U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 April 2007

Case No.: 2006-LHC-210

OWCP No.: 08-125025

In the Matter of:

O.B.
Claimant,

v.

CERES MARINE TERMINAL
Employer

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by Claimant against Ceres Marine Terminal (Employer).

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 28 Oct 05. All parties were represented by counsel. On 6 Jun 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.[2]

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[1] 33 U.S.C. §901 *et seq.*

[2] Claimant's brief was lengthy. However, when eventually considering attorney's fees, the Court must consider the nexus between the time spent and the result. The brief was a boilerplate description of the law and extensive reiteration of the facts, with almost no discussion of how the law applies to the evidence in this specific case. It did not play a significant role in obtaining an award for Claimant.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant
Thomas E. Isabelle, Jr.
Thomas J. Owens
John Halligan

Exhibits[4]
Claimant's Exhibits (CX) 1-39[5]
Employer's Exhibits (EX) 1-50, 53-59[6]
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[7]

1. There is jurisdiction under the Act.

2. Claimant was injured on 18 Jan 05.

3. The injury occurred in the course and scope of employment.

4. An Employer/Employee relationship existed at the time of the accident.

5. Employer was properly notified of the injury.

6. There was proper and timely controversion.

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[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Before briefs were submitted, the record was reopend for additional medical evidence at Claimant's request over Employer's objection, in the interests of creating a complete record. The Employer was also able to supplement its medical evidence in response.
[5] Employer objects to CX-10 and CX-34, which are copies of the Informal Conference report. The Court sustained the objection in part. The objection was sustained as to any substantive opinions contained in the report. However, the Court will consider the report for the purpose of establishing what happened administratively. CX-37 is not entirely legible and only the portions that can be read will be considered.
[6] EX-51 and EX-52 were blank. Employer offered into evidence Claimant's deposition as EX-37. Since Claimant also testified live at the formal hearing, counsel were cautioned that the Court would not consider Claimant's deposition unless cited to specific pages. EX-55 through EX-59 were offered into evidence post-hearing.
[7] JX-1.

7. At the time of injury, Claimant had an average weekly wage of $1,313.35, with a corresponding compensation rate of $875.56.

8. Claimant received temporary total disability compensation benefits from 19 Jan 05 through 10 May 05.

9. Dr. DeBender is Claimant's choice of physician.

ISSUES[8]

1. Compensable Injury

   a. Whether Claimant in fact injured his left shoulder during his work related injury.

2. Nature and Extent of Injury

3. Maximum Medical Improvement

4. Entitlement to Medical Benefits

FACTUAL BACKGROUND

On 18 Jan 05, while working for Employer as a rigger, Claimant fell between two hatch covers. His right arm and left leg were caught on the rail while he hung upside down. He needed assistance up and was taken to the hospital for treatment. Claimant suffered various injuries to his body and received continuous medical treatment. He now seeks continued temporary total compensation benefits and reimbursement and payment of his medical expenses.

POSITION OF THE PARTIES

Claimant contends that the physical disabilities, as described by Drs. DeBender, Berry, Long, Masson, and Brownhill and further substantiated by the FCE, confirm that Claimant is not capable of performing his regular duties as a longshoreman. Claimant further contends that he has not reached maximum medical improvement and needs further medical care, including arthroscopic surgery to his shoulder.

Employer contends that Claimant's claim for benefits should be denied. It reasons that Claimant's injury resolved in May 2005, or at the very latest by 05 Jan 06. Regardless, Employer contends that appropriate longshore jobs, including painting and

[8] JX-1.

the "under the whip" position, were available to Claimant and would have resulted in no wage loss. Employer argues that Claimant has actual earnings from his painting and union jobs. Employer contends that it is not liable for reimbursement of medical expenses, other than for Dr. DeBender, since Claimant failed to obtain authorization and did not file an attending physician report. Finally, Employer contends that Dr. Masson's recommendation for left shoulder surgery is contrary to the medical evidence, especially since Claimant did not even claim a left shoulder problem.

LAW

It has been consistently held that the Act must be construed liberally in favor of the claimant.[9] However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[10] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[11]

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.[12] If a physician's opinion is based on a claimant's subjective complaints and the claimant is not credible, then the physician's opinion is questionable.[13]

Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."[14] In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[15] The presumption takes effect once the claimant establishes a ***prima facie*** case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.[16]

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[9] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[10] 5 U.S.C. § 556(d).
[11] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[12] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).
[13] *Director, Office of Workers' Compensation Programs [Roberson] v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65, 12 BRBS 344 (5th Cir. 1980), *aff'g* 8 BRBS 775 (1978).
[14] 33 U.S.C. § 902(2).
[15] 33 U.S.C. § 902(a).
[16] *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which ***could have caused*** the harm or pain.[17] These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.[18]

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.[19]

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.[20] "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.[21] Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).[22] The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.[23]

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.[24] If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.[25] The presumption does not apply, however, to the issue of whether a physical

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[17] *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).
[18] *Id.*
[19] *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).
[20] *See Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (5th Cir. 1994).
[21] *Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier,* 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").
[22] *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982).
[23] *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).
[24] *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).
[25] *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267.

harm or injury occurred[26] and does not aid the claimant in establishing the nature and extent of disability.[27] In addition, a psychological impairment can be an injury under the Act if it is work related.[28] Employers accept their employees with the frailties which predispose them to bodily injury.[29]

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain.[30] A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition.[31] Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does.[32] The application of the aggravation rule is well settled in cases involving multiple injuries.[33] However, a Claimant cannot claim aggravation when the disability resulted from the natural progression of a prior injury and would have occurred regardless of the presence of a second injury.[34] If the disability resulted from the natural progression of the first injury then the carrier at risk at the time of the first injury is liable. If the disability is a result of an aggravation of the first injury, then the carrier at the time of the second injury is liable for the totality of the resulting disability.[35]

Injuries that are not caused by discrete incidents, but rather gradually produced by work activities, fall under the aggravation rule.[36] The last aggravation does not have to be the primary factor in the disability.[37] If the last aggravation combined with the previous condition in an additive way to result in greater overall impairment, the last

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[26] *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).
[27] *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).
[28] *Director, OWCP v. Potomac Elec. Power Co.*, 10 BRBS 1048 (D.C. Cir. 1979).
[29] *Britton,* 377 F.2d at 147, 148.
[30] *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).
[31] *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Fulks v. Avondale Shipyards, Inc.,* 637 F.2d 1008, 1012 (5th Cir. 1981).
[32] *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982).
[33] *Berry v. Southern Maintenance & Repair*, 2004 WL 2331292 (DOL Ben.Rev.Bd 2004) (unpublished), *citing Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981).
[34] *Lawrence v. Newport News Shipbuilding and Dry Dock Co.*, 2002 WL 31039495 (DOL Ben. Rev. Bd. 2002) (unpublished), *citing Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986); *see also Abbott v. Dillngham Marine and Manufacturing Co.*, 14 BRBS 453 (1981) *aff'd mem sub. nom.Willamette Iron and Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).
[35] *Berry*, 2004 WL 233129 (citations omitted).
[36] *Foundation Constructors , Inc. v. Director, OWCP*, 950 F.2d 621, 624 (9th Cir. 1991).
[37] *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

employer/carrier is liable.[38] "If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer[/carrier]."[39]

The opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances.[40]

Maximum Medical Improvement

The traditional (albeit not exclusive) method for determining whether an injury is permanent or temporary is the date of maximum medical improvement (MMI).[41] The date of maximum medical improvement is a question of fact based upon the medical evidence of record.[42] An employee reaches maximum medical improvement when his condition becomes stabilized.[43]

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[44] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[45] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[46] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work.

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[38] *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991).
[39] *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.2d 1102 (9th Cir. 2003).
[40] *Black & Decker Disability Planv. Nord.*, 123 S.Ct 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (*citing Pietrunti v. Director, OWCP*, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary)); *Rivera v. Harris*, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of the non-treating physicans).
[41] *See Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 235 n. 5 (1985); *Trask*, 17 BRBS 56; *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).
[42] *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).
[43] *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).
[44] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).
[45] 33 U.S.C. § 902(10).
[46] *Sproull*, 25 BRBS at 110.

Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[47] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[48] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[49]

The question of extent of disability is an economic as well as a medical concept.[50] To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[51]

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[52] Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

Suitable Alternative Employment

If the claimant is successful in establishing a ***prima facie*** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.[53] Addressing the issue of job availability, the Fifth Circuit has developed a two part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

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[47] *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).
[48] *Trask*, 17 BRBS at 60.
[49] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[50] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[51] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).
[52] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).
[53] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[54]

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[55] Employers may meet their burden by first introducing evidence of suitable alternate employment at the hearing,[56] even though such evidence may be suspect and found to be not credible.[57]

The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish the claimant is physically and mentally capable of performing the work and that it is realistically available.[58] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record.[59] A showing of only one job opportunity may suffice under appropriate circumstances.[60] Conversely a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[61] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[62]

A showing of available suitable alternative employment may not be applied retroactively to the date the injured employee reached MMI. An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate

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[54] *Id.* at 1042.
[55] *P & M Crane Co. v. Hayes,* 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).
[56] *Turney*, 17 BRBS 236-37 n. 7 (1985).
[57] *Diamond M. Drilling Co.*, 577 F.2d at 1007 n. 5.
[58] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).
[59] *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *see generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).
[60] *P & M Crane Co.*, 930 F.2d at 430.
[61] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[62] *Turner*, 661 F.2d at 1038 (quoting *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

employment to be available.[63] MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis."[64] "[I]t is the worker's inability to earn wages and the absence of alternative work that renders [him] totally disabled, not merely the degree of physical impairment."[65]

An employer can show suitable alternative employment by offering the claimant a job in its facility.[66] However, such a job must be a "substantial" one, not designed for the primary benefit of the employee. The job cannot be "sheltered employment." An employer-provided job or "sheltered employment" will not establish suitable alternative employment if it is a job for which the employee is paid even if he cannot do the work or the job is unnecessary to the employer's operations and was created merely to place claimant on the payroll.[67] If the employer-provided position is not "sheltered employment," the employer has satisfied the requirement to show suitable alternative employment.

Any time an employer offers a claimant light duty work because of physical or mental inability to perform usual work duties, that light duty is tailored to the employee's physical limitations.[68] If the light duty is within a claimant's restrictions, then employer meets its burden of establishing suitable alternative employment.[69] Claimant cannot abandon work and then claim employer did not provide suitable alternative employment.[70]

To qualify as suitable alternative employment the employer offered job may be different than the original one and may involve light duties to accommodate the employee's injury.[71] The job may even be specifically tailored for the employee.[72] However, an offered job that is too physically demanding for the claimant to perform is not suitable alternate employment.[73] To qualify as suitable alternative employment, the job must accommodate all working conditions required by all physicians of record.[74]

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[63] *Rinaldi*, 25 BRBS at 131.
[64] *Palumbo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991).
[65] *Id*.
[66] *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.2d 685 (5th Cir. 1996); *Darden v. Newport News Shipbuilding*, 18 BRBS 224 (1986).
[67] *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).
[68] *Bryan v. Global Associates*, 1996 WL 454719 (DOL O.A.L.J.).
[69] *Id.*
[70] *Id.*; *see also generally Darden,* 18 BRBS 224.
[71] *Walker v. Sun Shipbuilding,* 19 BRBS 171 (1986).
[72] *Darden*, 18 BRBS at 224.
[73] *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307 (1984).
[74] *Crum v. General Adjustment Bureau*, 738 F.2d 474 (D.C. Cir. 1984), *rev'g in pertinent part*, 16 BRBS 101 (1983); *see also Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979) (job meeting only one restriction is not suitable alternate employment); *Jameson v. Marine Terminals*, 10 BRBS 194 (1979) (offering to try employeei n job not meeting medical restrictions is not suitable alternate employment).

Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[75]

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.[76] Medical care must also be appropriate for the injury.[77]

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[78]

Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.[79] Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.[80]

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect, or refusal.[81] Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury.[82]

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment.[83] Refusal to authorize treatment or neglecting to provide treatment can only take place after

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[75] 33 U.S.C. § 907(a).
[76] *Pernell v. Capitol Hill Masonry,* 11 BRBS 532, 539 (1979).
[77] 20 C.F.R. § 702.402.
[78] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984).
[79] *Ballesteros*, 20 BRBS at 187.
[80] *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1980); *Wendler v. American National Red Cross*, 23 BRBS 408, 414 (1990).
[81] *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 103 (1997); *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).
[82] *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).
[83] *See generally*, 33 U.S.C. § 907(d)(1)(A).

there is an opportunity to provide care, such as after the claimant requests such care.[84] Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care.[85]

Medical providers must submit their reports of first treatment to the employer and the deputy commissioner within 10 days of the initial treatment, otherwise, employer's liability to pay for past medical expenses will cease.[86] The report must be filed within 10 days regardless of whether a claimant obtained pre-authorization or employer refused to provide treatment.[87] Employer must also demonstrate actual prejudice by the late delivery of the physician's report.[88] A failure to submit the initial report within 10 days of the first treatment may be excused for good cause.[89] However, it may only be excused by the director and the administrative law judge (ALJ) has no authority to waive this requirement.[90] The ALJ must still make a determination as to whether the initial medical reports were in fact untimely. Once an ALJ determines the initial reports are untimely, the case must be remanded to the district director for a determination of whether there is good cause to excuse the failure to report.[91]

EVIDENCE AND ANALYSIS

Testimonial Evidence

Claimant testified at trial in pertinent part that:[92]

> He was born on 18 Dec 55 and has been married for 26 years. He graduated from Kashmere High School and attended two years at Houston Community College. He has been working as a longshoreman since he was in high school. His father was a longshoreman for about 42 years. Before he worked at the docks, Claimant

[84] *Mattox .v Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982).
[85] *Id*.
[86] 33 U.S.C. §907(d)(2); 20 C.F.R. §702.422; *Simmons v. Electric Boat Corp.*, 1994-LHC-01212 (Nov. 4, 1999); *Ravia v. Caleb Brett, et al*, 2004-LHC-01897 (May 24, 2005); *Toyer et al v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994); *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992); *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994).
[87] 33 U.S.C. §907(d)(2).
[88] *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Simmons*, 1994-LHC-01212.
[89] 20 C.F.R. §702.422(b); *Simmons.*, 1994-LHC-01212; *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981); *Roger's Terminal*, 784 F.2d 687.
[90] *Ravia,* 2004-LHC-01897; *Toyer*, 28 BRBS at 351-355; *Krohn*, 29 BRBS at 75; *Jackson v. Universal Maritime Service Corp.*, *et al*, 31 BRBS 103 (1997).
[91] *Toyer*, 28 BRBS at 351-355.
[92] Tr. 81-180.

was a busboy, worked at a warehouse, and had a side job with a cleaning company. He has been a longshoreman for 32 years and has a seniority classification of 26 out of 43. There are about 25 other people with a level 26 seniority classification.[93]

He is a member of the truck driving board. There are about 160 members on the truck driving board, which works on a rotating basis. A truck driver must crawl under the trucks and do safety inspections. He turns in worksheets to the company and the mechanic. He is also the chairman of the truck driving safety committee. This is a job directly from the hiring hall. However, it is also a job union workers do for the companies. It is a committee position. He basically created the job because the companies were failing to take care of their equipment and workers were getting hurt. He proposed the committee, it was accepted, and he was voted chairman. He has three guys that work with him and give companies an idea of what is required for the safety of the drivers. A big company usually takes about two days to inspect and provide them with worksheets. Companies do not go to the hall to ask for inspections. It is usually done after workers complain. The inspections are not regularly scheduled. The union pays for the inspection. He did about one inspection every three months prior to his work injury. He has not done a truck inspection since his work injury.[94]

During the year prior to his work accident, Claimant mostly worked as a rigger and truck driver. As a rigger, he tied and untied 20 to 40-foot containers on the ships. He secured the containers with rods. The rods are secured by turnbuckles which weigh about 15 to 20 pounds. The containers are then stacked about three to five boxes high. It requires a lot of overhead work and the rods weigh about 23 to 40 pounds. He also had to bend, stoop, and stand on his feet all day to work as a rigger.[95]

He has also worked the whip job, which is dangerous because trucks pass through. Instead of just bending down and taking the dogs out and twisting them, he must quickly move out of the way of the trucks and spot it again. Workers with seniority higher than his rarely do whip work. Claimant does not believe he could work the whip job because it would require him to bend, stoop, and lift. His arms and back wear out. The job requires continuous fast movement and hurts him a lot. He would not be able to keep pace and would get yelled at and fired for slowing down the job and not doing his part. He takes pride in what he does and in handling the equipment safely and fast. His and the union's reputations are on the line. In an eight-hour day, Claimant would get 88 to 100 trucks moving through his "gang." In one month, he may be offered a whip job six to ten times,

[93] Tr. 81-85.
[94] Tr. 85-86, 92-94, 99-100, 164-165.
[95] Tr. 86-87.

but it is not available to Claimant on a regular or daily basis. The foreman just offers whatever job is left once he makes it to Claimant's section. Claimant cannot choose what job he wants to go to. He has not checked the exact availability of the whip job and his testimony is based on what he has seen in the past.[96]

He also worked as a truck driver. A truck driver drives a mule truck/yard hustler, which is a one-seater. Claimant would have to back up the truck and latch it onto the box. Sometimes he had to get out of the truck to dolly the container up. It would be an over-height container and he would have to crank it up. He sometimes had to crawl under the box to get the legs up or down. The air hose is at his ankles and he has to bend down to hook up the air lines. He also had to get in and out of the truck all day long by holding onto two rods on the side of the truck since the steps are almost two feet above the ground. A truck driver and yard hustler has to keep a constant lookout since the flow of traffic is very rigorous. The truck driving committee had mirrors installed in every blind spot. A driver has to turn frequently to drive safely through the terminal. No operation is the same because he could unload from the wheels or a pad.[97]

On the day of his work related accident, Claimant worked as a rigger. When he reached for a rod, he stepped into darkness. His right hand went between two turnbuckles that were up on the hatch. The hatch was about two feet up. His right arm went between the two rods. His left foot hung on the top of the railing that he was standing on. He was wearing a hard hat, but it split right in the center. The hardhat hit the side of the hatch and Claimant fell between the two hatches flat onto his chest. His left foot and right arm stayed in the air and the rest of his body was on the hatchway down in between. Even though the hardhat broke, it probably saved his face from getting torn up and probably saved his life. He was helped up by J.E. Lewis and E.B. Jones. He could not move without their help. Claimant was dazed after the incident.[98]

After the accident, he went to the superintendent and reported the incident to "Tony" and the walking foreman, Benny Fry. Claimant was given a slip to take to the emergency room. At the emergency room, x-rays were taken, he was examined by physicians, and he was injected with a lot of "pain shots." He injured his neck, back, arm, both shoulders, and leg. At first, the adrenalin masked some of his pain, but once the adrenalin wore off he started feeling pain over his

[96] Tr. 87-89, 95-97, 105, 160-162.
[97] Tr. 89-92, 162-164.
[98] Tr. 105-107.

entire body. After the hospital, Claimant treated with Dr. DeBender, an orthopedic specialist. Dr. DeBender took a complete history, performed a physical examination, and recommended extensive physical therapy. Dr. DeBender also prescribed medication.[99]

Claimant mentioned to the foreman only that he hurt his right wrist, left hip, low back, right arm, hand, neck and right leg. He did not state that he also hurt his left arm or shoulder. However, he was feeling the adrenalin and excitement. When his body cooled down he felt more pain than he felt before.[100]

Since his work injury, Claimant has not done any physical work on the docks. He has pretty good strength at waist level because of physical therapy. However, if he tries to lift things above his head his arms and hands go numb, he gets tingling in his fingers, and he gets weak. He does not want to re-injure himself. He also does not want to injure another worker by dropping a 32 to 40 pound rod. He is doing physical therapy to get his body better. If he were capable of returning to any work he definitely would have. He does not think he could work as a truck driver because his neck hurts so badly and he has constant spasms. He cannot turn his head or bend over as many times as required to perform the truck driving job.[101]

He is a member of the executive board and a member of the accident review board. Claimant gets paid for attending executive board meetings. He is also a member of the supervisor's committee and does payroll. He has been elected three times and has served on the board for six years. The executive board hears complaints from employees. They meet about once per month and the sessions go all day long. He attends almost every meeting and tries not to let his own problems show. Claimant will stand behind his chair during the meetings because he has a lot of spasms. He also walks to get a little exercise and moves around because the stiffer he gets, the more spasms he has. Payroll is every other Friday. He did not pass out the checks prior to his work related injury. He asked for that duty to try to generate some funds to take care of his family. He has problems passing out the checks because he has to bend his head, stand up, and move around to read names. All of these activities are uncomfortable and increase his muscle spasms. Officer McNeil worked with Claimant when he passed out payroll and observed Claimant's muscle spasms. Claimant gets paid for passing out the checks.[102]

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[99] Tr. 107-110.
[100] Tr. 147-148.
[101] Tr. 94-95.
[102] Tr. 97-98, 100, 126-128, 130.

Claimant did not initially disclose that he received money for attending board meetings and passing out checks because he thought the request was only related to longshore work. Once he figured out that Employer meant any type of work, he obtained wage sheets from the financial secretary at the ILA Local 24. He also provided a copy of his 2005 W-2. He never intended to hide his wage information. He earned $226.63 a pay period for attending the executive board meetings. He also received $226.63 a pay period for passing out checks. He did not start passing out payroll until after his compensation benefits were cutoff. He could not explain why he received two separate payments in February 2005 because he was not handing out payroll at that time. He then admitted that he had tried to hand out payroll after his work accident, but could not do it because of his muscle spasms. He believes he was paid regardless. Claimant could not explain the discrepancies in the LS-200 and W-2. The LS-200 is from the information the financial secretary, Mike Culverson gave him. Claimant did not even look at the wage statements that Mr. Culverson gave him, he just brought the sealed envelope to his attorney. A longshore year is not the same as a calendar year, which may explain any discrepancies. A longshore year goes from October through the next September.[103]

The spasms feel like somebody is hitting him in the back of his head with lightening across his brain. They feel as if someone has hit him in the eye. They only last for several seconds, but are a painful jolt and are very frustrating because he does not know when they are going to occur. He does not know what aggravates the spasms. Any physical movement – such as putting on a hardhat, turning to the left, or someone touching his head – aggravates his pain. His daughter once grabbed him around the neck, but jumped back because she felt a spasm. Nobody can put their hand around his shoulder because it also causes spasms.[104]

In the eighties, while working a foreman, Claimant was hit with a hook on his shoulder. He received medical treatment and thoracic outlet surgery. It was experimental surgery where they removed muscle tissues. They did not remove his first rib. After the surgery, he returned to full duty work with no restrictions. He did not have any subsequent problems with his shoulder until after his work related accident in January 2005. He also injured his back in the seventies or eighties, when a coworker kicked a drum and injured Claimant's back. He was not off from work for too long and returned to full duty after that incident.[105]

[103] Tr. 128-130, 132-136, 170-172.
[104] Tr. 98-99, 126-128.
[105] Tr. 100-103.

In the nineties, he was dropped 21 feet in a truck while holding onto a steering wheel, which caused his wrists to collapse. He received conservative treatment and then had surgery. He returned to full duty work after carpal tunnel surgeries.[106]

In 2000, Claimant injured his left foot while working as a rigger. A turnbuckle was thrown across Claimant's foot and he was off from work for about six to seven months. His foot was fractured, but he did not need surgery. He was told to wear a false shoe. He returned to full duty following this incident. He also recalled fracturing his finger while working outside on a pipe, but returned to full duty following that accident as well.[107]

In June 2000, Claimant also injured his left shoulder when he was either struck with a swinging hook from a crane or from the incident with the rod. He did not recall having a left shoulder x-ray in June 2000 or that an x-ray from April 2001 revealed degenerative arthritis in his left shoulder. He did not recall whether he had complaints of left shoulder pain for more than one year. Regardless of how long the pain persisted, he eventually went back to work at full duty. He recalled being given an impairment rating, but did not know whether it was a twelve percent (12%) permanent disability rating. Although a doctor may have restricted Claimant to light duty work, there is no light duty on the waterfront.[108]

Sometime in 2000 or 2002, Claimant was injured in a motor vehicle accident when an eighteen-wheeler ran a red light and hit his truck broad side. He had some minor tissue damage from the car accident. The pain did not hit him immediately; it crept up on him the day after his accident. He did not need surgery as a result of the accident and was returned to full duty work. Prior to his current work injury, Claimant did not have any physical limitations or restrictions placed on him as a result of his prior injuries.[109]

Claimant submitted to an independent medical examination (IME) with Dr. Likover. The examination lasted about ten minutes. Dr. Likover did not appear to care, seemed like he had already formed an opinion, and called Claimant a "big time longshoreman." During the examination, Dr. Likover asked Claimant to raise his arms. Claimant raised them as high as he could and Dr. Likover forced them up higher. He asked Dr. Likover to stop forcing his arms higher. Dr. Likover also

[106] Tr. 102.
[107] Tr. 103-104.
[108] Tr. 147-152.
[109] Tr. 104-105, 147-148.

asked him to bend over, hit him in the knees, and raised his legs. That was the extent of the examination. Claimant's compensation and medical benefits were terminated after Dr. Likover's examination. Claimant did not get to see the upper extremity specialist Dr. DeBender recommended in May 2005.[110]

Claimant also treated with a neurosurgeon, Dr. Berry, in June 2005. Claimant told him that he injured his neck, back, leg, and shoulders. He does not know why Dr. Berry only reported[111] complaints to the left shoulder and chest. Dr. Berry recommended additional films, a cervical myelogram and a CAT scan of Claimant's neck and back. Dr. Berry also recommended that Claimant treat with a pain management doctor and referred him to Dr. Benhamou. After his medical benefits were terminated, Claimant started paying for his treatment with a credit card and his group insurance. Dr. Benhamou examined Claimant and recommended steroid injections. After the first steroid injection, Claimant felt some relief in his neck for about three to four days, but then the pain and weakness started to gradually come back. The spasms also restarted. Claimant was put to sleep for the injections because if he had a spasm while an injection was being given, he could have paralyzed himself. Dr. Benhamou referred him to a physical therapy clinic because he does not do physical therapy himself. Claimant's insurance would not pay for the physical therapy.[112]

Before the second epidural injection, the U.S. Department of Labor (DOL) scheduled an IME appointment with Dr. Brownhill in September 2005. Claimant's medical benefits were not reinstated following his second IME. He paid for the second injection on his own. He was put under anesthesia for the second injection too. The second injection helped relieve some of the pain for about three to seven days. He spoke with the pain specialist after the second injection and the doctor advised him that he wanted to proceed with the third injection. Claimant received the third injection around 10 Nov 05. The third injection helped relieve his pain for about three weeks. He was not receiving any other treatment at the time, but was trying to get into physical therapy. He was not able to get physical therapy because his group insurance would not get him into a clinic even though Dr. Benhamou recommended physical therapy after the third shot.[113]

When Employer asked him to go back to Dr. Brownhill, Claimant said no and gave Employer a counteroffer. He told Employer he would agree to go back to Dr. Brownhill, if Employer would promise to pay back compensation and medical benefits in the event Dr. Brownhill found Claimant unable to work. Employer

[110] Tr. 110-112, 140-142.
[111] EX-19.
[112] Tr. 112-115, 142-143, 165-166, 168-169.
[113] Tr. 115-118.

refused. Claimant did not ask for the money up front. The labor board asked Employer to put him back on compensation after the first examination with Dr. Brownhill and Employer did not believe Dr. Brownhill. Claimant wanted something up front, in writing, to show that Employer would hold up its end. He does not want to return to work because his job is physical, he is in pain, and he needs physical therapy first.[114]

Claimant eventually started receiving physical therapy from Pain & Recovery around April 2006. It is helping him get his strength and stamina back. He has not yet reached the right peak, but is working on getting there. Claimant returned to work for Employer at light duty about five weeks prior to the June 2006 hearing. He brushes spreader bars and paints them. The work aggravates his shoulders, neck, back, and knees, but as long as he gets frequent breaks he can do the work. Employer lets him take breaks as needed. Claimant is not required to work overhead. Claimant goes to physical therapy about three times a week, so he works about six (6) hour days. It takes Claimant about 30 to 35 minutes to get to work. His therapy sessions can last anywhere from one hour and fifteen minutes to two hours. He feels like he has gotten some relief from physical therapy because he feels his stamina getting better. Claimant believes he would be back to full duty work had the physical therapy treatments been started earlier. He receives physical therapy under a letter of protection. The letter of protection states that he will reimburse the Pain & Recovery Clinic once he gets his compensation benefits. His attorney sent him to the Pain & Recovery Clinic because the doctors Dr. Benhamou recommended would not see him without payment. He is still responsible for reimbursing the pain clinic even if he does not get awarded benefits under the Act.[115]

The physical therapy is a gradual increase program to get Claimant to a position where he can return to work. He does range of motion exercises with his neck, arms, legs, and back. He also lifts weights. He is doing everything he can to get his body back into physical shape. Claimant has been a longshoreman for 32 years. He is an officer in the industry. He enjoys his job and takes it very seriously. He has been doing the light duty work the best that he can and feels like he has been doing a good job.[116]

Claimant is prescribed anti-inflammatories, muscle relaxers, sleeping pills, and pain medication. Because he works during the day, Claimant takes his medications at night. Even with his medications, he only sleeps about three hours at night because of the pain.[117]

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[114] Tr. 142-147.
[115] Tr. 118-121, 127-128, 137-138.
[116] Tr. 121-122, 138-139.
[117] Tr. 122-123.

The light duty work arrangement is through Employer, not through the union. His hours are not going towards his seniority or his group insurance. Claimant was at a capacity of fourteen hundred hours a year, so he got full group insurance coverage for him and his family. Although his wages from ILA would go toward his retirement plan, his wages from working light duty with Employer do not.[118]

Claimant does not believe he could pass the required physical for the truck driving position. He does not think he could pass the bending, squatting, or turning portions of the examination.[119]

He intends to continue working for Employer at light duty while he receives physical therapy. He plans to do the best job he can do. He enjoys being a longshoreman and likes the people he works with. His goal is return to work as a longshoreman. [120]

Claimant still cannot turn to his left. He can turn to his right if he does not do it too quickly. If somebody touches him or puts an arm around him, it causes muscle spasms. The pain radiates from his shoulder blades to his neck and head. It goes over the top of his brain and feels like someone punched him in his eye. He feels like someone is hitting him with a hammer in the back of his neck. He is always tight and feels bulging in the back of his neck. The pain in his back radiates all the way down to his feet. Prior to his work accident, he did not have any of these symptoms and was able to work at full capacity. He really enjoyed his job and the freedom it gave him. He would have been back to full duty work out of the hiring hall if he could. He does not want to be hurt, but he also does not want to hurt anybody else. If he returns to his usual work and cannot handle the rod, he could hurt or kill a coworker. He does not want to put himself or anyone else in that sort of position.[121]

Even with all of his neck spasms and other problems, Claimant can drive. However, he cannot sit in a car for too long. He drives a one-ton Ford. He drives like a "bat out of hell."[122]

Claimant currently lives off of a $60,000.00 inheritance.[123]

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[118] Tr. 122-124.
[119] Tr. 124-125.
[120] Tr. 125-126.
[121] Tr. 126-131.
[122] Tr. 136-137.
[123] Tr. 137.

Dr. DeBender provided physical therapy to Claimant for about three months. Dr. DeBender discharged Claimant on 17 May 05 and recommended follow-up care with Dr. Berry. Claimant explained that the recommendation for further physical therapy may not be in Dr. DeBender's notes because it was through another physical therapy clinic. Dr. DeBender did not see a need for surgery, but wanted Claimant to treat with Dr. Berry, a neurosurgeon. Unlike Dr. Likover, Dr. DeBender took his time examining Claimant.[124]

He told Dr. DeBender that he hurt his left and right shoulder, hand, and back when he fell at work. He did not tell Dr. DeBender about his prior left shoulder injury because he did not have problems with it before he hurt himself at work and believed the problem had healed. He just told Dr. DeBender what hurt. He disclosed his bilateral carpal tunnel syndrome and thoracic outlet syndrome because Dr. DeBender asked about prior surgeries. He was able to fix those problems with physical therapy.[125]

Prior to his current work injury, Claimant had a nerve conduction study and it was positive. He told Dr. DeBender that he had previously injured his neck and did not know why Dr. DeBender did not write it down in his history. Claimant never had surgery to his neck, but disclosed the information because Dr. DeBender asked him if he ever injured himself. He told Dr. DeBender everything he remembered. If it does not still bother him, he likely forgot about it. Claimant could not recall Dr. Wills' opinion that he was unable to perform his work duties from 13 Jan 01 through 15 Sep 01 due to extreme pain and nerve damage.[126] Even though Dr. Wills only released Claimant to light duty, Claimant went back to his regular longshore work. When he first went back to work after his 2000 work injury, he initially did inspections. He then worked in payroll, the executive board, and light longshoreman work. He stated that he did not go back to his regular longshore job for at least one month.[127]

Claimant is not afraid that he will have a heart attack if he goes back to work. He had his heart examined by a cardiologist because of chest pain and problems through his arms. The cardiologist told him that his heart is in good shape.[128]

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[124] Tr. 137-142.
[125] Tr. 150-154, 158.
[126] EX-31.
[127] Tr. 154-160.
[128] Tr. 169-170.

Claimant testified by deposition in pertinent part that:[129]

> Claimant stopped going to college because he needed to pay bills and had decided to become a full-time longshoreman. While he was in high school, he worked at a warehouse stocking bins and as a busboy. He also painted and did bodywork on cars. At one point, he worked for his uncle installing "cleaners."[130]
>
> He has not worked anywhere since his work injury on 18 Jan 05. His only source of income is his wife. She is a teacher. He had a six month term disability policy. He believes the policy paid him a total of $1,800.00 over a six-month period. He also has disability insurance through his credit union and put his truck up for collateral to pay for a friend's burial. The car note is about $200.00 per month, which was being paid by his disability insurance. However, the disability insurance company now wants more extensive medical documentation before it will reinstate the note. His mortgage is not being paid by insurance. All the money coming in comes from his wife.[131]
>
> Claimant was injured while trying to put the rod on the hatch. When he stood up on a rail, he fell forward. His right arm went in between two turnbuckles. His left foot hung on the rail he was standing on. He hit his head on the side of the hatch and the rest of his body went down on the floor with his right arm and left leg still up in the air and the rest of his body in between.[132]
>
> Dr. Benhamou was the doctor that recommended steroid injections. He has already had three injections. The first one did not improve his neck for too long, but the second one relieved the pain a little longer and the third shot relieved his pain for about three weeks. Dr. Benhamou tried to get Claimant into physical therapy the entire time. Claimant was going through his private insurance and had to wait until the board had its next monthly meeting. His physical therapy was not restarted until 28 Feb 06. He gets physical therapy to his entire body. Every time he goes for therapy new exercises are added to his routine. He receives hot packs, TENs, massages, and exercises to try to loosen his body up. They work on his neck, shoulders, arms, back, waist, and legs. They have not indicated how long Claimant needs physical therapy; just that he will be reevaluated as necessary. His next appointment was scheduled with his regular doctor, Dr. Hong, at Dr. Wills' office in May 2006. Claimant was treating with Dr. Benhamou about once or twice a month.[133]

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[129] EX-37.
[130] EX-37, pp. 6, 19-21.
[131] EX-37, pp. 21-24.
[132] EX-37, pp. 59-60.
[133] EX-37, pp. 33-36 (the Court is aware that it advised counsel that only portions of the deposition specifically cited to would be considered part of the record. However, in order to get the entire relevant testimony in context, as

Dr. DeBender sent Claimant for physical therapy. Claimant just got the basic hot pack and massage and was about to start range of motion exercises around 10 May 05, when his benefits were cut off. He initially started physical therapy after his injury and it lasted about six weeks in the training room, so Claimant had about 3.5 months of physical therapy. For the first two months he received hot wax treatments to his hands, rested his legs in the hot tub, and got hot packs and massages. Then he was transferred to the physical part of physical therapy. He received the physical therapy from Dr. DeBender's office and an office connected to his space.[134]

Claimant has a prior left foot, shoulder and hip injury from 13 Jun 00. He was hit in the shoulder by a rod. He could not recall exactly how long he was out of work for this injury, but stated it was a few months. Claimant had fully recovered from that left shoulder, hip, and foot injury.[135]

Thomas E. Isabelle, Jr. testified at trial in pertinent part that:[136]

He has worked as a longshoreman since September 1977 and has been the president of Local 24 in Houston for 18 months. Local 24 is referred to as the "Deep-Sea Local." They unload and load any kind of floating structure in Harris County. Workers are hired through daily dispatch by seniority or on rotation, depending on the job. To be on rotation, a worker must normally maintain participation. There are also "core gangs" which are base groups of men for the lower paying jobs that Local 24 competes for very heavily against non-union men. Claimant is at a 20-25 seniority level. Claimant is also on the truck driving board. There are 160 drivers on the board and it goes in a daily rotation. Drivers are supposed to call dispatch at a particular time. If they do not call, they are replaced with another available certified driver.[137]

To get on the truck driving board, Claimant had to have a Class A CDL and complete a West Gulf Maritime Certification Process. The Department of Transportation checks a worker's blood sugar, vision, hearing, and heart. It also checks the worker to see if he can stoop, bend, and squat. The ones that complete the programs and have seniority make it onto the board until it is filled. Truck drivers must also pass annual physical examinations to remain on that board. They have to be healthy and be able to sit in that position throughout the day. The

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Employer argues that Claimant lied about whether he received physical therapy from Dr. Benhamou, the Court went slightly past the section actually cited to by counsel for Employer in his brief).

[134] EX-37, pp. 28-30.

[135] EX-37, pp. 15-16.

[136] Tr. 39-69; CX-35 (Mr. Isabelle also provided an affidavit on 22 Jun 06, which is hereby incorporated into his testimonial section).

[137] Tr. 39-42; CX-35.

trucks are usually single axle with a hydraulic lift. They also usually have power steering. Most of the trucks have a hydraulic piston under the seat, which is like a shock absorber. Generally, a driver will make four to five trips per hour – forty containers in an eight hour stretch is a good estimate.[138]

If the health of an employee is questioned by an employer, the employer sends a complaint that the person is "not to be referred" until a "productivity review committee hearing" can be held to determine whether the complaint is valid.[139]

A driver must be able to climb in and out of the cab during the course of the day. If he is hauling containers, he may have to raise or lower dolly legs by cranking a device. He must turn his head continuously since it is a very congested terminal. His head must be "on a swivel" looking around so he does not hurt himself or others.[140]

Claimant also worked "under the whip." As a container is brought to the whip there will be a man to line up the container with the spreader bar on the crane. Automatic twist locks are put into or taken out of the bottom of the containers. The locks are spring loaded. If there is any kind of heavy lift cargo, the nature of the operation changes a little. The twist locks tend to weigh about fifteen pounds, sometimes smaller.[141] There are also lighter locks that go below deck, but they do not catch all the weather and are not strong enough to keep the box secured. An under the whip worker has to be on his feet almost the entire time and is required to bend and stoop. If there are 30 containers in one hour, he would have to bend over, pick up, and bend over again to replace 60 twist locks in that hour. The work area surface is uneven and it is a high volume, fast pace job. Based on his observations of Claimant since his injury in January 2005, Mr. Isabelle has "serious doubts as to whether he could perform the whip job effectively on a regular basis . . ." If Claimant is unable to complete a job, he would get a replacement. If that happens too many times, a complaint would be filed against him by the company involved.[142]

Claimant was injured while doing a rigging job. A rigger basically works on container vessels. They tie down the containers for shipment and untie them after shipment. They use about six to thirteen foot long rods to hold down weight in storm situations. The rods are attached to the bottom of the container. A worker

[138] Tr. 42-47, 65-66.
[139] Tr. 46-47.
[140] Tr. 47-48.
[141] CX-36 (picture of twist lock and affidavit stating that the twist lock was weighed and is 15.8 pounds).
[142] Tr. 48-50; CX-35.

would hoist and connect a rod, then swing it across to the securing buckle and fasten it down. The worker also takes it down. He never weighed a rod, but thinks they weigh about 40 pounds. It requires a worker to work above his shoulders for extended periods of time. The activity is continuous.[143]

ILA 24 does not have light duty work and requires workers to do what the job requires. It will not put workers on a job and tell the employers that they can only do light duty. However, there are jobs that are easier than others. Workers hire onto whichever job they can get in the morning. When they are hired, workers are expected to perform at their best. The employers may have light duty programs to get workers acclimated to perform the duties required of a longshoreman after a return to work, but that is between the injured worker and the particular stevedore and does not involve the ILA local. Some jobs are just inherently lighter than others. A hustler driver normally does not have to lift more than ten pounds. However, some hustler drivers must get out of the truck and tie and untie the cargo throughout the entire day.[144]

Claimant is on the executive board of ILA local. The board meets once a month to hear whatever complaints arose during the month. An employee can appeal the board's decision. Mr. Isabelle has had opportunities to observe Claimant. He notices grimaces on Claimant's face from time to time. Sometimes Claimant looks like he is getting shocked, like a jerking motion and a grimace. Claimant earned about $240 a day for his work on the executive board. Claimant also passed out paychecks. A local police officer provides security when the paychecks are distributed to make sure there are no problems.[145]

A worker cannot just present a release for light duty and get hired out as a truck driver or a whip man. If the worker's annual physical has expired, he must take another before he would qualify to drive. If a worker tries to go to work and an employer says he cannot physically do the work, a worker can present at his hearing a note from his doctor releasing him to work.[146]

As far as Mr. Isabelle knows, there have not been any complaints regarding Claimant's work history or work ethic prior to January 2005. Claimant was elected to the executive board by his peers and would not have been elected if he was not truthful and honest. Claimant was also one of the union's inspectors on their trucks. Claimant determined whether the equipment needed repair to

[143] Tr. 53-56.
[144] Tr. 50-51, 62-63.
[145] Tr. 51-53, 61-62.
[146] Tr. 53, 66.

perform safely. Claimant was paid to inspect the trucks and equipment. He would turn in an inspection report regarding things that needed repairing and the report would be sent to the company. Claimant has not inspected trucks in the 18 months Mr. Isabelle has been president of the union.[147]

He believes Claimant had a prior injury in 2002. He is not aware of any other injuries. Claimant has always done a good job as far as he is concerned. He did not know that Claimant's doctor had released him to return to light duty work after the 2002 injury. An employee comes in and hires to do what he feels is light duty work and does only what he can physically do. A worker comes in, stands on line in his particular hiring area until a foreman goes around and offers available jobs to those who think they are the most qualified for the particular job. The men with the most seniority get to pick first. Truck driving positions are not based on seniority and are assigned differently. A worker will not be required to submit to a physical exam just for coming into the hall. A worker is not required to present a doctor's note clearing him for work. Workers are supposed to have a physical exam after 100 hours, but he is not sure how that is enforced.[148]

If a worker goes to a job and the employer feels he is unfit for whatever reason, it can file a complaint that the worker not be sent back to that particular company. However, other than truck driving positions, the workers are not required to submit to physical examinations and do not need a doctor's note clearing them for duty. A worker just needs to think he is physically able to do the work and if he has seniority, he will be hired. If the worker goes to the job and the foreman does not think he can perform, the foreman will fire the worker. The foreman has to have evidence that the worker is not doing the job. The union will not let an employer pre-judge a worker. The employer has to hire the worker until the union gets a paper trail that says the worker is not doing his job, shirking the work, or not showing up on time. At that point, it would go to a hearing to determine who is right. It makes no difference whether a worker has a work release from a chosen physician, if he is not capable of doing the work required in the eyes of the foreman, he can still get fired. Mr. Isabelle could not think of one time in 2005 where an employer fired a worker because the worker just could not physically do the job. If a worker has a problem, most of the guys will try to help him through the day.[149]

[147] Tr. 53-57, 61.
[148] Tr. 57-60, 65.
[149] Tr. 60-61, 67.

Mr. Thomas Isabelle also testified via deposition in pertinent part that:[150]

> He has known Claimant for 20 years. They met through their work as longshoremen. He is the current president of the ILA 24. Claimant is one of ILA 24's executive board members and passes out checks every other week. Claimant has been on the executive board for at least six years. There are board meetings about once a month to address complaints, hear cases, and vote on proposals. Claimant gets paid about $250 per day as an executive board member. They have meetings about once a month. As such, Claimant earns about $3,000 per year for attending board meetings.[151]
>
> Claimant also gets paid for handing out checks. Board members take turns passing out the checks and the position runs concurrent with being a board member. Claimant received a W-2 for attending the board meetings and handing out the checks.[152]
>
> The ILA 24's collective bargaining agreement states that the union and the employer will comply with all federal and state laws, including the ADA.[153]
>
> He described some of the jobs available on the waterfront. A hustler driver drives a truck and hauls containers or cargo from its point of rest to the ship side and back. Normally there is no lifting involved and a worker would just need to hook up his airlines and roll down the dolly legs. He would need to spend about 90% of his day sitting in the truck driving. Claimant has been a driver for a very long time. He has to be able to climb in and out of the truck and hook up the airlines. He may also be required to position the cargo by putting up sticks and directing the driver how the cargo should be loaded. Most of the trucks have power steering and are automatic transmissions. He may have to climb steps or ladders to hook up the air hose.[154]
>
> A job as a whipman would allow Claimant to work with one or two other guys. A whipman puts in and removes twist locks. If it is container work, then he would just stand next to the truck and put in and take out twist locks from the corners of the containers. A whipman will stand around for a long time on an uneven area. It is not a bad job, but not a good one either. He was sure that Claimant had been a whipman before.[155]

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[150] EX-48 (the Court only considered those portions of the deposition cited to as Mr. Isabelle also testified live at trial and provided a subsequent affidavit).
[151] EX-48, pp. 4-6, 13.
[152] EX-48, pp. 13-14.
[153] EX-48, pp. 6-7.
[154] EX-48, pp. 7-9.
[155] EX-48, pp. 9-10.

The drivers work off rotation and there are about 160 drivers on the board. Seniority only gets a driver on the board. After that it is "an even slice." Claimant can get on the board with his seniority. The whip jobs are based on seniority and how much work is available. Sometimes it is easy to get a whip job, sometimes it is difficult. Regardless, Claimant's main job was that of a driver.[156]

Mr. Isabelle did not know about any of Claimant's prior injuries. Since the accident, Claimant continues to attend their board meetings and has been passing out checks. He seems to walk around ok, but he has noticed Claimant in pain. Sometimes he sees Claimant jerk from the pain and he looks uncomfortable. They try to ignore it and move on with business. He has not noticed any other physical problems with Claimant. A position as a board member is an easy working position and environment.[157]

Claimant informed Mr. Isabelle that he wants to go back to work on the waterfront once he finishes his physical therapy. It is hard for Claimant to be off work and not get a regular check. Claimant does not want to be in a position trying to do a job he cannot do physically or make someone else do his work.[158]

Mr. Isabelle does not know whether Claimant inherited money, but knew that he is involved in racing. He does not know whether Claimant owns a race car, just that he enjoys the sport.[159]

John Halligan testified at trial in pertinent part that:[160]

He is the operations manager for Employer. His workers probably handle about 4,000 containers during one week. He is in charge of the whole operation.[161]

He has known Claimant for about 20 years and he has always been a good worker. He never had problems with Claimant's work and never had to file a complaint against him.[162]

For the month prior to formal hearing, Claimant worked for Employer at a light duty painting job. Someone gets the paint for Claimant. In the beginning Claimant was not really motivated, but as time went on he did everything he was

[156] EX-48, pp. 11-12.
[157] EX-48, pp. 12-14.
[158] EX-48, pp. 14-15.
[159] EX-48, p. 15.
[160] Tr. 180-199.
[161] Tr. 180-181.
[162] Tr. 192.

told to do and did a good job. He earned $15.00 per hour. The painting position is available forty hours a week. Employer more or less gave Claimant waist level painting work. He told their supervisor to make it as comfortable for Claimant as possible so he could do the work.[163]

The average seniority for people working under the whip is twenty years. With 26 years experience, Claimant had a lot more seniority than the average person working under the whip. Given his seniority, Claimant could probably work about four days a week, ten hour days, under the whip. So Claimant could work the normal eight hour day, plus two hours at time and one-half overtime. As of 10 May 05, an employee can earn $28.00 per hour working under the whip. It works out to about $1,200.00 per week. Working under the whip requires a person to stand for basically the entire day. It is a fast-moving operation. Sometimes they have to wait until the next truck comes, so Claimant may be able to sit for a little while.[164]

There are about 200 hustler drivers and the board rotates that position. The average driver earns about $1,200.00 per week. If Claimant worked both as a hustler driver and under the whip, he could do very well monetarily. The under the whip job would be considered a secondary job. If he worked both jobs, he could probably work five days per week and earn over $1,500.00. Based on Claimant's seniority, he should earn about $1,500.00 weekly. Truck drivers must be continuously aware of what is around them. They must move their neck like a swivel.[165]

An air hose does not weigh much. The lashing rod weighs about 20-25 pounds. Some are heavier.[166]

Claimant is working light duty for Employer in accordance with the job description that Dr. Berry signed off on. Claimant goes to therapy everyday. Mr. Halligan's testimony is merely to establish the availability of work, not that Claimant can perform the work. He believes Claimant takes his job seriously and tries to do as good a job as he can.[167]

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[163] Tr. 181, 191.
[164] Tr. 181-183, 188, 192-193; EX-55.
[165] Tr. 183-185, 194-195.
[166] Tr. 196-198
[167] Tr. 185-190, 195-196.

Johnny Lewis testified via deposition in pertinent part that:[168]

> He has been a longshoreman for 39 years and has worked with Claimant in the past. Claimant is a good safe worker and takes pride in his work. Claimant is an honest man. For example, when Mr. Lewis lost personal property around Claimant, Claimant returned it. He is aware that Claimant lost time from work for other injuries, but could not state whether Claimant stayed out of work longer than necessary.[169]
>
> He witnessed Claimant's injury. He saw Claimant try to position a rod, get up on a hatch, and lose his footing. Claimant fell between the containers and turnbuckles. The position of his fall could not be comfortable. He landed on steel. His arm looked like it was in between two turnbuckles and the left side of his body was in between two hatches. It looked like Claimant landed on his side.[170]
>
> Mr. Lewis helped Claimant up. Claimant was not completely lying down because he was jammed in between the turnbuckles. He was at about a 45 degree angle. Claimant complained about his shoulder and arm. Mr. Lewis could not remember what Claimant actually said. Claimant tried to work the pain out, but he said he could not go on after 10 or 15 minutes. Claimant went to the office to report his injury[171]
>
> He has seen Claimant since the accident, but they have not spoken about the accident. He could not tell if something was wrong with Claimant because all he did was pass out checks.[172]

Elton Bernard Jones testified via deposition in pertinent part that:[173]

> He has been a longshoreman for 32 years and worked with Claimant in the past. Claimant was a very good worker, a team member who took pride in his work and did not rely on others to do his work. He believes Claimant is a "very honest" man. Claimant has taken time off from work for prior injuries, but Mr. Jones has no way of knowing whether Claimant took more time off than was necessary.[174]

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[168] CX-29; EX-51 (although Employer cites to EX-51 as Mr. Lewis' deposition, there was no deposition attached as an exhibit. Regardless, Claimant submitted this exhibit as CX-29).
[169] CX-29, pp. 11-13.
[170] CX-29, pp. 4-7.
[171] CX-29, pp. 7-10.
[172] CX-29, pp. 10-11.
[173] CX-30; EX-52 (although Employer cites to EX-52 as Mr. Jones' deposition, there was no deposition transcript attached as EX-52. Regardless, Claimant submitted this exhibit as CX-30).
[174] CX-30, pp. 12-13.

He was with Claimant at the time of his accident. They were trying to hang a rod. Claimant slipped off the rail and fell into a hole. He is not sure what caused Claimant to fall and did not see the actual fall because his back was turned. He realized Claimant fell because he heard the commotion of the rod falling. Claimant fell about four or five feet onto the railing. He was straddling the railing with his body. Claimant tried to break his fall with his hands. When he and Mr. Lewis tried to help Claimant up, he noticed that Claimant's arm and hand were swollen.[175]

Claimant said he was hurt. Mr. Jones could see Claimant's hand swelling, but did not know if anything else hurt. However, then Claimant said his leg was hurting too. Mr. Jones was not sure whether it was the left or right leg. Claimant left the jobsite and got medical help. Since the accident, he sees Claimant when he picks up his checks, but he has not talked to him.[176]

Herbert Bushnell testified via deposition in pertinent part that:[177]

He has known Claimant for about 31 years. He considers Claimant to be a very truthful and credible person. Based on his observations, there is no reason to believe that Claimant is not being honest about his symptoms or that Claimant is faking his injury. Mr. Bushnell works for North Forest ISD as a teacher. He sees Claimant pretty often since Claimant lives close to Mr. Bushnell's mother. He first found out about Claimant's work injury around June 2005. He understood that Claimant injured his upper body, shoulder, back, and arms. Mr. Bushnell sees Claimant about two or three times per week and noticed that Claimant was always complaining about aches and pains. For example, if Claimant sits for too long, he cannot move and he can barely raise his arms.[178]

Mr. Bushnell knew that "years ago" Claimant had prior injuries, he believed, to Claimant's arm or shoulder, he could not recall for sure. However, Claimant never had problems lifting his arms before. He believed Claimant had thoracic outlet surgery and seemed to be getting along well after his last injury. Mr. Bushnell generally drove over to Claimant's house, where they watched games or played poker.[179]

Claimant looks "messed up pretty bad, just by observing," and Mr. Bushnell believes his condition has worsened over time.[180]

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[175] CX-30, pp. 5-8.
[176] CX-30, pp. 9-12.
[177] CX-31.
[178] CX-31, pp. 4-6, 14-15.
[179] CX-31, pp. 6-8.
[180] CX-31, p. 8.

They once drove 140 miles to Nacogdoches and he had to help Claimant get out of the car. They went to look at a race car that Claimant owns and is being built. He and Claimant are partners in the car. They both paid for it to be built. They have spent about $30,000 total on the car and about $5,000 each since March 2005. Claimant has put in about $5,000 in cash and borrowed the rest. Mr. Bushnell drives the race car. Claimant does not drive the car at all. Claimant guides and directs Mr. Bushnell. During races, Claimant uses hand signals to contact Mr. Bushnell. However, he has not done any racing in the last year because they are waiting for the car to be finished. Mr. Bushnell had a race car before, but not with Claimant. Claimant cannot lift anything and has not helped build the car.[181]

Jarvis Thompson testified via deposition in pertinent part that:[182]

He met Claimant around 1978 or 1980. Claimant drives an automatic Ford pickup. Mr. Thompson has a welding shop. Claimant sometimes comes by the shop and they go out to lunch together. Claimant is not involved in Mr. Thompson's welding work. Mr. Thompson does not work as a longshoreman and has no involvement in longshore work. He has done several small odd jobs for Claimant in 2006 and saw him at least a dozen times. Mr. Thompson might have been to Claimant's house once or twice.[183]

Mr. Thompson has done different types of welding work for Claimant, such as repairing a table leg and aluminum welding. He knows that Claimant owns a race car, but has not done any work on the car. He does not think that Claimant could race the car even if it was running. He does not know if Claimant raced in the past.[184]

Claimant has come by the shop, complaining that he was unable to sleep because of pain. Mr. Thompson has seen Claimant in pain. His shop is within a five mile radius from Claimant's home. It is about an eight minute drive.[185]

Although Mr. Thompson believed Claimant seemed fine in 2005, he could not recall how many times he saw him. He was not sure about the time frame, but believed he first started noticing that Claimant had physical problems no later than December 2005. However, he did not know for sure and also stated that it could have been at least as early as the summer of 2005. He has seen Claimant in a lot of pain and with muscle spasms in his neck and back. He has even offered him

[181] CX-31, pp. 8-14.
[182] CX-32.
[183] CX-32, pp. 4-6.
[184] CX-32, pp. 6-8.
[185] CX-32, pp. 8-9.

pain medication, but Claimant told him he was already taking medication. Claimant could not stand or sit for a long time. Mr. Thompson would get annoyed at Claimant when he came around in pain, but Claimant explained that he just needed to get away and talk because he could not sleep. That is when Mr. Thompson started to understand what Claimant was going through. Claimant would only stay at the shop for 15 or 20 minutes at a time.[186]

He could see the pain in Claimant's facial expressions. He was not aware of any other injuries Claimant may have suffered. They did not talk about Claimant's medical care. Mr. Thompson does not know anything else about Claimant's condition. He believes Claimant's condition has remained the same since he first started noticing Claimant was in pain.[187]

Claimant has never lied to him and has always been a credible person. He has no reason to believe that Claimant is exaggerating his symptoms. However, he does not know anything about Claimant's past medical history. He does not know if Claimant was in a car accident or had other work injuries or surgeries. He did not start to see Claimant regularly until after the work accident. Their friendship progressed and grew over time. He did not see Claimant much (maybe 2 to 3 times per year) prior to his accident because Claimant was always at work.[188]

Carvel Lee McNeil, Jr. testified via deposition in pertinent part that:[189]

He believes he first met Claimant on 03 Feb 06. He started working full time for ILA on 27 Jan 06 after his partner retired. He has been with the Houston Police Department for more than 26 years. He works full-time for the police department and part-time for ILA.[190]

He works at ILA on his Fridays off. To prevent problems, he stands guard while they pass out the checks. To his knowledge there have not been any serious problems in the last seven or eight years that he has worked at ILA. He only worked about two or three times before he came on part time and took the job from his retired friend.[191]

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[186] CX-32, pp. 9-13.
[187] CX-32, pp. 13-16.
[188] CX-32, pp. 17-21.
[189] CX-33.
[190] CX-33, pp. 4-5.
[191] CX-33, pp. 5-7.

He sees Claimant walking around the union hall on Fridays and handing out checks. He has not seen Claimant outside the union hall. They have spoken generally about Claimant's injury. Claimant may have told him how the accident happened, but not about his personal situation.[192]

He does notice that Claimant gets up from his chair after every 15 or 20 minutes. Sometimes it looks like he has a shooting pain going through his body. Claimant will cringe down his head and close his eyes, like he is being stuck with a needle. It also seems like the pain goes through Claimant's right arm because it becomes frozen. He asked Claimant if he was hurt or had a pinched nerve and Claimant told him he was hurt at work. He sees Claimant every other Friday from 5:00 a.m. up to 12:00 p.m. Claimant can pass out the checks, but it is obvious he is in pain.[193]

Claimant's condition appears to be the same and continuous. Claimant is in pain on a continuous basis. Although he is not a doctor, Mr. McNeil opined that whatever therapy or treatment Claimant is undergoing is not helping.[194]

Kirby D. Ford stated in an affidavit in pertinent part that:[195]

She is the claims manager for Employer and handled Claimant's claim. She authorized and paid for medical care by Dr. DeBender as Claimant's treating physician for the 2005 work injury. She also authorized and paid for the NCS/EMG test by Dr. Mathurin that Dr. DeBender requested. Dr. Berry and Dr. Benhamou never asked for authorization for their medical care from Kirby Ford or anyone else at Employer. Claimant and his attorney did not seek authorization either, at least as of 28 Feb 06. Kirby Ford did not even know that Dr. Berry was treating Claimant until September 2005 and did not know that Dr. Benhamou was providing treatment until 01 Mar 06. In addition, neither Dr. Berry nor Dr. Benhamou submitted an initial attending physician's report as required by Section 7 of the Act. They have not sent her any reports, office notes, or documentation of treatment.

She provided a subsequent affidavit on 05 Jun 06. She did not authorize a change of physician to Dr. Walter Long or the Pain and Recovery Clinics of Houston. In addition, neither Dr. Long nor the Pain and Recovery Clinic sent her or DOL an initial attending physician's report as required by Section 7 of the Act.[196]

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[192] CX-33, pp. 7-8.
[193] CX-33, pp. 8-10.
[194] CX-33, pp. 10-12.
[195] EX-35; EX-54.
[196] EX-54.

Medical Evidence Related to Prior Injuries

Dr. Gary C. Freeman's medical records state in pertinent part that:[197]

> Dr. Freeman is an orthopedic surgeon and certified independent medical examiner. On 13 Jan 01, Claimant was in a significant motor vehicle accident. Dr. Freeman knew that Claimant had a left thoracic outlet surgery in the left clavicular area and a right carpal tunnel release. As of 19 Apr 01, Claimant continued to have discomfort in his lower back, left hip, and left upper extremity. Physical examination revealed some tenderness in the mid portion of the left clavicle and weakness in the gross grasp of the left hand. Although Claimant had good range of motion, he also had tenderness in both his left forearm and left chest. Dr. Freeman opined that Claimant has a degenerative arthrosis of the left AC joint.[198]
>
> On 16 May 01, Dr. Freeman accepted Claimant as his patient. He found no indication for surgery, but believed orthotics would give Claimant a significant amount of symptom relief and allow him to return to meaningful activity in a more functional manner. Claimant was working and was able to continue working. Claimant's left foot continued to improve symptomatically. The orthotics helped his foot and relieved some discomfort in his back. Since Claimant was stabilized to the point of maximum medical improvement, Dr. Freeman released him from his care on 06 Aug 01. Claimant had full range of motion, a negative neurologic assessment, and no specific disorder. He did not place an impairment percentage on Claimant.[199]

The medical records from Bayshore Medical Center state in pertinent part that:[200]

> X-rays were taken of Claimant's left foot and left shoulder on 13 Jun 00. The left shoulder demonstrated marked narrowing of the AC joint with spurring which could result in impingement syndrome. There was also a small spur from coracoid process medially. There were no acute fractures or dislocations noted. The left foot had no acute fractures or dislocations either. However, a small spur was noted at the Achilles tendon.[201]

Dr. Patrick W. Wills' medical records state in pertinent part that:[202]

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[197] EX-7B.
[198] EX-7B, p. 1.
[199] EX-7B, pp. 2-3.
[200] EX-53.
[201] EX-53, p. 1.
[202] EX-31; EX-33; EX-50; EX-53.

Claimant began treating with Dr. Wills in June 2000 for a workers' compensation injury. He was injured while tying down a container with a rod and turnbuckle. He injured his left foot and left shoulder. He continued to treat with Dr. Wills for his left shoulder at least through October 2000.[203]

On 31 Jan 01, he treated Claimant for severe left and right shoulder pain and left forearm pain post trauma. Claimant was in a motor vehicle accident on 13 Jan 01. He injured his left shoulder, left hip, and left arm. Claimant was unable to work and at that time, his disability was indefinite. Claimant also had back pain and spasms. Claimant could not perform his job functions from 13 Jan 01 through 15 Sep 01. On 24 Aug 01, Claimant stated that he would try to return to work. As of 15 Sep 01, Claimant was released to return to work at light duty even though he still had pain from his injury. Although he released Claimant to return to work at light duty, Dr. Wills continued to treat Claimant for his injuries.[204]

Dr. Wills completed an accident report on 23 Jun 03 after Claimant was in a motor vehicle accident. He diagnosed Claimant with a sprained shoulder. He anticipated that Claimant could return to work on 12 Aug 03, but would be unable to work at all until then.[205]

Texas Workers' Compensation "specific and subsequent medical report" states in pertinent part that:[206]

As of 01 Aug 01, Claimant had continued left foot, left shoulder, and left hip pain. His meds were continued. On 24 Aug 01, Dr. Wills released Claimant to return to work with limited activity. Claimant continued to have left foot and leg tenderness. He also had left shoulder, arm, and hip pain. Claimant had not yet reached maximum medical improvement and was assigned a 12 % whole body impairment rating.

Medical Evidence Related to Current Condition

The medical records from San Jacinto Methodist Hospital state in pertinent part that:[207]

Claimant went to the hospital on 18 Jan 05. He provided a history of falling between a rail and platform from about four feet, hitting his head. He complained

[203] EX-50; EX-53, pp. 2-3.
[204] EX-31; EX-53, pp. 4-11 (an EMG/NVS was performed on 22 Feb 01. However, the report is illegible and was not considered part of the record).
[205] EX-33.
[206] EX-32.
[207] CX-18; EX-8; EX-9; EX-10.

of generalized pain in his neck, back, and lower right shoulder that was worse in the right arm, hand, and neck. He also complained of muscle spasms in his back.

X-rays were taken of Claimant's chest, lumbar spine, and cervical spine. There was no evidence of acute abnormality in Claimant's lower back. An x-ray was taken of Claimant's cervical spine because of his complaints of pain in his hip, back, arm, and hand. There was no fracture or dislocation. However, degenerative disc disease was present in his lumbrosacral and cervical spine. There were also postoperative changes in the apex of the left lung. He was diagnosed with a chest contusion and strained neck.

The MRI reports from Memorial MRI & Diagnostics state in pertinent part that:[208]

An MRI of Claimant's left knee was performed on 21 Feb 05. There were no anatomical abnormalities, but that did not exclude the possibility of clinically significant pathology.[209]

An MRI of Claimant's lumbar spine was performed on 08 Mar 05. Claimant had relative loss of the normal lumbar lordotic curve disproportionate to the normal osseous structures and discs. He also had a posterior central disc bulge at L5-S1.[210]

An MRI of Claimant's cervical spine was also performed on 08 Mar 05. There was a 2 mm right posterolateral disc protrusion at C3-4 with intervertebral foraminal narrowing. Claimant also had right posterolateral spondylosis at C4-5 with mild intervertebral foraminal narrowing.[211]

The medical records from Cardiology Associates state in pertinent part that:[212]

Claimant was initially referred for cardiology workup on 08 Aug 03 by Dr. Wills because he has a strong family history of heart disease and complained of shortness of breath on exertion and occasional chest pain.[213]

Claimant presented for a cardiology consultation on 10 Mar 05. He reported having episodes of chest pain for the past eight months, specifically upon exertion and sexual intercourse. He feels tightness in his chest that lasts a few minutes. Sometimes, he also has sharp left sided breast discomfort. Claimant is

[208] CX-19; EX-12-EX-14.
[209] CX-19, p. 3; EX-12.
[210] CX-19, p. 1; EX-13.
[211] CX-19, p. 2; EX-14.
[212] EX-34.
[213] EX-34, p. 1.

hypertensive and hypercholesterolemic. Dr. Podet suspected that Claimant had angina. They discussed cardiac catheterization since chest pains from sexual relations often represents fairly significant coronary disease. Claimant wants to defer the catheterization.[214]

As of 31 Mar 05, Claimant's angina and home blood pressure were controlled. Claimant underwent a stress cardiolite on 12 Apr 05. Cardiac images demonstrated a small, mild ischemia involving the inferoapex. There was normal LV function.[215]

The medical records from Memorial Hermann Southwest Hospital state in pertinent part that:[216]

A lumbar myelogram was performed on 19 Jul 05. There were small ventral defects present at L4-5 and L5-S1. There was also poor filling of the L4 and L5 nerve roots bilaterally. No other abnormalities were noted in Claimant's lumbar spine. A cervical myelogram was also performed. It revealed a small ventral extradural defect at C3-4, but was otherwise negative.[217]

In addition, Claimant underwent a CT scan of his cervical and lumbar spine and reconstructions. Mild mid and lower cervical and lumbar spondylosis was present, but there were no definite acute fractures, herniations, or dislocations. There was mild disc bulging and uncovertebral joint hypertrophy at C2-3, C3-4, C4-5, and C5-6. There was also mild spinal canal narrowing and right neural foraminal narrowing at C2-3, C3-4, C4-5, C5-6, and C6-7. There was ossification of the anterior longitudinal ligament region in the upper thoracic region causing mild indentation of the anterior portion of the thecal sac. Minimal disc bulges were also suspected at L4-5 and L5-S1.[218]

Dr. DeBender testified by deposition on 23 May 06 and his records show in pertinent part that:[219]

He has been a board-certified orthopedic surgeon since 1979. He initially examined Claimant on 20 Jan 05. Claimant provided a history of being injured after falling from a rail into a hole on a ship.[220]

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[214] EX-34, pp. 2-3.
[215] EX-34, pp. 4-5.
[216] CX-20; EX-21; EX-22; EX-23.
[217] CX-20, pp. 1-3; EX-21; EX-22.
[218] CX-20, pp. 4-7; EX-23.
[219] CX-26; CX-11 and EX-11 (Claimant's medical records are incorporated in his testimony).
[220] CX-26, pp. 4-6.

Dr. DeBender conducted a physical examination on 20 Jan 05. Claimant had an injury to his neck with tenderness, decreased range of motion, and muscle spasms. He also had pain and tenderness in the middle portion of his spine (thoracic spine). He had some limitation of motion, but it was not severe. Claimant also had pain, tenderness and muscle spasms in his lower back with decreased range of motion. He had complaints of pain over the front of both knees, but there was no swelling or loss of motion. He had pain in his left shoulder, particularly with abduction. Claimant was able to be brought to full motion passively. There was some tenderness over the lateral and anterior part of the shoulder. No instability of the shoulder was noted. He had tenderness and stiffness in the back of the right hand and wrist with no swelling and full range of motion. Claimant had a large bruised area over the front of his right thigh.[221]

It was Dr. DeBender's impression that Claimant suffered a cervical, thoracic, and lumbar strain. He also had a strain of his left shoulder with possible rotator cuff injury. He had a strain and contusion of both knees, right thigh, and a sprain of his right hand and wrist. He recommended a course of physical therapy, heat treatments, traction, paraffin baths for the right hand, whirlpool for his knees, range of motion exercises for those areas, including left shoulder. He was given a muscle relaxer, anti-inflammatories, and pain medication.[222]

Claimant returned on 10 Feb 05 with continued complaints of pain in his neck extending into his right arm, lower back radiating into his left leg, and left shoulder. Because of the radiating symptoms from the neck and back, Dr. DeBender recommended MRIs of the cervical and lumbar spine and left knee. He also recommended EMG testing. The EMG demonstrated an objective finding of right-sided S1 radiculopathy and nerve root irritation of the cervical spine at the lower cervical nerve roots. The EMG was performed to evaluate the radiating symptoms, which could be caused by a disc rupture and commonly happens in accidents like Claimant's. It is done to localize the level that is involved and verify that the symptoms are related to nerve injury. The MRI of the cervical spine showed a small disc protrusion at C3-4 extending to the right side, which is where Claimant's symptoms were. The MRI of the lumbar spine showed a small bulge at L5-S1, but had no significant nerve root compression and was relatively normal.[223]

On 24 Mar 05, it appeared that Claimant's knee and wrist were improving. He had continued problems with his neck with some numbness and the pain in his lower back still extended into his left thigh and foot. Dr. DeBender continued Claimant on no work status. As of 21 Apr 05, Claimant's shoulder continued to

[221] CX-26, pp. 6-7, 25; CX-11, pp. 1-3; EX-11, pp. 1-3.
[222] CX-26, pp. 7-8; CX-11, p. 4; EX-11, p. 3.
[223] CX-26, pp. 7-10; CX-11, pp. 6, 8-12; EX-11, p. 4.

improve and his knees were better. He still had symptoms in his neck and back, but the intensity of the problem decreased. However, Claimant remained in off work status. He started complaining of pain in the left anterior chest wall, which he related to a prior surgery for thoracic outlet syndrome in the 1970s. Dr. DeBender could not explain why Claimant would first state he had intermittent leg pain, but then later stated that his pain was constant. He no longer had problems with his right hand, wrist, or thigh. Claimant also started an exercise program. Dr. DeBender requested a functional capacity evaluation (FCE), which was performed in May 2005.[224]

The FCE demonstrated Claimant was unable to return to his usual work as a longshoreman because the work is moderately heavy and Claimant was restricted to light duty work. Claimant had a negative sitting flex test and a positive supine straight leg raising test. They should not result in different results because they are basically the same test even though the patient is in a different position for the tests. This would make him question the validity of Claimant's complaints. However, a variety of things can cause the different results, such as the degrees the leg was raised to the point he had pain. The FCE reflected that Claimant is unable to work above shoulder height, work while bending, stoop, kneel, stand, walk, sit, push, pull, or climb ladders at his job demand level. Claimant returned for a follow-up on 17 May 05. He continued to have pain in his lower back and neck. He also complained of increasing sharp pain in his left shoulder and anterior chest well. However, he had no radiation of pain, weakness, or numbness into his arms. The pain in his shoulder almost takes his breath away. Nevertheless, his range of motion was improving. Claimant still had discomfort in his knees, but they were continuously improving.[225]

Based on the FCE, Dr. DeBender would not have recommended that Claimant return to work as a hustler driver, even though it would not require him to lift anything. It would only have required that he drive a truck around in circles and unhook a trailer and/or air hose. Dr. DeBender felt Claimant needed further evaluation to find out what was going on with his neck and back. Regardless of whether the job is considered light duty, Dr. DeBender would not recommend that Claimant perform a job that required him to bend and hook/unhook things or bounce around in a truck all day.[226]

If the under the whip job was available and only required Claimant to wait for trucks to pull up and put 15 pound twist locks into the corner of the containers, Dr. DeBender opined that Claimant might have been able to do that job, but may have increased problems with prolonged standing on concrete. He would not have

[224] CX-26, pp. 8-11, 32-33; CX-11, pp. 7, 13-15; EX-11, pp. 5-6.
[225] CX-26, pp. 10-14, 31-32, 33-36; CX-11, pp. 16-31; EX-11, p. 7.
[226] CX-26, p. 36; CX-11, pp. 16-31.

recommended the under the whip job in July 2005 if it would have required Claimant to stay on his feet for quite a bit of the day and involved some bending. However, after Claimant saw Dr. Berry and the surgical lesion was excluded, it would have been okay for him to try the under the whip job.[227]

Claimant returned on 27 Jul 05 with continued complaints of pain in his back extending to his legs and pain in his neck extending to the arms, especially on the left side. At the time, it appeared that Claimant's left shoulder strain resolved. Dr. DeBender explained that sometimes symptoms are intermittent and can come and go. Claimant had good motion and strength. He had no instability of his knees and only occasional discomfort in his left knee. Claimant's problems with his wrist and hand had also resolved. Dr. DeBender did not think Claimant needed any surgery or other treatment. Dr. DeBender did not refer Claimant for physical therapy because other than Claimant's neck and back, the other problems were pretty much resolved.[228]

He referred Claimant to a neurosurgeon, Dr. Berry, for a follow-up for his spine problems. He initially referred Claimant to Dr. Masson, but whoever was managing the workers' compensation case would not authorize treatment. The case manager did advise him that they would allow treatment with a neurosurgeon. Dr. DeBender wanted Dr. Berry to evaluate Claimant to determine whether any surgical treatment would be necessary and if not, to recommend non-surgical management for Claimant, such as physical therapy. Dr. Berry recommended a myelogram and CT scans of the neck and back. The cervical myelogram and CT were similar to the previous MRI. It showed a defect or small disc protrusion at C3-4 in the cervical spine and the myelogram of the lumbar spine showed disc protrusions at L4-5 and L5-S1 and some compression of the nerve roots at both sides of L4 and L5. Claimant did not have other prior symptoms that would be related to these injuries. Dr. DeBender attributes these findings as resulting from Claimant's work accident on 18 Jan 05.[229]

Dr. DeBender believes the actual pathology was caused by the work injury and not a degenerative condition. However, he also testified that it could also have been caused by the aging process. Claimant had a prior neck and back injury, which could also explain the findings of the myelogram, MRI and CT scans. If one hundred people who have no back or neck pain are taken off the street and given MRIs, abnormalities, including herniated discs, would be found in about one-half of them. There can be changes on an MRI where a person is asymptomatic.

[227] CX-26, pp. 26-27, 53-54.
[228] CX-26, pp. 14-16, 26-28.
[229] CX-26, pp. 14-16, 26-28, 32, 36-39, 49-50; CX-11, p. 32; EX-11, p. 8.

However, a person can also have fairly mild findings and have more severe problems.[230]

Dr. DeBender agreed with Dr. Berry's assessment that the discs were not compressing the nerve enough to warrant surgical management and his recommendation for treatment with a pain management specialist. Claimant received physical therapy and steroid injections, which Dr. DeBender finds appropriate.[231]

Claimant returned for a reevaluation in May 2006, with continued complaints of pain in his neck and tingling extending into his arms. Claimant noted weakness in both arms after any overhead use. He also complained of pain in his lower back extending into his left leg and foot. Physical examination revealed decreased reflexes in his arms and legs, but no atrophy or weakness in the lower extremities. He had some limited range of motion in his neck and back, which was secondary to pain. There were no muscle spasms. Claimant had improved. Dr. DeBender recommended continued treatment with Dr. Berry for Claimant's neck and back pain. He also reiterated that Claimant should see Dr. Masson for an evaluation for possible thoracic outlet syndrome since it could suggest other exercise programs that may be helpful for Claimant.[232]

Claimant expressed a desire to improve and return to work, hopefully at his usual employment. Claimant advised Dr. DeBender that he had been working a relatively light duty job – painting at bench level. Claimant could not do overhead work, but still wanted to return to his usual work. Dr. DeBender believes Claimant would benefit from a work conditioning program.[233]

Although he could not state for sure, Dr. DeBender opined that it was possible that Claimant's work accident had the propensity to aggravate an underlying spondylosis condition. It is more probable than not that Claimant's neck problems are related to an aggravation of the pre-existing spondylosis.[234]

Thoracic outlet syndrome (TOS) is a series of symptoms that can occur from compression of nerve roots and sometimes the arteries and veins that exit from the neck into the shoulder and down into the arm. It can cause symptoms of pain in

[230] CX-26, pp. 27-29.
[231] CX-26, pp. 16-18.
[232] CX-26, pp. 18-20, 29.
[233] CX-26, p. 20.
[234] CX-26, pp. 20-21.

the neck and numbness in the shoulder. A common finding of TOS is weakness when doing overhead work. Claimant had surgery for TOS in the 1970s. Given the nature of Claimant's accident, it could have aggravated the pre-existing TOS.[235]

Claimant has been a cooperative patient. Dr. DeBender has no reason to believe that Claimant has not been truthful regarding his symptoms.[236]

Dr. DeBender clarified how Claimant could have injured his left shoulder if he fell on his right side by stating that he probably did not write a real detailed report on how Claimant fell. Claimant was standing on a railing and "bounced off a number of things when he fell. He fell partially into a hatch and caught his arms on one side and was bent another direction." Claimant banged his legs, arms, shoulders, and "a whole bunch of things" when he fell. When a person falls so quickly like Claimant did, Dr. DeBender is not sure that the person would remember exactly what happened. If Claimant only fell on his right side, Dr. DeBender would not expect Claimant to have any problems with his left shoulder.[237]

The normal recovery period for a cervical strain, depending on how badly injured, is about six weeks. The same is true for a thoracic and lumbar strain. Based on his first visit with Claimant, Dr. DeBender believed Claimant would fully recover with two weeks of physical therapy, or at least improve. However, Dr. DeBender did not initially have some of the findings that he subsequently found out about.[238]

Typically, physical therapy is stopped after six to eight weeks. However, sometimes patients are still benefiting from the physical therapy and are given more of an exercise program toward the end. A patient can continue physical therapy longer than eight weeks and is sometimes put into a work conditioning or hardening program, which are more intense. Passive modalities usually go on for eight to twelve weeks. If a patient still has weakness after 12 weeks and was showing progress, therapy would be continued. It is on a case-by-case basis. If exercise helps Claimant, it may be a good idea for him to go back to work and exercise at work, so long as he does not do more than he should. However, sometimes that is just not possible because employers do not want people to return to work until they are 100 percent.[239]

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[235] CX-26, pp. 21-23.
[236] CX-26, p. 23.
[237] CX-26, pp. 24-26.
[238] CX-26, pp. 26-27.
[239] CX-26, pp. 39-41.

After 12 weeks of maximum physical therapy (as of July 2005), Dr. DeBender did not know exactly what was going on with Claimant's neck and back. It was before the myelograms and CT and Claimant may have needed surgical management. Although exercise is normally good, it can worsen a condition or aggravate things further. Once Dr. Berry determined that Claimant did not need surgical intervention, Claimant could have tried to see if he could do the work if there was light duty work available.[240]

It is a little surprising that Claimant still has the same complaints and symptoms over 15 months after his accident. However, TOS is an unusual diagnosis. TOS was brought to mind because Claimant had it before and it can drag on for a long time because there is no real diagnostic test for it. EMGs are typically negative or a very mild finding, such as with Claimant. Therefore, Dr. DeBender ruled out the cervical spine problem with MRIs and myelograms. Claimant does not appear to have any surgical problems in his cervical spine, but Dr. DeBender wants Claimant to be evaluated by someone who specializes in TOS to see if that would explain why Claimant's symptoms have persisted for so long. Claimant's symptoms have continued longer than one would expect with a typical cervical strain or small disc rupture. Claimant received all the treatments that would normally have led to either surgery or improvement.[241]

Dr. DeBender is not diagnosing Claimant with TOS, just that Claimant should be evaluated for it since his condition has not improved. There is always a possibility that nothing is there. Assuming there is no TOS, the patient takes physical therapy, and strengthening and injections do not significantly help, the condition can become permanent and chronic. Dr. DeBender still wants Claimant to see Dr. Masson for an evaluation of TOS.[242]

Dr. DeBender agreed with Dr. Brownhill that Claimant needed injections in his neck, however, he could not testify that it was all Claimant needed. If the injections were helpful and Claimant had no further symptoms, then it was enough. If he continued to have symptoms following the injections, then he would need further evaluation and/or treatment. As of May 2006, Dr. DeBender would have only recommended further treatment for Claimant's neck and back. He has no reason to disagree with Dr. Brownhill's opinion that Claimant no longer needed treatment for his lower back in September 2005. It is possible that the neck injections were not working because there is nothing wrong with Claimant.[243]

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[240] CX-26, p. 41.
[241] CX-26, pp. 28-30.
[242] CX-26, pp. 30-31.
[243] CX-26, pp. 41-43.

Claimant's condition had not changed much from July 2005 until May 2006. He still had neck and back pain and some paresthesias. The most significant change was his new complaints of weakness when he tried to do any overhead work. His new complaints are completely subjective and he has no way to determine if it is right or wrong. The new problems could be occurring because Claimant is developing TOS and compression of those nerves and vessels. TOS develops over time and forms more and more scar tissue or inflammation. TOS becomes chronic and causes compression. It is not something one would see right after an injury unless there is some fracture in the area. TOS develops over time with scar tissue, inflammation, and chronic changes. In July 2005, Claimant had complaints of neck and arm pain with paresthesia, which is consistent with TOS and may have been the real underlying problem. The tests showed nothing wrong with his neck, which would also be explained by developing TOS because the symptoms are similar to neck problems. That is why it is difficult to separate out. He looked for the more common problems first – cervical injury or disc problems.[244]

Claimant complains of pain in both arms with overhead use, but he also had complaints of left shoulder and neck pain extending to both the right and left arms. TOS is frequently associated with neck pain. Common symptoms of TOS include neck pain, shoulder pain, and pain and numbness into the arms. Dr. DeBender knew Claimant had TOS surgery in the '70s or '80s. Even though Claimant may have already had a rib removed (which is the usual surgery for TOS), there could be scar tissue in that area and with a subsequent injury it could cause inflammation and further scarring, which would compress those structures. He may also have a band of scar tissue or muscle that was removed and now the rib is causing a problem.[245]

Dr. DeBender does not just refer patients to pain specialists when he cannot find anything wrong with them instead of just saying that there is nothing wrong. He refers patients to pain specialists to look for other ways to treat a non-surgical patient. Dr. DeBender does not do injections so he refers patients to doctors who do. He thinks of pain specialists as a proactive treatment. Pain specialists deal with relatively noninvasive treatment, such as injections and medication management. Pain specialists may also order physical therapy if it can be helpful.[246]

[244] CX-26, pp. 43-45.
[245] CX-26, pp. 45-47.
[246] CX-26, pp. 47-49.

There were no objective findings during the May 2006 examination. Claimant had some decreased range of motion, but no spasms. Although Claimant complained of weakness, Dr. DeBender did not detect any on examination. Reflexes were decreased, but they were equal on both sides. Therefore, there were only subjective complaints and no objective findings.[247]

Claimant can continue to work the painting job as long as he does not have pain when working overhead. The light duty painting job is an arrangement between Claimant and Employer. Dr. DeBender does not know what Claimant would need as far as a release to go back and work out of the union hiring hall.[248]

One of Dr. DeBender's employees, Donna Clary, provided an affidavit[249] regarding Claimant's 17 May 06 visit. She stated that Dr. DeBender recommended that Claimant see Dr. Mason, who specializes in upper extremity problems. She called Employer to obtain authorization and spoke with Kirby Ford. Kirby Ford advised her that Employer would not authorize the referral to Dr. Masson and "would not authorize any further medical treatment period." Claimant's attorney also asked Employer's counsel for authorization to treat with Dr. Masson.[250] However, based on Dr. Brownhill's opinion, Employer's counsel would not authorize treatment with Dr. Masson.[251]

The medical records from Ortho Therapeutic Center state in pertinent part that:[252]

Claimant received physical therapy from Ortho Therapeutic Center from 26 Jan 05 through 03 May 05 to both knees, right hand, cervical spine, left shoulder, and lumbar spine. Claimant complained of increased pain and soreness, but mostly tolerated physical therapy well. On 04 Apr 05, Claimant reported lower back pain,

> left leg pain to the heel and toes, left groin pain, pain that increases with movement, pain that increases with prolonged sitting, headaches, left shoulder pain that increases with movement, difficulty sleeping, pain in both forearms, pain and numbness in the forearms that increases with pressure on the arms, pain in the knees left worse than right, with the left knee giving way.[253]

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[247] CX-26, pp. 50-52.
[248] CX-26, pp. 52-53.
[249] CX-27.
[250] CX-28, p. 1.
[251] CX-28, p. 2.
[252] CX-16; EX-18 (FCE dated 12 May 05).
[253] CX-16, pp. 15-34.

Claimant reported that he had periods of feeling better, but on 03 May 05, he reported that he hurt more that day. However, he performed all of his assigned activities to the best of his abilities.[254]

On 05 May 05, Claimant's doctor signed off that Claimant could perform light duty maintenance and yard tractor (hustler) driver work. The maintenance job would require Claimant to work above his shoulder height intermittently (about 2 hours per day); work with his body bent at the waist for four hours per day; stoop for three hours per day; work in a kneeling/crawling position for less than one hour per day; stand and walk for about four hours per day; sit for one hour per day; climb for less than one hour per day; and push and pull for about four hours per day. The job as a hustler driver would not require Claimant to work above shoulder height, with arms extended at shoulder height, crawl/kneel, climb ladders, or push and pull. He would only have to work bent over, stooped, standing, walking and climbing inclined ladders/stairs for less than one hour.[255]

An FCE was performed on 12 May 05. Claimant's functional performance during the evaluation revealed that he has moderate to severe functional deficits in his ability to perform at the minimum physical demand level of his regular job. Claimant was referred for a work hardening rehabilitation program. The physiotherapist recommended continued intervention and monitoring by Claimant's treating physicians. The physical examination revealed multiple points of tenderness throughout his cervical, thoracic and lumbar spine, as well as bilateral upper and lower extremities. Claimant also had a significantly elevated blood pressure of 193/117, which prevents the doctor from performing any cardiovascular or lifting tests. As of 12 May 05, Claimant is capable of performing at a light duty physical demand level. Claimant had moderate to severe functional deficits related to meeting the reaching and material handling job criteria as defined by Claimant's job description as a light duty maintenance man, lasher/rigger, and tractor/hustler driver, which are considered medium-heavy positions based on the information supplied by Employer.[256]

The FCE further reflected that Claimant could not work above shoulder height, bend, stoop, kneel, stand, walk, sit, climb, push or pull, as required by the light duty maintenance, lasher/rigger, and tractor driver positions. Claimant's range of motion in his left knee was 42% of normal. Claimant had some limited range of motion in his cervical spine, both knees, left shoulder, and lumbar spine. There was no evidence of symptom magnification or submaximal effort, except with his leg and high near lifts there were indications of inconsistent effort. However, Claimant had started to experience more pain with subsequent lifts and decreased

[254] CX-16, pp. 1-3, 10-14.
[255] CX-16, pp. 3-9.
[256] EX-18, pp. 1-3.

his effort. Claimant "demonstrated a safe weight lifting ability of 0 lbs." Then again, Claimant voluntarily stopped the test. Claimant's Waddell signs were checked and were negative, meaning there was no evidence of symptom magnification or exaggeration. Claimant had a positive supine SLR test and a positive Patrick's test.[257]

The medical records from Texas Orthopedic & Physical Medicine state in pertinent part that:[258]

EMG and nerve conduction studies were performed on 09 Mar 05. The nerve conduction and sensory studies were within normal limits. The EMG showed denervation potential with fibrillation potential in the muscles innervated by S1 nerve root. The absence of abnormality in other muscles innervated by S1 does not detract from the diagnosis of radiculopathy. Claimant was diagnosed with a right S1 radiculopathy. The EMG of the cervical spine showed left nerve root irritation.

Dr. John B. Berry's medical records state in pertinent part that:[259]

He is a neurosurgical specialist. On 27 Jun 05, he treated Claimant upon a referral from Dr. DeBender for complaints of neck and back pain related to a fall at work on 18 Jan 05. Claimant has pain in his left shoulder, elbow and fingers, and weakness. He also has difficulties on his right side. Turning his head to the left aggravates the pain in his shoulder, arm, and neck. His problems are aggravated with sexual activity and he feels like he is about to have a heart attack and has shortness of breath. Claimant also has low back problems with numbness radiating from the left hip down to the calf and foot. He feels weakness in his neck when he extends his head. The pain in his neck, left shoulder, and chest is also aggravated when he turns to the left.[260]

Claimant recalled having TOS surgery on the left, after getting hit with a hook in the left chest in the 1980s. He also had bilateral carpal tunnel syndrome release in the 1990s.[261]

Physical examination revealed limited range of motion in all directions, particularly to the left, which aggravates his left neck, chest, and arm pain.

[257] EX-18, pp. 4-15.
[258] CX-17; EX-15.
[259] CX-12; EX-19; EX-20; EX-24; EX-41.
[260] CX-12, pp. 1, 4; EX-19, p. 1.
[261] CX-12, pp. 1, 5; EX-19, pp. 1, 4.

Extension aggravates Claimant's posterior neck pain. Turning his head to the right did not cause a change in his pulse and was relatively negative. Cervical radiculopathy on the left appeared to be the most consistent diagnosis for Claimant's complaints.[262]

On 06 Jul 05, Dr. Berry reviewed Claimant's MRIs, which reflected a degree of stenosis at L4-5 in the lumbar area and mild degenerative disc and herniation at C3-4 on the right. However, Claimant's is more symptomatic on his left. There was no significant neurocompressive pathology that would warrant more aggressive surgical treatment. Dr. Berry tried to get preauthorization for the cervical and lumber myelogram and CT scan, but was denied by "Carol @ insurance." Dr. Berry started submitting his bills to Claimant's private insurance because Claimant's longshoreman workers' compensation ended.[263]

Claimant returned on 27 Jul 05, after he underwent the cervical and lumbar myelogram and CAT scan. He had mild degenerative changes at C3-4, more on the right than on the left, but was more symptomatic on the left. He also had mild degenerative changes and a small canal in the lumbar area. There was no significant neurocompressive pathology that would warrant aggressive surgical treatment and he referred Claimant for pain management.[264]

Dr. Berry analyzed the light duty painter job with Employer to see if Claimant was capable of performing the work. He opined that Claimant could intermittently (about 2 hours daily) reach above shoulder height and work with his arms extended at shoulder height. He also opined that Claimant could work with his body bent over at the waist, stand, and walk for about four hours per day, although his ability to stand and walk may vary. Claimant could sit for one hour daily, but that is also subject to change. Claimant cannot climb vertical ladders at all. He put a maximum lifting restriction of 56 pounds, rarely, on Claimant. As of 18 Apr 06, Claimant could work as a light duty painter for Employer.[265]

Dr. Elias Benhamou's medical records state in pertinent part that:[266]

Claimant first treated with Dr. Benhamou on 21 Jul 05 for complaints of pain in his knees, shoulders, arms, lower back, legs, ankles, and feet. He described his pain as moderate, aching, electric like, and throbbing. His back pain radiates to his left hip, buttocks, leg, and feet. He has numbness in his hands and tingling in his hands and arms. Physical therapy, heat, and steroid injections help relieve his

[262] CX-12, p. 2; EX-19, p. 2.
[263] CX-12, pp. 7-12, 15; EX-20.
[264] EX-24.
[265] EX-41.
[266] CX-13.

pain. His symptoms include loss of balance, mood swings, insomnia, headaches, and weakness. On 04 Aug 05, Dr. Benhamou prescribed a soft neck collar to wear when Claimant is in pain and on medication.[267]

During the initial examination, Claimant's chief complaint was pain in his back and left knee. Dr. Benhamou did not note any exaggerated pain behavior. ZJ tenderness was present in the right and left lower cervical facet column. His cervical and lumbar range of motion was limited and cervical distraction did not lessen the pain. It was Dr. Benhamou's impression that Claimant had lumbar nerve root irritation, lumbar facet arthropathy, cervical nerve root irritation, cervical facet arthropathy, and muscle spasm. Claimant had significant radicular pain that could be secondary to a six foot fall on 18 Jan 05. He opined that Claimant would benefit from conservative treatment, including physical therapy, medication, and injection therapy.[268]

Dr. Benhamou administered epidural steroid injections. As of 08 Sep 05, Claimant had four days of 50% relief from the injections and had more than two weeks of 15-20% improvement with muscle spasms and left shoulder pain. His pain is severe, sharp, and electric-like. The pain is more severe at night and radiates essentially to the left upper extremity. Claimant also has numbness and tingling in his hands, arms, and feet. His pain is aggravated by sitting, bending, and turning his head. He has relief with physical therapy, heat, and steroid injections. Claimant continued to have cervical nerve root irritation, cervical facet arthropathy, occipital neuralgia, and muscle spasms. The fact that Claimant has symptoms on his left side and imaging studies that are positive on the right side is not unusual and does not rule out that Claimant has true pathology.[269]

Claimant saw Dr. Benhamou for a follow-up on 27 Dec 05. There were no changes in Claimant's condition. Claimant returned on 21 Feb 06 with the same complaints. His neck pain radiates to his right and left shoulder/arms/fingers. Sitting, bending, and looking up or left aggravates his pain. On average, his pain is at a level 6, at worst it is at 10 out of 10. Claimant's symptoms include loss of balance, mood swings, insomnia, loss of balance, fatigue, joint pain, dizziness, headaches, weakness, and swelling in hands and feet.[270]

Physical examination revealed cervical spasms on the left and right, pain in both knees, and ZJ tenderness in the upper and lower right region and in the lower left

[267] CX-13, pp. 26-27.
[268] CX-13, pp. 20-22.
[269] CX-13, pp. 14-16.
[270] CX-13, pp. 1-5.

region. His cervical range of motion was still limited. He referred Claimant to Dr. Koll for a consultation regarding Claimant's knee and left shoulder. He also ordered Claimant into physical therapy three times per week with all necessary modalities and treatment with TENS unit.[271]

Dr. Robert L. Brownhill's medical records state in pertinent part that:[272]

He examined Claimant upon request by the DOL on 14 Sep 05 regarding complaints of pain in his neck, both shoulders, back, both arms, and both legs. Claimant provided Dr. Brownhill with a description of his injury and related medical treatment. Dr. Brownhill also reviewed Claimant's medical records. Claimant reported that the pain does not remain in one place and is present on a constant basis. He described the pain as dull, stabbing, shooting, and tingling with intensity from slight to severe. Claimant also noted numbness and tingling in his left arm, elbow, and right hand. His pain worsens when he turns his head or looks up. His leg pain worsens if he lies on his left side or sits for a long period of time.[273]

Claimant told Dr. Brownhill about his prior treatment for thoracic outlet syndrome, carpal tunnel syndrome and "soft tissue," including surgical intervention. He also noted that he fully recovered from those prior injuries.[274]

Claimant appeared comfortable and arose with support, but without hesitation. Claimant did not have any trigger point tenderness or muscle spasms on palpation. His "cervical flexion and extension were decreased by 50%, as were cervical right and left lateral flexion maneuvers and cervical right and left rotation." Dr. Brownhill attributed Claimant's limited range of motion related to his neck to spondylolysis.[275]

Claimant had no instability in his shoulders, sternoclavicular, acromioclavicular, elbow, forearm, wrist, thumb or finger joints and no tenderness over the lateral or medical epicondyle (elbows). The neurological examinations were normal and the carpal tunnel compression test was negative and normal bilaterally. Claimant's cervical muscle, elbow, forearm, wrist, and hand strength were normal bilaterally.[276]

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[271] CX-13, pp. 2-3.
[272] CX-14; EX-25; EX-26; EX-58.
[273] CX-14, pp. 1-3; EX-25, pp. 1-3.
[274] CX-14, p. 4; EX-25, pp. 2-4.
[275] CX-14, p. 5; EX-25, pp. 4-6.
[276] CX-14, pp. 6-8; EX-25, pp. 6-8.

An examination of the back showed normal extremity alignment and weight bearing. There was no swelling or muscle spasm. There was no tenderness over the buttock, however, there was tenderness over the lower lumbar spine and over the left sacroiliac joint. The Waddell test revealed appropriate responses by Claimant. There were no scars, redness, swelling, effusion, tenderness, or increased temperature at Claimant's knees, ankles, or feet. The muscle strength in Claimant's back, hips, knees, ankles, subtalar, and great toes were also normal bilaterally.[277]

Dr. Brownhill agreed with the various diagnoses of Dr. DeBender. Dr. Brownhill diagnosed Claimant with spondylosis of the cervical spine at multiple levels; lumbar disc bulge without clinical evidence supportive of radiculopathy, status post strain of the left shoulder, contusion of both thighs by history, hematoma of the right thigh with contusion by history, and sprain of the right hand by history. Claimant had limitations in his range of motion to both shoulders with some discomfort, particularly the left shoulder. He also had pain and a "snapping" sensation in the both scapulae when raising and lowering his arms.[278]

Dr. Brownhill opined that it is reasonable that Claimant's problems were caused by his January 2005 injury. For his chief complaint of neck pain, Dr. Brownhill opined that Claimant should complete pain management treatment, including cervical epidural steroid injections. It was unnecessary to perform further diagnostic testing and Claimant did not need additional treatment to his lumbar spine, upper extremities, shoulders, or lower extremities. Claimant does not need additional diagnostic testing to his cervical spine. Dr. Brownhill saw no need for surgical intervention. However, Claimant required further treatment and as of 19 Sep 05, was not at maximum medical improvement.[279]

On 16 Nov 05, Dr. Brownhill supplemented his original report. Claimant had objective findings, including general limitation of motion of both upper extremities and painful motion in both the neck and lumbar spine. "Painful range of motion" is not a subjective complaint of diffuse pain, it was obvious pain as a result of various motions during the physical examination." He does not agree with Dr. Likover's opinion that Claimant could return to gainful employment. He also disagreed with Dr. Likover's opinion that there were no objective findings. He did not believe Claimant could work as either a hustler driver or whipman. Locking and unlocking a trailer is "quite a chore" and a whipman would have to move his arms around, moving the twist locks and attaching it to containers. This requires a good deal of force and movement that would be painful for Claimant.

[277] CX-14, pp. 8-11; EX-25, pp. 8-11.
[278] CX-14, pp. 11-13; EX-25, pp. 11-12.
[279] CX-14, pp. 12-14; EX-25, pp. 13-15.

Therefore, he cannot perform either job. Dr. Brownhill expected Claimant to fully recover and to return to his former work by January 2006.[280]

Dr. Brownhill provided another supplement to his original report on Claimant. He reviewed Dr. Likover's IME report dated 05 Sep 06 and the EMG/NCV report of 28 Aug 06. Based on his own evaluation and the record available, Dr. Brownhill did not see any indication for surgery to the left shoulder. Without re-examining Claimant, Dr. Brownhill still felt Claimant was unable to return to his regular rigging work, as a hustler driver, or as a whipman. Although he previously opined that Claimant may completely recover by January 2006, Dr. Brownhill would not opine as such without a re-examination.[281]

The medical records from Pain & Recovery Clinic of Houston state in pertinent part that:[282]

Claimant began treating at the Pain & Recovery Clinic on 28 Feb 06. Their advertisement in the yellow pages states that they "are patient advocates."[283] He reported low back pain aggravated by bending, kneeling, and stooping. He also reported upper limb soreness secondary to overhead and end range motions. He received treatment to his cervical, thoracic, lumbar, upper extremity, and lower extremity regions. He tolerated therapy well and noted a decrease in pain after passive care.[284]

An initial therapy evaluation was performed on 01 Mar 06. Claimant reported a work-related accident on 18 Jan 05 while attempting to hang a rod. He lost his balance and fell to the ground. His right arm and left leg were caught between cross rods and he hit his head on a hatch. Claimant provided his medical treatment history, including the fact that Dr. Benhamou recommended that he undergo progressive active physical therapy. Claimant presented with neck pain, which was recreated with performing end repetitive movements, with turning his head, or from maintaining one position for a long period. He also complained of pain to his left side. He noted constant cramping in the neck and top of the shoulder, headaches, left shoulder pain and numbness, right and left knee pain, cramping in both thighs, and low back pain radiating down into his left leg and foot. Claimant had difficulty walking and felt weakness in his left side (i.e. his left leg gave out from underneath him).[285]

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[280] EX-26.
[281] EX-58.
[282] CX-15.
[283] EX-44.
[284] CX-15, p. 33.
[285] CX-15, p. 29.

A visual inspection of Claimant in a seated position revealed that Claimant has a slight decrease in his cervical curvature with a head tilt noted to the left side and a slight decrease in his lumbar lordotic curvature. He had a positive cervical compression test, positive cervical distraction, positive Jackson compression test on the left side, and positive shoulder depression test bilaterally with recreation of tenderness extending from the cervical spine into the top of the shoulders and tenderness into the left arm. He also had a positive straight leg raise on the left side and a positive Bragard's test. Strength and sensory was decreased as to the left side in the upper extremity. In addition, the physical therapist noted a decrease in strength in the left leg and slightly decreased sensory to the left side. Claimant had limited range of motion in his left shoulder and a positive Apley scratch test with tenderness recreated with external and internal rotation. He also was positive for the apprehension and Yergason test. Left shoulder strength was decreased with abduction and flexion in comparison with his right shoulder.[286]

Claimant also had a slight decreased range of motion noted in his left knee. Tenderness was recreated in the left knee with performing Apley compression and McMurray tests. Tenderness was also recreated in the left knee when he performed a drawer test in the flexed position. There was palpatory tenderness noted in the left knee. Tenderness was also recreated in the right knee with apprehension and drawer tests and a medial stress test.[287]

On 01 Mar 06, Claimant was diagnosed with cervical disc syndrome, lumbar radiculitis, left shoulder impingement, bilateral internal knee derangement, and headaches. Dr. Long sought authorization for active physical therapy for 12 visits, three times a week for four weeks, at which point Claimant would be reevaluated.[288]

Claimant continued to receive physical therapy at Pain & Recovery from 02 Mar 06 through 12 Apr 06. Treatment included therapeutic exercises and passive therapy. Claimant performed cervical spine range of motion stretching exercises and pulleys. He also received treatment with heat/ice, stimulation, ultrasound, gentle soft tissue massage, and electrode. On 08 Mar 06, lumbar spine exercises and myofascial release manual therapy were added to Claimant's physical therapy routine. Claimant had difficulty performing strengthening exercises due to multiple myospasms. On 10 Mar 06, Claimant reported disturbed sleep pattern due to elevated pain and soreness. He also had difficulty performing the stretches due to pain in his left upper limb secondary to overhead and end range motions.[289]

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[286] CX-15, pp. 30-31.
[287] CX-15, pp. 30-31.
[288] CX-15, pp. 23, 31.
[289] CX-15, pp. 1-22.

Claimant continued to have pain which he described as a shocking sensation from his neck down into his mid back, difficulty sleeping, myospasms, lower cervical spine radicular pain to left upper limp, bilateral lower extremity pain, and soreness. He did not report any improvements until 27 Mar 06. He reported improvement while performing strengthening exercises. There was obvious improvement in Claimant's range of motion, flexibility, and left upper limb strength. However, on 29 Mar 06, Claimant once again complained of persistent pain in his cervical spine that limited his daily living activities. He also reported lumbar spine discomfort. Dr. Long increased the weight of triceps extensions and biceps curls, with a moderate amount of pain following the exercises. On 30 Mar 06, Claimant reported cramping in his upper spine when lifting and carrying heavy objects. Dr. Long noted tenderness of bilateral SCM and trapezius musculature. Claimant's pain was diminished following passive therapy.[290]

On 03 Apr 06, Dr. Long completed a Texas Workers' Compensation Work Status Report, reevaluated Claimant, and noted that Claimant's injury still prevented him from returning to work as of 03 Apr 06 through 24 Apr 06. He recommended an additional four weeks of physical therapy and then reevaluation, but his medical report asks for 10 visits over eight weeks. Dr. Long noted that Claimant's age was detrimental to his rate of recovery with the extent of his injuries. However, Claimant had shown improvement and medical necessity requires continued treatment. Dr. Long believed that Claimant would recover if he was allowed to perform continuing active treatment at an aggressive level.[291]

On 05 Apr 06, Claimant began reporting intermittent throbbing headaches primarily with overhead motions. Dr. Long noted soreness of bilateral SCM and trapezium musculature, but there was diminished pain after passive therapy. On 07 Apr 06, Claimant had myospasms of the thoracolumbar spine while perfoming strengthening exercises and Dr. Long noted weakness in the lower extremities bilaterally. On 10 Apr 06, Claimant's range of motion and flexibility of his cervical spine were restricted. Claimant also had a throbbing sensation that exacerbated with bending, kneeling, and stooping. The last report is dated 12 Apr 06 and notes difficulty with end range motions. It also noted that Claimant needed to continue with the current treatment plan.[292]

[290] CX-15, pp. 10-18.
[291] CX-15, pp. 5-9.
[292] CX-15, pp. 1-4.

The medical records from U.S. Anesthetics Services state in pertinent part that:[293]

> On 09 May 06, Claimant underwent a pain management evaluation by Dr. McKay. Claimant had complaints of neck pain radiating into his left shoulder and associated headaches. He also had complaints of lower back pain radiating intermittently into his lower extremities. The pain is sharp, shooting and very severe. It is aggravated by bending, twisting, lying flat, and exercises.[294]
>
> A physical examination revealed a decreased range of motion in the cervical spine. The cervical face joints were tender to palpation mainly on the right at C3-4 to C4-5 levels. He had a positive Spurling's test.[295]
>
> Dr. McKay diagnosed Claimant with lumbar vertebrogenic pain, cervical certebrogenic pain, lumbar facet joint arthropathy, and cervical facet joint arthropathy. He wanted Claimant to have bilateral cervical facet joint injections at C3-4 through C4-5 with steroid medication. Once the injections were performed he would reevaluate Claimant to determine whether he needed further interventional pain management.[296]

Functional Capacity Evaluation dated 17 May 06 states in pertinent part:[297]

> The FCE was performed by a chiropractor, Wayne Parks on 17 May 06. Claimant provided Mr. Parks with a history of being injured at work on 18 Jan 05. Claimant was hanging a rod when he slipped and fell, causing his injuries.[298]
>
> Claimant's typical work day in his regular position consisted of sitting for two hours, standing for three hours, and walking for three hours. Claimant's job required continuous bending, stooping, squatting, crawling, climbing, reaching above shoulder level, crouching, kneeling, balancing, reaching out, lifting, repetitive foot motion, pushing, and pulling. The job also required frequent lifting of up to 100 pounds, fine manipulation of both hands, and firm and simple grasping of both hands. He was also required to work on unprotected heights and around moving machinery. Claimant had to drive automotive equipment and was exposed to marked changes in temperature and humidity and to dust, fumes, and gas.[299]

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[293] CX-16 (a report from Dr. McKay was attached to the back of Ortho Therapeutic Center's medical records, submitted as CX-16).
[294] CX-16, pp. 39-40.
[295] CX-16, p. 40.
[296] CX-16, p. 41.
[297] CX-34.
[298] CX-34, p. 1.
[299] CX-34, p. 2.

The FCE took four hours. Mr. Parks concluded that Claimant's regular job fell under a "very heavy" work classification. However, the test data reflects that Claimant is at a sedentary light to light work classification. Mr. Parks opined that Claimant is currently unable to perform his normal work duties without the risk of re-injury.[300]

Claimant completed a "short screen for anxiety and depression." Based on his responses, the probability of him having a clinically important disturbance is greater than 50 percent. As such, Mr. Parks recommended follow-up treatment with a qualified mental healthcare provider.[301]

Claimant was able to occasionally lift 30 pounds from floor and waist. He can only lift from floor and waist 15 pounds frequently and 6 pounds constantly. He is limited to occasionally lifting 20 pounds to his shoulder and carrying 20 pounds. However, he can only frequently carry and lift to his shoulders 10 pounds and constantly four pounds. He cannot lift more than 15 pounds overhead occasionally, which places him in a sedentary light work classification. Otherwise, his abilities place him at a light work classification. Claimant is able to sit and walk for 60 minutes each. He can only stand for 15 minutes at a time and kneel for 3 minutes. Claimant cannot squat or bend, but can occasionally reach up and out. Claimant met requirements for sitting and walking, but they had to stop the test for squatting, reaching, bending, standing, and kneeling because of increased pain.[302]

Mr. Parks tested the validity of Claimant's performance during the FCE. All of the tests performed showed Claimant gave consistent effort. He also performed a standard grip test which offers additional insight into worker participation. All five position grip tests showed valid effort, as did the REG test. Therefore, Mr. Parks opined that the overall level of effort by Claimant is reliable.[303]

Dr. Marcos V. Masson's medical records state in pertinent part that:[304]

Claimant initially presented with left shoulder pain and numbness caused by a work related injury. Although Claimant had a prior left thoracic outlet

[300] CX-34, p. 2.
[301] CX-34, p. 2.
[302] CX-34, pp. 2-3, 5, 12-16.
[303] CX-34, pp. 3-4, 17-20.
[304] CX-37 (the medical records from Dr. Masson were not entirely legible, making it difficult to determine the dates of treatment other than 16 Aug 06 or to read test findings. Counsel's summary of the medical evidence in his post-hearing brief merely states that the nerve conduction studies and additional examination findings can be found in the report, but does not provide the Court with any guidance as to what the report actually states. Only the legible portions of this exhibit are considered part of the record. Claimant also submitted this exhibit in a letter dated 20 Jul 06, referencing it as CX-29. In fact, CX-29 refers to the deposition of J.E. Lewis and not Dr. Masson's reports).

compression syndrome (TOC) scalenectomy, the TOC exam was negative. Claimant was given an injection which helped eliminate his left pushup pain after stressing. Dr. Masson recommended an EMG/NCS and opined that he believed Claimant's ACJ is the culprit of his shoulder pain. As such, Claimant may need a left distal clavicectomy and SAD. A left CTC and elbow flexion test caused referred left shoulder pain.[305]

Claimant returned after his EMG/NCS exams. Physical examination revealed normal range of motion on Claimant's left side. The point of maximum tenderness test was positive for AC joint on the left side, but negative for tuberosity. Dr. Masson concluded that Claimant suffers from left chronic shoulder pain since his work injury, with no improvement over 1.5 years. He gave Claimant another ACJ injection which resolved Claimant's pain. His mode of injury is consistent with a chronic ACJ strain that can be explained by his work accident. Claimant has not improved with treatment.[306]

Claimant returned on 16 Aug 06. The EMG report[307] noted C5-6 radiculopathy and thoracic outlet syndrome on Claimant's left. Although the ACJ injections provided complete relief of pain, it was only temporary. Pain occurs with activity and during sleep. Claimant is awakened with numbness, tingling, and weakness. Dr. Masson continued Claimant's no work status. Claimant's range of motion on his left side was normal. Compression tests were negative on the right side, but it was positive for cubital and negative for carpal on the left side. Claimant's current medical problems are related to his work injury. Claimant is a candidate for a left shoulder distal clavicectomy and SAD arthroscopic surgery. He prescribed a pain medication, Lortab 10 mg.[308]

As of 26 Sep 06, Claimant had chronic inflammatory pain due to a traumatic arthritic ACJ. Dr. Masson did not believe Claimant reached maximum medical improvement as to his left shoulder injury. He diagnosed the left shoulder with a chronic left AC joint strain and an arthritic AC joint. Dr. Masson opined that Claimant could work in a sedentary work capacity, but must avoid heights. Dr. Masson agreed with Dr. Likover's opinion that Claimant's area of discomfort is not the source of his pain, but disagrees with Dr. Likover's conclusion regarding the left AC joint.[309]

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[305] CX-37, pp. 1-2.
[306] CX-37, pp. 4-5.
[307] CX-38.
[308] CX-37, pp. 6-8.
[309] CX-39.

The medical records from Memorial City Neurology state in pertinent part that:[310]

> On 28 Aug 06, Claimant underwent an EMG/NCS test. The NCV study revealed normal motor and sensory responses and normal F-waves. The EMG needle exam was also normal. There was no electrophysiological evidence of left radiculoneuropathy or neurogenic thoracic outlet syndrome.

Dr. Likover testified at deposition[311] and his medical records[312] state in pertinent part that:[313]

> He graduated from medical school in 1975. He is a board-certified orthopedic surgeon and has been in private practice for 25 years. He sees patients daily and still performs surgeries. He has treated other patients on behalf of Employer and conducts carrier exams for other entities and the Texas State system too. He performs about 15 – 20 examinations a month on behalf of others.[314]
>
> He first examined Claimant on 05 May 05 for about 10 minutes. Claimant provided a history of falling about two and one-half feet between two hatches. As a result, "he developed neck ache, backache, aching in both legs, aching in both arms, numbness and tingling in both hands, and discomfort in the left and right shoulder, as well as discomfort in the left and right neck area and back area." Claimant also complained of headaches and numbness in all five fingers. The physical exam was basically objectively normal. There were no significant physical findings. Claimant has what he calls a "multitude of subjective complaints . . . with no evidence of any significant injury." Based on Dr. DeBender's diagnosis, the MRIs and the myelograms, Dr. Likover expected Claimant to have been recovered when he saw him in May 2005. He opined that Claimant could return to regular duty work as of 05 May 05. He also signed off on the jobs described as yard tractor/hustler driver and light maintenance man work.[315]
>
> Dr. Likover does not necessary disagree with Dr. Brownhill's September 2005 opinion that Claimant needed three steroid injections in his neck before he could go back to work. However, he would not consider that a medical necessity either, only ancillary care. If Claimant does not have any improvement from the injections then Dr. Likover would conclude that Claimant has no significant

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[310] EX-56.
[311] EX-49.
[312] EX-16; EX-17; EX-27; EX-30 (CV); EX-57; EX-59.
[313] EX-16; EX-59.
[314] EX-49, pp. 4-5, 21-22.
[315] EX-49, pp. 5-9, 17; EX-16; EX-17.

structural problems in his neck and that his original opinion that Claimant did not need treatment was correct.[316]

Dr. Likover reexamined Claimant on 05 Jan 06. He reviewed all of Claimant's diagnostic tests and medical records and believes they were no more than slight variations of his own opinion. Claimant had another normal examination of his neck, upper back, lower back, and shoulders. Dr. Likover concluded that Claimant had no signs of a serious injury, no sign of a surgical problem, and no need for further treatment. Although Claimant continued to feel like he could not return to work at any capacity, Dr. Likover believed Claimant could return to work as a longshoreman without activity restrictions. Claimant had received three injections in his neck, which provided some relief on the right side of his neck, but he still had pain in the left side of his neck. Dr. Likover opined that the exam reflected significant inconsistency upon examining Claimant's back and no objective findings supported his complaints of significant, severe, and disabling pain in his neck, upper back, shoulder area, low back, or leg. Claimant appeared "to be as healthy as they come." He believed there were secondary factors. Dr. Likover rarely refers his patients for pain management. He also does not want to mess with patients with chronic pain conditions due to orthopedic problems. He "sends them on."[317]

Claimant had less complaints of pain on 25 May 06 than he did on 05 May 05. He no longer had complaints about his hands, but continued to complain of pain in his neck, both shoulders, lower back and both knees. He also had new complaints of pain in both elbows and left hip and groin area. Claimant indicated that his left shoulder hurt worse than his right one. Claimant did not indicate any improvement from treatment and actually complained of continued pain all over his body. Dr. Likover considers Claimant's pain complaints more like aches, which are a disease of life for a 51 year old man. A physical examination revealed no objective evidence of a serious problem in any area. Claimant was working light duty several days a week and hoped to one day return to regular duty. However, Dr. Likover already believed Claimant could return to his normal work.[318]

Although Dr. DeBender recommended an evaluation for thoracic outlet syndrome (TOS), Dr. Likover opined that Claimant "did not manifest any complaints whatsoever consistent with thoracic outlet syndrome." With TOS, a patient normally has complaints of numbness in the fourth and fifth finger, outside part of the hand, inner portion of the forearms, under part of the upper arm, and pain radiating up to the chest area. TOS is caused by different things that will pinch the

[316] EX-49, p. 8.
[317] EX-49, pp. 8-9; 17-19; EX-27.
[318] EX-49, pp. 6-7, 9-10.

nerve or artery. With TOS, if a person keeps his arm above his shoulder for about 20 minutes and the artery is being pinched by the muscles or a rib, then the person will develop numbness and tingling. Claimant does not have any of these complaints. Dr. Likover has diagnosed a patient with TOS one time. It is a very rare syndrome and it is now considered questionable as to whether it actually exists. Regardless, Claimant already had a TOS surgery. Since Claimant already had a rib removed, there is really no chance of him getting TOS again because the structural cause has been removed. Had in fact the January 2005 accident caused TOS, it would have manifested itself right away.[319]

Dr. Likover reviewed Claimant's medical records from Dr. Benhamou and Dr. Long. In his opinion, continued physical therapy is not necessary medical care. He believed that the therapy provided to Claimant was rather excessive and a short period of physical therapy would have been more reasonable. He considers Claimant's injuries to be self-limited. Physical therapy for Claimant was only ancillary and he should have healed in four to six weeks. He did not need more than a maximum of six weeks of physical therapy. Dr. Benhamou was merely treating Claimant's subjective complaints. Dr. Long's physical therapy that started in March 2006, was not medically necessary either because it was completely ancillary. People get over injuries like Claimant's without having any physical therapy.[320]

There is no objective evidence for Claimant's complaints, his complaints are only subjective. An individual can have a muscle spasm one minute and then five minutes later nothing. He reviewed the EMG report that demonstrated nerve irritation on Claimant's cervical spine. However, it is likely due to his pre-existing long-standing degenerative disc disease. It does not mean that he has a pinched nerve and it does not mean that he needs surgery. Claimant does not need any further treatment. The mere fact that a person has an abnormal EMG does not mean he has a condition that needs treatment. Dr. Likover reviewed the 10 Jul 06 x-rays and opined that the x-rays of the left shoulder were normal and Claimant does not need surgery.[321]

Dr. Likover did a repeat IME on 05 Sep 06, after Claimant received a recommendation for surgery by Dr. Masson for a procedure on the left acromioclavicular joint. Claimant had a follow up EMG by an independent neurologist. The EMG of the left upper extremity showed no sign of TOS or any type of nerve root compression. Claimant continued to complain of persistent pain in his neck, shoulder, back, and knees. Dr. Likover reiterated his previous opinion that Claimant has a multitude of subjective complaints without any objective

[319] EX-49, pp. 10-12, 19-20.
[320] EX-49, pp. 12-16.
[321] EX-49, pp. 22-25; EX-59.

findings. He had a normal clinical examination and no physical findings in his shoulder that would make a surgical procedure a necessity. The EMG and nerve conduction of the left upper extremity were normal. Dr. Likover saw no reason to perform any surgery for nerve entrapment on the left upper extremity. He also saw no reason for a distal clavisectomy. He opined that Claimant "appears healthy, appears capable of returning to work. Activity restriction is not required. Secondary factors appear operative."[322]

The EMG report from 17 Jul 06 states in pertinent part that:[323]

The examination revealed severe muscle spasms in the neck and left shoulder, weakness in the hand, and decreased sensation in the left hand. The NCS showed normal motor and sensory responses. However, the EMG showed evidence of chronic neurogenic changes in the deltoid and triceps. Claimant was diagnosed with C5-6 radiculopathy and thoracic outlet syndrome on the left.

Vocational Rehabilitation Evidence

Thomas J. Owens' testimony at trial and reports state in pertinent part that:[324]

He has been a vocational rehabilitation counselor since he graduated in 1999. He worked with state vocational rehabilitation for six months, but has been in the private sector for the past 5 ½ years. He met with Claimant and determined he was capable of working at sedentary to light duty. He has worked on about six cases for Employer since 2002. He has also done vocational work for hire for other stevedores in the Houston area. He is certified by the Office of Workers' Compensation Programs too, which is a voluntary program.[325]

Claimant reported radiating pain down his left side and cramping in his hands. He is afraid of dropping things. He only gets about 2 ½ to 3 hours of sleep per night because of his pain. He only sleeps through the night about once every 3 to 4 days due to exhaustion. He can perform his personal daily living activities, but painfully and slowly. He cannot perform chores and his family helps him clean his home.[326]

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[322] EX-57.
[323] CX-38 (Claimant submitted this exhibit with a letter dated 20 Jul 06 as CX-30. However, CX-30 is the deposition of E.B. Jones and not the EMG report).
[324] Tr. 70-80; EX-38; EX-39.
[325] Tr. 70-71, 78-79; EX-40.
[326] EX-38, p. 4.

The May 2005 FCE reflected that Claimant could work at light duty. The FCE is Mr. Owens' favorite piece of data as to what a person can physically do. He believes the FCE is the most objective information one can obtain.[327]

He completed a labor market survey[328] to determine whether there were jobs available for Claimant. He first looked to the state employment agency for open listings (about 4,000 weekly). He went through the spreadsheet and determined which jobs were sedentary. Although the FCE referenced that Claimant could work light duty, per counsel for Employer's request, Mr. Owens only looked for full-time sedentary positions. He located job openings available in April 2006. He also went back to May 2005 to determine if the jobs were also available then. Some jobs were always hiring. The telemarketing employer asks potential hires to call first so it can determine whether to hire them based on their voice. United Recovery System takes applications over the phone. They have a message that describes available positions and how to apply for them. Home Depot is constantly hiring workers to greet people. ALM Services, United Recovery System, and Home Depot have had positions available since May 2005.[329]

Mr. Owens located several sedentary positions available in Houston, Texas as of 25 Apr 06. There were quite a few telemarketing positions available, paying anywhere from $9.00 to $12.00 per hour. One of the telemarketing positions that paid $10.00 per hour was available either full or part-time. Salaries could increase depending upon experience. He also located a telephone interviewer position which paid $7.00 per hour, plus bonuses and a raise after three months. Claimant would be required to call households throughout the United States, conducting political and consumer research surveys. A position as an appointment generator for Residential Air Conditioning Services pays about $8.00 per hour, plus commission and bonuses, and is available full or part-time. There were also several cashier positions available full or part-time, however, a worker may be required to lift more than 10 pounds. Finally, there were positions for collections which paid, depending upon experience, anywhere from $8.65 to $12.00 per hour, plus commissions.[330]

He was asked to find open employment opportunities for Claimant at a sedentary level. He was also asked to find some cashier jobs. He believes that if a person really wants to work they will sell themselves to get into the position. There are a lot of people who still work even though they are hurt and they do not have a problem with it. If a person goes to physical therapy twice a week that would have to be accommodated for by the employer and would likely fall under the

[327] Tr. 71-72.
[328] EX-39.
[329] Tr. 72-75.
[330] EX-39.

Americans with Disabilities Act (ADA). If a worker needed to stand or sit as needed, the employer would have to accommodate that restriction too. It can provide a "leaning stool" or cushioned pads to take pressure off a person's back. Under the ADA, employers are not supposed to ask a worker about their medical condition before they make a job offer. However, in reality they do.[331]

Although an employer would probably like to have an accurate idea of the people hired and their physical abilities, Mr. Owens just tells the potential worker it is a "moral judgment" that is up to them. If they want to tell the employer right away what they can or cannot do there is a good chance they will not get hired. But others want to work bad enough that they get the job first then deal with problems as they come. That is where job restructuring comes into play. It is not for him to tell a person to lie to an employer, but some people do not have a problem with it because they want the job bad enough. Some people refuse to withhold the information from a potential employer because if the truth comes out they can be fired for lying during the interview. He lets them make that moral decision on their own. If a person has to go to therapy or a doctor, he would have to tell his employer why he had to go. However, there are a lot of employees who have regular doctor's appointments and employers are fine with that.[332]

ANALYSIS

Claimant's Credibility

This case places Claimant's credibility at center stage. It weighs heavily in the determination of the existence of an injury, the relationship of the injury to an accident, and the nature and extent of the injury. Although there are some corroborating diagnostic tests, the treating and evaluating physicians concede that they base their opinions on his subjective reports. In a broad based attack on Claimant's credibility, Employer cites a number of factors, including that: Claimant did not include a left shoulder injury on his claim form;[333] Claimant failed to fully disclose previous injuries in giving his history to his physicians; and Claimant failed to disclose his union income.

Claimant admitted that he did not tell Dr. DeBender about his prior left shoulder injury, but explained that he did not say anything because he did not have any problems with his left shoulder prior to his 2005 work injury. He believed the problem had healed and Dr. DeBender only asked him about what hurt. Claimant disclosed his prior surgeries

[331] Tr. 75-76, 79.
[332] Tr. 76-77.
[333] *U.S. Industries v. Director*, 455 U.S. 608, 102 S.Ct. 1312, 71 L.Ed 2d 495, 14 BRBS 631, 632 (1982).

because Dr. DeBender specifically asked about prior surgeries. He claimed that he did inform Dr. DeBender about his neck injury because Dr. DeBender asked about prior injuries. He explained the reason he disclosed one prior injury and not the other was that if it does not still bother him, then he probably forgot it happened.

Claimant also explained that he believed he was only reporting Longshore income, and corrected the error immediately when it was drawn to his attention. Although Claimant did not specifically note the shoulder on his claim form, he did list both neck and arm pain and reported shoulder problems to his physician. In fact, he specifically complained of left shoulder pain to Dr. DeBender two days after his work accident. Moreover, only Dr. Likover questioned Claimant's truthfulness. The FCE found no evidence of submaximal effort and Dr. DeBender said he had no reason to question Claimant. In addition, Claimant offered a significant amount of opinion evidence of his good character for truthfulness. Finally, on the stand at hearing Claimant was credible in his demeanor and his prior inconsistencies appeared to be a function of confusion or mistake, rather than an intent to deceive.

Consequently, I find Claimant's testimony to be probative and give more weight to physicians' opinions relying on his subjective reports.

Compensable Injury

This case presents not only an issue regarding a medical opinion, but also "mingled elements of fact[s], medical opinion[s] and inference[s]."[334] The instant record consists of medical opinions coupled with the testimony of Claimant, his friends, and his co-workers and supervisor at the time of injury.

The parties appear to agree that on 18 Jan 05, Claimant endured various injuries entitling him to compensation under the Act, specifically, some bruising and possible neck, back, and knee problems. However, Employer disputes whether Claimant suffered any injury to his left shoulder, much less whether that injury resulted from a job related accident.

Before Claimant can establish a relationship between his work accident and injury, he must, without the benefit of any presumption, establish an injury. Employer points out that Claimant did not include a left shoulder injury on his claim form.[335] However, the claim form did disclose injuries to "both knees, ankles, foot (various body parts), head, neck, both arms, both wrists, back, and chest." It is a reasonable inference that a complaint of pain in the arms and neck would include the shoulder injury, and the absence of a specific reference to the shoulder is not as probative as other evidence. Claimant received medical treatment from Dr. DeBender on 20 Jan 05, for pain in his left

[334] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).
[335] *U.S. Industries v. Director*, 455 U.S. 608, 102 S.Ct. 1312, 71 L.Ed 2d 495, 14 BRBS 631, 632 (1982).

shoulder, particularly when raising his arm. At that time, he also complained of tenderness over the lateral and anterior parts of his shoulder. Dr. DeBender diagnosed Claimant with a strain of his left shoulder with possible rotator cuff injury. Claimant testified and other witnesses corroborated by observation, that he continues to have neck and shoulder problems, particularly while working above waist level. I found that testimony to be credible. Thus, the weight of the evidence is that Claimant suffered injuries including his back, neck, and left shoulder.

Claimant's *Prima Facie* Case

Having shown an injury, Claimant need only show that his accident could have caused his left shoulder problems in order to invoke the presumption of causation. Claimant endured a traumatic injury when he fell between the hatches. He was hung upside down, with his right arm and left leg caught. He subsequently fell to his chest. Although he may not have immediately complained specifically of left shoulder pain, according to Mr. Lewis, Claimant did complain of arm pain right after the accident. The nature of the accident leads to the conclusion that Claimant's left shoulder problems could have been caused by the accident as described. Moreover, Dr. DeBender in addition to opining that Claimant's cervical and back problems could have been caused by the fall, he also noted that the shoulder problem could have been the result of the accident aggravating Claimant's previous TOS. Thus, Claimant has established a *prima facie* case sufficient to invoke the Section 20(a) presumption.

Employer's Rebuttal

Employer argued on brief that Claimant did not sustain some of the alleged injuries at all, and the ones he did sustain have resolved or no longer result in a loss of wage earning capacity. It did not address Section 20 (a) or suggest that it had rebutted any presumption that those injuries that did exist were not a consequence of Claimant's accident on 18 Jan 05. Nonetheless, I have considered the issue. The most likely evidence that could be argued to rebut the presumption is the multiple previous injuries and pre-existing back conditions of age related degeneration and spondylosis. Claimant's treating doctor allowed that his condition could be a result of aging or his prior injuries. Accordingly, I find the record provides evidence sufficient to rebut the presumption and return to Claimant the burden of establishing by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on 18 Jan 05.

Weight of the Evidence

The weight of the evidence in the record indicates it is more likely than not that Claimant's injuries were either caused directly by his 18 Jan 05 accident, or a pre-existing condition aggravated by that accident. The temporal nexus of the onset of Claimant's credible complaints to his accident, corroborating witness testimony and the

doctors' opinions that those complaints could be consistent with injuries resulting from that accident, constitute sufficient circumstantial evidence for Claimant to have met his burden.

Claimant reported on his claim form injuries to "both knees, ankles and foot (various part of body), head, neck, both arms, both wrists, back, chest." However, that description of injuries could reasonably be interpreted to include a complaint of shoulder pain. In any event, Claimant received medical treatment from Dr. DeBender on 20 Jan 05 and specifically complained of left shoulder pain.

Claimant's coworkers, Mr. Isabelle, Mr. Halligan, Mr. Lewis and Mr. Bernard, attested to Claimant's honesty and work ethic. Mr. Lewis actually witnessed Claimant's injury. He testified that Claimant's left side was stuck between two hatches and that Claimant complained of pain in his shoulder and arm. Mr. Jones was also with Claimant at the time of his work accident and testified that Claimant tried to break his fall with his hands. Mr. Thompson has known Claimant for over 20 years and has never known Claimant to have a problem raising his arms until after his work related injury in 2005.

Employer's reliance on *U.S. Industries* that the Supreme Court has held that Employer only needs to defend against injuries described on the claim form is misplaced. In *U.S. Industries*, the Supreme Court determined that the statutory presumption did not require the judge to adjudicate a claim for a work related injury, when the injury occurred at home and the claimant noted on his claim form that it was a work related injury that occurred during the course of employment. This case can be distinguished from *U.S. Industries* since Claimant's description was adequate to include a shoulder injury and subsequent pain.

Even though Claimant had a pre-existing thoracic outlet syndrome surgery and surgery for carpal tunnel syndrome, he was able to return to work for many years with no problems. In 2000, Claimant was hit on the left shoulder by a rod and in the foot by a turnbuckle. X-rays taken in June 2000, show a narrowing of the AC joint with spurring, which could result in an impingement syndrome. He was in a motor vehicle accident in January 2001. Dr. Wills treated Claimant on 31 Jan 01 for severe left and right shoulder pain following the motor vehicle accident. He kept Claimant off work from 13 Jan 01 through 15 Sep 01. Claimant had continued pain in his left upper extremity as of 19 Apr 01. Dr. Freeman opined that Claimant had good range of motion and degenerative arthrosis of his left AC joint. However, there was no indication for surgery and on 06 Aug 01, Dr. Freeman released Claimant to return to his usual employment without restrictions or problems. Claimant was involved in another motor vehicle accident in

June 2003. Dr. Wills treated him after that accident too. He was diagnosed with a sprained shoulder, but Dr. Wills anticipated that Claimant could return to work on 12 Aug 03. Claimant did not complain about left shoulder pain again until after his 18 Jan 05 work accident. The record indicates that all of Claimant's pre-existing problems had resolved.

After the 18 Jan 05 work accident, Claimant went to the emergency room and received "pain shots." He complained of generalized pain in his neck, back, and lower right shoulder that was worse to the right arm, hand, and neck. The pain shots initially masked his pain, but once they began to wear off, he felt pain over his entire body. X-rays taken at the hospital revealed no fractures or dislocations, but did reveal degenerative disc disease in his lumbrosacral and cervical spine. Claimant was diagnosed with a chest contusion and strained neck.

Claimant reported left shoulder pain to Dr. DeBender on 20 Jan 05, only two days after his work injury. Dr. DeBender conducted a physical examination and determined that Claimant's neck was tender with a decreased range of motion and muscle spasms. Claimant also had pain in his left shoulder, particularly with abduction. Dr. DeBender opined that Claimant had a strain of his left shoulder with a possible rotator cuff injury. Given the nature of the accident and the initial pain medications it is not incredible that Claimant may not have specifically mentioned his left shoulder until treating with Dr. DeBender two days after the accident.

Dr. DeBender believed the actual pathology was caused by the work injury and not a degenerative condition. However, he could not exclude aging as the cause of Claimant's problems. Dr. DeBender opined that at the very least, Claimant suffered an aggravation of a pre-existing condition on 18 Jan 05. Therefore, I find that Claimant suffered a compensable injury to his left shoulder on 18 Jan 05.

NATURE AND EXTENT OF DISABILITY/SUITABLE ALTERNATIVE EMPLOYMENT

Claimant received temporary total disability benefits from 19 Jan 05 through 10 May 05, at which point Employer contends that he reached maximum medical improvement and could return to his usual employment as a longshore worker. Employer argues that Claimant's complaints of pain are not credible and reflect an unwillingness, rather than an inability, to work.

The record is clear and the parties do not appear to dispute that Claimant has some post injury earning capacity in that he has been working in a light duty painter's job for Employer and has additional income from his work on the executive board of the union and passing out union checks. Claimant concedes he can do the light duty painting job as

long as he does not have to work overhead. Nevertheless, Employer contends that it also established other suitable alternative employment in the "under the whip" and hustler truck driving positions, but that Claimant has falsely reported left shoulder pain to avoid working.

Claimant testified he is not able to return to his usual employment as a longshoreman or do the work required of the "under the whip" and hustler driver positions. He continues to have extremely painful muscle spasms which last several seconds and feel like somebody is hitting him in the back of his head and in the eye. Being touched or any physical activity like putting on a hardhat or turning to the left aggravates his pain. He must take medication every day, but he only takes them at night since he works during the day.

Dr. Masson would restrict Claimant to sedentary work. While Dr. Brownhill, estimated Claimant could return to full duties by January 2006, he would not clear Claimant to do so without a chance to conduct another examination. Dr. Likover never believed Claimant was disabled to any degree.

Based on the May 2005 FCE, Dr. DeBender opined that Claimant cannot return to his usual employment. The FCE reflected that Claimant cannot work above shoulder height, bend, stoop, kneel, stand, walk, sit, push, pull, or climb ladders at his regular job's demand level. When he returned to Dr. DeBender for a follow-up, his overall condition was improving, but he complained of increased sharp pain in his left shoulder. When Claimant returned to Dr. DeBender on 27 Jul 05, the doctor reported that it appeared that Claimant's left shoulder problems had resolved. When Claimant returned in May 2006, his condition had improved, but he still had limited range of motion in his neck and back, secondary to pain and decreased reflexes in his arms and legs. Based only on Claimant's subjective complaints during Dr. DeBender's May 2006 evaluation, Dr. DeBender opined that Claimant could continue to work in the painting position, so long as he does not have pain while working overhead.

The FCE reflected that Claimant could perform at a light duty physical demand level. Claimant had functional deficits that would prevent him from doing the light duty maintenance man, lasher/rigger, and tractor/hustler driver positions, which could be considered medium-heavy. The FCE further limited Claimant to no work above shoulder height, bending, stooping, kneeling, standing, walking, sitting, climbing, pushing or pulling as required by the light duty maintenance worker, lasher/rigger, or truck driving positions. Notably, there was no evidence of symptom magnification or exaggeration during the FCE.

Dr. Brownhill examined Claimant at the request of the Department of Labor and opined that Claimant could not return to his usual employment or as a yard hustler or maintenance worker. He opined that Claimant could continue working in the painter's position.

Dr. Likover only met with Claimant for ten minutes and opined that Claimant could return to gainful employment. He believes that Claimant only has subjective complaints with no real evidence of any significant injury. Dr. Likover opined that Claimant could return to work as a longshoreman, without any restrictions. Dr. Likover admitted though, that he did not like to deal with patients with chronic pain conditions and just "sends [those patients] off." However, Dr. Brownhill conducted a more extensive examination and opined that he disagreed with Dr. Likover's opinion. Dr. Brownhill also disagreed with Dr. Likover's opinion that there were no objective findings for Claimant's complaints. Based the limited nature of Dr. Likover's examinations and interaction with Claimant and his determination that Claimant's subjective complaints are not credible, I give his opinion less weight than that of the other expert medical opinion evidence.

Claimant began treatment with pain specialists in February 2006. As of 01 Mar 06, Claimant was diagnosed with cervical disc syndrome, lumbar radiculitis, left shoulder impingement, bilateral internal knee derangement, and headaches. Dr. Long authorized active physical therapy.

Another FCE was performed on 17 May 06. It reflected that Claimant remains at a sedentary to light work classification and is unable to perform his normal employment without risk of re-injury. Claimant gave consistent effort throughout the FCE. He is limited to occasionally lifting 20 pounds to his shoulder and can only frequently carry 10 pounds to his shoulders, four pounds constantly. He cannot lift more than 15 pounds overhead. He can only stand for 15 minutes at a time, but can sit and walk for 60 minutes. He cannot squat or bend.

Claimant underwent another EMG on 17 Jul 06. It revealed severe muscle spasms in his neck and left shoulder, weakness in his hand, and decreased sensation in the left hand. The EMG showed evidence of C5-6 radiculopathy and thoracic outlet syndrome on the left.

Rigger Position

The rigger position would require Claimant to hoist and carry 40 pound rods throughout the day. It requires a worker to continuously work above his shoulders for extended periods of time.

Dr. Likover is the only physician who testified that Claimant could return to work without restrictions. He based his opinion on the fact that Claimant only has subjective complaints without any real objective findings. Claimant's EMG shows radiculopathy and TOS. In addition, Claimant's CT scans revealed defects. As such, the Court finds that the weight of the medical evidence, along with Claimant's subjective testimony is contrary to Dr. Likover's opinion. Consequently, I give less weight to his blanket clearance of Claimant to return to unrestricted employment and find that Claimant is unable to return to his usual employment as a rigger.

Under the Whip Position

The under the whip position requires that a worker bend and stoop continuously in an eight hour day. The worker must remove and place automatic twist locks into the containers. The locks tend to weigh about 15 pounds. This job also requires that the worker stand for almost the entire time. If there are 30 containers in one hour, a worker would have to bend and replace 60 twist locks.

This position is mostly available to people with 20 years seniority and Claimant has 26 years. Therefore, Claimant could expect to work about four days a week for 10 hour days in this position. He could earn about $28 per hour, or about $1,200 per week doing this job. This is a fast moving job that would require that Claimant stand for the basically the entire day, even though he occasionally might be able to sit as he waits for the next truck.

Dr. DeBender believed it was possible that Claimant could work the under the whip job, but not in July 2005, if it required continued standing and some bending. He clarified that the under the whip position would have been alright to try after Claimant saw Dr. Berry and a surgical lesion was excluded. Dr. DeBender also believed that Claimant would have problems with the prolonged standing on concrete. Dr. DeBender's endorsement of the under the whip job was equivocal at best.

Dr. Brownhill did not believe Claimant could work the under the whip job because he would have to move his arms around. The job would require a good deal of force and movement, which would be painful for Claimant. Based on that opinion and Dr. Debender's assessment that Claimant could "try" the job, I do not find that the record supports a finding that Claimant can perform the under the whip job.

Hustler Driver Position

The truck driving position works on rotation. Before issuing his initial certification, the Department of Transportation had to ensure Claimant could stoop, bend, and squat. Truck drivers must pass annual physical examinations to remain on the board and before Claimant could return to the truck driving position he would have to undergo

the physical examination. A truck driver must be healthy and able to sit throughout the day. A driver generally makes four or five trips per hour, or forty in an eight hour day. A truck driver must be able to climb in and out of the cab throughout the day. He must also "swivel" his head continuously since the terminal is a congested area.

A hustler driver does not usually have to carry more than 15 pounds at a time, but must be able to get in and out of the truck throughout the day. A truck driver must be continuously aware of his surroundings and constantly turn his head.

Claimant reports he cannot turn his head to the left and can only turn his head to the right slowly. He gets muscle spasms if someone touches him. His pain radiates from his shoulder to his neck and head. He feels the pain in his head all the way down to his feet. He denied having these problems prior to his 2005 work injury. Claimant admits that he drives his own car "like a bat out of hell." However, he claims he cannot drive for too long a period. He owns a race car with Mr. Bushnell, but does not drive that car at all. Claimant has given Mr. Bushnell hand signals during races, but has not done any of that in the last year because the car is not finished. Claimant cannot lift anything and has not helped build the race car. Claimant has driven in the car with Mr. Bushnell for about 140 miles at one time, but Claimant needed assistance to get out of the car after the trip.

Dr. DeBender opined that Claimant could not do the hustler truck driving job. Even though it would not require him to lift anything, Dr. DeBender would not recommend a job that required him to bend and bounce around in a truck all day. Any position that makes Claimant sit for the entire day will not be within Claimant's restrictions as reflected on both the 2005 and 2006 FCEs.

Consequently, the Court finds that Claimant is unable to work the hustler truck driving position either.

Painting Position

The painting position is available 40 hours per week. Claimant earns $15.00 per hour. Employer has given Claimant waist level painting duties, which is well within his medical restrictions. Mr. Halligan specifically told his supervisors to make Claimant as comfortable as possible.

Dr. Berry opined that Claimant could reach above shoulder for about two hours per day. He also opined that Claimant could work with his body bent over the waist, stand and work for about four hours per day and sit for one hour daily. As of 18 Apr 06, Dr. Berry believed Claimant could work as a light duty painter for Employer.

Claimant began working with Employer at a light duty painting position in May 2006. He is not required to do any overhead lifting and only works about six hours per day. He admitted that he tolerates the job well since Employer allows him to take frequent breaks. He feels like he has been doing a good job in the painting position. He goes to physical therapy three times per week, which is helping with his stamina. Claimant believes he is doing everything possible to get himself back into physical shape so he can return to his usual employment as a longshoreman. He leaves work early on the days he goes to physical therapy.

The Court finds that Claimant is able to work in the painting position. The job is available 40 hours per week on a continuous basis. However, since Claimant must leave work early three times per week for physical therapy he is able to work 34 hours per week at the painting position. It pays $15.00 per hour and yields Claimant a weekly earning capacity of $510.00.

Union Position

Claimant is paid $226.63 for attending board meetings and $226.63 a pay period for passing out checks. The executive board meets about once a month and he passes out checks every other week. Therefore, Claimant can earn up to $679.89 per month or $169.97 per week with ILA. Although Claimant contends that all of the activities (i.e. bending his head, standing up, and moving around) makes him uncomfortable and increases his muscle spasms, he is able to do the job.

Labor Market Survey Positions

Mr. Owens completed a labor market surgery and located several jobs available in April 2006. He also asked if the jobs would have been available as of May 2005. He opined that some of the jobs he located were always hiring, such as the positions with ALM Services, United Recovery System, and Home Depot. The jobs he located were all sedentary positions. Mr. Owens admitted that Claimant may not be hired if he disclosed that he had to go to physical therapy three times per week or that he had a work related injury. At this stage, any suitable alternative employment must allow for Claimant's medical status, which includes three weekly physical therapy treatments. Jobs which do not provide such an accommodation do not qualify as suitable alternative employment. Consequently, Employer's labor market survey did not carry the burden in showing suitable alternative employment.

Nevertheless, the record shows that Claimant's current post injury earning capacity is $510 per week from his work as a painter and $679.89 per month from his union work, for a post-injury weekly earning capacity of $679.97.

MAXIMUM MEDICAL IMPROVEMENT

Employer argues that Claimant reached maximum medical improvement (MMI) possibly as early as May 2005, but in any case not later than 05 Jan 06. Claimant contends that since he needs additional surgery and treatment, he has not yet reached MMI.

According to Dr. DeBender, Claimant's problems had resolved as of 27 Jul 05, except for his problems with his neck and back. He referred Claimant to Dr. Berry for a follow-up regarding his spine problems.

On 14 Sep 05, Dr. Brownhill opined that Claimant should complete pain management treatment, including cervical epidural steroid injections. However, Dr. Brownhill found that more diagnostic testing and treatment for Claimant's lumbar spine, upper extremities, shoulders, and lower extremities was unnecessary. In addition, Dr. Brownhill did not believe surgical intervention was needed. Nonetheless, Dr. Brownhill opined that Claimant needed further treatment and had not yet reached MMI as of 19 Sep 05. Although Dr. Brownhill expected Claimant to make a full recovery by January 2006, he would need to re-examine Claimant to be sure. Dr. Masson's recommendation for a left shoulder distal clavicectomy and SAD arthroscopic surgery is reasonable, appropriate and necessary, and is a clear indication that he does not believe Claimant has reached MMI.

Based on Drs. Masson, Brownhill, and DeBender's opinions, I find the record indicates Claimant has not yet reached maximum medical improvement.

SECTION 7 ENTITLEMENT TO MEDICAL BENEFITS

Reasonable and Necessary Medical Treatment

According to Dr. DeBender, as of May 2006, Claimant only needs further evaluation to determine what is going on with his neck and back.

Upon further treatment regarding Claimant's back, Dr. Berry and Dr. DeBender opined that the discs were not compressing the nerve enough to warrant surgical intervention. Dr. Berry recommended that Claimant treat with a pain management specialist. Dr. DeBender opined that Claimant's physical therapy and steroid injections were appropriate medical care.

In May 2006, Dr. DeBender referred Claimant to Dr. Masson for an evaluation of possible thoracic outlet syndrome. The record contains testimony that once a patient has TOS surgery, the syndrome cannot return because the area that causes the syndrome no longer exists. However, Claimant testified that he did not have the typical TOS surgery

of rib removal. Moreover Dr. DeBender knew about the surgery and still opined that the accident could have aggravated his TOS. Likewise, Dr. Masson knew of the surgery and opined that Claimant still suffered from TOS. As a result, it is possible that he had another incident of TOS secondary to his work related injury. Therefore, the Court finds the referral to and subsequent treatment by Dr. Masson to be reasonable, appropriate and necessary. Claimant's complaints of pain and weakness, when trying to work overhead, are consistent with a diagnosis of TOS. In addition, complaints of neck and arm pain with paresthesia is consistent with TOS and could have been the underlying problem since tests show nothing wrong with Claimant's neck.

Claimant seeks left shoulder surgery. However, as of 27 Jul 05, Dr. DeBender did not believe Claimant needed surgical intervention or any other treatment related to his shoulder, arms, or knees. He did believe Claimant needed additional treatment for his neck and back problems and referred Claimant to a neurosurgeon, Dr. Berry, for a follow-up regarding his spine problems. Dr. Brownhill did not believe the left shoulder surgery was necessary either. However, Dr. DeBender also referred Claimant to Dr. Masson for a further evaluation of possible TOS. Although Dr. Masson opined that Claimant is a candidate for left shoulder distal clavicectomy and SAD arthroscopic surgery, Dr. Masson did not have a history of Claimant's medical problems.

After the FCE on 12 May 05, the physiotherapist opined that Claimant should receive continued intervention and monitoring by his treating physicians since he had multiple points of tenderness throughout his cervical, thoracic and lumbar spine, as well as bilateral upper and lower extremities.

Claimant began treatment with pain specialists at Pain & Recovery Clinic in February 2006. He received physical therapy and strengthening exercises. Claimant had myospasms of the thoracolumbar spine while performing exercise and Dr. Long noted weakness and restricted range of motion. The last report, dated 12 Apr 06, reflects that Claimant needed continued physical therapy. The record includes medical opinion evidence that although typically physical therapy lasts for only six to eight weeks, it is not unusual to continue such treatment if a patient is benefiting.

Based on record, Claimant is entitled to continued physical therapy and reevaluations as to his neck, back, and legs. In addition, based on the Court's finding that the left shoulder is a compensable injury due to a TOS aggravation, Dr. Masson's recommendation for a left shoulder distal clavicectomy and SAD arthroscopic surgery is reasonable, appropriate, and necessary.

10 Day Requirement for Initial Report

Employer raises the failure of Claimant's providers to submit initial treatment reports within 10 days. Employer contends that it is not liable for the past medical bills of Dr. Berry, Dr. Benhamou, Dr. Long, Pain & Recovery Clinic of Houston, or Dr. Masson. Claimant responds that Employer refused to provide any medical care after Dr. Likover's May 2005 examination and should therefore be held responsible for the outstanding past due medical charges. Claimant did not specifically discuss the 10 day filing requirement in either his initial or reply brief.

Before the 1984 amendments to Section 7,[336] the regulations allowed both the district director and the ALJ to determine whether a failure to submit an initial physician's report within 10 days constitutes good cause. However, the language in 7(d)(2) changed with the 1984 amendments to allow only the director to make such a determination.[337] An administrative law judge has no authority under the Act to excuse an untimely filing of a physician's first report of treatment.[338] That discretionary authority rests with the Secretary and the district director.[339] This limitation is supported further by the 1984 amendment to 7(d)(4), where Congress intentionally amended the regulation to include an authority by the ALJ to suspend benefits when a claimant unreasonably refuses to submit to medical treatment.[340] Had Congress intended for the ALJ to make good cause determinations regarding the filing of the initial reports then it would have explicitly delegated that authority, as it did with 7(d)(4).[341] The Board found that since the Director's interpretation of 7(d)(2) was reasonable, it had to give it deference because deference should be given to an agency's interpretation of its own authorizing statutes.[342]

The Court recognizes that other administrative courts have determined that they could make a determination as to good cause for failing to file the initial report,[343] unfortunately, the Board decisions and the 1984 amendments show otherwise.[344]

The unrebutted evidence in the record is that Employer received no reports from any of the relevant doctors. Under the regulations, Claimant's assertion of the Employer's refusal of treatment is not relevant to the initial report requirement.

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[336] 33 U.S.C. § 907(d)(2).
[337] *Toyer*, 28 BRBS at 351-355; *Krohn*, 29 BRBS at 75; *Jackson*, 31 BRBS 103.
[338] *Toyer*, 28 BRBS at 347, 355.
[339] *Id*.
[340] *Id*.
[341] *Id.*
[342] *Id*.; *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991).
[343] *Simmons v. Electric Boat Corp.,* 1994-LHC-01212 (1999).
[344] *Toyer*, 28 BRBS at 351-355; *Krohn,* 29 BRBS at 75; *Jackson*, 31 BRBS 103.

The record provides no indication that the Director excused the physicians' failure to comply with the reporting requirements of the Act. The Board has instructed and the regulations provide that only the Director has the authority to excuse the failure to comply with the reporting requirement. Even though that interpretation may lead to a bifurcation of the case and delay in final decision and some courts have elected to rule otherwise, it is binding. Therefore, I find this matter must be bifurcated and remanded to the district director for consideration of whether good cause for failure to provide reports of treatment by Claimant's medical providers has been shown.

The Court does find that the treatment was necessary, appropriate, and reasonable and if not otherwise excused by the providers' failure to file reports, Claimant would be entitled to reimbursement from Employer for such treatment.

ORDER AND DECISION

1. Claimant suffered a compensable injury to his left shoulder on 18 Jan 05.

2. Claimant had an average weekly wage (AWW) of $1,313.35.

3. Claimant has not reached maximum medical improvement.

4. Claimant was temporarily totally disabled from 19 Jan 05 through 1 May 06 and Employer shall pay Claimant total disability compensation for that period based on an AWW of $1,313.35

5. Claimant has been temporarily partially disabled from 02 May 06, through present and continuing and Employer shall pay Claimant partial disability compensation for that period based on an AWW of $1,313.35 and a post-injury weekly earning capacity of $679.97.

6. The case is hereby bifurcated and remanded to the District Director solely for a determination of whether there was good cause for the providers' (Dr. Berry, Dr. Benhamou, Dr. Long, Dr. Masson, and Pain & Recovery Clinics of Houston) failure to file their initial report with the deputy commissioner and Employer within 10 days of first treatment.

7. Employer shall pay all future reasonable, appropriate, and necessary medical expenses arising from Claimant's work injury, pursuant to the provisions of Section 7 of the Act. This includes the recommended course of treatment with a pain management specialist and left shoulder surgery.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[345]

9. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

10. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[346] 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. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

[345] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267 (1984)

[346] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **28 Oct 05**, the date this matter was referred from the District Director.