**U.S. Department of Labor**

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

**Issue Date: 17 January 2003**

**CASE NO.: 2001-LHC-2686**

**OWCP NO.: 07-154184**

**IN THE MATTER OF:**

**ROBIN R. KEA**

**v.**

**HALTER MARINE GROUP**

**Employer**

**RELIANCE NATIONAL**
**INDEMNITY COMPANY**

**Carrier**

**and**

**MISSISSIPPI**
**INSURANCE GUARANTY ASSOCIATION**[1]

APPEARANCES:

TOMMY DULIN, ESQ.

For The Claimant

KARL R. STEINBERGER, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

---

[1] The caption appears as amended at the hearing.

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Robin R. Lea (Claimant) against Halter Marine (Employer), Reliance National Indemnity Company (Carrier), and its successor, Mississippi Insurance Guaranty Association.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on June 5, 2002, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 15 exhibits, including exhibits 1 through 5, exhibits 7 through 14, part of exhibit 18 (pp. 1-8, 11-15), and exhibit 19, which were received. Employer/Carrier proffered 13 exhibits, including exhibits 1 through 5 and 7 through 14, which were received into evidence. The parties submitted a joint stipulation of Claimant's earnings after her injury and before her termination which is hereby received into evidence as JX-1.

The record was left open for 60 days for additional development, including taking depositions and gathering additional medical records. Claimant submitted a Supplemental Report of Dr. Fleet, which was received as Claimant's exhibit number 8. Employer/Carrier submitted depositions of Dr. Schnitzer, Timothy Howard, Adrienne Locascio, and Dr. Cooper, which were received as Employer's exhibits 15, 16, 17, and 18, respectively. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on October 30, 2002 and November 13, 2002 respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

---

[2] References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

## I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (EX-1; JX-1),[3] and I find:

1. That the Claimant was injured on March 6, 1999.

2. That Claimant's injury occurred during the course and scope of her employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on March 6, 1999.

5. That Employer/Carrier did not file a Notice of Controversion.

6. That an informal conference before the District Director was held on March 6, 2001.

8. That Claimant's average weekly wage at the time of injury was $448.70.

9. That Claimant's earnings were equal to or no less than the stipulated average weekly wage of $448.70 while she performed modified work for Employer from March 6, 1999 until her termination of employment on January 7, 2000.

10. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

## II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether Claimant has reached maximum medical improvement.

---

[3] Although joint stipulations are customarily received as a joint exhibit, both parties signed the stipulation at EX-1, which was introduced without objection as a joint stipulation.

3. Whether suitable alternative employment has been established.

4. Whether there has been an independent intervening cause.

5. Entitlement to and authorization for medical care and services.

6. Attorney's fees, penalties and interest.

## III. STATEMENT OF THE CASE

### The Testimonial Evidence

### Claimant

Claimant was born on April 22, 1960. She is married and has two dependent children, ages 7 and 16. She has a high school diploma with some college education, including "a year and a half in accounting." She went to junior college for three semesters, studying English, Math, Speech and Algebra. She earned "mostly A's and B's." She quit school for financial reasons. She has no special vocational training of any kind. (Tr. 24-25, 45-46).

Prior to working with Employer, Claimant worked as a cashier for various employers, including Church's Chicken and several convenience stores. While at the convenience stores, Claimant "worked her way up as far as responsibilities" until she was eventually doing "all the paperwork during shift breaks at one store." She was a cook at the Moss Point Schools for six years. She worked as a waitress at K-Mart. She never filed any workers' compensation claims before the present matter. (Tr. 25, 46-48).

Claimant began working with Techserve, a staffing company for Employer. After working there for two months, she "got to switch over from Techserve to [Employer]." Claimant was assigned a "paint labor" job, and "started off doing labor work." Specifically, she would "clean up modules, different things like that that need cleaning up." After two years of working at this job, "They moved me – they started giving me labors, and I started – I became a painter's helper and then on up to a painter." (Tr. 25-26).

Claimant never incurred lost time from any injuries with either Techserve or Employer prior to March 6, 1999; however, she

missed six weeks due to gall bladder surgery while working for Employer. (Tr. 27).

On March 6, 1999, Claimant was injured while performing a "fill bucket on a labor job...." Specifically, she was injured while cleaning a large engine. To reach the engine, she "had to go down a bunch of flights down from the top of the boat all the way down to the bottom of the boat. It's like a floor and it's like a grate on top of the floor. You have to take the grating up to get down to ... where the engine was ...." She injured her low back when she attempted to lift the grate, and explained:

> I had to – I took my feet and kind of picked it up. I had to do it like a couple times before I could really get it up, it was so heavy. I had to bend down and pick it up. When I bent down, I can feel it kind of buckle up a little bit in my legs and I moved it on over. I got on down in there. When I got in the hole [sic] I started – my legs was hurting me. My back was hurting real bad because I kicked that grate in and I was hurting real bad, and they told me to sit down and wait a minute before I do anything else. So I sit there for a few minutes before I do anything else.

She added that there were other co-workers with her and that she reported the incident to "Mr. Nevils," who was "like a supervisor."[4] (Tr. 28-29).

Nevertheless, Claimant continued to work "all day," cleaning scrap metal out of the hold in anticipation of an inspection. She used paint brushes, scrapers and spatulas to "get stuff up." She filled buckets with scrap metal and carried the filled buckets "all the way up from the bottom all the way to the top to empty the bucket." (Tr. 29). In her deposition, Claimant described the buckets as "two feet high," and recalled using four of them. (EX-5, pp. 60-61). The work caused problems with Claimant's arm and neck. She told her supervisor about her arm and neck pains. (Tr. 30).

---

[4] In a May 10, 2002 deposition, Claimant stated she told "Mr. Nettles" of her injury, indicating "Mr. Nevils" may be a misspelling. (CX-5, p. 31).

"Five days later," Claimant sought medical care with Dr. Cooper, who she had never "been to" before.[5] Specifically, she was directed to Dr. Kevin Cooper by "Safety and health." She treated with Dr. Cooper "at least once a week." She stated, "I was having pain in my neck and my shoulders and my arms and my hands, and my leg was swollen all the way down to my ankle and my feet." She added that the symptoms in her leg "went from one leg to the other," starting with the left leg. Claimant showed her legs to Dr. Cooper, who tried to treat them. Dr. Cooper prescribed medication, performed X-rays and an MRI. While she treated with Dr. Cooper, Claimant remained employed in a light-duty capacity by Employer, "doing nothing" and "just sitting in the office" because she was unable to walk. (Tr. 31-32).

Claimant stated Dr. Cooper referred her to Dr. John McCloskey, who "just checked me and ... gave me some medicine, and he wrote me something to send me to the therapy ...." She was then referred to Dr. Jeff Noblin. She also treated with Dr. Terry Millette. Dr. McCloskey also referred her to Dr. Edward Schnitzer, who "gave me shots and medicine," some of which helped. (Tr. 32-33, 35).

While Claimant was treating with Drs. Noblin, McCloskey and Millette, she continued working for Employer. She was provided a light-duty job removing trash with a stick, but did not believe she could perform the job. She was moved to a light-duty job in "the parts room," where "they had me sitting at ... a homemade desk to clean bolts and screws, rusted screws." For this job, Claimant was paid the same wage as that which she earned before her March 6, 1999 work-related accident; however, as an injured worker, she was prohibited by Employer from working overtime, resulting in fewer available hours of work. (Tr. 33-34, 54-55).

Claimant also performed a light-duty job in "the tool room," where she would "give whatever I could give out. If I couldn't get it, I'd have the other man in the tool room get it for me." She was allowed to sit down if necessary. For this job, Claimant received the "same wage and no overtime ... [because] people that was injured couldn't get overtime." (Tr. 34-35). Claimant agreed that, although she was not allowed overtime while performing a restricted job for Employer, the light-duty jobs she

---

[5] Although Claimant stated she had never "been to" Dr. Cooper before, she later stated Dr. Cooper performed her pre-employment physical for Employer. (Tr. 48-49).

performed in material preparation, issuing tools, and cleaning the yard were necessary jobs. (Tr. 80-82).

Claimant continued to work on the light-duty status with Employer until she was terminated in January 2000. According to Claimant, Employer "... was laying everybody that was on light duty off, and I didn't know I was terminated until I got a paper in the mail saying I was terminated." She added that "all the light-duty people" were terminated. (Tr. 35-36). Thus, Claimant acknowledged she was not laid off because of her condition. (Tr. 57).

At that point in time, Claimant "called labor relations" to request medical treatment for the pain she still experienced. She mentioned that she had not chosen a physician and was told "... I had my right to have my choice of physician, so ... I went to Dr. Fleet for my choice of physician." According to Claimant, "labor relations" was not affiliated with Employer, but "help[ed] people that needs help when they come down." (Tr. 36-37).

According to Claimant, "Dr. Fleet gave me tests to see what the problem was." He referred her to another physician who provided a spinal and other injections, and medication for her neck, hands, leg, and back. Claimant was unaware if Dr. Fleet sought workers' compensation authorization. Dr. Fleet also referred Claimant to Drs. Joe Ray and Ben Freeman. Dr. Ray provided carpal tunnel surgery that did relieve her problems with her left hand, which was no better at the time of hearing than it was on March 6, 1999, when Claimant suffered her work-related accident. Specifically, Claimant stated, "I still can't hold on to stuff, I still drop things, I still have problems, my hands are still swollen." After her surgery, Claimant underwent therapy for her hand at Gulf Coast Therapy. Meanwhile, Dr. Freeman provided ineffective injections for Claimant's left hand. (Tr. 37-40, 42, 76-77).

Claimant continues to treat with Dr. Fleet. She still suffers "a lot of pain." According to Claimant, Dr. Fleet believes she will "always have pain." (Tr. 40-41).

Claimant has not worked anywhere since she worked for Employer. Further, she has not been involved in any accidents since she last worked for Employer. She applied for and received unemployment benefits in January 2000, when she was terminated by Employer. Claimant applied for unemployment, relying on Dr. McCloskey's release to return to work and her indication that she

was looking for a job to obtain benefits. Claimant confirmed that she looked for a job at the time she applied for unemployment. She added that "the people at Unemployment Security Commission" did not require her to seek work with particular employers or report any results from job searches as a condition of obtaining benefits. (Tr. 41-42, 77-78, 88-89).

Claimant was being treated at the time of formal hearing by Dr. John DeGroote for a thyroid problem. She was currently taking two types of medicines prescribed by Dr. DeGroote. Claimant did not "really believe" her thyroid condition became worse because of her March 1999 work-related injury. Moreover, she acknowledged a letter from Dr. DeGroote indicating that he treated her for her thyroid condition, which was not related to her work injury. (Tr. 42-43; 78-79; EX-4, p. 52).

Since her work-related accident, Claimant has had difficulty sleeping. Consequently, she was prescribed sleeping medication by Drs. McCloskey, Schnitzer, and Fleet. She also suffers headaches, for which Dr. Fleet prescribed medication. (Tr. 43-44). She added:

> Since my accident, I have pain in my lower back, all the way down my [left] leg .... Sometime it goes in my right leg. I have pain in my arms, my neck, my head, sometime it goes down the middle of my spine, my shoulders. I have headaches a lot, no sleep. Sometime I can't – if I don't take my sleeping medicine, I can't sleep. I be in a lot of pain.

(Tr. 44). She stated that her pain affects her ability to carry out her normal daily activities. Specifically, she cannot walk a "long distance," for which she has a "disability parking sticker." She cannot pick up grocery bags which she formerly had no problem lifting. Further, she cannot do her daily housework that she performed prior to her injury. Claimant is able to drive her car to the grocery store and to church. Since her accident, she has to lay down during the day and sometimes sleeps during the day. She recently looked for work, but does not think she is "really capable of working." (Tr. 44-45, 73).

On cross-examination, Claimant stated she signed a choice of physician form identifying Dr. Cooper as her physician of choice, "but I told [Employer] I didn't want Dr. Cooper for my doctor." Claimant explained, "That man told me I had to sign this paper. In order to see a doctor, I had to sign these papers to go see

their doctor." She added, "I said, well, I don't want Dr. Cooper for my doctor. He told me that Dr. Cooper was not going to be my doctor."[6] (Tr. 50-51). Nevertheless, Claimant continued treating with Dr. Cooper for "months," during which time Dr. Cooper prescribed medications and referred Claimant to Drs. Noblin, Schnitzer, Millette. (Tr. 53).

Claimant also stated on cross-examination that Dr. McCloskey released her to return to light-duty work consistent with the restrictions of a December 1999 functional capacity evaluation (FCE), which indicated Claimant could perform light-duty jobs. When she returned to work, Roy Odum, a supervisor, assigned her the job of picking up trash with a stick, which was supposedly within the restrictions assigned by Dr. McCloskey; however, she did not believe she could perform the job. She requested and was authorized a visit with Dr. McCloskey, who was unavailable at the time. Claimant instead saw Dr. Cooper, who told Claimant to return to work and provided a return-to-work slip. Claimant returned to work and continued to try working. (Tr-53-55).

Claimant understood Employer paid for Drs. Cooper, McCloskey, Noblin, and Schnitzer. Claimant has not returned to see Dr. Cooper because he told her he could not continue as her physician. Consequently, she began treating with Dr. Fleet in January 2000. She stated Employer refused her requests to pay for Dr. Fleet's treatment. She added Employer told her that she already had doctors for whom it would pay. (Tr. 58).

After Claimant began treating with Dr. Fleet, a neurologist, she continued treating with Dr. Schnitzer, a "pain doctor." Both physicians prescribed medications. Dr. Fleet eventually told Claimant to stop working. Her husband's health insurance paid Dr. Fleet's bills, while Employer paid for Dr. Schnitzer. (Tr. 59-60, 80).

Claimant stated she is unable to return to work; however, she has continued to seek employment. Specifically, she was not ready to find a job, but "I just went out and tried, to see for myself." Claimant added, "So I went out, and I tried to find a job in the condition that I'm in." She testified her job search

---

[6] Although Claimant stated that she signed the form when she treated with Dr. Cooper on March 12, 1999, her signature on the form is dated March 15, 1999. Claimant stated she did not enter the date, nor did she know who did. (Tr. 90-91).

lasted for three days and occurred shortly before the formal hearing. (Tr. 60-61). Specifically, from the time Claimant was terminated by Employer, which was January 7 or 10, 2000, she did not look for any work at all until May 29, 2002, three days before the formal hearing. (Tr. 67).

Over the course of her job search, Claimant called or visited 8 employers, but was not offered a job.[7] Claimant sought a position as a painter with the first two employers, who were not taking applications. The third employer, Hancock Bank (Hancock), discussed having Claimant take a test for a teller job; however, Claimant subsequently received a letter from Hancock, indicating that "they went back and looked over my records, and they wouldn't even let me take the teller test." She inquired about a painter position with Moss Point Marine (Moss Point), who was not taking applications. She admitted that Moss Point is actually closed and that she did not really go to the location, but called about the job. First Federal accepted Claimant's resume, but was not otherwise taking applications. Keesler Federal Credit Union (Keesler) and Ingalls Credit Union took Claimant's resume, but have not since contacted her. Lastly, Claimant inquired about a job as a painter with Ingalls Shipbuilding, which was not currently hiring. (Tr. 61-64; 82).

Despite applying for the positions as a painter, Claimant did not believe she can work as a painter or a painter's helper. She explained she doubted Counsel for Employer/Carrier, who told her that Employer had "a job for me in my condition." Rather, Claimant believed nobody would hire her in her condition and wished to prove she was "really hurting." Nevertheless, if she had been actually hired, Claimant would have tried working. Claimant added that at least two employers, Hancock and Keesler, were hiring when she inquired about jobs. She reiterated she has not heard from Keesler and that Hancock would not hire her upon its review of her background. (Tr. 64-66).

Claimant acknowledged receiving a card from Hancock, indicating her background was reviewed and, should a favorable employment match be determined, she would be contacted. She reaffirmed, however, that Hancock reviewed her background and advised her not to take a teller test as originally scheduled. Hancock told her they would contact her at a later date. She did

---

[7] The jobs about which Claimant inquired are identified at CX-19, p. 1.

not tell Hancock that she was under a doctor's care, nor did she tell Hancock she had any limitations or inabilities to do the job. (Tr. 66-67).

Claimant stated Carrier wanted her to try to get a job upon her termination from Employer. Rather than apply for a job, Claimant began treating with Dr. Fleet. She told Dr. Fleet she was having problems with both hands. Dr. Fleet recommended Dr. Freeman, who recommended surgery on her left hand that was performed by Dr. Ray on April 2, 2001. The health care was paid for by her husband's health insurance. Claimant did not file the bills with Employer/Carrier nor request payment from Employer/Carrier. According to Claimant, "They wouldn't pay for it." (Tr. 68-69).

Claimant has treated with Dr. Fleet monthly over two years and five months. He keeps her prescriptions filled, including prescriptions for: (1) Prozac, (2) Seroguel, (3) Depakote, (3) Ambien, (4) Mobic, (5) Zanaflex, (6) Topamax, and (7) Colace. Dr. Degroote prescribes Synthroid, while Dr. Susan Fleet, whose bills have not been submitted in this case, prescribed Prevacid and Bentyl. (Tr. 69-71).

On October 20, 2000, Claimant and her attorney met with Adrienne Locasio, a vocational rehabilitation counselor. Ms. Locasio located several jobs for Claimant that were within her restrictions. On December 18, 2000, those jobs were identified in a letter mailed to Claimant. Claimant did not apply for any of the jobs because Dr. Fleet told her she was disabled. She added that Dr. Fleet never discussed light-duty restrictions with her, nor did Dr. Fleet ever approve any of the jobs identified by Ms. Locasio. (Tr. 71-73, 88).

Claimant's complaints of headaches did not start until she began treating with Dr. Fleet. She did not complain about headaches to Drs. McCloskey, Millette, Schitzer, or Cooper. She denied her headaches became worse gradually after she treated with Dr. Fleet. (Tr. 73-74). She further denied she did not complain of shoulder pain before her treatment with Dr. Fleet. Rather, she asserted that her shoulder problems began when she treated with Dr. Cooper, despite the absence of such complaints in Dr. Cooper's notes and an accident report indicating

complaints of low back, left hip, and leg pain only.[8] (Tr. 74-75). Claimant also denied that she did not originally complain of pain in her right leg. She stated that she told Drs. Cooper and McCloskey she had pain in her right leg; however, Claimant agreed that Dr. McCloskey's records from her initial visit did not indicate right leg pain. (Tr. 75-76).

On December 30, 1999, when Claimant stated Dr. Cooper told her that he could no longer be her physician, Claimant denied telling Dr. Cooper to "take her off work" or telling Dr. Cooper she did not believe she was capable of working. She disputed that Dr. Cooper told her to return to work. She complained of pain but did not ask Dr. Cooper to do any more for her. Claimant stated that she was not sure if she told Dr. Cooper she was going to treat with another physician, "Dr. Longnecker," when Dr. Cooper told her to get another doctor. Claimant agreed Dr. Cooper gave her a prescription for Celebrex and that a notation in her medical record indicates she could return to Dr. Cooper "as needed." Claimant understood that Employer would continue paying for Dr. Cooper's services. (Tr. 83-85; EX-8, p. 5).

**Mr. Clifford Lane**

Since November 1998, Mr. Lane has been employed as a medic by Employer. When employees are injured on the job site, he refers them to their physician of choice and receives that doctor's recommendations, which are transcribed onto company forms. He then informs employees and Employer about the physician's restrictions. (Tr. 94-95).

Mr. Lane recalled Claimant and stated her title was a "painter/blaster helper." Mr. Lane testified that Claimant's "true job description while working for Employer" was a "painter's helper." According to Mr. Lane, Claimant did not do any blasting. (Tr. 95-96, 99-100).

Mr. Lane stated he had an opportunity to work with Claimant regarding Employer's efforts to return her to regular duty. When Mr. Lane "came to the yard," Claimant had already been seen by several physicians for her injury. When Claimant would come to

---

[8] See CX-14, p. 12. Claimant agreed that a reference to working at a level between hips and shoulders was a limitation on painting rather than a report of shoulder pain complaints. (Tr. 89-90).

see Mr. Lane, he would refer her to those physicians, as she requested. He kept a log of activities regarding Claimant. Specifically, he would record Claimant's assignments within her restrictions that were assigned by the physician and discuss Claimant's limitations with Claimant and her foreman. He stated he probably saw Claimant on a daily basis. (Tr. 96-97).

Mr. Lane testified that Employer assigns injured employees to duties that need to be done in the course of the work which the company is employed in doing. For instance, an injured worker may be assigned to handing out tools in the tool room, where Claimant worked, when Employer needs tools distributed. Likewise, the job assignment of cleaning, which was also assigned to Claimant, was a duty that needed to be done in the course of work. (Tr. 97-98).

In December 1999, Mr. Lane contacted Dr. McCloskey's office regarding the results of an FCE. He requested a written report of the FCE and what Claimant's restrictions would be. Mr. Lane provided a description of Claimant's occupation to Dr. McCloskey's office, outlining Claimant's job duties. Dr. McCloskey's office informed Mr. Lane that Claimant was prescribed Vicodin, a pain medication, to be taken every 8 hours. Because Employer has a company policy against taking narcotic pain medication at work, Dr. McCloskey approved Claimant to take Vicodin only at night. (Tr. 99-100).

On December 28, 1999, Claimant returned to work with restrictions. Mr. Lane noted the restrictions or limitations, as prescribed by the doctor, and provided those to the foreman. Mr. Lane stated he received the FCE on December 28, 1999. (Tr. 101, 108-109; EX-4, pp. 55-57). Mr. Lane indicated Claimant could lift no more than 10 pounds. He also added that she could lift one-gallon cans of paint, which he estimated weighed less than 10 pounds. (Tr. 109-110).

When Claimant was assigned the task of cleaning up the grounds, she requested a second opinion or another evaluation. According to Mr. Lane, Claimant attempted to see Dr. McCloskey, who was unavailable, and instead saw Dr. Cooper, who released her within "the same restrictions as in the FCE." Claimant returned to work at that time and continued to work until she was laid off January 7, 2000. (Tr. 101-102)

Mr. Lane recalled that, on December 28, 2000, Claimant requested to see another physician. Employer's position was that

she selected her physician of choice “at the beginning when the injury occurred.” Thus, “she was not authorized to see any other physicians unless they were assigned or she had been referred by her physician of choice.” However, “she was told she could return to see Dr. Cooper at any time. There was no appointment required. The others, she could just see them as we could get appointments.” Claimant returned to Dr. Schnitzer after December 28, 1999, and that visit was paid for by Employer. (Tr. 102-103).

Mr. Lane stated that Claimant was terminated as part of a reduction in “the entire workforce.” Claimant’s medical condition had nothing to do with her termination. Since that time, Employer has undergone “numerous, numerous reductions.” (Tr. 103-104).

On cross-examination, Mr. Lane agreed that Dr. Cooper indicated treatment would probably need to be discontinued altogether on December 30, 1999. He explained:

> I would say that Dr. Cooper really couldn’t do anything more for her. He had already referred her to Dr. McCloskey. Dr. Schnitzer had seen her, but he would see her anytime for conditions other than that.

(Tr. 104; EX-8, p. 5).

Mr. Lane also stated that, on the modified work, Claimant would only be allowed to work 40 hours a week. Mr. Lane did not know whether Claimant missed any time from work due to her injury from the date of accident through the date of her termination. Mr. Lane was assigned to Claimant’s particular facility in “early December” 1999, and had only been there for a short period of time before Claimant was terminated. (Tr. 107-108).

**Mr. Roy Martin**

Mr. Martin testified that he works for Employer as the corporate division safety manager for vessels. He is familiar with Employer’s policy for providing medical treatment to injured employees. He added that Employer complies with the selection of physician rules under the Act. He stated any employee who has selected a physician is allowed by Employer to return for medical treatment to those authorized physicians at any time. He agreed with Mr. Lane’s testimony that Dr. Cooper was available to Claimant since she was injured. (Tr. 111-112).

Mr. Martin asserted that the jobs to which Claimant was assigned were regular jobs in the course of the shipyard. Specifically, her jobs in the pipe room, tool room, and cleaning the yard were necessary jobs to facilitate Employer's business. (Tr. 112-113).

Mr. Martin was familiar with the January 2000 layoff at the shipyard. Slightly over 200 employees were terminated in the week surrounding January 7, 2000. The reason for the layoff was a reduction in force. Moreover, Claimant's termination was a result of the reduction in force rather than her physical condition. (Tr. 113-114).

On cross-examination, Mr. Martin could not specifically recall any individual who performed jobs in the pipe shop where Claimant worked. He confirmed Claimant was never reassigned to her original job following her job injury. (Tr. 114-115).

**The Medical Evidence**

**Dr. Kevin Cooper, M.D.**

On July 22, 2002, Dr. Cooper, who has practiced for ten years as "an occupational medicine physician who also does general practice," was deposed. He stated that companies in his community refer their employees to him for various types of occupational injuries. He is called "the company doctor;" however, he does not have "direct contacts" with the companies. He stated that he would have no occasion to refuse medical treatment to any employee of a company for which he regularly provided services. (EX-18, pp. 6-7).

On March 12, 1999, Dr. Cooper concluded Claimant had a cervical and lumbosacral sprain when he treated her for the first time.[9] He stated Claimant was already scheduled for an upcoming

---

[9] On March 12, 1999, when Dr. Cooper first examined Claimant, he reported that Claimant complained of pain in "her left side of her neck, her left arm, and her lower back" since her work injury. She reported that her pain had been "radiating down into the arm and back." He noted that Claimant complained of "progressively worsening" pain, with weakness in the left upper extremity and in the left leg. He found "some spasm" in the left lower lumbar area with pain to palpation. He diagnosed cervical strain and lumbosacral strain. (EX-8, p. 1).

appointment, and could return on an as-needed basis. (EX-18, pp. 7-8; EX-8, p. 1).

Claimant returned to Dr. Cooper weekly with continuing complaints of pain until May 14, 1999, when Dr. Cooper referred Claimant to Dr. McCloskey. Dr. Cooper confirmed that Dr. McCloskey treated Claimant and referred her to Dr. Schnitzer for pain management. (EX-18, pp. 9-12; EX-8, pp. 1-4).

On December 30, 1999, Claimant returned to visit Dr. Cooper when she was released by Dr. McCloskey. Prior to that visit, Dr. Cooper received and reviewed Claimant's FCE and concluded that she could return to work within the restrictions indicated in her FCE. Specifically, he indicated Claimant could return to regular duty according to the job description supplied by Employer/Carrier. He was aware that Dr. McCloskey also reviewed the same job description. (EX-18, pp. 9-13; EX-18, exhibit 2).

Nonetheless, Claimant reported that she was not sure she could return to work as Dr. McCloskey indicated she could. Dr. Cooper stated he did not refuse to continue treating Claimant on December 30, 1999; however, he had no further appointments with Claimant. Claimant was advised she could return on an as-needed basis; however, Dr. Cooper stated she told him that she was going to go to another doctor of her own, not authorized by Employer/Carrier. Dr. Cooper added that, if Claimant sought an appointment with him, his office would contact Employer/Carrier for authorization. He stated Employer/Carrier never denied authority for him to treat Claimant. Dr. Cooper did not expect Claimant to return to treat with him after he referred her to a specialist. (EX-18, pp. 13-16, 28; EX-8, p. 5).

On cross-examination, Dr. Cooper stated that a reasonable amount for Claimant to be required to lift "is going to run between 50 and 80 pounds." He did not confer with Drs. Schnitzer or McCloskey about Claimant's treatment. He added that, other than the records of Drs. Schnitzer and McCloskey, he did not review any other medical records concerning Claimant. He was not aware Claimant was ordered to undergo a cervical MRI or an MRI of her left shoulder. (EX-18, pp. 21-24).

Dr. Cooper further indicated he did not know whether Claimant selected him as her choice of physician, nor did he recall Claimant ever telling him that she wanted him to be her choice of physician. (EX-18, pp. 24-25).

Dr. Cooper stated there were positive findings of Claimant upon examination. He found "probable pre-existing scoliosis, not simply secondary to spasm." He further found some spasm in Claimant's left, lower lumbar area, which he testified was an objective finding. Dr. Cooper stated Claimant's cervical area became less significant to him because Claimant discontinued complaining about her neck;[10] however, he agreed that he reported Claimant was having difficulty with her neck and upper left extremity with pain down her forearm when he last saw her on December 30, 1999. He explained there was a "large gap of time that I did not see her, she never mentioned anything to me about a cervical spine pain or the numbness or anything down her left arm." (EX-18, pp. 26-28; EX-8, pp. 1-5).

On April 23, 1999, Dr. Cooper ordered a lumbar MRI, which was reported normal; however, he stated there was "mild, scoliatic curvature" noted. He stated he "kind of suspected that from the first." (EX-18, pp. 28-31; EX-8, p. 3).

**Dr. John McCloskey, M.D.**

On May 31, 1999, Claimant treated with Dr. McCloskey, a neurosurgeon, per Dr. Cooper's referral. Claimant complained of low back and left leg pain radiating to the bottom of her foot, neck and shoulder pain, neck stiffness, and numbness in her left arm and hand. Dr. McCloskey's impression included: (1) post-traumatic low back syndrome with left leg pain; (2) post-traumatic neck pain; (3) suspected left carpal tunnel syndrome; and (4) mitral valve prolapse. He noted that there "certainly doesn't seem to be anything neurosurgical going on," and concluded Claimant would "probably benefit" from seeing a psychiatrist if she did not rapidly improve. He recommended X-rays and electrical studies of her arm and leg. He noted Claimant would continue to work at light-duty. (EX-11, pp. 74-75).

Dr. McCloskey provided an Occupational Injury/Illness Work Release, whereby he concluded Claimant could perform a variety of tasks, including: (1) carrying under 20 pounds; (2) using her fingers, hands and arms; (3) walking for 2 hours; (4) standing

---

[10] From March 12, 1999 until April 8, 1999, Dr. Cooper diagnosed Claimant with cervical strain and lumbosacral strain. After April 8, 1999, he diagnosed lumbosacral strain only. (EX-8, pp. 1-5).

for 1 hour; (5) sitting for 8 hours; (6) operating a motor vehicle; (7) using both eyes; and (8) hearing without aid. He restricted Claimant from bending, stooping, twisting, lifting, climbing or doing repetitive work overhead. (EX-11, p. 77). Dr. McCloskey prescribed physical therapy and recommended a re-evaluation thereafter. (EX-11, p. 72).

On June 23, 1999, Dr. McCloskey's records indicate Claimant complained of pain in her neck, back and hands. She reported that her physical therapy was only for her back, which was "much better," but her neck was still painful. (EX-11, p. 60). On August 8, 1999, Claimant still complained of pain in her neck and back, despite her physical therapy. She reported that her hands and neck were swollen. On August 23, 1999, Dr. McCloskey referred Claimant to Dr. Schnitzer, who was eventually approved by Carrier on September 22, 1999 for an appointment in October 1999. (EX-11, pp. 54, 56).

On December 8, 1999, a notation in Dr. McCloskey's records indicates a physical therapist called, requesting Claimant undergo an FCE. The FCE was approved and scheduled for December 16, 1999. (EX-11, p. 49).

On December 15, 1999, Claimant continued to complain of pain, which was not getting any better, and requested to see "Dr. Danielson," but Dr. McCloskey's office told her she would instead benefit from seeing Dr. Schnitzer. (EX-11, p. 47). On December 17, 1999, notes from Dr. McCloskey's office indicate Claimant "came to office crying, in lots of pain. FCE hurt her yesterday." She requested "something stronger for pain," Lortabs were prescribed. (EX-11, p. 47).

On December 28, 1999, Employer contacted Dr. McCloskey's office requesting Claimant's restrictions. It was noted that she had multiple complaints and was taking Lortabs because the pain was "so bad." Employer could not let Claimant work while she was on the medication. Dr. McCloskey provided a work release/restriction form, indicating Claimant could return to regular-duty work based on the job description in Claimant's FCE.[11] (EX-11, pp. 42, 46).

---

[11] Employer/Carrier contend that, "although not specifically stated, Dr. McCloskey also found the Claimant to be at maximum medical improvement on this date;" however, Employer/Carrier cite no authority in the record for its

On December 30, 1999, Claimant complained of “a lot of pain,” and did not believe she could work under the restrictions Dr. McCloskey provided. Claimant sought a referral to Dr. Danielson, who was not approved by Carrier on January 5, 2000. Dr. McCloskey instead referred Claimant to Dr. Schnitzer, who was approved by Carrier on January 6, 2000, to be evaluated and treated for neck and back pain. (EX-11, p. 40).

**Dr. Terry Millette, M.D.**

On June 21, 1999, Dr. McCloskey referred Claimant to Dr. Millette, a neurologist. He performed an EMG and nerve conduction study. He reported a “normal nerve conduction velocity study and electromyography of the left upper and left lower extremities.” He noted, “Clinical examination reveals posterior tibialis tendonitis on the left, along with cervical myofascial spasm on the left.” (EX-10, p. 1).

**Dr. Jeffrey D. Noblin, M.D.**

On July 9, 1999, Claimant treated with Dr. Noblin, an orthopedic surgeon, upon Dr. McCloskey’s referral. She complained of numbness in her left thumb, index and middle fingers, and pain radiating down her left leg into her left foot. Dr. Noblin found stiffness in Claimant’s neck. He noted that Claimant’s X-rays showed “some scoliosis, but no real narrowing of the joint space.” He further noted a “fairly extreme lordosis of the lower part of her back.” His assessment included lumbar and cervical strain. He stated, “[Claimant] is having symptoms in terms of some subjective numbness in the left upper extremity of her neck which is now four months out from the original injury.” To further assess her complaints, Dr. Noblin recommended a cervical MRI. (CX-11, pp. 1-2; EX-9, p. 6).

Dr. Noblin released Claimant to return to full-time, light-duty work, lifting a maximum of 20 pounds. She was restricted from bending, stooping, crawling, overhead work, and using fast-moving equipment. (CX-11, p. 3; EX-9, p. 12).

---

position. (Emp. Post-hrg. Br., p. 32 n. 25). Although a review of Dr. McCloskey’s records establishes that he indicated Claimant could return to regular duty, pursuant to a job description and FCE, he did not appear to offer any opinion regarding a permanent impairment rating or maximum medical improvement. (EX-11, pp. 40, 42, 46-47, 49-50).

On July 20, 1999, Dr. Noblin reported that Claimant's lumbar MRI was "unremarkable." Her cervical MRI was reported as "basically unremarkable, with no disc narrowing, no protrusion to the cord." He referred Claimant to another physician to evaluate her thyroid hypertrophy. His assessment included cervical and lumbar mild degenerative disc disease with spasm and pain. He recommended "just strengthening" for 3 weeks and returning to normal-duty work thereafter. He noted that he would recommend Claimant to a chiropractor if therapy was ineffective. He provided a release to return to full-time, light-duty work, lifting a maximum of 20 pounds. She was restricted from bending, stooping, and overhead work. (CX-11, pp. 2, 4-6; EX-9, pp. 6, 8-11).

On September 24, 1999, Claimant returned to Dr. Noblin, complaining of pain "all throughout her entire body." He noted, "I have evaluated just about everything on her and all has been normal." Dr. Noblin questioned Claimant's willingness to perform maneuvers during a physical examination. He found pain "basically all over on touching." Upper extremities did not show radicular signs or symptoms. He reported, "She does have some weakness in the biceps mainly, but otherwise very poor effort." He otherwise found "some moderate spasms in her neck." Dr. Noblin concluded his work might result in some duplication of services, and referred Claimant back to Dr. McCloskey and a Mobile neurosurgeon to whom she stated she was referred. He continued Claimant's previous restrictions in a release to return to work. (CX-11, pp. 8-9; EX-9, pp. 5,7).

**Robin Walley, P.T.**

On June 7, 1999, Ms. Walley began providing physical therapy for Claimant three times per week upon Dr. McCloskey's referral. She noted Claimant was complaining of cervical, bilateral upper extremity and left lumbar pain. Ms. Walley reported that Claimant "appears to be having mild spinal alignment problems accompanied by soft tissue dysfunction. Claimant was instructed on stretching and would be advised on a home exercise program prior to discharge. (EX-11, p. 29).

On July 12, 1999, Claimant stated her pain "is basically unchanged. Moderate right lumbar stabilization weakness was observed. On July 14, 1999, Claimant stated her back hurt "very minimally," but her neck and left upper arm were "quite painful." On August 10, 1999, Claimant continued to complain of left upper arm weakness and stated that her arm "feels swollen and heavy."

According to Ms. Walley, “Certainly, soft tissue tightness can be felt over [Claimant’s] anterior forearm and left upper trapezius.” It was further noted that Claimant “is basically unhappy at the prospect of having to return to her former job. I feel that she is very anxious about possibly not being able to perform her previous job. Ms. Walley told Employer that Claimant was becoming quite “disgruntled with the entire system.” (EX-11, p. 24).

**Dr. Edward Schnitzer, M.D.**

On August 8, 2002, Dr. Schnitzer, whose certification includes physical medicine and rehabilitation and internal medicine, was deposed by the parties. He first saw Claimant on October 20, 1999 upon referral by Dr. McCloskey. Claimant complained of “low back/left leg pain; neck pain with intermittent radiation into the left arm.” He reported that an April 21, 1999 lumbar MRI showed degenerative disc changes at L4-5 and L5-S1, with disc bulges. No surgery was recommended at the time. He noted Claimant found little relief from physical therapy. Dr. Schnitzer noted Dr. Noblin treated Claimant for her neck, and a July 15, 1999 cervical MRI showed no disc herniation. Dr. Schnitzer indicated Claimant complained of “occasional radiation down the left arm and hand with numbness of the left arm. Her back pain was reported as “nagging and aching,” made worse by walking. Pain was noted “down to the left heel as well as intermittent report of left lower limb weakness.” (EX-15, pp. 8-10; CX-9, p. 1; EX-12, p. 11).

Dr. Schnitzer observed normal range of cervical motion. He also reported “left greater than right mid upper trapezius and rhomboid tenderness with local radiation on palpation.” Upon examination of Claimant’s back, Dr. Schnitzer noted, “Waddell’s sign is positive (low back and left leg pain elicited with light axial compression of shoulders).” His impression included: (1) degenerative disc disease of the lumbar spine; (2) chronic neck and low back pain with radicular and myofascial features; and (3) some non-organic findings of back pain. Dr. Schnitzer prescribed Skelaxin, Lodine and Ambien as needed for sleep; Claimant was to continue her present job. He noted trigger point injections into affected muscles may help with myofascial pain on subsequent visits and Claimant should return to his office in about two weeks. Claimant was allowed to continue working at that time. (EX-15, pp. 8-10; CX-9, p. 2; EX-12, pp. 12-13).

On January 19, 2000, Claimant's chief complaint included "ongoing neck/left shoulder and arm pain; ongoing back and left leg pain." Her neck pain was reported to radiate into her left shoulder, arm, and hand. Her back pain was also noted to be related to her left leg numbness. Claimant's use of Lodine and Skelaxin was stopped because the medications caused headaches. Dr. Schnitzer found "left mid upper trapezius tenderness with some spasm and local radiation on palpation. Claimant reported that she was terminated by Employer on January 10, 2000. Dr. Schnitzer stated he was authorized by the workers' compensation carrier to continue treating Claimant. His impression included: (1) chronic neck pain with myofascial component; and (2) chronic low back pain with radicular features. Dr. Schnitzer performed a trigger point injection using bupivacaine into the left mid upper trapezius muscle, recommended the re-use of Skelaxin, continued Claimant on home exercises, and Claimant was to return in about 3 weeks, at which time another trigger point injection might be necessary. Dr. Schnitzer was told that Dr. McCloskey placed Claimant at MMI and assigned an impairment rating. Consequently, Dr. Schnitzer did not offer an additional impairment rating.[12] (EX-15, pp. 9-12; CX-9, pp. 6-7).

On February 8, 2000, Dr. Schnitzer reported that Claimant's chief complaint included "ongoing neck pain; left arm and hand pain." He noted Claimant's relief from her last trigger point injection lasted "about two days." He reported Claimant was taking Skelaxin without much benefit and Motrin, which helped with sleep somewhat. He also noted Claimant began seeing Dr. Fleet, who performed electrodiagnostic tests in the upper limbs. Claimant stated the tests revealed carpal tunnel syndrome on the left. He reported that Claimant "remains out of work, stating there are no light-duty jobs available at this time." He added:

> ... [Claimant] informed Workers' Comp about her initial injury, which involved not only the neck and low back but also the entire left upper extremity, including significant hand swelling. History from initial visit on 10/20/99 documents left arm pain beginning the day after the injury.

---

[12] See note 11, supra. Although Dr. Schnitzer testified that "Donna Perricone" told him Dr. McCloskey placed Claimant at MMI and assigned a permanent impairment rating, no such determinations appear to exist in Dr. McCloskey's medical records. (EX-11; CX-12).

Dr. Schnitzer found bilateral mid-upper tenderness with radiation upon palpation. He found no atrophy in Claimant's upper limbs. His impression included: (1) chronic myofascial neck pain related to work injury; and (2) left hand and arm pain. Dr. Schnitzer reported that: (1) although there was some "documented evidence, per patient history today," it was unclear at that time whether Claimant's carpal tunnel syndrome on the left hand was "directly related" to her work injury; (2) it would be helpful to review "early documentation of complaints and treatment to see whether this [carpal tunnel] problem may, in fact, be related to her work injury;" and (3) Claimant was to return in "about four weeks." (EX-15, p. 13; CX-9, pp. 9-10; EX-12, pp. 5-6).

On March 8, 2000, Claimant's chief complaint included "persistent bilateral arm and hand pain with swelling; ongoing low back pain." Dr. Schnitzer reported Claimant's symptoms of the right arm were worse than before. He noted Claimant was told by Dr. Fleet that she had carpal tunnel syndrome on both sides, "which is related to work." She was wearing wrist splints on both wrists at night. He reported that the results of a December 16, 1999 FCE indicated Claimant could perform in the light-duty category, although exaggerated behavior was observed. Claimant's limitations included a 20-pound lifting limit and occasional bending, squatting, kneeling, crawling and climbing. Dr. Schnitzer noted "it is possible that [Claimant] could perform beyond the [FCE] restrictions." (EX-15, pp. 14-15; CX-9, p. 11; EX-12, pp. 5-6).

Dr. Schnitzer found bilateral mid-upper trapezius tenderness with some tightness and local radiation on palpation. His impression included: (1) chronic myofascial neck pain with exacerbation; (2) reported documentation of bilateral carpel tunnel syndrome; and (3) bilateral arm and hand pain. Dr. Schnitzer recommended trigger point injections using bivupicaine, and noted a review of Dr. Fleet's EMG testing which indicated carpal tunnel syndrome would be helpful. He recommended Claimant's continued use of splints at night. He opined it was still not clear whether Claimant's carpal tunnel syndrome of the left hand was related to her March 1999 work injury since "carpal tunnel syndrome is usually caused by chronic, repetitive irritation to the wrist joint (frequently seen in jobs such as computer work, carpentry, assembly line workers, etc.). He further noted, "If Claimant's documented job activities included repetitive work involving the hands and wrists, then it is conceivable that CTS could have been related to that job. Dr.

Schnitzer provided a trigger point injection into Claimant's upper back and neck muscles. (EX-15, pp. 14-15; CX-9, p. 12).

On March 29, 2000, Dr. Schnitzer noted Claimant's chief complaint included "persistent neck/bilateral shoulder and arm/hand pain." He reviewed Dr. Fleet's EMG studies and reported that the "upper limb showed carpal tunnel syndrome." He reported Claimant continued to wear her splints at night and was complaining of increased frustration and depression over her situation. She remained out of work at that time. (EX-15, pp. 17-19; CX-9, p. 13; EX-12, p. 3).

Dr. Schnitzer observed no significant atrophy. His impression included: (1) chronic myofascial neck pain; (2) persistent radicular arm pain on the left; (3) documented bilateral carpel tunnel syndrome; and (4) "some electrodiagnostic evidence suggestive of entrapment neuropathy of left ulnar nerve at the elbow." He reported that: (1) Claimant's anti-depressant medication might also help with chronic pain; (2) home exercises should be continued; (3) medications should be continued; (4) vocational rehabilitation was recommended; (5) Claimant should be able to do some light-duty work; (6) because of carpal tunnel syndrome, Claimant should avoid work involving repetitive hand and arm movements, grasping, fine manipulation or frequent overhead work; and (7) Claimant should return in about 4 weeks. By the time of his deposition, Dr. Schnitzer stated he had not formed an opinion whether or not Claimant's carpal tunnel syndrome was work-related. (EX-15, p. 19; CX-9, pp. 13-14; EX-12, pp. 3-4).

On April 26, 2000, Dr. Schnitzer reported Claimant's chief complaint included "persistent left-sided neck, shoulder, low back and left leg pain." He observed "mild bilateral trapezius tenderness without significant radiation on palpation." His impression included: (1) chronic myofascial neck pain; (2) persistent radicular pain from Claimant's neck to her left arm; (3) bilateral carpel tunnel syndrome. He continued to recommend Claimant be cleared for light-duty work, including restrictions of no frequent overhead reaching or work and no frequent movements of the hands, and Claimant should "await vocational rehab." Claimant was to "return to the clinic on an as needed basis." (EX-15, pp. 19-20; CX-9, p. 15; EX-12, p. 2).

On June 27, 2000, Dr. Schnitzer was contacted by a vocational rehabilitation expert. He opined that Claimant reached maximum medical improvement on April 26, 2000, and placed

restrictions on Claimant that he believed were consistent with Claimant's December 16, 1999 FCE. He approved most of the jobs identified by the vocational rehabilitation expert. Specifically, Dr. Schnitzer approved the following jobs: (1) cashier/floor worker; (2) hostess/cashier; (3) counter attendant; (4) room service dispatcher; and (5) receptionist. A job as a showroom usher was not approved by Dr. Schnitzer. (EX-15, pp. 23-24; EX-13, pp. 13-14, 23-30).

On June 7, 2002, Dr. Schnitzer treated Claimant after the formal hearing. At that time, she complained of persistent aching and burning neck and low back pain as well as left arm pain and numbness and some soreness of the left leg. She was on several medications prescribed by Dr. Fleet, including Prozac, Serequel, Depokote, Ambien, Synthroid, Mobic, Topomax, and Prevocet. Claimant reported that she underwent ineffective carpal tunnel surgery by Dr. Ray on her left arm. (EX-15, pp. 24-25; EX-15, exhibit 5).

A physical exam revealed some left upper trapezius tenderness with some radiation to the local area on palpation. Positive Waddell's signs were present, "specifically positive with torsional movements of the trunk and hips as well as with mild axial compression of the shoulders." Dr. Schnitzer's impression included: "status post left carpal tunnel surgery, chronic neck pain including myofascial features and chronic low back pain." He also reported cervical disc bulges and bilateral carpal tunnel syndrome. He decided Claimant should continue home exercises, and recommended "an updated physical therapy program in order to try and control her pain." No changes were made regarding Claimant's restrictions, nor were any other medications prescribed. Claimant was to follow-up as needed. (EX-15, pp. 25-26; EX-15, exhibit 5).

At his deposition, Dr. Schnitzer stated he was still seeing Claimant upon Dr. McCloskey's referral. He opined Claimant is still capable of performing the jobs he identified. He is still available to treat Claimant, should she desire additional medical care. (EX-15, pp. 26-28).

On cross-examination, Dr. Schnitzer stated he never diagnosed fibromyalgia. He was "distantly knowledgeable but not intimately knowledgeable" with painters' work in shipyards such as at Employer. He opined that the job of a painter could be a job "whereby repetitive motions of the hand may lead to

development of carpal tunnel syndrome. I'd say it's possible." (EX-15, pp. 28-30).

From the time he began treating Claimant until June 2002, Dr. Schnitzer stated her overall condition remained "rather static." He observed no significant improvement in Claimant's condition. (Ex-15, pp. 30-31). Dr. Schnitzer stated that, although there is "no good explanation" for the non-organic component of Claimant's pain, such a conclusion "does not necessarily mean she's a malinger [sic]." He stated he never entertained the diagnoses of hysterical conversion, conversion neurosis, or adjustment disorder, nor did he ever consider referring Claimant to a psychologist or a psychiatrist. (EX-15, pp. 31-32). He also stated that Serequel, Ambien, and Depokote may cause drowziness, while the other medications Claimant was taking are not usually associated with significant drowziness. (EX-15, pp. 32-33).

Dr. Schnitzer explained that, although it is possible Claimant's carpal tunnel syndrome could be attributed to her work activities, it would be "difficult or not accurate to make a specific impairment" without physical exam tests that must be performed. He opined Claimant may need intermittent treatment, which might include medications, trigger point injections, splinting of her hand if pain persists, and physical therapy if Claimant develops an exacerbation of myofascial pain or difficulty with range of motion. Nevertheless, Dr. Schnitzer opined Claimant was and continued to be capable of performing jobs identified in a December 2000 labor market survey, including "jobs that require, like the cashier jobs, repetitive use of her hands." (EX-14, pp. 43-46; EX-13, pp. 23-33).

**Dr. William Shepherd Fleet, M.D.**

On January 7, 2000, Dr. Fleet, a neurologist, examined Claimant, who was referred to him by an attorney.[13] Dr. Fleet reported complaints of pain in the right side of her head, pain in her neck, nervousness, and problems sleeping. Dr. Fleet's review of systems included reports of neck pain, back pain, and right hand pain. (CX-8, p. 3).

---

[13] Claimant attributed this recommendation to "labor relations, offshore department," an entity that is not affiliated with Employer. (Tr. 36-37).

On January 24, 2000, an electromyographic examination (EMG) was performed, indicating a normal EMG of the left arm and associated cervical-paraspinal muscles. Likewise, a normal EMG of the left leg and associated lumbar-paraspinal muscles was reported. (CX-8, pp. 7-12).

On February 6, 2000, outpatient testing of Claimant revealed a notation of an epidural block at L4-5. Claimant was diagnosed with lumbar radiculitis. Nerve conduction studies of the upper extremities and a fractionated study of the median nerve were performed. Carpal tunnel syndrome on the right and left sides was reported. (CX-8, pp. 4-6).

On February 21, 2000, Claimant reported neck complaints and tightness in both shoulders upon a change in weather. An epidural performed by another physician[14] helped for the first two days. A notion indicates, "sleeps o.k." Headaches were reported, and some headaches occurring 2 to 3 times per week are reported as "new since injury...." Lumbar radiculitis, carpal tunnel syndrome and insomnia were diagnosed. Dr. Fleet noted he would get a copy of Claimant's lumbar MRI report and seek an MRI of Claimant's cervical spine. (CX-8, pp. 14-15).

On February 25, 2000, an MRI of Claimant's cervical spine was performed. It revealed straightening of the normal lordosis of the mid to upper cervical spine. The vertebral alignment was "otherwise normal," and there was "no evidence of disc bulge, protrusion, or extrusion." No canal or neural foraminal narrowing was reported. The spinal cord was reported "normal size and signal intensity, and the neural foramina were "patent." The impression included: (1) straightening of the normal lordosis of the mid to upper spine, and (2) otherwise unremarkable MRI of the cervical spine. (CX-8, p. 16).

Thereafter, Claimant treated monthly with Dr. Fleet. Her complaints generally persisted. Dr. Fleet continued to diagnose lumbar radiculitis, carpal tunnel syndrome of the left side, and insomnia.

On March 20, 2000, Claimant reported that her shoulders "feel heavy," weighing "a ton." Her headache was reported "gone," helped by medication. Likewise her sleep was improved by

---

[14] Dr. Fleet's records do not indicate which physician performed the epidural.

medication. (EX-8, pp. 19-20). On April 3, 2000, Claimant's lower back and legs were "killing her." Her left forearm ached "all the time, and her neck pain was the "same." Further, she reported that an epidural was of "no help." (CX-8, pp. 23-24). On July 27, 2000, Claimant's low back pain was the same, but radiated down her left leg. Her left hand was reported swollen and painful. Claimant reported that Dr. Schnitzer told her not to return to work. (CX-8, pp. 31-32).

On August 17, 2000, an "Attending Physician's Report" indicates Dr. Fleet diagnosed lumbar radiculitis, carpal tunnel syndrome, and insomnia. According to Dr. Fleet, no hospitalization was required for Claimant's March 6, 1999 work-related injury, and no surgery was required. He indicated Claimant became disabled on January 24, 2000, the date of her first visit.[15] He indicated October 12, 2000 as an "approximate" date Claimant could return to work. (CX-8, p. 36).

On December 28, 2000, Claimant complained of burning pain in her left arm. Claimant reported that her arms felt "as if they'll fall off." She continued to experience left leg and low back pain, which increased with cooler weather. There is a notation on Dr. Fleet's record that "W. Comp. sent her list of jobs to look into." (CX-8, pp. 41-42). Dr. Fleet provided "Work/School Excuse," which indicated Claimant was under his care and unable to attend work until further notice. (CX-8, p. 44).

On January 3, 2001, a cervical MRI was performed and compared with Claimant's February 25, 2000 cervical MRI. There was "no significant change from the comparison." The impression included: (1) "straightening of the normal cervical lordosis," and (2) "otherwise unremarkable MRI of the cervical spine." (CX-8, p. 45).

---

[15] Dr. Fleet indicated Claimant was not totally disabled from her regular or any occupation; however, his indications appear to be internally inconsistent insofar as they suggest Claimant could return to work at her regular or any occupation. Dr. Fleet also reported on the same form that Claimant was totally disabled from returning to work and it was unknown when she could return to work. (CX-8, p. 36).

On February 19, 2001, Dr. Fleet noted Claimant saw Dr. Freeman,[16] who provided a shot in the left arm. He reported Claimant's hand still hurt and both legs were painful. Claimant's speech was "terrible" and "slurred." Dr. Fleet again diagnosed lumbar radiculitis, carpal tunnel syndrome, and insomnia; however, for the first time, he diagnosed cervical strain without explanation. He continued to diagnose cervical strain thereafter. (CX-8, pp. 47-48).

On April 16, 2001, Claimant reported "a little" low back pain, and her left arm was "better." She also complained of "speech problems since she got hurt." He noted Dr. Ray performed a carpal tunnel release on Claimant's left hand, which was "better already [after] two weeks." Claimant reported that her right hand continued to bother her. (CX-8, pp. 51-52).

On July 27, 2001, Claimant reported that her shoulders were hurting and her low back pain persisted along with her leg pain. Dr. Fleet noted Claimant "sleeps often." He prescribed massage for Claimant's carpel tunnel syndrome. (CX-8, pp. 57-58).

On August 24, 2001, Claimant reported that her low back pain increased and she wanted surgery because her ovaries hurt. She complained that her neck was "sore all the time." She also still experienced pain in her left hand where surgery was performed. Dr. Fleet diagnosed lumbar radiculitis, carpal tunnel syndrome in both hands, insomnia, and cervical strain. (CX-8, pp. 59-60).

On October 29, 2001, Claimant reported that her low back pain was "still about the same." She complained of carpal tunnel syndrome in both hands. She reported that the surgery to her left hand "did not really help – brace doesn't help much." She also complained that her neck was painful and swollen. Dr. Fleet noted that Claimant "sleeps usually." His diagnoses remained the same. (CX-8, pp. 55-56).

On November 16, 2001, for the first time, Claimant reported pain in her hips in addition to her continuing complaints pain in her low back, neck, shoulders, and arms. (CX-8, pp. 65-66). On November 25, 2001, Dr. Fleet's diagnoses were unchanged. (CX-8, p. 67).

---

[16] Dr. Freeman's records are not contained in the record.

On December 14, 2001, Claimant's complaints of pain in her low back, neck, shoulders, arms and her hips were the same; however, she also complained of numbness in her left leg. Dr. Fleet noted an "ortho referral Dr. Z." (CX-8, pp. 68-69). On February 6, 2002, Claimant continued to complain of pain in her low back, hip, left leg, and also complained of "neck, shoulder and arm pain." She indicated she was "dropping things." She reported that her brace "only occasionally helps sometimes." (CX-8, pp. 72-73). On March 6, 2002, Claimant reported muscle spasms in her neck in addition to her complaints of pain in her neck, shoulder, arm, and hip. (CX-8, pp. 74-75).

On June 6, 2002, Dr. Fleet responded to Counsel for Claimant's May 14, 2002 request for neurological opinions. Dr. Fleet opined that: (1) Claimant's March 1999 job injury "caused or materially contributed" to her cervical strain, lumbar radiculitis, and carpal tunnel syndrome; (2) Claimant was not presently at maximum medical improvement; (3) Claimant's injuries require additional treatment of "pain and pain induced insomnia;" (4) Claimant's injuries necessitated his referral of Claimant to Dr. Ray for carpal tunnel surgery; (5) his bill for professional services was "reasonable, necessary, and customary;" and (6) the services he rendered to Claimant were for the injuries which she sustained while working for Employer. (CX-8, pp. 89-90).

**Dr. Joe Ray, M.D.**

On March 21, 2001, Claimant was referred to Dr. Ray by Dr. Fleet. Dr. Ray found symptoms of tendonitis that did not "appear to be a major problem." He observed numbness and diminished sensation over Claimant's fingers. He noted, "Presumably, she has a fairly strong indication of carpal tunnel syndrome." (CX-10, p. 1). On March 28, 2001, Dr. Ray diagnosed carpal tunnel compression syndrome bilateral, greater on the left than the right," and prescribed an endoscopic carpal tunnel release, which he performed on April 2, 2001. (CX-10, pp. 2-3, 8).

On July 2, 2001, when Dr. Ray last treated Claimant, he diagnosed post-operative carpal tunnel decompression, endoscopic method on the left, and bilateral carpal tunnel compression syndrome. He anticipated improvement in Claimant's hand that would allow her "to try to return to routine daily use." He released Claimant to continue treating with Dr. Fleet noting, "It is best for [Dr. Fleet] to work with her to determine when she has enough benefit from the procedure already done to justify considering another procedure." (CX-10, p. 16).

**The Vocational Evidence**

**Functional Capacity Evaluation**

On December 16, 1999, Claimant underwent a FCE, which lasted 4 hours. The occupational therapist reported Claimant was able to work at the light physical demand for an 8-hour day. She was found to have an acceptable leg lift capacity of 20 pounds. She qualified for climbing, forward bending and stooping on an occasional basis. The therapist concluded Claimant could return to her job as a painter helper. She reported that Claimant exhibited symptom/disability magnification behavior, indicating a non-organic component to Claimant's pain, medical impairment and disability. She also noted that the validity criteria suggested "very poor effort." (EX-8, p. 11; CX-12, p. 49).

**Adrienne Kern Locascio, MHS**

On September 3, 2002, Ms. Locascio was deposed. She was employed as a licensed and certified rehabilitation counselor by Gisclair and Associates during 2000 and 2001. At the time of her deposition, she was employed in sales by another employer. She holds a Masters of Health Science degree and still maintains her license with the national certification for rehabilitation counselors. (EX-17, pp. 4-6).

On September 26, 2000, Ms. Locascio met with Claimant and her attorney for an initial evaluation. After that evaluation, she performed a labor market survey. On December 18, 2000, she forwarded a letter to Claimant indicating the jobs identified in her survey. She relied on Dr. Schnitzer's medical opinion, the results of Claimant's FCE, and Claimant's restrictions when she performed her labor market survey. She provided an "estimated work capacities form" that was completed by Dr. Schnitzer. (EX-17, pp. 6-9).

According to Ms. Locascio, Claimant was capable of performing the jobs identified in her labor market survey on December 18, 2000. Further, she stated that, based on her experience in conducting labor market surveys, the jobs identified in her survey were "pretty much available throughout the year." Thus, she concluded the jobs were substantially the same jobs available on April 26, 2000, the date Dr. Schnitzer opined that Claimant reached maximum medical improvement. (EX-17, pp. 9-10).

On cross-examination, Ms. Locascio stated she did not perform any type of testing on Claimant. She indicated the jobs in her survey were available on December 17, 2000, but not on the date of Claimant's injury. She did not attempt to determine whether any of the jobs identified were available on the date Claimant reached maximum medical improvement; however, she stated that the jobs were "typically available throughout the year." (EX-17, pp. 11-12).

Ms. Locascio testified she relied on Dr. Schnitzer's medical opinion because Dr. Fleet did not respond to requests for information. Thus, Dr. Fleet never approved the jobs identified in her survey. Additionally, she relied on light-duty restrictions from the estimated work capacities form, the FCE results, and restrictions against repetitive hand use to generate her survey. According to Ms. Locascio, the jobs in her survey required no continuous hand or wrist movements. When she identified the jobs in her survey, Ms. Locascio considered Claimant's use of medications and was aware of Claimant's use of Neurontin, Vioxx, Zyrexa, Serzone, Despiramin and Synthroid. (EX-17, pp. 12-14).

Ms. Locasio stated that Claimant's regular and routine job was a painter's helper while working for Employer. According to Ms. Locascio, Claimant reported that "she was in charge of touch-up painting on ship rooms and clean-up, cleaning up the work areas...." Claimant's job was identified as a painter's helper and classified as "semi-skilled" under the Dictionary of Occupational Titles. Ms. Locascio did not provide the exertional level of Claimant's former job. Lastly, Ms. Locascio acknowledged that Dr. Fleet "actually pulled [Claimant] from work" on December 28, 2000. (EX-17, pp. 13-14; EX-13, p. 36).

**Other Evidence**

**Timothy Randall Howard**

On August 8, 2002, Mr. Howard was deposed. He stated that he was a safety representative with Employer in March 1999. He knew Claimant and saw her on Friday, March 12, 1999. Claimant "came to the safety department complaining of pain, requesting to be treated for first aid. I sent her out to Dr. Cooper at Cooper Family Medical on this date." On Monday, March 15, 1999, he stated, "we had [Claimant] come back in to the safety department. We presented her with a choice of physician form for Dr. Cooper

at which time she signed it in my presence," in compliance with Employer's standard procedure. (EX-16, pp. 6-9).

On cross-examination, Mr. Howard stated he provided general first aid and prescribed Ibuprofen to Claimant. Employer's policy against medications included a prohibition against sedatives. "Nothing as far as anything that would alter your ability to work, become drowsy or anything on the job. The only thing you were allowed to take was an over-the-counter medication such as Tylenol, Ibuprofen, or antihistamine of some sort." (EX-16, pp. 10-11).

Mr. Howard was aware of Employer's policy regarding assignment or limitation of hours worked by employees who were assigned modified or light-duty work. He indicated, "We would assign them to an eight-hour workday, forty hours a week." (EX-16, p. 11).

Mr. Howard testified that Employer's procedure of explaining a choice of physician to an injured employee as:

> On initial complaints requesting medical, we send them immediately to Dr. Kevin Cooper. After she was sent to Dr. Kevin Cooper, I brought her back in Monday morning, asked her if she had a choice of physician that she wanted to use or was she satisfied using Dr. Cooper at which time she stated she was satisfied with Dr. Cooper and would keep him on as her medical doctor.

Thus, Mr. Howard stated Claimant was given an opportunity to select another physician, but chose Dr. Cooper; however, he stated he did not give any list of other physicians or suggest any other physicians. Specifically, he recalled, "I told her I couldn't suggest anyone outside." He could not recall whether he had a list of DOL-approved physicians when Claimant presented herself. (EX-16, pp. 12-13).

Regarding the choice of physician form signed by Claimant, Mr. Howard stated, "I wrote everything out in her presence and had her sign it and my witness on the presence." He could not recall if Claimant ever came back to request another physician. Other than "what [Dr. Cooper] sent me back on the forms that he usually sends back with a diagnosis," Mr. Howard did not have any discussion with Dr. Cooper or any other physician concerning Claimant. Mr. Howard was aware that Claimant was put on a modified duty status. (EX-16, pp. 13-14; EX-4, p. 13).

**The Contentions of the Parties**

Claimant asserts she has not reached maximum medical improvement and is temporarily totally disabled. She maintains that she has never been paid compensation benefits. According to Claimant, she was returned to a modified job following her injury, and worked for a short time until she was laid off as part of a reduction in force. Upon her termination, she claims she chose her own physician, Dr. Fleet, a neurologist, who presently opines that Claimant remains temporarily totally disabled. She asserts that Dr. Fleet referred her to Dr. Joe Ray, an orthopedic specialist, who performed surgery. Alternatively, Claimant asserts that, if she is at maximum medical improvement, she has a lower wage earning capacity and cannot return to her prior job.

Employer contends that Claimant selected Employer's physician, Dr. Cooper, as her choice of physician, evidenced by her choice of physician form. She was treated and referred to other physicians through 1999 and then released. Employer argues that Claimant did not protest any of her physicians until they released her to return to work. Employer contends it established suitable alternative employment before its reduction in force, but Claimant never applied for any jobs. Employer further argues an intervening cause occurred, but is not sure in what form. Employer argues Claimant's medical condition has expanded from her neck, back, and hand to headaches, dizziness, and pains from her head to her feet with no causal connection to the job.

## IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

**A. The Compensable Injury**

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between her work and the harm she has suffered, but rather need only show that: (1) she sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

**1. Claimant's Prima Facie Case**

Since her job injury, Claimant complained of a host of symptoms, including persistent and continuing pain in various

parts of her body, insomnia, carpal tunnel syndrome, thyroid problems, and speech problems. Dr. Fleet related the following to Claimant's job injury: (1) cervical strain; (2) lumbar radiculitis; (3) carpal tunnel syndrome; and (4) treatment for pain and pain induced insomnia. Employer does not contest Claimant's claim that she suffered a work-related accident on March 6, 1999, when she injured herself lifting a grate; however, Employer argues that Claimant's continuing complaints and additional complaints are not related to her March 6, 1999 injury. Thus, Employer argues that it is not responsible for Claimant's continuing and additional complaints.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

**a. Claimant's Cervical Strain, Lumbar Radiculitis, Carpal Tunnel Syndrome, Pain, and Pain-induced Insomnia**

Based on the stipulations of the parties, Claimant's injury is undisputed. However, the scope of the alleged injuries are at issue. Claimant credibly testified that she suffered neck pain, low back pain, arm pain, and pain-induced insomnia since her job injury. The medical evidence of record establishes she complained of these symptoms to the various treating physicians after her job injury. Further, Dr. Schnitzer testified that it is possible that there would be conditions at Claimant's workplace that could have contributed to the development of carpal tunnel syndrome. Thus, Claimant has established a **prima facie** case that she suffered an "injury" under the Act, having established that she suffered a harm or pain on March 6, 1999, and that her working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

**b. Claimant's Thyroid Problems and Slurred Speech**

At the formal hearing, Claimant testified that she does not really believe that her thyroid condition became worse because of her March 1999 work injury. Further, she acknowledged a letter in which Dr. DeGroote, who treated her for the condition,

concluded that it was not related to her job injury. Accordingly, I find that Claimant has failed to establish a **prima facie** claim for compensation with respect to her thyroid condition. As a result, she is not entitled to the Section 20(a) presumption that her thyroid condition arose out of and in the course of employment.

Likewise, Claimant reported to Dr. Fleet that she suffered slurred speech as a result of her job injury. No objective evidence of this phenomenon was observed by any physician until Dr. Fleet reported it on February 19, 2001. His notation that Claimant complained of speech problems "since she got hurt" appears later on April 16, 2001. Thus, no objective evidence of Claimant's slurred speech was observed until almost two years after her job injury.

Accordingly, the length of time that passed between Claimant's March 6, 1999 injury and the first indication of her slurred speech make it very difficult to conclude her slurred speech was caused by her March 1999 work injury. Further, Dr. Fleet offered no opinion regarding any nexus between Claimant's slurred speech and her job injury when he concluded some of Claimant's symptoms were caused by her injury. Moreover, Dr. Fleet did not report the symptom after the April 2001 visit.

Consequently, I find that Claimant has failed to establish a **prima facie** claim for compensation with respect to her slurred speech. As a result, she is not entitled to the Section 20(a) presumption that her slurred speech arose out of and in the course of employment.

**2. Employer's Rebuttal Evidence**

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by her working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir.

1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

**a. Claimant's Cervical Strain, Lumbar Radiculitis, Pain and Pain-induced Insomnia**

In the present matter, Dr. Fleet's conclusions that Claimant's cervical strain, lumbar radiculitis, pain and pain-induced insomnia are work-related are not challenged by any medical opinion of record. Employer offered the medical testimony and records of physicians who treated Claimant for her persistent complaints of pain since her work injury, but none of the physicians concluded Claimant's complaints were not caused by her job-injury. Thus, the record is devoid of a physician's opinion that no relationship exists between Claimant's injury and her employment to rebut the Section 20(a) presumption.

In December 1999, Dr. Cooper opined Claimant could return to work pursuant to a job description and limitations indicated by her FCE; however, he offered no opinion regarding the cause of Claimant's symptoms. His records indicate that, on Claimant's initial visit on March 12, 1999, she complained of a "lot of pain" in the left side of her neck, left arm, and lower back since her job injury. Dr. Cooper testified that there were positive findings, including probable pre-existing scoliosis and spasms. He initially diagnosed cervical strain and lumbosacral strain. He further stated that Claimant reported difficulties with her neck and upper left extremity with pain down her forearm when he last saw her on December 30, 1999. Accordingly, Dr. Cooper's opinion that Claimant could return to work subject to

restrictions does not amount to substantial evidence that her symptoms were not caused by her working conditions, nor aggravated, accelerated or rendered symptomatic by such conditions.

Although Dr. Noblin questioned Claimant's willingness to perform maneuvers on his last visit with her in September 1999, he deferred to Dr. McCloskey and "the neurologist in Mobile" for further evaluation. Moreover, Dr. Noblin continued to report complaints of pain and moderate spasm in Claimant's neck on his last visit with her. Thus, I find Dr. Noblin's statement regarding Claimant's willingness to perform maneuvers on evaluation does not amount to substantial evidence that Claimant's condition was neither caused by her working conditions nor aggravated, accelerated or rendered symptomatic by such conditions.

When Claimant continued complaining of pain, Dr. McCloskey prescribed medication and referred Claimant to Dr. Schnitzer. Dr. Schnitzer offered no opinions severing Claimant's job injury as the etiology of her cervical strain, lumbar radiculitis, pain and pain-induced insomnia. As recently as his June 7, 2002 physical evaluation of Claimant, Dr. Schnitzer continued to find complaints of chronic neck and low back pain, reporting cervical disc bulges. Dr. Schnitzer testified that Claimant's overall condition remained "rather static," observing no significant improvement in Claimant's condition since he began treating her in October 1999. He continued to recommend physical therapy to control Claimant's pain. Thus, Dr. Schnitzer's opinions are not inconsistent with the conclusions of Dr. Fleet, who attributes Claimant's symptoms to her work-related injury.

Thus, because Employer/Carrier offered no medical evidence to rebut the work-relatedness of Claimant's cervical strain, lumbar radiculitis, pain, and pain induced insomnia, I find that those conditions are related to her job injury.

Assuming **arguendo** that Employer rebutted the Section 20(a) presumption, I find that the medical evidence of record supports Dr. Fleet's reasoned opinion that Claimant's cervical strain, lumbar radiculitis, pain and pain-induced insomnia are related to her job injury.

The record establishes that, since Claimant first treated with Dr. Cooper on March 12, 1999, she has consistently complained of pain in her neck, left arm and lower back.

Although Dr. Cooper occasionally reported less neck pain than back pain, he reported numbness, tingling and pain that radiated into Claimant's legs in addition to her original complaints of pain. Dr. Cooper's diagnoses of Claimant included cervical strain and lumbosacral strain. Dr. Cooper prescribed a variety of medications, including Soma, Lorcet, Skelaxin, Naprelan, and Magsal.

Because Claimant continued to complain of pain "all over," Dr. Cooper referred her to Dr. McCloskey, who noted that Claimant initially complained of low back and left leg pain radiating to her foot, neck and shoulder pain, and neck stiffness. On May 31, 1999, Dr. McCloskey diagnosed post-traumatic low back syndrome with left leg pain, post-traumatic neck pain and probable carpal tunnel syndrome. Claimant's complaints of pain persisted until Dr. McCloskey last saw Claimant in January 2000. Because of her continuing complaints of pain, Dr. McCloskey referred Claimant to Drs. Millette, Noblin, and Schnitzer.

On June 21, 1999, Dr. Millette found posterior tibialis on the left and myofascial spasm on the left. Likewise, Dr. Noblin reported moderate spasm in Claimant's neck, when he referred Claimant back to Dr. McCloskey. While he treated Claimant, Dr. Noblin diagnosed lumbar sprain, cervical sprain, cervical and lumbar mild degenerative disc disease with spasm and pain.

As noted above, Dr. Schnitzer testified Claimant's condition did not significantly improve since his October 1999 treatment of her until his June 2002 evaluation. While he treated Claimant, Dr. Schnitzer found degenerative disc disease of the lumbar spine, chronic neck and low back pain with radicular and myofascial features, non-organic findings of pain, persistent radicular pain from Claimant's neck to her left arm. He prescribed medications for pain and sleep. He provided trigger point injections into Claimant's trapezius, in which he found spasms. Dr. Schnitzer concluded Claimant was not necessarily a malingerer because of the non-organic component of her pain. He also continued to believe that physical therapy may be necessary.

Consequently, a review of the entire record supports Dr. Fleet's opinions that Claimant's cervical strain, lumbar radiculitis, pain, and pain-induced insomnia are related to her work injury. Accordingly, I find the preponderance of probative evidence establishes that Claimant suffered a job injury on March 6, 1999 which caused her cervical sprain, lumbar radiculitis, pain, and pain-induced insomnia.

**b. Claimant's Carpal Tunnel Syndrome, Headaches, and Hip Pain**

I find the medical records and testimony adduced belie Dr. Fleet's conclusions about Claimant's carpal tunnel syndrome and her job injury. Although Dr. Fleet indicated without explanation that Claimant's carpal tunnel syndrome was related to her traumatic job injury, his records provide no evidence of his opinion regarding causation while he treated Claimant. Likewise, the records of Drs. McCloskey and Ray do not indicate opinions regarding the relationship of Claimant's carpal tunnel syndrome and her work.

On the other hand, Dr. Schnitzer, who treated Claimant concurrently with Dr. Fleet, specifically reported that it was not clear whether Claimant's carpal tunnel syndrome was related to her employment with Employer. He testified that, while he treated Claimant, he could not render an opinion that there was a relationship between Claimant's carpal tunnel syndrome and her work. By his August 2002 deposition, Dr. Schnitzer still could not conclude Claimant's carpal tunnel syndrome was work-related. Dr. Schnitzer, who was deposed and subject to cross-examination, was much more specific in his conclusions. Consequently, I find Employer presented specific and comprehensive evidence severing the potential connection between any injury or aggravation of a pre-existing condition and Claimant's working conditions. Thus, because Employer has established suitable rebuttal evidence to challenge the Section 20(a) presumption regarding Claimant's carpal tunnel syndrome, the evidence of record must be weighed as a whole.

I accord greater weight to the medical opinion of Dr. Schnitzer. He was deposed and subjected to cross-examination, while Dr. Fleet's tenuous conclusions were provided in Counsel for Claimant's form document without any supporting explanation. Dr. Fleet's remarks do not establish whether he attributes Claimant's carpal tunnel syndrome on her left, right, or both sides to the job injury, nor do they establish an explanation for Claimant's carpal tunnel syndrome on her right side. Although Dr. Schnitzer concluded that it might be conceivable that Claimant's carpal tunnel syndrome could have been related to her job if her documented job activities involved repetitive work involving the hands and wrists, the record does indicate any documented job activities involving repetitive work with Claimant's hands and wrists. Further, Dr. Schnitzer's opinion that Claimant's work might possibly have contributed to her

carpal tunnel syndrome was based on the assumption Claimant was a painter. The record establishes Claimant was working as a painter's helper when she was injured. Dr. Schnitzer thus could not conclude that her job injury caused her condition, based upon all of the clinical evidence, including Claimant's EMG data obtained by Dr. Fleet.

Although Claimant asserts her traumatic injury lifting a grate caused her carpal tunnel syndrome, Dr. Schnitzer noted that carpal tunnel syndrome is usually caused by chronic, repetitive irritations to the wrist joint. There is no indication that Claimant suffered chronic, repetitive, wrist joint irritations while working for Employer. Thus, the record supports Dr. Schnitzer's opinion that it is unclear whether Claimant's carpal tunnel syndrome is related to her employment.

Further, although Dr. Fleet discussed Claimant's carpal tunnel syndrome, his records did not delineate the basis upon which he concluded that Claimant's condition was work-related. The EMG data that Dr. Fleet obtained was also interpreted by Dr. Schnitzer, who could not conclude Claimant's carpal tunnel syndrome was work-related. There is no evidence of record on which Dr. Fleet relied to conclude Claimant's carpal tunnel syndrome was related to her job injury. Moreover, although Drs. Ray and McCloskey noted Claimant's symptoms of carpal tunnel syndrome, neither physician offered an opinion that her condition was caused by her March 1999 job injury or working conditions. Accordingly, I find that Dr. Fleet's opinion is not well-reasoned, nor is his opinion buttressed by any objective evidence of record.

Thus, based on the record as a whole and weighing all relevant medical evidence, I find that Claimant failed to establish causation for her carpal tunnel syndrome by a preponderance of the evidence. Consequently, Claimant's claim for benefits regarding her carpal tunnel syndrome must be denied.

Claimant testified her headaches did not start until treating with Dr. Fleet in January 2000. The length of time that passed between Claimant's job injury and her first symptoms of headaches, which was not reported by the other treating physicians in the period following her job injury, compels a finding that Claimant's headaches are unrelated to her job injury. Further, Dr. Fleet did not relate Claimant's headaches to her job injury when he opined Claimant's other symptoms were related to that injury. My conclusion that Claimant's headaches

are unrelated to her job injury is also buttressed by the records of Dr. Schnitzer, who reported Claimant discontinued the use of Skelaxin and Lodine because she complained the medication caused her headaches. After Dr. Schnitzer recommended the re-use of Skelaxin, Dr. Fleet reported Claimant's symptoms of headaches, which were "new since injury." Accordingly, I find that Claimant has not established a **prima facie** claim for compensation with respect to her headaches. Therefore, she is not entitled to the Section 20(a) presumption that her headaches arose out of and in the course of her employment.

Likewise, Claimant's complaints of hip pain first became manifest while treating with Dr. Fleet on November 16, 2001, over two years post-injury. The length of time that passed between Claimant's injury and her complaints of hip pain complicate a finding that the condition is related to her job injury. Moreover, Dr. Fleet did not attribute the symptom to Claimant's job injury when he opined Claimant suffered various symptoms as a result of her job injury. No other physician of record reported the hip pain or attributed such pain to Claimant's job injury. Consequently, I find that Claimant has failed to establish a **prima facie** claim for compensation with respect to her hip pain. As a result, she is not entitled to the Section 20(a) presumption that her hip pain arose out of and in the course of employment.

**B. Intervening Cause**

At the hearing, Employer/Carrier argued that Claimant's medical conditions, based on subjective symptoms, "expanded" to include new symptoms that were not causally related to her work injury, but rather were due to an independent cause; however, Employer/Carrier could not identify an independent cause. (Tr. 22-23). Employer/Carrier did not address this argument post-hearing, nor did they identify what independent cause occurred to terminate their liability.

Accordingly, I find that Employer/Carrier offered speculation, and failed to produce substantial evidence of an intervening cause sufficient to rebut the Section 20(a) presumption. See, e.g., Buchanan v. International Transportation Services, 33 BRBS 32, 38 n. 6 (1999)(If a claimant alleged a work-related injury and the employer sought to establish the existence of a later traumatic event that is the cause of the claimant's disability, the employer would bear both the burden of production and of persuasion in order to escape liability).

**C. Nature and Extent of Disability**

The parties stipulated that Claimant suffers from a compensable injury; however the burden of proving the nature and extent of her disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

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

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by 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 question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that she is unable to return to his regular or usual employment due to her work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of her usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing her usual employment, she suffers no loss of wage earning capacity and is no longer disabled under the Act.

**D. Maximum Medical Improvement (MMI)**

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when her condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The date on which Claimant reached maximum medical improvement is at issue. Prefatorily, it is well-settled that the opinions of a treating physician are entitled to greater weight than the opinions of non-treating physicians in administrative proceedings. See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000). The only two physicians of record who offered an opinion on maximum medical improvement are Drs. Schnitzer and Fleet, although Employer/Carrier suggest Dr. McCloskey also offered an opinion regarding maximum medical improvement and permanent impairment. Drs. McCloskey and Fleet

treated Claimant at successive periods of time whereas Dr. Schnitzer treated Claimant concurrently with both of the foregoing physicians. Accordingly, the opinions of all three treating physicians arguably may be entitled to greater probative value.

Of the medical opinions of record, I find Dr. Schnitzer's opinion that Claimant reached maximum medical improvement on April 26, 2000 persuasive and entitled to greater probative value. Dr. Schnitzer, a pain specialist, explained that Claimant's condition did not significantly improve after he began treating her in October 1999 until he last saw her in June 2002, but remained "rather static."

The medical records of evidence establish that Claimant continued complaining of the same general host of symptoms after her March 1999 injury. Specifically, she complained of pain in the left side of her neck, her left arm, and her low back radiating into her left leg. Claimant continued complaining of her persistent symptoms as she treated with Drs. McCloskey, Noblin, and Millette.

Upon treating with Dr. Schnitzer, Claimant continued complaining of low back/left leg pain, and neck pain with intermittent radiation into her left arm. He provided conservative treatment, including prescribing sleep and pain medication, trigger point injections, and recommending Claimant to continue working. On April 26, 2000, the date he opined Claimant reached maximum medical improvement, Dr. Schnitzer again found Claimant complained of persistent left-sided neck, shoulder, low back and left leg pain. Likewise, when he examined Claimant in June 2002, Claimant continued to complain of pain in her neck, low back, left arm and left leg. He concluded Claimant's restrictions were the same in 2002 as they were since he last saw her in April 2000, making no changes in regard to those restrictions or any other medications or treatment modalities.

Dr. Schnitzer also had the benefit of reviewing Dr. Fleet's January 2000 EMG data when he formed his original opinion that Claimant reached maximum medical improvement on April 26, 2000. In June 2002, Dr. Schnitzer examined Claimant and was provided Claimant's full medical history since her last visit with him. Dr. Schnitzer's opinion regarding maximum medical improvement did not change as of his August 2002 deposition. Thus, I find Dr. Schnitzer's opinion that Claimant reached maximum medical

improvement on April 26, 2000 is well-reasoned, supported by the record, and entitled to greater probative value.

Although Dr. Fleet concluded by June 2002 that Claimant had not yet reached maximum medical improvement, I find that his opinion is entitled to diminished probative value. As previously discussed, Dr. Fleet's opinion is not well-reasoned because it was provided in Counsel for Claimant's fill-in-the-blank form and was supported by no underlying analysis. Further, Claimant's medical records do not support Dr. Fleet's conclusion that Claimant had not reached maximum medical improvement by June 2002. Rather, the records establish that Claimant's condition stabilized prior to Dr. Fleet's treatment of her.

While Dr. Fleet treated Claimant, she continued complaining of the same host of symptoms for which she was already treated by Dr. Schnitzer. Dr. Fleet continued to provide conservative treatment and prescribe medication that was consistent with Dr. Schnitzer's treatment. While Claimant periodically complained of a few symptoms other than her neck, low back and arm pain, the record establishes that those symptoms were temporary and unrelated to her job injury, as discussed above.

Further, although surgery was ultimately performed for Claimant's carpal tunnel syndrome, it was not contemplated by either Dr. Fleet or Dr. Schnitzer by April 26, 2000, when Dr. Schnitzer concluded Claimant had reached maximum medical improvement. Likewise, in August 2000, Dr. Fleet indicated that surgery was not required due to Claimant's March 1999 injury. Notwithstanding the foregoing, the eventual surgery was for a condition for which Claimant failed to carry her burden of persuasion regarding causation, as discussed above. Thus, I conclude Dr. Schnitzer's opinion is more reliable than Dr. Fleet's opinion, which was formed after surgery for an unrelated condition.

