U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 July 2007

Case No.: 2006-LHC-1618

OWCP No.: 08-114960

In the Matter of:

R. M.,
Claimant,

v.

SABRE PERSONNEL ASSOCIATES, INC.,
Employer,

and

RELIANCE NATIONAL INDEMNITY CO.
c/o Texas Property and Casualty Insurance Guarantee Association
Carrier

APPEARANCES:

QUENTIN D. PRICE, ESQ.,
On Behalf of the Claimant

ADRIAN V. VILLACORTA, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

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 Sabre Personnel Associates, Inc. (Employer) and Reliance National Indemnity Co. (Carrier) in receivership c/o Texas Property and Casualty Insurance Guarantee Association.[2]

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 10 Jun 06. All parties were represented by counsel. On 27 Feb 07, 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.

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

Witness Testimony of
Claimant

Exhibits
Claimant's Exhibits (CX) 1-20
Employer's Exhibits (EX) 1-40, 42-54.[4]
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[5]

1. Claimant's fall on 18 Jul 98 occurred under circumstances that fall within coverage and jurisdiction of the Act.

2. That injury occurred in the course and scope of employment.

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[1] 33 U.S.C. §§901-950.
[2] Hereinafter collectively referred to as Employer.
[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] EX-39 and EX-40 are depositions of Claimant. Since Claimant testified live at the formal hearing, Counsel were cautioned that the Court would only consider those pages specifically cited. Tr. 6. The same limitation applied to EX-21 and EX-22. Tr. 7.
[5] JX-1; Tr. 20-23.

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

4. Employer was properly notified of the injury.

5. All past medical benefits have been provided.

FACTUAL BACKGROUND

On Saturday, 18 Jul 98, within a month or two of being hired by Employer, Claimant slipped and twisted his ankle at work. Although he finished that day's shift, he went to Employer's doctor on Monday and has never returned to his original job. Since that accident, he has been treated for injuries to his right ankle, right foot and back, undergoing back surgery in 2005. He participated in the Department of Labor Rehabilitation program and has had a number of jobs since his injury. He currently has a job in a car wash and is under the care of a pain management physician. Employer paid Claimant disability compensation from the date of injury until 15 Dec 05. Both the Employer and Carrier have gone out of business.

ISSUES & POSITIONS OF THE PARTIES

Although there is no stipulation to the matter, there is no dispute that Claimant injured his ankle on 18 Jul 98. The primary matters of contention in this case are: (1) the origins of Claimant's back and related foot drop conditions, (2) the nature and extent of Claimant's back and ankle/foot injuries and his post-injury earning capacity, (3) the correct calculation of Claimant's Average Weekly Wage (AWW), (4) Claimant's entitlement to further medical care under Section 7, and (5) whether Texas Property and Casualty Insurance Guarantee Association[6] (TPCIGA) is liable for attorney's fees, penalties, or interest.

Causation

Claimant maintains that in his 18 Jul 98 fall, he not only injured his ankle, but also injured his back. Claimant alleges that the back injury has subsequently caused, among other things, Claimant's foot drop. In the alternative, Claimant argues that if the initial fall did not directly injure Claimant's back, the resulting altered gait and use of crutches led to his back injury. Employer responds that Claimant's foot drop is not genuine and in any event his back injury has no relationship directly or indirectly to his 1998 fall.

[6] In place of Employer in receivership.

Nature and Extent

Claimant argues that he was temporarily totally disabled from the date of his injury until his back injury reached maximum medical improvement (MMI) on 11 Apr 06. He then was permanently totally disabled until starting his car wash job on 27 Jan 07. From that point on Claimant has been permanently partially disabled with an adjusted post-injury weekly earning capacity of $194.97.

Employer answers that Claimant's ankle injury reached MMI and he was able to return to full duty on 9 Apr 03. It maintains that since the back injury was not related to the 1998 fall, Claimant had no residual disability as of that date. However, even if the back injury was related to the 1998 fall, Claimant reached MMI as to that injury on 15 Dec 05. Employer further submits that any claim of total disability from 11 Apr 06 to 27 Jan 07 is contrary to the fact that Claimant was actually employed at times during that period and the record shows other suitable alternative employment identified for Claimant by the DOL counselor. Employer finally counters that Claimant's calculation of his current post injury earning capacity fails to take into account a much higher paying job from which Claimant was terminated because of his illegal drug use.

Further Medical Care

Although there is no dispute over past medical care because Employer elected to provide treatment for Claimant's back and related foot conditions, Claimant seeks continuing medical care for those problems. Employer responds that since the back and foot drop problems were not related to his 1998 fall, it is not responsible for providing any more medical care. However, even if that were not the case, the treatment sought by Claimant is not reasonable and necessary.

Average Weekly Wage

Both sides agree that Section 10(c) applies in this case. Claimant urges the use of an AWW of $620.00, which was used on the initial report of injury and reflects the $15.50 per hour Claimant was earning at the time of his injury. Employer replies that since Claimant worked only a short period of time for Employer, such a calculation would unfairly exaggerate Claimant's earnings. Employer submits that the AWW should take into account a more extended period of time and the wages earned during that period. It suggests looking back five years and using the resultant figure of $139.11.

Penalties

The Act provides an incentive for employers to give prompt notice of a possible disagreement over compensation due an employee.

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice [of controversion] is filed under subdivision (d) of this section . . . .[7]

Where the employer pays some compensation voluntarily, fails to controvert the remainder, and the claimant ultimately is awarded compensation in an amount greater than that which the employer voluntarily paid, the employer's liability under Section 14(e) is based solely on the difference.[8]

Where the employer fails to file a notice of controversion, its liability under 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed."[9] Therefore, where an employer fails to file a timely notice of controversion, it has 28 days from the date of knowledge within which to pay compensation without incurring liability under 14(e).

The requirement to controvert applies even in cases where the employer pays some compensation, but disputes the amount.[10] The employer should pay the compensation it considers due and controvert the remainder.[11] If it fails to do so, and the claimant is ultimately awarded additional compensation, the penalty is based solely on the difference.[12] The employer must controvert the claim on specified grounds and cannot merely state that it might later controvert the claim.[13] Timely controversion shields the employer from liability under Section 14(e) even if it abandons the specific grounds listed in its controversion and adopts new ones.[14] A notice of controversion or informal conference terminates Section 14(e) penalty liability as of the date of the filing

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[7] 33 U.S.C. § 914(e)(2001).
[8] *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978).
[9] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979); *Hearndon v. Ingalls Shipbuilding Inc.*, 26 BRBS 17, 20 (1992) (DOL knew of facts that proper notice would have revealed when case was referred to OALJ for formal hearing).
[10] *Lorenz v. FMC Corp., Marine & Rail Equip. Div.*, 12 BRBS 592, 595 (1980).
[11] *Alston v. United Brands Co.*, 5 BRBS 600, 607 (1977).
[12] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979), *remanding in pert. part* 5 BRBS 290 (1977); *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978).
[13] *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 898 F.2d 1088, 1095 (5th Cir. 1990).
[14] *Pruner v. Ferma Corp.*, 11 BRBS 201, 209 (1979).

of the notice of controversion or on the date of the informal conference.[15] The penalty attaches to all payments which are "due and unpaid" at the time liability ceases.[16]

Liability for Penalties, Interest, and Attorney's Fees

Claimant simply notes the standard entitlement to interest and attorney's fees. He also argues that Employer stopped compensation on 18 Apr 03 but did not file a notice of controversion until 15 Oct 03 and seeks corresponding penalties. Employer answers that as an entity created under state law to handle claims against carriers in receivership, it is not liable for attorney's fees, penalties, or pre or post-judgment interest.

LAW

Although the Act must be construed liberally in favor of the claimant,[17] 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,[18] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[19]

In arriving at a decision in this matter, 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.[20] 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.[21]

Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."[22] In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[23] The presumption

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[15] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977).
[16] *Pullin v. Ingalls Shipbuilding*, 27 BRBS 45, 46 (1993).
[17] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[18] 5 U.S.C. § 556(d).
[19] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[20] *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).
[21] *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).
[22] 33 U.S.C. § 902(2).
[23] 33 U.S.C. § 902(a).

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.[24]

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.[25] These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.[26]

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.[27]

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.[28] "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.[29] 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).[30] The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.[31]

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[24] *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

[25] *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).

[26] *Id.*

[27] *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).

[28] *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).

[29] *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").

[30] *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

[31] *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.[32] If the Section 20(a) presumption is rebutted, the causation issue is resolved based on the record as a whole, weighing all of the evidence.[33] The presumption does not apply, however, to the issue of whether a physical harm or injury occurred[34] and does not aid the claimant in establishing the nature and extent of disability.[35] In addition, a psychological impairment can be an injury under the Act if it is work related.[36] Employers accept their employees with the frailties which predispose them to bodily injury.[37]

The opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances.[38]

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[39] which are then divided by 52[40] to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.[41]

A worker's average wage may be based on his earnings for the limited period he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best reflect a claimant's earning capacity at the time of the injury.[42]

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[32] *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).
[33] *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.
[34] *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).
[35] *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).
[36] *Director, OWCP v. Potomac Elec. Power Co.*, 10 BRBS 1048 (D.C. Cir. 1979).
[37] *Britton*, 377 F.2d at 147, 148.
[38] *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).
[39] 33 U.S.C. § 910(a)-(c).
[40] 33 U.S.C. § 910(d).
[41] *SGS Control Services v. Director, Office of Worker's Compensation Programs*, 86 F.3d 438, 441 (5th Cir. 1996); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom., Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).
[42] *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.[43]

The administrative law judge has broad discretion in determining annual earning capacity under subsection 10(c).[44] The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.[45] A definition of "earning capacity" for the purpose of this subsection is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury."[46] In determining earning capacity, wages which would have been earned but for events not likely to reoccur may be considered.[47]

Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.[48] In calculating annual earning capacity under subsection 10(c), the administrative law judge may consider: the actual earnings of the claimant at the time of injury,[49] the earnings of other employees of the same or similar class of employment,[50] claimant's earning capacity over a period of years prior to the injury,[51]

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[43] 33 U.S.C. § 910(c).

[44] *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

[45] *See Barber*, 3 BRBS 244.

[46] *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

[47] *Hawthorne v. Director, OWCP*, 844 F.2d 318 (6th Cir. 1988) (strike); *Le Batard v. Ingalls Shipbuilding Div., Litton Sys.*, 10 BRBS 317 (1979) (layoff); *Browder v. Dillingham Ship Repair*, 24 BRBS 216 (1991) (mother's funeral); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984) (automobile accident); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982) (gall bladder operation).

[48] *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991).

[49] 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

[50] 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.

[51] *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).

claimant's wage rate multiplied by a time variable,[52] probable future earnings of claimant,[53] or any fair and reasonable representation of the claimant's wage-earning capacity.[54]

Under subsection 10(c), the administrative law judge must arrive at a figure which approximates an entire year of work (the average annual earnings).[55]

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).[56] The date of maximum medical improvement is a question of fact based upon the medical evidence of record.[57] An employee reaches maximum medical improvement when his condition becomes stabilized.[58]

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.[59] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). 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."[60] Therefore, for a claimant to receive a disability award, an economic loss coupled with a

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[52] *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 287 (1980) (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).

[53] *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Palacios*, 633 F.2d at 842-43; *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).

[54] *See generally, Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).

[55] *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

[56] *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n. 5 (1985); *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).

[57] *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

[58] *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).

[59] *Trask*, 17 BRBS at 56.

[60] 33 U.S.C. § 902(10).

physical and/or psychological impairment must be shown.[61] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[62] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[63] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[64] However, an underlying permanent condition is not altered by a period of temporary disability due to a subsequent surgery.[65]

The question of extent of disability is an economic as well as a medical concept.[66] 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.[67]

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.[68] 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

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.[69] To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.[70]

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[61] *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).
[62] *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).
[63] *Trask*, 17 BRBS at 60.
[64] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[65] *Richmond v. Northrop Grumman Ship Systems*, BRB No. 06-0437 (Feb 27, 2007) (unpublished).
[66] *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).
[67] *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).
[68] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).
[69] *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).
[70] *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984).

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.[71] 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?
>
> (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?[72]

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."[73]

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.[74] 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.[75] A showing of only one job opportunity may suffice under appropriate circumstances.[76] 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.[77] 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."[78]

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[71] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).
[72] *Id.* at 1042.
[73] *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).
[74] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).
[75] *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).
[76] *P & M Crane Co.*, 930 F.2d at 430.
[77] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[78] *Turner*, 661 F.2d at 1038 (quoting *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

If suitable alternative employment is available, but the claimant is fired from it for violating a company rule, the employer no longer has a duty to show other suitable alternative employment. The claimant's disability is partial, not total.[79]

Post-injury Earning Capacity

The Act is designed to compensate for "incapacity because of injury to earn the wages which the employee was receiving at the time of injury."[80] Incapacity is the difference between the AWW and the post-injury wage-earning capacity.[81]

Calculation of the post-injury wage-earning capacity involves (1) determining whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity and, if not, (2) determining the dollar amount which fairly and reasonably represents the claimant's wage-earning capacity.[82] The burden of proof is on the party arguing that the claimant's actual post-injury wages do not reasonably and fairly represent his wage-earning capacity.[83]

State Insurance Guarantor Liability

The Texas state statute that created and regulates TPCIGA did so to "…avoid financial loss to claimants or policyholders because of an insurer's impairment;"[84] There is some inconsistency and confusion in the statutory language and citations, since the Act was amended and re-codified on 1 Apr 07. However, the language in effective up until that date provided that

> The association shall pay covered claims that exist before the designation of impairment or that arise within 30 days after the date of the designation of impairment…. The association has no liability any *[sic]* other claim or damages, including claims for recovery of attorney's fees, prejudgment or post judgment interest, or penalties …. This subsection does not exclude the payment of workers' compensation benefits or other liabilities or penalties authorized by Title 5, Labor Code, arising from the association's processing and payment of workers' compensation benefits after the designation of impairment.[85]

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[79] *Darby v. Ingalls Shipbuilding, Inc.*, 99 F. 3d 685, (5th Cir. 1996); *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 BRBS 171 (1986); *Harrod v. Newport News Shipbuilding and Dry Dock Co.*, 12 BRBS 10, 14-16 (1980).
[80] 33 USC § 902(10).
[81] 33 USC § 908.
[82] *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979).
[83] *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988).
[84] V.T.C.A. , Insurance Code § 462.002(2).
[85] Texas Property and Casualty Insurance Guaranty Act §8(a). (Tex. Ins. Code Ann. Art 21.28-C§8(a)).

The amended language clarifies. "Prejudgment or post judgment interest that accrues after an insurer is determined to be an impaired insurer is not a covered claim."[86]

"A supplementary payment obligation, including an adjustment fee or expense, attorney's fee or expense, court cost, interest or penalty, or interest or bond premium, incurred before an insurer is determined to be an impaired insurer is not a covered claim."[87]

Employer cites a 1992 Benefits Review Board opinion[88] for the proposition that such exclusionary provisions are not preempted by the Act and urges a similar determination in this case. However, that case is not entirely dispositive. Although the statutes are similar, in that case the employer was still viable. The Board simply held that since the employer was "liable for the payment of interest and penalties notwithstanding [the state guarantor's] liability for compensation benefits…. the Florida statute is not inconsistent with, and need not be preempted by, the Act." [89] In other words, since the employer was to pay the interest and penalties, there was no need for the Board to decide if the state statute sheltering the guarantor was preempted by the Act. On the other hand, in a footnote, the Board noted that "Although a preemption analysis is unnecessary to resolve this particular issue, we note that the law of preemption does apply to the Act in general, as it is a federal statute."[90]

Preemption of state law "may be either express or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[91] In the absence of "explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[92] Even where "Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law."[93] Such a conflict "arises…when state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[94]

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[86] Id. at § 462.209.
[87] Id. at § 462.208.
[88] *Canty v. S.E.L. Maduro and Florida Ins. Guaranty Assoc.*, 26 BRBS 147 (1992).
[89] *Id. at 157.*
[90] *Id.*, fn 9.(*citing Bouchard v. General Dynamics Corp.*, 963 F. 2d 541, 544 (2d Cir. 1992)).
[91] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).
[92] *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141, 153 (1982).
[93] *Id.*
[94] *Id.*

EVIDENCE AND ANALYSIS

Testimonial Evidence

Claimant testified live in pertinent part that:[95]

> He was born 17 Aug 76. He was born in Oakdale, Louisiana, and raised in-between Oakdale, Louisiana and Orange, Texas. He currently lives in Orange. He completed the tenth grade in 1994 and got a GED the same year. He went through a small welding program in 1996.
>
> Since he was held back in the first grade, he was seventeen when he dropped out of high school. At that time he went to work for Citadel Security. He worked for them on and off for two years, because he also worked offshore training to be a tankerman. A tankerman pumps chemicals into barges. He did not complete that training because he watched a man get killed and did not want to be on the water all the time anymore.
>
> Before he went to work for Employer he started out as a laborer. In 1994, he was a receptionist for H&R Block. He worked for them two tax seasons, but does not recall the pay. He was employed by the Longhorn Club in 1995 on the cleanup crew. He threw away empty cups and beer cans. Then he was moved back of the bar, helping the bartenders keep everything stocked. He does not recall the pay. He worked for Industrial Tech Inc. doing everything from running forklifts and moving furniture to sweeping out warehouses and hazardous containment.
>
> He worked at Burton Shipyard as a welder's helper, but does not recall the exact year or pay. He may have done some welding work for Gulf Coast Industrial Contractors in 1996, but does not recall the exact length, time, or pay. He was a welder's helper at Turner Industries, which was also known as International Maintenance Holding. He does not recall the exact dates or pay, although he ended at $10.00 per hour.
>
> In 1996 he also worked for A-1 American Fence unloading trucks and as a welder's helper. A welder's helper is basically a gopher. He goes and gets rods. He stretches out the leads. If there is a problem with the machine, he goes down and resets it. He does the grinding. It is the welder's job to teach him to weld. Working as a welder's helper is like an apprenticeship program. He is not sure of the exact dates he worked there.

[95] Tr. 34-93.

In 1996, he also worked for Trinity Industries and got his certification to become a welder. There were two different Trinities. One was Trinity Marine; one was Trinity Railcar division. He worked for both of them at different times. He does not recall the exact dates or pay.

He worked for Solid State Geophysical Corporation, for a couple of months, laying seismograph lines and moving dynamite and caps. He doubts if he earned more than $280.50 at Solid State Geophysical. He does not recall working for Baird Industries Inc.

In 1997, he worked for American Citadel as a security guard, but does not recall the exact dates. He also worked for F J T Technical Resources, bolting hopper gates on the bottom of railcars. He does not recall the exact dates. In 1997, he also worked for Brown and Root as a welder's helper. He does not recall the exact dates or pay. He worked for Southeast Texas Industries as a welder's helper but is not sure about the years. He does not recall ever working for an employer named Chynna.

He worked for Freddy Goldman under Employer. It would have been TDI – Holter selling to Freddy Goldman and Freddy Goldman selling to Signal. He may have worked for Gulf Copper in 1998, but does not recall the exact rate of pay. It may have been twelve something.

He qualified for the welding class at Trinity Marine, where he learned to MIG weld and stick weld. He moved from job to job and company to company, because that is the nature of being a welder. He worked on building railcars, building barges, and repair work. He wanted to pursue a welding career.

He was physically fine and had no limitations. He had never had any problem with his low back or any other significant injuries before this accident. In 2001 he got a fish hook stuck in his neck. The only reason it could have been significant would be because the barb was behind the carotid artery.

He does not recall the exact date he hired with Employer, but it was maybe a month or two or a little more before his injury. He hired on as a 1st class welder. Employer was an employer service that sent him to somebody else's place to work. He got his paycheck from Sabre, but was working at some other company's facility. He worked at Gulf Copper Industries, Trinity Marine, and TDI-Holter.

During the one to two month period he worked for Employer, he worked more than forty hours every week because he was working a minimum sixty-hour week. It is possible he might have had a week with less, but he put in fifty, sixty, seventy hours every week. He worked a minimum of fifty hours a week while he was there. He worked sixty or more hours four to six weeks out of eight. He knows of at least two weeks that he worked seventy hours because he worked fourteen days straight with no day off.

At the time of his injury, he was working at TDI's Childers yard, adjacent to the Sabine River. He was working on barges in the water just nosed up to the bank. His job was to weld and make sure the welds were formed correctly. It required kneeling, bending, stooping, and crawling. He had to carry a box of welding rods weighing anywhere from twenty-five to fifty pounds and a welding machine weighing seventy-five pounds. His normal day was ten hours a day and he worked six or seven days a week. He was paid $16.60 per hour.

He was injured on a Saturday, 18 Jul 98. He was working the evening and night shifts. He was coming out of a hatchway, and as he stepped out of the hatchway, he stepped on welding leads. As he pivoted on his foot to pick the other foot, the leads were jerked out from underneath. His foot rolled, and he fell over. His right ankle started hurting immediately. They put ice on him and gave him aspirin. He wanted to go home, but the yard superintendent told him, "If you go home, I will fire you." He went back and worked another four or five hours crawling pretty much. His back was also real tense and knotted up.

He went to see the company doctor on Monday morning. They were a husband and wife pair of doctors, both named Dr Drumwright. His ankle was swollen and discolored. He could not put pressure on it. It was bruised. The doctor said he had a sprained ankle and put him on medication with no weight bearing. They wrapped it for a couple of weeks. Claimant told the doctor at that first visit that his back hurt. The doctor told him that he probably tensed up when he fell and pulled some muscles. The doctor said to rub Icy Hot on it, and it should be fine. Dr. Drumwright put him on crutches.

He went back once a week. They took the wrap off and put him in an air cast. That kept on for a couple of weeks. He was still on no weight bearing and taking medication. Finally, the doctor told him he needed to see a specialist because a simple sprain should have healed by then.

He went to Dr. Beaudry, who ran a series of tests and gave him Cortisone and sent him to physical therapy. Claimant continued on his crutches and had a foot brace. Dr. Beaudry asked if anything else hurt, and Claimant told him his back was real tight and tense and starting to have an ache in it. Claimant guessed it was from walking on the crutches. The doctor said they would check it out. After a number of tests, told Claimant he had a pinched sciatic nerve. Dr. Beaudry, said that when Claimant fell, it seemed like a sprained ankle, but that in his fall Claimant had actually pinched a lower back nerve that controls the lower extremities. Dr. Beaudry recommended surgery, but never did it because of problems with the insurance company.

Claimant was on crutches for a total of three and a half years. He was only able to start walking on his right ankle after he had epidural shots in his back. They made the swelling go down. The epidural shots, the therapy, and the cortisone shots, got the circulation back in his foot. Before, it was ice cold. He slowly got circulation back, was able to go weight bearing, and quit using the crutches.

When Dr. Beaudry refused to deal with Claimant's insurance, Claimant went to Dr. Stanley. It took eight months to a year to get in to see him. Dr. Stanley agreed with Dr. Beaudry's opinion that the back injury was caused by the fall. Dr. Stanley said Claimant needed a lumbar fusion. On 27 Jan 05, Dr. Stanley performed a lumbar fusion and installed titanium cages, rods, screws and plates. There were some delays in scheduling that surgery, because Claimant failed a drug test and tested positive for marijuana. He had tried using it to help with his pain.

From the date of the accident through the date of that surgery, Claimant would get compensation on and off. Carrier would pay for a while and then it would stop and then start again. During that time Claimant did some deer hunting and hog hunting. For a while he could not do much because he was on crutches. When he went deer hunting it was not in a stand, but off the ground. He does not know how many times he went deer hunting during that period, but he would go to the woods for a week at a time. During that time he also went fishing quite regularly. He has his own boat and is able to do some of the repair work on it.

After Dr. Stanley performed the surgery, he referred Claimant to Dr. O'Neill. Claimant started seeing Dr. Stephen O'Neill at the end of 2005 or the beginning of 2006. Dr. O'Neill distributes Claimant's pain, sleep, and stress medication. Claimant takes six pain pills, one stress and depression pill, and one sleep pill each day.

Claimant has been in a foot and ankle brace ever since he was hurt. It's a hard plastic brace going all the way up the length of his foot and well over three-quarters of the way on his calf. It is for his foot drop. A lot of the feeling in his right foot is gone. If he picks up his foot or pushes down, his calf muscle is like someone stuck an electrical prod in it and cramps up immediately. He does not move it because he does not want it to knot up. Over the last six months or so, both feet have started to do it, but none of the doctors have explained why his left foot is burning, even though he has told them that his feet are getting worse.

He can walk without the ankle brace but it hurts because he has to actually pick the foot up and set it back down. The brace helps pick the foot up and keep it level.

He cannot go back out and do the work as a welder because he cannot bend and stoop like he used to. He cannot pick up the weight he used to pick up. He is afraid to get on a ladder because his knees tend to give out on him. His legs are not stable and since the injury he has fallen many times.

He understands that as a result of his on-the-job fall, the nerve was pinched in the lower back due to the bulging disc. The nerve being pinched off affected his right leg and ankle/foot.

He can stand up about thirty minutes without a problem, but then starts feeling it in his feet. It gets better if he sits down for forty-five minutes to an hour. His feet are still hurting, but he can be mobile again for a little while.

He has gone through the Department of Labor training program with a specific vocational rehabilitation counselor to get to back to work. Since the injury, he has worked in three places, counting his current job. Ms. Colenburg did not find any of the three jobs.

The first job was in 2006 doing some welding, doing some supervising, and running forklifts and boom trucks for Mr. Langley. He did that for a few weeks on and off over a stretch of three months, maybe four. He got that job through friends. He had to stop because the job was too physically demanding to do every day. Some days he was so stiff and sore he could not get out of bed. He started out at $8.00 an hour and when he left his pay was $13.00 an hour.

Claimant also worked for B&E Enterprise as a welder fitter for two and a half days in January 2007. In 2007 He had applied for three or four welding jobs. The B&E job was a different type of welder than what he was doing for Employer. B&E was all new construction and everything was done on a shop table. There

was no climbing and all that. He stopped working for B&E when they told him there was a problem with his urine drug screen. No one explained the specific problem. He disclosed his medications when he took the drug screen, but the lady did not write it down. She just wanted to know how he could afford all those drugs. Claimant explained his workman compensation claim. He gave the sample at a separate testing facility the day before he actually started work. Two and a half days later they told him he did not pass the drug screen and was no longer an employee.

He is currently working for Simonize Car Wash. He learned about that job from his son. He preps cars to go through their car washing tunnel. He puts the car on the track and sprays the fender wells with a pressure hose. He has been working there for three or four weeks, earning $6.50 an hour. One week, there may be thirty hours work and the next week it may be forty-two, depending on the weather. He may have had a few hours overtime, but it is not an every week thing. He has a lot of time required on his feet, but no lifting requirements. When he has a slight moment, he can sit down on a bucket. The job is tearing his body down, but he does not have any choice. He physically keeps pushing himself. When he comes home every night, his feet and legs are killing him and his lower back is so stiff he can barely get out of the truck to walk to the house. But sitting here today he intends to continue working at the car wash unless Vickie Colenburg can come up with a better job.

Ms. Colenburg did find some jobs that he applied for, such as a courier service job. He did not fill out an application, but did call over the phone and also go in to speak with the employer. They wanted to know what car he drove and if it is reliable, if he has insurance, what hours he is available, and things of that nature. Some of the courier service positions or delivery jobs that Ms. Colenburg has found require a commercial driver's license. Claimant has not applied for those positions because he does not have a commercial driver's license. He has not tried or started studying for a CDL he is working and does not have a truck and trailer to take the driving test.

She asked Claimant to get her the basic information for a resume and said she would put it all in order and send it back. She sent a rough copy back. He changed a few things and sent it back to her by regular mail in January. He has not received a final draft. He has been working with Ms. Colenburg since June or so of last year. He last spoke with her a week ago and they discussed his resume. She asked how the job was going.

His ankle and low back injury interfere with his seeping. Sometimes, if the weather is right, he cannot sleep at all. Dr. Stanley has ordered a twenty-nine pound lifting limit.

Bending sometimes causes pain in the lower back and stomach. If he sits too long without moving he gets stiff. Wiggling around in the chair can help, but sometimes he has to get up and stretch. After sitting, for thirty minutes, he starts to feel it in his low back and hips.

At one point since the accident in 1998 he also was going to weld for Quality, but did not pass their bend test. He applied at Beacon, the Port of Orange, STI, and Quality Contracting. In January 2007, he took a weld test for STI and assumes he passed. He is still waiting to get called in to take the bend test. In February 2007 he did not pass a bend test for Quality Contracting.

Dr. Beaudry told him that the cause of his back pain could be his gait. Claimant has noticed his right calf is not near as strong as it used to be, but does not know if it is smaller than his left. He has been told by doctors there is no size difference.

Claimant's supervisor accident report states in pertinent part that:[96]

On 18 Jul 98, Claimant reported he had slipped and twisted his ankle at about 8:00 AM. He returned to work about 10:30AM.

Business Health Partners' records state in pertinent part that:[97]

Claimant initially presented to Dr. Drumwright on 20 Jul 98. He reported having twisted his right ankle. He described pain outside and below the ankle with constant throbbing and swelling with motion. An x-ray revealed no fracture and Claimant was diagnosed as suffering from a sprained ankle. He was restricted to sedentary work, prescribed medication, ice, and elevation, and told to return in 3 days. There was no entry made regarding any report of back problems.

Claimant returned on 23 Jul 98 and reported continuing ankle pain, throbbing, and swelling. He had moderate edema, burning, and tenderness. He was assessed with a mild to medium ankle sprain, prescribed more medication and returned to light duty with no weight on his right ankle. He was told to return in a week. There is no chart entry reflecting any complaint of back problems.

On 31 Jul 98, Claimant returned reporting some improvement, but complaining that he was continuing to have pain and swelling. The diagnosis remained ankle sprain, but he was taken off all work and told to return in a week. There is no chart entry reflecting any complaint of back problems.

[96] CX-14; EX-30.
[97] CX-14; EX-30.

On 7 Aug 98, Claimant returned and reported the ankle was improving but the brace was making his foot hurt. There was still some swelling and tenderness. Additional X-rays were normal. The diagnosis remained ankle sprain with slow but steady improvement. Claimant was kept off all work, referred for a rehabilitation assessment and told to return in a week. There is no chart entry reflecting any complaint of back problems.

On 14 Aug 98, Claimant returned and continued to report ankle pain. He was cleared for light duty and sent back to therapy with a plan to return in a week. There was no indication Claimant had mentioned any back problems.

St Elizabeth Hospital records state in pertinent part that:[98]

On 11 Aug 98, Claimant was assessed for outpatient rehabilitation. He described his injury and subsequent ankle pain. The therapist's assessment was that Claimant was now walking with a highly altered gait to avoid bearing weight on his right side. Claimant was reporting constant throbbing and pain. The plan was for Claimant to return for five visits over one week to work on gait training, strengthening and range of motion and treat for swelling and pain. He would then return to his treating doctor for further assessment. There was no indication Claimant had mentioned any back problems.

Dr. Carl Beaudry's records state in pertinent part that:[99]

He first saw Claimant on 21 Sep 98. Claimant described his initial injury and reported the immediate pain and subsequent treatment. Claimant's main complaint was chronic pain and swelling of the ankle especially when walking over unstable surfaces. Claimant demonstrated a mild antalgic and his ankle had a grossly normal range of motion, while the subtalor joint was limited in motion. An x-ray was normal, and Claimant was assessed as suffering from a grade I to II ankle sprain, but recommended for an MRI, in view of the delayed recovery. There was no indication Claimant had mentioned any back problems.

The MRI revealed a small joint effusion without any other significant findings. On 5 Nov 98, Claimant returned with continued complaints of pain and swelling. He was treated with steroid injections in the joint, continued with his ankle brace, and started on physical therapy. There was no indication Claimant had mentioned any back problems.

[98] EX-31.
[99] EX-13.

On 30 Nov 98, Claimant returned and reported significant improvement in pain but some continuing range of motion limitation and weakness. There was no indication Claimant had mentioned any back problems. He was scheduled for an EMG to rule out a neurological explanation for his poor response to treatment. There was no indication Claimant had mentioned any back problems.

The EMG showed no evidence of peripheral nerve entrapment.

On 1 Apr 99, Claimant returned and reported continued ankle pain. He was given a local steroid injection. A bone scan the next day revealed no abnormal activity in the right ankle. There was no indication Claimant had mentioned any back problems.

On 14 May 99, Claimant returned and was advised in light of his ongoing symptoms and failure to respond to conservative treatment, to seek a second opinion.

On 2 Oct 01, Dr. Beaudry recommended, based on a lumbosacral MRI, that Claimant have an epidural block.

Park Place Medical Center records state in pertinent part that:[100]

An MRI of Claimant's right ankle on 29 Oct 98 showed mild increased joint fluid along the mortise with no other significant findings.

A bone scan on 6 May 99 showed minimal increased activity in the left ankle and no abnormal activity in the right ankle.

A 9 Feb 01 bone scan showed degenerative lumbar disease.

An 11 Jun 01 lumbar x-ray showed no abnormality or changes since 14 Jan 00.

A 20 Sep 01 lumbar MRI showed no change since 14 Jan 00. It showed mild degeneration desiccation of the L5 transitional disc with a mild annular bulge, but no focal disc herniation.

On 15 Oct 02, an EMG/NCS of Claimant's right leg was normal with no evidence of lumbosacral radiculopathy, peripheral neuropathy, or entrapment.

[100] CX-11; EX-16, 32.

Dr. James Stanley testified by deposition and his medical records state in pertinent part that:[101]

> He is a board certified orthopedic surgeon practicing at the Beaumont Bone & Joint facility. He does not take referrals from attorneys unless there are extreme extenuating circumstances.
>
> Dr. Stanley first saw Claimant in March 2003 on referral from Dr. McNeill. He took Claimant's history and examined him. Claimant complained of suffering from leg and back pain ever since his injury. Claimant had an obvious limp and limited range of motion in his lumbar region. Claimant had little strength in his toe flexor, which is usually associated with a L-5 injury, and was weak in his ankle dorsiflexors and peroneals. Claimant had a positive straight leg raise, indicative of nerve irritation.
>
> Claimant had had two EMGs. A 1999 EMG indicated a L5-S1 right side radiculopathy and a 2002 EMG showed no abnormality. Dr. Stanley also reviewed Claimant's 2001 MRI. It showed Claimant had an annular bulge with no herniation at the L5 transitional level.
>
> The MRI also showed Claimant had transitional anatomy, which is mostly a labeling or counting issue. Most people have five lumbar levels with a disc in between each lumbar and then a disc between the last lumbar, which is L5, and the sacrum, which is S1. Claimant had a transitional level, which is sort of a hybrid between the sacrum and the lumbar. So, his last true lumbar, which on the average person would be L4-L5, was more like L5-S1.
>
> Claimant did not present a straightforward history or injury. His neurological examination did not correlate with his MRI. Normally a significant deficit such as Claimant's would involve a big disc herniation and Claimant's MRI did not show one, although that could have been a function of MRI quality. He appeared to have an initial ankle injury along with the back injury.
>
> Dr. Stanley was trying to determine if surgery would help Claimant. After five years with a foot drop, it was unlikely that the nerve would come back, if it was out. He ordered another MRI, which showed a mild disc bulge and foraminal disc herniation without nerve root displacement. That finding was more consistent with right radicular leg pain and weakness. It could also be seen as the cause of the foot drop, but typically there would be more impressive nerve compression than Claimant's. It is possible that over the time between the MRIs, the annular bulge progressed to a more discreet tear.

[101] CX-7-10, 18; EX-15, 20, 36.

Dr. Stanley sent Claimant to Dr. Larkins for an opinion on whether Claimant needed a simple discectomy or more aggressive surgery. Dr. Larkins recommended a CT myelogram to assess nerve root compression. That test was read as showing an L4-5 degenerative disc with encroachment of the neuroforamen on the right, consistent with the herniation indicated by MRI. The actual level was transitional and the confusion in numbers was due to Claimant's anatomy.

Dr. Stanley does not know why Claimant had a delayed pain response to the back injury or why, in the absence of an intervening event, the same injury causing the foot symptoms later led to back pain. A disc injury associated with nerve root injury does not necessarily mean back pain. Although Claimant did not present a textbook set of subject and objective findings, Dr. Stanley believed Claimant had real complaints related to his July 1998 fall and was not a malingerer. The radicular pain and back pain definitely correlate to the disc injury. The least objective aspect of Claimant's case was the foot drop, which was suspicious in light of the normal EMG.

After consulting with Dr. Larkins, Dr. Stanley determined Claimant needed a lumbar decompression and fusion.

Claimant's initial surgery date had to be rescheduled because Claimant tested positive for marijuana. Claimant acknowledged that he had smoked marijuana once or twice. Claimant tested positive for marijuana on two occasions, the second one was within 60 days of the first test.

Dr. Stanley performed a lumbar decompression fusion with instrumentation on Claimant on 25 Jan 05. It was a posterior decompression and circumferential fusion. That means he made an incision on Claimant's abdomen, excised the disc at the operative level, and put a spacer where the disc used to be in order to effect a fusion of the disc space. Then from Claimant's back he decompressed nerves and put in rods and screws and a bone graft to fuse the entire spine. He has done hundreds of this type of procedure. When he actually performed the surgery, he observed that Claimant indeed had pressure on his nerve roots at that level.

Claimant did well with surgery and had no intraoperative complications. Dr. Stanley followed Claimant after the surgery with periodic checks, physical examinations, and x-rays to assess his progress. Claimant progressed as expected. He continued to have low back and leg pain and difficulty with anything other than sedentary-type activities. He had a fall shortly after surgery that did not do anything to the hardware, but put him back in terms of progress. He still has quite a bit of debilitation. Claimant's goals were to get back to doing physical things;

and Dr. Stanley does not know that he will be able to do that. He had told Claimant he was not optimistic and that the surgery would not cure his back pain. Claimant was still requiring pain medication, although perhaps less than before the surgery, and was still not able to do what he had done before.

He referred Claimant to Dr. O'Neal for pain management, which may include psychiatric care. Claimant does not require further orthopedic treatment, but will need pain management treatment for the rest of his life. Dr. Stanley believes that most of Claimant's ankle weakness was more due to his back injury. Claimant should not have had any long-term problems from the ankle itself, but he will with his back.

On 11 Apr 06, Dr. Stanley completed a form indicating Claimant had reached maximum medical improvement. That was a year and three months after surgery and the time frame he would expect someone to reach maximum medical improvement following Claimant's type of surgery. He would maintain the same restrictions that are on the form, with the addition of no climbing.

Patients like Claimant tend to have good days and bad days. On good days, they're able to do most of what they would like to do. On the bad days, they have difficulty getting out of bed. Claimant would be expected and need to miss days of work periodically. He does not believe Claimant could have gone back to work until he was medically released.

Dr. Stanley does not know Dr. Martin Barrash. He understands Dr. Whitsell conducted an IME for the Department of Labor in September 2003. Dr. Whitsell found Claimant had a lumbar herniation with radiculopathy with right foot drop, which by history resulted from the 1998 fall.

Dr. Stanley considers the possibility that patients are malingering, but does not believe Claimant was, since he found objective observable causes for his radicular complaints while performing the surgery.

Dr. Stanley has never been sure what to make of the weakness of Claimant's foot. He did have objective weakness which was better with distraction, but it was not normal. Claimant definitely had radicular pain, whether or not the EMG documented it. Not everybody that has radicular pain has EMG-documented nerve damage or even nerve irritation. Claimant was sort of at the end of his rope from a treatment standpoint. Surgery was his last resort.

Dr. Stanley has never seen an individual that has a normal EMG with foot-drop-type symptoms. A patient with a foot drop cannot have a normal EMG. He does believe Claimant's initial fall or subsequent limping and walking on crutches exacerbated or caused the low back pain. The medical treatment he recommended with Dr. O'Neal is related to Claimant's original 18 Jul 98.

Dr. Stanley never thought that Claimant had a foot drop as a result of a severe nerve injury to his nerve root. The radicular pain down the leg and the back pain were coming from the injury. The surgery was designed to hopefully get rid of or improve the radicular pain in the leg and the low back pain.

He does not attribute Claimant's low back pain and the radiculopathy to using crutches or favoring one side while walking. He thinks when Claimant first fell he injured that disc and the ankle. Ankle injuries can mask lumbar injuries. Nobody noticed that Claimant had a back problem until his knee [sic] quit hurting. It is unusual that the first time Claimant made complaints of low back pain was over seven months after the fall, because patients will usually have pain before that.

Claimant had a lot of tests to determine where his pain was coming from and everything pointed to that level.

The fusion is stabilized and all the hardware is in place. There is no movement at the fused level. The actual diagnosis was lumbar disc displacement. That can be a degenerative condition or acute. For Claimant, it is probably acute on top of degenerative. That's because of his history. Claimant has an anomalous anatomy, did not have any problems with his back, did something to his back and then started having pain. It is also possible that there may have been an intervening event after the July 1998 fall.

Dr. Stanley did not measure Claimant's calves to determine whether they were symmetrical. He would not expect Claimant to necessarily have asymmetry in his calves, especially, with a normal EMG. He treated Claimant for back and right leg pain, not foot drop.

He last saw Claimant on 22 Mar 06. Claimant had stable symptoms of back pain worsened with activity and leg pain with occasional numbness if he sits or stands any length of time. Claimant is not scheduled to see him at any point in the foreseeable future.

Dr. J. Martin Barrash testified by deposition and his medical records state in pertinent part that:[102]

> He is a board certified neurosurgeon. This is his 21st year of doing medical/legal work. He probably does 75 cases a year in which he is hired by a law firm to evaluate an individual who is not his patient. Probably three out of four personal injury cases are referred to him are by firms representing defendants. He probably actually examines and reports on one case per week. He sees patients, but no longer performs primary neurosurgery. He does scrub in about once a week as an assistant surgeon. He does as much as he can. Some days all he can do is just suck and retract because his hand bothers him. Some days he can literally do a whole case.
>
> He charges $900 for examinations and writing reports and $1200 per hour for depositions here today. On this particular case he may have billed approximately $3,000. He still sees a lot of patients—probably 700 to 800 new patients a year. He works them up, does the diagnostics, evaluates them, and admits them to the hospital. He assists in surgery.
>
> He examined Claimant on two occasions, 9 Apr 03 and 30 Jan 07. He has also reviewed some of the medical records in this matter. His opinions are reflected in his reports at EX-7 and EX-8.
>
> From the first examination in April 2003, Dr. Barrash has thought that Claimant was making a conscious effort to put forth complaints that Claimant knew were not real. Claimant was basically faking. He believed Claimant was a malingerer because there was no objective evidence to support any of the complaints he had all through the years or from his examination.
>
> Claimant said he had a foot drop, but he did not have a foot drop. Most people walk heel to toe. In a foot drop the patient cannot raise his toe up so the foot flops and the toe hits the ground first before the heel. The foot flops on the floor each time they raise that foot to move it. It is a characteristic gait. A foot drop is caused by involvement of the nerve which elevates the foot, the L5 nerve root or any place along its course, the peroneal nerve. There are objective tests or studies available to determine if a patient, in fact, has a foot drop. They include examining the muscle for atrophy in the muscle, an EMG and nerve conduction study to check functioning of the nerve, and observing the gait. An MRI is not

[102] EX-7-8, 19.

indicative of a foot drop. He has seen people with huge disks that do not have a foot drop and people with small disks right in the intervertebral foramen with a foot drop. It is unusual or unlikely to have an inflammatory process involve just one nerve root of the nerve.

Claimant had normal EMG/NCS studies on 15 Nov 02[103] and 21 Mar 99.[104] The 1999 EMG showed no EMG evidence to suggest entrapment neuropathy, myopathy or peripheral myopathy at the time. It indicated a mild L5-S1 radiculopathy. The L5 nerve root comes out between L4 and 5. The S1 nerve root comes out between L5 and S1. The EMG showed mild and chronic innervation at right L5, S1 right. That would indicate that there was a problem with Claimant's nerve root at L5, S1. The EMG also showed increased insertional activity with no spontaneous potentials at rest at the L5. Claimant has trace polyphasic, which is really nothing. Claimant had nothing that points to a L5 radiculopathy. There was nothing to clinically and objectively support a foot drop to the right foot.

The 2002 EMG was a normal EMG and nerve conduction study. It might be possible, but Dr. Barrash has never seen or heard of a normal EMG/NCS with a foot drop.

In his two occasions to physically examine Claimant, he noted inconsistencies with respect to a diagnosis of a right foot drop. Claimant did not have a foot drop.

On 9 Apr 03, he noted Claimant had voluntary breakaway weakness of the entire right lower extremity. Claimant did not follow an anatomical pattern. It was every muscle, which does not occur, especially with a normal EMG. He had normal hair and normal texture. The muscles, the nails, et cetera, were all symmetrical. He was also complaining of having Regional Pain Syndrome, but he had no evidence of that for which he had been treated. He could not raise his right foot, but the right foot did come off the ground when he walked. He had voluntary weakness of the right foot, but when Dr. Barrash specifically tested Claimant, the inverters were strong. They are the same muscles that involve the muscles that pick up the foot and invert it. It was inconsistent with his complaint. When Dr. Barrash measured Claimant's legs, there was no atrophy. If Claimant's condition had been present for the four years that he alleged the muscle is not used and shrinks and dies. If muscles do not get innervation from a nerve, they do not work and shrink away. Claimant's muscles did not shrink away. Claimant flexed 90 degrees sitting but only 15 to 20 degrees standing. Bending over standing is the same as sitting and raising the legs up. There is no difference. When Dr. Barrash just touched Claimant's skin, he complained of pain out of proportion to the amount of stimulation.

[103] EX-16.
[104] EX-34.

Claimant had no pathological reflexes indicating spinal cord compression. Claimant's sensation to pin touch and vibration was less in his right extremity than the left extremity. Claimant was without back spasm, but it is not uncommon for somebody that actually does have a back problem to not have any spasms while at the office.

In January 2007, when he examined Claimant, he again noted any inconsistencies between the Claimant's subjective reports and the objective tests and studies. Claimant reported working full time as a welder, when work was available, but complained that if he bends for long periods of time he can get some low back pain and his hips, knees, and legs can hurt. He complained that sneezing increases his low back. All of that is consistent with patients that have had low back surgery. Claimant walked almost with a foot drop gait which he stated had been present since 1998. Neurologically his reflexes, including the hamstring reflex (which is a reflex mediated by L5) were normal. He had decreased sensation globally in the entire right lower extremity except for the foot. That does not happen. Claimant walked favoring his right foot but had a high top work shoe on and a brace, in his shoe. He still had no atrophy. There was evertor weakness and probably not any inverter weakness. The calves measured the same. There were a number of things with this examination which were also incompatible with a foot drop.

Claimant had had a surgery, which he said made him maybe 15 percent better, which is a terrible result. Dr. Barrash felt there was a large amount of functional components to his case. The surgery was a 360-degree global fusion performed by Dr. Stanley on 26 Jan 05 at L5-S1. Dr. Barrash does not agree with Dr. Stanley that the discogram justified the surgery, and in any event does not believe that the discogram disclosed anything related to Claimant's accident on 18 Jul 98. Claimant had a desiccated disc which was probably of a congenital nature and which would always show as abnormal on a discogram. There was no herniation. Dr. Stanley treated Claimant based on a worthless test. A lot of people believe in discography, but Dr. Barrash does not. Dr. Barrash saw no objective tests warranting the surgery. Claimant had had no complaints for eight months to a year. Patients do not injure their backs and then a year later start getting problems. Claimant's back surgery and alleged back injury have nothing whatever to do with his ankle injury that occurred in 1998.

The first indication of Claimant reporting back pain Dr. Barrash found in the records was to Dr. Beaudry on 17 Aug 99, after an EMG done in March 1999 to evaluate chronic ankle pain. That would be consistent with Dr. Barrash's conclusion that Claimant is a malingerer. It is not common for him to see malingering patients, but he does get one to three a year. It is a terrible label to put

on somebody, but he thinks that the criteria for malingering were met on this gentleman. Malingering is very unusual and he will often send the patient for personality profile.

Dr. Barrash cannot identify an injury that claimant suffered by the time he examined Claimant in 2003 related to the 18 Jul 98. At that time, Claimant was at MMI then and had absolutely no need for any additional medical care from his work injury. He was capable of returning to work at that time.

Dr. Barrash did not do a functional capacity evaluation on Claimant as part of his recent examination in January 07, but as a generalization, someone who has had Claimant's surgery and apparently healed satisfactorily can go back to light to medium work. Some could still even go back to heavy duty, although he does not generally recommend that. He does not want the patient to be bending over for eight hours a day. He would limit bending to two to four hours at most but not continuously. Squatting would be case by case depending on how it was tolerated. Driving over very bumpy surfaces on continuous basis would not be good. Some individuals with low back surgery such as Claimant's regularly complain of problems with sitting too long, standing too long, or walking too long. They need to be able to change from one to the other. Some are miserable and in constant pain.

Dr. Barrash believes that on 18 Jul 98 Claimant injured his ankle, but suffered no other injury. If Claimant does have back problems they are not related to any on-the-job occurrence or any injury from his on-the-job activity, even considering the fact that Claimant was walking on crutches for months. Dr. Barrash would not expect that to cause any kind of low back problems. In 2003 Claimant was faking his complaint. The things he had are not neuron-anatomically verifiable. His examination was incompatible with the complaints he had. By January of 2007 Claimant had had surgery and some of his prayers had been answered. He got operated on. At that point he may not have been malingering, but engaging in symptom magnification. He actually has an injury now, due to his back surgery. However, his foot drop is still a result of malingering.

He knows Dr. Whitsell only by reputation and has never met him. Dr. Whitsell is basically retired, and all he does is IMEs. He would assume that the IMEs are for workman's compensation or the insurance carrier or maybe the courts. Generally, that's not the type of doctor that routinely suggests needless surgery.

He does not know Dr. Larkins at Beaumont Bone and Joint, but knows his work. Dr. Larkins is no longer operating and Dr. Stanley came in and took over for him. Dr. Barrash would not call Dr. Larkin a plaintiff's doctor or a defense doctor. Most of the things he saw Dr. Larkin do were appropriate.

Dr. Daniel Wolens' report states in pertinent part that:[105]

> He conducted a review of Claimant's medical records on 1 Feb 00. He noted a right ankle inversion injury in July 1998 resulting in a type I or II sprain. Claimant continued to have pain in spite of appropriate treatment and an EMG in March 1999 was done. Dr. Wolens suspected that the EMG was normal with only findings of rare polyphaiscs and mild insertional changes that were not at all conclusive of a radiculopathy.
>
> He noted Claimant did not report back pain until the EMG and felt there was no intimate connection between Claimant's back problems and his 1998 ankle injury. He anticipated that if a lumbar MRI should show L5-S1 abnormality, it would not be related to the ankle pain.
>
> He recommended non-interventional pain management and that with more than a year of chronic pain, Claimant had plateaued and was at MMI.

Dr. Alvin Larkins' report states in pertinent part that:[106]

> He examined Claimant on 29 May 03. He noted Claimant had a steppage gait on the right. Claimant was unable to get back on his heels on the right side. He noted Claimant demonstrated hypothesia in the L5 on the right and some portion of the S1 distribution. EHL was 0 on right and 5 over 5 on left. He noted x-rays revealed a narrowed L5-S1 disc space and MRI showed narrowed L5-S1 with a foraminal disc on the right at L5-S1. His impression was that Claimant had a disc herniation at L5-S1 with foramina on the right and lumbosacral radiculopathy on the right with a foot drop. He recommended decompression and fusion, but felt there should be more definition with a myelogram CT scan, which would likely show the L5 nerve root out. He anticipated Claimant would probably not regain his ability to dorisflex the right foot.

Dr. Stacey Bourland's report states in pertinent part that:[107]

> She evaluated Claimant psychologically as a candidate for fusion surgery on 22 Dec 04. Claimant was open and forthcoming. He gave her a detailed history and explained that after his 1998 accident, his back pain was mild, and he believed he had only sprained his ankle. Overtime, he started experiencing more pain in his

[105] EX-12.
[106] CX-16.
[107] EX-38.

back and a pinched nerve in his back was discovered, radiating pain to his ankle. He indicated his sciatic nerve was pierced during his EMG, forcing him to wear a leg brace for the rest of his life. He reported he was suing the responsible physician.

He described his pain and that it prevented him from working, sleeping regularly, or engaging in many other life activities. He conceded having used marijuana on two occasions for pain management, but said he did not like the drug.

Dr. Bourland found to him to be a suitable candidate for surgery.

Dr. Marshall Hayes' report states in pertinent part that:[108]

He saw Claimant on 12 Sep 02 for a consultation and evaluation. He noted marked weakness of the dorsiflexors on the left side and that Claimant was using a foot drop brace. He reviewed a September 2001 MRI and found no definite disc herniation, but some mild bulging at L5-S1. He also reviewed a March 1999 EMG study. He recommended a new MRI, because the "pretty normal looking" MRI does not explain Claimant's persistent leg pain and foot drop.

Dr. Stephen O'Neil's records state in pertinent part that:[109]

He began treating Claimant for pain management on 20 Feb 06. He has prescribed for Claimant pain medication, anti-depressants, and sleep aids. He continues to see Claimant every 2 to 3 months and monitor his medications.

Dr. Jack McNeil's records state in pertinent part that:[110]

He saw Claimant for an independent medical evaluation on 17 Jun 99. Claimant described his initial accident and subsequent ankle problems. He reported to Dr. McNeil that he had chronic back pain. Claimant said it that began right after the EMG study after which Dr. Beaudry told him he had a sciatic nerve problem in his back. Dr. McNeil noted Claimant had pain with active range of motion in the ankle. He reviewed the March 1999 EMG study that reported an impression of L5-S1 radiculopathy on the right with mild active and chronic denervation changes, but no evidence of entrapment neuropathy, myopathy, or peripheral neuropathy. Dr. McNeil's diagnosis was an ankle sprain, L5-S1 radiculopathy and possible reflex sympathetic dystrophy.

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[108] EX-35; CX-17.
[109] CX-20; EX-14.
[110] CX-15; EX-33.

He saw Claimant again on 3 Jul 01 for another examination. Claimant reported he had fallen two weeks prior and injured his right foot and low back. Claimant walked with a foot drop. Claimant had no perceptible muscle atrophy in the thighs and calves. His straight leg test was positive. Dr. McNeil concluded Claimant was not at MMI, but getting worse and unable to work. He recommended Claimant have a lumbar MRI and believed Claimant's work injury to his right ankle either concurrently or derivatively, through altered gait and crutch use, caused his back and leg problems.

Dr. Leslie Bishop's report states in pertinent part that:[111]

He evaluated Claimant at Dr. Stanley's request to determine if Claimant had reached MMI, and if so, what percentage of disability should be assigned. Dr. Bishop took a history from Claimant, reviewed Claimant's records, and examined Claimant. He noted that Claimant's surgery was delayed when Claimant's drug screen was positive for THC and then two additional drug screens were positive. He noted an inconsistency in Claimant ability to dorsiflex the right foot while being observed for formal donning his socks and performing heel stance. Dr. Bishop's diagnosis was that Claimant was post lumbar fusion surgery and right ankle sprain. He found 0% impairment for the ankle and 10% whole person for a history of herniated disc.

St. Mary Hospital records state in pertinent part that:[112]

On 24 Mar 98 an EMG of Claimant's lower right extremity showed L5-S1 radiculopathy on the right with mild active and chronic denervation changes, but no evidence to suggest entrapment neuropathy, myopathy, or peripheral neuropathy.

Christus St. Elizabeth Hospital records state in pertinent part that:[113]

A lumbar myelogram on 2 Jul 03 was unremarkable. Nerve roots were bilaterally symmetric. A lumbar CT scan on 2 Jul 03 showed at transitional S1 segment, mild annular bulge at L2-3, L3-4, and L4-5, and encroachment of the right L4-5 foramina that may represent a lateral disc herniation versus nerve root edema.

On 22 Sep 04, Claimant's urine tested positive for amphetamine.

On 26 Jan 05, Claimant underwent a lumbar laminectomy/fusion.

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[111] EX-10.
[112] EX-34.
[113] CX-12, 19; EX-37.

Spine and Sports Medical Center records state in pertinent part that:[114]

> From 1 Jun 05 to 26 Jul 05, Claimant underwent physical therapy for his lumbar back. He initially presented with pain in his right leg and back, along with a right foot drop. His goal was to return to welding. He missed his first scheduled evaluation and eight treatments over the two month course of treatment. On discharge testing, Claimant appeared to give way during resistive isometric testing and not give consistent effort. He was overall slightly improved, but self-limiting related to function and testing.

Vocational Evidence

William Quintanilla's vocational reports provide in pertinent part that:[115]

> In February 2007, he reviewed Claimant's medical, workers' compensation, workforce, and social security records, along with Claimant's and Dr. Stanley's depositions. He did not meet Claimant. He conducted a labor market survey for light and sedentary jobs. He identified five specific jobs which appeared to be within Claimant's abilities and medical restrictions. They included motel clerk, security guard, and cashier/customer service positions and offered starting wages up to $10 per hour.

Vickie Colenburg testified at deposition and her vocational reports provide in pertinent part that:[116]

> She has worked as a DOL vocational rehabilitation expert or consultant since 1998. When not working for DOL, she worked for carriers. In June 2006, she was appointed by the Department of Labor to perform vocational rehabilitation services and to assist Claimant in finding suitable employment within his work restrictions as reflected in OWCP-5[117] that was filled out by Dr. Stanley on 11 Apr 06. She first met Claimant 30 Jun 06.
>
> Claimant was not timely in responding to her or providing her with information that she requested of him. He would maintain contact with her. One time he expressed an interest in retraining and was advised to go to the Texas Workforce Commission. He went, but did not sign up for services. He did not go to Lamar University to research the CAD program and speak to a counselor; he said he thought she would do that for him. She asked for a copy of his job log and finally got one, but not on time.

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[114] EX-9.
[115] EX-11.
[116] EX-3-5; 42-54.
[117] CX-10.

She last spoke with Claimant on 6 Mar 07 and with Claimant's spouse on 13 Mar 07. His file closed on 23 Mar 07 and she is no longer providing any type of vocational rehabilitation services to him. She had determined that Claimant was employable and he had maintained, although with different companies, employment during a 60-day period.

She does not know for sure if Claimant is currently employed. His spouse indicated to her in their conversation on 13 Mar 07 that he had an injury not related to this claim and that he may not go back to the car wash. She said the doctor said with the bending in and out of the cars Claimant bruised his colon.

She prepared several labor market surveys. The jobs identified on the 15 Nov 06 survey[118] were available as of that date. She is not sure if they were available before then. Claimant was qualified for each of the jobs and they were within the restrictions set by Dr. Stanley on 11 Apr 06. She did not include a limit on climbing in identifying the jobs, but only the monitoring technician job with IPR/EMS and the Quality concrete mixer driver position might require climbing. The jobs would permit Claimant to work 40 hours per week. If the job is not identified as full time, she asks.

As far as she knows, Claimant did not apply for any of those jobs. He never provided her with a job log with respect to these jobs, even though she had asked for one. When she asked if Claimant had applied for the jobs she found, he always had some other job coming available to him. One occasion he said he had a friend that was going to try to get him on with a company that the friend was working for. She asked Claimant for the name of the company, but never got it from Claimant. That exchange is reflected in her 25 Nov 06 report.[119] She routinely sees individuals going to friends and family to find employment.

She believes the jobs that are set forth in the labor market survey were suitable positions of employment available to Claimant. Another labor market survey she prepared is also dated 15 Nov 06.[120] Claimant was qualified for each of those jobs and they were within the restrictions placed on Claimant by Dr. Stanley per the OWCP-5 dated 11 Apr 06. None required climbing except for possibly getting in and out of a vehicle on one step up, which was not inconsistent with any restriction Dr. Stanley has set. The jobs would permit Claimant to work 40 hours per week. As far as she knows, Claimant did not apply for any of those jobs. He

[118] EX-5 pp 20-25.
[119] EX-4.
[120] EX-5 pp 10-13.

did not provide her with any job log sheets with respect to these jobs identified and to her knowledge, never applied for the jobs. It not uncommon for males, in particular, to fail to return job logs. The failure, though, can show a lack of motivation.

She assumed based on the DOT that the Auto Zone position fell within the DOT work restrictions. She did not ask how much delivery drivers were required to carry. There are car parts that would weigh more than 20 pounds. The Crane Technical, Inc. job is in China, TX. She thinks that is no more than 50 miles from Orange. She tried to keep the jobs within a 50-mile radius. It is another parts delivery and pick-up position. She does not recall asking how much an individual would be required to lift in regards to the parts that they would be picking up or delivering. The Clean Sweep job is in Grayburg, TX. The position requires driving a machine around the parking lot, picking up debris. She did not ask about the lifting requirements. The Act Fast Delivery job is a courier position involving packages. She does not recall any of the employers that she identified actually indicating how much Claimant would be required to lift in order to perform their job. She cannot say that any of the employers she has identified told her their job would not require more than two hours of sitting, two hours of walking, or two hours of standing, or any of the other specific restrictions from Dr. Stanley.

Outsource Staffing, American Personnel, Manpower, Cooper Staffing, and Silva Employment Network are all employment or staffing agencies. Discussion about those jobs would have been with the agency and not with anybody that worked for the employer. The IPR/EMS job is a monitoring technician. The person goes around in a plant and gathers readings from various meters or monitors in a petrochemical industrial complex. She would expect that it would require climbing. She does not know how much the ENSR/AECOM position would pay. She does not know if the Quality Concrete mixer trucks have ladders on the back, but if they do and the driver had to climb the ladder, the job is not within Dr. Stanley's restrictions.

She did a job search in early December 2006.[121] Later that month, she sent two letters[122] to Claimant with additional jobs she had identified for him. Those were available jobs within Claimant's restrictions, but to her knowledge Claimant never applied for any of them. The 29 Dec 06 letter had jobs averaging $8 per hour. That's an estimate because employers refused to tell her what they paid. On 1 Dec 06, Claimant reported that he got the first letter, but said he planned to apply for a position as a welder inspector. She does not know if Claimant ever applied for that position. The Gulf Coast Welding, Inc. job probably required climbing. American Personnel & Temps. is a staffing agency, and she never actually talked

[121] EX-53.
[122] EX-45-46.

to the employer regarding the position as a printed circuit board assembler. Normally assemblers have the flexibility to sit or stand. She asks if they have the flexibility to sit or stand. She talks with either the personnel department or in the case of a staffing company, whoever the staffing agent is that answers the phone. Her information is only as good as theirs. The Calibration Corporation position indicates it is an entry level laborer in a chemical plant. It does not make sense that such a person would not be required to pick up more than 10 to 20 pounds. The Bridge City Paint & Body is a wrecker driver position. She does not know how cars get off the side of the road that cannot be lifted up by the front end and dragged in. She did not ask if the position is required to pick up wheels weighing more than 10 to 20 pounds. She does not know how much the Hertz or Southeast Title jobs pay.

On 18 Dec 06, Claimant said he had been looking for work, but no one will hire him because of his injury. Claimant indicated he was explaining his injury to potential employers. She advised Claimant to put "will discuss at the time of interview" on the forms and if he got an interview, to explain his situation, but that he was cleared to work and could do the job. Claimant returned to work with B&E as a welder in January of 2007. She thought Claimant continued working there and only found out in the course of preparing to testify that he only worked there for 2½ days. She found that fact out on 6 Mar 07.[123] Between January and March of 2007, she occasionally spoke with Claimant. She asked how he was doing on the job and if he was having any problems. When they talked on 19 Jan 07, he said he was making $19 per hour. She had not found the B&E job and did not believe it was within the restrictions set forth by Dr. Stanley. Claimant told her he lost the job because his drug screening was positive for drugs. He did not indicate what substance.

On 10 Jan 07, Claimant's spouse indicated Claimant was working five ten-hour days per week.

Claimant finally did provide some job log sheets on 9 Mar 07.[124] They showed he applied to B&E Fabrication on 22 Dec 06, Quality on 21 Jan 07, SETZA on 24 Jan 07, Falcon on 29 Jan 07. He started working at the car wash on 3 Feb 07. She had not found any of those jobs for Claimant and consequently does not know if they were within Claimant's physical restrictions.

In March 2007, Claimant's spouse indicated he was having a lot of back pain working at the car wash. He was having problems getting in and out of cars because he was bending, and was not going to go back to work at the car wash.

[123] EX-43.
[124] EX-43 pp. 5-7.

In doing labor market surveys, she does some DOT searches. She enters in a computer the restrictions and it tells her whether or not the claimant can actually do that particular job based on the DOT job descriptions. In order to determine whether or not the actual work required by a specific job falls within a claimant's restrictions, she has to contact each employer.

She did not actually go out to the job on any of the jobs that she identified in any of the labor market surveys. She usually researches from the internet and the newspaper and then follows up with the employers to find out if the jobs are still available and what are the requirements. The research on the internet does not often provide any information as to the physical requirements of the job, so she bases that on research from the Dictionary of Occupational Titles.

She does find in some cases employers are hesitant about hiring somebody that has had an on-the-job injury and has filed a workers' compensation claim. Missing work occasionally because of chronic health problems is a concern.

Based on Dr. Stanley's restriction against climbing, Claimant cannot do a job that requires climbing up into a truck.

She believes that Claimant has been diligent in trying to find employment, just not within his restrictions. Although he indicated several times he needed to find a job to provide for his family, he was never able to show her anything to indicate that he was actually trying to find a job other than by word of mouth, so she does not believe that he was diligent in trying to find work.[125] She is looking at the fact that Claimant did not fill out the logs. The fact that he found a job shows diligence to find a job to support his family, but not within his restrictions.

Various DOL Forms show in pertinent part that:[126]

Employer paid Claimant temporary total disability compensation at a weekly rate of $208.94 from 9 Aug 98 to 15 Dec 05.

Claimant reported no employment earnings from 1 Jan 99 to May 2006. He reported a total of $1,000 income during May and August/September 2006 from employment with Leon Langley and Hamshire Fannett. On 25 Jan 07, he reported earning $420.90 from working for B&E from 10 to 12 Jan 07.

Employer filed a first report of injury on 27 Jul 98. The reported injury was a right ankle sprain. Claimant filed a claim for a right knee and foot injury on 3 Sep 98.

[125] Inconsistency in the original.
[126] EX-1-2, 23, 25, 27, 28, 29; CX-1, 3.

Employer filed a notice of controversion on 15 Oct 03.

Various pay records and Claimant's tax returns show in pertinent part that:[127]

In 1994, Claimant earned a total of $15096.09, including:

$310.26	from the Longhorn Club
$667.50	from HRB
$2675.50	from American Citadel
$1502.83	from Industrial Tech

In 1995, Claimant earned a total of $7882.28, including:

$3545.70	from American Citadel
$260.00	from Hollywood Marine
$324.00	from Westaff
$3752.58	from Industrial Tech

In 1996, Claimant earned a total of $6710.08, including:

$2937.52	from International Maintenance Holding
$129.15	from Gulf Coast Industrial Contractors
$682.51	from Burton Shipyard
$52.25	from A-1 American Fence
$2628.15	from Trinity Industries
$280.50	from Solid State Geophysical

In 1997, Claimant earned a total of $6481.21, including:

$588.82	from Brown & Root
$1508.00	from Southeast Texas Ind. Inc.
$682.50	from American Citadel
$2374.09	from Trinity Marine (Baird Ind.)
$1328.00	from Technical Resource

In all of 1998, Claimant earned a total of $9940.10, including:

$276.00	from TDI Halter
$61.75	from Southeast Texas Ind. Inc.
$4711.00	from Gulf Copper
$125.10	from Staffing Specialists
$4766.25	from Employer

In January 2007, Claimant worked 25.5 hours for B&E at a rate of $19.00 and earned $484.50.

[127] CX-5-6; EX-17-18, 24.

ANALYSIS

This case presents not only an issue regarding a medical opinion, but also "mingled elements of fact[s], medical opinion[s] and inference[s]."[128]

Causation – Claimant's Back Injury & Foot Drop

There appears to be no significant dispute as to the nature and extent of, or disability due to Claimant's ankle injury. Claimant concedes that if his back injury is not related either directly or indirectly to his July 1998 fall, he was due no compensation after 8 Apr 03. That presents the threshold question of the case, the origin of Claimant's back injury.

There is no presumption aiding Claimant in the determination of whether or not an injury exists. The burden is on the Claimant to establish that fact by a preponderance of evidence. However, Dr. Stanley testified that when he performed surgery on Claimant's back he saw the pressure on Claimant's nerve root. That observation was corroborated by imaging and physical examinations. Employer does not suggest that Claimant has no back injury. The evidence clearly establishes that Claimant suffered from a lumbar back injury.

The evidence is not at all as persuasive as to Claimant's alleged foot drop. Although he testified to it and either made complaints about it or physically manifested it during examinations, there is highly probative evidence that he did not have foot drop. The physicians were consistent in their opinions that there could be no foot drop with a normal EMG. Dr. Stanley felt the foot drop was Claimant's least objective injury and made it clear he did not treat Claimant for foot drop. Although he thought the mild disk bulge could be seen as causing a foot drop, he would have expected to see more impressive nerve compression. He has never seen a foot drop patient with a normal EMG.

Dr. Barrash noted none of the asymmetric atrophy he would have expected to see with a foot drop. He too has never seen or heard of a foot drop with a normal EMG. He noted inconsistencies with foot drop in his examination of Claimant. He stated unequivocally that Claimant did not suffer from foot drop. Dr. McNeil noted that Claimant demonstrated an inability to dorsiflex during formal testing but was able to do so donning socks performing a heel test. In light of the other inconsistencies in Claimant's testimony concerning the onset of his back pain, Claimant was not a wholly reliable or credible witness. Thus, the weight of the evidence is that Claimant did not have foot drop.

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[128] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Nonetheless, having established the existence of a back injury, Claimant need only offer evidence that the July 1998 fall could have caused it, in order to invoke the presumption of causation. Employer does not dispute that the presumption applies, and in fact, Dr. Stanley's testimony alone fulfills that requirement.

On the other hand, Dr. Barrash's testimony that Claimant's fall injured his ankle but did not cause any back injury. Claimant concedes that unless Dr. Barrash's testimony is essentially discounted in whole, Employer may have rebutted the presumption. I find no reason to disregard his testimony. It is sufficient to rebut the presumption and place back on Claimant the burden to establish causation by a preponderance of the evidence in the record as a whole. Consequently, Claimant has the burden to show that the evidence as a whole establishes his lumbar disc injury was either caused by his fall in July 1998 or by his altered gait and walking on crutches as a result of that fall.

Claimant testified at hearing that on the day of his fall that he went back to work and his back was tense and knotted up. Claimant also stated that when he presented to Dr. Drumwright on the Monday following his Saturday fall he reported that his back hurt and the doctor told him he had pulled some muscles and should rub Icy Hot on it. Yet there is no indication in any of the medical records from Dr. Drumwright that Claimant ever mentioned any back problem, much less that it was diagnosed as a pulled muscle and Claimant was advised to treat it with a topical medication.

Claimant testified at hearing that when prompted by Dr. Beaudry's question if anything else hurt, he mentioned his back. He stated Dr. Beaudry guessed it might be from walking on the crutches and that after a number of tests, Dr. Beaudry told Claimant that when he fell at work it may have seemed like an ankle injury, but was also a pinched sciatic nerve.

On the other hand, the records from Dr. Beaudry actually entered into evidence show no such exchange. Given the passage of time, it appears that some of the reviewing physicians had access to records not entered into evidence in this case. Dr. Barrash testified that in his review of Claimant's records, the first indication that Claimant mentioned back pain was on 17 Aug 99 following an EMG done in March 1999. Dr. Wolens noted in his review that Claimant did not report back pain until the EMG.

Moreover, Claimant told Dr. Bourland that initially his back pain was mild and he believed he had only a sprained ankle, but that over time he experienced more pain. That led to the discovery of a pinched nerve. Claimant stated his sciatic nerve had been pierced during the EMG, forcing him to wear a leg brace for the rest of his life. He said he was suing the doctor. Conversely, Claimant told Dr. McNeil that he had chronic back pain, but that it started right after the EMG study when Dr. Beaudry told him he had a sciatic nerve problem.

Claimant's suggestion that physicians may have focused on Claimant's ankle and failed to document or adequately assess Claimant's reports of back pain is not as compelling as the weight of the evidence, which shows that Claimant did not complain of back pain until the 1999 EMG. Claimant's increased level of pain and decision to complain about it may at that point have been motivated in part by a possible lawsuit against the EMG physician.

In short, I find the records of what Claimant told various doctors to be more reliable than his testimony as to what he now recalls telling them. I did not find Claimant to be a reliable witness as it related to his foot drop.[129] The record indicates Claimant also may have exaggerated his symptoms in general. At the Spine and Sports Medicine Medical Center he was noted to be self-limiting in function and testing, give way in resistive isometric testing, and not give consistent effort. Dr. Barrash also noted inconsistencies.

Although Dr. Stanley testified that Claimant's back injury was caused or exacerbated by the July 1998 or subsequent altered gait and crutches, he also thought it unusual that Claimant would not complain of back pain for more than seven months. He also later clarified the testimony to exclude using crutches or favoring one side versus the other while walking as a cause of Claimant's low back pain and radiculopathy. He noted that he did not specifically know why without any intervening injury the same injury causing Claimant's foot problem would also have led to his back pain.

Dr. Whitsell's collusion that Claimant had a lumbar herniation resulting from the 1998 fall was "by history." Moreover, Dr. Whitsell believed Claimant suffered from foot drop. He appears to have heavily weighed his opinion on the history and subject reports given him by Claimant. Claimant was not a credible witness, particularly as to the timing of reports of back pain, and I accordingly find Dr. Whitsell's opinions less reliable. Dr. Stanley's reliance on Claimant's subjective reports and history equally affects the probative value of his opinions.

Dr. McNeil believed Claimant's work injury to his right ankle either concurrently or derivatively through altered gait and crutch use caused his back and leg problems. Dr. Wolens did not find an intimate connection, but was no more specific. Dr. Hayes thought Claimant had a "pretty normal" MRI that did not corroborate Claimant's complaints.

Dr. Barrash, on the other hand, was unequivocal in his determination that Claimant suffered no more than a simple ankle injury in July 1998, and any back problems are not due to that incident or any subsequent period of walking on crutches.

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[129] *See supra*.

Claimant counters that Dr. Barrash stands alone against all the other physicians in the case in his determination that Claimant was a malingerer. However, the question of whether Claimant is a malingerer is discrete from whether he has shown that it is more likely than not that his back injury is related to his work for Employer.

Claimant alleges that his herniation originated with his fall in July 1998. Yet there is no record of any complaints related to his back until months later. Claimant testified that he complained about his back at his first medical appointment following the fall, but told Dr. McNeil the back pain began at the time of the EMG. While Dr. Stanley thinks that Claimant's ankle injury may have masked the concurrent disc injury, he concedes it is unusual that Claimant had no back complaints for months and that the disc condition could have been degenerative. Moreover, while Dr. Stanley was Claimant's treating physician and followed Claimant more closely than Dr. Barrash, he also appears to more heavily consider Claimant's subjective reports.

Although Dr. Stanley initially stated that Claimant's altered gait and crutch use could be responsible for the herniation, he later retracted that statement. Dr. Barrash rejected the suggestion outright. I weigh those two opinions more heavily than that of Dr. McNeil.

In sum, I find that Claimant has failed to show that it is more likely than not that his herniation was either created or aggravated by his fall in July 1998 or subsequent altered gait and crutch use. Based on the totality of the evidence as a whole it appears equally as likely that his herniation was caused by an intervening event or degeneration over time.

Nature and Extent

The parties did not dispute that as to the ankle injury alone, Claimant reached MMI and was able to return to full duty on 9 Apr 03. Given the finding as to the back injury, the fact that Claimant was unable to return to his original job until reaching MMI, and the absence of evidence of any suitable alternative employment in the interim; Claimant was totally temporality disabled from the date of injury to that date.

Further Medical Care

There is no dispute over past medical care because Employer elected to provide treatment for Claimant's back and related foot conditions.[130] Given the findings as to Claimant's

[130] Claimant also cited Employer's willingness to provide Claimant's back surgery as evidence that the condition was work related. I considered that but did not give it significant weight. Providing medical care in close cases should not commit an employer to concede causation and there may be times that employers later determine they were not required to provide care.

back, Employer is not responsible for providing any future medical care related to the lumbar disc.[131]

Average Weekly Wage

Both sides agree that Section 10(c) applies in this case. The record shows that Claimant's earning capacity at the time of his injury was significantly higher than that of the five years preceding it. He was working as a 1st class welder at $15.50 per hour and there is no evidence to indicate that the court should assume he would not continue on a regular basis in that capacity and at that rate. Although Claimant testified that he actually worked more than 40 hours per week for Employer, his testimony was sufficiently ambiguous to make it equally unfair to presume a standard overtime supplement. Employer's suggestion would grossly underestimate Claimant's earning capacity at the time of his injury. Consequently, the most fair and accurate estimate of Claimant's AWW is $620.00.[132]

Liability for Penalties, Interest, and Attorney's Fees

Claimant seeks penalties because Employer stopped compensation on 18 Apr 03 but did not file a notice of controversion until 15 Oct 03. Employer does not dispute those predicated facts but claims immunity from penalties under state law. Given the finding that Claimant was no longer disabled after 8 Apr 03, there were no disability payments due after 18 Apr 03 upon which to base penalties and that part of Claimant's claim is denied.

On the other hand, the weekly temporary total disability paid by employer to Claimant from the date of injury to the date of full restoration as to the Longshore injury was $208.94. Based on the finding of an average weekly wage of $620.00, that weekly payment should have been $413.33. Thus, Employer underpaid Claimant from the date of injury until 8 Apr 03, and did not controvert the claim until 15 Oct 03. Penalties would apply under the Act in the absence of any valid statutory defense or immunity.

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[131] Had Claimant's back injury been related to his work for Employer, the record is clear that Claimant established an un-rebutted *prima facie* case, through the testimony of his treating physicians, that the continuing pain management care is necessary and reasonable.

[132] Although rendered moot by my findings as to causation I would note that in fairness a similar analysis would have applied to my determination of Claimant's post injury earning capacity, had I found Claimant's back injury to be related to his work for Employer. In spite of Ms. Colenburg's concerns that Claimant's employment with B&E as a welder was not within Dr. Stanley's limitations, the most probative evidence was that Claimant found the job himself, applied for it, was hired, and started work on it, leaving it only because of his illegal drug use. Consequently, I would have found it to be suitable alternative employment and his post injury earning capacity from that point forward to be $19.00 per hour, or $760 per week.

Although Claimant argues that the state statute immunizing the association does not apply because the language includes an exception for claims brought under the state workmen compensation scheme. However, a strict reading of the language in context would appear to indicate that while the legislature may have intended for the association to be subject to state compensation scheme penalties, interest and fees, in the absence of broader language, it does not indicate that the legislature meant to subject the association to other federal compensation fees, penalties, and interest.[133] Claimant also cited language that "the association shall pay the full amount of any covered claim arising out of a workers' compensation claim made under a workers' compensation policy."[134] Again, when read in context, that language appears to identify an exception to an individual claim limit, rather than an intent to subject to other fees, penalties, and interest from all workmen compensation schemes.[135]

Therefore, the state statutory language directly raises the issue of preemption. Although the Board in *Canty* did not directly address the issue and elected to place on Employer rather than the state guarantee association the non-disability obligations of the failed insurer, the dicta in the footnote appears to be a forewarning statement, if not specifically binding precedent. Thus a preemption analysis would be appropriate.

There is little question that the purpose of penalties is to motivate carriers and employers under the act to quickly identify and provide notice of disputes and potential disputes under the law. The penalties do not directly relate to making the Longshore worker whole. Forcing state guarantee associations to pay penalties on behalf of insolvent employers and carriers would do little to motivate employers and carries to controvert claims in a timely fashion. Consequently, the state statute immunizing guaranty associations from paying penalties does not frustrate the purpose of the Act and is not preempted by it.

On the other hand, since under the Act, attorney's fees are essentially available only from the employer and carrier, any state statute immunizing guarantee associations from paying those fees would essentially make them unrecoverable. There would be no motive for any attorney to accept a case under the Act against an insolvent employer and carrier. Clearly, that would frustrate the purpose of the Act and such language is preempted by the Act.

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[133] "This subsection does not exclude the payment of workers' compensation benefits or other liabilities or penalties authorized by Title 5, Labor Code, arising from the association's processing and payment of workers' compensation benefits after the designation of impairment." (Tex. Ins. Code Ann. Art 21.28-C§8(a)).

[134] Texas Property and Casualty Insurance Guaranty Act §5(8). (Tex. Ins. Code Ann. Art 21.28-C§5(8)).

[135] "Individual covered claims … shall be limited to $300,000, except that the association shall pay the full amount of any covered claim arising out of a workers' compensation claim made under a workers' compensation policy." (Tex. Ins. Code Ann. Art 21.28-C§5(8)).

Finally, the purpose of interest is to make the claimant whole for the lost time value for benefits not timely paid. State language immunizing guarantee associations from paying interest would frustrate that purpose and the Act. It is preempted.

Therefore, Employer is liable for interest and fees under the preemption doctrine, but not penalties.

The board has addressed this specific question in *Pelaez v. Levingston Ship Building Company and Texas Property and Casualty Insurance Guarantee Association and Gulf Copper & Manufacturing Corp.*[136] and reached a contrary conclusion. In *Pelaez*, the Board found the state language does not attempt to shield the state guaranty association, and again found no need to reach the preemption question. However, the Board has ruled that its unpublished Decisions and Orders lack precedential value and generally should not be cited or relied upon by parties in presenting their cases.[137] Were that not the case and the state statutory language cited by Employer was found to afford it no protection, Employer would be found liable for penalties, interest, and fees.

ORDER AND DECISION

1. Claimant injured his ankle in the course and scope of Longshore employment with Employer on 18 Jul 98. His average weekly wage at the time of his injury was $620.00.

2. Claimant was temporarily totally disabled from the date of his injury until 9 Apr 03, when his ankle reached maximum medical improvement. At that time his ankle and the other consequences of his 18 Jul 98 no longer prevented him from returning to his original job and he suffered no related disability.

3. Employer shall pay to Claimant temporary total disability benefits from 18 Jul 98 through 9 Apr 03, based on an average weekly wage of $620.00.

4. Employer is liable for penalties for the differential between the disability rate actually paid and that based on the correct AWW from the date of injury until the date of controversion.

5. Claimant's back injury was not a consequence of his 18 Jul 98 accident at work. His claim for disability and future medical care related to his back is denied.

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[136] BRB No. 06-0821 (25 June 2007). The Board's unpublished decisions lack precedential value and generally should not be cited or relied upon by parties in presenting their cases. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Nonetheless, even though the Board elected to not publish the *Pelaez* opinion, the identical nature of the question addressed and the fact that the Board does on occasion cite to unpublished opinions in reviewing, affirming, and remanding cases compels me to follow the Board's *Pelaez* opinion in this case.

[137] *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

6. Employer shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[138]

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

9. 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.[139] 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

[138] 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)

[139] 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 **30 Jun 06**, the date this matter was referred from the District Director.