U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 20Sep2001

CASE NO.: 2000-LHC-02269

OWCP NO.: 07-149151

In the Matter of:

MICHAEL LECOMPTE,
Claimant

v.

AMERICAN COMMERCIAL MARINE SERVICE CO.,
Employer

APPEARANCES:
DANIEL E. BECNEL III, Esq.
For Claimant

R. SCOTT JENKINS, Esq.
For Employer/Carrier

BEFORE: **JAMES W. KERR, JR.**
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"). The claim is brought by Michael LeCompte, Claimant, against his former employer, American Commercial Marine Service ("Louisiana Dock"), Respondent. A hearing was held in Metairie, Louisiana on March 9, 2001, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Claimant's Exhibits Nos. 1-5, 6(a)-6(i); and

2) Respondent's Exhibits Nos. 1-26.[1]

Upon conclusion of the hearing, the record remained open for the submission of post hearing briefs, which were timely received by both parties. This decision is being rendered after having given full consideration to the entire record.

STIPULATIONS[2]

After an evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

(1) Fact of injury/accident is disputed;
(2) Claimant allegedly injured his back on June 13, 1998. Employer contends that Claimant's injury was preexisting and unrelated to his employment.
(3) An employer/employee relationship existed at the time of the alleged accident;
(4) Employer was notified of the injury on June 13, 1998. The Secretary of Labor was notified of the injury on June 24, 1998;
(5) Notice of Controversion was filed on February 23, 2001;
(6) An informal conference was held on April 18, 2000;
(7) Whether disability resulted from the injury is disputed;
(8) Whether medical benefits were paid under Section 7 of the Act is disputed;
(9) Employer has paid $37,010.38 in medical benefits to Claimant;
(10) Temporary Total benefits were paid from June 15, 1998 to February 13, 2000 in the amount of $46,606.37;
(11) Claimant's average weekly wage is $795.72; and
(12) Maximum Medical Improvement is disputed.

ISSUES

The unresolved issues in this proceeding are:

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[1] The following abbreviations will be used in citations to the record: CTX- Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

[2] CTX-1

1) Fact of Injury and Causation;
2) Nature and Extent of Injury/Disability; and
3) Reasonable and Necessary Medical Benefits

SUMMARY OF THE EVIDENCE

TESTIMONY

Michael LeCompte

Claimant testified that he is forty-six years old and worked for Respondent for over twenty years. He added that he has a ninth grade education. He stated that he began work as a tack welder with Respondent in 1975 and worked his way up to the position of project coordinator by 1991. Claimant described his project coordinator/estimator position as requiring boarding barges, taking repair orders and samples, and returning to his office in order to perform the necessary calculations. TR. 26-32.

Claimant testified that he was injured in June, 1998 in an explosion at Respondent's facility. He stated that the concussion effect of the explosion blew out the windows and the ceiling in the office barge where he was working. This "pushed" him from his chair to the ground, where he injured his back and shoulder. Claimant stated that he called Mr. Hoffmeister to report the incident, but did not tell him about the injury or seek medical treatment immediately after the explosion. He testified that his pre-existing back pain became more severe after the accident and described it as burning sensations and severe aches. Claimant stated that he also began experiencing panic and anxiety the night after the explosion occurred. He added that he had nightmares where he would relive the accident and see the body of a co-worker who was killed. TR. 33-37, 66-70.

As to his pre-existing back injury, Claimant testified that he had two minor back sprains in 1987 and 1988. He added that he began experiencing lower back pain in 1995. He stated that he saw Dr. Fleming for treatment during this period. He testified that due to this pain, he underwent a fusion. Claimant testified that he had good days and bad days, but missed no work after the surgery. He added that he went back to the same position with restrictions. Claimant stated that he continued to experience pain, but attempted to work as he had previously. He also testified that he suffered from anxiety prior to the accident and was treated by his family physician. TR. 30-33.

After the explosion, Claimant continued to be treated by Dr. Fleming and underwent a second fusion in September, 1998. He added that he met with a social worker for counseling for his developing emotional problems from the explosion. Claimant stated that he met with her regularly for approximately one year. However, he added that he currently has problems sleeping and suffers from anxiety. Claimant

conceded that he did experience anxiety episodes, requiring medication, for ten years prior to the explosion. He testified that he did not return to work for Respondent after the explosion and that Respondent never contacted him in February, 2000 about either offering him his original job or a light-duty position. TR. 30-33, 57-67.

Claimant testified that he was making $14.11 an hour at the time of the explosion. He added that he wants to begin working as soon as he is physically and mentally capable of doing so. Claimant also viewed the video surveillance of him and stated that, while he performed the activities depicted in the video, he had a "bad day" the next day. He described a bad day as when he cannot get out of bed or having problems walking due to pain. Claimant stated that he is currently taking pain medication, and described his psychological injuries as continuing, but not as bad. Claimant testified that sometimes he is able to be active, but not for prolonged periods of time. TR. 40-50, 85-87.

Janice LeCompte

Janice LeCompte, Claimant's wife, testified that Claimant was experiencing severe pain after the explosion. Mrs. LeCompte testified that Claimant's new complaints after the explosion included pains radiating into his right leg and numbness in his toes. She stated that both before and after the explosion, Claimant took pain pills everyday and had to stay in bed. TR. 147-157.

Mrs. LeCompte testified that Claimant's anxiety episodes worsened after the explosion, and that he had nightmares. She stated that his back pain condition has not improved since the November, 2000 surgery. She added that Claimant currently takes medication for pain and anxiety. Mrs. LeCompte stated that she was currently unemployed, because she has to stay home and take care of Claimant. She stated that she has not worked in twenty years, with her last employment being at a dry cleaners. She testified that Claimant's unemployment is a severe financial strain on their family. TR. 147-158.

