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Issue Date: 28 May 2010

CASE NO.: 2009-LDA-575

OWCP NO.:02-158395

IN THE MATTER OF

**RICHARD W. FULKERSON,
Claimant,**

v.

**LEAR SIEGLER SERVICES, INC.,
Employer**

and

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

APPEARANCES:

**GARY PITTS, ESQ.
On behalf of Claimant**

**JOHN L. SCHOUEST, ESQ.
On behalf of Employer/Carrier**

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651, *et. seq.*, (the Act), brought by Richard W. Fulkerson (Claimant) against Lear Siegler Services, Inc. (Employer) and the Insurance Company of the State of Pennsylvania (Carrier). A formal hearing was held on March 3, 2010, in Houston, Texas. Each party was represented by counsel, and each presented documentary evidence, examined and cross-examined witnesses, and made oral and written arguments.¹ The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-17, and Employer/Carrier's Exhibits 1-24.²

Stipulations

Prior to the hearing, the parties entered into the following joint stipulations of facts and issues:

1. Claimant sustained a work-related injury on March 16, 2007;
2. The injury occurred within the course and scope of Claimant's employment;
3. There was an employer/employee relationship between Employer and Claimant at the time of the injury;
4. Employer was advised of Claimant's injury on March 16, 2007;
5. An Informal Conference was held on August 11, 2009;
6. Claimant's average weekly wage at the time of his injury was \$1,847.77;
7. Claimant reached maximum medical improvement on June 30, 2009;

¹ The parties were granted time to file post-hearing briefs.

² The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript (Tr. __); Joint Exhibits (JX-__, p. __); Claimant's Exhibits (CX-__, p. __); and Employer/Carrier's Exhibits (EX-__, p. __).

8. Employer/Carrier paid to Claimant temporary total disability benefits for the period from March 17, 2007, through June 30, 2009, at a weekly rate of \$1,114.44; and

9. Employer/Carrier paid to Claimant certain medical benefits, but did not reimburse Claimant's Sleep Number bed purchase. (JX-1).

Issues

The parties have presented the following issues for adjudication:

1. The nature and extent of Claimant's disability; and
2. Claimant's entitlement to Section 7 medical benefits.

Statement of Relevant Evidence

Claimant's Testimony

Claimant, who is forty-six years old, was born in San Diego, California. (Tr. 11). After graduating from high school he moved to Washington, where he worked as a diesel mechanic. (Tr. 11). Although he did not attend college, he received certification in welding. (Tr. 11). Prior to going overseas, his primary business involved buying, selling, and repairing buses. (Tr. 12). He stated he was in good physical condition prior to working for Employer and had passed a pre-employment physical. (Tr. 14). However, he admitted he had undergone back surgery in 2004 at the L5-S1 level. (Tr. 15).

Claimant testified he was interested in working overseas because he wanted to serve his country, and he ultimately did not make much more money than he had as a diesel mechanic. (Tr. 12-13). He took a job with Employer as an engineer equipment mechanic stationed in Tikrit; however, he soon discovered the job was not as labor-intensive as he had envisioned. (Tr. 13). Therefore, he offered his services as a weld equipment mechanic to the foreman of that crew. (Tr. 13).

On March 16, 2007, Claimant replaced the engine and transmission on a pallet loading system truck. (Tr. 14). Just as he was finishing up, he injured his lower back. (Tr. 14). He reported his injury to the foreman and was taken to see Employer's medic. (Tr. 14). He was put on bed rest, and the next day he was taken to the military hospital for x-rays. (Tr. 15). The military doctor there told Claimant he believed he had injured his lower back and would need to be sent home for treatment. (Tr. 15).

Claimant returned home and underwent a laminectomy at the L4-L5 level on July 3, 2007, and after a few weeks of physical therapy, an MRI revealed a disc had collapsed, which led to a second surgery in December 2007. (Tr. 15-16). Claimant also participated in a spinal cord stimulator trial under the care of Dr. Grover, but it did not help to relieve his symptoms and was eventually removed. (Tr. 16-17).

Dr. Grover is currently treating Claimant with a variety of pain medications, which Claimant has been taking for approximately one year. (Tr. 18). According to Claimant, Dr. Grover has restricted him from driving due to these medications. (Tr. 18). Dr. Kushwaha has also restricted Claimant from driving, as well as from lifting over twenty pounds and working more than one or two hours per day. (Tr. 18-19). Dr. Kushwaha also prescribed a Sleep Number bed for Claimant due to his back condition and his resultant inability to sleep. (Tr. 19). Claimant testified the bed has indeed helped him, but Employer/Carrier have not reimbursed Claimant for it. (Tr. 20).

A week before the hearing, Claimant received Employer/Carrier's labor market survey, and he testified he had been in phone contact with all the employers identified in the survey. (Tr. 20-21). However, Claimant testified Dr. Kushwaha informed him these jobs do not meet his restrictions. (Tr. 21).

Claimant expressed concern that his body had become addicted to the various pain medications he had been prescribed, but he testified he had been told his only alternative would be a morphine pump. (Tr. 24-25). He testified his driving since receiving his restrictions has been limited to the property of the mobile home park where he lives. (Tr. 24).

Claimant's Medical Records (CX-1; EX-10)

Claimant was treated for lower back pain by Employer's medic on March 16, 2007. (EX-10, p. 9). The following day, he was referred to the military hospital. (EX-10, p. 11).

Claimant sought treatment from Dr. Allen, Criswell, an orthopedic. Dr. Criswell ordered an MRI and prescribed pain medications and physical therapy. (EX-10, p. 13). At that time, he also restricted Claimant from working until April 28, 2007. (EX-10, p. 15). An MRI of Claimant's spine dated April 10, 2007, revealed degenerative disc disease and spondylosis at L4-L5, causing moderate encroachment on the left L5 descending nerve root and mild encroachment on the right L5 descending nerve root. (CX-1, pp. 5-6; EX-10, pp. 25-26). Following the MRI, Dr. Criswell recommended a series of epidural steroid injections. (EX-10, p. 27). In a letter dated April 24, 2007, Dr. Criswell described Claimant's injury as significant, requiring several months of treatment and possible surgical intervention. He also extended Claimant's work restrictions through June 1, 2007. (CX-1, p. 8; EX-10, p. 30).

On May 30, 2007, Dr. Criswell referred Claimant to Dr. Vivek Kushwaha for a spinal surgery consultation and continued Claimant's work restrictions for the next three weeks. (CX-1, p. 10; EX-10, p. 51). Dr. Kushwaha first examined Claimant on June 12, 2007, and recommended Claimant undergo a myelogram in order to determine the best course of action. (CX-1, pp. 12-13; EX-10, pp. 53-54). He continued Claimant's work restrictions through August 12, 2007. (CX-1, p. 14; EX-10, p. 55). Following the myelogram, Dr. Kushwaha recommended Claimant undergo a laminectomy and discectomy. (CX-1, p. 19; EX-10, p. 66).

Dr. Kushwaha performed these procedures on July 2, 2007. (EX-10, pp. 68-69). Following the surgery, Claimant returned to Dr. Kushwaha on July 18, 2007, and August 15, 2007, continuing to complain of back pain. (EX-10, pp. 85, 87). After months of physical therapy, Claimant's pain had not diminished, and on October 3, 2007, Dr. Kushwaha ordered another MRI of Claimant's spine. (EX-10, p. 120).

The MRI, which was performed on October 24, 2007, revealed disc protrusion at the L4-L5 level. (EX-10, pp. 133-34). After reviewing these results, Dr. Kushwaha recommended a decompression and fusion, to which Claimant agreed. (EX-10, p. 140). These procedures were performed by Dr. Kushwaha on December 10, 2007. (EX-10, pp. 173-74). At a follow-up appointment on

December 26, 2007, Dr. Kushwaha reported Claimant was healing well and was having normal post-surgical pain. (EX-10, p. 188). Dr. Kushwaha reported continued improvement on February 26, 2008. (EX-10, p. 192).

However, Claimant's pain worsened over the next several weeks, and Dr. Kushwaha ordered an additional MRI on April 29, 2008. (EX-10, p. 196). On May 21, 2008, Dr. Kushwaha reported Claimant's MRI did not reveal any additional herniation or stenosis, but he believed Claimant might be suffering from psuedarthrititis. (EX-10, p. 206). On June 4, 2008, Dr. Kushwaha recommended exercise and therapy, hoping these would help with Claimant's pain over time. (EX-10, p. 221). He also referred Claimant to Dr. McCann for an evaluation of his spine.

On July 9, 2008, Dr. McCann examined Claimant and reported he agreed with Dr. Kushwaha's treatment thus far and recommended continued physical therapy as prescribed by Dr. Kushwaha. (EX-10, pp. 232-35). Although Claimant did continue with the physical therapy, by August 2008, he reported to Dr. Kushwaha that it was not helping with his pain, nor were the additional medications he had been prescribed. (EX-10, p. 257). Therefore, on September 8, 2008, Dr. Kushwaha performed a removal of the hardware at Claimant's L4-S1. (EX-10, p. 267).

Claimant showed some improvement on October 1, 2008. (EX-10, p. 280). He was again examined by Dr. McCann, who referred him to Dr. Kennington, a clinical psychologist, for additional treatment. (EX-10, pp. 282-87). On December 3, 2008, Dr. Kushwaha prescribed a Sleep Number bed for Claimant. (EX-10, p. 22). He also stated he did not believe there was anything more he could do for Claimant from a surgical perspective, and recommended Claimant follow-up with a pain management doctor. (EX-10, p. 294).

Claimant began seeing Dr. Grover for pain management on February 11, 2009. (EX-10, p. 303). At that time, Dr. Grover recommended a spinal stimulator. (EX-10, p. 305). Dr. Kushwaha agreed with Dr. Grover's recommendation. (EX-10, p. 310). Claimant underwent surgery to have the stimulator placed on May 8, 2009. (EX-10, pp. 312-14). However, by June 30, 2009, he was still complaining to Dr. Kushwaha of pain in his lower back. Dr. Kushwaha stated he hoped Claimant could learn to live with his present symptoms. (EX-10, p. 318). Dr. Kushwaha also indicated Claimant was unable to return to his usual job and was permanently restricted from working more than one or two hours per day and from driving more than about an hour. (EX-10, p. 23).

On September 11, 2009, Dr. Kushwaha referred Claimant for a functional capacity evaluation (FCE). The FCE, which was done on September 21, 2009, ultimately found Claimant was only capable of infrequent lifting of forty-five pounds, frequently lifting of twenty-five pounds, and carrying twenty-five pounds. The report stated Claimant was unable to return to work. (CX-1, p. 29).

On December 10, 2009, Dr. Grover restricted Claimant from driving due to his medications. (CX-1, p. 30). Dr. Grover reiterated this restriction in a letter dated February 25, 2010. (CX-17, p. 1).

Vocational Evidence (CX-3; EX-12)

Claimant was placed on medical leave from his job with Employer on March 22, 2007. (CX-3, pp. 1-2).

In a labor market survey dated February 12, 2010, Sherrill Marshall of CompEx Vocational Services identified the following seven positions which she believed were suitable for Claimant:

1. Appointment Setter for Integrity Group: The employee will contract businesses to promote sales of Visa and MasterCard protection. The employee will schedule appointments for the outside sales person to meet with the business. This job pays between \$9.00 and \$12.00 per hour.
2. Dispatcher for Liberty Cab: The employee will communicate with and dispatch drivers to pick-up locations via telephone and radio. He will also handle incoming calls. This job pays \$9.00 per hour.
3. Dispatcher for R&L Carriers: The employee will handle incoming calls. He will also record the times of departures, destinations, cargo, and expected times of return. He will assist with delivery route destinations and communicate with drivers via telephone and radio. There is no wage listed for this position.
4. Dispatcher for Telecommunication Operator: The employee receives calls from the public regarding police emergencies, fire and EMS services, animal control, and city water and sewer issues. He also monitors radio channels, answers incoming calls, and dispatches the appropriate departments. This job pays \$17.20 per hour.

5. Diagnostic Tech for Longs Auto Repair: The employee performs inspections and diagnoses needed repairs. He will also provide light-duty repairs within his physical restrictions. This job pays \$11.00 per hour.

6. Auto Service Advisor for Advantage BMW: The employee greets service customers, takes service calls, schedules appointments, advises customers of estimated costs, and reviews invoices with customers. The job pays between \$40,000.00 and \$50,000.00 per year.

7. Auto Service Advisor for Norman Frede Chevrolet: The employee greets customers, takes service calls, schedules appointments, advises customers of estimated costs, and reviews invoices. This job pays \$40,000.00 per year. (EX-12, pp. 4-7).

However, it should be noted that this labor market survey did not include a description of the physical requirements of any of the positions identified.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who appeared at the hearing, and upon an analysis of the entire record; the arguments of the parties; and applicable regulations, statutes, and case law. My evaluation of the evidence has been guided by the principle that the proponent of a rule bears the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

As trier of fact, I may accept or reject any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). The “true doubt” rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act, and thus has not been employed in my review of this claim. *Greenwich Collieries*, 512 U.S. at 281.

Fact of Injury/Causation

Section 20(a) of the Act provides a claimant with a presumption his disabling condition is causally related to his employment if the claimant can prove the following two elements: (1) he suffered an injury or harm, and (2) employment conditions existed which could have caused, aggravated, or accelerated his condition. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003) (citing *Conoco v. Director, OWCP*, 194 F.3d 684, 687 (5th Cir. 1999)). Once a claimant has made this *prima facie* showing, the burden shifts to the employer to rebut the presumption with substantial evidence employment conditions did not cause the injury. *Ortco Contractors, Inc.*, 332 F.3d at 287. “Substantial evidence” has been defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982) (quoting *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1006 (5th Cir. 1978)). If the employer meets this burden, he rebuts the Section 20(a) presumption, and the administrative law judge must then weigh all the evidence and render a decision supported by substantial evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The parties have stipulated, and therefore I find, Claimant sustained a work-related injury on March 16, 2007. (JX-1).

Nature and Extent

A claimant bears the burden of proving the nature and extent of his work-related injuries. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1986). The parties have stipulated Claimant reached maximum medical improvement (MMI) on June 30, 2009. (JX-1). Therefore, I find Claimant reached MMI on that date.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). A claimant must make a *prima facie* case of disability by showing he is unable to return to his former job due to his work-related injury. Once he has done so, the burden shifts to the employer to show the existence of suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

The claimant remains entitled to total disability compensation until the date upon which the employer establishes the availability of such employment, at which point, the disability becomes partial. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131.

To establish suitable alternative employment, an employer must prove the existence of realistically available job opportunities. The employer must take into account factors such as the claimant's age, education, employment history, and physical capabilities. *Turner*, 661 F.2d at 1042. The employer must also demonstrate the claimant could realistically secure the alternative employment if he diligently tried. *Id.* at 1042-43. The *Turner* standard does not require the employer to seek out specific job offers for the claimant, but the employer must outline the specific terms, nature, and availability of the identified suitable alternative employment. *Id.* at 1041. Failure to present evidence of job availability supports a determination of total disability if the claimant is incapable of returning to his former job. *Roger's Terminal & Shipping Co. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986) (citing *Odom Construction Co. v. U.S. Dept. of Labor*, 662 F.2d 110, 116 (5th Cir. 1980)).

Employer/Carrier do not dispute Claimant has made a *prima facie* case of disability. Since the date of his injury, Claimant has been restricted from working by his various physicians. (CX-1, pp. 8, 10, 14, 23; EX-10, pp. 15, 30, 51, 55). Moreover, on June 30, 2009, Dr. Kushwaha opined Claimant was unable to return to his former job and unable to work in any capacity for more than one to two hours per day. (CX-1, p. 23). Therefore, I find Claimant has made a *prima facie* case of disability.

In response, Employer/Carrier argue the labor market survey dated February 12, 2010, constitutes evidence of suitable alternative employment. (EX-12, pp. 4-7). However, this labor market survey does not provide sufficient information to determine whether the identified positions are suitable for Claimant. Specifically, the report fails to describe the physical requirements of any of the identified positions. In addition, none of the positions appear to fit with Dr. Kushwaha's opinion that Claimant is incapable of working in any capacity for more than a few

hours per day, and according to Claimant, in fact, Dr. Kushwaha indicated these jobs do not meet his restrictions. (CX-1, p. 23; Tr. 21). For these reasons, I find Employer/Carrier have not met their burden of proving suitable alternative employment, and Claimant is entitled to total disability compensation benefits from the date of his injury and continuing.³

Medicals

In order for medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). A claimant establishes a *prima facie* case for treatment by showing a qualified physician has deemed the treatment necessary for the claimant's work-related injury. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). When an employer or carrier learns of an employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial, free choice of physician, he may change physicians only with prior written approval from his employer or carrier, or from the district director. 33 U.S.C. § 907(c).

In this case, the parties' only dispute with respect to medical benefits is Claimant's purchase of a Sleep Number bed, for which he requests reimbursement. Dr. Kushwaha, Claimant's treating physician, prescribed a Sleep Number bed for Claimant on December 3, 2008. (CX-1, p. 22). Employer/Carrier argue the bed is an unreasonable and unnecessary expense because Claimant's need for the bed is not sufficiently linked to his work-related injury. However, I find the bed a reasonable medical expense, as it was prescribed for Claimant by his treating physician in response to his complaints of insomnia due to his work-related back pain. Therefore, I find Employer/Carrier must reimburse Claimant for this expense.

ORDER

It is hereby **ORDERED, ADJUDGED, and DECREED** that:

(1) Employer/Carrier shall pay to Claimant temporary total disability compensation benefits for the period from March 16, 2007, to June 30, 2009, based on Claimant's pre-injury average weekly wage of \$1,847.77;

³ After observing Claimant, and listening to him testify at trial, I cannot imagine, given his presentation and his dependency on pain medications, that he is employable at this time.

(2) Employer/Carrier shall pay to Claimant permanent total disability compensation benefits for the period from June 30, 2009, and continuing, based on Claimant's pre-injury average weekly wage of \$1,847.77;

(3) Employer/Carrier shall pay or reimburse to Claimant all reasonable and necessary past and future medical expenses, including Claimant's purchase of a Sleep Number bed, resulting from Claimant's work-related injury;

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at a rate provided for in 28 U.S.C. § 1961;

(6) Claimant's counsel shall have twenty days from receipt of this ORDER in which to file a fully-supported attorney fee petition and simultaneously serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have ten days from receipt of the fee petition in which to file a response; and

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 28th day of May, 2010, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge