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Issue Date: 13 June 2008

CASE NOs.: 2007-LHC-00044; 2007-LHC-00045

OWCP NOs.: 15-048097; 15-049030

In the Matter of:

K. S.,

Claimant,

v.

BREWER ENVIRONMENTAL INDUSTRIES, LLC,

Employer,

and

SEABRIGHT INSURANCE COMPANY,

Carrier.

and

BIG ISLAND STEVEDORING, INC.,

Employer,

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION,

Carrier.

Appearances:

Preston Easley, Esq.,

For the Claimant

Richard C. Wootton, Esq.,

For Brewer Environmental Industries, LLC/Seabright Insurance Company

James P. Aleccia, Esq.,

For Big Island Stevedoring, Inc./Signal Mutual Indemnity Association

BEFORE: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

K.S. (“Claimant”) brings this claim under the Longshore and Harbor Workers’ Compensation Act, as amended (the “Act”), 33 U.S.C. § 901 *et seq.* against C. Brewer Environmental Industries, LLC (“Brewer”) and Big Island Stevedoring, Inc. (“BIS”).

A formal hearing was held in Honolulu, Hawaii on November 29, 2007,¹ at which all parties were present and represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge’s Exhibits (“ALJX”) 1-10, Claimant’s Exhibits (“CX”) 1-35, Brewer Exhibits (“EX”) 1-15, and BIS Exhibits (“RX”) 1-24. TR at 12, 13, 20, 24, 31, 74, 75, 94, 213. At the close of the hearing, the record was left open for the submission of post-trial briefs, which were filed by Claimant, Brewer, and BIS, without objection, and became part of the record on March 3, 2008, as ALJX 11, ALJX 12, and ALJX 13, respectively. TR at 214-217.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. The Act applies to Claimant’s claim.
2. Claimant suffered a specific injury on November 10, 2004.
3. At the time of his November 10, 2004 injury, Claimant was employed by Brewer.
4. Claimant allegedly suffered an injury on May 21, 2005.
5. At the time of his alleged May 21, 2005 injury, Claimant was employed by BIS.
6. Claimant timely noticed and filed his claims.
7. Claimant’s lower back condition has not reached maximum medical improvement.
8. Claimant is not now working and cannot perform any work at this time.
9. Claimant’s average weekly wage was \$1,917.17 as calculated under Section 10(c) of the Act, and currently he has no retained earning capacity. The maximum weekly compensation rate appropriate for that wage for all periods of temporary total disability is \$1,047.16.

TR at 31-38. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

ISSUE FOR RESOLUTION

The sole unresolved issue in this matter is whether Brewer or BIS is the last responsible employer liable for compensation and medical benefits for Claimant’s lower back condition.

¹ References to the hearing transcript are indicated by “TR.”

SHORT ANSWER

BIS is liable to Claimant as Claimant's subjective symptoms and the objective medical evidence show that Claimant's low back injury permanently worsened as a result of his work in 2005 for BIS.

DISCUSSION

The following findings of fact and conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing, and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it. *See Banks v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968); *Todd v. Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988). Furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *Id.* However, the opinion of a claimant's treating physician is generally to be accorded greater weight since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Amos v. Dir., Office of Workers' Compensation Programs ("OWCP")*, 153 F.3d 1051, 1054 (9th Cir. 1998), amended by 164 F.3d 480 (9th Cir. 1999)(quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.1989)); *see Pietrunti v. Dir., OWCP*, 119 F.3d 1035, 1043 (2nd Cir. 1997).

I. FINDINGS OF FACT

Claimant's Prior Injuries

Claimant is a forty-five year old longshoreman, born on November 22, 1962. TR 77. In October 1983, Claimant began working as a longshore laborer and crane operator for McCabe, Hamilton & Remy ("McCabe"). TR at 77.

On July 25, 1995, Claimant injured his lower back when he slipped on oil while coming off a top block. TR at 98-99. The next day after the accident, Dr. Kumora took x-rays which showed that Claimant had spurs at the L4 and L5 level with mild fourth disk space narrowing. TR at 99-100. Dr. Kumora explained to Claimant that he had moderate degenerative disk disease at the L4-L5 and L5-S1 level. TR at 100. Four months later, Claimant returned to work in November 1995. TR at 101.

Claimant did not recall, but medical records indicate that he experienced back pain from 1995-1999. TR at 101-105. On July 11, 1997, Claimant strained his back while climbing down onto an operator platform. TR at 102. On June 11, 1999, Claimant was driving a crane when someone hit the emergency stop button, causing Claimant to fly forward and hit his head and neck on the crane cab window. TR at 104.

Claimant further testified that he and his wife live on a ranch on the Big Island of Hawaii and his wife breeds Welsh Arabs, quarter-horses and thoroughbreds on 1,000 acres leased from Brewer.² TR at 120; RX 10 at 37; RX 13 at 149.

On October 29, 2004, Brewer sent notice to Claimant that its business would “cease operations” on Hilo on or about December 31, 2004 as recommended alternatives to Claimant should he become unemployed. EX 1 at 100109.

The November 10, 2004 Injury

In June 2003, Claimant left McCabe and began working as a longshore laborer on the Big Island for Brewer. TR at 78. Around midnight on November 10, 2004, while working for Brewer, Claimant injured his back when he pulled on a four-inch rope line while tying up a barge. TR at 80. When Claimant turned to put the line on the bit, he twisted such that he felt a “zinging sensation” in his lower back. TR at 80, 82. Claimant described the pain as immediate and as feeling “almost like getting stabbed with a knife.” TR at 80, 82. Claimant experienced radiating pain down his right leg into his right foot. TR 82. The pain worsened as Claimant worked the remainder of his shift. TR at 106. The following day Claimant had difficulty getting out of bed and standing up straight. TR at 106.

Claimant was initially treated by Dr. Ekechuku on November 11, 2004. TR at 114. Dr. Ekechuku prescribed Celebrex and a muscle relaxer and referred Claimant to Dr. Barry Blum, an orthopedic surgeon. TR at 106-107. After seeing Dr. Ekechuku, Claimant also saw physical therapist Carol Myrianthis, RPT, (“P.T. Myrianthis”) on the same day, but the history he gave her did not mention pulling on a line or feeling a zing in his back. Ex 14 at 100565. He told her that he did not recall the cause of his low back pain except that he worked long hours on Thursday, November 9, 2004. *Id.*

Dr. Barry Blum, a board certified orthopedic surgeon, first examined Claimant on November 17, 2004. TR at 108-109. In his November 17, 2004, report, Dr. Blum noted Claimant was experiencing lower back pain, sciatica going down his right leg, and mild incontinence. Ex 14 at 100566; EX 33 at 11; RX 6 at 8. Claimant’s history includes an industrial low back injury from 10 years ago associated with left-sided sciatica which Claimant fully recovered from with no residuals. EX 14 at 100566. Dr. Blum’s physical examination of Claimant revealed a seated straight leg raising (“SLR”) being negative bilaterally. Ex 14 at 100567. Dr Blum also observed that x-rays taken during the examination revealed degenerative disk disease at L4-L5, more pronounced on the left, with some localized scoliosis and large spurs at L4-L5. RX 6 at 9. Dr. Blum described Claimant’s symptoms as suggestive of a herniated disk on the right side at the L5-S1 level. EX 14 at 100567; RX 6 at 9. Dr. Blum prescribed Anexsia with one re-fill and Naproxen along with physical therapy. *Id.* Claimant testified that during his November 17, 2004, examination, Dr. Blum told him that he might need back surgery. TR at 90. Dr. Blum’s Nov. 17, 2004, medical report makes no mention of any surgery referral, however. EX 14 at 100566-67. In fact, at that time, Dr. Blum issued a work release for Claimant

² In February 2005, Matson Terminals, Inc. purchased Brewer and became BIS. TR at 43. It is uncertain whether Claimant’s 1,000 acre lease was also transferred to BIS from Brewer. *See* TR at 43; EX 1 at 100109.

indicating that Claimant was expected to return to regular duty work on December 1, 2004. EX 14 at 100570.

On November 24, 2004, Claimant underwent an MRI scan of his lumbar spine. EX 14 at 100568-69; RX 8 at 25. Dr. Roger Fellows interpreted the MRI results which showed a degenerative change with endplate edema and desiccation and narrowing of Claimant's L4-5 disk space with relatively broad-based annular bulge, more prominent on the left than right. EX 14 at 100569. The MRI also showed desiccation with minimal broad-based annular bulge at the L5-S1 level. *Id.*

Dr. Blum testified that he interpreted the MRI as showing a disk bulge not a frank herniation in November 2004 at the L4-5 location. EX 33 at 23-24. Dr. Blum further explained that the term herniation includes both an acute herniation and a disk bulge. EX 33 at 24. He opined that Claimant's herniation or disk bulge in November 2004 was caused by a combination of Claimant's arthritis or the degenerative disk disease and the scoliosis and spurs were due to the years of use, abuse, working, and whatever else went on in Claimant's life over the years but they were asymptomatic until the November 10, 2004, pulling on the line at work. *Id.* Stated differently, Dr. Blum further opined that Claimant's November 10, 2004 injury was a combination of a muscle strain on Claimant's degenerative disk situation and an irritation of the nerve root to an arthritic area of Claimant's spine due to the dehydration or desiccation of Claimant's disk at L4-5 that resulted in the flattening of the disk and a corresponding disk bulge that puts pressure on the nerve roots and causes or contributes to the pain. EX 33 at 25-26.

Claimant testified that during his visit on November 29, 2004, Dr. Blum went over the results of the MRI as he agreed with Dr. Fellows interpretations and advised Claimant that he was a surgical candidate. TR at 187; RX 6 at 10. Claimant testified that Dr. Blum told him he had two options, physical therapy or surgery. TR at 125-126. Claimant wanted to try physical therapy. TR at 125-126. Claimant testified that he did not schedule surgery because he was "fearful" and in a "state of denial and disbelief." TR at 188. Dr. Blum's Nov. 29, 2004, medical report makes no mention of surgery, however. EX 14 at 100571.

