U.S. Department of Labor

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

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

Issue Date: 30 October 2003

CASE NO.: 2003-LHC-930

OWCP NO.: 07-158040

IN THE MATTER OF:

GERALD J. DRUILHET
Claimant

v.

OMEGA PROTEIN,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN. LTD.,
Carrier

APPEARANCES:

Jennifer Jones, Esq.,
on behalf of Claimant

Alan K. Breaud, Esq.,
on behalf of Employer/Carrier

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 Gerald J. Druilhet (Claimant), against Omega Protein (Employer) and Signal Mutual Indemnity Assn. Ltd.,

(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 July 25, 2003, 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, called Mr. Glenn Hebert, and introduced two exhibits, which were admitted, including: his pre-trial statement and the curriculum vitae of Glenn Hebert.[1] Employer and introduced five exhibits, which were admitted, including: pertinent portions of Claimant's medical records from Dr. Duval, correspondence from Employer to Claimant, Dr. Foret and Dr. Duval regarding Claimant's job descriptions, Claimant's Jones Act claim filed against Employer in state court, and Employer's Notice of Controversion from August 30, 2002. The parties also introduced 7 joint exhibits, which were admitted, including: stipulations, depositions and medical records of Dr. Duval and Dr. Foret, Claimant's functional capacity evaluation report and records from the Center for Work Rehabilitation, Inc., and Employer's Notice of Final Payment.

Post-hearing briefs were filed by the parties.[2] 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. Claimant sustained an injury on September 18, 2000;

2. Claimant's injury was in the course and scope of his employment;

3. An employer-employee relationship existed at the time of Claimant's injury;

4. Employer was advised of the injuries on September 18, 2000;

5. Employer filed a Notice of Controversion on August 30, 2002;

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p__; Joint Exhibits- JX-__, p.__.

[2] Claimant submitted a 12 page, double spaced brief on September 4, 2003. Employer submitted a 7 page, double spaced brief on September 10, 2003.

6. An informal conference was held on November 12, 2002;

7. Claimant's average weekly wage at the time of injury was $1,359.90;

8. Employer paid temporary total benefits from September 19, 2000, through May 7, 2001 and permanent partial benefits from May 8, 2001 through September 17, 2002, for a total of $94,634.40;

9. Employer has paid all of Claimant's medical bills.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of Claimant's injury;

2. Date Claimant achieved MMI;

3. Existence of suitable alternative employment.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is 62 years old and worked as a longshoreman for Employer 35 years. He has an eighth grade education, and did not obtain his GED or have any further formal education or training. Claimant was a dock supervisor at Employer's Cameron, Louisiana facility; part of his duties including the oversight of unloading the fishing boats. On September 18, 2000, while Claimant was unloading fish, it became necessary to stop the conveyor and replace the rubber bumpers on the chute. Claimant was required to stand on the framework of the conveyor, behind the chute, to do this. After he completed this task, but before he had stepped off of the conveyor, the scale man inadvertently turned on the conveyor, which sucked Claimant in for an estimated 7 minutes.

Claimant was taken to a Lake Charles hospital and then transferred to Our Lady of Lourdes Hospital in Lafayette, where he was diagnosed with a broken right femur, pelvis,

gallbladder and kidney complications and problems with his teeth. Employer voluntarily paid Claimant temporary total disability benefits under the Act, beginning on September 19, 2000. On September 22, Dr. Duval performed surgery to repair Claimant's femur, which required the insertion of a metal rod and screws, and his pelvis, which required the insertion of three metal plates.[3] Claimant remained hospitalized until October 5, 2000. In the following weeks, Dr. Duval noted Claimant was healing well. X-rays taken on October 13, of Claimant's leg and pelvis, showed the hardware and bones were adequately positioned. On October 31, Dr. Duval noted Claimant was developing a hematoma on his left hip, which he partially drained on November 30. He successfully drained the rest in an outpatient surgery on December 4.

Dr. Duval saw Claimant on January 19, 2001, and noted his pelvis was healed and his leg was almost healed; Claimant still walked with a slight limp and used a cane. On February 20, Claimant requested a release to return to work; his leg had healed, he had discomfort in his left hip from the hematoma. Dr. Duval released Claimant to return to work as a supervisor in early March. He next saw Claimant on April 17, 2001. Claimant still walked with a cane, had some abdominal pain around the plates, and reported weakness in his leg. Dr. Duval ordered a functional capacity evaluation (FCE) because Claimant was unsure he could physically perform his job. The FCE was performed over the week of April 23, and restricted Claimant to performing light to medium level work. Dr. Duval reviewed the FCE with Claimant on May 8; he agreed with the results and released Claimant to work within the restrictions of the FCE. He opined Claimant had reached MMI as of this date. On this date, Employer changed Claimant's disability benefits from temporary total to permanent partial.

