

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 15 June 2012

CASE NO.: 2009-LHC-01127

OWCP NO.: 18-90184

In the Matter of:

VELIA CRUZ,
Claimant,

vs.

APM TERMINALS, INC.,
AMERICAN LONGSHORE MUTUAL ASSOCIATION/
F.A. RICHARD & ASSOCIATES,
Employer and Carrier.

Appearances: Rodney C. Pranin, Esquire
For the Claimant

James Aleccia, Esquire
For the Employer and the Carrier

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING PARTIAL BENEFITS

This is an action for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, ("Longshore Act") filed by Velia Cruz ("Claimant") for an injury to her low back she suffered while working for APM Terminals, Inc. ("APM") on November 17, 2006. The claim against APM and its carrier, American Longshore Mutual Association ("Carrier"), was initiated with the Office of Administrative Law Judges ("OALJ") on May 4, 2009, when it was referred to the OALJ for formal hearing by the District Director of the Office of Workers' Compensation Programs ("OWCP").

For the reasons set forth below, the Claimant's claims for compensation and medical benefits are GRANTED in part and DENIED in part.

PROCEDURAL BACKGROUND

This case was heard in Long Beach, California, on January 27 and 28, 2010. The Claimant's counsel, and counsel for the Respondents,¹ all appeared and participated at the hearing. All parties were afforded a full opportunity to present testimony, offer documentary evidence, and submit closing briefs. At the hearing, I admitted into evidence Claimant's Exhibits ("CX") 1 through 19 and 21;² and Respondent's Exhibits ("RX") 1 through 17. I additionally marked and admitted the District Director's referral letter as ALJ Exhibit ("ALJX") 1. Following the hearing, on March 23, 2010, I issued an order admitting post-hearing depositions as CX 22, CX 23, RX 18, and RX 19. On June 30, 2010, I issued an order admitting an addendum to CX 19.

My order on March 23, 2010, also set May 14, 2010, as the deadline for closing briefs. By the agreement of the parties, this was later extended and both closing briefs were submitted on June 15, 2010, as agreed.

STIPULATIONS

The parties agreed to the following stipulations at the hearing:

1. The Longshore and Harbor Workers' Compensation Act applies to this claim.
2. The Claimant suffered an injury on November 17, 2006.
3. There was an employer/employee relationship between the Claimant and the Employer at the time of her injury.
4. The claim was timely noticed and timely filed.
5. The Claimant is entitled to temporary total disability compensation benefits from November 18, 2006, through April 15, 2007.

(HT,³ pp. 13-14.)

ISSUES

The issues to be decided in this case are:

1. What is the nature and extent of the Claimant's disability?
2. What was the Claimant's average weekly wage at the time of her injury?

(HT, p. 5.)

¹ APM Terminals, Inc. and American Longshore Mutual Association will be referred to jointly as "the Respondents" throughout this decision.

² The Claimant did not submit an Exhibit 20.

³ References to "HT" are to the hearing transcript.

FACTUAL BACKGROUND

History of the Claimant Prior to Injury

The Claimant was born on May 9, 1971, and spent her childhood in southern California. (HT, p. 15.) Both her mother and her father's parents were from Mexico, so the family decided to send the Claimant to a private religious high school, University of Montemorelos, in Nuevo Leon, Mexico, to learn about Mexican culture. (HT, p. 115; RX 9, p. 59.)

For her last two years of high school in Mexico, the Claimant specialized in her studies, graduating in 1989. (HT, p. 116; RX 9, p. 59.) She was then able to enroll directly in medical school at the University of Montemorelos, without first attending college. (HT, p. 116.) The Claimant completed five years of medical study and one year of internships split into two-month rotations. (*Id.* at 117.) The Claimant then performed one year of social service, running a rural medical clinic that provided basic services. (*Id.* at 117, 119.) She took the Mexican medical boards and earned her license, but practiced in Mexico only briefly. (*Id.* at 120; RX 9, p. 60.)

Instead, in 1999, the Claimant moved to live with her sister in Texas, to study for and take the American medical board exams. (HT, p. 15.) She failed in her first attempt, but after moving in with her parents in California and completing a lengthy review course, she tried again. (*Id.* at 16.) Unfortunately, this was also unsuccessful, leaving the Claimant unable to practice medicine in the United States, and unable to even work as a physician's assistant without more schooling. (*Id.* at 121; RX 9, p. 61.)

It was at this point that the Claimant's father developed cancer. (HT, p. 16.) His health rapidly declined, and he died in 2002. (*Id.* at 122.) The Claimant's father had worked as a longshoreman for many years, and upon his death, the family learned that one of his children could inherit his longshore book to support their mother. (*Id.* at 122-23.) With only 30 days to decide and the Claimant's medical career on hold, the Claimant decided to take the opportunity. (*Id.*) She was sworn into the longshoreman's union, ILWU Local 13, in July of 2003, as a B book. (RX 9, p. 58; HT, p. 123.) Eighteen months later, she earned her A book. (HT, p. 123.)

The Claimant worked the day-shift on the waterfront, mostly driving UTR vehicles 9 hours a day, 5 days a week. (HT, pp. 124-25, 127.) Occasionally she would pick up work as a marine clerk, which paid 11 or 12 hours a day, if those jobs were sent over from the clerk union. (*Id.* at 126, 129.) The Claimant went to church every Saturday and saved Sundays for spending time with her family. (*Id.* at 129-30.)

Before 2005, the Claimant had minimal medical care. (HT, p. 131.) She had no primary physician and did not get routine check-ups, nor did she treat herself. (RX 9, pp. 78-79.) Other than some injuries in a car accident when she was two or three years old, the Claimant appears to have been very healthy. (HT, pp. 35, 145-46.)

Treatment from Dc.⁴ Schoch: February 2005, to November 2006

Under the longshore insurance plan, the Claimant could get up to 40 massages a year. (RX 19, p. 44.) On the recommendation of her coworkers, the Claimant started going to Natural Health Chiropractic, a clinic run by Dc. James G. Schoch, on February 17, 2005, according to insurance records. (HT, pp. 157-58; CX 22, p. 16; RX 12, p. 197.) The Claimant received massages at Dc. Schoch's office from the masseuse, Sophia White, roughly twice a month, through November 15, 2006. (HT, p. 160; RX 12.) During this time, the Claimant also received at least two chiropractic adjustments to her spine from Dc. Schoch. (HT, p. 163.) However, many of the details of the Claimant's treatment by Dc. Schoch are hotly disputed, so I will reserve discussion of them for the analysis section of this decision.

The Claimant's Injury: November 17, 2006

On November 17, 2006, the Claimant was driving a UTR on the day-shift for Respondent, APM Terminals ("The Employer"). (CX 1, p. 1; CX 9, p. 13.) At about 2 p.m. in the afternoon, a top handler picked up the container that was attached to the Claimant's UTR. (CX 1, p. 1.) Unfortunately, the pin connecting the container to the UTR did not disengage as anticipated. (CX 9, p. 13; CX 2, p. 2.) As a result, the top handler lifted the Claimant's UTR up as well, with the Claimant inside. (CX 8, p. 10; CX 9, p. 13.) It was not until the back of the UTR was several feet off the ground that the connecting pins loosened and the UTR crashed back down. (CX 9, p. 13.) While the Claimant was buckled into her seat, she was still jarred back and forth inside the cabin. (CX 8, p. 10; HT, p. 134.) The dock boss was immediately notified about the accident and the Claimant reported pain in her neck and shoulders. (HT, p. 140; RX 9, p. 68.) An accident report was filled out and the Claimant got a doctor's slip to go to the Little Company of Mary of San Pedro Hospital. (RX 9, p. 68.)

The Claimant arrived in the ER at 3:36 p.m., approximately 90 minutes after her fall. (RX 10, p. 123; RX 9, p. 68.) In the ER, the Claimant was examined by acute care nurse practitioner, Regina Petrikas. (RX 8, p. 44.) Nurse Petrikas completed a basic exam and history, diagnosing the Claimant with an "acute left cervical strain." (*Id.* at 44, 46.) No x-rays or labs were done, and the Claimant was prescribed rest, anti-inflammatories, pain medication, and muscle relaxants. (*Id.*) At the time of examination, the Claimant was not experiencing any back pain, had a full range of movement in her neck, and Nurse Petrikas described her as in "no acute distress." (*Id.* at 45-46.) The Claimant, however, remembers herself as being in "a lot of pain," and her pain as "intense." (HT, pp. 148, 305.) Nurse Petrikas also wrote that the Claimant gave a history of "chronic neck and back pain for the past 2-1/2 years and does see the chiropractor 1-2 times a week." (RX 8, p. 45; RX 10, p. 129.) The Claimant denies that she said this or that that assertion was true.⁵ (HT, pp. 144-45, 147, 302-03.) After about an hour in the ER, the Claimant was released and told to return for follow-up on November 21, 2006. (RX 8, p. 46.)

Initial Visit with Dr. Loddengaard: November 21, 2006

While at home that weekend, most likely on Sunday, November 19, 2006, the Claimant began to experience pain in her lower back. (HT, pp. 156, 307; RX 9, p. 69.) The Claimant's

⁴ "Dc." stands for "Doctor of Chiropractics," i.e., a chiropractor who does not have a medical license.

⁵ Again, this is a point that will be discussed in the analysis section of this decision.

cousin visited her and advised her to consult a lawyer, Mr. Rodney Pratin, who had previously represented the cousin in a disability claim. (HT, p. 154.)

The Claimant took her cousin's advice and called Mr. Pratin's office on Monday morning, eventually hiring him as her counsel in this case. (RX 9, p. 70.) Mr. Pratin referred the Claimant to Dr. James M. Loddengaard for treatment. (HT, p. 155; RX 9, p. 70.) Because of these arrangements, the Claimant chose not to follow up with the ER at the Little Company of Mary of San Pedro Hospital. (RX 9, p. 70; HT, pp. 307-10.)

The Claimant's first appointment with Dr. Loddengaard was Tuesday morning, November 21, 2006. (CX 8, p. 10; RX 9, p. 71.) According to Dr. Loddengaard's report, the Claimant was experiencing pain in her low back in particular, though her neck pain had improved somewhat over the weekend. (CX 8, pp. 10-11.) Her range of movement in her neck was mildly restricted and her lumbar range of motion was "poor," as she was unable to get more than 15 inches from touching her toes. (*Id.* at 11.) According to Dr. Loddengaard, typically the worst people do on forward flexing is 4 to 6 inches away from their toes, so the Claimant's limitation was notable to him. (HT, p. 38.) The Claimant also reported pain with both forward flexion and backwards extension of her spine. (CX 8, p. 11.) X-rays were taken. (*Id.*) The lumbar images were normal, as were the cervical images, except for some "slight straightening of the normal lordosis," which is typically a sign of muscle spasm, possibly caused by the accident. (*Id.*; HT, p. 41.) Dr. Loddengaard diagnosed the Claimant with cervical and lumbar strains, and recommended that she continue her medications and get physical therapy three times a week for the next three or four weeks. (CX 8, pp. 11-12.) He wrote the Claimant a disability slip, pronouncing her temporarily totally disabled, with an expected return to work in two or three weeks' time. (CX 14, p. 34.)

Unbeknownst to the Claimant, November 21, 2006, was also the first day that the Respondents arranged for surveillance to investigate her disability claim.⁶ (RX 14, p. 422.) In the video from that day, though the Claimant drove herself on errands, she appeared to be walking stiffly and sometimes put a hand against her low back as if she were in pain or looking for support. (*Id.*, video.⁷)

The Employer Pays Compensation: November 29, 2006

Both the Employer, on November 20, 2006, (CX 2, p. 2), and the Claimant, on November 21, 2006, (CX 1, p. 1), filed reports about her accident. Supplemented by the initial records from Dr. Loddengaard, on November 29, 2006, the Respondents agreed to provide medical care and pay the Claimant temporary total disability benefits starting from November 18, 2006, based on an average weekly wage of \$1,646.36.⁸ (CX 3, p. 3.)

⁶ The Claimant pointed out at the hearing that in one or two of the videos, it was her neighbor's movements or house that were filmed, instead of her own. (HT, p. 189.) I was, however, able to distinguish those shots and set them aside, as will be noted below.

⁷ Citations to the RX 14 video indicate the inclusion of my own impressions that I formed while watching that footage.

⁸ There is no indication as to how Respondents arrived at this figure.

Physical Therapy: November 22 to December 13, 2006

The physical therapy prescribed by Dr. Loddengaard was conducted by Daniel Abruzzi, DPT, at Harbor Physical Therapy. (CX 16, p. 49; HT, p. 165.) The Claimant's first appointment was on November 22, 2006, at which she claimed neck and shoulder pain at 5/10 on the pain scale, and lumbar pain at 8/10, greater on the left than the right. (CX 16, p. 49.) She also had an antalgic gait, tenderness upon palpitation, and a restricted range of motion. (*Id.*) Mr. Abruzzi actually had to defer part of his examination because of the pain it caused the Claimant. (*Id.*) At that time, the Claimant reported limited ability to perform her activities of daily living. (*Id.*) Mr. Abruzzi planned to emphasize exercises that would help the Claimant regain range of motion and control her pain, and to train the Claimant in a home exercise program. (*Id.*)

After a week of therapeutic exercise and training in pain control modalities, Mr. Abruzzi wrote that the Claimant's pain was fluctuating and increased after physical activity. (CX 16, p. 50.) As of November 29, 2006, she mentioned shoulder and neck pain at 7/10 and low back pain at 5-6/10. (*Id.*) Mr. Abruzzi described her as "hypersensitive to touch" and with "[a]ll active motions limited secondary to pain." (*Id.*)

In another therapy note written on December 13, 2006, Mr. Abruzzi reported that the Claimant was beginning to feel more mobile, though her low back pain was rated at 8/10. (CX 16, p. 51.) The Claimant was also, "able to stand or walk for 15-20 minutes before onset of symptoms," though all of her active motions continued to be limited by pain, impairing Mr. Abruzzi's ability to examine her thoroughly. (*Id.*) Given her continued high pain levels and "[e]xcessive muscle guarding," Mr. Abruzzi recommended that the Claimant be reevaluated by her physician. (*Id.*)

Continuing Medical Treatment: December 14, 2006 – January 4, 2007

Accordingly, the Claimant returned to Dr. Loddengaard for further examination. (RX 5, p. 8.) He apparently formed an impression of muscle spasm and noted that standing for very long caused increased back pain for the Claimant. (*Id.*) Dr. Loddengaard recommended more physical therapy and arranged to see the Claimant for follow-up in three weeks. (*Id.*; CX 16, p. 56.)

Mr. Abruzzi continued seeing the Claimant for physical therapy, and wrote in his January 3, 2007, report that the Claimant's issues with her "neck/thoracic spine" had resolved, though the low back pain persisted. (CX 16, p. 52.) According to the Claimant, she could now tolerate sitting for up to two hours and standing or walking for one hour. (*Id.*) While the range of motion in her cervical spine was back to normal, her lumbar movement continued to be constrained by pain. (*Id.*) Still, Mr. Abruzzi anticipated being able to transition the Claimant to just a home exercise program in about a month. (*Id.*)

The Claimant had another check-up with Dr. Loddengaard on January 4, 2007. (CX 12, p. 25.) He wrote that the Claimant still could not bend well or change positions without pain in her low back, which was tender to the touch. (*Id.*) He considered her, "very slow to improve." (*Id.*) He recommended that the Claimant remain off work for another three weeks and continue physical therapy, but also decided to order a lumbar MRI to investigate. (*Id.*)

The Claimant's First Lumbar MRI: January 11, 2007

On January 11, 2007, an MRI of the Claimant's lumbar spine was performed by Dr. A.A. Goodarzi at Brookshire Imaging Medical Associates, at Dr. Loddengaard's request. (CX 10, p. 17.) The images showed minimal disc desiccation or dehydration, formation of a few Schmorl's nodes, and some hyperlordosis, but no disc protrusion, spinal stenosis, or abnormal cord signaling. (*Id.*) Dr. Loddengaard's opinion was, "basically it's a normal MRI," a view which all later physicians who reviewed the images concurred with. (HT, pp. 91; *see* RX 5, p. 7 (Dr. Delman); CX 9, p. 14 (Dr. Peck).)

Physical therapy continued, with the Claimant reporting increased tolerance for activity on January 15, 2007. (CX 16, p. 53.) She continued to exhibit muscle guarding and apprehension in her active movements though and her range of motion was still restricted in her low back. (*Id.*) Mr. Abruzzi again urged Dr. Loddengaard to reevaluate the Claimant. (*Id.*)

Dr. Loddengaard saw the Claimant again on January 16, 2007, but apparently found her much the same, estimating only that her recovery might take another three to six weeks.⁹ (CX 14, p. 36.)

Continued Surveillance: January 22 and 25, 2007

The Respondents' private investigator continued to record the Claimant's movements occasionally.¹⁰ (*See* RX 14.) Nothing particularly significant was captured during these sessions, though in general, the film of the Claimant on January 25, 2007, showed her moving somewhat faster than she had in November of 2006, and she was no longer noticeably in pain. (*Id.* at video.)

The Final Physical Therapy Appointment: February 2, 2007

Mr. Abruzzi saw the Claimant for a final physical therapy appointment on February 2, 2007. (CX 16, p. 54.) He reported her condition to be much the same, with pain limiting her movements and "excessive" lumbosacral lordosis, but also tolerance for sitting for up to two hours. (*Id.*) Mr. Abruzzi instructed her to continue her home exercises, though his active treatment of the Claimant was at an end. (*Id.*)

The Claimant made another visit to Dr. Loddengaard on February 5, 2007, where he renewed her muscle relaxant and anti-inflammatory medications. (CX 13, p. 32.) While the Claimant told Dr. Loddengaard that she "was less stiff and could move better," on exam, she "basically had no lumbar extension," and, "couldn't lean backwards." (HT, p. 45.) Since her forward bending had improved to reach six inches from her toes, the Claimant's exam was now "directional," as her backwards extension was "very poor" and painful. (*Id.*)

⁹ I frequently was provided with only Dr. Loddengaard's disability slips and prescriptions, not actual progress notes, so I have very limited information about many of Dr. Loddengaard's interactions with the Claimant.

¹⁰ As the Claimant pointed out, on January 22, 2007, one of her neighbors was mistakenly filmed instead of the Claimant. (HT, p. 189.) I ignored this irrelevant footage.

First Orthopedic Evaluation with Dr. Delman: February 6, 2007

At the request of the Respondents, the Claimant was evaluated by Dr. Allan M. Delman on February 6, 2007. (RX 5, p. 5.) Dr. Delman wrote a multi-page report about this examination. (*Id.*) Subjectively, the Claimant complained of daily low back pain rated at 8/10, that increased on and off throughout each day and whenever she extended her back. (*Id.*) She claimed to be unable to sit or stand for long and to tire easily from walking. (*Id.*) Cold weather made her pain worse. (*Id.*) The Claimant also asserted that lying on her back was painful, but that she could lie on her stomach if she used a pillow. (*Id.*) Her neck and shoulder pain had not resurfaced, nor did she have any numbness or tingling in her arms and legs. (*Id.* at 6.) Dr. Delman collected the Claimant's history, noting that she denied "prior injury to the low back or cervical spine that has resulted in disability." (*Id.*)

Dr. Delman examined the Claimant and found normal cervical vertebrae, but a restricted range of motion in her lumbar spine, with guarding, pain, and tenderness. (RX 5, pp. 6-7.) Straight-leg raising produced low back pain as well. (*Id.* at 7.) Based on what he had seen, Dr. Delman diagnosed the Claimant with a lumbosacral strain and a resolved cervical strain. (*Id.* at 8.) He recommended that conservative treatment continue for the Claimant's lumbar spine, including "anti-inflammatory medication, modified activity, physical therapy and heat or ice to the affected region for symptomatic relief." (*Id.* at 9.) Dr. Delman was also told that Dr. Loddengaard had recommended "therapeutic injections to the facet joints," an idea Dr. Delman considered reasonable for "persistent pain which is aggravated by lumbar extension." (*Id.*)

In Dr. Delman's opinion, based on the Claimant's restricted range of motion and lumbar tenderness, the Claimant was "temporarily totally disabled from her customary duties as a longshoreperson or UTR driver." (HT, p. 224; RX 5, p. 9.) He believed that her disability would likely continue for four more weeks, but that treatment could improve her condition, allowing her to return to work then, possibly with a transition period of light-duty work. (RX 5, p. 9.) He did "not anticipate any permanent work restrictions resulting from this injury" and did not see her as a potential surgical candidate. (*Id.*)

Consultation with Dr. Peck: February 13, 2007

Because Dr. Loddengaard believed that facet injections might be helpful to the Claimant, he referred her to Dr. Joseph C. Peck, who specialized in pain management. (CX 9, p. 13.) Dr. Peck saw the Claimant on February 13, 2007, noting current complaints of low back pain that fluctuated between 3/10 and 9/10 and which increased when sitting, standing, or walking. (*Id.* at 13-14.) The physical examination, however, turned up no analgesic list or focal tenderness, though the Claimant's lumbar range of motion remained quite constricted, with pain greater on extension than flexion. (*Id.* at 14.) Dr. Peck's impression was of "[c]hronic axial low back pain with potential lumbar facet arthropathy." (*Id.* at 15.) Since the Claimant's pain had not improved with conservative treatment and was still moderate to severe in intensity, Dr. Peck recommended proceeding with diagnostic and therapeutic facet joint injections, including medial branch blocks that might give her long-term relief. (*Id.*) If that failed, he considered radiofrequency neurotomy to possibly be an option in the future. (*Id.*) During the appointment, he discussed the risks of lumbar injections with the Claimant. (*Id.*) Ultimately, she decided not to receive any injections,

believing that the possibly short-term relief was not worth the potential risks. (HT, p. 320.) The Claimant had no further appointments with Dr. Peck.

The Claimant Tries Acupuncture: February 27 to March 22, 2007

The Claimant's next appointment with Dr. Loddengaard was on February 27, 2007.¹¹ (See CX 15, p. 46.) According to Dr. Loddengaard, the Claimant wanted to try acupuncture. (HT, p. 50.) He considered there to be no harm in trying it, so he wrote a prescription for six acupuncture visits over the next two to three weeks. (*Id.* at 50-51; CX 15, p. 46.) He also wrote a disability slip continuing the Claimant's temporary total disability for another three to six weeks. (CX 14, p. 38.)

The Claimant had her first acupuncture treatment with Dr. Roya Nematollahi on March 12, 2007. (CX 15, p. 45.) Dr. Nematollahi wrote in her notes that at that time, the Claimant had "very bad muscle spasm, low back pain, could not sit or stand for long period of time, lying on her back was painful." (*Id.*) In Dr. Nematollahi's opinion, the Claimant's range of motion improved after several sessions of acupuncture and her pain was reduced. (*Id.*)

This was also what the Claimant reported to Dr. Loddengaard when she saw him on March 22, 2007. (HT, p. 51.) She said acupuncture was "really helping" her and improving her extension, which Dr. Loddengaard's physical examination apparently confirmed. (*Id.*) Because of this improvement, he wrote the Claimant a prescription for four more weeks of acupuncture in twice weekly sessions, and predicted that she would be able to return to work in one month's time. (CX 15, p. 47; CX 14, p. 39.)

Reevaluation by Dr. Delman: March 29, 2007

Dr. Delman had a follow-up appointment with the Claimant on March 29, 2007. (RX 5, p. 11.) The Claimant continued to take Motrin, Flexeril, and the occasional Vicodin for pain, had had seven sessions of acupuncture so far, and was still not working. (*Id.*) She stated that her low back pain became "considerable" by 2 or 3 p.m. most days, reaching 8-9/10, increasing with movement, and requiring that she lie down. (*Id.*; HT, pp. 254-55.) Dr. Delman found that the Claimant's lumbar motion was still restricted, her movements guarded, and her back tender. (RX 5, p. 11.) Straight-leg raising continued to produce pain in her low back. (*Id.* at 12.) While the Claimant reported not improving much with conservative treatment, Dr. Delman believed that conservative treatment and home exercise remained her best options. (*Id.*)

Based on his observations, the length of time following the injury, and the objective test findings, Dr. Delman formed an opinion that the Claimant was able to return to light-duty work. (RX 5, p. 12; HT, p. 226.) She should refrain from heavy lifting, frequent forward bending, stooping, and squatting, but Dr. Delman felt that the Claimant could perform either signal or clerk work off of the casualty board. (RX 5, p. 12.) A four to six-week term on light-duty seemed appropriate to him, "in deference to her subjective complaints," but that then she should be reevaluated with an eye towards returning her to her regular duties. (*Id.*; HT, p. 256.)

¹¹ I have only the briefest of notes about this appointment to infer from.

The Claimant to Returns to Light-Duty Work: April 2007

Dr. Loddengaard reevaluated the Claimant on April 12, 2007. (CX 14, p. 40.) The Claimant again said that acupuncture had helped her and her extension had improved some. (HT, p. 52.) As a result, Dr. Loddengaard decided that she was capable of returning to work on a “light duty no heavy lifting trial basis.” (CX 14, p. 40.) He prescribed additional Ibuprofen and the Claimant still had three acupuncture visits left, but he agreed with Dr. Delman that light-duty work was the next step for the Claimant. (*Id.*; HT, p. 52.) In her testimony, the Claimant was clear that this return to work was her physicians’ idea, not hers, though she had discussed with Dr. Loddengaard what types of work she felt up to. (HT, p. 172.) In the end, he wrote a disability slip for the Claimant to return to work on April 14, 2007. (CX 14, p. 40.)

Accordingly, the Claimant returned to work the following Monday, April 16, 2007. (CX 4, p. 4.) However, she only went to the union hall on days where she felt up to it, otherwise staying in bed. (HT, pp. 176, 354.) By some estimates, she worked approximately three days a week her first few months back on the job. (RX 11, p. 177; HT, p. 257.) Being on light-duty required applying to the PMA, which she did, but the Claimant testified that she believed she was more limited in what jobs she could do than her medical restrictions said. (HT, p. 172, 175.) In the beginning, she avoided “signal and hatch work by taking different jobs,” but coworkers told her that she could get more restrictions, ones which would allow her to opt out of hatch clerk and dock signal work entirely, if she applied for an ADA accommodation. (*Id.* at 175, 326-27.)

When the Claimant returned to work, the Respondents stopped paying disability compensation benefits. (CX 4, p. 4.) From November 18, 2006, through April 15, 2007, Respondents had paid the Claimant \$1,097.57 in temporary total disability benefits each week, for a total of \$23,356.03. (*Id.*)

While working on light-duty, the Claimant continued to get acupuncture.¹² (CX 15, p. 45; RX 12, p. 256.) Dr. Nematollahi felt that the Claimant was improving in April and May. (CX 15, p. 45.) Dr. Loddengaard rechecked the Claimant’s condition on May 2, 2007, and decided to renew her prescriptions for Vicodin and for acupuncture, authorizing another six-week round of twice weekly appointments. (CX 15, p. 48; CX 13, p. 33.) Dr. Loddengaard had another appointment with the Claimant on May 30, 2007, but I have no note indicating he saw any changes. (CX 14, p. 42.) Dr. Nematollahi, however, reported on June 4, 2007, that the Claimant was complaining of more pain again, with tenderness in her back and in the acupuncture points on her legs. (CX 15, p. 45.)

Evaluation by Dr. Deutsch: June 15, 2007

As part of her application for assignment to light-duty on the casualty board, the Claimant was evaluated by Dr. James Deutsch, June 15, 2007. (CX 17, p. 63; RX 11, p. 177.) Dr. Deutsch wrote that the Claimant said her pain had become “significantly worse” over the previous month. (RX 11, p. 177.) According to the Claimant, she had begun experiencing radiating tingling pain down her right leg. (*Id.*) Dr. Deutsch noted that the Claimant was “in mild distress,” and he found muscle tenderness and pain with movement in the Claimant’s neck. (*Id.*

¹² Though strangely, Dr. Nematollahi recorded the April 17 and 20, 2007, appointments as being for treatment of cough, headache, and chest pain. (RX 12, p. 256.)

at 177-78.) Her lumbar spine was not tender, but had restricted motion, accompanied by pain, though straight-leg raising did not cause pain. (*Id.* at 178.) Dr. Deutsch diagnosed the Claimant with cervical and lumbar sprains, and possible sciatica. (*Id.*) He believed her claim that sitting and standing for long periods made her pain worse, and so he approved of the decision to place the Claimant on the light-duty casualty board. (*Id.*) He estimated she should remain there for three months, giving Dr. Loddengaard a chance to continue evaluation and treatment. (*Id.*)

While Dr. Loddengaard saw the Claimant again on June 28, 2007, none of his findings have been reported, only that he approved of her continuing to work light-duty. (CX 14, p. 43.)

In July, the Claimant returned to Dc. Schoch's office for massages, with visits on July 17 and 26, 2007. (RX 12, pp. 257-58.)

On August 2, 2007, Dr. Loddengaard apparently had another appointment with the Claimant, though again, I was given no record of his observations. (CX 14, p. 44.)

Reassessment of the Claimant's Capacity: September 2007

The Respondents' private investigator captured additional footage of the Claimant's movements on September 3, 2007. (RX 14, p. 412.) In the video, the Claimant is shown reaching over her head, looking upwards, and leaning into the truck of her vehicle for some minutes. (RX 14, video) There is also film of the Claimant watering her lawn, moving with apparent ease. (*Id.*)

More importantly, on September 11, 2007, the Claimant was again assessed by Dr. Delman. (RX 5, p. 14.) Her complaints and the physical examination findings were roughly the same – though she said that her right leg pain had stopped – but Dr. Delman had new x-rays of the Claimant's low back taken. (*Id.* at 14-15.) These x-rays were perfectly normal, just as previous ones had been. (*Id.* at 15.) Dr. Delman reported that Dr. Loddengaard disagreed with Dr. Deutsch, who had wanted another MRI done. (*Id.* at 14.) Dr. Loddengaard felt there was no need, so the additional imaging did not happen. (*Id.*) Instead, the Claimant continued to use acupuncture and Motrin, while working three days most weeks at light-duty. (*Id.*) For his part, Dr. Delman recommended a lumbar cortisone injection, as well as NASIDs, but he believed the Claimant was now “able to return to full duty work.” (*Id.* at 14-15.) He expected her residual subjective symptoms to be fully permanent and stationary within six to eight weeks. (*Id.* at 15.)

However, the Claimant continued to work only light-duty. (*See* CX 18, pp. 81-82.) She appears to have had no medical treatment for the next three months, save another massage at Dc. Schoch's office on November 8, 2007. (RX 12, pp. 254-55.)

The Claimant Reaches MMI: December 6, 2007

Dr. Loddengaard saw the Claimant next on December 6, 2007. (CX 7, p. 7.) In his report, Dr. Loddengaard referred to this as the “final evaluation” of the injuries the Claimant sustained on November 17, 2006. (*Id.*) He reported that while her low back was still painful and extension difficult, the Claimant's condition had been stable for a number of months and her forward bending was easier. (*Id.* at 7-8; HT, p. 59.) The Claimant also could perform most activities of daily living and had been back on light-duty for around eight months, though she claimed that signal jobs “killed her.” (CX 7, pp. 7-8; HT, p. 59.) Dr. Loddengaard's final diagnosis for the

Claimant was lumbar strain with residual low back pain and loss of extension. (CX 7, p. 8.) He thought the pain indicated a facet joint problem, but since the Claimant refused any injections to her back, there was “little more that can be done for her.” (*Id.*) Thus, Dr. Loddengaard believed the Claimant had reached maximum medical improvement. (*Id.*)

Dr. Loddengaard opined that the Claimant’s residual impairments permanently “preclude[ed] her from heavy lifting and repeated bending and stooping.” (CX 7, p. 8.) Using the AMA Guide, he rated her as “DRE Lumbar Category 2” based on an asymmetric loss of motion and continued pain. (*Id.*) He felt that her limitations “significantly interfere with activities of daily living,” representing a 7% impairment of the whole person. (*Id.*) Dr. Loddengaard thought that the Claimant should be provided with future medical benefits, in case she later decided to pursue back injections, though he did not anticipate her ever needing surgery. (*Id.* at 9.) When questioned at the hearing, Dr. Loddengaard testified that his report had omitted, but should have included, a restriction on the Claimant standing for more than short periods.¹³ (HT, pp. 59-60.)

While Dr. Delman did not see the Claimant again until January 17, 2008, he agreed with Dr. Loddengaard that the Claimant had probably reached MMI by December 6, 2007. (RX 5, p. 16; HT, p. 260.) During the visit in January, Claimant told Dr. Delman that she tried to avoid signal work and wore a back brace when prolonged standing was necessary. (RX 5, p. 16.) Her physical exam showed limited extension, some pain with movement, lying down, or straight-leg raising, and tenderness. (*Id.* at 17.) But because there was no objective evidence of low back pain or indication of the source of any pain, Dr. Delman did not give the Claimant’s assertions as much credibility as Dr. Loddengaard did. (*See* HT, p. 230.) He found “no factors of permanent disability according to the AMA Guides to the Evaluation of Permanent Impairment,” thus, he believed that the Claimant should be released to full duty work and did not require more medical treatment for the residuals of her November 17, 2006, injury. (RX 5, p. 18.)

The Claimant Applies for ADA Accommodations: January to March 2008

Despite Dr. Delman’s opinion, the Claimant continued to work only light-duty jobs on the waterfront. (*See* CX 18, pp. 84-85.) Further, in late January 2008, the Claimant filed paperwork with the Joint Port Labor Relations Committee requesting expanded job accommodations under the Americans with Disabilities Act. (CX 17, pp. 65-66.) The Claimant asked for permission to not accept dock signaling, hatch clerk, and other light-duty jobs that involved prolonged standing, sitting, or walking. (*Id.* at 65.) She additionally claimed that heavy lifting, repeated backwards movement, and bending or stopping also caused pain and must be avoided. (RX 10, p. 169.)

On January 23, 2008, Dr. Loddengaard completed a brief medical questionnaire to support the Claimant’s application, which said that the Claimant’s “[l]umbar strain, with residual low back pain and loss of extension” permanently precluded her from “heavy lifting, repeated bending and stooping.” (CX 17, p. 68.) He did not complete the section where he could have listed appropriate accommodations for those limitations. (*Id.* at 69.)

¹³ Dr. Loddengaard did not actually mention this limitation until the letter he wrote on February 18, 2009. (RX 17.)

Around this same time, the Claimant consulted a new chiropractor, Dc. Timothy D. Collins, on January 17 and 21, 2008, about potential spinal decompression treatment. (RX 18, pp. 1-2, 39; RX 12, pp. 252-53.) Dc. Collins examined the Claimant and took new x-rays, reaching a chiropractic diagnosis of “disc degeneration, lumbar lesion, and sacroiliac sprain.”¹⁴ (RX 12, pp. 252-53.) But, for the time-being, the Claimant held back on pursuing treatment with Dc. Collins.

On March 5, 2008, the Claimant received an hour-long independent medical evaluation from Dr. Philip Harber, as part of the review of her ADA accommodation request. (CX 17, p. 59; HT, p. 177.) The Claimant reported low back pain that radiated occasionally into her thighs. (CX 17, p. 60.) While comfortable in many positions, prolonged sitting, standing, and walking were all painful for her, with “severe pain” being produced by any attempt to bend backwards. (*Id.* at 60-61.) These restrictions had supposedly interfered with her ability to work as a dock signaler, hatch clerk, or tower clerk, as well as with her activities of daily living. (*Id.* at 61.) Upon examination, Dr. Harber found that the Claimant had a restricted lumbar range of motion, but no pain with straight-leg raising. (RX 11, p. 158.)

Dr. Harber observed that his opinions heavily relied on the Claimant’s own subjective self-reporting. Nevertheless, he decided that it would be a reasonable accommodation for the Claimant to avoid signal and hatch work. (CX 17, pp. 61-62.) He did not feel that tower clerk duty needed to be avoided, though, as while that task is mostly performed sitting down, the Claimant could stand and stretch as needed. (*Id.* at 62.) Dr. Harber thought that it had only been “about a year” since the Claimant’s accident, and, thus, improvement was still possible. (*Id.* at 61.) His recommendation for accommodation was, therefore, temporary and would require reassessment in one year.¹⁵ (*Id.*)

The Claimant had a check-up with Dr. Loddengaard on March 5, 2008, and claimed episodes of leg pain. (RX 5, p. 21.) Dr. Loddengaard believed this was a byproduct of facet dysfunction and recommended that the Claimant continue working only light-duty jobs. (*Id.*)

A Second MRI and More Chiropractic Treatment: April to November, 2008

In April of 2008, the Claimant began focusing her energies on chiropractic rather than medical treatment. On April 3, 2008, she had her last massage session at Dc. Schoch’s office. (RX 12, p. 249.)

The Claimant sought out further evaluation by Dc. Collins. At his request, a second MRI was obtained, this time with positional images of her lumbar spine in neutral, flexion, and extension poses. (RX 7, p. 36; HT, pp. 72, 75.) These images showed some small cysts and Schmorl’s nodes, but no significant disc bulge or protrusion, or abnormal nerve roots. (RX 7, pp. 36-37.) The Claimant testified that Dr. Loddengaard told her that the images showed “a slight herniation, but that it was within normal” limits. (HT, p. 77.) Dr. Delman agreed with that

¹⁴ The basis for Dc. Collins’ diagnosis is unclear because there is no indication that these x-rays showed any abnormalities. (RX 12, pp. 252-53.)

¹⁵ For unknown reasons, Dr. Harber did not write his formal report until four months later, on July 2, 2008, and the Joint Port Labor Relations Committee did not rule on the Claimant’s request until the following December. (CX 17, pp. 57, 59.)

assessment, as this MRI showed only a few insignificant findings and provided no objective support for a disability claim. (RX 5, p. 21; HT, p. 233.) The Claimant discussed the MRI results with Dc. Collins on April 30, 2008, though she still held off on getting treatment with Dc. Collins for another month. (RX 18, p. 3.)

Starting on June 2, 2008, the Claimant began a series of treatments with Dc. Collins, going to his clinic about three times a week for mechanical traction and electrical stimulation, and later for chiropractic adjustments to her back with a “Pulstar” gun-like tool. (RX 12, pp. 202-34; HT, pp. 170, 317; RX 18, pp. 8, 29-30.) This therapy was meant to relieve the pressure on the Claimant’s lumbar vertebrae. (RX 18, p. 16.) There were records of 13 such sessions in June of 2008, and another 4 in July of 2008.¹⁶

The Claimant told Dr. Loddengaard on June 26, 2008, that Dc. Collins’s spinal decompression had been of “questionable slight help,” and Dr. Loddengaard noted that the Claimant still had “basically no extension.” (RX 5, p. 21.) Dr. Loddengaard advised the Claimant to continue her modified-duty work for the next two months. (*Id.*) In the meantime, beyond Dc. Collins’s traction sessions, the Claimant’s insurance records show that she also had two more sessions of acupuncture with Dr. Nematollahi.¹⁷ (RX 12, pp. 201, 210.)

Dr. Loddengaard followed up with the Claimant on November 5, 2008. (RX 5, p. 22.) At this point, the Claimant said that the spinal decompression treatment had actually resulted in increased back pain. (*Id.*; HT, p. 170.) Dr. Loddengaard’s evaluation identified forward flexion to within four inches of toes, but poor and painful extension in her back. (RX 5, p. 22.) His recommendations were limited to exercise and NASIDs. (*Id.*)

ADA Accommodations Granted: December 19, 2008

On December 19, 2008, the Joint Port Labor Relations Committee agreed to grant the Claimant a temporary accommodation under the ADA, exempting the Claimant from “all signal

¹⁶ June 2, 2008 (RX 12, pp. 227-28; RX 18, Ex. 1, p. 4 (traction and electrical stimulation)); June 3, 2008 (RX 12, pp. 233-34; RX 18, Ex. 1, p. 5 (traction and electrical stimulation)); June 5, 2008 (RX 12, pp. 230-31; RX 18, Ex. 1, p. 6 (traction and electrical stimulation)); June 10, 2008 (RX 12, pp. 227, 229; RX 18, Ex. 1, p. 7 (traction and electrical stimulation)); June 11, 2008 (RX 12, pp. 217-18; RX 18, Ex. 1, p. 8 (traction and electrical stimulation)); June 12, 2008 (RX 12, pp. 225-26; RX 18, Ex. 1, p. 9 (traction and electrical stimulation)); June 17, 2008 (RX 12, pp. 223-24; RX 18, Ex. 1, p. 10 (traction and electrical stimulation)); June 19, 2008 (RX 12, pp. 221-22; RX 18, Ex. 1, pp. 11, 51 (traction, electrical stimulation, Pulstar, and manual therapy)); June 20, 2008 (RX 12, pp. 214-15; RX 18, Ex. 1, pp. 12, 53 (traction, electrical stimulation, Pulstar, and manual therapy)); June 23, 2008 (RX 12, pp. 214-16; RX 18, Ex. 1, p. 62 (traction, electrical stimulation, Pulstar, and manual therapy)); June 24, 2008 (RX 12, pp. 214, 216; RX 18, Ex. 1, pp. 13, 52 (traction and electrical stimulation)); June 25, 2008 (RX 12, pp. 219-20; RX 18, Ex. 1, pp. 14, 54-55 (traction, electrical stimulation, Pulstar, and manual therapy)); June 30, 2008 (RX 12, pp. 212-13; RX 18, Ex. 1, pp. 15, 22 (traction, electrical stimulation, Pulstar, and manual therapy)); July 7, 2008 (RX 12, pp. 204-05; RX 18, Ex. 1, p. 16 (traction, electrical stimulation, Pulstar, and manual therapy)); July 11, 2008 (RX 12, pp. 206-07; RX 18, Ex. 1, p. 17 (traction, electrical stimulation, Pulstar, and manual therapy)); July 14, 2008 (RX 12, pp. 206-08; RX 18, Ex. 1, p. 18 (traction, electrical stimulation, Pulstar, and manual therapy)); and July 16, 2008 (RX 12, pp. 202-03; RX 18, Ex. 1, p. 19 (traction, electrical stimulation, Pulstar, and manual therapy)).

¹⁷ Though again, the reasons for the treatment were listed as headaches, cough, and chest pain in the insurance records. (RX 12, pp. 201, 210.)

work and hatch clerk work without flopping,”¹⁸ though the Claimant still needed to take any yard or tower clerk work available. (CX 17, p. 57.) The Committee relied on the opinions of Dr. Harber in reaching its decision and the accommodation was good for one year after that examination, with March of 2009, the deadline for reevaluation. (*Id.* at 57-58, 61.)

The Claimant was able to arrange for Dr. Loddengaard to offer the evidence necessary to renew her accommodation. (*See* RX 17, p. 445.) Dr. Loddengaard provided a letter on February 18, 2009, stating that: “Because of her orthopedic problems, [the Claimant] continues to require ADA accommodations. Her restrictions are: No heavy lifting, no repetitive bending and no prolonged standing. These restrictions should remain in place for one more year.” (*Id.*) Though this letter was very short – this quotation was in fact all that the letter said – and did not explain its reasoning, it appears to have been enough evidence to secure the Claimant’s exemption from hatch and signal work for another year. (*Id.*; *see* RX 9, p. 62.)

More Surveillance Video: March 2009

The private investigator hired by Respondents performed more surveillance of the Claimant in early March of 2009, on March 1, 7, 8, and 15. (RX 14, pp. 393-94.) This video was reviewed by Dr. Delman, who opined that most of the actions it showed the Claimant engaging in were too brief to “shed light on [the Claimant’s] condition.” (RX 5, p. 28D.) He said that, “[t]he most significant observation on the video was the patient sitting for a prolonged period of time in what appeared to be a skating rink,” without any apparent discomfort. (*Id.*) While, as the Claimant later pointed out, she had used a special portable seat, Dr. Delman is familiar with the uncomfortable nature of skating rink bleachers and was surprised that the Claimant did not show more discomfort or adjust her position substantially. (HT, pp. 190, 273-75.) When I watched the footage of the Claimant at the hockey rink, I also noted the numerous times the Claimant easily leaned her head far back to tip in food and drink. (RX 14, video.) That motion would primarily rely on the cervical vertebrae, but would cause some extension of the lumbar spine, yet the Claimant did the movement repeatedly, casually, and without noticeable pain. (*Id.*)

Miscellaneous Final Medical Appointments: April to November, 2009

Between April and November of 2009, the Claimant had three more check-ups with Dr. Loddengaard. The records provided about each are extremely brief, essentially repeating concerns about low back pain, potential facet dysfunction, and the need to continue light-duty work. (RX 9, p. 63 (early April, 2009); RX 5, pp. 28D (September 28, 2009), 28B (October 3, 2009).) In his notes from the final appointment with the Claimant that are in evidence, Dr. Loddengaard suggested that the Claimant undergo some sort of procedure to “burn the nerve endings” in her back, but she did not pursue this. (RX 5, p. 28B.)

The Claimant was evaluated two more times by Dr. Delman. The first took place on April 30, 2009. (RX 5, p. 19.) On that day, the Claimant claimed that her low back pain reoccurred “practically every day,” alternating on and off, and generally getting worse later in the day. (*Id.*) At its best, she rated the pain at 2-3/10, at its worst, more like 8-9/10. (*Id.*) Every couple of weeks, she also experienced 30 minutes of pain radiating down into her right, and sometimes

¹⁸ “Flopping,” means refusing to take work which you are qualified to perform that was offered. (HT, p. 352.) Without an ADA accommodation, this would result in the worker losing his or her place on the dispatch list.

left, leg. (*Id.*) According to the Claimant, prolonged standing, sitting, or walking increased her pain, and forced her to lie down on her side. (*Id.* at 20.) Though the Claimant continued to work light-duty with additional accommodations, business was slow and, as a result, she was only getting about one day a week of work that was compatible with her limitations. (*Id.*) While work activity could increase her pain, she said that, after resting, her pain level would return to normal, without permanent worsening. (*Id.*)

At that point, the Claimant was still taking Motrin to control her pain, along with an occasional Vicodin. (RX 5, p. 20.) With testing, Dr. Delman found pain at the end of the ranges of the Claimant's lumbar motion, particularly lumbar extension. (*Id.*) He also noted guarded movement, along with a lack of tenderness and a normal lumbar lordosis. (*Id.*) As part of this examination, Dr. Delman had new lumbar and pelvic x-rays taken, but once more they showed no abnormalities. (*Id.* at 21.) Thus, Dr. Delman continued to believe that conservative treatment, exercise, and occasional medication were the best course for the Claimant. (*Id.* at 24.) Dr. Delman reiterated that the Claimant did not appear to him to have any permanent work restrictions and could have been returned to her full regular duties some months before this: "In my opinion, the [Claimant] should not be on an ADA accommodation. Although I found the [Claimant] to be pleasant and reliable on the examination, the MRI findings show only minor changes which would not explain the prolonged subjective complaints." (*Id.*)

The last medical appointment with Dr. Delman was on November 6, 2009, and largely confirmed his opinions from the April 30, 2009, evaluation. (RX 5, pp. 28A, 28E.) The Claimant still complained of daily low back pain that ramped up over the course of a day from 3/10 to 8/10. (*Id.* at 28A.) She also reported worsening with cold weather and radiating pain into her left leg, though she said that previously, "the pain would only radiate to the right leg." (*Id.*) The Claimant described this radiating pain as occurring every three or four weeks and lasting around three minutes per episode. (*Id.*)

Dr. Delman once more observed a limited range of lumbar motion and guarded movements, as well as tenderness along the lumbar spine. (RX 5, p. 28B.) Based on these findings, he maintained his belief that the Claimant was permanent and stationary, and had been capable of returning to her full longshore duties for quite some time. (*Id.* at 28E.) He just did not see any objective evidence that would support the Claimant's subjective complaints. (*Id.*) Dr. Delman said that his opinions had not changed since his April 30, 2009, report. (*Id.*)

Lastly, in June of 2009, the Claimant apparently had two more administrations of mechanical traction by Dc. Collins. (RX 18, Ex. 1, pp. 46, 66.) Her low back pain was rated at 6/10 during those appointments on June 5 and 11, 2009. (*Id.*)

The Claimant's Deposition: June 29, 2009

The Claimant was deposed for this case on June 29, 2009. (RX 9, p. 49.) I have included most of her testimony in the relevant factual sections of this decision and will not repeat it here. She did make some additional statements that should be noted:

At her deposition, the Claimant went into detail about her duties after her return to work in April of 2007. The Claimant said that she was still a Class A worker, but that UTR-driving was no longer possible for her because it involved lots of stooping and bending to hook up hoses, and also because UTR work is not offered on the light-duty job board. (RX 9, pp. 62, 64.) At the time of her deposition, the Claimant was working two to three days a week due to the economic downturn. (*Id.* at 80.) While Class A members on the regular board were still getting five days of work a week, despite the shortage of jobs, longshoremen on the B Class and casualty boards were seeing a big decrease in their ability to get work. (*Id.* at 80-82.) The Claimant testified that she was making herself available at the union hall five days a week – with Saturdays reserved for church and Sundays for family – except when she had doctor’s appointments. (*Id.* at 82-83.) On most days she even stayed at the hall for the second dispatch, in case more work came in. (*Id.* at 98.) As for her accommodations, the Claimant said that she had tried to perform signal work about four times after her accident, but that she could not do it, due to her lack of back extension and the strain of standing for long periods. (*Id.* at 84-85.) When she was not working, the Claimant mostly took care of chores. (*Id.* at 97-98.)

Hearing Testimony: January 27 and 28, 2010

The hearing in this case took place on January 27 and 28, 2010, in Long Beach, California. Much of the important testimony from the hearing has been incorporated in other sections of the facts or elsewhere in this decision, but there was some new testimony I want to point out:

On January 27, 2010, Dr. Loddengaard explained his medical decision-making in the Claimant’s case. (*See* HT, pp. 45-50.) Dr. Loddengaard said that when the Claimant’s back pain became “directional” – meaning it hurt more leaning backwards than forwards – he considered that an indication of a facet joint problem. (*Id.* at 45-46.) “Facet joints are fairly small. They’re the size of your knuckles. We can’t put scopes in them. Basically they can hurt but look normal on scans.” (*Id.* at 49.) Because traditional imaging methods might not capture a facet joint problem, Dr. Loddengaard wanted to do back injections, preferably in the form of medial branch blocks, as a way of testing his hypothesis. (*Id.* at 46, 50.) If the Claimant had an injection and then felt better, that would be clinical evidence that the facet joint that was treated was part of the problem. (*Id.*) While back injections usually have temporary effects, Dr. Loddengaard said improvement was sometimes permanent. (*Id.* at 47.) Moreover, if the patient’s condition responded well to injections, that could justify doing other procedures like radio frequency ablation to neutralize pain receptors. (*Id.* at 48.) In this case, however, the Claimant decided not to get any back injections, foreclosing that method of investigation and treatment. (*Id.* at 47-48.) Since the other option – conservative treatment with physical therapy and medication – had not been effective for the Claimant’s pain, all she could do now was “just put up with it.” (*Id.* at 46, 50.) Dr. Loddengaard also testified that the Claimant’s neck and forward bending had certainly improved since the accident, but he was not aware of any improvement in her lumbar extension. (*Id.* at 77-78.)

In addition, Dr. Loddengaard talked about the accommodations he assigned the Claimant. When questioned about why he did not specify the types of movements the Claimant could not perform, Dr. Loddengaard claimed that he usually just wrote “no heavy lifting” to qualify his patients for light-duty, as “I’m not going to write down four different things when I can write one

thing” that alone would place a patient on light-duty. (HT, p. 52.) Though he did not specify it on any of the earlier disability slips or forms, Dr. Loddengaard said that he nevertheless knew that the Claimant “had trouble with prolonged standing,” and with “looking up,” as these required both neck and back extension he thought would be too painful for the Claimant. (*Id.* at 56-57.) He believed it was still valid for the Claimant to be precluded from jobs requiring much standing. (*Id.* at 96.) Further, the Claimant should not drive UTRs because she could get shaken up and her pain might flare as a result. (*Id.* at 56.) Dr. Loddengaard had not, however, ever restricted the number of days the Claimant should work, as he relied on her to say how well she felt. (*Id.* at 63-64.)

On January 28, 2010, Dr. Delman testified that based on his review of the case, he would not recommend facet joint injections currently, as he did not “feel that there’s any evidence of facet syndrome or facet joint arthrosis.” (HT, p. 265.) He also opined that the Claimant’s condition had not been aggravated or her impairments increased by any of the work or activity she had done since returning to work in April of 2007. (*Id.* at 270.) Based on the objective evidence, Dr. Delman’s opinion was that the Claimant could return to regular work, up to and including heavy lifting and driving UTRs. (*Id.* at 270, 274, 277.)

Over the course of both January 27 and 28, 2010, the Claimant, for her part, told the court that she also believed that her work since 2007, had not increased her degree of back pain, despite temporary flares. (HT, p. 187.) While she described her pain after the accident as “really severe,” it had gradually improved to the point that it was somewhat “tolerable,” and she was “learning to live with the pain.” (*Id.* at 319.) Despite her medical training, the Claimant claimed that she had never been curious about the cause of her back pain or done research into the problem herself. (*Id.* at 320.) Under cross-examination, she qualified that statement, saying that she had done some research about the risks of facet injections. (*Id.* at 321.)

As for the work she was doing, the Claimant testified that in 2009 she was working around four days a week, all clerk shifts which are generally at least ten hour days. (HT, p. 184.) As a result, she was making more money than she would have earned driving a UTR five days a week. (*Id.*) She clarified that when she got jobs off the later dispatch, she was still paid for the entire shift. (*Id.* at 181.) UTRs were not offered on the light-duty board, so she had never driven once since her accident, yet she believed that doing so would be too hard on her back. (*Id.* at 183, 315.) The Claimant also said that she had done three signal clerk jobs in 2007, but that it was “painful,” though she had been able to return to work the day after. (*Id.* at 347.) However, she planned to renew her ADA accommodation and did not anticipate ever being able to return to regular-duty work. (*Id.* at 193.)

ANALYSIS AND FINDINGS

It has been consistently held that the Longshore Act must be liberally construed in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Keenan v. Dir., Benefits Rev. Bd.*, 392 F.3d 1041, 1043 (9th Cir. 2004); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147 (D.C. Cir. 1967). The United States Supreme Court, however, has determined that the so-called “true doubt rule,” that was previously used to resolve factual doubt in favor of Longshore claimants in cases where the evidence was evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof

and, thus, the burden of persuasion. *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993).

Credibility Determinations and Weight Accorded to Opinions

In arriving at a decision, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence, to draw her own inferences from such evidence, and is not bound to accept the opinion or theory of any particular medical examiner or other expert witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3d Cir. 1975).

In cases under the Longshore Act, the judge determines the credibility and weight to be attached to the testimony of a medical or other expert. It is solely within the judge's discretion to accept or reject all or any part of any testimony, according to her judgment. *Perini Corp. v. Hyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969). In evaluating expert testimony, a judge may rely on her own common sense. *Avondale Indus., Inc. v. Dir., OWCP*, 977 F.2d 186, 189 (5th Cir. 1992). A judge is not bound to accept the opinion of a physician if rational inferences urge a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Ennis v. O'Hearne*, 223 F.2d 755, 758 (4th Cir. 1955). A judge, furthermore, may base one finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 157 (1993) (ALJ may rely on one medical expert's opinion on the issue of causation and on another's opinion on the issue of disability).

Nonetheless, the opinion of a claimant's treating physician is generally to be accorded greater weight, since the treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Amos v. Dir., OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Duhagon*, 31 BRBS at 101; *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 n.3 (2003). The opinion of a treating physician that a claimant is unable to work at her former job is generally entitled to greater weight than the opinion of a non-treating physician. *Downs v. Dir., OWCP*, 152 F.3d 924, at *1 (9th Cir. 1998) (Table) (Jul. 10, 1998). A treating physician's opinions are "not, however, necessarily conclusive as to either a physical condition or the ultimate issue of disability," and the ALJ retains the discretion to disregard even an uncontradicted opinion of a treating physician when the ALJ can identify clear reasons for doing so. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (Health and Human Services administrative law decision).

Having heard the witnesses' testimony firsthand, I have been afforded an opportunity to observe their behavior, bearing, manner and appearance, which also forms part of the evidence in the record. As the U.S. Court of Appeals for the Ninth Circuit has explained, the credibility of witnesses "involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with

other evidence.” *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963); *see also Indiana Metal Prods. v. Nat’l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971). Insofar as credibility must be weighed as part of the resolution of certain issues, I have based my findings of credibility on a review of the entire testimonial record and exhibits, according due regard to the demeanor of witnesses, the logic of probability, and “the test of plausibility,” in light of all circumstances apparent to me from the record. *Indiana Metal*, 442 F.2d at 52.

The Claimant’s Credibility

In this case, the Claimant’s own credibility is of central importance, since Drs. Loddengaard, Delman, and Harber have all testified that their opinions are dependent on the Claimant’s self-reported symptoms, and lack objective support. (*See, e.g.*, HT, pp. 101-02, 220, 228, 230, 266; RX 5, pp. 24, 28E; CX 17, p. 61; RX 16, p. 15.) After reviewing all of the evidence, however, I find a multitude of reasons to seriously question the Claimant’s credibility.

Treatment with Dc. Schoch:

As I mentioned early in the facts section of this decision, an unexpectedly volatile area of dispute in this case was what treatment the Claimant received at the offices of Dc. Schoch between February 17, 2005, and November 15, 2006. Specifically, the Claimant insisted that she had only seen Ms. White for massages, not Dc. Schoch for chiropractic adjustments, on all but two of her appointments. (*See, e.g.*, RX 9, pp. 93-95.) Respondents challenged this narrative with the insurance records from Dc. Schoch that documented over thirty chiropractic adjustments and a wide variety of treatments beyond pure massage. (*See, e.g.*, HT, p. 196; RX 12.) The Claimant countered that she had had no idea that Dc. Schoch had charged her insurance company so much and that his bills were not only in error, but evidence of insurance fraud. (HT, pp. 161-62, 297-99.) Resolving this conflict of fact has been difficult because Dc. Schoch passed away and, thus, could not give evidence about his treatment of the Claimant. (*See* HT, pp. 162, 296.)

Though the issue of what Dc. Schoch did or did not do for the Claimant has been framed as being about his honesty, ultimately the Claimant has forced a choice between believing either her word or his, a decision which will have an obvious impact on my estimation of the Claimant’s credibility.

In many ways, it is strange that the accuracy of Dc. Schoch’s billing for services provided before the Claimant’s accident became such a focus in this case. After all, even if the Claimant had chronic back problems and extensive chiropractic treatment – as Dc. Schoch’s records tend to show, as do the notes from Nurse Petrikas – it would be an easy case to make to say that the Claimant’s accident aggravated those existing problems, generating a disability which Respondents would be wholly responsible for under the provisions of the Longshore Act.¹⁹ Thus, while I suspect that the Claimant did not realize this until after she had committed herself to her story, she had nothing much to gain from discrediting Dc. Schoch. Yet, when it was pointed out that the insurance records showed ten times as many adjustments as the Claimant had said there were, rather than attempting to minimize the discrepancy, Claimant’s counsel instead countered

¹⁹ If the Claimant’s back issues had emerged gradually, perhaps the previous symptoms would have raised questions about which employer was responsible for benefits, but even then, APM was clearly the Claimant’s last employer before she became temporarily totally disabled and would have been found solely liable.

with allegations that ballooned the point into the focus of several depositions. The Claimant staked her credibility on inflammatory accusations of long-term fraud by a well-respected physician who was no longer alive to defend himself. After reviewing all of the evidence, I find that this was a poor gamble for her to make.

To illustrate this, it is necessary to briefly outline the positions taken by the witnesses. It is agreed that the Claimant was regularly given massages by Sophia White in Dc. Schoch's office from early 2005, until just two days before her accident. (HT, pp. 157-58, 160; CX 22, p. 16; RX 12.) Beyond this, descriptions of events diverge.

The Claimant: When questioned about preexisting back pain during her deposition on June 29, 2009, the Claimant said that she did not recall having low back pain before November 17, 2006. (RX 9, pp. 91-92.) She admitted having, “[g]eneral stiffness” in her back, neck, and shoulders, but claimed that it had not affected her low back. (*Id.* at 92.) She testified that she had seen Dc. Schoch before her accident, had gotten spinal adjustments “[a]bout two times,” and otherwise went to his office only for massages from Ms. White. (*Id.* at 93-95.) The Claimant was questioned repeatedly about this, both during her deposition and at the hearing, but persisted in her statement that she had only had “approximately” two, or “maybe three,” spinal adjustments from Dc. Schoch before her accident. (*Id.* at 96; HT, pp. 159-60, 163-64, 194, 196, 200, 287-88, 290, 294-95.) She reiterated that the massages were never for pain or stiffness in her lower back,²⁰ though she did allow she may have had low back “discomfort” from UTR driving at times. (HT, pp. 313-15, 340-41.) She also was adamant that she never saw a chiropractor for treatment of headaches and “never” had any history of headaches. (*Id.* at 367-68.) The Claimant further said that if she had known what Dc. Schoch was billing her for sooner, she would have reported it as fraud. (*Id.* at 161-62; 297-99.)

Dc. Schoch's Records: Meanwhile, the billing records submitted by Dc. Schoch to the Claimant's insurance company, document a total of 40 visits to his office between February 17, 2005, and November 15, 2006. (RX 12.²¹) Though entered as a series of numerical codes, these records assert that the Claimant had 33 chiropractic adjustments of her spine, along with treatments listed as “Manual Therapy,” “Therapeutic Activity,” “Therapeutic Exercise,” “Massage Therapy,” and a handful of others.²² (*See id.*) The paperwork indicates the diagnoses these procedures were meant to treat as well. (*See id.*) While the diagnoses emphasized changed

²⁰ She did admit that the “two to three” chiropractic adjustments were to her whole spine. (HT, p. 317.)

²¹ The Dc. Schoch records are spread throughout RX 12, and include visits listed on the following pages: February 17, 2005 (p. 197); March 2, 2005 (p. 191); March 9, 2005 (p. 191.); March 17, 2005 (p. 193); March 30, 2005 (p. 195); April 18, 2005 (p. 317); May 6, 2005 (p. 316); May 25, 2005 (p. 315); June 3, 2005 (pp. 312-13); June 15, 2005 (pp. 312, 314); June 23, 2005 (pp. 309-10); June 30, 2005 (pp. 310-11); July 21, 2005 (p. 308); August 9, 2005 (p. 307); September 2, 2005 (p. 306); September 23, 2005 (p. 305); November 5, 2005 (p. 304); December 1, 2005 (p. 298); December 8, 2005 (pp. 296-97); December 20, 2005 (p. 295); February 2, 2006 (pp. 291-92); February 7, 2006 (pp. 293-94); February 16, 2006 (p. 290); February 24, 2006 (p. 289); March 9, 2006 (p. 288); March 16, 2006 (p. 286); March 22, 2006 (p. 287); March 29, 2006 (p. 285); April 6, 2006 (p. 284); April 13, 2006 (p. 283); April 21, 2006 (p. 282); May 1, 2006 (pp. 280-81); May 8, 2006 (pp. 278-79); June 6, 2006 (pp. 276-77); June 22, 2006 (pp. 274-75); August 2, 2006 (p. 273); August 21, 2006 (p. 272); September 20, 2006 (p. 271); October 4, 2006 (p. 270); and November 15, 2006 (p. 269). For the sake of efficiency, I will refer just to RX 12, without listing the string of specific page numbers, when describing information drawn from these visits as a whole.

²² Therapeutic Exercise is CPT procedure code 97110, Massage Therapy is 97124, Manual Therapy is 97140, and Therapeutic Activity is 97530. Chiropractic adjustments are encoded as 98940, 98941, and 98942, depending on how many areas of the spine were manipulated.

somewhat from appointment to appointment, the vast majority listed “Lumbago”²³ and “Headache” as the primary concerns, though “Thoracic Pain,” “Muscle Spasm,” and “Cervical Pain,” were also often featured.²⁴ (*See id.*)

Other witnesses were brought in for depositions after the hearing, on March 2, 2010, to attempt to clear up: whether Dc. Schoch had performed 3 or 33 spinal adjustments; whether the Claimant received “only massages” or the longer list of procedures; and whether her treatment was for neck and shoulder stiffness or low back pain and headaches. (*See* CX 22; CX 23; RX 18; RX 19.)

Sophia White’s Deposition: Sophia White, the masseuse who the Claimant usually got massages from, was deposed, but her credibility is questionable. (*See* CX 22.) For starters, she said that she “wouldn’t know anything about” any chiropractic adjustments or other procedures the Claimant had at the clinic beyond massages. (CX 22, p. 22.) Ms. White apparently did not discuss the patients’ treatment with Dc. Schoch and was not aware of his billing practices either. (*Id.* at 33, 37.) She estimated that she had given the Claimant “probably” more than 100 massages over the years and described the Claimant as coming in for appointments and then having another “three days later,” when the real number of appointments could not have been more than 40²⁵ and they were always a minimum of five days apart.²⁶ (*Compare id.* at 17, 22; *with* RX 12.) Ms. White also could not remember what year she started seeing the Claimant. (CX 22, p. 27.)

Despite her earlier statements, by the end of the deposition, Ms. White claimed that she knew that the Claimant never got a chiropractic adjustment from Dc. Schoch either before or after a massage. (CX 22, pp. 59-60.) Ms. White said that she knew this because she always saw her clients in and out of the building, insisting that she watched the Claimant go out the door and get into her car “every time” after massages. (*Id.* at 60-61.) Beyond the implausibility that a masseuse would “always” watch every client walk out the door and to their vehicle every single appointment, Ms. White’s assertion does not allow for the two or three chiropractic adjustments following massages that even the Claimant admits to having. (*See, e.g.,* HT, pp. 159-60.) Ms. White also asserted that after the accident, the Claimant showed up for massages “hunched over” and saying that she “felt so much pain that she felt that she would pass out.” (CX 22, pp. 46-47.) These are much more extreme symptoms than anyone has mentioned elsewhere in this case.

Therefore, my impression is that Ms. White, to the extent that she has any knowledge to offer, is an unreliable witness, very suggestible, and with a tendency for exaggeration. Ms. White has no apparent motive for offering misleading evidence, but nevertheless, I give Ms. White minimal credibility and will use her evidence only when it closely supports other evidence I already find credible.

²³ Otherwise known as low back pain.

²⁴ Lumbago is recorded as ICD-9 diagnostic code 724.2, Headache is 784.0 (Tension Headache is 307.81), Thoracic Pain is 724.1, Muscle Spasm is 728.85, and two different types of Cervical Pain are listed as 723.1 and 723.4.

²⁵ It is hard to imagine that Dc. Schoch would not submit charges for over 50 appointments.

²⁶ In fact, I could find only one instance of the Claimant’s appointments being separated by less than a week, and often there were longer gaps. (*See* RX 12.)

Luz Georgina Covian's Deposition: Dc. Schoch's former receptionist, Luz Georgina Covian, was deposed as well. (*See* CX 23.) A key fact is that she only began working for Dc. Schoch in July of 2007, meaning that her knowledge of the Claimant's treatment is limited to the four post-accident appointments the Claimant had with Dc. Schoch. (*Id.* at 8, 14.)²⁷ However, these are not the treatments that have been so hotly disputed.²⁸ Ms. Covian also admitted that she really could not testify about what happened once patients left the waiting room and did not know about Dc. Schoch's billings for the Claimant's treatment, as he did them all himself. (*Id.* at 18, 21, 47.) All she could say was that, to her knowledge, everyone was always billed the \$55.00 for a minimal office visit, even if they only got a massage. (*Id.* at 23.) For these reasons, I find that Ms. Covian's evidence is reasonably credible, but of limited relevance.

Moreover, the facts of Ms. Covian's employment make it hard to escape the conclusion that the Claimant fabricated at least part of her testimony at the hearing. When asked about her reaction to Dc. Schoch's bills, the Claimant said that she called the office and asked Ms. Covian about them. (HT, pp. 193-96.) According to the Claimant, Ms. Covian's response was, "I know, known you for years, know you only got 2-3 adjustments." (*Id.*) Yet, in fact, since Ms. Covian started working for Dc. Schoch in July of 2007, her contact with the Claimant would have been limited to the waiting room time for just four appointments spanning only nine months and Ms. Covian would have had no personal knowledge of any adjustments, since they all occurred before she got there. (*See* RX 12; CX 23, pp. 8, 14.) I, therefore, find the Claimant's story of their interaction difficult to believe.

Noelle Vuoso's Deposition: Lastly, Noelle Vuoso, who had previously done all of Dc. Schoch's medical insurance billing, was questioned. (RX 19, p. 7.) Ms. Vuoso had done Dc. Schoch's billing for about ten years, and, thus, she was very familiar with his billing practices. (*Id.* at 8.) Moreover, Ms. Vuoso also did medical billing for many other physicians during this time, giving her insight into how things were normally done in the local area and how Dc. Schoch's charges compared to those of other chiropractors. (*Id.* at 45.) Ms. Vuoso did, however, not have any personal knowledge of what occurred during appointments, who prepared the handwritten notes that were sent to her at her office to create bills from, or what payments Dc. Schoch received. (*Id.* at 40, 46, 48, 50-51.) Within her realm of expertise though, Ms. Vuoso impressed me as precise and confident in her statements, which is unsurprising given that she makes her living by accurately completing detail-oriented paperwork. I found Ms. Vuoso's technical explanations of the insurance records in RX 12 to be helpful evidence, which was consistent with the information I gathered from other sources. On this basis, I will give Ms. Vuoso's evidence great weight in this case and consider her to be a credible witness.

Returning to the dispute over Dc. Schoch's charges then, Ms. Vuoso's testimony that she had never heard any over-billing allegations leveled at him and that she considered him unlikely to "cook the books," carry weight. (RX 19, pp. 8-9, 14-15, 24-26, 64.) In addition, her point that the charges the Claimant disputes are ones that Dc. Schoch would not have profited much from, make it seem less likely that he would have risked his reputation in that way. (*Id.* at 14.) Ms. Vuoso also opined that Dc. Schoch was noticeably more conservative than other chiropractors in

²⁷ These were the appointments on: July 17, 2007 (RX 12, p. 258); July 26, 2007 (*Id.* at 257); November 8, 2007 (*Id.* at 254-55); and April 3, 2008 (*Id.* at 249).

²⁸ Ms. Covian is correct that the Claimant did not have chiropractic adjustments during any of those four appointments; Dc. Schoch's records agree with her. (*See* CX 23, pp. 14, 18; RX 12.)

the area about billing for his services, to the point that she said he would probably be the chiropractor she considered least likely to inflate his charges. (*Id.* at 45.) This is all persuasive evidence in favor of the accuracy of Dc. Schoch's billing records, and against the Claimant's allegations of fraud.

Analysis of the Insurance Records: Further, I devoted a great deal of time to analyzing the insurance records in Respondents' Exhibit 12 myself, as well as in researching issues of medical billing for chiropractic treatment.²⁹ I found that the procedures Dc. Schoch billed for, and that the Claimant claims never occurred, are widely acknowledged to be ones that overlap in definition, are often performed together, and are not clear in application. "Massage Therapy" and "Manual Therapy" are both time-based charges for what, to a layman, sound like similar manipulation of the body with a masseuse's hands. (*See Current Procedural Terminology*, American Medical Association (2012), listed in footnote 29.) Therefore, I would not be surprised if the Claimant did not distinguish between the different sensations: it probably all felt like "massage" to her. Likewise, since she did not bill the insurance company, Ms. White might only differentiate between what she called "deep tissue" and "Swedish" massages. (*See CX 22*, p. 46.) One possible explanation of the records is that the deep tissue massages Ms. White gave the Claimant primarily before her accident were billed as "Manual Therapy" and the more delicate Swedish massages she performed after the accident were listed as "Massage Therapy." (*Id.*; *see RX 12*.) Similarly, "Therapeutic Activity" and "Therapeutic Exercise" differ only in whether the goal was to improve performance generally or just in one specific area. (*See Current Procedural Terminology, supra.*) At least some sources indicated that these codes also might apply to instruction in what exercises the patient should perform by themselves at home.³⁰ Lastly, it appears that only the chiropractic adjustments definitely needed to be performed by Dc. Schoch, rather than Ms. White. (*See RX 19*, p. 58.)

For these reasons, I find it quite possible that the treatments the Claimant received from Ms. White, once encoded under technical standards, would sound unfamiliar to both Ms. White and the Claimant, while at the same time being truthful and arguably valid charges, according to the evolving standards of the industry. Further, the length, type, and reason for treatment listed in the records varies naturally over time, something that a routine inflation of bills would be less likely to do.

I also find the Claimant and her counsel's characterization of Dc. Schoch's charges as "outrageous" to be unconvincing. (HT, p. 297.) Anyone who has ever seen an "explanation of benefits" statement from their insurance company is aware that what the physician bills for is not at all what they get paid: An initial \$800.00 for a 30-minute appointment with a specialist might earn a \$200.00 reimbursement from the insurance company, the rest disappearing into the

²⁹ My primary source for information about procedure codes for medical billing was the online guide to the American Medical Association's *Current Procedural Terminology* (2012), available at: <https://ocm.ama-assn.org/OCM/CPTRelativeValueSearch.do?submitbutton=accept>. I also read a number of articles posted by the American Chiropractic Association and the American Academy of Professional Coders. Depending on the source, definitions and guidance varied greatly for almost all of the procedures that were disputed in this case. It appears that no one authority can claim to be objectively "right," as the whole field is based on shifting negotiations between powerful, and valid, competing interests. Rather, proper methodology is subjectively defined by reference to "norms," which vary by area and practice and which evolve rapidly.

³⁰ I am sure that this is something that the insurance companies and medical providers disagree about.

mysterious chasm of write-offs and negotiated payment schemes. In this case, since Dc. Schoch's bills are all clearly marked as coming from a "non-contracted!" provider, he likely received an even smaller payment relative to his billed amounts.³¹ (*See, e.g.*, RX 12, p. 291.) This seems highly likely since Ms. White testified that she did not necessarily assume that Dc. Schoch made a profit on the massages she provided, as he always told her, "I'm actually, you know, not making that much," and would joke that the masseuses' \$60 share of the payment was, "bleeding him dry." (CX 22, p. 37.) Again, this indicates a certain lack of motivation for Dc. Schoch to "cook the books" in the way the Claimant has alleged.

Given all of the evidence above, I find it much easier to believe that Dc. Schoch was honest and the Claimant the one who was twisting the truth, rather than the reverse.

Treatment from Dc. Collins:

Yet, Dc. Schoch was not the only physician the Claimant accused of fraud. She also testified to having "billing issues" with Dc. Collins. (HT, p. 198.) According to the Claimant, Dc. Schoch had overcharged her insurance by "about \$3,000," again, allegedly by billing for procedures which were not performed. (*Id.*) She claimed to have called Dc. Collins' receptionist about the issue, though she admitted to never discussing it with Dc. Collins himself. (*Id.* at 199, 292.) For his part, Dc. Collins was totally unaware of any complaints. (RX 18, p. 6.)

It is unclear to me what treatments the Claimant claims were not performed. She asserted that "I was only going for the spinal decompression, the stretching, and, yes, towards the end that's when I started seeing Dr. Collins." (HT, p. 291.) The Claimant admitted that she got adjustments from Dc. Collins too, using "a little trigger gun" which contained electrodes.³² (*Id.* at 317.) As far as I can see, Dc. Collins's bills and records show just that: initial appointments for mechanical traction and electrical stimulation to decompress her discs, followed by later chiropractic adjustments – which Dc. Collins testified were all done using Pulstar, the shocking gun the Claimant remembered – and deep tissue work to adjust muscle balance at trigger points, which Dc. Collins said involved both Pulstar and his hands.³³ Dc. Collins has provided a convincing explanation for the work he performed, one that tallied with his bills and his progress notes, whereas the Claimant failed to identify any specific errors, despite accusing Dc. Collins of a definite dollar-value of fraud. Once more, I find the physician's version of events more credible.

³¹ Non-contracted providers of non-emergency services can generally only recover the "reasonable value" of their services from insurance companies in California. (*See* Carol K. Lucas and Michelle A. Williams, *The Rights of Non-Participating Providers in a Managed Care World*, American Health Lawyers Association (2009), http://www.healthlawyers.org/Events/Programs/Materials/Documents/HHS09/lucas_williams.pdf). For a lone chiropractor in private practice, this more or less leaves the rate at the discretion of the insurance company, as I sincerely doubt that Dc. Schoch had the resources to mount a legal challenge to dispute the rate offered. Unsurprisingly, in such situations, the rates are often a fraction of the amount the provider billed for. (*See id.*)

³² Though, inconsistent with her statement above, at an earlier point in the Claimant's testimony, she did claim that she "never" got adjustments from Dc. Collins. (HT, p. 164.)

³³ These appear to have been coded as "manual therapy." (*See* RX 12.)

Nurse Petrikas's Report:

The Claimant also alleged that the acute care nurse, Regina Petrikas, recorded incorrect information when the Claimant sought care in the ER the day of her accident. Nurse Petrikas wrote in both her handwritten and typed records that she was told that the Claimant had a "history of chronic neck and back pain for the past 2-1/2 years and does see the chiropractor 1-2 times a week." (RX 8, p. 45; RX 10, p. 129.) The Claimant now asserts that she never said anything like that and that the statement is untrue. (HT, pp. 144-45, 147-48, 302-05.)

The evidence on this point is more limited. Dr. Delman did testify that he was familiar with Nurse Petrikas's work and had not found her records to be inaccurate previously. (HT, pp. 217-18.) On the other hand, the Claimant had seen Dc. Schoch for only a year and a half by the time of her accident, and her appointments were never as frequent as twice a week. (RX 12.) I further believe the Claimant's insistence that she did not refer to her pain as "chronic," as despite her medical training, I have noticed that the Claimant does not use clinical language in describing her symptoms, even apparently when speaking to her physicians.³⁴ (HT, p. 302.)

But even allowing for all of that, I feel that the flaws in what Nurse Petrikas wrote are fairly easy to explain, and leave untouched basic facts that appear to accord with other evidence. It takes little imagination to believe that a busy ER nurse might make the simple mistake of writing "twice a week" instead of "twice a month,"³⁵ might have similarly rounded up the length of the treatment,³⁶ and, in the hospital records, a nurse probably would correctly apply the clinical term of "chronic" to describe pain that had lasted for months. (See RX 8, p. 45; RX 10, p. 129; HT, p. 267.) Yet the general notion that, before her accident, the Claimant received regular chiropractic care, including massages, to treat chronic back and neck pain, remains and is supported by Dc. Schoch's records and, at least in part, even by Ms. White and the Claimant's own testimony. (See RX 12; CX 22, p. 17; HT, pp. 158-61.)

In evaluating the credibility of the Claimant, a theme emerges from the Claimant's version of events: Dcs. Schoch and Collins have untrustworthy records; Nurse Petrikas wrote things down wrong; the Claimant even had to complain to the Pacific Maritime Association because allegedly they recorded her as "flopping," i.e. refusing to take offered jobs, when she claims they should not have. (HT, p. 353.) At a certain point, one has to ask whether it is plausible that all these other parties are in error, rather than the problem lying just with the Claimant's own veracity.

My Own Observations:

In addition, weighing against the Claimant is the evidence of my own eyes. I have presided over many hearings concerning back injuries in my career and observed numerous claimants with alleged back pain. I watched the Claimant carefully during both days of the hearing in this case, keeping notes. She exhibited none of the behavior I have observed in

³⁴ Which helps explain why several of her physicians were unaware of the Claimant's medical training. (See, e.g., HT, p. 45; RX 14, p. 13.)

³⁵ A much more accurate general statement of how often the Claimant went to Dc. Schoch's offices. (RX 12.)

³⁶ Or the Claimant may have provided the wrong number herself, particularly since she was in a hectic environment and in pain.

claimants with serious back pain. During the first day of the hearing, I did not at any time observe the Claimant readjusting her position or otherwise moving as someone with back pain might after sitting for a long time nor did she exhibit any signs of pain when she got up after sitting for more than an hour. She appeared relaxed when seated and did not sit stiffly as if in pain or move as if she was in pain from sitting. For instance, on January 27, 2010, she sat still from 1:00 p.m. until 2:30 p.m. when we took a 10 minute break and was able to get up from her chair and walk away normally. This happened again when we took a 5 minute break at 3:50 p.m. When we took the 3:50 p.m. break, though she walked a little stiffly, she walked normally, not like someone with severe back pain who has been sitting for too long.

It was only on the second day, shortly after Dr. Delman testified that people with low back pain often shift in their seats, that the Claimant repositioned herself in her chair. Otherwise, I observed no behavior typical of back pain. The Claimant did say that her pain was only rated 3-4/10 those days, but under cross-examination, she insisted that on the first day of the hearing: “If you were in front of me, you would have saw [sic] that I was moving. You know, I would sit in one position, slightly move to the other side. That helps me out. I was.” (HT, pp. 323-24.) While Respondents’ counsel may not have been in front of the Claimant watching her movements, I was, and I did not see her shifting in her seat. She sat still and was relaxed. Her insistence that she did move, therefore, gives me a further reason to question her credibility.

Respondents’ surveillance videos also allowed me to observe the Claimant performing physical actions that were out of synch with the limitations she complained about in contemporaneous medical appointments. (*See* RX 14, video.) For instance, though the Claimant told Dr. Delman on September 11, 2007, that she experienced great pain with even slight extension, the footage of her shot on September 3, 2007, shows her raising her hands over her head to close the trunk of a vehicle and craning her neck up – both activities involving a degree of lumbar extension – without any apparent hesitation or resulting pain. (*Compare id.*; with RX 5, p. 14.) She was also filmed that day bending, stooping, and walking around her lawn while dragging a hose,³⁷ again with no obvious symptoms of back pain. (RX 14, video.) Likewise, the Claimant told Dr. Delman on April 30, 2009, that sitting in one position for long periods of time made her pain worse. (RX 5, pp. 19-20.) Yet surveillance video from March shows the Claimant sitting in one spot in the bleachers, without noticeable adjustment, for nearly an hour. (RX 14, video.) Her only real movements were to quickly tip her head far back in order to pour snacks or drinks into her mouth, which with her reported symptoms, would have been expected to cause her serious discomfort, yet she did it repeatedly without batting an eye. (*Id.*)

Other Indications of a Credibility Problem:

To finish this discussion, I would add just a handful of other small indications that the Claimant’s testimony should not be accepted at face value:³⁸

³⁷ This is not the lawn-watering footage of the neighbor, but a later recording that documented the Claimant herself performing similar activities. (*See* HT, p. 189.)

³⁸ Other evidence, like Dr. Collins’s opinion that the Claimant was not a “typical” patient and inconsistency in the Claimant’s reports of her leg pain symptoms could be mentioned, but given the abundance of evidence that the Claimant lacks credibility, I will pass over these smaller hints as essentially redundant.

Apart from the debate about how long and how much previous chiropractic care the Claimant received, there is the fact that she never mentioned anything about her chiropractic treatment or even her massages to any of her doctors. (See CX 8, p. 10; CX 9, p. 14; RX 16, p. 14; RX 18, p. 27; HT, pp. 35, 200, 220, 290.) The omission is particularly surprising in instances like Dc. Collins's patient history sheet that asked specifically about previous chiropractic care. (HT, p. 290.)

The Claimant also firmly denied any history of headaches, when records from Dc. Schoch and Dr. Nematollahi, as well as the testimony of Ms. White, all indicate that headaches had been a persistent problem for the Claimant over the years. (HT, pp. 367-68; RX 11, p. 163; RX 12; CX 22, pp. 22, 48.) Though the Claimant's history of suffering from headaches has no bearing on the Claimant's alleged injury in this case, her insistence – against a body of evidence – that she did not have such a history, reflects on her overall credibility, making the Claimant seem like someone who either is unaware that they have a terrible memory or who routinely lies.

Another point is that Dr. Harber was convinced of the genuineness of the Claimant's symptoms because “[g]etting on and off the examining table was done very slowly and with assistance.” (RX 11, 158; RX 16, p. 15.) However, he also recorded that the Claimant was “able to dress and undress quickly without assistance,” during that same appointment. (*Id.*) In my mind, the movements necessary to stand up from or sit down on an exam table and those necessary to stand up and sit down while putting on clothing like pants and shoes, would be quite similar. The only obvious difference is that for the first set of movements, the Claimant knew she was being observed.

Lastly, Dr. Delman pointed out that, “back pain is typically improved by lying down,” yet the Claimant said that this instead caused her pain. (HT, p. 245.) She preferred lying on her stomach with a pillow. (*Id.*) According to Dr. Delman, that position would actually hyperextend the spine, which should cause much more pain for someone with low back pain that – at least during examinations – was supposedly triggered by even slight extension. (*Id.*)

None of these points is conclusive, but each adds some additional weight to my skepticism of the Claimant's evidence.

What someone feels or does not feel is incredibly difficult to either verify or disprove. In analyzing the evidence here, I have, therefore, had to make inferences about the Claimant's honesty by comparing those statements which can be checked, with other records and sources. Though in many cases I cannot prove that what the Claimant said was untrue, the bottom line is that believing the Claimant was an honest witness would require also believing that two physicians were engaged in fraud, another was seriously inaccurate, that the PMA records were in error for nearly three years, and that the evidence of my own eyes could not be trusted. Of course, at least some of those things may be true, at least in part, but for all of them to be believed at once would require an enormous leap of faith. I cannot find justification for such trust in this case, and, therefore, find that the Claimant's credibility is seriously compromised. Her evidence will be given next to no weight and will be viewed with suspicion.

Because many of the medical opinions in this case placed heavy reliance on the Claimant's self-reporting of subjective symptoms that were not supported by objective

observations, finding the Claimant to be unworthy of credibility undermines most of those medical opinions.

Credibility of Sources of Medical Testimony

In my lengthy discussion of the Claimant's credibility, the credibility of numerous other sources of evidence has been at least alluded to. I will discuss only the primary sources of medical opinions in more detail here.

Dr. Loddengaard's Opinions

Dr. Loddengaard was the Claimant's treating physician in this case. (RX 9, p. 62.) He is a fellow of the American Academy of Orthopaedic Surgeons, a member of the North American Spine Society, and has been board certified in orthopaedic surgery since the late 1980's. (CX 21.) Dr. Loddengaard works primarily as a treating doctor, performing four or more spinal surgeries a week generally, and has previously served as the Chairman and Vice-Chair of the Surgery Department at the Little Company of Mary Hospital in Torrence. (HT, p. 29; CX 21.) Dr. Loddengaard only took over a partner's medico-legal practice a few years ago, but now regularly gets referrals from Mr. Pranin, Claimant's counsel here, and has treated hundreds of longshore patients over the years. (HT, pp. 30-31, 103.) Yet this case was apparently the first time Dr. Loddengaard had been called upon to testify at trial in a longshore matter and he has never been used as a defense expert. (*Id.* at 104-05.)

Though I could find hints in the evidence that Dr. Loddengaard may have seen the Claimant about 20 times in the three years of her treatment, for the vast majority, I have only a scribbled disability slip or prescription. (*See, e.g.*, CX 14, pp. 36 (January 16, 2007), 40 (April 12, 2007).) From that evidence, I have no idea if an examination was performed or if these slips resulted from follow-up phone calls alone. In total, I have only two written reports from Dr. Loddengaard, both three pages long and reasonably detailed; one page of minimal handwritten notes; and six short summaries of Dr. Loddengaard's treatment provided by Dr. Delman's reviews of the records.³⁹ (CX 8, pp. 10-12; CX 7, pp. 7-9; CX 12, p. 25; *see, e.g.*, RX 5, pp. 21-22, 28D.) Only the reports from the Claimant's first appointment, November 21, 2006, and the "final evaluation" Dr. Loddengaard wrote on December 6, 2007, provide me with any of Dr. Loddengaard's reasoning or examination findings. (CX 8, pp. 10-12; CX 7, pp. 7-9.) While that information is supplemented some by Dr. Loddengaard's testimony at the hearing, the evidentiary basis for Dr. Loddengaard's opinions is not as comprehensive as that of other physicians in the case.

Despite Dr. Loddengaard being a talented doctor and knowledgeable in his specialty, I find a lot of evidence that he put far too much trust in the Claimant's word in this case. Given the dearth of documentation of medical investigation of this claim by Dr. Loddengaard, it is hard to escape the feeling that, particularly after December 6, 2007, he more or less rubberstamped whatever the Claimant wanted. However talented the physician, ultimately opinions are only as

³⁹ Dr. Loddengaard also completed one page of the ADA accommodation request form and sent a very brief letter to get that accommodation renewed in February of 2009. (CX 17, p. 68; RX 17.) However, these provided negligibly more evidence than the disability slips.

strong as the evidence that supports them. When the Claimant's credibility crumbled, Dr. Loddengaard's opinions, which relied so heavily on the accuracy of those self-reports, fell also.

For these reasons, though Dr. Loddengaard was the treating physician in this case and is generally a credible physician, I will not give any weight to those of his opinions which are supported by only the Claimant's unverified self-reports.⁴⁰

Dr. Delman's Opinions

Dr. Delman was retained by Respondents in this case for independent medical evaluation of the Claimant's injuries. (HT, p. 210.) Dr. Delman is a fellow of the American Academy of Orthopaedic Surgeons, a member of the North American Spine Society, and specializes in orthopaedic and spine surgery for which he has held board certification for over two decades. (RX 15, p. 429; RX 5, p. 5.) He previously spent twelve years as a spine surgery instructor at Shriners' Hospital. (RX 15, p. 428.) While he works primarily as a treating physician in private practice and estimates that a huge number of his former patients have been longshoremen, he does regularly do medico-legal evaluations, though it is rare for him to give an opinion for the defense. (HT, pp. 209-10, 239-40.) Dr. Loddengaard was kind enough to testify that Dr. Delman has "a good reputation" in the medical community. (*Id.* at 82.)

It appears that Dr. Delman examined the Claimant five times in three years. (*See* RX 5.) For each of these appointments, Dr. Delman wrote a detailed, multiple-page report that intensively described subjective symptoms, careful physical examination findings, his recommendations, and clear reasons for his opinions. (*See id.* at 5-9, 11-12, 14-24, 28A-E.) This evidence was supplemented by his testimony at the hearing. (HT, pp. 209-282.)

Looking over the case, I find that Dr. Delman paid real attention to the Claimant's complaints and gave her claims a fair hearing. (*See* HT, pp. 224, 266.) However, he never lost sight of the need for objective evidence, ordering additional x-ray images at several points and looking at original MRI scans as well as the MRI report. (*See* RX 5, pp. 9, 15, 21; HT, pp. 228, 230, 276.) I found Dr. Delman's weighing of the evidence to be balanced and cautious, with him reaching firm conclusions only after appropriate investigation.

Though not a treating physician, Dr. Delman took great care in investigating this case, saw the Claimant over a long period of time, and has solidly backed his findings with medical evidence. Thus, I find Dr. Delman to be a very credible physician and will give his opinions great weight.

Dr. Harber's Opinions

Dr. Harber saw the Claimant for only one appointment to evaluate her request for accommodations from the Joint Port Labor Relations Committee. (RX 16, p. 41; HT, p. 177.) Dr. Harber's credentials are as sterling as those of Dr. Loddengaard and Dr. Delman, despite Dr. Harber's primary focus on occupational medicine rather than orthopaedics. (RX 16, Ex. 1.) Dr. Harber has been board certified in multiple specialties, including occupational medicine and as a

⁴⁰ Any findings Dr. Loddengaard reached on a more reliable basis, to the extent there are any, I will, however, view as reasonably credible.

medical examiner. (*Id.*) In addition to teaching at UCLA, Dr. Harber has contributed to a number of peer-reviewed research papers, including, interestingly, several studying the effectiveness of chiropractic care for chronic low back and neck pain. (*Id.*)

Dr. Harber's single report is five pages long⁴¹ and provides a great deal of detail about his observations and opinions. (*See* CX 17, pp. 59-62; RX 11, p. 158.) The Claimant even reported that Dr. Harber did a thorough exam and asked her lots of questions. (RX 9, p. 86.) I did, however, find several of his comments jarring. For one, Dr. Harber believed that the Claimant had "had only limited medical evaluation to this point," which is out of synch with a history of about 15 previous appointments with Dr. Loddengaard and four independent evaluations from Dr. Delman. (CX 17, p. 61.) Also, as mentioned above, Dr. Harber recorded a relatively clear inconsistency in the Claimant's behavior – "slow and needs assistance in getting up from table," and "fast and unassisted in getting up and down while dressing" – without apparently questioning the obvious discrepancy. (RX 11, p. 158.) At a different point in the document, he further confused this issue by saying that the Claimant had been able to get on and off of the examining table well during the examination.⁴² (CX 17, p. 61.) A potential explanation for these defects is that Dr. Harber examined the Claimant on March 5, 2008, but he did not sit down to write his report until July 2, 2008, nearly four months later. (*Id.* at 59.) Obviously details might be forgotten or misremembered after that length of time.

In general, Dr. Harber's opinions seem reasonable, understandably giving the Claimant the benefit of the doubt about her subjective symptoms, though he did somewhat rein in her accommodations request. (*See* CX 17, pp. 61-62.) Because of the strength of his qualifications and depth of his examination, I find Dr. Harber credible, but because of his limited contact with the Claimant, the delay in recording his opinions, and the small contradictions in his report, I will use Dr. Harber's evidence only as support for the opinions of other physicians. In addition, to the extent that his opinions relied on the Claimant's self-reports, his opinions will be discounted, just like those of the other doctors.

Other Testimony:

As for the other physicians involved in the case – including Mr. Abruzzi the physical therapist, Dr. Nematollahi who provided acupuncture, Dr. Peck who did a pain medicine consultation, and Dr. Deutsch who performed a single evaluation – they all seemed reasonably credible, but their evidence was limited.⁴³ Thus, I will hold off and address any points that are relevant below, as they arise.

⁴¹ The formatting here is odd, but the notes on RX 11, page 158, definitely appear to be a fifth page of Dr. Harber's report, which, for whatever reason, was not included with the first four pages in CX 17.

⁴² Yet, during his deposition, Dr. Harber cited the "objective evidence" of the Claimant having difficulty getting off the table as the reason he gave her subjective complaints credence. (RX 16, p. 15.) Obviously, this basis is not nearly as solid as Dr. Harber seems to have believed.

⁴³ My opinion of Dr. Collins's credibility is similar, though I did not find his notes particularly legible or helpful and consider his diagnoses – which were out of synch with those of the medical doctors here – questionable at best. (*See generally* RX 18, Ex. 1.) As discussed, I do not believe he committed insurance fraud, but in terms of credibility of his medical opinions, I share Dr. Loddengaard's skepticism. (*See* HT, p. 108.)

I. The Nature and Extent of the Claimant's Disabilities

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The Longshore Act defines disability in economic terms as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment.” 33 U.S.C. § 902(10). A disability compensation award requires a causal connection between the claimant’s physical injury and his inability to obtain work. Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 110 (1991). The employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a preexisting disease or underlying condition, the entire resultant disability is compensable. *Kooley v. Marine Indus. Northwest*, 22 BRBS 142, 146 (1989).

Compensation for an industrial injury depends on the nature and extent of the disability, both of which must be established by the claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). When evaluating a disability, the claimant’s age, education, and employment history are considered, as well as the availability of appropriate employment. *Am. Mut. Ins. Co. v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

Section 8 of the Longshore Act identifies four categories of injuries and specifies different methods for calculating disability benefits under each, based upon whether an injury is temporary or permanent and whether it is partial or total. 33 U.S.C § 908.

A disability is permanent if the claimant has any residual impairment after reaching maximum medical improvement (“MMI”), or if the disability has persisted for a lengthy period of time and appears to be of lasting or indefinite duration. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Watson v. Gulf Stevedores Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Trask*, 17 BRBS at 60. Thus, the traditional method for determining whether an injury is permanent or temporary is to ascertain the MMI date. *Trask*, 17 BRBS at 60. The MMI date is a question of fact based upon the medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 186 (1988).

The extent of disability concerns whether a disability is partial or total. *Stevens v. Dir., OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990). Under the Longshore Act, a claimant is presumed to be totally disabled where he establishes a *prima facie* case of inability to return to his usual employment. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 968-69 (9th Cir. 2005); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 91 (1984). The claimant’s usual employment is that which he was performing at the time of his injury. *Manigault*, 22 BRBS at 333.

Here, the parties have stipulated that the Claimant was temporarily totally disabled by her injuries from November 18, 2006, until April 15, 2007. (HT, p. 14.) The two physicians most involved in the case, Drs. Loddengaard and Delman, agreed that the Claimant was temporarily partially disabled for some period of time after returning to work on April 16, 2007 (RX 5, p. 12; CX 14, p. 40), and that she reached MMI by December 6, 2007 (CX 7, p. 8; HT, pp. 59, 230,

260). They disagreed, however, on how long that temporary partial disability lasted and whether the Claimant had any residual impairment after reaching MMI: Dr. Loddengaard opined that the Claimant had a 7% whole body impairment, whereas Dr. Delman saw no indications of permanent disability. (CX 7, pp. 8-9; RX 5, pp. 15, 18.)

When the Claimant returned to work on April 16, 2007, both major physicians, Dr. Loddengaard and Dr. Delman, agree that she was temporarily partially disabled, as she was able to perform only light-duty work, rather than her full regular employment, and was working less days per week than she had before her accident. (RX 5, p. 12; CX 14, p. 40; HT, p. 354.) When Dr. Deutsch evaluated the Claimant on June 15, 2007, he concurred that light-duty work was appropriate and probably should continue for another three months to allow the Claimant time for rehabilitation. (RX 11, p. 178.)

Dr. Delman re-evaluated the Claimant's situation on September 11, 2007, roughly three months after Dr. Deutsch's review. (RX 5, pp. 14-15.) He took additional x-rays of the Claimant's lumbar spine that day, but again, no abnormalities were visible. (*Id.* at 15.) Dr. Delman also observed that Dr. Loddengaard denied that a second MRI was necessary, despite Dr. Deutsch's suggestion that one should be sought. (*Id.* at 14.) Dr. Delman was willing to give the Claimant's subjective complaints enough "benefit of the doubt," to hold off on declaring her at MMI, but he was clear that there was no objective evidence of physical impairment. (*Id.* at 15; HT, pp. 227-30.) Thus, on September 11, 2007, Dr. Delman believed, much as Dr. Deutsch had expected would be true by that time, that the Claimant was able to return to "full duty work," while waiting for her alleged residual – though not meaningfully functionally impairing – subjective symptoms to resolve. (RX 5, p.15; RX 11, p. 178.)

Looking at the PMA records, I found evidence that Dr. Delman was right not to credit the Claimant's version of how her pain affected her work. The Claimant told Dr. Delman that she was only working three days a week because of pain. (RX 5, p. 14; *see also* HT, pp. 176, 354 (Claimant said she did not go to work when she was in too much pain to leave bed or had a doctor appointment).) Yet, between returning to work and her September appointment with Dr. Delman, there were almost 30 weekdays⁴⁴ where that the Claimant apparently went to the hall, but refused to take the jobs offered to her, jobs which were within every work restriction her doctors had given or which she had asked for by that point.⁴⁵ (RX 13, pp. 324-28, 349 (PMA records show 27 days where the Claimant either "flopped" or "refused dispatch to a clerk job")⁴⁶.) The PMA records do not show a single day during this period where the Claimant was

⁴⁴ The record is clear that it was not customary for the Claimant to work on either Saturday or Sunday, so I have looked only at weekday availability. (*See, e.g.*, HT, pp. 129-30.)

⁴⁵ The Claimant only requested to be relieved from signal and hatch clerk duties in January of 2008, and had not even attempted to take those jobs before November of 2007. (*See* CX 17, pp. 65-66, 68; RX 13, pp. 324-30, 349.) Dr. Loddengaard had restricted the Claimant to just "light duty work," with "no heavy lifting," not adding avoidance of "repeated bending and stooping" until December of 2007, and Dr. Delman had specifically approved her to return to both signal and clerk duties in the spring of 2007. (CX 14, p. 40; RX 5, p. 12.) Thus, until December of 2007, no one seems to have even suggested that the Claimant could not do any of the many light-duty jobs she was apparently turning down.

⁴⁶ At the hearing, the Claimant said that these entries were all incorrect and should have instead listed her as "unavailable." (*See* HT, pp. 350-54, 358-59.) It certainly would be very convenient for the Claimant if this was true, but no evidence was submitted to support her contention, and, as discussed, I am very dubious of the Claimant's credibility. Further, I cannot fathom why the record-keepers would code the same situation – the Claimant not being

available at the hall, but no jobs were available to her on the casualty board, and only show 10 days where she was truly unable to work and listed as unavailable at the hiring hall. (*Id.*)

In opposition to finding that the Claimant was able to return to her full regular employment by September 11, 2007, we have the Claimant's word and the opinion of Dr. Loddengaard, which depends heavily on the Claimant's statements.⁴⁷ As I have discussed at length, I have found tremendous evidence that the Claimant's assertions should be given no weight, which also undermines Dr. Loddengaard's opinions substantially, since he often relied entirely on the Claimant's self-serving claims of what she could and could not do. (*See* CX 7, pp. 7-8.) After the Claimant's first MRI in January of 2007, Dr. Loddengaard appears to have never again attempted to develop objective evidence of the Claimant's injury, even denying that it was desirable to do so when other physicians suggested a need for such proof. (*See* RX 5, p. 14 (no need for a new MRI).) Between January and December of 2007, I do not even have any records of the Claimant's subjective symptoms from Dr. Loddengaard, only one-line approvals of the restrictions the Claimant requested. (*See, e.g.,* CX 14, pp. 41-43.) Nor could Dr. Loddengaard provide a persuasive explanation for his belief in the Claimant's continuing impairment when he testified at the hearing, or really any explanation that went beyond accepting the Claimant's word. (*See* HT, pp. 39, 59, 63-64, 100-02.) For these reasons, I am disinclined to give much credit to Dr. Loddengaard's opinion in December of 2007, that the Claimant should be permanently restricted to light-duty work. (CX 7, p. 8.)

Based on all of the evidence, I find that the Claimant could return to her full regular duties after September 11, 2007. Thus, her period of temporary partial disability, which began on April 16, 2007, would terminate on September 11, 2007.

Turning to the Claimant's permanent disability claims, essentially the same elements enter the analysis. Again, Dr. Loddengaard pronounced a 7% whole body permanent impairment requiring permanent limitation to light-duty, relying on little more than the Claimant's self-serving claims. (*See* HT, pp. 101-02.) I find that evidence unconvincing, as did Dr. Delman who was clear in his belief that the Claimant was not permanently impaired in any way. (RX 5, p. 18; HT, pp. 228, 230, 266 (lack of any objective evidence of disability makes back pain claim doubtful).) Based on the lack of objective, or credible subjective evidence that could create even a *prima facie* case for permanent or any on-going disability beyond September 11, 2007,⁴⁸ I find that the Claimant suffered no permanent disabilities as a result of her accident on November 17, 2006.

at the hall – three different ways. On the face of it, it seems much more likely that if the union recorded her as “unavailable” on a Monday, “flopped” on a Tuesday, “worked” on Wednesday, and “refused dispatch to clerk position” on Thursday, that those different codes reflected different circumstances as they actually existed on each of the days. Absent credible evidence to the contrary – or even a plausible motivation for the record-keeper marking the Claimant incorrectly in the way she claims – I will rely on the accuracy of the records, rather than the post-hoc, self-serving explanations of the Claimant.

⁴⁷ Dr. Harber did not form an opinion until several months later and, as discussed, also relied on the Claimant and Dr. Loddengaard's own Claimant-reliant opinion. (CX 17, pp. 59-62.) Because of this, I do not feel his evidence, to the extent it is credible, is relevant to the Claimant's capacity in September of 2007.

⁴⁸ All later medical evidence seems to merely echo the opinions Dr. Delman and Dr. Loddengaard had already formed and which have been discussed here. I can find no later evidence that credibly suggests any real alteration in the Claimant's condition after December 6, 2007.

Therefore, I find that the Claimant was temporarily totally disabled from November 18, 2006, through April 15, 2007. I also find that the Claimant was temporarily partially disabled from April 16, 2007, through September 11, 2007. I have not found that the Claimant suffered any permanent disability, either total or partial.

II. The Date the Claimant Reached Maximum Medical Improvement

A claimant has not reached MMI until all conditions related to her injury have stabilized. *Jenkins v. Kaiser Aluminum & Chem. Sales*, 17 BRBS 183, 187 (1985) (all impairments related to the injury must have become permanent to reach MMI).

Here, both sides agree that the Claimant was found to have reached maximum medical improvement on December 6, 2007. (CX 7, p. 8; HT, pp. 59, 230, 260.) As discussed above, Dr. Delman found the Claimant able to return to her full regular duties almost three months before this, on September 11, 2007, but agreed with Dr. Loddengaard that her condition only became completely permanent and stationary as of December 6, 2007. (*Id.*; RX 5, p. 15.)

III. Calculation of the Claimant's Average Weekly Wage

A. *Methods of Calculating Average Weekly Wage*

Sections 10(a), 10(b), and 10(c) of the Longshore Act set forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage ("AWW"). 33 U.S.C. § 910. The first method for calculating a claimant's AWW, found in Section 10(a), applies to an employee who has worked in the employment in which she was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding her injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158, 160 (1986). "Substantially the whole of the year" refers to the nature of a claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75, 79 (1977), and presupposes that the claimant could have actually earned wages during all 260 workdays of that year. *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978). The Ninth Circuit has set out a strong presumption in favor of applying Section 10(a), emphasizing that it must be applied "unless it would be unreasonable or unfair to do so. The statute sets a high threshold and requires the application of Section 910(a) or (b) except in unusual circumstances." *Castro*, 401 F.3d at 974 (citing *Matulic v. Dir.*, *OWCP*, 154 F.3d 1052, 1058 (9th Cir. 1998)); *Palacios v. Campbell Industries*, 633 F.2d 840, 843 (9th Cir. 1980).

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). *Palacios*, 633 F.2d at 843. Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" within the meaning of Section 10(a) before her injury. 33 U.S.C. § 910(b); *see also Duncanson-Harrelson Co. v. Dir.*, *OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983); *Duncan v. Wash. Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979). Section 10(b) relies upon production of wage data of other employees "of the same class

working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place.” 33 U.S.C. § 910(b).

Whenever Sections 10(a) and (b) cannot “reasonably and fairly be applied,” Section 10(c) is applied. *See Nat’l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1291-92 (9th Cir. 1979); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987). More specifically, the use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 237 (1985). Section 10(c) mandates that a sum which “shall reasonably represent the annual earning capacity of the injured employee” be determined. 33 U.S.C. § 910(c). In determining average annual earnings under Section 10(c), regard may be given to (1) the previous earnings of the injured employee in the job at which the employee was injured, (2) previous earnings of similar employees, or (3) other employment of the injured employee, while the actual wages earned by the employee are not controlling. *Palacios*, 633 F.2d at 843 (citing *Bonner*, 600 F.2d at 1292).

Here, I find that the Claimant’s AWW should be calculated under 10(a), as she worked as a longshoreman “substantially the whole of the year” before her accident on November 17, 2006. Both parties agree that this is the appropriate measure, and particularly with the Ninth Circuit’s strong presumption in favor of 10(a) in mind, I can see no reason that applying 10(a) here would be unreasonable or unfair. (Claimant’s Trial Brief, p. 4; Respondents’ Trial Brief, p. 20.)

B. Amount of the Claimant’s Average Weekly Wage Under Section 10(a)

Under section 10(a), average weekly wage is calculated by taking the amount earned by the Claimant in the relevant 52-week period preceding the injury and dividing it by the number of days actually worked during that period, to find an average daily wage rate. *See* 33 U.S.C. §§ 910(a) and 910(d); *Matulic*, 154 F.3d at 1052. This average daily wage rate is then multiplied by 260 for a five day a week worker or by 300 for a six day a week worker. (*Id.*). That product is then divided by 52, resulting in the Claimant’s average weekly wage. *See* 33 U.S.C. § 910(d).

One issue that complicates this calculation is how to count vacation and holiday pay. In *Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616 (5th Cir. 2000), the Fifth Circuit ruled that a distinction should be made between vacation time that is taken as a day off, and vacation time that is “sold back” to the employer and paid to the worker in a lump sum. The court concluded that vacation days that are paid to the worker as a lump sum should be included in the calculation of the compensation that was received, but they should not be treated as days worked, while vacation days taken as days off may be properly included as days worked in an AWW calculation. *Wooley*, 204 F.3d at 618. The Ninth Circuit cited *Wooley* with approval and applied its reasoning in its decision in *Trachsel v. Rogers Terminal & Shipping Corp.*, 590 F.3d 967 (9th Cir. 2009). The Ninth Circuit ruled that holidays that are paid, but not worked, should be counted as work days when calculating the average daily rate under 10(a), though holidays that are paid and also worked should only be counted as one work day. *Id.* The Ninth Circuit reasoned that this accounting best served, “910(a)’s goal of a ‘theoretical approximation of what a claimant could ideally have been expected to earn in the year prior to his injury.’” *Trachsel*, 590 F.3d at 970 (quoting *Wooley*, 204 F.3d at 618).

The Ninth Circuit has explained that a worker need not fall squarely within the 260-day or 300-day categories to be considered a five-day or six-day worker under the Act. Specifically, the Ninth Circuit has acknowledged that the “fixed formula” of either a five- or six-day work week adopted by Congress in Section 10 anticipated “a degree of inaccuracy in the estimation of the worker’s earning capacity,” as Congress clearly understood that no five-day worker can be expected to work every one of the 260 available work days:

When Congress amended section 910 of the Act in 1948 to reflect the five-day work week, it undoubtedly was aware that virtually no one in the country works every working day of every work week; there are many reasons including illness, vacations, strikes, unemployment, family emergencies, etc. We can infer that Congress knew that both subsections (a) and (b) would result in some overcompensation, but retained the 260-day factor for administrative convenience.

Duncanson-Harrelson, 686 F.2d at 1342. Where these inaccuracies exist, the Court explained, the humanitarian nature of the Act mandates that “[f]lexibility and the resolution of doubts in favor of the worker [be] the rule rather than rigid mathematical certainty.” *Matulic*, 154 F.3d at 1057.

This guidance from the Ninth and Fifth Circuits, persuades me that the calculation of the number of days worked, for purposes of the *Matulic* calculation, should not include vacation days that were “sold back” to the employer, should include holidays that were paid but not worked, and should count holidays that were both paid and worked as only one day worked.

Here, I tabulated the number of days the Claimant worked directly from her PMA records. From November 17, 2005, through November 16, 2006, the Claimant worked 225 days and received 8 paid holidays on days she did not also work, totaling 233 compensated days.⁴⁹ (CX 18, pp. 71-94.) This means that the Claimant worked 89.6% of the 260 available work days in the previous year.⁵⁰ Under *Matulic* then, the Claimant qualifies as a five-day worker. *Matulic*, 154 F.3d at 1058.

From the PMA records, I calculated the Claimant’s total earnings from the year before her injury to be \$85,351.74. (CX 18, pp. 71-94.) Those earnings, divided by the number of days actually worked results in an average daily wage of \$366.32. Under section 10(a), that average

⁴⁹ From November 17, 2006, through the end of the month, she worked 9 days and received 1 paid holiday; in December 2006, she worked 14 days and received 3 paid holidays; in January 2007, she worked 21 days and received 2 paid holidays; in February 2007, she worked 19 days, one of which earned holiday pay as well; in March 2007, she worked 23 days, one of which earned holiday pay as well; in April 2007, she worked 20 days; in May 2007, she worked 24 days, one of which earned holiday pay as well; in June 2007, she worked 19 days; in July 2007, she worked 17 days, one of which earned holiday pay as well; in August 2007, she worked 14 days; in September 2007, she worked 17 days and received 1 paid holiday; in October 2007, she worked 19 days; and through November 16, 2007, she worked 9 days and received 1 paid holiday. (CX 18, pp. 71-94.) The 4 days where the Claimant both worked and earned holiday pay are each counted as only a single day. See *Trachsel*, 590 F.3d 967.

⁵⁰ $233/260 = 89.6\%$

daily wage is multiplied by 260 for a five-day worker like the Claimant, and then divided by 52 under section 10(d) to yield an average weekly wage of \$1,831.58.⁵¹

The Respondents by contrast decided that the Claimant had worked only 226 days in the previous year. (Respondents' Trial Brief, p. 20.) Thus, it appears that the Respondents did not follow *Traschel* and *Wooley*, and left out the eight paid holidays from their count, which accounts for all but one day of the difference. Their amount of earnings was also slightly higher than the one I reached: \$85,415.06 rather than \$85,351.74. (*Id.*) Because the Respondents undercounted the number of days worked and credited the Claimant with more earnings than I find she had, the Respondents' figure for AWW comes out erroneously high, at \$1,889.70. (*Id.*)

Yet, the Claimant still managed to come in even wider of the mark. Somehow, the Claimant reached 231 days worked and \$88,305.78 in earnings for the previous year. (Claimant's Trial Brief, p. 4.) The Claimant does not explain how she reached these numbers and I cannot find any basis for arriving at them either. Suffice to say, the Claimant's AWW of \$1,911.25 is too high, due to possible over-inflation of earnings and undercounting of days worked. (*Id.* at 5.)

For all of the above reasons, I set aside the flawed AWW calculations submitted by the parties and find, based on my own examination of the PMA records, that the Claimant's AWW is \$1,831.58.

IV. The Entitlement of the Claimant to Compensation and Medical Benefits

A. *Compensation Awarded to the Claimant*

Periods of Temporary Total Disability

For periods of temporary total disability, a claimant is entitled to compensation at the rate of $66\frac{2}{3}$ percent of her AWW. 33 U.S.C. § 908(a)-(b). However, under Section 6(b)(1) of the Longshore Act, the rate of compensation cannot exceed 200% of the national average weekly wage at the time of injury.

Here, two-thirds of the Claimant's AWW of \$1,831.58 would be \$1,221.05. But because the national average weekly wage at the time of the Claimant's injury was only \$557.22, under Section 6(b)(1) of the Longshore Act, the maximum compensation rate the Claimant can receive for her November 17, 2006, injury is \$1,114.44 per week. *Roberts v. Director, OWCP*, 2012 WL 912953 (Mar. 20, 2012.) On this basis, I find that for periods of temporary total disability, the Claimant should be compensated at the rate of \$1,114.44 per week. Both parties agree with this rate of compensation. (Claimant's Trial Brief, p. 5; Respondents' Trial Brief, p. 20.)

Periods of Temporary Partial Disability

For periods of temporary partial disability, a claimant is entitled to compensation of two-thirds of the difference between her pre-injury AWW and her wage-earning capacity after the injury. 33 U.S.C. § 908(e). Section 8(h) of the Longshore Act mandates a two-part analysis to determine a claimant's post-injury wage-earning capacity. *Devillier v. National Steel &*

⁵¹ $(\$366.32 \text{ per day} \times 260 \text{ days}) / 52 \text{ weeks} = \$95,242.28 / 52 \text{ weeks} = \$1,831.58 \text{ per week}$

Shipbuilding Co., 10 BRBS 649, 660 (1979). First, the judge must determine whether the claimant's actual post-injury wages reasonably and fairly represent her wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages comply with Section 8(h)'s requirements of reasonableness, the analysis stops there. *Devillier*, 10 BRBS at 660.

If the actual wages are unrepresentative of the claimant's wage-earning capacity, under the second step of analysis, the judge must arrive at a precise dollar amount which fairly and reasonably represents the claimant's post-injury wage-earning capacity. *Randall*, 725 F.2d at 796-97, 16 BRBS at 64; *La Faille v. Benefits Review Bd.*, 884 F.2d 54, 61, 22 BRBS 108, 118 (CRT) (2d Cir. 1989); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 345-46 (1988). This is done through consideration of a number of factors, including the claimant's physical condition, age, education, work history, the amount actually worked, and availability of employment which she can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir.1994); *Devillier*, 10 BRBS at 651. Other factors to be considered are the beneficence of a sympathetic employer, the claimant's earning power on the open market, whether she must spend more time or use more effort or expertise to achieve pre-injury production, and whether medical and other circumstances indicate a probable future wage loss due to the work-related injury. *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 153 (1988); *Hughes v. Litton Sys.*, 6 BRBS 301, 304 (1977); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121. These factors are not exhaustive and the judge need not consider every possible factor, as long as her final determination of wage-earning capacity is based on appropriate factors and is reasonable. *Devillier*, 10 BRBS at 661; *see also Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26, 31 (1988); *Palmer v. Washington Metro. Area Transit Auth.*, 20 BRBS 39, 41-42 (1987).

Here, the Claimant's pre-injury AWW was \$1,831.58, as discussed above. As for retained wage-earning capacity, the Claimant had actual earnings during her period of TPD, from April 16, 2007, through September 11, 2007.

I will first consider the outcome if I were to consider the Claimant's actual earnings on light-duty as fairly and reasonably representing her retained wage-earning capacity under 33 U.S.C. § 908(h). Since the Claimant earned a total of \$31,640.02 during the 21 weeks and 1 day period of her TPD, this equates to an average retained wage-earning capacity of \$1,496.69 per week.⁵² (*See* RX 13, pp. 324-29.) The difference between that and the Claimant's pre-injury AWW is \$334.89 per week, two-thirds of which would be \$223.26.⁵³ The Claimant would then be entitled to a total of \$4,719.72 in TPD benefits to compensate for the reduction in her wage-earning capacity between April 16, 2007, and September 11, 2007.

However, as I mentioned in a previous section, the PMA records show that during this period, there were 27 weekdays⁵⁴ where the Claimant reported to the union hall, but refused to take the light-duty jobs offered to her, deciding to self-impose further work restrictions which were not medically supported. (RX 13, pp. 324-29, 349; *see also* footnotes 45-46, above.) While

⁵² \$31,640.02/21.14 weeks = \$1,496.69 per week

⁵³ (\$1,831.58 - \$1,496.69) x 2/3 = \$334.89 x 2/3 = \$223.26

⁵⁴ Again, I defer to the Claimant's established practice of not working weekends. (*See, e.g.*, HT, pp. 129-30.)

I will grant the Claimant the benefit of the doubt that the ten weekdays she was marked as unavailable for work correspond with the days where her pain prevented her from working or where she had a doctor appointment to attend, I can find no credible excuse for the days she was well enough to come in, yet turned down jobs offered on the casualty board. (RX 13, pp. 324-29, 349; RX 5, p. 14; *see also* HT, pp. 176, 354.) Because the Claimant chose to work less days than the medical evidence for this period indicated that she was capable of, I find that the Claimant's actual earnings are not reasonably and fairly representative of the wage-earning capacity she retained working light-duty. *See* 33 U.S.C. § 908(h).

Because I find that the Claimant's actual earnings would have been representative of her retained wage-earning capacity if she had not refused to take available work without medical justification, there are not too many factors that need to be considered to reach a fair and reasonable dollar value for retained wage-earning capacity. The Claimant's actual earnings just need to be supplemented by the additional wages the Claimant could have earned if she had accepted appropriate available jobs on all days she went to the hall.

The Claimant's period of TPD here was 21 weeks and 1 day. During that time, there were 106 weekdays and one paid weekend holiday. In the year before her injury, the Claimant worked only 89.6% of the days available to a five day a week worker. Thus, even without an injury, the Claimant would have been expected to earn wages on only 95.87 days over this period.⁵⁵ During this TPD period, the PMA records also show 10 days where the Claimant was unavailable to work, which, as discussed, I have decided to attribute to genuine medical limitation. This leaves 85.87 days when the Claimant should have worked. The Claimant did work 67 days and had 3 paid holidays, leaving 15.87 weekdays where the Claimant should have worked but instead chose to reject appropriate positions that were available. (RX 13, pp. 324-29, 349.)

To adjust her actual earnings during this period to account for these days where she should have been earning wages, I will divide the amount of her earnings by the 70 days she actually earned wages to get an average daily wage of \$452.00,⁵⁶ and then multiply that figure by the 85.87 days she should have worked.⁵⁷ This represents the total amount of wages the Claimant would have been able to earn while on TPD, if she had not voluntarily turned down the assignments she was able to perform. Dividing that amount, \$38,813.26, by the weeks in the period produces an average retained weekly wage-earning capacity of \$1,836.01,⁵⁸ which I find to be a fair and reasonable representation under Section 8(h).

\$1,836.01 is of course slightly more than the Claimant's pre-injury AWW of \$1,831.58. This is not unreasonable, because though the Claimant's injury restricted the number of days she could work, being on the light-duty board meant she was working better-paid jobs than the UTR-driving she normally did most of the time. Higher pay meant she reached the same earnings with less time at work. The Claimant herself admitted as much. (HT, p. 184 (if I was doing pre-injury work, "I would make less, and I would have to work more days.")) Thus, I cannot find that the Claimant's injury caused her any economic harm, though her own medically unsupported decision to reject appropriate and available work did, since she chose not to earn all of the wages

⁵⁵ 89.6% of 107 days = 95.87 days.

⁵⁶ \$31,640.02/70 days = \$452.00 per day

⁵⁷ \$452.00 per day x 85.87 days = \$38,813.26 that the Claimant had the capacity to earn during this period.

⁵⁸ \$38,813.26/21.14 weeks = \$1,836.01 retained wage-earning capacity

she had the capacity to earn. Respondents, however, are not responsible for the financial repercussions of the Claimant's personal choices.

Therefore, from April 16, 2007, through September 11, 2007, I find that the Claimant suffered no reduction in wage-earning capacity as a result of her injury, despite being limited to light-duty work and not being able to work as many days a week as she did pre-injury. The Claimant is, thus, not entitled to any compensatory benefits for this period.

B. Medical Benefits Awarded to the Claimant

The employer is also obligated to provide medical benefits that "the nature of the injury and the process of recovery" require. 33 U.S.C. § 907(a). Awards of medical expenses are independent of awards for, or denial of, Section 8 compensation benefits. *Union Stevedoring Corp. v. Norton*, 98 F.2d 1012 (3d Cir. 1938). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984).

In this case, I have found that any low back pain the Claimant experienced after September 11, 2007, was too minor to impact her ability to work. I have also found that the Claimant had no residual impairments after she reached MMI on December 6, 2007, and Dr. Delman's opinion was that the Claimant required "[n]o active or future medical treatment" after that date. (RX 5, p. 18.) Nothing in the later records convinces me otherwise, since the Claimant had no on-going disability to treat.

While Dr. Loddengaard believed that the Claimant should be provided on-going medical benefits to treat the permanent pain and disability he diagnosed, as previously discussed, I find that Dr. Loddengaard's trust in the Claimant misled him. (CX 7, p. 9.) Even according to Dr. Loddengaard, reasonable on-going treatment would only have included check-ups and medications as necessary, as well as the option to do medial branch blocks if the Claimant changed her mind and decided to follow that recommendation.⁵⁹ (*Id.*) No other treatment was recommended as necessary by any credible medical doctor and both Dr. Delman and Dr. Loddengaard were clear that this was not an injury that would require surgical intervention. (*Id.*; RX 5, pp. 18, 24.)

Because I have found that the Claimant had no residual disability as a result of her accident on November 17, 2006, I find that she is entitled to reasonable and necessary medical benefits to treat that injury only through the date of MMI, on December 6, 2007.

⁵⁹ Dr. Delman disagreed with the reasonableness of doing medial branch blocks, but since the Claimant has expressed a strong desire to avoid invasive procedures, it is essentially a moot point. (HT, p. 256.)

V. Interest on Past Due Benefits

A claimant is entitled to interest on any accrued, unpaid compensation benefits. *Found. Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1981). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147, 153 (1992); *Byrum*, 14 BRBS at 837.

Accordingly, interest on any compensation amounts not paid by the Respondent when due should be included in the District Director's calculations of amounts due under this Decision and Order.

CONCLUSION

In conclusion, the Claimant is entitled to temporary total disability benefits from November 18, 2006, through April 15, 2007, for the back injury she sustained on November 17, 2006. These benefits should be paid at the applicable maximum compensation rate of \$1,114.44.

As a result of her injury, the Claimant was also limited to light-duty work from April 16, 2007, through September 11, 2007. However, because I find that she had a wage-earning capacity that was higher than her pre-injury average weekly wage, she is not owed any compensatory benefits for that period.

Based on the evidence above, I find that the Claimant was capable of returning to her full regular duties starting on September 12, 2007, and suffered no meaningful impairments as a result of her November 17, 2006, accident, beyond September 11, 2007.

Lastly, the Claimant is entitled to medical benefits reasonably necessary to treat her injury through December 6, 2007, and to interest on any compensation that was not paid when it was due.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that:

1. APM Terminals, Inc. and American Longshore Mutual Association shall pay the Claimant, Velia Cruz, temporary total disability compensation from November 17, 2006, through April 15, 2007, based on the applicable maximum compensation rate of \$1,114.44.
2. APM Terminals, Inc. and American Longshore Mutual Association shall receive credit for compensation benefits previously paid to the Claimant for this injury.
3. APM Terminals, Inc. and American Longshore Mutual Association shall pay the Claimant, Velia Cruz, medical benefits for low-back pain resulting from

her injury on November 17, 2006. These benefits shall be paid only for treatment through December 6, 2007.

4. APM Terminals, Inc. and American Longshore Mutual Association shall pay the Claimant interest on each past due, unpaid compensation payment from the date the compensation became due until the date of actual payment, at the rates prescribed under 28 U.S.C. § 1961.
5. All computations are subject to verification by the District Director who, in addition, shall make all calculations necessary to carry out this Order.
6. All parties shall cooperate with the District Director in determining total amounts owed by APM Terminals, Inc. and American Longshore Mutual Association for compensation.
7. Counsel for the Claimant shall, within 20 calendar days after service of this Decision and Order, submit a fully supported application for costs and fees to Respondents' counsel and to the undersigned Administrative Law Judge. Within 20 days thereafter, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with Respondents' counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, Respondents' counsel shall file and serve a Statement of Final Objections. The Claimant's counsel may file a reply 10 days after receipt of Respondents' objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.
8. The parties are ordered to notify this Office immediately upon the filing of an appeal.

A

JENNIFER GEE
Administrative Law Judge

San Francisco, California