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Issue Date: 21 June 2012

CASE NOs: 2010-LHC-01960, 2011-LHC-01012

OWCP NOs.: 18-94649, 98269

In the Matter of:

ROBERT AMEZCUA,
Claimant,

v.

YUSEN TERMINALS,
Self-Insured Employer,

and

SSA MARINE TERMINALS and
HOMEPORT INSURANCE COMPANY,
Employer and Carrier,

and

ILWU-PMA WELFARE PLAN,
Intervenor.

Before: Richard M. Clark
Administrative Law Judge

DECISION AND ORDER AWARDING COMPENSATION AND BENEFITS

This action involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("the Act"). These matters were referred for hearing on August 3, 2010 and March 11, 2011.

On June 20, 2011, a formal hearing was held in Long Beach, California. Preston Easley, Attorney at Law, represented Robert Amezcua ("Claimant"). Lawrence Postol, Attorney at Law, represented self-insured Employer Yusen Terminals ("Yusen"). Richard Salloum, Attorney at Law, represented Employer SSA Terminals and its carrier Homeport Insurance Company (collectively, "SSA"). Shawn Groff, Attorney at Law, represented the ILWU-PMA Welfare Plan ("ILWU").

At the hearing, the parties submitted a signed stipulation (ALJX 5) agreeing that the last responsible employer as determined at the hearing would pay the ILWU's lien for medical expense reimbursement. Hearing Transcript ("TR") at 6.

The following exhibits were admitted into evidence: ILWU-PMA's exhibits ("ILWUX") 1 to 3, 17 to 18, 24, 32, 40, 52, 59 to 60, 62, 64, 68, 73, and 75-82;¹ Yusen's exhibits ("YX") 1 to 46, 48 to 50, and 52 to 57; SSA's exhibits ("SSAX") 1 to 53; and Claimant's exhibits ("CX") 1 to 25. TR at 8-15. In addition, Claimant's pre-hearing statement was marked as ALJX 1, SSA's and Yusen's pre-hearing statements were marked as ALJX 2 and 3 respectively, and the ILWU's pre-hearing statement was marked as ALJX 4.

Claimant's closing argument and first amended closing arguments were marked as ALJX 6 and 7 respectively. Yusen's closing argument was marked as ALJX 8. SSA's closing argument was marked as ALJX 9. The record closed on September 22, 2011.

For the reasons stated below, this decision determines that SSA Terminals is the last responsible employer. Therefore, the claim against Yusen Terminals is denied and no relief is granted against Yusen. SSA Terminals is ordered to pay compensation and benefits as explained below and to reimburse the lien filed by the ILWU-PMA.

I. Issues in Dispute

This matter presents the following disputed issues:

1. Is Yusen or SSA Terminals the last responsible employer for Claimant's January 9, 2009, injury?
2. Did Claimant suffer a new injury on January 23, 2009, while working at SSA Terminals?
3. Did Claimant reach maximum medical improvement ("MMI") on March 15, 2010, as Yusen contends, or has he reached MMI at all? If not, is he entitled to temporary total disability from the date of injury until he returned to work on January 15, 2011?
4. If Claimant has reached MMI, what percentage of permanent disability does he have?

II. Stipulations

At the hearing, the parties agreed to the following stipulations:

1. Claimant's average weekly wage ("AWW") was \$1,969.18, with a maximum compensation rate for total disability of \$1,200.62 as calculated under section 10(a);
2. The Act applies to Claimant's claim;

¹ All other ILWU exhibits were withdrawn.

3. An employee-employer relationship existed at the time of Claimant's injury on January 9, 2009;
4. Claimant's injury arose out of and in the course of employment;
5. The claim was timely noticed and filed;
6. Claimant returned to longshore work on January 15, 2011.

TR at 19-22. The foregoing stipulations are supported by substantial evidence in the record and are accepted for all purposes. See *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 n.2 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984).

III. Factual Findings

Background and Injury

1. Claimant was born on May 26, 1971, and was 40 years old at the time of hearing. TR at 48. He lived in Carson, California, at the time of injury. TR at 63; YX 1, 4. He began work as a longshoreman as a casual in 1997 and has worked full-time as a longshoreman since June 20, 2004. TR at 48. On January 9, 2009, Claimant was injured at about 8:00 p.m. while working as a rail dock aloft, a position which requires the worker to climb on and off rail carts, at Yusen in the Port of Los Angeles, in Los Angeles, California. TR at 48; YX 9 at 11; YX 34 at 11-12. Claimant was climbing down a railcar ladder when he slipped and landed on his right foot at an angle, which hyper-extended his right knee. TR at 49; YX 34 at 14. Claimant described the distance he fell as "like five feet," but then indicated it was about the height of the judge's bench. TR at 76. He felt and heard a "loud" snap as he landed, and then he fell to the ground. TR at 49, 80-81; YX 34 at 14. He was taken by paramedics to the hospital where his knee was wrapped, he was given pain killers and crutches, as well as a knee immobilizer that used Velcro to fasten with two beams on the side. TR at 49-50, 53, 79. He was referred to Dr. Delman for treatment. TR at 50; YX 34 at 20.

2. Before returning to work, because he was experiencing significant pain and the symptoms kept progressing, Claimant returned to the emergency room on January 11, 2009. TR at 50-51, 79-80. When he was treated in emergency, he explained that he was experiencing pain at a level 8 on a 10-point scale, and his knee was swelling and was unstable. TR at 51-52. The night of the injury, his pain was a 10 on a 10-point scale. TR at 52. Claimant was not wearing the knee immobilizer he had been given the night of the injury when he went to the emergency room. YX 11 at 2.

3. Claimant first saw Dr. Delman on January 12, 2009. TR at 52. He described his pain at 5 or 6 on a 10-point scale. TR 52. Dr. Delman ordered an MRI, and gave him a different knee brace that allowed him to bend his knee as far as he was comfortable bending. TR at 52-53. The knee brace given to him by Dr. Delman allowed greater knee mobility than the one given to him in the emergency room. TR at 65.

4. In spite of his injury, Claimant continued to work evening shifts each day from January 12 through 20 and on January 22, for a total of nine shifts after his January 9, 2009, injury. TR at 53-54, 58; YX 34 at 41. According to Claimant's Pacific Maritime Association ("PMA") work history, he worked for Yusen Terminals on January 9, 2009, SSA Terminals on January 12, 13, 16, 17, and 22, 2009, and APM Terminals on January 14, 18, 19, and 20, 2009. CX 24; YX 1, 10, 35; SSAX 29. Claimant typically did not work for one specific terminal, but worked where the jobs were available and was hired out of a union hall. YX 34 at 7. For all the shifts Claimant worked after the January 9 injury, he drove a Utility Tractor Removal ("UTR"), which is a small diesel truck used to move containers from one point to another. TR at 53; YX 34 at 41. Of the jobs Claimant has held on the docks, UTR driver was the easiest because he sat the entire night and drove in circles; there was not much physical labor involved in this job. TR at 61; YX 34 at 10-11. Claimant considered driving a UTR as light duty and less strenuous than other work off the casual board. CX 62.

Last Shift Worked

5. Claimant's work shift at SSA on January 22, 2009, began at 6:00 p.m. and ended at 3:00 a.m. on January 23. TR at 53, 58. His mother drove him to work and she parked less than 100 yards from the UTR location when he started his shift; it was painful to walk to the UTR. TR at 57, 87; YX 34 at 54. At the start of his shift, his UTR was hooked to a bomb cart, which is a trailer that is used to carry and transport containers, and he drove the same UTR-bomb cart-combo all night. TR at 57, 59-60; YX 34 at 42-44. The UTR had an automatic transmission, power steering and power brakes. TR at 63. Every movement he made was painful for him, including getting in and out of the UTR. YX 34 at 54-57. Claimant ate his lunch in the UTR, and he usually got out of the UTR to go to the bathroom once or twice per shift, but he did not get out of the cab that night. TR at 56-57, 87; YX 34 at 43-44.

6. Claimant had to go up two steps to get into the UTR, and there were "hand-holds" that he used to pull himself up into the cab. TR at 56; YX 34 at 48-50. On his last shift at SSA, he used his left leg and right arm to pull himself into the UTR cab. TR at 87; YX 34 at 48-50. His right leg touched the step, without applying too much of his weight or bending it. YX 34 at 50-51. Claimant drove the UTR using his left foot, with his right leg moved to the side. TR at 55-56; YX 34 at 48. His right leg was wrapped "pretty tight," with an ace bandage that "felt like a cast, almost," that extended from his right thigh to his ankle. TR at 56, 86; YX 34 at 45. On top of the ace bandage, Claimant put the anterior cruciate ligament ("ACL") brace given to him by Dr. Delman, and he adjusted it so he could sit comfortably and drive all night. TR at 56. The knee brace allowed more movement and flexibility. TR at 65. Dr. Delman had showed Claimant how to strap his leg with the ace bandage in a firm position. TR at 86; CX 4 at 10. Driving around and sitting in the UTR made his knee hurt more. YX 34 at 58. When his shift ended on January 23, 2009, Claimant knew he could no longer work because of the pain in his knee was extreme and unbearable. SSAX 20 at 58-59. He saw Dr. Delman on February 3, 2009, and agreed to have the knee surgery. YX 12 at 8.

7. At hearing, Claimant said that the pain was never as great as the night of the January 9th accident and there was no real difference in his knee instability from the time of the accident to the time he worked his last shift. TR at 57. Claimant did not believe his knee

condition worsened during the nine shifts he worked after the injury. TR at 60-61. According to Claimant, his knee was unstable and remained that way throughout his shifts and treatment. TR at 57. Claimant stated at hearing that his pain was about the same for all shifts he worked after the injury, usually about a 5 or 6 on a 10-point scale. TR at 54. Claimant said his pain on the last shift was probably about a 7, but then it dropped to a 5 or 6 after he stopped working. TR at 55. However, at his deposition on December 10, 2010, Claimant said the pain got progressively worse to the point that it was unbearable and extreme. SSAX 20 at 58-59. At hearing, Claimant insisted that the pain was the same throughout the shifts he worked after the injury, though it may have escalated slightly to a 7 or 8 during his last shift three shifts. TR at 72. When confronted with his deposition testimony at the hearing, Claimant explained that he may have been nervous at the deposition and he had never been through a hearing process, but he believed the pain was the same at the start of his final shift as it was at the end, though he agreed that the pain increased during his last three shifts. TR at 72-73. After he rested a few days following his final shift on January 22-23, 2009, his pain went from a 7 or 8 to a 5 or 6 on a 10-scale. TR at 75-76; CX 55-56, 75-76. Claimant did not have any specific traumatic injury or event while working at SSA Terminals on January 22-23, 2009. TR at 86. There was never a time after the January 9, 2009, injury at Yusen that he was not in pain – practically every single movement he made hurt. TR at 88. At the hearing, Claimant confirmed his deposition testimony that by the end of his last shift he worked at SSA, the pain as “unbearable” and he could not function anymore; he said the pain was extreme on his knee during the last three shifts and he knew he was not going to work any longer after the last shift at SSA. TR 71-75; YX 34 at 58-59. Having reviewed both the deposition transcript from December 10, 2010, and Claimant’s hearing testimony, I am persuaded that Claimant experienced a worsening of pain over the last three shifts he worked to the extent that he could no longer function. Claimant’s deposition testimony was closer in time to the event and he agreed that the statements he made at the deposition were true. TR at 75. Accordingly, I find that the evidence established that the pain in Claimant’s knee increased to the point that he could no longer tolerate the pain and he stopped working following his last shift at SSA Terminals due to the increased pain.

8. Sal Ferrigno is the General Manager for SSA, Pier A, and oversees the entire terminal. SSAX 47 at 9. He was aware that Claimant worked as a UTR driver on January 22, 2009, for an eight hour shift. SSAX 47 at 9-10. Claimant did not report any injury on that shift. SSAX 47 at 10. According to Mr. Ferrigno, drivers get a one hour lunch and two coffee breaks, but he did not have any specific information about Claimant’s shift, such as how many times he may have gone in or out of the UTR. SSAX 47 at 13-14. The drivers could stop and go to the bathroom at any time. SSAX 47 at 14.

9. Greg Givot is the vessel superintendent for vessel operations at SSA, a position he had held for the past 14 years. SSAX 49 at 6. He corroborated Mr. Ferrigno that the drivers get an hour lunch and two breaks, with some leaving their trucks and some staying inside their trucks. SSAX 49 at 9. On January 22, Claimant worked an eight hour shift as a UTR driver. SSAX 49 at 6, SSAX 50. According to Mr. Givot, UTRs are similar to a truck cab, and have power steering and brakes, with automatic transmission. SSAX 50.

10. Claimant told Dr. Delman that he was going to keep working when he saw him on January 12, 2009, even though Dr. Delman’s office notes do not mention that Claimant

continued to work. TR at 64. Claimant also believed he told Dr. Delman that he had been working the last eight days when he saw Dr. Delman on January 22, 2009. TR at 64.

11. Claimant called Kirby Ford, who was Vice President of Workers' Compensation at Yusen, on January 12, 2009, and told her that he was going to continue to work, even though he was in severe pain, because he had a "big financial obligation." TR at 81-82. His financial obligations had increased since his last injury, including an IRS problem, an increase in debt, an increase in child support and the need to support his mother. TR at 89. According to Claimant, Ms. Ford told him to heed his doctor's instructions, but when Claimant said he was going to continue work, she told him that was okay until he received further instruction. TR at 82. Claimant left a message for Ms. Ford on January 14, 2009, telling her that he was working light duty. TR at 83. Had she told him that Yusen would not be responsible for his medical benefits or workers' compensation if he continued to work, Claimant said he would have stopped working. TR at 83-84.

12. Claimant returned to regular, full-time longshore work at the same rate of pay on January 15, 2011. TR at 62. Dr. Kharzai, his treating physician, did not tell him he was at MMI and, at the time of hearing, Claimant still not been told he was at MMI. TR at 62. Claimant did not look for employment, even as a cashier or a security guard, while he was being treated and recuperating because he believed there was no way he could do any job because of his knee pain. TR at 62-63. Claimant continued to experience pain in his right knee and, according to Claimant, he would not have been able to focus on performing any tasks. TR 62-63.

Kirby Ford

13. Kirby Ford is the Vice President for Workers' Compensation at Yusen, where she has worked for 13 years. SSAX 42 at 6, 9. Ms. Ford signed and submitted an LS-202 (Employer's report of injury) on January 12, 2009. CX 2, YX 3. Ms. Ford confirmed that she had talked to Claimant on January 12, 2009, and that he was still working. She also confirmed that she received a voicemail from Claimant on January 14, 2009, stating that he was working light duty and that was not a concern for her at that time. YX 50 at 51-52; SSAX 42 at 11-12 16. According to Ms. Ford, it is not unusual for a claimant to continue to work after an injury. SSAX 42 at 51. Yusen never gave any direction not to hire Claimant after his injury on January 9, 2009. YX 50 at 54-55.

Dr. Delman

14. Dr. Allan Delman is a fellow of the American Academy of Orthopaedic Surgeons and a Diplomate of the American Board of Orthopaedic Surgery. He has been an orthopedic surgeon since 1982 when he finished his residency at UCLA Center for Health Services. SSAX 7 at 1-2. Dr. Delman first examined Claimant on January 12, 2009. CX 4 at 1, 6; YX 12 at 1-3; SSAX 4. Claimant reported that he had right knee pain with swelling and that his knee gave out. CX 4 at 7-8. Dr. Delman found tenderness in Claimant's knee and calf, diagnosed a right knee sprain, and noted that the clinical findings suggested an ACL tear. CX 4 at 7, 9. On January 22, 2009, Dr. Delman again examined Claimant, who reported that he still had swelling and pain in the right knee, but was not sure if it gave out because he had not really tested it. CX 4 at 10; YX

12 at 4. Dr. Delman observed that Claimant had limited range of motion in the right knee and was guarded in the range of motion, had mild residual effusion, and was tender over the medial joint line. CX 4 at 10. Dr. Delman reviewed an MRI taken on January 16, 2009, which showed moderate effusion and a tear of the medial meniscus, bone bruising at the lateral femoral condyle and tibial plateau, with a tear of the ACL, as well as a Baker's cyst. CX 4 at 10; CX 7. Dr. Delman recommended surgery, but Claimant advised Dr. Delman that he would think about it because he needed to work for financial reasons. CX 4 at 10. Dr. Delman gave Claimant an ACL brace and noted Claimant could return to light duty work off the casualty board. CX 4 at 10. Claimant did not tell Dr. Delman that he was treated for knee pain from October 2007 to May 2008 by Dr. Joe Holtz, though he did tell him about a prior right knee surgery in 1999. TR at 66-67. There was some discrepancy whether Claimant specifically told Dr. Delman that his right knee gave out and or at what point he told him that it did, but it was swollen and painful when he went to the doctor. TR at 96-102.

First Knee Surgery

15. On February 9, 2009, Dr. Delman performed an arthroscopy of the right knee with a partial medial meniscectomy and chondroplasty, lateral tibial plateau, in addition to an ACL reconstruction with central third patella tendon allograft. CX 4 at 13; YX 14. Dr. Delman continued to observe and treat Claimant following the surgery. Claimant generally was doing well and healing, but reported he was continuing to have pain. CX 4 at 13-20. At an examination on June 8, 2009, Claimant reported that he was still in pain and was having increasing popping and clicking in the knee. CX 4 at 21-22. Claimant had another MRI on that date, and Dr. Delman examined Claimant and reviewed the MRI on June 16, 2009. CX 4 at 23; CX 8. The MRI showed some abnormalities in the knee that "may be postoperative changes," as well as mild degenerative changes with edema in the medial and lateral femoral condyles and lateral tibial plateau. CX 4 at 23. Dr. Delman reported that Claimant was not doing well following the surgery and was reporting pain, a painful click and a sensation that the knee was giving out. TR at 58; CX 4 at 35; YX 34 at 24. Dr. Delman recommended additional surgery for arthroscopy and revision of the ACL reconstruction and allograft. CX 4 at 24; YX 34 at 20, 26-27. Initially Claimant agreed to move forward with surgery, but on July 2, 2009, his attorney called Dr. Delman and told him that Claimant wanted to change doctors and see Dr. Kharzai, which was approved by Yusen. CX 4 at 24-25; CX 13.

Letters from Dr. Delman to Counsel

16. Dr. Delman responded to letters sent by Mr. Easley, attorney for Claimant, and Mr. Postol, attorney for Yusen. In the letter to Mr. Easley dated December 22, 2010, Dr. Delman said:

I have reviewed my records on this patient. In the absence of information suggesting a reinjury, another specific event or an episode of giving out followed by increased pain or swelling during the period in question between January 12, 2009 and January 22, 2009, I would not say that his nine days of post injury work caused a permanent aggravation or permanent worsening of this January 9, 2009 injury. The frequency and duration of the work performed in that time period, in the absence of additional information, would not

lead to the conclusion that an aggravation occurred. Certainly, the patient may have sustained a partial injury on January 9, 2009, that worsened following that date, but this most likely would have been associated with a specific episode of giving out or increased symptoms and swelling. I would have to rely on the information from the patient as to whether this occurred to form an opinion. The mere activity of working as a UTR driver for that period of time would not, in my opinion, be of sufficient frequency and duration to result in an aggravation of his condition, although it might exacerbate the condition on a temporary basis.

CX 4 at 25A.

17. In a letter to Mr. Postol dated December 2, 2010, Dr. Delman responded to questions posed by Mr. Postol, and stated that, regarding whether continued use of the leg would have unavoidably caused further deterioration of the meniscus and further tearing of the torn cruciate ligament even on a microscopic level, Dr. Delman opined:

The statement is not entirely accurate. Continued use of the leg may worsen the condition, but does not unavoidably or definitely worsen the condition. If there is information that he had another event or injury in those days he worked following the specific injury on January 9, 2009, then it would be reasonable to suggest that the subsequent injury or ongoing work following the specific incident may have worsen [sic] the condition. CX 4 at 25B; YX 38.

In response to a second question posed by Mr. Postol regarding whether Claimant's work on January 12 through 20 and 22 aggravated or worsened the condition and contributed to the need for surgery, Dr. Delman responded:

In the absence of information suggesting a reinjury, another specific event or an episode of giving out followed by increased pain or swelling, I cannot say that the work aggravated the condition that resulted from the specific event of January 9, 2009. The frequency and duration of the work alone in the absence of additional information would not allow a definitive statement that an aggravation occurred. Certainly, the patient may have sustained a partial injury on January 9, 2009, that worsened following that date, but this most likely would have been associated with a specific episode of giving out or increased symptoms such as swelling associated with his work duties and as to that, I would have to rely on the information from the patient. The mere activity of working as a UTR driver for that period of time would not in my opinion be of sufficient frequency and duration to result in an aggravation of his condition, although it might exacerbate the condition on a temporary basis.

CX 4 at 25B-C; YX 38.

18. In a letter to Mr. Salloum, attorney for SSA Terminals, dated April 28, 2011, Dr. Delman stated that there is "no objective medical evidence to indicate that the [C]laimant's work as a UTR driver with SSA Terminals on the night of January 22, 2009, permanently aggravated or worsened his knee injury that occurred while he was employed for Yusen Terminals on

January 9, 2009.” CX 4 at 25K. Dr. Delman told Mr. Salloum that he had previously written letters to both Mr. Easley and Mr. Postol expressing the same opinion. CX 4 at 25L. In Dr. Delman’s opinion, Claimant’s “work between January 12, 2009, and January 22, 2009, did not cause a permanent aggravation or permanent worsening of the January 9, 2009, injury.” CX 4 at 25L.

19. Marti Taylor, the claims manager for Homeport insurance, spoke to Dr. Delman about a week before her May 5, 2011, deposition and Dr. Delman did not change his position that the shift at SSA did not aggravate or worsen Claimant’s condition. SSAX 47 at 6, 10.

20. Dr. Delman received \$79,546.09 for evaluations done on behalf of SSA Terminals during the year 2010-2011. SSAX 43 at 3.

Dr. Delman’s opinion in another matter

21. Dr. Delman provided deposition testimony on June 16, 2009, in a separate and unrelated case involving a claimant named Sandra Fairchild. SSAX 53; YX 56. Ms. Fairchild worked as a UTR driver and was treated by Dr. Delman following an April 18, 2007, work related injury. SSAX 53 at 6-7, 9. Dr. Delman first examined Ms. Fairchild on May 4, 2007, and diagnosed her with a right rib contusion, right knee abrasion and strain, concussion, and cervical strain. SSAX 53 at 7-8. She was released to full duty on June 4, 2007, and worked on June 5, 2007. SSAX 53 at 11, 37-38. Dr. Delman treated her conservatively over a period of months, but Ms. Fairchild continued to complain of knee pain, including pain she felt when climbing in and out of the UTR or using foot pedals. Ms. Fairchild said her knee buckled; Dr. Delman suspected a torn meniscus and an MRI taken on December 21, 2007, showed a tear in the medial meniscus. SSAX 53 at 11-17. According to Ms. Fairchild, the adjuster suggested she keep working and she did so because of financial issues. SSAX 53 at 19. Dr. Delman performed an arthroscopy partial medial meniscectomy and chondroplasty of the patellofemoral joint and medial femoral condyle. SSAX 53 at 26. Initially, Ms. Fairchild did well after surgery, but then developed pain and other complications. SSAX 53 at 27-30. Dr. Delman thought she may have torn her meniscus in the original fall causing her injury on April 18, 2007. SSAX 53 at 33. Ms. Fairchild continued to experience back pain and radiculopathy symptoms, which can be caused by repetitive vibratory – type activities such as from a UTR. SSAX 53 at 34-35.

22. Dr. Delman opined that work activity following Ms. Fairchild’s return to work in June 2007 aggravated the right knee injury initially suffered on April 18, 2007, because her symptoms had improved and she returned to work, though she still complained of pain in her knee and did not have any episodes of her knee giving out. SSAX 53 at 35. Once Ms. Fairchild returned to work as a UTR driver, her subjective symptoms increased and, when considering the work activities and increased pain, Dr. Delman believed that her primary job of UTR driver aggravated her underlying condition. SSAX 53 at 36. He thought her other injuries, such as lumbar stenosis, were aggravated by the repetitive vibrations and bouncing that occur while driving a UTR, and opined that an altered gait from a knee problem can also aggravate a back injury. SSAX 53 at 37.

23. Dr. Delman wrote a letter in the Fairchild case to Mr. Postol dated April 17, 2009, stating his opinion that Ms. Fairchild did not sustain cumulative trauma, but then contradicted his opinion at his deposition and in a report dated December 17, 2009. SSAX 53 at 39-40. Dr. Delman described his opinion in the letter as a mistake. SSAX 53 at 40. His position remained that repetitive UTR driving could have aggravated the right knee condition. SSAX 53 at 41. He disagreed with Dr. London, who opined that Ms. Fairfield had preexisting osteoarthritis in her knee and that it was not aggravated or caused by the April 18, 2007, injury. SSAX 53 at 44. Dr. Delman had no objective evidence that the meniscus was torn during the April 2007 injury and had no objective findings regarding the meniscus from May to November 2007, yet he still found an aggravation based upon the subjective complaints from the claimant. SSAX 53 at 46, 55. According to Dr. Delman, the foot pedals in the UTR can be hard to use and the seats are at varying heights, so the repetitive back and forth to the foot pedals and turning and twisting, which potentially twists the leg, as well as everyday repetitive activity, can cause problems for the knee. SSAX 53 at 60. Dr. Delman stated that under normal circumstances, driving a UTR would not have caused the kind of injury Ms. Fairchild experienced. SSAX 53 at 71. Even though the facts are somewhat distinguishable between the current matter and Fairchild, notably Ms. Fairchild experienced some improvement before returning to work and reporting increased work pain, and her torn meniscus was not diagnosed at the time of injury even though it may have been torn at the time of injury, F.F. ¶¶ 21-22, Dr. Delman found an aggravation based upon the subjective information from the Fairchild claimant.

Dr. Kharzai

24. Dr. Daniel Kharzai is board certified in orthopedic surgery and a graduate of University of California, San Francisco Medical School. CX 6; SSAX 6. He first examined Claimant on June 30, 2009, and from this point forward, became his treating physician. CX 5 at 28; YX 17. Dr. Kharzai diagnosed Claimant with a right knee ACL tear and also observed x-rays that showed the results of the previous surgery performed by Dr. Delman, including a metallic tibial screw. CX 5 at 28-29. On July 7, 2009, Dr. Kharzai again examined Claimant and reviewed an MRI taken on July 1, 2009. CX 5 at 33-34; CX 9. The examination revealed persistent swelling in the right knee, and Claimant reported crepitation and mechanical symptoms in the right knee that were not functioning normally. CX 5 at 33. The MRI showed that the ACL was in satisfactory position and within normal limits, and there was evidence of degenerative changes on the medial tibial femoral compartment as well as evidence of a previous partial medial meniscectomy. CX 5 at 33. Dr. Kharzai recommended either that Claimant live with the issues in his knee or consider a diagnostic arthroscopy and revision reconstructive surgery of his right knee. CX 5 at 33. Dr. Kharzai saw Claimant again on August 4, 2009, and did not note any changes in his condition. CX 5 at 36-38. Dr. Kharzai also reported that he had reviewed records from Dr. Delman and a report of an examination of Claimant by Dr. James London dated July 18, 2009, and both recommended ACL reconstructive surgery. CX 5 at 36-38.

Second Knee Surgery

25. On September 25, 2009, Dr. Kharzai performed an endoscopic ACL reconstruction on Claimant's right knee, using Achilles tendon allograft with interference screw fixation, arthroscopic partial and lateral medial meniscectomy, chondroplasty patellofemoral joint and lateral and medial compartment, extensive three-compartment synovectomy/debridement, resection of the hypertrophic synovial plica, and a bone graft of proximal tibial tunnel with allograft and insertion of a pain pump. CX 5 at 50-51; YX 34 at 26-30; YX 19. This was the second surgery on Claimant's right knee after the January 9, 2009, injury. Dr. Kharzai examined and treated Claimant regularly post-surgery, including a recommendation for physical therapy, and noted that even though he was healing, Claimant reported some knee pain. CX 5 at 55-72; YX 20.

26. On March 23, 2010, Claimant reported to Dr. Kharzai that he was experiencing back pain since the knee surgery. CX 5 at 74. According to Claimant, because of the pain in his right knee, he altered the way he walked by shifting his weight to the left side which caused pain in his back. TR at 59. Dr. Kharzai observed Claimant maneuver himself into a chair to alleviate the back pain. CX 5 at 73.

27. At a May 4, 2010, evaluation, Dr. Kharzai reported that Claimant continued to experience back pain secondary to antalgic gait. CX 5 at 79. He also reviewed a report from Dr. Domenick Sisto dated March 15, 2010, who reported that Claimant had some residual chondromalacia of the right knee, with a 7% impairment and should be considered permanent and stationary, even though Dr. Sisto did not address Claimant's low back symptoms. CX 5 at 79. Dr. Kharzai did not state an opinion about MMI, but recommended an updated MRI of the right knee and lumbar spine, with a return in six weeks. CX 5 at 80. Dr. Kharzai stated in his report that he agreed with the recommendations of Dr. Sisto to avoid any pivoting or twisting of the right knee, but did not indicate that these were permanent restrictions imposed upon Claimant. CX 5 at 80; YX 17 at 25.

28. On August 3, 2010, Dr. Kharzai examined Claimant again, who reported that he still had pain, clicking and catching in his knee. TR at 59. An MRI of his lumbar spine taken on July 20, 2010, showed mild degeneration at Claimant's L3-4 and L4-5, but no disc herniation. CX 5 at 86; CX 10. An MRI of the right knee taken on July 20, 2010, showed the ACL graft was intact and that he had chondromalacia of the trochlea and lateral tibial plateau. CX 5 at 86. Objectively, Claimant's right knee showed a stable Lachman and anterior drawer testing with patellofemoral crepitation. CX 5 at 85. Dr. Kharzai recommended that Claimant undergo a right knee diagnostic and operative arthroscopy because he still had mechanical symptoms likely related to the grade 3 patellofemoral cartilage injury and peripatellar scar tissue. CX 5 at 86. On August 31, 2010, Dr. Kharzai reported that he wanted to appeal the denial of the request for the right knee scope because Claimant continued to have pain, especially upon activity, and the pain had increased since his last visit, there was catching and clicking in the knee, with evidence of patellofemoral crepitation, and evidence of chondromalacia of the trochlea and lateral tibial plateau. CX 5 at 89.

Third Knee Surgery

29. Dr. Kharzai performed a third arthroscopy operation on Claimant's right knee on October 8, 2010, that included arthroscopic partial medial and lateral meniscectomy, chondroplasty patellofemoral joint, medial and lateral compartments, three-compartment synovectomy/debridement, resection of hypertrophic synovial plica and resection of peripatellar scar tissue and insertion of pain pump. CX 5 at 92; YX 34 at 31; YX 36. Claimant felt a big improvement after the October 2010 surgery. YX 34 at 31.

30. On November 17, 2009, Dr. Kharzai also referred Claimant for physical therapy on his knee and back, which was approved by Kirby Ford on March 3, 2010. YX 20. Claimant received physical therapy for his back and knee from Dr. Patrick Fowler, a chiropractor, who had been treating Claimant since 2006. YX 34 at 23-26; YX 54 at 1. Dr. Fowler released Claimant to light duty on January 14, 2011. YX 34 at 23-26; YX 42; YX 54. Claimant began working full-time in longshore work on January 15, 2011. Stipulation 6, *supra* at p. 3; YX 43, 49.

Dr. London

31. Dr. James London conducted an independent medical examination of Claimant on July 13, 2009. CX 11; SSAX 11; YX 16. He has been a board certified orthopedic surgeon since 1975. SSAX 13. Claimant told Dr. London that he had constant pain over the medial part of his right knee, the pain was worse when walking or twisting the knee, and he heard "snapping" in his knee and it felt loose, with occasional swelling. CX 11 at 111-112. After his examination and review of prior medical reports, Dr. London believed that Claimant was in need of further treatment and recommended that he have a repeat surgery of his right knee with ACL reconstruction. CX 11 at 122.

Dr. Sisto

32. On March 15, 2010, Dr. Domenick Sisto, an orthopedic surgeon, conducted a medical evaluation of Claimant at the request of Yusen at his clinic in Sherman Oaks, California. CX 12 at 124; YX 52 at 32-33; YX 21; SSAX 12. The clinic was about an hour from where Claimant lived. TR at 63. Dr. Sisto attended George Washington University Medical School, is a member of the American Board of Orthopaedic Surgeons, and has been board certified in orthopedic surgery since 1990. YX 28; YX 52 at 9. He maintains a clinical practice primarily involving the knees and shoulders. YX 52 at 10.

33. At the March 15, 2010, examination, Claimant told Dr. Sisto that he had right knee pain in the anterior part of his knee and that there was clicking, grinding and popping in his knee, though there was no swelling and no instability. CX 12 at 125. During the examination, Dr. Sisto found that Claimant had residual pain and instability in his knee subjectively and objectively there was some tenderness to the knee; while there was some mild instability in the knee, which he called "one plus," Dr. Sisto thought the knee was stable. YX 52 at 22. Claimant had done relatively well after two major reconstructive knee surgeries and he had some residual chondromalacia, which was "a relatively common finding following reconstructive surgery," but no further treatment to the knee was warranted. CX 12 at 129; YX 52 at 22. Dr. Sisto opined

that Claimant had reached MMI and required no further treatment on the right knee. CX 12 at 130; YX 52 at 22, 52-53. He used the Fifth Edition of the AMA Guidelines to give Claimant a 7% whole person impairment rating, which equated to a 16% to life impairment. CX 12 at 130; YX 21 at 7; YX 22, 23; YX 52 at 23-24. Dr. Sisto stated that Claimant should have permanent work restrictions which “preclude him from kneeling, squatting, and climbing.” CX 12 at 130; YX 52 at 23-24. He did not believe Claimant could return to his usual and customary position with these restrictions. CX 12 at 130.

34. Dr. Sisto examined Claimant again on July 12, 2010, where Claimant was complaining of low back pain. CX 12 at 138; YX 25. Claimant complained to Dr. Sisto that he had numbness, tingling and some mild weakness in his right leg, but the knee was unchanged since the previous visit. CX 12 at 139; YX 25 at 2. Dr. Sisto agreed with Dr. Kharzai’s recommendation that an MRI be conducted on the back and believed that there was an industrial causation for the back pain, but did not agree that an MRI of the right knee was necessary. CX 12 at 145; YX 25 at 8. Dr. Sisto’s opinion about Claimant’s knee remained the same from the March examination: Claimant remained at MMI for his right knee, but was not at MMI for his back pain. CX 12 at 145; YX 25 at 8.

35. On December 13, 2010, Dr. Sisto again examined Claimant. Dr. Sisto indicated that he had talked “at length” with Claimant at the examination regarding the accident on January 9, 2009, and it was his opinion that Claimant tore his ACL that day. YX 52 at 15-16; YX 32 at 8. Dr. Sisto, however, opined that working nine full days following the injury caused increased damage to his knee and it was not in Claimant’s best interest to have continued to work with a torn ACL. YX 32 at 8. Dr. Sisto stated, “there is a chance it would have made it larger. Again, there is no definiteness to this, but I think it’s within the medical probability that it irritated it and possibly made the tear larger.” YX 52 at 16. Dr. Sisto indicated that Claimant was no longer at MMI for his knee because he had undergone arthroscopic surgery in October 2010 and was still receiving physical therapy. YX 32 at 8. He thought Claimant would reach MMI in about four months. YX 32 at 8. Dr. Sisto provided a written note indicating that Claimant’s work restrictions as of December 13, 2010, remained the same as before: no squatting, kneeling or climbing. YX 32 at 12.

36. Dr. Sisto did not believe a third surgery was warranted and disagreed with Dr. Kharzai on this point. YX 52 at 26. The MRI taken on July 25, 2010, showed that Claimant had chondromalacia of the trochlea part of the patellofemoral joint in the knee, as well as of the lateral tibia plateau, and he believed both were chronic changes to the knee that could not be fixed or changed by arthroscopy. YX 52 at 26. When he examined Claimant again after the third surgery, subjectively Claimant said he felt better, but objectively the measurements he took of the knee before and after surgery were the same, so there was no quantifiable change to Claimant’s knee. YX 52 at 27. Dr. Sisto equated the relief Claimant reported to possibly a “placebo effect” after the third surgery, and had no reason to doubt that Claimant felt relief. YX 52 at 27-29. Even though Claimant experienced relief, Dr. Sisto stated there was no objective information showing the surgery was necessary. YX 52 at 28.

37. At his April 11, 2011, deposition,² Dr. Sisto opined that any weight bearing on Claimant's knee with the torn ACL could cause swelling and pain, and would, therefore, be detrimental and aggravate the underlying injury. YX 52 at 60. Being sedentary and not doing anything is not painful, according to Dr. Sisto. YX 52 at 44. Dr. Sisto definitely believed Claimant had an aggravation and worsening of the knee condition from his nine days of employment after the injury, and it was not a temporary exacerbation of his injury, though the injury would have required surgery regardless of whether he continued to work or not. YX 52 at 54. He disagreed that Dr. Delman was in the best position to assess the injury, but instead believed that Claimant would be in the best position to determine if there was an aggravation. YX 52 at 56. Dr. Sisto said that based upon his taking Claimant's history, Claimant said he had pain and swelling from continuing to work. YX 52 at 54. Based upon Claimant's deposition, which he reviewed earlier on the day of his own deposition, and having talked to him in more detail, Dr. Sisto believed the condition worsened when Claimant continued to work. YX 52 at 15, 56, 58-59, 61. Dr. Sisto opined that based upon the medical reports, the portion of Claimant's deposition that he reviewed (pages 41-59), and Claimant's reports that continuing to work made the pain worse and there was more swelling, and that he stopped working because of pain, Dr. Sisto believed there was an aggravation. YX 52 at 15, 54, 61. He disagreed with the opinion of Dr. Delman. YX 52 at 58. Had Claimant been his patient, he would have recommended no further weight bearing activities and to have surgery. YX 52 at 60. Any other weight bearing activities that would cause swelling and pain were detrimental and, in his opinion, aggravated the injury. YX 52 at 60. From an objective standpoint, Dr. Sisto opined that working those additional nine days aggravated his injury "microscopically" because the knee was unstable and putting weight on it caused pressure on the two bones, which was aggravating, and the chondromalacia worsened because the bones rubbed together. YX 52 at 61-62. It was his opinion that any walking, whether it was at home, at work, or walking from his car to the doctor's office, would have caused further damage to the knee. YX 52 at 66.

38. Dr. Sisto opined at his deposition that Claimant went into his first surgery with a diagnosis of a torn ACL and a tear of the medial meniscus. YX 52 at 13. The medial meniscus is the inner compartment of the knee and acts as the shock absorber for the knee and prevents the bones from sliding on each other. YX 52 at 13, 30. The ACL is the central portion of the knee connecting the femur and tibia and provides joint stability. YX 52 at 14. Chondromalacia is the softening of the articular cartilage of the knee, which was apparent at Claimant's lateral tibial plateau. YX 52 at 14. Dr. Sisto stated that continuing to work with a tear of the medial meniscus created a chance it would make the tear larger. He explained that there is no definitive evidence of this occurring, but that it was within a medical probability that continued working irritated the meniscus and probably made the tear larger; it was his opinion that Claimant could not have worked nine days without irritating the meniscus. YX 52 at 16. Dr. Sisto also believed that Claimant aggravated or worsened the torn ACL. YX 52 at 17. According to Dr. Sisto, Claimant complained of increased swelling, which meant there was some "play" in his knee which made it more unstable. YX 52 at 18. He could not be sure whether there was a total tear the day of the injury or a partial tear that was aggravated by working and became a full tear, but

² Both Employers offered portions of Dr. Sisto's deposition into evidence. Yusen offered the entire deposition transcript, YX 52, while SSA offered only pages 31 to 68 (the last page of the deposition) through the condensed transcript, with four pages of transcript on one page. SSAX at 46. For ease of citation, reference will be made to the complete transcript at YX 52.

there was no question that continued working aggravated this condition. YX 52 at 18. Working also aggravated the chondromalacia. YX 52 at 19. Because Claimant had a torn ACL, his knee was unstable, which meant the bones hit each other with more regularity with more abnormal forces, which would lead to chondromalacia. YX 52 at 19.

39. Dr. Sisto did not think Dr. Delman had taken a very thorough medical history from Claimant. YX 52 at 56-57. Dr. Sisto did not find any discussion in Dr. Delman's notes whether Claimant was getting better or worse or if his knee was aggravated by work, or that Dr. Delman asked those questions of Claimant. YX 52 at 56-57. Dr. Sisto also opined that it was also not clear that Dr. Delman knew Claimant worked after the injury, but there was some indication that he did since Dr. Delman's notes make reference to light duty work. YX 52 at 62-63; see F.F. ¶ 10. During the calendar year 2010, Dr. Sisto received a total of \$141,644.10 for conducting IMEs on behalf of Yusen. YX 52 at 50-51.

Surveillance Video

40. On October 29, 2010, Claimant was observed and videotaped walking around and entering and exiting a vehicle. YX 33. He was also observed carrying a child and did not appear to be in any distress. YX 33. In the surveillance video, Claimant is wearing a long-sleeved shirt and his brother is wearing a short-sleeved shirt, with the logo ILWU. YX 46 at 2. Dr. Sisto observed the videotape surveillance on January 3, 2011, and thought Claimant appeared to be functioning fine. YX 52 at 29. Based upon his examination on December 13, 2010, and his observation in the video, it was Dr. Sisto's opinion that Claimant was able to work as a UTR driver as of the date of the surveillance video. YX 41 at 1; YX 52 at 29.

Vocational Evidence

41. On June 8, 2010, Rich Morrissey, who is a senior bilingual vocational consultant, prepared a report of a Labor Market Survey he conducted on June 4, 2010. YX 24. Mr. Morrissey has a Bachelor's degree in Psychology and a Master's degree in Business Administration and has worked as a vocational consultant since 1988. YX 29, 40. Mr. Morrissey based his evaluation upon medical reports from Dr. Sisto dated March 15, 2010, where Dr. Sisto stated that Claimant had work restrictions precluding kneeling, squatting and climbing, and also upon the report of Dr. Kharzai dated May 4, 2010, where Dr. Kharzai concurred with Dr. Sisto's recommendations and added that Claimant should avoid pivoting or twisting the right knee. YX 24 at 2. According to his analysis, Mr. Morrissey believed Claimant could find work as a cashier or unarmed monitoring security guard, based upon Claimant's age, education, experience and medical condition. YX 24 at 2. The jobs he examined were rated as non-skilled positions requiring no formal training or experience. YX 24 at 1.

42. Mr. Morrissey provided information for cashier positions available as of June 4, 2010. He listed two cashier jobs at a business called Zara, one located in Santa Monica and the other in Los Angeles, each paying \$12.75 per hour; one cashier position at San Pedro Plaza Self Storage in San Pedro, California, that paid \$10 per hour; one cashier position at Dewitt Petroleum Distribution in El Monte, California, that paid \$10 to \$12 per hour; and, one cashier position at Nader's LA Popular Furniture in Gardena, California, that paid \$9.75 per hour. Each

of the listed cashier positions fell within Claimant's work restrictions. YX 24 at 2A-3. In addition, Mr. Morrissey provided information for three unarmed security guard positions that were available as of June 4, 2010: one security guard position at Kindred Healthcare located in La Mirada, California, that paid \$13.00 per hour; another security guard position at Universal Protection Service in Los Angeles, that paid \$10-\$12 per hour; and, one security guard position at SOS Security in Santa Monica, California, that paid \$12 per hour. YX 24 at 4-7. The average wage for each of the positions was \$11.53 per hour or \$461.20 per 40 hour work week.³ YX 24 at 8. He found that there were a total of eight positions available as of June 4, 2010, YX 24 at 2A-5, and that there had been seven past positions available between March 1 and June 1, 2010, meeting the same criteria. YX 24 at 5-8.

43. Mr. Morrissey conducted a revised survey on January 5, 2011, for the Los Angeles and surrounding area. YX 39. The January 5 report lists information, including maximum physical tolerances, reported to him by Claimant during an interview on December 23, 2010. YX 39 at 1-2. According to this report, Claimant completed high school and some college, and had prior work experience as a clerical worker where he was typing up to 45 minutes at one point in time. YX 39 at 1-2. The positions examined were entry-level clerical type positions that fit within the work restrictions listed by Dr. Sisto on December 13, 2010, including: a file clerk position at Intercoast College in Burbank, California, that paid \$11 to \$14 per hour; a clerical associate position at Sears Roebuck in West Hollywood, California, that paid \$10 to \$13 per hour; an office assistant/driver position at Windsor Healthcare that paid \$10 per hour; an administrative assistant position at AVAD in Van Nuys, California, that paid \$11 per hour; an administrative-clerical position at Commercial Check Control, Inc., in Los Angeles, California, that paid \$10 to \$13 per hour; and, an administrative assistant position in Sherman Oaks, California, that paid \$9 to \$11 per hour. YX 39 at 2-4. According to the revised survey, there were six positions available at an average hourly salary of \$11.08 per hour or \$443.33 per 40 work week.⁴ YX 39 at 6. The report reflects that the positions were available as of "2/5/11," which appears to be a typographical error, since the report is dated January 5, 2011, and speaks to jobs "currently" available. YX 39 at 2, 6. In addition, there had been five positions available between March 1 and June 1, 2010, which met the same criteria and paid \$10.90 per hour or \$436 per week. YX 39 at 6.

IV. Analysis and Conclusions

As set forth below, the following findings of fact and conclusions of law are based upon analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. 29 C.F.R. § 18.57. In deciding this matter, the administrative law judge is entitled to weigh the evidence and to draw inferences from it. *See Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 477 (1947); 29 C.F.R. § 18.29.

³ 461.20 / 11.53 = 40

⁴ 443.33 / 11.08 = 40

A. LAST RESPONSIBLE EMPLOYER

The last responsible employer rule generally holds that a claimant's last employer is liable for all compensation due, despite the fact that prior employers may have contributed to the disability. *Metro. Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 1104 (9th Cir. 2003); *Found. Constructors, Inc. v. Dir., OWCP*, 950 F.2d 621, 623 (9th Cir. 1991). In cumulative trauma cases, the two-injury rule applies and the responsible employer depends upon the cause of the claimant's ultimate disability. *Metro. Stevedore*, 339 F.3d at 1102; *Found. Constructors*, 950 F.2d at 623-24 (also referring to the two-injury rule as the "aggravation rule").

If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.

Found. Constructors, 950 F.2d at 624 (citing *Kelaita v. Dir., OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986); accord *Metro. Stevedore*, 339 F.3d at 1105; *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453, 456 (1981), *aff'd sub nom. Willamette Iron & Steel Co. v. Dir., OWCP*, 698 F.2d 1235 (9th Cir. 1982).

The two-injury rule applies even if the employee did not incur the greater part of her injury with that employer. *Found. Constructors*, 950 F.2d at 624 (citing *Port of Portland v. Dir., OWCP*, 932 F.2d 836, 839-40 (9th Cir. 1991)). It is well-established that in the realm of workers' compensation, to hasten disability is to cause it, and if an employment injury accelerates a condition that ultimately would have become disabling at some point, that employment injury causes the employee's disability. *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966). In assigning liability to the last employer, the degree of additional contribution need not be great – even "some minor but permanent increase in the extent of . . . disability" will suffice. *Metro. Stevedore*, 339 F.3d at 1105. If a claimant's injury could have been caused by both the latter employer and the former employer, the flare-up of pain is the result of cumulative trauma that aggravates the underlying injury. *Kelaita*, 799 F.2d at 1311-12. Even where much of the existing condition stemmed from the progression of the injury over time, if the latter employment is harmful to the claimant's condition, or if the claimant worsens his preexisting injury, the last employer is responsible for compensation. *Found. Constructors*, 950 F.2d at 624-25. It is well-established in the Ninth Circuit that an injury that increases symptoms is an aggravation. See *Kelaita*, 799 F.2d at 1311-12; *Found. Constructors*, 950 F.2d at 624-25; *Metro. Stevedore*, 339 F.3d at 1105-07.

In this context, each potentially responsible employer bears the burden of proving by a preponderance of the evidence that it is not the responsible employer. *Buchanan v. Int'l Trans. Servs.*, 33 BRBS 32, 35-36 (1999) ("*Buchanan II*"). The first employer bears the burden of showing that there was a new injury or aggravation during employment with the second employer. *Buchanan v. Int'l Trans. Servs.*, 31 BRBS 81, 84-85 (1997) ("*Buchanan I*"). To escape liability, the second employer must prove that claimant's condition is solely the result of the progression of the injury with the first employer. *Id.* at 85. The judge's responsibility is to

weigh this evidence to determine if the resulting condition was the result of a work-related aggravation, or the natural progression of the underlying disability. *Buchanan II*, 33 BRBS at 35.

In *Metropolitan Stevedore*, 339 F.3d at 1104, the claimant experienced pain in his knees that began to increase significantly over the course of many years as a forklift driver, and after attempting to avoid work that could worsen his condition, he eventually sought medical treatment while employed at Crescent City. His doctor informed him that he needed knee replacement surgery because his medial joint line collapsed and further X-rays showed that no cartilage remained in his knees. *Id.* The claimant continued to work; he scheduled surgery a year later while employed at Crescent Wharf, and his doctor performed the surgery when he was last employed by Metropolitan Stevedore, for whom he worked for only one day. *Id.* The Ninth Circuit affirmed the ALJ's decision that Metropolitan Stevedore was the last responsible employer because the employment at that employer caused "some minor but permanent increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled." *Id.* at 1105. The *Metropolitan Stevedore* court explained that there was substantial evidence that the claimant's work, "even on that single day," "caused a marginal increase in the need for surgery," and aggravated his underlying condition. *Id.* at 1105-06. The Ninth Circuit noted that although the result of the last responsible employer rule might seem harsh, "[the] bright line rule eliminates the need for costly litigation and helps ensure that workers receive timely and adequate compensation for their injuries." *Id.* at 1105-07; *accord Found. Constructors*, 950 F.2d at 623 ("[t]his rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time") (quotations omitted).

In *Kelaita*, 799 F.2d at 1309-10, the claimant suffered identical injuries to his right shoulder on separate occasions at two different employers. The Ninth Circuit affirmed the ALJ's decision that the latter employer was the last responsible employer. *Id.* at 1310, 1312. It found substantial evidence that the claimant's injury resulted from continuous use of his arm and that "[e]ach flare-up of pain represented cumulative trauma and aggravated the underlying injury." *Id.* at 1311-12. Because the latter employer was the employer during the most recent "flare up" or aggravation, it was found to be the last responsible employer and liable for the entire disability. *Id.* at 1312.

In *Foundation Constructors*, 950 F.2d at 622, the claimant injured his back working as a pile driver and he sought treatment from his doctor who initially advised against job duties that worsened the pain. The doctor later determined that the claimant's back had deteriorated so much that the claimant could no longer work as a pile driver, and, at that time, the claimant's employer recently had been acquired by another company. *Id.* The Ninth Circuit affirmed the ALJ's decision that the acquiring company was liable because it was undisputed that the claimant's back condition "steadily worsened" at his new employer. *Id.* at 623-24. The *Foundation Constructors* court dismissed the acquiring company's argument that the degeneration was due entirely to the inevitable course of prior injuries because his employment was "'harmful' to his back condition," which was adequate evidence that the claimant aggravated his preexisting injury. *Id.* at 624-25.

Where claimant's work results in an exacerbation of his symptoms, the employer at the time of the work events resulting in the exacerbation is responsible for any resulting disability. *See Marinette Marine Corp. v. Dir.*, OWCP, 431 F.3d 1032 (7th Cir. 2005); *Del. River Stevedores, Inc. v. Dir.*, OWCP, 279 F.3d 233 (3rd Cir. 2002); *Kelaita*, 799 F.2d at 1311-1312. In this regard, the Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624; *O'Leary*, 357 F.2d 812; *see also Abbott*, 14 BRBS 453, *aff'd mem. sub nom. Willamette Iron & Steel Co.*, 698 F.2d 1235.

1. Evaluation of Expert Credibility

The ALJ is responsible for determining credibility and resolving conflicts in medical testimony. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (citing *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984)). "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). In arriving at a decision, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence, to draw inferences from such evidence, and is not bound to accept the opinion or theory of any particular medical examiner or other expert witness. *Bank v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999). An administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. *Altemose Constr. Co. v. NLRB*, 514 F.2d 8, 14 n.5 (3d Cir. 1975). In evaluating expert testimony, the judge may rely on his own common sense. *Avondale Indus., Inc. v. Dir.*, OWCP, 977 F.2d 186, 189 (5th Cir. 1992).

The opinion of a Claimant's treating physician is generally to be accorded greater weight, since the treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Amos v. Dir.*, OWCP, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Magallanes*, 747 F.2d at 751; *Duhagon*, 31 BRBS at 101; *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 n.3 (2003). "The treating physician's opinion is not, however, necessarily conclusive as to either a physical condition or the ultimate issue of disability," and the administrative law judge retains the discretion to disregard even an uncontradicted opinion of a treating physician when there are clear and convincing reasons for doing so. *Magallanes*, 881 F.2d at 751.

Generally, the treating physician opinion is entitled to great weight. However, given the specific facts of this case, I find that Dr. Sisto,⁵ the expert retained by Yusen, to have the more

⁵ SSA Terminals argued in its closing brief that Dr. Sisto's expert opinion fell short of the requirements of Federal Rule of Civil Procedure 702 and the standards set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). However, the Ninth Circuit has articulated that the standard for expert evidence in administrative proceedings is not subject to the requirements of *Daubert* and Rule 702. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 n.4 (9th Cir. 2005).

persuasive opinion regarding aggravation that has more support in the record than that of Dr. Delman, the treating physician. Dr. Delman was Claimant's treating physician from the time of injury until July 2009, a period of not quite six months. F.F. ¶ 15. His objective opinion was that there was no aggravation to Claimant's knee injury from working the additional nine days and specifically not while working the final shift at SSA Terminals before he went out on disability. F.F. ¶¶ 16-19. Dr. Delman opined that,

Certainly, the patient may have sustained a partial injury on January 9, 2009, that worsened following that date, but this most likely would have been associated with a specific episode of giving out or increased symptoms and swelling. I would have to rely on the information from the patient as to whether this occurred to form an opinion.

F.F. ¶ 16. However, what is missing from Dr. Delman's assessment is the subjective information provided by Claimant by way of deposition that corroborated his testimony at hearing and the opinion of Dr. Sisto. Dr. Delman also had an opportunity to ask those questions of Claimant while he was treating him, but did not inquire or did not notate any information in his report, which was why Dr. Sisto thought Dr. Delman took a poor history from Claimant. F.F. ¶ 39. Dr. Delman did not include in his opinion any of the subjective evidence that Claimant experienced unbearable and extreme pain in his knee, experienced some swelling as reported by Dr. Sisto, and could no longer work due to increased pain after his last three shifts, but left open the possibility of aggravation if the Claimant reported this information.

Further, Dr. Delman offered testimony and an opinion in an unrelated case that reached the opposite conclusion on very similar facts. *See* F.F. ¶¶ 21-23. In the Fairchild matter, Dr. Delman offered the opinion that time spent driving the UTR did aggravate the injury to the claimant in that matter. *See* F.F. ¶ 21-23. It is difficult to reconcile the opinion offered in the Fairchild matter with the opinion offered here. In Fairchild, Dr. Delman discounted the lack of clear objective changes in the claimant's condition caused by her work driving UTRs and based his opinion about aggravation primarily on the subjective information told to him by the claimant. In this case, Dr. Delman based his opinion upon the lack of objective findings of aggravation of Claimant's right knee, and did not emphasize any of the subjective findings that might have affected his opinion as it did in Fairchild. Dr. Delman stated that absent the subjective information, there was no evidence of a permanent aggravation. F.F. ¶¶ 16-19. Dr. Delman did not consider that Claimant experienced pain to the point that it was unbearable and extreme in his right knee, which is a strong indicator of an aggravated condition in the knee. F.F. ¶¶ 5, 7. The record indicates that Dr. Delman may have known that Claimant continued to work, but there is very little information about whether he inquired of Claimant how his knee felt following those shifts. In fact, Dr. Sisto reviewed Dr. Delman's medical reports for some indication of Claimant's knee condition, but found that Dr. Delman had not taken a thorough medical history. F.F. ¶ 39. Because on very similar facts, Dr. Delman gave significant weight to the subjective opinion of the claimant, it would make sense for him to do the same here. Instead, Dr. Delman did not appear to investigate the subjective complaints Claimant reportedly experienced following the work shifts after his injury and did not account for Claimant's reports of unbearable and extreme knee pain following the last work shift, or an increase in the pain from 5 or 6, to 7 or 8, on a 10-scale. F.F. ¶¶ 5-7. Had he done so, it is likely that Dr. Delman would have offered a different opinion about aggravation.

Moreover, in his letters to counsel, Dr. Delman specifically stated that in the absence of information about a new injury, or another specific event or episode of giving out, followed by increased pain or swelling, he could not say there was a permanent aggravation. F.F. ¶¶ 16-18. However, in this matter, there was evidence available from Claimant that was not considered by Dr. Delman. Here, for example, Dr. Delman said that objectively there was no evidence of aggravation, but he did not account for Claimant's subjective increase in pain and swelling during his final three shifts, to the point that his last shift at SSA was unbearable and he knew he could not work any longer. F.F. ¶¶ 5, 7. When you combine Dr. Delman's opinion in this matter with his opinion in the Fairchild matter, his opinion here is less persuasive because of the objective – subjective pain distinction. Here, Dr. Delman based his opinion on objective findings, but did not consider the subjective information from Claimant. Therefore, I give less weight to the opinion of Dr. Delman regarding aggravation. There is no question that the matters are not entirely the same, such as in Fairchild, the claimant worked regular shifts without any attempts to immobilize her injured knee and experienced some improvement before returning to work, unlike here, where Claimant placed his injured knee in a cast-like brace, that was basically immobilized and unused while he drove the UTR. Nevertheless, Claimant reported increased pain and swelling while working the last few shifts and ultimately the last shift at SSA just as the Fairchild claimant did. The subjective findings are relevant and ultimately persuasive here.

Additionally, it is worth noting that Dr. Delman's opinion about aggravation was offered in a series of letters to counsel that were not subject to cross examination. F.F. ¶¶ 16-18. Dr. Delman did not give a deposition in this matter or, if he did give a deposition, it was not offered into evidence by any party. Finally, Dr. Delman had not been Claimant's treating physician since July 2009 and had not had occasion to examine and evaluate Claimant since that time. F.F. ¶ 15.

Dr. Sisto, on the other hand, gave particular credence to Claimant's subjective complaints, specifically that he experienced increased pain and swelling over the last three shifts to the point that he could no longer work at the end of his final shift at SSA Terminals. F.F. ¶¶ 35, 37-38. Dr. Sisto used his extensive experience with knee injuries and his knowledge of ACL and meniscus tears to propound persuasively that Claimant could not have continued to work, walk and otherwise live his life without causing an aggravation to his injured knee. Dr. Sisto believed that Claimant should have been on bed rest, which Dr. Sisto would have ordered if Claimant were his patient. F.F. ¶¶ 37-38. Anything short of bed rest would have aggravated and worsened the underlying injury due to the nature of the injury to the knee and surrounding chondromalacia. Dr. Sisto could not say how much worsening objectively because there was no medical evidence, but given his extensive experience, review of Claimant's treatment and medical history, a review of Claimant's deposition, and based upon his own personal interview with Claimant, he believed an aggravation occurred. F.F. ¶¶ 37-38. This is consistent with the opinion offered by Dr. Delman in the Fairbanks matter and more consistent with the facts in this case. F.F. ¶¶ 21-23. Dr. Delman's opinion in Fairbanks contemplated that his opinion about aggravation could change if there was evidence of some other change in Claimant's condition while working after the injury. F.F. ¶¶ 16-18. Accordingly, I find Dr. Sisto to have the more persuasive and well-founded position in this matter regarding aggravation of the injury.

In addition, I do not find any bias in the opinion of either Dr. Sisto or Dr. Delman based upon the amount of money they were paid by the Employers over the past couple of years. While interesting, other than the fact that they received payment for their evaluations, Dr. Sisto almost \$142,000 in one year and Dr. Delman almost \$80,000, F.F. ¶¶ 20, 39, there was nothing compelling to indicate that either doctor provided anything other than a sound opinion based upon their extensive medical experience and examinations of Claimant. I find that Dr. Sisto, given his testimony and the other evidence in this matter, is the more persuasive of the two on the issue of aggravation and his opinion is entitled to greater weight under the facts of this matter than that of Dr. Delman.⁶

2. Discussion of Aggravation

The facts here are relatively undisputed. Claimant had a significant knee injury on January 9, 2009, while working at Yusen. F.F. ¶¶ 1-3. The injury was severe and he was taken to the hospital by ambulance. F.F. ¶ 1. In spite of the significant pain, Claimant desired to continue working because of financial obligations and told Yusen that he was going to continue to work. F.F. ¶¶ 10-11. Yusen told him to follow his doctor's advice, but was well aware that he was continuing to work in spite of the pain. F.F. ¶ 13. Claimant worked an additional nine days before going off work due to the injury. F.F. ¶ 4. His final shift occurred at SSA Terminals on January 22-23, 2009. F.F. ¶¶ 5-9.

On that shift, Claimant did not suffer a specific traumatic injury. F.F. ¶¶ 7-9. Instead, he wrapped his leg so that it was like a cast and immobilized. F.F. ¶ 6. He used his arms and other legs to get into the driver's seat of his UTR, where he remained for his shift. F.F. ¶ 6. Claimant candidly stated that his leg pain was increasing over the last three shifts he had been working, and after the shift at SSA Terminals, he knew he could no longer work. F.F. ¶¶ 5-7. At his deposition, he explained that the pain increased, but at trial he clarified that testimony. He explained at trial that the pain did not change on that one shift, but instead was increasing over the last three shifts. F.F. ¶ 7. He had never given testimony at a deposition before and thought the question and answer format was unusual. F.F. ¶ 7. He noted at hearing that he did not suffer any greater pain on that shift more than on any other, and he believed that the pain was still the same from the original injury. F.F. ¶ 7. Claimant was credible and believable on this point. He immobilized his knee the best he could but continued to work because of financial obligations. F.F. ¶¶ 6, 11, 13. Nevertheless, he experienced a worsening of pain during his last three shifts worked, culminating in his final shift at SSA Terminals, which included increased swelling. F.F. ¶¶ 5, 7, 35, 37-38. Claimant's testimony at first blush appears to favor a finding that there was not an aggravation. However, when comparing the statements he gave at deposition, to his doctors, and at hearing, the only reasonable conclusion when reviewing the totality of the evidence is that an aggravation occurred during his shift with SSA. F.F. ¶ 7.

⁶ Further, based upon the procedural history in this matter, I find no evidence bearing on credibility or bad faith. There is no indication or evidence that the addition of SSA Terminals to this matter, while very late in the process, was for any reason other than a sound legal reason by Yusen, which was supported by the evidence in this matter. I find no evidence of bad faith and decline to give the procedural history any weight in evaluating the credibility in this matter. *See* SSAX 21-28, 33, 35, 37-41, 44-45, 51.

Even though Claimant attempted to minimize the knee pain so that he could continue to work, he experienced a worsening of pain and swelling at SSA. His testimony shows that the pain increased over a series of shifts, and Claimant explained that his pain returned to his post-injury pain once he stopped working for a couple of days. F.F. ¶ 7. While there is no medical evidence, such as an MRI image, to corroborate the microscopic tear that Dr. Sisto believed occurred at work, the opinion of Dr. Sisto incorporates all of the relevant evidence, including both the objective and subjective indications of worsening described by Claimant. F.F. ¶ 35-37. Dr. Sisto's explanation about a microscopic tear was compelling and persuasive. F.F. ¶ 38. Dr. Sisto explained that to a medical probability, the work that Claimant did following the January 9th injury could have led to further tearing of the ACL and meniscus, and, since he had a torn ACL, his knee was unstable, which meant the bones hit each other more regularly and with abnormal forces, leading to chondromalacia. F.F. ¶ 38. Further, Dr. Sisto credited the subjective pain that Claimant experienced in forming his opinion about aggravation. F.F. ¶ 37. Dr. Sisto believed that someone with Claimant's injury should be on bed rest; otherwise, every activity would have worsened the condition. F.F. ¶¶ 37-38. As explained above, the legal threshold of aggravation in two-injury cases is not a rigorous standard. In the longshore context, the legal term "aggravation" includes a worsening, minor increase in the need for surgery, exacerbation, or acceleration of physical conditions. *See Metro. Stevedore*, 339 F.3d at 1105-06; *Found. Constructors*, 905 F.2d at 623-25; *Kelaita*, 799 F.2d at 1311-12. Given the information and explanation provided by Claimant, Dr. Sisto has the more plausible and well-reasoned opinion and I am giving it great weight in the evaluation.

Finally, it is worth noting that the facts of this matter are nearly identical to the facts in *Metropolitan Stevedoring*, 339 F.3d 1102. In that matter, the Claimant continued to work after his knees were bone-on-bone and already had knee replacement surgery scheduled to replace his injured knee. *Id.* at 1104. The ALJ found that the employer on his last shift before surgery was the last responsible employer because there was some evidence of a minor but permanent increase in the disability and the need for surgery. *Id.* The facts in the current case are very similar. Claimant was in need of surgery to replace the torn ACL and meniscus, but he continued to work for financial reasons. F.F. ¶¶ 4, 11, 13. His last shift caused an increase in pain and swelling to the point that he could no longer work. F.F. ¶¶ 4, 7. He stopped working and had surgery two weeks later. F.F. ¶¶ 7, 15. Further, in *Metropolitan Stevedoring*, there was not any single traumatic event on the final shift worked, yet the court still found aggravation, which is similar to the circumstance here where Claimant did not experience one single traumatic event on his final shift. The most persuasive expert opinion showed that some aggravation, perhaps only microscopic, occurred on that last shift because it was credibly established that someone could not work on with a torn meniscus and ACL without experiencing an aggravation of the underlying injury. F.F. ¶¶ 37-38.

Accordingly, after consideration of the entire record, the relevant case law, and an examination of the respective positions regarding natural progression and aggravation, I find that Claimant's pain on his last shift at SSA Terminals was an aggravation of the underlying injury and not the natural progression of the January 9 injury suffered at Yusen.

B. NATURE AND EXTENT OF DISABILITY

The burden of proving the nature and extent of disability lies with Claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980). The Act defines disability as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. . . .” 33 U.S.C. § 902(10). A disability is characterized according to its nature, or duration, and its extent, or severity. Disabilities are either temporary or permanent in nature, depending upon whether the injury has reached the point of maximum medical improvement (MMI). Additionally, disabilities are either partial or total in extent, depending upon whether the injured worker is capable of performing any kind of employment and whether he has suffered a loss of earning capacity. *Stevens v. Dir.*, *OWCP*, 909 F.2d 1256, 1259-60 (9th Cir. 1990). Determining the nature and extent of disability involves both a medical and an economic determination. *Id.*

An injured claimant who is incapable of working is entitled to total disability compensation equal to two-thirds of his average weekly wage (AWW) as of the date of injury. 33 U.S.C. § 908(a). If a claimant is capable of some work, he is entitled to partial disability equal to two-thirds of the difference between his AWW and his post-injury wage earning capacity. 33 U.S.C. § 908(e).

1. Maximum Medical Improvement

The determination of the nature of Claimant’s disability, either temporary or permanent, centers on the date of MMI. *See Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.5 (1985); *Trask*, 17 BRBS at 59. MMI is a question of fact that the ALJ determines from the medical evidence in the record. *Container Stevedoring Co. v. Dir.*, *OWCP*, 935 F.2d 1544, 1551 (9th Cir. 1991); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

A disability becomes permanent when the worker's condition reaches the point of MMI, which is the point when the injury has healed to the fullest extent possible. *Stevens*, 909 F.2d at 1257; *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233 (1988); *Trask*, 17 BRBS 56. Permanency may also be found using a second test, i.e., when the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson*, 400 F.2d at 654; *Care v. Wash. Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment with a view toward improving his condition. *Leech v. Serv. Eng'g Co.*, 15 BRBS 18, 21 (1982). A disability suffered by a claimant before reaching MMI is considered temporary in nature. *Stevens*, 909 F.2d at 1259.

Claimant contends that he has not attained MMI, even though he has returned to his usual and customary position effective January 15, 2011. F.F. ¶¶ 12, 30; *see* Stipulation 6, *supra* at 2. Yusen asserts that Claimant was at MMI as of March 15, 2010, based upon the opinion of Dr. Sisto. Yusen argues that even if Claimant was not at MMI, he was capable of doing alternative

work as of June 8, 2010, based upon work restrictions imposed by Dr. Sisto and Dr. Kharzai, and a labor market survey conducted by Mr. Morrissey. Finally, even if those dates do not show Claimant could work, Yusen argues that based upon the video surveillance evidence, Claimant could have worked as a UTR driver, and thus as a longshoreman, effective October 29, 2010.

The evidence established that Claimant had not reached MMI as of March 15, 2010. Claimant was receiving continued treatment by Dr. Kharzai, a reputable and experienced orthopedic surgeon. F.F. ¶ 15, 30. Dr. Kharzai was regularly treating Claimant following his second knee surgery in September 2009, and it was the sound medical opinion of Dr. Kharzai that Claimant required an additional (third) surgery on the knee. F.F. ¶ 28-29. Claimant agreed and received the subsequent surgery on October 8, 2010. F.F. ¶ 29. Given the close relationship between the treating physician and the nature of the medical history of Claimant's knee injury, it is entirely reasonable to believe that Claimant had not reached MMI and required further surgery. Claimant continued to complain of pain, as well as catching and clicking in the knee, and there was some evidence of crepitation. F.F. ¶ 28. As the treating physician, Dr. Kharzai's opinion is entitled to significant weight and deference. I find no compelling reason to discount any of the information offered by Dr. Kharzai regarding the treatment of Claimant's knee injury.

Further, the opinion of Dr. Sisto regarding MMI is not supported by the other evidence in the case. While Dr. Sisto provided a persuasive and the stronger opinion regarding aggravation, I am not persuaded that Dr. Sisto's opinion is the more persuasive on the issue of MMI. Dr. Sisto relied upon Claimant's subjective pain to determine there was an aggravation, but discounts any subjective complaints of pain from Claimant in his evaluation of MMI. F.F. ¶ 36. The issue really comes down to treatment—and I find that the interpretation given by Dr. Kharzai to the medical evidence and treatment plan to be more credible and entitled to more weight. Further, Dr. Sisto knew that Claimant was experiencing pain in his back and thought it was related to the knee injury and was an industrial injury. F.F. ¶ 34. However, even with this additional information, Dr. Sisto did not change his opinion about MMI and the treatment for Claimant's knee. Dr. Kharzai has the more reasoned opinion in this regard. Furthermore, Claimant explained that he had experienced significant relief following the surgery, an explanation that Dr. Sisto found to be the equivalent of a "placebo effect" because there was no change in the objective evidence of how Claimant performed pre and post-third surgery. F.F. ¶ 36. It was unclear why Dr. Sisto discounted the subjective views of Claimant when he was so persuaded by the subjective interpretation regarding aggravation. Thus, Claimant was not at MMI as of March 15, 2010, as suggested by Dr. Sisto.

For similar reasons, Claimant was not at MMI on July 12, 2010, when he was examined by Dr. Sisto in spite of Dr. Sisto's opinion that he was at MMI for his knee, but not for his back. F.F. ¶ 34. During that examination, Claimant was still under the treatment of Dr. Kharzai, who had recommended further MRI of both the knee and back. F.F. ¶¶ 28, 34, 36. As explained above, Dr. Kharzai, as the treating physician is entitled to deference on the treatment issue. F.F. ¶¶ 16-19. Further, Claimant had just had knee surgery in October 2010, and was not yet at MMI as of the date of the video surveillance on October 29, 2010, or during the December 13, 2010, examination by Dr. Sisto who opined that Claimant was no longer at MMI for his knee. F.F. ¶¶ 29-30, 34-35, 40.

The persuasive weight of the evidence is that Claimant did not reach MMI as of March 15, 2010, nor was he at MMI any time prior to returning to work as a longshoreman in January 2011. In fact, Claimant had not been told he was at MMI and therefore his disability was not yet permanent, before he returned to work in January. F.F. ¶ 12. Therefore, the nature of his disability was temporary from January 23, 2009, to January 14, 2011. Even though Claimant had not reached MMI, Yusen put forth some evidence that Claimant could work at entry-level clerical and unarmed security jobs prior to his return to his usual and customary position. The evidence will be examined in turn. Because Claimant had not reached MMI, the degree of permanent impairment is not determined.⁷

2. Claimant is Totally Disabled

Unlike the nature of disability, the extent of disability is a legal and economic determination. Since the extent of disability is not a medical determination, a medical opinion on the extent of disability is not determinative. The burden is initially on the claimant to demonstrate total disability by showing that he cannot return to his regular employment due to his work-related injury. *Bumble Bee Seafoods v. Dir., OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask*, 17 BRBS at 59. If the claimant shows that he cannot return to his past job due to a work-related injury, the claimant is presumed to be totally disabled unless the employer demonstrates the existence of suitable alternate employment in the geographical area where the claimant resides. See, e.g., *Hairston*, 849 F.2d at 1196; *Bumble Bee*, 629 F.2d at 1327. A claimant who can return to his usual employment has suffered no loss of wage earning capacity and is not disabled under the Act. A claimant must show a loss in wage-earning capacity in order to demonstrate the extent of his disability. See *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). If the employer succeeds in establishing suitable alternate employment, the claimant may still prevail by showing an inability to secure employment despite a diligent effort. *Stevens*, 909 F.2d at 1258.

Claimant has returned to his usual and customary employment as a longshoreman effective January 15, 2011. Thus, he is no longer disabled under the Act as he is no longer suffering a loss in wage earning capacity. No one disputes that Claimant could not return to his usual and customary position until at the earliest October 29, 2010, or at the latest, the date he actually returned to longshore work in January 2011. Thus, Claimant was totally disabled under the Act as of January 23, 2009.

However, prior to returning to work on January 15, 2011, the question remains whether there was suitable alternative employment available prior to his return to work. The discussion below concerns whether alternative work exists such that Claimant has a temporary total disability or a temporary partial disability.

⁷ At the March 15, 2010, examination of Claimant, Dr. Sisto opined that not only was Claimant at MMI, but he also had a 7% whole person impairment rating, which equated to a 16% to life impairment, based upon the Fifth Edition of the AMA Guidelines. F.F. ¶ 33. Because I have determined that Claimant was not at MMI on March 15, 2010, and, therefore, his disability was not permanent, there is no reason to consider or determine this issue.

C. ALTERNATIVE EMPLOYMENT

Once a claimant establishes that he cannot return to his usual employment, an employer bears the burden of establishing the existence of specific 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. *Bumble Bee*, 629 F.2d at 1330; *Hairston*, 849 F.2d at 1196; *Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 159 n.5 (1997). To satisfy its burden of showing suitable alternative available employment “the employer must point to *specific* jobs that the claimant can perform.” *Bumble Bee*, 629 F.2d at 1330 (emphasis in original); *Berezin v. Cascade General*, 34 BRBS 163, 164 (2000). In requiring evidence of specific jobs claimant can perform, the employer need not obtain a job for the claimant; rather, it must establish the availability of an actual job, rather than “theoretical job opportunities,” that are suitable given claimant’s abilities and restrictions. *Berezin*, 34 BRBS at 166; *see Bumble Bee*, 629 F.2d at 1330. A showing that a claimant might be physically able to perform general work is insufficient. *Hairston*, 849 F.2d at 1196. For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability and they must be jobs that are regularly available. *Edwards v. Dir.*, *OWCP*, 999 F.2d 1374, 1376 (9th Cir. 1993); *Stevens*, 909 F.2d at 1258; *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988).

In determining the employee's ability to perform possible work, the Board must consider the claimant’s technical and verbal skills, as well as the likelihood, given the claimant’s age, education, and background, that he would be hired if he diligently sought the possible job. *Stevens*, 909 F.2d at 1258. The ALJ must determine the claimant’s physical and psychological work restrictions based on the medical opinions of record and then apply those restrictions to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maint. Indus. Inc.*, 17 BRBS 99, 103 (1985); *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122, 123 (1996).

If the employer makes the requisite showing of suitable alternate employment, the claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he diligently tried to obtain such work, but was unsuccessful. *Edwards*, 999 F.2d at 1376 n.2; *Berezin*, 34 BRBS at 167. If claimant is medically able to work, but his condition is not yet permanent, the appropriate award is one for temporary partial disability in the event that employer establishes the availability of suitable alternate employment. *See* 33 U.S.C. § 908(e), (h); *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513 (4th Cir. 2000); *Berezin*, 34 BRBS at 167.

If the claimant fails to rebut the employer’s showing of suitable alternative employment, he is entitled to partial disability benefits if his retained earning capacity is less than his average weekly wage at the time of his injury. *See, e.g., Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984); *Darcell v. FMC Corp., Marine & Rail Equip. Div.*, 14 BRBS 294, 297 (1981); *see also* 33 U.S.C. § 908(e). A claimant is not required to apply for the specific jobs identified by the employer; he need only establish that he was reasonably diligent in attempting to secure a job “within the compass of employment opportunities shown by the employer to be reasonably attainable and available.” *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981); *see also Hairston*, 849 F.2d at 1196 (the ALJ must

determine whether there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job).

Yusen contends that Claimant could have performed non-longshore work effective March 15, 2010, or at least as of the time of the labor market survey on June 8, 2010. If those dates are not accepted, then Yusen contends that Claimant could have returned to longshore work effective October 29, 2010, the date of the video surveillance. Yusen also contends that Claimant was again capable of perform non-longshore work as of January 5, 2011, the date of the updated labor market survey. Claimant contends that due to his pain and treatment, he was not capable of performing any work until he was actually released to return to work on January 15, 2011.

1. Claimant's Work Restrictions

Dr. Sisto opined that on March 15, 2010, Claimant was at MMI and would have work restrictions that prevented him from squatting, kneeling and climbing. On May 4, 2010, Dr. Kharzai, Claimant's treating physician, reviewed the work restrictions suggested by Dr. Sisto and stated that he agreed with them, but included two additional restrictions to not pivot or twist the right knee. Taken together, the record reasonably established that Claimant's work restrictions as of March 15, 2010, were no squatting, kneeling or climbing, and no twisting or pivoting at the right knee. Further, Dr. Sisto opined that Claimant's work restrictions as of December 13, 2010, were no squatting, kneeling or climbing, and there was no contrary evidence presented about work restrictions. Thus, as of December 13, 2010, Claimant's work restrictions were no squatting, kneeling or climbing.

2. Labor Market Survey

Based upon the work restrictions, Yusen asked Mr. Morrissey to prepare a labor market survey. Mr. Morrissey prepared a report dated June 8, 2010, which found that positions such as cashier and unarmed security guard were available and would fit within the work restrictions imposed by Dr. Sisto and Dr. Kharzai. F.F. ¶¶ 27, 33, 41. He also believed these were appropriate restrictions because Dr. Kharzai, the treating physician, stated he did not disagree with Dr. Sisto in a report of his May 4, 2010, examination of Claimant, and that he agreed that Claimant should avoid pivoting and twisting of his knee. F.F. ¶ 27. In the June 8, 2010, report, Mr. Morrissey found that suitable alternative employment existed for Claimant at an average hourly rate of \$11.53 per hour. F.F. ¶ 42. He revised his job survey on January 5, 2011, and found that there were positions available at an average hourly rate of \$11.08. F.F. ¶ 43. Mr. Morrissey found that work was available during the March 1 to June 1, 2010, time frame at an average rate of \$10.90 per hour. F.F. ¶ 43.

The evidence established that suitable alternative employment was available to Claimant as of June 8, 2010, which was the date that the labor market survey was conducted. The jobs provided were within the work restrictions given by the doctors and there was no indication that they were not within the local community. F.F. ¶¶ 42-43.

Even though Claimant continued to undergo treatment and reported experiencing pain related to his right knee and low back pain associated with the right knee injury, there was no indication from his treating physician or from Dr. Sisto that he could not work in any capacity. Claimant ultimately underwent a third surgery on the knee in October 8, 2010, even though there was disagreement between Dr. Sisto and Dr. Kharzai about whether the surgery was necessary. F.F. ¶¶ 28-29, 36. Claimant experienced significant relief after the third surgery. F.F. ¶¶ 29, 36. Dr. Sisto established work restrictions for Claimant as of December 13, 2010, and an updated labor market survey showed jobs available within his restrictions as of January 5, 2011, the date of the updated report.

Based upon this information, I find that Claimant could have worked at entry-level sedentary nature jobs as of June 8, 2010, the date of the labor market survey, until the third surgery occurred on October 8, 2010. After the surgery, there was no evidence that he could return to alternative work until December 13, 2010, when Dr. Sisto examined Claimant and provided him work restrictions which were the same as the earlier restrictions and the labor market survey showed that entry-level suitable alternative employment was available as of January 5, 2011. Claimant returned to regular longshore work on January 15, 2011.

3. Claimant's job search

Claimant does not offer any evidence disputing the findings of the labor market surveys or the availability of the jobs listed therein. The labor market survey reports reflect that the each job easily fit within the work restrictions listed above, and that the jobs were available in the local community. F.F. ¶¶ 41-43. Claimant established that he did not pursue any work because of the pain he was experiencing and he said he would not have been able to focus. F.F. ¶ 12.

4. Claimant could work at alternative jobs

Claimant had work restrictions placed upon him by his treating physician. While there was a dispute between the Employer's expert witness, Dr. Sisto, and that of the treating physician, Dr. Kharzai, over the appropriate treatment plan for Claimant and his injury, they did not disagree over the appropriate work restrictions. F.F. ¶ 27. Dr. Kharzai had a reasonable treatment plan for Claimant given his complaints and injury, but Dr. Kharzai never opined that Claimant could not do any work. Here, the showing by Mr. Morrissey is sufficient to demonstrate suitable alternative employment available to Claimant. F.F. ¶¶ 41-43. Further, there was no dispute that Claimant did not seek any other employment while he was out on disability. In fact, Claimant stated that he did not believe he could work because of his pain and did not seek any jobs. F.F. ¶ 27.

Therefore, because Yusen showed the availability of suitable alternative employment available to Claimant as of June 8, 2010, and Claimant failed to provide any evidence of a diligent job search, the evidence established that Claimant was temporarily, partially disabled effective June 8, 2010, until his third surgery on October 8, 2010. After that date, an updated labor market survey showed jobs were available as of January 5, 2011, that fit within the work restrictions listed by Dr. Sisto on December 13, 2010. Accordingly, Claimant was able to

perform suitable alternative work from January 5, 2011, until he returned to longshore work on January 15, 2011.

5. Claimant could not return to longshore work as of October 29, 2010

Yusen also asserts that Claimant could have returned to regular longshore work as of October 29, 2010, the date of surveillance video shows him exiting and driving cars, as well as holding children. F.F. ¶ 40. However, I do not find the surveillance evidence to be persuasive or compelling. The video does not show any subjective pain that Claimant may or may not been experiencing, whether he could continue work for 8 hours per day for 40 hours per week, or if there were any other issues related to full-time longshore work. Standing alone, the surveillance video does not persuade me that Claimant was ready to return to full-time work as a UTR driver just two weeks after his third knee surgery. Further, Dr. Sisto later stated at his December 13, 2010, examination that Claimant was no longer at MMI after the October surgery. F.F. ¶ 35.

6. Claimant's Wage Earning Capacity

An award for temporary partial disability is based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); *Richardson v. Gen. Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Where a claimant requests total disability benefits, the projected earnings from suitable alternative employment are treated as the claimant's wage earning capacity. 33 U.S.C. § 908(h); see *Devillier v. Nat'l Steel and Shipbuilding*, 10 BRBS 649, 655-56 (1979). Total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. *Stevens v. Dir.*, OWCP, 909 F.2d 1256, 1259 (9th Cir. 1990); *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128, 131 (1991).

The Act contemplates that the current dollar amount of post-injury "wage-earning capacity" be adjusted downward (*i.e.*, backward in time) to account for post-injury inflation and general wage increases. This adjustment allows post-injury "wage-earning capacity" to be meaningfully compared to pre-injury "average weekly wages." *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1161 (9th Cir. 2002); *Hundley v. Dir.*, OWCP, 32 BRBS 254, 259 (1998).

A reasonable wage-earning capacity is determined by certain variables, including those variables set forth in Section 8(h), such as the nature of the injury, the degree of physical impairment, and the claimant's "usual employment." 33 U.S.C. § 908(h); *Devillier*, 10 BRBS at 655-56. Although the variables under Section 8(h) are to be given "due regard," "any other factors or circumstances which may affect [a claimant's] capacity to earn wages in his disabled condition are to be considered." *Devillier*, 10 BRBS at 655-6.

Based upon Claimant's background, his work restrictions, the nature of the injury and treatment, as well as the nature and type of alternate work offered by Employer through the vocational expert, \$11.53 per hour represents a fair and reasonable hourly wage for Claimant. This number reflects an average of the wages for the jobs presented in the labor market survey. There was a specific cashier position available at \$12.75 per hour and a security position

available at \$13 per hour, but an average of all the positions is best reflective of the nature of the jobs available and Claimant's lack of relevant and recent job experience in entry-level clerical positions. The hourly rate of \$11.53 per hour, or \$461.20 per 40 hour week, is a reasonable wage given the facts of this case, and acknowledges Claimant's lack of experience working in the areas listed, but given his prior work history and educational background, he is more than qualified for these positions and could have found work in this wage range. Furthermore, even though the average pay for the jobs changed during the updated labor survey on January 5, 2011, from \$11.53 to \$11.08 per hour, the evidence established that \$11.53 remained a reasonable anticipated wage for Claimant as of January 5, 2011. F.F. ¶¶ 42-43.

Employer demonstrated suitable alternative employment for Claimant within his work restrictions, which was not rebutted by Claimant. Employer demonstrated that suitable alternative employment was available as of June 8, 2010, when it provided the labor market survey to Claimant, and again as of January 5, 2011, when the updated survey was conducted. As discussed above, the evidence showed that Claimant has a post-injury wage earning capacity of \$461.20 per week. There was full-time work available in Claimant's local community that he is qualified to do and fits within his work restrictions. Thus, Claimant is entitled to an award of temporary partial disability.

To adjust for inflation, the change in the National Average Weekly Wage (NAWW) will be utilized as set by the Department of Labor Division of Longshore and Harbor Workers' Compensation between the date of injury in January 2009 and the date that alternative employment became available in June 2010.⁸ *Quan v. Marine Power & Equip. Co.*, 30 BRBS 124, 127 (1996). For the period of October 2008 to September 2009, the NAWW was \$600.31.⁹ For the period of October 2009 to September 2010, the NAWW was \$612.33.¹⁰ Claimant's wage earning capacity was \$461.20 per week at the time suitable alternative employment was available, or \$452.15 per week at the time of injury as reduced for inflation.¹¹ Since claimant was capable of doing full-time work within his work restrictions, he is entitled to temporary partial disability equal to two-thirds of the difference between his AWW (\$1969.18) and his post-injury wage earning capacity reduced for inflation (\$452.15). 33 U.S.C. §§ 906(b), 908(e).

Claimant had a temporary total disability from January 24, 2009, until the date suitable alternative employment was shown, which was June 8, 2010. He had a temporary partial disability from June 9, 2010, until October 7, 2010, the day before his third surgery. He had a temporary total disability from October 8, 2010, the date of his third surgery, until January 5, 2011, the day Yusen again showed suitable alternative employment was available. He had a temporary partial disability from January 6, 2011, until he returned to regular longshore work on January 15, 2011. Claimant was working in his usual and customary work and no longer had a disability because there was no economic loss related to his injury.

⁹ Division of Longshore and Harbor Workers' Compensation (DLHWC), NAWW Information, <http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm> (6-13-2011).

¹⁰ *Id.*

¹¹ $\$600.31 / \$612.33 = X / \$461.20 = \452.15 .

D. MEDICAL EXPENSES, REIMBURSEMENT AND CREDIT

In general, the employer is responsible for all medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). Claimant is entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for a work-related injury. *Tough v. Gen. Dynamics Corp.*, 22 BRBS 356 (1989). A claimant is entitled to interest on any accrued, unpaid compensation benefits. *See, e.g., Foundation Constructors, Inc. v. Dir., OWCP*, 950 F.2d 621, 625 (9th Cir. 1991); *Bynum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). Accordingly, interest on the unpaid compensation amounts owed by Respondents should be included in the District Director's calculations of amounts due under this Decision and Order.

V. Order

1. SSA Terminals is the last responsible employer and is thus responsible for the disability compensation and medical expenses incurred by Claimant resulting after January 23, 2009. Yusen Terminals remains liable for Claimant's medical care from the date of injury until Claimant's last shift on January 23, 2009.
2. SSA Terminals shall pay Claimant temporary total disability from January 23, 2009, to June 7, 2010, based upon an average weekly wage of \$1,969.18. SSA Terminals shall pay Claimant temporary partial disability from June 8, 2010, to October 7, 2010, based upon an average weekly wage of \$1,969.18 and wage earning capacity of \$452.15. SSA Terminals shall pay Claimant temporary total disability from October 8, 2010, until January 4, 2011, based upon an average weekly wage of \$1,969.18. SSA Terminals shall pay Claimant temporary partial disability from January 5, 2011, until January 14, 2011, based upon an average weekly wage of \$1,969.18 and wage earning capacity of \$452.15.
3. SSA Terminals shall reimburse Yusen for all disability compensation and medical expenses paid to Claimant after January 23, 2009.
4. SSA Terminals shall reimburse the ILWU-PMA for its lien pursuant to the stipulation signed by the parties and submitted at the start of the hearing (ALJX-5).
5. SSA Terminals shall also pay mandatory interest on all accrued benefits at the rate(s) prescribed by 28 U.S.C. § 1961.
6. The District Director shall make all calculations necessary to carry out this Order.
7. The parties are ordered to notify this office promptly if an appeal is filed.
8. Claimant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Claimant's behalf. A fee petition that comports with 20 C.F.R. § 702.132 must be filed within 21 days from the date of this order. The Employer must file its objections within 14 days after the fee petition is served. The parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections within 14 days after objections are served. Both

parties are charged with the duty to arrange the meeting. Claimant's counsel must file a report within 7 days thereafter stating which objections have been resolved, which have been narrowed, and which remain unresolved, and may respond to any unresolved objections. No other reply briefs are permitted.

San Francisco, California

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RICHARD M. CLARK
Administrative Law Judge