Claimant received a second opinion about his leg and pelvis from Dr. Foret on May 9, 2001. Dr. Foret opined Claimant's three main problems were chronic bilateral leg and right hip pain, osteoarthritis in his lower back, and symphysis pubis disruption with the plating in his pelvis; this was causing him chronic pain with lifting and sitting for long periods of time. He suggested putting Claimant on a physical training program to improve his strength and recovery.

In July and August of 2001, both Drs. Duval and Foret approved the job description for night shift general supervisor which Employer offered Claimant. Claimant returned to work in this capacity on July 23, 2001, earning his same pre-injury wages. He supervised a crew of 20-30 people, using a golf cart provided by Employer to get around the facility. In mid-November, 2001, Claimant was notified Employer was terminating his position. They offered Claimant a job as warehouse clerk for $7 per hour, which Claimant declined because he felt it was outside his physical restrictions. Employer continued to pay Claimant permanent partial disability benefits until September 17, 2002, when they terminated benefits.

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[3] Claimant also underwent gallbladder surgery and medical treatment for his kidneys and teeth.

Claimant returned to see Dr. Foret on October 9, 2002. He opined the metal rod in Claimant's leg was protruding and irritating the muscles, causing bursitis and pain in the right hip. He suggested removing the rod if the pain continues. Dr. Foret also noted Claimant had continued pain in his pelvis, but he did not recommend removing the plates. Overall, Dr. Foret did not note any significant change in Claimant's condition between May 9, 2001 and October 9, 2002.

B. Claimant's Testimony

Claimant became a longshoreman in 1965, unloading fishing boats. In March 1966, he went to work for Employer's predecessor; he worked on the water boats and later as a dock supervisor. As a dock supervisor, Claimant was in charge of unloading the fishing boats from April through October. This required Claimant to board the vessel to check the hydrogen sulfite meters, get the boats hooked up, instruct the engineers to pump the water down and then assist with the unloading. Claimant testified they unloaded at least three boats a week, and Employer had 13 boats when Claimant left. (Tr. 32-34). Claimant testified he was a hands-on supervisor who participated in the actual labor. He stated he was required to get on and off the boats, and occasionally lift heavy items. However, he also did environmental work for Employer, went out on the water boats and in the off-season from October to April he did maintenance and repair work on the dock. (Tr. 35-37).

Claimant testified that on September 18, 2000, he was helping unload fish from a vessel when it became necessary to change the rubber bumpers on the chute. The scale man turned off the conveyor, and Claimant stepped up onto the conveyor's framework, behind the chute, to replace the rubber quickly. After they finished unloading the remaining fish, the scale man turned off the conveyor again to allow Claimant to fix the rubber bumpers properly, and clean them off. After Claimant finished the task, but before he was off of the conveyor, the scale man inadvertently turned the conveyor back on. This sucked Claimant into the conveyor for about 7 minutes. (Tr. 38-39). Claimant testified he hurt his pelvis, leg, gallbladder and teeth. He was taken to a hospital in Lake Charles, and then on to Our Lady of Lourdes Hospital in Lafayette. Claimant was in the hospital for a couple of weeks and had surgeries to repair his leg, pelvis and gallbladder. (Tr. 40-41).

Claimant testified his job often required him to climb, sometimes up to four feet at a time. Although there were wet surfaces on the dock, the concrete was textured and not slippery. He never had difficulty walking or working in the past. (Tr. 41-43). Claimant testified he went to Dr. Foret for a second opinion; Dr. Foret took a MRI of Claimant's

back and gave him a vest to wear. (Tr. 44). Claimant returned to work on July 23, 2001, in a position as a consultant and advisor. He testified he was not given a title, but he did the same type of work as before, except not hands-on. Claimant was paid the same wages, and was provided with a golf cart to use to get around the dock. Specifically, Claimant testified in his new position he mostly just gave oral instructions to the dock workers. (Tr. 47-49). On cross-examination, he stated that while technically everyone at the plant worked under him, in actuality he had no authority. (Tr. 71). He assisted and trained his brother, who had succeeded him as dock supervisor. Claimant only fell once, when he was using his cane to walk on the dock. Overall, Claimant testified he felt he could not perform the job within his physical restrictions because he could not climb ladders or get onto the tanks to check fluids, even though he was told to do only what he could. (Tr. 49-50).