The medical report does state that Dr. Blum believed that Claimant had degenerative disk disease, most likely the result of years of hard work as a longshoreman. *Id.* It repeated that Claimant's recent injury earlier in the month "was a combination of a muscle strain and an irritation to an arthritic area of his [Claimant's] spine." *Id.* At that time, Dr. Blum expected physical therapy to help and projected that Claimant could to return to work on December 20, 2004, with some work restrictions. *Id.* Dr. Blum issued Claimant a work release stating that he was expected to return to work at light duty on December 20, 2004. EX 14 at 100572.

Dr. Blum referred Claimant to physical therapist P.T. Myrianthis. TR at 108-109. Claimant's initial physical therapy evaluation with P.T. Myrianthis took place on December 2, 2004. RX 12 at 74. At that time, P.T. Myrianthis found Claimant experiencing level 10 (out of 10) pain which radiated to his right foot. EX 14 at 100573.

P.T. Myrianthis saw Claimant again on December 7, 2004, and found him feeling better and being less sore. EX 14 at 100574.

P.T. Myrianthis also noted that Claimant was feeling “OK” with a mild ache, level 2 on December 9, 2004. EX 14 at 100578. That month Claimant had approximately six physical therapy sessions, during which he used therapeutic exercises to gradually increase his strength from 30 repetitions to 50 using free active exercises, free weights, tubing, and a pulley. EX 14 at 100580-81, 100585; RX 12 at 76.

P.T. Myrianthis wrote to Dr. Blum on December 20, 2004, summarizing her tests of Claimant including finding him in pain with right and left side range of motion bending at 20 degrees, and SLR positive in the lying position but negative in the seated or sitting position. CX 33 at 56-57; EX 14 at 100582-83.

On December 22, 2004, Dr. Blum wrote to Seabright’s Steve Wiper that Claimant told him that his back was feeling better but not all better and acknowledging that there was no light duty work at Brewer at that time. EX 14 at 100586. Dr. Blum further noted that Claimant’s SLR was negative at 90 degrees bilaterally with Claimant seated. EX 14 at 100586; RX 6 at 11; RX 11 at 46. Dr. Blum testified that Claimant approached him at that time and expressed his desire to return to work with no restrictions. CX 33 at 15. Dr. Blum also opined and suggested that Claimant would be able to return to full capacity work on January 3, 2005, and suggested that his physical therapy continue in January once a week. *Id.*

Claimant attended physical therapy on December 23, 2004, and reported feeling aching due to having sat too long. EX 14 at 100589-90.

In a letter dated December 27, 2004, referencing her evaluation of Claimant on December 23, 2004, P.T. Myrianthis stated Claimant’s pain level varied from 2-5, in contrast with the level 10 pain reported during his initial visit. Ex 14 at 100591; RX 12 at 74, 76. The letter further states that Claimant noted increased aches with compression “i.e., sitting greater than an hour.” *Id.* The letter also noted normal and pain-free lumbar range of motion. Ex 14 at 100591; RX 12 at 76. The December 27, 2004 letter concludes by stating that:

Functionally, [Claimant] is able to tolerate a host of isometric, isotonic and resistive trunk exercises. He can lift, on the pulleys, 30 pounds overhead and functional[ly] lift up to 50 pounds from 6 inches off the floor up to 48 inches, which is about shoulder level with excellent execution. To date, he will continue therapy. He is supposed to start back to work on 01/03/05. . . .

Ex 14 at 100591.

Claimant disagreed with P.T. Myrianthis’ description of his pain level and range of motion as of December 23, 2004. TR at 185. Claimant testified that P.T. Myrianthis did not ask him questions regarding his pain level. TR at 147. During the physical therapy sessions, he said they would only talk casually about how he was feeling that day. TR at 184. Claimant described the sessions as “a speedy thing,” where there were other patients being treated at the same time and P.T. Myrianthis mainly “hooked him up to machines.” TR at 183-184. Claimant testified that he continued to have significant pain after the November 10, 2004, injury and denied having normal and pain-free range of motion in his back. TR at 147, 185.

Claimant testified that there was no change in his condition from November 10, 2004, until December 22, 2004. TR at 139-140. He claims he remained in extreme pain, had trouble standing up, difficulty getting out of bed, and trouble urinating. TR at 140. Even though Claimant had not fully recovered from the accident, he asked Dr. Blum to release him, because he wanted the opportunity to try to return to work. TR at 139-140. Claimant explained that he comes from a family of athletes and that it is “not [their] nature ... to admit defeat or not give an honest effort at trying to overcome an adverse situation.” TR at 95.

When Dr. Blum released Claimant to heavy duty unrestricted work starting January 3, 2005, Dr. Blum was aware that Claimant’s work was going to require occasional lifting, pushing, pulling, kneeling, climbing, and very heavy work all of which can contribute to the progression of degenerative disk disease on a cumulative trauma basis. Ex 33 at 29-30.

Claimant’s Return to Work (January 3, 2005, - May 21, 2005)

Claimant returned to full-duty work at Brewer on January 3, 2005. TR at 81. He testified that on return he worked in the yard locking and unlocking chassis and containers, rolling up reefer cords, opening and closing containers, and driving to, from, and during work. RX 13 at 129-31. Claimant considered the work to be heavy duty and not light duty stevedoring longshoring responsibilities. *Id.* Claimant also testified that when he returned to work in January 2005, he worked on both sides of the Big Island sometimes having to travel one side to the other to work a double shift, 13-16 hours, in the yard on one side and on a vessel parked at port on the Hilo side of the island, 6-7 days a week. RX 13 at 131-34, 141. Claimant testified that it would take him an hour each way to drive to work in Hilo where he started each work day and some days when he worked on Kawaihae across island it would take three hours travel time each way. RX 13 at 140. He further stated that extended time sitting in a car and standing for prolonged periods exacerbated his back pain. RX 13 at 140-41. Claimant’s vessel work involved unfastening containers, using lashing chains and binders, and unloading vehicles. RX 13 at 137. Claimant compared the yard work and vessel work as equally aggravating. *Id.* At one point in mid-to-late February 2005, Claimant rented an apartment in Hilo so he could reduce his amount of driving and sitting in the car each work day. RX 13 at 156-57.

Claimant attended physical therapy on January 7, 2005 and reported feeling “OK.” EX 14 at 100595-96.

In February 2005, Matson Terminals, Inc. purchased Brewer and became BIS. TR at 43; EX 1 at 100109. Claimant testified that he returned to full-duty work with no restrictions because no light-duty was available. TR at 145; RX 13 at 172. During this time, Claimant performed the same heavy physical labor that he had been doing at Brewer before the accident. TR at 149; RX 13 at 156. When Claimant returned to work, he testified that he felt a new dull pain but not the same zinging sensation that he experienced on November 10, 2004. TR at 81-82. Claimant’s pain increased on the days he worked, but he testified that this increase was only temporary. TR at 88.

On February 18, 2005, Dr. Blum wrote to Mr. Wiper again and reported that he saw Claimant—who had returned to full duty work, 6-7 days per week—on January 3, 2005, and that Claimant reported chronic back pain, more right-sided sciatica pain, and that work made him tired. EX 14 at 100598. Dr. Blum further stated that Claimant’s mother was ill in January so he could only attend one physical therapy session. *Id.* The letter noted that Claimant had to drive a considerable amount because sometimes he worked in Hilo and sometimes in Kawaihae, on the other side of the big island. *Id.* Dr. Blum expressed his suggestion that Claimant only work five days a week so he could take off Fridays to attend physical therapy and also have Sunday as a second day off. *Id.* Dr. Blum also prepared a treatment plan for Claimant, finding his range of motion not relevant, but referring Claimant to continued physical therapy. EX 14 at 100597.

On February 25, 2005, Claimant attended physical therapy and P.T. Myrianthis noted that he reported pain at a level 8-10 with additional pain radiating from sciatica on both his right and left legs. EX 14 at 100601.

On March 18, 2005, Dr. Blum wrote to Mr. Wiper that he had examined Claimant and his exam revealed that Claimant’s “pain was not only in his low back but it went down the back of his left leg to the top of his calf.” EX 14 at 100604; RX 11 at 46. Claimant testified that he recalled reporting this to Dr. Blum in mid-March 2005 but he also thought the symptom started in mid-to-late December 2004. RX 13 at 146-47. Dr. Blum also reported for the first time SLR tests positive bilaterally in the seated position. EX 14 at 100604; RX 11 at 46. At that time, Claimant reported that due to more driving over the past week, additional work, or some combination of those factors, his back became too sore to continue working so he had to stop on March 17, 2005, and has been unable to work since then. *Id.* As of March 18, 2005, Claimant reported that he started to feel a little better. *Id.* Dr. Blum further reported that he had become unsure how long Claimant would be able to continue to work at his current job and requested that Mr. Wiper appoint a nurse case manager for Claimant and that a vocational rehabilitation might be indicated for Claimant. *Id.*

Claimant recalled missing a week or two of work due to his increased back pain after March 17, 2005. RX 13 at 147.

On March 28, 2005, Dr. Blum wrote Dr. Terry Smith about introducing him to Claimant. EX 14 at 100609. Dr. Blum also forwarded his notes to Dr. Smith with the letter. *Id.* The letter to Dr. Smith stated, for the first time, that Claimant and Dr. Blum “are wondering if you think he [Claimant] might be a surgical candidate.” *Id.* Dr. Blum referred Claimant to orthopedic surgeon Dr. Terry Smith.³ TR at 82-83; EX 33 at 8.

³ Dr. Blum referred Claimant to Dr. Smith because he was no longer a practicing back surgeon. TR at 83. Dr. Blum continued as Claimant’s treating physician until February 2006. RX 6 at 21. Claimant continued to attend physical therapy sessions with P.T. Myrianthis. Claimant had 19 physical therapy sessions from November 11, 2004, until May 20, 2005. RX 11 at 63. The physical therapy sessions ended in May because of an insurance dispute. RX 11 at 61.

On April 11, 2005, Dr. Blum wrote to Mr. Wiper that he saw Claimant earlier in the day at his office and that Claimant needed a refill of his pain medication, Anexsia, which was last filled 5 months earlier. EX 14 at 100618. Dr. Blum reported that Claimant missed work on 4/9, 4/11, and would miss it on 4/18/05 to meet with Dr. Smith. *Id.*

Claimant's surgical consultation with Dr. Smith took place on April 18, 2005. EX 14 at 100622-23; RX 7 at 23; TR at 83. Dr. Smith's April 18, 2005, report rated Claimant's pain level from 7-10 and Claimant reported having low back pain radiating into both legs. *Id.* In the report, Dr. Smith noted that Claimant's SLR test was positive in the sitting position for back pain alone. EX 14 at 100622; RX 11 at 47. Dr. Smith opined that Claimant had advanced disk degeneration at the L4-L5 level that was rendered symptomatic while on the job and recommended Claimant undergo back surgery. EX 14 at 100622-23; RX 7 at 23; TR at 83. The report solely referred to the line-pulling incident at Brewer and did not mention any specific or cumulative injury sustained at BIS in 2005. RX 7 at 23-24.

On May 20, 2005, P.T. Myrianthis evaluated Claimant for the last time and found many of his tests within normal limits. EX 14 at 100633-34. P.T. Myrianthis also noted that Claimant told her that he had decreasing ache in his low back with his current treatment program and a current pain level that varied from 3-4. *Id.* The report concluded by stating that Claimant has not complained of any radicular pain for several weeks. *Id.* Claimant recalled, however, experiencing radicular leg pain emanating towards his hip and down his leg in April and May 2005. RX 13 at 158, 168. He further believed that his symptoms also remained unchanged from November 10, 2004, through May 21, 2005, and his continued employment from January 3, through May 21, 2005, did not worsen the symptoms in his low back. RX 13 at 149, 165, 168.

On May 23, 2005, Dr. Blum wrote to Mr. Wiper to communicate that he was refilling Claimant's Anexsia pain prescription which had recently run out. EX 14 at 100632. Dr. Blum also reported that Dr. Smith told Claimant "that [Claimant's back] surgery might be helpful." *Id.* Dr. Blum also reported that Claimant had tried to continue working but could only get through half a day on May 21, and was not able to go back to work. *Id.* Dr. Blum further opined that it was time for Claimant to stop working and rest. *Id.*

About three days after he stopped working in May 2005, Claimant alleges that his pain level returned to the same level it was before he returned to work on January 3, 2005. TR at 86. Claimant did not report any new injuries to his supervisor and believed that his work did not cause any permanent change in his lower back pain. TR at 86, 87. Claimant explained that he did not stop working because the work worsened his back condition. TR at 191. He stopped working because he continued to experience the same pain he had since the accident. TR at 191. Claimant explained that on May 21, 2005, "the towel was thrown in" and he said, "I've had enough." TR at 164. Claimant testified that he did not sustain any specific injury during the period of employment from January 3, 2005, until May 21, 2005. TR at 191-192.

Dr. Blum's last examination of Claimant was on August 31, 2005. EX 33 at 21. At that time, Dr. Blum reported that there was no doubt in his mind that Claimant's complaints are genuine and are related to the November 9, 2004 injury and that he needs and would likely benefit from surgery that Dr. Smith has proposed. EX 33 at 21-22.

On February 20, 2006, Dr. Blum was asked if he agreed with Dr. Scarpino's findings from his 12/9/05 examination of Claimant and Dr. Blum opined that he did agree with Dr. Scarpino. RX 11 at 52. In his deposition, Dr. Blum further stated that he agreed with Dr. Scarpino's treatment recommendations, including lumbar spine surgery. EX 33 at 19-20. Dr. Blum then suggested that Claimant's ongoing care be provided by a spine surgeon and he discontinued his role as Claimant's treating physician. *Id.*

The very next day on February 21, 2006, Claimant filed a claim of injury indicating the date of injury was from 1/3/05 to 5/21/05 with injury to his back from repeatedly bending, lifting, and climbing while working at BIS. RX 11 at 52. He testified that his level of pain ranged from level 7 to 10 and never changed from November 11, 2004 through May 2005, despite medical record notations which show a fluctuation from as low as pain-free up to level 10 over the same time period. RX 13 at 151-52.

After Dr. Smith left Hawaii, Dr. James London, an orthopedic surgeon, examined Claimant in California on December 21, 2006. TR at 83. During his only examination of Claimant Dr. London found: negative SLR tests bilaterally, a normal gait, normal thoracic kyphosis and lumbar lordosis, no paraspinal muscle spasm, a slight lumbar scoliosis, forward flexion ROM - 70 degrees with pain, lateral bend - 30 degrees bilaterally, extension - 30 degrees, with no thoracic or lumbar tenderness or sacroiliac joint tenderness, and no sciatic notch tenderness. RX 11 at 53.

Dr. London referred Claimant to Dr. Rick Delamarter for surgery. TR at 84. He was examined on August 1, 2007, by Dr. Gallina, a colleague of Dr. Dilamarter's, who found Claimant with "significant pain with forward bending, little bit less pain with extension and some pain with external rotation." CX 31 at 92. Dr. Gallina also found Claimant on medications including ibuprofen for the pain as well as citalopram since late 2006. *Id.* Claimant also tested positive on the SLR of his right leg at 80 degrees with pain occurring in his back. *Id.* Dr. Galina assessed Claimant as having back and left leg pain greater than right leg pain for the last 2.5 years. *Id.*

On November 1, 2007, Dr. Delamater performed back surgery on Claimant, fusing the L4-5 and L5-S1 levels. TR at 84.

Through the date of trial, Claimant claims to have incurred without reimbursement \$13,357.11 in travel expenses related to his medical treatment in California in 2007. TR at 90-94; CX 35. These travel expenses include 4 trips (July 2, July 31, September 17, and October 22, 2007), two of which involved Claimant and a guest who assisted him. *Id.*

Medical Testimony

Dr. Blum

Dr. Blum was Claimant's treating physician from November 17, 2004, until February 2006. TR at 108-109; RX 6 at 21. Dr. Blum is formerly a board certified orthopedic surgeon. EX 33 at 7.

Dr. Blum testified that he believes in the concept of cumulative trauma – that specific acts of lifting, pushing, pulling, bending, stooping, and climbing contribute to the degeneration of people’s spines over time and that heavier work accelerates the progression of degenerative disk disease in people more than sedentary-type activities. CX 33 at 48-49.

Dr. Blum testified that, as of the last time he saw Claimant in December 2004, Claimant’s low back condition was due to a cumulative trauma of his years of heavy lifting at work plus the specific incident of November 10, 2004. CX 33 at 44-45. He also opined that he released Claimant to work in January 2005, knowing that Claimant still had a low back problem, that he “had to watch out for himself,” and that he was subject to risks. CX 33 at 45. Dr. Blum also agreed that “one way to look at” Claimant’s low back condition in October 2006, was that Claimant’s work after March 31, 2005, caused at least a minor but permanent increase in his level of disability. CX 33 at 46-48. Dr. Blum further testified that life is cumulative and that on a cellular level three more cells die when one with a bad knee or bad back hypothetically gets up in the morning, goes to the bathroom, and lies down again. CX 33 at 48 and 51.

Dr. Blum further testified that Claimant did not sustain a new injury as a result of his work activities in 2005. CX 33 at 46-47; RX 14 at 208, 248. Dr. Blum testified that he did not observe any conclusive evidence that would lead him to attribute Claimant’s disability to something new that happened during 2005. RX 14 at 236-237. Dr. Blum opined that Claimant’s employment from January 3, 2005, through May 21, 2005, did not increase and permanently worsen Claimant’s symptoms in his lumbar spine because he did not have any evidence to make him believe otherwise. CX 33 at 62; RX 14 at 252. He explained that a patient who has chronic problems may have increased pain on particular days but that does not mean the patient sustained a new injury. RX 14 at 236-237. Dr. Blum also testified that he believed Claimant to be candid and forthright in reporting his complaints each time Dr. Blum evaluated him. EX 33 at 20.

Up through his February 18, 2005 office visit with Claimant, Dr. Blum testified that he was not recommending back surgery to Claimant or that Claimant be referred to a spine surgeon as he believed Claimant was a person with a good understanding of his body who was ready to return to work. CX 33 at 31-33, 36-37. Dr. Blum further opined that it was his belief and hope that over time Claimant’s low back condition would diminish without the need for surgical intervention. CX 33 at 32.

After Claimant returned to work in January 2005 and Dr. Blum saw him on February 18, 2005, Claimant reported experiencing chronic back pain with work getting him more tired and more painful to the point that Dr. Blum recommended that Claimant actually reduce the number of days per week that he worked from 6 or 7 to 5 days per week. CX 23 at 33; CX 33 at 32.

Dr. Blum agreed that Claimant’s reported chronic back pain on February 18, 2005, was associated with his lifting, pushing, and similar types of work activities, aggravating Claimant’s underlying pre-existing degenerative disk disease. CX 33 at 49.

Dr. Blum testified that by the time he prepared his March 18, 2005, medical report, he noted for the first time that Claimant experienced radiation of pain into his left leg and a positive SLR test. CX 33 at 38-39. Dr. Blum further testified that March 2005 was the first time that

Claimant was uncertain whether he could continue to work and unable to complete an entire workday due to his symptoms. *Id.*

For the first time on March 18, 2005, Dr. Blum reported that Claimant needed a referral to a spine surgeon, due to his symptomatology. CX 33 at 40-41. Dr. Blum testified that Claimant's disability status and need for surgery solely related to the November 10, 2004, injury. EX 33 at 19; RX 14 at 209, 210, 252. Dr. Blum's medical reports from March 18, April 11, and August 31, 2005, described Claimant's condition as relating to the November 10, 2004, injury and made no reference to a specific or cumulative injury sustained at BIS in 2005.⁴ RX 6 at 14, 16, 19.

Dr. London

Dr. James T. London is a graduate of medical school at the University of California in San Francisco in 1968. CX 29 at 78-83. He became board-certified with the American Board of Orthopedic Surgery in 1975 and remains a member of the American College of Surgeons. *Id.* Currently, Dr. London is a staff surgeon, orthopedic surgery, at the Little Company of May San Pedro Hospital in San Pedro, California. *Id.* He presented "Total Hip Arthroplasties" at the San Pedro Hospital in October 2005. *Id.* Dr. London testified that 5-10 percent of his medical practice over the past two years involves forensic evaluations and, of that amount, approximately 70-75 percent is defendant or employer-oriented. RX 19 at 604. I take administrative notice that Dr. London regularly appears as an expert orthopedic medical witness in cases originating most often in the Long Beach area of California, and that he has worked on cases with BIS' counsel on numerous occasions.

Dr. London first met Claimant on December 21, 2006, and issued a report dated December 26, 2006. TR at 83. Dr. London testified that when he was brought into this case, he spent 3 hours and forty-five minutes reviewing all of Claimant's medical records, x-rays, and scans. RX 19 at 610. In addition, he spent another hour with Claimant on December 21, 2006 obtaining a history and conducting a physical exam before spending some more time preparing the report. *Id.* Dr. London testified that there was a question as to Claimant's future treatment given his location in Hawaii and Dr. London's in Southern California. RX 19 at 610-11. Dr. London stated that Claimant indicated a willingness to return to Southern California for future treatment but his back surgery was performed on November 1, 2007 by Dr. Rick Delamater on referral from Dr. London. TR at 84.

Dr. London noted in his December 26, 2006 report that Claimant's condition solely resulted from the November 10, 2004, incident and the natural progression of that injury, without any aggravation or acceleration due to his work in 2005. CX 34 at 53; RX 11 at 55. In his December 26, 2006, report, Dr. London noted that x-rays of Claimant's lumbosacral spine taken on December 21, 2006, were unchanged from those taken on November 17, 2004. RX 11 at 54. Dr. London recommended Claimant undergo surgery at the L4-L5 level and attributed Claimant's need for surgery solely to the November 10, 2004, injury alone. RX 11 at 55.

⁴ Though some of the medical reports and deposition testimony of the doctors refer to the date of injury as November 8 or November 9, 2004, the evidence shows that the injury occurred soon after midnight on November 10, 2004. *See also* Stip. No. 2.

Dr. London testified that Claimant's back has never been the same since the November 10, 2004, injury. RX 19 at 631. Dr. London opined that the November 10, 2004, injury at Brewer permanently aggravated or worsened Claimant's pre-existing degenerative changes in his low back at the L4-5 level. CX 34 at 37 and 53; RX 19 at 632. He found no evidence that suggested Claimant's work activities between January 3 and May 21, 2005, caused a worsening, acceleration, or aggravation of Claimant's condition. RX 11 at 55; RX 19 at 634, 648. Dr. London opined that Claimant's need for surgery and any medical treatment is attributable to the November 10, 2004, injury. RX 19 at 648.

Dr. London opined that Dr. Blum's decision to allow Claimant to go back to work as a longshoreman without restrictions in January 2005 was within the standard of care and Dr. London agreed with the decision. CX 34 at 38-39.

When asked about the term "micro-trauma," Dr. London testified that he doesn't use it or relate to it as he believes it is a legal term and, like the term "cumulative trauma," neither are medical terms found in Dorland's dictionary. CX 34 at 24. He further testified that to determine whether one has temporarily exacerbated the pain versus permanently exacerbated the injury, a doctor would look at whether the subjective symptoms returned to the pre-activity level and, secondly, whether there are objective medical diagnostic testing changes. CX 34 at 25-26.

Dr. London testified that he agreed that Claimant's work activities from after January 1, 2005, could contribute to cumulative trauma to the spine or worsen his low back condition. CX 34 at 27 and 39. Dr. London further testified that Claimant told him in December 2006 that when he stopped working in May 2005, he still suffered from chronic low back pain that radiated into his lower extremities but that his condition was no worse after working from January 3, 2005, through May 2005. CX 34 at 29 and 42. Dr. London further opined that he did not see any inconsistencies between Claimant's description of his condition to his doctors before he saw Dr. London in December 2006. *Id.*

Brewer Experts

Dr. Scarpino

Dr. Jon H. Scarpino is a board certified orthopedic surgeon specializing in spinal problems. EX 12 at 6-7. He testified that he practiced as an orthopedic surgeon, performing lumbar fusion with diskectomies thousands of times from 1974 through 1998, when he lost part of his vision and stopped performing surgery. Ex 12 at 7-9, Ex 1 attached to depo. transcript (Ex 12) at 1-2. On behalf of Brewer, Dr. Scarpino conducted an Independent Medical Examination of Claimant on December 9, 2005, while Claimant was awaiting approval for surgical intervention. EX 5 at 100378-394; EX 12 at 11.

Dr. Scarpino opined that Claimant's low back condition substantially worsened as a result of his employment in 2005. Ex 5 at 100392-393; EX 12 at 43. Dr. Scarpino based his opinion on the fact that Claimant was released to full duty work in January 2005 but was unable to work after May 21, 2005, had back spasms again, had increased pain, required the use of stronger medications, and was not as responsive to therapy as he had been before. *Id.* Claimant

noted no improvement in his back pain or leg pain from his last day of work on May 21, 2005, to the time of his examination with Dr. Scarpino. EX 5 at 100379. On December 27, 2004, however, Claimant's condition had improved as he was stronger and could lift a significant amount of weight and he was moving much better. EX 12 at 32-33.

Dr. Scarpino further opined that medical data indicates that heavy duty work increases the development of degenerative disk disease faster than sedentary work due to the stresses that are placed on the disks. EX 12 at 16. He further explained that the disk is an avascular structure meaning that after one reaches maturity, it has no blood supply so it is totally dependant on diffusion of nutrients in and waste products out for repair. *Id.* Dr. Scarpino further opined that the disk is subject to very high stresses and that when one lifts things, those stresses are multiplied so that as one ages there is more force on the disk, without the ability to improve or repair itself, so the disk tends to wear out more quickly with heavy lifting. *Id.*

Dr. Scarpino also testified that he believes in the medical concept of repetitive or cumulative trauma meaning that each incident of pushing, pulling, lifting, climbing, twisting, kneeling, stooping, the types of activities that are associated with heavy-labor occupations, tends to accelerate the development of degenerative disk disease. EX 12 at 17, 27. He also opined that normal work activities, even if it is not particularly heavy but involving some lifting, pushing, pulling, etc., can also cause an asymptomatic degenerative disk disease to become symptomatic. EX 12 at 17-18.

Dr. Scarpino tested Claimant for seated and supine SLR and found that he was able to raise his legs to 60 degrees bilaterally but with lumbosacral back pain at the end range on both sides for both tests. EX 5 at 100388-389. Dr. Scarpino also found that reverse SLR for Claimant produced lumbosacral discomfort in the prone position. EX 5 at 100389. Dr. Scarpino further found that, in the seated position, Claimant's manual muscle testing revealed generalized decrease in strength in the lower extremities, which Dr. Scarpino observed to be due to pain, most notable in the quadriceps and hamstrings. EX 5 at 100388. He also noted that Claimant report that he believed that his buttock muscles had atrophied and were much smaller than they were before and that he lost 15 pounds with his pain and inactivity. EX 5 at 100389.

Dr. Scarpino also opined that Claimant suffered progressive "microtrauma" from his employment in 2005 as Claimant's longshore work was very heavy work. EX 12 at 27, 140, 153. Dr. Scarpino explained that "microtrauma" physiologically happens to a degenerative disk when performing heavy labor. EX 12 at 154. Dr. Scarpino elaborated that "every activity of daily living causes microtrauma.... Every piece of tissue in your body, your musculoskeletal system undergoes injury every day with activities of daily living." EX 12 at 167-8. This microtrauma is "normally repaired on an overnight basis;" however, with "heavy work ... the amount of microtrauma will be greater than your body's ability to repair it overnight," and "if you continue to do that on a daily basis over a period of months and years, the tissue will degenerate." EX 12 at 168.

Dr. Scarpino's evaluation of Claimant involved his review of the November 24, 2004, MRI of Claimant's low back, which Dr. Scarpino opined showed significant degeneration disk disease at L4-5 with modic end plate changes and disk desiccation with associated posterior disk

bulging. EX 5 at 100379; EX 12 at 19-20. Dr. Scarpino further opined that Claimant's degenerative disk disease, as of November 24, 2004, was not caused solely by one lift on November 9, 2004, but, instead, developed over time. EX 12 at 19-22. Dr. Scarpino based his testimony regarding cumulative trauma on the fact that Claimant came to work in January 2005 with degenerative disk disease ("DDD") in his lower back and the 2005 work resulted in increased pain and use of pain medications to an increased degree such that Claimant has been unable to return to work since May 2005. EX 5 at 100393; EX 12 at 19-20.

Dr. Scarpino found Claimant unable to return to his former position as a longshoreman, incapable of any type of repetitive lifting, bending, or carrying, restricted to at most sedentary type of work, with mixed sitting and standing on a part-time basis only, and agreed with Dr. Smith that Claimant was a candidate for surgical intervention. Ex 5 at 100392-393. In addition, Dr. Scarpino found Claimant not yet at maximum medical improvement and opined that it would probably take a year following back surgery until his condition was permanent and stationary. *Id.*

Dr. Scarpino disagreed with the opinions of Drs. Henrickson and Davenport who opined that Claimant's work from February 1, 2005, through May 20, 2005, did not aggravate, accelerate, or worsen Claimant's low back condition but, instead, caused only a temporary aggravation of symptoms. EX 12 at 41-43. Dr. Scarpino explained that Claimant's aggravation was not temporary because he never returned to his December 23, 2004, functional level, when he could lift 30-50 pounds, had a negative SLR test in the seated position, did not require narcotics, and was moving freely without pain. EX 12 at 25, 31-33, 37-38, 40-45. Instead, after Claimant's work stopped on May 21, 2005, he was unable to lift 30 pounds overhead or 50 pounds from floor level up to his shoulder and Claimant stated that he was unable to carry out 90 percent of his former activities normally. EX 12 at 45-46. Also, on examination in December 2005, Dr. Scarpino found Claimant having persistent tightness in his muscles, limitations of motion consistent with ongoing inflammation, decreased sensation in his lateral calf and thigh, decreased strength. Ex 12 at 47-48.

I find Dr. Scarpino's opinion that Claimant's low back condition substantially worsened as a result of his employment in 2005 logical, credible, and consistent with the objective evidence, particularly as to Claimant's increased pain, decreased strength, inability to work, and his positive seated position SLR test after his 2005 work contrasted with a negative test on November 17, 2004, when examined by Dr. Blum. *See* EX 5 at 100388-389, 393; EX 12 at 25, 36-37, 40-41, 49.

Dr. Mauro

Dr. Anthony James Mauro is board-certified in internal medicine, neurology, and psychology but practices general neurology with a subspecialty interest in movement disorders. EX 13 at 5-6 and depo ex. 1, pp. 1-5, attached to EX 13. On behalf of Brewer, Dr. Mauro conducted an Independent Medical Examination of Claimant on December 8, 2006. Ex 6 at 100395-402, 100395A-C; EX 13 at 9.

Claimant reported to Dr. Mauro that he asked Dr. Blum if he could go back to work in January 2005 because his philosophy was to “suck it up” and continue to work if possible. EX 6 at 100395. Claimant described his work from January through May 2005 as six to seven day work weeks, performing full strenuous duties as a longshoreman, and sometimes driving four hours in a day between his home in Ka’u Kawaihae and Hilo. *Id.* Claimant also told Dr. Mauro that he thought his condition in December 2006 was “the same” as it was following the injury of November 9, 2004. *Id.* Claimant denied any medical evaluation or treatment for low back pain beginning in 1996 and continuing up until the industrial injury of November 2004. Ex 6 at 100396.

Claimant described extensive aching, burning, and sharp pain in his lower back extending into the buttocks, anterior hips, and lateral thighs to about the level of the knees, with numbness in the feet involving both dorsal and plantar surfaces. Ex 6 at 100396. Claimant further reported that he is incapable of washing a car, doing lawn work, or making a bed, due to his pain and stiffness. *Id.* On examination, Dr. Mauro found Claimant with demonstrated discomfort in the lying supine position with active SLR to a minimal degree of 10-20 degrees bilaterally. EX 6 at 100397. There were no reported findings for a seated SLR test. *Id.*

Dr. Mauro opined that Claimant’s condition worsened as a result of his employment in 2005. Ex 6 at 100398-401; EX 13 at 13. Specifically, Dr. Mauro commented that, in December 2004, Claimant was better but not all better yet was released to return to full-duty work per Dr. Blum’s opinion. EX 6 at 100398; EX 14 at 100586, 100604. By March 2005, Claimant’s back pain was such that it was unclear how much longer he could continue working. *Id.* Dr. Mauro opined that there was a change between December 2004 and March 2005, consistent with progression of the underlying DDD problem which pre-dated the one-time injury in November 2004. EX 6 at 100398-401. Dr. Mauro further concludes that based on reports at his December 2006 examination, Claimant is not at the same level of function in December 2006 as he was in December 2004 and his low back DDD condition has progressed further. EX 6 at 100399-401. For example, in the context of Claimant’s continuing work in 2005 as a longshoreman, Dr. Mauro opined that Claimant’s low back pain increased, requiring narcotic prescription, surgical referral, consideration of surgery, and finally cessation of work activities in May 2005. Ex 6 at 100400. Stated differently, Dr. Mauro further opined that Claimant’s activities between January and May 2005 contributed to the cumulative trauma in his lumbosacral spine, its attendant pain, and Claimant’s perception that he could “not go on.” Ex 6 at 100401.

At his deposition, Dr. Mauro also explained, “[i]t’s a physiological imperative that his [Claimant’s] heavy work as a longshoreman between January and May of 2005 aggravated his condition.” EX 13 at 13. Dr. Mauro explained,

The degenerative spine disease is a wear-and-tear phenomenon. It develops ... as a result of recurrent movement, activity, and resulting trauma to the lumbosacral spine.... It is virtually inconceivable that he [Claimant] could have performed heavy work for a number of months in 2005 and not had those activities contribute to the wear and tear.

EX 13 at 14-15. Dr. Mauro concluded that “every activity that he [Claimant] engaged in contributed to furthering wear and tear.” EX 13 at 15.

Dr. Mauro did review the deposition transcripts of Claimant and Dr. Blum, as well as Claimant’s medical records and the evaluation reports from Dr. Smith, Dr. Scarpino, Dr. Davenport, and John Henrickson through July 27, 2006 before he evaluated Claimant. Ex 6 at 100397-399; EX 13 at 36.

I find Dr. Mauro’s opinion credible for the same reasons listed for Dr. Scarpino.

BIS Experts

Dr. Davenport

Dr. Kent Davenport is a board certified orthopedic surgeon since 1977. RX 15 at 322. On behalf of BIS, Dr. Davenport conducted an Independent Medical Examination of Claimant on July 25, 2006. TR at 197; RX 9 at 27-31. During this examination, Dr. Davenport told Claimant that his need for surgery was based on the November 10, 2004 injury. TR at 197. Dr. Davenport reported that Claimant’s SLR test was normal on the right and left at 90 degrees but did not indicate what type of SLR test he conducted. RX 9 at 29; RX 11 at 52. As a result, I reject Dr. Davenport’s SLR test results as inconclusive and ambiguous in the reverse, supine and seated positions.

Dr. Davenport testified that 100 percent of Claimant’s disability was due to the November 10, 2004, injury. RX 15 at 290. He described the November 10, 2004, injury as “the straw that broke the camel’s back.” RX 15 at 290. Dr. Davenport opined Claimant’s employment from January to May 2005 only caused a temporary exacerbation of his low back pain and did not permanently worsen his condition. RX 9 at 29; RX 15 at 316-317.

Dr. Davenport testified there was no objective medical evidence indicating a worsening in Claimant’s lumbar spine subsequent to November 11, 2004. RX 15 at 316. Dr. Davenport explained that it is medically probable that Claimant’s work activities in 2005 did not cause any permanent increase in his disability, since after Claimant stopped working, his pain level reverted back to the level it was at before he returned to work in January 2005. RX 15 at 299, 304. Dr. Davenport’s report, however, states that following his work from January to May 2005, “he [Claimant] quickly returned to his pre-05/21/05 level.”⁵ RX 9 at 30. Finally, Dr. Davenport also opined that Claimant’s back condition at his July 26, 2006, exam “is the same as it was in December 2004 when he accepted to return to work.” RX 9 at 29.

Dr. Henrickson

Dr. John William Henrickson Jr. is a board certified neurologic surgeon. RX 16 at 534. On behalf of BIS, Dr. Henrickson conducted an Independent Medical Examination of Claimant

⁵ This statement, in his report, was in response to BIS, its carrier, or its lawyer’s written questions. Similar specific questions were posed by Brewer’s attorney and answered by its IME physicians, Drs. Scarpino and Mauro.

on July 25, 2006. TR at 198. Claimant testified that during this examination Dr. Henrickson explained Claimant's need for surgery resulted from the November 10, 2004, injury. TR at 198.

Among other things, Dr. Henrickson's IME report states that Dr. Blum recommended that Claimant return to work at full capacity on January 3, 2005, which Dr. Henrickson notes "is rather absurd considering the patient [Claimant] had an L4-5 disk injury" and "there is no indication he [Claimant] underwent any work simulation to assess whether he was capable of returning to the demanding work of a longshoreman without aggravating his condition." RX 10 at 34. Dr. Henrickson further critiqued Claimant's prior medical care, stating that while "Dr. Blum is an excellent orthopedic surgeon ..., he is not a spine surgeon ... as a spine surgeon experienced with disk injury would have realized that [in December 2004] this patient [Claimant] had a serious disk injury, was still symptomatic, and could not safely return to work at that time, and certainly not without first undergoing appropriate testing with work simulation or a functional capacity evaluation." *Id.* Dr. Henrickson faulted Dr. Blum for sending Claimant back to work without a functional capacity exam to determine Claimant's capacity for returning to work. RX 16 at 514. In faulting Dr. Blum, Dr. Henrickson's concern was that Claimant's return to his normal heavy work could possibly cause a worsening of his low back condition. *Id.* Stated differently, Dr. Henrickson opined that Claimant's heavy work microtraumas in 2005 could have result in further degeneration of Claimant's spine over a period of time. RX 16 at 514-15.

Nevertheless, Dr. Henrickson testified that, when he examined Claimant on July 27, 2006, Claimant's condition was the same as it was before he returned to work in January 2005. RX 16 at 487. However, in his July 27, 2006, report Dr. Henrickson stated that—as of the examination date—Claimant's life style was essentially sedentary, and he presented with: back pain rated as an 8-9/10, in a relaxed prone position Claimant had palpation of the lumbar spine demonstrating spasm in the thorocolumbar and lumbar paraspinal muscles, tenderness on compression of both sciatic notches, and a positive SLR test in the supine position and a seated SLR test "produces back and buttock pain at 90 degrees" but "[t]here is no referred neurologic symptomatology below the knees" which "[t]o a neurosurgeon [Dr. Henrickson] this represents a neurologically negative straight leg raising test."⁶ RX 10 at 37-38; RX 16 at 522. Dr. Henrickson opined Claimant's work between January to May 2005 resulted in an aggravation, but only a temporary aggravation, of his symptoms and did not cause or contribute in any way to his condition or need for surgery. RX 10 at 39; RX 16 at 485-486, 528. Dr. Henrickson explains that Claimant's temporary aggravation went away or resolved "evidenced by a very benign examination by Ms. Ladeluca-Myrianthis on 5/26/05." RX 10 at 39; RX 16 at 520. Dr. Henrickson knew P.T. Myrianthis well and opined that she does a very good job. *Id.* Dr. Henrickson explained that a patient can experience spinal pain without there being "microtrauma." RX 16 at 518. Dr. Henrickson further opined that Claimant's need for surgery solely arose out of the November 10, 2004, incident. RX 16 at 530.

At his December 19, 2006, deposition, Dr. Henrickson agreed that cumulative trauma is the result of a series of insults, some of them even minor, that are associated with bending,

⁶ Dr. Henrickson also notes that Dr. Smith examined Claimant on 4/18/05 and found seated straight leg testing was positive for back pain alone but that "back pain alone with no signs of radiculopathy on straight leg raising is considered a negative test." EX 10 at 36.

lifting, climbing, stooping, running, jumping, walking, standing, those types of activities that cause the spine to degenerate. RX 16 at 495-96. Dr. Henrickson continued to testify that prolonged static posturing and vehicular vibration of three to five cycles per second are other things that cause microtraumas to the spine. RX 16 at 497. He opined that Claimant's standing for long periods of time and driving in his work contributed to the degeneration of Claimant's spine before November 9, 2004. *Id.*

Dr. Henrickson also opined that if he had a patient with a preexisting underlying degenerative disk disease in the spine, a minor microtrauma such as brushing his teeth or bending over to tie his shoes could possibly be "the straw that breaks the camel's back" and results in symptoms. RX 16 at 498. Dr. Henrickson further agreed that the "straw" itself absent preexisting degeneration in the spine probably would not have been significant. *Id.*

Dr. Henrickson stated that after one day back at work in January 2005, Claimant's pain level had risen to the same level as it was at when he first injured himself on November 10, 2004, a level where he could not physically continue to work. RX 16 at 517. However, Dr. Henrickson acknowledged that Claimant continued to work for three or four months in 2005, despite being in great pain. *Id.* Dr. Henrickson further opined that, from January 3, 2005, through May 23, 2005, Claimant's work would have resulted in a worsening of his spinal condition. RX 16 at 517-18.

Dr. Henrickson explained that one of the reasons he opined that Claimant suffered only a temporary aggravation of his symptoms was the fact that he relied on what he thought was a May 26, 2005, physical therapy report from Carol Myrianthis which found Claimant to be pain free and had full range of motion of the lumbar spine. RX 10 at 39; RX 16 at 520. Instead, this report resulted from P.T. Myrianthis' May 20, 2005, evaluation of Claimant, one day before he could not complete a full day's work due to his extreme pain forcing him to stop work entirely. EX 14 at 633-34.

II. *CREDIBILITY*

As referenced above, in arriving at a decision in this matter, I am entitled to determine the credibility of the witnesses, weigh the evidence, and draw my own inferences from it; furthermore I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

Claimant

Claimant's testimony is inconsistent and contradicted by other evidence in the record which undermines his credibility as to his alleged low back symptoms and condition from November 2004 through May 2005. For example, Claimant testified under oath that Dr. Blum told him in November 2004 that he might need back surgery. TR at 90. Claimant further testified that Dr. Blum repeatedly told Claimant that he was a surgical candidate at his exam on

November 29, 2004. TR at 125-26, 187-88. Dr. Blum and his medical reports, however, do not mention Claimant's possible need for surgery any earlier than Dr. Blum's March 18, 2005, exam of Claimant followed by his March 28, 2005, letter to Dr. Smith where he states that he and Claimant are wondering if Dr. Smith thinks Claimant might be a surgical candidate. CX 33 at 40-41; EX 14 at 100571, 100586, 100598, 100604, 100609; RX 11 at 46. Dr. Blum testified that up through his February 18, 2005, office visit with Claimant, he was not recommending back surgery or that Claimant be referred to a spine surgeon as he believed that Claimant was ready to return to work in January 2005. CX 33 at 31-33, 36-37. Dr. Blum further opined that it was his belief that over time Claimant's low back condition would diminish without the need for surgical intervention. CX 33 at 32.

Moreover, Claimant is not a medical expert and is unqualified to accurately testify as to the cause of his low back condition or whether it was permanently aggravated or worsened by his work with BIS in May 2005.

In addition, Claimant's testimony is inconsistent and not credible with respect to the lack of change in his symptoms from December 2004 through May 2005. See TR at 86, 88, 95, 139-40, 147, 185, 191-92; RX 13 at 146-47, 149, 151-52, 165, 168. The medical records and testimony of Dr. Blum and other examining physicians and P.T. Myrianthis contradict Claimant's testimony that his low back condition remained unchanged from November 10, 2004, through his last day of work on May 21, 2005. First of all, the evidence shows that before Claimant returned to work in January 2005, his low back condition had significantly improved, such that by the end of December 2004, Claimant's pain level had markedly decreased, his range of movement and strength had materially increased to the point that he was able to lift heavy weights again and he was ready to return to full duty as a longshoreman. CX 33 at 15; EX 12 at 27-36; EX 13 at 23-24; EX 14 at 100574, 100578, 100580-83, 100585-86, 100591; RX 11 at 46; RX 12 at 74, 76. Claimant's attempt to dismiss any medical notes by Dr. Blum or P.T. Myrianthis showing his improved condition by December 2004 as inaccurate is unreliable as there is no other evidence suggesting that these notes are inaccurate nor do I find any motivation for these experts to make up Claimant's improved low back condition. Furthermore, Dr. Henrickson testified that he knew P.T. Myrianthis well and opined that she does a very good job. RX 10 at 39; RX 16 at 520.

Also, there is substantial medical evidence proving that Claimant's symptoms increased and his ability to function declined after February 1, 2005. After returning to work in 2005, Claimant's work week was cut from 6-7 days down to 5 on February 18, 2005, by Dr. Blum. EX 14 at 100598. Claimant's testimony that he first experienced symptoms in his left leg in mid-to-late December 2004 is not supported in the medical evidence and is disregarded as inconsistent. RX 13 at 146. Instead, I find that on February 25, 2005, Claimant first reports additional pain radiating down his left leg which continued after he stopped working on May 21, 2005. TR at 83; CX 33 at 38-39; EX 14 at 100601, 100604, 100622-23; RX 7 at 23; RX 11 at 46.

Before March 18, 2005, Claimant's SLR tests in the seated position had always been negative. CX 33 at 56-57; EX 14 at 100567, 100582-83, 100586; RX 11 at 46. At his March 18, 2005, exam of Claimant, Dr. Blum reported SLR tests positive bilaterally in the seated position. CX 33 at 38-39; EX 14 at 100604; RX 11 at 46. Generally, these tests stayed positive and

continued well past his work stoppage in May 2005.⁷ See CX 31 at 92; Ex 5 at 100388-89; EX 14 at 100622; RX 11 at 47.

In addition, Dr. Blum testified that on March 18, 2005, for the first time, Claimant needed a referral to a spine surgeon due to his increased symptomatology. CX 33 at 40-41. When Claimant returned to work, he testified that he felt a new dull pain but not the same zinging sensation that he experienced on November 10, 2004. TR at 81-82.

Furthermore, Claimant used back pain narcotic medications more frequently after returning to work in 2005 as his first prescription for Anexsia was given on November 17, 2004, and lasted Claimant until April 11, 2005. TR at 156-59; EX 14 at 100566-67. The next prescription of the same pain medication lasted Claimant a little more than a month as Dr. Blum asks for a re-fill on May 23, 2005. EX 14 at 100618, 100632; RX 6 at 9. Also, Claimant reached a point on May 21, 2005, where he could not function at all at work which continued to the present, as Claimant suffers to complete simple activities of daily living as compared to the heavy duty work he performed for over four months in 2005. EX 14 at 100591; EX 33 at 29-30; RX 12 at 74, 76; RX 10 at 37.

The above-referenced inconsistencies in Claimant's testimony cause me to reject his testimony as unreliable and not credible. Because of this, his statements concerning whether or not his symptoms varied from November 10, 2004, to May 21, 2005, cannot be relied upon.

Medical Doctors

I find the testimony of medical experts Drs. Scarpino and Mauro most persuasive because they best explain Claimant's changed low back condition in a manner that is consistent with Claimant's objective test results, subjective symptoms, and functionality as recorded in the medical records of Drs. Blum and Smith, as well as P.T. Myrianthis.

Dr. Scarpino examined Claimant in December 2005—closest in time to his last day of work with BIS. He and Dr. Mauro both opined that Claimant's treatment before his return to work in 2005 markedly improved his low back condition. By the end of December 2004, Claimant's pain level had been reduced significantly, his range of motion and strength were up, and he was able to lift heavy weights again. Both doctors agreed that, with Dr. Blum's treatment, Claimant's function had improved so much he could return to full duty work in January 2005. EX 12 at 27-36; EX 13 at 23-24.

Dr. Mauro's opinion that Claimant aggravated his low back condition by performing heavy duty work at BIS from February to May 2005 is supported by the testimony of Dr. Scarpino and consistent with the medical evidence that shows that after Claimant returned to heavy duty work in 2005 and worked for BIS, he developed permanent symptoms and

⁷ But see Dr. London's and Dr. Davenport's negative SLR test findings on December 21, 2006 and July 25, 2006 discussed below for each non-treating physician. RX 9 at 29; RX 11 at 52-53. As discussed below, IME Dr. Henrickson noted Claimant's pain at 90 degrees for a SLR test in the seated position on July 27, 2006 but was not credible with his explanation that a positive test is not really positive unless there is neurological symptomatology below the knees. RX 10 at 37-38; RX 16 at 522.

experienced permanent decreased functionality that he did not encounter after hurting himself at Brewer on November 10, 2004. This evidence was referenced above and includes the fact that Claimant could occasionally lift up to 50 pounds with ease of motion as of December 23, 2004, he had negative SLR tests in the seated position before March 18, 2005, he did not report any pain radiating down his left leg before February 25, 2005, no physician recommended him as a low back surgery candidate until March 28, 2005, he uses increased amounts of narcotic pain medication after March 2005, and Claimant returns to his former heavy duty position working the same 6-7 days until February 18, 2005, when Dr. Blum first reduces his work week to five days and later Claimant is unable to finish a work day on May 21, 2005. All of these changed conditions support an aggravation or worsening of Claimant's low back condition attributable to his heavy duty work at BIS in 2005 given Claimant's pre-existing degenerative disk disease.

Even Claimant's treating physician, Dr. Blum, testified that he believes in the concept of cumulative trauma and he agreed with Dr. Scarpino's findings that Claimant's low back condition substantially worsened as a result of his employment in 2005. CX 33 at 48-49; Ex 5 at 100392-393; EX 12 at 43; RX 11 at 52.

Dr. Blum also opined that he released Claimant to work in January 2005 knowing that Claimant still had a low back problem, that he had to watch out for himself, and that he was subject to risks. CX 33 at 45. Dr. Blum also agreed that one way to look at Claimant's low back condition in October 2006 was that Claimant's work after March 31, 2005, caused at least a minor but permanent increase in his level of disability, although Dr. Blum did not see anything conclusive of a new injury. CX 33 at 46-48. Dr. Blum further testified that life is cumulative and that on a cellular level three more cells die when one with a bad knee or bad back hypothetically gets up in the morning, goes to the bathroom, and lies down again. CX 33 at 48 and 51. While specifically not finding a new injury tied to Claimant's work in 2005, Dr. Blum did not rule out an aggravation, acceleration, or worsening attributable to Claimant's work in 2005. In fact, Dr. Blum agreed that Claimant's reported chronic back pain on February 18, 2005, was associated with his lifting, pushing, and similar types of work activities "aggravating" Claimant's underlying pre-existing degenerative disk disease. CX 33 at 49.

Claimant and BIS refer to Dr. London as Claimant's "treating" physician despite the fact that Dr. London examined Claimant just one time on December 21, 2006, and prepared one lone report similar to the independent medical exam reports he has prepared numerous times over the years primarily in cases heard in Long Beach, California, many times as a medical expert for clients of BIS' counsel. Because Dr. London's opinions remained unchanged from this single visit with Claimant, I find that there was no long-term relationship between Claimant and Dr. London establishing a greater opportunity for Dr. London to know and observe Claimant as a patient similar to the extended medical relationship Claimant had with Dr. Blum. Thus, I find that Dr. London is not a treating physician whose opinions are entitled to any greater weight than the independent medical examiners in this case. *See Amos*, 153 F.3d at 1054; ALJX 12 at 7-8; ALJX 13 at 8. Furthermore, Dr. London's opinions are directly contradicted by the medical evidence and the more persuasive opinions of Drs. Scarpino and Mauro.

Dr. London admitted that, in order to determine whether one has temporarily exacerbated the pain versus permanently exacerbating an injury, a doctor would look at whether the

subjective symptoms returned to the pre-activity level and, secondly, whether there are objective medical diagnostic testing changes. CX 34 at 25-25. Dr. London further agreed that Claimant's work activities from January 3, 2005, through May 21, 2005, could contribute to cumulative trauma to Claimant's spine or worsen his low back condition. CX 34 at 27 and 39.

Drs. Blum, London, Davenport, and Henrickson, on the other hand, fail to provide any explanation as to why Claimant's symptoms improved with rest after the November 10, 2004, incident but did not do so after the February-May 21, 2005 work aggravation. These physicians either ignored, without discrediting, P.T. Myrianthis' December 27, 2004, functionality report or improperly relied on Claimant's medical history which is inconsistent with the objective medical evidence of Drs. Blum, Scarpino, Mauro, and Smith, and P.T. Myrianthis as referenced above. In addition, Dr. Davenport states that Claimant's pain level returned to its pre-2005 level when he stopped working based on P.T. Myrianthis' examination of May 20, 2005, that Dr. Davenport mistakenly believed occurred on May 26, 2005, after Claimant had stopped working. EX 14 at 100633-34; RX 15 at 299, 304. Instead, Claimant's pain level was so much higher on May 21, 2005, than it was on December 23, 2004, that Claimant could only stand to work a half day before permanently ending his work career. EX 14 at 100591, 100632; RX 12 at 74, 76.

Dr. Henrickson's opinions about the causation of Claimant's low back condition and that his condition in July 2006 was the same as on December 23, 2004, are rejected because he completely ignored P.T. Myrianthis' December 23, 2004, work simulation/functionality assessment of Claimant and did not explain why Claimant could not return to his pre-2005 functionality level even after rest by 2006. RX 10 at 34; RX 16 at 487, 514. Dr. Henrickson opined that Dr. Blum's recommendation that Claimant return to full duty work in January 2005 "is rather absurd" considering Claimant's condition at that time. *Id.* Even Dr. London opined that Dr. Blum's recommendation that Claimant return to heavy duty full time work in January 2005 was within the proper standard of care given the work simulation/functionality assessment and Dr. London agreed with Dr. Blum's recommendation. CX 34 at 38-39. Dr. Henrickson did opine that one risk of Claimant's returning to work in 2005 with his pre-existing low back condition was that Claimant could aggravate or worsen this condition. RX 10 at 34; RX 16 at 514-15. I find that is exactly what happened—Claimant's 2005 work permanently aggravated and worsened his low back condition.

Dr. Henrickson further opined that from January 3, 2005, through May 23, 2005, Claimant's work would have resulted in a worsening of his spinal condition. RX 16 at 517-18. I find that it did.

Dr. Henrickson explained that one of the reasons he opined that Claimant suffered only a temporary aggravation of his symptoms was the fact that he relied on what he thought was a May 26, 2005, physical therapy report from Carol Myrianthis which found Claimant to be pain free and had full range of motion of the lumbar spine. Dr. Henrickson makes the same mistake as Dr. Davenport in failing to note that P.T. Myrianthis' examination of Claimant occurred on May 20, 2005, *before* Claimant stopped work on May 21, 2005, when his pain level was so much higher than it was on December 23, 2004, that Claimant could only stand to work a half day before ending his work career. EX 14 at 100591, 100632; RX 12 at 74, 76.

Finally, I give little weight to Dr. Henrickson's opinion that Claimant's positive SLR test results on examination on July 27, 2006, represents a neurologically negative SLR test because there is "no referred neurologic symptomatology below the knees." Regardless of symptoms, or lack thereof, below the knee, the same tests were completely negative before March 18, 2005. Since then, they are positive for pain which is evidence of a worsened low back condition.

Dr. Davenport agreed that Claimant's increased pain while working in 2005 confirmed trauma to his spine, but denied that Claimant's work with BIS caused any permanent aggravation solely because Claimant told him his pain was precisely the same in July 2006, when Dr. Davenport saw him, as it had been at the end of December 2004, just before he was ready to return to work. RX 15 at 304-05. Dr. Davenport's opinion is rejected as it is based on Claimant's inconsistent statements which are in conflict with the medical records referred to above showing his low pain level and greatly improved functionality on December 20, 2004. CX 33 at 15; EX 12 at 27-36; EX 13 at 23-24; EX 14 at 100574, 100578, 100580-83, 100585-86, 100591; RX 11 at 46; RX 12 at 74, 76.

As a result, I reject the opinions of Dr. London, Davenport, and Henrickson that Claimant's low back condition solely resulted from the November 10, 2004, incident and the natural progression of that injury, without even a marginal increase in permanent aggravation, acceleration, or worsening due to his work in 2005.

With the foregoing determinations in mind, I turn to my legal conclusions.

III. *CONCLUSIONS OF LAW*

The sole unresolved issue in this matter is whether Brewer or BIS is the last responsible employer liable for Claimant's compensable low back condition.

There is no dispute that Claimant suffered a work-related low back injury while employed by Brewer on November 10, 2004, and every medical expert who testified has so opined. *See* Stip. No. 2. In addition, by May 21, 2005, Claimant's low back condition progressed to the point of total disability, requiring surgery which he obtained in November 2007. He is recovering from that surgery. The critical determination to be made is whether Claimant's low back condition is merely the natural progression of his November 10, 2004, injury with Brewer, or was permanently aggravated by his 2005 work with BIS.

Last Responsible Employer

Under the "last responsible employer" rule, when a claimant's disability is attributable to a series of injuries suffered while working for more than one employer, the claimant's last employer may be held liable for all compensation due to the claimant. *Foundation Constructors v. Dir.*, *OWCP*, 950 F.2d 621, 623 (9th Cir. 1991). The Ninth Circuit recognizes two tests for determining last responsible employer, one for occupational disease cases and another for multiple or cumulative trauma cases. *Id.* In a cumulative trauma case, the aggravation test, also known as the two-injury test, determines the last responsible employer based on the cause of the claimant's ultimate disability. *Kelantan v. Dir.*, *OWCP*, 799 F.2d 1308, 1311-12 (9th Cir. 1986).

In the instant case, the aggravation test is appropriate for determining the last responsible employer, given the nature of Claimant's alleged injuries. The rule is applied as follows:

If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury *aggravating, accelerating or combining with a prior injury* to create the ultimate disability, . . . the employer of the worker at the time of the most recent injury is the responsible, and therefore liable, employer.

Metro. Stevedore v. Crescent Wharf, et al., & Price, 339 F.3d 1102, 1105 (9th Cir. 2003) (hereinafter "*Price*") (citing *Foundation*, 950 F.2d at 624). In *Price*, the Ninth Circuit affirmed the ALJ's finding that each day of work as a forklift operator caused some permanent loss of bone and cartilage from the claimant's knees, thus his knee injury was aggravated by his work, even though the claimant *only worked for employer for one day and had already scheduled knee surgery prior to that date*. *Id.* at 1107. Thus, under *Price*, even a very minor permanent aggravation or acceleration of an earlier injury is enough to trigger liability under the Act. *Id.* at 1105.

Each employer bears a burden to prove, by a preponderance of the evidence, that the claimant's disability is due to his employment with another employer:

[The ALJ is to determine] whether [Employer I] met its burden of proving, by a preponderance of the evidence, that there was a new injury or aggravation with [Employer II], or whether [Employer II], on the other hand, successfully established that claimant's condition is the natural result of his injury with [Employer I].

Buchanan v. Intl. Trans. Serv., 33 BRBS 32, 35 (1999). "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." *Id.* (citation omitted). In the unlikely event that neither employer is able to carry its burden, the Benefits Review Board ("BRB") has held that the purposes of the Act would best be served by assigning liability to the *later* employer, or "if there is uncertainty as to which employer was last, then the Ninth Circuit has stated that the purposes of the Act are best served by assigning liability to the employer claimed against." *McAllister v. Lockheed Shipbuilding, et al.*, 41 BRBS 28, 31 (2007) (citing *Gen. Ship Serv. v. Dir., OWCP*, 938 F.2d 960, 962 (9th Cir. 1991)); *see also Buchanan*, 33 BRBS at 36.

Here, BIS and Claimant argue that Claimant's heavy duty work with BIS for almost four months in 2005 only caused a temporary increase in pain and did not result in any cumulative trauma or new injury, therefore Brewer is the last responsible employer even though the single day that the claimant worked in *Price* caused a minor but permanent aggravation. ALJX 11 at 3; ALJX 13 at 5. BIS and Claimant rely on the testimony and medical reports of Drs. Blum, Smith, London, Davenport, and Henrickson and contend that Claimant remained temporarily totally disabled even though he was released to return to work. *Id.* They argue that his work activities

in 2005 caused him a temporary increase in pain, but within three days of stopping work, his pain level returned to the level it was before his return to work. *Id.* Claimant denies sustaining a specific or cumulative trauma while working for BIS in 2005. *Id.* Instead, Claimant argues that he chose to stop working because he was experiencing the same pain he had before his return and felt “enough was enough.” *Id.* Claimant maintains that his cumulative trauma claim against BIS is a merely a protective claim brought in the alternative. *Id.*

On the other hand, Brewer argues that BIS is the last responsible employer, because Claimant had pre-existing degenerative disk disease before the November 2004 accident, Claimant then recovered fully enough to return to work, but his work activities in 2005 at BIS caused new symptoms, positive objective findings, and a need for back surgery resulting in Claimant’s permanently aggravated, accelerated and worsened low back condition. ALJX 12 at 12-13. Brewer relies on the testimony and medical reports of Drs. Blum, Smith, London, Scarpino, and Mauro.

I find that Brewer has shown by a preponderance of the evidence that Claimant’s work activities from January to May 2005 permanently aggravated or worsened his lower back condition, even if only a small amount like the claimant in the *Price* case referenced above. This finding is supported by the medical records and the credible record-keeping of treating physician Dr. Blum, P.T. Myrianthis, and Brewer experts Drs. Scarpino and Mauro. Furthermore, I place great weight on the following changed conditions from before Claimant returned to work in January 2005 and after he stopped working his heavy duty work almost four months later on May 21, 2005:

1. P.T. Myrianthis tested Claimant’s functional limits on December 23, 2004, and recorded that he could lift 50 pounds and Claimant was released to full duty heavy work which he performed at a decreasing rate for almost four months. EX 14 at 100591; EX 33 at 29-30; RX 12 at 74, 76. In late December 2004, Claimant reported that his pain had decreased to the 2-5/10 level. *Id.* After leaving work on May 21, 2005, Claimant needed surgery and could not perform simple activities of daily living let alone his heavy duty work or lift up to 50 pounds. RX 10 at 37.
2. None of Claimant’s treating physicians observed a positive SLR test in the seated position prior to March 18, 2005, after he had returned to work and by May 21, 2005, and thereafter, most physicians who credibly tested Claimant for SLR in the seated position found this to be a positive test for pain. EX 14 at 100566-67, 100582-83, 100586. 100604, 100622; CX 33 at 38-39, 56-57; RX 10 at 37-38; RX 11 at 46-47;
3. Claimant was asymptomatic for left leg radicular pain in 2004 and prior to returning heavy duty work in January 2005. Beginning on February 25, 2005, and thereafter, Claimant suffered from left leg sciatica and left leg pain associated with his low back condition. TR at 82-83; CX 33 at 11, 24, 40-41; EX 14 at 100566, 100573, 100598, 100601, 100604, 100622-23; RX 6 at 8; RX 7 at 23; RX 10 at 38-39; RX 11 at 46. Claimant described feeling a new dull pain after returning to work in 2005 but not the same zinging sensation that he experienced on November 10, 2004. TR at 81-82.
4. Surgery for Claimant’s low back was never mentioned as a remedy by any treating physician until March 2005 after Claimant returned to work at BIS. Claimant had

surgery performed on November 1, 2007. TR at 82-83; CX 31; CX 33 at 8, 31-33, 36-37; Ex 12 at 50; EX 14 at 100609, 100622-23, 100632; RX 7 at 23.

5. Claimant used back pain narcotic medications more frequently after returning to work in 2005 as his first prescription for Anexsia was given on November 17, 2004, and lasted Claimant until April 11, 2005. The next prescription of the same pain medication lasted Claimant a little more than a month as Dr. Blum asks for a re-fill on May 23, 2005. EX 14 at 100618, 100632; RX 6 at 9.

I have weighed the evidence and I find that Drs. Scarpino and Mauro are more credible concerning the permanent aggravation issue than Claimant or Drs. Blum, Smith, London, Davenport, or Henrickson. I find that a preponderance of the evidence supports a finding that, between January 3, 2005, and May 21, 2005, Claimant performed many job activities that caused at least a minor increase in his need for low back surgery. Claimant's symptoms increased after he returned to work in 2005. There is no reliable evidence that shows that back surgery was even suggested as a remedy to Claimant's low back problem before Claimant had returned to heavy duty work and Dr. Blum referred him to Dr. Smith in March 2005. The evidence, however, shows that by May 21, 2005, as reflected in the objective test results from Claimant's SLR tests in a seated position, his new complaints of left leg pain, his inability to perform any heavy duty work, and his increased use of pain narcotics, Claimant had developed a permanent aggravation of his low back condition requiring surgery. More specifically, I find that the heavy duty work performed by Claimant for BIS in 2005 exposed Claimant to injurious conditions and permanently aggravated his low back degenerative disk disease.

For these reasons, I find by a preponderance of the evidence that Claimant's work at BIS, combined with his pre-existing degenerative disk disease, permanently aggravated and worsened his low back condition as evidenced by his extreme loss of functionality, the return of his left leg sciatica/radicular pain, his positive SLR tests in the seated position, his newfound need for low back surgery, his increased use of narcotic pain medications, and his complete inability to return to heavy duty work at all. After working in 2005, Claimant's symptoms did not settle down with rest, medication and physical or home therapy and his functionality did not improve as they had in December 2004 with rest, medication, and physical therapy.

Therefore, BIS is liable for all of Claimant's disability and medical expenses/benefits from May 21, 2005, and continuing. Alternatively, I further find that because there is substantial conflicting evidence, neither employer has persuaded me that it is more likely than not that the opposing employer is liable as the responsible party. In that case, I also assign liability to BIS as the later employer.

Travel Expense Reimbursement

Claimant resides in Hawaii and traveled to California to be examined by Drs. London and Delamarter. Through the date of trial, Claimant seeks reimbursement of \$13,357.11 in unreimbursed paid travel expenses related to his medical treatment in California in 2007 with Drs. London and Delamarter. TR at 83-84, 90-94; CX 35. These travel expenses include 4 trips (July 2, July 31, September 17, and October 22, 2007), two of which involved Claimant and an attendant who assisted him. *Id.* Claimant first raised the issue of unpaid and unreimbursed costs

incurred for transportation for medical purposes at hearing and not in his pre-hearing statement. *See* ALJX 2. Employers counsel first received a copy of Claimant's travel expenses at hearing on November 29, 2007. TR at 93; CX 35. I reject this claim for travel expenses as untimely raised.

In determining the choice of physician, consideration must be given to availability, the employee's condition, and the method and means of transportation. Generally, 25 miles from the place of injury or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into account. 20 Code of Federal Regulations (CFR) subsection 702.403. I find that Claimant has failed to present evidence showing a legitimate reason or a solid medical justification for seeking medical treatment outside his home state of Hawaii, where I presume that adequate comparable treatment is available without the added travel costs to California where Claimant incurred the higher travel costs for seeing doctors in 2007. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996) (Claim for reimbursement for medical treatment in Boston denied as unreasonable because adequate comparable treatment available in Houston at lesser cost); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). As a result, I deny Claimant's request for reimbursement for travel expenses to California as unreasonable because there was no evidence presented that Hawaii lacks competent spine surgeons.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. BIS is the responsible employer.
2. BIS shall pay all temporary total disability compensation due to Claimant at the compensation rate of \$1,047.16 per week from May 21, 2005, to the present and continuing.
3. BIS shall reimburse Brewer for any compensation and medical expenses paid to Claimant for the time period after he began working for BIS in 2005, plus interest at the rates specified under the provisions of 28 U.S.C. § 1961.
4. BIS shall provide all past, present, and future medical care which is reasonable and necessary for the treatment of Claimant's low back condition.
5. BIS is entitled to a credit for any compensation and medical benefits previously paid to Claimant.
6. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.
7. The District Director shall make all calculations necessary to carry out this Order.

8. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for BIS and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for BIS shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for BIS. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for BIS. Counsel for BIS shall have 15 days from the date of service of such application in which to respond, but cannot raise new objections to fees or costs claimed in Claimant's counsel's original application for costs and fees. No reply will be permitted unless specifically authorized in advance.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California