

U.S. Department of Labor

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

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



Issue Date: 02 December 2010

CASE NOs.: 2009-LHC-00338
2009-LHC-02030

OWCP NOs.: 15-049877
15-048708

In the Matter of:

JASON TERUYA,
Claimant,

v.

U.S. BAE SYSTEMS HAWAII SHIPYARDS,
Employer,

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION,
Carrier,

and

DISTRICT DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances: Jason Teruya
Claimant, in *pro se*

James P. Aleccia, Esq.
Aleccia, Socha & Mitani
For the Employer and Carrier

Before: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

These claims arise under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("the Act"). The central issues disputed by the parties in this case are the extent of the injuries sustained by Mr. Jason Teruya ("Claimant") while working for Employer U.S. BAE Systems Hawaii Shipyards/Carrier Signal Mutual Indemnity Association, Ltd. ("Employer") and Employer's entitlement to Special Fund relief; however, there are several related issues that turn on my findings regarding the extent of Claimant's injuries. Formal hearings occurred in Honolulu, Hawaii, on July 26 and 28, 2010. Claimant, in *pro se*, and Employer, through legal counsel, appeared at hearing and submitted closing briefs while the District Director, through the Office of the Solicitor, elected not to appear at hearing or participate in submitting a closing brief as to the § 8(f) Special Fund relief issue.

I admitted the following exhibits into evidence at the hearing: Claimant's Exhibits ("CX") 00-5; Employer's Exhibits ("EX") 1-20; and Administrative Law Exhibits ("ALJX") 1-13. Hearing Transcript ("Tr.") at 202, 238, 245. Also at the hearing, I allowed Employer's taking of a post-trial deposition of a medical expert, Tr. at 39; *see* 29 C.F.R. § 18.54(a), which occurred on July 28, 2010. Employer submitted this deposition transcript into evidence on August 10, 2010, and I now admit it into evidence without objection as EX 21. Also on or about October 1, 2010, Claimant and Employer submitted their post-trial briefs in this matter – which I now mark respectively as ALJX 14 and ALJX 15 – thereby closing the record.

Stipulations:

The parties agreed to the following stipulations:

1. The Act applies to both claims.
2. Claimant injured his back on September 8, 2005, and injured his right hand on January 6, 2006.
3. The injuries arose out of and in the course of Claimant's employment with Employer.
4. Claimant and Employer were in an employer-employee relationship at the time the injuries occurred.
5. Claimant filed timely claims for compensation.
6. Claimant is entitled to compensation and medical benefits with respect to both claims.
7. Claimant reached maximum medical improvement ("MMI") on February 9, 2006.¹
8. Claimant is not working at present time.
9. Claimant's average weekly wage at the time of injury was \$893.60 with a corresponding compensation rate of \$595.73.

¹ Despite this stipulation, Claimant disputes his MMI date in his post-trial brief. ALJX 14 at 3. This is discussed in detail below.

Issues in Dispute:

The following are issues in dispute:

1. the nature and extent of Claimant's disability;
2. Claimant's residual wage-earning capacity;
3. Claimant's entitlement to ongoing medical treatment;
4. Claimant's entitlement to litigation costs recovery; and
5. Employer's entitlement to § 8(f) Special Fund relief.

SUMMARY OF CONCLUSIONS

Despite Claimant's lack of credibility, I find Claimant is entitled to permanent partial disability compensation from February 9, 2006 – the date he reached MMI – and continuing in the amount of \$250.67 per week. This is based on a finding that Claimant cannot return to his regular employment with Employer and that he has a residual wage-earning capacity of \$517.60 per week. I further find Claimant is able to work with restrictions against lifting over thirty-five pounds, no repetitive bending or stooping, and no prolonged work in awkward positions. In addition, I find that Claimant is also entitled to recover his litigation costs, and Employer remains liable for Claimant's medical treatment under § 7 of the Act as to his low back condition. I further find Employer is entitled to receive a credit for disability payments previously made and Special Fund relief under § 8(f) of the Act.

DISCUSSION

Legal Standard

I base the following findings of fact and conclusions of law on my observations of the appearance and demeanor of Claimant – the only witness who testified live at the hearing; analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. In this decision, I am entitled to determine witness credibility, to weigh the evidence, and to draw my own inferences from it. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.* 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989).

Background

In this section, I discuss Claimant's work, medical, and vocational rehabilitation history. I begin with his educational and pre-work histories, leading into his employment history with Employer. Next, I summarize Claimant's back injury and subsequent medical treatment, followed by Claimant's medical treatment relating to his hand injury. Then, I discuss Claimant's functional capacity examinations ("FCE"), moving on to Claimant's vocational rehabilitation program. Finally, I summarize Claimant's hearing testimony.

I. Claimant's Educational Background

Claimant is fifty-five years old and has never been married. EX 1 at 1; EX 12 at 106-07. Claimant graduated from McKinley High School in 1973. CX 3 at 81. In August 1980, Claimant received an AS Certificate in Machine Shop Technology from Honolulu Community College. *Id.* In December 1980, Claimant received his PHNSY Certificate for Machine Shop Theory Blueprint Reading. *Id.* In 1986, Claimant received his Brush Plating Certificate from the Brooktronics Engineering Corporation. *Id.* In March 1994 through March 1995, Claimant became EPA certified in air conditioning/refrigeration after completing a program at the New York Technical Institute of Hawaii. *Id.*

II. Claimant's Pre-Injury Work History

During the 1970s, Claimant held temporary jobs as a warehouse clerk, a stock clerk, a construction shop helper, and a pipe shop cleaner. CX 3 at 80. From 1980 through 1993, Claimant worked as a machinist at the Pearl Harbor Naval Shipyard. *Id.* Starting in 1996, Claimant spent a year working as a self-employed refrigeration mechanic, though the venture eventually proved unsuccessful. *Id.*

In June 1997, Claimant began working as an HVAC mechanic/technician at Corrosion Engineering Services, Inc. EX 19 at 697; CX 3 at 79. His duties included providing maintenance and repair services for the air conditioning and refrigeration equipment on a barge, and assisting in attaching and disconnecting power, water, and communication lines and cables. EX 19 at 697.

III. Claimant's September 8, 2005 Injury (Low Back) and Subsequent Related Treatment History

On Thursday, September 8, 2005, Claimant injured his low back while pulling an ice machine onto the bed of a Cushman truck while another employee lifted from underneath the ice machine. EX 1; EX 12 at 180. The ice machine weighed approximately 135 pounds. CX 00 at 2. Claimant stated he felt a sharp pain in his back followed by weakness. EX 12 at 182, 188-89. Claimant did not file an accident report immediately following this event. *Id.* at 182-83. Rather, Claimant took leave from work on Friday, September 9, 2005 and Monday, September 12, 2005. *Id.* at 183. He returned to work on Tuesday, September 13, 2005 to fill out an accident report and was then sent to Concentra Medical Centers for medical examination. *Id.* at 186; EX 17 at 506. Claimant returned to light-duty work on Wednesday, September 14, 2005 and continued to work in this capacity until March 3, 2006. EX 12 at 186-87.

On September 13, 2005, Claimant was treated by Dr. Robert Brumblay at Concentra. EX 17 at 506. Dr. Brumblay noted Claimant had no acute pain at the time of the injury, but had gradually increasing symptoms since the injury. *Id.* at 509. Dr. Brumblay found Claimant to be alert and cooperative, with the full range of motion of his back and without tenderness to palpation. *Id.* Dr. Brumblay diagnosed Claimant as having acute lumbar strain from about L3 to L5 in the posterior midline. *Id.* Dr. Brumblay stated Claimant could return to work with restrictions on repetitive lifting over twenty pounds and pushing or pulling over twenty pounds of force. *Id.* at 506. Dr. Brumblay scheduled Claimant to return to Concentra for reevaluation

on September 16, 2005. *Id.* He also prescribed Claimant Naproxen and Skelaxin. *Id.* at 509. Moreover, he anticipated Claimant would reach MMI on September 27, 2005. *Id.*

On September 16, 2005, Claimant returned to Concentra and was again treated by Dr. Brumblay. *Id.* at 500. During the examination, Dr. Brumblay noted Claimant had full range of motion of his back and, on flexion, could even put his hands almost flat on the floor. *Id.* at 503. Dr. Brumblay assessed Claimant to be objectively improved, but subjectively the same. *Id.* Dr. Brumblay maintained his previous restrictions of no repetitive lifting over twenty pounds and no pushing or pulling of over twenty pounds of force. *Id.* at 500.

On September 20, 2005, Employer controverted the low back claim at issue here. EX 3 at 5. Additional notices of controversion were submitted by Employer on September 24, 2008, October 24, 27, 2008, November 11, 2008, and January 5, 2010. EX 3 at 6-11.

On September 22, 2005, Claimant returned to Concentra and was treated by Dr. Ronald Kienitz. *Id.* at 493. Dr. Kienitz found that Claimant had approximately full range of motion of his back. *Id.* at 498. He diagnosed Claimant as having subjective low back pain and a low back strain without radiculitis. *Id.* Dr. Kienitz discussed with Claimant the necessity of exercises and stretching and told Claimant he may experience day to day aches and pains at his age. *Id.* Dr. Kienitz scheduled a reevaluation of Claimant for September 29, 2005 and modified his work restrictions to no repetitive lifting over thirty pounds and removed all restrictions on pushing or pulling. EX 17 at 493.

On September 29, 2005, Claimant returned to Concentra where he was treated by Dr. Adolph Diaz-Ordaz. *Id.* at 487. Dr. Diaz-Ordaz noted Claimant had discontinued the use of his prescribed medications due to some side effects. *Id.* at 490. Upon physical examination, Dr. Diaz-Ordaz observed Claimant had good range of motion of his lower back, though he had pain on forward bending. *Id.* Dr. Diaz-Ordaz diagnosed Claimant as suffering from chronic lower back pain. *Id.* He recommended Claimant be placed on no activity from September 29, 2005 to October 6, 2005 as work duties were aggravating Claimant's condition. EX 17 at 489. Dr. Diaz-Ordaz prescribed him Cyclobenzaprine and Ibuprofen and scheduled Claimant to be reevaluated on October 6, 2005. *Id.* at 491-92.

On October 6, 2005, Dr. Kienitz treated Claimant at Concentra. *Id.* at 481. Dr. Kienitz examined Claimant and found Claimant was in minimal distress with a normal seated posture and gait and a good range of motion throughout his low back. *Id.* at 484-85. Dr. Kienitz diagnosed Claimant as having low back strain and low back pain without radiculopathy. *Id.* at 485. He released Claimant back to work on a full-duty basis; stating that if Claimant was unable to tolerate the activity he would be sent to rehabilitation at Comprehensive Health and Active Rehabilitation Training ("CHART"). *Id.* Dr. Kienitz scheduled Claimant for a follow-up visit set for October 13, 2005. *Id.* at 481.

On October 13, 2005, Dr. Diaz-Ordaz reevaluated Claimant. *Id.* at 478. Claimant told Dr. Diaz-Ordaz his job constantly aggravated his condition due to bending forward and carrying a twenty-pound tool sack up and down a narrow stairwell of a barge. *Id.* Dr. Diaz-Ordaz also noted Claimant was no longer taking his medications. *Id.* Dr. Diaz-Ordaz observed Claimant

had slight discomfort rising from a seated position and some pain and stiffness on forward and back bending, though he had full range of motion of the lower back. *Id.* Dr. Diaz-Ordaz diagnosed Claimant as having chronic lower back pain and released him to continue work on a full-duty basis. *Id.* at 478-79. Dr. Diaz-Ordaz requested Claimant received rehabilitation at CHART and scheduled a follow-up visit with Dr. Kienitz for October 27, 2005. *Id.* at 476, 479.

On October 27, 2005, Claimant met with Dr. Kienitz at Concentra. *Id.* at 470. Claimant told Dr. Kienitz his low back was feeling somewhat better, but that he still had pain at his job. *Id.* at 473. Claimant stated he was able to tolerate his normal work but that some exercises at CHART and some work activities seemed to cause an exacerbation of his discomfort. *Id.* He was also no longer taking his medications. *Id.* Dr. Kienitz observed Claimant exhibited good back bending and side bending bilaterally, but was only able to forward bend to about ten inches from touching the floor. *Id.* at 474. Dr. Kienitz diagnosed Claimant with low back strain and low back pain without radiculopathy. *Id.* Dr. Kienitz recommended Claimant continue his CHART rehabilitation and work but back off on his more strenuous exercises until the exacerbation improved. *Id.* He further recommended Claimant resume his medications. *Id.* Dr. Kienitz released Claimant to modified activity at work with restrictions on lifting over twenty pounds, bending more than five times per hour, and pushing and pulling over twenty pounds of force. EX 17 at 471. Dr. Kienitz scheduled Claimant for reevaluation on November 3, 2005. *Id.*

On November 3, 2005, Dr. Brumblay reevaluated Claimant at Concentra. *Id.* at 464. Claimant stated bending forward at work would make him feel worse and assessed his pain level to be a six on a scale from one to ten. *Id.* Dr. Brumblay noted Claimant was not taking any of his medications. *Id.* at 467. Upon physical examination, Dr. Brumblay observed Claimant had absolutely full range of motion with flexion to at least eighty degrees, at which time Claimant's fingers could touch the floor. *Id.* Dr. Brumblay found Claimant had excellent range of motion and seemed to be doing fairly well – despite believing his improvement to be limited. *Id.* Dr. Brumblay diagnosed Claimant with lumbar strain and increased Claimant's work restriction to lifting no more than thirty pounds, with all lifting limited to only four hours per day. *Id.* at 467-68. In making this increase, Dr. Brumblay noted Claimant was more concerned with the frequency of lifting than the weight limit. *Id.* Dr. Kienitz scheduled Claimant for a follow-up visit set for November 10, 2005. *Id.* at 464.

On November 10, 2005, Dr. Kienitz reevaluated Claimant at Concentra. *Id.* at 458. Claimant told Dr. Kienitz his back was feeling much better, though he still felt some pain levels as high as six on a scale from one to ten, and some pain with forward bending. *Id.* at 461. Claimant stated he was able to tolerate his full duty at work reasonably well, though he did feel some continued pain. *Id.* Claimant also told Dr. Kienitz he would be ending rehabilitation because he did not feel that it had been particularly beneficial. *Id.* He also stated he only took his medication off and on. *Id.* Upon physical examination, Dr. Kienitz observed normal position changes and a full and smooth range of motion of Claimant's low back. *Id.* at 462. Dr. Kienitz diagnosed Claimant as having post lumbroacral strain without radiculopathy. *Id.* He recommended to Claimant an exercise program and scheduled him for reevaluation set for December 9, 2005. *Id.* Dr. Kienitz further noted that if Claimant appeared reasonably stable at that time, his case may be closed. *Id.*

On December 19, 2005, Claimant met with Dr. Diaz-Ordaz at Concentra. *Id.* at 450. Claimant told Dr. Diaz-Ordaz he was suffering from intermittent pain at pain level of six or seven on a scale from one to ten. *Id.* Claimant also told Dr. Diaz-Ordaz he was requesting a permanent disability rating. *Id.* Dr. Diaz-Ordaz observed Claimant could rise to the standing position without any discomfort and had a full range of motion. *Id.* He diagnosed Claimant as having chronic lower back pain at MMI. *Id.* Dr. Diaz-Ordaz released Claimant to regular duty and deemed the case to be closed. *Id.*

On January 23, 2006, Claimant returned to Concentra and was seen by Dr. Kienitz. *Id.* at 446. Dr. Kienitz released Claimant to work with restrictions against lifting over twenty-five pounds and pushing or pulling over twenty-five pounds of force. *Id.*

On February 9, 2006, Claimant came back to Concentra and was seen by Dr. Kienitz. *Id.* at 440. Claimant explained that despite being able to do his normal duties at work, his back would sometimes become stiff and he would take some days off. *Id.* Claimant felt he could no longer do his full-duty work and no limited-duty work was available. *Id.* Dr. Kienitz noted Claimant was no longer taking Ibuprofen. *Id.* Dr. Kienitz observed Claimant's position changes were smooth and non-antalgic, though his range of motion was slightly stiff. EX 17 at 440. He concluded Claimant was at MMI and able to perform light duty work. *Id.* at 441. Dr. Kienitz suggested Claimant join a gym in order to improve his activity tolerance, but noted Claimant was somewhat resistant to this idea. *Id.* Dr. Kienitz deemed Claimant at MMI and released him to work with restrictions on repetitive lifting over ten pounds, pushing or pulling over ten pounds of force, and bending more than five times per hour. *Id.* at 442.

On March 1, 2006, Claimant returned to Dr. Kienitz for reevaluation after having missed the previous two days of work. *Id.* at 437. Claimant stated he was sent to Concentra to get a note regarding his absences from work. *Id.* He told Dr. Kienitz he was sometimes unable to avoid heavy exertions and therefore decided to stay off work on some occasions. *Id.* He also told Dr. Kienitz he felt somewhat back to status quo and able to return back to his activities. *Id.* Dr. Kienitz observed Claimant's posture changes were reasonably normal and his range of motion was mildly painful and restricted. *Id.* at 438. Dr. Kienitz concluded Claimant was at MMI. *Id.* He opined Claimant should be on a permanent limited duty placement or else he would need a new job placement or a new job. *Id.* He suggested that vocational rehabilitation might be needed. *Id.* Dr. Kienitz noted there was consideration for permanent partial impairment rating at that time, though no absolute radiculopathy was found. *Id.* Dr. Kienitz released Claimant to work with restrictions on repetitive lifting over ten pounds, pushing or pulling over ten pounds of force, and bending more than five times per hour. *Id.* at 434.

On May 4, 2006, Dr. Clifford K.H. Lau, an orthopedic surgeon, conducted an independent medical evaluation of Claimant at the request of the Employer. EX 8 at 61. Claimant told Dr. Lau he was doing no exercises for his back and was taking no medications. *Id.* at 62. Dr. Lau observed that Claimant had a normal gait, was able to forward bend with his fingers touching his toes, and had a full range of motion. *Id.* at 63, 65. Dr. Lau stated Claimant's presentation of no improvement after six months was not consistent with an acute injury. *Id.* at 65. Dr. Lau suspected Claimant's subjective complaints to be in excess of his objective findings. *Id.* Dr. Lau believed Claimant should be at MMI at the point (six months after his injury) noted

by Dr. Kienitz. *Id.* Furthermore, Dr. Lau disagreed with the physical restrictions placed on Claimant as they appeared to be based on Claimant's personal history. *Id.*

On June 1, 2006, Dr. Diaz-Ordaz reevaluated Claimant. *Id.* at 431. Claimant was no longer working and stated his pain level was presently a one on a scale from one to ten. *Id.* Dr. Diaz-Ordaz noted Claimant could rise to a standing position without difficulty, and his range of motion of the lower back was full without pain. *Id.* Dr. Diaz-Ordaz released Claimant to the same modified duty status as given to Claimant in his March 1, 2006 visit. *Id.*

On July 3, 2006, Claimant returned to Concentra and was evaluated by Dr. Kienitz. *Id.* at 421. Claimant told Dr. Kienitz his pain was a one of a scale from one to ten. *Id.* Furthermore, Claimant told Dr. Kienitz that, despite being released from his previous job, he was not looking for alternative employment and intended to stay home and off the work force and collect compensation. *Id.* Dr. Kienitz observed that Claimant was very direct in explaining his symptoms and noting that they were minimal. EX 17 at 421-22. Dr. Kienitz further observed Claimant's position changes were normal, he could forward bend almost fully, and there was no real pain in his range of motion. *Id.* at 422. Dr. Kienitz believed Claimant had recovered quite well. *Id.*

On December 13, 2006, Claimant returned to Concentra for a check-up with Dr. Kienitz. *Id.* at 418. Claimant told Dr. Kienitz his discomfort was a two or three on a scale of one through ten. *Id.* Dr. Kienitz felt Claimant was not interested in resuming employment and would rather stay on unemployment benefits. *Id.* Dr. Kienitz examined Claimant and found Claimant's position changes to be normal and his forward bending to be normal. *Id.* at 419. Dr. Kienitz suggested, and he believed Claimant to be amenable to, the rehabilitation program at CHART. *Id.* In his observations, Dr. Kienitz noted it was uncertain whether Claimant actually wanted to make progress in his rehabilitation program and continue the process on an independent basis or if he was only doing it to keep his benefits open for the time being. *Id.*

On December 22, 2006, Dr. Tae H. Rho of Island Imaging Center performed an MRI examination on Claimant. CX 4 at 71. The MRI revealed posterior anular tears at L4-5 and L5-S1. *Id.* The MRI also showed mild diffuse disc bulge contributing to mild central segmental stenosis along with ligamentous and facet hypertrophy at L3-4. *Id.* at 72.

On January 16, 2007, Claimant returned to Concentra and was treated by Dr. Diaz-Ordaz. *Id.* at 412. Claimant told Dr. Diaz-Ordaz his pain level could be a six on a scale from one through ten when he exerted himself. *Id.* He also told Dr. Diaz-Ordaz he had discontinued the use of Naprozen and Skelaxin because he did not feel they helped. *Id.* Dr. Diaz-Ordaz observed Claimant's range of motion was full and he could forward bend to about three inches from touching the ground. *Id.* Dr. Diaz-Ordaz reviewed Claimant's MRI and noted the posterior annular tears at L4-5 and L5-S1. *Id.* at 413.

On February 6, 2007, Claimant returned to Concentra and was treated by Dr. Kienitz because he felt that his back was not improving. *Id.* at 406. Claimant told Dr. Kienitz he did not feel that he was able to do any more functional work despite rehabilitation, though he admitted

feeling slightly stronger. *Id.* Dr. Kienitz observed Claimant's position changes to be normal and that Claimant could forward bend to about two inches from the ground with no pain. *Id.* at 407. Dr. Kienitz diagnosed Claimant as having chronic subjective low back pain and an apparent poor motivation for recovery with a disability mentality. *Id.*

On February 27, 2007, Dr. Kienitz treated Claimant for his low back strain. *Id.* at 394. Claimant noted no change in his condition and Dr. Kienitz believed there may have been some symptomatic exaggeration. *Id.* He further noted Claimant felt he was disabled and seemed as though he did not want to go back to work in any way, shape, and form. *Id.* Upon physical examination, Dr. Kienitz found Claimant's posture to be normal and his position changes to be smooth. *Id.* at 395. Dr. Kienitz diagnosed Claimant with low back strain, chronic subjective low back pain, and somatoform pain disorder with development of a disability mentality. *Id.* Dr. Kienitz suggested vocational rehabilitation may be necessary at this time because Claimant did not want to return to work at his previous job and may not want to return to work at all. EX 17 at 395.

On August 25, 2007, Dr. James T. London examined Claimant. EX 10 at 91. Dr. London found Claimant's gait to be normal and his range of motion to be full. *Id.* Upon examining Claimant and reviewing past medical records, Dr. London believed the September 8, 2005 injury to Claimant's back aggravated pre-existing conditions in his back, including degenerative lumbar disc disease. *Id.* at 92. Dr. London agreed with Claimant's treating physician, Dr. Kienitz, that Claimant had reached MMI on February 9, 2006. *Id.* Dr. London believed Claimant was able to work after that date with restrictions against lifting or carrying loads over thirty-five pounds, repetitive bending or stooping, and prolonged work in awkward positions. *Id.* Dr. London stated he did not think any additional treatment was necessary. *Id.*

On February 4, 2008, Dr. Kienitz reevaluated Claimant. *Id.* at 390. Claimant said he had been experiencing a clicking in his back with movements, generally when he was in a seated position. *Id.* He told Dr. Kienitz he stays at home and remains minimally active. *Id.* Dr. Kienitz observed Claimant's position changed to be slightly stiff and found he could forward bend to about eight inches from the ground. *Id.* at 391. Dr. Kienitz performed x-rays at Claimant's request and found them to be reasonably normal. *Id.* Dr. Kienitz also reviewed Claimant's MRI and found degenerative joint disease at L4-5 with an annular tear at L5-S1. *Id.* Dr. Kienitz believed Claimant's disability mentality was worsening and hoped the vocational rehabilitation process would get Claimant into some active employment so that he would not be a mentally and physically disabled for the rest of his life. *Id.* Dr. Kienitz noted Claimant could be a challenge in disability management, but was optimistic something could be done. *Id.* On this same day, Dr. Kienitz referred Claimant for a radiograph. CX 4 at 99. Dr. Craig A. Hamasaki performed the radiograph and found degenerative disc disease most pronounced at L3-4 and L4-5 and no compression fracture or subluxation in the lumbar spine. *Id.*

On February 7, 2008, Claimant returned to Concentra to pick up his medical paperwork regarding his private insurance plan for private benefits and was seen by Dr. Kienitz. *Id.* at 389. Dr. Kienitz observed Claimant's posture, gait, and position changes to be normal. *Id.* Dr. Kienitz told Claimant he believed he was suffering from somatoform pain disorder. *Id.* Claimant's demonstrated ability to come to the clinic, maintain reasonable movement status, and

maneuver around the clinic and the parking lot showed he was not fully disabled from work. *Id.* Dr. Kienitz noted Claimant was somewhat upset by this suggestion, but seemed to accept it. *Id.*

On March 31, 2009, Claimant visited Dr. Scott McCaffrey at the Work Star Injury Recovery Center at referral of his prior attorney. CX 4 at 106. Dr. McCaffrey was recommended to Claimant by his former attorney in this matter. Tr. 141-42. Claimant told Dr. McCaffrey he injured his back while trying to move an ice-making machine weighing over two-hundred pounds. *Id.* Claimant complained to Dr. McCaffrey about aches and numbness in his low back and bilateral calves. *Id.* Dr. McCaffrey noted Claimant continued to be impaired significantly, and activities of daily living remained affected as well. *Id.* Dr. McCaffrey mentioned Claimant was upset over the withholding of recommended and appropriate care. CX at 107. He diagnosed Claimant as having severe back-related impairment based primarily on Claimant's non-credible subjective complaints. *Id.*

On June 7, 2010, Claimant visited Dr. Kent Davenport for purposes of an independent medical evaluation at the request of the Employer. EX 11 at 93. In preparing for his evaluation, Dr. Davenport reviewed Claimant's medical records as well as Claimant's deposition testimony, his brother's deposition testimony, and Claimant's CHART records. *Id.* at 93-94. Dr. Davenport examined Claimant and found he had no specific complaints at this time. *Id.* at 96. Claimant did not have any back pain. *Id.* In answering specific questions provided to Dr. Davenport by the Employer's attorney, Dr. Davenport concluded Claimant's subjective complaints clearly outweighed his objective findings. *Id.* at 98. Dr. Davenport added Claimant had demonstrated that he is able to do work but is not interested in being employed. *Id.* He noted Claimant's subjective complaints vary depending upon whether he was doing work on his own home or requested to do outside employment. *Id.* Dr. Davenport concluded Claimant was capable of working with restrictions against lifting over thirty-five pounds. *Id.* at 99. He believed Claimant had reached MMI on February 27, 2007 and did not need further treatment for his back. *Id.* at 98-99.²

On June 28, 2010, Dr. McCaffrey took Claimant off duty for thirty days due to the unsupported conclusory diagnosis of severe back related impairment. CX 4 at 111.

IV. Claimant's January 6, 2006 Injury (Right Hand) and Subsequent Related Treatment History

On January 6, 2006, Claimant injured his right hand while picking up his tool bag. EX 2 at 4. He felt his hand spasm and his right-hand grip became weaker than his left hand's grip. *Id.* The tool bag weighed approximately twenty pounds. CX 00 at 4.

On February 28, 2006, Dr. Melvin Yee examined Claimant's hands. CX 4 at 115. Dr. Yee performed nerve conduction studies that revealed mild carpal tunnel syndrome. *Id.* He recommended a right wrist brace for Claimant. *Id.*

² Dr. Davenport's medical report did not provide any rationale for his finding Claimant reached MMI on February 27, 2007. EX 11.

On April 13, 2006, Dr. Daniel Singer examined Claimant. CX 4 at 112. Claimant complained to Dr. Singer about a combination of spasms and weakness in the hand. *Id.* Dr. Singer's examination revealed no weakness with abduction of the thumb, and full wrist and digital motion. *Id.* Dr. Singer diagnosed Claimant as having probable carpal tunnel syndrome based primarily on Claimant non-credible subjective complaints. *Id.*

On May 5, 2006, Claimant returned to Dr. Singer for treatment of his hand. EX 9 at 67. He told Dr. Singer he did not feel he could go back to work because of his back and wanted Dr. Singer to write him a note that he could not work due to his hand as well. *Id.* Dr. Singer found the diagnosis of carpal tunnel to be equivocal. *Id.* He told Claimant that he did not usually take people off of work related to carpal tunnel and suggested Claimant should just live with it. *Id.*

On August 25, 2007, Dr. London examined Claimant's hands and found a full range of motion in all joints. EX 10 at 91. Dr. London believed Claimant's subjective symptoms were quite atypical for carpal tunnel syndrome and did not think that his symptoms were caused by work. *Id.* at 92. Dr. London stated Claimant should be treated on a private basis for the carpal tunnel syndrome. *Id.*

On June 19, 2008, Dr. Singer examined Claimant's left wrist. CX 4 at 117. Claimant said he was having cramping in his left hand related to dishwashing and putting his hands in his pockets. *Id.* Dr. Singer found Claimant to have full wrist flexion and extension and no weakness in the first dorsal interosseus. *Id.* X-rays revealed normal carpal alignment. *Id.* Dr. Singer did not have a good diagnosis for Claimant and suggested a wrist brace. *Id.* at 118.

On September 29, 2009, Dr. Xuong Tang examined Claimant's hands at the request of Dr. McCaffrey. CX 4 at 121. Claimant complained of pins and needles as well as weakness to his right hand. *Id.* Dr. Tang's examination revealed no swelling, pain, or abnormality and no electrodiagnostic evidence of plexopathy, radiculopathy, polyneuropathy, or myopathy in Claimant's upper extremities. *Id.* at 122.

On June 1, 2010, Dr. McCaffrey took Claimant completely off duty for his hand injury. CX 4 at 127. He diagnosed Claimant with bilateral carpal tunnel syndrome without reference to any supporting objective evidence, test results, or observable hand weaknesses on physical examination. *Id.*

On June 7, 2010, Claimant visited Dr. Davenport for purposes of an independent medical evaluation. EX 11 at 93. In preparing for his evaluation, Dr. Davenport reviewed Claimant's medical records as well as Claimant's deposition testimony, his brother's deposition testimony, and Claimant's CHART records. *Id.* at 93-94. Dr. Davenport examined Claimant and found he had no specific complaints at this time. *Id.* at 96. Claimant did not have any symptoms in his right or left hands. *Id.* In answering specific questions provided to Dr. Davenport by the Employer's attorney, Dr. Davenport concluded Claimant did not have carpal tunnel syndrome. *Id.* at 98-99.

V. Claimant's Vocational Rehabilitation Program

On March 6, 2007, Edward Cope, a vocational rehabilitation specialist, contacted Claimant about vocational rehabilitation services. CX 3 at 2. On November 9, 2007, Mr. Cope assigned Kathryn Dziekan to provide Claimant with Plan Development Services. *Id.* at 4. In his status report to Ms. Dziekan, Mr. Cope stated Claimant was able to work in the light physical demand range on a full-time basis. *Id.* at 6. Ms. Dziekan believed there were jobs available within fifty miles of Claimant which he could perform and estimated a starting salary of \$35,000 to \$40,000 upon completion of rehabilitation. *Id.* at 9. Ms. Dziekan did note that in order to obtain these jobs Claimant would need computer training, and thus enrolled Claimant in the necessary courses. *Id.* at 8-9.

On March 11, 2008, Mr. Cope reassigned Claimant's rehabilitation services program to Ron Fleck. *Id.* at 23. Mr. Fleck designed a rehabilitation plan for Claimant to work as a security guard or security monitor with an estimated yearly earning capacity of \$24,850. CX 3 at 30. Mr. Fleck based his placement on Dr. London's August 25, 2007 report indicating Claimant was able to work at the light physical demand for an eight hour day. CX 3 at 31.

VI. Claimant's Functional Capacity Evaluations

Claimant completed two separate FCEs. CX 2 at 31. His first FCE was performed on May 31, 2006, and his second FCE was performed on February 13, 2007. *Id.* Dr. London noted the AccuLift results from the first FCE showed Claimant demonstrated a profile consistent with "poor effort." EX 10 at 71. The results of the second FCE showed a decrease in Claimant's functional capacity as compared to the results of his first FCE. CX 2 at 31. Claimant's static strength tests showed a drop from an averaged percentile of 6.2% to an averaged percentile of 3.3%. *Id.* Claimant's occasional material handling tests showed a drop from an averaged percentile of 10.4% to an averaged percentile of 1.6%. *Id.* Claimant's hand tests revealed a drop from an averaged percentile of 16% to an averaged percentile of 2%. *Id.* Claimant's physical demand level went from "Medium" after his first FCE to "Sedentary" after his second FCE. *Id.* In Dr. Kienitz's February 27, 2007 evaluation of Claimant, Dr. Kienitz characterized the results of the second FCE compared to the results of the first FCE as a significant drop. EX 6 at 55. Despite Claimant's decrease in functional capacity, Claimant still qualified for "Constant" sitting, standing, and walking; "Occasional" bending; and "Frequent" forward reaching and overhead reaching. CX 2 at 32. Under the FCE definitions, "Constant" is defined as 67% to 100% of the day, "Frequent" is defined as 34% to 66% of the day, and "Occasional" is defined as 3% to 33% of the day. *Id.*

VII. Summary of Claimant's Hearing Testimony

As noted above, a formal hearing for this matter occurred on July 26 and 28, 2010. At the hearing, Claimant stated he hoped to show his medical case should not have been stopped by Dr. Kienitz and should have proceeded through with the definition of MMI. Tr. at 58-59. He further stated he intended to prove his permanent partial disability benefits were not being calculated in conformance with the Longshore Procedure Manual. *Id.* at 60.

On direct testimony, Claimant began by saying he felt pain and he was not in agreement with Dr. Kienitz's diagnosis of somatoform pain disorder. *Id.* at 67-68. He testified he feels pain every day, and the pain level is generally at a level of one on a scale from one to ten. *Id.* at 68. However, the pain level will increase with heavier activity and Claimant will "sit around and do nothing" until the pain subsides. *Id.* Around his house, Claimant performs chores as well as looking for things to repair or clean-up, removing weeds, and painting his front door. *Id.* Claimant testified he tries to limit his activity outside the house between two to three hours a day, due to the gnawing pain in his back. *Id.* at 69. He admitted that in late 2009 he replaced the front door of his home with a new door, weighing approximately one-hundred pounds. *Id.* at 119. However, Claimant explained this activity took him all day, while it was an activity "someone else could do in one hour." *Id.* at 120. Claimant also replaced a six-foot wide by thirty-foot long balcony at his home with plywood weighing seventy-five pounds per piece. *Id.* at 125-26. He stated he worked on his balcony all day long, but at a slow pace. *Id.* at 166. Claimant testified he never would go on walks. *Id.* at 69. He further testified he had discovered he cannot do "brisk walking" because of his ankle injury.³ *Id.* at 171. Claimant stated he can walk from the parking lot near the Aloha Tower Marketplace to the Gordon Biersch Brewery, then he can sit down at the bar for the rest of the night, and then walk back to the parking lot. *Id.* at 171-72.

Claimant testified he did not believe there were any jobs he could perform. *Id.* at 70. Claimant stated he disagreed with his own physical therapy sessions due in large part to the fact they took place for two hours per day, three days per week. *Id.* at 70. Claimant believed therapy sessions should last forty hours per week in order to test his endurance. *Id.* In his own opinion, Claimant testified he could work at a job that allowed him to sit and stand whenever he wanted and limited his lifting to less than twenty-five pounds for "maybe a few hours, maybe a couple of days, two or three days." *Id.* 70-71. Claimant would then have to stop because his pain level would increase and he would not have enough time to rest in order for the pain to subside. *Id.* at 71. When asked how a job that required him to talk on the telephone all day long differed from a regular day at home, Claimant testified: "Well, for one thing, it would be for eight hours straight, you know. I wouldn't be able to relax the way I wanted to relax. Sitting in my own chair, at home, I still need to stand and sit, stand and sit." *Id.* at 72. Claimant stated he believed his physical restrictions should be between ten pounds and twenty pounds, clarifying he was not certain how much weight he could handle because his physical therapy sessions had "only been so long." *Id.* at 73-74.⁴ Claimant further admitted he had not applied to any jobs in the past five years. *Id.* at 74. He expressed he had been interested in a security monitoring position that allowed him to sit, but his search was cut short due to a non-work-related ankle injury at home. *Id.* at 74-75.

I asked Claimant his thoughts regarding his capability to perform various jobs. *Id.* 76-80. Claimant stated he could not perform the tasks of an electrician because he would have to go back to school. *Id.* at 76. He stated he could not be a customer service representative because he is not a people person, doesn't particularly care to use the phone, and doesn't hear certain tones

³ Claimant injured his ankle while trying to close his "jealousy window." Tr. at 76.

⁴ It is worth noting Claimant himself did not place physical restrictions against standing or sitting for prolonged periods; nor did any of his physicians.

very well. *Id.* at 77-78. He stated he may not be able to perform the duties of a dispatcher if a lot of it relies on memory. *Id.* at 78. Claimant testified he would not like to be a tool room supply manager because of the heavy tools in the inventory room, the walking back and forth, the maintaining of records, and the use of a computer. *Id.* 78-79. Claimant explained he did not have computer experience, but through the use of a public library computer he is able to explore the internet and is discovering the computer himself. *Id.* at 79.

Claimant ended his direct testimony by reiterating he believed he was not receiving the correct amount of compensation. *Id.* at 81-83. Claimant testified he could live off a higher compensation amount and then would not have to even consider getting a job. *Id.* at 82, 97. On cross-examination, Claimant stated he had to use extra stomach muscles in order to perform the physical examinations required by his physicians, but they had not remembered to record this information. *Id.* at 92-93. Claimant testified he did not want to return to any form of work, and conceded to telling his physicians this same desire. *Id.* at 94-95, 102, 106. Claimant explained he had spent several hundred hours building a remote control helicopter with his hands during 2007. *Id.* at 98. Claimant disagreed with Dr. Davenport's conclusion that he did not have carpal tunnel syndrome. *Id.* at 102-03. Claimant explained he was diagnosed with carpal tunnel syndrome by Drs. Yee and Tang, who he was referred to by Dr. McCaffrey. *Id.* at 104. Claimant further testified he was originally referred to Dr. McCaffrey by his previous attorney. *Id.* 141-42. Claimant testified he had never had any conversations with Dr. Kienitz about his desire to go to work. *Id.* at 110-11. He explained the difference in his FCE results by stating he had been more well-rested for his first FCE. *Id.* at 112. Claimant denied any intentional attempt to alter the results of his second FCE. *Id.* at 113. When asked if he could work as an HVAC supervisor and direct men on what to do, Claimant testified: "My idea is not to go back to work. – So I'm not thinking about why I cannot do certain type of work." *Id.* at 137. Claimant testified he chose not to extend his vocational rehabilitation process because of his non-work-related ankle injury. *Id.* at 147-48. Claimant was asked about a multitude job positions, all of which he did not believe he could do based on his perceived physical limitations. *Id.* at 150-62. When asked if he could perform the tasks of a radio dispatcher, Claimant reiterated that he had issues with his hearing. *Id.* at 159-60. When asked specifically if he had a hearing problem, Claimant testified: "Ordinarily, not really But I've had problems with people with accent[s], people who would talk fast." *Id.* at 160.

Claimant's Disability Claims

Below I examine Claimant's disability claims. First, I examine Claimant's credibility as he was the only witness at the hearing and his injuries turn largely on his own subjective complaints of back and hand pain. Next, I analyze the nature and extent of Claimant's disability. Finally, I discuss whether Employer has shown suitable alternative employment for Claimant and other related issues.

I. Claimant's Credibility

Claimant makes several arguments throughout his Closing Brief for his entitlement to permanent partial disability benefits in the amount of \$616.30 bi-weekly. ALJX 14 at 1.⁵ Claimant asserts he did not qualify for various jobs due to his lacking certain abilities. *Id.* at 2. Claimant further argues in direct opposition to some of the medical evidence. *Id.* at 5, 10. For example, Claimant contends he alerted various doctors that he felt weakness in his lower back and therefore could only perform certain body movements with the extra use of stomach muscles. *Id.* at 5.

Before beginning an analysis of Claimant's arguments, it is necessary to first discuss Claimant's own credibility. "It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences from the evidence." *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87, 93 (2008). Through my observations and the comparison of live trial testimony to medical evidence and deposition testimony, I have had the opportunity in this case to evaluate the credibility of Claimant.

I found Claimant almost completely lacking in credibility as a witness, specifically in regard to his pain level and physical limitations. Throughout the record, there are competing opinions of Claimant's actual pain level and physical restrictions. At the hearing, Claimant testified: "I don't think I can work with this back – sit and stand, stand and sit – for an eight-hour period." TR at 97. Furthermore, Claimant stated in his post-trial brief he feels pain, weakness, and stiffness in his lower back and that if Drs. Kienitz and Davenport had performed diagnostic tests, they could have confirmed Claimant's condition. ALJX 14 at 10. Claimant also notes an inability to sit and stand for any period of time longer than an hour. *Id.* at 6.

The record, however, contains objective evidence, medical opinions, medical reports, deposition testimony, and rehabilitation evaluations that cast serious doubt on the truthfulness of Claimant's characterization of his symptoms and extent of his pain.

As noted, *supra*, there are several instances in which treating physicians believed Claimant was exaggerating his pain level. On September 16, 2005, only eight days after the injury, Dr. Brumblay believed Claimant had objectively improved, but felt subjectively the same. EX 17 at 503. On November 3, 2005, Dr. Brumblay further noticed that although Claimant believed his improvement was limited, he actually had excellent range of motion and seemed to be doing fairly well. *Id.* at 467. When Dr. Kienitz treated Claimant on February 27, 2007, he suspected there may have been some symptomatic exaggeration. *Id.* at 394. On December 19, 2005, despite Claimant's stating he had a pain level of six or seven out of ten, Dr. Diaz-Ordaz observed that Claimant could rise to the standing position without any discomfort and had a full range of motion. *Id.* at 450. On May 4, 2006, Dr. Lau reported he suspected Claimant's subjective complaints to be in excess of his objective findings. EX 8 at 65. Dr. Kienitz even began to believe Claimant was developing a disability mentality. EX 17 at 394, 391. On June 7, 2010, Dr. Davenport opined Claimant's subjective complaints clearly outweighed his objective findings. EX 11 at 98. Dr. Davenport concluded Claimant demonstrated he was able to do work

⁵ Claimant attached four exhibits to his post-trial brief. These exhibits were not admitted into evidence and were disregarded pursuant to 29 C.F.R. § 18.54(e).

but was not interested in being employed. *Id.* Thus, there is overwhelming evidence from the physician reports to support the notion Claimant is exaggerating his symptoms.

Claimant has also demonstrated behavior that is inconsistent with one seeking to improve or heal from an alleged injury. On October 13, 2005, Dr. Diaz-Ordaz noted Claimant was no longer taking his medications. EX 17 at 478. On October 27, 2005, Dr. Kienitz made the same observation that Claimant was no longer taking his medication. *Id.* at 470. On November 3, 2005, Dr. Brumblay again noted Claimant was not taking medications. *Id.* at 467. On November 10, 2005, Claimant told Dr. Kienitz he was ending rehabilitation because he did find it to be beneficial, and that he was only taking his medication off and on. *Id.* at 461. On February 9, 2006, Claimant was hesitant towards Dr. Kienitz's suggesting that he join a gym in order to improve his activity tolerance. *Id.* at 441. Two months later, Dr. Lau observed Claimant was doing no exercises for his back and was taking no medications. EX 8 at 63, 65. These examples depict Claimant as an individual with little interest in improving his physical condition despite repeated subjective complaints of debilitating back pain.

Moreover, Claimant's own testimony often undermines his claim that he is unable to do any work. Claimant testified he replaced the balcony at his house. Tr. at 125. The date of this event, however, is unclear. In his deposition, Claimant first stated this work was performed after September 8, 2005. EX 12 at 145-46. Yet later in the deposition, Claimant stated this work was done towards the beginning of the year and prior to 2006. *Id.* at 194-95. Furthermore, Claimant's brother stated in his deposition he believed the balcony work was completed around 2007. EX 13 at 286. Claimant testified the balcony work took him several months to complete and consisted of laying pieces of plywood that weighed seventy-five pounds per piece over an area that is six feet wide by thirty feet long. Tr. at 125-26. In contradiction to his deposition testimony, Claimant testified the balcony work did not increase his back pain. *Id.* at 127. However, he further testified that as his pain would get worse in performing the balcony work, he would take rests. *Id.* at 128. The balcony work involved lifting pieces of plywood, crouching to install the flooring, and working on his knees to screw the plywood into place. *Id.* at 126. Claimant also admitted that in late 2009 he replaced the front door of his home with a new door, weighing approximately one-hundred pounds. *Id.* at 119. In his deposition, Claimant stated he began a project of building a remote control helicopter from scratch. EX 12 at 132. He further noted he would sometimes spend all day working on his helicopter. *Id.* at 155. He testified at the hearing that while this work would bother his hands, he would continue to work on it when he could. Tr. at 99. While Claimant may portray himself as completely unable to perform physical activity, the record demonstrates he has found ways to perform somewhat demanding physical labor on his own time.

Claimant's credibility is further weakened when the above evidence is coupled with Claimant's own admission regarding his desire to work. On December 13, 2005, Dr. Kienitz went as far as questioning whether Claimant actually wanted to make progress in his rehabilitation program or if he was only doing it to keep his benefits open for the time being. EX 17 at 419. On July 3, 2006, Claimant told Dr. Kienitz he was not looking for alternative employment and intended to stay home and collect compensation. *Id.* at 421. At the hearing, Claimant testified several times his desired outcome was to not return to work. *See* Tr. at 97, 137. Claimant testified he would like a doctor to give him a work endurance program. *Id.* at

169. When asked what would be the point of such a program if Claimant did not want to work, Claimant replied: “Well, just -- just to prove my point.” *Id.* at 169-170. Claimant’s brother stated in his deposition he was “disappointed” with Claimant for not making an attempt to find work. EX 13 at 278. He further stated that he believed there were jobs Claimant was capable of performing. *Id.* at 280. Claimant’s testimony at the hearing further implicated a strong desire to avoid employment. When asked if he thought he could perform the work of a dispatcher, Claimant testified he had no desire to work with phones or a radio. Tr. at 159-160. When Claimant was reminded he had no work restrictions against using a phone or a radio, Claimant stated that he sometimes has a hearing problem, especially with people with accents, or people that talk fast. *Id.* at 160. These statements tend to strengthen Dr. Davenport’s opinion that Claimant’s subjective complaints vary depending upon whether he was doing work on his own home or requested to do outside employment. EX 11 at 98. This testimony, coupled with the above examples, demonstrates Claimant simply does not want to work and believes he has found a way to avoid future employment. Nonetheless, the parties agree that Claimant cannot return to his former regular employment with Employer due to the restrictions imposed by Drs. London and Davenport which I adopt for this decision related to Claimant’s work-related low back injury. *See* ALJX 15 at 13-17.

II. Nature and Extent of Disability

A disability is the “incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment.” 33 U.S.C. § 902(10) (2006). Compensation for an industrial injury depends on the nature and extent of the disability, both of which must be established by Claimant. 33 U.S.C. § 908(c)(21) (2006); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). When evaluating a disability, Claimant’s age, education, and employment history are considered, as well as the availability of appropriate employment. *See Gen. Constr. Co. v. Castro*, 401 F.3d 963, 968-69 (9th Cir. 2005); *Edwards v. Dir., OWCP*, 99 F.2d 1374, 1375 (9th Cir. 1993); *Stevens v. Dir., OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990); *Am. Mut. Ins. Co. v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

A. Existence of Compensable Injuries

In analyzing Claimant’s compensation claim, it is necessary to first determine whether he sets forth sufficient evidence to invoke the presumption contained under § 20(a) of the Act, which favors claimants in Longshore cases. Under § 20(a), a court may presume that a claimant’s injury causally relates to his or her employment. 33 U.S.C. §920(a); *see Pedroza v. BRB*, 583 F.3d 1139, 1143-44 (9th Cir. 2009); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981). However, for a claimant to receive the benefit of the § 20(a) presumption, he or she must establish two elements: (1) that physical harm or pain has occurred and (2) that working conditions existed or an accident occurred that could have led to such harm. *See U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., OWCP*, 455 U.S. 608, 615-16 (1982); *Kelaita*, 13 BRBS at 329-31; *see also Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 959 (9th Cir. 1998). In this case, Employer has accepted both of Claimant’s injuries. Tr. at 46; ALJX 11 at 3. Therefore, Claimant has satisfied the § 20(a) presumption, and I now analyze the nature and extent of Claimant’s disability.

B. Nature of Disability

In this case, the parties are in agreement that any injury to Claimant's back would be permanent in nature. A disability is permanent if Claimant has any residual impairment after reaching MMI, or if the disability has persisted for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Trask*, 17 BRBS at 60. Here, Claimant has demonstrated permanent injury to his back. Furthermore, the parties have stipulated Claimant reached MMI with respect to his back injury on February 9, 2006. Tr. at 47-49; EX 10 at 92; EX 17 at 441. Consequently, I find Claimant reached MMI on February 9, 2006.

With the respect to Claimant's hand injury, the record indicates, at most, an equivocal finding of carpal tunnel syndrome. There is no definitive evidence regarding the nature of Claimant's hand injury. As discussed below, however, I ultimately conclude any such injury did not result in any permanent impairment. Therefore, I now examine the extent of Claimant's disabilities.

C. Extent of Disability

Under the Act, a claimant is presumed to be totally disabled where he or she establishes an inability to return to usual employment. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 91 (1984). If a claimant invokes this presumption, the burden shifts to employer to establish the availability of suitable alternative employment that the claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Bumble Bee Seafoods v. Dir.*, OWCP, 629 F.2d 1327 (9th Cir. 1980). To meet this burden, the employer must identify specific positions which are realistically available to the claimant and comport with the claimant's physical restrictions. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods*, 629 F.2d at 1330. Even if the employer succeeds in establishing suitable alternative employment, the claimant may still prevail by showing an inability to secure employment despite a diligent effort. *Palombo v. Dir.*, OWCP, 937 F.2d 70, 73 (2d Cir. 1991).

In this section, I start by analyzing the extent of Claimant's low back injury, followed by the extent of Claimant's right hand injury. Next, I determine whether Employer has established suitable alternative employment and whether Claimant has demonstrated a diligent effort in obtaining such employment.

1. Claimant's Low Back Injury

On February 9, 2006, Dr. Kienitz deemed Claimant to have reached MMI following the September 8, 2005 injury, diagnosing him with low back pain without radiculopathy. EX 17 at 440. Dr. Kienitz restricted Claimant to no repetitive lifting over ten pounds, no bending greater than five times per hour, and no pushing or pulling over ten pounds of force. *Id.* at 442.

Claimant argues that I should give deference to the medical opinion of Dr. McCaffrey. ALJX 14 at 10. However, I do not find Dr. McCaffrey's opinion to be credible, and I reject it as it is mainly based on Claimant's own subjective complaints, including his statement that the ice-machine weighed over two-hundred pounds. CX 4 at 106. This weight estimate is drastically different than the one-hundred-thirty-five pound estimate Claimant intimated to me in his Pre-Hearing Statement. CX 00 at 2. Moreover, Dr. McCaffrey's conclusion that Claimant is significantly impaired, affecting the activities of his daily living, and his diagnosis of severe back-related impairment are contradicted by the medical opinions of every other physician in this matter as well as some of Claimant's own direct testimony. Claimant further argues the medical reports of Dr. Kienitz and Dr. Davenport are not complete and that had either physician done diagnostic testing they would have seen results confirming his complaints of pain, weakness, and stiffness. ALJX 14 at 10. Following the analysis of Claimant's credibility stated above, I do not find merit in disregarding the medical opinions of Dr. Kienitz or Dr. Davenport.

The Employer credibly argues the only work restriction Claimant requires is a restriction against lifting greater than thirty-five pounds. ALJX 15 at 13. In the alternative, Employer argues Claimant requires, at most, restrictions against lifting over thirty-five pounds, no repetitive bending or stooping, and no prolonged work in awkward positions. *Id.* The Employer contends little deference should be given to the opinion of Dr. Kienitz because his opinion seemed to be based more upon Claimant's subjective complaints. *Id.*

As noted, *supra*, a claimant's treating physician's opinion generally receives greater weight because the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Amos v. Dir.*, *OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)), *amended by* 164 F.3d 480 (9th Cir. 1999); *see Pietrunti v. Dir.*, *OWCP*, 199 F.3d 1035, 1043 (2d Cir. 1997). However, deference to a treating physician may be rebutted by conflicting evidence, such as an opinion by another physician who relied upon more comprehensive or differing medical records. *See Nitschke v. Coastal Tank Cleaning*, 310 Fed. App'x 183, 184 (9th Cir. 2009); *Orn v. Astrue*, 495 F.3d 625, 632-33 (9th Cir. 2007).

Here, the record shows some variance in the medical restrictions placed on Claimant. I find the lack of a consistent work restriction to be less based on the inaccuracy of objective findings and more based on the lack of consistent physical abilities of Claimant. As noted throughout, Claimant's range of motion and forward bending have changed from evaluation to evaluation. This may be due to Claimant's own subjective complaints, or due to the level of physical activity performed by Claimant leading up to each evaluation. Accordingly, the reliable medical opinions must be reviewed in order to establish the appropriate work restrictions for Claimant.

At Concentra, Dr. Brumblay – examining Claimant on September 13 and 16, 2005 – placed a restriction on Claimant against repetitive lifting of over twenty pounds and pushing or pulling over twenty pounds of force. When he first examined Claimant on September 22, 2005, Dr. Kienitz modified Claimant's work restrictions to no repetitive lifting over thirty pounds and removed all restrictions on pushing or pulling. Dr. Kienitz then further modified the work restrictions of October 27, 2005 to restrict against lifting over twenty pounds, bending more than

five times per hour, and pushing or pulling over twenty pounds of force. Seven days later, Dr. Brumblay changed Claimant's work restrictions to restrict against lifting more than thirty pounds with all lifting limited to only four hours per day. In making this modification, Dr. Brumblay noted Claimant was more concerned with the amount of lifting than the weight limit.

On February 9, 2006, the date of MMI, Dr. Kienitz placed restrictions against Claimant's lifting over ten pounds, pushing or pulling over ten pounds of force, and bending more than five times per hour.

In an independent medical evaluation, Dr. Lau found Claimant's subjective complaints to be in excess of his own objective findings. Dr. Lau disagreed with the physical restrictions placed on Claimant, believing them to be based on Claimant's personal history. He recommended an FCE to determine Claimant's true work restrictions.

In another independent medical evaluation, Dr. London concluded Claimant should be restricted against lifting over thirty-five pounds, repetitive bending or stooping, and prolonged work in awkward positions. Dr. London also stated he agreed with the date of MMI as concluded by Dr. Kienitz of February 9, 2006.

As stated by the Employer in its post-trial brief, Dr. Davenport concluded the only work restriction necessary for Claimant was against lifting over thirty-five pounds.

As noted above, Claimant's FCE results were inconsistent, showing a significant drop in physical capacity from the first FCE to the second. The first FCE revealed a physical demand level of "Medium," while the second test revealed a physical demand level of "Sedentary." This discrepancy in results suggests they are not entirely reliable in this particular case. However, even in the second FCE, the AccuLift results demonstrated an acceptable ability to lift up to thirty-five pounds, one to four times a day. CX 2 at 37.

Moreover, Claimant's own physical activities – including building his balcony and replacing his front door – tend to show an ability to lift greater weight than thirty-five pounds and an ability to repetitively bend and stoop. It must be noted, however, that Claimant has stated that while he is able to perform these tasks, he must do so at his own pace. Tr. at 126. On top of this, any conclusion of work restrictions must take into account Claimant's own subjective physical limits. At the hearing, Claimant even testified he was surprised to see how much weight he could lift at his FCE. *Id.* at 112. This statement suggests Claimant can often underestimate his own physical abilities. Accordingly, the Employer is correct in noting that consideration must be given to the effect Claimant's subjective complaints would have on any physician's objective findings.

Based on the above mentioned evidence, I believe the appropriate work restrictions for Claimant are restrictions against lifting over thirty-five pounds, no repetitive bending or stooping, and no prolonged work in awkward positions. Claimant has never been given restrictions against prolonged sitting or standing, thus I will not impose one now.

2. Claimant's Right Hand Injury

Claimant argues he has a mild case of carpal tunnel syndrome. ALJX 14 at 10. In support of this contention, Claimant refers to Dr. McCaffrey's June 1, 2010 diagnosis of bilateral carpal tunnel syndrome and Dr. Tang's September 29, 2009 medical evaluation revealing positive tinnels to bilateral cubital tunnel. CX 4 at 122, 127. Claimant's argument, however, lacks merit when coupled with competing medical opinions and his own lack of credibility.

With respect to Dr. McCaffrey's June 1, 2010 diagnosis of bilateral carpal tunnel syndrome, I have stated earlier that I do not find Dr. McCaffrey's opinion to be credible. His evaluation of Claimant's low back was contradicted by virtually every other medical opinion. Similarly, Dr. McCaffrey's carpal tunnel diagnosis is not supported by the opinions of Drs. London, Singer, or Davenport. In fact, a mere six days after Dr. McCaffrey's diagnosis, Dr. Davenport concluded in an independent medical examination that Claimant did not have carpal tunnel syndrome. EX 11 at 98-99. Moreover, Claimant told Dr. Davenport he had no specific complaints at the time of the evaluation. *Id.* at 96. This evidence lends further support to the notion that Dr. McCaffrey's diagnoses were mostly based on Claimant's subjective complaints.

As for Dr. Tang's September 29, 2009 evaluation, this same evaluation also revealed no swelling, pain, or abnormality in Claimant's hands. CX 4 at 122. Dr. Tang found no electrodiagnostic evidence of plexopathy, radiculopathy, polyneuropathy, or myopathy. *Id.* Moreover, it is interesting to note Dr. Tang's physical exam also revealed a normal sitting and standing tolerance in Claimant. *Id.* As noted above, Claimant testified that he cannot work a job requiring him to sit and stand for prolonged periods of time. Tr. at 97. Taking this testimony into consideration, Claimant has asked that I defer to parts of Dr. Tang's evaluation, while disregarding others. This request is suspect, at best.

For the foregoing reasons, combined with Claimant's lack of credibility and the majority of medical evidence against a definitive carpal tunnel diagnosis, I find Claimant does not have any work restrictions with respect to his right hand injury.

3. Suitable Alternate Employment

As mentioned above, if the claimant establishes a *prima facie* case of total disability, the burden shifts to the employer to establish suitable alternative employment. The employer must establish the existence of realistically available job opportunities within the geographic area in which the claimant resides and which he is capable of performing considering his age, education, work experience and physical restrictions. *Hansen v. Container Stevedoring Co.*, 13 BRBS 155, 159 n.5 (1997); *Hairston*, 849 F.2d at 1196; *Bumble Bee Seafoods*, 629 F.2d at 1330. If the employer has established suitable alternative employment, the claimant can nevertheless prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Hairston*, 849 F.2d at 1196. In this case, it is important to note that even if the claimant declines to consider a suitable available job, the judge may nonetheless find that it constitutes suitable alternative employment. *Dove v. Sw. Marine*, 18 BRBS 139 (1986).

a. Employer's Burden of Establishing Suitable Alternative Employment

First, I analyze whether Employer has met its burden of establishing suitable alternative employment. To this end, Employer has furnished the labor market surveys ("LMS") of Donald Kegler and Howard Stauber. Additionally, Employer points to the job analysis report prepared by Ron Fleck during Claimant's vocational rehabilitation program.

Donald Kegler is the Chief Operating Officer of Case Management Works – Hawaii, Inc. EX 15 at 320. On January 15, 2008, Mr. Kegler conducted a face-to-face interview with Claimant and administered the "Wide Range Achievement Test." *Id.* at 321. On March 31, 2008, Mr. Kegler prepared an LMS based on Claimant's medical records, physical therapy reports, FCEs, and his own interview of Claimant. *Id.* at 320-21. Mr. Kegler's LMS identified three possible employment positions within Claimant's work restrictions: electrician, customer service representative, and dispatcher. *Id.* at 325-27. He identified electrician jobs with four different companies, of which, only one is suitable alternative employment.⁶ *Id.* at 325. The suitable electrician position was available with Trane Pacific Services and would pay between \$10 - \$30 per hour. *Id.* The customer service representative jobs were available with nine different companies and ranged in pay from \$8.00 to \$10.50 per hour with an average wage of \$9.50 per hour. *Id.* at 326. The dispatcher jobs shows openings with five different companies ranging in pay from \$9.23 to \$21.63 per hour, with an average wage of \$14.17 per hour. *Id.* at 327. While Mr. Kegler did not provide addresses for each employer, he noted that each job was available on Oahu, the Hawaiian island on which Claimant resides. *Id.* at 325.

Howard Stauber is a vocational rehabilitation consultant at Stauber & Associates Vocational Rehabilitation Services. EX 14 at 309. Mr. Stauber prepared his LMS by reviewing Claimant's medical records, Claimant's deposition, and Mr. Kegler's LMS. *Id.* Mr. Stauber concurred with the positions identified in Mr. Kegler's LMS. *Id.* at 311-12. Additionally, he identified two more possible employment positions for Claimant. *Id.* at 313-15. First, he named machine shop operator/shop coordinator positions with four different companies; ranging in pay from \$15.75 to \$17.00 per hour. *Id.* at 313-14. For example, Mr. Stauber identified Pacific Shipyards International as a potential employer seeking a machine shop operator. *Id.* at 313. Pacific Shipyards International is located at Pier 41 in Honolulu Harbor. *Id.* This job's physical demands included alternating between sitting, standing, and walking; no lifting greater than twenty pounds; and no repetitive or frequent forward bending. *Id.* Second, he named shop-tool room/supply manager positions with two different companies; ranging in pay from \$16.00 to \$16.50 per hour. *Id.* 314-15. One such employer was Todoki Machine and Marine Works at 810 Halekauwila Street in Honolulu. *Id.* at 315. This position's physical demands included alternating between sitting, standing, and walking, no lifting greater than twenty pounds, and no repetitive or frequent forward bending. *Id.*

On March 11, 2008, Ron Fleck was authorized to provide plan development services to Claimant through Edward Cope of the U.S. Department of Labor. CX 3 at 24. In his report, Mr. Fleck identified security guard and surveillance system monitor positions within Claimant's work restrictions with a weekly wage of \$478.00. *Id.* at 35-38. Claimant expressed an interest in

⁶ Three of these electrician jobs require Claimant to obtain a State of Hawaii Journey Worker Electrician's License. Because of this, I do not find these positions to represent suitable alternative employment for Claimant.

the security monitor position. Tr. at 74. However, Claimant's non-work-related ankle injury prevented him from actively pursuing this position. Tr. at 75.

The reports of Mrs. Kegler, Stauber, and Fleck have all identified jobs within Claimant's geographical area that Claimant is capable of performing given his work restrictions.⁷ Therefore, I find Employer has met its burden of establishing suitable alternative employment and I turn to Claimant's rebuttal based on a diligent effort to secure employment.

b. Claimant's Diligence in Seeking Suitable Alternative Employment

Once the employer has established suitable alternative employment, the claimant can nevertheless prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Hairston*, 849 F.2d at 1196. Here, I find Claimant has made no diligent effort in securing suitable alternative employment. The conclusion is supported by Claimant's own testimony at the hearing. When asked if he had applied to any jobs over the past five years, Claimant testified simply, "No." Tr. at 74. Furthermore, throughout his testimony Claimant repeatedly stated he did not want to work. *Id.* at 94-95, 102, 106. Independent from Claimant's testimony, there is Mr. Fleck's December 1, 2008 report indicating vocational rehabilitation services had been terminated because Claimant refused further vocational services. CX 3 at 51; EX 3 at 72. This evidence, added to the totality of Claimant's hearing testimony summarized above, clearly shows Claimant has not made a diligent effort in seeking suitable alternative employment.

Based on the foregoing analysis, I find Claimant to have a permanent partial disability. Next, I must determine Claimant residual wage-earning capacity.

III. Claimant's Wage-Earning Capacity

"Wage-earning capacity" refers to "an injured employee's ability to command regular income as the result of his personal labor." *Seidel v. Gen. Dynamics Corp.*, 22 BRBS 403, 405 (1989). Section 8(c)(21) of the Act provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21). When the claimant seeks benefits for total disability and the employer establishes suitable alternative employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. *See Berkstresser v. Wash. Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). Furthermore, I must establish a precise dollar amount for post-injury wage-earning capacity. *Wausau Ins. Cos. v. Dir.*, *OWCP*, 114 F.3d 120 (9th Cir. 1997). Moreover, I am permitted to average the hourly wages of jobs found to be suitable employment for a claimant in order to calculate wage earning capacity. *See Avondale Indus. v. Pulliam*, 137 F.3d 326 (5th Cir. 1998). Thus, I may average the hourly wages of jobs found Employer has established as suitable alternative employment.

⁷ Claimant currently resides at 955 Paula Drive, Honolulu, Hawaii 96817. EX 12 at 106.

Employer has established six suitable alternative employment positions for Claimant: electrician, customer service representative, dispatcher, machine shop operator, shop-tool/room supply manager, and security guard/monitor. In determining the average for each of these positions, I will add together the lowest hourly wage for each company (representing the base salary) and then divide the sum by the number of different companies with jobs available.

For the electrician position, Employer identified one company with a base salary of \$10 per hour. EX 15 at 325. Thus, the average for electrician positions is \$10 per hour. For the customer service representative position, Employer identified eight different companies with base salaries of \$9.00, \$10.50, \$8.00, \$10.00, \$9.00, \$9.00, \$10.00, and \$10.00 per hour, respectively.⁸ Thus, the average for customer service representative positions is \$9.44 per hour. For the dispatcher positions, Employer identified five companies with base salaries of \$21.63, \$14.99, \$9.50, \$15.00, \$9.23 per hour, respectively. Thus, the average for dispatcher positions is \$14.07 per hour. For the machine shop operator/shop coordinator positions, Employer identified four different companies with base salaries of \$15.75, \$16.00, \$16.00, and \$16.00 per hour, respectively. Thus, the average for machine shop operator/shop coordinator positions is \$15.94 per hour. For the shop-tool room/supply manager positions, Employer identified two different companies with base salaries of \$16.00 and \$16.50 per hour, respectively. Thus, the average for shop-tool room/supply manager positions is \$16.25 per hour. For the security guard/monitor positions, Mr. Fleck's report expressed an average weekly wage of \$478.00. CX 3 at 36. Mr. Fleck also stated he believed Claimant capable of working an eight-hour work day. *Id.* at 31. Therefore, these numbers can be divided out to show an average wage of \$11.95 per hour for the security guard/monitor positions.

When these six averages are added together and their sum is subsequently divided, the average hourly wage is \$12.94. This number must then be multiplied by 2,080 (the annual amount of hours worked when a fifty-two week work schedule is multiplied by forty hours per week). This shows Claimant has a residual annual wage-earning capacity of \$26,915.20, or a weekly wage-earning capacity of \$517.60.

IV. Claimant's Compensation

Under § 8(c) of the Act, a claimant with an unscheduled permanent partial disability is entitled to two-thirds of the difference of his pre-injury average weekly wage and his post-injury wage earning capacity. 33 U.S.C. § 908(c)(21). Here, the parties have stipulated to Claimant's pre-injury average weekly wage being \$893.60. I have found Claimant's post-injury wage earning capacity to be \$517.60. The difference between Claimant's average weekly wage and post-injury wage-earning capacity is \$376.00. Accordingly, Claimant is entitled to weekly compensation in the amount of \$250.67.⁹

⁸ While Mr. Kegler identified nine companies in his report, AIG Hawaii's listed pay rate is "Competitive." EX 15 at 326. As such, I find it would be unfair to assign this company an arbitrary pay rate and will not use it for purposes of averaging Claimant's wage-earning capacity.

⁹ Employer has been paying Claimant permanent partial disability benefits at a weekly rate of \$183.73 from October 25, 2008 to the present. ALJX 15 at 3.

V. Entitlement to Medical Expenses

Subsection 7(a) of the Act provides that “the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. § 907(a). In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). The employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *M. Cutter Co. v. Carroll*, 458 F.3d 991, 993 (9th Cir. 2006) (“It is axiomatic that [an] employer is responsible for reasonable and necessary medical care related to the work injury.”). The Board has interpreted this provision broadly. *See, e.g., Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94-95 (1989) (holding employer liable for modifications to claimant’s house as medical expenses). A claimant has established a prima facie case for compensable injury where a qualified physician indicates treatment is necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984).

Here, I adopt the agreement between Drs. Davenport, Singer, and London that Claimant does not require any additional treatment for his right hand related to his work at Employer as any carpal tunnel symptoms were not caused by his work at Employer and should be treated on a private basis. EX 9 at 67; EX 10 at 92; EX 11 at 97, 99. Employer further argues Claimant is in no need of future medical treatment for his low back condition. ALJX 15 at 22; EX 6 at 57-58; EX 10 at 92; EX 11 at 99. However, I find Claimant is entitled to receive reasonable and necessary future medical treatment for his compensable work-related low back condition should the condition flare up. Accordingly, Employer must pay for any future medical treatment reasonable and necessary to treat Claimant’s low back condition.

VI. Special Fund Relief

Employer has applied for § 8(f) relief from the Special Fund as of February 27, 2009. If an employer can prove entitlement to § 8(f) relief, the Special Fund may assume responsibility for part of the employer's obligation. Where the Special Fund is implicated, an employer's obligation varies depending upon the type of injury the claimant sustained while working for the employer (scheduled or non-scheduled), and the portion of the entire resulting disability which is attributable to the employment injury. Under § 8(f)(2), if there is a non-scheduled employment injury which results in permanent partial disability, the employer’s liability is limited to 104 weeks. 33 U.S.C. § 908(f). Here, the District Director of the Office for Workers’ Compensation Programs initially disputed Special Fund relief as to the contribution element prior to Dr. Davenport’s July 28, 2010 deposition and submittal of Employer’s post-trial brief. *See* ALJX 13; ALJX 15; EX 21. The District Director’s own post-trial brief, if any, was due for filing on November 1, 2010. Tr. at 55-56. The District Director has not timely filed a post-trial brief, and I find he has waived the right to do so. Moreover, I find substantial evidence supports a finding that Employer is entitled to Special Fund relief under § 8(f) of the Act.

To qualify for § 8(f) relief, an employer must make a three-part showing: (i) that the employee had a pre-existing partial disability, (ii) that this partial disability was manifest to the employer, and (iii) that it rendered the second injury more serious than it otherwise would have

been. *Dir., OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990). There is an additional requirement in cases of permanent partial disability: the disability must be materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. § 908(f)(1). If the employer lacks actual knowledge of the pre-existing disability, constructive knowledge satisfies the requirement. Constructive knowledge may be proven from medical records in existence at the time of the subsequent injury from which the condition was objectively determinable. *Am. Shipbuilding Co. v. Dir., OWCP*, 865 F.2d 727, 731-32 (6th Cir. 1989); *Dir., OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 457 (3rd Cir. 1978).

I find Employer has met the requirements for § 8(f) relief. Claimant had a pre-existing partial disability of his low back in connection with a 1985 incident involving his lifting a bag of cement that pre-dated his September 8, 2005 work-related low back aggravation as evidenced in Claimant's medical record history. *See* EX 5; EX 6; EX 7; EX 8; EX 9; EX 10; EX 11; EX 12; EX 17; EX 21. The pre-existing disability was manifest to the Employer through these medical reports and numerous other medical records. If Employer did not have actual knowledge of the disabilities, which seems unlikely, it certainly had constructive knowledge.

Dr. Kent Davenport, a board certified orthopedic surgeon, examined Claimant on June 7, 2010 and issued a medical report of the same date. EX 11 at 93. Dr. Davenport opined Claimant's 1985 injury likely resulted in acute herniation of a disk, and found significant Claimant's neurological symptoms, including being confined to a bed for three weeks and being incontinent. Dr. Davenport agreed with Claimant's statement that his low back was never the same after the 1985 injury. EX 21 at 6-8. Dr. Davenport further opined Claimant's cervical and lumbar spine X-rays of June 16, 2005, a few months prior to the September 8, 2005 work incident, reveal Claimant had symptoms in his neck and low back that pre-date his work injury. EX 21 at 8-9. The cervical spine X-rays reveal some mild posterior spurring at C4-5 and C5-6 with mild spurring also at L2 to L5; mild narrowing of the right side of the L3-4 disk space; mild scoliosis with convex to the left; a nine-millimeter focal sclerosis overlying S1 on the lateral view probably, in the left sacrum, on the AP view; and the diagnosis degenerative disk disease L3-4, mild scoliosis and some sclerosis of the left side of S1. EX 21 at 9. As a result, Dr. Davenport opined Claimant had a pre-existing degenerative condition at his lumbar spine that predisposed Claimant to further injury to his lumbar spine. EX 21 at 10. Dr. Davenport concluded by opining that, due to Claimant's prior injury of 1985, Claimant's overall disability in the lumbar spine is materially and substantially greater than that which would have occurred due to the subject alleged injury standing alone. EX 21 at 10-11. Therefore, I find that the medical evidence shows Claimant's pre-existing 1985 lumbar spine degenerative disease and herniated disk (nine-millimeter focal sclerosis overlying S1 on the lateral view probably, in the left sacrum, on the AP view), combined with his less severe September 8, 2005 work injury to create a disability that was materially and substantially greater because of the pre-existing condition. Based on this evidence, I find that Employer is entitled to § 8(f) Special Fund relief.

VII. Attorney Fees and Costs

On October 29, 2010, this Office received a request from Claimant for reimbursement from Employer for \$1312.78 for the following costs and fees: \$1,113.59 for the purchase of the

hearing transcript as well as copies of three deposition transcripts; \$194.83 for copying as well as the purchase of various office supplies used in preparation for the hearing; and \$3.60 in mileage costs. No opposition was received from Employer as to this request for reimbursement.

Section 28(a) of the Act allows an award for the costs sought by Claimant in this case. Section 28 generally allows an award of attorney's fees in an instance of "successful prosecution of a case." 33 U.S.C. § 928(a). Section 28(d), by its explicit language, allows only the reimbursement of "costs, fees and mileage for necessary witnesses attending the hearing," *id.* § 928(d), and would consequently appear to allow Claimant to recover only the \$3.60 sought for mileage reimbursement. The BRB, however, has interpreted § 28(a) to allow for the recovery of costs associated with hearing transcripts and depositions as well. *See, e.g., Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 667 (1982); *Luce v. Bath Iron Works Corp.*, 12 BRBS 162, 169 (1980). Consequently, I find Claimant is entitled to the \$1312.78 he seeks as reasonable and necessary costs associated with the successful prosecution of his claim. *See* 33 U.S.C. § 928(a).

ORDER

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

1. Employer/Carrier shall pay Claimant temporary total disability benefits from September 9, 2005 to September 13, 2005 and from February 27, 2006 to February 28, 2006 at the weekly compensation rate of \$595.73.¹⁰
2. Employer/Carrier shall pay Claimant permanent partial disability from February 9, 2006 and continuing for 104 weeks at the weekly compensation rate of \$250.67.¹¹
3. Employer/Carrier is entitled to § 8(f) relief from the Special Fund after paying permanent partial disability benefits for 104 weeks from February 9, 2006.
4. Beginning in week 105 from February 9, 2006, and continuing, the Special Fund shall pay Claimant permanent partial disability benefits at the weekly compensation rate of \$250.67.
5. Employer/Carrier is entitled to a credit for any excess compensation payments to Claimant and the Special Fund, in turn, shall reimburse Employer any such excess payments with interest at rates determined pursuant to 28 U.S.C. § 1961 within 30 days after receipt of a final form LS-208 showing the Employer's payments to the Claimant.
6. Employer/Carrier is the responsible employer for § 7 medical benefits in connection with Claimant's low back condition from September 8, 2005 to the present and continuing.
7. Employer shall pay Claimant reasonable costs in the amount of \$1,312.78.
8. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.
9. All computations are subject to verification by the District Director, who in addition shall make all calculations necessary to carry out this Order.

¹⁰ AWW of \$893.60 x 2/3 = \$595.73.

¹¹ This shall exclude, however, the two days of temporary total disability on February 27 and 28, 2006. *See Shaw v. Todd Pac. Shipyards Corp.*, 23 BRBS 96, 100 (1989)

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

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California