

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 August 2011

Case No.: 2010-LDA-262

OWCP No.: 02-132683

In the Matter of

OREN C. ARMSTRONG,

Claimant,

v.

HERITAGE SERVICES, INC.,

Employer,

and

CONTINENTAL INSURANCE COMPANY/CNA INTERNATIONAL,

Carrier.

APPEARANCES:

GARY B. PITTS, ESQ.

On Behalf of the Claimant

SARAH V. BAHLERT, ESQ.

On Behalf of the Employer

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),¹ brought by Claimant against Employer and Carrier.² On 6 Apr 10, the matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 17 May 11, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:³

Witness Testimony of

Claimant
Claimant's Spouse

Exhibits⁴

Joint Exhibit (JX) 1
Claimant's Exhibits (CX) 1-13
Employer's Exhibits (EX) 1-49⁵

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

STIPULATIONS⁶

1. Claimant injured his lower back on 28 Dec 02 at the United States Consulate in Sao Paulo Brazil during an employee/employer relationship with Employer, in the course and scope of that employment, and under conditions falling within the coverage of the Act.
2. Claimant's average weekly wage as of that date was \$849.14.
3. Claimant has been unable to return to his original job since the injury and was temporarily totally disabled as a result of that injury from 30 Dec 02 to 31 Jan 07.
4. Claimant reached maximum medical improvement (MMI) on 1 Feb 08.

¹ 42 U.S.C. § 1651 (2011) (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 901-950).

² For simplicity both Employer and Carrier are collectively referred to herein as Employer.

³ 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.

⁴ Some exhibits appeared to be *in globo* collections of records. Counsel were cautioned that in the case of any exhibit in excess of 20 pages (CX- 1, 6, 11; EX-17, 19, 22, 28, 31, 37, 39) or the deposition of any witness also testifying live (EX-38), only those pages specifically cited to would be considered a part of the record upon which the decision would be based. Tr.7.

⁵ Post hearing, Employer submitted what it identified as EX-50, but what was actually an inadvertently omitted page (between what was labeled as page 26 and 27) of EX-39.

⁶ JX-1; Tr. 8-12.

5. Employer paid Claimant the proper amount of disability compensation for the period of his temporary disability.
6. There was timely notice, filing and controversion of the claim.
7. An informal conference was held on 30 Jun 04 and 4 Dec 08.

FACTUAL BACKGROUND

Claimant was a plumber and security systems specialist who suffered an accident in 1998 that decreased his ability to engage in heavy labor. He returned to work in a reduced capacity. On 28 Dec 02, while working for Employer on construction and repair in the United States Consulate in Sao Paolo, Brazil, he injured his lower back, has undergone extensive invasive medical treatment, but has never returned to any type of work.

ISSUES & POSITIONS OF THE PARTIES

The parties agree that Claimant was totally disabled to the date of MMI, 1 Feb 08. However, Claimant maintains he remains unable to obtain and hold any job and is permanently and totally disabled. Employer counters that it has demonstrated suitable alternative employment and that Claimant is only partially disabled.⁷

Employer also sought an order granting Special Fund Relief under Section 8(f), since its petition had been denied. However, after the hearing and having had an opportunity to examine the full record, the Solicitor withdrew her opposition to the petition.

LAW

Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.⁸ However, an ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinions of the treating doctor.⁹

Nature and Extent

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.¹⁰ Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

⁷ On brief Claimant also argued for specific medical treatment, which was contrary to the stipulations he entered into at hearing. He subsequently withdrew that part of his claim.

⁸ *Downs v. Dir., OWCP*, 152 F.3d 924, (9th Cir. 1998); *see also Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000) (Social Security administrative law decision).

⁹ *Duhagan v. Metro. Stevedore Co.*, 31 BRBS 98 (1997).

¹⁰ *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980).

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.”¹¹ Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.¹² 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.

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.¹³ A claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.¹⁴ Any disability suffered by a claimant before reaching maximum medical improvement is considered temporary in nature.¹⁵

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury.¹⁶ If the claimant makes this showing, the burden shifts to employer to show suitable alternative employment.¹⁷

Medical Care

Section 7(a) of the Act requires employers to provide reasonable and necessary medical care.¹⁸ 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.¹⁹ A claimant “shall have the right to choose an attending physician.”²⁰

¹¹ 33 U.S.C. § 902(10)(2009).

¹² *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 104 (1991).

¹³ *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 Servs. v. Dir.*, *OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).

¹⁴ *Trask*, 17 BRBS at 60.

¹⁵ *Berkstresser v. Wash. Metro. Area Transit Auth.*, 16 BRBS 231 (1984); *SGS Control Servs.*, 86 F.3d at 443.

¹⁶ *Elliott v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988); *La. Ins. Guar. Ass’n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

¹⁷ *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

¹⁸ 33 U.S.C. §907(a).

¹⁹ *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-8 (1984).

²⁰ 33 U.S.C. § 907(b).

EVIDENCE

Claimant testified at trial²¹ and deposition²² in pertinent part that:

He is sixty-seven and is currently getting Social Security. He was born in Little Rock, Arkansas, and grew up in Victoria, Texas, Midland, Texas, and a little bit in Utah. He completed the ninth grade, but got a G.E.D. He worked for his dad and brother in the plumbing business for a while, had various short jobs and in 1968 went to Vietnam. He spent five years there off and on with a break in between in Guantanamo, Cuba. In 1972 he worked in Colorado for a while as a plumber and then went to Texas. He went to Alaska for two years and worked on the Trans Alaska Pipeline. He lived in California for several years, went to Haiti for a year doing plumbing with Brown and Root, went to Hungary for a year and a half, and went to Russia as a plumber, where he was hurt.

In Russia, they were carrying eight and ten inch cast iron pipe that was about three or four hundred pounds. The embassy had a lot of holes in the floor that had been torn out because of some security problems. It was just a real hard and dangerous place to work. Everything they did was heavy work. He was lifting heavy piping for roof drains and hurt his back very badly. He was transported to Houston where a good neurosurgeon, Dr. Westmark, did surgery. He filed a claim on the injury and was able to return to a light duty job with Employer.

Before the injury in Russia, he was a master plumber, but afterward he couldn't do that anymore. He had a top secret security clearance, so he took a light duty supervisory job that involved less physical work. The first job was in Uganda and Kenya. Then he went to Croatia, back to Canada, and finally to Sao Paulo. Those were all security work on the embassies. He looked for explosive devices or something that could be planted in the walls.

By the time he got to Brazil, he had recovered from the previous back surgery pretty well. In his career he had had scratches and both knees replaced. He also had colds, flu, pneumonia, and things like that, but nothing else of consequence, except for the back injury in Russia.

The job in Brazil was an inspector job, but was very physical. He went everywhere the construction workers went. He was climbing on scaffolding, under buildings, on top of buildings, and on the side of buildings. On 28 Dec 02, he was in the American Consulate in Sao Paulo, crossing a very rickety homemade ladder. He climbed up and down it many times. There was an opening in the floor that he had to jump across. When he did, he hurt his back. He went to the doctor, spent about four or five days on the floor in his room and they finally got him out of there. He has had no other income since that day.

²¹ Tr. 20-45.

²² EX-38 (as cited, see n.4).

He came back to Houston and went back to Dr. Westmark, who had a partner, Dr. Adebayo, who was a pain specialist. They tried all kinds of different stuff. Eventually, they did a fusion in October 2004. Then they had to go back and take it out again. All the metal and stuff in his back was causing more pain than it helped. At some point, about three years ago, they put in a spinal cord stimulator, which did nothing, whatsoever.

Since his injury in December of 2002, none of the surgeries or procedures have significantly helped his pain level. There was some discussion over the last three years about actually having to implant a morphine pump, but there was some problem at that time with the insurance company not wanting to do it. There was also talk about a pain stimulator.

He is taking about 10 or 12 hydrocodone and oxycodone a day. He has a long list and couldn't say what all he takes. They are all narcotics. He got tired of being drugged up all the time and told Dr. Fukshansky he'd like to get off of them. Now he takes Suvoxone or something and it's done a world of good. It was originally prescribed for his neck, but it also helps the back. He takes Gabipendin, which is a nerve type thing, and the maximum amount of acetaminophen per day. He gets along, as long as he doesn't do anything stupid, like lift anything heavy or something like that.

He has pain in the lower back. It never has changed. It gets worse if he sits a long time or stands. For example, if he goes into Sam's Club, long as he can get out within 30 minutes, it's no problem. He can't drive a long way. 20 miles is no problem, he just can't do a long trip or stand a long time. He can't sit in a hard chair for too long. If he does push those limits, he gets a lot worse. He goes to bed for several days. He used to have muscle relaxers, but doesn't take those anymore, because he got tired of being drugged up. There is also some risk to his liver from all the drugs.

His normal day is not much of a day compared to the rest of his life beforehand. He gets up, maybe goes to the grocery store and buys a few light groceries. Every now and then he goes to Home Depot and buys something light. He is also the cook and chief bottle washer around the home. He can't vacuum the floor with a big vacuum cleaner because that makes it much worse. He watches a lot of TV and has a lot of movies recorded. That's about the extent of it. He hasn't been on any long trips in a year.

He sleeps sometimes not at all and sometimes two or three or four hours and sometimes five or six hours. Four hours is a good night's sleep. He can't nap during the day. He sleeps in a big recliner. He hasn't slept in a bed for probably a year or two. The recliner helps his back. He has heating pads to lie on and uses ice. He is chronically fatigued.

He doesn't know what job he could get and keep. When the insurance company had the vocational labor market analysis done, he applied for every local job. His wife helped him type CX-7 and CX-11. She did most of the work, because he couldn't sit very long and even help her. The information is true and correct. None of the employers in the insurance company's vocational labor market analysis that he contacted ever offered him

a job. Some of them responded that the position had been filled or was no longer available. He did not look for any other jobs and did not follow up his applications by phone, except the job with the city.

He doesn't think he could have actually done any of the jobs, but was told to apply anyway. If they had offered, and asked him to come on down and talk to them, he would have. He thinks he put forth his best efforts in completing the applications. He applied to the central clearing house for federal positions. He knew his Navy veteran status would give him a hiring preference, but didn't know the same thing applied to his Schedule A disability. Many of the jobs required a college degree or a four or five year master's degree and he was not qualified. He applied, but was told they had a higher education requirement.

He sees Dr. Fukshansky for his neck, not his back. The neck medicine does help his back, but not enough to allow him to go back to any kind of work. The neck pain is not related to the injury with Employer, but is degenerative arthritis.

Albert Einstein Hospital's records state in pertinent part that:²³

Claimant was seen on 30 Dec 02 for low back pain, was prescribed medications, physical therapy and bed rest.

Cigna Property and Casualty's records state in pertinent part that:²⁴

Claimant was treated for a back injury sustained in Russia in 1998.

Claimant's Spouse testified at trial in pertinent part that:²⁵

She has been married to Claimant for about 49 years. She helped him type CX-7 and CX-11. She heard Claimant's testimony about his daily life and can only add that on a day when he's feeling very well he will try to do more, but then he pays the consequences. Just cooking a meal puts him down in bed or in his chair with heating pads and ice packs for another day or two in excruciating pain. She expects that to happen after the hearing. He is fatigued all the time and doesn't get much sleep.

She has worked outside the home and doesn't think he could get and keep a job. He can't do anything for a length of time. He would've loved to have some of those jobs. They are ideal jobs for him, but he can't do them. If he tries, he will end up in bed or in his recliner for one or two days. He just can't do anything for any length of time. For instance, she just had to hire a security guard at the dialysis clinic that she runs. She thought that's one of the jobs that they want Claimant to apply for. The guard basically sat all day long, once in a while getting up and walking up and down in front of the

²³ CX-1 (as cited, see n.4); EX-25.

²⁴ EX-22 (as cited, see n.4).

²⁵ Tr.45-48.

clinic. Claimant can't even do that. He couldn't have sat in that chair. He couldn't have walked up and down for a long time. Two hours would've been it for him.

Dr. Richard Westmark testified at deposition²⁶ and his records²⁷ state in pertinent part that:

He is a neurosurgeon and operates primarily on spines. He first saw Claimant on 19 May 98, upon referral from Dr. Searcy and Dr. McDonald. Claimant described having been working in Russia and lifting a heavy pipe, feeling a pop, and now suffering symptoms of low back pain, right lower extremity pain, right low extremity numbness and tingling. He took Claimant's history and it was not notable for any preexisting spine conditions. Claimant said he was taking Hydrocodone and an anti-inflammatory. He did a neurological exam on Claimant that entailed testing brain function, spinal cord function, and peripheral nerve functions. It involved a cranial nerve exam, which is getting the patient to do various things; testing reflexes using a reflex hammer; and testing various sensory modalities. He did not get X-rays or MRIs, but did review plain X-rays of the lumbosacral spine. They revealed degenerative disc disease and listhesis at L4-5 and L5-S1. He believes that this predated Claimant's injury in Russia. He was not able to review X-rays or MRIs that predated that injury. His diagnosis for Claimant at that time was probable L5 radiculopathy. If Claimant did not get better in 10 to 14 days he planned to try epidural steroid injections. He didn't know if Claimant could have returned to work.

By 1 Jun 98, he had gotten the MRI from Russia. It showed severe modic changes, with L4-5 greater than L5-S1. Ten days later, he saw Claimant, who reported that his leg was getting worse. He recommended a CT myelogram and pain medication, but no surgery. However, the next day Claimant presented to the emergency room with intractable right leg pain that developed into complete weakness of the right lower extremity with progressive numbness and tingling as well. A CT myelogram revealed lateral recess stenosis and a far lateral disc herniation in L4-5. They did surgery that day.

On 23 Jun 98, Claimant reported no leg pain and minimal low back pain. He wanted Claimant to return in six week for evaluation for possible return to work. On 12 Aug 98, Claimant reported minimal lower extremity numbness and tingling and low back soreness, especially with activity. He recommended a trial of physical therapy and Advil. On 8 Dec 98 reported returning to work, but that the soreness had progressed to low back pain. He recommended a current MRI and took Claimant off work. The MRI was done and showed no change since the Russian one. He recommended that they try getting epidural steroid injections and that Claimant stay off work because of the degree of discomfort.

The next time he saw Claimant was not until 31 Jan 03, when Claimant reported he had had no problems for four and a half years, but fell on 28 Dec 02 and felt a pop. Claimant complaints were low bilateral back pain at L4-5, worse with activity; right lower extremity pain; numbness and tingling; and mild medial ankle. He did an examination

²⁶ EX-45.

²⁷ EX-19 (as cited, see n.4).

and there was decreased pinprick along the right dorsal equal medial foot, indicating problems with either the L4 or the L5 nerve root. His diagnosis for Claimant was likely myofascial injury. He felt Claimant had suffered a new injury or an aggravation. His initial recommendation was a trial of steroid dose pack and if no improvement in three weeks, an MRI with and without contrast of the lumbosacral spine. If there was improvement with the dose pack, he recommended physical therapy.

On 7 Mar 03, he released Claimant to return to regular work as of April 11th, 2003. On 4 Apr 03, Claimant said he was the same or worse and that he had had pain in bilateral buttocks three days ago, but it was better. He amended the diagnosis based on the MRI to include L3-4 central stenosis. He extended the off work period to 25 Apr 03, to allow for a trial of epidural steroid injections. On 6 Jun 03, Claimant reported the injections made him a lot better. He recommended physical therapy. On 25 Jul 03 Claimant reported that the physical therapy made it worse, that he could not work, because the low back pain is constant and incapacitating.

On 19 Sep 03, Claimant reported no change, noted he was due to get bilateral knee replacements, asked for conservative measures of treatment, and asked about being disabled. He told Claimant it would not be reasonable for him to think that he will ever return to gainful employment. That was based on the persistence of his complaints in the setting of the radiographic abnormalities. Surgery could have possibly helped, but Claimant wanted conservative measures, which was not unreasonable. He doesn't ever recommend anyone undergo a fusion. A fusion is a big operation that carries with it very definite risks and no certainty of relief. It could potentially make them worse. Nevertheless, because of the possibility of surgery helping, he did not feel that Claimant had reached maximum medical improvement. Based on the pain and medications, he did not believe Claimant could return to any type of work, even sedentary.

By 29 Dec 03, Claimant had seen Dr. Adebayo, a pain management doctor, for management of his back and knee pain. Claimant said he was able to make due with a combination of Darvocet, PRN use of Flexeril and Naprosyn.

As of 13 Jul 04, based on the subjective complaints, he believed Claimant was totally incapacitated from an employment standpoint, but had not yet reached maximum medical improvement.

On 3 Sep 04, he saw Claimant, who complained of low back pain across the L3-S1 segment that interferes with every daily activity like walking, sitting, sleeping, shopping, doing yard work, et cetera. They discussed options, and by this point Claimant wanted to try fusion surgery. On 5 Oct 04, they reviewed a new MRI of the lumbosacral spine, X-rays of the lumbosacral spine, and bone scan. The imaging studies showed degenerative disc disease at L4-5 and L5-S1 with stenosis. On 29 Oct 04, Claimant reported that his symptoms worsened tremendously over the last 60 days.

On 4 Nov 04, he performed a posterolateral fusion from L4 to S1 and a decompression of the nerves from the L3 level to the S1 level. Two weeks later, Claimant reported doing great with no lower extremity complaints and no low back pain.

On 5 Feb 05, Claimant said he felt 1,000 times better. Claimant needed to wean himself out of his brace and begin physical therapy. On 10 Jun 05, Claimant reported his low back pain had worsened in the past two months and that he had a burning sensation. Claimant said he went to physical therapy for only five or six sessions, because it was too expensive, but did home exercises, which helped some.

On 5 Jul 05, Claimant reported continued low back pain that prevented him from sitting more than 30 minutes and discomfort at the site of the stimulator battery in his back. Two days later, they removed the stimulator. On 22 Jul 05, Claimant said he was much better with no low back pain. Since the bone stimulator battery was out, he was done treating Claimant and sent him to pain management.

On 26 Sep 06, Claimant returned and reported that Dr. Adebayo had told him that the pain was coming from his hardware. He recommended that they obtain a CT scan and a bone scan, which showed no evidence of abnormal motion and apparent solid fusion at L4-5 and L5-S1. Claimant said he still suffered pain and wanted the fusion hardware removed. He agreed to do the surgery because the only way to determine whether a fusion is solid or not is to explore it. There is also literature that suggests the possibility that removing hardware will result in relief of complaints if someone is fused.

They did the surgery on 8 Nov 06, removing the posterior hardware, exploring the fusion, decompressing the right-sided L4 and L5 nerve roots, and redoing the right laminectomy and L5 laminectomy.

On 21 Nov 06, Claimant reported no changes in his low back pain and said he could not tolerate extended sitting or standing in positions. At that point the diagnosis changed to failed back syndrome. That meant all the normal treatment failed and ongoing pain management was the only answer. He did not see Claimant again, but did write a letter in December of 2008 saying Claimant was incapacitated and unable to work. That was based upon the fact that there was no reason to expect that the condition would change

There was discussion about a third fusion surgery, but he would not want to be the doctor to do it. Another fusion would need to be extended up to the L3-4 and potentially on up the spine. Before considering a L3-4 fusion, he would want to do a full physical and probably repeat MRIs.

Based on his knowledge of the case and keeping in mind he last saw Claimant in 2006, he does not believe Claimant could ever go back to any work, even with work revisions, including sedentary employment.

He has not reviewed the reports or deposition of Dr. Barrash. Before he would agree with Dr. Barrash that Claimant could do medium level work at the time of his 2004 evaluation, he would have to ask Claimant. He believes in combining his objective findings with the patient's subjective complaints. He has not reviewed the June 2009 report of Dr. Esses, but defers any suggestion that Claimant could have returned to work in a sedentary capacity as of 26 Jun 09 to Claimant. He did not review the 10 Feb 10 Functional Capacity Evaluation report. He disagrees with the interpretation of whether someone is or is not capable of working, because no one can interpret to what degree mental capacity to perform a job would be impacted by pain. Claimant's ability to work is ultimately dependent on how he perceives his current level of pain. If Claimant said he improved enough to return to work, he does think Claimant could do so.

The L3-4 injury could have been a new one caused in December 2002 or a consequence of the 1998 injury to L4-5 and L5-S1, aggravated by the 2002 injury. Claimant has been a compliant patient, but remains unable to return to any work. In his experience, failed back syndrome does not spontaneously resolve.

Dr. Mikhail Fukshansky testified at deposition²⁸ and his records²⁹ state in pertinent part that:

He is a specialist in pain management, evaluating and treating patients with various pain syndromes and addressing those issues either through prescribed and appropriate pain medications or performing procedures that would alleviate the condition. He performs implants and administers injections. He first saw Claimant on 17 Jan 08, on referral from Dr. Allon, his previous pain manager. Claimant was complaining of symptoms related to the on-job injury sustained on 28 Dec 02 and the following lumbar surgeries performed by Dr. Westmark. The purpose of the appointment was to address worsening symptoms related to the failed back surgery syndrome and lumbar radiculopathy on the right side.

Claimant reported continued severe pain in the low back with radiation to both lower extremities, aggravated by sitting, standing, bending, and walking. Claimant also complained of difficulty with walking, using stairs, bending, and other activities. The physical exam was positive for straight-leg-raise at 45 degrees amongst other symptoms. There was also weakness in the legs with the right being worse than the left. Claimant's gait was antalgic. He also reviewed a March 2003 MRI, which was before the latest surgery.

Claimant's medical history was notable for a history of cardiovascular disease with hypertension, abdominal discomfort and pain, hernia, hypercholesterolemia, depression, and hyperlipidemia. Current pain medications were Motrin, Baclofen, and Hydrocodone.

The diagnosis was failed back surgery syndrome, right lumbar radiculopathy, degenerative disk disease, and myofascial pain syndrome. Since Claimant was already receiving treatment more aggressive treatments probably would be required. So he recommended diagnostic therapeutic injections for right L3-L4 and L4-L5, along with

²⁸ CX-12; EX-49.

²⁹ CX- 1(as cited, see n.4); EX-27.

Baclofen, Norco, and Lyrica. He did not believe that Claimant could return to work at that time because he had significant neurological impairment and his uncontrolled pain would limit his ability to perform productive employment. He also thinks pain medication sometimes causes an inability to react or perform certain tasks. He could not comment on specific jobs, but he didn't think Claimant could return to his usual position doing repairs and didn't know if a sedentary job was feasible, but looking at Claimant on the whole, he felt that Claimant was truly disabled and unable to pursue productive employment.

Claimant returned on 8 Feb 08 and reported his symptoms had worsened. They started Neurontin in place of the Lyrica and decided to go ahead and perform the injections. On 7 Mar 08, Claimant said his symptoms had worsened significantly, with new quantities and qualities of pain. The pain was described as sharp burning with numbness, tingling, and weakness down his right leg. He recommended they consider getting approval for an intrathecal pain pump, but it was never approved. Even if oral morphine was ineffective, it could still work via the pump, or other medications could be used. He still believes a pump would be a reasonable treatment.

They did perform the right transforaminal epidural steroid injections at L3-L4 and L4-L5 on 22 Apr 08. On 13 May 08, Claimant said he had gotten 70 to 80 percent improvement of his pain for two weeks following the injection, but it was back at original levels. They discussed the pump again, since the injections were not effective. A second steroid injection was not approved by Employer. He believed Claimant's return to work was becoming less and less likely.

He saw Claimant again on 27 May 08 and 10 Jun 08. There was no significant change in the symptoms and they continued to try to get approval for the pump. By 4 Sep 08, the pain had worsened with activities of daily living like dressing, walking and cooking. They changed to Oxycontin. On 2 Oct 08, the symptoms worsened again and they increase his Percocet at that point. Through October and November 2008, the pain remained severe. All they could do was change oral medications. By then, steroid injections were not going to help.

On 23 Dec 08, he evaluated Claimant, who reported no change. At that time, they had done everything they could and Claimant had limitations on sitting, walking, standing, reaching above the shoulders, twisting, bending, stooping, and operating a motor vehicle. The medications may cause drowsiness and impair concentration. He was of the opinion that Claimant could not work at all. If a cognitive test showed Claimant was capable of doing a sedentary job, he would be comfortable with that, but the best option is to ask a psychologist who routinely evaluates those types of patients to see what testing would be appropriate for him.

On 22 Jan 09, the symptoms and diagnosis remained the same. They again had an extensive discussion about the intrathecal pump. On 19 Feb 09 and 19 Mar 09, Claimant complained of worsening symptoms. At that point he had received a letter from the Texas Department of Insurance of Workmen's' Compensation saying doctors cannot

continue to prescribe any opiates for pain patients for chronic pain because the use of chronic pain medications is not approved by Texas Workmen's' compensation. Consequently, he told Claimant there was nothing more he could do.

He feels that Claimant is a very genuine patient who has a significant condition that has pretty much overtaken his whole life and would benefit from more aggressive pain treatments, such as a pump. Otherwise, he is going to suffer significantly and remain highly disabled. He has not seen Claimant for his back since then. After Claimant was discharged, he had open bypass heart surgery complicated by pneumothorax and developed a different quality and quantity of pain, that he treated.

The results of the February 2010 functional capacity evaluation are consistent with his expectations. He would agree that Claimant could physically perform a job that would allow for frequent position changes and limit his lifting to negligible, but there are cognitive issues with the medications, and although Claimant does not exhibit cognitive or mental deficits during appointments, he is unable to make a determination if Claimant could do any of the jobs in the labor market survey from a cognitive standpoint.

Claimant has been a cooperative and straightforward patient. It is very common patients that have his kind of problem to also have depression. Statistically it's 70 to 80 percent. The depression and anxiety could also be a function of cardiovascular problems. All of the treatment that he has rendered has been reasonable and necessary in relation to the on-the-job injury.

Dr. Stephen Esses testified at deposition³⁰ and his records³¹ state in pertinent part that:

He is a specialist in the field of orthopedic surgery and spine surgery who was retained by Employer in May 2009 to evaluate Claimant. He conducted the evaluation on 25 Jun 09. Prior to examining Claimant, he reviewed records from Clear Lake Regional Medical Center and Cardiovascular Associates. He took a history from Claimant, who told him that on 28 Dec 02 he was on a ladder, had a jerking sensation, and felt pain in his back. Claimant was straightforward and cooperative. Claimant said he was having low back pain that occasionally radiated into his right leg and that the pain was made worse by sitting and standing, making him unable to walk more than a half a block. Claimant came to the office using a portable oxygen tank and was short of breath during the examination itself, so he thought the limits on walking and standing seemed reasonable based upon the totality of his physical condition. He did a physical examination of Claimant and assessed his status as post lumbar fusion. That was the only time he ever saw Claimant.

The records he reviewed indicated Claimant had had a previous injury on or around 8 May 98 with subsequent surgery in June 1998 and that Claimant continued to have significant pain. An MRI scan at the end of that year showed significant pathology at L4-5 and L5-S1. He concluded that the 28 Dec 02 incident aggravated the 1998 injury.

³⁰ EX-43.

³¹ CX-1(as cited, see n.4); EX-30, 31(as cited see n.4).

The first injury made Claimant more vulnerable and but for it, he would not have needed the second surgery or be as impaired.

He also estimated that Claimant would have reached maximum medical improvement by February 2007, when he had recovered from the hardware removal. He did not recommend work restrictions based on the back condition and thought that they should do a functional capacity evaluation. He believed Claimant was not totally disabled and at the very least, could return to work in a sedentary capacity. He saw no reason for more surgery.

He later had a chance to review Claimant's deposition, a functional capacity evaluation report, Dr. Barrash's deposition, records from Cardiovascular Associates, a Labor Market Survey dated 17 May 10, and miscellaneous medical records from U.T., Hope Rehab, and Texas Surgical Associates. None of that changed his opinion in any way. He did find the functional capacity evaluation notable in that it indicated his limited walking ability was a consequence of his lack of aerobic capacity, rather than any back disorder. Things like bending, squatting, climbing, crawling, pushing, pulling, and walking are all significantly impacted by his lack of aerobic capacity. He does agree with the restrictions, based on the totality of his being.

He believes Claimant is capable of some type of full time work and his back does not prevent him from doing the jobs identified by John Drew.

Dr. J. Martin Barrash testified at deposition³² and his records³³ state in pertinent part that:

He is a physician practicing neurosurgery, who was retained by Employer to evaluate Claimant, who he saw on 21 Sep 04. It was the only time he has ever seen Claimant. Prior to that date he reviewed the records of Dr. Westmark, Dr. Adebayo, Clear Lake Regional Medical Center, United Surgical Center, and Dr. Gurova, along with numerous X-rays, imaging studies, and radiographs.

Claimant said he has back pain that began on 28 Dec 02, when he was climbing a ladder carrying a backpack in which a radio was placed and he felt a pop and some pain that night. Claimant reported that he saw a local doctor in Brazil, was sent back to the United States, and saw Dr. Westmark, who felt that the problem in the back was not surgical and sent him to Dr. Adebayo, a pain specialist. Claimant related that trigger point injections, lumbar epidural steroid injections, and medications provided no relief, but his knees bothered him more. Claimant noted that the knee pain was addressed with replacement surgery in 2004, but when his back pain continued, he returned to Dr. Westmark, who suggested an L3 through S1 fusion that was scheduled for a date after his evaluation for Employer. Claimant did not describe any physical limitations.

³² EX-41.

³³ EX-32-33.

He did a physical examination of Claimant including a neurologic and general physical. He asked Claimant to walk, bend, and raise his legs. He felt the back to see if there's spasm, and if the back is straight or skewed. His impression was that there was no indication for a three-level fusion surgery. Claimant had spinal stenosis from a herniated disk and some arthritis with dorsal compression at L3-4. He did not think any of the changes at L4-5 or L5-S1 had anything to do with the present complaints, because the complaints were limited to the L3-4 level, which was symptomatic. The other levels were asymptomatic.

Claimant also mentioned that in 1998 he had back surgery L4-5 by Dr. Westmark. That was a consequence of a May 1998 injury sustained while working in Russia that led to right low back pain going to the right thigh and a CT that showed a 7 millimeter right-sided L4-5 herniated disk with a spur at L5-S-1 and a bulge at L3-4. Dr. Gurova felt he had degenerative changes with dehydration and herniation at L4-5 and a right foraminal disk at L5-S-1. After Dr. Westmark operated on him for the L4-5 abnormality the left leg pain was better. Claimant said he was sore, but with a little lower back pain, which increased with a little activity. Claimant also said he lifted something like 60 to 70 pounds and reinjured himself in 1999.

He believes that Claimant suffered an aggravation of his 1998 injury on 28 Dec 02. The 1998 surgery was on L4-5 and the subsequent surgery in 2004 was on L4-5 and L5-S1. At the time of the evaluation, he believed Claimant had reached maximum medical improvement to L4-5 and L5-S1, but not L3-4. Since at the time, Claimant was scheduled to have surgery his ability to return to work would depend on the post-operative course. But for the surgery, Claimant would have been capable of medium work, meaning some lifting, bending and climbing, but no lifting over 50 pounds or walking five miles a day.

He thought L3-4 (which pre-existed the 2002 injury) needed to be looked at, but believed Dr. Westmark was going to evaluate that situation. The X-rays showed chronic low back pain for many years. The degenerative disease was there long before the second injury in 2002 and probably before 1998 injury.

After seeing that September 2004 examination, he thought that Claimant might be able to do some semi sedentary work, but based on what he observed in the office, doubted that Claimant could sit long enough to do anything on a concerted basis.

As a result of the prior back condition, Claimant had some level of permanent disability. It would have probably come out to 5 percent. He currently is probably 10 percent. The 1998 injury without question predisposed Claimant to further injury. But for the first surgery in 1998 there would have been no need for the fusion in 2004 and Claimant probably wouldn't be restricted to just sedentary work.

In February 2005, he had a chance to review additional medical records. He determined that the prior back condition combined with the 2002 injury to create a disability which was greater than that which would have resulted from the December 2002 injury alone.

Since February 2005, he has been provided with additional reports from Mr. Drew, Clear Lake Regional, Dr. Uzelmeier, Dr. Adebayo, Dr. Miller, Dr. Allon, Dr. Mason, Dr. Fukshansky, Dr. Esses, and Dr. Gurshankar. None of those changed his opinion and in fact reinforced it. He has reviewed the labor market survey prepared by John Drew and believes Claimant is physically qualified to do the jobs identified with the exception of one of the jobs from Houston and one of the jobs from Texas City or League City. They were as a construction inspector and PW Operations Manager. Claimant shouldn't stand for more than an hour or so at a time. He does not think Claimant is permanently and totally disabled.

Clear Lake Regional Medical Center's records state in pertinent part that:³⁴

On 4 Nov 04, Claimant was warned of the risks of surgery, and that he should not undergo it unless pain was interfering with every aspect of his daily life. He insisted his pain had worsened tremendously over the past 60 days. He underwent arthrodesis, fusion, laminectomy and bone graft.

On 8 Nov 06, Claimant reported that the pain in his back was crippling and the hardware from the earlier fusion was surgically removed.

On 31 Jan 06, Claimant had an aortic stent inserted to treat his abdominal aortic aneurysm.

Houston Spine and Neurosurgery Center's records state in pertinent part that:³⁵

On 19 Mar 03, an MRI showed moderate stenosis at L3-4 and severe degenerative changes at L4-5 and L5-S1. On 4 Apr 03 he was ordered off work through 25 Apr 03.

On 14 Apr 03, Claimant was assessed as having aggravated his preexisting back problems while working in Brazil and given trigger point injections. On 19 Sep 03, he was told it was not reasonable for him to think he would ever return to gainful employment. On 13 Jul 04, he was deemed totally incapacitated from work because of his back.

On 8 Nov 04, Claimant was discharged following a lumbar decompression and fusion. On 15 Feb 05, he reported doing a thousand times better. On 18 Feb 05, an ultrasound disclosed an abdominal aortic aneurysm.

On 17 Jun 05, a lumbar MRI of L4-5 and L5-S1 showed spondylosis, degenerative facet arthrosis, probable recess narrowing with effacement and nerve root displacement. L3-4 showed degenerative facet arthrosis and disc bulge with stenosis and effacement. On 7 Jul 05, Claimant's bone stimulator was removed.

³⁴ CX-1(as cited, see n.4); EX-17 (as cited, see n.4).

³⁵ CX-1(as cited, see n.4); EX-18.

On 15 Sep 05, Claimant reported back pain and leg numbness and was continued on medication. On 8 Dec 06, Claimant reported concerns that he was growing dependent on Norco pain medication.

On 7 Jun 06, Claimant reported chronic back pain became exquisite with prolonged sitting and intermittent leg pain. On 26 Jun 06, Claimant underwent joint injections.

On 16 Sep 06, Claimant was reported to be at MMI and have a life-long incapacity to work an eight hour day because of hypertension, obesity, abdominal aneurysm, and failed back. He was limited in standing, sitting, walking, and reaching.

On 18 Dec 08, Claimant was reported to be totally unable to work because of low back pain.

***Space City Pain Specialists' records state in pertinent part that:*³⁶**

On 11 Jun 07, Claimant was seen on referral from Dr. Westmark and reported heavy and constant lower back pain that first appeared in 1998 and was aggravated in December 2002. He related a history of three back surgeries. The assessment was failed back syndrome.

***Gulf Coast MRI & Diagnostics Center's records state in pertinent part that:*³⁷**

A 29 Sep 04 lumbar MRI showed an abdominal aortic aneurysm, moderate to large protrusion with stenosis and mass effect on the ganglion and root at L4-5, protrusion and stenosis with root contact at L5-S1, and protrusion and thecal sac narrowing at L3-4. An 18 Jul 08 cervical MRI showed spondylosis.

***University of Texas Medical Branch records state in pertinent part that:*³⁸**

In July 2010, Claimant reported chronic back pain aggravated by and interfering with his daily activities and underwent surgical insertion of a bone stimulator.

***Hope Rehab Physical Therapy records state in pertinent part that:*³⁹**

A functional capacity evaluation on 10 Feb 10 indicated some symptom magnification and Claimant was reluctant to complete some requested tasks, fearing pain later. The evaluator concluded that Claimant could not return to construction, but could do a job which allowed for frequent position changes and required only negligible lifting.

³⁶ CX-1(as cited, see n.4); EX-20.

³⁷ CX-1(as cited, see n.4); EX-21.

³⁸ EX-28 (as cited, see n.4).

³⁹ CX-13; EX-29.

John Drew testified at deposition⁴⁰ and his records⁴¹ state in pertinent part that:

He is a vocational rehabilitation counselor and was paid by Employer to perform a vocational evaluation and labor market survey on Claimant's case. He works for both plaintiffs and defense. His philosophy is that people can generally work in spite of their disabilities. That philosophy just happens to appeal to insurance companies and defense lawyers more. He wrote two reports, dated 17 May 10 and 4 Nov 10. He interviewed Claimant twice, on 4 Feb 05 and on 8 Jan 05. He also reviewed Claimant's medical records and resume.

Claimant is a highly skilled construction security and surveillance monitor, has worked on federal contracts worldwide, and is a master level plumber, including supervisory, management, inspection positions. The plumbing involved very heavy work. However, after his 1998 injury and surgery Claimant was unable to do heavy level work and found an easier job with Employer as a security surveillance monitor.

In the first interview, Claimant said he was real careful with his back, but could do lighter-duty work.

In the second interview, after the 2002 injury, Claimant said the main pain was in his lower back, he also had arthritis problems in his neck that were significant, so his limitations and pain varied from day-to-day. Claimant said he had good and bad days, but estimated that he could lift/carry approximately 20 pounds maximum, like a grocery bag. Claimant said he could sit for about one hour maximum in a straight sitting position, could stand about one hour maximum on a good day, and could stand and walk slowly and guarded, about one hundred yards without a break. Claimant also described avoiding stairs unless necessary. Claimant said he does not stay in bed, but gets up and dressed and can do basic activities of daily living, including non-vacuuming housework. He said he can drive as long as he gets breaks on any long extended driving. Claimant explained that he liked photography, writing, had no significant difficulty operating a computer keyboard, watches TV, lays down, and shops for groceries.

On 14 Sep 06, Dr. Adebayo said Claimant was limited in sitting, walking, standing, reaching, bending and stooping, pushing, pulling, lifting, squatting, kneeling, and climbing. On 12 Dec 08, Dr. Westmark thought that because of chronic low back pain and discomfort, Claimant was incapacitated and unable to work. On 23 Dec 08, Dr. Fukshansky also documented specific restrictions of sitting, walking, standing, reaching, reaching above shoulder, twisting, bending, stooping, operating motor vehicles, squatting, lifting, pushing, and pulling. On 26 Jun 09, Dr. Esses, opined that Claimant was not permanently or totally disabled and should undergo a functional capacity evaluation.

⁴⁰ EX-44.

⁴¹ CX-6(as cited, see n.4); EX-39 (as cited, see n.4), 40.

The functional capacity evaluation determined that Claimant's ability for: trunk flexion ability was occasional, sustained bending for three minutes was occasional, squatting was occasional, kneeling two minutes was modified occasional, crawling 25 feet was nonexistent, balancing was occasional, reaching forward was occasional, working overhead was occasional, sitting 60 minutes was frequently, standing 45 minutes was occasional, walking 25 minutes or one mile was nonexistent, stair climbing 50 steps was occasional; ladder climbing 40 rungs was occasional; lifting 10 pounds 6 inches to knuckle was occasional, lifting 7.5 pounds was frequent, and lifting 3 pounds was constant. The FCE concluded Claimant could not return to a job in construction, would need a job that would allow for frequent position changes and limit his lifting to negligible, and was deconditioned and could benefit from physical therapy.

He also reviewed the depositions of the two non-treating doctors. On 26 Oct 10, Dr. Barrash said Claimant could do medium work with lifting bending, and climbing, but no lifting over 50 pounds, or extended walking. On 11 Nov 10, Dr. Esses generally agreed with the restrictions in the functional capacity evaluation.

As a rehabilitation counselor, he places the most weight on what the injured worker tells me what they can and can't do. They know better than anybody else. He was impressed because Claimant's self-reported restrictions seemed better than what a lot of the doctors had said he could and couldn't do. He was very impressed with Claimant's medical profile and everything he had gone through. Claimant presented very well physically. He also read Claimant's deposition.

He contacted near a hundred employers in Claimant's local area, and the United States labor market. He performed a transferable skills analysis and did a labor market survey to see where they transferred into the world of work. He started out with the local labor market area, which would be Dickinson, Texas, and the surrounding area up to Houston and down to Galveston. Since Claimant worked all over the country and internationally, He also did a labor market survey of the national labor market found some employers that were interested in utilizing Claimant in foreign countries. They also used the worldwide labor market to evaluate his employability. In the interview, Claimant had been clear that he didn't want to relocate for work, but also was adamant that he could not return to any type of work ever again.

He was able to speak to hiring personnel at almost all of the employers that he identified in his report. Of over a hundred employers, there were only two that he can recall that he couldn't reach. It took a couple of months to reach everybody. When he spoke to the hiring personnel, he told them about Claimant's work restrictions and qualifications and asked about salary.

He generally looked at public works and the building construction trades, management level jobs in that field, and security types of jobs. There were a lot of no openings, but in the first report, he found jobs with salaries ranging from minimum wage to almost six digit figures. A rough ballpark estimate was an average of \$40,000 to \$50,000 per year or more. He believes Claimant would be strong candidate for most of the positions.

Some were more of a possibility. All of the positions were within Claimant's work restrictions or the employers were willing to reasonably modify the jobs to meet the restrictions. All of the positions were open at the time of the evaluation. Some might have been in the process of being filled, just filled, or anticipated future openings.

He also prepared an addendum report to update the labor market survey and see what was currently available. He re-contacted the employers from the May survey to determine if the positions were still available. He also identified additional positions. The average salary in Texas was about \$30,000 to \$40,000 per year. The national average was about \$50,000 to \$90,000 per year.

Claimant was very cooperative, had been through a lot, and was very knowledgeable, but on one application, wrote that they needed to discuss his disability, physical restrictions, and limitations. That was written very negatively and would discourage any employer.

The 1998 injury denied Claimant access to his career field and heavy work. If the only restrictions were those related to his 2002 injury, Claimant could probably do residential plumbing or be an armed security job guard. There would be a lot more jobs for him and a lot better pay. Claimant is going to be 68 years old in about a month or so and age is relevant to vocational possibilities. It depends on the particular employer, the job position, and what they're looking for. The last time he met Claimant he said he was on oxygen about two hours a day. He does not know if Claimant is currently on narcotic pain medications.

Claimant's job search records state in pertinent part that:⁴²

He did not apply to some of the identified jobs because they paid only one half of his previous salary and he was unwilling to relocate.

Department of Labor forms state in pertinent part that:⁴³

On 30 Dec 02, Employer reported that Claimant had injured his back on 28 Dec 02, while working in Sao Paulo, Brazil. Employer filed a petition for special fund relief on 14 Dec 04.

ANALYSIS

As noted by counsel at hearing, the only issue presented for adjudication is very narrowly defined. The parties agree that on 28 Dec 02, while working in conditions covered by the Act, Claimant aggravated a preexisting condition and became temporarily totally disabled until 1 Feb 08, when he reached MMI. The only issue in dispute is whether, at any time since that date, Claimant could have returned to any type of paid employment. Since they also agree he remains

⁴² CX-7, 11 (as cited, see n.4).

⁴³ CX-2-4, 9-10; EX-1-5.

unable to return to his original job, the question is whether Employer was able to show that it is more likely than not that suitable alternative employment was available.

Employer offered substantial and credible evidence relating to the existence of a variety of jobs that would be consistent with Claimant's vocational skills and complied with the physical restrictions and limitations noted in the functional capacity evaluation and by many of the physicians offering opinions in this case. Moreover, although Claimant attempted to argue in rebuttal that a job search was unsuccessful, the evidence is clear that he had no real interest in actually finding a job. He did not apply to jobs that did not pay what he had been making or would have required him to relocate within the United States, even though the job on which he was injured was in Brazil. He emphasized the issue of his disability by raising it at the beginning. He submitted his search logs and asked what else he was required to do, appearing to be simply going through the motions. That behavior is entirely consistent with his testimony at hearing, where he made it clear he did not believe he could actually do any of the jobs for which he had applied.

Consequently, the fundamental question is whether Claimant can physically do any job. Dr. Westmark treated him for almost a decade and through repeated surgeries. Dr. Westmark has consistently said that Claimant is unable to return to any work. Dr. Westmark also testified that he relies on a combination of objective findings and subjective patient reports, but ultimately believes Claimant's ability to work is limited by Claimant's perceived level of pain.

Dr. Fukshansky also had an extended opportunity to observe Claimant as a treating physician. While he thought Claimant could physically perform a job of some type and conceded Claimant did not show any cognitive problems during appointments, he testified he was unable to opine that in spite of the medications, Claimant could do any of jobs in the labor market survey from a cognitive standpoint.

On the other hand, the functional capacity evaluator observed what he believed to be some symptom magnification, noting Claimant was reluctant to complete some requested tasks, fearing pain later. He concluded that Claimant could do a job which allowed for frequent position changes and required only negligible lifting.

The two physicians hired by Employer to review Claimant's case were consistent in that they both reported that he should be able to work in some capacity. They both interviewed and examined Claimant, albeit only once. They based their opinions on the same objective data that Dr. Westmark has, but come to a contrary conclusion as to whether Claimant retains the ability to do any type of work. The inconsistent conclusions are a reflection of the weight they give to the subjective reports of the Claimant, who, in the case of the two evaluating doctors, was not a patient, but rather a subject.

Thus, the credibility of Claimant is of crucial importance. With the exception of the reference to symptom magnification there is nothing of significance in the record to suggest malingering or deceit. In fact, both evaluating doctors testified that Claimant was very cooperative and neither reported observing him doing anything that was inconsistent with or beyond his subjectively reported limitations. However, most probative was the hearing

testimony of Claimant and his spouse, both of whom I found to be very credible. Based on their highly probative testimony and the opinion of Dr. Westmark, I find that the record does not establish that Claimant could reasonably expect to do the types of jobs identified by the labor market survey from either a physical or cognitive standpoint. Accordingly, I find that he became permanently totally disabled as of 1 Feb 08 and remains so.

ORDER

1. While working for Employer in Brazil on 28 Dec 02, Claimant aggravated a preexisting back condition and became totally disabled. Claimant's average weekly wage (AWW) on that date was \$849.14.
2. Claimant was temporarily totally disabled until 1 Feb 08, when he reached maximum medical improvement. Employer shall pay Claimant temporary total disability compensation for that period based on his average weekly wage.
3. Since 1 Feb 08, Claimant has been permanently totally disabled and remains so. Employer shall pay Claimant permanent total disability compensation from that date to the present and continuing, based on his average weekly wage.
4. Employer shall receive credit for all compensation heretofore paid, as and when paid.
5. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's injuries, pursuant to the provisions of Section 7 of the Act.
6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.⁴⁴
7. Employer's motion for Special Fund Relief is granted and the fund will make payments consistent with that motion.
8. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

⁴⁴ Effective February 27, 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 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).

9. 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 additional attorney's fees.⁴⁵ 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.

ORDERED this 25th day of August, 2011, at Covington, Louisiana.

A

PATRICK M. ROSENOW
Administrative Law Judge

⁴⁵ 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. Gen. 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 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.