Although Claimant wanted to return to work, he told his superiors he could not perform his job anymore, despite the fact Employer made the work as easy as they could by providing him a golf cart and allowing Claimant to do only what he was capable of. Claimant testified he told Greg Fewell, the general manager, Tom Galloway, from personnel, Ricky Romero, the warehouse supervisor, as well as Brenda Daigle, Darlene Tingler and Sandra DeShields he could not physically perform his work anymore. His main problem was that he could not sit or stand for too long without pain. (Tr. 45-47, 88). On cross-examination, Claimant testified he was well-liked among his co-workers, who were mostly family members, and they would have seen him working after the accident, although none of them testified on his behalf. Specifically, there were 20-30 people working under him at the plant. He stated he only told people at the plant he could not perform his duties. Claimant testified he knew Dr. Duval signed off on the night supervisor position, but he did not know if Dr. Foret approved the job. Claimant did not complain to Dr. Duval the job was too physically demanding for him to perform, and deferred to Dr. Foret's report regarding the same. (Tr. 70-72, 75-77, 84).

Claimant testified Greg Fewell notified him in November 2001, shortly before Thanksgiving, Employer was eliminating Claimant's job. On cross-examination, Claimant admitted other jobs were eliminated at the same time. Claimant was offered a position as a warehouse clerk; however, he did not accept it because he felt it exceeded his physical restrictions. (Tr. 58-60, 88). On cross-examination, Claimant admitted the job insulted him, but clarified that was not the reason he did not accept it. He testified he did not take the job because it was outside his restrictions; however, he does not remember telling anybody that. (Tr. 81-82). Specifically, Claimant stated he would be on his feet a lot of the time, going back and forth between the counter and the stock to get people the supplies they request. Claimant had concerns about sitting in hard chairs and walking on cement floors. He stated he has problems walking without a cane, and cannot climb stairs or ladders. Claimant testified the warehouse clerk position had not been approved by his doctor; additionally, Dr. Foret told Claimant he is totally disabled. (Tr. 60-65).

Claimant testified he has continued weakness in his legs, which give out on him. He stated Dr. Foret did not recommend removing the hardware in his leg to relieve his pain; Claimant is unsure about undergoing another surgery. Claimant testified Dr. Foret told him the plates in his pelvis are misaligned, and Claimant understood that to be the cause of his left leg pain; his left leg was not injured in the accident. (Tr. 66-67). On cross-examination, Claimant testified he last saw Dr. Foret in October, 2002. Although Dr. Foret told him to return as needed, Claimant has not had the money to pay for the visits. Claimant testified he requested money for medical bills, but has not been paid; he paid the bills himself. However, he stated Employer did pay for his back vest and his first cane. (Tr. 85-88).

C. Testimony of Glenn M. Hebert, M.R.C.

Mr. Hebert is a Louisiana licensed vocational rehabilitation counselor; he has spent the last 21 years in private practice and worked at Crawford Rehabilitation year prior to that. On voir dire, Mr. Hebert testified he is certified by the American Board of Experts as a vocational expert, qualifying him to testify on loss of earning capacity. Litigation generates 100% of his business, and he testifies 20-25 times per year. Most of his work is plaintiff referrals, although he does some defense work, as well. Mr. Hebert was accepted by the parties and the court as an expert in the field of vocational rehabilitation. (Tr. 96-99).

Mr. Hebert testified he met with Claimant on October 16, 2002, for one and one-half hours to see if he was a viable candidate for rehabilitation and to re-enter the labor force. Mr. Hebert found Claimant to be a 61 year-old male with an eighth grade education and no GED or vocational training. Mr. Hebert gave Claimant the Wide-Range Achievement Test and found him to be operating academically on an eighth grade level. Mr. Hebert opined Claimant is not a candidate for vocational training or returning to school, and would have difficulty performing office work. (Tr. 99-101).

Mr. Hebert testified he was familiar with the operations of Employer's Cameron plant, as he has visited the plant in the past and did compensation work for AIG in Intercoastal City and Cameron. He stated he has done job surveys and restructuring at the Cameron plant.[4] Although Mr. Hebert did not know Claimant prior to October 2002, he testified Claimant's prior work at Employer was semi-skilled and heavy work,

[4] On cross-examination, he stated he last visited Claimant's plan 10-12 years ago, and did not speak to anyone but Claimant regarding this case. (Tr. 106).

requiring him to lift over 50 pounds throughout the day. He testified Claimant does not have many transferable skills. (Tr. 101-102).

Mr. Hebert based his conclusions on Claimant's medical records, the interview he conducted and tests Claimant performed. He concluded Claimant is not able to return to work; he can perform light duty work, but is not place able considering his limited education and transferable skills, age and medical condition. Mr. Hebert feels Claimant will be unable to return to gainful employment. Mr. Hebert testified Claimant would not benefit from vocational rehabilitation, and did not know of anyone who would tender Claimant employment. (Tr. 104-105). Mr. Hebert stated he only interviewed Claimant once and reviewed his medical records and work history; he did not conduct a labor market survey for Claimant, or attempt to look for a job for Claimant. He clarified that under his ethical guidelines, if he does anything for an injured worker, he must have a reasonable expectation of succeeding; "[i]f we can't succeed, we don't try." Based on his 21 years of experience, Mr. Hebert testified Claimant was unemployable. (Tr. 105, 107).

On cross-examination, Mr. Hebert testified while 100% of his business is generated by litigation, he has an active caseload of putting people back to work. He did not analyze Claimant's pre-injury job, or verify anything with Employer; he took Claimant at face value. Mr. Hebert analyzed Claimant as a supervisor that did labor activities. He was aware Claimant's FCE restricted Claimant to light/medium duty work, and that Drs. Foret and Duval had released Claimant to full duty work within these restrictions. Mr. Hebert testified he could not verify Claimant wanted to return to work, instead of retire. Mr. Hebert also reviewed Claimant's post-injury jobs of night superintendent and warehouse clerk; he thought the second job was much harder than the first, although neither listed any physical labor in their descriptions and he did not verify the job description with Employer. (Tr. 108-13).

D. Exhibits

(1) Deposition and Medical Records of Michael Jude Duval, M.D.

Dr. Duval testified by deposition on June 10, 2003. He is board certified in orthopedic surgery since 1997, and has privileges at the local hospitals in Lafayette, Louisiana. He testified his emphasis is in arthroscopy, although he has done a fair amount of trauma surgeries. He has previously been accepted as an expert witness in the field of orthopedic surgery; the parties accepted him as an expert without objection. (JX-2, pp. 1-7, 25). Dr. Duval first saw Claimant on September 19, 2000, after he had been transferred to Lafayette from a Lake Charles hospital where he was diagnosed with a fractured femur. Dr. Duval testified he diagnosed Claimant with a fractured femur,

fractured pelvis, and elevated kidney functions. Dr. Duval performed surgery on September 22 to repair Claimant's pelvis and femur, which Claimant tolerated well. On cross-examination, Dr. Duval clarified he put hardware plates, screws and a metal rod in Claimant's right leg, and two plates on the front of his pelvis. He does not intend to remove the hardware unless they cause infection. *Id.* at 8, 29-30.

Dr. Duval testified Claimant remained hospitalized until October 5, 2000, and that he followed with him after his discharge. On October 13, x-rays showed everything was adequately positioned and Claimant was doing alright. On October 31, Claimant was ambulatory with a walker, his wounds had healed, but he was developing a hematoma on the left hip. Dr. Duval also stated he found a healing callus over the right femur, which is a new bone formation in response to the facture and indicates healing. Dr. Duval believed Claimant was well ahead of schedule on his recovery. *Id.* at 9-12. On Claimant's November 30 visit, Dr. Duval noted the x-rays showed the fractures were healing well, and Claimant was doing fine except for the hematoma on his left hip. Dr. Duval testified he allowed Claimant to put weight on his right leg, and drained 120 cc's of blood from the hematoma. Dr. Duval drained the rest of the hematoma in an outpatient surgery on December 4. He followed up with Claimant on December 6, noting the drainage helped Claimant's pain, and no infection had been found. *Id.* at 12-15. On December 14, Dr. Duval noted a small reoccurrence of hematoma, but overall found Claimant to be doing well and released him to physical therapy. *Id.* at 15.

Dr. Duval next saw Claimant on January 9, 2001, and found Claimant's pelvis had healed as of this date, and his femur was healing nicely. Dr. Duval recommended 6 weeks of physical therapy to get Claimant off of his cane. Dr. Duval wrote a letter to Mr. Galloway, in Employer's personnel office, indicating Claimant was progressing well in therapy, but he still had a slight limp. (JX-2, p. 16; JX-4, p. 14). Dr. Duval testified Claimant looked great at his next visit, on February 20, 2001. He had a slight limp on his right side, not much pain, discomfort in the hematoma, and a lot of problems with his teeth for which he had been prescribed an antibiotic. Claimant reported to Dr. Duval the antibiotics seemed to help the pain in his hematoma, so Dr. Duval continued him on a 3 week course, suspecting a possible infection. Dr. Duval stated Claimant's femur had healed completely; per Claimant's request he released him to work with no restrictions. (JX-2, pp. 16-18).

Dr. Duval next saw Claimant on April 17, 2001. He testified Claimant expressed concern about being fired and reservations about returning to work because he felt he was not physically capable of performing his duties; he was accompanied on this visit by Mr. Galloway. Claimant was doing well and able to walk without his cane, but felt more comfortable with it. Dr. Duval's examination of Claimant revealed abdominal pain over the plates and right leg weakness, both of which were not uncommon. However, Dr. Duval indicated there was nothing he could do about Claimant's abdominal pain. He ordered an FCE to evaluate Claimant's capabilities. *Id.* at 18-20. Dr. Duval received

Claimant's FCE results on April 27, 2001. They indicated Claimant could not return to work as a dock supervisor because it was considered heavy, as confirmed by Employer. The FCE restricted Claimant to only light or medium work levels. (JX-4, p. 51).

Dr. Duval next saw Claimant on May 8, 2001. He reviewed the FCE with Claimant, and was informed Claimant arranged for a second opinion regarding his hip. Dr. Duval noted no recurring hematoma, and stated most of Claimant's pain was in his buttock musculature, which he suspected was nothing to worry about. Dr. Duval opined Claimant had reached MMI as of this date and discharged him from his care, offering to review any further tests he may undergo with another doctor. He has not seen Claimant since this examination. (JX-2, pp. 20-22, 24).

On cross-examination, Dr. Duval testified the chances of Claimant needing a hip replacement are extremely low because the femur fracture was in the middle of the shaft, not near the hip. He believes Claimant's weakness is permanent and does not suspect further surgery is necessary. Dr. Duval clarified he released Claimant to his position as supervisor; he did not think Claimant could return to heavy work. *Id.* at 31. Dr. Duval also stated the fact that Claimant's hematoma was still present in October 2002, per Dr. Foret's notes, is not surprising; there is not much to do about it because it is probably scarred in. Dr. Duval stated a hematoma is localized swelling that will not go away and can be painful; he thought Claimant's complaints were accurate. (JX-2, pp. 33-34).

Dr. Duval testified he received a description of a night shift superintendent position which Employer had created for Claimant; it was restrictive regarding lifting, carrying and climbing and the letter indicated Claimant's experience and knowledge were more important to Employer than his physical labor. Dr. Duval agreed with Claimant's FCE results, and believed Claimant was capable of performing this job. He approved the position in a letter to Mr. Ott dated July 23, 2001. *Id.* at 22-23. On cross-examination, Dr. Duval testified he thinks vocational rehabilitation specialists would be beneficial in determining the type of work Claimant can perform. Because he has no knowledge of Claimant's condition after May 8, 2001, he deferred to the vocation rehabilitation counselor regarding what Claimant can do from a job standpoint. He testified he believed the most accurate way to evaluate a patient's work capacity is to consider the person's FCE, experience and education. *Id.* at 35-36, 39.

Overall, Dr. Duval testified he found Claimant to be a good patient, who made a diligent effort at recovery. He felt the femur fracture resulted in a 10% total body disability, and noted Claimant's pelvic fracture, hematoma and kidney condition were not disabling conditions. *Id.* at 36-38.

(2) Deposition and Medical Records of Lynn Foret, M.D.

Dr. Foret testified by deposition on July 7, 2003. He is board certified in orthopedic surgery and has been a solo practitioner since 1982. Dr. Foret testified he first saw Claimant on May 9, 2001, on a referral from Dr. Richard Sanders, a family doctor in Cameron. Claimant presented with low back pain, pelvic pain, chronic bilateral leg pain, and bursitis in the right hip which he believed to be residual from the accident. Dr. Foret ordered an MRI of Claimant's back on May 10, which indicated significant arthritis at the L5/S1 level.[5] He testified these results are normal for a 61 year-old laborer, and they were not the cause of Claimant's pain or otherwise trauma-related. (JX-3, pp. 5-8, 18, 22). On cross-examination, Dr. Foret testified he did not review Claimant's past medical records. He took x-rays on May 9, 2001, and testified Dr. Duval did an excellent job putting Claimant back together.

Dr. Foret opined Claimant's biggest problem was the symphysis pubis disruption with the plating in his pelvis. He testified such hardware is notorious for chronic pains with lifting and sitting for long periods. He stated it would be beneficial for Claimant to work with a professional trainer to increase his quad and abdominal strength. However, Dr. Foret opined Claimant will have difficulty returning to work if climbing, squatting or heights are involved. He opined Claimant's work range is probably moderate to sedentary. (JX-3, pp. 8-10). On cross-examination, Dr. Foret testified he approved Employer's night shift superintendent position for Claimant in August 2001. *Id.* at 24.

Dr. Foret next saw Claimant on October 9, 2002. Upon examination, he found Claimant was having difficulties with the iron rod in his femur; it was protruding and causing atopic bone to build up. Claimant also presented with pain in the right hip, near the bursitis. Dr. Foret opined removing the metal rod from Claimant's femur may help relieve his right hip pain. (JX-3, p. 10). He noted Claimant was having difficulty ambulating because of the hip pain, and it may have also caused his feet to swell. Dr. Foret opined the bursitis was a result of the hardware in Claimant's leg and hip irritating the muscles and ligaments; however, on cross-examination, he stated Claimant's leg surgery did not involve his hip joint. If the build-up continues, he recommended removing the hardware if the hip and femur are completely healed. *Id.* at 11-13, 26.

On cross-examination, Dr. Foret testified Claimant would more likely than not have to have something done about his right hip bursitis. He stated removing the hardware would improve Claimant's pain, but would not heal him. Additionally, Dr. Foret stated he would have to make sure Claimant's bone was solid at the site of the fracture. However, he also testified he did not believe the bursitis would be a disabling

[5] Dr. Foret discussed the MRI results with Claimant in a phone conversation on May 22, 2001. (JX-3, p. 7).

condition from an employment standpoint. Dr. Foret testified there were no significant changes in Claimant's condition between May 2001 and October 2002. *Id.* at 27-29, 31.

Dr. Foret noted Claimant's pubic plate remained intact. He testified Claimant showed signs of pelvic pain and soreness during weight bearing activities; however, he stated it is often difficult to recover from this type of injury 100% and did not recommend removing the plates. *Id.* at 11-12. Dr. Foret also found osteoarthritic changes in Claimant's right hip, but testified they are consistent with the old femur fracture. Dr. Foret testified the hematoma, or subacute tissue of Claimant's left hip, is a result of the hardware. However, he opined Claimant's hips hurt because he was not properly rehabilitating his muscles; he did not suggest a hip replacement. *Id.* at 13-14.

Dr. Foret testified he feels Claimant is disabled and would have problems with even sedentary work which required him to sit for long periods of time. He stated he would have to review Claimant's job description to determine if he was capable of working. *Id.* at 15-17. He also testified weight loss, physical therapy and anti-inflammatory medications could all be good alternatives to surgery. *Id.* at 32.

(3) Records from the Center for Work Rehabilitation, Inc.

Claimant was referred to the Center for Work Rehabilitation, Inc., by Dr. Duval for a FCE. Claimant underwent a functional capacity assessment during the week of April 23, 2001. (JX-6, p. 7). Claimant's FCE results placed a total restriction on climbing ladders, climbing more than 4 or 5 stairs, carrying items while climbing, crawling and full squats. Claimant can continuously sit for 1.5 hours, stand and walk for 15 minutes; Claimant can alternately sit, stand and walk for 8 hours. The results stated Claimant is capable of full-time work within the light to medium duty restrictions. The FCE concluded Claimant is unable to return to his former job as Employer's Dock Supervisor because he has not demonstrated an ability to work at a heavy duty job. Claimant agreed this was a fair assessment of his capabilities. *Id.* at 3-5.

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he has not reached maximum medical improvement (MMI), as indicated by Dr. Foret's opinion he may need more surgery to ease his hip pain. He also asserts Employer has failed to provide suitable alternative employment. Specifically, Claimant contends the night shift general superintendent position was sheltered employment which was not within his physical restrictions and subsequently became

unavailable, and the warehouse clerk position did not meet Claimant's physical requirements. In light of the foregoing, Claimant argues he is entitled to temporary total disability from the date of his injury, September 18, 2000, until he returned to work on July 23, 2001, as well as from December 4, 2001, and continuing. Claimant clarified he is not seeking benefits for the period during which he was employed as night shift general superintendent because Employer paid him the full amount of his pre-injury wages.

Employer contends Claimant achieved MMI on May 8, 2001, as indicated by Dr. Duval and that Dr. Foret's opinion should not be relied upon because his suggestion of surgery was not a formal recommendation and he was not Claimant's treating physician. Additionally, Employer contends they have provided Claimant with suitable alternative employment in the form of two positions, night shift general superintendent and warehouse clerk, thus rebutting his *prima facie* claim of total disability. Employer asserts the night superintendent position was not sheltered employment because it was created as a way for Employer to utilize Claimant's experience and knowledge of the job, which was valuable to them. Also, Employer emphasizes both Dr. Duval and Dr. Foret approved this position for Claimant. Employer contends the warehouse clerk position was not more strenuous than the night shift superintendent, and they would have accommodated Claimant if he had expressed his concerns to them. Thus, Employer argues Claimant is capable of returning to gainful employment, and only entitled to permanent partial disability benefits from May 8, 2001 and continuing.

B. Nature and Extent

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. § 902(10) (2003). Disability is an economic concept based upon a medical foundation distinguished by either its 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 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, 23 BRBS (CRT)(2d 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).

In the present case, the parties do not dispute Claimant sustained a work-related injury on September 18, 2000. He endured extensive surgeries and treatment for the subsequent eight months, all under the constant care of Dr. Duval. Dr. Duval did not report any significant changes in Claimant's condition after April 17, 2001, and declared Claimant at MMI on May 8, 2001. Dr. Foret made no opinions, either way, about whether Claimant had reached MMI. However, I find his testimony that he did not notice any changes in Claimant's condition between May 2001 and October 2002 supportive of Dr. Duval's opinion Claimant reached MMI on May 8, 2001. Although Dr. Foret alluded to the possibility of further surgery to relieve Claimant's right hip bursitis, he clarified he would have to reevaluate Claimant before making any definite recommendations regarding the surgery. I do not find this indicative of the fact Claimant continues to undergo treatment to improve his condition. I further note Dr. Foret only saw Claimant twice, over a period of one and one-half years, whereas Dr. Duval treated Claimant 12 times in an eight month period. I am thus inclined to place more weight on the testimony of Dr. Duval, which is nonetheless supported by Dr. Foret's testimony as mentioned above. Therefore, I find Claimant reached MMI on May 8, 2001, and is entitled to permanent disability benefits from that date forward.

Case law has held that to establish a *prima facie* case of total disability under the Act, a claimant must prove 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); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish 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). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, I find the evidence overwhelmingly indicates Claimant can no longer perform his pre-injury duties as Employer's dock supervisor. Claimant testified he did many labor activities as supervisor, and Employer verified the position constituted heavy work. (JX-4, p. 51). Claimant's FCE and both Drs. Duval and Foret stated Claimant is incapable of returning to heavy work. Claimant himself testified he is incapable of performing his previous job. Accordingly, I find Claimant has established a *prima facie* case of total disability as of September 18, 2000.

C. 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). To establish suitable alternative employment, an employer must prove the availability of actual employment opportunities within Claimant's geographical location which he could perform considering his age, education, work experience and physical restriction. *Turner*, 661 F.2d at 1042-43; *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993); *cert. denied* 511 U.S. 1031 (1994). The finder of fact may rely on the testimony of a vocational expert in determining the existence of suitable alternative employment, even if the expert did not examine the claimant, as long as the expert is aware of the claimant's age, education, work experience and physical restrictions. *Hogan v. Schiavone Terminal*, 23 BRBS 290 (1990); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985).

Ordinarily, an employer is not a long term grantor of employment. *Olsen v. Triple A Machine Shops*, 25 BRBS 40 (1991); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). However, once an injured employee establishes a *prima facie* case of total disability, is offered a light duty position or modified work in the employer's facility, and is laid off due to reasons not associated with his performance, the light duty job within the employer's facility does not establish suitable alternative employment because it was not reasonably available to the claimant. *Northfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999)(determining that the employer made a post-injury light duty position "unavailable" through a lay-off and to rebut the employees *prima facie* case of total disability the employer had to do more than point to its own internal light duty job); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 25 (1988)(finding that once the employer laid the injured worked off from his post-injury light duty job the suitable alternative employment was no longer available and the employer failed to prove that the injured worker could perform other work). The employer then has a renewed burden to establish suitable alternative employment.

In the present case, Claimant returned to work for Employer on July 23, 2001, as night shift general superintendent. He testified he could not perform the duties required of him as they were not within his physical restrictions; specifically he could not climb ladders or get onto the tanks to check the fluid levels. However, I find this testimony to be incredible and not supported by the record. The written job description provided by Employer mentioned none of the duties Claimant asserts he cannot perform. According to the description, Claimant was to supervise, direct and coordinate production activities

through subordinate supervisors. The description did not include any labor activities and the only physical requirements were that Claimant walk and stand, and occasionally climb stairs. (EX-1, pp. 5-6). Claimant admitted Employer accommodated his physical restrictions by providing him a golf cart and allowing him the discretion to do only those activities he felt capable of performing. Moreover, both Dr. Duval and Dr. Foret approved the position. Claimant also argues this position was sheltered employment; however, the record indicates that although Employer created the job especially for Claimant, it did so in order to retain and utilize his knowledge and experience with the company. The position was important and necessary to Employer's business, thus it did not constitute sheltered employment. In light of the above, I find the position of night shift general superintendent was within Claimant's physical restriction and was not sheltered employment.

However, I note the position was eliminated by Employer only four months after it was created for Claimant. Accordingly, I find this position was not reasonably available to Claimant such as to relieve Employer's burden of establishing suitable alternative employment. Although the elimination was based on economic reasons and other positions were also eliminated at the same time, Employer has a renewed burden to establish suitable alternative employment for Claimant. Thus, I find the position of night shift general superintendent did not satisfy Employer's obligation to establish suitable alternative employment under the Act.

Employer attempted to establish suitable alternative employment by offering Claimant a position as warehouse clerk. However, the record indicates Claimant was not physically capable of performing this job. Claimant himself testified he believed the job to be outside of his physical restrictions; specifically, the job would involve a lot of walking on cement floors, possibly climbing and carrying heavy objects. This was corroborated by the testimony of Mr. Hebert, who stated the warehouse clerk position was more strenuous than the night superintendent position, and may constitute heavy duty work. Neither Dr. Foret nor Dr. Duval approved the warehouse clerk position, and Employer offered no affirmative evidence to show it was within Claimant's physical restrictions. In light of the foregoing, I find the warehouse clerk position did not constitute suitable alternative employment under the Act.

Additionally, I note Mr. Hebert testified Claimant is unemployable in any position, given his age, education and physical restrictions. Specifically, Mr. Hebert stated Claimant would not benefit from vocational rehabilitation, and he did not know of anyone who would tender Claimant employment. Accordingly, and in consideration of the above findings, I find Employer has failed to establish suitable alternative employment for Claimant and thus rebut his *prima facie* case of total disability. As such, Claimant is entitled to an award of total disability benefits.

In conclusion, I find Claimant achieved MMI on May 8, 2001, entitling him to permanent benefits. I also find Claimant established a *prima facie* case of total disability, which Employer failed to rebut. As Claimant is unable to return to his pre-injury job, and Employer has not established suitable alternative employment, I find Claimant is entitled to permanent total disability benefits from May 8, 2001, and continuing.

D. 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.

E. 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. The Act prohibits the charging of a fee in the absence of an approved application.

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 permanent total disability compensation pursuant to Section 908(a) of the Act for the period from May 8, 2001, to present and continuing based on a stipulated average weekly wage of $1,359.90.

2. Employer shall be entitled to a credit for the permanent partial disability compensation paid to Claimant under Section 908(c)(21) of the Act, as well as all wages paid to Claimant, after May 8, 2001.

3. 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.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. 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.

A

CLEMENT J.KENNINGTON
ADMINISTRATIVE LAW JUDGE