Assuming **arguendo** that Dr. McCloskey found Claimant reached maximum medical improvement and assigned a permanent impairment rating on December 28, 1999, I find that his opinions are entitled to diminished probative value. Any basis upon which Dr. McCloskey could render a well-reasoned opinion is absent in Dr. McCloskey's records, which do not reveal any discussion regarding whether Claimant reached maximum medical improvement or should be assigned permanent impairment ratings. Employer/Carrier cited no authority for their assertion that Dr. McCloskey offered such opinions. Thus, Dr. McCloskey's purported opinions regarding

maximum medical improvement and permanent impairment ratings are not supported by the record and entitled to no weight.

Based on Claimant's testimony and the medical evidence of record, I find and conclude that Claimant reached maximum medical improvement on April 26, 2000, consistent with the opinion of Dr. Schnitzer. Accordingly, all periods of disability prior to April 26, 2000 are considered temporary under the Act. Therefore, Claimant is entitled to temporary disability compensation benefits from March 6, 1999, the date of her injury, until April 25, 2000.

**March 6, 1999 - January 9, 2000**

Since her March 6, 1999 injury, Claimant could not return to her former occupation, but remained under light-duty restrictions while she treated with Dr. Cooper until he referred her to Dr. McCloskey, who also assigned restrictions. Dr. Noblin likewise assigned restrictions in July 1999. In October 1999, when Claimant was under modified duty for Employer, Dr. Schnitzer reported Claimant had not significantly improved since her job injury.

Employer/Carrier argue Claimant was eventually released by Dr. McCloskey to return to her prior occupation at regular duty without restrictions on December 28, 1999, based on her job description and her FCE; however, I find that the job description provided with Claimant's FCE does not accurately describe Claimant's prior job. The handwritten job summary of a supervisor's description when no job description was otherwise proffered indicates Claimant's requirements included mixing cans of paint, moving painting equipment, and cleaning areas prior to and after painting. Claimant was required to climb, bend, stoop and lift usually no greater than 10 pounds.

Claimant's injury, which involved lifting a 60-pound grate, belies that job description. Moreover, Employer's records indicate Claimant failed to follow safety rules against picking up items over 40 pounds alone,[17] indicating Claimant must lift weights up to 39 pounds alone. Claimant also testified she consistently carried large buckets of scrap metal up five flights of stairs to discard the scraps at the time of her injury.

---

[17] See EX-4, p. 10.

Therefore, I conclude the requirements of Claimant's former occupation exceeded Employer's job description.

Thus, I find Dr. McCloskey's opinion that Claimant could return to unrestricted work according to Employer's job description is based on inaccurate information and unpersuasive in establishing Claimant could return to her prior occupation. Likewise, Dr. Cooper's conclusion that Claimant could return to work within the restrictions indicated in her FCE does not indicate whether Claimant could return to her former occupation because it relied upon the same inaccurate job description. Moreover, when Dr. Cooper last saw Claimant on December 30, 1999, he had not seen her since May 14, 1999. He did not confer with Drs. Schnitzer or McCloskey about Claimant's treatment, nor did he review any of Claimant's medical records other than records of Drs. Schnitzer and McCloskey. On December 30, 1999, the records of Drs. Cooper and McCloskey establish that Claimant, whose condition did not significantly improve, continued to complain of disabling neck, arm, and back pain, for which she was referred back to Dr. Schnitzer for further treatment. Thus, the opinions of Drs. Cooper and McCloskey do not establish Claimant could return to her prior occupation.

Accordingly, I find that Claimant was unable to return to her former occupation after her job injury. However, based on the parties' stipulations, Claimant did not suffer any loss in wage earning capacity during the period from her March 6, 1999 injury until her January 10, 2000 termination. "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, for Claimant to receive a disability award, she must have an economic loss coupled with a physical or psychological impairment. Sproull, supra. Because Claimant was provided a job at her pre-injury wages, I find she did not suffer a loss in wage-earning capacity and was therefore not disabled under the Act. See Swain v. Bath Iron Works Corp., 17 BRBS 145, 147 (1985). Thus, Claimant is not entitled to compensation benefits from March 6, 1999 to January 9, 2000.

**January 10, 2000 - April 25, 2000**

On January 10, 2000, Claimant was laid off from her modified job for reasons unrelated to any of her own actions. Because Claimant remained unable to return to her former occupation, she has established a **prima facie** case of total disability. Thus,

the burden shifts to Employer to establish suitable alternative employment, as discussed below. Because Employer/Carrier failed to establish suitable alternative employment until December 18, 2000, I find Employer failed to satisfy its burden. Thus, Claimant's temporary partial disability became temporary total on January 10, 2000. Accordingly, Claimant is entitled to temporary total compensation benefits from January 10, 2000 until April 25, 2000, based on her pre-injury average weekly wage of $448.70.

**April 26, 2000 - December 17, 2000**

On April 26, 2000, when Claimant reached maximum medical improvement, her condition became permanent under the Act. Because Claimant remained unable to return to her former occupation after reaching maximum medical improvement, she has established a **prima facie** case of total disability from April 26, 2000 until December 17, 2000, the date suitable alternate employment became available to Claimant. Thus, Claimant is entitled to permanent total disability compensation benefits from April 26, 2000 through December 17, 2000, based on her pre-injury average weekly wage of $448.70.

**December 18, 2000 - Present**

On December 18, 2000, Claimant remained unable to return to her former occupation, but Employer established suitable alternative employment. Accordingly, Claimant's disability status became permanent partial, which entitles her to compensation benefits based on the difference between her pre-injury average weekly wage and her post-injury wage earning capacity from December 18, 2000 and continuing through present and thereafter.

**E. Suitable Alternative Employment**

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following her

injury, that is, what types of jobs is she capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which she reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Further, an employer may discharge its burden of establishing suitable alternate employment by offering a claimant a job in its facility, including a light-duty job, as long as it does not constitute sheltered employment. Darby v. Ingalls Shipbuilding, Inc. 99 F.2d 685, 688 (5th Cir. 1996); Ezell v.

Direct Labor, Inc., 33 BRBS 19 (1999); Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980). A job tailored to an employee's restrictions is not sheltered as long as it involves necessary work. Darden, supra at 226. Light-duty work is not sheltered employment if the employee is capable of performing it, it is necessary to employer's operations, it is profitable to employer, and several shifts perform the same work. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987); Walker, supra.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that she tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

After her March 6, 1999 job injury, Claimant did not return to her prior occupation, but continued working light-duty jobs for Employer. Claimant agreed that her work in the tool room and cleaning the yard were necessary jobs. Likewise, Mr. Lane and Mr. Martin testified that the jobs Claimant continued to perform were necessary jobs, which were profitable for Employer. For these jobs, the parties stipulated Claimant's earnings were equal to or no less than her pre-injury average weekly wage. Accordingly, the record establishes Claimant's post-injury jobs with Employer were not sheltered employment. Thus, suitable alternate employment became available to Claimant on March 6, 1999, and continued thereafter until Claimant's termination on January 10, 2000.

On January 10, 2000, Claimant was laid off from her job for reasons unrelated to any of her own actions. Thus, when Employer withdrew Claimant's opportunity for modified work, suitable alternative employment in its facility was no longer available. Wilson v. Dravo Corp., 22 BRBS 463, 466 (1989).[18]

Employer/Carrier argue they are not liable for compensation because Employer terminated Claimant due to a reduction in force rather than her disability from her work-related injury, relying on Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374, 375 (1981)(the Act provides payments for a work-related disability, and a mere layoff alone does not entitle a claimant to benefits). Employer/Carrier's reliance upon Suppa is also misplaced because the claimant in Suppa did not establish that he continued to suffer from a work-related injury or that he was disabled from returning to his former occupation prior to his termination. As discussed above, Claimant established that she suffered from a work-related injury that disabled her from returning to her prior occupation. Accordingly, Claimant was not merely laid off, but continued to suffer a disability from her job injury when she was terminated.

In the present matter, Claimant established that she could not return to her former job as a painter's helper due to her work-related injury and that she was terminated due to no actions on her part. The burden thus shifts to Employer to show the availability of a new suitable alternate job. Vasquez v.

---

[18] Employer/Carrier's reliance on cases where an employee is terminated for violations of company rules or collective bargaining agreements is misplaced. Those lines of cases involve an employee's personal actions giving rise to alternate grounds for employment termination. See Brooks v. Director, OWCP, 2 F.3d 64 (4th Cir. 1993)(the Board's denial of benefits was upheld where a work-related injury led an employer to discover falsification of a claimant's company records and to consequently fire the claimant); Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986)(claimant was discharged for a violation of a union's collective bargaining agreement); Harrod v. Newport News Shipbuilding and Dry Dock Co., 12 BRBS 10 (1980)(a claimant was fired for violating a company rule against possessing hand guns at work); Mangaliman v. Lockheed Shipbuilding Co., 30 BRBS 39 (1986)(claimant was fired after receiving three performance notices within twelve months for unauthorized absences and unsatisfactory work).

Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990). I find that Employer/Carrier did not carry this burden until establishing suitable alternate employment on December 18, 2000.

On December 18, 2000, Ms. Locascio provided a survey of jobs available within Claimant's vocational profile in the geographical area where Claimant resides, based on restrictions assigned by Dr. Schnitzer, the FCE results, and restrictions against repetitive hand use. She testified to a reasonable degree of vocational certainty that Claimant was capable of performing the jobs identified in the survey.

Employer/Carrier assert suitable alternate employment was established on April 26, 2000, and possibly as early as December 1999, based on the December 18, 2000 labor survey, relying on Ms. Locascio's opinion that jobs identified on behalf of Claimant are "pretty much available" throughout the year. Although she testified that the jobs were typically available, Ms. Locascio specifically testified she could only state the jobs were available when she identified them in December 2000. According to Ms. Locascio, there was no determination made whether the jobs existed when Claimant was injured or when she reached maximum medical improvement on April 26, 2000. Thus, I find Ms. Locascio's testimony does not establish the jobs were reasonably available in the community for which Claimant was able to compete and which she reasonably and likely could secure prior to December 18, 2000.

Since I find Claimant is capable or performing light-duty work with restrictions against frequent overhead reaching, frequent overhead work, frequent manipulation movements of her hands, and lifting no more than 25 pounds, per Dr. Schnitzer's restrictions, most of the jobs identified by Ms. Locascio satisfy Employer/Carrier's burden. All of the jobs in Ms. Locascio's survey are sedentary or light-duty jobs requiring no more than a high school education. None of the jobs require lifting more than 20 pounds.

The job as a hostess/cashier requires Claimant to seat people in a restaurant, accept customer payment, and provide change. There is no requirement to perform frequent overhead reaching, frequent overhead work, or frequent manipulation of her hands. The counter attendant job requires Claimant to operate a cash register, accept customer payments, and fill orders. There is no requirement to perform frequent overhead reaching, frequent overhead work, or frequent manipulation of her hands. The job

requires some cashier experience, which Claimant testified she obtained while working for former employers. The room service dispatcher job requires Claimant to dispatch servers to provide room service. The job also requires general clerical skills, which Claimant testified she obtained in previous employment. The receptionist job involves answering phones, assisting guests, providing information, and general clerical skills. There is no requirement to perform frequent overhead reaching, frequent overhead work, or frequent manipulation of Claimant's hands.

Some of the jobs on Ms. Locascio's survey would not be suitable alternative. Dr. Schnitzer reviewed the jobs at his deposition and opined the job as a showroom usher would not be suitable alternative employment. Meanwhile, the cashier/floor worker job requires hanging clothes and picking up clothes from the floor to replace on racks. It also involves picking up toys to replace on shelves. The job does not indicate how much of this work to be performed is overhead work or whether it involves overhead reaching. Likewise, the credit clerk/cashier job requires Claimant to establish accounts for casino guests, verify checks, and input data. Although the job requires previous cashier experience and general clerical experience, which Claimant testified she has, the job also requires typing. The job does not identify how much Claimant would be required to type. Thus, the job fails to specify whether frequent manipulation movements of her hands may be avoided. Accordingly, I find the jobs as a showroom usher, cashier/floor worker, and credit clerk/cashier do not qualify as suitable alternate employment.

Thus, I find and conclude Employer/Carrier have established suitable alternative employment as of December 18, 2000. Claimant must demonstrate she used reasonable diligence to obtain suitable alternative employment without success.

In this case, Claimant failed to demonstrate a reasonably diligent job search. She met with the vocational expert and received a list of potential jobs. While Dr. Fleet's records indicate Claimant was provided a list of jobs to look into, there is no record that he discussed the jobs with Claimant or whether Claimant desired to apply for the jobs. Rather, Dr. Fleet provided a Work/School Excuse, indicating Claimant was under his care and unable to attend work until further notice.

Nevertheless, Claimant searched for jobs three days prior to the hearing in this matter. Most of the 8 jobs into which she

inquired were not hiring or taking applications. She failed to follow-up with the potential employers who were hiring. Claimant admitted she failed to visit one potential employer, Moss Point Marine, but placed a phone call instead. Further, she admitted Moss Point Marine was actually closed. Claimant testified at the hearing that she did not really believe she is able to perform any work. She applied for these occupations to prove that she could not work in her condition. Although Claimant stated she would have worked if a prospective employer actually hired her, she stated she is sure she cannot work.

Consequently, I find Claimant has failed to demonstrate a reasonably diligent job search. Thus, I find that, given Claimant's age, education, industrial history and availability of employment, Claimant's residual wage earning capacity amounts to the average of the hourly wages of jobs reasonably available. See Avondale Industries, Inc. v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998)(averaging is a reasonable method for determining an employee's post-injury wage earning capacity); Louisiana Insurance Guaranty Association v. Abbot, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994)(averaging salary figures to establish earning capacity is appropriate and reasonable). The suitable jobs identified in Ms. Locascio's December 18, 2000 report include:

| Description: | Hourly Rate: |
|---|---|
| Hostess/Cashier | $5.88[19] |
| Counter Attendant | $8.17[20] |
| Room Service Dispatcher | $6.00 |
| Receptionist | $6.00 |

Accordingly, I find Employer established suitable alternative employment on December 18, 2000 paying $6.51 per hour (($5.88 + $8.17 + $6.00 + $6.00) ÷ 4 = $6.51), or $260.40 for a 40-hour work week ($6.51 x 40 = $260.40). Taking into consideration the increases in the national average weekly wage between March 6,

---

[19] The job paid a minimum of $12,221.00 per year. Assuming a 5-day work week of 8-hour days, the minimum amount Claimant would earn is $5.88 an hour. ($12,221 ÷ (5 x 8 x 52) = $5.88).

[20] The job paid a minimum of $17,000.00 per year. Assuming a 5-day work week of 8-hour days, the minimum amount Claimant would earn is $8.17 an hour. ($17,000 ÷ (5 x 8 x 52) = $8.17).

1999, the date of accident, and December 18, 2000, the date Employer proved suitable alternative employment, $260.40 per week in 2000 equates to $243.09 in March 2000.[21] Thus, as Claimant's average weekly wage at the time of accident was $448.70, and her post-injury earning capacity is $243.09, Claimant is entitled to permanent partial disability benefits, pursuant to Section 8(c)(21), of $137.14 per week.[22]

**F. Entitlement to Medical Care and Benefits**

Section 7(a) of the Act provides that:

> 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 of recovery may require.

---

[21] Claimant was injured on March 6, 1999. The national average weekly wage from October 1, 1998 to September 30, 1999 was $435.88. Employer demonstrated suitable alternative employment on December 18, 2000. The national average weekly wage from October 1, 2000 to September 30, 2001 was $466.91, reflecting an increase of $31.03, or 7.12% from 2000. ($31.03 ÷ $435.88 = .0712). Employer established suitable alternative employment at $260.40 per week on December 18, 2000, and discounting that amount by 7.12% results in 2000 earnings of $243.09 ($260.40 ÷ 1.0712 = $243.09). See Table of Compensation Rates as of October 1, 2001, Longshore Newsletter and Chronicle of Maritime Injury Law, vol. XIX, No. 7, Oct. 2001.

[22] Section 8(c)(21) provides:

> Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21)(2002). Thus, Claimant's compensation benefits are computed by subtracting $243.09 from her average weekly wage of $448.70, yielding a difference of $205.61, which, when multiplied by .667, equals $137.14.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also 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 was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on her own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking her employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant

requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

**1. Claimant's Right to Choose an Attending Physician**

Section 7(b) of the Act provides in pertinent part,

> The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided. If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him. ... Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

33 U.S.C. § 907(b). See also 20 C.F.R. § 702.405 and 20 C.F.R. Section 702.406(a).

In the present matter, there is no showing that Dr. Cooper was Claimant's choice of physician based on a medical emergency. Rather, Claimant was in no need of immediate emergency care, and was able to recount the facts of her injury to Dr. Cooper. Claimant continued treating with Dr. Cooper for several months until he referred her to Dr. McCloskey, who in turn, referred her to Drs. Noblin, Millette, and Schnitzer. Claimant never objected to her treatment, for which Employer paid.

Employer argues Claimant initially chose Dr. Cooper as her treating physician for purposes of medical treatment under the Act because she signed a choice of physician form and continued to treat with Dr. Cooper on various occasions. Consequently, Employer/Carrier argue Claimant was required to obtain their consent to change her attending physician to Dr. Fleet. Further, Employer/Carrier assert Claimant did not seek authorization for Dr. Fleet's treatment. Thus, Employer/Carrier conclude Claimant is not entitled to reimbursement for the services of Dr. Fleet or his referrals.

Employer's argument that Claimant expressed her choice of physician when she signed Employer's form is unpersuasive. Although Employer obtained a signed choice of physician form from

Claimant, the record indicates Claimant did not understand its purpose or intent. Mr. Howard testified that injured employees are immediately sent to Dr. Cooper and subsequently provided a "choice of physician form for Dr. Cooper," in compliance with Employer's "standard procedure." Although he testified Claimant was asked whether she was satisfied with Dr. Cooper or desired another physician, he did not indicate whether Claimant was instructed on her right to choose her own physician under the Act. Further, he did not provide Claimant a list of other physicians or suggest other physicians because he was not allowed to suggest "anyone outside." Further, he could not recall whether he provided Claimant with a list of DOL-approved physicians.

Employer's policy might expedite claimants' medical treatment; however, the policy can frustrate a claimant's right to her choice of a physician under the Act where, as here, a claimant is unaware of her rights or unfamiliar with the choice of physician form. See Hunt v. Newport News Shipbuilding & Dry Dock Co., 28 BRBS 364, 371 (1994)(an administrative law judge rationally concluded an employer's physicians were claimant's physicians of choice when claimant had previous injuries and was familiar with the process of selecting a treating physician, as well as with the selection of physician form); Bulone v. Universal Terminal & Stevedoring Corp., 8 BRBS 515, 517-518 (1978), overruled on other grounds, Shahady v. Atlas Tile & Marble Co., 13 BRBS 1007 (1981), rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 495 U.S. 1146 (1983)(finding that a physician who was referred to the claimant by emergency room personnel was not claimant's choice of physician when the claimant spoke very little English, and believed in good faith he was required to treat with that physician, based on a note he received). Specifically, Claimant expressed confusion over the form, and testified she thought signing the form was necessary for medical services. Accordingly, the choice of physician form, under these circumstances, is not persuasive evidence that Claimant exercised her choice of physician under the Act.

Nevertheless, based on the present facts and through her actions, I find Claimant chose Employer's physicians for treatment. The facts of this case are similar to Senegal v. Strachan Shipping Co., 21 BRBS 8, 11 (1988), where an injured worker was referred by an emergency room to a physician, Dr. Palm. Claimant continued to treat with Dr. Palm after the referral until his release to work. Subsequently, the claimant sought medical treatment from another physician, whose

authorization was refused by the employer. The Board held that, although claimant was referred to Dr. Palm by the emergency room, he continued to receive medical care from Dr. Palm until this doctor released him for work. Although Dr. Palm was not a pulmonary specialist, he referred claimant to specialists skilled in treating his injuries. The specialists provided necessary care for the proper treatment of the claimant's injury. Thus, claimant's initial choice, Dr. Palm, provided him with the care of a specialist. Accordingly, the Board held that the employer was not required to consent to a change in physicians. Because employer did not consent to the change, the medical services claimant subsequently received were not reimbursable. Id.

Likewise, Dr. Cooper was Claimant's initial choice of physician because, although Employer referred Claimant to him in March 1999, she continued to receive medical care from him until he released her for work in December 2000. Although Dr. Cooper was not a specialist, he referred claimant to specialists skilled in treating Claimant’s injuries. Drs. McCloskey, Millette, Noblin, and Schnitzer provided necessary care by specialists for the proper treatment of Claimant's March 6, 1999 injury. After Dr. Cooper released Claimant to work, she desired to continue her treatment with Dr. Schnitzer, a pain specialist, for whose services she knew Employer/Carrier would pay. Claimant specifically understood Employer would also continue to pay for the services of Drs. Cooper, McCloskey, and Noblin. Thus, Claimant's initial choice of physician, Dr. Cooper, provided her with the care of a specialist.

Moreover, Claimant acknowledged she was made aware of her right to choose a physician in January 2000, when she decided to continue treating with Dr. Schnitzer. Likewise, Dr. Cooper’s December 30, 1999 report notes that Claimant was aware of her option to choose her own physician. Accordingly, I find Employer/Carrier were not required to consent to a change in physicians to Dr. Fleet. Because Employer/Carrier did not consent to the Claimant’s change of physicians, the medical services she received from Dr. Fleet are not reimbursable.

Additionally, I find Employer/Carrier never refused necessary treatment excusing Claimant’s failure to seek Employer/Carrier’s authorization. Once the employer has refused to provide treatment or to satisfy a claimant’s request for treatment, the claimant is released from the obligation of continuing to seek the employer’s approval. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988). Claimant understood

Employer/Carrier paid for the services of Drs. Cooper, McCloskey, Noblin, Millette, and Schnitzer and were obligated to continue paying for her medical services. The record establishes Drs. Cooper and Schnitzer would continue treating Claimant as needed. Likewise, the record establishes Dr. Schnitzer continued treating Claimant at Employer/Carrier's cost. Drs. Schnitzer and Cooper both testified they were willing and had authority to treat Claimant. Thus, I conclude Employer/Carrier never refused medical treatment for Claimant.

I further find the actions of Drs. Cooper and Schnitzer were not tantamount to Employer/Carrier's refusal to provide medical treatment. Matthews v. Jeffboat, Inc., 18 BRBS 185, 189 (1986)(where an employer's physician's actions constitute a refusal of treatment, the employee is justified in seeking treatment elsewhere without employer's authorization and is entitled to reimbursement for necessary treatment subsequently procured on his own); Slattery Associates v. Lloyd, 725 F.2d 780, 16 BRBS 44(CRT)(D.C. Cir. 1984)(a physician's positive diagnosis and release for work did not amount to a refusal of treatment). Although Dr. Cooper released Claimant to return to work, he and Dr. Schnitzer would continue treating Claimant as necessary. The record conclusively demonstrates Drs. Cooper and Schnitzer had authority to treat Claimant. Accordingly, I find the actions of Drs. Schnitzer and Cooper are not tantamount to Employer's refusal of medical treatment.

Lastly, I find Employer/Carrier's denial of Dr. Danielson as Claimant's choice of physician does not relieve Claimant of her obligation to seek authorization for a different physician, Dr. Fleet, nor equate to a tacit authorization to treat with a physician other than Dr. Danielson under the Act. Claimant appears to argue that a request for Dr. Fleet's services would have been futile because Employer/Carrier denied authorization for Dr. Danielson. Shell v. Teledyne Movable Offshore, 14 BRBS 585, 590 n.2 (1981)(the employee need not request treatment when such a request would be futile). I find her unsupported allegation is unpersuasive to relieve Claimant of her obligation to seek authorization under the Act.

Assuming **arguendo** Claimant's request for Dr. Fleet would be futile, I find the record does not establish that Dr. Fleet's medical services were necessary. Rieche v. Tracor Marine, Inc., 16 BRBS 272 (1984)(when a claimant requests treatment and the employer fails to satisfy that request, the claimant is entitled to reimbursement pursuant to Section 7(d) if the treatment she

subsequently procures was necessary for treatment of the injury). Dr. Fleet provided the same regular, conservative treatment, including medication for Claimant's symptoms, that Dr. Schnitzer provided. The primary distinctions between the physicians' services are that Dr. Fleet restricted Claimant from returning to any kind of work and recommended surgery for symptoms unrelated to Claimant's job injury. Accordingly, I find Claimant failed to establish Dr. Fleet's services were necessary for her treatment.

Thus, I find that Employer/Carrier have provided proper care and treatment for Claimant under Section 7 of the Act, and must continue to provide reasonable and necessary medical care for Claimant's job injury, without liability for the costs of Drs. Fleet, Ray, Freeman, or any other unauthorized physicians to whom Dr. Fleet may have referred Claimant.

**2. Claimant's Carpal Tunnel Treatment and Surgery**

As discussed above, Claimant failed to establish her carpal tunnel syndrome is related to her job injury. Accordingly, I conclude Employer/Carrier are not liable for reimbursement of Claimant's treatment, including surgery, for this non-work-related condition.

## V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer provided medical payments; however, no compensation benefits were paid by Employer, including temporary partial benefits, permanent partial benefits, or permanent total benefits. Claimant's average weekly wage of $448.70 yields a compensation rate of $296.14.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of

her injury or compensation was due.[23] Thus, Employer was liable for Claimant's temporary partial disability compensation payment on March 20, 1999. The record does not support a find that Employer filed a notice of controversion, which should have been filed by March 20, 1999 to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion, and is liable for Section 14(e) penalties from March 6, 1999 until March 6, 2001, the date of informal conference. See National steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1295 (9th Cir. 1979)(employer's liability under Section 14(e) terminates when DOL knew of the facts that a proper notice would have revealed); Hearndon v. Ingalls Shipbuilding, Inc., 26 BRBS 17, 20 (1992)(DOL knew of facts that a proper notice would have revealed when the case was referred to OALJ for formal hearing); National steel & Shipbuilding Co. v. Dep't. of Labor, 606 F.2D 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co., 5 BRBS 794 (1977)(for the purposes of the Bonner test, the date the Department knew of the facts which a proper notice would have revealed is the date of informal conference); Browder v. Dillingham Ship Repair, 24 BRBS 216, 220, on recon., 25 BRBS 88 (1991)(employer is liable for Section 14(e) penalty, applicable from the time of injury until date of informal conference).

## VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982).

---

[23] Section 6(a) does not apply since Claimant suffered her disability for a period in excess of fourteen days.

This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

## VII. COST OF LIVING INCREASES

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Accordingly, upon reaching a state of permanent and total disability on April 26, 2000, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year for the applicable period of permanent total disability, and shall commence on October 1, 2000.[24] This increase shall be the lesser of the percentage that the national average weekly wage has increased from the preceding year or five percent, and shall be computed by the District Director.

## VIII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[25] A service sheet showing that

---

[24] See Trice v. Virginia International Terminals, Inc., 30 BRBS 165, 168 (1996)(It is well established that claimants are entitled to Section 10(f) cost of living adjustments to compensation only during periods of permanent total disability, not temporary total disability); Lozada v. Director, OWCP, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990) (Section 10(f) entitles claimants to cost of living adjustments only after total disability becomes permanent).

[25] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal

service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## IX. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from January 10, 2000 to April 25, 2000, based on Claimant's average weekly wage of $448.70, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from April 26, 2000 to December 17, 2000, based on Claimant's average weekly wage of $448.70, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from December 18, 2000, and continuing based on two-thirds of the difference between Claimant's average weekly wage of $448.70 and her reduced weekly earning capacity of $243.09 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section

---

conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **July 6, 2001**, the date this matter was referred from the District Director.

10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 6, 1999 work injury, pursuant to the provisions of Section 7 of the Act, consistent with this Decision and Order.

6. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments are found to be due and owing from March 6, 1999 to March 6, 2001.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**ORDERED** this 17th day of January, 2003, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge