In the Matter of:	DATE: March 11, 1999
LUIS PADILLA, Claimant, v. SAN PEDRO BOAT WORKS, Employer, and SIGNAL MUTUAL INDEMNITY ASS'N, Insurer.	CASE NO. 1998-LHC-699 OWCP NO. 18-63028

Appearances

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Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter referred to as "the Act" or "the Longshore Act"). A trial on the merits of the claim was held in Long Beach, California, on August 20, 1998. The employer and insurer (hereinafter jointly referred to as "the employer") as well as the claimant were represented by counsel, and the following exhibits were admitted into evidence:

Claimant's Exhibits (CX) 1-10 and Employer's Exhibits (EX) 1-23. Following the trial, the following additional exhibits were admitted into evidence: EX 24 (an audio tape of an interview with the claimant), EX 25 (a transcript of Employer's Exhibit 24), EX 26 (a transcript of a post-trial deposition of Nedra Meyers), EX 27 (a transcript of a post-trial deposition of Dr. James London) and CX 11 (a transcript of a post-trial deposition of Dr. Robert William Hunt).[1] Both the claimant and the employer filed post-trial briefs.[2]

BACKGROUND

The claimant, Luis Padilla, was born in Texas on August 19, 1950, but, according to his testimony, lived in Mexico until he was age 14. Tr. at 39, 91-92; EX 19 at 173. The claimant also testified that he attended school in Mexico for only six years and did not obtain either a high school diploma or GED certificate after returning to the United States. Tr. at 39, 87-88. In the 1960's, however, he attended night school for "a couple of years" and in the 1970's completed a six-month welding course. Tr. at 39, 89-91; EX 19 at 174-75. As well, he obtained certifications of his welding skills from both the Navy and the State of California. Tr. at 39-40. During the 1980's, he worked as a welder for various employers, including San Pedro Boat Works, but was off work for about five months in 1989 due to a left knee injury. Tr. at 43-45, EX 18. In 1992, he was again employed by San Pedro Boat Works. He continued such employment until the morning of May 28, 1996, when he tripped while walking on a gangway and fell onto both of his knees. Tr. at 46-51. According to the claimant, immediately after he fell his left knee, back and left shoulder were all painful, but he continued working until around noon, when his knee pain caused him to seek medical treatment. EX 19 at 196-98, Tr. at 46-55, 100-01.

After deciding he needed medical care, the claimant drove to a San Pedro Peninsula Hospital Care Station, where he was examined by Dr. I. Norton Stein. Tr. at 54, EX 9. According to the claimant's testimony, he told Dr. Stein about his left knee complaints and is "pretty sure" he also told him about the back and arm pain. Tr. at 97, 102-03. However, according to Dr. Stein's report, the claimant complained of left knee pain and swelling, but had "no other complaints or other trauma." Dr. Stein diagnosed the injury as "internal derangement of left knee" and gave the claimant a knee brace. In addition, the claimant was "instructed to obtain and use crutches" and given a prescription for Naprosyn. EX 9. Two days later, the claimant returned to the same facility and reported that he still had a "lot" of left knee pain and had not improved. Id. According to the claimant, during this

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[1]It is noted that on October 14, 1998 I issued an order designating the transcript of the audio tape as Employer's Exhibit 23. However, that designation was an error since another document had previously been admitted into evidence as Employer's Exhibit 23. Accordingly, the transcript of the audio tape has been renumbered and admitted into evidence as Employer's Exhibit 25.

[2]However, even though the this case involves an application for subsection 8(f) relief, no one has filed a brief, statement of position, or even a notice of appearance on behalf of the Director of the Office of Workers' Compensation Programs.

second visit he also reported to a physical therapist and to a physician that his left shoulder was hurting. Tr. at 55-56.

On the same day that the claimant made his second visit to the San Pedro Peninsula Hospital Care Station (May 30, 1996), the claimant was interviewed by Frank Weber, a representative of the insurer. EX 23 (Weber notes), EX 24 (audio tape of interview), EX 25 (transcript of interview). During the interview, the claimant represented that he had fallen on his knees during the May 28 injury but answered, "No, that's it" when asked if any other parts of his body had been injured. EX 25 at 5. In addition, he told Mr. Weber that at the time of the accident he had a bucket of tools in his right hand and nothing in his left hand. EX 25 at 4-5.

The following day, the claimant was examined by Dr. James T. London, a board-certified orthopedic surgeon who the employer selected to provide the claimant's treatment. EX 19 at 234. According to the claimant's testimony, during this first visit to Dr. London and during every subsequent visit, he reported that he was suffering knee, back and shoulder pain, as well as "a lot of headaches." Tr. at 108-10, 112, 116, 124, 197. According to Dr. London's first report, however, during that first visit the claimant complained of constant left knee and left calf pain, but denied sustaining any "additional injuries." EX 10 at 59-61. Dr. London recommended that the claimant undergo an MRI scan of his left knee and continue using crutches. EX 10 at 61. On June 5, the MRI scan of the claimant's knee produced results which were interpreted by Dr. Neil Chafetz as showing, *inter alia,* "very small joint effusion," evidence of a prior meniscectomy "without definite evidence of recurrent tear," and "chondromalacia patellae and chondromalacia of the opposing surfaces of the medial compartment." CX 5. On June 10, the claimant was again examined by Dr. London, who reviewed the results of the MRI scan and noted that the claimant was continuing to experience pain in his left knee. EX 10 at 62. In addition, Dr. London's report noted that the claimant was also complaining of pain in his lower back. Id. Dr. London prescribed Naprosyn and the continued use of crutches. Id. The claimant was next examined on June 24, at which time Dr. London noted that there had been no improvement in the condition of the claimant's knee. EX 10 at 64. Dr. London changed the claimant's medication to Indocin and recommended that he continue to use crutches. Id. On July 8, the claimant told Dr. London that he was continuing to have severe knee pain and was unable to bear weight on his left leg. EX 10 at 66. In response, Dr. London discussed the possibility of total knee replacement surgery with the claimant, renewed the claimant's Naprosyn prescription, and advised the claimant to continue using crutches. Id.

On July 19, 1996, Dr. London responded to the claimant's reports of intermittent low back pain by taking x-rays and conducting a physical examination of the claimant's spine. EX 10 at 68-69. Six days later, Dr. London examined the claimant's thoracolumbar spine for a second time and recommended that he undergo an MRI scan of his lumbar spine. EX 10 at 70-71. On August 2, an MRI scan of the claimant's lumbar spine was interpreted by Dr. Stephen Rothman as showing "no evidence of neural compression" but "borderline" foramina at L5-S1, and diffuse degenerative changes in all lumbar discs. EX 13. Likewise, the results of this MRI scan were subsequently interpreted by another radiologist, Dr. Gail Schlesinger, as showing "disk desiccation with a 3 mm diffuse disk bulge ... at the L5-S1 level without thecal sac or nerve root compression," mild narrowing

of the L5 neural foramina bilaterally, and anterolateral osteophytes throughout the lumbar spine. CX 6.

On August 7, 1996, the claimant and Dr. London agreed that the claimant would undergo total knee replacement surgery. In reporting this decision, Dr. London noted that the claimant would be unable to return to work as a welder, even if the surgery was fully successful. EX 10 at 72-73. On September 19, Dr. London performed the knee replacement surgery at San Pedro Peninsula Hospital. EX 10 at 74-75. On the same day, the claimant's counsel sent the Office of Workers' Compensation Programs a claim form seeking benefits under the Longshore Act for injuries to the claimant's left knee and low back. CX 1.

On October 4, 1996, the claimant was examined for the first time by Dr. Robert W. Hunt, a board-certified orthopedic surgeon who, at the claimant's request, was assisted by a Spanish speaking interpreter. CX 3 at 68-75, CX 11 at 88. Dr. Hunt's report listed the claimant's "chief complaint" as being left knee and low back pain, with radiation through the buttocks and into the left lower extremity. CX 3 at 69. After interviewing the claimant and conducting a physical examination, Dr. Hunt concluded that the claimant would benefit from "a short period of conservative orthopedic care" and recommended that the claimant undergo supervised physical therapy five times a week. CX 3 at 74. According to Dr. Hunt, during this initial visit, the claimant did not make any complaints of left shoulder pain but did make such complaints during a follow-up visit on October 18. CX 11 at 10-11. Between the October 18, 1996 visit and July of 1998 the claimant was seen in Dr. Hunt's office about once a month, but there was no further use of a Spanish speaking interpreter. CX 3, CX 11 at 90-91.

On October 23, 1996, the claimant was again examined by Dr. London. CX 4 at 176-78. In a November 5, 1996 report concerning this examination, Dr. London noted that the claimant had failed to keep several post-surgery appointments with him and had later given several different reasons for missing the appointments. Id. Initially, Dr. London recounted, the claimant said that he had forgotten an appointment, but later claimed that an insurance company had referred him to Dr. Hunt. Finally, Dr. London noted, the claimant indicated that his attorney had advised him that he should receive his medical treatment from Dr. Hunt. Id., see also EX 10 at 121. The report further notes that the claimant told Dr. London that Dr. Hunt had started him on a physical therapy program in his office and that the physical therapy encompassed his lower back and left shoulder, as well as his left knee. According to Dr. London's report, he then advised the claimant that during his post-operative recovery period it would be "extremely important" to have his care managed by someone experienced in total knee replacement surgery and post-operative rehabilitation. CX 4 at 176-78. He also added that he told the claimant that the post-operative period following total knee replacement surgery presented a "golden opportunity" to develop an optimum range of motion in his knee and that if the opportunity was not pursued within a few months after the surgery, it would be lost. Id. In the report's conclusion it was also noted that on October 3, 1996 the claimant had appeared for his first post-operative physical rehabilitation appointment at the physical therapy clinic recommended by Dr. London, but had failed to appear for any subsequent appointments at that facility. Id.

On December 4, 1996, the claimant was again examined by Dr. London. CX 4 at 164-65. At that time, the claimant reported that he had been receiving physical therapy treatments five days a week. He also asserted that he had "constant pain" in the anterior infrapatellar aspect of his left thigh, "constant pain" in his left shoulder, and "constant soreness" in his lower back. The claimant was next examined by Dr. London on December 23, 1996, who reported that at that time the claimant had complaints of soreness in his left thigh, constant left shoulder pain, constant soreness over the posterior aspect of his left knee, and "intermittent" pain in his lower back. CX 4 at 162-63. In the report, Dr. London also asserted that the claimant had not made any complaints of back pain to him until July 8, 1996 and opined that it was "not reasonably probable" that the claimant sustained any injury to his back or left shoulder during his May 28, 1996 work injury. Id. On January 23, 1997, the claimant was again examined by Dr. London and during the course of this examination reported that he was suffering from "constant" pain in his left knee, thigh, and calf, in addition to constant pain in his left shoulder and a constant back pain that radiated all the way to the back of his head. CX 4 at 160-61. In addition, the claimant also asserted that he was suffering from "constant occipital headaches." Id.

On January 15, 1997, the claimant amended his September 9, 1996 claim for Longshore Act benefits to include injuries to his left shoulder. EX 2.

On March 2, 1997, Dr. London prepared a letter in which he noted that upon reviewing his handwritten notes he had found that the claimant had in fact complained of low back pain on June 10, 1996, thereby correcting a statement in an earlier report indicating that the claimant has not made any back pain complaints until July 8, 1996. CX 4 at 159. In addition, Dr. London noted that while it was still his opinion that the claimant had not suffered an injury to his lower back on May 28, 1996, he may have suffered an exacerbation of a pre-existing back condition as a result of alterations in his gait attributable to the knee injury. Id. He added, however, that he anticipated that the exacerbation would resolve as the claimant recovered from his knee replacement surgery. Id.

On March 5, 1997, the claimant reported to Dr. Hunt that he was continuing to experience daily headaches, constant left knee pain, and on-going left shoulder pain. CX 3 at 60. In response to the claimant's complaints of shoulder pain, Dr. Hunt decided to request authorization to perform a Mumford procedure on the shoulder. CX 3 at 57, 60.

On April 30, 1997, Dr. London again examined the claimant, at which time the claimant reported that he was suffering from a constant headache, constant left shoulder pain that was radiating to the left side of his neck, and constant pain in the anteromedial and anterolateral aspects of his left knee. CX 4 at 154-55.

On June 3, 1997, the claimant underwent an MRI scan of his left shoulder. According to the radiologist's report, the scan showed an "full thickness tear" of approximately one centimeter involving the suppaspinatus tendon and acromioclavicular joint arthrosis with inferior bony spurring. CX 7.

On July 9, 1997 the claimant reported to Dr. Hunt that his left knee, left shoulder, and low back were all worse and that he had pain radiating from his low back to his entire left leg. CX 3 at 47.

On August 11, 1997, Dr. London prepared an additional report in which he represented that the claimant had not made any complaints of shoulder pain to him until October 23, 1996. CX 4 at 152-53. In addition, Dr. London opined that the claimant had not suffered any injury to his shoulder during his work injury of May 28, 1996, and noted that the MRI scan of the claimant's left shoulder showed evidence of "a chronic impingement syndrome with arthritis in the acromioclavicular joint" along with "a rotator cuff tear in the supraspinatus tendon." Such findings, he added, were not related to the claimant's use of "external support devices such as a walker or crutches" following his total knee replacement surgery. Rather, he asserted, such conditions "are chronic, degenerative changes that take years to develop and could not have been caused or aggravated by the 5/28/96 injury or [the claimant's] use of external support devices after that injury." Id.

On November 19, 1997, the claimant was again examined by Dr. London. CX 4 at 147-51. According to Dr. London's report, during the examination the claimant asserted that his condition was getting worse and that he continued to have headaches, as well as pain in his neck, left shoulder, back, and left knee. As well, the claimant asserted, he could barely walk due to the low back and left knee pain. After setting forth the results of his physical examination, Dr. London opined: (1) that the claimant had a "50 % impairment" in his lower left extremity as a result of his work injury; (2) that the claimant probably did not injure is lower back during his work injury and that any exacerbation of his pre-existing lumbar disc disease attributable to his altered gait had resolved, (3) that the claimant's left shoulder impairments were unrelated to his work injury, (4) that the claimant is not capable of returning to work as a welder, and (5) that the claimant's work injury precluded him from performing work that involves "prolonged standing, prolonged walking, repeated climbing, repeated bending, kneeling or squatting." Id.

Because of the employer's refusal to authorize the left shoulder surgery recommended by Dr. Hunt, in November of 1997 the claimant sought treatment for his shoulder impairment from his private health insurer, Kaiser Permanente. CX 8 at 142-43. According to Kaiser Permanente's records, when seeking that treatment the claimant represented that at the time of his work injury he "dropped tools he was carrying in his left hand." CX 8 at 142. On November 24, 1997, Dr. Chandra Dissanayake, a Kaiser Permanente physician, performed surgery to repair the claimant's torn rotator cuff and to remove part of the anterior surface of the claimant's left acromion. CX 8 at 141. On February 18, 1998, Dr. Dissanayake released the claimant "to return to work without restriction" on March 2, 1998. CX 8 at 144.

On February 18, 1998, Dr. Hunt issued a supplemental report in which he explicitly disagreed with Dr. London's opinion that the claimant's left shoulder condition was unrelated to his work injury. CX 3 at 33-35. In explaining the reasons for his disagreement, Dr. Hunt conceded that the claimant had a pre-existing left shoulder pathology, but contended that it would be "mere speculation" to conclude that the claimant's use of crutches following his left knee injury did not cause the pathology to become symptomatic. Id. Dr. Hunt also asserted that it was "probable" that the claimant had not

been provided "formal gait training or instruction in crutch ambulation" when he was initially treated for his left knee injury. Id. Dr. Hunt also opined that the claimant had not mentioned his shoulder complaints to him until October 18, 1996 because until that date the medication given to the claimant following his left knee replacement surgery had masked his shoulder pain. Id.

At the request of Dr. Hunt, on May 22, 1998 the claimant underwent an MRI scan of his brain. EX 15. The results were negative. Id.

On July 21, 1998, Dr. Hunt prepared a report concerning a "permanent and stationary examination" he performed on the claimant on June 22, 1998. CX 3 at 12-22. According to the report, at the time of the examination the claimant had complaints of constant "catching and stabbing pain" in his left knee, constant low back pain that "radiates up the spine to the neck and head and down the legs," and constant pain in both his shoulders, especially the left shoulder. Id. The report also set forth the results of various types of physical examinations, including information indicating that when the claimant's left leg was examined he gave a positive response at zero degrees when given a straight-leg test in a sitting position, but did not report a positive response until 60 degrees when given the test in a prone position. CX 3 at 17. In the "diagnostic impressions" section of the report Dr. Hunt described the claimant's back impairment as a "lumbosacral strain with findings per overread on 8/1/97 of MRI scan taken on 8/2/96." Dr. Hunt also concluded that the impairments resulting from the claimant's work injury became permanent and stationary on June 22, 1998, and that he had a 47 percent "whole person impairment" under the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. According to the report, one component of the whole person impairment was a 25 percent whole person impairment for the claimant's left leg impairment. CX 3 at 21. In addition, Dr. Hunt concluded that the claimant could no longer work as a welder and should be given vocational rehabilitation. CX 3 at 21-22.

ANALYSIS

The parties agree: (1) that on May 28, 1996 the claimant sustained an injury to his left knee and low back that arose out of and in the course of his employment by San Pedro Boat Works, (2) that the injury occurred at a maritime situs and while the claimant was employed in a maritime status, (3) that the claimant's average weekly wage at the time of the injury was $572.53, (4) that the notice of injury, claim for benefits, and controversion of liability were all timely, (5) that the claimant's injury permanently precludes him from returning to his past job as a welder, and (6) that in 1990 the claimant received a total of $17,399 from settling a claim for a left-knee injury that occurred during the course of his employment by another Longshore Act employer. The following issues are in dispute: (1) whether the claimant's May 28, 1996 injury also caused or aggravated the claimant's left shoulder impairment, (2) the permanency of any work-related back impairment, (3) the date of maximum medical improvement for the claimant's compensable injuries, (4) the extent of the claimant's permanent disability, (5) the employer's entitlement to subsection 8(f) relief, if the claimant is found to be entitled to an award of unscheduled benefits, and (6) the employer's entitlement to credit for the $17,399.00 in Longshore Act benefits the claimant received for his prior left knee injury.

1. Causal Relationship between the Work Injury and the Claimant's Left Shoulder Impairment

Under subsection 2(2) of the Act, a worker's injury is not compensable unless the injury arose out of and in the course of the worker's employment. In proving that an injury arose out of and in the course of employment, a claimant is aided by subsection 20(a) of the Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary ... (a) that the claim comes within the provisions of the Act...." However, in order to invoke this presumption, a claimant must prove that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. See, e.g., Kalaita v. Triple A Machine Shop, 13 BRBS 326 (1981). Thus, a claimant has the burden of proving the existence of working conditions or an accident that could have caused his or her impairment, and merely proving that some sort of impairment exists is not enough to warrant invocation of the presumption. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982) ("[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer"). Once the subsection 20(a) presumption has been properly invoked, the employer is assigned the burden of presenting substantial evidence to counter the presumed relationship between the claimant's impairment and its alleged cause. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). If the presumption is then rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982). Under the decision of the Supreme Court in Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant.

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." Amos v. Director, OWCP, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." Id. In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" Id.

In this case, there is clear evidence of abnormalities in the claimant's left shoulder, e.g., the June 3, 1997 MRI scan showing a full thickness tear of the suppaspinatus tendon as well as acromioclavicular joint arthrosis with inferior bony spurring. In addition, Dr. Hunt has testified that in his opinion this condition was at least aggravated by the claimant's work-related fall or by his improper use of crutches following the fall. See CX 11 at 47-48, 54-55, 57, 133. Hence, the claimant has satisfied both pre-conditions for invoking the subsection 20(a) presumption of causation.

In an effort to rebut the presumption, the employer relies on Dr. London's testimony that in his opinion the claimant's right shoulder impairment was not the result of his work injury or the use

of crutches but was instead the consequence of longstanding degenerative changes that were present for years prior to the injury. EX 27 at 44, 117. I find that this testimony is sufficient to rebut the presumption. See Bath Iron Works Corp. v. Director, OWCP, 137 F.3d 673 (1st Cir. 1998)(holding that a physician's testimony that a claimant's lung cancer was "most likely" the result of non-industrial causes was sufficient to rebut the subsection 20(a) presumption of causation). Accordingly, it is necessary to weigh all the evidence to determine if the claimant has shown a causal relationship by a preponderance of the evidence.

Two complementary theories of causation have been proposed by the claimant concerning the putative relationship between the claimant's work injury and his left shoulder impairment. Under the first theory, pre-existing degenerative changes in the claimant's shoulder were aggravated by a traumatic injury to the shoulder that occurred simultaneously with the injury to the claimant's left knee. Under the second theory, the pre-existing condition was aggravated by the claimant's prolonged use of crutches.

The first theory is supported by Dr. Hunt's testimony that in his opinion a traumatic injury to the claimant's shoulder must have happened at the same time as the knee injury because the claimant told him that he experienced left shoulder pain immediately after he fell onto the gangway. CX 11 at 133-35. Dr. Hunt also apparently bases his opinion on his belief that if the claimant had any sort of "significant problems" with his shoulder before his May 28, 1996 injury, he wouldn't have been able to perform some of the duties of a welder. CX 11 at 55-56. The theory that the claimant suffered a traumatic injury to his shoulder is further supported by the claimant's testimony that he believes that the tear in his left rotator cuff occurred when a bucket of tools he was carrying in his left hand pulled his arm down as he fell onto the gangway. Tr. at 95-96,118. In addition, the claimant testified that he felt pain in his left shoulder right after he fell and that he is "pretty sure" he later reported such pain to Dr. Stein. Tr. at 46-55, 97, 100-01, 102-03. Moreover, the claimant testified, he reported shoulder pain to Dr. London the first time he was seen in Dr. London's office and during every subsequent visit. Tr. at 108-10, 112, 116, 124, 197. These assertions are corroborated in part by the claimant's wife, who testified that the claimant reported left shoulder pain to her "right from the beginning." Tr. at 216 (testimony of Juliana Padilla). On the other hand, as previously noted, the employer's contention that there was no traumatic injury is supported by Dr. London's opinion that the problems with the claimant's left shoulder were the result of chronic, longstanding degenerative changes and were not the result of any sort of work-related injury. EX 27 at 44, 117. In this regard, Dr. London has also testified that the rotator cuff tear shown in the MRI scan of the claimant's left shoulder is consistent with the longstanding degenerative changes in the shoulder and that, even though such changes would "most commonly" cause pain to someone engaged in heavy lifting or pulling heavy objects, they would not have prevented the claimant from functioning in his job as a welder. EX 27 at 116,

On balance, I find that the weight of the evidence does not support a finding that the claimant suffered a traumatic injury to his shoulder. Although Dr. Hunt is undoubtedly correct in concluding that complaints of shoulder pain immediately following a work-related accident warrant an inference that the accident entailed a traumatic injury to the shoulder, there is a plethora of highly reliable evidence indicating that in fact the claimant did not experience or report any shoulder pain until

months after the claimant's work-related accident. For example, even though the claimant asserts that he repeatedly reported left shoulder pain in the days and months following his work injury, not one of the medical records prepared before October 18, 1996 reflects any complaints of such shoulder pain.[3] Although it is conceivable that Dr. London could have negligently failed to record such complaints, this possibility seems highly unlikely in view of the fact that Dr. London did record the claimant's back complaints and the fact that Dr. London follows various procedures designed to ensure that all complaints are recorded. See EX 27 at 14-18 (testimony of Dr. London concerning office procedures designed to ensure that all complaints are recorded). Moreover, both the first report prepared by Dr. Stein and the first report prepared by Dr. London specifically indicate that the claimant expressly denied receiving any injuries other than the injury to his left knee injury. See EX 9 (initial report of Dr. Stein), EX 10 at 59-61 (initial report of Dr. London). Likewise, the tape-recorded statement the claimant gave to Mr. Weber two days after his work injury contains a specific denial of any injuries other than the left knee injury. EX 25 at 5. In addition, the claimant's assertion that his left shoulder tendon must have torn when his arm was jerked downward by a bucket of tools he was carrying in his left hand is inconsistent with a series of earlier statements in which the claimant represented that he had been carrying the bucket of tools in his right hand. See EX 25 at 4-5 (tape-recorded statement taken two days after the accident in which the claimant represented that he was carrying the bucket of tools in his right hand and nothing in his left hand), CX 11 at 13-14 (testimony of Dr. Hunt that the claimant initially reported to him that he had been carrying the bucket in his right hand). The one evidentiary factor that does provide at least plausible support for an inference that the claimant did in fact suffer a traumatic left shoulder injury is Dr. Hunt's testimony indicating that, in his opinion, if the claimant had a rotator cuff tear prior to his work injury, he would have been unable to perform the work of a welder. However, I find this evidence to be outweighed by the nearly indisputable fact that the claimant failed to make any complaints of shoulder pain until many months after his work-related injury and by Dr. London's testimony indicating that, even though a pre-existing rotator cuff tear could have caused the claimant occasional pain, it would not have been severe enough to have precluded the claimant from working as a welder. It is further noted in this regard that Dr. London's qualifications to offer opinions concerning the effects and causes of the

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[3]It should also be recognized that although the claimant asserts that he was so dissatisfied with Dr. London's alleged failure to respond to his repeated complaints of shoulder pain that he elected to seek treatment from Dr. Hunt, the record shows that the claimant "forgot" to even mention the shoulder pain during his first visit with Dr. Hunt or even to promptly bring the shoulder pain to the attention of his attorney. Tr. at 127 (testimony that the claimant "forgot" to mention the shoulder pain during his first visit to Dr. Hunt), Tr. at 147-48 (testimony that the claimant also "forgot" to mention the shoulder pain during an initial meeting with his attorney). It is also noted that Dr. Hunt's suggestion that the use of pain killing drugs must have masked the claimant's shoulder pain until October 18, 1996 is inconsistent with the claimant's testimony that he had been experiencing shoulder pain since his May 28, 1996 injury and with the claimant's testimony that his primary medication was Naprosyn, a drug that Dr. Hunt concedes would not mask any shoulder pain. See Tr. at 106 (claimant's testimony that Naprosyn is the medication he had been taking "most of this time"), CX 11 at 153-54 (testimony of Dr. Hunt conceding that Naprosyn would not mask shoulder pain).

claimant's left shoulder rotator cuff tear are enhanced by the fact that in 1993 he performed surgery to repair a similar tear in the claimant's right shoulder rotator cuff. EX 27 at 5-6.

The claimant's second theory of causation is based on Dr. Hunt's testimony that in his opinion the claimant's prolonged use of crutches aggravated his pre-existing shoulder condition. See CX 11 at 47-48 (testimony of Dr. Hunt that the rotator cuff tear was attributable to both pre-existing spurring and the post-injury use of crutches). In explaining this opinion, Dr. Hunt noted that physical therapists report that people who use crutches for "long periods of time" have a greater incidence of shoulder complaints than persons who do not use crutches. CX 11 at 202. Since the record shows that the claimant was in fact required to use crutches for many months, Dr. Hunt's opinion has a superficial plausibility. However, on balance I find that Dr. Hunt's opinion on this issue is substantially undermined and outweighed by other, more convincing evidence suggesting that in fact the claimant's pre-existing shoulder impairment was probably not aggravated by the use of crutches. Most significantly, the evidence indicates that although Dr. Hunt has premised his opinion, at least in part, on a belief that the claimant was not instructed in the proper use of crutches, the claimant testified during the trial that in fact he had been given such instruction when initially treated by Dr. Stein. See CX 11 at 151, 202 (Dr. Hunt's testimony that he believes crutches caused shoulder aggravation because the claimant was not taught how to use crutches), Tr. at 105 (claimant's testimony that he was instructed on how to use crutches when he was first treated by Dr. Stein). Likewise, although Dr. Hunt's opinion is also apparently premised on an assumption that the claimant experienced shoulder pain from the very first day he began using crutches, Dr. London's medical reports and other previously discussed evidence indicates that the claimant did not begin to experience shoulder pain until many months after he began using crutches. See CX 11 at 106 (Dr. Hunt's testimony that the claimant told him his left shoulder pain began as soon as he started using crutches). Moreover, there is conflicting testimony concerning Dr. Hunt's views on this issue. In particular, even though Dr. Hunt testified that he believes that the rotator cuff tear resulted from a "combination" of "walking with crutches" and "pre-existing degenerative spurring," the claimant testified that Dr. Hunt had told him that he did not believe that the use of crutches caused the tear in his left shoulder or necessitated his shoulder surgery.[4] Tr. at 118-19. Finally, it is noted although Dr. Hunt is a well qualified expert in orthopedics, an equally well qualified expert, Dr. London, has explicitly opined that the claimant's left shoulder pathology was neither caused nor aggravated by the use of crutches. See CX 4 at 152-53 (report in which Dr. London opines that the conditions shown by the MRI scan of the claimant's left shoulder could not have been caused or aggravated by the use of crutches), EX 27 at 117 (testimony in which Dr. London represented that he has never seen a rotator cuff tear develop from the use of crutches).

Accordingly, I find that when all of the relevant evidence on this issue is considered, the claimant has failed to establish by a preponderance of the evidence that his left shoulder pathology

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[4] The claimant's testimony further suggests that after receiving this opinion the claimant formulated his own previously described theory that his rotator cuff tear must have been caused by the bucket of tools he was carrying. Tr. at 118-19.

was either caused or aggravated by his work injury. Rather, it appears to be more likely than not that the claimant's prolonged use of crutches caused only the temporary development of the same type of shoulder pain experienced by many other long-term users of crutches, thereby leading to the diagnosis of an unrelated, pre-existing degenerative condition.

2. Permanency of the Claimant's Work-Related Back Impairment

The claimant contends that his work injury has resulted in a permanent back impairment. In contrast, the employer concedes that the claimant's degenerative back condition was temporarily aggravated as a result of his left knee injury and the ensuing alteration of his gait, but contends that the claimant does not have any permanent work-related back impairment.

It is well established that the burden of establishing the permanency of any work-related impairment is on the claimant. See Holton v. Independent Stevedoring, 14 BRBS 441 (1981); Duncan v. Bethlehem Steel Corp., 12 BRBS 112 (1979).

The claimant's argument that he has a permanent work-related back impairment is supported both by his own testimony concerning his alleged back pains and by Dr. Hunt's testimony that, in his opinion, both the May 28, 1996 accident and the subsequent alteration of the claimant's gait caused back pain that permanently limits his ability to engage in various types of work activities. See Tr. at 67 (claimant's testimony that he has pain in his back "all the time" and that the pain becomes worse when he walks, moves his arms, or does something with his hands), CX 11 at 40 (Dr. Hunt's testimony that the three millimeter disc bulge shown on the lumbar MRI scan could have been caused or aggravated by the claimant's industrial injury), CX 11 at 143-44 (testimony of Dr. Hunt in which he opined that both the claimant's work injury and his altered gait contributed to his back pain complaints), CX 11 at 201 (testimony in which Dr. Hunt opines that the claimant injured his back when he fell), CX 11 at 204-05 (testimony of Dr. Hunt in which he opined that the claimant's back injury has caused him to lose 50 percent of his ability to bend, turn, or twist his spine).

In asserting that the claimant does not have a permanent work-related back impairment, the employer primarily relies on Dr. London's testimony that in his opinion the claimant's knee injury and use of crutches caused an alternation in his gait that in turn temporarily "exacerbated" pre-existing degenerative changes in the claimant's back, but did not result in any permanent worsening of the back condition. EX 27 at 21, 49-50, 112, 114, 124. In addition, the employer also points out that the MRI scan of the claimant's lumbar spine fails to show any disc herniation or nerve root compression and that Dr. London testified that there was no evidence in the MRI scan of any "acute changes," i.e., the kind of changes that might result from trauma. EX 13 (MRI interpretation of Dr. Rothman), CX 6 (MRI interpretation of Dr. Schlesinger), EX 27 at 131 (testimony of Dr. London). As well, the employer notes that both the claimant's legs are of equal length and that, despite the claimant's complaints of radicular leg pain, there is no evidence of muscle atrophy in either leg. CX 11 at 164 (testimony of Dr. Hunt).

Because the claimant's testimony in this proceeding contains so many apparent misrepresentations of fact concerning the mechanics of his injury and its subsequent symptoms, in

weighing the evidence on this issue very little weight has been given to claimant's testimony that he is now suffering from continuing back pain.[5] However, even after that testimony has been discounted, there still remains a bare preponderance of the evidence favoring the conclusion that the claimant's work-related injury probably did result in some kind of permanent back impairment of at least mild severity. Most significantly in this regard, the evidence clearly shows that the claimant did make complaints of back pain to Dr. London within 12 days after his work injury, a fact that in turn suggests that he suffered a traumatic injury to his back simultaneously with his fall or that the alteration in his gait resulting from his knee injury quickly aggravated a pre-existing back condition. In addition, although the results of the claimant's lumbar MRI scan do not corroborate the claimant's assertions that he suffers from constant back pain that radiates into his legs and up to his head, the MRI results do show a bulge that, according to Dr. Hunt's testimony, could cause back pain after prolonged bending, lifting, sitting or standing.[6] CX 11 at 39-40. Moreover, it is also noted that even though Dr. London now asserts that the back pain attributable to the alteration of the claimant's gait was only temporary, his office notes indicate that on August 7, 1996 he told the claimant that the planned total knee replacement "wouldn't take away the low back pain." EX 27 at 119.

3. Date of Maximum Medical Improvement

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); Air America, Inc. v. Director, OWCP, 597 F.2d 773, 781-82 (1st Cir. 1979); Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (D.C. Cir. 1984); Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988). The date of maximum medical improvement is primarily a question of fact, and the factual determination must be based on the medical evidence rather than on economic factors. Williams v. General Dynamics Corp., 10 BRBS 915 (1979); Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988); Dixon v. John J. McMullen and Associates, Inc., 19 BRBS 243 (1986); Trask v. Lockheed Shipbuilding and Construction Co., 17

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[5]Among the most obvious of these misrepresentations is the claimant's assertion that at the time of his work injury he was carrying his tool bucket in his left hand and his oft-repeated contention that he complained to Dr. London about alleged shoulder pain and headaches during every visit to Dr. London's office.

[6] To the extent there is any dispute concerning the existence of a causal relationship between the claimant's disc bulge and the claimant's work injury, I find that Dr. Hunt's testimony that the claimant's work injury could have caused the claimant's L5-S1 disc bulge is sufficient to invoke the subsection 20(a) presumption, that Dr. London's testimony that the MRI scan showed no acute changes is sufficient to rebut the presumption, and that a preponderance of the evidence supports a conclusion that the work injury either caused or aggravated the disc bulge. In reaching this conclusion, determinative weight has been given to the fact that the claimant reported back pain within 12 days after his injury and the fact that there is no evidence indicating that the claimant had any back pain complaints prior to his May 28, 1996 injury.

BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. Brown v. Bethlehem Steel Corp., 19 BRBS 200 (1987). Where surgery is anticipated, maximum medical improvement has not yet been reached. Kuhn v. Associated Press, 16 BRBS 46 (1983), and McCray v. Ceco Steel Co., 5 BRBS 537 (1977). When a claimant has undergone surgery, maximum medical improvement occurs only after the claimant has recovered from the surgery. Walker v. National Steel & Shipbuilding Co., 8 BRBS 525 (1978); Edwards v. Zapata Offshore Co., 5 BRBS 429 (1977). However, if anticipated surgery is not expected to improve a claimant's condition or if a claimant reasonably refuses to undergo surgery, the condition may be considered permanent. Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988); Worthington v. Newport News Shipbuilding and Dry Dock Company, 18 BRBS 200 (1986).

In this case, the employer contends that, based on a report by Dr. London, the claimant's knee and back injuries reached the point of maximum medical improvement on November 19, 1997. See CX 4 at 147-51. In contrast, the claimant contends, based on a report by Dr. Hunt, that both conditions reached the point of maximum medical improvement on June 22, 1998. See CX 3 at 12-22. After reviewing these reports and other relevant evidence, I conclude that the date of maximum medical improvement for both the claimant's knee and back injury is the date determined by Dr. London: November 19, 1997. There are several reasons for this conclusion. First, the date submitted by Dr. London reflects ample time for the claimant to have achieved a maximum recovery from his May 28, 1996 injuries. Indeed, the date determined by Dr. London is almost 18 months after the claimant's work injury and more than a year after his total knee replacement surgery. Second, Dr. Hunt's treatment records fail to show any improvement in the claimant's condition after November 19, 1997 and, if anything, indicate that the claimant was asserting that his condition was steadily worsening. Third, Dr. London's opinion on the date of maximum medical improvement for the knee injury is more convincing because he performed the surgery on the claimant's knee and appears to have more experience in treating total knee replacement patients than Dr. Hunt. See CX 11 at 175 (testimony of Dr. Hunt concerning his experience in total knee replacement surgery), EX 27 at 76 (testimony of Dr. London).

4. Extent of Permanent Disability

Since the parties agree that the claimant's left knee injury precludes him from returning to his past work as a welder, the claimant must be found to be totally disabled unless the employer demonstrates the availability of suitable alternative employment. See Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 277 n.17 (1980); Davenport v. Daytona Marine & Boat Works, 16 BRBS, 196, 199-200 (1984); Hicks v. Pacific Marine and Supply Co., 14 BRBS 549, 556 (1981). In order to satisfy this burden, the employer must establish the existence of specific and realistically available job opportunities within the geographic area where the employee resides which a person with the employee's technical and verbal skills is capable of performing. See Edwards v. Director, OWCP, 99 F.2d 1374 (9th Cir. 1993). In deciding if such a job opportunity is realistically available, it is also necessary to consider the claimant's age, education and background in order to determine if there is a reasonable likelihood that he would be hired if he diligently sought the job. See

Hairson v. Todd Shipyards, 849 F.2d 1194 (9th Cir. 1988); Stevens v. Director, OWCP, 909 F.2d 1256 (9th Cir. 1990).

In an attempt to satisfy its burden of showing the availability of suitable alternative employment, the employer has submitted the deposition testimony and reports of Nedra Meyers, a certified vocational rehabilitation counselor. EX 17 (reports), EX 26 (deposition testimony). According to Ms Meyers' testimony and reports, she interviewed the claimant on January 27, 1998 and was told that he attended school in Mexico through the sixth grade and that after attending Harbor Vocational School for six months, he was able to obtain certifications in welding, arc welding, gas welding and stick welding. EX 17 at 145-49. On February 23, 1998, Ms. Meyers prepared a report which indicates that as a result of conducting a labor market survey she was able to identify a variety of available jobs that could be performed by a person with the claimant's vocational characteristics and the physical limitations prescribed by Dr. London. EX 17 at 151-58. In particular, her report indicates that she located four jobs as a cashier in commercial parking facilities and an additional four "customer service" jobs in various types of businesses. Id. In addition, on August 14, 1998, Ms. Meyers produced a second labor market survey in which she reported that she had also located an additional four customer relations job openings and an additional four cashier job openings. EX 17 at 158a to 158l. According to Ms. Meyers' deposition testimony, in conducting the second job market survey she took into account work restrictions related to the claimant's shoulder and back impairments. EX 26 at 34. However, she did not explain what she thought those restrictions to be. Id. In addition, she acknowledged that at the time she prepared this survey she had not seen a copy of the July 21, 1998 report setting forth Dr. Hunt's understanding of the claimant's work restrictions and therefore did not discuss Dr. Hunt's restrictions with any of the potential employers contacted during the survey. EX 26 at 84.

The claimant contends that, for essentially two reasons, none of the jobs identified by Ms. Meyers constitutes suitable alternative employment. First, the claimant asserts that the job market surveys conducted by Ms. Meyers fail to show the availability of suitable alternative employment because the surveys identify many jobs that are unsuitable for a person with the claimant's limited education and English literacy. Secondly, the claimant asserts that to the extent that any of the jobs are suitable for a person with his education and English language abilities, they are beyond his physical abilities. The employer disputes both contentions.

Upon reviewing the relevant evidence, I find that there is some merit to the claimant's contention that at least some of the jobs identified by Ms. Meyers are unavailable to him because of his limited education. In this regard, it is noted that Ms. Meyers has concluded that the claimant must be able to read and write English "to a comfortable degree" because he successfully completed the classroom aspects of his welding training and because he is reported to have personally filled out an employment application in which he represented that he can read and write in both Spanish and English. EX 26 at 37-39,79 (testimony that the claimant personally completed an employment application and filled out cards concerning his work assignments), EX 26 at 85 (testimony that in Ms. Meyers' opinion the claimant is literate in English to a "comfortable degree"), EX 26 at 103 (testimony that the welding training program the claimant completed in the 1970's included textbooks and written tests), EX 26 at deposition exhibit 1 (employment application in which the claimant

represented he can read and write in both Spanish and English). It is also recognized that during the trial the claimant actually read aloud in English from a claim form. Tr. at 144-45. However, the fact remains that, despite the English literacy skills the claimant has apparently acquired informally, he still lacks formal training in the English language and, even more importantly, a high school diploma or GED certificate. Thus, it seems unlikely that he would be hired by any employer seeking to fill a job that requires something more than rudimentary reading and writing skills. Accordingly, I have determined that, regardless of any physical limitations, the claimant is unlikely to be hired for three of the four customer service jobs identified in Ms. Meyers' first survey (the jobs with DM Tech America, Assistance in Marketing, and LA World Port Hotel) or for any of the four "customer relations" jobs identified in the second survey (jobs with National Research Group, MSI Market Research Interviews, Assistance in Marketing, and NISI Traffic School). Thus, the remaining potential jobs are four parking lot cashier jobs, a job as a customer service representative in the "Pic Your Part" salvage yard, and four jobs as a cashier in check cashing businesses.

In considering the suitability of the remaining jobs, it has been noted that the claimant testified that he is unable to ambulate without using a cane and suffers from constant pain in his left leg, back, left shoulder, and head. See, e.g., Tr. at 64-69. Obviously, if this testimony is accurate, it is highly unlikely that the claimant would be able to physically perform any of the remaining jobs. However, even though this testimony was given under oath and is theoretically subject to prosecution for perjury, it is, for several reasons, not believable. First, the testimony given by the claimant concerning other issues in this case has already been found to be untrustworthy (e.g., his testimony that he was carrying his tool bucket in his left hand at the time of his work injury and his testimony that from the very first hours following that injury he repeatedly complained of back, shoulder, and headache pain). Second, many of the claimant's pain complaints are either not corroborated by objective evidence (e.g., the complaints of constant headaches) or, when there is some corroboration in the form of medical tests, seem to be greatly disproportionate to the test results (e.g., the complaints of extensive, unremitting back pain despite MRI results showing a disc bulge that, according to Dr. Hunt, would generate pain only in certain circumstances).[7] Third, even Dr. Hunt has conceded that from an orthopedic standpoint the claimant is capable of performing some type of work, including possibly sedentary customer service jobs and parking lot cashiering jobs. CX 11 at 73-75, 187, exhibit 1.

In considering the jobs that have been identified by Ms. Meyers, it is noted that Dr. London has determined that the claimant is physically capable of performing the work of a parking lot cashier and that Dr. Hunt has testified that such a job would be suitable if the claimant didn't have to "stand or walk for any distance" and could get up and stretch every 90 to 120 minutes. EX 27 at 71-72 (testimony of Dr. London), CX 11 at 73 (testimony of Dr. Hunt). It is further noted that Ms. Meyers'

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[7]It is further noted in this regard that despite the claimant's assertion that he suffers from constant pain in his left knee, Dr. London testified that he has performed numerous total knee replacement surgeries and cannot recall any other patient who has complained of either constant or severe knee pain following such surgery. EX 27 at 76. Dr. London also noted that in the absence of complications which are not present here (e.g., loosening or infection), there is no "good reason" for such a patient to experience pain until later in the life of the prosthesis. Id.

testimony is convincing insofar as she opined that the claimant's work as a welder shows that he has the computational skills necessary to perform the work of a cashier. EX 26 at 61 . See also Tr. at 146 (testimony of the claimant that he writes checks). I therefore find that the four parking lot cashier jobs identified by Ms. Meyers constitute suitable alternative employment for the claimant.[8] According to Ms. Meyers report, at the time she performed her first job market survey in February of 1998 the parking lot cashier jobs were full-time positions paying from $210 to $280 per week.[9] EX 17, EX 26 at 19-24. I thus find that as of the date of Ms. Meyers' first report (February 23, 1998) the claimant had a residual wage earning capacity of $245.00 per week (i.e., the average of the weekly wages for all four jobs).

Since it has been determined that suitable alternative employment is in fact available to the claimant but at wages lower than those he earned as a welder, it is also necessary to determine whether the wage loss is attributable solely to the claimant's left knee impairment. In the event that the knee impairment is found to be the sole cause of the claimant's loss of earning capacity, his only entitlement to benefits would be a so-called "scheduled award" under the provisions of subsection 8(c)(2) of the Act. Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 (1980), Winston v. Ingalls Shipbuilding, 16 BRBS 168, 172 (1984). On the other hand, if it is found that the claimant's loss of wage earning capacity is also attributable, at least in part, to one or more so-called non-scheduled impairments compensable under the provisions of subsection 8(c)(21), the claimant would be entitled to simultaneously receive both a scheduled award under subsection 8(c)(2) and an unscheduled award under subsection 8(c)(21). See Bass v. Broadway Maintenance, 28 BRBS 11 (1994). However, under the BRB's decision in Frye v. Potomac Electric Power Co., 21 BRBS 194 (1988), "any loss in wage-earning capacity due to the scheduled injury must be factored out" of the subsection 8(c)(21) award. Although the BRB has not yet provided any comprehensive guidance on how such "factoring out" should be performed, in one recent decision it did determine that if the evidence shows that the unscheduled injury alone could have caused a claimant's entire loss of wage earning capacity, the claimant is entitled to concurrently receive unreduced scheduled and unscheduled awards. Green v. I.T.O. Corporation of Baltimore, 32 BRBS 67 (1998).

In this regard, it is noted that the claimant contends that his 1996 work injury resulted not only in a scheduled left leg impairment, but also unscheduled impairments in the form of back pain, left shoulder disabilities, and constant headaches. As previously explained, the shoulder condition

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[8]Moreover, to the extent that there is a conflict between Dr. Hunt and Dr. London on any limitations attributable to the claimant's knee impairment, I find the opinion of Dr. London to be more convincing because he performed the surgery on the claimant's knee and appears to have substantially more experience in treating total knee replacement patients than Dr. Hunt. See CX 11 at 175 (testimony of Dr. Hunt concerning his experience in total knee replacement surgery), EX 27 at 76 (testimony of Dr. London).

[9]In view of this conclusion, no finding is being made at this time concerning the suitability of the comparably-paid customer service job at Pic Your Part or the suitability of the check cashing jobs identified by Ms. Meyers in August of 1998.

has not been found to be causally related to the claimant's work injury and the complaints of constant headaches have not been found to be credible.[10] Hence, the only unscheduled injury which needs to be considered at this point is the injury to the claimant's back. In this regard, it is noted that there is no evidence in the record conflicting with Dr. Hunt's testimony indicating that the three millimeter bulge in the claimant L5-S1 disc could cause symptoms if he were to engage in lifting, turning, pushing, pulling, or other rigorous activities. CX 11 at 198-201. It is further noted that the claimant has credibly testified that his job as welder necessarily required him to engage in such activities. Tr. at 40-42. Accordingly, I find that the injuries to the claimant's back alone would have precluded him from returning to work as a welder and thereby would have caused the claimant's entire loss of wage earning capacity, even if he had not suffered an injury to his left knee. Thus, under the BRB's decision in Green v. I.T.O. Corporation of Baltimore, supra, the claimant is entitled to receive both unscheduled disability benefits under subsection 8(c)(21) and scheduled benefits under the provisions of subsection 8(c)(2) of the Act. The calculation of these benefits is set forth below.

A. Calculation of Unscheduled Disability Benefits

In calculating a claimant's entitlement to unscheduled disability benefits, the claimant's current earning capacity must be adjusted to account for any wage inflation between the date of his or her work injury and the date that suitable alternative employment became available. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 695 (1980); Walker v. Washington Metropolitan Area Transit Authority, 793 F.2d 319, 321 (D.C. Cir. 1986). Ordinarily, this adjustment should be made by determining the wage level that prevailed for the alternative employment at the time of the claimant's work-related injury. However, no such evidence is contained in this record. Accordingly, the necessary adjustment must be made by decreasing the claimant's current residual wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage (NAWW) since the date of the claimant's work injury. Richardson v. General Dynamics Corp., 23 BRBS 327 (1990). Data published by the Department of Labor show that the NAWW increased from $391.22 on October 1, 1995, to $417.79 on October 1, 1997. Therefore, when adjusted to reflect the changes in the NAWW, the claimant's February 1998 residual wage earning capacity of $245.00 was equivalent to a weekly wage of $229.41 in May of 1996. The claimant's loss of wage earning

[10]In any event, it is highly unlikely that the claimant's left shoulder condition precludes him from returning to work as a welder. In fact, both Dr. London and the Kaiser Permanente physician who performed the surgery on the claimant's left shoulder have concluded that the claimant does not have any work restrictions on the use of his left shoulder. EX 27 at 50 (testimony of Dr. London), CX 8 at 207(statement from the Kaiser Permanente physician who performed the left shoulder surgery authorizing the claimant to return to work without restrictions). Moreover, the evidence shows that even though the same type of surgery that was performed on the claimant's left shoulder in 1997 had been performed on his right shoulder in 1993, the claimant was able to work as a welder between 1993 and 1996. EX 27 at 6 (testimony of Dr. London). It is further noted in this regard that although Dr. Hunt has opined that work restrictions should be imposed on the claimant's use of his left shoulder, the restrictions he suggested are no greater than the restrictions he suggested for the right shoulder. CX 11 at 52-54, 64, 205.

capacity is thus $343.12 per week (his stipulated average weekly wage of $572.53 minus $229.41). Therefore, on February 23, 1998 the claimant's entitlement to total disability benefits ended and he became entitled to permanent partial disability benefits equal to two-thirds of $343.12, i.e., $228.74 per week.

B. Calculation of Scheduled Benefits

Under the provisions of subsection 8(c)(2), a worker who suffers the permanent partial loss of use of a leg is entitled to that portion of 288 weeks compensation which is equal to the percentage of the use of the worker's leg that has been lost, even if there is no proof of an actual loss of wage earning capacity. See Henry v. George Hyman Construction Co., 749 F.2d 65 (D.C. Cir. 1984). Conversely, the amount of an injured worker's benefits is limited to the amount specified in subsection 8(c) and may not be increased to reflect additional losses, such as pain or suffering. Young v. Todd Pacific Shipyards Corporation, 17 BRBS 201 (1985). Pain may be relevant, however, in determining the extent to which a claimant has lost the use of a particular body part. See Amato v. Pittson Stevedoring Corp., 6 BRBS 537 (1977). In determining the extent of loss of use of a body part, an administrative law judge may rely on the American Medical Association's Guides to the Evaluation of Permanent Impairment (hereinafter the "AMA Guides"), but is not required to use those guidelines, except in cases involving hearing losses under subsection 8(c)(13) and occupational diseases covered under the provisions of subsection 8(c)(23). Ortega v. Bethlehem Steel Corporation, 7 BRBS 639 (1978).

In this case, two physicians have provided opinions concerning the extent of the claimant's loss of use of his left leg. According to Dr. London, the claimant's knee injury has resulted in a 50 percent loss of use of his left leg. EX 27 at 47-49, 59-62, 66-68. On the other hand, according to Dr. Hunt, the claimant has lost 75 percent of the use of his left leg. CX 11 at 72. Both opinions are purportedly based on the fourth edition of the AMA Guides.

In evaluating the foregoing opinions concerning the extent of the claimant's left leg impairment, it is noted that although Dr. London was the physician who performed the surgery on the claimant's knee, Dr. Hunt was the treating physician when the knee condition reached the point of maximum medical improvement. Hence, in the absence of other considerations, it might be appropriate to defer to the opinion of Dr. Hunt. However, in this case there are two considerations which cause Dr. London's opinion to be the more convincing. The first of these considerations is the fact that Dr. Hunt has given greater weight to the claimant's subjective complaints of knee and leg pain than Dr. London, who has credibly testified that he can see no medical explanation for the severity of the claimant's pain complaints and finds them to be inconsistent with the experience of the vast majority of patients who have had total knee replacement surgery. EX 27 at 73-76. Second, Dr. London's testimony indicating that he has treated far more knee replacement patients than Dr. Hunt suggests that Dr. London is better qualified to make the kinds of measurements necessary to calculate a loss-of-use rating under the AMA Guides. EX 27 at 76 (testimony of Dr. London indicating that he has treated almost 2,000 knee replacement patients), CX 11 at 175 (testimony of Dr. Hunt indicating that he does only four to six total knee replacement surgeries per year), CX 11 at 178 (testimony of Dr. Hunt indicating that before testifying in this case, he had never rated a total

knee replacement under the AMA Guides). Accordingly, I find that the claimant has lost 50 percent of the use of his left leg and that under the provisions of subsection 8(c)(2) he is therefore entitled to be paid 144 weeks of compensation.

Since the claimant's weekly compensation rate for any scheduled injuries is $381.68, the total amount to be paid for the claimant's leg impairment (before any adjustment for credits) is $54,961.92. Ordinarily, this amount would be paid at the rate of $381.68 per week and, under the BRB's Bass and Frye decisions, such payments would have to be made concurrently with the weekly payments for the claimant's unscheduled disability. However, as pointed out by the employer, if both types of benefits were to be paid simultaneously, the total weekly payments received by the claimant would exceed two-thirds of his average weekly wage, thereby producing a result that the Ninth Circuit is likely to find inconsistent with subsection 8(c) of the Act. See Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419 (9th Cir. 1995). Accordingly, I find that the scheduled disability benefits should be paid at the rate of $152.94 per week (i.e., the difference between two-thirds of the claimant's average weekly wage and the $228.74 weekly payment owed for the claimant's unscheduled disability) and that the payment of such benefits should not commence until February 23, 1998 (the date the claimant's total permanent disability became a partial permanent disability). Thereafter, such scheduled disability payments shall continue to be paid at the rate of $152.94 per week until the total amount owed for the scheduled disability ($54,961.92 minus any credits) is completely liquidated.

5. Special Fund Relief

In this case, the employer is not requesting subsection 8(f) relief for the scheduled injury to the claimant's left knee, but does seek Special Fund relief from any award of unscheduled disability benefits.[11] The employer's application for Special Fund relief was sent to the Office of Workers' Compensation Programs (OWCP) prior to the date this matter was referred to the Office of Administrative Law Judges, but, as previously mentioned, the Director of OWCP has not filed any response to the application.

In order to obtain relief from the Special Fund under subsection 8(f) the employer must show: (1) that the claimant had a permanent partial disability prior to his 1996 work-related injury, (2) that the pre-existing disability was manifest prior to that injury, and (3) that the pre-existing disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. See Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982). For the reasons set forth below, I find that the employer is not entitled to such relief from the award of unscheduled disability benefits.

Existence of a Pre-Existing Permanent Disability. As already noted, the first of the three requirements for obtaining subsection 8(f) relief is a showing by the employer that prior to the claimant's work-related injury the claimant had a pre-existing permanent partial disability. Such a pre-

[11]In this regard, it is noted that if the employer is granted the $17,399 credit it seeks, fewer than 104 weeks of benefits will be owed for the scheduled injury to the claimant's left knee.

existing disability, however, need not be economically disabling or require medical treatment in order to constitute a permanent partial disability within the meaning of subsection 8(f). Rather, it is sufficient to show that, "because of a greatly increased risk of employment related accident and compensation liability," the pre-existing condition would motivate a cautious employer to discharge or refrain from hiring the employee. See C&P Telephone Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977); Director, OWCP v. Campbell Industries, Inc., supra. See also Todd Pacific Shipyards v. Director, OWCP, 913 F.2d 1426 (9th Cir. 1990); Currie v. Cooper Stevedoring Co., 23 BRBS 420, 426 (1990). In this case, the evidence shows that prior to the claimant's 1996 left knee injury he had suffered another work-related left knee injury that resulted in a permanent left knee impairment. EX 8 at 24-26 (physician's May 10, 1990 report indicating that a 1989 work injury had resulted in "a 16 percent impairment" to the claimant's left knee). In addition, the record contains: (1) reports of MRI scans indicating that prior to the claimant's May 28, 1996 injury he also had degenerative conditions in both his left shoulder and lower back, and (2) testimony indicating that in 1993 the claimant underwent surgery to repair a rotator cuff tear in his right shoulder. EX 13 (MRI scan of the claimant's lumbar spine), EX 14 (MRI scan of the claimant's left shoulder), EX 27 at 5-6 (testimony of Dr. London indicating that he performed rotator cuff surgery on the claimant's right shoulder in 1993). After consideration of this evidence, it appears more likely than not that a cautious employer would be motivated to discharge a person with such a medical history from a welder's job like the claimant's due to a fear of potential workers' compensation liability. Accordingly, I find that the first prerequisite for subsection 8(f) relief has been met.

Evidence Disability Was Manifest. The second pre-condition for subsection 8(f) relief is a showing that the claimant's pre-existing disability was "manifest" to the employer prior to the subsequent injury. See Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983). This requirement can be met by showing either that the employer had actual knowledge of the condition or that there were medical records in existence prior to the subsequent injury from which the claimant's condition was objectively determinable. Todd v. Todd Shipyards Corporation, 16 BRBS 163 (1984). Moreover, the medical records need not indicate the precise nature of the pre-existing condition, including its permanency, so long as they contain information regarding the existence of a serious lasting problem that would motivate a cautious employer to consider terminating the employee because of the risk of future compensation liability. Lockhart v. General Dynamics Corp., 20 BRBS 219, 225 (1988), aff'd sub nom. Director, OWCP v. General Dynamics, 980 F.2d 74 (1st Cir. 1992). In addition, the records do not have to show that the condition was symptomatic or that the condition would actually impair a person's ability to work. Director, OWCP v. Berkstresser, 921 F.2d 306, 310 (D.C. Cir. 1991). In this case, there is evidence indicating that both the claimant's 1989 left knee surgery and 1993 right rotator cuff surgery were manifest in medical records prior to his May 28, 1996 work injury. Hence, the second requirement for subsection 8(f) relief has also been met insofar as any disabilities related to these surgeries may satisfy the subsection 8(f) requirement that manifest pre-existing disabilities contribute in the prescribed way to the claimant's ultimate disability. However, the employer has failed to provide any evidence indicating that either the claimant's left shoulder or lower back impairments were in any way manifest prior to his 1996 injury.

Contribution to the Ultimate Permanent Disability. The third requirement for obtaining subsection 8(f) relief is proof that the pre-existing disability contributed to the claimant's ultimate

permanent disability in the manner prescribed in the Act. There are two aspects of this requirement. First, the employer must establish that the ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is either partial or total. 20 C.F.R. §702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, subsection 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. FMC Corp. v. Director, OWCP, 886 F.2d 1185 (9th Cir. 1989); Director, OWCP v. Luccitelli, 964 F.2d 1303 (2nd Cir. 1992); Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a factfinder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 8 F.3d 175, 185 (4th Cir. 1993).

As previously noted, the employer is not seeking Special Fund relief for any benefits owed for the scheduled injury to the claimant's left knee, but is seeking such relief only for any unscheduled benefits that it may owe. Thus, since the claimant has been found to be entitled to an award of unscheduled benefits for the injury to his back, in order to obtain Special Fund relief the employer must show that the two aforementioned contribution requirements have been met with respect to the claimant's back impairment. In an attempt to show that these contribution requirements have been satisfied, the employer elicited testimony from Dr. London indicating that in his opinion the disabilities associated with the claimant's pre-injury left knee and right shoulder surgeries made the claimant's "overall" disability materially and substantially greater than the disability which would have resulted from the 1996 injury standing alone. EX 27 at 6-7. In addition, the employer also elicited testimony from Dr. Hunt indicating that he agrees with the statement that the claimant's prior right shoulder injury and prior left knee injury contributed to his overall disability to make it substantially greater than if these prior injuries had not occurred. CX 11 at 191-92.

After careful consideration of the foregoing evidence and legal principles, I have concluded that the evidence upon which the employer relies is not sufficient to entitle the employer to subsection 8(f) relief from the benefits which are owed for the injury to the claimant's back. There are two reasons for this conclusion. First, although Dr. London and Dr. Hunt in effect testified that the claimant's pre-existing left knee and right shoulder impairments made the claimant's overall disability materially and substantially greater than the disability that would have resulted from the 1996 injury alone, their testimony neither alleges nor explains why the specific unscheduled disability for which the employer seeks subsection 8(f) relief (the claimant's back impairment) is not due solely to his 1996 injury. In fact, Dr. Hunt's testimony convincingly shows that the claimant's back impairment is due solely to a combination of his 1996 injury and a pre-existing degenerative condition that was not manifest to the employer until after that injury. Second, although in the peculiar circumstances of this case the employer must show that the claimant's pre-existing left knee and right shoulder impairments made the claimant's unscheduled back impairment materially and substantially greater, the testimony of Dr. London and Dr. Hunt focuses solely on the claimant's overall disability, i.e., the

combination of his final left knee, right shoulder and lower back impairments.[12] In theory, it might have been shown that the claimant's pre-existing knee and right shoulder limitations combined with his back injury in a way that reduced his post-injury wage earning capacity to a materially and substantially greater extent than the back injury alone would have reduced his earnings, but no such evidence is in the record. Moreover, the vocational evidence that was offered into evidence strongly suggests that there is only a slim possibility that such a showing could ever be made. Accordingly, I find that the employer has failed to satisfy the third requirement for subsection 8(f) relief and that the application for such relief must therefore be denied.

6. Credit for the Amount of the Prior Benefits Received

It is now well established that if a worker who has received workers' compensation benefits for a permanent work-related disability later suffers another work-related injury that worsens the disability, any Longshore Act employer responsible for the subsequent injury is required to compensate the worker for the total resulting disability, but is also entitled to a credit equal to the amount the worker received in permanent partial disability compensation for the earlier injury. See Blanchette v. OWCP, 998 F.2d 109, 113 (2nd Cir. 1993); Todd Shipyards Corp. v. Director, OWCP, 848 F.2d 125 (9th Cir. 1988); Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986). It has also been determined that any such credit must be based on the dollar amount paid in compensation for the previous injury rather than on the disability percentage used to calculate the prior award. See Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759 (5th Cir. 1989). However, if the subsequent employer obtains relief under the provisions of subsection 8(f) of the Act, the Special Fund, not the subsequent employer, is entitled to the benefit of the credit. Id.; Blanchette, supra.

In this case, exhibits submitted by the employer show that in 1990 the claimant received a total of $20,000 by settling a claim for a 1989 work-related injury to his left knee. EX 18. Since the settlement documents indicate that the claimant was separately compensated for any periods of temporary disability and that $2,601 of the $20,000 was specifically allocated for medical expenses, it appears that the amount of permanent partial disability compensation the claimant received from the settlement was $17,399. The employer thus contends that it is entitled to a $17,399 credit against the amount awarded in this proceeding for claimant's left leg impairment. Although the claimant apparently opposes this request, he has failed to articulate any reasons for denying such a credit. Accordingly, the full $17,399 will be credited against the employer's obligation to pay the claimant scheduled benefits for the 1996 injury.

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[12]In this regard, it is noted that the claimant's pre-existing left knee impairment probably did materially and substantially increase the claimant's ultimate left knee disability and that therefore Dr. London and Dr. Hunt were correct in opining that the claimant's overall disability was increased because of his pre-injury impairments.

ORDER

1. The employer shall pay the claimant compensation for total temporary disability due to the injury to his left knee and back for the period between May 28, 1996 and November 18, 1997, inclusive, at a compensation rate of $381.68 per week.

2. The employer shall pay the claimant compensation for total permanent disability due to the injury to his left knee and back for the period between November 19, 1997 and February 22, 1998, inclusive, at a compensation rate of $381.68 per week.

3. Beginning on February 23, 1998, the employer shall pay the claimant compensation of $152.94 per week for the permanent partial loss of use of his left leg. Thereafter, such scheduled disability payments shall continue to be paid at the rate of $152.94 per week until the total amount owed for the scheduled disability ($54,961.92 minus a $17,399 credit) is completely liquidated.

4. Beginning on February 23, 1998 and until ordered otherwise, the employer shall pay the claimant unscheduled permanent partial disability benefits of $228.74 per week.

5. The employer shall provide such future medical care as may be reasonable and necessary for the treatment of the injuries to the claimant's left knee and back.

6. The employer shall receive credit for all compensation paid to the claimant since May 28, 1996.

7. The employer shall pay interest on each unpaid installment of compensation from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §1961.

8. The employer's application for relief under the provisions of subsection 8(f) of the Act is denied.

9. The District Director shall make all calculations necessary to carry out this order.

10. Counsel for the claimant shall within 20 days of this order submit a fully supported application for costs and fees to counsel for the employer. Within 15 days thereafter, counsel for employer shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with counsel for the employer. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for the employer.

Counsel for the employer shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by the administrative law judge.

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Paul A. Mapes
Administrative Law Judge

Date_____