

**U.S. Department of Labor**

Office of Administrative Law Judges  
St. Tammany Courthouse Annex  
428 E. Boston Street, 1<sup>st</sup> Floor  
Covington, Louisiana 70433

(985) 809-5173  
(985) 893-7351 (FAX)



**Issue Date: 16 February 2006**

**Case No.: 2005-LDA-54**

**OWCP No.: 02-136317**

**IN THE MATTER OF**

**JAMES O. NEAL,**  
Claimant

**vs.**

**SERVICE EMPLOYERS INTERNATIONAL, INC.,**  
**c/o BROWN & ROOT, INC.,**  
Employer

**and**

**INSURANCE COMPANY OF THE**  
**STATE OF PENNSYLVANIA,**  
**c/o AIG WORLDSOURCE,**  
Carrier

**APPEARANCES:**

**GARY B. PITTS, ESQ.,**  
On Behalf of the Claimant

**JOHN L. SCHOUEST, ESQ.,**  
**BRIAN E. WHITE, ESQ.,**  
On Behalf of the Employer/Carrier

**Before: PATRICK M. ROSENOW**  
**Administrative Law Judge**

## DECISION AND ORDER

### PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act (the Act),<sup>1</sup> brought by James Neal (Claimant) against Service Employers International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o AIG Worldsource (Carrier).<sup>2</sup>

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 26 Jul 05 a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witness, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:<sup>3</sup>

#### Witness Testimony of Claimant

#### Exhibits

Claimant's Exhibits (CX) 1-23  
Employer's Exhibits (EX) 1-36  
Joint Exhibits (ALJX) 1-2<sup>4</sup>

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

---

<sup>1</sup> 42 U.S.C. § 1651 *et. seq.* (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 901 *et seq.*).

<sup>2</sup> For simplicity both Employer and Carrier are collectively referred to herein as Employer.

<sup>3</sup> I have reviewed and considered all testimony and exhibits admitted in to the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

<sup>4</sup> Pursuant to the Court's request, the parties submitted ALJX-2, a chronological table of Claimant's medical treatment. The parties stipulated that they reflect the history given to Claimant's medical providers, the diagnoses made, and the assessments made. They did not stipulate to the accuracy of the histories, diagnoses or assessments.

## **STIPULATIONS<sup>5</sup>**

1. Jurisdiction exists under the Defense Base Act.
2. There was an employee/employer relationship at the time of the alleged accident.
3. Employer was properly notified of the injury.
4. Notice of controversion was timely and properly filed.
5. No medical benefits have been paid.
6. No disability benefits have been paid.

## **ISSUES<sup>6</sup>**

1. Compensable injury,
  - a. Whether Claimant sustained a new injury or an aggravation of a pre-existing injury in the zone of special danger in Afghanistan on or about 23 Jun 04.
2. Average weekly wage at the time of injury.
3. Nature and extent of disability.
4. Date of maximum medical improvement.
5. Choice of physician.
6. Section 8(f) relief.
7. Attorney's fees.

---

<sup>5</sup> ALJX-1.

<sup>6</sup> Id.

## FACTUAL BACKGROUND

Claimant has a long employment history as a truck driver. He had several injuries prior to the subject injury. In 1990, Claimant fell off of a vacuum truck in a work-related accident and hurt his back. An MRI taken after his 1990 injury revealed disc bulging at the L2-3, L3-4, L4-5, and most notably L5-S1 levels. After nine months of treatment, he was released to return to work with no permanent disability.<sup>7</sup>

Claimant returned to work full-time after his 1990 injury, but in January 1991 he tripped and fell while loading a radiator. He received medical treatment for burning discomfort in his lower back radiating down to his leg. No MRI study was taken and Claimant returned to light duty on 22 Jan 91, with a lifting restriction of five pounds.<sup>8</sup> Claimant continued active medical treatment for this injury until 25 Mar 91 when he was released to his regular job with a restriction of no lifting more than 25 pounds above shoulder or at desk level.<sup>9</sup> Claimant was also restricted from carrying anything greater than 37 pounds and ordered to avoid repetitive bending, pushing, or pulling. No restrictions were placed on his walking, kneeling, or crawling.<sup>10</sup> Dr. Cannon assigned a three percent whole-body impairment rating related to Claimant's spinal injury.<sup>11</sup>

Three pins were implanted into Claimant's right hip after a tractor ran over him in 1993. No MRI study was taken after this injury.

In 1994, Claimant was involved in a work-related motor vehicle accident and was diagnosed with traumatic lumbar sprain complicated by bilateral paravertebral lumbar muscle spasms. Claimant also blacked out for several minutes following this accident. Claimant received manipulative corrections from a chiropractor, Dr. Weathersby, who said that Claimant's prognosis was good, but Claimant would probably require treatment as long as his condition was aggravated by his activity level.<sup>12</sup> No MRI study was taken after this accident. Claimant returned to work as a truck driver.

Prior to working for Employer, Claimant underwent a pre-employment physical on 20 Apr 04. Employer approved him for work and Claimant left the United States on 28 Apr 04. He arrived in Afghanistan on 02 May 04. As he was getting off the airplane, Claimant stumbled. He did not immediately go to the medic because the pain went away and he started his job without problems. He first went to the medical department on 06 May 04 for complaints of right hip and leg pain. The doctor gave him pain medication

---

<sup>7</sup> EX-21, p. 1; EX-22, p. 2.

<sup>8</sup> EX-25.

<sup>9</sup> EX-28.

<sup>10</sup> Id.

<sup>11</sup> EX-33.

<sup>12</sup> EX-34.

and told him to return for a follow-up in two weeks.<sup>13</sup> Claimant took his medication and continued his job. He started “driving trucks”<sup>14</sup> for Employer about three weeks after he arrived in Afghanistan.

Claimant returned to the medical department on 24 Jun 04, with complaints of back pain, right leg numbness, and right leg weakness. He attributed his pain to getting in and out of his work truck and to the “rocky” roads with “chug holes.” Claimant informed the doctor that his symptoms were much more severe than on 06 May 04 and the doctor placed Claimant on light duty.<sup>15</sup> He diagnosed Claimant with arthritic back pain and sciatica.<sup>16</sup> The doctor informed Claimant that he could not do his truck driving job with his injuries. Claimant spoke with his supervisor regarding potential light duty work in Afghanistan, but there was no light duty work available. Claimant returned to the United States to figure out what was wrong with his back. He returned to the United States on medical leave on 30 Jun 04.

Upon returning to the United States, Claimant treated with Dr. Miguel Flores on 12 Jul 04 for complaints of right leg numbness from his upper knee to thigh and burning sensations and tingling in his lower back.<sup>17</sup> Claimant related his pain to an injury in Afghanistan. Dr. Flores prescribed medication and diagnosed Claimant with pulled back muscles. He did not authorize an MRI. On 20 Jul 04, Claimant informed Dr. Flores that he “did not have any pain whatsoever” and was ready to return to work. After Dr. Flores examined Claimant’s back for flexibility and ability to move and twist, which revealed no back discomfort, Claimant was “fully released to work with no restrictions.” Dr. Flores did not assign a permanent impairment and stated that Claimant did not require any maintenance treatment.<sup>18</sup>

Before Claimant could return to work, Employer wanted an MRI. Employer paid for the MRI after a recommendation from the U.S. Department of Labor District Director. An MRI was performed on 04 Aug 04, revealing disc desiccation at all levels, canal stenosis in the transverse dimension at all levels, L2-3 broad-based disc protrusion, canal stenosis, compromise of both L2-3 nerve roots and L3-4 left foraminal and lateral recess, and far lateral HNP with at least moderate compromise of the left L3 nerve root.<sup>19</sup> Based on this MRI and Dr. Cantu’s opinion, Employer found Claimant “medically unfit” and refused to return him to work. Claimant went to see Dr. Cantu, but was escorted from the building.

---

<sup>13</sup> CX-4.

<sup>14</sup> Claimant did not actually drive trucks for Employer. He was an escort to an Afghanistan truck driver.

<sup>15</sup> EX-2, p. 3.

<sup>16</sup> Id.

<sup>17</sup> CX-6, p. 2.

<sup>18</sup> Id. at 7.

<sup>19</sup> EX-6; CX-7.

Claimant returned to work as a truck driver for Mission Petroleum from 10 Dec 04 through 25 Mar 05. He stopped working for Mission Petroleum when his Social Security early retirement benefits began. Since he could survive off his Social Security benefits and had continued pain, Claimant stopped working. Claimant consistently testified that he wants to return to work for Employer overseas. Claimant has not worked since 25 Mar 05.

### **POSITIONS OF THE PARTIES**

Claimant contends he either suffered an original injury or had a pre-existing condition aggravated while in the zone of special danger in Afghanistan when he had to “clamber up bolts and swing himself over to get in and out” of a truck with no steps, had to drive on rough roads, and had an initial stumble and fall when he got off the airplane. He argues that he started having persistent back problems and eventually got to the point where he had to leave Afghanistan and return to the United States for treatment.

Claimant further claims temporary total disability benefits from 30 Jun 04 through 9 Dec 04, temporary partial disability benefits from 10 Dec 04 through 25 Mar 05 and temporary total disability benefits from 26 Mar 05 to present and continuing. He argues he has not reached maximum medical improvement.

Claimant seeks reasonable and necessary medical treatment by an orthopedic specialist of his choice and contends proper calculation of his average weekly wage requires use of Section 10(c) along with his contract rate of pay because his truck driving position with Employer was not the same as his usual truck driving appointments.

Employer, on the other hand, submits that Claimant neither injured himself nor suffered an aggravation of a pre-existing condition while working for Employer. Alternatively, if a pre-existing injury was aggravated, Employer argues that Claimant was temporarily totally disabled for a very short time from 24 Jun 04 through 21 Jul 04, has reached maximum medical improvement, and is now 100% and can return to work. If this Court makes a finding of permanent disability, Employer seeks Special Fund<sup>20</sup> relief because of the aggravation of the pre-existing condition.

Finally, Employer suggests that a section 10(a) calculation will fairly and reasonably represent Claimant’s wages for the year preceding his work-related injury. Claimant’s average weekly wage should be \$797.39.

The Director, Office of Workers’ Compensation Programs contends that in the event that this Court determines Claimant reached maximum medical improvement and is permanently disabled, Employer is not entitled to recover from the Special Fund.

---

<sup>20</sup> 33 U.S.C. §908(f).

## LAW

### Disability Compensation

It has been consistently held that the Act must be construed liberally in favor of the Claimant.<sup>21</sup> However, the United States Supreme Court has determined that the “true-doubt” rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,<sup>22</sup> which specifies that the proponent of a rule or position has the burden of proof and thus the burden of persuasion.<sup>23</sup>

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.<sup>24</sup>

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of or in the course of employment.”<sup>25</sup> In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.<sup>26</sup> The presumption takes effect once the claimant establishes a **prima facie** case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.<sup>27</sup>

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain.<sup>28</sup> These two elements establish a **prima facie** case of a compensable “injury” supporting a claim for compensation.<sup>29</sup>

---

<sup>21</sup> *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

<sup>22</sup> 5 U.S.C. § 556(d).

<sup>23</sup> *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

<sup>24</sup> *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

<sup>25</sup> 33 U.S.C. § 902(2).

<sup>26</sup> 33 U.S.C. § 920(a).

<sup>27</sup> *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

<sup>28</sup> *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).

<sup>29</sup> *Id.*

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption.<sup>30</sup>

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.<sup>31</sup> "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.<sup>32</sup> Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).<sup>33</sup>

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.<sup>34</sup> If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.<sup>35</sup> The presumption does not apply, however, to the issue of whether a physical harm or injury occurred<sup>36</sup> and does not aid the claimant in establishing the nature and extent of disability.<sup>37</sup>

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain.<sup>38</sup> A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition.<sup>39</sup> Although a pre-

---

<sup>30</sup> See *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

<sup>31</sup> See *Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

<sup>32</sup> *Avondale Industries v. Pulliam*, 137 F.3d 326,328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

<sup>33</sup> See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

<sup>34</sup> *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

<sup>35</sup> *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994).

<sup>36</sup> *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

<sup>37</sup> *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

<sup>38</sup> *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

<sup>39</sup> See *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012 (5th Cir. 1981).

existing condition does not constitute an injury, aggravation of a pre-existing condition does.<sup>40</sup> It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily injury.<sup>41</sup>

The opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances.<sup>42</sup>

### **Average Weekly Wage**

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,<sup>43</sup> which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.<sup>44</sup>

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.<sup>45</sup> Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.<sup>46</sup> But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then Section 10(c) is appropriate.<sup>47</sup>

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

---

<sup>40</sup> *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982).

<sup>41</sup> *Britton*, 377 F.2d at 147-148.

<sup>42</sup> *Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary"); *Rivera v. Harris*, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

<sup>43</sup> 33 U.S.C. § 910(a)-(c).

<sup>44</sup> *SGS Control Services*, 86 F.3d at 441; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

<sup>45</sup> 33 U.S.C. § 910(a).

<sup>46</sup> 33 U.S.C. § 910(b).

<sup>47</sup> *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

A worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best adequately reflect a claimant's earning capacity at the time of the injury.<sup>48</sup>

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.<sup>49</sup>

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).<sup>50</sup> The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.<sup>51</sup> Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.<sup>52</sup> In calculating annual earning capacity under subsection 10(c), the Administrative Law Judge may consider: the actual earnings of the claimant at the time of injury,<sup>53</sup> the earnings of other employees of the same or similar class of employment,<sup>54</sup> claimant's earning capacity over a period of years prior to the injury,<sup>55</sup> multiply claimant's wage rate by a time variable,<sup>56</sup> all other sources of income,<sup>57</sup>

---

<sup>48</sup> *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).

<sup>49</sup> 33 U.S.C. § 910(c).

<sup>50</sup> *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

<sup>51</sup> *See Barber*, 3 BRBS 244.

<sup>52</sup> *Gatlin*, 935 F.2d at 822.

<sup>53</sup> 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

<sup>54</sup> 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.

<sup>55</sup> *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).

<sup>56</sup> *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 287 (1980). (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).

<sup>57</sup> *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).

overtime,<sup>58</sup> vacation and holiday pay,<sup>59</sup> probable future earnings of claimant,<sup>60</sup> or any fair and reasonable representation of the claimant's wage-earning capacity.<sup>61</sup>

Under subsection 10(c), the Administrative Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).<sup>62</sup>

### **Maximum Medical Improvement**

The traditional (albeit not exclusive) method for determining whether an injury is permanent or temporary is the date of maximum medical improvement.<sup>63</sup> The date of maximum medical improvement is a question of fact based upon the medical evidence of record.<sup>64</sup> An employee reaches maximum medical improvement when his condition becomes stabilized.<sup>65</sup>

### **Nature and Extent of Disability**

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.<sup>66</sup> Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."<sup>67</sup> Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.<sup>68</sup> Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

---

<sup>58</sup> *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).

