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Issue Date: 10 May 2012

CASE NOS.: 2009-LHC-00287
2009-LHC-00288

OWCP NOS.: 14-147158
14-149063

In the Matter of

GEORGE W. LYNN,
Claimant,

v.

KNIGHT, INC. (FORMERLY KINDER MORGAN),
Employer,

and

ACE-ESIS,
Carrier.

Appearances: Richard Mann, Esq.
for Claimant

Richard M. Slagle, Esq.
for Employer/Carrier

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901, *et seq.* I began a duly noticed hearing on November 18, 2009 in Portland, Oregon. Both parties were represented by counsel of record. I admitted numerous exhibits.¹ Claimant testified on his own behalf and called as a witness his former supervisor Brad Clinefelter. I then adjourned the hearing.

¹I admitted Joint Exhibits (J.Ex.) 1-19, 21 and 24; Claimant's Exhibits (C.Ex.) 6, 31, 33-35, 37, 39 and 47-49; and Employer/Carrier's exhibits (E.Ex.) 3, 6, 9, 13, 15, 18, 21-23, 29, 35, 38, 47, 52 and 59.

The hearing resumed on February 1, 2010, again in Portland. Claimant completed his testimony, and presented that of his wife, Jena Lynn. Employer/Carrier offered the testimony of three Company managers: terminal manager Bruce Craven, human resources manager Larry Sharpless and superintendent James Farrell, as well as that of vocational expert Roy Katzen. I admitted an additional exhibit into evidence (C.Ex. A).

Claimant alleges that he is permanently partially disabled from four specific traumatic injuries and also cumulative trauma to his lower back, legs, left elbow, right shoulder, hands, and neck. Employer/Carrier disputes liability, arguing that the injuries did not arise out of and in the course of employment and that Claimant is able to return to his usual employment without wage loss.

If it is found liable, Employer/Carrier seeks relief from the Special Fund. *See* 33 U.S.C. §908(f). The Director, Office of Workers' Compensation Programs, opposes. He asserts that there was no pre-existing disability, and even if there was a pre-existing disability, it wasn't manifest to Employer and didn't contribute to the extent of disability. The Director offered no evidence or argument following the trial.

Undisputed facts. The parties stipulated to the following:

- The Act applies as to situs and status;
- There was an employer/employee relationship at all relevant times;
- Claimant timely filed the claim;
- Claimant gave timely notice of a cumulative trauma claim with an onset date of October 23, 2006;²
- Employer/Carrier timely controverted the claim;
- Employer/Carrier is not currently paying compensation;
- Claimant reached maximum medical improvement on October 26, 2007;
- Claimant has outstanding medical bills;
- Employer/Carrier has not provided medical benefits;
- Claimant has not worked since October 23, 2006; and
- The alleged injury is unscheduled.

Tr. 6-9. I turn now to findings on the remaining facts, to which the parties did not agree by stipulation.

Background and work history. Claimant was born on February 1, 1945, and has lived most of his life in Portland, Oregon. Tr. 54-56. He is a high school graduate who completed various

² Claimant also alleges specific traumatic injuries in November 1998, January 2004, December 2005 and October 2006. Employer/Carrier disputes the timeliness of notice for these claims. Tr. 6.

trainings and received certificates in mechanics and management. Tr. 57. Prior to his work for Employer, he'd worked with heavy equipment, including as an equipment manager for a stevedoring company. Tr. 57. He began working for Employer's predecessor Hall-Buck on January 1, 1996, as an entry-level superintendent. Tr. 56-57. Sometime in the late 1990's, Employer Kinder Morgan bought Hall-Buck. *Id.* Around that time, Claimant was promoted to assistant terminal manager, the position he held until his employment ended in 2006. Tr. 58.

Claimant's duties as an assistant manager. The parties disagreed about Claimant's duties as an assistant manager, and specifically, how much and what kind of physical labor he was expected to do. In Claimant's telling, he was to inspect the facilities and oversee the superintendents at the terminal. Tr. 59. He estimated that he spent more than half of his time in the yard and the remainder in an office. Tr. 99. Employer/Carrier disputes some of the tasks that Claimant says he performed, contending that longshore workers did that work. Employer's Br. at 12-13. It also disputes how often Claimant performed some tasks and whether he could have delegated them if he chose. *Id.* at 12-15.

An undated job description for Claimant's job includes the following:

- Responsible for safety of all areas of operation;
- Coordinates with [other staff] to maintain efficient and safe operations; and
- Oversees and implements all facility maintenance and modifications.

J.Ex. 10 at 290-93. The job description requires that the employee be "mentally and physically capable of functioning in the marine environment, to include extensive walking and climbing of stairs and ladders." *Id.* at 291.

The terminal where Claimant worked is a large facility. It covers about seven acres. Tr. 59. It has a rail facility with twelve tracks capable of holding as many as 250 rail cars. Tr. 59, 63. There is a storage building that can hold almost 30,000 metric tons of cargo. Tr. 59. The terminal focuses exclusively on shipping soda ash, a powdery substance that is used in the manufacture of glass and as an ingredient in soaps and detergents. Tr. 60-61. Over one hundred ships are loaded each year. Tr. 76.

Soda ash is moved around the terminal on a series of conveyer belts that extend from the rail yards, where it is offloaded, to a storage facility, to ships, where it is loaded as cargo. Tr. 65-66. Walkways – often steep and covered with ash – run parallel to the conveyer belts and afford access for inspection and maintenance. Tr. 75-76; J.Ex. 14 at 432, 434-35; Tr. 87. Claimant said that he walked these ramps daily to inspect for mechanical problems. He'd open access doors to check for and dislodge build up with a seventeen-pound sledge hammer. Tr. 71-72, 87.

Claimant also testified that he regularly had to climb stairs and ladders to do his inspections. Some of the conveyer belts ran through a 100-foot tower on the terminal yard. Tr. 67-70. Access to the tower was by a combination of stairs and ladders. Tr. 67-69. During the first nine years of his work for Employer, Claimant inspected the tower daily. Tr. 73. In his last year, he wasn't able to inspect it every day because of increasing orthopedic problems. Tr. 73. To

facilitate unloading, the rail cars bringing soda ash have hopper gates on their underside so they can drop the ash directly onto an underground conveyer belt. Tr. 79-82; J.Ex. 14 at 441-43. Claimant had to walk down a set of stairs to access the conveyer belt for inspection and cleaning. Tr. 81-82; J.Ex. 14 at 441. He also regularly washed down this conveyer belt to prevent excessive dust build up. Tr. 83.

The job required other physical exertions. Each day, Claimant did a safety inspection on the tops of rail cars; he had to climb up the cars to accomplish that. Tr. 84; J.Ex. 14 at 437. He walked under a “finger pier” and aging dock area to check generally for safety and to see if any pile heads needed replacement.³ Tr. 88-89, 91-93. He walked the length of the rail yard several times daily to look for misaligned or tipped rails, leaking cargo, and other safety problems. Tr. 94-95. He also looked for cars on which the brake wasn’t set properly; when he found one, he’d climb the car and crank the wheel that controlled the brakes. Tr. 94-96. The rail yard surface was made up of “rail ballast,” which created an uneven and somewhat unstable surface. Tr. 93; J.Ex. 14 at 457-58. Each time a ship arrived, Claimant went aboard, introduced himself to the captain, and inspected for safety. Tr. 104-05. At times, the gangway onto a ship could be as steep as 45 degrees. Tr. 105.

In the last year or two of his employment, Claimant appears to have stopped or decreased how often he performed some of the more strenuous tasks, such as climbing the marine tower and walking the conveyer belts. Tr. 305-09. There are some inconsistencies in Claimant’s reports of when this happened and whether he continued to perform the tasks occasionally or stopped altogether.⁴ *Id.* Either way, Claimant reports that his physical problems significantly curtailed his ability to do some of his duties. In view of this, Claimant arranged informally with his terminal manager Clinefelter and his coworkers for them to help out with the tasks he no longer was able to do. Tr. 310-11. He testified that this often accommodated his limitations, but at times there was no one available to help, and the work didn’t get done. Tr. 311-12.

As Claimant’s supervisor, Clinefelter estimated that it would take a physically fit person an hour and a half to complete an inspection tour if he moved quickly and didn’t encounter any problems. Tr. 268-69. Employer’s policies required that each area of the terminal be inspected at least once per shift, but Clinefelter stated that each site needed to be inspected multiple times per shift for the terminal to be safe. Tr. 268. Clinefelter testified that while Claimant was working, the terminal was hazardous with many uneven surfaces, unsafe walkways, potholes that posed trip hazards, and sharp objects. Tr. 245-46.⁵

Clinefelter confirmed that Claimant had many physically demanding duties. Tr. 199. Clinefelter testified that during the early years of Claimant’s employment, he was almost constantly out in the yard to deal with equipment failures. Tr. 203-06. He frequently had to walk the various

³ Ship crews needed to access the area under the dock to rescue anyone who fell from the ship. Tr. 93. For that reason, the area had to be maintained in a safe condition.

⁴ Given the years that passed between the relevant times and the trial, these discrepancies reflect only the normal limitations of memory; they do not impugn Claimant’s veracity.

⁵ At some point after Claimant’s employment ended, a new rail yard was constructed that was much safer and easier to walk around to supervise and inspect various sites. *Id.*

conveyer belts and climb up into the towers. *Id.* There were significant problems with the union in those years; at times managers had to do the physically demanding work that the longshore workers usually did. Tr. 212-14. Both Clinefelter and Claimant would swing a sledgehammer to break up collected soda ash dust, drive forklifts, and unload deliveries. Tr. 256-59.

When Claimant was on a shift, Clinefelter and one superintendent generally would work with him. Tr. 267. Clinefelter confirmed that, in Claimant's later years, he continued to do the inspections, until toward the end, when he had to cut back because of physical limitations. Tr. 263-64. For example, by the time Claimant stopped work, he was no longer able to climb the tower ladders. Tr. 270. Clinefelter also said that Claimant's job as the assistant terminal manager included many non-physical duties, such as scheduling, coordinating with terminal customers and personnel, and making deliveries. Tr. 269-71.

Bruce Craven, the terminal manager who replaced Clinefelter, confirmed much of what Claimant and Clinefelter said about Claimant's job duties. He agreed that Claimant's job involved physical inspections of the rail tracks, the conveyer belts, and the loading and unloading areas to ensure safety. Tr. 420. He agreed that the assistant terminal manager had to inspect the fall arrest safety system and the pier; on these he said only that it wasn't necessary to do these every day. Tr. 428-30. He agreed that an assistant terminal manager had to lift objects weighing over fifty pounds infrequently (with most lifting under ten pounds and ranging up to 25). Tr. 433-37.

Craven felt that Claimant could have done some of the tasks less frequently or delegated them. But he offered nothing to put into doubt that in fact Claimant did his work exactly as he and Clinefelter described. What is relevant is not how Claimant *could have done* the work, but how he *did* it.⁶ On that point, Craven had little opportunity to observe Claimant: They typically didn't work the same shift. Tr. 451. That left Craven to testify only in generalities about how he'd done the work when he had Claimant's job or how he'd observed others (not Claimant) do it.⁷ Tr. 452.

Craven disputed that an assistant terminal manager had to swing a sledgehammer or wash down areas with fire hoses. Tr. 427-28. He also said that, under the collective bargaining agreement, management was precluded from much of physical labor because that is union work, and wage penalties apply if a manager does it. Tr. 417-19. But much of what Craven disputed was work that Claimant was doing early on, not when Craven was there. As to the rest, Craven conceded that the duties might have shifted in recent years to require less exertion and more office work because the increasing safety and environmental regulation has meant more paperwork. Tr. 450-51.

⁶ The Longshore Act is a no fault workers' compensation statute. Contributory negligence and assumption of the risk are not defenses. On liability, it doesn't matter if a worker can do his work with less exertion or in a way that would not have been as injurious. At most, Craven's testimony about how Claimant could have done the work would be relevant to an assertion that Claimant could return to his prior work and perform it within his restrictions.

⁷ For example, Crave testified that when he was assistant terminal manager, he did not have to climb the 100-foot tower every day; it was a job that could be "done or delegated." Tr. 423. The same was true of inspecting the conveyer belts, walking the rail yard three times daily, or lifting objects weighing over 50 pounds. Tr. 427-28, 431-34. Still, he admitted that the option to delegate did not mean that an assistant terminal manager could avoid these tasks entirely; it meant only that he did not have to perform them personally every time. Tr. 424, 428-30.

Claimant agreed that union workers did much of the physical work, but maintained that his regular inspections duties were physically demanding and that he did have other physically demanding duties. Tr. 100-04. For example, when no union worker was onsite, he or Clinefelter would help unload trucks delivering belts, welding rods, 55-gallon oil drums, and other equipment, even though this was technically classified as longshore work. Tr. 102-04. He estimated that he did this work approximately once weekly. Tr. 105. Craven conceded that when no longshoremen were onsite, managers could end up unloading delivery trucks. Tr. 432.

In all, there's little dispute about the work activities in which Claimant engaged. Claimant's and Clinefelter's testimony are consistent. Craven worked a different shift and thus seldom observed Claimant working. He conceded that he was describing the job duties as he'd experienced them, not as Claimant did them. And for the most part, he described the job as Claimant and Clinefelter did anyway. The job was physically demanding every day, with prolonged walking on uneven surfaces, climbing ladders and inclines, and lifting and carrying 10 pounds frequently, 25 pounds occasionally, and 50 pounds or more seldom. It required working at heights and on surfaces with uncertain footing.⁸

Claimant's medical history prior to October 2006. Claimant contends that his various disabilities are the result of cumulative trauma and the aggravation of several traumatic injuries he sustained during his work for Employer.

His medical records with his primary care physician, Dr. John E. Bauer, indicate sporadic work and other injuries during the years he worked for Employer. In November 1998, Claimant fell out of a chair at work, resulting in ongoing pain in his left hip and lower back. J.Ex. 1 at 4; J.Ex. 2 at 36; J.Ex. 3 at 81. He filed an accident report and worker's compensation claim, and ultimately treated with orthopedic surgeon Dr. Joseph J. Mandiberg for his injuries. J.Ex. 2 at 37-41. An October 1999 MRI revealed a mild central disc bulge at L5-S1 and mild central canal stenosis at L4-L5. J.Ex. 2 at 40. Dr. Mandiberg diagnosed a trochanteric bursa and gave Claimant an injection of anesthetic, which helped considerably.⁹ J.Ex. 2 at 43. A lumbar scan done a year later (October 2000) was within normal limits. J.Ex. 1 at 8. Another scan in March of 2001 showed diagnosed degenerative disc disease at Claimant's cervical spine. J.Ex. 1 at 8-9; J.Ex. 16 at 570.

⁸ Superintendent James Farrell worked with Claimant from 1996 to 2003. Tr. 534-35. Not having worked with Claimant for several years by the time of trial, Farrell was unable to remember many things, such as whether he'd seen Claimant lifting over 100 pounds or swinging a sledgehammer. Tr. 536. In other respects, however, his testimony confirms that Claimant had many physically demanding duties, such as walking in the storage building and on the pier, and climbing steep gangways onto ships. Tr. 539-41. He denied seeing Claimant wash the facility with a fire hose, lift 50 gallon barrels of oil, or unload trucks. Tr. 539-40. He also stated that he believed that Claimant spent about eighty percent of his time in the office. Tr. 541. Given that Farrell's memory of the events was limited and that he didn't work with Claimant during the most relevant time – the three years leading up to the end of his employment – I accord Farrell's testimony only minimal weight.

⁹ Surgery was not indicated. J.Ex. 3 at 82-83.

In mid-2002, Claimant began reporting pain in his right shoulder and neck.¹⁰ J.Ex. 1 at 9. He'd injured the shoulder while lifting weights and was treated with an injection. Tr. 147. Dr. Bauer's notes show there no discrete precipitating trauma, and Dr. Mandiberg later noted that the injury was not work-related. *Id.*; J.Ex. 2 at 59. Conservative treatment was initially successful.

In January 2004, Claimant slipped on ice at work and fell on his left side and knee. Tr. 119; J.Ex. 1 at 14. He'd had previous surgery on that knee after a skiing accident in 1992. Tr. 149. After the 2004 incident, he had pain and numbness in his lower back, radiating down his left leg. Tr. 119. He began conservative treatment with Dr. Bauer. Tr. 120-21; J.Ex. 14-23.

Meanwhile, Claimant's problems with his right shoulder and neck returned. With conservative treatment failing, Dr. Mandiberg diagnosed a torn rotator cuff, for which Claimant underwent surgery on June 25, 2004. J.Ex. 2 at 43-49; J.Ex. 3 at 49; Tr. 117. Post-surgery, Claimant took about six weeks of short-term disability and did physical therapy. Tr. 117-18. He returned to work with six months' modified duties (no climbing ladders or other physically strenuous duties). J.Ex. 2 at 56, 59-60; Tr. 118.

Similarly, the lower back problems continued despite conservative treatment, and on March 16, 2005, Claimant underwent surgery with Dr. Rosenbaum. Tr. 120-21; J.Ex. 1 at 14-23. He took off four to five weeks and returned to light duty, which he did for several months (no climbing ladders or walking up ramps; limited walking on the rail ballast surface of the yard). Tr. 121-22.

For both surgeries, Claimant elected to rely on his short-term disability insurance rather than Longshore Act claims. Tr. 121.¹¹

In the summer of 2005, Claimant began experiencing worsening pain in his left back and leg. J.Ex. 1 at 24. It wasn't worse with any particular motion; rather, it just got worse over the course of the day. *Id.* Magnetic resonance imaging on August 12, 2005 was "very benign," with the surgical area "unremarkable" and no indication of nerve impingement. J.Ex. 3 at 112; J.Ex. 16 at 582.¹²

At a November 2005 appointment with Dr. Bauer, Claimant said that his back was better but that his leg pain was persisting to the point that he was concerned he might have to retire early. J.Ex. 1 at 33. He reported a burning sensation radiating down his leg, sometimes involving his back, worse with walking and especially with climbing stairs. *Id.* Dr. Bauer prescribed physical therapy but, noting the imaging results from August 2005, opined that further surgery would not be helpful. *Id.* At an April 14, 2006 visit, Claimant reported continued back pain, for which Dr. Bauer prescribed Vicodin. J.Ex. 1 at 34.

¹⁰ The first visit with Dr. Bauer calls this *left* shoulder pain, but subsequent notes from Dr. Bauer and Dr. Mandiberg refer to right shoulder pain. J.Ex. 9-11.

¹¹ Employer provided cash bonuses to managers when no workers filed injury claims. Tr. 150, 220. Claimant felt peer pressure not to file a claim, although he had previously filed some. *Id.* Claimant's supervisor Clinefelter agreed that there was pressure not to file workers' compensation claims. Tr. 219.

¹² The radiologist's comment on the lumbar imaging was that there was mild stenosis at L4-5 from a diffuse disk bulge, but no evidence of foraminal nerve root contact.

Claimant's medical condition and treatment in January through October 2006. After a sharp pain in his right shoulder and trapezius area after lifting something at work, Claimant saw Dr. Mandiberg on January 3, 2006. J.Ex. 2 at 62. He'd had no shoulder problems since the rotator cuff repair in mid-2004. Dr. Mandiberg diagnosed a right shoulder and right upper back strain, and prescribed physical therapy. *Id.* He told Claimant not to do overhead work for the next four weeks. *Id.* Claimant went for about a dozen physical therapy sessions and then discontinued after some improvement. J.Ex. 2 at 63; J.Ex. 4 at 118B-118D.

But when he saw Dr. Bauer on June 1, 2006, Claimant again reported right shoulder problems. J.Ex. 1 at 34. He apparently didn't associate this with the lifting incident at work in January 2006: he told Dr. Bauer that no particular trauma precipitated the pain. *Id.*

Claimant returned to Dr. Mandiberg about six weeks later, on July 12, 2006. J.Ex. 2 at 63. He said he'd been working despite ongoing shoulder pain. *Id.* He reported awakening with stiffness in his shoulder and difficulty reaching behind himself. *Id.* Dr. Mandiberg gave him an injection of anesthetics. *Id.*

At a follow up visit on August 2, 2006, Claimant reported that the injection had given him only slight, short-term relief. J.Ex. 2 at 64. Dr. Mandiberg tentatively diagnosed a recurrence of tendinitis and gave another injection, this time in different location. *Id.* This injection produced an improvement in both pain and range of motion but did not completely alleviate the problems with either. J.Ex. 2 at 66.

Claimant continued to work at his regular job, which he was able to modify to avoid aggravating his shoulder. *Id.* He showed improvement at visits on August 16 and September 13, 2006. J.Ex. 2 at 66, 68.

But by this time (August 2006), Clinefelter felt that Claimant's physical limitations were impacting his performance enough that he reflected the changes on Claimant's annual performance review.¹³ Tr. 229-30; J.Ex. 10 at 287-88. Because of Claimant's physical limitations, Clinefelter had to do a greater share of the terminal management duties, such as climbing up into the towers. Tr. 230.

On October 10, 2006, Claimant again saw Dr. Bauer, complaining of increasing left arm pain for two to three months, worsen when Claimant lifted or turned objects. J.Ex. 1 at 35. Claimant reported no specific precipitating trauma, but Dr. Bauer's notes indicate that, with the right shoulder injury, Claimant might be using his left arm more, causing in part the left elbow pain. *Id.* Dr. Bauer prescribed Celebrex and referred Claimant to Dr. Mandiberg, whom he'd been seeing for the right shoulder. *Id.* Dr. Bauer did not note that Claimant reported back pain or problems with his hands, nor do they discuss any work restrictions. *Id.*

¹³ In the review, Clinefelter rates Claimant at "meets" expectations rather than "exceeds" for eleven out of fifteen performance areas. J.Ex. 10 at 287-89. For each year from 2003 to 2005, Clinefelter had rated Claimant at "exceeds" for all but one category. *Id.* at 281-86. Clinefelter testified that the lower rating in 2006 was due entirely to the fact that Claimant's physical limitations meant that Clinefelter and other workers had to perform many of the duties that Claimant had previously done. Tr. 229-31.

Claimant contends that he injured his left elbow in a fall at work on October 11 or 12, 2006. Tr. 97-98. He was climbing down a ladder off a rail car when he slipped on an oily rung. Tr. 97. He grabbed the second rung of the ladder with his left arm and ended up hanging with his feet dangling 6 to 12 inches off of the ground. Tr. 97. He did not mention the incident to his Clinefelter because Clinefelter was on a vacation. Tr. 98. By the time Clinefelter returned, Claimant was already on a vacation from which he never returned to work. As a result, Claimant never mentioned the incident to Clinefelter. Tr. 98. Nor did he file an accident report. Tr. 153.

Claimant saw Dr. Mandiberg a week later, on October 18, 2006. J.Ex. 2 at 69-70. On the right shoulder problem, Dr. Mandiberg put Claimant at permanent and stationary with no permanent impairment due to this episode. J.Ex. 2 at 69. He stated that Claimant could work without any restriction based on the shoulder. *Id.*

As to the right elbow, Dr. Mandiberg's notes do not mention the fall. *Id.* at 70. He writes that Claimant said he'd had right elbow pain for a few months off and on, but that it was now markedly worse and that he was on Celebrex from Dr. Bauer.¹⁴ *Id.* Claimant also complained of back pain for which he reported taking Vicodin. *Id.* Although Dr. Mandiberg noted that he explained to Claimant "the etiology of the [elbow] problem," the doctor didn't recite the etiology in the chart. He gave Claimant an injection of anesthetics in his elbow and advised him how to lift. *Id.* He asked Claimant to return in two weeks. *Id.* It appears, however, that Claimant did not return until two months later, in January 2007. J.Ex. 2 at 71.

Claimant's October 2006 vacation. Claimant had previously scheduled vacation time for the week of October 16-20, 2006. Tr. 109-10. He and his wife Jena closed on the sale of their house in Portland on the Friday of that week. Tr. 110. Two years earlier, they'd bought another house three hours' drive away in Terrebonne, Oregon (near Redmond). *Id.* The parties dispute whether Claimant's sale of his house was part of a plan to leave his employment in Portland.

After buying the house in Terrebonne, Claimant and Jena set about remodeling the Portland house, with the goal of selling it and moving to Terrebonne. Tr. 291-92. They thought Terrebonne had better schools, and they'd discussed the possibility of Jena's staying at home with their young daughter. Tr. 114. Jena also looked into the possibility of her employer's transferring her to Redmond, which would be close to the Terrebonne house. Tr. 142. As it turned out, the Redmond job would require Jena to take a significant pay cut, from \$16 per hour to \$10. Tr. 142. The Lynn's couldn't afford to carry the mortgages on both houses if Jena wouldn't be working, so they put the Portland house up for sale in August 2006. Tr. 110-11. Claimant testified that his plan was to continue working for Employer in Portland for five years and that he would rent a room in the Portland area from a friend of his wife while his wife lived with their daughter in Terrebonne. Tr. 113.

¹⁴ Dr. Mandiberg's October 18, 2006 chart notes discuss Claimant's right elbow. J.Ex. 2 at 70. However, both Dr. Bauer's notes and Dr. Mandiberg's notes from a follow-up appointment in January of 2007 both reference Claimant's left elbow. J.Ex. 1 at 35; J.Ex. 2 at 71. I thus conclude that the mention of Claimant's right elbow in Dr. Mandiberg's October 18 notes is an error; the chart should have read that Dr. Mandiberg was treating Claimant for left elbow pain.

By the time the sale on the Portland house closed on October 20, 2006, most of the Lynn's' possessions were already in Terrebonne. Tr. 111, 297. The afternoon of the closing, Jena and a friend moved the remaining items (a small table, a couch, a chair, beds, and some items from the garage). Tr. 111. Claimant was unable to move the heavier items because Dr. Mandiberg had told him not to use his left arm after getting the injection. Tr. 112, 297-98.

As of this time, there was no transfer available for Jena to work in Redmond. Given that Mr. Lynn felt unable to continue working, he and his wife decided that Jena would continue to work in Portland through the end of the year, and Claimant would stay in Terrebonne, where they would enroll their daughter in school. Tr. 112-13, 142-43, 146, 329. That is what they did, with Jena staying in her friend's house as Claimant would have done had he continued to work in Portland. *Id.*

Claimant concluded that he was unable to return to work because he felt he couldn't do the "climbing or walking the conveyers, accessing the end of the railcars, just basically almost everything. I was just – I couldn't sit at my desk for long because my back bothered me." Tr. 98-99. "I was to the point where I was having difficulty really doing anything. I could not walk much. I had – I couldn't hardly hold a cup of coffee. I couldn't zip my pants up. I couldn't tie my shoes. So there's just a whole host of things." Tr. 98.

On the morning of October 23, 2006, Claimant called Dr. Bauer and asked to be placed on disability leave. Tr. 115. He said that he felt unable to work and wanted to use Employer's short-term disability plan benefits. Tr. 115. After Dr. Bauer agreed, Claimant called Clinefelter to tell him. Tr. 115-16, 233-34; J.Ex. 7 at 219.

The short-term disability claim and termination. Claimant's short-term disability claim was the subject of several emails and discussions between Employer, Claimant, and the short-term disability carrier's administrator. J.Ex. 7 at 219-20, 231-38. Much of the discussion was about documentation of Claimant's medical status. *Id.*

Ultimately, the manager who supervised the disability program wrote to two other managers on November 28, 2006, that she had not received a sufficient medical report on Claimant's short-term disability claim.¹⁵ J.Ex. 7 at 237. She had confirmed this with the plan administrator. *Id.*; Tr. 481. For this reason, the plan was denying the claim. Thus, on November 28, 2006, the disability manager wrote to human resources manager Larry Sharpless:

I will let you know when the letter is mailed to [Claimant informing him that his claim for short-term disability is being denied]. He should then be contacted and advised that he is on an unapproved leave of absence. You know the rest of the drill. He's notified in writing that he returns to work within a specified period of

¹⁵ Yet, it appears that Employer's benefit administrator did receive the forms and medical records from Dr. Bauer. A letter written to Claimant on November 29 indicated that medical had been received, but deemed insufficient to support the requested disability leave. J.Ex. 7 at 239. It is unclear from the record whether the difference between no medical report and an insufficient medical report was due to poor phrasing in this email or to a miscommunication between the manager and the benefits administrator. Without more information about what was communicated to whom, I do not infer malice from this error.

time, whatever days are designated, or he risks the possibility of termination.
This becomes an attendance issue handled by HR/supervisor

J.Ex. 7 at 237.¹⁶ Management did not consult with Claimant's supervisor Clinefelter about whether modified work was an option. Tr. 244, 483.

As the benefits manager had indicated, he wrote to Claimant the next day, November 29, 2006, that his request for short-term disability was denied and that his time off would be charged as leave without pay.¹⁷ J.Ex. 7 at 239.

On the same day, November 29, 2006, three human resources managers, including Sharpless, called Claimant to confirm the denial and to tell him that he needed to get back to work. Tr. 123, 175-76, 474-75; J.Ex. 7 at 242. It was during this call that Claimant for the first time mentioned anything about filing a claim under the Longshore Act. Tr. 176. He told the human resources managers that his doctor still recommended that he stay off work, and that since his short-term disability claim was being denied, he was going to file a Longshore Act claim. Tr. 176-77. Apparently no one on the call raised the possibility of Claimant's coming back to work in a modified position. Tr. 128-29, 476.

A couple weeks later (in mid-December 2006), Sharpless wrote Claimant to reaffirm the November 29, 2006 letter denying short-term disability and stating that Claimant's continued absence was therefore unexcused. J.Ex. 7 at 243. He warned that Employer would terminate the employment if Claimant did not return by December 15, 2006. *Id.* Curiously, Sharpless didn't date the letter.¹⁸ *Id.* From the registered mail receipt, it was not delivered until December 18, 2006, three days after the deadline for Claimant to return to work. *Id.*; Tr. 130, 182.

Claimant spoke with Sharpless on the phone shortly after he received the letter. Tr. 130, 182. Sharpless offered to change the termination date to December 20, 2006 so that Claimant could exercise some stock options. Tr. 526. They discussed Claimant's retirement account and the Company's demand that Claimant repay wages paid him while he was off work.¹⁹ Tr. 130-31, 182, 477-78. But they did not discuss more time for Claimant to return to work. Tr. 526.

At trial, Sharpless denied that Claimant's statement that he would be filing a Longshore claim affected the decision to terminate the employment. Tr. 478. He said that Employer's practice is to have the Vice President of Human Resources and the Company's legal department review all terminations and that this already had happened before the managers made the call in which

¹⁶ The parties submitted copies of various other internal emails between several of its managers and human resources specialists during this time discussing whether Claimant had provided adequate documentation of his claim. *See, e.g.*, J.Ex. 7 at 231-38. The question of whether Claimant provided documentation of his injuries considered adequate by the short-term disability plan administrators will have no bearing on the result of this case.

¹⁷ It appears that Employer demanded that Claimant return \$2,766.75 in wages it paid him while it was determining whether he qualified for short-term disability. *See* J.Ex. 7 at 241.

¹⁸ According to Sharpless, the fact that the letter was undated was an oversight, and he later determined that it was sent on December 11, 2006. Tr. 495-97.

¹⁹ Claimant apparently never repaid these wages to Employer. Tr. 131.

Claimant first raised a possible Longshore claim. Tr. 503, 511-12. Sharpless viewed the decision as complete at the time it was approved, other than to set the particular date by which Claimant would be required to return to work, a decision that Sharpless made later. *Id.* at 503, 526.

Filing the Longshore Act claim. Claimant filed the Longshore claim on January 4, 2007. J.Ex. 12 at 320-21, 325. He alleged injuries to his back, right shoulder, and left elbow from “cumulative trauma due to continued usage and weight-bearing activities while at work.” *Id.*

Continued medical treatment in late 2006 and 2007. Employer/Carrier makes much of the fact that Claimant saw a doctor only one time in the two months between October 18, 2006 (when he stopped working) and December 20, 2006 (when the Company terminated the employment).²⁰ But Claimant was getting settled in Terrebonne during these two months, and nothing suggests that anything needed to be changed in the treatment. *See* Tr. 131, 170. Caring alone for his daughter, registering her for school, adjusting to the new location, beginning to look for new local health care providers, and similar activity involved readily explain why Claimant would not drive three hours back to Portland to see doctors at this time.

Consistent with this, Jena ultimately moved to Terrebonne five months later, in May 2007. Tr. 333. She testified that she did this despite a significant pay cut, sporadic work hours, and the loss of all seniority because Claimant needed her help. *Id.* She remained there for almost two years, until February 2009, when her employer eliminated the job in Redmond and transferred her back to Portland. Tr. 335-36. At that point she began working four ten-hour days per week, and flying to Terrebonne for her three days off. Tr. 336. I draw no inference from Claimant’s seeing his doctor only once during these two months.

Lower Back Treatment. On December 29, 2006, Claimant saw his back surgeon, Dr. Rosenbaum. E.Ex. 25 at 70. He said that he’d done well initially after the surgery in March 2005, but that the pain and the numbness in his left leg had increased over time. *Id.* He said he’d fallen at work on several occasions but couldn’t remember the exact dates. *Id.* He was taking Celebrex, Vicodin, and Flexeril. *Id.* On examination, there was limited lumbar range of motion with some sacroiliac pain. Dr. Rosenbaum assessed probable post-surgical residual radicular symptoms. *Id.* In his view, Claimant likely was not a good candidate for further surgery. *Id.* He ordered magnetic resonance imaging of Claimant’s lower spine. *Id.* The imaging report (January 22, 2007) shows the expected post-operative changes, together with additional mild degenerative changes at L4-5 and L5-S1. J.Ex. 5 at 127-28.

Claimant began to seek out doctors closer to his new home and began to see primary care physician Dr. John Allen on February 27, 2007. J.Ex. 5 at 128-29; Tr. 132. Dr. Allen took a history. *Id.* Claimant complained of numbness in both arms, intermittent back pain, and sciatica that he “lives with.” *Id.* Dr. Allen read the January 2007 imaging report as showing Claimant’s lumbar spine as “okay.” *Id.* Claimant was taking Celebrex and Vicodin and had stopped the

²⁰ *See* J.Ex. 2 at 36; Tr. 183-84; *see, e.g.,* Employer’s Br. at 1-4; Tr. 170-73, 183-86. The visit was to see Dr. Bauer on November 21, 2006. Claimant complained that his neck had been “locking” for 4-6 weeks. Dr. Bauer attributed this to osteoarthritis.

Flexeril. *Id.* Dr. Allen did not conduct a thorough neurological examination because he stated that Claimant was still seeing orthopedist Dr. Mandiberg and neurologist Dr. Rosenbaum. *Id.*

On June 29, 2007, Claimant began treating for back pain with physical medicine and rehabilitation specialist Dr. Timothy A. Hill in Bend, Oregon. J.Ex. 5 at 143. Dr. Hill is board certified and focuses on non-surgical treatments. J.Ex. 19 at 833.²¹ He took a history, in which Claimant mentioned a fall sometime in the previous fall or winter, after which he'd had recurring numbness in his left leg. J.Ex. 5 at 143. Claimant complained of lower back pain, worse with standing and walking; tingling in his left leg and foot; numbness (worse with sitting or prolonged standing or walking); occasional mild weakness in the left foot; and left shoulder pain, reportedly from a fall the previous October. *Id.* Claimant said the shoulder was worse when he reached overhead or behind his back. *Id.* He was taking the Vicodin infrequently and the Celebrex regularly. *Id.* He said that he was unable to work due to his various medical problems. *Id.*

After an examination (including neurological), Dr. Hill diagnosed lumbar spondylosis with disc degeneration at L4-L5 and L5-S1, though he noted that the recent imaging had not definitively shown nerve impingement. *Id.* at 145. He also noted other possible pathology. *Id.* He recommended a bone scan of the lumbar spine to rule out arthropathy, and he referred Claimant to Dr. James R. Verheyden for possible epicondylitis. *Id.* He continued Claimant on physical therapy. *Id.* Finally, he gave Claimant an injection of anesthetic for the shoulder pain. *Id.*

Claimant underwent the bone scan on July 9, 2007. J.Ex. 5 at 162. Dr. Hill read the scan to show significant inflammation at L4-L5. *Id.* at 165. After he discussed treatment options, Claimant elected steroid injections. *Id.* at 165. Dr. Hill also recommended stretching exercises for the shoulder. *Id.* He continued to note Claimant as unable to work because of his back and other medical problems. *Id.* at 162.

On July 30, 2007, Claimant saw his new primary care physician Dr. Allen and reported that he had recently fallen down two steps onto cement, landing on his right hip and shoulder. J.Ex. 5 at 166-67. He said he was having searing pelvic pain every time he took a step. *Id.* at 167. Dr. Allen noted a probable "bone bruise"; an x-ray showed no fractures. *Id.* at 167-68.

The next day, July 31, 2007, Claimant saw surgeon David Stewart, who performed a nerve block at L4-L5 and a steroid injection at L5-S1. J.Ex. 5 at 169.

Claimant returned to Dr. Hill about two weeks later, on August 17, 2007. He said that the treatment had helped: his back pain was 60 percent better, the left leg pain had stopped, and although he still had some numbness and weakness it was improving. *Id.* J.Ex. 5 at 171. Dr. Hill noted that the back pain was work-related and opined that Claimant could perform only sedentary or light work; he added: "No way he can go back to work as a longshoreman." *Id.* at 172.

²¹ Dr. Hill also frequently performs medical arbiter exams for Oregon state worker's compensation cases. J.Ex. 19 at 833-35. He has been in practice for fifteen years. *Id.* at 833.

Claimant followed-up with Dr. Hill two months later, on October 26, 2007. J.Ex. 5 at 174-81. He said that the dramatic benefits from Dr. Stewart's treatment had declined, and by this time, he was having increased back pain with occasional leg parasthesias. *Id.* at 174. After a discussion with Dr. Hill, Claimant was interested in radio frequency ablation (RFA) to destroy the nerves involved in his back pain, but he and Dr. Hill agreed to wait for a time. *Id.* at 175. Dr. Hill then noted:

We also discussed vocational issues. It is my impression that this worker is totally disabled given his multiple musculoskeletal problems. He is 60 years old and has always worked as a longshoreman. I think it is quite reasonable and appropriate that he appeal his recent Social Security Disability claim denial.

*Id.*²²

Claimant returned to Dr. Hill on November 30, 2007. J.Ex. 5 at 177. His lower back pain continued, as did his intermittent radicular symptoms in his left leg. *Id.* At this visit, Dr. Hill proposed, and Claimant agreed to, a diagnostic neurological procedure that should show whether he'd be a candidate for radio frequency ablation. J.Ex. 5 at 178. Dr. Hill also gave Claimant another steroid injection, which apparently helped his leg symptoms. *Id.* at 179.

Ultimately, Claimant underwent the radio frequency ablation with Dr. Stewart in late 2007 or early 2008. J.Ex. 5 at 179. It gave him significant relief on the left and some relief on the right, albeit with some burning sensations. *Id.* After a recurrence of lower back pain, Dr. Stewart repeated the procedure in December 2008, giving Claimant significant relief, although Dr. Hill continued to prescribe Vicodin and Celebrex, to which he added Neurontin on January 11, 2008. J.Ex. 5 at 194-195.

Claimant next returned to Dr. Hill on April 4, 2008. J.Ex. 5 at 180. He was doing well with his symptoms under control. *Id.* Dr. Hill refilled the prescriptions and advised Claimant to continue home exercise. *Id.* Claimant continued to do well as of follow up visits on July 18 and August 12, 2008. J.Ex. 5 at 190-192.

Over a year later, on June 19, 2009, Claimant returned to Dr. Hill with complaints of pain in his left lower lumbar region for two months. J.Ex. 5 at 198. He was taking Neurontin, doxazosin, and occasional Vicodin and Celebrex. *Id.* Dr. Hill recommended another radio frequency ablation, which Dr. Stewart did on July 14, 2009. *Id.* at 199-200.

²² Dr. Hill later explained at a deposition that he'd misunderstood at the time that Claimant had worked as a longshoreman rather than as a manager on the docks. J.Ex. 19 at 851-52. He stated that he later understood Claimant's job to involve "working long shifts, having to do some lifting at times, some bending and twisting and up on his feet for long periods of time." *Id.* He also noted that his opinion here that Claimant was "totally disabled" was addressed to Claimant's social security claim; he didn't mean that he believed Claimant was unable to do *any* gainful employment. *Id.* at 875.

This somewhat brings Dr. Hill's credibility into question. "Totally disabled" is unambiguous; it doesn't allow for the possibility of gainful employment. If Dr. Hill would write that Claimant was "totally disabled" when in fact he believed Claimant could do some work, it shows that Dr. Hill was willing to "bend" his opinion to support his patient's claim for federal benefits – more the role of an advocate than a treating physician.

Left elbow treatment. Meanwhile, there is a parallel and separate history of the treatment of Claimant's left elbow. On January 15, 2007, Claimant returned to Dr. Mandiberg. J.Ex. 2 at 70-71. For the first time, he mentioned the fall from the ladder at work in October 2006, when he'd caught himself with his left arm and aggravated his elbow symptoms. *Id.* He told Dr. Mandiberg that he hadn't filed a workers' compensation claim. *Id.* at 71. He said that the injection on October 18, 2006, had only helped for a day or two. *Id.* Claimant had discomfort on range of motion testing. *Id.* Dr. Mandiberg prescribed physical therapy, gave Claimant an elbow brace, and offered an injection. *Id.* He opined that, if the injection didn't work, surgery was the next option. *Id.* Since Claimant was taking Celebrex and Flexeril for his back, no additional medication was needed. *Id.*

Claimant went to nine sessions of physical therapy from mid-January into February 2007. J.Ex. 4 at 119, 124. At the end, he said the elbow was 50 percent better but that progress had stopped. *Id.* at 124. The physical therapist suggested further medical evaluation and discharged Claimant to home exercise. *Id.*

Claimant returned to Dr. Mandiberg on February 19, 2007. J.Ex. 2 at 72. Although Dr. Mandiberg discontinued the physical therapy at that time, it appears that Claimant returned to it: a July 5, 2007 progress note states that Claimant had made significant progress since April, with decreased pain and increased strength, range of motion, and function. J.Ex. 5 at 150.

Also on July 5, 2007, Claimant turned to Dr. James R. Verheyden, whose offices are closer to his new home in Terrebonne. J.Ex. 5 at 148. On examination, Dr. Verheyden found mild tenderness over the left elbow and noted that Claimant's shoulder was "relatively benign and unremarkable."²³ *Id.* He recommended conservative care. *Id.* He discontinued the elbow brace because it was irritating Claimant's elbow. *Id.* He recommended stretching and strengthening exercises and acupuncture. *Id.*

When Claimant returned on November 2, 2007, he was frustrated that none of the treatment had helped his elbow pain. J.Ex. 5 at 154. On examination, there was tenderness, crepitation, and triggering at the ring finger. *Id.* He was very tender over the epicondylar area and had pain with resisted wrist extension. *Id.* Dr. Verheyden recommended surgery for the left elbow and conservative care for mild arthritis in Claimant's left thumb. *Id.* He gave Claimant an injection of anesthetics in his ring finger. *Id.*

The surgery, a left elbow epicondylectomy, was on December 3, 2007. J.Ex. 5 at 158. Physical therapy followed. J.Ex. 5 at 151-53, 158-160. Claimant's recovery appears to have been relatively uneventful and generally complete by March 20, 2008, with a significant reduction in elbow pain. *Id.* At an April 17, 2008 visit, Claimant had no complaints about his left elbow and said it felt "wonderful." J.Ex. 5 at 182.

²³ Claimant's symptoms may have been milder in his shoulder because he had had a steroid injection in his left shoulder at his visit with Dr. Hill about a week earlier. J.Ex. 5 at 145.

Neck pain and carpal tunnel. Meanwhile, Claimant was also undergoing another course of treatment, this one for pain in his neck and hands. On February 19, 2007, Dr. Mandiberg evaluated Claimant for neck pain, which Dr. Mandiberg believed was not work-related. J.Ex. 2 at 73. He noted that the physical therapist who had been treating Claimant for his elbow had done some manipulation on his neck and that Claimant felt the manipulation had aggravated his pre-existing neck problems. *Id.* Claimant stated that at times he had pain in his left arm that radiated up into his neck and down into his left anterior chest, sometimes reaching his right arm. *Id.* He reported some alteration in the sensation of his left ulnar digits for a few years. *Id.* He also reported decreased range of motion and “grating” in his neck when he moved it. *Id.*

Dr. Mandiberg said the neck condition was likely degenerative and distinct from the left elbow problem. *Id.* On examination, range of motion was “basically full,” with a slight limitation from previous right shoulder impingement surgery. *Id.* Strength was intact. *Id.* But Spurling’s was positive, with pain in the neck, upper trapezius, and left arm. *Id.* X-rays showed significant degenerative changes at C4 through T1 and some indication of foraminal narrowing at C4-6. *Id.* Magnetic resonance imaging confirmed multilevel cervical degenerative disc disease and facet arthrosis, but without foraminal or spinal canal narrowing. J.Ex. 5 at 133; J.Ex. 2 at 75. An electromyography/nerve conduction study showed mild to moderate nerve compromise at the carpal tunnel. J.Ex. 5 at 134-36. Claimant was given braces for carpal tunnel syndrome. *Id.*

On March 21, 2007, Claimant talked to Dr. Mandiberg and said the braces weren’t helping. J.Ex. 2 at 76. Dr. Mandiberg thought the problem was more likely arthritis than nerve compromise. *Id.* He recommended gentle physical therapy for the neck and surgery for the carpal tunnel syndrome; Claimant agreed to both. *Id.* The doctor performed a carpal tunnel release on the left on March 30, 2007 and on the right on April 20, 2007. J.Ex. 2 at 78-79.

Both surgeries appear to have succeeded for at time. But on October 26, 2007, Claimant told Dr. Hill that he was having triggering in his right thumb and tingling in his right hand. J.Ex. 5 at 174. When a nerve conduction study showed improvement over the pre-surgical condition, Dr. Hill referred Claimant to Dr. Verheyden. *Id.* at 175.

It appears that Claimant did not follow up at that time. He did see Dr. Verheyden nearly six months later, on April 17, 2008. J.Ex. 5 at 182. He said his symptoms were still better than before the carpal tunnel surgery, but that he’d started to have mild achy discomfort and numbness in his hands. *Id.* His main complaint was with triggering in his index fingers and thumbs, especially on the right. *Id.* On examination Dr. Verheyden noted tenderness and crepitation over both thumbs and index fingers but no active triggering. *Id.* Still, he and Claimant agreed to bilateral trigger finger releases, which Dr. Verheyden performed on May 1, 2008. *Id.*; J.Ex. 5 at 186-88. Two weeks later, Claimant reported relief and that he was doing well. *Id.*

In February of 2009, Claimant reported some recurrent numbness in his hands in a visit to Dr. Hill. J.Ex. 5 at 196. Dr. Hill performed some nerve conduction studies and found evidence of possible borderline residual carpal tunnel syndrome on the right. *Id.* He recommended conservative treatment. *Id.*

Updated Longshore claim. On November 15, 2007, Claimant filed a new LS-203 describing his injuries as “bilateral carpal tunnel syndrome, bilateral tendonitis and trigger finger, left shoulder strain, and arthritis” caused by “repetitive motion and cumulative trauma while using hands at work over the period of several years.” J.Ex. 12 at 327. Claimant also alleged a discriminatory discharge claim under section 48(a) of the Act. *Id.*

January 2009 independent medical examination. On January 22, 2009, Claimant saw Dr. Clyde A. Farris for an independent medical examination at Employer’s request. J.Ex. 8. Dr. Farris is an orthopedic surgeon in private practice who does about two independent medical examinations per week. J.Ex. 15 at 466-67.

Claimant told him that he hadn’t worked since October 2006. He complained of problems with his lower back, legs, hands, right shoulder, and left elbow. *Id.* at 251-52. He estimated that he was about 50% better than when he stopped working in October 2006, but said he still had significant symptoms, especially the pain and numbness in his lower back and legs. *Id.* at 253. He was taking Celebrex and Gabapentin, as well as an occasional Vicodin. *Id.* at 252. He said he’d had radiofrequency ablation for his lower back. *Id.* at 252-53. Claimant cooperated with the exam, and Dr. Farris saw no signs of malingering. J.Ex. 15 at 515-16.

Dr. Farris thought highly of Drs. Rosenbaum and Dr. Mandiberg, and did not take issue with the course of treatment they pursued with Claimant. *Id.* at 516-18. After examining Claimant, Dr. Farris diagnosed chronic lumbosacral strain and mild right rotator cuff tendinitis, status post multiple surgeries. *Id.* at 266. Dr. Farris concluded that with the possible exception of the carpal tunnel syndrome, none of Claimant’s injuries were work-related,²⁴ but as I will discuss below, his rationale is not convincing.

On the issue of whether Claimant had reached maximum medical improvement, Dr. Farris simply stated “On the basis of medical probability [Claimant] has reached maximum medical improvement at this time.” J.Ex. 8 at 269. He did not give a date for maximum medical improvement. *Id.* He limited Claimant to medium exertion work with no lifting over 50 pounds or repetitive or sustained use of his upper extremities at or above shoulder level. *Id.* at 269; J.Ex. 15 at 478.

As to Claimant’s return to his prior job, Dr. Farris said that Claimant had told him he’d been doing heavy work half of the time, and if that were true, Claimant could not return to the same job. J.Ex. 15 at 504.²⁵ But having reviewed a written analysis for Claimant’s job duties, Dr. Farris stated that he believed Claimant would be capable of performing the duties except for the lifting in excess of 50 pounds.²⁶ J.Ex. 8 at 269. In his opinion, Claimant could walk most of the

²⁴ J.Ex. 8 at 269; J.Ex. 15 at 266-68.

²⁵ Dr. Farris did not recall receiving a job description detailing Claimant’s duties, and at the deposition, had “no recollection” of what he was told about the physical requirements of Claimant’s job. J.Ex. 15 at 512-13. In his report, however, he notes reviewing a job analysis worksheet. J.Ex. 8 at 269.

²⁶ The record does not contain the job description reviewed by Dr. Farris, nor does it state the basis for his understanding of Claimant’s job duties. *See* J.Ex. 8, 15.

day and climb stairs and ladders occasionally.²⁷ J.Ex. 15 at 479. Dr. Farris did not believe that Claimant had a permanent impairment from any of the injuries except his back. J.Ex. 15 at 478-79, 484, 486-87.

Claimant's current medical condition, treatment needs, and work restrictions per treating physician. Treating physician Dr. Hill testified that, because of his back and left leg, Claimant should be restricted to no lifting over 25 pounds and no repetitive bending or twisting. J.Ex. 19 at 852-53. Because of the left elbow, Claimant cannot do repetitive forceful gripping on the left. *Id.*

Dr. Hill disagreed with Dr. Farris' opinion that Claimant could walk most of the day; the disagreement focused on the fact that the surfaces across which Claimant had to walk were uneven or sloped. J.Ex. 19 at 883-84. He thought that this would likely cause Claimant significant pain and accelerate the arthritis in his back, especially in a cold, damp environment. *Id.* at 883-84. He stated that climbing ladders daily would also aggravate the carpal tunnel and elbow problems. *Id.* at 885. In all, he believed that Claimant could do a job that was 75 percent sedentary desk work and 25 percent inspections on the yard, if he could drive on part of the inspections and was not required to do any lifting, bending, or twisting. *Id.* at 916.

Dr. Hill anticipated that Claimant might need future injections for his back and leg pain but that surgery was unlikely. *Id.*

On causation, Dr. Hill stated that he believed that Claimant's work aggravated the disc problem for which he'd had surgery in 2003. J.Ex. 19 at 887. He said that Claimant's work activities were "definitely a contributing cause" to his back problems, though he was not able to definitively state whether they were "a major contributing cause." *Id.* at 891. He also stated that Claimant's work was "definitely a contributing cause" to the carpal tunnel, and "at least a contributing cause, if not the major cause" of the left elbow problems. *Id.* at 893.

Activities of daily living. Jena's testimony about Claimant's activities of daily living is consistent with the limitations that Dr. Hill stated. She said she called Claimant her "one armed-man" because one of his arms was so weak that he could not use it much. Tr. 324. She said of "working around the house, projects, [and] vacationing," the family has "had to alter most of our lifestyle to accommodate him not having the strength and mobility." *Id.* She believed Claimant experiences constant back pain because she could "see it on his face" and because of his limited ability to participate in family activities. Tr. 325. This is consistent with Claimant's reports to his physicians of difficulty with prolonged standing or walking and his reports that he had to cut back on hunting and fishing because of orthopedic problems.

Claimant's Job Search. On August 12, 2008, Claimant saw Dr. Hill and requested a work release so that he could apply for a job with the Transportation Security Administration in

²⁷ This testimony was by deposition. Claimant stated an objection "as to form" without specifying what was wrong with the form. The purpose of an objection as to form is to alert the questioning attorney so that she may rephrase in a way that is not objectionable. A general objection "as to form" fails to meet that purpose; to be effective, the objection must state what is wrong with the form (*e.g.*, ambiguous). Essentially, the form of the objection was inadequate. Irrespective of this, the objection is overruled.

Redmond. J.Ex. 5 at 192. Dr. Hill noted that Claimant was doing “extremely well” with his various medical issues. *Id.* The job was 20 hours per week and would have involved occasional lifting of up to 70 pounds. Tr. 136. Dr. Hill filled out the necessary paperwork to support Claimant’s application. J.Ex. 5 at 192.

Respondents argue that Dr. Hill’s certifying Claimant as able to do a half-time job with lifting up to 70 pounds undermines the credibility of the more limiting restrictions he’s stated in the context of this case, including a lifting limitation of 25 pounds. I agree.

Dr. Hill chalked up his signing the form to “bad judgment.” J.Ex. 19 at 919. He thought TSA workers’ duties weren’t as strenuous as the form indicated, given that the local airport is small and probably wouldn’t have as many heavy items as at most airports. *Id.* He said he forgot that TSA employees have to lift passengers’ bags. *Id.* He said he encourages his patients to try to work when possible, and he thought Claimant could try out the job and see if he could do it. *Id.* at 918-19, 931.

I find Dr. Hill’s explanation inadequate. If Dr. Hill believed that lifting anything more than 25 pounds was medically unacceptable because it posed too great a risk of aggravating Claimant’s condition, “trying out” a job requiring lifting 70 pounds (even if only seldom) makes no sense. Dr. Hill made the same “mistake,” going in the opposite direction, on Claimant’s application for Social Security disability benefits. There he said that Claimant was “totally disabled” (see above), but later admitted that he didn’t mean Claimant couldn’t engage in substantial gainful activity. I conclude that in this case Dr. Hill was willing to vary his opinions significantly as advocacy for Claimant’s varying purposes, including when the result might be the payment of benefits to which Claimant was not entitled.

Claimant also lied in an effort to get the TSA job. As part of the application process, he filled out a form on which he indicated that he’d never missed work due to an orthopedic injury. J.Ex. 9 at 274. At trial, Claimant acknowledged that this was false. Tr. 286-87. He said he’d lied on the application because he really wanted the job. *Id.* He also indicated on the form that he had no difficulty standing for up to three hours, another statement that he later acknowledged was false. Tr. 288. As did Dr. Hill, he said he’d thought the job was not as strenuous as the employer’s form indicated and that he could do the job as it actually was done. Tr. 289.

Amidst all the prevarication, I find greater fault with Dr. Hill. At least with Claimant, it appears more likely that he genuinely wanted to work. For purposes of this case, that tends to support his contention that the reason he is not working is that he isn’t able to work, not for any lack of diligence or willingness to work. Lying in an effort to get work impeaches Claimant less for this purpose than would, for example, evidence that he exaggerated disabling symptoms.

Equally interesting is that, ultimately, although Claimant applied for the job and went through various screening processes, TSA rejected him on account of his medical problems. Tr. 136.

Report of vocational expert Nancy Bloom. In the spring of 2009, Employer/Carrier retained vocational consultant Nancy Bloom to perform a vocational assessment of Claimant. J.Ex. 13. She reviewed Claimant’s medical records, interviewed him, administered various tests, and

prepared a report that she issued on July 6, 2009. *Id.* at 332, 336-37. In the interview, Claimant told Bloom that he had difficulty driving more than 30-45 minutes, sitting or standing for prolonged periods, bending, leaning, stooping, and manipulating small objects with his hands. *Id.* at 338. As examples, he mentioned trouble loading the dishwasher and opening jars. *Id.* He said that, although he enjoys hunting and fly fishing, his injuries had made it difficult to do either. *Id.* at 333. When hunting, he had to use a “four wheeler” to get around, and when fly fishing he was hesitant to go deeper than knee level because he felt unsteady on his feet. *Id.* Bloom found that, if she accepted Claimant’s stated restrictions, he could do only sedentary work. *Id.* at 339.

But on August 20, 2009, Bloom prepared a labor market survey based on the work restrictions as Dr. Farris stated them following his independent medical examination of Claimant in January 2009: no lifting over 50 pounds and no sustained or repetitive use of his arms at or above shoulder level. *Id.* at 340. With these restrictions, Bloom identified four employers with security guard jobs that she opined Claimant could do in the Portland area. *Id.* at 342-45. All four employers had had positions open in 2006 as well as other open positions within the past six months. *Id.* Two had current openings; all anticipated further openings within the next six months. *Id.* The 2009 wages offered for these jobs ranged from \$8.75 to \$11.50 per hour; the 2006 wage range was \$7.80 to \$10.00 per hour. *Id.* Bloom also identified a security company in Bend, Oregon. It had no current openings, had had one opening in the past six months, and had had five or six openings in 2006. *Id.* at 345-46. This employer did not know when it might have more openings. *Id.* The starting wage at the time of the study (2009) was \$8.40 per hour; 2006 wages had been \$8.00 to 8.50 per hour. *Id.*

Bloom also identified driver jobs: four in Portland and one near Terrebonne, in Redmond, Oregon. J.Ex. 13 at 346-50. Only one of the Portland companies was hiring at the time; the company in Redmond had no current openings. *Id.* All but one of the companies had done some hiring in the past six months, and all stated that they would possibly or probably hire within the next six months. *Id.* All but one of the Portland companies had had openings in 2006. *Id.*

Finally, Bloom identified two parking lot attendant jobs and two video store clerk jobs. *Id.* at 350-53. All were in the Portland area except one of the video stores. *Id.* One of the Portland companies had a current opening. *Id.* The Redmond video store did not have any current openings but had had one in the last six months. *Id.* at 352. This employer told Bloom that they received three or four applications daily. *Id.* All of the four companies anticipated hiring in the next six months and had hired in 2006. *Id.* at 350-52. The jobs paid between \$8.40 and \$9.00 at the time Bloom contacted them; in 2006 they paid between \$7.50 and \$7.80. *Id.*

Bloom concluded that Claimant was qualified for and could perform the jobs she’d identified, and that he would get hired if he made a diligent effort. *Id.* at 353-54. Given the troubled economy, however, she conceded that “the number of applicants [for any given position] has increased, and openings are filled very rapidly.” *Id.* at 353.

Bloom conducted a follow up labor market survey two months later, in October 2009. She identified some companies that employed dispatchers. J.Ex. 13 at 376-79. Of these, only one was currently hiring; none could definitively say they anticipated hiring in the next six months.

Id. The one Central Oregon employer, Burlington Northern Railroad, stated that it listed job openings on its website; Bloom did not report that the website showed any openings at the time. *Id.* at 376-77.

Claimant testified at trial that he'd applied for some of the jobs that Bloom suggested. Tr. 136-37. He checked the Burlington Northern website and filled out an applicant profile, but the website returned no job openings on the West Coast. *Id.* He also contacted BTS Container in Portland, the only company Bloom had identified as currently hiring dispatchers. *Id.* They said they didn't have any openings or anticipate any for some time. *Id.*

November 2009 vocational evaluation. In late 2009, Claimant's vocational expert Roy Katzen performed an evaluation. J.Ex. 14. He reviewed the medical records; the depositions of Claimant's doctors, wife and supervisor; Bloom's vocational report; and other records. J.Ex. 14 at 390-91. He also spoke with Claimant's prior supervisor, Mr. Clinefelter, and visited Claimant's previous work site, taking a number of photographs. *Id.* at 391. He didn't do a labor market survey specifically for this case but had recently conducted others for the same kinds of jobs. Tr. 355-56. He stated that the current labor market in Portland was poor, and that the labor market in Central Oregon was worse. Tr. 370.

Katzen relied in part on a form Clinefelter filled out in May of 2006 that listed an assistant terminal manager's job requirements (including the hazards). J.Ex. 13 at 370-71. Clinefelter had described the job as requiring lifting up to 10 pounds more than two-thirds of the time, lifting 11 to 25 pounds one- to two-thirds of the time, and lifting 26 to 100 pounds up to one-third of the time. *Id.* at 371. The lifting ranged from bending to pick up from the ground to shoulder height. *Id.* The job required overhead work up to one-third of the time as well as pushing and reaching about that same length of time. *Id.* It required five hours of sitting, one hour of walking, 30 minutes of climbing stairs, one hour of standing, and less than 15 minutes of kneeling or climbing ladders. *Id.* There was repetitive hand use (both simple grasping and fine manipulation). *Id.* Katzen stated that the form was consistent with the job description both Clinefelter and Claimant had given him orally. Tr. 351.

Based on his knowledge of the Portland and Central Oregon job markets, Katzen opined that Claimant could not find work similar to his previous job, both because such work was scarce and because of his physical restrictions. *Id.* at 405; Tr. 354. Katzen also observed that the availability of many of the jobs Bloom identified (security guard, parking lot attendant, and customer service representative) had decreased significantly in the economic downturn. J.Ex. 14 at 405. At trial, however, he stated that he believed Claimant would have been a competitive applicant for the security guard jobs that Bloom identified in the Portland area. Tr. 368. He noted that if Claimant performed a diligent job search in that area, he would likely get hired as a security guard at about \$360 per week. Tr. 376-77; J.Ex. 14 at 4-5-06; J.Ex. 14 at 405-06. Katzen also contacted BTS Container and corroborated Claimant's report that they did not have any recent, current, or anticipated openings. *Id.* at 405-06.

Discussion

I. Timeliness of Notice and Filing.

Claimant filed his Longshore Claim on January 4, 2007, alleging cumulative injuries to his back, right shoulder and elbow. At trial, Claimant also introduced evidence of various traumatic injuries that occurred over the course of his work for Employer. In his closing brief, he specifically notes four traumatic injuries in addition to his cumulative trauma claim: a November 1998 fall from a chair that injured his back and hip; a January 2004 slip and fall injuring his back, leg and shoulder; a December 2005 lifting injury to his shoulder; and an October 2006 fall injuring his left elbow. Claimant's Br. at 3-4. The Act requires that claims be filed within one year after the relevant injury, so claims for any of Claimant's injuries occurring prior to January 4, 2006 are time-barred. 33 U.S.C. § 913(a).

The Act further requires that an employee give notice within thirty days of an injury, or within thirty days of the date that the employee should reasonably have known that the injury was employment-related. 33 U.S.C. § 912(a). Absent substantial evidence to the contrary, an employee is presumed to have given proper notice of a claim. 33 U.S.C. § 20(b); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). Even where no proper notice was given, a claim may still proceed "(1) if the employer . . . had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure [on certain enumerated grounds]." 33 U.S.C. § 912(d). The Ninth Circuit has held that an employer bears the burden of showing that it was prejudiced by a claimant's failure to give proper notice. *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 1275 (9th Cir. 1998) (citing *Bivens, supra*). "Evidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient [to show prejudice]; a conclusory allegation of prejudice is not." *Id.* at 1276.

Employer asserts that Claimant failed to notify it timely about his fall in October 2006. Tr. 6. Claimant admitted that he never told his supervisor about the fall or filed an accident report. The fall occurred shortly before his vacation and subsequent disability leave, and there is no indication that he mentioned it to anyone at work. From the medical records, it seems that he might not have mentioned it even to his doctors until January 2007. Nonetheless, the late notice does not bar the claim because Employer has not shown – or even averred – that the delay in notice was prejudicial. It offers no evidence in this regard; its conclusory allegation is legally deficient. *See Kashuba, supra*.

Employer also argues that Claimant never filed a Longshore Act claim for the October 2006 elbow injury. Employer's Br. at 11. Claimant's original claim in January of 2007, however, did mention cumulative trauma to his left elbow. Given the humanitarian purpose of the Act, I interpret Claimant's pleading liberally, and conclude that Claimant intended to include the October 2006 injury as contributing to the alleged cumulative trauma to his elbow. In the alternative, as I discuss below, I find that there is sufficient evidence to show cumulative trauma injury to Claimant's elbow even were I not to consider the October 2006 injury as a separate specific traumatic injury.

II. Compensability of Injuries

Employer contends that Claimant's injuries did not arise out of and in the course of his employment, and thus are not compensable. The Longshore Act requires a three-step analysis to determine whether an alleged injury is compensable. The source of the analysis begins in the statutory language, which states: "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary – (a) That the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). The Act thus presumes compensability, which the courts have held to be grounded in its humanitarian purpose. *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24 (1975), *aff'd mem.*, 547 F.2d 706 (D.C. Cir. 1977).

Even so, for the presumption to arise, a claimant must establish a *prima facie* case by affirmative proof. See *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); see also *Director v. Greenwich Collieries*, 512 U.S. 267 (1994). He must establish that: (1) he sustained harm or pain, and (2) working conditions existed or an accident occurred in the course of his employment that could have caused, aggravated, or accelerated the harm or pain. *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 182 (1991); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, (9th Cir. 1998); see also *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); see also *U.S. Industries-Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The employment activities need not have been the major or primary cause of the harm; all that is necessary is that the Claimant's work activities were a contributing cause. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kooley v. Marine Industries N.W.*, 22 BRBS 142 (1989); see also *Mattich v. Jones Washington Stevedoring Co.*, 164 F.3d 630 (9th Cir. 1998) (unpublished) ("even if an accident is not the sole or primary cause of a permanent disability, an employer is still fully liable as long as the accident was a contributing cause").

The quantum of proof required is less than a preponderance of the evidence; it is enough if a claimant produces "some evidence tending to establish" both the injury and the connection to covered employment. *Brown v. I.T.T.-Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. See *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). A claimant need not offer medical evidence that the working conditions could have caused the harm. See *U.S. Industries-Federal Sheet Metal, Inc.*, 455 U.S. at 608; see, e.g., *Volpe v Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1982) (chest pain at work sufficient without evidence of myocardial infarction).

If a claimant makes out a *prima facie* case, "Section 20(a) provides claimant with a presumption that his injury is causally related to his employment." *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 182 (1991), (citing *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988)); see *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985) (presumption links the harm with the employment).

Once a claimant raises a presumption of compensability, the burden shifts to the employer to rebut it. The employer may do this by producing substantial evidence that the claimant's condition was neither caused nor aggravated by his employment. See *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999); *Ramey v. Stevedoring Services of America*, 134

F.3d 954 (9th Cir. 1998); *Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). An employer's burden is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959 (citation omitted); *see also Damiano*, 32 BRBS at 262-263.

"Substantial evidence as used in the Act 'is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Matter of District of Columbia Workmen's Comp. Act*, 554 F.2d 1075, 1084 (D.C. Cir. 1976); *see Avondale Industries v. Pullman*, 137 F.3d 326, 328 (5th Cir. 1998); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003). The proof required is less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence. *See Charpentier, supra*, 332 F.3d at 287. When there has been a work-related incident followed by an injury, the employer can rebut the presumption by introducing medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation. *Stevens v. Todd Pac. Shipyards*, 14 BRBS 626 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983).

If the employer rebuts the presumption, the analysis continues to a third and final step. The presumption of compensability drops out of the case, and the causation issue must be resolved on the record as a whole, with the claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 236 (4th Cir. 1997); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988); *see generally, Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). The judge must weigh all the evidence and resolve the issue of causation. *Greenwich Collieries; see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

A. Injuries to Claimant's Lower Back and Legs.

Claimant has made out a *prima facie* case regarding cumulative injuries to his back and legs. Claimant gave detailed testimony about the back pain and related tingling, numbness, and pain in his left leg. After years of consistent performance, he had to cut back on his work activity because of these conditions – even when it led to a performance review noting his decreased production. His consistently giving up activities of daily living that he'd enjoyed for a lifetime adds to the credibility of his reports of subjective symptoms, as do the consistency of those reports to doctors, his willingness to undergo dangerous surgery to alleviate the symptoms, and the fact that, when treatment helped his condition, he reported it.

Claimant also demonstrated working conditions that could have caused, aggravated, or accelerated the symptoms. These included prolonged walking on uneven and unsteady rail ballast surfaces, and other surfaces on steep grades; climbing up and down stairs and ladders to the tower and on rail cars; bending to view the ash through access ports; and lifting and carrying objects weighing up to at least 50 pounds if not more.

Employer failed to produce substantial evidence that Claimant's injuries were not caused by his employment activities. Dr. Farris stated no substantial evidence to sever a causal link. On the contrary, he conceded that Claimant's "work activities over the years have probably contributed to these degenerative changes in the lumbar spine." *Id.* at 251. He hastened to add that he did

not believe work was “the major contributing cause of the pathology in the lumbar spine.” *Id.* But that is not the question: What is relevant is whether the work he did for Employer was a *contributing factor* to the ultimate disability. See *Independent Stevedore Co. v. O’Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966). On that, Dr. Farris offers no contrary opinion.²⁸ As he conceded while pointing to age as the major cause: “I am sure that . . . the more you use your back . . . the more quickly it ages.” J.Ex 15 at 472.

Similarly, Craven and Farrell conceded that Claimant’s job required considerable exertion: significant walking, climbing stairs and ladders, and occasional heavy lifting. Although Craven contended that he believed Claimant could have delegated more, he offered nothing to suggest that Claimant *did* delegate more or didn’t exert himself as much as he testified. Even were I to assume that Claimant did no more than Craven conceded was minimally required, that limitation would not sever the causal link: What remains is a significant amount of ongoing, daily exertion over many years. But in any event, the question is what Claimant did, not what the job absolutely required him to do as a minimum, and Craven had nothing of substance to offer on that.²⁹

As Employer has failed to rebut the section 20(a) presumption of compensability, I find that Claimant’s cumulative trauma injury to his lower back and legs arose in the course and scope of his employment for Employer. The injury is compensable, and Employer/Carrier is liable for it.

B. Injuries to Claimant’s Right Shoulder.

Claimant sustained a right shoulder injury for which he received treatment starting on January 3, 2006. He told Dr. Mandiberg that the injury happened while he was lifting something at work.³⁰ Dr. Mandiberg treated him for right shoulder strain and tendinitis from January 2006 until October 2006. During this time Clinefelter accommodated Claimant, who continued to work. On October 18, 2006, Dr. Mandiberg found that Claimant had been working, the injury was permanent and stationary, and there was no permanent impairment. There is no record of treatment after that appointment. It was less than a week later that Claimant stopped working and requested short-term disability benefits because of his other and different orthopedic problems. There is no evidence that Claimant lost any wages as a result of any injury to his right

²⁸ In his discussion of whether Claimant’s various injuries were work-related, Dr. Farris focused primarily on whether the medical evidence corroborated Claimant’s reports of traumatic injuries at work. J.Ex. 8 at 266-68. But this is a cumulative trauma case, and the medical focus is more on repeated exertion than on specific traumatic incidents. A discrepancy in Claimant’s reports of specific trauma goes more to Claimant’s credibility than to the causation.

²⁹ Farrell also offered nothing substantial. He stopped working for Employer three years before Claimant’s termination (and did not return until after Claimant was gone). He had no opportunity to observe Claimant working for those three years. Remembering back at the time of trial to what he’d observed of someone else performing the job seven years earlier, he candidly admitted that there was much he could not remember. Essentially, I find Mr. Farrell not competent to testify as to what Claimant’s job entailed at the relevant times.

³⁰ Dr. Bauer, who saw Claimant six months after the onset of the injury, indicated in his notes that there was no particular precipitating trauma. As Dr. Mandiberg was the treating physician for the shoulder problem, and Dr. Bauer didn’t see Claimant until six months after the problem started, I find that Dr. Mandiberg’s notes more probably reflect the true origin of the shoulder injury.

shoulder before or after October 18, 2006, no evidence of any medical treatment after that date, and no evidence that the condition is likely to recur. This specific injury is time-barred, and there is no evidence of a cumulative trauma injury to Claimant's right shoulder. This is not a viable claim.³¹

C. Injuries to Claimant's Left Elbow.

There is ample documentation of Claimant's left elbow injury (which at times included left shoulder symptoms). Beginning in October 2006, Claimant sought medical attention for pain in his left elbow that was later diagnosed as lateral epicondylitis, or tennis elbow. There is significant evidence on the record that Claimant engaged in activities at work that could have caused cumulative trauma to his elbow. The parties agree that climbing ladders and doing some heavy lifting were a part of what Claimant did. As I discussed above, I credit Claimant's and Clinefelter's testimony about the frequency of these activities over that of Craven and Farrell. Also contributing to the condition was the fall at work in October 2006, when the elbow was hyper-extended. Claimant underwent various treatments that culminated in the epicondylectomy in December 2007.

Some of the medical notes have vague references. When Claimant first reported elbow pain to Dr. Bauer on October 10, 2006, he did not report a specific precipitating trauma. He told Dr. Bauer that the pain was worse with lifting or turning objects. Dr. Bauer thought that Claimant *could have* been using his left arm more because of his right shoulder problems, and this *might* have caused the left elbow problem, but Dr. Bauer reached no conclusions on causation. Dr. Mandiberg did not discuss what had precipitated the elbow problem, other than to note that it had begun several months earlier and worsened over time. He noted that Claimant's left elbow problem was unrelated to his "work comp shoulder problem," presumably meaning the right shoulder injury that he indicated to be completely resolved on the same date. He and Claimant's physical therapist both mention the October 2006 fall in later records, and describe it as aggravating pre-existing elbow pain. I infer from these records that Claimant had left elbow symptoms that pre-existed the October 2006 fall, that the symptoms worsened over time into lateral epicondylitis, and that conditions existed at work that could have caused a cumulative traumatic injury to his left elbow. This is sufficient to make out a *prima facie* case and raise the section 20(a) presumption.

Again, Dr. Farris fails to offer substantial evidence to rebut the presumption. He concedes that Claimant's work activities could have contributed to the lateral epicondylitis, although not as "the major contributing cause." As he testified at a deposition, "Anything that involves repetitive use of the wrist, especially resistive extension, would certainly aggravate tennis elbow or common extensor tendinitis." J.Ex. 15 at 496. Again, this supports the claim and does not refute it because the standard is whether the trauma contributed to the condition, not whether it was "the major contributing cause."

³¹ Even were the claim compensable and not time-barred, Claimant lost no wages and submitted no evidence of any medical expenses (including the visits to Dr. Mandiberg).

Accordingly, I find that Employer has failed to rebut the § 20(a) presumption as to the lateral epicondylitis of Claimant's left elbow, and I therefore that Employer/Carrier is liable for this injury.

D. Carpal Tunnel.

Claimant documented treatment for carpal tunnel syndrome starting in early 2007. After various diagnostic tests and treatments, he had carpal tunnel release surgery on both hands in March and April of 2007, and further right-hand surgery in May 2008. It appears that he may have had some lingering symptoms, but subsequently pursued only conservative treatment.

Dr. Mandiberg's notes do not discuss the origins of the carpal tunnel syndrome. Claimant told the doctor who did the diagnostic nerve testing that his pain was worse with activity. All of the witnesses who discussed the duties of the assistant terminal manager agreed that office work was a significant part of Claimant's duties. While none of the witnesses explicitly stated how much of the office work involved typing, from the description of the work, I infer that a considerable amount of typing was involved. Clinefelter, for example, stated, that when Claimant was recovering from his shoulder surgery, he mostly did work on the computer in the office. Tr. 224. Craven stated that the duties of the assistant terminal manager included "paper flow, record keeping, overseeing the record keeping of the superintendents, making sure that documents are properly signed and filed and retrievable when needed, safety - - coordinating the safety training program for the facility, making sure that the safety materials get distributed." Tr. 420. This establishes a *prima facie* case sufficient to raise the section 20(a) presumption.

Dr. Farris conceded in his report that Claimant's work may have contributed to his carpal tunnel. In a later deposition Dr. Farris modified his opinion, but not sufficiently to rebut the section 20(a) presumption. He opined that a connection to work was unlikely unless Claimant spent more than two or three hours per day typing. Claimant admitted that he spent "over half" of his time in the yard, but the remainder would exceed two or three hours and consisted only of office work. Given that there is significant evidence that Claimant's duties involved more than two hours of typing daily, Dr. Farris' modification of his opinion to require that much typing has no effect on the analysis. The rest of Employer/Carrier's witnesses only offered testimony that Claimant probably spent more, not less, time in the office, making the prolonged, frequent typing all the more likely – again not rebutting the presumption.

I therefore find that the carpal tunnel was a covered workplace injury for which Employer/Carrier is liable.

E. Injuries to Claimant's Neck.

The medical evidence reflects that Claimant was having neck complaints at various relevant times. Some related to a non-industrial injury in 2002. In November 2006, the month after he stopped working, Claimant saw Dr. Bauer for pain and locking in his neck. Dr. Bauer did not discuss causation. In February 2007, Claimant began treating with Dr. Mandiberg for his neck pain at the same time that he was seeing him for carpal tunnel. Dr. Mandiberg noted that the neck problems as "not work related." On the other hand, he also noted that, during physical

therapy for the elbow problem, the therapist's manipulations aggravated Claimant's pre-existing neck problems. J.Ex. 2 at 73.

I reconcile Dr. Mandiberg's notes by inferring from them an opinion that nothing happened at work to aggravate Claimant's neck condition, but that the treatment for the elbow injury did aggravate the neck. When the course of treatment of a covered injury results in further injury, the secondary injury is covered as well. See *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Employer/Carrier offers nothing to rebut the existence of an aggravation or the causal link that Dr. Mandiberg's opinion established. I therefore find, based on the record as a whole, that Claimant has established this as a covered injury for which Employer/Carrier is liable.

III. Nature and Extent of Disability

A. Claimant Cannot Return to His Customary Employment.

When a claimant cannot return to his prior position, he is presumptively totally disabled, and the employer bears the burden of showing suitable alternative employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980). Here, the parties dispute whether Claimant can return to his prior job.

There is conflicting evidence about Claimant's current medical restrictions. Claimant's current treating physician Dr. Hill testified that Claimant's various orthopedic problems preclude lifting over 25 pounds, repetitive twisting and bending, repetitive forceful gripping with his left hand, being on his feet for most of the day, walking on uneven or sloped surfaces (which would likely cause significant pain and accelerate his back condition), or climbing ladders daily (which likely aggravate his elbow condition and his carpal tunnel). Dr. Hill did state that Claimant could do a job that was 75 percent office work and 25 percent yard inspections if he could drive to the inspection sites and did not have to lift, bend, or twist.

Employer/Carrier's expert Dr. Farris restricted Claimant only to avoid lifting over 50 pounds and avoid repetitive use of his arms at or above shoulder level.

After reviewing the medical evidence and the opinions of the two doctors, I find Dr. Hill's opinion more persuasive. In part this is for the very reasons that greater deference usually is accorded to treating physicians. See *Amos v. Director, OWCP*, 164 F.3d 480 (9th Cir. 1999) (holding that treating physicians may be accorded greater deference because they are "employed to cure and ha[ve] a greater opportunity to know and observe the patient as an individual."). Dr. Hill observed Claimant's progress over more than two years, albeit not until after Claimant stopped working for Employer. He advised Claimant mostly about his back problems, a central cause of Claimant's work restrictions. As an independent medical examiner, Dr. Farris saw Claimant only once (in January of 2009). One of the risks of a single examination is that the particular date of the exam might not be at a time when the worker's condition was entirely representative of his usual condition. That's what happened here: Claimant's back symptoms were largely in abeyance because of he'd recently had a radio frequency ablation that was

helpful then but only temporarily; the treatment's effectiveness diminished with time, with Claimant again reporting increased symptoms in both his lower back and hands.

In addition, Dr. Farris' opinion on restrictions seems inadequate to address the level of treatment that Claimant's condition has required and continues to require. In the year and a half after he left work, Claimant underwent a nerve block, a steroid injection, and radio frequency ablation on his lower back; had carpal tunnel surgery on both hands; and had surgery on his left elbow. Closer to trial, in July 2009, he underwent another radio frequency ablation procedure on his back because the relief from the first procedure had decreased over time. While the elbow surgery seems to have succeeded in largely addressing that problem with minimal residual symptoms, Claimant has continued to have pain and other problems with his back and his hands, despite ongoing treatment. Dr. Hill believes that Claimant can still do *some* work, but the few restrictions Dr. Farris suggest (such as unlimited frequency of lifting up to 50 pounds) seem inadequate for a man who was 65 years old at the time of trial and who'd had as many orthopedic surgeries and other procedures as Claimant has required. Rather, Dr. Farris appears to neglect issues such as the walking surface (rail ballast), the inclines, the ladder climbing, and the bending and twisting needed for inspections – on all of which I accept Dr. Hill's opinion that these activities can aggravate a back problem like Claimant's.

I therefore adopt Dr. Hill's opinion on the medically-based limitations on Claimant's ability to work.

I also accept Claimant's description of the job as accurately describing what it is he would have had to return to if the duties were not modified to accommodate him. (I address below the possibility that the job has been redefined or modified over time, such as to increase the office component and decrease the more physically challenging part of the job.) As Claimant described it, he often had to walk on uneven or steep surfaces and climb ladders or stairs. He had to lift heavy objects (sometimes over 50 pounds), and to engage in other physically strenuous tasks like using a sledgehammer to clear the buildup of soda ash from various conveyer belts and access points. His testimony is consistent with the job description, which refers to the physical demands of work "in the marine environment, to include extensive walking and climbing of stairs and ladders." J.Ex. 10 at 291. Clinefelter confirmed the duties as Claimant described them. Employer's witnesses offered nothing to refute that all of the activities Claimant and Clinefelter described were required; they offered no more than that, on occasion (but not always), some of the work could be delegated. But Claimant's can't lift over 25 pounds, and the job requires it. He can't walk on uneven or sloped surfaces, and the job requires it. He can't be on his feet most of the day, and putting together all of the time on the yard plus even one-fourth of his time in the office, that is too much time on his feet.³²

³² Employer argues that Claimant did not stop working because of his medical limitation, but rather did so because he closed the sale on the Portland house and chose to retire to Terrebonne. I reject the argument. Too much was changing during Claimant's final months, too many medical issues coincided with his decision that the time had come to stop work, and finally, his treating physician concurred that it was time to stop for medical reasons.

As discussed above, in the year or two preceding his stopping work, he had been having increasing difficulties meeting the physical demands of some of his duties. Although Clinefelter accommodated him by helping out personally and arranging for others to help Claimant, by mid-August 2006, Clinefelter felt that he could no longer meet Claimant's increasing need for accommodation and reflected this in Claimant's performance evaluation. This

I find that Claimant could not, consistent with his medical restrictions, return to his prior job without modification of the job duties.

An employer may meet its burden of showing suitable alternative employment by providing an injured employee with appropriate light duty work. *Darden v. Newport News Shipbuilding and Drydock Co.*, 18 BRBS 224, 226 (1986) (citing *Johnson v. C & P Telephone Co.*, 13 BRBS 492 (1981); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980)). The employment offered must be necessary to the employer; an offer of sheltered employment is insufficient. *Darden*, 18 BRBS at 226; *Harrod*, 12 BRBS 10. The fact that an employer modifies a job to accommodate a claimant's disability does not in itself make the work sheltered employment. *Darden*, 18 BRBS at 226-27 ("Any time light duty work is offered to an employee because he is physically or medically incapable of performing his usual work, the light duty employment will necessarily be tailored somewhat to the employee's physical limitations.").

Claimant concedes that, at least at some point in time, he could have performed his old position with modifications, but he says that Employer never offered him a modified position. Claimant's Br. at 36. The background for this is that Employer did offer Claimant modified work at an earlier time, before Claimant stopped working: It consisted of the informal arrangements with Clinefelter. The reason this fails as an ongoing offer of modified work is that in the months before Claimant stopped working, Clinefelter concluded that the modifications were interfering with the operation of the terminal. Clinefelter stated that he was forced to take on a greater share of the terminal inspection duties because of Claimant's inability to perform them. Clinefelter viewed this as a performance issue and reflected it in lower ratings on Claimant's 2006 performance review.³³ And Claimant conceded that his inability to do the work was affecting

was Employer's message to Claimant that his need for accommodation was affecting operations to a point no longer acceptable.

Claimant testified to his increasing subjectively experienced pain at this time, and his medical records are consistent with this. Earlier in his career, he'd had at least two accidents at work where he injured his back, underwent back surgery in March 2005, and yet returned to work despite continued significant pain that worsened as each day went on. In November 2005, he told Dr. Bauer that he feared his leg pain alone would force him to retire early. Claimant's elbow problems were increasing and eventually required surgery in the year after he left work. At various points in 2007, Dr. Hill noted in his medical records that Claimant's various orthopedic problems prevented him from working.

It is possible that the sale of the Portland house forced a decision point that affected the timing of Claimant's decision to stop working. Had Claimant's wife moved to Terrebonne after the sale of the house as the couple had planned, the family would have lost her income, at least until her company had a job for her in Central Oregon or she found other work. To justify her giving up her job while Claimant continued to work in Portland, Claimant would have to have felt that he'd be able to continue working for some time into the future. It would have required him to look at his ability to go on working for Employer. I accept that the move might have led Claimant to confront directly the question of whether he could continue to do job.

But I reject that his decision that he could continue no longer was affected by the sale of the Portland house. There is plenty of independent evidence that he no longer could work by that time, not the least of which is the performance evaluation Employer had just given him. His treating physician agreed. That is an adequate basis to place the date on which Claimant no longer could work as of the date he stopped working and to confirm that he stopped for medical reasons, not as part of a pre-existing plan to retire to Terrebonne.

³³ From 2003 through 2005, Claimant received exemplary performance reviews.

operations: He testified that when no one was around to help him out, the work that he no longer could do on his own simply went undone.

Ultimately Clinefelter determined that he no longer could continue accommodating Claimant's medically-based limitations – that's what led to the lower ratings on the performance evaluation. If Employer's delineation of Claimant's job duties genuinely had been modified to relieve him of the requirements he no longer could meet, his not doing those things wouldn't have resulted in criticism on a performance review. Performance-based criticism is for failure to perform something expected, not something that had been excused or removed from the job duties.

As far as any offers of modified work after Claimant left the job, Claimant and Sharpless agreed that, during their discussions in late 2006, there was no mention of modified duties. Nor is there any other offer of a modified job. I find that Employer did not offer Claimant a modified job that he could perform within his medical restrictions, either by way of continuing or extending the accommodation that Clinefelter offered for a time while Claimant was working, or by offering some other modification after Claimant stopped work.

B. Suitable Alternative Employment.

To establish that a claimant is only partially disabled, an employer must identify specific jobs that the claimant would be capable of performing, given his physical limitations, education, background, and skills. *Id.* at 1330; *see also Hairston v. Todd Pacific Shipyards*, 849 F.2d 1194, 1196 (9th Cir. 1988). Once the employer establishes the existence of suitable alternative employment, the claimant may still rebut this evidence by showing that he has diligently sought employment, but has been unsuccessful in securing it. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993). A claimant's total disability becomes partial at the earliest date on which the employer shows the availability of suitable alternative employment. *Stevens v. Director, OWCP*, 909 F. 2d 1256 (9th Cir. 1990).

When a claimant relocates, his new location is the presumptively relevant geographical labor market area. *Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 596-97 (1st Cir. 1997) (“Employee's chosen community is presumptively the proper choice for determining earning capacity, and . . . employer bears the burden of showing that the original move, or a refusal to move again, is unjustified”); *Holder v. Texas Eastern Products Pipeline*, 35 BRBS 23, 27 (2001) (same).

“The presence of a legitimate purpose influencing a post-injury relocation is a significant factor warranting consideration in a determination of the relevant labor market.” *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 382 (4th Cir. 1994). Because a move to an area where the job market was significantly weaker could pose an undue burden on the employer,

The ALJ's determination of the relevant labor market should include consideration of such factors as the claimant's residence at the time of his filing for disability benefits, his motivation for relocation after the accident, the legitimacy of that motivation, the duration of his stay in that new community, his ties to that new community, the availability of suitable job opportunities in the

new community as opposed to those in his former residence, and the degree of undue prejudice to the employer in proving suitable alternative employment in the claimant's new community.

Id. at 383.

When determining what constituted adequate justification for moving, “economic judgments ought generally to control”; a move for purely personal reasons is less adequate than one for such economic reasons as an attempt to find work or a move to an area with a lower cost of living. *Wood, supra*, at 597.

A move predicated on a legitimate intent to reduce an injured claimant's cost of living is consistent with the LHWCA's perception of disability as a physical and economic concept, in that such relocation can mitigate the economic consequences of the claimant's impairment.

Id. at 383. *See also Holder v. Texas Eastern Products Pipeline*, 35 BRBS 23, 27 (2001) (new community is relevant market where the move was for a lower cost of living and better place to raise children and when the worker intended to stay in the new community; that the new community was “rural and modest” did not alter the result); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996) (Portland is the relevant market where it was the location of the injury, and where Claimant returned for reasons of financial necessity after a short stint living in Seattle).

Here, Employer has not met its burden to rebut the presumption that Terrebonne is the relevant job market. Claimant's move was motivated in large part by family economic considerations. When Claimant and Jena decided to buy the house in Terrebonne and then to sell in Portland, the plan was for Claimant to remain in Portland to work for some years. Claimant's disability and its economic impact altered this plan. As Claimant would no longer be working, it became essential for Jena to remain in Portland, where she could earn wages for the family, leaving Claimant and their daughter to live in Terrebonne. She then joined Claimant and their daughter because his disability-related condition demanded it. They were still living in Terrebonne at the time of trial, which shows intent to remain there. Thus, Terrebonne, Oregon and the nearby Central Oregon area is the relevant labor market even if the job market there is weaker.

Looking to the Terrebonne market, Employer's expert Ms. Bloom identified no Central Oregon employers that were currently hiring. Only one prospective employer – the video store – even indicated that it would likely have an opening in the next six months. One potential future opening is insufficient to show that Claimant likely could have secured a position, particularly as this video store indicated that it received three to four applications each day. The fact that some of the Central Oregon employers had openings in 2006 is also unhelpful. The relevant time is the time of the survey: the analysis of total versus partial disability requires the employer to show currently available employment. Even were I to focus on jobs in 2006, Bloom did not inquire as to when in 2006 the jobs were open. Claimant was still working for Employer into October of that year and wouldn't have been looking for work earlier.

Nonetheless, Claimant relieved Employer of an obligation to show more because, at the outset of trial, he conceded that he was able to work and had a retained earning capacity of \$360 per week. Tr. 5. Employer was entitled to rely on that representation and not offer evidence on the point unless it wanted to demonstrate a retained earning capacity *greater than* \$360 per week. I therefore conclude that Claimant has a retained earning capacity of \$360 per week.

This still leaves open the date as of which Employer established the availability of work at \$360 per week. There is nothing on the record to establish a date until Claimant stipulated to it on the first day of trial, November 18, 2009. I therefore take that as the date that Claimant's status changed from permanently totally disabled to permanently partially disabled. As Claimant did not stipulate to the date at which Employer established this retained earning capacity, I find that it was established on the first day of the trial, November 18, 2009.³⁴

C. Claimant Sustained Periods of Temporary Total Disability, Permanent Total Disability, and then Permanent Partially Disability with a Retained Earning Capacity of \$360 per Week.

Claimant was disabled as of the day he stopped working, October 23, 2006. He was totally disabled until the date as of which Employer established suitable alternative employment in Terrebonne, November 18, 2009. Initially the total disability was temporary; this changed on October 26, 2007, when Claimant reached maximum medical improvement.³⁵ As of that date, Claimant was permanently totally disabled. I therefore find that Claimant sustained a period of temporary total disability from October 23, 2006 to October 26, 2007; of permanent total disability from October 27, 2007 to November 17, 2009; and of permanent partial disability from November 18, 2009 and ongoing with a retained earning capacity of \$360 per week.

IV. Average Weekly Wage and Compensation Rate.

At trial, Claimant contended that his average weekly wage was \$1,370.56 as calculated under section 10(a); Employer/Carrier contended it was \$1,265.13 under section 10(c). Tr. 10. Neither party submitted closing arguments on the point; they cite nothing in the record.

When an injured worker has “worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury,” his average weekly wage is calculated based on section 10(a) of the Act. 33 U.S.C. § 910(a).

³⁴ As Claimant suffered injuries to his hands and arms as well as his back, he could also be entitled to an award for a scheduled disability. But he stipulated that the injury he was asserting is an unscheduled injury. Employer/Carrier was entitled to rely on this. I therefore do not reach any scheduled injury. Moreover, the medical evidence shows that Claimant has no permanent impairment to his left elbow, and he offered no evidence of the extent to which his residual symptoms of carpal tunnel impair his use of his limb. (The residuals cannot be totally disabling because Claimant stipulated that he could work and earn \$360 per week.)

In his closing brief, Claimant requested “full back pay . . . until [he] reaches his Social Security retirement age of 66 on February 1, 2011” and “on-going total disability pay under the Act” thereafter “due to employer’s failure to find suitable alternative employment.” Claimant’s Br. at 36. The request for full back pay as disability compensation is not available under section 8. I therefore take this demand as stated under section 48a, which I address below.

³⁵ The parties stipulated to the date of maximum medical improvement.

Section 10(c) is a “catch-all” provision applicable if neither §§ 910(a) nor 910(b) applies.” *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998). “The key to determining an injured worker’s average weekly wage is the requirement that § 910(a) will apply unless it would be unreasonable or unfair to do so.” *Id.* at 1057. The principle is sufficiently strong that “when a claimant works more than 75% of the workdays of the measuring year the presumption that § 910(a) applies is not rebutted.” *Id.* at 1058. But “when there is insufficient evidence in the record to enable the ALJ to make an accurate calculation under sections 910(a) and (b),” then resort to section 10(c) is proper. *Stevedoring Services of America v. Price*, 382 F.3d 878, 884 (9th Cir. 2004).

Claimant has worked full time for Employer in various capacities since 1996, and had been assistant terminal manager for several years by the time he stopped working in October 2006. He worked for Employer for the whole year prior to his injuries, all of which points to an analysis under section 10(a).

That analysis is achieved by multiplying the worker’s average daily wage or salary by 300 for a six-day per week worker, and by 260 for a five-day worker. 33 U.S.C. § 910(a). But Claimant offered no evidence of his daily wages. The only evidence in the record of Claimant’s earnings in the year prior to October 2006 appears to be his IRS Forms W-2 from 2005 and 2006. These list his earnings for the purposes of Social Security and Medicare as \$63,584.30 for 2006 and \$60,037.87 for 2005. J.Ex. 10 at 296-97. Claimant provided no evidence on the number of days he worked per week.³⁶ Without evidence on the number of days Claimant worked, the record is insufficient to calculate average weekly wage under section 10(a).

As there is insufficient evidence to determine Claimant’s average weekly wage under section 10(a) or (b), the calculation must be under section 10(c).³⁷ That section provides:

The average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

In this case, however, Claimant’s evidence is inadequate even to calculate his average annual earnings under § 10(c). To find Claimant’s annual earnings for the year prior to the date when he left work because of his disabilities would require looking to his earnings for the period of time from late October 2005 to mid-October 2006. His W-2 forms do not provide this level of specificity, but only lists calendar year earnings.

³⁶ On his LS-203, Claimant alleged that he worked seven days per week. This, however, is merely an allegation, not evidence. I cannot accept, without supporting proof, that a worker essentially never took any time off.

³⁷ No party offered evidence or argument related to section 10(b).

As it is Claimant's burden to establish his average weekly wage, I will find no more than the amount to which Employer/Carrier stipulated under section 10(c): \$1,265.13 per week. That is the average weekly wage.

During his periods of total disability, Claimant was entitled to two-thirds of his average weekly wage, or \$843.42. As he was permanently totally disabled from October 27, 2007 to November 17, 2009, he is entitled annual adjustments to his compensation rate beginning on October 1, 2008 and October 1, 2009. *See* 33 U.S.C. §910(f). After November 18, 2009, he is entitled to two-thirds of the difference between his average weekly wage and his retained earning capacity of \$360 per week, or \$603.42 per week.³⁸

V. Obligations of the Special Fund under Section 8(f).

Employer/Carrier requests relief from the Special Fund under section 8(f). While the Director did not appear at trial or file a brief in this case, he did file a pre-trial statement in opposition to 8(f) relief on the grounds that there was no pre-existing disability, that the disability was not manifest to Employer, and that the contribution requirement had not been met. *See* final pre-trial submission, August 17, 2009.

Under certain circumstances, section 8(f) limits the liability of an employer or carrier for disability payments when an employee who was previously partially disabled suffers an injury and the resulting disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1). When an employer successfully invokes section 8(f), its liability for permanent disability payments is limited to 104 weeks. *Id.* To qualify for relief, "the employer must establish: (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that the disability that is the subject of the current claim is not due solely to the most recent injury." *Todd Pacific Shipyards v. Director, OWCP*, 913 F.2d 1426, 1429 (9th Cir. 1990). The pre-existing disability need not have caused any loss in wages; the requirement for pre-existing permanent partial disability is met if the employee has "such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." *Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41, 42 (1986) (quoting *C&P Telephone Co. v. Director*, 564 F.2d 503, 513 (D.C. Cir. 1977)). When an ALJ awards more than one period of disability for the same injury (e.g. a period of permanent partial disability followed by a period of permanent total disability), the employer is only liable for one 104 week period; the clock on the 104 weeks does not reset when there is a change in the extent of a claimant's disability. *Murphy v. Pro-Football, Inc.*, 24 BRBS 187, 190-91 (1991).

Employer/Carrier here has made the showing required for relief under 8(f):

³⁸ I rely on the plain language of 33 U.S.C. §908(c)(21). The result is that, as of the date he became permanently partially disabled, Claimant will lose the benefits of the section 10(f) increases he'd received while permanently totally disabled.

- Claimant had significant, well-documented problems with his back and legs prior to the cumulative trauma claim here.³⁹ He had two pre-existing traumatic back injuries at work and underwent back surgery in 2005. Although the surgery was helpful, Claimant never fully recovered. This history could have motivated a cautious employer to discharge him because of the increased risk of a subsequent injury at work.
- The injury was clearly manifest to Employer, as it is apparent in already extant medical records.
- Claimant's current back problems are materially worse because of his pre-existing disability. It was the pre-existing problems that made him so susceptible to the cumulative trauma to his back that he sustained, resulting in permanent disability and a lower earning capacity.

Employer is thus entitled to relief under § 8(f). Claimant's disability became permanent on October 26, 2007. The Special Fund is obliged to pay compensation beginning 104 weeks from that date.

VI. Discrimination for Claiming an Entitlement to Compensation.

Claimant alleges that Employer terminated the employment because, when Employer resisted paying him under its short-term disability plan, he stated that he was going to file a Longshore Act claim. "It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer." 33 U.S.C. § 948a. For a violation, an employer may be required to pay a penalty of \$1,000 to \$5,000 and to reinstate the employee and pay back wages so long as the employee is still able to perform the job. *Id.*; see also, *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5, 8-9 (1988).

At the threshold, Employer asserts collateral estoppel as a defense. In a previous case in the U.S. District Court (D. Ore.) (Case No. 08-6352-HO), Claimant named Employer (among others) as defendant and alleged wrongful termination and violations of the Employee Retirement Income Security Act, the Family Medical Leave Act, and Oregon's Family Leave Act. E.Ex. 59 at 360-61. Based on a stipulation of the parties, the district court dismissed with prejudice on August 5, 2009. But, as the Court stated, the parties' stipulation included that "Plaintiff and defendants have agreed to dismiss this action with prejudice with the understanding that plaintiff will be able to pursue his LHWCA claims for alleged industrial injuries [then pending before the Office of Worker's Compensation Programs] without being prejudiced by this dismissal." *Id.* at 361. As the dismissal was predicated on Claimant's reservation of rights to pursue claims under the Longshore Act, collateral estoppel does not apply. I therefore reach the substance of the allegations.

³⁹ It is less clear that Employer would be entitled to 8(f) relief based on Claimant's other injuries. His right shoulder injury does not seem to have any lingering symptoms that impact the extent of his disability past October of 2006. For his left elbow and carpal tunnel, there is insufficient evidence of a pre-existing disability.

To establish discrimination within the definition of section 48a, an employee must show that the employer committed a discriminatory act motivated by discriminatory intent or animus. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996) (citing *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759 (4th Cir. 1988)). The “essence” of discrimination is “different treatment of like groups or individuals.” *Holliman*, 852 F.2d at 761. At trial, it is Claimant’s burden to establish the claim.⁴⁰

Claimant here has not met his burden. Both Sharpless’ testimony and Employer’s internal emails show that Employer decided to terminate the employment before Claimant mentioned filing a claim under the Act. Claimant first mentioned his plan to file a Longshore Act claim in the phone call with Sharpless and several other managers on November 29, 2006. On the preceding day, Employer’s benefits manager told the line managers that Claimant’s request for short-term disability was denied, that he was to be told to return to work by a date certain, and that, if he did not return, the employment was to be terminated. The record shows that the decision was consistent with routine policy. As the benefits administrator wrote: “You know the rest of the drill. He’s notified in writing that he returns to work within a specified period of time, whatever days are designated, or he risks the possibility of termination. This becomes an attendance issue handled by HR/supervisor rather than an [insurance] and risk [management] issue.” The termination merely followed that routine application of established policy. There is no indication that the Company treated Claimant differently from other similarly situated employees.⁴¹

Moreover, there is no indication that Employer altered its course after Claimant threatened to file a Longshore Act claim. As it had planned before then, management notified Claimant of a date certain by which he was to return to work. When the notice arrived after the date had run, the Company contacted Claimant. Claimant expressed no interest in returning to work. The termination thus went into effect when the Company followed its routine plan, decided before Claimant mentioned a Longshore Act claim, and Claimant expressed no interest in returning to work. This is insufficient to show a discriminatory act or discriminatory animus.

Conclusion and Order

During the last year of his employment with Employer, Claimant sustained compensable cumulative traumatic injuries to his lower back and legs, to his left elbow, and to his hands (carpal tunnel). He became temporarily totally disabled and left work as of October 23, 2006. On October 26, 2007, he reached maximum medical improvement and became permanently

⁴⁰ Some early cases held that, once a claimant made out a *prima facie* case of discrimination, the burden shifted to the defense. *See, e.g., Geddes v. Benefits Review Bd.*, 735 F.2d 1412, 1416 (D.C. Cir. 1984); *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988); *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). Such a rule cannot survive the Supreme Court’s more recent rejection of the “true doubt rule.” *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). In *Greenwich Collieries*, the Court held that the allocation of burdens of proof in the Administrative Procedures Act applies to all issues on Longshore Act claims unless Congress specifically provided otherwise. *Id.* at 280-81. The Administrative Procedures Act provides: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d).

⁴¹ Although at trial Claimant proved that he was disabled as of the time he stopped working, that does not mean he met Employer’s short-term disability requirements for medical status and documentation.

totally disabled. Although unable to return to his prior job, on November 18, 2009, Claimant became able to work with a retained earning capacity of \$360 per week. As of that date, he became permanently partially disabled. Employer is entitled to relief from the Special Fund, and is not liable for penalties for discrimination under section 48a of the Act.

1. Employer/Carrier will pay Claimant temporary total disability compensation in the amount of \$843.42 per week for the period from October 23, 2006 through October 25, 2007. 33 U.S.C. §908(b).
2. Employer/Carrier will pay Claimant permanent total disability compensation for the period from October 26, 2007 through November 17, 2009. *Id.* The compensation rate for this period begins at \$843.42 per week; the rate is subject to annual statutory increases on October 1, 2008 and October 1, 2009. 33 U.S.C. §§908(a), 910(f).
3. Employer/Carrier will pay Claimant permanent partial disability compensation in the amount of \$603.42 per week for the period commencing November 18, 2009 and continuing. 33 U.S.C. §908(c)(21).
4. Employer/Carrier is entitled to a credit in the amount of any wage compensation paid Claimant between October 26, 2006 and December 18, 2006, according to proof presented to the Director and satisfactory to him.
5. Employer/Carrier will pay interest at the statutory rate on all unpaid compensation from the date due until the date paid. *See* 28 U.S.C. §1961.
6. Employer/Carrier will provide future medical care reasonably necessary to treat workplace cumulative trauma to Claimant's lower back, legs, left elbow, and hands. 33 U.S.C. §907.⁴²
7. The Special Fund will assume responsibility for the payment of compensation beginning 104 weeks after October 26, 2007, and continuing. 33 U.S.C. §908(f).
8. Claimant's discrimination claim is DENIED. 33 U.S.C. §948a.
9. The District Director will make all calculations necessary to carry out this Order.

⁴² Claimant offered no evidence of unpaid past medical expenses.

10. Within 14 days, all counsel will meet and confer in an effort to agree on the amount of fees to which Claimant's counsel is entitled. If the parties do not agree, Claimant's counsel may file a fee petition within 30 days of the date of this Order. *See* 33 U.S.C. §928.

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge