U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 October 2008

Case No.: 2007-LHC-2114

OWCP No.: 07-175942

In the Matter of:

W.S.,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer

APPEARANCES:

ROBERT E. O'DELL, ESQ.
On Behalf of the Claimant

PAUL B. HOWELL, 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 Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 11 Sep 07. All parties were represented by counsel. On 20 May 08, a hearing

[1] 33 U.S.C. §§901-950.

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:[2]

Witness Testimony of
Claimant
George Shimp
Michelle Edwards

Exhibits[3]
Joint Exhibit (JX) 1-2
Claimant's Exhibits (CX) 1-13[4]
Employer's Exhibits (EX) 1-27

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 was injured on 18 Jul 05 under circumstances that bring him within the jurisdiction and coverage of the Act.

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

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

4. Employer was given notice of the injury on 21 Jul 05.

5. Employer controverted the claim on 20 Sep 06.

6. Claimant reached maximum medical improvement (MMI) on 29 Aug 06.

7. Claimant has never been able to return to his usual employment.

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[2] 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.
[3] Some exhibits appeared to be *en globo* collections of records. Counsel were cautioned that in the case of any lengthy exhibit or the deposition of any witness also testifying live, (CX-2, 4, 9; EX-16, 17, 20, 24) only those pages specifically cited to would be considered a part of the record upon which the decision would be based. Tr.16. Tr.6.
[4] Post hearing, Claimant submitted an additional exhibit when he cited as CX-11, but should have been CX-13. Employer did not object and it was considered as CX-13.
[5] JX-1; Tr 8-15; 47.

8. Claimant worked for Employer from 18 Jul 05 to 1 Nov 05; 15 Jul 06 to 19 Aug 06; 7 Nov 06 to 12 Feb 07; and 15 May 07 to 17 Jul 07.

9. Claimant worked at DirecTV from 30 Apr 07 to 15 May 07 and 30 Jul 07 to 19 May 08.

10. Claimant was paid total disability benefits of $392.04/week from 2 Nov 05 to 14 Jul 06 and 20 Aug 06 to 14 Oct 06.

11. Claimant was paid temporary partial disability benefits of $179.42/week from 15 Oct 06 to 6 Nov 06 and 13 Feb 07 to 14 May 07.

12. As of 20 May 08 Claimant was not totally disabled and had a post injury weekly earning capacity of not less than $318.93.

13. All medical benefits have been provided.

FACTUAL BACKGROUND

Claimant injured his right shoulder on 18 Jul 05. He continued to work until 2 Nov 05 and eventually was restricted from constant repetitive work with that arm. Employer paid him total disability benefits from 2 Nov 05 to 14 Jul 06, when he returned to Employer for restricted duties at no loss of wages. Employer let him go again on 19 Aug 06 and paid him total disability until 14 Oct 06, when it began partial disability benefits. It paid those benefits until 6 Nov 06, at which time it again provided Claimant restricted work at no loss of wages. On 12 Feb 07, Employer once again released Claimant and placed him back on partial disability. Claimant found alternative employment with DirecTV from 30 Apr 07 to 15 May 07. On 15 May 07, Claimant returned to work for employer at restricted duties at no loss of wages. On 17 Jul 07, Employer asked Claimant to operate a hand held air powered sander/buffer called a big machine. Claimant refused, citing his medical restrictions. Employer asked him to attend a demonstration of the tool so it could determine why it was unsafe. Claimant refused and Employer determined it had no other employment for him. Employer did not resume Claimant's disability benefits and Claimant eventually returned to work for DirecTV on 30 Jul 07, working there until he was discharged on 19 May 08.

ISSUES & POSITIONS OF THE PARTIES

Nature and Extent of Disability

Although there are number of periods when Claimant was not working for either DirecTV or Employer, the parties focused on the principle question of Claimant's status after 17 Jul 07. Employer argues that it had provided suitable alternative employment (SAE) with no loss of wages and since Claimant simply refused to work, he is entitled to no disability benefits. Claimant responds that Employer did not offer SAE when it asked him to operate the big machine. Therefore, Claimant is entitled to partial disability benefits.

Average Weekly Wage (AWW)

Notwithstanding the fact that Claimant went from a five-day worker to a four-day worker in year prior to his injury, Claimant argues that Section 10(a) applies. He suggests using a weighted average to account for the distribution of four and five day work weeks and then using a multiplier of 208 for the four-day work days to arrive at an AWW.

Employer counters that since Claimant was a four day worker, Section 10(a) cannot apply and the AWW should be calculated by taking his total earnings and dividing them by the number of weeks worked. Employer submits 49 should be the number of weeks Claimant was deemed to have worked. Claimant responds that in the event section 10(c) is used, Claimant's weeks of work would be 41.32, not 49. Both sides agree that Claimant earned $28,227.23 in the applicable period.

Penalties

Claimant argues that Employer failed to controvert the claim until 20 Sep 06. Employer responds that its LS-208 filed on 20 Jul 06 was sufficient to constitute controversion.

LAW

While the Act is construed liberally in favor of the claimant,[6] 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,[7] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[8]

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[6] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[7] 5 U.S.C. § 556(d).
[8] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

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

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[10] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[11] 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.[12] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[13] Any disability suffered by a claimant before reaching maximum medical improvement is considered temporary in nature.[14]

The question of extent of disability is an economic as well as a medical concept.[15] 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.[16]

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[9] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).
[10] 33 U.S.C. § 902(10).
[11] *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).
[12] *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).
[13] *Trask*, 17 BRBS at 60.
[14] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[15] *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).
[16] *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).

Suitable Alternative Employment

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof shifts to employer to establish suitable alternative employment.[17] Addressing the issue of job availability, the Fifth Circuit 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?[18]

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."[19] The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish that the claimant is physically and mentally capable of performing the work and that it is realistically available.[20] 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.[21] A showing of only one job opportunity may suffice under appropriate circumstances.[22] 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.[23] 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."[24]

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

Average Weekly Wage (AWW)

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[25] which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.[26]

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.[27] Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.[28] But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate.[29]

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

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.[30]

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[25] 33 U.S.C. § 910(a)-(c).
[26] *SGS Control Services*, 86 F.3d at 441; *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).
[27] 33 U.S.C. § 910(a).
[28] 33 U.S.C. § 910(b).
[29] *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).
[30] 33 U.S.C. § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).[31] 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.[32] Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.[33]

Earning capacity takes into account the claimant's ability, willingness, and opportunity to work and reflects what the claimant would have the potential and opportunity to earn absent the work injury.[34]

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,[35] the earnings of other employees of the same or similar class of employment,[36] claimant's earning capacity over a period of years prior to the injury,[37] multiply claimant's wage rate by a time variable,[38] all other sources of income,[39] overtime,[40] vacation and holiday pay,[41] probable future earnings of claimant,[42] or any fair and reasonable representation of the claimant's wage-earning capacity.[43]

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[31] *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).
[32] *See Barber*, 3 BRBS 244.
[33] *Gatlin*, 935 F.2d at 822.
[34] *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).
[35] 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).
[36] 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.
[37] *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).
[38] *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)).
[39] *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).
[40] *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).
[41] *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991).
[42] *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 v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).
[43] *See generally, Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).

Under subsection 10(c), the Administrative Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).[44]

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 . . . [45]

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.[46] An informal conference can satisfy the controversion requirement in terms of terminating the penalty assessment period.[47]

The title of the document is not determinative and if a document contains all of the required information, it may be considered equivalent to a notice of controversion.[48] A notice of suspension of payments may also qualify.[49] The essential elements of the notice include a statement that the right to compensation is controverted, the names of the claimant and employer, the date of the alleged injury, and the grounds for controversion.[50]

In order to controvert the right to compensation, the employer must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice.[51] The employer must file on or within the 14th day after it has knowledge of the injury, not knowledge of the claim.[52] Where the employer fails to file a notice of

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[44] *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).
[45] 33 U.S.C. § 914(e)(2001).
[46] *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978).
[47] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979).
[48] *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 249 (1991), *aff'd on recon. en banc*, 25 BRBS 346 (1992).
[49] *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 79 (1984), *White v. Rock Creek Ginger Ale Co*., 17 BRBS 75, 79 (1984), *rev'g Garner v. Olin Corp.*, 11 BRBS 502 (1979), 11 BRBS 502 (1979).
[50] See 33 U.S.C. § 914(d).
[51] *See Spencer v. Baker Agric. Co.*, 16 BRBS 205, 209 (1984).
[52] *See Jaros v. National Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988); *Spencer*, 16 BRBS at 209; *Wall v. Huey Wall, Inc.*, 16 BRBS 340,343 (1984); *Miller v. Prolerized New England Co.*, 14 BRBS 811, 821 (1981); *Davonport*

controversion, its liability under 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed."[53] 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.[54] The employer should pay the compensation it considers due and controvert the remainder.[55] If it fails to do so, and the claimant ultimately is awarded compensation in the higher amount, the penalty is based solely on the difference.[56] The employer must controvert the claim on specified grounds and cannot merely state that it might later controvert the claim.[57] 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.[58] A notice of controversion or informal conference terminates Section 14(e) penalty liability as of the date of the filing of the notice of controversion or on the date of the informal conference.[59] The penalty attaches to all payments which are "due and unpaid" at the time liability ceases.[60]

EVIDENCE

Claimant testified at trial in pertinent part that:[61]

> He is 33 years old and worked for Employer for about 11 years as a painter. Employer switched from five-day work week to a four-day work week on 12 Nov 06. He also had certain paid vacation and holidays. He did not sell back any of his vacation days or work on holidays the year before his injury. In the year prior to his injury, he missed a substantial amount of time with chronic sinus problems. He also took a leave of absence due to a sick grandfather.

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v. Apex Decorating Co., 13 BRBS 1029, 1041 (1981); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985).

[53] *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).

[54] *Lorenz v. FMC Corp., Marine & Rail Equip. Div.*, 12 BRBS 592, 595 (1980).

[55] *Alston v. United Brands Co.*, 5 BRBS 600, 607 (1977).

[56] *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).

[57] *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 898 F.2d 1088, 1095 (5th Cir. 1990).

[58] *Pruner v. Ferma Corp.*, 11 BRBS 201, 209 (1979).

[59] *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).

[60] *Pullin v. Ingalls Shipbuilding*, 27 BRBS 45, 46 (1993).

[61] Tr. 48-151; 214-223.

