongoing symptomatology for 3 years since his work injury, and his inability to improve enough to return to work despite multiple treatment interventions, I would consider him totally disabled at this time for any employment in the foreseeable future.

(Ex. P4 at 23.)

45. Mr. Loura's direct supervisor at the Taunton DPW Water Division, Michael Prado, completed the employer's portion of Mr. Loura's disability retirement application on a form prescribed by PERAC. (Exh. P10.) This, too, was on a PERAC form. The form requested, among other things, a description of Mr. Loura's essential duties. What Mr. Prado wrote was consistent with Mr. Loura's description; the job required daily work in trenches, with heavy equipment

including power and pneumatic tools, in all weather conditions and possibly at any time of the day or night, and this work required the ability to climb ladders, lift 50 pounds overhead, and engage in frequent bending, climbing and reaching. (*Id*. at 3.) The form also asked whether Mr. Loura could perform the essential duties of his position if he was reasonably accommodated. Mr. Prado answered "no," and identified "watchman" as the only position Mr. Loura could perform with the water division. (*Id*.) He also stated that Mr. Loura had "a history of poor 'time and attendance'" and had "been disciplined and suspended for that history." (*Id*. at 4.) Mr. Prado described the August 20, 2009 incident was "lifting pipe cutter without assistance," but stated that Mr. Loura's claimed disability was *not* the result of any misconduct on his part. (*Id*. at 5.)

h. Medical Panel Determination

46. PERAC convened a regional medical panel comprising three orthopedic surgeons—Dr. Robert J. Nicoletta, Dr. Ronald E. Rosenthal, and Dr. Victor A. Conforti—to determine whether Mr. Loura qualified for accidental disability retirement under M.G,L. c. 32, §7(1).[10] The panel members were asked to evaluate the three grounds on which an accidental disability retirement application is determined under the statute: incapacity (whether Mr. Loura was, as a result of the

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[10]/ M.G.L. c. 32, § 6(1) provides in pertinent part that "[n]o member shall be retired for a disability under the provisions of this section or section seven unless he has been examined first by a regional medical panel and unless the physicians on such panel, after such examination, shall review the pertinent facts in the case, and such other written and oral evidence as the applicant and the employer may present to be reviewed in making a determination of the member's medical condition."

injury he alleged, mentally or physically incapable of performing the essential duties of his job), the likelihood that the incapacity was permanent, and causation— whether Mr. Loura's disability was "such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement [was] claimed." To assist the medical panel members preparing their respective evaluations, the Taunton Retirement Board sent each of them a copy of Mr. Loura's official job description, his accidental disability retirement application (including his description of the work he performed and the August 20, 2009 pipe cutter incident, his reasons for claiming disability, and Dr. Zullo's supporting statement), the employer's statement regarding the application, and Mr. Loura's medical records. (Exh. R3 at 1.) Each of the medical panel members reviewed the materials that the Retirement Board sent him, examined Mr. Loura individually, and prepared a report of his findings and conclusions (Exhs. P12, P13, P14.)

i. Evaluation by panel member Dr. Robert Nicoletta

47. Dr. Nicoletta examined Mr. Loura on September 29, 2012 and prepared a report of the same date. (Exh. P12 at 1-3.)

(a) *History and medical records review*. Dr. Nicoletta noted the extensive medical records after August 20, 2009 for Mr. Loura, including a lumbar spine MRI showing degenerative spondyloarthropathy, most prominent at L5-S1, with grade 1 spondylolisthesis. He also described Mr. Loura's work for the Taunton Water Department as involving "heavy labor-type activity," and

of having injured his lower and mid back on August 20, 2009 while attempting to move a pipe cutter to avoid a backhoe. Dr. Nicoletta also described Mr. Loura's increasing lower back pain following the injury with some radiation down his left leg, for which neither physical and occupational therapy nor pain management injections had provided improvement. (Exh. P12 at 1-2.)

(b) *Physical examination*. Dr. Nicoletta described Mr. Loura's current complaints as "left paralumbar pain with left buttock pain, pain radiating into theouter aspect of his left hip, and radiating down the posterior aspect his left leg," as well as "lower back pain with prolonged sitting, bending, turning and twisting activities." (Exh. P12 at 2.) Physical examination showed "palpable tenderness of the left para-lumbosacral musculature, especially with range of motion," with discomfort with flexion at 40 degrees and extension at 20 degrees, left and right lateral bending at 15 degrees, and left and right rotation at 50 degrees. (*Id*. at 2-3.) Mr. Loura complained of "lower back pain radiating to the left leg, not distal to the knee with straight left raising in the sitting position on the left, negative on the right." (*Id.* at 3.)

(c) *Answers as to Disability, Permanence and Causation*. Dr. Nicoletta's diagnosis was "[l]umbar strain with chronic lower back pain, lumbar degenerative disc disease, lumbar spondylosis, most pronounced at L5-S1 with ongoing left sided radiculopathy/sciatica." (Exh. P12 at 3.) As to conclusions regarding disability, permanence and causation, Dr. Nicoletta wrote:

> There does appear to be a causal relationship established by the history. He has had conservative management extensively. He has had injections; the injury was 3 years ago. He is unlikely to have any further change in his symptomatology with any ongoing treatment. It does not appear he can return to his prior work capacity which

> involves heavy manual labor, both now and in the future due to the fact that he is likely [to] have further exacerbation of his symptomatology related to a chronic lumbar spondyloarthropathy and lumbar degenerative disk disease.

(*Id.*) Dr. Nicoletta's answers were, thus, "yes" as to Mr. Loura being disabled and as to the disability's likely permanence, and that his incapacity was "such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed." (*Id.*)

ii. Evaluation by panel member Dr. Ronald E. Rosenthal

48. Dr. Rosenthal examined Mr. Loura on October 11, 2012 and prepared a report of the same date. (Exh. P13 at 1-5.)

(a) *History and medical records review*. Dr. Rosenthal related Mr. Loura's description of his August 20, 2009 injury as having occurred while he working at a water department job site while lifting a heavy pipe cutter weighing over 80 pounds, and as having been followed by progressive thoracolumbar[11] pain, which had left him unable to continue working. (Exh. P13 at 1.) He also noted that the report of the September 24, 2009 MRI (*see* Finding 18) described "mild to moderate degenerative disk disease throughout the thoracic spine," and that the report of the lumbar spine MRI performed on January 2, 2010 described "multiple areas of degenerative disk disease,

[11]/ Thoracolumbar refers to the area containing both the thoracic and lumbar vertebrae of the spine. *See* https://www.reference.com/science/thoracolumbar-spine-972d4e66134ee6cf

which was most prominent and most severe at L5-S1, with a posterior facet hypertrophy, and spinal stenosis," as well as " grade 1 spondylolisthesis at L5-S1." (Exh. P13 at 2.) Dr. Rosenthal stated that he "did not see any description of a pars interarticularis defect," and he "believe[d] that the spondylolisthesis is degenerative, rather than developmental, in nature."[12]

(b) *Physical examination*. Dr. Rosenthal noted that Mr. Loura walked slowly with an antalgic limp (meaning that it was a way of walking to avoid pain), sometimes on the right and on other occasions on the left. He found an area of diffuse tenderness over the entire lumbar spine, the entire sacrum, and both gluteal and trochanteric areas, and no palpable lumbar paravertebral spasm. Lumbar spine motions were painful, and attempts to move the back beyond the limits Dr. Rosenthal noted (flexion to 75 degrees, hyperextension to -15 degrees, and lateral bending to 15 degrees in each direction) resulted in "increasing pain referred to the midline of the lumbar spine." This was also noted when Mr. Loura engaged in heel-and-toe walking. Dr. Rosenthal also noted "an area of slightly-decreased sensation across the lateral border of the left leg." (Exh. P13 at 3.)

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[12]/ The pars interarticularis is a small connecting bone in the lumbar spine. It "connects the facet joints that are a chain of joints found on each side of the spine." The "facet joints spread apart and have no pressure on them when one is sitting or bending forward," but "press against each other and are under pressure during activities such as running, jumping, kicking, rotating or arching backward." Harris, S, *Pars Stress Fractures of the Lumbar Spine* (Palo Alto Med. Foundation; undated), http://www.pamf.org/sports/harriss/parsstressfractures.pdf. Pars interarticularis stress fractures occur almost exclusively among adolescents, whose pars bones are elongated and, as a result, particularly thin, weak and prone to fracturing, and this type of injury is therefore well-known among adolescent athletes. *Id*. These fractures occur at the lowest parts of the lumbar spine, usually at the L5 level. *Id*. For the most part, these fractures are not visible on spinal x-rays unless they have been present for some time; however, they can be seen on an MRI, CT or bone scan, tests that are generally performed when the patient complains of significant pain before the point at which a pars stress fracture becomes visible on an x-ray. *Id*.

(c) *Answers as to Disability, Permanence and Causation*. Dr. Rosenthal's diagnosis was degenerative arthritis of the lumbar spine and a thoracolumbar strain. He concluded that Mr. Loura was physcially incapable of performing the essential duties of his job, all of which he understood as involving crawling, heavy lifting, working overhead or underground, or wielding heavy equipment. It was also his view that Mr. Loura's incapacity was likely to be permanent. Dr. Rosenthal found the treatment Mr. Loura received to have been appropriate, including physical therapy and then epidural steroid injections for pain relief. Because none of these modalities had relieved his symptoms, Dr. Rosenthal believed that Mr. Loura was "at a medical end point." (Exh. P13 at 4.) As to causation, Rosenthal opined that Mr. Loura's incapacity was *not* the natural and proximate result of the August 20, 2009 injury. He wrote:

> In reviewing his records, I am unable to connect the accident that occurred over three years ago with his current symptoms today. I believe that his current physical examination and symptoms are due to the progression of underlying osteoarthritic changes in his lumbar spine. I believe that this is due to the progression of underlying conditions, and that the thoracolumbar strain he sustained on August 29 [sic], 2009 would have [otherwise] resolved within a period of six to eight months. Therefore, it is my opinion that said incapacity is not the proximate result of the work injury sustained on account of which retirement is claimed.

(*Id.*)

iii. Evaluation by panel member Dr. Victor A. Conforti

49. Dr. Conforti examined Mr. Loura on October 22, 2012 and prepared a report of the same date. (Exh. P14 at 1-4.)

(a) *History and medical records review.* Dr. Conforti related Mr. Loura's description of his August 20, 2009 injury as having occurred while he was working to fill a trench, when he attempted to move a heavy pipe cuttter as a backhoe was maneuvering, as a result of which he developed pain in his back that continued, and for which he sought treatment at Sturdy Memorial Hospital. (Exh. P14 at 1.) Mr. Loura described the physical therapy he received as having "made him worse." (*Id.* at 2.) Dr. Conforti noted that the thoracic spine MRI showed "mild to moderate degenerative disc disease without evidence of herniation," and "slight cord contact in the neutral position at T8-9, slightly eccentric to the left without compression," and that the lumbar spine MRI he had subsequently, on January 2, 2010, "showed degenerative spondylo-arthropathy most prominent at L5-S1 with first degree spondylolisthesis," as well as "diffuse bulges at L2-3, and L3-4 and degenerative changes at L4-5." (*Id.*) Dr. Conforti also noted that three subsequent injections in Mr. Loura's low back generated no improvement for him, and that he was not sure if he was really obtaining relief from the TENS unit he was given by Sturdy Memorial Hospital's pain unit. (*Id.*)

(b) *Physical examination*. Dr. Conforti described Mr. Loura's current complaints as back pain, with pain radiating to the left leg as far as the calf. He did not have any tingling or numbness in his feet. He had previously been able to exercise in the gym regularly, but could not do this any more. (Exh. P14 at 2.) During the physical examination, Dr. Conforti noted that Mr. Loura walked with a slight antalgic gait, favoring the left leg. He noted tenderness in the lumbar area and in the left sciatic notch. Mr. Loura was able to flex to 50 degrees, with discomfort. Lateral

bending was to 10 degrees, and extension was 0 degrees. Dr. Conforti noted that Mr. Loura's heel and toe walking were "intact," and that straight leg raising "produces a little posterior thigh pain on the right at 90 degrees. He noted a difference in thigh measurements (the right thigh measured 16½ inches, and the left thigh measured 15½ inches).

(c) *Answers as to Disability, Permanence and Causation*. Dr. Conforti diagnosed "aggravation of underlying degenerative arthritis and degenerative disc disease, and first degree spondylolisthesis at L5-S1 of the lumbar spine." (Exh. P14 at 3.) Because Mr. Loura was not able to lift over 5-10 pounds on a continuous basis, it was Dr. Conforti's opinion that he could not perform the essential duties of his job. (*Id*.) Because this incapacity was not likely to improve in the near or distant future, and there was "no mention of surgery for him," Dr. Conforti's opinion was that it was permanent. (*Id*.) As to causation, it was Dr. Conforti's opinion that Mr. Loura's August 20, 2009 injury had "accelerated" his "underlying condition of degenerative arthritis and degenerative disc disease," and that his incapacity was therefore "such as might be the proximate result of the work injury sustained on account of which retirement is claimed." (*Id*.)

i. The Retirement Board's Questions to the Medical Panel Members, and Their Responses

50. On January 7, 2013 the retirement board, by its counsel, sent a letter to each member of the medical panel requesting clarification of each panel member's findings. (Exh. R4.) Each of the panel members responded to the board's request. (Exhs P12 at 4-5 (Dr. Nicoletta); Exh. P13 at

6-7 (Dr. Rosenthal); Exh. P14 at 5-6 (Dr. Conforti).)

i. Questions to, and Response by, Dr. Nicoletta

51. In his January 7, 2013 letter to Dr. Nicoletta, board counsel noted that he had answered the question as to causation in the affirmative; he also stated that the MRI reports in the medical records "did not show any description of a pars interarticularis defect (fatigue fracture) and a question has arisen whether the spondylolisthesis from which Mr. Loura suffers is degenerative in nature rather than developmental" (parentheses in original).[13] His questions to Dr. Nicoletta were therefore:

> 1. In reviewing the MRI reports provided to you, is there merit to the suggestion that the lack of a pars interarticularis defect connotes a disability due to the natural progression of an underlying degenerative condition rather than a condition which developed as the result of trauma? If the answer is yes, please articulate why, and if the answer is no, please articulate why not.
>
> 2. The medical records post injury suggest that Mr. Loura suffered a thoracolumbar strain on the date of injury. Would it not be expected that such a strain would resolve over a period of time?
>
> 3. In linking Mr. Loura's permanent disability to his August 20, 2009 injury, can you further expand upon your opinion as to how a thoracolumbar strain is the proximate cause of the disability or otherwise aggravated Mr. Loura's pre-existing condition to the point of disability?

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[13]/ Dr. Rosenthal (but not Dr. Nicoletta) had noted that the MRI reports did not mention a pars interartularis defect, and based, at least in part, upon this omission, Dr. Rosenthal concluded that Mr. Loura's spondylolisthesis was "degenerative, rather than developmental, in nature." *(See* above at Finding 47(a).)

(Exh. R4 at 3-4.)

52. Dr. Nicoletta responded to these questions on January 24, 2013, in a letter he titled "Addendum." (Exh. P12 at 4-5.) Referring to the physical examination he performed after Mr. Loura described his August 20, 2009 injury and his current pain complaints, Dr. Nicoletta wrote that:

> The patient was complaining of left paralumbar pain, left buttock pain, and pain radiating down the lateral aspect of the left hip, posterior aspect of the left leg, lower back pain with prolonged sitting, bending, turning and twisting activities. The patient underwent a physical examination. The diagnosis was a lumbar strain occurring at that time, now with chronic lower back pain, lumbar degenerative disk disease, lumbar spondylosis, most pronounced at L5-S1 with ongoing left-sided radiculopathy and sciatica. Based on the patient's ongoing symptomatology of chronic pain issues, conservative management which has been extensive including injections, it is unlikely as having any further change in his symptomatology with ongoing treatment and that any heavy manual labor both now and in the future would cause further exacerbation of his symptomatology related to not the lumbar strain but the chronic lumbar spondyloarthropathy and lumbar degenerative disk disease. The patient's disabilities related to underlying progressive spondyloarthropathy, degenerative disk disease, which did not occur from one specific incident but which progressed over time. The injuries previously noted specifically was [*sic*] a soft tissue thoracolumbar strain injury and that would be expected to improve over a period most likely of 8 to 12 weeks. The patient was left with chronic pain issues it appears related to lumbar degenerative disk disease, lumbar spondylosis, left-sided radiculopathy and sciatica. The patient's current cause of disability is related to those findings and not related to the thoracolumbar strain.

(Exh. P12 at 5.) Per this explanation, Dr. Nicoletta clarified that Mr. Loura's disabilities, including his ongoing chronic pain, did not occur as the result of a specific incident such as the August 20, 2009 injury he sustained while moving the pipe cutter, or as a result of the strain he sustained as a result of that injury, and instead were related to an underlying process (progressive spondyloarthropathy and degenerative disk disease) that were not caused by any one specific incident

but which had instead progressed over time. However, while Dr. Nicoletta had ruled out causation as a result of the August 20, 2009 injury, he did not state in his “addendum” that he had changed his understanding that Mr. Loura was asserting not only the August 20, 2009 injury but also cumulative injury over time due to years of heavy, repetitive and strenuous work, mostly in outdoor trenches. Dr. Nicoletta also did not state explicitly that he had changed his answer as to causation, which, per his September 29, 2012 report, was that Mr. Loura’s incapacity was “such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed.” (*See* Finding 46(c).)

ii. Questions to, and response by, Dr. Conforti

53. Board counsel’s January 7, 2013 letter to Dr. Conforti noted that the doctor had answered in the affirmative as to causation, and that the MRI reports in the medical records “did not show any description of a pars interarticularis defect (fatigue fracture) and a question has arisen whether the spondylolisthesis from which Mr. Loura suffers is degenerative in nature rather than developmental.” (Ex. R4 at 1-2.) He posed the same questions to Dr. Conforti as he had posed to Dr. Nicoletta. (*See* Finding 51.)

54. Dr. Conforti responded to these questions on January 10, 2013. His response did not change his affirmative answers as to disability, its permanence and its causation to negative ones. He wrote:

> Firstly, a pars interarticularis defect, is not a fatigue fracture. Spondylolisthesis is usually developmental, but may occasionally be produced by trauma. It is not a degenerative condition.
>
> MRI report of the lumbar spine obtained on January 2, 2010 showed degenerative spondyloarthropathy, most prominent at L5-S1. There was incidentally first degree spondylolisthesis at that level. Those two are not related. The disc bulges described at 2-3, 3-4 and 4-5 are degenerative.
>
> Following the incident, of August 20, 2009, he did not respond to treatment including injections in his back, TENS unit, or other pain management.
>
> Specifically, to question one, the answer is no, in that a pars interarticularis defect is not a degenerative condition. Regardless of whether this showed or did not show on some other MRI is immaterial. It was evident on the MRI of January 2, 2010.
>
> While he may have suffered a thoracolumbar sprain, his injury aggravated the condition of degenerative arthritis and degenerative disc disease of the lumbar spine and first degree spondylolisthesis at L5-S1. Yes, the sprain usually will resolve; however, the aggravation of the underlying condition did not resolve.
>
> The injury to his back even though a sprain was involved and may subsequently resolve itself, does not mean that aggravation of the underlying condition would necessarily resolve and clinically it has not or had not resolved.
>
> Therefore, my opinions as outlined in my report of October 24, 2012 remain the same.

(Exh. P14 at 5-6.)

iii. Questions to, and Response by, Dr. Rosenthal

55. In his January 7, 2013 letter to Dr. Rosenthal, board counsel noted that Dr. Rosenthal had answered the question of causation in the negative. He also stated in pertinent part that:

> In reviewing your narrative report, the Board noted that with respect to the issue of causation, your response was not couched in terms of medical possibility . . . [T]he instructions pertaining to Question 3 ask that you offer your opinion regarding causation "in terms of medical possibility and not in terms of medical certainty." Since your response to causation was not presented "in terms of medical possibility," the Board would appreciate your answering the following questions:
>
> 1. Is it medically possible that Mr. Loura's August 29 [sic], 2009 injury aggravated his underlying condition to the point of disability?
>
> 2. If the answer to question 1 is "no," can you kindly articulate why it is not medically possible, and whether there is any evidence – or lack thereof – in the medical records to support this opinion?
>
> 3. If the answer to question 1 is "yes," can you also offer an opinion whether you believe it is more likely than not that the August 29 [sic], 2009 injury aggravated Mr. Loura's underlying condition to the point of disability?

(Exh. R4 at 6.)

56. On January 10, 2013, Dr. Rosenthal responded that:

> It is, indeed, medically possible that [Mr. Loura's] August 29th [sic], 2009 injury aggravated his underlying condition to the point of disability.
>
> To answer your question as to whether it is more likely than not that this accident aggravated his underlying condition to the point of disability; it remains my opinion that the accident in question did not aggravate his underlying condition to the point of disability.

(Ex. P13 at 6-7.)

j. Retirement Board's Denial of Mr. Loura's Disability Retirement Application, and Appeal

57. On March 15, 2013, the retirement board denied Mr. Loura's application for

accidental disability retirement, for the following reason:

> The Board reviewed the medical panel's report and subsequent clarification-reports.[14] As a result of the medical panel majority answering the question of causation in the negative, the Board voted to deny the application.

(Exh. P9.)

58. On March 26, 2013, Mr. Loura appealed the denial of his application for accidental disability to the Contributory Retirement Appeal Board (Exh. R1.)

k. Further Evaluation of Mr. Loura by Dr. Doerr in 2013

59. On June 14, 2013, physiatrist[15] Dr. Joseph Doerr examined Mr. Loura to evaluate his complaint of a dull, aching pain in his lumbar spine area radiating to his left posterior thigh, intermittently to the calf and down to the foot, and determine whether he should have electrodiagnosis (EDX) or be given other rehabilitation recommendations. (Exh. P8 at 1-3.) Dr. Doerr prepared a report, dated June 16, 2013, that he sent to Dr. Zullo, Mr. Loura's primary care physician. (Exh. P8.) Based upon his review of the medical records and the physical examination he performed, Dr. Doerr's assessment was, in pertinent part:

> A work related incident of 08/20/2009 with chronic pain syndrome of the spine and extremities, probably multifactorial.

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[14]/ The hyphen between "clarification" and "reports" appears in the board's denial.

[15]/ A physiatrist is a specialist in physical medicine and rehabilitation.