Cory Neal Green

Cory Green testified that he is employed as a private investigator for Terrell Miceli Investigations. Mr. Green testified that he conducted surveillance of Claimant's outside activities for approximately six hours on two successive days. He described Claimant's actions as not showing any pain or discomfort. Mr. Green added that the one time Claimant did appear to "hold his back," it was apparent to him that Claimant had spotted the surveillance vehicle. TR. 102-108. On cross-examination, Mr. Green conceded that most of his work was on behalf of insurance companies. TR. 118-120.

Kent Edward Hoffmeister

Kent Hoffmeister testified that from November 1994 to June 2000, he was the shipyard manager for Respondent's facility. He was aware that Claimant was experiencing back problems as early as 1996

and that he underwent a fusion. Mr. Hoffmeister testified that Claimant remained employed by Respondent following his surgery, but requested that he be assigned a light duty position. He stated that Claimant had individuals climb onto the barges for him, so that he could just do the "internal" work on the computer. It was agreed that when Claimant's condition improved, he would gradually resume a more active role in gathering the information himself. TR. 126-129, 134. He added that Claimant never resumed his more active position after his surgery. Mr. Hoffmeister testified that he was suspicious about Claimant's prolonged period of "recovery" and requested an inquiry into his medical condition. He added that Claimant did have a "short fuse" and was curt with a lot of different people. TR.132, 133-134.

He testified that Claimant called him after the explosion occurred at the facility, but did not indicate that he was injured. Mr. Hoffmeister added that Claimant never returned to work after the explosion. He also viewed the videotapes of Claimant's surveillance and observed that Claimant was more active in the videotape than he had been at the shipyard in his light duty position. TR. 133-139.

MEDICAL DEPOSITIONS AND RECORDS

Robert A. Fleming, Jr.[3]

Dr. Fleming testified that prior to his retirement in November, 1999, he was a board-certified orthopedic surgeon. Dr. Fleming testified that the first time he saw Claimant was on November 6, 1995. Claimant reported experiencing discomfort to his lower back, radiating into his left leg, while serving as a pallbearer at a funeral. Dr. Fleming diagnosed Claimant's back injury as a symptomatic degenerative disc lumbar herniation at the L5-S1 level with bilateral leg referral. He did not restrict Claimant from working, because Claimant indicated that his work did not involve a lot of bending, squatting, or stooping. He recommended surgery in December, 1995 and performed a fusion to correct this condition on June 5, 1996. Dr. Fleming testified that surgery for degenerative disc lumbar herniations are not contemplated unless the patient is in severe pain. RX-4.

Dr. Fleming released Claimant to light duty work in August 13, 1996. Claimant continued to see him with complaints of pain. On July 7, 1997, Dr. Fleming diagnosed Claimant with a non-union of the 1996 fusion. Claimant met with him the same month to discuss treatment alternatives, at which time, Claimant indicated that he wished to postpone surgery, and that he would try to "live with his problem." On May 26, 1998, Claimant returned to Dr. Fleming complaining of severe pain, at which time a second fusion was again discussed. On June 16, 1998, Claimant informed Dr. Fleming of the explosion and

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[3]Dr. Fleming's records are reproduced as RX-3. These medical records have been considered by this Court and will be cited to the extent that they add to his deposition testimony.

complained of an on-set of pain and spasm in the lower back with radiation and discomfort in both legs. Dr. Fleming opined at the time that Claimant had sustained a sprain superimposed upon the pre-existing nonunion at the L5-S1 level. On September 1, 1998, Dr. Fleming performed the fusion surgery. Dr. Fleming opined that after the 1998 fusion, Claimant should have been able to do light duty work. RX-4.

Claimant indicated that he still suffered from low back pain and occasional radiation, but it was not as severe as it was prior to the surgery. Dr. Fleming opined that Claimant could have developed arachnoiditis, which is scarring surrounding nerve bundles. He testified that a third back surgery for a nonunion, if it existed, was optional and would need to be addressed from a pain standpoint. RX-4.

Dr. Fleming stated that Claimant's pain complaints during his last visits were similar to the complaints Claimant presented in 1995. He stated that in the instant case, if Claimant had a demonstrated non-union, Claimant's complaints of back pain would more likely than not have been related to the non-union and not arachnoiditis. Dr. Fleming retired from the practice of medicine in November, 1999 and referred Claimant to another orthopedist, Dr. Gallagher. RX-4.

Daniel J. Gallagher, M.D.[4]

Dr. Daniel Gallagher testified that he is board-certified in orthopedics. He stated that he first examined Claimant on December 13, 1999. He became Claimant's treating physician upon Dr. Fleming's retirement. On February 29, 2000, Dr. Gallagher approved of two jobs at Louisiana Dock, Respondent's facility, that he believed Claimant was capable of performing. These positions were an estimator, which was Claimant's original position, and shop assistant. RX-2.

Claimant continued to be treated by Dr. Gallagher periodically throughout the year 2000, during which time Dr. Gallagher began to suspect that Claimant had a non-union of his 1998 fusion. However, he explained that the existence of the non-union would not affect his opinion that Claimant was capable of returning to work at the dock in February, 2000. Dr. Gallagher performed a fusion of the nonunion on November 27, 2000. He stated that as of March 8, 2001, Claimant was progressing well, and that he expected Claimant to reach maximum medical improvement six to eight weeks after the operation. He concluded that Claimant would be able to return to gainful employment, light to medium duty work, at that time. RX-2.

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[4]Medical records and correspondence pertaining to Dr. Gallagher's testimony are reproduced as CX-3, RX-1, and RX-26. This evidence has been considered by this Court and will be cited to the extent that it adds to his deposition testimony.

Dr. Gallagher opined that it is more probable than not that Claimant's current condition is the result of his back problems, which pre-existed the 1998 explosion. He opined that although Claimant may have experienced some increase in pain from the nonunion, subsequent to the explosion, any such increase would subside, with the pre-existing nonunion as the cause of Claimant's on-going back pain. RX-2.

Dr. Gallagher testified that Claimant's CAT scan and myelogram showed no objective signs of injury. He stated that Claimant's alleged pain as a result of the nonunion and the increase in pain subsequent to the explosion are subjective in nature. RX-2.

Dr. Gallagher stated that Claimant could engage in work activities, he would just experience pain because of the nonunion. However, he stated that Claimant could just as easily not experience any pain in performing these activities. Although he had only seen Claimant two times prior to viewing the videotapes, his impression was that Claimant was very sedate in his activities and could not do any of the activities depicted on the video surveillance. RX-2.

Carlos Pisarello, M.D.[5]

Dr. Carlos Pisarello testified that he is a neurosurgeon. He performed an independent neurological evaluation of Claimant on February 3, 2000. All of Claimant's medical records generated prior to February 3, 2000 were provided to him. Dr. Pisarello testified that Claimant's problems are due to a nonunion from the original surgery in 1996. He added that if Dr. Fleming was correct in his diagnosis of a sprain from the 1998 surgery, the sprain would have no lingering effect on Claimant's nonunion. RX-6.

Dr. Pisarello opined that Claimant was not credible with regard to his complaints of pain. He stated that when manipulating Claimant to test range of motion without Claimant's knowledge, Claimant was able to sit at right angles to his legs with good reversal of the lumbar spine. Dr. Pisarello concluded that it was obvious Claimant was trying to feign limitations in the range of motion examination that were not real. Dr. Pisarello added that while not all of a patient's pain can be eliminated with back surgery, the pain level can be reduced to a very small percentage. RX-6.

He also observed two surveillance tapes of Claimant. After comparing his notes of Claimant's complaints to his actions in the videotapes, he concluded that the degree of activity in the video was contradictory to Claimant's guarded motions and limping at the time of his office visit. RX-6.

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[5]Medical records and correspondence pertaining to Dr. Pisarello's testimony are reproduced as RX-5. This evidence has been considered by this Court and will be cited to the extent that it adds to his deposition testimony.

Given Claimant's complaints and history of back problems, Dr. Pisarello opined that the explosion was not the cause of his back problems. On February 23, 2000, Dr. Pisarello approved two jobs at Louisiana Dock for Claimant. RX-6.

Jose M. Marina, M.D.[6]

Dr. Jose Marina, general practitioner, testified that Claimant has been a patient of his since November, 1992. He stated that he treated Claimant for chronic anxiety and panic disorder. Dr. Marina testified that Claimant exhibited signs of panic disorder and tachycardia throughout his treatment. RX-8.

He listed symptoms of this panic disorder as being easily excitable, insomnia, the inability to concentrate, tachycardia, and experiencing nervous episodes. Dr. Marina placed Claimant on Clorazepate for his condition. Dr. Marina testified that on August 12, 1998 Claimant exhibited symptoms of post traumatic stress disorder, which is a different condition from the anxiety. He stated that he did not think that the back pain was related to the reported stress. Dr. Marina added that he referred Claimant to a psychiatrist and added Paxil as medication for his treatment. RX-8

Dr. Marina stated that while both Claimant and his wife noted symptoms in Claimant of post traumatic stress after the explosion, both thought that the anxiety medication would control his behavior. He added that he last saw Claimant in April, 2000, and that he appeared more tranquil than the last visit. Dr. Marina stated that throughout his treatment of Claimant, he found him to be a credible patient as to his complaints. RX-8

Richard Roniger, M.D.[7]

Dr. Roniger testified that he is a board-certified psychiatrist. He added that the majority of his referrals are from defense firms, insurance companies, or competency attorneys. Dr. Roniger stated that he had reviewed Claimant's complete medical history records and conducted an evaluation of Claimant. He examined Claimant on December 8, 2000. Dr. Roniger added that he took Claimant's history, performed a mental status exam, and reviewed the medical records given to him. RX-10.

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[6]Medical records and correspondence pertaining to Dr. Marina's testimony are reproduced as RX-7. This evidence has been considered by this Court and will be cited to the extent that it adds to his deposition testimony.

[7]Medical records and correspondence pertaining to Dr. Roniger's testimony are reproduced as RX-9 and RX-24. This evidence has been considered by this Court and will be cited to the extent that it adds to his deposition testimony.

He concluded that Claimant suffered from panic disorder since the early 1990's and probably attention deficit disorder, but did not have post traumatic stress disorder at the time of the evaluation. Dr. Roniger testified that while Dena Theriot diagnosed Claimant with PTSD, she gave him a low severity rating. He stated that a trauma could aggravate an existing panic disorder condition, but added that Claimant's panic disorder would not have precluded him from returning to work at the time of his evaluation. Dr. Roniger testified that while he thought Claimant experienced a traumatic event, he did not have the persistent re-experiencing, avoidance attempts, and failure of said attempts to render a diagnosis of Post Traumatic Stress Disorder. He added that Claimant was not psychiatrically disabled from engaging in work activities, including the position he held with Respondent and had been able to work since being discharged from Ms. Theriot's care. RX-10

Kevin J. Bianchini, Ph.D.[8]

Dr. Kevin Bianchini is a neuropsychologist and clinical psychologist. He examined Claimant on November 20 and 21, 2000, and reviewed medical records from Drs. Gallagher, Pisarello, Scrignar, and Ms. Theriot. RX-12. Dr. Bianchini administered several diagnostic tests including the General Intellectual Ability test and WAIS III. He stated that Claimant's low scores on these tests were unusual and indicated either low motivation or sedation. Additionally, Claimant exhibited some impairment on the motor function and language functioning tests. He noted that the majority of Claimant's scores were in the normal ranges given his education and current functioning. Dr. Bianchini administered a formal malingering test, testing the symptom exaggeration of cognitive complaints, and Claimant's scores were normal. However, there was some indication of symptom exaggeration. After reviewing the other doctors' reports and conclusions, Dr. Bianchini concluded that Claimant exhibited evidence of psychological factors, including symptom magnification, that affects his report of his mental and physical symptoms. RX-12.

He stated that Claimant was capable of working and would be capable of returning to his prior employment. He added that Claimant would have been capable of working at the time he finished counseling with Dena Theriot. Dr. Roniger also stated that Claimant's termination of the sessions indicates Claimant had reached a point where he would be able to work. Dr. Bianchini testified that Claimant did not have Post Traumatic Stress Disorder at the time he examined him. He based this conclusion on the fact that Claimant did not have intrusive thoughts, and that many of the complaints that Claimant made to him were based on symptoms which Ms. Theriot indicated had subsided during her sessions with him. Dr.

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[8]Medical records and correspondence pertaining to Dr. Bianchini's testimony are reproduced as RX-11 and RX-25. This evidence has been considered by this Court and will be cited to the extent it adds to his deposition testimony.

Bianchini stated that he has treated patients who have experienced severe work-related trauma in relation to their employment. RX-12.

Dr. Bianchini ultimately concluded that Claimant exhibited signs of symptom magnification and malingering with respect to his psychological complaints stemming from the 1998 explosion. He opined that Claimant has been capable of working, from a psychological standpoint, since the time he stopped seeing Dena Theriot in September, 1999. RX-12.

Susan Andrews, Ph.D.[9]

Dr. Susan Andrews testified that she is certified in clinical neuropsychology. Approximately 70% of her practice involves work on behalf of claimants. Dr. Andrews evaluated Claimant on November 8 and 15, 2000. She diagnosed Claimant with generalized anxiety disorder and mild, chronic depression. At the time of her examination, Dr. Andrews did not feel that Claimant had Post Traumatic Stress Disorder, because Claimant did not mention any recurring nightmares or the re-experiencing of a trauma. She opined that these characteristics are essential to the diagnosis of the disorder. RX-20.

Dr. Andrews explained that Claimant may have had Post Traumatic Stress Disorder at one time, but that it had mutated back to the initial anxiety disorder that he has experienced for years. Based on her review of Dena Theriot's records and pursuant to her conversations with Ms. Theriot, she opined that Claimant received the necessary therapy that he needed following the explosion. Dr. Andrews further explained that the reported deterioration of Claimant's condition since he stopped seeing Dena Theriot in September, 1999 makes her suspicious, since Claimant experienced no intervening trauma during that time. Dr. Andrews suspected that the majority of Claimant's underlying problems with anxiety and depression result from the anxiety medication he is taking and the pain medication for his back. RX-20.

With regard to Claimant's work ability, Dr. Andrews opined that Claimant's psychological problems do not warrant the self-limiting restrictions that he currently reports, such as not being able to go out of his house or do activities outside the home. She would defer to his treating therapist, Dena Theriot, regarding whether he could return to the same job he was doing prior to the explosion. She added that there was an element of exaggeration regarding Claimant's report of his psychological problems. Dr. Andrews' opinion was that Claimant needs ongoing therapy for his underlying anxiety and needs to develop an on-going relationship with a psychiatrist. RX-20.

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[9]Correspondence pertaining to Dr. Andrews' testimony is reproduced as CX-1. This evidence has been considered by this Court and will be cited to the extent that it adds to her deposition testimony.

C.B. Scrignar, M.D.[10]

Dr. Scrignar, psychiatrist, began seeing Claimant in November, 2000 and through March 27, 2001. Dr. Scrignar concluded that Claimant did suffer from Post Traumatic Stress Disorder. He stated that Claimant exhibited all four symptoms for a diagnosis of post traumatic stress syndrome, including experiencing recurrent nightmares. Dr. Scrignar stated that he did not look at any of Claimant's medical records involving his back injury. Dr. Scrignar conceded that he was not aware of Claimant's ten-year history of anxiety, but was not surprised. RX-21.

Dr. Scrignar explained that Claimant's ability to engage in routine activities could be due to the fact that his pain fluctuates on a day to day basis. He added that the mere fact that Claimant stopped seeing Dena Theriot did not necessarily mean that he was able to return to work. As to Claimant's future employability, Dr. Scrignar opined that Claimant would be able to return to employment, but probably not at a shipyard. RX-21. Dr. Scrignar testified that he examines patients for both employers and claimants. He opined that Claimant's condition would certainly worsen without future psychiatric consultation. Dr. Scrignar testified that he currently sees Claimant monthly, and that Claimant is improving under his care. He added that Claimant would need to be treated on a weekly basis for about another year. RX-21.

Dena Theriot, L.C.S.W., A.C.S.W., B.C.D.[11]

Dena Theriot is a licensed clinical social worker whose practice is limited to adult mental health, specifically anxiety, depression, crisis intervention, and Post Traumatic Stress Disorder (PTSD). Ms. Theriot first examined Claimant on August 19, 1998, approximately two months after the explosion at the Louisiana Dock. At the conclusion of her initial examination, she diagnosed Claimant with anxiety disorder and PTSD. She determined that the anxiety disorder was preexisting. According to Ms. Theriot, Claimant's PTSD was associated with the explosion at Louisiana Dock. She added that Claimant also suffered from a recurrent depressed mood due to his physical injuries and loss of functioning. At her first session with Claimant, Ms. Theriot tried to refer Claimant to a psychiatrist, primarily for the purpose of medication management, since medication for Claimant's anxiety disorder had been prescribed by a general practitioner. Claimant indicated that he was satisfied with his medication and refused the referral. RX-14.

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[10]Medical records and correspondence pertaining to Dr. Scrignar's testimony are reproduced as CX-2. This evidence has been considered by this Court and will be cited to the extent that it adds to his deposition testimony.

[11]Reports and correspondence pertaining to Dena Theriot's testimony are reproduced as RX-13. This evidence has been considered by this Court and will be cited to the extent that it adds to her deposition testimony.

Claimant reported that he had difficulty performing the general activities of daily living, including getting dressed, sitting, standing, or performing any activity that required minimal physical exertion. Ms. Theriot met with Claimant on a weekly basis, stopping only for the period of time Claimant was undergoing surgery in September, 1998. Afterwards, she met with Claimant on a monthly basis until September 30, 1999. Ms. Theriot stated that she had some concerns regarding Claimant's credibility throughout the course of her sessions with him. She stated that during his final sessions, he reported increases in his symptoms, which she felt was inconsistent with his prior sessions. RX-14.

Ms. Theriot noted that Claimant continued to improve with treatment, and on his last visit, she did not believe that he was psychologically precluded from returning to his job at Louisiana Dock. Ms. Theriot opined that Claimant would have actually been capable of returning to work as early as March 3, 1999. She acknowledged that Claimant reported talking to representatives at Louisiana Dock about suitable jobs for him. RX-14.

OTHER EVIDENCE

VOCATIONAL REHABILITATION EVIDENCE[12]

Lisa Richie, M.R.E., L.R.C.

Lisa Richie, a vocational case manager with Concentra Managed Care, began working with Claimant following his surgery in September, 1998. Ms. Richie met directly with Claimant and held discussions with both his orthopedic surgeon and his social worker. Based on this information and discussions with personnel at Louisiana Dock, Ms. Richie developed a detailed job description pertaining to Claimant's original job duties as an estimator, as well as a clerical job in the shop at Louisiana Dock. RX-23.

Ms. Richie testified that the clerical assistant/shop job was presented to Claimant in April, 1999 by the shop superintendent, who contacted Claimant directly about the job opening. It was her impression that this discussion took place on April 21, 1999. Ms. Richie also communicated with Ms. Theriot, who advised her that Claimant was psychologically capable of returning to work at that time. Ms. Richie and Claimant agreed that Claimant would discuss the job opening with Dr. Fleming at his next examination, but Claimant did not do it. She stated that the job was eventually approved by Dr. Gallagher on February 29,

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[12]The vocational rehabilitation reports prepared by Lisa Richie and Becky Riecke are reproduced as RX-16 and RX-17. This evidence has been considered by this Court and will be cited to the extent that it adds to their deposition testimony.

2000, as well as Dr. Pisarello. In addition to the clerical job, both Drs. Gallagher and Pisarello approved Claimant to return to his regular job as an estimator. RX-23.

Becky G. Riecke

Becky Riecke, a vocational case manager with Concentra Managed Care, testified that she began working with Claimant following his consultation with Lisa Richie. She stated that she was asked to identify certain jobs for Claimant around January, 2000. She added that it was her understanding that as of February, 2000, two physicians had approved two light-duty jobs for Claimant. Ms. Riecke testified that she also attempted to find alternative light duty jobs for him both maritime and non-maritime in nature. RX-22.

She identified several jobs for Claimant ranging from $7.00 to $10.00 per hour. Becky Riecke added that the job at Avondale Shipyards was $8.00 to $10.00 per hour. She stated that all jobs were available as of February, 2000. Ms. Riecke added, however, that she did not know what impact the November, 2000 surgery would have on Claimant's physical ability to perform these light duty jobs. The non-maritime positions were dispatcher, inside sales, alarm dispatcher, service counselor, alarm central station operator, and inventory clerk. The maritime positions were with Avondale Shipyards and consisted of a steel coordinator, buyer, estimator, purchasing coordinator, tool room clerk, and dispatcher for towing. RX-22.

VIDEO SURVEILLANCE

After a review of the surveillance videos submitted by Employer, this Court notes that there are some inconsistencies between Claimant's descriptions of his current abilities and the activities depicted on the videotapes. Therefore, this Court will weigh the video surveillance along with the medical evidence when evaluating Claimant's credibility and the extent of his injury. RX-18(a)-(e).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in

favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

I. FACT OF INJURY AND CAUSATION

To establish a prima facie claim for compensation, a claimant does not need to affirmatively establish a connection between the work and the harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides the claimant with a presumption that his injury was causally related to his employment if he establishes two things. First, the claimant must prove that he suffered a physical injury or harm. Second, he must show that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the injury. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989).

1. CLAIMANT'S SHOWING OF A HARM

The first prong of a claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
> 33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley; Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. See Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). The Court has the discretion to determine a witness' credibility, and may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

This Court finds that the testimony and medical evidence indicate that Claimant had a pre-existing back injury and anxiety disorder. Prior to the explosion, Dr. Fleming had diagnosed Claimant with a non-union of his previous back surgery. *See* RX-4; RX-3. Claimant had also been diagnosed by his family doctor as suffering from an anxiety disorder several years prior to the explosion. These factors do not automatically preclude recovery by Claimant for these injuries, because when an employment-related injury aggravates, combines with, or accelerates a pre-existing condition, the entire resultant condition is compensable. See Rajotte v. General Dynamics Corp, 18, BRBS 85 (1986).

In this case, Claimant testified that he suffered a back injury, chronic back pain, and sustained a mental injury as a result of the explosion at Respondent's facility. *See* TR. 33-37. He testified that his physical injuries occurred when he was thrown from his chair in the explosion and landed on the floor. See TR. 33-37. While Claimant did not immediately report his injuries, he did seek medical treatment for his back pain three days later with Dr. Fleming, his treating orthopedist. *See* RX-4. Dr. Fleming diagnosed Claimant with a sprain in the same area as his pre-existing nonunion. *See* RX-4. As to his mental injuries, Claimant reported that he began experiencing nightmares and increased anxiety soon after the explosion occurred. *See* TR. 30-40. He indicated to his family physician, Dr. Marina, that he continued to take medication prescribed for his pre-existing anxiety condition, but that it did not help. *See* RX-8. Dr. Marina diagnosed Claimant with Post Traumatic Stress Disorder (PTSD), which he distinguished from the pre-existing anxiety disorder. *See* RX-8. Claimant sought treatment for his condition with Dr. Marina two months after the accident occurred. *See* RX-8. Around that same time, Claimant also saw Dena Theriot, a licensed clinical social worker, who determined that Claimant did suffer from low severity Post Traumatic Stress Disorder and an aggravation of his pre-existing anxiety disorder. *See* RX-14.

Claimant's testimony regarding his accident and symptoms at the trial are generally consistent with his statements to Dr. Fleming, Claimant's treating orthopedist, made three days after the injury. Additionally, his testimony regarding his mental injury and symptoms are consistent with those given to Dr. Marina and Dena Theriot approximately two months after the injury. Therefore, after examining the medical evidence as to both physical and mental injuries, this Court finds that Claimant did suffer an injury which aggravated his pre-existing back condition. Additionally, Claimant's injury aggravated and combined with Claimant's pre-existing anxiety disorder. This, in and of itself, is sufficient to meet the first prong of Claimant's prima facie case.

2. CLAIMANT'S SHOWING OF A WORK ACCIDENT

In order to invoke the §20(a) presumption, Claimant must also show the occurrence of an accident or the existence of working conditions which could have caused the harm. The Section 20(a) presumption does not assist the Claimant in establishing the existence of a work-related accident. See Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981). Therefore, a claimant has the

burden of establishing the existence of such an accident by a preponderance of the evidence. The Court must weigh all the record evidence, including that supporting claimant's testimony and that contradicting it, in order to determine whether he has met his burden in establishing a work accident.

Claimant alleges that he was injured on June 13, 1998, when he fell out of his chair during an explosion at Respondent's facility. *See* TR. 33-37. He testified that the concussion effect of the explosion pushed him out of his chair and caused the windows of his office to shatter and ceiling tiles to fall. *See* TR. 33-37. Respondent asserts that no one was around to witness Claimant's fall. However, Respondent does not deny that an explosion occurred on June 13, 1998. *See* TR. 133-139. Additionally, Kent Hoffmeister, Respondent's Shipyard Manager, testified that the building where Claimant was located did sustain some damage during the explosion, which is consistent with Claimant's testimony. TR. 133-139. Therefore, this Court finds that Claimant has produced sufficient evidence to establish that working conditions existed which could have caused or aggravated both his back injury and his mental condition.

After an examination of the entire record, including both lay and medical testimony, this Court finds that Claimant has met his initial burden of proving that working conditions existed that could have caused or aggravated his injuries. Therefore, this Court finds that Claimant has provided sufficient evidence to invoke the Section 20(a) presumption.

3. REBUTTAL EVIDENCE

Once Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls, and the record as a whole must be evaluated to determine the issue of causation. See Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); See Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Respondent submitted several medical depositions as rebuttal evidence for the physical and mental injuries alleged by Claimant. As to Claimant's physical injury, Dr. Pisarello, neurosurgeon, examined Claimant on February 3, 2000. *See* RX-6. He opined that Claimant's current problems were due to the nonunion from the 1996 back surgery and not the explosion. *See* RX-6. However, he examined Claimant several years after the explosion occurred. *See* RX-6. If Claimant had suffered a sprain, as diagnosed by Dr. Fleming, it would be unlikely that there would be any lingering effects of the injury at the time of this examination. *See* RX-6. Therefore, this Court finds that Dr. Pisarello's medical opinion regarding Claimant's physical injury is more relevant to ascertaining the nature and extent of Claimant's current

condition, as opposed to causation, and will be discussed accordingly. As a result, Dr. Pisarello's testimony is insufficient to constitute substantial countervailing evidence to rebut the §20 presumption.

As to Claimant's mental condition, Respondent submitted the depositions of Drs. Roniger, Bianchini, and Andrews. This Court notes that while these individuals would be more qualified to diagnose Claimant than his therapist, they examined Claimant several years after the accident occurred. For instance, Dr. Roniger, the clinical psychiatrist, opined that Claimant had a pre-existing anxiety disorder, but did not exhibit signs of Post Traumatic Stress Disorder. *See* RX-10. However, he conceded that a traumatic event could aggravate Claimant's pre-existing condition. *See* RX-10. Dr. Roniger also stated that he believed Claimant experienced such an event. *See* RX-10. Therefore, Dr. Roniger's medical opinion is not sufficient to sever a causal connection between an aggravation of Claimant's mental injury and the explosion.

Drs. Bianchini and Andrew's opinions focus on the Post Traumatic Stress Disorder aspect of Claimant's mental injury. Both neuro-psychologists concluded that Claimant did not exhibit Post Traumatic Stress Disorder symptoms at the time of the examinations. *See* RX-12; RX-20. Dr. Andrews opined that if Claimant even had Post Traumatic Stress Disorder, it had mutated back into the general anxiety disorder which pre-existed the explosion. *See* RX-20. However, neither neuro-psychologist negated a causal link between the explosion and an aggravation of Claimant's anxiety disorder. While this Court will give their opinion the appropriate weight as to Claimant's current condition, the neuropsychologists' opinions are not sufficient to sever a causal connection between the explosion and an aggravation of the pre-existing anxiety disorder.

II. NATURE/EXTENT OF DISABILITY AND MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one 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. SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at

60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

A judge must make a specific factual finding regarding maximum medical improvement and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, the judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708 (1978).

If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

This Court previously found that Claimant sustained both physical and mental injury as a result of the explosion at Louisiana Dock. With regard to the nature of Claimant's physical condition, this Court finds that Dr. Fleming's and Dr. Gallagher's medical opinions are entitled to determinative weight. The evidence indicates that Dr. Fleming was Claimant's treating physician and evaluated Claimant both before and after the time of injury. *See* RX-4. Dr. Gallagher became Claimant's treating physician upon Dr. Fleming's retirement and evaluated Claimant on a regular basis after the injury. *See* RX-4; RX-2.

While both doctors opined that Claimant continues to suffer from a nonunion of 1996 surgery, neither one was able to objectively identify any physical damage to the nonunion from the explosion in

1998. Dr. Fleming opined that the explosion caused a sprain superimposed on the nonunion. *See* RX-4. He stated that this would cause chronic pain, but could not identify a healing period for this type of injury. *See* RX-4. While he stated that it would take three months in a healthy individual, he did not give a period for an individual with a nonunion. *See* RX-4. Additionally, while Dr. Gallagher opined that while Claimant's increase in pain, or aggravation of the nonunion area, would subside, he was unable to give a time frame for the healing process. *See* RX-2. Therefore, while the sprain of the nonunion area might have healed, this Court finds that there is insufficient evidence to establish a maximum medical improvement date for Claimant's pain from said injury. As a result, Claimant's injury is temporary in nature.

As to Claimant's psychological/psychiatric injury, credible medical testimony indicates that Claimant has a pre-existing anxiety disorder, which was aggravated by the work-related accident. Dr. Marina, general practitioner, first diagnosed Claimant with this disorder in 1997. *See* RX-8. These findings are supported by Dena Theriot, who saw Claimant two months after the explosion and Dr. Roniger, the psychiatrist who examined Claimant in 2000. *See* RX-14; RX-10; While this Court notes that Dena Theriot is a licensed therapist and not a psychologist, this Court finds that her reports of Claimant's condition is credible. *See* RX-14. She counseled Claimant regularly for approximately one year and was sufficiently able to ascertain any improvement or decline in Claimant's psychological condition. *See* RX-13. Therefore, her opinion is considered credible, and is supported by psychological and psychiatric opinions on Claimant's mental state.

Dena Theriot opined that Claimant seemed to suffer an aggravation of this pre-existing anxiety disorder. *See* RX-14. During her evaluations of Claimant, she determined that Claimant might also suffer from a low severity level of Post Traumatic Stress Disorder. *See* RX-14; RX-15. She also reported continuous improvement in Claimant's condition throughout her sessions with Claimant. *See* RX-14. Ms. Theriot reported that Claimant stopped seeing her in September of 1999, because he no longer felt that it was necessary. *See* RX-14. At that time, Ms. Theriot opined that any aggravation of his anxiety disorder had subsided. *See* RX-14. Her conclusion are supported by Dr. Roniger's conclusion in December, 2000 that Claimant did not currently suffer from Post Traumatic Stress Disorder and would not be psychiatrically disabled from engaging in work activities. *See* RX-10. However, neither expert was able to ascertain the extent of aggravation of Claimant's pre-existing anxiety disorder. While each one indicates that Claimant's condition was improving from therapy, there is insufficient evidence to determine a date of maximum medical improvement. Therefore, Claimant's condition, both mental and physical, is temporary in nature.

The extent of disability can be either partial or total. Total disability is a 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. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work-related injury be

the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

In the present case, there is credible, medical evidence that Claimant was unable to work due to his physical condition from the date of the accident, June 13, 1998 to February 29, 2000. On that date, Dr. Gallagher, Claimant's treating physician approved of two positions at Respondent's facility that he believed Claimant was capable of performing. *See* RX-2. Although Dr. Pisarello approved of these jobs prior to February 29, 2000, this Court finds that the opinion of Claimant's treating physician is entitled to determinative weight. As his treating physician Dr. Gallagher's approval was based on his observations, over an extended period of time, of Claimant's physical condition.

As to Claimant's mental problems, Claimant has failed to establish a prima facie case of total disability. This Court places determinative weight on Dr. Roniger's opinion that Claimant was able to work from the date of his last appointment with Dena Theriot on September 30, 1999. *See* RX-10. This opinion is consistent with the objective testing and expert opinions of both neuropsychologists, Drs. Andrews and Bianchini, who opined that any aggravation in Claimant's anxiety disorder which would prevent him from working had subsided during his therapy with Dena Theriot. *See* RX-12; RX-20. Their objective testing indicated no current signs of a psychological aggravation as of the date of the examinations. *See* RX-12; RX-20.

Since there is some evidence of symptom magnification regarding Claimant's reports of his physical and mental symptoms, this Court will not consider Dr. C.B. Scrignar's opinion in weighing the extent of Claimant's injury. Dr. Scrignar opined that Claimant is currently totally disabled and unable to work due to Post Traumatic Stress Disorder. *See* RX-21. However, his opinion is based on subjective complaints from Claimant, who has been labeled as someone who exaggerates both physical and mental symptoms. *See* RX-6; RX-12. Additionally, since Dr. Scrignar was unaware of Claimant's past history with anxiety problems, the accuracy of his diagnosis is in question. Since Dr. Scrignar's diagnosis was based primarily on Claimant's self-reporting of his medical history and symptoms, the credibility of Dr. Scrignar's diagnosis is weakened. This Court finds that while Claimant was psychologically able to return to work after his sessions with Dena Theriot, he was physically unable to work because of the aggravation of the nonunion area, which caused his back pain.