He sustained an injury to his shoulder on 18 Jul 05. He was doing a lot of overhead work with a power tool and felt a snap and burning in his right shoulder. He is right hand dominant. He was treated by Dr. Fontana, but continued to work through 2 Nov 05, when Dr. Fontana took him off work.

He had a course of treatment with Dr. Fontana for about a year and had arthroscopic surgery in March 2006. On 29 Aug 06, Dr. Fontana released him with a three percent disability with the restrictions of no constant repetitive work with the right shoulder or climbing or walking at unprotected heights. He could use his right shoulder some and there were no limits on his left shoulder.

When he was released by Dr. Fontana, he was contacted by vocational specialists.

There were two security guard jobs and an Auto Zone job. He applied for the Sweetman and Magnolia, Mississippi Security Police security jobs. They told him he could come and work for them, but by then DirecTV had called. He does not remember when he applied for them because he did so many of them with Ms. Krueger.

Once he left Ingalls, he was trying to find a job. He does not recall turning down a job at Mississippi Security Police in October 2006. They said that the job was kind of physical because he would have to come into contact with the juvenile offenders. He got an offer from Mississippi Security Police for fulltime at $9 or $10 per hour, but he was going to start working with DirecTV.

After the surgery, he had a long course of physical therapy and returned to work for Employer on 7 Nov 06. In February 2007, he aggravated his shoulder and had to return to Dr. Fontana for more treatment. Dr. Fontana wanted to do more surgery, but he decided against it. On 12 Feb 07, his supervisor, George Shimp, said Employer wanted more clarifications on his restrictions. When he got them, Employer told him they had no work for him under those restrictions.

When Employer let him go, he spoke to Sandra Krueger, a vocational counselor. She had many jobs, but the driving distance was too far. He took a job with DirecTV as a utility assistant tech from 30 Apr 07 to 15 May 07. He averaged $480.00 a week. He had good attendance there and felt like the work was something he could do and liked doing. He could have kept doing that utility tech job but for the fact he got called back to work at Employer.

Employer called him back and told him that they found work for him. He returned to Employer on 15 May 07 and worked about two months. He was doing masking and painting and other similar activities. He went through Michelle Edwards, who was the return-to-work coordinator. His restrictions were no repetitive work with

his right shoulder, climbing, overhead work, repetitive work with his right hand, or constant and repetitive work with power tools. He was working for Mr. Shimp on a ship using a needle gun power tool, doing tie-downs on the flight deck.

A needle gun is a straight tool with a set of pins that oscillate in and out and chip the paint or rust off of a surface. It's a vibrating tool, probably three-quarters of an inch wide. It can be used with one hand because it just vibrates. Sometimes he would use his right hand when his left got tired, just to switch off. The majority of the time he used his left hand. Depending on the angle, it would bother his right shoulder. It would swell up. He did not have any significant problem using the needle gun and earned his regular wage and worked his regular hours operating the needle gun.

He also used a buckeye. It is a small surface grinder with a sanding pad of three or four inches. It is a one-handed tool. He would use those two tools 10 hours a day. He used his left hand 75 percent of the time. He also painted.

A big machine is another air-powered tool. It is used for sanding a larger area. It has a wire wheel attachment in addition to a sanding attachment. He has used that machine a number of times during the course of his employment and is extremely familiar with its operation. He had not been asked to use it when he returned to Employer in May to July 2007. The other periods he returned to work at Employer he did masking and touch-up painting.

Whether the big machine has a sander or a wire wheel, it requires two hands. It has two handles, but he has seen some with the second handle removed. The second handle is 90-degree to the trigger handle. The machine is designed for right handed use on the trigger handle. It runs at 3,600 RPM or more.

Before his injury, he would always use his right hand to pull the trigger and left hand to hold onto the second handle. The big machine requires downward pressure to work properly. It was unsafe to use one hand because it will take off and jump out of the hand.

The big machine might come out of the tool room with one or two handles. It's up to the tool room clerk that issues it. If the operator doesn’t use two hands the machine can get away. There are situations when the second handle can get in the way, like in a tight corner. Then a buckeye can be used. He did not refuse to use a buckeye. Generally painters use two hands. It is necessary to put downward pressure on the machine to get it to operate properly if the rust is heavier. He had seen other painters doing the type of work that Employer wanted done and they used two hands.

During his last period of work with Employer, he had received written warnings about his work. One was for failure to follow supervisor instruction because he failed to complete the requisite amount of work. Another was for loafing, when he used the bathroom and got some water and was gone for 10 or 15 minutes. Both warnings were from Shimp.

He had nothing against Mr. Shimp and does not know that Mr. Shimp has anything against him, although Mr. Shimp didn't like the fact that he had limitations. Mr. Shimp did accommodate those limitations. He had worked within his limitations from 15 May 07 up until 17 Jul 07, making $20.00 an hour.

On his last day with Employer, he was told to use a big machine. Mr. Shimp thought he could use it with one hand. He knew couldn't do it. There is no way to do a good job with one hand. He had never seen anyone use it on the deck with just one hand. He did not want to get hurt. He told Mr. Shimp that and that he wanted a union rep and went to call Mike Dailey. Dailey told him Mr. Shimp wanted him to show the safety man what problem he would have in using the big machine with his left hand, but he didn't have to do that. He went back and collected his tools. He never saw the big machine and doesn’t know if it had one or two handles. Shimp told Dailey Employer had no work for him within his medical restrictions.

He has never voluntarily withdrawn from the workforce at Employer.

After he was let go by Employer on 17 Jul 07, he went back to DirecTV as a technician. He had his own van and more responsibilities. The physical demands were the same, but he didn't have a partner. He started on 30 Jul 07. He was installing satellite dishes and satellite systems in homes. They had production requirements of 3.9 points per hour. He got three warnings for not meeting that goal. The warnings were evenly spaced throughout his employment. He was terminated the day before the hearing.

He worked three different times for Employer while on limitations. Some of the work he did was work as an errand runner and some was office work in the administration building. It was work that had to be done by somebody and he was paid his regular salary and worked his regular hours. The other job was masking work. It was necessary to the shipbuilding process and he earned his regular wage and worked his regular hours.

He last saw Dr. Fontana on 11 Mar 08 and got medication and a TENS unit, because his shoulder swells up.

Claimant testified at deposition in pertinent part that:[62]

After he injured his shoulder, he kept working. He mentioned to his supervisor that he had hurt something and was told to go to the clinic. There, he was told to see a specialist. A coworker recommended Dr. Fontana. As of the deposition, he was working for Employer within his limitations, making the same wages and working the same hours.

George Shimp testified at trial in pertinent part that:[63]

He has been a paint foreman for Employer for four to five years. In May 2007, Claimant was assigned to work for him. Claimant brought his restrictions.[64] He considered those restrictions in assigning Claimant to jobs. At first, he had Claimant running a needle gun on some tie-downs on the flight deck and cleaning them up. He then painted what he had stripped. Claimant seemed satisfied with the job assignments.

He gave Claimant a warning for loafing. Claimant was talking and milling around. It did not have anything to do with his right shoulder. He didn't have anything against Claimant.

On 17 Jul 07, the job changed and he needed Claimant to work on a big machine on the deck in the berthing area. It was about 30 yards wide and 50 or 60 yards long. He needed Claimant to run the flat deck so it could be painted and the bunks could go in. The deck had rust.

The big machine is a pneumatic tool for sanding the deck. It is 14 pounds in weight and can be operated with one hand. The machine says it has 6000 max RPM. It does not have two handles on it. It is a standard machine that is checked out from the tool room and never has two handles. When the machine is issued by the tool room, it has only one handle.

He has used the big machine. One hand would hold the machine and operate the trigger. He would not need to put a second hand on the machine while working on a deck. A second hand might be used for working on a bulkhead. If too much pressure is applied, the machine could stop.

He wanted Claimant to use a sanding disk. The torque isn't bad. It’s like a buffer. He believes Claimant could safely and reasonably operate it without doing any overhead work, any constant repetitive work with his right shoulder, any climbing

[62] EX-20 (as cited, see n.3).
[63] Tr. 172-213.
[64] CX-11, p.3.

or walking at unprotected height, or any constant repetitive work with his right shoulder.

When he gave Claimant the assignment, Claimant said his restrictions wouldn't allow him to use that machine or the buckeye sander. He agreed only to use a needle gun up on the flight deck.

He sent Claimant to the medical staff and Michelle Edwards called. She suggested Claimant demonstrate why he could not use the machine. He set up a meeting with his boss and the safety man to figure out exactly what Claimant could do. Claimant was going to demonstrate why he couldn't use the big machine and they would show him how he could use it. When Claimant arrived he refused to operate either the big machine or the buckeye. He never told Claimant he could use the buckeye instead of the big machine. When Claimant refused he told him to gather up his tools and meet him on the ground.

Claimant never used the buckeye sander while working for him.

He has never seen painters using big machines with two handles on them. He has seen chippers use them with a handle on.

Claimant would have used the machine all day, but would have taken breaks. He understood Claimant couldn't use his right arm and presumed he could use the big machine with his left arm.

90 percent of people are on their knees, put one arm on the deck, and use the machine with the other arm. They support their weight with one hand and then they use the other hand to run the machine.

George Shimp's written statement shows in pertinent part that:[65]

Claimant said he could not perform his work assignment for the day because of his medical restriction. He sent Claimant to the hospital to get more details. Claimant returned and again said he could not perform his assignment. They went to the painting superintendent and general foreman and Claimant told them he could not perform his assignment. In the meantime, he had discussed the situation with Michelle Edwards, who believed Claimant should be able to do the work with his left hand. They went to the work place and met with the safety man so that Claimant could try the big machine and buckeye sander and demonstrate why he could not use them. Claimant refused to participate. When they met on the ground, two union stewards were there.

[65] EX-21.

Michelle Edwards testified at trial in pertinent part that:[66]

She is a registered nurse and the return-to-work coordinator for Employer. She facilitates returning to work for employees returning to work from work-related or industrial injuries. Employer goes strictly by what the physician defines as what the work activity is or the restrictions are. She only sees employees when they are assigned permanent restrictions from their physician.

She worked with Claimant when he was called back in May 2007. He was able to do some work on a ship within the restrictions given to him.[67] He was limited from overhead work, constant repetitive power tool work with his right shoulder, and climbing or walking at unprotected heights. Claimant was not restricted from using his right arm at all.

The restrictions are provided to the supervisors, who are instructed to work people within their restrictions. Claimant was assigned to Mr. Shimp and there were no problems until his last day of work.

On 17 Jul 07, Claimant told his supervisor that he could not or would not do a job. The supervisor followed the protocol by sending Claimant back to West Bank Hospital. Claimant then came to her. She reviewed all of the work activity restrictions and tried to discuss them with Claimant, but he was on the phone with someone and just kept telling her no. She called Mr. Shimp and found out what the tool was. She asked Joe Walker, the representative from Department of Labor, who visits employees that are on permanent restrictions to look at the situation. She also spoke with Johnny Pope, the safety man at the shipyard, and asked what he knew about the big machine and if he could make sure that Claimant knew how to use it.

She thought the job that was being assigned to Claimant was suitable. There was an alternate way for him to complete the job. He could have used a smaller unit or a smaller tool. She did not discuss that with his supervisor and Joe Walker, or Mike Dailey, that he not be required to use the big machine, but use a smaller tool. That's just the normal way they would approach that problem to get the job done but accommodate the restrictions. Mr. Shimp said he could have worked Claimant somehow with other tools, but Claimant didn't even try to use the tool he was assigned to use. She does not know if that option was communicated to Claimant.

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[66] Tr. 151-171.
[67] CX-11, p.3.

Mike Dailey testified at deposition in pertinent part that:[68]

> He is a union steward in the paint department at Employer's workplace. In July 2007, Claimant told him that he had come off of worker's compensation and that Employer wanted him to operate a big machine. Claimant added that he had restrictions that prohibited him from using vibrating tools with either hand and Employer wanted him to give the big machine a test.
>
> He called Claimant's general foreman and asked why they were working Claimant beyond his restrictions. The general foreman said he would talk to the immediate foreman.
>
> A day or two later, Claimant called again and said Employer was pushing him to test the machine. He talked to the foreman, who said that the only job he had for Claimant was to operate the big machine. He told the foreman it takes two hands to run a big machine, but the foreman said that was the only job they had. He was standing on the ground when Claimant and Mr. Shimp walked up. Claimant said that he had been told to leave.
>
> Claimant had already been told to leave when he found out about a meeting to test the big machine. He did not tell Claimant not to try to work with the machine. The safety man told him he thought Claimant could use the big machine, but he told the safety man that was up to Claimant. He saw the restriction sheet and knew that Claimant was limited only on one side. Had he known Claimant's job depended on it, he would have told Claimant to try it, and worried later if it was unsafe.
>
> A buckeye can be operated with one hand. The big machine is one of the most powerful hand tools they operate weighing 30 to 40 pounds. He believes OSHA requires it to have two handles, but has seen some with a handle removed and there are probably people using them that way. Depending on the job, there are safety issues with operating it with one hand. The immediate supervisor is in the best position to determine that. He can't say if the machine could be safely used one handed on a wide open floor, because he has never tried to use it with one hand.
>
> It could be operated on a very short term with one hand but not for a ten hour shift. If the machine is going around or up and down things, or on an uneven surface, it requires two hands. He would not use the machine one handed on a flat surface. Using the machine with one hand is unsafe.

[68] CX-10.

Dr. Andre Fontana's records indicate in pertinent part that:[69]

He first saw Claimant on 18 Aug 05. Claimant reported that he injured his shoulder on 18 Jul 05 and suffered from shoulder pain and popping. His impression was that Claimant had an impingement or possible labral injury and he ordered an MRI.

An MRI on 22 Sep 05 disclosed mild impingement with trace bursitis, a fine intra-laminar tear, and slight attenuation to the long head of the biceps tendon.

He saw Claimant again on 28 Sep 05, scheduled him for physical therapy and gave him an injection. He released Claimant to full duty.

Claimant returned on 2 Nov 05, received an injection, was continued on physical therapy, and was taken off work.

On 26 Jan 06, Claimant continued to report pain and catching in the shoulder. They discussed surgery and Claimant was given another injection. Claimant was kept off work.

On 21 Mar 06, Claimant reported no improvement and was scheduled for surgery. Claimant was kept off work.

On 22 Mar 06, Claimant had arthroscopic surgery on his shoulder. He was scheduled for physical therapy and kept off work.

Claimant attended physical therapy following surgery. By 6 Jun 06, he had improved range of motion and strength but still suffered from some pain. He was kept off work and scheduled for an MRI.

An MRI on 21 Jun 06, disclosed trace bursitis and partial tearing.

On 6 Jul 06, he cleared Claimant for light duty with no overhead work, no climbing or walking on unprotected heights, and no constant repetitive work with the shoulder.

On 1 Aug 06, Claimant reported he bumped his shoulder and had pain. He was taken off work for 31 Jul 06 and 1 Aug 06. He was also limited to no lifting over 25 pounds, no constant or overhead work with his right arm, and no climbing.

[69] CX-2; EX-16.

On 29 Aug 06, he determined Claimant had reached MMI at 3% impairment to the whole body. Claimant's permanent restrictions were no climbing or walking on unprotected heights, no overhead work, and no constant repetitive work with the arm.

On 1 Feb 07, Claimant reported intermittent pain, but that he was able to tolerate light duty. He was given Flexeril.

On 13 Feb 07, Claimant reported some increase in pain and was kept on light duty.

Claimant saw him on 2 Apr 07 with tightness in the shoulder. He gave Claimant a refill of Flexeril.

Joe Walker's records indicate in pertinent part that:[70]

Claimant was injured on 18 Jul 05, continued to work for a time, but after some medical treatment eventually was taken off work by 3 Nov 05. By 29 Aug 06, after surgery and rehabilitation, Claimant was deemed to be at MMI and cleared for work with restrictions against climbing, overhead work, and constant repetitive work with his right arm.

Employer asked Claimant to return to work on 6 Nov 06 and he was assigned to monitor Claimant's return.

On 13 Nov 06, Claimant reported he was doing light painting, masking and clean-up. Claimant mentioned there was a question about his ability to operate an air powered surface grinder. He concluded that Claimant's use of the grinder was not completely ruled out by his restrictions, but if after a time there were problems because the grinder required dominant right hand activity, Claimant could raise the issue with his supervisor and safety.

On 21 Nov 06, Claimant had no substantial complaints and reported Employer appeared aware of his restrictions.

On 12 Dec 06, Claimant had no substantial complaints related to his work restrictions.

On 30 Jan 07, Claimant reported that following the holiday break, he had taken additional time off to repair damage to his house. He had no substantial complaints related to his work restrictions.

[70] EX-20 (as cited, see n.3).

On 13 Feb 07, Claimant was placed off work by Employer, but returned again on 15 May 07 with essentially the same restrictions. Claimant was assigned to use the needle gun and had some concerns about being able to do so. Claimant left, pending clearance from his doctor. Dr. Fontana clarified the restriction to prohibit constant repetitive use of power tools. Claimant returned to work using the needle gun and voiced no complaints about his restrictions.

On 8 Jun 07, Claimant indicated he was able to use the needle gun but avoided the buckeye, as it required repetitive motion of the arm and shoulder.

On 17 Jul 07, Claimant contacted Michelle Edwards to discuss the use of the big machine. Claimant had been apprehensive about using the buckeye and would be unable to use the big machine, which requires two hands. Edwards communicated with the foremen about whether Claimant could safely operate the big machine. Jerry Eubanks from safety, discussed the subject and they decided to meet at the work place, see and operate the machine, and make a determination. Claimant went to the meeting but declined to take part in operating the machine. The safety rep indicated that the machine could be operated on the flat deck safely with one hand.

Claimant stated that his restriction of no repetitive work applied to his right shoulder and his restriction of no constant repetitive work with power tools applied to both arms. He agreed that he could use the needle gun, but not any tools with repetitive torque forces. Claimant stated he believed Employer had other light duty within his restrictions, but was not offered it.

Claimant's supervisors believed he could safely operate the machine with one hand.

Sandra Kreuter's records indicate in pertinent part that:[71]

On 11 May 06, she was assigned by DOL to develop a vocational rehabilitation program for Claimant.

On 4 Oct 06 Mississippi Security Police indicated they had a position for 32 hours per week. Claimant stated he had applied for and felt he could do a security job for that company.

On 11 Oct 06, Claimant stated he had applied for two openings with Magnolia Security paying $9 to $10 per hour. Sweetman Security in Biloxi had two Day

[71] EX-17; CX-4 (as cited, see n.3).

Guard openings and Claimant indicated he would bring his application to the Sheriff for a background check.

On 17 Oct 06, Claimant stated he had turned in his application to Sweetman Security and applied at Lowes for loss prevention. He indicated the Auto Parts store had no openings.

Tommy Sander's records indicate in pertinent part that:[72]

On 1 Sep 06, he was retained by Employer to conduct a vocational assessment and labor market survey for Claimant. He met with and interviewed Claimant, discussing Claimant's medical restrictions. He found the following employment opportunities for Claimant:

As of 29 Aug 06:

Security guard for Sweetman Security paying $8.00 per hour
Security guard at Magnolia Security
Delivery driver for Auto Zone paying $7 to $8 per hour.

As of 4 Oct 06:

Security guard for Magnolia Security paying $8.00 per hour
Security guard Singing River Hospital paying $8.17 per hour
Cashier for Lowes paying $7.75 per hour.

On 1 Mar 07, he conducted a follow up survey and found the following employment opportunities for Claimant:

Security Guard at Wal-Mart paying $8.00 per hour
Delivery driver for Auto Zone paying $7.00 per hour
Security guard for Mississippi Security Police paying $8.00 per hour.

On 4 Oct 07, he conducted a follow up survey and found the following employment opportunities for Claimant:

Security guard for Sweetman Security paying $8.00 per hour
Gas station clerk paying $6.00 per hour
Food bar runner for Barhill's paying $6.00 per hour.

[72] EX-18; CX-4 (as cited, see n.3).

A surveillance video shows in pertinent part that:[73]

Claimant driving, sitting in, standing around, and walking around a DirectTV truck.

Claimant's pay records indicate in pertinent part that:[74]

Claimant earned $28,227.23 in wages from Employer in the year preceding his injury. Employer implemented a four day work week on 15 Nov 04. During the eight hour day part of that time, Claimant missed approximately 14 days for medical problems, took paid vacation for 12 days, and took 6 days to be with an ill family member. During the ten hour day part of that time, Claimant missed approximately 23 days for medical problems.

Various DOL Forms indicate in pertinent part that:[75]

On 20 Aug 07, 20 Sep 06, and 13 Oct 06, Employer filed notices of controversion.