<sup>59</sup> *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991).

<sup>60</sup> *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).

<sup>61</sup> See generally, *Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).

<sup>62</sup> *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

<sup>63</sup> See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n. 5 (1985); *Trask*, 17 BRBS 56; *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).

<sup>64</sup> *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

<sup>65</sup> *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).

<sup>66</sup> *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

<sup>67</sup> 33 U.S.C. § 902(10).

<sup>68</sup> *Sproull*, 25 BRBS at 110.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.<sup>69</sup> A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.<sup>70</sup> Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.<sup>71</sup>

The question of extent of disability is an economic as well as a medical concept.<sup>72</sup> To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.<sup>73</sup>

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.<sup>74</sup> Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.<sup>75</sup> If the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment.<sup>76</sup> The presumption of disability ends on the earliest date that the employer establishes suitable alternate employment.<sup>77</sup>

A job does not qualify as suitable alternative employment if it requires the claimant to expend extraordinary effort or endure excruciating pain or diminished strength.<sup>78</sup> This exception is narrowly applied.<sup>79</sup>

---

<sup>69</sup> *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).

<sup>70</sup> *Trask*, 17 BRBS at 60.

<sup>71</sup> *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.

<sup>72</sup> *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

<sup>73</sup> *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

<sup>74</sup> *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

<sup>75</sup> *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984).

<sup>76</sup> *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

<sup>77</sup> *Palombo v. Director, OWCP*, 937 F.2d 70, 25 (2d Cir. 1991).

<sup>78</sup> *Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978) (exception applied where claimant managed to get through workday, despite pain, swelling, and excruciating pain; once at home went directly to bed to lie flat on his back; and only over weekends experienced a measure of relief).

<sup>79</sup> *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986).

Retirement occurs when a Claimant voluntarily withdraws from the workforce with no realistic expectation of return.<sup>80</sup> The 1984 Amendments to the Act allowed voluntary retirees who later became aware of the existence of an occupational disease to recover under the Act in certain circumstances.<sup>81</sup> To determine whether a retirement is voluntary or involuntary the court looks at whether a work-related condition forced the claimant to leave the workforce.<sup>82</sup> If the claimant leaves the workforce because of a work related condition it is an involuntary retirement. If he leaves because of other considerations, the retirement is voluntary. If a claimant gets impaired by an occupational disease after he voluntarily retires, his disability compensation is limited to permanent partial disability based on his extent of impairment. If the retirement is involuntary, the claimant is entitled to an award of his loss of wage-earning capacity and Sections 2(10), 8(c)(23), and 10(d)(1), (2) do not apply.<sup>83</sup>

### **Medical Care and Choice of Physician**

Section 7(a) of the Act requires employers to provide reasonable and necessary medical care.<sup>84</sup> A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.<sup>85</sup>

According to Section 7(b) of the Act, Claimant “shall have the right to choose an attending physician.”<sup>86</sup> After an initial choice of physician, a claimant may not change physicians without prior written consent of the employer or carrier.<sup>87</sup> An employer shall consent to a change in physician where claimant’s initial free choice was not of a specialist whose services are necessary for and appropriate to, the proper care and treatment of the compensable injury.<sup>88</sup> Consent for change of physician may be given upon a showing of good cause. Claimant’s treating physician may refer claimant to a specialist for services which are necessary for the proper care and treatment of his compensable injury.<sup>89</sup>

---

<sup>80</sup> 20 C.F.R. § 702.601(c); *Harmon v. Sea-Land Service Inc.*, 31 BRBS 45 (1997); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Johnson v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 160 (1989).

<sup>81</sup> *Id.* citing *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181, 184 (1986).

<sup>82</sup> *Harmon*, 31 BRBS 45.

<sup>83</sup> *Id.*

<sup>84</sup> 33 U.S.C. §907(a).

<sup>85</sup> *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-8 (1984).

<sup>86</sup> 33 U.S.C. § 907(b).

<sup>87</sup> 33 U.S.C. § 907(c)(2).

<sup>88</sup> *Id.*

<sup>89</sup> 20 CFR § 702.406(a).

## Section 8(f) Relief

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim.<sup>90</sup>

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer, and (3) the current disability is not due solely to the employment injury.<sup>91</sup>

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone.<sup>92</sup> Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such cases.<sup>93</sup> Section 8(f) is to be liberally applied in favor of the employer.<sup>94</sup>

“Pre-existing disability” refers to disability in fact and not necessarily disability as recorded for compensation purposes.<sup>95</sup> “Disability” as defined in Section 8(f) is not confined to conditions which cause purely economic loss.<sup>96</sup> “Disability” includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability.<sup>97</sup>

---

<sup>90</sup> *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983).

<sup>91</sup> 33 U.S.C. § 908(f); *Two “R” Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), *rev'g* 4 BRBS 23 (1976); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 222 (1988).

<sup>92</sup> *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 1110 (4th Cir. 1982); *Comparsi v. Matson Terminals, Inc.*, 16 BRBS 429 (1984).

<sup>93</sup> *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 516-517 (5th Cir. 1986) (en banc).

<sup>94</sup> *Maryland Shipbuilding and Drydock Co. v. Director, OWCP*, 618 F.2d 1082 (4th Cir. 1980); *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317 (9th Cir. 1980), *aff'g Ashley v. Todd Shipyards Corp.*, 10 BRBS 423 (1978).

<sup>95</sup> *Id.*

<sup>96</sup> *C&P Telephone Co.*, 564 F.2d at 509.

<sup>97</sup> *Campbell Industries, Inc.*, 678 F.2d at 836; *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

The judicially created “manifest” requirement does not mandate actual knowledge of the pre-existing disability. If prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met.<sup>98</sup>

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest.<sup>99</sup> If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury.<sup>100</sup> Furthermore, a disability is not “manifest” simply because it was “discoverable” had proper testing been performed.<sup>101</sup> There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury.<sup>102</sup>

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee’s permanent total disability was not due solely to the most recent work-related injury.<sup>103</sup> An employer must set forth evidence to show that a claimant’s pre-existing permanent disability combines with or contributes to a claimant’s current injury resulting in a greater degree of permanent partial or total disability.<sup>104</sup> If a claimant’s permanent total disability is a result of his work injury alone, Section 8(f) does not apply.<sup>105</sup> Moreover, Section 8(f) does not apply when a claimant’s permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability.<sup>106</sup>

## EVIDENCE AND ANALYSIS

### Testimonial and Medical Evidence

***James Oliver Neal, Claimant, testified at trial that:***<sup>107</sup>

He was born 28 Nov 41 in Arizona. He was in the Army from 28 Nov 58 to 13 Feb 67, reaching the rank of a Sergeant, E-5. He was incarcerated in Georgia in May

---

<sup>98</sup> *Equitable Equipment*, 558 F.2d at 1197-1199; see *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1224 (5th Cir. 1989).

<sup>99</sup> *Todd v. Todd Shipyards Corp.*, 16 BRBS 163, 167-68 (1984).

<sup>100</sup> *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420, 426 (1990).

<sup>101</sup> *Eymard & Sons*, 862 F.2d at 1223-24; *C.G. Willis, Inc. v. Director, OWCP*, 28 BRBS 84, 88 (1994).

<sup>102</sup> *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616 (9th Cir. 1983) (*en banc*).

<sup>103</sup> *Two “R” Drilling Co.*, 894 F.2d at 849-50.

<sup>104</sup> *Id.*

<sup>105</sup> *C&P Telephone Co.*, 564 F.2d at 514; *Picoriello v. Caddell Dry Dock Co.*, 12 BRBS 84 (1980).

<sup>106</sup> *Cf. Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

<sup>107</sup> Tr. 19-135 (Claimant also testified via deposition on 19 Jul 05, which was admitted into the record as EX-35).

1966. Since getting out of prison, Claimant worked as a painter and a carpenter. He also did oilfield work, such as “drilling rigs, swabbing (phonetic) rigs, vacuum trucks, high pressure pump trucks, winch trucks; trucking period.” In the year prior to going to Afghanistan, Claimant drove trucks.<sup>108</sup>

Prior to working for Employer, he drove trucks for Bullet Concrete and Tammany Road through Louisiana, Mississippi, Alabama, and Arkansas. He quit his job at Bullet Concrete because his boss refused to pay him after he blew out a front tire on a winch truck. He went to Texas Employment Commission or the Workforce and they referred him to Employer. Based on his military training, Claimant believed “food service” would be cooking, but to Employer it was the wait staff. He originally thought he would be a truck driver for Employer, but he needed immediate work and accepted the position in food service.<sup>109</sup>

Claimant underwent an extensive physical examination prior to leaving for Afghanistan.<sup>110</sup> Claimant passed his pre-employment physical. In the twelve months prior to Employer’s pre-employment physical, Claimant did not have any accidents or auto collisions. He was in general good health when he went to Afghanistan.<sup>111</sup> In addition, during the six months prior to leaving for Afghanistan, Claimant had “no trouble whatsoever” with his back. In fact, Claimant had not been to a doctor for his back in at least a year prior to Afghanistan. He “was not experiencing any pain that [he knew] of with relation to the injuries that [he had] sustained over there in Afghanistan somehow or another.”<sup>112</sup> He knew his L5 bulged, but the only medication he took prior to Afghanistan was Tylenol and Ibuprofen for headaches and pulled muscles.<sup>113</sup>

Prior to working for Employer, Claimant did not have any problems with his back. He was taking Ibuprofen because he “needed glasses and [was] always having headaches.”<sup>114</sup> Claimant disclosed his L5 bulging on his employment application and advised Employer that he took Ibuprofen and Tylenol. Claimant authenticated a pre-employment questionnaire he completed for Employer, which included a medical questionnaire.<sup>115</sup> Although Claimant stated that he takes Ibuprofen and Tylenol for

---

<sup>108</sup> Tr. 20-21.

<sup>109</sup> Tr. 22-23.

<sup>110</sup> Tr. 23-25.

<sup>111</sup> Tr. 54.

<sup>112</sup> EX-35, p. 90.

<sup>113</sup> Id.

<sup>114</sup> Claimant testified that his glasses were about four years old and he needed new glasses because they caused headaches.

<sup>115</sup> EX-18.

headaches, he did not check off the “frequent headaches” box because the headaches were due to his glasses and he just needed new glasses. It was not because he had recurring pain in his back. As soon as he returned from Afghanistan, he went and bought new glasses.<sup>116</sup>

Before Employer hired Claimant, he had to complete an employment agreement and other documents for Employer. Claimant read over and signed the employment contract. He understood his employment with Employer was “at-will.” Service Employers is owned by KBR who is owned by Halliburton and any of these Employers could give Claimant work orders. “At-will,” under Texas law, means he could be fired, terminated, or quit at anytime he or Employer wanted. “But, when a man is injured in his employment, and then he is terminated due to that injury, that is denying him the equal employment opportunity.” Claimant’s position in this suit is that he was terminated due to a disability that [he] received at Employer’s hand.” The contract also stated that there was no guarantee that Claimant would be overseas for twelve months. He knew that at any day, any time, he could be told to “load your stuff up and go home.” If this happened, he would have packed his bags, returned to the United States, and return to work driving trucks. He enjoys driving trucks.<sup>117</sup>

Employer sent Claimant to Afghanistan to the Bagram Air Force Base. Claimant left the United States around 28 Apr 04 and arrived in Afghanistan the first part of May 2004. While getting off the airplane at an enroute stop in Tashkent or Katulia, Claimant stumbled and felt pain in his hip or back. He “just picked up and kept going.” He told the insurance adjuster, but did not seek any medical treatment. He did not think he needed to go to the medical clinic. He had some immediate pain, but it did not bother him anymore.

His first day overseas, Claimant put in for a “truck driving” position. Prior to his transfer to a truck driving position, Claimant worked in food service, cleaning tables seven days a week for twelve hour days. At some point after getting to Afghanistan, while working in food service, Claimant’s back started hurting. Claimant did not know the cause of his back pain. One time he fell in the mess hall, but he denied injuring himself.<sup>118</sup>

The work caused his legs to hurt and he went to medical on 06 May 04. He saw the medic in Afghanistan and complained of “right hip and thigh numbness, worse over the past two days.” The doctor gave him a narcotic for the pain.<sup>119</sup> Because the

---

<sup>116</sup> Tr. 87-89.

<sup>117</sup> Tr. 61-65.

<sup>118</sup> EX-35, p. 78.

<sup>119</sup> Claimant recalled the medication was a narcotic because he had to sign for the medication.

pharmacy only had one bottle of the prescribed medication, the army changed his medication. Claimant did not know what he took.<sup>120</sup>

According to Claimant, there is a contradiction in the Afghanistan doctor's medical records. The medic, on 06 May 04, stated Claimant had no back pain, no stumbling, and no weakness in his legs. The doctor stated that Claimant had back pain. Claimant explained that he had weakness and stumbling, but no back pain. The doctor's report on the same page stated that Claimant had back pain and that Claimant did not have back pain. The doctor gave him some pain pills, but during a company meeting his supervisor informed everyone that "no narcotics allowed." He told his supervisor that he was on medication and was advised to "try to control it . . . don't overdose." His supervisor also told him to "sit down, take a break" when he started hurting.<sup>121</sup>

He had been in Afghanistan only three or four days before going to the Employer's medical clinic. In addition to prescribing medication, the doctor ordered him to return in two weeks. Claimant took the medication and after a couple of weeks started escorting local national drivers for Employer. He was more of an escort and had a truck driver to do the driving. He also had a worker to do the physical labor. His job entailed keeping "eyeball sight on them" one-hundred percent of the time. It was "pencil work." He also did the paperwork (i.e. how many barrels) when they picked up and discharged water.<sup>122</sup>

Claimant took pictures of the Mercedes 2-cylinder truck he drove in Afghanistan.<sup>123</sup> He connects his back problems to the truck. The right side bottom step was broken off and to get into the truck, he had to mount it. This was made even more difficult when the truck was loaded with water. The water would jack up the truck, raising the front end another four or five inches. He had to climb up on the wheel's lug nuts to get up to the cab. To actually get into the cab, he "literally had to reach up and jump and grab, and pull [himself] up in it." There were no low steps as required by OSHA in the United States. There were a lot of differences between the methods of climbing in and out of the trucks in the United States versus the trucks in Afghanistan.<sup>124</sup> Claimant is 6'2 and while in Afghanistan, weighed about 220 pounds.<sup>125</sup>

Claimant's next visit to the clinic in Afghanistan was six weeks later, on 24 Jun 04 to treat his complaints of right leg numbness and weakness. Getting in and out of the truck caused the muscles in his back to pull and he had to pick his right leg up and set it to where he could get in the truck. He hurt himself every time he got in or out of the

---

<sup>120</sup> Tr. 87, 89-93.

<sup>121</sup> Tr. 25-28.

<sup>122</sup> Tr. 28-29.

<sup>123</sup> CX-3 (Claimant took the truck pictures while in Afghanistan).

<sup>124</sup> EX-35, p. 89.

<sup>125</sup> Tr. 29-31.

truck. The roads were rocky roads “with chug (phonetic) holes in them.”<sup>126</sup> Claimant compared driving on the rocky roads to riding a “bucking horse” in slow motion. There were no other causes that Claimant could pinpoint as causing his leg pain. The burning sensation was something new. The pain was more in his thigh than in the back of his hip where the pins are.<sup>127</sup>

Claimant was diagnosed with “arthritic back pain and sciatica.” Claimant did not understand these diagnoses because the 06 May 04 report says nothing about arthritis, yet on 24 Jun 04 that is what he is diagnosed with. He believes this is a contradiction. He said he had pain in his lower back and right leg numbness on 06 May 04 and 24 Jun 04. The only difference was that on 24 Jun 04, the pain was more severe. The medic told him to go to physical therapy and Claimant went to see the doctor. Claimant advised the doctor that he did not think it was right to take physical therapy until someone found out what was wrong with his back. The clinic placed Claimant on light duty. He took the next day off to determine whether the medication made him drowsy or sleepy. It put him right to sleep. He slept until four o’clock. He got permission to go to the Human Resources building and to see Don England, his supervisor, to discuss the light duty restriction.<sup>128</sup>

The Army doctor contacted the medic regarding the light duty restriction and the medic told him there was no light duty available. Claimant double-checked by contacting his supervisor and personally asked him whether there were any light duty jobs Claimant could do. Mr. England told him no and Claimant returned to his barracks. He had to have permission to leave the building when he is on sick leave – it is called “quartered, you’re confined to quarters.” After a few days, there was no further medical treatment available for Claimant in Afghanistan and Claimant was returned to the United States to find out what was wrong with his back.<sup>129</sup>

He returned to the United States because the doctor in Afghanistan put him on light duty and indicated that Claimant could not drive a truck. He took the day off from work because his medication made him drowsy and he must “stay one hundred percent eyeball sight of [his] workers, otherwise [he would] get terminated . . . fired.” His contract required him to accept any medical treatment and medication given to him, whether he wanted them or not. He understood he would get fired if he refused recommended treatment or medications. The medic prescribed one medication, but the army pharmacy said it was needed for the soldiers, so his medication was substituted for something else. He did not know what he took. He did not want to fall asleep in the truck – “its 140 degrees out there . . . and you have a hard time staying awake.” If he fell asleep in the truck it would be grounds for dismissal. He discussed with the medic the

---

<sup>126</sup> CX-3 (pictures depicting the rocky roads described by Claimant’s testimony).

<sup>127</sup> Tr. 32-34; EX-35, pp. 80-82.

<sup>128</sup> Tr. 93-95.

<sup>129</sup> Tr. 95-97.

possibility of taking Tylenol instead, but was advised that he had to take the army medication. He took the day off to determine how he would react to the medication; he slept all day.<sup>130</sup>

The next evening he went to speak with his supervisor, Don England, to ask if any light duty work was available, but he was told that there was nothing available in Afghanistan. Claimant wanted to stay in Afghanistan and as of the hearing, he still wanted to return, but Employer says he is medically unfit. He agreed to return to the United States to find out what was wrong with his back. He returned on “arthritis medical leave.”

Claimant returned to Conroe<sup>131</sup> on 30 Jun 04 and after a referral from a chiropractor, starting treating with Dr. Flores. Claimant knew he could not treat with a chiropractor because he comes under the defense program – he could not go to a chiropractor unless a specialist orders it as required treatment. He went to the chiropractor/occupational injury office, advised them he could not treat with them and received a referral to Dr. Flores.<sup>132</sup>

Around 12 Jul 04 Dr. Flores became Claimant’s doctor. Claimant asked him for an MRI, but the doctor advised him that he only needed x-rays. The x-rays came back negative. Dr. Flores treated him for pulled muscles in his back. Since the medication relieved his pain, Claimant felt his pulled muscle resolved and asked Dr. Flores to release him to return to work. Claimant drove to his appointment with Dr. Flores. By the time he started treating with Dr. Flores, Claimant finished all the medication prescribed by the army pharmacy and only took Tylenol and Ibuprofen. Claimant treated with Dr. Flores between two and four times, he could not recall. Dr. Flores also prescribed medication. The medication did not affect Claimant’s ability to drive. On 22 Jul 04, Claimant told Dr. Flores that he wanted a release to go back to work. Dr. Flores released Claimant to return to work after an examination. Claimant did not know what Dr. Flores wrote in his reports, just that he “was released to go back to work at [Claimant’s] request. Dr. Flores tested Claimant’s back flexibility and noted no discomfort in Claimant’s back. Dr. Flores made Claimant sit on the table and he hit Claimant with a “little hammer to make [his] feet jump up.” Claimant stood and touched his toes. That was the extent of the examination. Dr. Flores told Claimant he was treating him for pulled back muscles, but they did not discuss anything else. Claimant read Dr. Flores’ reports and clarified that he did not feel pain because he was on the medication Dr. Flores prescribed, not because he did not have pain. Claimant wants to file malpractice charges against Dr. Flores and “wouldn’t take his words as exact.”<sup>133</sup>

---

<sup>130</sup> Tr. 35-37.

<sup>131</sup> Conroe is about thirty to forty miles north of Houston

<sup>132</sup> Tr. 97-99.

<sup>133</sup> Tr. 100-105.

When Dr. Flores gave him the release to return to work, they did not discuss Claimant's medication. Claimant needed to get back overseas so he would not have to pay taxes on the money he earned while working for Employer. Claimant was ready to return to Afghanistan and did not mention to Dr. Flores what medications he still took or anything else. If Employer allowed him to return to Afghanistan, he would have "tried" to do his job. He might have returned to work and started hurting again or he could have started his medication again and "just stayed over there." Claimant wanted to go back to Afghanistan and finish his contract. He still wants to go back.<sup>134</sup>

Claimant wanted to get back to work overseas (to make money), but Employer would not let him, stating he was "medically unfit." Dr. Flores did not see the MRI prior to releasing Claimant to return to work.<sup>135</sup> Even though Dr. Flores released him to return, Employer said he could not return without an MRI and further evaluation.

After the MRI, Employer again told him he could not go back to work in Afghanistan as a truck driver, but maybe as an office worker. Claimant told them he would go back on anything.

Although Claimant never met Dr. Cantu, even after requests to see him,<sup>136</sup> Matt Denny, Dr. Cantu's assistant has repeatedly advised Claimant that he was "medically unfit, medically disabled." Wendy Byens, Wendy Vega, and Jeanette Little have all "referred to Dr. Cantu saying [Claimant] cannot go back to driving the truck. [He] can go back as a clerk or something else like that, but not as a truck driver." Claimant informed Employer that he would go back as anything, but he was advised that Employer was "debating the issue whether [Claimant] can wear a flack jacket or not." Claimant did not understand how Employer could decide whether he could wear a flack jacket without giving him an "endurements [sic] test." When he worked for Campbell Ready Mix, during his pre-employment exam required that he take an "endurements [sic] test." They put him on computers and tested how much he could lift and pull. It checked his maximum capabilities and Claimant did not know why Dr. Cantu would not perform the same type of tests.<sup>137</sup>

He went to speak to Dr. Cantu under Employer's open door policy and waited about two and one-half hours. Mr. Denny came down with two security guards, who escorted him out of the office. To date, Claimant has yet to see Dr. Cantu.<sup>138</sup> Claimant understands that Dr. Cantu does not treat patients, but feels that Dr. Cantu denied him the

---

<sup>134</sup> Tr. 128-131.

<sup>135</sup> Tr. 40-43.

<sup>136</sup> Claimant testified that he has been "denied the right to see" Dr. Cantu.

<sup>137</sup> Tr. 105-106.

<sup>138</sup> Employer's open door policy allows employees to be able to talk to anybody they want to about their jobs and job requirements.

right to earn a living and “he’s not even man enough to look [Claimant] in the face.” If a man will not tell him to his face, then Claimant does not have much respect for him.<sup>139</sup>

Claimant did not know the differences between his earlier MRI and the 2004 MRI, except that in 1989 he had a bulge in L5, with a five percent disability from an injury after he fell off the top of a vacuum truck. At that time, he had tingling sensations in his right leg and sought treatment with Dr. Crockett and Dr. Monahan. After Dr. Monahan recommended surgery, Claimant went for a second opinion with Dr. Borsky. To the best of his knowledge, Claimant recovered from his 1989 injury. He collected workers’ compensation for about nine months and then returned to work full duty around August 1989. To his knowledge Claimant never lost any other time from work due to his back. No one ever told him that he had a herniated disc with nerve root compromise.<sup>140</sup>

Claimant presently can pick up a five-gallon trash can and walk a hundred feet, but his back hurts just from carrying the trash.<sup>141</sup> Once he makes it back to the house, he must take a break and sit down and rest. His pain is associated to his amount of activity. Claimant has a weightlifting set on his front porch. While lying on his back, he lifts ten pound weights, ten times; then he pulls down seventy-five times. He also has a rope tied up to his porch, which helps him get up and down. He grabs the rope to pull himself up. He also uses the rope to exercise his back, per Dr. Zapata’s recommendations, to pull himself up and down about ten or fifteen times. This helps make him flexible. He tried the “Chicana” that Dr. Zapata told him to do, but he could not do it, so he “rigged [his] own method of exercise up.”<sup>142</sup>

Claimant believes he can do his job while on medication because he feels no pain. He is not saying that he would not hurt himself again or that he would not pull another muscle because he is a workaholic and he will “work until [he] drops.”<sup>143</sup>

For his present injury, Claimant only treated with Dr. Flores and Dr. Kaldis. Employer sent Claimant to Dr. Kaldis. Since the 2004 MRI, Claimant has not seen the doctor of his choice, even though he tried several different times. Claimant even went to Dr. Kushwah’s office and tried to see the doctor, but could not get in to see the doctor.<sup>144</sup>

After Employer refused to allow Claimant to return to work, Claimant had to find a job to survive and pay his bills. “Mission Petroleum closed their eyes, and – or Dr. Knight did, and he said, “I was born this way.” He worked as a lease driver, driving a tanker truck in Texas and Louisiana. He started training with Mission Petroleum around

---

<sup>139</sup> Tr. 113-115.

<sup>140</sup> Tr. 43-44.

<sup>141</sup> Claimant indicated he carried the trash holding both hands straight out.

<sup>142</sup> Tr. 44-46.

<sup>143</sup> Tr. 106-107.

<sup>144</sup> Tr. 46-47.

10 Dec 04 until his last paycheck on 25 Mar 05. Claimant provided copies of his income records which accurately reflect how much income he made from Mission Petroleum.

Claimant went to work for Mission Petroleum in December 2004. He worked for it until mid-March 2005. He did not take medication while working for Mission Petroleum, but that did not mean he did not have pain. While working for Mission Petroleum, he drove trucks, loaded and unloaded trucks, climbed on top of the trucks to close his domes, climbed down off trucks, hooked his hoses, and kicked in his air blower and discharged products. The hoses were approximately five inches in diameter, eight to twenty foot long, and rubber. They were too bulky to carry, so they were drug. He drove all over Texas, Oklahoma, and Louisiana.<sup>145</sup>

Claimant only worked for Mission Petroleum because he “wanted to eat.” He had pain the entire time he worked for Mission Petroleum. Claimant went to the Department of Labor Workers’ Compensation Office and informed them that he was planning on going on emergency medical call. He asked who would pay for the treatment. He quit his job shortly thereafter.<sup>146</sup>

He stopped working for Mission Petroleum because he became re-eligible for Social Security payments. When he worked for Bullet Concrete he signed up for early retirement. That allowed him to receive about \$750.00 a month in Social Security while still earning \$11,600.00 in wages. When Claimant went to work for Employer he contacted the Social Security office and told them he expected to earn in excess of \$50,000.00 and requested that they stop his Social Security Retirement checks.<sup>147</sup> Social Security advised him that they would not stop his early retirement, but would stop the checks. When he left Employer, and restarted his Social Security payments, he had only earned \$13,000. Eventually, Social Security advised him that it owed him \$4,000.00 in back benefits.<sup>148</sup>

He stopped working for Mission Petroleum in March 2005 for two reasons: (1) his pain and (2) the Social Security office told him they owed him \$4,000.00. He originally went to Max Stringfield to discuss emergency medical leave and a doctor at the hospital to get him medicine for his back. But when Social Security advised him of the underpayment, he figured he did not need to work anymore because \$769 in Social Security Retirement plus the underpayment of \$4,000.00 was sufficient for him to survive on. He does not “owe but about three hundred a dollars a month, so that leave[s] me --” Therefore, he did not “find it necessary to survive to continue working for Mission Petroleum.”<sup>149</sup>

---

<sup>145</sup> Tr. 56-57.

<sup>146</sup> Tr. 50-51.

<sup>147</sup> Tr. 47-49.

<sup>148</sup> Tr. 49-50.

<sup>149</sup> Tr. 57-59.

If the Social Security Administration told him it was not going to give him the money, he would not have been in a financial position to quit working for Mission Petroleum. He might have been under some pain, but he could have continued driving trucks for Mission Petroleum.<sup>150</sup>

He did not know whether he could go back to a sustained, full-time job as a truck driver without hurting himself, however, “Dr. Ciepiela” told him that he could be cured and return to work. Although Dr. Ciepiela is not Claimant’s treating physician, he recommended certain treatments for Claimant. Dr. Ciepiela was not allowed to do any treatment even though he was an “impartial doctor requested by the workers’ comp office to exam[ine] [Claimant].” Claimant wants medical care to treat his back problems and get him back to work with Employer. He would go back to work overseas in a “heartbeat.”

With the proper medication, Claimant believes he could do the work he did prior to his injury with Employer. Claimant did not know whether he would have surgery if a doctor recommended it because Dr. Ciepiela says it would “disable [him] totally.” A friend of his told him that once you have surgery it takes a long time to heal from it. That is why Claimant wants to continue working with medications that do not put him to sleep – so if he could return to Afghanistan, he would.<sup>151</sup>

Claimant provided copies of his income tax returns from 1998 through 2004, which as far as he knew were accurate.<sup>152</sup>

Claimant has not had any other accidents since returning from Afghanistan.

At the formal hearing, Claimant had pain in his back from getting in and out of the car and walking to the courtroom. Sitting in the courtroom, Claimant did not have pain. He did not take medications prior to the hearing. He ran out of medication around August 2004. Dr. Flores gave him a sixty-day supply of two pills a day. Since August 2004, Claimant takes aspirin for headaches, but nothing for his back. Claimant does not like to take medicine.<sup>153</sup>

After the 2004 MRI, the doctor told him the “L2-3 and L3-4 were bulging or herniated. He did not know what that meant. Prior to that, he never had an opportunity to look at any records that reflected what was wrong with his back. “The only thing [he] knew was L5 was bulging, and that was back in 1989 when [he] took nine months off.” After looking at documents, “going back” in his mind, and looking at the earlier MRI,

---

<sup>150</sup> Tr. 131-132.

<sup>151</sup> Tr. 53-54.

<sup>152</sup> Tr. 54.

<sup>153</sup> Tr. 56.

they might have said something about L2 or 3, but he did not remember. He just remembered that a bulging L5 with a five percent disability. Claimant thought this was “nothing” and since 1989 had “consistently worked in the oilfield, busting tires, mechanic work, running truck, hauling lumbar, pipes, everything else that you haul in the oilfield.”<sup>154</sup>

Claimant submitted income tax records dating back to 1998. They reflected income he earned driving trucks and working in the oilfield (which was truck related). It also reflected his work as a company painter, repairman, maintenance man, and truck driving for Bullet Concrete. When there was nothing to do at Bullet Concrete, Claimant filled in “to make a living doing painting, repair work, whatever [he] could do to make a dollar.” Bullet Concrete hired him on as a truck driver. Claimant’s official position in all the jobs reflected in the submitted tax returns was a truck driver and related work.<sup>155</sup>

While working for Cardinal Well Service, Claimant fell from the top of a vacuum truck and fell off.<sup>156</sup> He pushed forward on a “thirty-six inch pipe wrench, trying to tighten up a gooseneck on top of the trailer. The wrench slipped. When it slipped [he] spun in the air landing on my feet backwards, running backwards.” He complained to Dr. Brodsky of “pain in the middle of [his] back and then into [his] groin.” He basically hurt all over. He initially treated with Dr. Crockett because of a “hot tingling sensation in [his] right leg, calf of [his] leg.” Dr. Crockett was “concerned” and referred him to Dr. Monahan. Dr. Monahan wanted to operate if Claimant agreed, but Claimant went for a second opinion to Dr. Brodsky. He advised Dr. Brodsky that the pain occurred with sitting, standing, and walking. He did not have to lift anything for the pain to start.<sup>157</sup>

Dr. Brodsky sent Claimant for an MRI of the lumbar spine.<sup>158</sup> No one ever told him that he had degeneration at multiple levels in his lower back, not just at L5. No one ever told him he had bulges at L3-L4, L4-L5, L2-L3, and L5-S1. Claimant was only told about the bulging at L5. With treatment, Claimant was able to return to work driving trucks. He was out of work for nine months because of the 1990 incident. Whatever condition he had resolved and “never hurt [him] again . . . for a long time.”<sup>159</sup>

Claimant injured himself a second time in a motor vehicle accident in Kentucky. A pickup truck pulling a trailer spun out, lost control, and came right towards him. Claimant “jackknifed [his car] to avoid a head-on collision.” The motor vehicle accident caused a brain concussion and Claimant went to a specialist in Houston. The insurance company also sent him to one of its doctors. Its doctor said Claimant could return to

---

<sup>154</sup> Tr. 60-61.

<sup>155</sup> Tr. 65-67.

<sup>156</sup> Claimant could not recall exactly when this incident happened, but believed it happened in 1989 or 1990. Dr. Brodsky’s medical records reflect the incident occurred on 25 Jan 90.

<sup>157</sup> Tr. 67-71.

<sup>158</sup> EX-20.

<sup>159</sup> Tr. 71-74.

work. Claimant still had a stiff neck and advised the insurance company. He did not sustain back injuries from this motor vehicle accident. Claimant blacked out for a short period of time after the motor vehicle accident.<sup>160</sup>

After the motor vehicle accident, Claimant treated with Dr. Dale Weathersby.<sup>161</sup> He did not recall informing the doctor that he had pain at the back of his neck, low back, left leg, and bottom of the left foot or that the low back pain gradually became worse. Claimant could not recall having any back pain as a result of the motor vehicle accident. Dr. Weathersby concluded that Claimant's prognosis was good, but "will probably require occasional treatment as long as this condition is aggravated by his activity level." The main thing that concerned Claimant was the brain concussion and stiff neck. After the motor vehicle accident, Claimant returned to work as a truck driver.<sup>162</sup>

Claimant also hurt his back trying to lift or move a radiator while working for Cardinal Well Services. He recalled that his boss "L.C. Smith was operating a backhoe front-end loader and we were picking a radiator up, and [Claimant] tripped and fell and told L.C. [he] was hurt."<sup>163</sup> He did not recall treating with doctors for this incident. He remembered treating at Sports Medicine Therapy, but thought that was for the fall from the vacuum truck. According to the medical records, the radiator incident occurred about one year after he fell off of the vacuum truck, right when his workers' compensation claim finished up. Claimant did not deny what the records said, just stated that he did not recall the incident.<sup>164</sup>

He recalled his treatment at Sports Medicine. He was put on a table and stretched to try to pull his back straight. He reiterated that he believed all this treatment related to his fall from the vacuum truck, not dropping the radiator. Claimant agreed that he had "been in many injuries," but could not remember things that happened twelve, fourteen years ago.<sup>165</sup>

Claimant had surgery to his hip after his personal farm tractor rolled over on top of him. He fractured the back top part of his leg. He had three pins inserted into his right hip. Claimant still had the pins in his right leg.<sup>166</sup>

---

<sup>160</sup> Tr. 74-76.

<sup>161</sup> Claimant could not recall who this doctor was but confirmed the information found in Dr. Weathersby's medical report.

<sup>162</sup> Tr. 76-78.

<sup>163</sup> Claimant did not recall seeing a Dr. Cannon in Woodlands or describing an incident where a radiator he was loading onto a roll bar when Claimant lost his balance and fell to the floor.

<sup>164</sup> Tr. 78-82.

<sup>165</sup> Tr. 82-84 (Claimant admitted that if that is what the records state, then it must have happened).

<sup>166</sup> Tr. 84-85.

He did not recall Dr. Cannon telling him in 1991 that his “prognosis for returning to full gainful employment without restrictions was extremely poor.” He did not recall Dr. Cannon placing restrictions of no walking, kneeling or crawling. The only thing he recalled was that Dr. Cannon gave him a five percent disability rating. Although Claimant was injured on several occasions, he shook off all these incidents and returned to driving a truck pain-free.<sup>167</sup>

Claimant’s attorney told him what the 2004 MRI revealed. Claimant never knew what his earlier MRI said, except that he had a L5 bulging disc and he informed Employer about the bulging on his employment application. After the 2004 MRI, Employer wanted Claimant to get a second opinion. Claimant received a “threatening letter from James Hile citing Section 7” sending him to Dr. Kaldis. Dr. Kaldis examined Claimant on 12 Aug 04, but wrote his report on 14 Sep 04. Claimant informed Dr. Kaldis that he wanted to return to work and Dr. Kaldis released him to work with no restrictions. Dr. Cantu still said he could not return to work because he was medically unfit and disabled. Claimant told Employer he would return to work doing anything; he did not have to be a truck driver. After he agreed to go back to work doing anything, Employer then said he could not wear a flack jacket, without testing him.<sup>168</sup>

One of Claimant’s complaints was that in Afghanistan, he had to drive trucks on bumpy roads. In 1990 he told Dr. Brodsky that driving over bumps in the road produced pain. In 1990 he drove in the oilfield in the United States.<sup>169</sup>

Claimant went to work for Bullet Concrete in March 2003, but quit two or three days later. His earnings are accurately reflected in his 2003 tax returns. All of his earnings are from driving trucks. Claimant also submitted tax returns for Mission Petroleum, the company he started working for after Employer.<sup>170</sup>

Other than the MRIs involved with his vacuum truck accident in 1990, Claimant did not have another MRI until he returned from Afghanistan. Claimant read from his 1990 MRI that “the disc at L3-L4 level shows minimal bulge but is otherwise unremarkable.”<sup>171</sup> He also read from his 2004 MRI “far lateral herniated nucleus stenosis with at least moderate compromise of the left L3 nerve root.”<sup>172</sup>

---

<sup>167</sup> Tr. 85.

<sup>168</sup> Tr. 109-113.

<sup>169</sup> Claimant stated right before this testimony that he never had problems with bumpy roads while driving in the United States.

<sup>170</sup> Tr. 118-119.

<sup>171</sup> EX-20, p. 1.

<sup>172</sup> Tr. 120-122.

In 1994, Claimant treated with a chiropractor, Dr. Weathersby. Claimant injured himself lifting the radiator in 1991. He had hip surgery from his tractor accident around December 1993. For the ten years prior to going to Afghanistan, Claimant worked full duty without limitation.<sup>173</sup>

If Employer gave him another shot, Claimant would return to Afghanistan and continue working in pain as long as he could. Claimant has five acres in Montgomery, when he bought it, it was solid grass. He cleared it himself, with the help of his son. In the process of clearing land, he moved logs and pulled muscles in his back. He hurt so bad, that he literally cried getting up in the truck. By this time, he drove a “truck from Houston to Oklahoma with a back brace on, and the bouncing and the massaging of the seat, [he would] be fine.” He worked the pain out – he worked the pulled muscle out. He would grit his teeth and keep going just like he did with Mission Petroleum. If he wants to eat and keep his land, he has no choice, he has to “go out there and do as good a job as [he] can, and earn [his] own money.” Claimant is willing to work beyond his medical capacity to maintain his land.<sup>174</sup>

***Dr. Alexander E. Brodsky’s medical records reveal that:***<sup>175</sup>

On 14 Mar 90, Claimant presented with occasional pain under both shoulder blades and occasional pain in his lower midline back, both groins, right lateral hip, both mid third medial thighs, both arches of feet, mid third left foot medially and mid third right lower leg. He also presented with weakness in his left leg. Claimant described falling off of an 18-wheeler vacuum truck on 25 Jan 90 and that a wrench struck him across his mid back. He felt immediate back pain, but continued working. Pain in his right groin started about 30 minutes later.<sup>176</sup>

The pain in Claimant’s back subsided within one week, but his right groin pain continued. He stopped working on 19 Feb 90 and treated with Dr. Watson on 20 Feb 90. Dr. Watson took Claimant off work and x-rayed his back and right hip. The CT scan revealed a ruptured disc and Claimant went to physical therapy three times a week for two weeks. Pelvic traction caused Claimant’s pain to start in his left groin, right lateral hip, both arches of his feet and mid thighs, and weakness of the left leg. Physical therapy only helped relieve the numbness and some pain in his right lower leg. Dr. Brodsky referred Claimant to Dr. Howard Crockett, an orthopedist and Dr. Ronald Manicom, a neurologist.<sup>177</sup>

---

<sup>173</sup> Tr. 122-123.

<sup>174</sup> Tr. 133-135.

<sup>175</sup> EX-19, pp. 1-22.

<sup>176</sup> EX-19, p. 1.

<sup>177</sup> EX-19, p. 1-2.

The pain under Claimant's right shoulder blade restarted 13 Mar 90 about one hour after he "jerked on a chainsaw at his home." The pain under his right shoulder blade lasted throughout the day, but was not present at the time of Dr. Brodsky's examination. He did, however, complain that his left shoulder blade started hurting about one hour prior to the examination and he had a "slight ache." Claimant informed Dr. Brodsky that his pain happens when he sits, stands, or walks. Sometimes his pain is centralized; sometimes it is in a few places. "When he gets tired of a pain he just changes position and gets relief of that pain while a new pain starts up." He feels no pain with pain medication.<sup>178</sup>

Claimant admitted to Dr. Brodsky that in the past year, he has had pain in his shoulder blades several times while lifting heavy objects at work. The pain would last anywhere from one week to one month. He had no previous problems with his lower back. Claimant fractured his right forearm at age six and his right hand in 1986. He also had his left eardrum repaired in 1986.<sup>179</sup>

Physical examination revealed no limp, list, or pelvic obliquity. Claimant's Lordotic curve was present. Flexion was done well, with Claimant only missing the floor with his fingers by six inches. His reversal was also good. Claimant's extension was complete, producing 1+ lumbosacral pain. His right and left bending were fair and he stood on his toes and heels without demonstrable weakness. His Deyerle's test was negative bilaterally, as well as the neurological exam to his lower extremities. Claimant's straight leg raise was negative bilaterally, but produced some posterior thigh discomfort. His Patrick's and Gaenslen's test were also negative bilaterally. There were no sciatic notch tenderness, buttock neurological changes, midline or lateral tenderness and the abdomen was negative.<sup>180</sup>

Dr. Brodsky reviewed outside x-rays. Claimant's 20 Feb 90 right hip x-rays were normal.<sup>181</sup> On 20 Feb 90 he also had lumbar spine x-rays performed, revealing five lumbar vertebrae. Alignment was good, but the lateral film was underexposed. The film showed "some slight wedging of the body of L2 and L1 and appears to be old and is probably related to an old juvenile epiphysitis. The oblique projections showed no spondylolysis. The lateral spot film was "negative showing the lower three discs very clearly. An up angle view is negative showing normal sacroiliacs and no transitional vertebrae."<sup>182</sup>

---

<sup>178</sup> EX-19, p. 2.

<sup>179</sup> Id.

<sup>180</sup> EX-19, p. 3.

<sup>181</sup> Two AP and one lateral x-rays were performed.

<sup>182</sup> EX-19, p. 3.

Dr. Brodsky also reviewed a CT scan performed on 21 Feb 90 which showed a little vertebral rotation “which is not important.” It also showed “a little disc bulging in the foramen on the right side at L5-S1 and in another frame of questionable significance.” The original radiologist circled three frames and referred to them in his report “as possibly but not definitely producing some disc herniation on the right side at L4-5.” Dr. Brodsky disagreed and observed that it looked “more like facet arthrosis encroaching upon the neuroforamen and neural canal although there could be some disc material there, it [was] not definite.” According to Dr. Brodsky, the CT scan was not clearly positive. He needed to rule out a midline bulging at L5-S1.<sup>183</sup>

On 14 Mar 90, Dr. Brodsky recommended an MRI examination and if that did not work, he also recommended a myelogram. Dr. Brodsky did not think the CT scan was diagnostic by itself; it needed verification and elaboration by other tests, such as the recommended MRI. The x-rays did not provide a definite diagnosis either. He concluded that Claimant presented with no objective findings upon examination. Dr. Brodsky wanted Claimant to return in one week to review the findings of the MRI. He also wanted Claimant to start therapy “to be instructed in flexion exercises and, if possible, back school” and hydrocollator massage. Dr. Brodsky also thought it would be helpful to get an EMG because Claimant complained that his leg pain was worse than his back pain. Basically, he gave Claimant general back hygiene instructions. Dr. Brodsky’s clinical impression was that Claimant had lower back pain from undetermined etiology. He suspected functional overlay.<sup>184</sup>

Claimant returned to Dr. Brodsky on 03 Apr 90. He missed his last appointment on 21 Mar 90. He also failed to get an EMG examination. He had an MRI which revealed some minor changes at L2-3 and L3-4, but more importantly, it revealed some bulging of the disc at L5-S1. Claimant told Dr. Brodsky that “he just about recovered.” Claimant occasionally has a little discomfort in his mid-lumbar region in the midline when he lifts 50 or 60 pounds. Claimant informed Dr. Brodsky that he was “just about ready to go back to work.” Claimant’s physical examination was negative and he had a good range of back movement. He still had no limp, list, or pelvic obliquity. In addition, there was no remarkable back tenderness or trigger points. The neurological examination of the lower extremities and buttocks, straight leg raises, and Deyerle’s tests were also negative.<sup>185</sup>

Dr. Brodsky concluded that Claimant was on the verge of recovery. He gave him a slip for return to duty in one week from 03 Apr 90. He told Claimant to return if he had any further trouble. Dr. Brodsky saw no point in getting the EMG since Claimant was “on the verge of getting well.” He opined that it appeared as if Claimant’s recovery will

---

<sup>183</sup> EX-19, p. 4.

<sup>184</sup> EX-19, p. 4.

<sup>185</sup> EX-21, p. 1.

be one with no permanent disability. “If he paces himself properly, he ought to be able to go back to regular duty gradually.”<sup>186</sup>

Claimant next saw Dr. Brodsky on 23 Oct 90 for complaints of “occasional pain in the low back midline with occasional shooting pains to various areas of both legs and feet. Back pain is greater than leg pain.” Claimant returned to work on 16 Apr 90 at regular duty and as of 23 Oct 90 he still worked. He missed a few days of work due to pain. Claimant complained that driving over bumps in the road, sudden movements, and sitting or lying down all produce pain. Claimant is “tired of hurting. He is afraid to lift things. He wants his back fixed.” He presented no outward evidence of pain or distress and there was no limp, list or pelvic obliquity. The Lordotic curve was still present.

During physical examination, Claimant continued to perform flexion well, only missing the floor with his fingers by three inches during this examination. Reversal was good and extension was complete. His right and left bending were 50%. He stood on his toes and heels without demonstrable weakness. His Deyerle’s test, neurological examination, Patrick’s test and Gaenslen’s test were negative. His straight leg raise was 65 degrees and negative on the right. There was slight low back pain on the left at 65 degrees. There was no midline or lateral tenderness.<sup>187</sup>

X-rays of lumbar spine revealed good alignment and well preserved disc spaces. There was slight wedging of the upper lumbar and lower thoracic spine due to an old epiphysitis which is not of any consequence.” Claimant’s obliques were negative and there was no spondylolysis. Dr. Brodsky’s concluded the lumbar spine x-ray was negative.<sup>188</sup>

Dr. Brodsky stated that on 23 Oct 90, Claimant presented with no objective findings and he “saw nothing serious here.” He saw no reason preventing Claimant from continuing to work. He informed Claimant that he “should manage good back hygiene with a firm bed, flexion exercises and lift with his leg and not from his waist.” Dr. Brodsky saw no reason Claimant should not recover from this. He ordered Claimant to return in three months for a check up unless he gets worse.<sup>189</sup>

***MR Imaging’s medical records reveal that.***<sup>190</sup>

An MRI of Claimant’s lumbar spine was performed on 15 Mar 90. Claimant presented with low back pain, alternating from right to left. It revealed a “[b]ulge of the disc at the L2-3 and L4-5 levels and more notable at the L5-S1 level. Changes at the L5-

---

<sup>186</sup> Id.

<sup>187</sup> EX-22, p. 2.

<sup>188</sup> EX-22, p. 2.

<sup>189</sup> Id.

<sup>190</sup> EX-20.

S1 level are more pronounced on the right and possibility of a small subligamentous herniation of the disc could not be excluded.” There were no other significant findings.<sup>191</sup>

***Dr. Carl L. Cannon’s medical records reveal that.***<sup>192</sup>

Claimant presented for initial consultation with Dr. Cannon, an orthopedic surgeon, on 07 Jan 91. Claimant described a fall while unloading a radiator on 01 Jan 91. He denied any memory of which body part hit the floor first. He denied losing consciousness. The pain started in his lower back and then subsequently radiated down both legs. The pain was more severe than any pain he felt from his past back injury. His back improved slightly, but Claimant reported increased severity of bilateral hip, groin, and abdominal pain. He described level 5 pain<sup>193</sup> in his left groin region. Claimant informed Dr. Cannon that when he takes hydrocodone pain medication, his pain is relieved for about two hours.<sup>194</sup>

Dr. Cannon reviewed Claimant’s past medical history, including his back injury from a fall off of a vacuum truck on 25 Jan 90. He was initially evaluated by Dr. Watson and underwent a CAT scan which was “unclear.” Claimant underwent several weeks of physical therapy without improvement and was then referred to an orthopedist. He was prescribed pain medication, but when he failed to improve by March 1990, he was sent to a back surgeon, Dr. Monahan. Dr. Monahan performed an examination and told Claimant that “he could not hurt in that many places from one accident.” Claimant went to Dr. Brodsky for a second opinion. His 1990 MRI revealed a bulging disc at L5. Claimant continued treating with Dr. Brodsky. Claimant told Dr. Brodsky that he was improving and Dr. Brodsky told him that “no disability would be awarded and he was released to go back to work.”<sup>195</sup>

On 07 Jan 91, Claimant presented with “moderately severe burning type discomfort in his low back with radiation down both lower extremities primarily in the hip and groin region.” He described a variable pattern of numbness and tingling that did “not follow a specific dermatomal distribution.” Claimant’s symptoms are aggravated while sitting or coughing. He also reported a high stress level due to pending litigation regarding his initial workers’ compensation injury in 1990.<sup>196</sup>

---

<sup>191</sup> EX-20, pp. 1-2.

<sup>192</sup> EX-23-27, 29-31.

<sup>193</sup> On a pain scale of 0 to 10, with 10 indicating maximum discomfort.

<sup>194</sup> EX-23, p. 1.

<sup>195</sup> EX-23, pp. 1-2.

<sup>196</sup> EX-23, p. 2.

After his 01 Jan 91 injury, Claimant treated at the Medical Center Hospital Emergency room and received medications, including Naprosyn and Hydrocodone. He was also referred to Dr. Bill Alexander. Dr. Alexander did not treat Claimant because of his previous history, so Claimant was subsequently referred to Dr. Cannon.<sup>197</sup>

Examination revealed Claimant could ambulate with a satisfactory gait. “There was normal gross alignment of his lumbar spine with perhaps straightening.” There was no significant tenderness upon palpation over his lower back, but he had mild left sciatic notch tenderness. Claimant did not have spasms. Flexion of the lumbar spine was done well, with Claimant missing the floor by six inches. Claimant’s right lateral bending was 40 degrees and his left lateral bending was 25 degrees and painful on the right sacroiliac region. Extension was full. Straight leg raises were negative bilaterally. He had some pain in the left groin area with hip flexion against resistance.<sup>198</sup>

Dr. Cannon concluded that Claimant appeared to suffer from musculoskeletal low back pain. He prescribed Clinoril. He also told Claimant to seek further evaluation of his abdominal discomfort. Dr. Cannon believed Claimant might improve with a brief trial of physical therapy. He anticipated that Claimant would not suffer from a permanent long term disability from this injury, but could not comment on Claimant’s previous level of functioning prior to his “reaggravation or new injury.” Dr. Cannon wanted additional diagnostic testing and recommended that Claimant remain under active medical care to evaluate his progress. After ten days, Dr. Cannon would reevaluate Claimant to determine whether he could be weaned back into at least light duty work capacity. “His prognosis of returning for full gainful employment still should be satisfactory.” He also believed Claimant would be a good candidate for a work hardening type effort to minimize the chance of recurrent episodes of additional low back problems after returning to work.<sup>199</sup>

Claimant returned for follow-up treatment on 22 Jan 91 and reported feeling about 20 percent better since his last visit. He described his pain level at five with pain up to a level eight in the past 24 hours. His symptoms and complaints were similar to his first visit and he described some right sacroiliac and right buttock pain radiating posteriorly down his thigh and calf. The pain does not go past his ankle. The pain is gone from his foot and toes, but he had a burning sensation posteriorly in his thigh and calf.<sup>200</sup>

Physical examination revealed Claimant’s reflexes remained symmetrical and intact, his sitting straight leg raise was negative, and a satisfactory neurovascular check was completed. Dr. Cannon recommended continued physical therapy treatment with

---

<sup>197</sup> Id.

<sup>198</sup> EX-23, pp. 2-3.

<sup>199</sup> EX-23, p. 3.

<sup>200</sup> EX-25, p. 1.

reevaluation in several weeks. He did not feel that additional diagnostic testing was necessary until he knew the results of Dr. Brodsky's previous workup and still had not received Dr. Brodsky's records.<sup>201</sup>

Dr. Cannon released Claimant to "return for light duty if his employer should agree, but [Dr. Cannon] would restrict his lifting to only 5 pounds at this time, desk work or writing type activities would be satisfactory." Claimant's prognosis for returning to full gainful employment remained satisfactory. Claimant was not amenable to desk type work because he is "claustrophobic" and it brings him back to his 13 years in jail. Claimant reported that he wanted to return to "driving." Dr. Cannon reiterated that Claimant would be a good candidate for work hardening to minimize any chance of him having recurrent episodes of additional low back pain after returning to work.<sup>202</sup>

On 05 Feb 91, Claimant returned for follow-up with Dr. Cannon and reported that he was "unchanged" since his last visit. He described back discomfort at a level five and stated that the physical therapy was providing him with good temporary relief during therapy, but has recurrence of symptoms between the sessions. Claimant denied any shooting pains down his legs, but described some bilateral buttocks discomfort and pain in his left arch of his foot with occasional left ankle pain. He also described similar area of discomfort down his right lower extremity, but not as often.<sup>203</sup>

Dr. Cannon reviewed Dr. Brodsky's medical records in detail, but they did not provide him with any significant new information. Dr. Brodsky determined Claimant suffered from musculoskeletal back pain. He did not find any evidence of surgically treatable lesions. Claimant improved under Dr. Brodsky's care and Dr. Brodsky cancelled the scheduled EMG. An MRI was performed and revealed only a bulge at L2-3, L4-5, and more notable at L5, S1 level. The changes at the L5, S1 level was more pronounced on the right and the possibility of a small subligamentous herniation of the disc could not be excluded by the MRI. There were no other significant findings.<sup>204</sup>

Claimant appeared fixated on his "bulging discs." Dr. Cannon explained to him that a bulging could be normal. Since Claimant kept described vague areas of discomfort in both legs, with numbness in various locations, Dr. Cannon suggested proceeding with some electrical hard evidence to see if there was any neurocompromise by performing an EMG and nerve conduction velocity of both legs. If no improvement was clinically identified, Dr. Cannon would consider epidural steroid administration. He placed Claimant on Clinoril which he tolerated well and Darvocet for significant discomfort. Dr. Cannon suggested Claimant ween off of the Darvocet as soon as possible.<sup>205</sup>

---

<sup>201</sup> EX-25, pp. 1-2.

<sup>202</sup> EX-25, p. 2.

<sup>203</sup> EX-26, p. 1.

<sup>204</sup> Id.

<sup>205</sup> EX-26, p. 2.

There were no significant changes in Claimant's physical examination and his reflexes remained symmetrical and intact. Dr. Cannon continued to feel that Claimant could return to at least light duty work if his employer agreed. He also continued Claimant's lifting restriction to no more than five to ten pounds. Finally, Dr. Cannon still wanted Claimant to participate in a work hardening program to minimize future low back problems.<sup>206</sup>

Claimant's returned to Dr. Cannon on 26 Feb 91 after the EMG was performed and reported that he felt 50 percent worse since his last visit. He described his pain at a level ten with radiating "discomfort into both legs right greater than left from the groin area medially into his foot anteriorly." Dr. Cannon reviewed the EMG of his right and left lower extremities, performed on 08 Feb 91, which were both normal. Claimant's reflexes remained symmetrical and intact. "His exam [was] basically unchanged from before."<sup>207</sup>

Dr. Cannon discussed the possibility of epidural steroid injections and Claimant was interested in pursuing this treatment option. They also discussed the possibility of a work hardening program. "This patient has been out of work previously and does not appear close to being able to return to work in the near future." Dr. Cannon hoped a work hardening program would help minimize the chances of Claimant having recurrent episodes of additional low back problems after returning to work. They discussed the program in detail, but Claimant did not appear very enthusiastic. Claimant would like to explore this option, but if it "causes any pain [he'll] quit." Dr. Cannon told him he should expect increased discomfort as he begins the program, but it was important for him to work through it to benefit from the program.<sup>208</sup>

Since Claimant was starting the work hardening program, he remained under active medical treatment. He would start with two to four hours a day and increase his work capacity as gains are hopefully made. Claimant's "prognosis for return for full gainful employment without restrictions remains incredibly guarded however hopeful he can return for at least some form of employment with some restrictions . . . outlined with computerized Key Functional Assessments."<sup>209</sup>

Claimant returned for follow-up treatment with Dr. Cannon on 05 Mar 91 and reported a 50 percent improvement since his last visit. He presented for an unscheduled visit and wanted to clarify something he was told during his work hardening program. The therapist told Claimant that "unexcused absences" would not be tolerated even though Claimant explained "at length about the various things he has going on in his life

---

<sup>206</sup> Id.

<sup>207</sup> EX-27, p. 1.

<sup>208</sup> EX-27, p. 2.

<sup>209</sup> Id.

including a relative who is in jail in Round Roc, care of his children, obligations at home, and multiple other details.” Dr. Cannon reinforced the physical therapist’s opinion that attendance needed to be near perfect, if not perfect. Claimant was most concerned that he would get “fired” from the work hardening program, which would affect his benefits. Dr. Cannon told Claimant to return in about four weeks to evaluate his progress and to assess the efficacy of the epidural steroid injections. Claimant remained under active medical treatment and was not cleared for employment.<sup>210</sup>

On 20 Mar 91, Claimant returned to Dr. Cannon, but treated with Dr. Wilhite instead because Dr. Cannon was in surgery and unavailable. Claimant believed the work hardening program aggravated his back condition and he wanted “out.” Claimant did not want to consider an epidural steroid injection because he was told there was a “one in a million [chance] that you could get paralyzed” and Claimant believed he would be that one in a million. Claimant informed Dr. Wilhite that the night before he had back discomfort which made him take a Clinoril. After he took the Clinoril, he had generalized itching. However, Dr. Cannon and the anesthesiologist told him to discontinue the Clinoril and any other anti-inflammatory medication because of his stomach problems.<sup>211</sup>

Physical examination revealed no tenderness over the lumbosacral spine. He had some mild tenderness over his left iliolumbar ligament and muscle insertion at the lateral left iliac crest. There were no palpable defects or paraspinal muscle, sacroiliac joint or sciatic notch tenderness. Claimant’s hips revealed full symmetric range of motion without pain and bilaterally negative sitting straight leg raising. Dr. Wilhite noted no muscle weakness in Claimant’s lower extremities. Claimant could walk on his heels and toes without difficulty. He had good strength on resisted knee extension and flexion and against resisted hip flexion. Supine straight leg raising test on the right made him complain of lower back discomfort but no radicular pain.<sup>212</sup>

Dr. Wilhite concluded Claimant suffered from musculoskeletal lower back pain and explained to Claimant that it was normal to have soreness when starting the work hardening program and that he should try to push through some of the soreness. He informed Claimant that about 80-90 percent of patient’s noted improvement from an epidural steroid injection provided that they have not had prior back surgeries. Claimant remained under active medical treatment and was not cleared for employment until he got reevaluated by Dr. Cannon on 25 Mar 91.<sup>213</sup>

Claimant returned to Dr. Cannon’s office on 25 Mar 91 and informed Dr. Cannon that he was “no longer interested in returning to [his] office for routine care.” Dr.

---

<sup>210</sup> EX-29, pp. 1-2.

<sup>211</sup> EX-30, p. 1.

<sup>212</sup> EX-30, pp. 1-2.

<sup>213</sup> EX-30, p. 2.

Cannon, therefore, dismissed Claimant from routine orthopedic followup [sic].” Dr. Cannon did “not feel [he has] anything further to offer this patient in the way of diagnostic or therapeutic modalities that the patient is interested in.” Dr. Cannon released Claimant to return to his previous line of employment with the restrictions outlined in his key functional assessment,<sup>214</sup> primarily no lifting greater than 25 pounds above the shoulder level, no lifting greater than 25 pounds at the desk or chair level, and no carrying greater than 37 pounds. Claimant had no limitations on walking, kneeling, or crawling, but should avoid repetitive bending, pushing, and pulling and should limit this to approximately 25 pounds. Claimant’s “prognosis for return for full gainful employment without restrictions is extremely poor. He indeed should be able to remain gainfully employed with the restrictions as outlined above.” Dr. Cannon gave Claimant a three percent “valid” total spine impairment rating.<sup>215</sup>

***Woodlands Sports Medicine Centre’s medical records reveal.***<sup>216</sup>

On 01 Mar 91, a Key Functional Assessment was performed to determine Claimant’s functional capabilities. “This is identified to be a Conditionally Invalid representation of [Claimant]’s present physical capabilities based upon consistencies and inconsistencies when interfacing grip dynamometer graphing, resistance dynamometer measurements, pulse rate variations, weights achieved, and selectivity of pain reports and pain behaviors.” Claimant exhibited a tendency to perform beyond his safe capability level. Prolonged activity at those levels would pre-dispose him to risk of injury.<sup>217</sup>

The weights achieved on the assessment did not reflect Claimant’s true safe limits. Claimant did not know what his safe limits were either. Therefore, physical therapist John Ford opined that a work hardening program would be in Claimant’s best interest to help him identify his limits. Claimant had some reservations about participating in the work hardening program. He reported that he had “potential family ‘emergencies’ that might require him to leave town.”<sup>218</sup>

Claimant was released from physical therapy on 25 Mar 91 to return to regular work. Claimant was restricted to no lifting more than 25 pounds above shoulder level or at desk/chair level. He was also limited to carrying no more than 37 pounds. Claimant’s walking, kneeling, or crawling was not restricted, but he should avoid repetitive bending, pushing, or pulling (also limited to 25 pounds).<sup>219</sup>

---

<sup>214</sup> EX-33.

<sup>215</sup> EX-31, pp. 1, 4.

<sup>216</sup> EX-28, 32.

<sup>217</sup> EX-28, p. 1.

<sup>218</sup> Id.

<sup>219</sup> EX-32, p. 1.

*Chiropractor Dale Weathersby's, medical records reveal that:*<sup>220</sup>

Claimant was seen as a result of an automobile accident on 09 Mar 94 where a car spun out of control and came toward his 18-wheeler. Claimant's truck jack-knifed and the front left of the car hit the front of his vehicle. He blacked out and had "flashbacks." He had pain at the back of his neck, lower back, left leg, and bottom of the left foot. His low back pain gradually worsened.<sup>221</sup>

Physical examination revealed a normally developed adult male with muscle spasms in the lumbar area of the spine. Dr. Weathersby diagnosed Claimant with "traumatic lumbar sprain complicated by bilateral paravertebral lumbar muscle spasms. Claimant received chiropractic treatment consisting of special manipulative corrections or interosseous disrelationships with specific spinal mobilization maneuvers. Physical therapy was used to ease the muscle spasms in the affected area."<sup>222</sup>

Dr. Weathersby believed Claimant's prognosis was good, even though he would probably require occasional treatment, as long as his condition is aggravated by his activity level. Dr. Weathersby believed that comparative examination including x-rays should be made periodically to monitor the actual degree of post traumatic pathology.<sup>223</sup>

Claimant treated with Dr. Weathersby from 22 Mar 91 through 23 May 94. Although Claimant did not get relief from the work hardening or physical therapy, Dr. Weathersby's treatments were helping. Claimant informed Dr. Weathersby that he feels better each and every day. Even though Dr. Cannon released Claimant to return to light duty work, Employer would not let him return. On 04 Oct 93, Claimant's lower back started hurting after he hit some bumps in the road, until he could barely get out of his truck. Claimant slowly started getting better, but his back was sometimes sore. On 09 Mar 94, a car spun out of control and hit the front of his truck. He started having flashbacks after the accident. His lower back pain gradually worsened. About one month after the accident, Claimant reported that his back was 50 percent better, but his left knee hurt when he sat in a car. Claimant's lower back feels good until he has no medication, but continuously reported his pain was getting better and he felt good.<sup>224</sup>

---

<sup>220</sup> EX-34.

<sup>221</sup> EX-34, p. 1.

<sup>222</sup> EX-34, pp. 1-2.

<sup>223</sup> EX-34, p. 2.

<sup>224</sup> EX-34, pp. 3-4.

***Halliburton Companies' Occupational Injury and Illness Reports reveal that:***<sup>225</sup>

Before working for Employer, Claimant underwent a pre-employment physical on 20 Apr 04 which required a variety of examinations and tests for overseas deployment. The processing included: physical examination, drug screen, blood work, pulmonary function test, audiometric test, EKG, chest x-ray, DOT exam and certification, evaluation for fitness to wear a respirator, med-x back evaluation (baseline), spirometry, vaccinations and anti-malarial medications.<sup>226</sup> The report reflected no evidence of prior surgery to the spine or extremities, however, under additional comments, Claimant noted that he broke his hip in 1994 and had a ten minute loss of consciousness in 1994, a back injury in 1989, throat surgery in 1996, and ear surgery in 1984.<sup>227</sup> Based on her examination, Rebecca Decker, examiner, reported Claimant qualified and could be assigned to any work consistent with his skills and training, subject to review by the Medical Surveillance Department.<sup>228</sup> Claimant's physical examination revealed no immediately significant medical problems.<sup>229</sup>

Claimant completed a medical questionnaire for his pre-employment physical. He noted that within the 12 months before 20 Apr 04, he had a physical by Dr. Glenn Shipley. He also disclosed that in 1994 he suffered a head injury when he lost consciousness for ten minutes.<sup>230</sup> Claimant informed the medical department that he had stomach pains and had back injuries, back pain, and broken bones. Specifically, Claimant stated his L5 bulged, starting around 1989 and in 1994 he hurt his right hip and right arm. Claimant further disclosed he had ringing in his ears and a prior ear surgery around 1984. Claimant had several injuries to his head or ears: severe blow to his head, eardrum puncture, knocked out, automobile accident, and broken arm and hand.<sup>231</sup> Claimant's x-rays and spirometry were within normal limits.<sup>232</sup>

On 06 May 04, Claimant presented to Employer's medical department with numbness in his right leg and no history of trauma. He complained of right hip pain through his right leg. It felt like "the pain when you bump your funny bone." The pain started two days before. He felt relief from the pain when he sat however the tingling would not stop. There was no swelling. Claimant gave a history that he had pins in his right hip since 1994 and that he broke the ball head of his femur. His musculoskeletal

---

<sup>225</sup> CX-2, 4-5; EX-2, 18.

<sup>226</sup> CX-2.

<sup>227</sup> EX-18, pp. 1, 4.

<sup>228</sup> EX-18, p. 1.

<sup>229</sup> Id.

<sup>230</sup> EX-18, p. 4.

<sup>231</sup> EX-18, pp. 4-5.

<sup>232</sup> EX-18, pp. 9-10.

pain worsened with standing. The doctor prescribed Prednisone and Darvocet and ordered that he discontinue taking ibuprofen.<sup>233</sup>

Claimant returned to the medical clinic on 24 Jun 04 with complaints of lower back pain and weakness. The pain was across the small of his back without radiation or weakness in his right leg. Claimant described no history of trauma. The doctor noted he saw Claimant seven weeks ago with back pain; that he improved, but was now worse. The doctor reported that he previously diagnosed Claimant with arthritic back pain and sciatica and placed on steroids for twelve days. After the 06 May 04 visit, the doctor told Claimant to follow-up in two weeks, but he failed to do so. He also asked Claimant to do physical therapy, but Claimant is not comfortable with physical therapy until he gets a firm diagnosis. Claimant cannot do his job with sciatic and low back pain. The doctor noted “perhaps new job driving trucks has given a sciatic exacerbation.” He was prescribed Ultram 50 mg every four hours as needed for pain.<sup>234</sup>

***Dr. Miguel Flores’ medical records reveal that:***<sup>235</sup>

On 12 Jul 04, Claimant presented with complaints of right leg numbness from the upper knee area to the thigh and sometimes when he stands his right leg gets a burning and tingling sensation. He also complained of lower back pain. He gave Dr. Flores a history of three pins in his right hip and bulging at the L5. Neither of these injuries has been symptomatic since 1994. Claimant was on medical leave because of right leg pain since 24 Jun 04 from an injury to his back and right leg while working in Afghanistan. Physical examination of Claimant’s back revealed normal gait, normal deep tendon reflexes, 90 degree bilateral straight leg raise, normal lumbar flexion, lumbar spine 3 tender to palpate, and negative Patrick’s test. Physical examination of Claimant’s right hip revealed normal flexion, normal external and internal rotation, and normal sensory. Dr. Flores diagnosed Claimant with right leg paresthesias and lumbar sprain related to his recent injury. The lumbar x-ray revealed degenerative changes, osteopenia, and no spondylolysis. He prescribed Anaprox and a reevaluation in one week.<sup>236</sup>

Claimant returned for a follow-up with Dr. Flores on 20 Jul 04 requesting a medical release form to return to work. Claimant stated that he did not have pain whatsoever and he felt he was ready to return to work. Physical examination remained essentially unchanged with the exception that he did not have pain at the L3 lumbar spine. Dr. Flores examined Claimant for back flexibility and ability to move, which revealed no discomfort to his back. Dr. Flores concluded that Claimant was at full recovery of his back injury with no permanent injury sustained. Claimant showed no

---

<sup>233</sup> CX-4; EX-2, pp. 1-2.

<sup>234</sup> CX-5; EX-2, pp. 3-4.

<sup>235</sup> CX-6; EX-4-5.

<sup>236</sup> CX-6, pp. 1-2, 6; EX-5, p. 1.

need for any further treatment and was fully released to work with no restrictions.<sup>237</sup> He did not require any maintenance treatment.<sup>238</sup>

Dr. Flores completed a form for Employer and gave Claimant an excellent prognosis, releasing him for work on 20 Jul 04. He diagnosed Claimant with lumbosacral and right hip pain. He ordered rest for one week. Dr. Flores was aware that Claimant would return to Kuwait-Iraq where there is limited medical assistance. Dr. Flores released Claimant to return to work as a truck driver knowing the physical and psychological requirements of his job. Claimant was under his care from 12 Jul 04 through 20 Jul 04 and could return to work on 21 Jul 04 with no restrictions.<sup>239</sup>

Claimant last treated with Dr. Flores on 04 Aug 04 because although Dr. Flores released him to return to work, another doctor ordered an MRI before Claimant could return to work. He still complained of back pain. On 04 Aug 04, Dr. Flores ordered an MRI of the lumbar spine. He did not provide Claimant with medical treatment.<sup>240</sup>

***River Oaks Imaging and Diagnostic's medical records reveal that:***<sup>241</sup>

Claimant had x-rays of his lumbar spine taken on 14 Jul 04. They revealed multi-level degenerative changes and osteopenia with no spondylolysis.<sup>242</sup>

An MRI of Claimant's lumbar spine was taken on 04 Aug 04. The doctor had no prior films for evaluation. Claimant had disk desiccation at all levels, with the most significant disk space narrowing at L2-3. He also had canal stenosis in the transverse dimension at all levels because of shortened pedicles. There were also Schmorl's nodes in multiple endplates and normal signal intensity.<sup>243</sup>

At L2-3 the MRI revealed degenerative disk changes to include posterior osteophyte formation, mild posterior ridging. It also revealed broad-based disk protrusion, mild lateralization to the right and degenerative facet changes bilaterally. It further revealed canal stenosis in both the AP and transverse dimensions, AP dimensions of the canal was .7 cm and compromise of both L2 and L3 nerve roots.<sup>244</sup>

---

<sup>237</sup> EX-4.

<sup>238</sup> CX-6, pp. 3-7; EX-5, pp. 1-2.

<sup>239</sup> CX-6, pp. 4-5.

<sup>240</sup> CX-6, p. 8.

<sup>241</sup> CX-7; EX-3.

<sup>242</sup> EX-3, p. 1.

<sup>243</sup> CX-7, pp. 1-2; EX-6, p. 1.

<sup>244</sup> CX-7, pp. 1-2; EX-6, p. 1.

At L3-4 the MRI revealed left foraminal, lateral recess disk protrusion and facet arthropathy particularly on the left. These cause foraminal and lateral recess stenosis and far lateral HNP with at least moderate compromise of the left L3 nerve root. The right L3 did not appear compromised. The L4-5 was unremarkable.<sup>245</sup>

At L5-S1 the MRI revealed mild diffused disk bulging with no significant compromise of the nerve roots.<sup>246</sup>

***Dr. Michael Kaldis' medical records reveal that:***<sup>247</sup>

Claimant was evaluated on 14 Sep 04 for a second opinion regarding his work-related injury he sustained while in Afghanistan. Claimant wishes to return to work. Physical examination revealed no evidence of neurological deficit. Dr. Kaldis reviewed the lumbar spine MRI which revealed no evidence of significant soft tissue or osseous abnormalities.<sup>248</sup>

Dr. Kaldis reviewed Claimant's medical records and did not recommend surgical intervention. He saw no evidence of a surgical lesion or anything that would preclude Claimant from returning to work full duty without restrictions. He also ordered that Claimant return to the care of his treating physician.<sup>249</sup>

Dr. Kaldis based his findings on Claimant's subjective complaints, medical history, objective medical records and tests and physical examination of Claimant.<sup>250</sup>

***Dr. Michael D. Ciepiela's medical records reveal that:***<sup>251</sup>

On 13 Apr 05, he examined Claimant for an independent medical evaluation. The purpose of the examination was for evaluation only, not for care, treatment, or consultation. Claimant gave Dr. Ciepiela the history of his injury. He reported that on 23 Jun 04 while working for Employer, he was getting in and out of a truck much higher than normal trucks and as a result of pulling and lifting himself into the truck he started having back and leg pain. Claimant also informed him that he worked for Mission Petroleum from 10 Dec 04 through 25 Mar 05 out of necessity to pay bills and buy food.<sup>252</sup>

---

<sup>245</sup> Id.

<sup>246</sup> Id.

<sup>247</sup> CX-8; EX-7.

<sup>248</sup> CX-8, p. 2; EX-7.

<sup>249</sup> Id.

<sup>250</sup> Id.

<sup>251</sup> CX-10; EX-8.

<sup>252</sup> CX-10, pp. 1-2; EX-8, pp. 1-2.

Claimant did not have a treating physician at the time of the independent medical examination. He considered surgery so he could return to work, but Employer would not authorize a specialist. Claimant was not taking medication, but needed it sometimes for his pain. On 13 Apr 05, Claimant complained of radiating pain in his low back and leg. It is present on a frequent to constant basis. The pain is aching, stabbing and shooting with intensity from moderate to severe. Claimant told Dr. Ciepiela that sometimes he nearly collapsed due to pain. He has numbness and tingling in the right leg, thigh, and lower calf. The pain is worse with standing, bending, and walking. Rest and medication helps relieve Claimant's pain.<sup>253</sup>

Claimant told Dr. Ciepiela about his prior injuries. About 15 years ago, in 1989, Claimant fell off the top of a truck and L5 was bulging. He also had an ear operation around 1985 and right hip surgery (three pins placed in Claimant's right hip) in December 1994. Claimant received physical therapy for the bulging disc for about nine months in 1989. Claimant says he fully recovered from his injury and returned to work with no limitations.<sup>254</sup>

Dr. Ciepiela conducted a physical examination of Claimant which revealed that all ranges of motion were normal. Hamstring flexibility was 50 percent full on the right and 40 percent full on the left. He diagnosed Claimant with aggravation of L2-3, L3-4, spondylosis, stenosis, and radiculopathy.<sup>255</sup>

The history Claimant related, including pictures of the truck he had to climb, the bumpy roads with constant jarring of the truck, and kitchen duty which caused him to develop severe cramping and burning, essentially confirmed aggravation of the upper lumbar nerve roots. "[T]he constant bump axial load driving in the truck would be consistent with aggravating the evolving stenosis, spondylosis in the upper lumbar spine. The adductor muscle involvement that he related to [Dr. Ciepiela] is also consistent with this." Claimant has not yet reached maximum medical improvement from the effects of his injury. Dr. Ciepiela felt that Claimant needed further curative medical treatment including an EMG/nerve conduction velocity study to document the degree of nerve involvement. He also recommended epidural steroid injections times three in conjunction with an active spine therapy program consisting of flexibility, strength, conditioning and core stabilization. Finally, he recommended Claimant get a Pilate's exercise video incorporating flexibility and core stabilization to do on a prophylactic basis.<sup>256</sup>

---

<sup>253</sup> CX-10, p. 2; EX-8, p. 2.

<sup>254</sup> CX-10, p. 3; EX-8, p. 3.

<sup>255</sup> CX-10, pp. 3-4; EX-8, pp. 3-4.

<sup>256</sup> CX-10, pp. 4-5; EX-8, pp. 4-5.

Dr. Ciepiela noted that Claimant is incredibly motivated to return to his regular job. If he had an invasive lumbar surgery, he could not return to work and that does not interest Claimant. The treatment recommended should bring Claimant back to a reasonable functional level allowing him to return to work.<sup>257</sup>

## Analysis

### **Disability Compensation**

This case presents not only an issue regarding a medical opinion, but also “mingled elements of fact[s], medical opinion[s] and inference[s].”<sup>258</sup> The record consists of medical opinions related to Claimant’s current injury coupled with the testimony of Claimant and medical records predating the subject injury.

There is clearly sufficient evidence to invoke the Section 20(a) presumption that Claimant injured his back as a result of his employment in Afghanistan.

Claimant testified that he stumbled off the airplane when he arrived in Afghanistan, but he denied injuring himself at that time. He also testified to falling in the mess hall, but again denied injuring himself. He initially went to Employer’s medical department on 06 May 04 with complaints of pain in his legs. He provided no history of trauma. He denied having back pain at that time.<sup>259</sup> The doctor prescribed him medication and ordered him to return in two weeks for a follow-up.<sup>260</sup>

Claimant did not return to Employer’s medical department until 24 Jun 04. He returned with complaints of right leg pain, more in his thigh than in his hip. He also complained of back pain. The doctor prescribed pain medication. Claimant attributed his back and leg pain to getting in and out of his work truck and driving on rocky roads with “chug holes” in them.<sup>261</sup> Claimant explained that although the truck in Afghanistan was lower than the ones he usually drove in the United States, the truck was not up to OSHA standards.<sup>262</sup> He described a broken bottom step causing him to have to mount the truck to get into it. Getting into the truck is even more difficult when the truck was loaded

---

<sup>257</sup> CX-10, p. 6; EX-8, p. 6.

<sup>258</sup> *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

<sup>259</sup> There is a discrepancy in Claimant’s medical records. He could not explain why the doctor wrote that Claimant had back pains. Claimant said he had weakness and stumbling, but no back pain. He had pain in his legs. The medical records from 06 May 04 reflect that Claimant only complained of pains in his leg, there is no reference to back pain, however, in Employer’s 24 Jun 04 medical records, it states Claimant treated there seven weeks prior for back pain, not leg pain as the record reflects. The record does not support the doctor’s statement that Claimant complained of back pain on 06 May 04.

<sup>260</sup> CX-4; EX-2, pp. 1-2.

<sup>261</sup> Tr. 29-31; CX-3.

<sup>262</sup> Tr. 29-31; CX-3.

because it would raise the front end another four or five inches. Claimant had to climb up on the wheel's lug nuts to get up to the cab and would literally have to reach up, jump, grab, and pull himself into the cab of the truck.<sup>263</sup> He testified that every time he got into the cab it caused his muscles to pull and he would have to pick up his right leg and set it to where he could get into the truck.<sup>264</sup> Employer's doctor in Afghanistan commented that "perhaps new job driving trucks has given a sciatic exacerbation."<sup>265</sup>

He further explained that his back pain was also caused by the rocky roads in Afghanistan. He compared driving on the rocky roads to riding a bucking horse in slow motion. He did not pinpoint any other causes of his pain.<sup>266</sup> He did not want to participate in physical therapy until he knew what was wrong with his back. Claimant returned to the United States because the doctor in Afghanistan put him on light duty and said he could not drive a truck. Claimant returned to the United States to find out what was wrong with his back.<sup>267</sup> He started seeing Dr. Miguel Flores.<sup>268</sup>

Claimant presented to Dr. Flores on 12 Jul 04 with complaints of right leg numbness from the upper knee area to the thigh and lower back pain. He provided Dr. Flores with a complete medical history, including prior injuries. Dr. Flores took x-rays, but determined that an MRI was unnecessary. Dr. Flores told Claimant that he pulled muscles in his back. He diagnosed Claimant with right leg paresthesias and lumbar sprain related to his recent injury in Afghanistan.<sup>269</sup>

The 04 Aug 04 MRI, revealed disc desiccation.<sup>270</sup> He also had canal stenosis in the transverse dimension at all levels because of shortened pedicles.<sup>271</sup> The MRI revealed degenerative disc changes at L2-3 and left foraminal, lateral recess disc protrusion and facet arthropathy particularly on the left at L3-4. More importantly the MRI revealed at L5-S1 mild diffused disc bulging and far lateral herniated nucleus pulposus with at least moderate compromise of the left L3 nerve root.<sup>272</sup> Although Claimant's 1990 MRI also revealed minimal bulging, it did not reveal a herniation or nerve root compromise.

Per Employer's request, on 13 Apr 05, Dr. Michael Ciepiela examined Claimant for an independent medical examination.<sup>273</sup> Claimant provided him with a history of getting in and out of trucks much higher than normal in the United States, requiring him

---

<sup>263</sup> Tr. 29-31.

<sup>264</sup> CX-5; EX-2, pp. 3-4.

<sup>265</sup> CX-5, p. 2.

<sup>266</sup> Tr. 32-34; EX-35 pp. 80-82.

<sup>267</sup> CX-5; EX-2, pp. 3-4.

<sup>268</sup> CX-6; EX-4-5.

<sup>269</sup> CX-6.

<sup>270</sup> EX-3, p. 1.

<sup>271</sup> CX-7, pp. 1-2; EX-6, p. 1.

<sup>272</sup> CX-7, pp. 1-2; EX-6, pp. 1-2.

<sup>273</sup> CX-10; EX-8.

to pull himself into the truck. Claimant complained of radiating pain in his low back and leg on a frequent to constant basis. He described an aching, stabbing and shooting pain with intensity from moderate to severe. Dr. Ciepiela was informed of Claimant's prior injuries. Physical examination revealed all ranges of motion were normal. He diagnosed Claimant with **aggravation** of L2-3, L3-4, spondylosis, stenosis and radiculopathy.<sup>274</sup> The "constant bump axial load driving in the truck would be consistent with aggravating the evolving stenosis, spondylosis in the upper lumbar spine. The adductor muscle involvement that [Claimant] related to [Dr. Ciepiela] is also consistent with this." Knowing Claimant's full medical history, Dr. Ciepiela still related Claimant's current problems to his work in Afghanistan. He opined that Claimant suffered from an aggravation of a pre-existing injury, not an unresolved pre-existing condition.

Employer also sent Claimant to Dr. Michael Kaldis for a second opinion. On 14 Sep 04, physical examination revealed no evidence of neurological deficit or significant soft tissue or osseous abnormalities.<sup>275</sup> Dr. Kaldis ordered that Claimant continue treatment with his regular treating physician.<sup>276</sup>

Although the evidence does not establish that Claimant suffered a new injury while in Afghanistan, it does establish Claimant suffered an aggravation of a pre-existing condition. Claimant provided credible subjective complaints and his medical records confirmed there is sufficient evidence to invoke the Section 20(a) presumption.

Employer argues that Claimant failed to disclose any prior injury or pre-existing condition and is barred from recovery from Employer. The evidence does not support the predicate of Employer's argument. On his pre-employment physical examination form, Claimant disclosed that he broke his hip and had a prior back injury.<sup>277</sup> Claimant checked off that he had a head injury in 1994, with a 10 minute loss of consciousness. He also disclosed stomach pains, back injury, back pain, broken bones, and specifically L-5 disc bulging. In addition, he disclosed that he had ringing in his ears and ear surgery, "severe blow to [his] head," "eardrum puncture," "knocked out," "auto accident," and "broken arm and hand." Claimant disclosed all of his pre-existing conditions in sufficient terms to place Employer on notice.

Claimant had a number of prior injuries to his back. On 25 Jan 90 Claimant fell off an 18-wheeler vacuum truck and a wrench struck him across the middle of his back.<sup>278</sup> He felt immediate pain and received medical treatment from Dr. Brodsky. Claimant was taken off work and his back and right hip were x-rayed. The CT scan revealed a ruptured disc and Claimant went to physical therapy, which relieved the

---

<sup>274</sup> CX-10, pp. 3-4; EX-8, pp. 3-4.

<sup>275</sup> CX-8, p. 2; EX-7.

<sup>276</sup> Id.

<sup>277</sup> EX-18, p. 1.

<sup>278</sup> Tr. 67-71; EX-19.

numbness and some pain in his lower leg. He also complained of pain in his shoulder blades caused when he jerked on a chainsaw around 13 Mar 90. A 20 Feb 90 x-ray revealed a normal hip and good alignment in the lumbar spine. There was slight wedging of the body of L2 and L1, but it appeared to be juvenile. He also had a little disc bulging on the right side at L5-S1.<sup>279</sup> Dr. Brodsky did not think it was a disc herniation and observed that it looked more like facet arthrosis encroaching. An MRI was performed on 15 Mar 90 which revealed some bulging at L5-S1 with the possibility of a herniation at L5-S1 that could not be excluded. Claimant received continued medical treatment, but was never diagnosed with a herniation. Dr. Brodsky returned Claimant to regular duty work on 16 Apr 90.<sup>280</sup>

After returning to work, Claimant continued to have occasional pain in his lower midline back with occasional shooting pains in various areas of both legs and feet.<sup>281</sup> He returned to Dr. Brodsky on 23 Oct 90. He complained that after returning to work on 16 Apr 90 that has pain when “driving over bumps in the road produces pain, as well as sudden movements, sitting, or lying down.” Even though Claimant had complaints of pain, his x-rays of his lumbar spine revealed good alignment and Dr. Brodsky concluded the x-rays were negative. Upon examining Claimant he stated that “he saw nothing here.” He saw no reason preventing Claimant from working. He did not assign a permanent injury and it appears from the record that Claimant healed from this injury.<sup>282</sup> As with his subject injury in 1990 Claimant complained of pain while driving over bumps. Claimant received treatment for his pain and did not complain again about “bumpy roads” causing back pain until 24 Jun 04. Claimant aggravated his pre-existing back injuries while working for Employer in Afghanistan.

Claimant injured himself again on 01 Jan 91 when he fell while unloading a radiator. The pain started in his lower back and subsequently radiated down both legs. This pain was more severe than his prior back injury. Claimant treated with Dr. Cannon for this 1991 injury and described a pattern of numbness and tingling that was aggravated by sitting or coughing. He was prescribed pain medication. Dr. Cannon believed Claimant suffered from musculoskeletal low back pain. Dr. Cannon gave Claimant a good prognosis for returning to full gainful employment. Dr. Cannon released Claimant to return to light duty work with a five pound lifting restriction around the end of January 1991.<sup>283</sup>

Claimant informed Dr. Cannon on 25 Mar 91 that he no longer wanted to return for routine care. As such, Dr. Cannon released Claimant from routine orthopedic follow-up. Dr. Cannon did not think there was anything else he could offer Claimant in the way

---

<sup>279</sup> EX-21, p. 1.

<sup>280</sup> Id.

<sup>281</sup> Id.

<sup>282</sup> EX-22.

<sup>283</sup> EX-23.

of diagnostic or therapeutic modalities that Claimant would be interested in. He released Claimant to return to work with a lifting restriction of 25 pounds, but no restrictions on walking, kneeling, or crawling. He further stated that Claimant's prognosis for return to full gainful employment without restrictions was extremely poor, but he could remain gainfully employed with a lifting restriction of 25 pounds. Dr. Cannon assigned a three percent total spine impairment rating to Claimant. There is no doubt that Claimant has a pre-existing spine injury, however, this Court does not believe that it precludes Claimant from obtaining a compensation award because the work Claimant performed while in Afghanistan aggravated his pre-existing back injury.<sup>284</sup> Employer is liable for consequences of a work-related injury which aggravates a pre-existing condition.

Claimant also admitted that on 04 Oct 93, his lower back started hurting after he hit some bumps in the road, until he could barely get out of his work truck. He further stated that he slowly started getting better, but that his back was sometimes sore.<sup>285</sup>

Claimant's last relevant prior injury occurred on 09 Mar 94 when a car spun out of control and collided with his 18-wheeler.<sup>286</sup> Claimant testified that he blacked out and had flashbacks. The accident caused pain at the back of Claimant's neck, low back, left leg, and bottom of the left foot. His lower back pain gradually worsened. Claimant received medical treatment from a chiropractor for the "traumatic lumbar sprain complicated by bilateral paravertebral lumbar muscle spasms." According to Dr. Weathersby, Claimant's prognosis was good, but he would require occasional treatment, as long as his condition is aggravated by his activity level." Claimant treated with Dr. Weathersby for two months. Claimant received relief from Dr. Weathersby treatment.<sup>287</sup>

In addition, before working for Employer, Claimant underwent a pre-employment physical on 20 Apr 04. He passed a very extensive pre-employment physical with Employer's medical department, including, but not limited to a back evaluation (baseline) and fitness to wear a respirator. Claimant disclosed that he broke his hip, lost consciousness due to a motor vehicle accident in 1994 and had a back injury in 1989, throat surgery in 1996, and ear surgery in 1984. He also noted that 12 months prior to the 20 Apr 04 pre-employment physical, he had a physical with Dr. Glenn Shipley. He also informed the medical department that he had stomach pains, back injuries, back pain, and broken bones. He specifically noted that he had an L5 disc bulging. Claimant's physical examination revealed no immediately significant medical problems. The medical department qualified Claimant to work without restrictions or problems.<sup>288</sup>

---

<sup>284</sup> EX-31.

<sup>285</sup> EX-34, pp. 3-4.

<sup>286</sup> EX-34.

<sup>287</sup> Id.

<sup>288</sup> EX-18.

The evidence of prior back injuries is sufficient to rebut the Section 20(a) presumption. Nonetheless, the weight of the evidence on the whole reflects that it is more likely than not that Claimant suffered an aggravation of a pre-existing injury. Claimant not only recovered from his prior injuries, but there is more than ten (10) years between his 1994 injury and his recent complaints of pain in 2004. Employer provided no medical testimony denying a causal relationship between Claimant's complaints and his description of the work-related injury. It is true that the change in the MRIs that are ten years apart is not necessarily due to events taking place in only the last few months of that period. However there is a temporal nexus between the Claimant's work for Employer and the drastic change in his subjective symptoms. Claimant demonstrated a real motive to do whatever it took to return to work and had no motive to exaggerate his symptoms.

Claimant did not receive any medical treatment for back pain in the ten (10) years prior to Afghanistan. In addition, Claimant passed an extensive pre-employment physical prior to shipping out to Afghanistan. Claimant disclosed his prior injuries during his pre-employment physical. He also passed and qualified for employment after the physical. As such, Employer accepted Claimant with any frailties which predisposed him to bodily injury. Claimant aggravated a dormant pre-existing condition while he worked for Employer in Afghanistan. Employer even sent Claimant to an independent medical examiner who opined that Claimant suffered an aggravation of a pre-existing back injury.<sup>289</sup> Finally, in the ten (10) years prior to working in Afghanistan as a truck driver, Claimant continuously worked in the United States as a truck driver as well, with no complaints.

The record as a whole establishes Claimant suffered an aggravation of his pre-existing injuries while working as a truck driver in Afghanistan. In addition, there is no suggestion by Employer that Claimant could return to his original job. In fact, Employer's expert, Dr. Cantu found Claimant "medically unfit" to return to work for Employer and the independent medical examiner diagnosed Claimant with an aggravation of a pre-existing back injury. Therefore, Claimant suffered a compensable injury under the Act.

### **Maximum Medical Improvement**

Claimant has not yet reached maximum medical improvement. He continues to have pain in his back and Employer has declined to provide him with treatment.

---

<sup>289</sup> CX-10; EX-8 (Employer sent Claimant to Dr. Ciepiela for an independent medical examination. Dr. Ciepiela diagnosed Claimant with an aggravation of L2-3, L3-4, spondylosis, stenosis, and radiculopathy. At no point did Dr. Ciepiela relate Claimant's injuries to his pre-existing injuries from over ten years ago).

Dr. Flores, Claimant's treating physician, acceded to Claimant's wishes and issued a medical finding that Claimant showed no need for any further treatment and was fully released to work with no restrictions. However, he only saw Claimant on three occasions. Moreover, the 2004 MRI revealed multi-level degenerative changes, mild diffused disc bulging, and a herniation<sup>290</sup> and Dr. Flores never supplemented his opinion after the 2004 MRI.

On the other hand, Claimant treated with Dr. Michael Kaldis on 14 Sep 04 for a second opinion per Employer's request. While Dr. Kaldis saw nothing precluding Claimant from returning to work full-duty without restrictions, he also returned Claimant to continue care with his treating physician.<sup>291</sup>

Employer sent Claimant for another independent medical examination on 13 Apr 05 with Dr. Ciepiela. Claimant provided Dr. Ciepiela with a complete medical history, including prior injuries. According to Dr. Ciepiela, Claimant has not yet reached maximum medical improvement because he needs further curative medical treatment including an EMG/nerve conduction velocity study to document the degree of nerve involvement.<sup>292</sup> He also recommended epidural steroid injections in conjunction with an active spine therapy program consisting of flexibility, strength, conditioning, and core stabilization.<sup>293</sup> Dr. Ciepiela even recommended that Claimant do a Pilate's exercise video at home because it incorporates flexibility and core stabilization. Consistent with his medical records, Dr. Ciepiela opined that the recommended continued treatment should bring Claimant back to a reasonable functional level allowing him to return to work.<sup>294</sup> Dr. Ciepiela recognized that Claimant was "incredibly motivated to return to his regular job."<sup>295</sup> Dr. Ciepiela further stated that if Claimant had an invasive lumbar surgery, he would not be able to return to work. That is why he recommended treatment that would bring Claimant back to a reasonable functional level allowing him to return to work.<sup>296</sup>

I find Dr. Ciepiela's opinion to be most credible and corroborated by Dr. Kaldis. The evidence shows Claimant could improve with continued treatment and his condition has not stabilized yet. Based on the Claimant's testimony and medical opinions in the record, Claimant has not reached maximum medical improvement.

---

<sup>290</sup> CX-7, p. 2; EX-6, p. 2.

<sup>291</sup> CX-8; EX-7.

<sup>292</sup> CX-10, pp. 4-5; EX-8, pp. 4-5.

<sup>293</sup> Id.

<sup>294</sup> Id.

<sup>295</sup> Id.

<sup>296</sup> EX-10, p. 6; EX-8, p. 6.

## **Nature and Extent of Disability**

Since Claimant has not reached maximum medical improvement, his work-related disability is still temporary in nature. Underlying the nature and extent analysis is the fundamental fact that Employer determined that Claimant was and is still unable to return to his original job.<sup>297</sup> Claimant is consequently considered totally disabled until such time as the record establishes suitable alternative employment.

### *24 June 2004 through 10 December 2004*

After Claimant was sent home from Afghanistan to determine the cause of his lower back pain, Employer's expert, Dr. Cantu, said that Claimant was "medically unfit" and could not return to Afghanistan to work as a truck driver. Employer refused to allow Claimant to return to work.

Since Claimant was unable to return to his original job after his injury and there is no evidence of suitable alternative employment, Claimant was totally disabled from 24 Jun 04 through at least 10 December 2004.

### *10 December 2004 through 25 March 2005 and continuing*

Claimant's return to work as a truck driver with Mission Petroleum on 10 Dec 04, is sufficient to establish suitable alternative employment. Claimant testified that he was in pain while he drove for Mission, and he only did so because he needed the money. Many people work only because they need the money. Claimant candidly conceded that if the Social Security money were not available he would still be driving for Mission. The evidence does not indicate that Claimant had to expend extraordinary effort or endure excruciating pain or diminished strength. He retired from driving for Mission because he no longer needed the money bad enough to continue.

The case before this Court is comparable to *Harmon*.<sup>298</sup> The court determined that although the claimant retired from the workforce, since the claimant suffered a traumatic injury, not an occupational injury, the "sole relevant inquiry in this case with regard to claimant's burden of proof on disability is whether claimant's work injury precludes his return to his usual work." Whether a retirement is voluntary or involuntary does not apply to traumatic injury cases. The instant Claimant is entitled to disability benefits because he was injured and established a work related disability which impaired his earning abilities.

---

<sup>297</sup> Obviously, Employer argues that Claimant's inability to return to his original job is due to a concealed pre-existing condition, but that issue has been decided.

<sup>298</sup> 31 BRBS 45.

On the other hand, the work for Mission was not the same as his original employment. An essential feature of the job with Employer was that it was in a dangerous and remote location. It did not even require Claimant to actually drive, but rather escort and oversee local drivers. The evidence is clear that Claimant's suitable alternative employment was not the same as his original job with Employer.

Claimant earned \$6,173.62 in 11 weeks as a truck driver with Mission Petroleum.<sup>299</sup> This correlates to a post-injury wage-earning capacity of \$561.24. Therefore, Claimant is entitled to temporary partial disability benefits amounting to the difference between his post-injury wage-earning capacity and his average weekly wage.

### **Average Weekly Wage**

The Average Weekly Wage issue ultimately rests on a determination whether Claimant's work for Employer was the same type of employment he held in the United States for substantially the whole of the year prior to his injury. I find that it was not. This is a difficult issue not envisioned by the drafters of the Act and arising with some frequency as a result of our nation's active military involvement in various overseas locations.

The Act envisions compensation based on an employee's true pre-injury earning capacity. Taken in its most broad context, that might have opened the door to employees offering evidence that they could have made much more in a non-longshore job, had they wanted to, and that income should be taken as their earning capacity. The law does not allow that however, and looks to the type of employment at the time of injury and what actually was earned.

The suggestion that Employer was asking Claimant to do essentially the same type of work in Afghanistan that he was doing for Bullet is contrary to the evidence. At its core, the essential job for Bullet was driving trucks for few hours a day. The essential nature of the job for Employer was to travel and live in a remote, harsh, and dangerous environment, so to be available to accompany, escort, and oversee local truck drivers. While location is always an aspect of employment, and would not necessarily be considered in an AWW similar employment determination, it is unrealistic to separate the location and living conditions from the nature of the job in this case. There is a reason for the gap in wages for a driver for Bullet and a "driver" for Employer.

Since Section 10(a) does not apply and the parties did not offer any suggestion that Section 10(b) is applicable, the average weekly wage must be determined under Section 10(c). Claimant argues that this Court should apply Section 10(c) and use Claimant's

---

<sup>299</sup> EX-11, pp. 1-11 (copy of Claimant's wage earnings with Mission Petroleum from pay periods ending 17 Dec 04 through 04 Mar 05).

average weekly wages earned while he worked in Afghanistan for 8 weeks. While that is a short period of time, it remains the best evidence of what his earning capacity was at the time of his injury.<sup>300</sup> There is no indication that the job was highly tenuous or that Claimant would be unable to renew his contract or take another. To include Claimant's actual earnings for the entire 52 weeks prior to his injury which reflect a lower paying job would unfairly discount what he could expect to make at the time. To consider evidence of non-similar jobs and weigh too heavily the impact of possible market or political changes upon an employee's pre-injury earning capacity would infuse the average weekly wage determination process with even more uncertainty.<sup>301</sup>

I thus find Claimant's average weekly wage to be \$1,565.48 based upon Claimant earnings of \$13,870.14 in 62 days or 8.86 weeks ( $\$13,870.14/8.86 = \$1,565.48$ ).

### **Choice of Physician**

Claimant's treating physician, Dr. Flores, only saw him on three occasions. He did not order an MRI until after he released Claimant to return to work without restrictions and after Employer stated Claimant could not return to work without one. After Dr. Flores ordered an MRI, he never had a follow-up appointment with Claimant or wrote a supplemental report regarding Claimant's condition.

Employer sent Claimant to Dr. Kaldis for a second opinion in September 2004. Dr. Kaldis recommended that Claimant continue treatment with his treating physician. However, Dr. Flores already released Claimant from treatment two months earlier. Employer then sent Claimant to another independent medical examination with Dr. Ciepiela in April 2005. Dr. Ciepiela reviewed the MRI and examined Claimant. Claimant informed Dr. Ciepiela that he considered surgery so he could return to work, but Employer would not authorize treatment with a specialist. Dr. Ciepiela said that Claimant needed further curative medical treatment and recommended epidural steroid injections with an active spine therapy program. Based on Dr. Ciepiela's recommended treatments for Claimant, Claimant should be allowed to see a physician of his choice for those treatments.

### **Section 8(f) Relief**

The Court finds that Employer's request for Section 8(f) relief is not ripe, since Claimant has not reached MMI.

---

<sup>300</sup> See, e.g., *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882, 886 (1981).

<sup>301</sup> Employer's argues that *Zimmerman v. Service Employer International*, 2004-LHC-927 (Mar. 25, 2005) (unpublished), is factually distinguishable from this case based on Claimant's "failure to disclose material facts on his employment application" specifically prior injuries. However, this Court finds that Claimant disclosed his prior injuries on his employment application.

## DECISION

1. Claimant suffered a compensable aggravation of a pre-existing condition under the Act.
2. Claimant's average weekly wage at the time of his work-related injury was \$1,565.48.
3. Claimant's post injury earning capacity is \$561.24.
4. Claimant has not reached maximum medical improvement.
5. Claimant suffered a temporary total disability beginning 24 Jun 04 through 10 December 2004. From 10 Dec 04 and continuing, Claimant suffers from a temporary partial disability.
6. Employer's motion for Section 8(f) relief is denied.

## ORDER

1. Employer shall pay Claimant compensation for temporary total disability from 24 Jun 04 through 10 Dec 04 based on Claimant's average weekly wage of \$1565.48.
2. Employer shall pay Claimant compensation for temporary partial disability from 10 Dec 04 to present and continuing based on an average weekly wage of \$1565.48 and a weekly post injury earning capacity of \$561.24.
3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May-June 2003 injury, with a physician of Claimant's choice pursuant to the provisions of Section 7 of the Act and consistent with Dr. Ciepiela's recommendations.
4. Employer shall receive credit for all compensation heretofore paid, as and when paid.
5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).<sup>302</sup>

---

<sup>302</sup> Effective 27 February 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This

6. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.<sup>303</sup> A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

**So ORDERED.**

**A**

**PATRICK M. ROSENOW  
Administrative Law Judge**

---

order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

<sup>303</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1<sup>st</sup> Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **13 May 05**, the date this matter was referred from the District Director.