However, Claimant's assertion that he currently suffers from a back injury and pain stemming from the explosion is weakened by the video surveillance and the medical opinions of Drs. Gallagher and Pisarello. *See* RX-18(a)-(e); RX-2; RX-6. Therefore, Claimant has only proven a complete loss of wage earning capacity and established a prima facie case for total disability from June 13, 1998 to February 29, 2000, the date when Dr. Gallagher examined him. There is evidence in the record to indicate that Claimant

underwent back surgery in November, 2000. *See* CX-4. However, Dr. Gallagher stated that this surgery was to attempt to correct, for the second time, the non-union of the 1996 surgery. *See* RX-2. As stated previously, this Court found that Claimant sustained an aggravation of his prior injury, which Dr. Fleming testified was soft tissue in nature. Drs. Gallagher and Pisarello also opined that there would be no objective lingering effects on the nonunion. *See* RX-2; RX-6. Therefore, for purposes of the Act, Claimant will not be considered totally disabled for the time period of this surgery.

Total disability, and loss of wage earning capacity, becomes partial on the earliest date that the employer establishes suitable alternative employment. See Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, physical restrictions, and an opportunity that he could secure if he diligently tried. See New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); See McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Respondent presented Lisa Richie's and Becky Riecke's testimony showing that it tendered two light duty positions, as an estimator and tool shop assistant at Louisiana Dock. Both counselor's testified that these positions became available as of April, 1999. *See* RX-22; 23. The estimator position was the position held by Claimant prior to the explosion. *See* RX-23. This Court finds both counselor's testimony credible regarding both the tender of the jobs and the duties required in the described positions. Claimant's treating physician, Dr. Gallagher, determined that both positions were suitable after evaluating Claimant on February 29, 2000. *See* RX-2; RX-23. Ms. Riecke testified that both positions were available in February, 2000. *See* RX-22.

Additionally, Ms. Riecke conducted a labor market survey for sedentary to light work, both maritime and non-maritime in nature, which were consistent with his physician's approval. *See* RX-22. The non-maritime positions were dispatcher, inside sales, alarm dispatcher, service counselor, alarm central station operator, and inventory clerk. *See* RX-16; RX-17; RX-22. The additional maritime positions consisted of a steel coordinator, buyer, estimator, purchasing coordinator, tool room clerk, and dispatcher for towing. See RX-22; RX-17. These positions ranged from $7.00 per hour for the non-maritime activities to $14.11 for the estimator position Claimant had occupied prior to the explosion. *See* RX-16; RX-17. All of these positions were available as of February, 2000. *See* RX-22. As stated previously, the medical evidence shows that neither Claimant's psychological problems nor his physical condition would have prevented him from being employable. Therefore, Claimant's disability is partial after February 29, 2000.

After averaging the wage ranges in the vocational rehabilitation reports, and after consideration of the medical testimony, this Court finds that Respondent has established suitable alternative employment for a position paying approximately $10.55 per hour. For an eight-hour day and a five-day work week, this would yield a weekly wage of $422.00. Since Claimant's pre-accident average weekly wage was $795.72, Claimant has sustained only a partial loss of wage earning capacity after February 29, 2000. *See* CTX-1. Thus, Claimant's compensation rate will be diminished accordingly.

III. REASONABLE AND NECESSARY MEDICAL BENEFITS

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so. 33 U.S.C. § 97(d)(2).

This Court has previously determined that Claimant sustained both physical and mental injury from a work-related injury. *See* CTX-1. Therefore, he is entitled to all properly authorized and reasonable medical benefits stemming from this condition. Dr. Gallagher, Claimant's treating orthopedist, opined that future surgery, with instrumentation, on his back was optional for pain alleviation. *See* RX-2. He added that Claimant would be able to continue to work, however, he might continue to experience pain due to the non-union. *See* RX-2. This Court finds that Claimant's medical expenses and mileage prior to the November, 2000 surgery would be necessary expenses to alleviate aggravation stemming from the explosion. However, based on a review of the record, this Court concludes that the November, 2000 surgery was necessary to correct a pre-existing condition and not an aggravation of his work-related condition. *See* CX-5.

As to Claimant's mental injuries, this Court finds that Claimant is entitled to reasonable and necessary benefits for his mental injury sustained as a result of his work-related accident. While there is evidence to indicate a pre-existing anxiety disorder, it is also evident from psychiatric testimony, that this condition was exacerbated by his work-related accident and is compensable. *See* RX-10. Thus, Claimant is entitled to reasonable and necessary past and future compensable psychiatric treatment, medication, and mileage incurred associated with the aggravation of this anxiety disorder. *See* CX-5.

Accordingly,

ORDER

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

(1) Employer/Carrier shall pay to Claimant any unpaid compensation for temporary total disability benefits from June 13, 1998 to February 29, 2000 based on an average weekly wage of $795.72;

(2) Employer/Carrier shall pay to Claimant any unpaid compensation for temporary partial disability benefits from March 1, 2000 and continuing, subject to the limitations of §8(e), based on the suitable alternative employment wages of $422.00;

(3) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses and mileage with interest, in accordance with Section 1961, which resulted from his work-related injury. See 33 U.S.C. §907;

(4) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the

Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this 20th day of September, 2001, at Metairie, Louisiana.

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JAMES W. KERR, JR.

Administrative Law Judge

JWK/sls