On 24 Oct 06, 4 Aug 06, and 20 Jul 06, Employer filed notices of final payment based on Claimant's return to work. On 13 Oct 06, Employer filed a notice of final total disability payment based on Claimant's reaching MMI and suitable alternative employment.

Claimant earned the following wages from Brewster and Associates:

30 Apr 07 – 14 May 07	$960.00
19 Aug 07 – 23 Aug 07	$480.00
2 Sep 07 – 6 Sep 07	$480.00
23 Sep – 27 Sep 07	$193.20

Employer's medical clinic records indicate in pertinent part that:[76]

On 21 Jul 05, Claimant was seen for a shoulder injury. He was given medication and work restrictions of 25 pounds lifting for one day.

Claimant returned to the clinic on 27 Jul 05 with worsening shoulder pain. He was restricted to no overhead work and no heavy tools for seven days and sent for an orthopedic follow up.

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[73] EX-23.
[74] CX-1; EX-4.
[75] CX-3; EX-2, 5-13, 22.
[76] EX-15.

On 12 Feb 07, Claimant was still restricted from constant repetitive work with his right shoulder. Employer had no work within those restrictions as of 13 Feb 07.

On 15 May 07, Claimant remained restricted from constant repetitive work with his right shoulder, but Employer had work for him.

Employer's work restriction forms indicate in pertinent part that:[77]

On 16 Aug 06, Claimant was restricted from constant repetitive work with his right shoulder. Employer had no work for him within those limits.

On 2 Apr 07 Claimant remained subject to that restriction.

Employer's medical leave records indicate in pertinent part that:[78]

Claimant suffers from a chronic sinus condition that will result in him missing work 1-2 times per month for 2-3 days each time.

Letters between Employer and Claimant indicate in pertinent part that:[79]

Claimant missed work in the year preceding his injury due to broken finger bones.

Claimant was returned to work with Employer on 7 Nov 06.

Claimant was released from work in February 2007 due to a general work force reduction.

Claimant was returned to work with Employer on 15 May 07.

Photos show in pertinent part:[80]

The big machine is about a foot long and has can have the second handle removed. The buckeye has a handle designed for one hand.

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[77] CX-5.
[78] CX-6.
[79] CX-8.
[80] EX-26; CX-13.

ANALYSIS

Average Weekly Wage

At the time of his injury, Claimant was a four day worker. He also had an extended period of time as a five day worker during the year preceding his injury. It is mathematically possible to apportion his earnings over those periods and arrive at average daily wages for each. However, there is no statutory basis for Claimant's suggestion that Section 10(a) should be extrapolated to arrive at a 208 multiplier for a four day worker daily wage. Thus, I find that Section 10(a) cannot be applied and instead apply Section 10(c).

Section 10(c) requires a review of the relevant evidence to the record to determine the most fair and reasonable approximation of Claimant's earning capacity at the time of his injury. Both Counsel agree that Claimant earned $28,227.23 during the year prior to his injury, but disagree on the number of weeks that Claimant actually was able and willing to work and should be used to arrive at an average annual wage.

Claimant testified that he took all of his paid vacation and holidays and did not sell any days back. He noted that he missed a substantial amount of time due to a chronic sinus problem. His doctor estimated that Claimant would, in the long term, miss 2-3 days 1-2 times each month because of his sinuses. A letter from Claimant's counsel indicates that Claimant missed some days in the year prior to his injury because of broken fingers. The pay records indicate Claimant missed six days to be with a family member and he testified he took time to be with an ailing grandfather. The record also indicates Claimant missed time to repair his house from damage following Hurricane Katrina.

Claimant suggests using only the days/weeks for which he was actually paid to reflect his reasonable earning capacity and argues that the $28,227.23 should be divided by 41.32 to arrive at a fair weekly wage. Employer responds that Claimant could have worked 49 weeks and that should be the divisor.

The house repair, grandfather, and broken finger periods do not appear to be likely to recur and should not act to decrease Claimant's AWW. On the other hand, Claimant's suggestion unreasonably increases Claimant's AWW in that it ignores the impact of his chronic sinus problems, which his own doctor predicted would cause him to regularly miss work. Since the sinus condition is not related to the injury, time missed because of it should not be included in Claimant's potential wage earning time. It is not clear whether the doctor was assuming a four or five day work week when he opined that Claimant would miss 2-3 days of work 1-2 times each month. However, assuming Claimant would have only one episode each month and that episode would lead to 3 days missed work he would miss 36 days a year. Giving Claimant the benefit and assuming a five day work week, the 36 days equals 7.2 weeks. Thus, Claimant's divisor of 41.32

weeks is understated by 7.2. A reasonable estimate of the period that Claimant was able and willing (in terms of Section 10(c)) to work for the time before his accident would be 48.52 weeks.

Dividing the total earnings of $28,227.23 by 48.52 weeks yields a weekly wage of $581.76.[81] Thus, the Claimant's AWW was $581.76.

Nature and Extent of Disability

The Big Machine and SAE with Employer

There is no suggestion that Claimant was never able to return to his original unrestricted work. The primary issue in this case was whether Employer provided suitable alternative employment when it asked him to operate the big machine.

There is no real question that Claimant's medical limitations restricted him from constant repetitive work with his right arm and shoulder. Claimant's union steward was some what equivocal. He conceded that the degree of safety related to operating a big machine with one hand would depend on the circumstances and that the supervisor would be in the best position to determine that. On the other hand, he ultimately opined that using the machine one handed, even on a flat surface was not safe and he would not do it.

Claimant's supervisor, Mr. Shimp, testified that he believed Claimant could safely operate the big machine with one hand as long as he was just doing the flat deck. He observed that the machine is normally issued with just one handle. He also stated 90 percent of workers operate the machine on their knees, put one arm on the deck, and use the machine with the other arm. They support their weight with one hand and use the other hand to run the machine. Moreover, Mr. Shimp apparently anticipated the possibility that Claimant would not be able to operate the big machine, since he was prepared to allow Claimant to use the buckeye instead, although he never explained that to Claimant.

Employer carries the burden of establishing that the use of the big machine was within Claimant's restrictions. Even if the machine could be operated as suggested by Mr. Shimp, Claimant would still be supporting and shifting his weight on his right arm throughout the work shift. That appears to be contrary to the restrictions. I find that Employer did not establish that its assignment of Claimant to operate the big machine was suitable alternative employment.

[81] Multiplying by 52 to reach the average annual wage and re-dividing by the same number results in the same figure as the AWW.

Other Periods

Given the inability to return to his original job and the absence of evidence of suitable alternative employment, Claimant was temporarily totally disabled from 2 Nov 05 to 14 Jul 06. Employer provided SAE at no loss of wages from 15 Jul 06 to 19 Aug 06. Claimant returned to temporary total disability on 20 Aug 06 and remained so until reaching MMI on 29 Aug 06.

The record shows that there were security jobs available at $8.00 per hour as of 29 Aug 06. Claimant's testimony as to his job search was not entirely clear but he did state that Magnolia Security told him that he could come work for them. I find that the rehabilitation reports and job market surveys establish the consistent availability of suitable alternative employment (SAE) in the form of security guard positions. Those positions provided a weekly post injury wage earning capacity of $320.00 and were available throughout the periods of 29 Aug 06 to 6 Nov 06 and 12 Feb 07 to 30 Apr 07. From 6 Nov 06 to 12 Feb 07, Employer provided SAE at no loss of wages.

As of 30 Apr 07, I find Claimant's position with DirecTV was SAE and provided him a weekly post injury earning capacity of $480.00. On 15 May 07, Employer once again provided SAE at no loss of wages until 17 Jul 07. I find the record does not establish SAE for the period between 17 Jul 07 and 30 Jul 07, and Claimant was permanently totally disabled for that period.

However, I find that his re-employment with DirecTV on 30 Jul 07 did establish SAE with a weekly post injury earning capacity of $480.00. Finally, I find that the weight of the evidence does not show that Claimant's termination from DirecTV in May 2008 was a consequence of his original injury and therefore Claimant remains permanently partially disabled with a weekly post injury earning capacity of $480.00.

Penalties

Employer's LS-208 filed on 20 Jul 06 includes the names of Claimant and Employer, the date of injury, and Employer's intent to cease benefits because of Claimant's return to work. It is sufficient to satisfy the requirements for controversion and the claim was controverted on 20 Jul 06.

ORDER AND DECISION

1. Claimant's average weekly wage (AWW) at the time of his injury was $581.76.

2. From 2 Nov 05 through 14 Jul 06, Claimant was temporarily totally disabled and Employer shall pay Claimant compensation for that period based on his AWW.

3. From 15 Jul 05 through 19 Aug 06, Claimant suffered no economic disability, as his post injury earning capacity was equal to or greater than his AWW.

4. From 20 Aug 06 through 28 Aug 06, Claimant was temporarily totally disabled and Employer shall pay Claimant compensation for that period based on his AWW.

5. On 29 Aug 06, Claimant reached MMI and from that date through 6 Nov 06, was permanently partially disabled. Employer shall pay Claimant compensation for that period based on his AWW and a weekly post injury earning capacity of $320.00.

6. From 7 Nov 06 through 12 Feb 07, Claimant suffered no economic disability, as his post injury earning capacity was equal to or greater than his AWW.

7. From 13 Feb 07 through 29 Apr 07, Claimant was permanently partially disabled. Employer shall pay Claimant compensation for that period based on his AWW and a weekly post injury earning capacity of $320.00.

8. From 30 Apr 07 to 15 May 07, Claimant was permanently partially disabled. Employer shall pay Claimant compensation for that period based on his AWW and a weekly post injury earning capacity of $480.00.

9. From 16 May 07 through 17 Jul 07, suffered no economic disability, as his post injury earning capacity was equal to or greater than his AWW.

10. From 18 Jul 07 through 29 Jul 07, Claimant was permanently totally disabled. Employer shall pay Claimant compensation for that period based on his AWW.

11. From 30 Jul 07 to present and continuing, Claimant has been permanently partially disabled. Employer shall pay Claimant compensation for that period based on his AWW and a weekly post injury earning capacity of $480.00.

12. Employer first controverted the claim on 20 Jul 06. Employer shall pay penalties on the above amounts in accordance with Section 14(e) until that date.

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

14. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[82]

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

16. 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.[83] 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.

ORDERED this 6th day of October, 2008 at Covington, Louisiana.

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PATRICK M. ROSENOW
Administrative Law Judge

[82] 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).

[83] 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 the date this matter was referred from the District Director.