> In terms of the left lower extremity symptoms, these are suspicious for L5 radiculopathy, and some of this is in agreement with his at least more recent IMEs[16] and their clinical findings

(Exh. P8 at 2.) Dr. Doerr concluded that, in view of the duration of his distal symptoms, Mr. Loura warranted an EDX and, based upon the results, "perhaps a retry of some aggressive conservative treatment," most likely "something different in terms of chiropractic mobilization." In the interim, Dr. Doerr gave Mr. Loura a home exercise program and pain medication (Ultram, a medication used to treat moderate to severe lower back pain; and Zanaflex, a muscle relaxant used to treat muscle spasms). (Exh. P8 at 2.)

60. Dr. Doerr evaluated Mr. Loura on several occasions subsequently.

(a) On August 9, 2013, Dr. Doerr noted that Mr. Loura continued to experience L5 radiculopathy, and he prescribed chiropractic treatment and Nucynta for pain relief. (Exh. P8 at pp. 4-5.)

(b) On September 6, 2013, Dr. Doerr's assessment of Mr. Loura's condition was "[m]ore likely left L5 radiculopathy than proximal sciatic entrapment, i.e. piriformis." His plan was to "continue to PRECERT for pain management for 'the combo'; in this case probably L5 transforaminal epidural injection and assumption of medications to coordinate with [Dr. Zullo]." (Exh. P8 at 6-7.)

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[16]/ Independent medical examinations, meaning, here, those that were performed relative to Mr. Loura's workmen's compensation benefits claim (*see* Findings 25-29).

(c) On October 4, 2013, Dr. Doerr used a Marcaine injection to address "the myofascial component and possible proximal sciatic entrapment" related to his lower left pain. His plan was to precertify Mr. Loura for pain management and a trial of chiropractic. Dr. Doerr also noted that Mr. Loura was being treated by a myotherapist. (Exh. P8 at 8-9.)

(d) On October 4, 2013, Dr. Doerr injected Mr. Loura with Lidocaine and Kenalog to treat the myofascial component of his pain and "possible trochanter bursitis." (Exh. P8 at 10-11.)

(e) Following his examination of Mr. Loura on December 6, 2013, Dr. Doerr's assessment was "[m]ore likely left L5 radiculopathy than proximal sciatic entrapment, i.e. piriformis," for which he intended to manage Mr. Loura's pain with an L5 transforaminal epidural injection and medications to be coordinated with his primary care provider (Dr. Zullo), and to hold off for the time on"trigger point injection" to address possible proximal sciatic pain, prescribing a specific muscle stretch but not formal physical therapy. (Exh. P8 at 12-13.)

(f) Dr. Doerr noted no relevant changes when he examined Mr. Loura on December 30, 2013 and January 30, 2014. (Exh. P8 at 14-17.) Dr. Doerr's note for his February 26, 2014 examination of Mr. Loura showed that none of the pain management approaches taken thus far appeared to have been successful. (*See* Exh. P8 at 18-19.)

61. Mr. Loura's mid-low back pain, and pain in the left hip and leg, continues to-date. The pain begins in his lower back and radiates down from the left hip, through the left knee and leg. He finds it difficult to walk and climb stairs, although he is able to drive and perform light shopping. In

addition, he walks to prevent "locking up" or becoming stiff, although it has become more difficult for him to walk. He feels that the pain is becoming worse, despite the steroid injections he has been given. (Loura direct testimony, Tr. 22-26; Exh. P11 at 4.) Mr. Loura stood during much of his testimony at the hearing, because it was more painful for him to sit. (*See*, *e.g.*, Tr. 34 (Mr. Loura stated, while being cross-examined, that he was standing because he was not comfortable sitting).)

l. Workers' Compensation Benefits Decision, and the Surveillance Video

62. Following a hearing held between December 13, 2013 and July 21, 2014, the DIA Administrative Judge issued a decision on July 31, 2014 that granted Mr. Loura's request for further workers' compensation benefits payments in part. (Exh. P16: *Loura v. City of Taunton*, D.I.A. # 022863-09, Decision (Mass. Dep't of Industrial Accidents, Div. of Dispute Resolution, Jul. 31, 2014).) The Administrative Judge found Mr. Loura to be partially disabled and incapacitated, capable of employment that does not require lifting in excess of 20 pounds or excessive bending, lifting, stooping and/or pushing and pulling, and capable of working at full-time, lighter-duty employment "in positions that would include parking lot attendant, cashier, or customer service representative, on a full-time basis and at the minimum wage (at that time, $8.00 per hour), eight hours a day, five days a week, "yielding an earning capacity of $320.00 per week," and that he has been capable of this employment since July 16, 2012. The Administrative Judge also determined that Mr. Loura was not capable of "returning to any of his prior employment positions given the physical requirements . . .

and his limitations." (*Id*. at 14-15.) In view of that earning capacity, and an average weekly wage of $885.14, the Administrative Judge ordered the City of Taunton to pay partial disability benefits to Mr. Loura, pursuant to M.G.L. c. 152, § 35, at the rate of $339.08 per week from July 16, 2012, as well as medical benefits (for medical, hospital, physical therapy and pharmaceutical services) pursuant to M.G.L. c. 152, §§ 13 and 30. (*Id.* at 16.)

63. One of Taunton's exhibits in the workmen's compensation hearing was a surveillance video (copied to and/or edited for a DVD) made by Darren Pace, a private investigator working for the city, who, on March 8, 2013, observed and videotaped Mr. Loura with a band known as "Let It Ride" at the Sandbar Grille in Taunton, Massachusetts. (Exh. R10; Exh. P16 at 7-8.) Mr. Pace testified during the workmen's compensation hearing that at approximately 4:15 p.m. on that date, Mr. Loura set up the cymbals for the band, then left and returned at approximately 8:00 p.m. to play with the band for two hours without taking breaks, and then, at the end of the evening, left the facility "pushing speakers with another person," although Mr. Pace did not observe Mr. Loura lift anything. (Exh. P16 at 8.)

64. Mr. Loura also testified at the workmen's compensation hearing. He acknowledged that the video showed him, and that he had known the band's keyboard player for 35-40 years but had played with them on only a few occasions before the night in question. (Exh. P16 at 6.) He testified that he took Vicodin for his pain before playing that night, that he played the cymbals and/or congas and snare drums, and also played the harmonica and sang, during a show that began at approximately

9:45 p.m. and played in two 20-minute sets of 4-5 songs each, separated by a half hour, but that he also took short breaks during the two sets, and that, during the two sets, he experienced back and leg pain. (*Id*. at 7.) At the end of the evening, he helped a sound technician move the speakers by pushing them approximately five feet, but he did not lift them, and did he pack or move any other items, before he left the premises at approximately 1:00 a.m. (*Id*.) He was paid $100 for his work that night. (*Id*.) Mr. Loura testified further that he experienced increased soreness in his back and left leg on the following day, and that he has not played with the band since, as he felt physically unable to do so, and does not feel capable of using his arms and legs to play drums. (*Id*.) Based in part upon this video, and upon Mr. Loura's testimony and demeanor at the hearing overall, the DIA administrative judge found him to be a credible witness, but she also found that his pain and disability did not "rise to the level complained of," and that he was "capable of activities greater than that which he has testified to" (*id*.), although she found him to be as physically limited and restricted as Dr. Pizzarello, the impartial examiner, found. (Exh. P16 at 10; as to Dr. Pizzarello's findings regarding Mr. Loura's physical limitations and restrictions, which included a weight lifting restriction of 20 pounds (*see* Finding 31).

Discussion

The Taunton Retirement Board denied Mr. Loura's accidental disability retirement application because it perceived that the panel majority's affirmative answer as to causation had changed to a

negative one, based upon Dr. Nicoletta's response to board counsel's questions. Although not stated in its denial, the board adds here that only the "single-injury" causation hypothesis was presented to the panel members, and as a result, (1) their review was confined to that hypothesis; and (2) Dr. Nicoletta's rejection of a single injury as causative of Mr. Loura's disability left no other hypothesis upon which the panel majority could ground an affirmative answer as to causation.

If a majority of the medical panel had refused to certify that any one of the three prerequisites for accidental disability retirement, including causation, had been met, the retirement board would have been obligated to reject Mr. Loura's accidental disability retirement application. However, the panel answered unanimously as to disability and its likely permanence, and a a panel majority that included Dr. Conforti and Dr. Nicoletta answered in the affirmative as to causation. A careful review of Dr. Nicoletta's original report and his subsequent answers to the board's questions reveal that although he rejected the August 20, 2009 injury as having caused Mr. Loura's injury, the doctor's opinion remained that Mr. Loura had suffered a gradual spinal deterioration due to identifiable job conditions. There remained, thus, a majority panel affirmative answer as to causation comprising Drs. Nicoletta and Conforti, and the board should have gone on to evaluate the merits of Mr. Loura's claim based upon all of the medical and non-medical evidence, including the medical panel's answers. I do that now, in this *de novo* proceeding, with a particular focus upon causation.

I have found that the materials the board sent to the medical panel members for their review, in particular Mr. Loura's accidental disability retirement application, placed both causation

hypotheses before the medical panel members—the "single-injury" hypothesis, based upon the August 20, 2009 injury sustained while moving the heavy pipe cutter, and the hypothesis of cumulative injury due to a work-related identifiable condition that is not common to many occupations or to daily life. Therefore, both hypotheses were before the panel members when they answered as to causation.

Based upon the medical records, the disability retirement application, and the histories related by the panel members in their physical examination reports, it is clear as well that the panel members understood the "identifiable condition" not common to many occupations or to daily life upon which Mr. Loura's cumulative injury hypothesis was based—that performing the essential duties of his water maintenance job over an eight-year period required him to regularly lift and move heavy pipes, machinery, and piles of rocks and dirt, and to do this, he needed to regularly turn, bend, lift and kneel in confined quarters such as trenches, mostly outdoors, day or night, and regardless of the weather, all of which exacerbated his underlying spinal deterioration.

I have also found that in his response to board counsel's questions, Dr. Nicoletta, one of the two panel members comprising its affirmative majority as to causation, stated that he did not ascribe the causation of Mr. Loura's disability to a single event such as the August 20, 2009 injury involving the pipe cutter. That clarified Dr. Nicoletta's rejection of the "single-injury" causation hypothesis. He did not reject, however, the cumulative injury/identifiable condition hypothesis. He also did not state that he had changed his affirmative answer as to causation to a negative one.

As a result, the panel majority's answer as to causation remained affirmative as to Mr. Loura's hypothesis that his disability was caused by cumulative injury resulting from his exposure to a work-related identifiable condition. With this point clarified, I review *de novo* the medical and non-medical evidence in the record, including the medical panel's affirmative majority answer as to causation. Based upon this evidence, I determine that Mr. Loura has met his burden of proving, by a preponderance of the evidence, that he was disabled, likely on a permanent basis, from performing the essential duties of his job as a result of cumulative injury caused by a work-related identifiable condition. The medical panel's affirmative majority answer as to causation based upon this hypothesis is both credible and persuasive on this point, because it is consistent with what the medical records show. There are present none of the factors that would justify ignoring the panel's answer as to causation if it had been negative—there is no evidence of improper panel composition, and no application of an incorrect standard by the panel members, and the panel's answers as to disability, its permanence and causation were not plainly wrong. I conclude, as a result, that Mr. Loura has proven his entitlement to receive accidental disability retirement benefits.

1. Applicable Law

a. Accidental Disability Retirement, Generally

In order to receive accidental disability retirement benefits, a member in service (as Mr. Loura was) must prove by a preponderance of the evidence, including an affirmative certification by a

majority of the members of a regional medical panel following their examination of the member, that he is "unable to perform the essential duties of his job" as a result of "a personal injury sustained, or a hazard undergone as a result of, and while in the performance of, his duties . . . without serious and willful misconduct on his part." M.G.L. c. 32, § 7(1). Stated another way, the prerequisites for accidental disability retirement are disability, its likely permanence, and a proximate, work-related cause for this permanent disability. A majority of the medical panel's physician members must certify that these prerequisites are met. *See Retirement Bd. of Revere v. Contributory Retirement Appeal Bd.*, 36 Mass. App. Ct. 99, 101, 629 N.E.2d 332, 334 (Mass. App. Ct. 1994), *rev. denied*, 417 Mass. 1105, 635 N.E.2d 252 (1994).

In order to establish causation, as it was his burden to do, Mr. Loura was required to prove one of two hypotheses—(1) that his disability was caused by a single work-related event or a series of them; or (2) that his employment exposed him to an identifiable condition that is not common and necessary to all or a great many occupations, and that resulted in disability through gradual deterioration. *See Adams v. Contributory Retirement Appeal Bd.,* 414 Mass. 360, 609 N.E.2d 62 (1993); *Blanchette v. Contributory Retirement Appeal Bd.*, 20 Mass. App. Ct. 479, 481 N.E.2d 216 (1985); *Bergeron v. Fall River Retirement Bd.*, Docket No. CR-07-226 (Mass. Div. of Admin. Law App., Jun. 12, 2008); *See also Zerofski's Case*, 385 Mass. 590, 433 N.E.2d 869 (1982).

It is for the retirement board and, on appeal, for the Contributory Retirement Appeal Board (CRAB), to make the ultimate findings as to incapacity, its permanence, and causation, but the

"fundamental medical questions at the core" of those issues require an application of medical expertise, and those questions must be answered first, therefore, by the medical panel's physician members. *Retirement Bd. of Revere,* 36 Mass. App. Ct. at 111, 629 N.E.2d at 339. If the panel answers in the negative as to disability, its likely permanence, and a proximate, work-related cause for it, that negative answer precludes allowing an application for accidental disability retirement benefits unless the panel applied an erroneous standard or failed to follow proper procedure, or if its decision is "plainly wrong." *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669, 684, 904 N.E.2d 755, 766 (2009); *Leduc v. Contributory Retirement Appeal Bd.*, No. BRCV2015-00617, Mem. of Dec. and Ord. on Cross-Motions for Judgment on the Pleadings at 12 (Bristol Super. Ct., Sept. 18, 2016). In contrast, an affirmative answer by the panel as to these issues is "some evidence" with respect to them, but it does not mandate granting the accidental disability retirement application. Thus, if the panel answers in the affirmative as to causation (as well as disability and its likely permanence), that is "a mere statement of medical possibility of connection to service," but it is not the ultimate fact of causation." *Leduc* at 13; *Blanchette*; 20 Mass. App. Ct. at 483, 481 N.E.2d at 219 (medical panel's certification that accidental disability retirement applicant's disability "might be the natural and proximate result" of a personal injury sustained" as a result of the applicant's employment" is not conclusive of the ultimate fact of causal connection but stands only as some evidence on the issue.") That is a determination for the retirement board (and, if the matter is appealed, for CRAB) to make based upon all of the underlying evidence, including the medical and

non-medical facts. *See Murphy v. Contributory Retirement Appeal Bd.*, 463 Mass. 333, 335-36, 974 N.E.2d 46, 49-50 (2012).

That the medical panel's affirmative answer as to causation is "no more than some evidence" on the issue relates to the retirement board's (and CRAB's) role in assuring that the statutory prerequisites for the receipt of accidental disability retirement benefits are met, rather than to the evidentiary value of the panel's answer. The board (and CRAB) may find the panel's affirmative answer to be helpful in determining the causation issue from a medical perspective. If (as was the case here) the panel majority explains its views and the reasons for answering affirmatively as to causation, that answer may even prove persuasive, so long as the panel does not "certify the ultimate fact of causal connection" and, instead, goes no further than concluding it to be medically plausible that disability could be the natural and proximate result of workplace conditions. *See Narducci v. Contributory Retirement Appeal Bd.*, 68 Mass. App. Ct. 127, 134-35, 860 N.E.2d 943, 949-50 (2007), *rev. denied*, 448 Mass. 1108, N.E.2d (2008); *Leduc* at 13; *see also Collari v. Marlborough Retirement Bd.*, Docket No. CR-15-179, Decision at 17-18 (Mass. Div. of Admin. Law App., Sept. 19, 2016) (in determining that the petitioner's pre-existing left foot condition was aggravated by a work injury, the DALA magistrate found that the medical panel's majority affirmative majority answer as to causation "weighed heavily," because the panel members had reviewed the petitioner's job description and all of the pertinent medical records and diagnostic studies, had each examined the petitioner and prepared reports of their findings and conclusions, "displayed an adequate

understanding as to the mature of [p]etitioner's left foot condition immediately prior to [the work-related injury], her treatment history, and her physical job requirements," and the two physicians who answered affirmatively as to causation "did not apply any erroneous standards, lack any pertinent medical facts or engage in any procedural irregularities.")

What the board (or, if an appeal follows, CRAB) cannot do is simply ignore the medical panel's affirmative answer as to causation, or as to disability and its likely permanence. Rather, the panel's affirmative answer can be accorded minimal, or even no, evidentiary weight, so long as there are grounds for doing so. Those grounds may include any of the reasons that would justify rejecting a negative panel as to causation—the panel's employment of an "erroneous standard," or its failure to follow proper procedure, or if the panel's answer was "plainly wrong" based upon the medical and non-medical facts. *See*, as to the standards for rejecting a negative panel certification, *Kelley v. Contributory Retirement App. Bd.*, 341 Mass. 611, 617, 171 N.E. 2d 277 (1961); *see also Retirement Bd. of Revere*, 36 Mass. App. Ct. at 106, 629 N.E.2d at 337 ("[f]ailure to follow proper procedure" includes improper panel composition—for example, a panel comprised of physicians whose specialty or expertise did not encompass the area of medicine implicated by the applicant's work-related injury—and a "plainly wrong decision" includes panel findings that were made without reviewing all the pertinent facts). An affirmative panel certification as to disability and causation might also be rejected as "plainly wrong," and therefore entitled to little or no evidentiary weight, if the evidence showed that the disabling injuries were likely not sustained by the accidental disability retirement

applicant "while in the performance of his duties," as M.G.L. c. 32, § 7(1) requires. *See Murphy*; 463 Mass. at 347-52, 974 N.E.2d at 58-61 (in affirming the denial of accidental disability retirement benefits to a former judge who claimed permanent disability as a result of severe psychiatric and related physical injuries sustained following the publication of libelous articles regarding the performance of his judicial duties, and the subsequent receipt of hate mail and death threats, because the judge did not prove that he was performing judicial duties when he or his chambers received these threats and mailings, the court implicitly found no error on the part of either the retirement board or CRAB in ignoring the affirmative unanimous answer of a psychiatric medical panel as to the judge's disability, its permanence, and its job-related causation).

b. Disability and its Likely Permanence

The board denied Mr. Loura's accidental disability retirement application based solely upon what it perceived to be the medical panel majority's negative answer as to causation, and not upon the absence of evidence that he was permanently disabled. (*See* Finding 57.) The board argues that whatever it gave as the rationale for denying the application need not be considered here, however, in view of the *de novo* nature of CRAB hearings at DALA and Mr. Loura's burden to establish every element of his accidental disability retirement claim by a preponderance of the evidence, including his asserted disability and its permanence. (Board's post-hearing mem. at 18.) In the board's view, the medical evidence shows that he "did not sustain an acute injury on August 20, 2009," (*id.*), and

the MRIs in particular do not show that whatever occurred on that date resulted in a fracture, disk herniation or other visible injury. (*Id*. at 19.) All that remains to support Mr. Loura's permanent disability claim is, according to the board, his "subjective complaints of pain for which there is no objective test," and for which the only support is Mr. Loura's credibility, assuming his pain complaints are determined to be genuine rather than exaggerated or fabricated. (*Id*.) In asserting that Mr. Loura's pain complaints are not credible, the board relies primarily upon the video showing him playing congas with a band, and helping it move some items before and after a performance, on March 8, 2013.

I note, first, that none of the examining physicians concluded that Mr. Loura's pain complaints were fabricated or exaggerated. In addition, none of the examining physicians qualified his assessment of Mr. Loura's condition as limited by the lack of an "objective test" for evaluating pain complaints. Instead, all of them employed generally-accepted methodologies for evaluating his pain complaints, among them obtaining a history of the injury from Mr. Loura, reviewing his available medical records including the MRI reports, and performing a physical examination that included range of motion and flexibility assessments.

Two of the them found no permanent disability related to the August 20, 2009 occurrence involving the pipe cutter, but their reports did not rule out disability related to the aggravation of spinal deterioration over time on account of the work Mr. Loura performed as a water maintenance system worker.

Dr. James Leffers, who examined Mr. Loura on April 27, 2010 on behalf of the City of Taunton's workmen's compensation insurance carrier, diagnosed a resolved infrascapular strain on the left (the left thoracic strain) related to the August 20, 2009 occurrence that had resolved, minor left lower back pain that was unrelated to the August 20, 2009 occurrence, and moderate to major left gluteal pain with left anterior thigh referral, that was "more likely than not" unrelated to the August 20, 2009 occurrence, although he neither identified nor suggested any other origin for this pain. (Finding 28.) Dr. Leffers found Mr. Loura to be partially disabled. His report focused more upon the thoracic spine MRI performed in September 2009 than upon the lumbar spine MRI performed in January 2010. Although Dr. Leffers opined that the thoracic spine MRI did not show that the thoracic strain was related to the August 20, 2009 occurrence, he did not address whether that MRI, or the lumbar spine MRI, showed conditions that could have been aggravated by Mr. Loura's water maintenance system work. Dr. Leffers' opinion that Mr. Loura was able to perform his job duties was based solely upon his view of Mr. Loura's thoracic strain as having resolved. Because he viewed Mr. Loura's lower back pain and leg pain as being unrelated to the August 20, 2009 occurrence, he expressed no opinion as to whether this pain prevented him from performing his job duties. These omissions diminish the evidentiary value of Dr. Leffers's report with respect to Mr. Loura's disability and its permanence in the accidental disability retirement context.

Dr. James Broome, who performed an independent medical evaluation of Mr. Loura on June 17, 2010 for the Department of Industrial Accidents, found a causal connection between Mr. Loura's

medical conditions—“left shoulder pain, degenerative disc disease in the lumbar spine, osteoarthrosis of both knees, and left greater trochanteric pain related to bursal pain or disruption of the gluteus medius tendon of insertion” —and both the August 20, 2009 injury “and the nature of work he performed over a long period of time,” based upon both the history Mr. Loura provided and the “clinical findings and medical records.” (Finding 29(c).) Dr. Broome found that Mr. Loura was “medically disabled and partially and temporarily so,” as he could not lift, stand, sit, push or pull “for any length of time beyond the activities of daily living.” (*Id.*) However, the only reason Dr. Broome gave for qualifying this disability as partial and temporary was that he did not view Mr. Loura as having yet reached a medical end result. (*Id.*) That may have been a justifiably hopeful prognosis in June 1010, when Dr. Broome examined Mr. Loura. However, several additional years' worth of physical examinations has generated no evidence that further conservative pain treatment, or surgery, would likely allow Mr. Loura to perform the work of a water system maintenance worker. Dr. Doerr's more recent assessment of Mr. Loura as having obtained no relief from his mid-low back pain and related left hip and leg pain (*see* Findings 59-61) suggests that he has reached a medical end result. Dr. Rosenthal, who examined Mr. Loura on October 11, 2012, believed that he had reached one. (*See* Finding 48(c).) For these reasons, I find unpersuasive Dr. Broome's 2010 qualification of Mr. Loura's disability as partial and temporary.

The remainder of the physicians' assessments furnish ample support for Mr. Loura's pain complaints, based upon a work-related injury, to the point of permanent disability.

In his April 23, 2012 letter supporting Mr. Loura's disability retirement application (*see* Finding 43), primary treating physician Dr. Mark Zullo opined that Mr. Loura was unable to perform the essential duties of his position (which he described as requiring "lifting, bending, reaching, squatting") based upon a medical diagnosis of lumbar back pain with radiculopathy sacroiliitis, confirmed by the lumbar MRI showing degenerative spondylopathy. In addition, Dr. Zullo attributed this disability to the injury that Mr. Loura sustained on August 20, 2009 when he was "lifting an object at work," with ongoing pain since that time, and "no prior history of significant back injury." Dr. Zullo opined, as well, that Mr. Loura's disability would continue indefinitely because his condition had not improved over the 2 ½ years following his August 2009 injury despite injections and "multiple appropriate interventions." (Exh. P11: Disability Retirement Application, Treating Physician's Statement at 2, 3.)

When Dr. Nicoletta examined Mr. Loura on September 29, 2012, the complaints he noted were "left paralumbar pain with left buttock pain, pain radiating into the outer aspect of his left hip, and radiating down the posterior aspect his left leg," as well as "lower back pain with prolonged sitting, bending, turning and twisting activities. " (Finding 47(b).) These complaints were consistent with the degenerative spondyloarthropathy shown by the lumbar spine MRI (Finding 47(a)), and with what Dr. Nicoletta found during his examination— "palpable tenderness of the left para-lumbosacral musculature, especially with range of motion," with discomfort with flexion at 40 degrees and extension at 20 degrees, left and right lateral bending at 15 degrees, and left and right rotation at 50

degrees," as well as the pain Mr. Loura experienced during straight left leg raising in the sitting position on the left, but not on the right side. (Finding 47(b).) Based upon the history he obtained from Mr. Loura, his review of the medical records including the MRIs, and what he observed during the physical examination, Dr. Nicoletta's diagnosis was "[l]umbar strain with chronic lower back pain, lumbar degenerative disc disease, lumbar spondylosis, most pronounced at L5-S1 with ongoing left sided radiculopathy/sciatica." (Finding 47(c).) Dr. Nicoletta noted the "heavy labor-type activity" of Mr. Loura's job. He opined that Mr. Loura could not return to work involving heavy manual labor, "due to the fact that he is likely [to] have *further exacerbation* of his symptomatology related to a chronic lumbar spondyloarthropathy and lumbar degenerative disk disease." (*Id.*; emphasis added.) He therefore answered "yes" as to Mr. Loura being disabled and as to the disability's permanence. (*Id.*) Although Dr. Nicoletta would later clarify that this disability was not the result of a single occurrence, such as the August 20, 2009 pipe cutter-related incident, he did not retract his affirmative answer regarding causation, or his affirmative answers as to job-related disability and its permanence.

When Dr. Conforti performed his physical examination on October 22, 2012, Mr. Loura complained of back pain, with pain radiating to the left leg as far as the calf. (Finding 49(b.) Dr. Conforti noted that the thoracic MRI showed "mild to moderate degenerative disc disease without evidence of herniation," and "slight cord contact in the neutral position at T8-9, slightly eccentric to the left without compression," and that the lumbar spine MRI showed "degenerative spondylo-arthropathy most prominent at L5-S1 with first degree spondylolisthesis," as well as "diffuse bulges

at L2-3, and L3-4 and degenerative changes at L4-5." (Finding 49(a).) His observations during the physical examination included Mr. Loura's walking with a slight antalgic gait favoring the left leg, tenderness in the lumbar area and in the left sciatic notch, discomfort upon flexing to 50 degrees, and inability to lift more than 5-10 pounds. (Finding 47(b).) These observations, and what the MRISs showed, were consistent with Mr. Loura's pain complaints. Dr. Conforti's opinion was that Mr. Loura had sustained a work-related aggravation of his underlying degenerative arthritis and degenerative disc disease and, more particularly, that the August 20, 2009 injury had accelerated this condition. (Finding 47(c).) Dr. Conforti also opined that Mr. Loura was unable to perform the essential duties of his water system maintenance job, particularly since he could not lift more than 5-10 pounds on a continuous basis, and that this condition was unlikely to improve. (*Id.*)

These medical assessments suffice to show a work-related disability that is likely to be permanent. They are, in short, proven by a preponderance of the evidence.

I determine, next, that causation has been proven as well.

c. Causation, Specifically, and in Particular, the "Identifiable Condition" Requirement

Mr. Loura asserted in his accidental disability retirement application, and has claimed since, that his disability was caused by either a work-related event—the injury he sustained on August 20, 2009 while attempting to move the heavy pipe cutter, or his exposure over the years of his work in the Taunton water department to an identifiable condition that is not common and necessary to all or

a great many occupations: in general, bending, twisting, shoveling, lifting and moving large piles of rocks, and operating heavy equipment, in confined spaces, mostly trenches, both indoors and outdoors in all types of weather, and, more specifically, jackhammering to break the ground for the operators of excavation equipment in order to dig trenches for water mains and pipes, as well as shoveling, welding, cutting and fitting pipes in street trenches, and repairing water main breaks and leaks, all of which required repetitive twisting, bending, stooping, and lifting, mostly in tight spaces, and being on his knees in awkward positions, to perform this work. (Exh. P11 at 2, 3, 5 and 6; *see* Finding 42(c) above.) He contends that these circumstances comprise an identifiable work condition not common or necessary to all or a great many occupations that resulted in disability through gradual deterioration. (*See, e.g.*, petitioner's post-hearing memorandum (Oct. 12, 2015) at 10.)

The Board counters that Mr. Loura did not assert any such identifiable condition. In the board's view, what Mr. Loura asserts is "wear and tear" of a type that is common to many occupations, and that, as a result, the only basis on which he could move forward with his disability retirement application, and the only causation hypothesis as to which the Board needed to pose questions to the medical panel members as to causation, was the single-injury hypothesis. (*See, e.g.*, Taunton Retirement Board's prehearing memorandum at 11.) The Board also contends that identifiable conditions not shared by many occupations are those such as exposure to asbestos that result in physical injury or diseases such as asbestosis, silicosis or mesothelioma. (*Id*. at 25.)

M.G.L. c. 32, § 7 does not explain what does, or does not, amount to an "identifiable

condition," and so I turn to the caselaw for guidance on this point, particularly what the Supreme Judicial Court and the Appeals Court have had to say on this subject.

As the retirement board notes, "there is no appellate case law which has specifically defined what qualifies as an 'identifiable condition.'" (Taunton Retirement Board's prehearing memorandum at 25.) The assistance provided by the courts is, nonetheless, helpful here, as it sets out, broadly, the parameters within which an identifiable condition tends to fall. It also confirms whether or not the courts have, as yet, excluded all but the most unusual, and lethal, types of exposures and resulting sequellae from the universe of identifiable conditions that suffice to show causation under M.G.L. c. 32, § 7.

The caselaw instructs, first, that "identifiable condition" relates to the distinction between work-related personal injuries incurred in the performance of public employment for which the Commonwealth and its subdivisions provides (and should provide) compensation or retirement benefits, and other injuries for which coverage and compensation are available, if at all, under other forms of insurance. Although it addresses compensation for work-related injuries under the Commonweath's worker's compensation statute, *see* M.G.L. c. 152, § 26, rather than eligibility for accidental diability retirement benefits, *Zerofski's Case* presents an explanation of "identifiable conditions" that has been cited frequently in accidental disability retirement decisions. It held that:

> The line between compensable injury and mere 'wear and tear' is a delicate one.... Nevertheless, the distinction is necessary to preserve the basic character of the [controlling statute] . . . To be compensable, injury must arise "out of" as well as "in the course of" employment . . . To be compensable, the harm must arise either from

> a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in the sense we have described, be identified with the employment.

385 Mass. at 594-95, 433 N.E.2d at 871-72.

Adams v. Contributory Retirement Appeal Bd., 414 Mass. 360, 609 N.E.2d 62 (1993) an accidental disability retirement decision, explained further that:

> [J]ob duties involving common movements done frequently by many humans both in and out of work will not be sufficient to establish an entitlement under G.L.c. 32, § 7 (1), in order to preserve the policy behind the statute which differentiates between work-related personal injuries for which the Commonwealth should bear responsibility, and other injuries which should more properly be covered by personal health insurance (*citing Zerofski*) . . . An undue blurring of the line between the two classes of injuries, based on an enlargement of recovery when the injury stems from a long period of common movements, would substantially erode, if not eliminate, the policy and would tend, for all practical purposes, to turn G.L.c. 32, § 7 (1), into a "scheme for health insurance" (citation omitted).

Id.; 414 Mass. at 366, 609 N.E.2d at 66. *Adams* also instructed that the "[f]requency and intensity of activity compared to other occupations . . . are the factors that must be relied on in distinguishing between compensable injuries and gradual deterioration, caused by wear and tear, that would be common to many occupations as well as daily life, and which is not compensable." *Id*.; 414 Mass. at 365-66, 609 N.E.2d at 65.

Adams underscores that the "line between compensable injury and injuries brought about by 'mere wear and tear'" can be difficult to discern, and can also defy both medical and legal consensus. In *Adams*, this difficulty prompted a myriad of decisions and remands, including those of a divided

Appeals Court (twice), further appeals, and, after four years of litigation, a final decision on the matter by the Supreme Judicial Court.

I review the facts and history of that case as the Supreme Judicial Court' s decision relates them. *See Adams,* 414 Mass. at 360-66, 609 N.E.2d at 63-66. Ms. Adams, an elementary school teacher, submitted an accidental disability retirement application after 14 years of teaching and, by that time, her development of significant back pain that left her unable to continue working. She claimed disability based upon the hypothesis that her employment had exposed her to an identifiable condition that was not common and necessary to all or a great many occupations, and that had resulted in her disability through gradual deterioration. The teacher's medical history included childhood polio that had left her with a "flail" lower left leg (meaning that it was without mobility or sensation), followed by a mild scoliosis of the back, and a residual left leg weakness that required her to wear a leg brace. She had also had a right club foot as a child that was corrected. Her work responsibilities included teaching third-grade pupils, managing the classroom and maintaining discipline, monitoring recess and lunch periods, and performing bus duty. During recess periods, a teacher was responsible for preventing students from wandering onto railroad tracks near the school yard, and for breaking up occasional fights among students. Performing these responsibilities required "continual periods of walking and standing and frequent bending over to assist students in a variety of tasks." A year after delivering her first child and then returning to work, Ms. Adams developed disabling back pain that forced her to cease working altogether after attempting to teach

part-time. Her treating physicians attributed the back pain to either disc herniation or arthritis in the lower back joints. A medical panel certified that the teacher was permanently disabled from performing her duties as a result of a "lumbar insufficiency associated with degenerated lumbar disc at the lowest lumbar level complicated by flail left lower extremity secondary to childhood polio myelitis and associated with right sided club foot, congenital, treated." The panel also answered affirmatively as to whether the claimed disability was job-related. The medical panel chairman included, with the certificate, a letter in which he stated that the panel members "kn[e]w of no other event which may have occasioned" the teacher's disability. Per the Supreme Judicial Court's *Adams* decision, this statement was "modified somewhat" by an additional statement in the panel chairman's letter that:

> We do know that she had a club foot on the right from childhood which was apparently a birth problem and that at the age of 9 she acquired polio myelitis which left her with a flail left lower extremity. Her left lower extremity is essentially flail and she wears a brace and has worn a brace since the age of 10. She has a short left lower extremity and a level pelvis when wearing special shoes and her brace. While this coupled with bending over and teaching small children could be a contributing factor, it is a question of apportionment and the question in Section K [pertaining to whether the disability is work-related] is phrased with the word "might." Therefore, we answered yes.

414 Mass. at 362-63 n. 2, 609 N.E.2d at 64 n.2.

The Teacher's Retirement Board denied the accidental disability retirement application, and the teacher appealed to DALA. A DALA magistrate concluded that the teacher's continual standing, bending and moving about in the performance of her job duties had aggravated pre-existing residuals

of her childhood polio and produced a disabling back condition. The magistrate also concluded that the teacher's particular work regime involved physical movements and exertions that depended upon whatever the situation demanded to insure proper care for her young pupils, and, therefore, did not reflect an activity level common or necessary to daily life or to all employment. The magistrate held that the teacher was entitled to accidental disability retirement benefits.

CRAB adopted the magistrate's findings of fact, but upheld the retirement board's benefits denial. There followed a lengthy sequence of court review, remands and appellate review, driven mostly by disagreement in the various reviewing fora over whether the teacher's job duties had subjected her to an identifiable condition not common or necessary to a great many occupations. The Appeals Court divided over this issue. The majority of the panel deciding the appeal concluded that the teacher's back injury was the natural and proximate result of job duties whose performance required extensive bending that was "identifiably distinct" from what other occupations required, and in doing so distinguishing the teacher's circumstances from those in *Zerofski*, which the court described as "years of standing and walking at work" that was common to a great many occupations. *Adams v. Contributory Retirement Appeal Bd.*, 26 Mass. App. Ct. 1032, 534 N.E.2d 11 (1989) ("*Adams I*").

After the Appeals Court remanded the case to CRAB for further proceedings, CRAB again denied accidental disability retirement benefits to the teacher, this time because the evidence was "too equivocal on the issue of causation" to meet the requirements of M.G.L. c. 32, § 7(1), and also based

upon its conclusion that her injury resulted from the "wear and tear" of physical demands common to a great many occupations, among them "homemakers, doctors, nurses, waiters, chefs, laborers, patrolmen, correctional officers, janitors, tradesmen, watchmen, salespersons, metermaids, baseball players and umpires." On appeal, the Superior Court reversed and held the teacher entitled to the benefits she sought, and an again-divided Appeals Court affirmed the Superior Court's decision. *See Adams v. Contributory Retirement Appeals Bd.*, 33 Mass. App. Ct. 171, 597 N.E.2d 1051 (1992)("*Adams II*").[17]

After granting CRAB's application for further review, the Supreme Judicial Court reversed, and upheld CRAB's denial of the teacher's accidental disability retirement application. *Adams v. Contributory Retirement Appeal Bd.*, 414 Mass. 360, 609 N.E.2d 62 (1993). As to the identifiable condition issue related to causation, the Supreme Judicial Court held that:

> It is not enough for an applicant to show that his or her daily duties are unique to the job because all jobs have their own special characteristics. The Appeals Court correctly noted [in *Adams II*] that "[f]requency and intensity of activity compared to other occupations," are the factors that must be relied on in distinguishing between compensable injuries and gradual deterioration, caused by wear and tear, that would be common to many occupations as well as daily life, and which is not compensable...
>
> The administrative magistrate found that the plaintiff's duties involved "frequent walking, standing and bending over." CRAB noted that the physical activities required of the plaintiff in her job could not be distinguished from the activities required in a wide variety of other occupations and gave a list of examples to illustrate its point, observing, quite correctly, that the list could have been considerably longer.

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[17]/ The description of CRAB's decision on remand is from *Adams II;* 33 Mass. App. Ct. at 176, 597 N.E.2d at 1054.

> Relying on *Zerofski's Case* . . . CRAB suggested that back problems in occupations involving frequent walking, standing and bending were typically the result of "wear and tear." This suggestion reflects the point that job duties involving common movements done frequently by many humans both in and out of work will not be sufficient to establish an entitlement under G.L.c. 32, § 7 (1), in order to preserve the policy behind the statute which differentiates between work-related personal injuries for which the Commonwealth should bear responsibility, and other injuries which should more properly be covered by personal health insurance [citing *Zerofski's case*]. An undue blurring of the line between the two classes of injuries, based on an enlargement of recovery when the injury stems from a long period of common movements, would substantially erode, if not eliminate, the policy and would tend, for all practical purposes, to turn G.L.c. 32, § 7 (1), into a "scheme for health insurance." (citation omitted).
>
> We agree with CRAB that the plaintiff's case falls on the side of "wear and tear." We have held that "[p]rolonged standing and walking are simply too common among necessary human activities to constitute identifiable conditions of employment" (citing *Zerofski's Case)* . . . We do not consider the plaintiff's case materially improved by the additional factor that her work involved frequent "bending over." That movement also is common to necessary human activities and to many jobs. We view the plaintiff's case as analytically similar to those cases in which recovery was denied because the disability resulted from wear and tear despite the employee's having engaged in a lengthy period of frequent activity. *See Spalla's Case*, 320 Mass. 416 (1946) (no compensable injury where evidence demonstrated only that employee's abdominal muscles had become attenuated from years of working in a foundry); *Doyle's Case*, 269 Mass. 310 (1929) (no compensable injury where evidence showed that employee's back had been weakened by years of physical exertion); *Burns's Case*, 266 Mass. 516 (1929) (compensation denied for heart deterioration caused in part bywalking up and down stairs). *See also Blanchette v. Contributory Retirement Appeal Bd.*, 20 Mass. App. Ct. 479, 487 (1985) (mental and emotional stresses of job as school custodian, indistinguishable from stresses of other jobs, did not cause compensable injury).

414 Mass. at 365-67, 609 N.E.2d at 65-66.

Adams recites, in short, no rule to the effect that an identifiable condition of employment must rise to the level of asbestos exposure, with resulting asbestosis or similar *sequellae*, in order to qualify

as one that is not common and necessary to all or a great many occupations. Instead, it emphasizes the distinction between "wear and tear" caused by a long period of movements common to necessary activities and many jobs, which does not suffice to show disability compensable under M.G.L. c. 32, § 7(1), and wear and tear caused by work activities whose frequency and intensity distinguish them from those common to other occupations, which supports a hypothesis of work-related disability through gradual deterioration. I apply this pragmatic distinction here.

2. Mr. Loura's "Identifiable Condition"

The question presented here is whether Mr. Loura has asserted (1) non-compensable "wear and tear" based on movements common to "necessary human activity and many jobs," or stresses that are indistinguishable from those of other jobs; or (2) whether he was exposed to an identifiable condition that is not common and necessary to all or a great many occupations, and that caused him to become disabled through gradual deterioration.

Mr. Loura's work as a water department maintenance worker over the eight years he performed its essential duties required bending, twisting, shoveling, and lifting heavy equipment, as well as large piles of dirt and rocks, in confined spaces, mostly trenches, and mostly outdoors during the day or night in all types of weather. This work required, generally, repetitive twisting, bending, stooping, lifting and being on one's knees in awkward positions. It included jackhammering to break the ground for the operators of excavation equipment in order to dig trenches for water mains and

pipes, as well as shoveling, welding, cutting and fitting pipes in street trenches, and repairing water main breaks and leaks. (S*ee* Finding 8.)

These work-related activities implicated intense physical stress on a regular, if not constant, basis, and Mr. Loura needed to perform them in order to perform the essential duties of his water maintenance worker job. The frequency and intensity of Mr. Loura's work activities were constant, involved heavy equipment (in case of the pipe cutter he moved without assistance on August 20, 2009 to avoid an accident with an operating backhoe, over 80 pounds' worth), were performed in tight quarters, and were critical to performing and completing water maintenance work successfully–in other words, they were critical to Mr. Loura's performance of his essential job duties rather than strains and stresses experienced during the performance of incidental tasks. It is worth adding that performing these duties was essential to the operation or resumption of a municipal water supply system, a critical function essential to the health of citizens who depend upon the delivery of clean water via public systems. All of this suggests that Mr. Loura's work activities needed to be completed relatively quickly as a matter of public health and safety, at whatever time, and in whatever weather and lighting conditions, the need to perform them arose, as was the case during a water main break. This factor added to the intensity of Mr. Loura's job-related activities.

Mr. Loura's work-related activities are readily distinguished from walking about and bending incidental to performing one's essential job, as was the case in *Adams*, and, as well, from the wear and tear common to the occupations that CRAB listed in its second *Adams* decision (homemakers,

doctors, nurses, waiters, chefs, laborers, patrolmen, correctional officers, janitors, tradesmen, watchmen, salespersons, metermaids, baseball players and umpires; *see* above at 85-86). Those jobs, and others, require walking, bending and lifting, but very few (if any) of them require the regular lifting and moving of heavy equipment and pipes, and large quantities of dirt and rocks, in cramped conditions within outdoor trenches, regardless of the weather or the presence of daylight. Stated another way, the water maintenance work Mr. Loura performed is distinguished readily from other activities involving walking, standing or lifting, in terms of the bulk and weight of materials and equipment moved and lifted, the location in which these activities were performed, the stress and strain required to complete these tasks, and the additional risk of injury posed by performing this work outdoors, in cramped, wet, rocky and often muddy quarters, regardless of weather or gloom.

Mr. Loura's work activities exceeded, in frequency and intensity, those of a worker whose walking and bending over are incidental to, but not necessarily critical to, the performance of his essential duties, and the frequency and intensity of his job duties distinguished them readily from those of most occupations and those of daily life. Mr. Loura presented, therefore, the identifiable condition needed to establish a compensable injury.

This identifiable condition was clearly before the medical panel. The panel members had each received records and documents to review before examining Mr. Loura, among them Mr. Loura's accidental disability retirement application, his job description, his employer's statement, and the reports of the many physicians and physical therapy caregivers who had described his job duties and

what he was doing when he was injured on August 20, 2009. There is nothing in the reports and subsequent answers to board counsel's questions that Drs. Nicoletta, Rosenthal and Conforti each prepared, or elsewhere in the record, that even suggests the panel members did not review the accidental disability retirement application included in the records they received from the board. The retirement application recited the alternate grounds upon which Mr Loura alleged causation—the single-injury hypothesis, and also the hypothesis that his employment as a water maintenance worker exposed him to an identifiable condition that is not common and necessary to all or a great many occupations, and that resulted in disability through gradual deterioration. The application also included descriptions of Mr. Loura's essential job duties, from him and from Taunton DPW. In addition, each of the panel members obtained a history from Mr. Loura that included a description of his job and the type of work he performed regularly. The panel members were able to evaluate, therefore, both of the causation hypotheses that Mr. Loura asserted in his disability retirement application. They also knew what the nature, frequency and intensity of Mr. Loura's job duties were, and could distinguish them readily from the less-intense physical demands of most other occupations or of regular life.

3. The Medical Panel's Majority Opinion as to Causation

Mr. Loura asserted two reasons for claiming a job-related disability; first, that he was disabled as a result of moving a heavy pipe cutter in a water maintenance trench on August 20, 2009, and

second, that he was disabled as a result of many years of work as a water department maintenance worker, which, uniquely to that work, required repetitive heavy lifting, as well as stooping, bending, squatting, and being on his knees in awkward positions, mostly in outdoor trenches, regardless of the weather or lighting conditions. He asserted both hypotheses in his disability retirement application (*see* Finding 42(c)) and has done so since, placing particular emphasis on the hypothesis that his exposure over the years to the unique physical stresses of his job exacerbated the chronic lumbar spondyloarthropathy and degenerative disk disease revealed by the MRIs, and resulted in his disability through gradual deterioration.

A majority of the panel members (Dr. Nicoletta and Dr. Conforti) answered affirmatively as to causation after examining Mr. Loura in the fall of 2012; Dr. Rosenthal, the minority panel member as to this issue, answered in the negative. Two questions are posed here as to the panel's majority causation answer. One is whether the panel majority's affirmative answer as to causation addressed only the single-event causation hypothesis. The other is whether the panel majority's affirmative answer as to causation shifted to a negative one as a result of Dr. Nicoletta's answers to the Board's questions in January 2013. That would have been the case if only the single-injury hypothesis had been before the medical panel, since Dr. Nicoletta's clarification rejected it.

The Board's assertion that the panel had only the single-event causation hypothesis before it appears to rest upon two grounds. One is that only the single-injury hypothesis was presented by the materials reviewed by the panel members. I have rejected that ground because the materials, in

particular Mr. Loura's accidental disability retirement application, presented both causation hypotheses. The other is that what the panel members had before them did not show Mr. Loura's exposure to an identifiable condition that is not common and necessary to all or a great many occupations. However, I have already determined, per the standard enunciated by the Supreme Judicial Court in *Adams*, that the frequency and intensity of the physical activities required to perform Mr. Loura's essential job duties distinguished them from the physical requirements common to a great many occupations and incidental to life in general, and therefore presented an identifiable condition that was not common or necessary to a great many occupations. The panel members had the facts demonstrating this identifiable condition before them, from both Mr. Loura's job and injury descriptions in his accidental disability retirement application and in the history he gave to each of the medical panel members. As a result, both hypotheses were before the medical panel for their evaluation. The medical panel's affirmative answer as to causation was not changed to a negative answer, therefore, when Dr. Nicoletta explained that he had rejected a specific work-related event as having caused Mr. Loura's disability, as that left unrejected the alternative hypothesis of deterioration due to exposure over time to an identifiable condition.

The potential difficulty here is that the medical panel members did not answer the causation question with as neat a differentiation between the two causation hypotheses as one might prefer. Nonetheless, both causation hypotheses were before the panel members, and none of them changed his opinion as to causation.

In answering in the negative as to causation, Dr. Rosenthal addressed specifically only the injury Mr. Loura sustained on August 20, 2009 and perceived no causative relationship between it his disability, particularly in view of the underlying spondylolisthesis revealed by the lumbar spine MRI that was performed several months later. *See* Findings 48(c) (Dr. Rosenthal's answer as to disability, permanence and causation), and 55 (Dr. Rosenthal's answer to the retirement board's questions to him). Dr. Rosenthal did not specifically address the hypothesis that Mr. Loura's spinal condition deteriorated due to exposure over time to an identifiable condition. Because the materials he reviewed placed that hypothesis squarely before him, however, I conclude that he rejected it implicitly.

I follow a similar approach to the panel majority's affirmative causation answer. Dr. Conforti's opinion was that Mr. Loura's August 20, 2009 injury had "accelerated" his underlying degenerative arthritis and disk disease, and that his incapacity was therefore "such as might be the proximate result of the work injury sustained on account of which retirement is claimed." (Finding 49(c).) In his response to the board's questions to him, Dr. Conforti stated that the August 20, 2009 injury "aggravated the condition of degenerative arthritis and degenerative disc disease of the lumbar spine and first degree spondylolisthesis at L5-S1." (Finding 54.) He added that spondylolisthesis was not a degenerative condition, and was usually developmental, although it "may occasionally be produced by trauma." (*Id.*) Dr. Conforti did not explain whether by trauma he was referring only to the August 20, 2009 injury, or whether he also was referring to trauma over time, such as the

repetitive heavy lifting, stooping, bending, squatting, and resting on the knees in awkward positions that Mr. Loura asserted in his disability retirement application. Unquestionably, though, that assertion was in the materials Dr. Conforti reviewed, and the identifiable condition hypothesis was therefore before him. He did not mention it specifically, but because the hypothesis was before him, it is more significant that he did not reject it in his original report or in his answer to the board's questions, and that his answer as to causation remained affirmative.

Dr. Nicoletta opined that "[t]here does appear to be a causal relationship established by the history," and that he could not return "to his prior work capacity which involves heavy manual labor, both now and in the future due to the fact that he is likely [to] have *further exacerbation* of his symptomatology related to a chronic lumbar spondyloarthropathy and lumbar degenerative disk disease" (emphasis added). (Finding 47(c).) His use of the phrase "further exacerbation" suggests strongly that Dr. Nicoletta viewed Mr. Loura's work as having exacerbated his symptomatology even before the August 20, 2009 pipe cutter incident.

I am persuaded that Dr. Nicoletta's affirmative answer as to causation was expressed as to both of the disability hypotheses Mr. Loura asserted in his disability retirement application, which was included in the materials Dr. Nicoletta reviewed. In answering the board's questions to him, Dr. Nicoletta clarified that Mr. Loura's disabilities, including his chronic pain, did not occur as the result of a specific incident such as the strain he sustained while moving the pipe cutter on August 20, 2009, and that Mr. Loura's spondyloarthropathy and degenerative disk disease were not caused by any one

specific incident but had progressed over time. (Finding 51.) Dr. Nicoletta did not specifically affirm the hypothesis that Mr. Loura became disabled through exposure to an identifiable condition that is not common and necessary to all or a great many occupations but, more significantly, he did not reject that hypothesis, and nor did he change his affirmative answer as to causation. In view of this, and because the materials he reviewed presented both hypotheses, Dr. Nicoletta's original answer is more reasonably viewed as affirmative regarding both of them, rather than as affirmative with respect to the single-injury hypothesis only. His subsequent clarification rejecting single injury as having caused Mr. Loura's disability left his affirmative answer as to causation intact, therefore, as to the identifiable condition/deterioration hypothesis.

If the retirement board had wanted each of the panel members to clarify whether his answer as to causation addressed both disability causation hypotheses specifically, it could have asked them to do just that. It did not do so, however. The board's explanation that only the single injury hypothesis was properly before the panel is of no avail. Both hypotheses were presented in Mr. Loura's disability retirement application, one of the records the board sent to the panel members. In addition, all of the panel members appeared to understand the nature of Mr. Loura's water system maintenance work and its constant, intense physical demands. As orthopedic surgeons, all of them were likely aware that spondyloarthropathy and degenerative disk disease can be exacerbated by repetitive trauma. (*See* Finding 23(b) n. 5.) The possibility of repetitive trauma as a result of moving and lifting unusually heavy equipment, pipes, and piles of rocks and dirt in confined, mostly outdoor

work environments was suggested strongly by Mr. Loura's official job description, which was also included in the materials sent to the panel members for their review, and by the consistent description of his work duties that Mr. Loura gave to the panel members when they examined him. In these circumstances, the suggestion of causation by repetitive trauma presented itself to the panel members at least implicitly.

I conclude that the panel majority's affirmative answer as to causation was with respect to both causation hypotheses, and properly so because both hypotheses were presented to them. That answer was revised to eliminate the single-injury hypothesis of causation, per Dr. Nicoletta's answers to the board's questions, but it was never retracted. After the medical panel members had answered the board's questions, there remained an affirmative majority panel answer as to causation that no longer included Mr. Loura's single-injury hypothesis, one of the two he asserted in the materials that the panel members reviewed. However, it still included the alternative hypothesis he asserted, and that the materials the panel reviewed also presented—deterioration through exposure to an identifiable condition.

4. No Grounds for Rejecting the Medical Panel Majority's Affirmative Answer as to Causation

I have already noted that the medical panel majority's affirmative answer as to causation is "not conclusive of the ultimate fact of causal connection," and is only "some evidence" as to whether the applicant is entitled to accidental disability retirement benefits under M.G.L. c. 32, § 7(1). (*See*

discussion above at 70-73.) Because there remained an affirmative majority panel answer as to causation, and the panel's answers as to disability and its likely permanence remained unchanged as well, the panel's answers can, and should, be given appropriate weight in considering whether the statutory prerequisites for that type of retirement have been proven here.

Mr. Loura's case rests upon the medical and non-medical facts presented by the record, the medical panel's unanimous affirmative answers as to his disability and its likely permanence, and the medical panel's majority affirmative answer as to causation. The board asserts what appear to be grounds for rejecting the credibility of Mr. Loura's accidental disability retirement claim overall, even as to whether he is disabled, and, more specifically, for rejecting the panel's answers or giving them minimal weight in sifting the evidentiary mix. In determining what weight I should give the panel's affirmative answers, I find it helpful to determine whether there would exist any of the grounds on which a negative panel answer may be rejected—improper panel composition, application by the panel of an incorrect standard, or a panel answer that is "plainly wrong."

The record does not support rejecting the medical panel's majority affirmative answer as to causation on any of these grounds.

a. Medical Panel Composition, and Standard Applied by the Panel Majority

The Board did not, and does not now, object to the composition of the medical panel that examined Mr. Loura. In view of the type of injury Mr. Loura alleged and the underlying spinal

conditions that the MRIs and physical examinations showed, and the two causation hypotheses Mr. Loura asserted, the panel was properly comprised of three orthopedic surgeons.

The Board also has not asserted that the panel members applied an incorrect standard in answering the questions as to disability, its permanence and causation. Instead, the board concluded, incorrectly, that the panel had before it only the single-injury hypothesis as to causation, and that the majority affirmative answer as to causation evaporated when Dr. Nicoletta clarified his answer to exclude a single injury as having caused Mr. Loura's disability. What actually happened was that the panel majority's affirmative answer as to causation remained intact as to the alternative causation hypothesis—that Mr. Loura's disability resulted from his exposure, as a water maintenance worker, to an identifiable condition—repetitious lifting and moving of heavy materials, such as machinery, pipes, and quantities of rocks and soil, mostly in cramped conditions in outdoor trenches regardless of the weather or light conditions—that is not common and necessary to all or a great many occupations, and that resulted in disability through gradual deterioration. Because that causation hypothesis , as well as the single-injury hypothesis, was before the panel based upon the materials the board sent the panel members for their review, the panel's affirmative answer properly extended to both of them. For the same reason, when panel majority member Dr. Nicoletta clarified his answer as to causation to exclude a single injury as having caused Mr. Loura's disability, the affirmative panel majority remained as to the alternative causation hypothesis.

In that respect, the unretracted panel majority answer as to causation based upon the

cumulative injury/identifiable condition hypothesis cannot be rejected as having been based upon the application of an incorrect standard.

b. Whether the Panel Majority's Affirmative Answer as to Causation was "Plainly Wrong"

The medical evidence does not show that the medical panel's affirmative majority opinion as to causation on the identifiable condition/gradual deterioration hypothesis was "plainly wrong."

First, neither the MRI reports nor any of the many physical examination reports in the record state, or even suggest, that Mr. Loura's spondyloarthropathy and degenerative disc disease were not exacerbated by, or could not have been exacerbated by, the physical exertion required to perform his water maintenance job, or by the repetitive trauma as a result of moving and lifting unusually heavy equipment and pipes in confined, mostly outdoor work environments.

Second, there is no evidence that Mr. Loura was disabled due to an injury other than gradual deterioration on account of the repetitious heavy lifting and moving he was required to perform over many years in order to carry out the essential duties of his water maintenance work. There are no medical records of any disabling injury prior to the August 20, 2009 pipe cutter incident. He was cleared for DPW work without restriction following a physical examination on June 25, 2001. (Finding 5.) The only other record of a medical examination prior to the August 20, 2009 injury involving the pipe cutter is from Dr. McGuire's emergency care examination of Mr. Loura regarding neck pain on October 27, 2008. (*See* Finding 9.) His note related a history of chronic neck pain and

a history of a bulging disc in his neck, and a current complaint that the neck was sore to the touch and with movement, both of which had worsened during the previous 48 hours, and that Mr. Loura denied any new, direct trauma to the neck area, but stated that he had "an exertional job where he could have potentially exacerbated some of his muscular issues." (*Id.*) Dr. McGuire did not discuss Mr. Loura's specific tasks, or the heavy lifting he was required to perform. However, he described his neurological examination of Mr. Loura as "normal," and his impression was that Mr. Loura had chronic neck discomfort, with no serious etiology such as atypical cardiac or cerebrovascular presentation, and no "life-threatening emergent process regarding the neck." (*Id.*)

Third, the medical panel's minority negative answer as to causation, by Dr. Rosenthal (*see* Finding 48 for his original answer, and Finding 56 for his answer to the board's questions), provides no factual basis for rejecting the identifiable condition/gradual deterioration hypothesis.

Because both causation hypotheses were before Dr. Rosenthal, as they were before Drs. Nicoletta and Conforti, his negative answer as to causation applied to both causation hypotheses. That said, Dr. Rosenthal offered no explanation for rejecting the hypothesis that Mr. Loura's underlying spinal deficits were exacerbated by repetitious heavy lifting and moving he was required to perform over many years in order to carry out the essential duties of his water maintenance work. In fact, he did not address, or specifically rule out, a relationship between Mr. Loura's spondyloarthropathy and degenerative disk disease and the heavy lifting, moving, and other physically-demanding activities that his work required. His response to the Board's questions was

that the August 20, 2009 did not aggravate those underlying conditions to the point of disability, but Dr. Rosenthal did not address whether performing the heavy lifting and moving his work required over the years had done so. Indeed, when the board asked him to state whether it was medically possible that Mr. Loura's August 20, 2009 injury aggravated his underlying condition to the point of disability, Dr. Rosenthal answered that this was medically possible, although in answering whether he believed it more likely than not that this had occurred, Dr. Rosenthal answered that it remained his opinion "that the acccident in question did not aggravate [Mr. Loura's] underlying condition to the point of disability." (Finding 56.) However, although the board had also asked him to state whether there was any evidence in the medical records to support this opinion (*see* Finding 55), Dr. Rosenthal did not answer this question, and the medical evidence that Dr. Rosenthal relied upon in formulating his opinion as to lack of aggravation remained unclear. As a result, Dr. Rosenthal's original answer as to causation, and his response to the Board's questions to him, do not furnish any evidence that the panel majority's affirmative answer as to causation based upon the identifiable condition/gradual deterioration hypothesis was "plainly wrong."

Finally, there is no basis in the record for rejecting the panel's majority affirmative answer as to causation as "plainly wrong" based upon a potentially causative injury that preceded Mr. Loura's work for Taunton DPW. As Dr. Rosenthal noted, Mr. Loura's MRIs did not show a pars interarticularis fracture (*see* Finding 48(a)) and, as a result, the MRIs did not suggest an earlier, non work-related injury such as one seen in adolescent athletes. There is also no evidence that Mr. Loura

has ever played a sport or suffered an injury while doing so.

ii. Misconduct or Malingering

The Board emphasizes that Mr. Loura moved the pipe cutter without assistance on August 20, 2009, despite the generally accepted practice of having two workers move this heavy equipment weighing as muich as 100 pounds, particularly in the unstable environment of an outdoor trench. It contends that in moving the pipe cutter without assistance, and in admitting that he did so intentionally, Mr. Loura strayed from the job requirement that he lift 50 pounds, and, therefore, did not injure himself during the performance of his duties. In the alternative, the board argues, he engaged in conduct without regard for its probable consequences and that rose to the level of "serious, willful misconduct" that, per M.G.L. c. 32, § 7(1), would preclude the payment of accidental disability retirement benefits to him.

Mr. Loura testified without contradiction, however, that although moving the pipe cutter was a two-person operation due to the equipment's weight, he perceived an imminent collision involving a backhoe digging a water trench if he did not move the pipe cutter without first seeking assistance. (*See* Finding 10.) In addition, Mr. Loura's direct supervisor stated, in the employer's section of the disability retirement application, that the disability Mr. Loura claimed was *not* the result of any misconduct on Mr. Loura's part. (*See* Finding 45.) There is no evidence of misconduct, therefore, that would furnish sufficient cause for the board to reject the medical panel's majority affirmative

causation answer as "plainly wrong."

There is also no cause for rejecting the affirmative panel answer as "plainly wrong" based upon "malingering."

Although the board did not specifically deny Mr. Loura's accidental disability retirement application based upon evidence of malingering, it suggests this ground here. In support of the suggestion, it offered a DVD prepared from a videotape recording showing Mr. Loura performing with a band in March 2013, during which he was playing congas and cymbals in a standing position. (Exh. R11.) The City of Taunton introduced the video (either in the original format or, as here, in DVD format) during the workers' compensation hearing, together with the testimony of the private investigator who prepared it. (*See* Finding 57.) The board did not call the investigator as a witness during the hearing in this appeal. Instead, in addition to relying upon the DVD, the board relied upon the July 31, 2014 decision of the DIA administrative judge in Mr. Loura's workers' compensation case (Exh. P16), and the March 13, 2013 report of one of the investigators who conducted the surveillance that produced the video from which the DVS was made (Exh. R10). The board also relied upon its cross-examination of Mr. Loura, during the hearing in this appeal, regarding his performance with the band. (*See* Tr. 58-59, 65-66, 69-70, 75.)

The DVD does not show Mr. Loura lifting heavy objects. It shows him playing congas during the band's performance in a standing position, with the congas resting on the stage. Playing these types of drums appears to have required frequent arm movement, mostly with the hands and with the

elbows in a bent position, but it did not involve any lifting, bending, squatting or kneeling. The video therefore does not show that Mr. Loura could perform the essential duties of his water system maintenance job, which required lifting machinery, tools, pipe and rock and dirt, or that this disability had resolved by March 13, 2013, when the band performance in question occurred. Based upon the testimony described by the DIA administrative in her workers' compensation decision, participating in the band performance signaled to Mr. Loura that despite wanting to return to playing instruments as he had done in the past, he was no longer able to do so. As the DIA administrative judge's decision noted, Mr. Loura testified that he took a painkiller (Vicodin) before performing with the band, and that the day after performing was particularly painful and persuaded him not to repeat the performance. (*See* Finding 64.)

Neither Dr. Nicoletta nor any of the other physicians who examined Mr. Loura ruled out his ability to stand or walk about, whether while playing congas in a band or otherwise. That level of activity is not contraindicated by the findings and opinions of any of these physicians, and nor is it inconsistent with the deficits the physicians observed when they examined Mr. Loura. What had resolved was the thoracic strain. Several of the physical examination reports in the record note, however, that Mr. Loura's back and lower left leg pain, and decreased range of motion, was worse while he was sitting or lying down, rather than while he was standing; two of the medical panel members noted that he was able walk in the examination room, albeit with a limp, and that moving about became painful for Mr. Loura when it involved bending. (*See, e.g.,* Finding 30(b), regarding

Dr. Shapiro's examination of Mr. Loura on July 16, 2012; Finding 47(b), regarding Dr. Nicoletta's examination of Mr. Loura on September 29, 2012); and Finding 49(b), regarding Dr. Conforti's examination of Mr. Loura on October 22, 2012.) The conservative pain treatment regime he was administered beginning in late 2009 emphasized exercising, although exercises that required bending or stretching provided no relief and proved painful instead.

Nothing Mr. Loura can be seen doing in the video is at odds with the spinal deficits that the MRIs show, or that the treating and examining physicians observed. In addition, during the hearing I held on August 5, 2015, Mr. Loura preferred standing to sitting while he testified. The fact remains, however, that Mr. Loura found the physical cost of performing with the band, in terms of the pain he suffered afterward, was not worth the fun he may have had, nor the money he earned, doing it.

Conclusion and Disposition

In order to qualify for accidental disability retirement benefits under M.G.L. c. 32, § 7(1), Mr. Loura was required to demonstrate his inability to perform the essential duties of his municipal water system maintenance job as a result of a personal injury he sustained while performing them , the likely permanence of this incapacity, and a proximate, work-related cause for this incapacity. Mr. Loura met his burden of proving these prerequisites for accidental disability retirement by a preponderance of the evidence.

The preponderating medical evidence shows that Mr. Loura is unable to perform the essential

duties of his job as a result of unresolving pain, in the mid and lower back area radiating to the hips and left leg resulting from a work-related aggravation of his underlying, progressive spondyloarthropathy and lumbar degenerative disk disease, and that this disability is likely to be permanent. The preponderating medical and non-medical evidence supports the hypothesis that his employment exposed him to an identifiable condition that is not common and necessary to all or a great many occupations, and that resulted in disability through gradual deterioration. The "identifiable condition" here was regularly bending, twisting, being on his knees in awkward positions, shoveling, and lifting heavy equipment, as well as heavy quantities of dirt and rocks, in confined spaces, mostly trenches, and mostly outdoors during the day or night in all types of weather, in order to repair water mains and leaks and perform the other essential duties of his job as a water system maintenance worker. A majority of the medical panel's orthopedic surgeon members answered in the affirmative as to incapacity, its likely permanence, and causation based upon the "identifiable condition/gradual deterioration" hypothesis, which was presented in the materials sent to the medical panel members and was therefore properly before them for consideration. Absent any showing that the medical panel was comprised improperly, applied an incorrect standard in reaching its conclusions, or reached conclusions that were clearly wrong, the panel's affirmative answer cannot be ignored. I give it great weight in evaluating the evidence before me, particularly because the panel members answered affirmatively as to disability and its likely permanence, and those answers, as well as the majority affirmative panel answer as to causation based upon the identifiable condition/gradual

deterioration hypothesis, are supported strongly by the medical and non-medical evidence. As to support for that hypothesis, the evidence shows that the frequency and intensity of Mr. Loura's regular bending, twisting and heavy lifting, mostly outdoors in cramped conditions, day and night in all kinds of weather and light conditions, in order to perform the essential duties of his work as a water system maintenance worker, distinguished his work activities from those common to other occupations and to those of daily life, and caused "wear and tear" that exacerbated his underlying degenerative spinal condition. The panel's affirmative answers are persuasive of causation to a reasonable degree of medical certainty.

This matter is, therefore, remanded to the Taunton Retirement Board for the purpose of granting Mr. Loura's accidental disability retirement application, and awarding accidental disability retirement benefits to him.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: December 2, 2016