U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 December 2002

CASE NUMBER: 2002-LHC-1014

OWCP NO.: 07-154809

IN THE MATTER OF

JOHN N. SIMMS,
Claimant

v.

PNEU-ELECT, INC.,
Employer

and

RELIANCE INSURANCE CO. c/o LOUISIANA INSURANCE GUARANTY ASSOCIATION c/o MOR-TEM RISK MANAGEMENT,
Carrier

APPEARANCES:

Andre' F. Toce, Esq.
On behalf of Claimant

John N. Chappuis, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by John Simms (Claimant) against Pneu-Elect, Inc., (Employer) and Reliance Insurance Co., c/o Louisiana Insurance Guaranty Association, c/o Mor-Tem Risk Management (Carrier). The issues raised by the parties could not be resolved administratively,

and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 9, 2002, in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twenty-seven exhibits, which were admitted, including: correspondence from Carrier; mileage records; filings with the district director for the U.S. Department of Labor; Employer/Carrier's discovery responses; medical billing summaries and medical bills from Drs. Stuart Phillips, Scott Gammel, F.T. Friedberg, and O.E. Reavill; the deposition of Dr. Stuart Phillips; medical billing summaries and medical bills from Park Place Surgery Center, Medical Center of Southwest Louisiana, Premier Medical Equipment, Acadiana Medical Laboratories, Acadiana Physical Therapy Clinic, Rosser's Pharmacy, Eckerd Drugs, Albertson's Pharmacy, and Acadian Ambulance; the medical records of Drs. Stuart Philips, Scott Gammel, O.E. Reavill, F.T. Freidberg, and Ricardo Leoni; medical records from Park Place Surgery Center, Medical Center of Southwest Louisiana, Our Lady of Lourds, and Occupational Medicine Clinic of Acadiana, Inc; and the vocational report of John Grimes.[1]

Employer submitted seven exhibits, which were admitted, including: records from Carrier; medical records from Drs. Ricardo Leoni, Olga Reavill and Claude Williams; medical records from Occupational Medical Clinic of Acadiana and Our Lady of Lourdes; and the deposition of Stuart Phillips. Post-hearing, the parties submitted, and I admit, the deposition testimony of Lester Colomb and Don Palmintier.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following findings of fact, conclusions of law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The injury occurred on October 16, 1999, in the course and scope of employment, and Claimant was employed as a foreman at the time of the accident;

2. Employer was advised of Claimant's injuries on October 16, 1999;

3. Employer filed notices of controversion on December 7, 1999, July 24, 2000, and October 23, 2000;

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Joint Exhibits - Ex-__, p.__; Administrative Law Judge Exhibits- ALJX-__, p.___.

4. An informal conference was held on August 7, 2001;

5. Claimant's average weekly wage at the time of the injury was $904.83, with a corresponding compensation rate of $603.22;[2]

6. As of September 13, 2002, Employer paid disability benefits from October 28, 1999, to May 5, 2000, totaling $16,890.17;

7. As of September 13, 2002, Claimant's total medical expenses are $93,958.26, of which Employer paid $5,439.44, leaving an outstanding balance of $88,518.82;

8. As of September 16, 2002, Claimant's total mileage for traveling to and from medical appointments is 5743 miles, and should the Court hold Employer liable for those expenses, Employer stipulates that Claimant's mileage expense is $1,952.62, reserving its right to challenge its obligation to reimburse Claimant;

9. All medical reports and bills submitted into evidence are authentic and the parties do not challenge their admissibility, with Employer reserving the right to its right to challenge its obligation to reimburse Claimant;

10. Claimant's August 2000 correspondence with attachments to the U.S. Department of Labor is authentic and admissible, with Employer reserving the right to its right to challenge its obligation to pay Claimant any LHWCA benefits;

11. Reliance was an admitted carrier in Louisiana insuring the LHWCA obligations of Pneu-Elect to its employees on October 16, 1999. Due to the insolvency of Reliance, LIGA is responsible for whatever LHWCA benefits Claimant proves entitlement to, but only up to the limits, and under the restrictions, of the Louisiana Insurance Guarantee laws;

12. All documents obtained through subpoena duces tecum in the third party action, *John Nick Simms v. Roclan Services, Inc.*, filed in the U.S. Federal Court, Western District, under civil action number CV00-2275, from Reliance, are authentic and admissible, with Employer reserving all legal arguments Employer may have that these documents do not obligate Employer to pay Claimant LHWCA benefits, penalties, or attorney fees;

13. Crawford and Company, on behalf of Reliance, sent letters to Claimant on April 7, 2000, and April 27, 2000, requesting a vocational evaluation and Claimant never responded to those letters; and

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[2] The parties stipulated that Claimant's compensation rate is $602.33, but under 33 U.S.C. § 908(a-c) (2002) compensation is set at 66 2/3 of a Claimant's average weekly wage. Because Claimant's stipulated average weekly wage is $904.83, his corresponding compensation rate is $603.22.

14. That if the claims adjuster Linda Hampton had testified, she would have stated that Claimant's benefits were stopped because Crawford & Co., on behalf of Reliance Insurance, had not received up to date doctor's reports from Dr. Phillips and that efforts to institute vocational rehabilitation were not responded to.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Claimant's entitlement to medical benefits;

2. Notification/authorization for medical treatment and medical procedures regarding treatment by Dr. Scott Gammel and/or Dr. Ted Friedberg;

3. Claimant's entitlement to weekly benefits;

4. Claimant's obligation to cooperate/participate in vocational rehabilitation analysis;

5. Claimant's ability to return to work and the level of work;

6. Date of maximum medical improvement;

7. Suitable alternative employment; and

8. Penalties, interest, and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Claimant was born in 1956, completed the eleventh grade in high school and his work history consisted of heavy manual labor in the oilfield. (Tr. 27). When Claimant started working for Employer in 1996, he was an electrician's helper, but at the time of his accident, he was a working foreman. (Tr. 28-29). Specifically, Claimant's job entailed lifting twenty to fifty pounds frequently, and lifting weights of two hundred pounds on rare occasions. (Tr. 29). Claimant was required to frequently bend, stoop, climb, pull, and squat while he installed electrical equipment on offshore platforms. (Tr. 29-30). On October 19, 1999, Claimant was injured in the course and scope of his employment while installing electrical instrumentation on an offshore platform. The captain of the vessel where Claimant sustained his injury reported:

> On 10-16-99 the M/V Sea Rambler was tied to G.I. 63 when at approx. 1800 hrs. John Simms was being lowered to the deck in platforms personell (sic) basket.

> The basket was lowered atop other deck cargo and flipped, dropping Mr. Simms to the deck. He complained of back pain but did not think medical attention was need. (sic). Mr. Simms awoke the morning of 10-17-99 at 0600 hrs complaining of intense back pain. He was then sent aboard platform G.I. 63.

(CX 15, p. 24).

Subsequently, Claimant was transported to Our Lady of Lourdes Hospital where Dr. Charles Burnell opined Claimant had muscle strain/spasm, after viewing normal x-rays. (CX 23, p. 7-9). Claimant then reported to Employer's physicians at Occupational Medicine Clinic of Acadiana, where Claimant was referred to Dr. Jack Hurst, a neurosurgeon. (CX 26, p. 4). Meanwhile, Claimant requested his choice of physician, Dr. Phillips, an orthopaedist, who was authorized by Carrier. (CX 3, p. 1-3).

On December 7, 1999, Employer controverted Claimant's claim on the grounds that Claimant refused to present to Dr. Hurst, and because Employer did not have the medical reports from Occupational Medicine Clinic of Louisiana. (CX 15, p. 19). Claimant alleged that he presented to Dr. Hurst on two occasions, the first time Dr. Hurst refused to see him because he did not bring x-rays taken at the hospital on the day after his injury, and on the second occasion Dr. Hurst was absent with an emergency. (Tr. 39). Employer never paid any medical bills associated with Dr. Phillips. Eventually, Claimant presented to Dr. Hurst's partner, Dr. Leoni, on March 14, 2000, but Carrier suspended compensation payments to Claimant on May 5, 2000, and filed a notice of controversion on July 24, 2000, on the grounds of causation, failure to substantiate temporary total disability payments, and failure to obtain prior approval of a treating physician. (CX 6, p.1; CX 15, p. 20; CX 25, p.2). After Claimant filed his claim for compensation, Employer filed a third notice of controversion on October 20, 2000, alleging that there was no medical evidence to substantiate Claimant's entitlement of medical benefits. (CX 15, p. 7).

After Employer denied medical benefits under the Act, Claimant continued to receive medical treatment from Dr. Phillips. (CX 18). Claimant's attorney remained the payer on all of Claimant's medical bills. (CX 16). Dr. Phillips diagnosed Claimant as having lumbar disc displacement and disorder of the sacrum based on Claimant's physical findings, an MRI, and a discogram. (CX 18, p. 5-7, 10-11, 26). Dr. Phillips recommended against surgery, because surgery would entail a three level fusion, which would leave Claimant with an intensely stiff back. *Id*. at 14.

With surgery no longer a legitimate option, Claimant sought out a pain management specialist, Dr. Reavill, in May 2001. (EX 5). Unhappy with the relationship between Dr. Reavill and himself, and because he was unable to obtain any pain relief from her treatment, Claimant chose a different pain management specialist, Dr. Gammel. (Tr. 80-81; CX 19, p.1; EX 5, p.5). Meanwhile, Claimant attempted to perform several odd jobs, but was unable to work over two to three hours a day because of his pain. (Tr. 50-51, 59-62). After treating Claimant from May 2001 to May 2002, Dr. Gammel recommended, and Claimant, chose, to surgically implant a spinal cord stimulator based on the fact that Claimant was not achieving any relief with conservative pain management, and his back pain was

debilitating. (CX 19, p. 26-33). Dr. Gammel surgically revised the spinal cord stimulator on June 26, 2002, and Claimant testified at the formal hearing that he was still waiting for the surgically implanted leads to set in his spine before attempting any more work. (Tr. 70-71).

B. Claimant's Testimony

Regarding his October 16, 1999 injury Claimant testified:

> It was a personnel basket injury. A painter was running the crane and it just went awry. . . . He actually tried to set the personnel basket down and he set it on the stern of the boat, the first time he tried to set us down, and it tilted us toward the water. Then he pulled us back up and swung us back around and set us down on a, about a six foot tall, jump basket that had a bunch of junk in it and twisted the basket sideways, and I was twisted, laying, hanging on.

(Tr. 31).

Claimant never hit his back on anything, but he was twisted by the jerking of the basket. (Tr. 34). An accident report was filled out on the spot. (Tr. 37). Claimant related that he was taken to the emergency room at Our Lady of Lourdes Hospital, where x-rays were taken, and he was instructed to follow-up with a specialist, Dr. Hurst. (Tr. 38). When Claimant presented to his appointment with Dr. Hurst, however, the doctor would not see him because he did bring the hospital x-rays with him. (Tr. 39). When Claimant appeared for a second appointment, Dr. Hurst was absent on an emergency and Claimant was directed to see Dr. Leoni. (Tr. 39). Meanwhile, Claimant chose a treating physician, Dr. Phillips. (Tr. 40).

After undergoing an MRI, a discogram, and deciding against having surgery, Claimant testified that Dr. Phillips recommended that Claimant undergo treatment with a pain management physician. (Tr. 44-45). Claimant related that the spinal cord stimulator surgically implanted by Dr. Gammel helped relieve some of his pain. (Tr. 47). Although he received about six months of compensation benefits, Claimant stated that he was never reimbursed for his mileage expenses. (Tr. 47). Regarding the informal conference held on August 7, 2001, in New Orleans, Claimant testified that Carrier's adjuster admitted that he was owed disability, milage and medical treatment. (Tr. 49-50).

Since hurting his back in October 1999, Claimant attempted to work on three occasions. (Tr. 50). For three weeks he helped a friend remodel his house and performed light duty electrical work earning $6.50-$7.00 an hour. (Tr. 50-51). Claimant would work two to three hours a day, skip a day, and then return for another two or three hours. (Tr. 50). After the third week, Claimant just quit because he could not tolerate the pain. (Tr. 50). Claimant also did some electrical work for Nash Restaurant in Broussard, Louisiana, working two to four times over a two year period, and he never worked longer than two hours at a time. (Tr. 50-51). Nash Restaurant paid him fifteen to twenty dollars for each job. (Tr. 51). After Claimant received his spinal cord stimulator, he testified

that he was unable to work around any "hot" electrical wires. (Tr. 51). Merely being around electricity could change the level of his stimulation. (Tr. 54).

Claimant related that Employer had not offered Claimant any job since his workplace accident, but Claimant testified that he called Employer and spoke to Tammi Colomb about returning to light duty work after a company physician indicated that he could return to work. (Tr. 52). Claimant related that Ms. Colomb refused to let him return until his physical condition was better. (Tr. 52). Claimant also worked at a business called One Little Pizza in Broussard, Louisiana, working as a manager, making pizza, taking orders, and making deliveries. (Tr. 59-60). Claimant testified, however, that he could not perform that work because the job entailed lifting fifty to one-hundred packs of flour, and standing over a hot stove for long periods of time. (Tr. 60). Two hours of work was the most Claimant thought he could perform, and if he tried to work longer, then he would become incapacitated the following three or four days. (Tr. 62).

Claimant testified that he could sit for about two hours at a time, but working on something electronic was extraordinarily difficult because the amount of pain medication he took clouded his concentration. (Tr. 67). Doing any activity with his arms in front of him caused pain within five minutes. (Tr. 68). As of the date of the formal hearing, Claimant testified that he was unwilling to try to work over two hours a day until the surgically implanted leads to his spinal cord stimulator properly set into his spine. (Tr. 70-71). Additionally, Claimant opined that he did not have a sufficient level of expertise as an electrician to supervise residential electrical work because he was unfamiliar with the technical aspects of the job. (Tr. 75). Claimant's electrical ability was limited to looking a blueprint and implementing the instructions. (Tr. 76). Performing light electrical work as a vocation was not an option for Claimant because he could not work around electrical currents with his spinal cord stimulator. (Tr. 78-79).

As of the date of the formal hearing, Claimant testified that he took eighty milligrams of OxyContin twice a day, ten milligrams of Loratab four times a day, and there was never a day when Clamant felt that he could go without pain killers. (Tr. 54-55). Claimant was also taking psychotropic medications under the supervision of Drs. Friedberg and Gammel, consisting of Zoloft, for mood control, and Ambien for sleep. (Tr. 56). Claimant chose Dr. Friedberg on the advice of his attorney, however, Claimant related that both Drs. Phillips and Gammel suggested he seek help with emotional problems surrounding his injury. (Tr. 57-58).

Regarding his treatment with Dr. Reavill, a pain management specialist, Claimant testified that he switched to Dr. Gammel because he did not like it when Dr. Reavill told him that she was going to take him off his pain medication, the injections that she administered were not under fluoroscope, and her treatment failed to provide him with any relief. (Tr. 80-81).

C. Deposition Testimony of Lester Colomb

Mr. Colomb, the former president of Pneu-Elect, was deposed by Employer on November 13, 2002. (EX 8, p. 1). Mr. Colomb testified that he was familiar with Claimant, and Claimant was engaged in the business of electrical and instrumentation installations on offshore platforms at the time of his injury. *Id*. at 5-6. Claimant worked as a foreman, but had never served as a job superintendent. *Id*. at 6. Mr. Colomb testified that Claimant attempted to return to work sometime during the fall, winter, or spring of 1999-2000, and he arranged for Claimant to do estimating work in the office. *Id*. at 8, 42. That position entailed looking at drawings, making material lists, and Claimant would have been allowed to work at his own speed. *Id*. at 8-9. Mr. Colomb was aware that Claimant had physical restrictions and was not to lift anything heavy. *Id*. at 9. He related that Claimant only worked for two to four weeks before he stopped coming, and Mr. Colomb testified that if Claimant had stayed, he could have continued his job as an estimator. *Id*. at 9-10. Other light duty work included doing paperwork in the materials office, and purchasing materials on the telephone. *Id*. at 10. On larger construction projects, Claimant could serve as an indoor office personnel doing "red line" drawings and tending to materials. *Id*. at 12. When Claimant returned to work in the spring of 2000, he was making $14.00 and hour, and Mr. Colomb related that he would allow Claimant to continue at that wage rate. *Id*.

Mr. Colomb related that he personally saw Claimant working in the shop during the Spring of 2000, on five or six occasions, but he did not know why there were no payroll records in Claimant's name after December 1999. (EX 8, p. 13-14). Mr. Colomb was unaware of the extent of Claimant's medical treatment, was unaware of his prescription medication, and had no knowledge that Claimant was using a spinal cord stimulator. *Id*. at 15. Allowing Claimant to work for his company under such influences was up to the company physician, Dr. Boyer. *Id*. at 16. Mr. Colomb acknowledged that Claimant was earning around $50,000.00 a year before his injury, and that his offer to return to work in the office at $14.00 an hour would likely limit Claimant to a forty hour work week. *Id*. at 17-18.

Prior to his injury, Mr. Colomb testified that Claimant was one of his top producing foremen and he was very satisfied with the way Claimant handled his crew. (EX 8, p. 35). If Claimant wanted to return to work today, Claimant would have to go through Dr. Boyer to obtain clearance. *Id*. at 91. If Dr. Boyer gave Claimant clearance, Mr. Colomb stated that he would give Claimant a chance to work in the office. *Id*. at 92. Mr. Colomb paid his clerical staff anywhere from $12.50 per hour to $16.00 per hour for a forty hour week. *Id*. at 92-93. The fact that Claimant had not graduated high school did not concern Mr. Colomb because the paperwork was very easy. *Id*. at 93.

D. Deposition Testimony of Dan Palmintier

Mr. Palmintier, a claims adjuster for Crawford & Co., testified that he was a senior claims adjuster specializing in liability. (EX 9, p. 5-6). Mr. Palmintier related that he attended the informal conference before the Department of Labor on August 7, 2001, but he did not have authority to settle

the claim. *Id*. at 7-9. A legal representative of Carrier was also in attendance at the informal conference via telephone. *Id*. at 16. Shortly after the informal conference, before Mr. Palmintier could make a recommendation to Carrier to pay or not pay Claimant, Reliance Insurance declared its insolvency, and the case was transferred away from Mr. Palmintier. *Id*. at 28.

E. Exhibits

(1) Correspondence to Carrier

On November 2, 1999, Carrier advised Claimant that he was to return to see Employer's choice of physician on October 25, 1999, and thereafter he could elect to treat with his choice of orthopaedist, Dr. Phillips. (CX 1, p. 1). On November 19, 1999, Claimant's attorney forwarded $300.00 on Claimant's behalf to Dr. Phillips to secure an appointment, and requested that Carrier reimburse those funds advanced on Claimant's behalf. (CX 2, p. 1). On December 10, 1999, Carrier refused to reimburse a pre-payment of expenses, however, Carrier acknowledged its obligation to pay itemized bills in accordance with "usual and customary fees." (CX 3, p. 1). Carrier also acknowledged that Dr. Phillips was authorized as Claimant's choice of orthopaedic surgeons. *Id*. Carrier further admonished Claimant for not appearing for a prescheduled appointment with Employer's orthopaedist, Dr. Boyer on October 19, 1999. *Id*. at 2. Additionally, Carrier requested that Claimant keep his appointment with Dr. Hurst, Employer's choice of physician on December 22, 1999 for an updated evaluation. On November 24, 1999, however, Claimant's attorney wrote that Claimant would not keep his appointment with Dr. Hurst because he was scheduled to undergo diagnostic testing on the day of that appointment as ordered by Dr. Phillips. (CX 4, p. 1).

On April 24, 2000, Claimant's attorney submitted a mileage expense record to Carrier detailing 387 miles for attending doctor's appointments. (CX 5, p. 1-2). A one-way trip to see Claimant's choice of orthopaedist, Dr. Phillips, in New Orleans was 190 miles. *Id*. at 2. On December 13, 2001, Thomas B. Domingue, II, a claims adjuster for Mor-Tem Risk Management Services, Inc, wrote to Claimant's attorney that since Reliance Insurance had declared insolvency, the Louisiana Insurance Guaranty Association (LIGA) was handling the claim and Mor-Tem Risk Management was handling the claim on behalf of LIGA. (CX 7, p. 39).

(2) Employer's Vocational Correspondence to Claimant

On April 7, 2000, G. Louis Herbert, Employer's vocational counselor, wrote to Claimant's attorney to request an initial vocational evaluation of Claimant. (EX 1, p. 1). On April 27, 2000, Mr. Herbert sent a follow-up letter indicating that he had called six times and had spoken with Jessica who had assured him of a response. *Id*. at 3. When Mr. Herbert did not receive a response to his telephone messages or earlier letter, he authored a letter on April 27, 2000, requesting that Clamant's attorney contact him within five days, or he would assume Claimant's attorney was not wiling to allow a meeting with Claimant. *Id*.

On August 7, 2000, Mr. Herbert wrote to Carrier that he had contacted Employer in an effort to gain background information on Claimant. (EX 15, p. 56). Employer's representative told Mr. Herbert that Clamant was hired on April 4, 1996, had never quit or been terminated, and that Claimant was a working foremen. *Id*. On June 8, 2000, Employer's representative told Mr. Herbert that Claimant could not return to work due to his lifting restrictions. (CX 15, p. 76). Claimant was in regular contact with Employer, had indicated that he was bored, and that he wanted to return to work. *Id*. at 77. Mr. Herbert also related that he called Claimant's attorney on July 14, 2000, in an attempt to reschedule a vocational interview, but was informed that Claimant's attorney was busy with a five month long trial and that was the primary reason he had not responded to requests for vocational rehabilitation. (CX 15, p. 56). After Mr. Herbert made five additional attempts to speak to Clamant's attorney, Mr. Herbert closed Claimant's file due to un-cooperation on August 7, 2000. *Id*. at 57.

(3) Correspondence to the Office of Workers' Compensation Programs (OWCP)

On January 21, 2000, Claimant submitted to OWCP an objection to Employer's notice of controversion on the grounds that Claimant had not abandoned his medical care in December 1999. (CX 7, p. 28). Claimant's attorney detailed Claimant medical treatment during that time period and explained that Claimant cancelled his appointment with Dr. Hurst because Claimant had a scheduled appointment on that date with his treating physician. *Id*. Furthermore, Claimant attended the rescheduled appointment on December 22, 1999, but Dr. Hurst refused to examine him because Claimant did not bring his x-rays from Dr. Boyer, who was Employer's physician, and whom Claimant alleged did not take any x-rays. *Id*. at 29.

On August 2, 2000, Claimant's attorney submitted a defense to Claimant's rights to compensation benefits before OWCP, regarding a notice of controversion filed by Employer on July 24, 2000, on the grounds that Claimant did not have a total disability and prior approval of a treating physician was not obtained. (CX 6, p. 1; CX 7, p. 1). Claimant contested Employer's notice of controversion on the grounds that Claimant's physicians had established a causal relationship, and Carrier had approved and authorized treatment by Dr. Phillips. *Id*. at 1-2. Claimant's attorney also requested a ten percent penalty on all unpaid medical bills. *Id*. at 3. On July 16, 2001, Claimant's attorney filed an objection to Employer's October 20, 2000, notice of controversion, which alleged that there was no medical evidence to substantiate the extent of Claimant's disability. (CX 9, p. 1; CX 10, p. 1). In support, Claimant's attorney offered the recommendation of Dr. Phillips who stated that Claimant's disability was total and permanent. *Id*. At the informal conference on August 10, 2001, the district director recommended that Employer pay travel/mileage expenses, unpaid medical, and ongoing temporary total disability. (CX 12, p. 1).

(4) Medical Records from our Lady of Lourdes Hospital

On October 17, 1999, Claimant was admitted to Our Lady of Lourdes Hospital at 8:30 p.m., complaining of mid to lower back pain. (CX 23, p. 5). Claimant related to the hospital staff that he "felt something pop" while he was working offshore on the night before. *Id*. A physical examination

conducted by Dr. Charles Burnell revealed the Claimant was in a moderate amount of distress secondary to pain, he had tenderness all over the paraspinous musculature, negative straight leg raises, and discomfort when walking. *Id*. at 7. X-rays, taken in the emergency room and read without a radiologist, demonstrated small calcification of the lumbosacral spine in the ligament, without any gross abnormalities. *Id*. at 7-9. Dr. Burnell's diagnosis was lumbar strain with muscle spasm, and he issued Claimant some medication and instructed him to follow-up with the workers' compensation physician. *Id*. at 7. Claimant was discharged home at 10:20 p.m, and released to return to work after clearance by the workers' compensation physician. *Id*. at 1, 5, 8.

(5) Medical Records of Occupational Medicine Clinic of Acadiana

On October 19, 1999, Dr. James Trahan at Medicine Clinic of Louisiana began treating Claimant for a lumbar strain on the referral from Employer, and he opined that Claimant could return to work on October 25, 1999, with restrictions of no lifting over ten pounds, no bending, twisting, jumping, or climbing. (CX 26, p. 9, 15). Treatment consisted of Aleve, hot baths, heating pads, and a walking program. *Id*. at 15. On October 25, 1999, a physician at Medicine Clinic of Acadiana released Claimant to return to work with restrictions of no lifting over five pounds, no bending, twisting, stooping, or climbing. *Id*. at 8. On October 29, 1999, a physician at the Occupational Medicine Clinic of Acadiana noted that Claimant complained of a "little twinge" in his back. *Id*. at 4. Claimant did not appear in any apparent distress, he reported lumbosacral and thoracic pain without radiation or sciatica into the buttocks. *Id*. Claimant did mention numbness in his right fourth and fifth digit in the morning, but that numbness subsided with manipulation. *Id*. Claimant also reported a 1982 job injury where he suffered a torn lumbar ligament that was treated by physical therapy and sixteen months of missed work. *Id*. Claimant was referred to Dr. Jack Hurst, a neurosurgeon, and Carrier approved the referral. *Id*.

(6) Deposition and Medical Records of Dr. Stewart Phillips

On November 23, 1999, Claimant began his treatment with Dr. Phillips, an orthopaedist, with the diagnosis of "somatic dysfunction sacral region, lumbar disc displacement," and Dr. Phillips opined that Claimant was temporarily totally disabled as of the date of his visit. (CX 18, p. 1). In his November 30, 1999 report, Dr. Phillips recounted the event of Claimant's workplace accident, and noted that Claimant complained of moderate to severe radiating low back pain. *Id*. at 2. Claimant also had inter-scapular pain with numbness and tingling in the little finger of the right hand. *Id*. In his physical exam, Claimant walked with an antalgic gait, had a normal cervical exam, and had a 25% loss of flexion in the lumbar spine. *Id*. at 3. Claimant also had tenderness at L4 and the right scaroiliac joint. *Id*. Additionally, Claimant had positive Trendelenburg and Patrick signs on the right, abnormal straight leg raises at 30-45 degrees, and decreased calf size. *Id*. X-rays taken in his office revealed a diminution of the lumbosacral joint, decrease in the joint height level, and hypermobility with retrolisthesis in hyperextension at L4-5. *Id*. X-rays also revealed facet joint changes at L4-5 and L5-S1, anterior wedging of the dorsolumbar junction suggestive of Scheuermann's disease, superior subluxation of the right hemipelvis with degenerative hip changes, and a possible acute fracture or

degenerative arthritis of the dorsal spine. *Id*. at 3-4. Dr. Phillips opined that Claimant may have a disc herniation at L4-5. *Id*. at 4. Dr. Phillips stated:

> If you put it all together, you have a man who had quite a jerk on that basket. He injured his back. He injured his hand, but the hand injury appears to be healing. He also injured his sacroiliac joint.

(CX 18, p. 4).

On November 24, 1999, Claimant underwent an MRI of his lumbar spine which demonstrated: probable mild desiccation involving virtually all of the lumbar intervertebral discs; minimal early spondylosis; mild circumferential annular bulging at L3-4, and L2-3; and no evidence of lumbar intervertebral disc herniation or spinal or forminal stenosis. (CX 18, p. 5-6). An MRI of the thoracic spine was negative. *Id*. at 7. Dr. Phillips noted that the MRI showed some spurring in the thoracic spine, and on January 18, 2000, he administered steroid shots and prescribed physical therapy. *Id*.

On February 15, 2000, Claimant related that physical therapy was not helping. (CX 18, p. 8). Before determining whether Clamant had a problem L3-4 disc or had sacroiliac syndrome, Dr. Phillips wanted to wait until six months had passed from the date of injury. *Id*. Accordingly, he placed Claimant back in physical therapy, issued more pain medication and injected more steroids. *Id*. On March 28, 2000, Dr. Phillips noted a questionable depression of the right S1 reflex, and noted tenderness at L4-5 and L5-S1. *Id*. Claimant's symptoms, however, appeared to originate from his discs, thus, Dr. Phillips ordered a lumbar discogram at L3-4, L4-5, and L5-S1. *Id*. at 8-9. Dr. Phillips instructed Claimant not to lift anything over 25-50 lbs, and to avoid repetitive stooping and bending. *Id*. at 9.

On May 9, 2000, Claimant underwent a lumbar discography. (CX 18, p. 10-11). At L3-4, Claimant's segment was abnormal, symptomatic, and an injection of Ancef produced low back to anterior thigh pain. *Id*. at 10. L4-5 was a normal segment, but was symptomatic because an injection of Ancef also produced pre-sacral pain. *Id*. L5-S1 was an abnormal, symptomatic segment demonstrating bilateral radial annular fissuring with pre-sacral pain and left posterior thigh pain. *Id*. at 10-11. In a computed tomography of Claimant's lumbosacral spine, taken after his discogram, L3-4 demonstrated an abnormality in that it had confluent circumferential and radial annular fissuring and a diffuse annular bulge. *Id*. at 12. L4-5 demonstrated a midline radial annular fissure extending in to the external annulus, and L5-S1 was abnormal with posterolateral radial fissuring extravasating in to the neural foramen. *Id*. at 12-13. Reviewing the films, Dr. Phillips opined that if Claimant ever needed surgery, he would need a three level fusion that would leave him with an intensely stiff back. *Id*. at 14.

On July 25, 2000, Dr. Phillips noted that OxyContin was controlling Claimant's pain, and that he was hesitant to suggest surgery because Claimant would have to undergo a three level fusion. (CX 18, p. 15). Dr. Phillips continued Claimant's temporary total disability status. *Id*. On September 5, 2000, Dr. Phillips noted that Claimant was "down 10 days" during the past six weeks. *Id*. at 16.

Claimant had severe lumbar disc involvement, but Dr. Phillips wanted "desperately" to avoid surgery. *Id*. Claimant, for the first time, also demonstrated signs of bilateral radiculitis and mechanical back pains in his dorsal spine. *Id*. Dr. Phillips changed his diagnosis to "lumbar disc displacement, SI joint dysfunction, dorsal sprain/strain. *Id*.

On October 17, 2000, Claimant scheduled a special appointment because his back pain was persistent, he had pain in his hips, and had an episode of thoracic pain around T7 with bolts of pain radiating into his chest. (CX 18, p. 16). Physical findings included lumbar tenderness with moderate spasm, a 75% limitation on forward flexion, positive straight leg raises on the right, and tenderness of the dorsal spine. *Id*. Dr. Phillips elevated his earlier diagnosis of dorsal sprain/strain to dorsal spondylosis, and recommended conservative care with prescriptions of OxyContin, Vioxx and Vicodin. *Id*. On November 28, 2000, Claimant began to complain of new symptoms consisting of left groin pain and spasm. *Id*. at 17. Dr. Phillips changed his diagnosis to include dorsal syndrome. *Id*. By January 9, 2001, however, Claimant demonstrated the ability to flex to sixty degrees, and had negative straight leg raises. *Id*. at 18. Claimant continued to complain of groin pain, Dr. Phillips documented muscle spasms, and Claimant related that any increase in activity caused him to have increased pain. *Id*.

On February 21, 2001, Dr. Phillips reported that Claimant was not ready to accept invasive testing or surgery. (CX 18, p. 19). Dr. Phillips instructed Claimant to avoid repetitive bending, stooping, or lifting heavy weights. *Id*. Claimant had a permanent disability and could not return to heavy manual labor, but Dr. Phillips continued Claimant's temporary total disability status. *Id*. On March 29, 2001, Dr. Phillips remarked that Claimant's symptoms were static. *Id*. Claimant's new diagnosis was "lumbar disc displacement, SI joint dysfunction, thoracic sprain, thoracic spondylosis," and Dr. Phillips changed Claimant's disability status to total and permanent *Id*. On May 11, 2001, another physician from Dr. Phillips's office opined that Claimant should alternate sitting and standing about every forty-five minutes and should change positions for comfort. *Id*. at 20.

On June 22, 2001, Dr. Watermeier, a physician in Dr. Phillips's office, reported that Claimant was attempting two hours of light electrical work per day. (CX 18, p. 22). While Claimant experienced an increase of his lumbosacral pain, he experienced a decrease in his leg symptoms and coldness in his feet. *Id*. On August 3, 2001, Dr. Adatto, also in Dr. Phillips's office, reported that Carrier had not approved a SI joint arthrogram to confirm the diagnosis of sacroiliac syndrome. *Id*. at 23. Dr. Adatto also opined that Claimant did not show any signs of tolerance or abuse of his medications. *Id*.

On September 14, 2001, Dr. Phillips reiterated the need for more diagnostic testing to differentiate whether Claimant had sacroiliac syndrome or facet syndrome. (CX 18, p. 24). On a physical exam, Claimant demonstrated positive straight leg raises, moderate to severe back pain, soreness in hips, gluteus, and thighs, with limited forward flexion. *Id*. Dr. Phillips changed his diagnosis to "disorder of the sacrum bilaterally, lumbar disc derangement multiple level, facet syndrome." *Id*. By December 11, 2001, Dr. Phillips reported that Clamant's symptoms had increased, and a neurological exam of the lower extremity demonstrated a loss of sensation in the first

sacral dermatome. *Id*. at 26. Nonetheless, considering that any operation to Claimant would be large, Dr. Phillips wanted to continue conservative care. *Id*. His new diagnosis was "lumbar disc displacement, disorder of the sacrum." *Id*. On March 19, 2002, Dr. Phillips reiterated his opinion that Claimant was not a surgical candidate, but he advised Claimant on other non-operative treatments such as a spinal cord stimulator. *Id*. at 27. On August 1, 2002, Dr. Phillips noted that Claimant was using an implanted stimulator which provided terrific pain relief and allowed Claimant to cut his oral medication in half. *Id*. at 28. Dr. Phillips discharged Claimant from his care with instructions to follow up on a per needed basis and to continue care with his pain management physician. *Id*.

On June 10, 2002, Dr. Phillips was deposed by Lisa McLachlan, a representative of Roclan Energy Services. (CX 17, p. 1, 5). In comparing the results of Claimant's MRI and discogram, Dr. Phillips opined that the two tests were not particularly consistent. *Id*. at 16. Particularly, Dr. Phillips noted that findings related to the L3-4 disc were consistent, but the L4-5 disc, which was normal on the discogram, was at odds with the MRI which showed degeneration. *Id*. at 16-17. Also, the discogram revealed a tear in the annulus of L5-S1, but that was not noted on the MRI. *Id*. at 17. Dr. Phillips stated that Claimant had some definite generalized degenerative disc disease that pre-existed any trauma. *Id*. at 18. Additionally, Dr. Phillips stated that when performing a discogram a good disc is usually used as a control sample, but in Claimant's case all three discs were bad. *Id*. at 39-40. Dr. Phillips was not expecting to have abnormal discs at L4-5 and L5-S1 based on the MRI, and after performing a discogram on three discs, a heroic undertaking, the radiologist made the determination not to stick another needle into Claimant to find a control disc. *Id*. at 39-40.

In explaining his diagnosis of lumbar disc derangement, Dr. Phillips explained that Claimant had a tear of the ligament which caused pain without any physical evidence of herniation outside of nerve pressure. (CX 17, p. 23). While he never diagnosed Claimant with a herniated disc, Claimant did have a tear, or a rupture, of his ligament, but the disc material was not protruding out. *Id*. at 23-24. Disc derangement is mechanical in the sense that the ligament is torn, but then it is a chemical problem because inflammation causes injury to the nerves. *Id*. at 24. Claimant also had other abnormal discs at L1-2, and L2-3, that Dr. Phillips had not tested and considering that surgery would require a three level fusion already, Dr. Phillips was not willing to recommend surgery to Claimant. *Id*. Regarding Claimant's reports of groin pain, Dr. Phillips opined that it could be related to the problem disc at L3-4, which has a nerve that extends in to the groin. *Id*. at 35-36.

In recommending total permanent disability, Dr. Phillips explained that Claimant was not responding to conservative care, Claimant was treated with all available medication, Claimant had degenerative disc disease with internal disc disruption, and Claimant was unable to comfortably exercise or gain strength. (CX 17, p. 27-28). Claimant's condition was permanent because Dr. Phillips could not think of any surgery that had a better than fifty/fifty chance of making Claimant better. *Id*. at 30. Dr. Phillips defined a permanent disability as the inability to ever return to one's previous employment. *Id*. at 28. A referral to a pain management specialist was appropriate because Dr. Phillips had nothing to offer Claimant form a surgical standpoint. *Id*. at 31-33.

(7) Medical Records of Dr. Richard Leoni

On November 16, 1987, Claimant presented to Dr. Leoni, a neurologist, complaining of mid to lower back problems due to lifting a pump at work. (EX 2, p. 43). Claimant denied a previous history of back pain, denied having radicular symptoms, and Claimant had negative straight leg raises, but he had back spasms. *Id*. at 40. Claimant did not appear to have any fractures in his thoracic and lumbar spine, but Dr. Leoni ordered a CT scan. *Id*. The CT scan, performed on November 18, 1987, did not show any evidence of disc protrusion or significant forminal stenosis, and was a negative study. *Id*. at 37. On November 24, 1987, Dr. Leoni opined that Claimant had a resolving severe strain and should be treated conservatively with physical therapy and medication. *Id*. at 36. Claimant continued to complain of pain on January 5, 1988, and Dr. Leoni started Claimant on pelvic traction. *Id*. at 34. When pelvic traction did not work, Dr. Leoni opined that Claimant's primary problem was muscle strain, he stopped physical therapy as ineffective on February 18, 1988, and on March 22, 1988, Dr. Leoni reported that Claimant was slowly getting better and that he should start an exercise program to return to work. *Id*. at 28, 32-33. By May 24, 1988, Claimant was working five hours a day, and Dr. Leoni agreed that Claimant could return to full duty in one week. *Id*. at 26.

Unfortunately, on June 2, 1988, Claimant returned to Dr. Leoni, after one week of full duty, complaining that he had a severe increase in low back pain after lifting some valves, and Dr. Leoni removed Claimant from work again. (EX 2, p. 24). On July 5, 1988, Dr. Leoni opined that Claimant was experiencing SI joint-like pain. *Id*. at 21. On August 4, 1988, Claimant complained of right hip pain when walking, and Dr. Leoni ordered an MRI from T10-S1. *Id*. at 20. That MRI, dated August 5, 1988, demonstrated minimal spondylitic disease at T10-11 causing minimal ventral compression of the theca. *Id*. at 19. After a referral to a neurosurgeon, Dr. Leoni concurred on August 25, 1988, in the need for a myleogram, considering the fact that Claimant was not improving. *Id*. at 17. That myleogram, performed on August 29, 1988, demonstrated mild degenerative changes, moderate diagnostic insensitivity at L5-S1 due to a widened anterior epidural space, otherwise the myelogram was unremarkable. *Id*. at 16. Similarly, a CT scan post myleography was unremarkable. *Id*. at 15. On September 13, 1988, Dr. Leoni opined that Claimant had a muscololigamentenous strain. *Id*. at 13. On September 29, 1988, Dr. Leoni reported that Claimant did not have a permanent impairment, had not yet reached maximum medical improvement, and should continue physical therapy. *Id*. at 12.

On March 14, 2000, Dr. Leoni, examined Claimant in regards to his October 16, 1999 workplace accident and noted after reviewing Claimant's MRI taken by Dr. Phillips that he did not have a herniated disc, but had problem discs at L3-4 and L2-3. (CX 25, p. 2). Claimant had negative straight leg raises, and Dr. Leoni opined that Claimant could engage in light work lifting no more than 10-20 pounds on an occasional basis. *Id*. Claimant was unable to continue to work offshore, and Dr. Leoni thought it was questionable whether Claimant could work an eight hour work day. *Id*. Further restrictions included no continuous sitting over two hours a day, no walking over one hour, no lifting over one hour, no standing over one hour, and no continuous kneeling over one hour. (EX 2, p. 5). Claimant could intermittently sit for two hours, walk for four hours, lift for three hours, kneel for one

hour and Claimant could intermittently stand for one hour. Claimant should not engage in any bending, squatting, climbing, twisting, repetitive hand and foot motions, or operate a vehicle. *Id*.

(8) Medical Records of Dr. Olga Reavill

On May 1, 2001, Claimant presented to Dr. Reavill complaining of back pain. (EX 5, p. 13). Dr. Reavill's initial impression was a lumbar herniated disc, bilateral sacroiliac problems, and bilateral forminal stenosis. *Id*. at 12. On May 8, 2001, Dr. Reavill diagnosed Claimant with resolving SI joint pain and lumbar facet syndrome. *Id*. at 6. Treatment included right and left SI joint blocks. *Id*. at 8. On May 15, 2001, Dr. Reavill stated that Claimant needed to return to Dr. Phillips because he was not being helped by pain management. *Id*. at 5.

(9) Medical Records of Claude S. Williams

Dr. Williams conducted a second opinion evaluation on behalf of Employer on July 20, 2001. (EX 6, p. 1). In his physical exam of Claimant, Dr. Williams noted increased thoracic kyphosis, a slight flattening of his lumbar lordotic curve, and Claimant had negative straight leg raises. *Id*. at 3. Dr. Williams diagnosed chronic back pain, a history of a probable lumbar strain, and no detectable signs of disc herniation or nerve root compression. *Id*. Dr. Williams further opined that Claimant's present physical findings did not indicate a necessity for surgery, and that his prognosis to return to work as an electrician was favorable. *Id*. at 4. Back treatment and elimination of Clamant's narcotics was Dr. William's recommended treatment. *Id*.

(10) Medical Records of Dr. Scott A. Gammel

On August 23, 2001, Claimant presented to Dr. Gammel, a pain management specialist, on the recommendation of his attorney. (CX 19, p. 1). Dr. Gammel detailed symptoms of chronic numbness in his right thigh, some lower extremity weakness, and difficulty in raising his legs without the onset of back pain. *Id*. at 2. A physical exam demonstrated negative straight leg raises, a positive Gaenslen's test on the right, a loss of lordosis with a markedly increased tone in the paraspinous musculature, tenderness on interspinal palpation, tenderness over the sacroiliac joints, and a decreased range of motion. *Id*. Dr. Gammel's initial impression without reviewing the diagnostic studies or care-giver notes was chronic sacroiliac ligament irritation with lower lumbar facet joint disease. *Id*. at 3. Claimant likely sustained a capsular disruption and had chronic inflammation. *Id*. Additionally, Claimant had continued myofascial syndrome. *Id*. As of the date of his initial visit, Claimant did not have any radicular findings that would warrant spinal cord stimulation. *Id*.

On September 19, 2001, after reviewing Claimant medical records, Dr. Gammel recommended a trial of epidural steroid injections in conjunction with sacroiliac and facet injections for diagnostic and therapeutic purposes. (CX 19, p. 7). After Claimant completed two epidural steroid injections, Dr. Gammel reported on January 16, 2002, that Claimant's upper back pain was virtually gone, and Claimant no longer had back spasms. *Id*. at 14. Claimant's low back pain

continued, however, but it was without specific radiation. *Id*. In his physical exam, Claimant had negative straight leg raises, a positive Gaenslen's test and diffuse tenderness in the upper inter-spinous segment. *Id*. Dr. Gammel's impression was low back pain with positive sacroiliac testing maneuvers, and his recommendation was to try bilateral sacroiliac joint injections. *Id*.

On February 11, 2002, Claimant returned to undergo the bilateral sacroiliac joint injections, and Claimant reported on February 22, 2002, that the injections caused him to become bedridden for the first two or three days. (CX 19, p. 16, 20). Claimant experienced severe pain in his right calf, continued low back pain, and Claimant leg temporarily gave out on him. *Id*. at 20. Claimant's upper back pain, however, had not reoccurred. *Id*. Dr. Gammel's impression was multi-factorial low back pain and lower extremity pain from a combination of lumbar facet joint pathology, SI joint pathology, and lumbar spine/disc disease. *Id*. Dr. Gammel opined that Claimant's leg and calf symptoms were due to radicular irritation unrelated to his sacroiliac joint injection. *Id*. at 20-21. Dr. Gammel recommend a psychological evaluation and treatment for depression, and opined that Claimant's residual pain and symptoms would continue indefinitely. *Id*. at 21. One possibility to relieve his pain was spinal cord stimulation, costing about $25,000.00 for implantation, and a replacement generator was needed every eighteen months to four years at a cost of $15,000.00 to $20,000.00. *Id*. Regarding an intrathecal pump instead of a stimulator, Dr. Gammel advised that it should only be used as a last resort, had many side effects, and the $30,000.00 to $40,000.00 pumps lasted five to ten years. *Id*. The pump also had to be refilled six times per year at a cost of $700.00 each time. *Id*. at 24.

On April 11, 2002, after his low back pain reappeared with "a vengeance," Claimant informed Dr. Gammel that he wished to proceed with the implantation of a spinal cord stimulator. (CX 19, p. 23). Dr. Gammel also projected that even if Claimant is given the spinal cord stimulator, he may need implantation of the intrathecal pump within the next five to ten years. *Id*. at 24. Furthermore, Dr. Gammel reported that Claimant had significantly more back pain than lower extremity pain, and that necessitated the use of a "dual lead spinal cord stimulator." *Id*. Such a device required the placement of an extra lead in the epidural space and a special dual lead generator costing approximately twice as much as a single lead generator. *Id*. In total, Dr. Gammel estimate that the cost of the procedure would increase to $55,000.00. *Id*.

Claimant underwent a trial stimulator placement on May 1, 2002, and was discharged from the hospital on May 9, 2002. (CX 19, p. 26-33). On May 16, 2002, Claimant returned to the hospital for placement of a permanent spinal cord stimulator after a successful trial. *Id*. at 35-37. Dr. Gammel reported that Claimant had responded successfully to the trial stimulator which relieved about fifty percent of his back pain. *Id*. at 37. On May 24, 2002, Claimant reported some alteration in his stimulation patters with stimulation in the rib area that bothered him when he increased his activity. *Id*. at 41. Claimant reported that the stimulator allowed him to cut his narcotic pain medication in half, and he reported some functional improvement. *Id*. at 41. Claimant continued to complain of upper back pain and he complained of alteration of stimulation with minor position changes. *Id*. In all, Dr. Gammel opined that Claimant was responding well to the stimulator, and planned to configure the stimulator to best suit Claimant's needs. *Id*. On June 26, 2002, Dr. Gammel readmitted Claimant

to the Medical Center of Southwest Louisiana, where he revised the spinal cord stimulator electrodes. (CX 19, p. 49). Claimant experienced an excellent result. *Id*.

(11) Psychological Records of Dr. F.T. Friedberg

Dr. Friedberg, a clinical psychologist, administered clinical testing to Claimant on March 12, 2002. (CX 24, p. 4). Dr. Friedberg reported that Claimant processed information slowly, but that slowness may have been a result of his pain medication and depressive symptomatology. *Id*. at 5. Claimant was able to read on a eighth grade level, and could do arithmetic on a sixth grade level. *Id*. Claimant had difficulty concentrating and focusing his attention on visual material and he showed no indications of exaggerating his cognitive symptomatology. *Id*. Claimant also had moderate to severe depression, characterized by feelings of sadness and discouragement about the future. *Id*. He had general anhedonia, became irritated and annoyed much quicker than before his accident, and had difficulty decision making. *Id*. Dr. Friedberg reported that Claimant's psychological profile was valid, there were no signs of exaggeration, and Claimant's symptoms were common among chronic pain patients. *Id*. In total, Claimant was undergoing significant anxiety and depression associated with chronic pain, and there was little doubt that Claimant needed medication for depression, for sleep disturbance, and Claimant needed supportive counseling. *Id*.

(12) Vocational Report of Dr. John W. Grimes

On December 13, 2001, Dr. Grimes conducted a vocational evaluation of Claimant on behalf of his attorney. (CX 27, p. 1). Claimant had completed the eleventh grade in high school, had not obtained a GED, had not received any vocational/educational training, and served eight months in the Air Force in 1974 receiving an honorable discharge. *Id*. at 2. Claimant's vocational history included work as a driller, tool pusher, electrician's helper, and food service manager. Claimant started work with Employer in 1995 as an electrician's helper, and primarily worked as an electrician or a foreman with a brief stint as job superintendent. *Id*. Vocational testing revealed an intellectual impairment in the "quite suspicious" category. *Id*. at 2-3. Academically, Claimant scored at the college level for word recognition, spelled at a seventh grade level, and was able to do math at the eighth to ninth grade levels. *Id*. at 3.

Dr. Grimes concluded that Claimant was disabled based on the medical records of Drs. Phillips and Gammel. (CX 27, p. 4). Claimant's future employability depended on his medical treatment and residual functional capacity. *Id*. If restricted to light duty, the majority of employment opportunities for Claimant ranged in the $5.50-$7.50 per hour range. *Id*. Although Claimant had adequate intellectual, academic, and aptitudinal abilities, Dr. Grimes recommended Claimant obtain an GED while recovering
from his injuries. *Id*. Claimant had the capacity for retraining, but would be restricted by his functional limitations and age. *Id*.

IV. DISCUSSION

A. Contention of the Parties

Claimant argues that he established an un-rebutted *prima facie* case of entitlement to compensation under Section 20 of the Act. Thus, Claimant argues that as a matter of law he is entitled to a favorable ruling on the issues of entitlement to benefits, causation, and compensability of medical expenses. Second, Claimant contends that he is entitled to penalties under Section 14(e) of the Act for Employer's untimely notice of controversion. Third, Claimant asserts that his medical and wage benefits were wrongfully terminated because Claimant appropriately sought and received approval for the medical treatment of Dr. Phillips, that his failure to obtain authorization to treat with Drs. Gammel, Reavill, and Friedberg was excused by Carrier's termination of benefits, and he had no obligation to cooperate with Employer's request for a vocational rehabilitation evaluation. Fourth, Claimant argues that he has not reached maximum medical improvement because he had a spinal cord stimulator implanted in May 2002, and the exact course of his future medical treatment is undeterminable. Fifth, Claimant contends that he is totally disabled and incapable of returning to work at any level.

Employer argues that it terminated Claimant's benefits on May 5, 2000, because Dr. Phillips failed to provide Employer with updated medical records and because Claimant refused to cooperate with vocational rehabilitation counseling. Employer also contends that Claimant is capable or returning to light duty work as established by Dr. Leoni. Employer had offered Claimant a office job paying his same hourly wage, thus, Claimant had no economic disability. Additionally, Employer asserts that Claimant is not entitled to pay for the medical treatment provided by Drs. Gammel and Friedberg because Claimant never sought its authorization or requested a change in treating physicians, and Employer never had the opportunity to refuse or neglect such a request. Furthermore, Employer asserts that Dr. Phillips never referred Claimant to Dr. Reavill, her approval was never obtained, and Employer never approved or authorized a change in pain management specialists to Dr. Gammel, who was a product of doctor shopping. Claimant did not comply with Section 7(c)(2) of the Act, and none of Claimant's physicians complied with Section 7(d)(2) of the Act in providing Employer timely medical reports. Finally, Employer asserts that penalties are not applicable in this case because the provisions in Section 14(e) do not apply to the payment of medical benefits and Employer filed notices of controversion on December 7, 1999, and July 24, 2000, when it suspended compensation benefits on May 5, 2000. LIGA asserts that it cannot be held liable for attorney's fees because it is an "association" not an employer or carrier under the Act, and Employer asserts that it should not be liable for attorney fees because it turned the matter over to Reliance, now insolvent, and from there the claim was handled by Montlake who hired a third party administrator, Crawford & Co.

B. Entitlement to Medical Benefits

B(1) Failure to Provide Medical Reports

Section 7(d)(2) of the Act provides:

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

33 U.S.C. § 907(d)(2) (2002).

Complementing the Act, the regulations provide:

> Notwithstanding the fact that medical care is properly obtained . . . a finding by the Director that a medical care provider has failed to comply with the reporting requirements of the Act shall operate as a mandatory revocation of authorization of such medical care provider. The effect of a final finding to this effect operates to release the employer/carrier from liability of the expenses of such care. In addition to this, when such a finding is made by the Director, the claimant receiving treatment will be directed by the district director to seek authorization for medical care from another source.

20 C.F.R. § 702.422(a) (2001).

Only the district directors have the authority to make a determination as to whether a physician has shown good cause for failing to file a first report of treatment in a timely manner. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J. dissenting). *See also Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72, 74-75 (1994) (remanding case to district director for a determination of whether the decedent's delayed reporting of his medical exam should excuse the employer from paying medical costs under Section 7(d)(2), or excuse the failure to report in the interest of justice); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992) (holding in a case decided before *Toyer*, that a failure to file a report in compliance with Section 7(d)(2) is excused in the interest of justice when the employer failed to present any evidence that the treatment was unnecessary or not related to the work injury). *Cf. Rogers Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 693 (5th Cir. 1986) (determining that the better procedure is to remand a case to determine a Section 7(d)(2) issue, but finding the remand was a mere formality because the claimant substantially complied with the regulations and the employer suffered no prejudice and any contrary determination would be an abuse of discretion); *Ambrose v. Bethship/Bethlehem Steel Corp.*, 32 BRBS 14 (ALJ) (holding in a well reasoned opinion that the effect of *Toyer* is to deprive parties of the full benefit of a 5 U.S.C. § 557 hearing, in contravention of the APA and Congressional intent which commands the ALJ to decide discretionary issues on the record, thus, the ALJ determined that statutory mandate was more compelling than "an untested precedent based on regulatory interpretation, without regard for relevant provisions of the Administrative Procedures Act,

Congressional intent, and judicial interpretation."). Although the active supervision of a claimant medical care rests with the district director, 33 U.S.C. § 907(b) (2002), that grant of authority cannot be read to remove the administrative law judge to decide contested factual issues following a formal hearing. *Sanders v. Martine Terminal Corp.*, 31 BRBS 19 (1997).

In this case, on August 10, 2001, the district director recommended:

> It is recommended the carrier pay travel/mileage expenses, unpaid medical, and TTD ongoing from date of termination until the treating physician returns him to usual and customary work or releases him to duty with restrictions, or until the third party cause of action ripens and the parties arrive at an equitable resolution.

(CX 12, p. 1).

By specifically recommending that Employer pay all "unpaid medical" the district director implicitly determined that any failure to comply with the reporting requirements of Section 7(d)(2) for all unpaid medical expenses incurred up to that date was excused in the interest of justice. No medical bills were submitted from Occupational Medicine Clinic of Acadiana, Inc., where Dr. Boyer worked with Dr. Trahan, but those physicians were the Employer's physicians, and any application of Section 7(d)(2) to an agent of the principal is at best specious. In any event, any failure of Dr. Phillips or Dr. Boyer to comply with the requirements of Section 7(d)(2) was excused by the district director. Thus, Section 7(d)(2) is not a defense to Employer's liability to pay for Claimant's medical bills incurred prior to the informal conference.

B(2) Refusal to Provide Medical Care under Section 7(d)(1)(A)

In general, an employer whose worker was injured on the job is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). An employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b) (2001). The issuance of authorization for treatment by the employer binds the carrier to furnish and pay for such care and services. 20 C.F.R. § 702.420 (2001).

Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir.1982). When an employer refuses a claimant's request for authorization, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v.*

Todd Shipyards Corp., 22 BRBS 20 (1989). After an employer wrongfully refuses reasonable and necessary medical treatment, the claimant is relieved of seeking approval for any subsequent change in physicians under Section 7(d). *Anderson*, 22 BRBS at 23 (holding that a claimant is entitled to reimbursement for necessary medical treatment under Section 7(b) even though the claimant did not first seek approval under Section 7(b) when the employer had earlier denied medical treatment); *Prozzi v. Todd Shipyards, Corp.*, 21 BRBS 294 (1988) (finding that once the employer refuses medical treatment after a request, the claimant is released from the obligation of continuing to seek employer's approval). Specifically Section 7(d)(1) provides:

> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless--
>
> (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or
>
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. § 907(d) (2001). *See also* 20 C.F.R. § 702.421 (2001); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982)(awarding reimbursement for medical expenses after being discharged by employer's physician); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10, 15 (1983) (allowing medical costs only if the claimant gave employer the opportunity to initially authorize or deny treatment).

In this case, Claimant was initially treated at Our Lady of Lourdes Hospital on October 17, 1999. (CX 23 p. 5). Dr. Charles Brunell instructed Claimant on his release to continue treatment with the workers' compensation physician. *Id*. at 7. Thereafter, on October 19, 1999, Claimant presented to Dr. James Trahan at the Medicine Clinic of Louisiana, where Dr. Trahan determined that Claimant needed referral to a neurosurgeon, Dr. Hurst. (CX 26, p. 4, 9). Dr. Hurst did not make himself available to Claimant, and Claimant was evaluated by Dr. Hurst's partner, Dr. Leoni. (CX 15, p. 2). Meanwhile, Claimant requested his choice of physician, Dr. Stewart Phillips, whom Carrier authorized, and he began treatment with Dr. Phillips on November 23, 1999. (CX 3, p. 1; CX 15, p. 12; CX 18, p. 1).

On December 7, 1999, Employer controverted Claimant's right to compensation on the grounds that Claimant was scheduled to see Dr. Hurst but canceled his appointment, and because Carrier did not have any medical records from Dr. Boyer since October 24, 1999.[3] (CX 15, p. 19). Apparently, Carrier officially suspended payment on all of Claimant's medical bills incurred by Dr. Phillips after this date, but there is no evidence in Dr. Phillips's billing summary that Carrier ever paid any of Dr. Phillips's medical bills as the only payer for Claimant's account was Claimant's attorney.

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[3] Dr. Boyer was Employer's physician. (EX 8, p. 79). Dr. Boyer was a practitioner at the Occupational Medicine Clinic of Acadiana where Dr. Trahan also worked. (CX 26, p. 7).

(CX 16, p. 3-7). On May 5, 2000, Employer suspended compensation payments to Claimant. *Id*. at 20. On July 24, 2000, Employer filed a second notice of controversion contending that Claimant could not substantiate his entitlement to future temporary total disability benefits and prior approval to obtain a treating physician was not obtained. (CX 6, p. 1). In October 2000, Claimant filed a his claim for compensation under the Act, and Employer filed a third notice of controversion on October 20, 2000, alleging that there was no evidence to substantiate Claimant's assertion of disability. (CX 15, p. 7-10).

I find that Claimant properly requested and received authorization from Employer to treat with Dr. Phillips as evidenced by Claimant's completion of the LS-1, (CX 3, p. 3), and Carrier written acknowledgment on December 10, 1999, that Dr. Philips was authorized as Claimant's choice for a orthopaedic physician.[4] (CX 3, p. 1). Thus, Claimant complied with subsection (b) of Section 7 of the Act. No showing was made that Dr. Phillips was prohibited from treating Claimant under Section 7(c)(1), and Claimant never sought to change treating physicians pursuant to Section 7(c)(2) prior to Employer's termination of benefits. Therefore, I find that Claimant complied with both subsection (b) and (c) of Section 7, entitling him to take advantage of Section 7(d)(1)(A). The fact that Employer denied medical treatment is uncontested, and after its refusal to furnish medical services, Claimant is relieved of his obligation to seek continued authorization for treatment, and must only establish that treatment for his injuries was reasonable and necessary.[5] Accordingly, Claimant had no duty to obtain Carrier's approval to treat with Drs. Reavill, Gammel or Freidberg, and Claimant only needs to show that his self-procured medical treatment is reasonable and necessary.

B(3) Reasonable and Necessary Medical Treatment

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2002). The Board has interpreted this provision to

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[4] Accordingly, Employer's reason for controvertion benefits on July 24, 2000, which was based in part on Claimant's failure to obtain prior approval of a treating physician was false.

[5] Employer's argument that Claimant was required to seek authorization of each physician he treated with, and for each change of physicians, after Employer denied medical benefits is without merit. The cases Employer cites to support this proposition are inapplicable. *See McGuire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992) (holding that a when an authorized treating physician ends his practice and refers the claimant's future care to another treating physician, the claimant is not required to seek prior authorization as it is a mere continuation of authorized treatment); *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983) (determining that the employer was not liable for medical benefits when it had no notice of the injury and when the claimant never sought medical benefits from the employer); *Maddox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982) (refusing to award medical benefits when the claimant never requested medical treatment, the employer had never refused treatment, and when the claimant never notified the employer of the injury).

require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988).

In this case, Claimant suffered a back injury and sought authorization to obtain treatment from Dr. Phillips, an orthopaedist, who was approved by Carrier. (CX 3, p. 1-3). After Employer terminated Claimant's medical benefits in December 1999, Claimant continued to treat with Dr. Phillips, and obtained treatment from Dr. Leoni, a neurosurgeon, on March 14, 2000 (Employer's physician), Dr. Olga Reavill, a pain specialist, on May 1, 2001, Dr. Gammel, a pain specialist, on August 23, 2001, Dr. Williams on July 20, 2001, (Employer's physician), and Dr. Friedberg, a psychologist, on March 12, 2002. I find that the medical treatment Claimant procured from Drs. Phillips, Reavill, Gammel and Friedberg constituted reasonable and necessary treatment under the Act.

Prior to seeking treatment from a pain management specialist on May 1, 2001, Dr. Phillips noted that Claimant was not willing to undergo invasive surgery, and his symptoms had become static. (CX 18, p. 19). In his deposition, Dr. Phillips stated that he had not recommended a pain management specialist for Claimant yet because he had not reached that point in his treatment of Claimant. (CX 17, p. 40-41). Specifically, Dr Phillips would want to perform invasive tests, such as a facet joint arthrogram. *Id*. at 41. On March 19, 2002, however, Dr. Phillips advised Claimant on non-operative treatments, including a spinal cord stimulator. (CX 18, p. 27). Dr. Phillips also stated in his deposition that he did not recommend surgery, either now or in the future, and he related that if Dr. Gammel took over Claimant's care then that would be "all right" with him. *Id*. at 29-30. Specifically, Dr. Phillips related that a proper candidate for pain management was a patient whom he could not help, i.e., a patient without a surgical option for improvement. *Id*. at 32. Because surgery was not appropriate for Claimant, pain management was a reasonable option. *Id*. at 32-33. Therefore, I find that Claimant's decision to seek treatment from Drs. Gammel and Reavill for pain management was both reasonable and necessary based on his condition.

Regarding, Dr. Reavill's treatment on May 1, 2001, a physician filling in for Dr. Phillips on May 11, 2001, indicated that Claimant had presented to a pain management specialist but was unable to obtain any relief when she injected steroids into his back. (CX 19, p. 20). Indeed, Dr. Reavill reported on May 15, 2001, that Claimant needed to report back to Dr. Phillips because he was not being helped by pain management. (EX 5, p. 5). Thereafter Claimant sought epidural steroid blocks from Dr. Phillips, (CX 18, p. 21-23), and that practice was continued by Dr. Gammel. (CX 19, p. 7). Accordingly, I do not find any difference in the pain treatment modalities between Dr. Reavill, Phillips, and Drs. Gammel. When Claimant was unable to obtain effective relief from Dr. Reavill's administration of steroid injections, and he was able to obtain effective relief from Dr. Phillips's administration, termination of treatment with Dr. Reavill until he could find another pain management specialist was reasonable. As noted *supra*, Part B(2), Claimant had no duty in request authorization from Employer to change pain management physicians. In sum, I find Dr. Reavill's treatment

reasonable and necessary, albeit unsuccessful, because Dr. Phillips could recommend no surgical procedure to improve Claimant's condition, Dr. Phillips opined that a referral to a pain management specialist was appropriate when a patient had no appropriate surgical options, and Dr. Reavill's treatment modality was the same as employed by Drs. Phillips and Gammel.

Likewise, Dr. Gammel's treatment was both reasonable and necessary because as indicated by Dr. Phillips, pain management was appropriate considering the fact Claimant was not a surgical candidate. Additionally, Dr. Gammel stated that Claimant's residual pain stemming from his injury would continue indefinitely, and the implantation of a spinal cord stimulator would greatly reduce Claimant's intake of narcotic medication and greatly reduce his pain levels. (CX 19, p. 21). In fact, Dr. Gammel reported that the implantation of the spinal cord stimulator reduced Claimant's intake of medication by half, and reduced his back pain by half. *Id*. at 37, 41. Accordingly, I find that Dr. Gammels' treatment was both reasonable and necessary.

Regarding treatment by Dr. Friedberg, I note that Dr. Gammel referred Claimant to him on February 22, 2002. (CX 19, p. 21). Specifically, Dr. Gammel stated that he wanted Claimant to see Dr. Friedberg "for psychological evaluation and treatment of his depression as this is part and parcel of managing his chronic pain condition." *Id*. Dr. Friedberg concluded on March 12, 2002, that Claimant had significant anxiety and depression associated with his chronic pain and there was little doubt that Claimant needed medication for depression, sleep disturbance and Claimant needed supportive counseling. (CX 24, p. 5). Accordingly, I find that the treatment by Dr. Friedberg, and the course of treatment outlined by Dr. Friedberg, is both reasonable and necessary.

C. Entitlement to Wage Benefits

C(1) Failure to Submit to Vocational Rehabilitation

An employer bears the burden of showing that there is suitable alternative employment available to the clamant which the claimant can realistically secure considering his age, education, physical, and medical background. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). An employee has no duty to submit to a vocational evaluation on employer's request under the Act.[6] *See Jenson v. Weeks Marine, Inc.*, 33 BRBS 97, 98-99 (1999) (affirming finding by ALJ that the claimant was permanently and totally disabled when the claimant refused to cooperate with the employer's vocational expert); *Simpson v. Seatran Terminal of California*, 15 BRBS 187 (1982) (reversing order by district director suspending compensation for failure to

[6] Section 7(d) of the Act provides that at any time the employee refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, Secretary, or administrative law judge, the claimant's compensation may be suspended during the period of refusal. 33 U.S.C. § 907(d) (2002). By its express terms this provision applies only to medical and not vocational examinations of the claimant. Mendez v. Bernuth Shipping, Inc., 11 BRBS 21 (1979), *aff'd* 638 F.2d 1232 (5th Cir. 1981) (Table); Morgan v. Asphalt Construction Co., 6 BRBS 540 (1977).

cooperate in vocational rehabilitation) (Ramsey dissenting). Rather, citing the dissenting opinion of Judge Ramsey in *Simpson*, the Board has determined:

> Although *Turner* holds specifically that a claimant must establish due diligence in seeking a job only after employer locates suitable available jobs, we believe that it is consistent with *Turner* and *Tarner* to require that the employee cooperate in rehabilitation evaluations. We hold that an employee must, if possible considering his medical condition, reasonably cooperate with employer's rehabilitation specialist; the employee cannot without good reason simply refuse to meet with the specialist, As Chief judge Ramsey has stated:
>
> > [I]t is clearly reasonable to require that claimant undergo <u>evaluation</u> in order that employer may understand the nature of his skills and abilities and assist claimant in his return to the job market. To allow claimant to refuse an ordered rehabilitation evaluation for fear that employer may discover claimant is able to work or that employer will then be able to locate an available job leads us to results inconsistent with the purposes of the Act. If claimant is capable of performing available work he is not permanently totally disabled. . . . The Act does not provide employment benefits for employees who are able to perform a job but do not wish to work.

Villasenor v. Marine Maintenance Indus., Inc., 17 BRBS 99, 101-02 (1985) (citing *Simpson*, 15 BRBS at 193).

Considering the fact that a claimant has no legal duty to submit to a vocational evaluation, and considering the policy reasons enunciated by Chief Judge Ramsey, the Board held in *Villasenor*, that when a claimant unreasonably refuses to met with a vocational expert, that factor must be evaluated in considering the extent of the disability. *Id*. *Accord Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104, 109-10 (1989) (determining that the ALJ's finding that claimant was only partially disabled due to her failure to cooperate with vocational experts, and in assigning a residual wage earning capacity consistent with the prevailing minimum wage, was reasonable and supported by substantial evidence); *Anderson v. Ingalls Shipbuilding, Inc.*, 25 BRBS 408 (1991) (ALJ) (same). A failure to submit to vocational evaluations, however, does not automatically result in a finding of a residual wage earning capacity, it is but one factor for the judge to determine in the context of the entire record. *Jensen*, 33 BRBS at 99 (affirming award of total disability when the employer produced only generic jobs and industry descriptions without showing the general background needed for employment, wages, physical or mental requirements); *Villasenor*, 17 BRBS at 102 (remanding case to consider the relevance, if any, of the claimant's lack of cooperation); *Cruz v. May Ship Repair*, 23 BRBS 167 (1990) (ALJ) (excusing claimant's lack of vocational cooperation when the employer's vocational expert had met with the claimant's previous employer, spoke with the claimant's physician, and had received the claimant's medical records). Accordingly, a failure to

submit to vocational evaluation is not grounds to suspend compensation benefits, but is evidence in considering the extent of Claimant's injury.

C(2) Nature and Extent of Injury and Date of Maximum Medical Improvement.

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 90 2(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is 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 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168 (2nd Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

C(2)(a) Nature of Claimant's Injury

On November 23, 1999, Claimant began his treatment with Dr. Phillips with the diagnosis of "somatic dysfunction sacral region, lumbar disc displacement." (CX 18, p. 1). A November 24, 1999 MRI of the lumbar spine demonstrated: probable mild desiccation involving virtually all of the lumbar intervertebral discs; minimal early spondylosis; mild circumferential annular bulging at L3-4, and L2-3; and no evidence of lumbar intervertebral disc herniation or spinal or forminal stenosis. (CX 18, p. 5-6). On March 14, 2000, Dr. Leoni reviewed Claimant's MRI and noted that Claimant did not have a herniated disc, but had problem discs at L3-4 and L2-3. (CX 15, p. 2).

A May 9, 2000 lumbar discography of Claimant revealed: an abnormal and syptomatic segment at L3-4 which produced low back and anterior thigh pain with injection; a normal segment at L4-5 that was symptomatic because an injection produced presacral pain; and an abnormal and syptomatic segment at L5-S1 that demonstrated bilateral radial annular fissuring with presacral pain and left posterior thigh pain. (CX 18, p. 10-11). In a computed tomography of Claimant's lumbosacral spine, taken after his discogram, L3-4 demonstrated an abnormality in that it had

confluent circumferential, radial annular fissuring, and a diffuse annular bulge. *Id*. at 12. L4-5 demonstrated a midline radial annular fissure extending in to the external annulus, and L5-S1 was abnormal with posterolateral radial fissuring extravasating in to the neural foramen. *Id*. at 12-13. Reviewing the films, Dr. Phillips opined that if Claimant ever needed surgery, he would need a three level fusion that would leave him with an intensely stiff back. *Id*. at 14.

On September 5, 2000, Dr. Phillips noted, for the first time, that Claimant had signs of bilateral radiculitis and mechanical back pains in his dorsal spine. (CX 18, p. 15). Dr. Phillips changed his diagnosis to "lumbar disc displacement, SI joint dysfunction, dorsal sprain/strain. *Id*. On October 17, 2000, Dr. Phillips elevated his earlier diagnosis of dorsal sprain/strain to dorsal spondylosis. *Id*. at 16. On November 28, 2000, Claimant began to complain of new symptoms consisting of left groin pain and spasm. *Id*. at 17. Dr. Phillips changed his diagnosis to include dorsal syndrome. *Id*. On March 29, 2001, Dr. Phillips remarked that Claimant's symptoms were static. *Id*. Claimant's new diagnosis was "lumbar disc displacement, SI joint dysfunction, thoracic sprain, [and] thoracic spondylosis." (CX 18, p. 19).

On July 20, 2001, Dr. Williams noted increased thoracic kyphosis, a slight flattening of his lumbar lordotic curve, chronic back pain, a history of a probable lumbar strain, and no detectable signs of disc herniation or nerve root compression. (EX 6, p. 1-3). On August 23, 2001, Dr. Gammel's initial impression of Claimant's condition, without reviewing the diagnostic studies or care-giver notes, was chronic sacroiliac ligament irritation with lower lumbar facet joint disease, capsular disruption and chronic inflammation without radicular findings. (CX 19, p. 3).

On September 14, 2001, Dr. Phillips changed his diagnosis to "disorder of the sacrum bilaterally, lumbar disc derangement multiple level, facet syndrome." (CX 18, p. 24). By December 11, 2001, Dr. Phillips's new diagnosis was "lumbar disc displacement, disorder of the sacrum." *Id*. at 26. In explaining his diagnosis of lumbar disc derangement, Dr. Phillips explained that it was a tear of the ligament causing pain without any physical evidence of herniation of the disc outside of nerve pressure. (CX 17, p. 23). While he never diagnosed Claimant with a herniated disc, Claimant did have a tear, or a rupture, of his ligament, but the disc material was not protruding out. *Id*. at 23-24. Disc derangement is mechanical in the sense that the ligament is torn, but then it is a chemical problem because inflammation causes injury to the nerves. *Id*. at 24. Claimant also had other abnormal discs at L1-2, and L2-3, that Dr. Phillips had not tested, and considering that surgery would require a three level fusion already, Dr. Phillips was not willing to recommend surgery to Claimant. *Id*. Regarding Claimant's reports of groin pain, Dr. Phillips opined that it could be related to the problem disc at L3-4, which has a nerve that extends in to the groin. (CX 27, p. 35-36).

On September 19, 2001, Dr. Gammel opined that Claimant had low back pain with positive sacroiliac testing maneuvers. (CX 19, p. 7). On February 11, 2002, Dr. Gammel's impression was multi-factorial low back pain and lower extremity pain from a combination of lumbar facet joint pathology, SI joint pathology, and lumbar spine/disc disease. *Id*. at 20. In May 2002, Dr. Gammel implanted a spinal cord stimulator, which was surgically revised in June 2002. (CX 19, p. 26-33, 37, 49).

On March 12, 2002, Dr. Friedberg reported that Claimant had moderate to severe depression, characterized by feelings of sadness and discouragement about the future. (CX 24, p. 5). *Id*. Dr. Friedberg also opined that Claimant had general anhedonia, he became irritated and annoyed much quicker than before his accident, and had difficulty in decision making. *Id*. Claimant testified that the nature of his injury required not only the use of a spinal cord stimulator, but also forced him to take eighty milligrams of OxyContin twice a day, ten milligrams of Loratab four times a day, Zoloft, for mood control, and Ambien to help him sleep. (Tr. 54-56).

Accordingly, I find that the nature of Claimant's injury is: mild circumferential bulging at L2-3; mild circumferential bulging at L3-4 that is symptomatic with annular fissuring; a symptomatic disc at L4-5 with annular fissuring, and an abnormal and symptomatic disc at L5-S1 with posterolateral radial fissuring. These diagnostic findings, combined with Claimant's physical findings, demonstrate lumbar disc displacement and disorder of the sacrum, which also produces groin pain as reported by Dr. Phillips. Claimant also has lumbar facet joint pathology, SI joint pathology, and lumbar spine/disc disease, severe depression and ahedonia. The nature of this injury is such that if Claimant was to ever undergo surgery, it would require a three level fusion, and Clamant is dependent on prescription pain medication and a spinal stimulator.

C(2)(b) Extent of Claimant's Disability

On October 19, 1999, Dr. James Trahan at Medicine Clinic of Louisiana began treating Claimant for a lumbar strain on the referral from Employer, and he opined that Claimant could return to work on October 25, 1999, with restrictions of no lifting over ten pounds, no bending, twisting, jumping, or climbing. (CX 26, p. 9, 15). On October 25, 1999, a physician at Medicine Clinic of Acadiana released Claimant to return to work with restrictions of no lifting over five pounds, no bending, twisting, stooping, or climbing. *Id*. at 8.

On November 23, 1999, Dr. Phillips opined that Claimant was temporarily totally disabled on the date of his visit. (CX 18, p. 1). Although continuing his recommendation of temporary total disability, Dr. Phillips, on March 28, 2000, instructed Claimant not to lift anything over 25-50 lbs, and to avoid repetitive stooping and bending. *Id*. at 9. On February 21, 2001, Dr. Phillips again reported that Claimant was temporarily totally disabled but he instructed Claimant to avoid repetitive bending, stooping, or lifting heavy weights, and he informed Claimant that he had a permanent disability that prevented him from returning to heavy manual labor. *Id*. at 19. On March 29, 2001, Dr. Phillips remarked that Claimant's symptoms were static and he changed Claimant's disability status to total and permanent *Id*. In recommending total permanent disability, Dr. Phillips explained that Claimant was not responding to conservative care, Claimant was treated with all available medication, Claimant had degenerative disc disease with internal disc disruption, and Claimant was unable to comfortably exercise or gain strength. (CX 17, p. 27-28). Claimant's condition was permanent because Dr. Phillips could not think of any surgery that had a better than fifty/fifty chance of making Claimant better. *Id*. at 28. On May 11, 2001, another physician from Dr. Phillips's office opined that Claimant should alternate sitting and standing about every forty-five minutes and should

change positions for comfort. (CX 18, p. 20). On June 22, 2001, Dr. Watermeier a co-worker of Dr. Phillips, reported that Claimant was attempting two hours of light electrical work per day that caused an increase in his lumbosacral pain. *Id*. at 22.

On March 14, 2000, Dr. Leoni opined that Claimant could engage in light work lifting no more than 10-20 pounds on an occasional basis. (CX 15, p. 2). Claimant was unable to continue to work offshore, and Dr. Leoni thought it was questionable whether Claimant could work an eight hour work day. *Id*. Further restrictions included continuous sitting no more than two hours a day, walking for one hour, lifting for one hour, standing for one hour, and no continuous kneeling over one hour. (EX 2, p. 5). Claimant could intermittently sit for two hours, walk for four hours, lift for three hours, kneel for one hour and stand for one hour. Claimant should not engage in any bending, squatting, climbing, twisting, repetitive hand and foot motions, and should not operate a vehicle. *Id*. On July 20, 2001, Dr. Williams opined that Claimant's present physical findings did not indicate a necessity for surgery, and that his prognosis to return to work as an electrician was favorable. (EX 6, p. 4).

Under the care of Dr. Gammel, Claimant underwent a trial stimulator placement on May 1, 2002, and was discharged from the hospital on May 9, 2002. (CX 19, p. 26-33). On May 16, 2002, Claimant returned to the hospital for placement of a permanent spinal cord stimulator after a successful trial. *Id*. at 35-37. Dr. Gammel reported that Claimant had responded successfully to the trial stimulator which relieved about fifty percent of his back pain. *Id*. at 37. On May 24, 2002, Claimant reported some alteration in his stimulation patters with stimulation in the rib area that bothered him when he increased his activity. *Id*. at 41. On June 26, 2002, Dr. Gammel readmitted Claimant to the hospital where he revised the spinal cord stimulator electrodes. (CX 19, p. 49). Claimant experienced an excellent result. *Id*.

Claimant testified that the extent of his injury was such that he could work two to three hours a day, skip a day, and then return for another two or three hours, but the cumulative affect of this activity was such that he could only sustain such work for three weeks. (Tr. 50). After Claimant received his spinal cord stimulator, he testified that he was unable to work around any "hot" electrical wires because electricity could change the level of his stimulation. (Tr. 51, 54). Two hours of work was the most Claimant thought he could perform, and anything greater caused him to become incapacitated the following three or four days. (Tr. 62). As of the day of the formal hearing, Claimant stated he could sit for about two hours at a time, but had difficulty concentrating because of his medication. (Tr. 67). Doing any activity with his arms in front of him caused pain within five minutes. (Tr. 68).

(C)(2)(b)(i) Weighing the Evidence

I do not find that Dr. Phillips's recommendations of total disability accurately describes the extent of Claimant's injury. Specifically, Dr. Phillips stated in his deposition that he defined temporary total disability as an inability to perform Claimant's former job, and permanent total disability to mean that Claimant could never perform his former job. (CX 17, p. 27). Thus, Dr.

Phillips's limitations did not apply to jobs other than his former employment. I do not credit the report of Dr. Williams concerning the extent of Claimant's disability because Dr. Williams merely opined that Claimant did not need surgery and had the potential to return to work as an electrician. (EX 6, p. 4). Dr. Willams never elaborated on work restrictions and never analyzed the work of an electrician to determine if Claimant was capable of fulfilling the requirements of that job. From an objective medical standpoint, I find the restrictions set by Dr. Leoni are reasonable and largely in accordance with Claimant's stated abilities, and the and restrictions set by a physician in Dr. Phillips's office on May 11, 2001.

Dr. Leoni limited Claimant's activity to no lifting more than 10-20 pounds on an occasional basis, no sitting over two hours, no walking over one hour, no lifting over one hour, no standing over one hour, and no continuous kneeling over one hour. (EX 2, p. 5). Claimant could intermittently sit for two hours, walk for four hours, lift for three hours, kneel for one hour, and stand for one hour. *Id*. Claimant should not engage in any bending, squatting, climbing, twisting, engage in repetitive hand and foot motions, or operate a vehicle. *Id*. Similarly, On May 11, 2001, a physician from Dr. Phillips's office opined that Claimant should alternate sitting and standing every forty-five minutes and should change positions for comfort. (CX 18, p. 2). Likewise, Claimant uncontradicted creditable testimony established that he had difficulty working over two to three hours a day. (Tr. 50).

Accordingly, I find that from October 17, 1999 to October 25, 1999, Claimant was capable of returning to work with restrictions of no lifting over ten pounds, no bending, twisting, jumping or climbing, and no working over three hours a day. From October 26, 1999 to March 14, 2000, Claimant was limited to no lifting over five pounds and no bending, twisting, stooping, or climbing, and no working over three hours a day. After March 14, 2000, Claimant was capable of working three hours a day with limitations of no lifting over twenty pounds, no walking, lifting, standing or kneeling over one hour, no sitting over two hours, no repetitive hand and foot motions, no operation of a motor vehicle, and Claimant must have the ability to alternate positions during his two to three hour work day. These restrictions continued in effect until May 1, 2002, when Dr. Gammel admitted Claimant for surgery. Thereafter Claimant remained temporarily totally disabled while Dr. Gammel implanted a permanent spinal cord stimulator on May 16, 2002, while Dr. Gammel revised the leads on June 26, 2002, and Claimant remains temporarily totally while the leads are "setting" in his spine.

C(2)(c) Maximum Medical Improvement

While I find that Claimant reached maximum medical improvement from an orthopaedic standpoint on March 29, 2001, Claimant has not yet reached maximum medical improvement from a pain management standpoint. On March 29, 2001, Dr. Phillips remarked that Claimant's symptoms were static and he changed Claimant's disability status from temporary to permanent. (CX 18, p. 19). In his deposition Dr. Phillips explained that he issued the permanency rating because Claimant had not improved with conservative care, Claimant was diagnosed with multiple level degenerative disc disease with internal disc disruption, and surgery was not an option. (CX 17, p. 28). From a pain management perspective, however, Claimant had not reached maximum medical improvement

because Claimant had a spinal cord stimulator implanted in May of 2002, it was revised in June 2002, and Claimant testified that the surgically implanted leads need time to set in his spine and need to be better programed to counteract his pain. Therefore, since Claimant is still undergoing treatment with a view toward improvement, Claimant has not attained maximum medical improvement.

C(3) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, no physician opined that Claimant could resume his former job and Claimant established a *prima facie* case of total disability.[7]

C(4) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer may also establish suitable alternative employment by offering the claimant a position within its facility so long as it does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

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[7] In this regard I note that Dr. Williams stated that Claimant's future prognosis to return to work as a electrician was favorable, but Dr. Williams never opined that Claimant could resume is former job. (EX 6, p. 4).

C(4)(a) Jobs in Employer's Facility

In this case, Mr. Colomb testified that Employer had light duty jobs that Claimant could perform as an estimator, doing paper work in the materials office, or purchasing materials on the telephone. (EX 8, p. 9-10). In larger projects, Claimant could serve as indoor office personnel doing "red line" drawings and tending to materials. *Id*. at 12. All of these positions required that Claimant work forty hours a week. *Id*. at 17-18. Although Mr. Colomb testified that Claimant returned to work for a period of time during either the fall, winter, or spring of 1999-2000, Claimant's wage records do not reflect any hours worked in 1999 after the pay period ending October 22, 1999. (EX 8). Also, Mr. Colomb promised to produce wage records for the year 2000 showing that Claimant had worked during that time period, but Employer never introduced any such evidence. Accordingly, I find that the light duty jobs within employer's facility do not constitute suitable alternative employment because they violate Claimant work limitation that he cannot work over three hours a day, and Employer made no showing that the jobs fifth within Dr. Leoni's work limitations.

C(4)(b) Jobs in Claimant's Geographic Community

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is the capable of performing or capable of being trained to do? (2) Within this 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 he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

As discussed, *supra*, Part C(1), Claimant refused to cooperate with Employer's vocational expert in Employer's effort to show a residual wage earning capacity. As the Board directs, I must consider this as a factor in determining the extent of Claimant's injury in evaluating the different jobs available in Claimant's community. As noted by Dr. Grimes, Claimant's vocational expert, Claimant's employability depends on his future medical treatment and residual functional capacity, but, if restricted to light duty, the Claimant likely had a residual wage earing capacity of $5.50 to $7.50 per hour. (CX 27, p. 4).

Employer's vocational expert, Mr. Herbert, attempted to contact Claimant's attorney and arrange a vocational interview with Claimant during the spring and summer of 2000. (CX 1; EX 15).

After numerous attempts to interview Claimant, Mr. Herbert closed the file due to lack of cooperation on August 7, 2000. (CX 15, p. 57). During this time, Employer had the medical report of its own physician, Dr. Leoni, dated March 14, 2000, detailing what Dr. Leoni opined were Claimant's restrictions from a neurological standpoint. On July 14, 2000, Mr. Herbert also had contacted Employer to obtain information about Claimant's abilities and work history. *Id*. at 56. These facts are remarkably similar to those in *Cruz v. May Ship Repair*, 23 BRBS 167 (1990) (ALJ), in which the ALJ determined that the claimant's lack of cooperation with employer's vocational expert was excused because the employer had met with the claimant's employer, spoken with claimant's physician, and had the claimant's medical records. Furthermore, I find that in this case Claimant had an additional reason for not cooperating with the Employer's vocational expert, namely that he was in intractable pain, incapable of working more than two to three hours a day, and could not perform any sustained work without spending a few days in bed. (Tr. 62). Claimant's uncontradicted testimony established that the few jobs he did perform, doing light electrical work, or working for a pizza restaurant, were beyond his physical capabilities.[8] (Tr. 50-51, 59-60, 62). In sum, I find that

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[8] The Act does contain specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. *See* 33 U.S.C. §§§ 903(e), 914(j), 933(f) (2001). In addition, an independent credit doctrine exists in case law which provides employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir.1986); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). The Act does not contain any specific credit provision entitling an employer to offset sums a claimant earned from another employer. *Carter v. General Elevator Co.*, 14 BRBS 90, 98 n.1 (1981). Rather, instead of awarding a credit, "the proper procedure is for the administrative law judge to award temporary total disability benefits from the time claimant did not work, punctuated by temporary partial awards for the time claimant was engaged in part-time employment." *Id*. at 98; *Turk v. Eastern Shore Railroad*, 33 BRBS 468 (1999)(ALJ)(same). "An award of total disability while a claimant is working is the exception and not the rule." *Carter*. 14 BRBS at 97. *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Claimants working in pain or in sheltered employment may still receive total disability even though they continue to work. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (sheltered employment); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979)(extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974)(beneficent employer). Also, the employer bears the burden of showing suitable alternative employment after the claimant establishes a *prima facie* case of total disability. *Turner*, 661 F.2d at 1042-43; *Carter*, 14 BRBS at 97. Therefore, for an employer to take advantage of the *Carter* rule, a claimant's voluntary employment must be such that it does not constitute sheltered employment or extraordinary effort, and must be suitable alternative employment as established by the employer. In this case, Claimant held odd jobs as an electrician and worked for a pizza restaurant. (Tr. 50-51, 59-60). I credit Claimant's uncontradicted testimony that he was unable to perform these jobs due to intractable pain, (Tr. 50-51, 62), and I find that the odd jobs Claimant performed do not constitute suitable alternative employment entitling Employer to pay only partial disability compensation.

Claimant's refusal to cooperate with Employer's vocational counselor in this case, when considered in light the nature of Claimant's injury, the extent of his disability, his subjective reports of pain, and Employer's failure to identify any jobs consistent with the information it garnered from Claimant's supervisors and medical reports, compels the conclusion that Claimant's lack of cooperation is excused and Employer failed to establish suitable alternative employment.

D. Section 14(e) Penalties

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e) (2002). *See also National Steel & Shipbuilding Co. v. Bonner*, 600 F. 2d 1288, 1294 (9th Cir. 1997) (holding the employer liable for Section 14(e) penalties on all payments of compensation which became due fourteen days after it suspended payments without filing a notice of controversion); *Grbic v. Northeast Stevedoring Co.*, 13 BRBS 282 (1980) (finding the employer liable for the penalty until the date of the informal conference when the employer did not file a notice of controversion after unilaterally suspending payments) (Miller dissenting); *Garner v. Olin Corp.*, 11 BRBS 502 (1979) (awarding Section 14(e) penalties after a unilateral suspension of compensation without filing a notice of controversion after a controversy arose under Section 14(d) when the employer suspended payments thinking that the claimant had reached maximum medical improvement).

Assessment of a Section 14(e) penalty ceases whenever the employer complies with the requirements of Section 14(d) and files its notice of controversion. *Oho v. Castle and Cooke Terminals, Ltd.*, 9 BRBS 989 (1979) (Miller dissenting); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989) (stating that "Section 14, taken as a whole, rather than the narrow interpretation of Section 14(e) urged by the claimant, suggests that employer's liability for the Section 14 penalty terminates with its filing of the Notice of Controversion."). "Compensation" under the Act is defined as "the money allowance payable to an employee." 33 U.S.C. § 902(11) (2002). While the term "compensation" has been interpreted to include medical benefits under certain sections of the Act, "compensation" does not include medical benefits under Section 14(e). *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989) (stating that the plain language of Section 14 limits its application to installments of compensation benefits, which medical benefits are not). *Cf. Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S. Ct. 2589, 120 L.Ed.2d 379 (1992) (implying that medical benefits are part of "compensation" by stating that an employee had a right to "compensation" the

moment his right to recover vested); *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 1300 (5th Cir. 1992) (holding that medical benefits are "compensation" for the purposes of accelerated enforcement procedures of Section 18(a)).

On December 7, 1999, Employer controverted Claimant's right to compensation on the grounds that Claimant was scheduled to see Dr. Hurst but canceled his appointment, and because Carrier did not have any medical records from Dr. Boyer since October 24, 1999.[9] (CX 15, p. 19). After this date, Employer continued to pay Claimant's weekly temporary total disability benefits, until May 5, 2000, when Employer suspended compensation payments to Claimant. *Id*. at 20. On July 24, 2000, Employer filed a second notice of controversion contending that Claimant could not substantiate his entitlement to future temporary total disability benefits, and prior approval to obtain a treating physician was not granted. (CX 6, p. 1). Accordingly, I find that Employer suspended payments to Claimant on May 5, 2000, without filing a notice of controversion, and Employer is liable for a ten percent penalty on all "compensation" payments due to Claimant from May 6, 2000 to July 24, 2000.

E. Conclusion

Any failure of Claimant's physicians before August 10, 2001, to comply with the reporting requirements of Section 7(d)(2) was excused in the interest of justice by the district director. Employer wrongfully terminated Claimant's medical benefits in December 1999, and after that date Claimant was relieved of his obligation to seek approval from Employer before obtaining reasonable and necessary medical treatment. I find that Claimant's continuing treatment with Dr. Phillips was reasonable and necessary, his treatment with Drs. Reavill, Gammel and Friedberg was reasonable and necessary, and because of Employer's termination of medical benefits, Claimant was relieved of any obligation he had to request authorization from Employer before changing physicians. Claimant has not reached maximum medical improvement under the Act because he is still undergoing treatment with a view toward improvement while Dr. Gammel adjusts he spinal cord stimulator and the dual leads of the stimulator set into his spine. The nature and extent of Claimant's injury is such that from October 17, 1999, to October 25, 1999, Claimant was capable of returning to work with restrictions of no lifting over ten pounds, no bending, twisting, jumping or climbing, and no working over three hours a day. From October 26, 1999, to March 14, 2000, Claimant was limited to no lifting over five pounds and no bending, twisting, stooping, or climbing, and no working over three hours a day. After March 14, 2000, Claimant was capable of working three hours a day with limitations of no lifting over twenty pounds, no walking, lifting, standing or kneeling over one hour, no sitting over two hours, no repetitive hand and foot motions, no operation of a motor vehicle, and Claimant must have the ability to alternate positions during his two to three hour work day. These restrictions continued in effect until May 1, 2002, when Dr. Gammel admitted Claimant for surgery. Thereafter Claimant remains temporarily totally disabled until released to return to work by Dr. Gammel. Claimant cannot perform his former job, Employer failed to offer a suitable job within its facility, and

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[9] Dr. Boyer was Employer's physician. (EX 8, p. 79). Dr. Boyer was a practitioner at the Occupational Medicine Clinic of Acadiana. (CX 26, p. 7).

based on the extent of Claimant's disability, Employer failed to show suitable alternative employment. For failing to file a notice of controversion within fourteen days after suspending Claimant's wage benefits, Claimant is entitled to a Section 14(e) penalty for the period of May 6, 2001 to July 24, 2001.

F. 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). 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.

G. Attorney 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. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.[10] The Act prohibits the charging of a fee in the absence of an approved application.

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[10] LIGA, Carrier, and Employer's contentions over liability for attorney fees should be resubmitted as an opposition to the fee petition. I shall consider the merits of those arguments at that time.

V. ORDER

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

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from October 17, 1999, and continuing based of an average weekly wage of $904.83, and a corresponding compensation rate of $603.22.

2. Employer shall ay a penalty pursuant to Section 14(e) of the Act for all compensation payable to Claimant from May 6, 2000 to July 24, 2000.

3. Employer shall be entitled to a credit for all disability wages paid to Claimant.

4. Employer shall reimburse Claimant or pay for all treatment rendered by Drs. Phillips, Reavill, Gammel and Friedberg, including $88,518.82 in stipulated medical bills, and $1,952.62 in stipulated mileage expenses.

5. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

6. Claimant is entitled to interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge