

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)



Issue Date: 29 June 2012

CASE NO.: 2011-LHC-2241

OWCP NO.: 08-130409

IN THE MATTER OF:

JUAN SILVA

Claimant

v.

LABOR READY, INC.

Employer

and

ACE AMERICAN INSURANCE COMPANY

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.
For The Claimant

MATTHEW D. CRUMHORN, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a modification claim under Section 22 of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Labor Ready, Inc. (Employer) and Ace American Insurance Company (Carrier) against Claimant.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 16, 2012, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered two exhibits,¹ Employer/Carrier proffered ten exhibits which were admitted into evidence. This decision is based upon a full consideration of the entire record.²

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

This is a modification proceeding following a Decision and Order which issued on August 10, 2009, during which the parties stipulated, and I find:

1. That the Claimant injured his right ankle and leg on February 27, 2008.
2. That Claimant's ankle/leg injury occurred during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.

¹ Post-hearing Claimant offered CX-2, an e-mail from Nestor Rodriguez, a former employer in Mexico, which reflects that in the past Claimant worked on occasion for various companies, and CX-3, "Historical Exchange Rates." An Order issued in this matter which rejected CX-2 and received CX-3. The record was held open to allow Claimant to submit an e-mail offering Claimant a job in Mexico by Mr. Rodriguez. Clearly, CX-2, the offered e-mail, is not relevant to this proceeding and is hereby rejected. Claimant also submitted CX-3, "Historical Exchange Rates," reflecting the value of Pesos to U.S. Dollars through February 20, 2012. Employer/Carrier objected to the document based on the authenticity of the website from which the Exchange Rate was derived. I take official notice of the Exchange Rate Website and admit CX-3.

² References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____.

4. That Claimant contended Employer was notified of the accident/injury on February 27, 2008, whereas Employer contends it received notice of the accident/injury on February 29, 2008.
5. That Employer/Carrier filed a Notice of Controversion on June 18, 2008.
6. That an informal conference before the District Director was held on June 24, 2008.
7. That Claimant reached maximum medical improvement for his right ankle and leg on March 3, 2008.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.
2. Whether Claimant has reached maximum medical improvement for his back injury.
3. The reasonableness and necessity of recommended MRI anthrogram of the right shoulder.
4. Entitlement to and authorization for medical care and services.
5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

Procedural History

On August 10, 2009, the undersigned issued a Decision and Order involving Claimant's original claim. I found Claimant's testimony in the first hearing to be generally credible. I found he reported his neck and back injuries within one week of the accident to Mr. Flores, the branch manager of Employer. I further found that Claimant established a **prima facie** case of injuries to his shoulder, neck, back, and right lower extremity. (D&O, p. 17). I also found that Employer/Carrier rebutted Claimant's **prima facie** case with the opinions of Dr. Larrey. After weighing all of the medical evidence, I concluded that the preponderance of the evidence supported a finding that Claimant had suffered injuries to his neck, back, right shoulder and lower right extremity.

Dr. Donovan treated Claimant and opined he was totally disabled and unable to return to his former work. Dr. Donovan never released Claimant nor opined that he had reached maximum medical improvement. I found Claimant remained temporarily totally disabled until May 27, 2008, when he obtained employment, which I concluded was suitable alternative employment. Despite not having achieved maximum medical improvement, Claimant obtained various jobs beginning on May 27, 2008, and was considered temporarily partially disabled thereafter. He was still employed by FAM Marine at the time of the initial formal hearing earning \$16.00 an hour and had no loss of wage earning capacity from February 20, 2009.

Employer/Carrier did not present any vocational evidence at the initial formal hearing, nevertheless, Claimant sought and obtained suitable alternative employment on his own.

Claimant's average weekly wage was determined to be \$417.92 at the time of his February 27, 2008 work injury. All reasonable and necessary medical care for Claimant's neck, back shoulder and right lower extremity was ordered pursuant to Section 7 of the Act.

Thus, Claimant was found to be entitled to temporary total disability compensation benefits for various periods as set forth in paragraph one of the Order at page 33 of the Decision and Order, as well as temporary partial disability compensation benefits commencing on November 17, 2008.

The Testimonial Evidence

Claimant

On examination by Employer/Carrier, Claimant testified he lives in Crosby, Texas, which is 26 miles from Houston, Texas. He stated since February 2008, he has worked for three employers although the prior Decision and Order reveals work for seven different employers. (Tr. 15-16).

He testified he worked as a fitter and a welder for Labor Ready, but at the time of his work injury in February 2008 he was working as a welder. (Tr. 16-17).

He worked for short periods of time for Liberty Tire Service as a welder. (Tr. 17-18; EX-6). He also worked for ADEC as a welder from November 2008 until February 2009. (EX-4). He worked for Mathew Marine in April 2009. (Tr. 18; EX-5). He testified that he did not leave any jobs because of his job injuries. (Tr. 19).

In July 2011, he received a job offer from Labor Ready, which would comply with his work restrictions. (Tr. 20; EX-2). He testified that when he arrived to work on July 7th, he intended to work but was directed to the office because of a problem with his social security number. (Tr. 21). He recalled discussing a janitorial job with Employer in 2010, but left the position after one week due to pain. (Tr. 24; EX-7, p. 14).

In March 2011, Claimant underwent another examination with Dr. Larrey and told Dr. Larrey of all his complaints, including his back pain following his janitorial job with Labor Ready in 2010. (Tr. 23-24). He testified he later received a letter from Dr. Larrey which stated he had no limitations, but could not remember when he received the document. (Tr. 25).

In June 2011, he was evaluated by Dr. Kaldis and reported all his complaints and symptoms. (Tr. 25). He later received documents stating that he did not have any work restrictions and was able to work. He testified that Dr. Kaldis reviewed the results of his MRI from September 29, 2011, and released him with no damage to his spine. (Tr. 26).

Claimant last saw Dr. Donovan on September 8, 2010, at which time Dr. Donovan recommended that Claimant be restricted to modified light work, and should refrain from any repetitive bending, lifting, pushing, or pulling weights greater than twenty pounds. (Tr. 27-28; EX-8, p. 34). He was given a document stating his restrictions, which he brought to the Employer. (Tr. 27). Dr. Donovan told him that he could do nothing more for Claimant and recommended that he should look for light work. Dr. Donovan released him from his care. (Tr. 28).

In January 2011, Claimant was examined by Dr. Jose Rodriguez after reporting back pain and difficulty lifting with his right arm. (Tr. 29). Dr. Rodriguez recommended an MRI to rule out any persistent or recurring injuries and a follow-up appointment to discuss further treatment. (CX-1, pp. 14-15). The Claimant only saw Dr. Rodriguez for the first appointment and does not have any appointments scheduled for the future. He is not currently taking any prescription medication and has not taken any prescription medication since 2010. (Tr. 29).

He testified that he met with the vocational expert, Dawn Paradis, who was to help find employment for him. (Tr. 29). Claimant stated that Ms. Paradis found approximately eight jobs for him and that he had applied for six of the jobs. (Tr. 31). She found hand-held welder jobs which are light duty work tacking welds. Claimant stated that he only applied to these welding jobs because he didn't know how to do anything else. (Tr. 30). Claimant stated that he did not apply for the parking lot cashier job because he believed he would have to walk or stand for long periods and was not sure he could perform the job. He also did not apply for the job at the Jewelry store. (Tr. 31). He had an interview for a manual welding job on the day of the formal hearing. (Tr. 32).

On cross-examination, Claimant testified that he is 42 years of age and originally from Tampico, Mexico. (Tr. 33). He completed secondary school in Mexico and speaks limited English, but can identify his tools in English. (EX-8, p. 25). He testified that he has been coming to the United States seasonally since 2008, however the Decision and Order from 2009 stated that he began working in Alabama in 1989 and later returned to Houston. (D&O, p. 4).

Claimant testified he had a Social Security number and work visa when he began working for Labor Ready in 2007. His work extension on his work visa ran out in 2008 after his work injury. (Tr. 34). After his injury, he also sought jobs in Tampico, Mexico that would comply with his medical restrictions. He stated that he found a possible job opportunity as a hand held welder in Tampico working for a former employer, Nestor Rodriguez. He had previously worked for Mr. Rodriguez from 2002 to 2005 repairing boats. His pay would be 5,200 pesos per week which he estimated to be equivalent to 12.60 pesos per \$1.00. (approximately US\$413 per week). (Tr. 35-36). He believed he could get and keep the job in Tampico. (Tr. 36).

Claimant looked for an orthopedist on the Internet after he left the transitional position with Labor Ready. He testified that he went to see Dr. Donovan, who told Claimant that he had already released Claimant from his care and could not do anything else for him. He then found Dr. Rodriguez on the Internet as a Spanish-speaking orthopedist. (Tr. 36). Claimant testified that in the past month he was always in pain, and that he was unable to sit for long periods and felt better if he was constantly moving. He had problems when he was working for Labor Ready doing janitorial services. He testified that he sometimes had a problem standing up straight after bending over. At his position for Labor Ready he was asked to clean the legs of chairs and had trouble standing afterwards. (Tr. 37).

Claimant testified that he went to the state unemployment office and applied for jobs as hand-held and stick welder. He stated that he has an interview for one of the jobs through the state unemployment agency the day of the hearing. (Tr. 38). He asked for \$16.00 an hour for pay and was told that they would negotiate his salary at the interview. He testified that he has not submitted his documentation and does not know if his expired work visa will prevent him from accepting the job offer. (Tr. 39).

Claimant testified that he did not apply to the jobs that were listed in the labor market survey, which was prepared by Dawn Paradis. (Tr. 40). However, earlier in examination, Claimant testified that he had applied to six of the jobs found for him by the vocational expert. (Tr. 30). He stated that he did not apply for these jobs because he does not know what the job entails or if he will be able to do the job. (Tr. 40). He also stated that the jobs Ms. Paradis found were in the downtown Houston area and it would take him an hour and a half to get to work. (Tr. 41).

On re-direct examination, Claimant stated that he did apply for six of the jobs located by Ms. Paradis. (Tr. 43). He stated that the jobs that he applied to were either hand-held welding jobs, or a job to clean piping. (Tr. 44). Claimant stated that he first obtained a work visa in 2008, but that he has been working in the United States since 1998. (Tr. 45-46). He testified that when he was working in janitorial services for Labor Ready, he requested that the company modify his current responsibilities because he was having trouble bending and standing. He stated that he was told there were no other available jobs that complied with his work restrictions at that time. (Tr. 46-47).

The Medical Evidence

Dr. Donovan

Dr. Donovan, a board-certified orthopedist, first saw Claimant in 2008 for his lower back pain and continued to treat him until September 2010. (CX-1; EX-8, p. 32). On February 24, 2010, Dr. Donovan performed a lumbar hemilaminectomy at L4-5. (CX-1, pp. 7-10). On August 9, 2010, he opined that Claimant was capable for returning to modified light work, had reached maximum medical improvement, and had the following permanent

limitations: he was unable to do repetitive bending, lifting, pushing, pulling, or twisting any weights greater than twenty pounds; that Claimant will never be able to work as a laborer; and Claimant will never return to work as a boat repairman or AB. (CX-1, pp. 12-13; EX-8, pp. 32-33).

Dr. Larrey

At the behest of the Employer/Carrier, Dr. Larrey, a board certified orthopedic surgeon, conducted a second orthopedic consultation of Claimant on March 2, 2011. (EX-7, p. 14). He had previously seen Claimant in 2008 following his initial injury, and at that time, recommended that Claimant be released with no work restrictions beyond the usual and customary precautions. In his exam in 2008, he stated that Claimant reached maximum medical improvement on March 3, 2008. (EX-7, p. 7). Following his examination of Claimant in 2011, he stated that the patient reached maximum medical improvement on August 9, 2010. He released Claimant with no work restrictions. (EX-7, pp. 18-19).

Dr. Kaldis

Dr. Kaldis conducted Independent Medical Evaluations on June 25, 2011 and October 31, 2011, at the request of the U.S. Department of Labor. In the course of his exams, Dr. Kaldis determined that Claimant had reached maximum medical improvement and could return to full duty without restrictions. (EX-3, p. 2). However, Dr. Kaldis stated that he had not seen the most recent MRI of the lumbar spine ordered by Dr. Rodriguez. The most recent MRI results available to him were from before Claimant's spinal surgery. He agreed with Dr. Rodriguez's order for an MRI of the lumbar spine following the spinal surgery. Until he had the opportunity to review an updated MRI, Dr. Kaldis could not determine if the Claimant had any work restrictions. (EX-3, p. 6). On October 31, 2011, Dr. Kaldis reviewed the MRI of September 29, 2011, which he interpreted as showing post-operative changes at L4-5, no evidence of disk herniation or spinal stenosis. He opined there was no evidence of a need for surgery or future medical treatment. (EX-3, p. 2).

The New Medical Evidence

Dr. Rodriguez

Dr. Jose Rodriguez saw Claimant on January 7, 2011, following his complaints of neck, right shoulder, and lower back pain. Dr. Rodriguez reviewed the history of Claimant's injury, including Dr. Donovan's diagnosis of a SLAP lesion type 2 and a herniated disc at L4-5 and a herniated disc at C3-4 and C5-6. Dr. Rodriguez determined that Claimant developed recurrent lower back pain after mopping the floor in September 2010. Claimant told Dr. Rodriguez that the pain was constant, radiated to his right leg, and was exacerbated by sitting or walking. Claimant also complained that he was unable to lift comfortably with his right upper extremity due to persistent pain in his shoulder and neck. (CX-1, p. 14).

On physical examination of Claimant, Dr. Rodriguez's impression was neck pain with herniated disk C3-4 and C5-6, SLAP lesion right shoulder type 2, and post laminectomy syndrome with lumbar radiculitis at L5. He recommended an MRI anthrogram of the right shoulder to rule out persistent SLAP lesion and an MRI of the lumbar spine to rule out any recurrent disc herniation at L4-5. He recommended that until the MRI was conducted, Claimant should stay unemployed. He recommended that Claimant make a follow-up appointment following the MRI. (CX-1, p. 15). At the time of the formal hearing, Claimant did not have updated MRI results.

The Vocational Evidence

Dawn Paradis

Ms. Paradis testified at the formal hearing. She is a vocational rehabilitation counselor and has been since 1992. (Tr. 48). Part of her duties involve conducting vocational evaluations with individuals who have been injured and identifying jobs for these workers based on the restrictions proposed by the treating physicians and with regard to each individual's work history and educational background. (Tr. 49).

She met with Claimant on October 18, 2011, for two hours to review his background information and his employment history. (Tr. 49-50). At this time, Ms. Paradis found that Claimant had been working intermittently in the United States with a work

visa since 1989. She determined that the majority of his work experience was in welding or ship repair, but that he had also worked as the captain of a shrimp boat and as a bus driver in Mexico. Claimant was also in the Army in Mexico prior to coming to the United States. (Tr. 50).

Ms. Paradis reviewed medical records set forth at EX-8, page 24 as part of her vocational evaluation. During her visit with Claimant, she stated that he needed to alternate between sitting and standing during the interview process. She was not aware if he took any type of medication and Claimant told her that he had his last visit with a physician in 2010, when he saw Dr. Kaldis. (Tr. 51). After her first visit with Claimant, she determined that he was employable based on his educational background, work history, and medical restrictions. She found several employers who were willing to consider a Spanish-speaking employee with Claimant's medical restrictions. (Tr. 52).

She began her labor market survey at the end of November or early December 2011. (Tr. 52; EX-8, p. 20). She prepared a labor market survey on December 2, 2011, which identified the following jobs:

1. A cashier job with Standard Parking which collects payment from customers for parking services and facilitates the flow of traffic. The job was an entry level position that would provide on-the-job training. The employer was willing to consider a Spanish-speaking person. The employee would spend the majority of his time sitting, but would occasionally be able to stand and walk. Frequent reaching with hands and arms was required. This position would pay \$8.00-\$10.00 per hour. (Tr. 53; EX-8, p. 161).

2. Another cashier job was located at Central Parking with the same job requirements and paid \$7.50 an hour. (Tr. 53-54; EX-8, p. 165).

3. An entry level position at Jared's Galleria of Jewelry as a jewelry polisher. The position offered on-the-job training and would require the employee to spend the majority of the time seated, however he would be able to stand if needed. The employer was willing to consider Spanish-speaking applicants for the position. The job paid \$8.00 per hour. (Tr. 54-55; EX-8, p. 162.)

4. A full-time shoe repairer job at Zapato Shoe Repairers provided on-the-job training and would allow the employee to spend time seated, standing, and walking around. The employer would consider Spanish-speaking applicants and the position paid \$8.25 an hour. (Tr. 55; EX-8, p. 163).

5. A full-time position as a Printed Circuit Board (PCB) Assembler at Carlton Staffing paid \$10.00 to \$13.00 an hour, and would allow the employee to alternate between sitting, standing, and walking. The job involved reworking PCB, hand soldering, reading schematics, and building PCB. The employee would be required to lift up to ten pounds and frequent reaching and handling would be required. The position offered on-the-job training. (Tr. 56; EX-8, p. 164). A second PCB Assembler position assembling PCBs, running wires, and soldering electronic parts was found through Instatech Corporation, which had the same physical requirements and paid \$12.00 to \$14.00 an hour. (Tr. 57; EX-8, p. 166).

6. A welder position with Powell Electrical Systems, which paid \$15.00 to \$16.00 an hour. The job would require that the employee frequently stand and walk, and occasionally bend and stoop. The employee would also occasionally lift up to fifty pounds. (EX-8, p. 167). A second welder job was located through the Texas Workforce Commission Staffing Company, which required the same physical abilities and the employee would rarely be required to lift up to seventy-five pounds. The position paid \$16.00 per hour. (EX-8, p. 170).

7. A Welder II position with Baker Hughes which had the same physical requirements as the Texas Workforce Commission Staffing Company job and offered \$15.00-\$16.00 an hour. (EX-8, p. 171).

Ms. Paradis testified that she sent a report detailing the jobs found in the labor market survey to Dr. Kaldis, Dr. Donovan, and Dr. Larrey. (Tr. 58). Dr. Kaldis approved of all of the jobs identified in the labor market survey as appropriate for Claimant. (Tr. 58; EX 8, pp. 5-7). Dr. Larrey approved of the majority of the jobs identified, except for the Welder positions that would require Claimant to lift up to seventy-five pounds. (Tr. 58-59; EX-8, pp. 9-11). Dr. Donovan only approved the parking lot attendant positions and the jewelry polisher position as appropriate for Claimant's work restrictions. (Tr. 58; EX-8, pp. 14-16). Ms. Paradis testified that Claimant and his attorney were notified that the physicians had approved some, or all, of the jobs in the labor market survey on January 31, 2012. (Tr. 59).

Ms. Paradis testified that she was unfamiliar with the hand held welding jobs that Claimant had mentioned, and was unable to locate any modified welding jobs. (Tr. 60). During the course of the meeting with Claimant, Ms. Paradis believed that he was ready and able to work and she was not aware that his work visa had expired. (Tr. 61-62). She believed that the job market in Houston was sufficient and that there were available jobs for the Claimant to work within his restrictions. (Tr. 62).

On cross-examination, Ms. Paradis testified she was not familiar with "E-Verify," nor was she aware of any employers who have been prosecuted for employing illegal aliens. (Tr.62, 64). She stated the unemployment rate in the Houston, Texas area was 7.0%, which was lower than the average for the United States. (Tr. 65).

The Contentions of the Parties

On request for modification, Employer/Carrier contend that Claimant has been paid compensation pursuant to the prior Decision and Order. In August 2010, it is asserted that Dr. Donovan, Claimant's treating physician, released him to light work. Claimant was evaluated by Dr. Kaldis, during an Independent Medical Examination, who opined that Claimant had reached maximum medical improvement and released Claimant to return to work with no restrictions. A vocational expert was retained who identified jobs for which Claimant could compete and obtain in the labor market. Employer/Carrier contend that Claimant's status as an unauthorized worker is irrelevant to the issues pending in this case. Employer/Carrier argue that Claimant is now in no need for further medical treatment and not entitled to any additional compensation.

At the formal hearing, Claimant contended that "E-Verify" restricts on-line applications since a social security number must be entered and verified by employers which impacts Claimant's ability to compete for available jobs. Claimant's post-hearing brief is devoid of any reference to "E-Verify." Claimant underwent L4-5 lumbar surgery on February 25, 2010. Although Dr. Donovan opined that Claimant had reached maximum medical improvement in August 2010, Dr. Rodriguez, whom Claimant has seen on one occasion, has recommended an MRI of the shoulder and back. Claimant contends he has not reached MMI and is entitled to temporary total disability from April 23, 2009 to September 2010, and from four days thereafter until present and continuing. In the alternative, if the undersigned determines that Claimant has reached MMI, he contends he is entitled to permanent partial disability from December 2, 2011 to the present and continuing. He also contends that Employer failed

to take into consideration the opinion of Dr. Rodriguez and that they have failed to establish suitable alternative employment. If the undersigned determines that suitable alternative employment has been established, Claimant contends that he is entitled to temporary partial disability from December 2, 2011 to the present and continuing.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

A. Credibility

I have considered and evaluated the rationality and internal consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See Indiana Metal Products v. National Labor Relations Board, 442 F.2d. 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941 (5th Cir. 1991).

Moreover, in arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n.3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

In the instant case, Employer/Carrier contend that Dr. Jose Rodriguez's opinion should be given less, or no weight, than that of Claimant's treating physician. Dr. Donovan was Claimant's treating physician following his injury in 2008, however, Claimant saw Dr. Rodriguez in 2011 after complaining of pain in his right shoulder. Claimant did not present evidence at the formal hearing or in his post-hearing brief that he received authorization from Employer/Carrier to change his treating physician from Dr. Donovan to Dr. Rodriguez. Further, Claimant saw Dr. Rodriguez on only one occasion and did not follow up with his recommended treatment plan. Accordingly, I will give greater weight to Dr. Donovan's opinions as Claimant's treating physician.

B. Applicability of Section 22 Modification

Section 22 of the Act provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Incorporated, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. Id. at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of **res judicata**, and to allow the fact-finder to consider any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g denied, 404 U.S. 1053 (1972). An administrative law judge, as trier of fact, has broad discretion to modify a compensation order. Id.

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding. O'Keefe, supra at 255. The scope of modification based on a mistake in fact is not limited to any particular kinds of factual errors. See Rambo I, supra at 295; Banks v. Chicago Grain Trimmers Association, Inc., supra at 465. However, it is clear that while an administrative law judge has the authority to reopen a case based on any mistake in fact, the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. Kinlaw v. Stevens Shipping and Terminal Company, 33 BRBS 68, 72 (1999). A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making. O'Keefe, supra; see also General Dynamics Corp. v. Director, OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Modification based upon a change in conditions or circumstances has also been interpreted broadly. Rambo I, supra at 296. There are two recurring economic changes which permit a

modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable alternative are not suitable; or (2) the employer contends that suitable alternative employment has become available. Blake v. Ceres, Inc., 19 BRBS 219 (1987). A change in a claimant's earning capacity qualifies as a change in conditions under the Act. Rambo I, supra at 296. Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. Id.; See also Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998); Vasquez, supra at 431.

However, Section 22 is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation strategy/tactics, errors or misjudgments of counsel. General Dynamics Corp. v. Director, OWCP [Woodberry], supra; McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Delay v. Jones Washington Stevedoring Company, supra, at 204.

The U. S. Department of Labor (DOL) has consistently advanced a view that Section 22 articulates a preference for accuracy over finality in judicial decision making. See Kinlaw, supra at 71; Old Ben Coal Company v. Director, OWCP [Hilliard], 292 F.3d 533, 36 BRBS 35, 40-41 (CRT)(7th Cir. 2001). DOL has maintained in other modification proceedings that as Section 22 was intended to broadly vitiate ordinary **res judicata** principles, the interest in "getting it right," even belatedly, will almost invariably outweigh the interest in finality. Kinlaw, supra at 71.

C. The Threshold Requirement under Section 22 of the Act

For the reasons discussed hereinafter, I find Employer has met the threshold requirement for modification under Section 22 of the Act by presenting evidence of a change in Claimant's physical/medical and economic condition. Subsequent to the issuance of the original Decision and Order in this matter, Claimant underwent diagnostic testing and a hemilaminectomy at the L4-L5 level on February 24, 2010. Dr. Donovan opined that Claimant reached MMI on August 9, 2010. I find this sufficient to constitute a change in Claimant's physical/medical condition.

Although Claimant contends a mistake of fact exists in that he has not yet reached MMI and that he needs further treatment for his injuries, including the MRI anthrogram of the right shoulder that was requested by Dr. Jose Rodriguez, I find there

is no probative, cogent evidence supporting such an argument. Dr. Donovan, Claimant's treating physician, who evaluated Claimant prior to the initial Decision and Order, agreed that MMI had been reached by August 9, 2010. Dr. Larrey, concurred with Dr. Donovan and placed Claimant at MMI on August 9, 2010. The Department of Labor's independent medical examiner, Dr. Kaldis, also opined that Claimant had reached maximum medical improvement as of October 31, 2011. As discussed below, I find Claimant suffered a temporary deterioration in his condition after lumbar surgery while recuperating which resulted in MMI being reached on August 9, 2010. Such a temporary change does not negate the initial determination of MMI or a state of permanency. See McCaskie v. Aalborg Ciserv Norfolk, Inc., 34 BRBS 9, 12-13 (2000).

Therefore, I find that Claimant became permanently disabled on August 9, 2010, when he reached MMI according to Dr. Donovan.

Further, subsequent to the issuance of the original Decision and Order in this matter, Employer/Carrier consulted a vocational expert to assess Claimant's vocational potential and future employability. I find the results of the labor market survey sufficient to constitute a change in Claimant's economic condition. The existence of E-Verify legislation in Texas is not sufficient to negate the Employer's showing of available jobs for Claimant. Therefore, I find and conclude that Employer/Carrier have presented new information to warrant consideration of modification under Section 22 of the Act.

Consequently, I find that Employer/Carrier have met the threshold requirements for modification by presenting evidence of a change in Claimant's physical/medical and economic condition. Therefore, balancing the need to render justice under the Act against the need for finality in decision making, I hereby grant Employer/Carrier's motion and reopen the record to consider modification of the prior Decision and Order.

D. Suitable Alternative Employment

I have found that Claimant was permanently disabled on August 9, 2010, with work restrictions. In the absence of a showing of suitable alternative employment, Claimant arguably would be permanently totally disabled from August 9, 2010, until suitable alternative employment is established. If the claimant is successful in establishing a **prima facie** case of total

disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job

opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Contrary to Claimant's argument at formal hearing, a claimant's ability to secure suitable alternative employment in the private sector is not affected by the E-Verify program in Texas. E-Verify was created by Congress as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) as an alternative to the traditional I-9 process. E-Verify is "an internet-based system that allows an employer to verify an employee's work-authorization status." Chicanos Por La Causa, Inc. v Napolitano, 588 F.3d. 856, 862 (9th Cir. 2009).

The Secretary of Homeland Security is prohibited from requiring a person or entity **outside the Federal Government** to use E-Verify. However, the United States Supreme Court has held that this does not preempt the ability of state governments to enact legislation requiring private and public employers to use

the E-Verify Program. Chamber of Commerce of the United States v Whiting, 131 S.Ct. 1968, 1985 (2011). Several states have adopted E-Verify in various forms, including: Alabama, Arizona, Colorado, Georgia, Idaho, Indiana, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, and Virginia.

Texas has enacted a state statute, which provides that a **public agency, state or local taxing jurisdiction, or economic development corporation** must require a business that submits an application for a **public subsidy** include a statement that the business does not and will not knowingly employ an undocumented worker, and if applicable, proof that the business uses the E-Verify Program. H.B. 582, 82nd Leg., (Tex. 2011). I find in this instance, the Texas legislation does not affect private entities such as Employer here, or any of the named employers in the instant labor market survey. Therefore, the existence of the E-Verify program and the possibility that some employers may use E-Verify will not bar the instant Employer from establishing suitable alternative employment.

As noted above, the only physical restrictions placed on Claimant which must be considered for vocational purposes are those set out by Dr. Donovan relating to his back injury from 2008, which restricted Claimant to modified light work with no repetitive bending, lifting, pushing, or pulling weights greater than twenty pounds. There were no limitations placed on Claimant regarding his capacity to perform full-time employment. Thus, Employer/Carrier have the burden of establishing suitable alternative employment within Claimant's physical capabilities given his work restrictions imposed by Dr. Donovan.

Claimant contends that he has additional restrictions assigned by Dr. Rodriguez. Claimant argues Dr. Rodriguez's opinion that he remain off work until he undergoes further testing to determine the appropriate course of treatment has not been given sufficient weight. I disagree with Claimant's contention that Dr. Rodriguez's opinion has not been given sufficient consideration. Section 7(c)(2) of the Act provides that when the employer learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. The claimant is only able to change physicians if he obtains prior written approval of the employer, carrier, or "deputy commissioner." Claimant did not produce any evidence showing that he obtained authorization or was not obligated to obtain authorization due to emergency, neglect, or refusal prior to seeking treatment with Dr. Rodriguez. Claimant saw his treating

physician, Dr. Donovan, prior to seeing Dr. Rodriguez and testified that he was released from his care. After reviewing Dr. Donovan's records, there is no indication that Claimant was unable to return to his treating physician for continuing medical care. Claimant's decision to seek treatment from Dr. Rodriguez was not the result of Employer/Carrier's refusal to provide treatment or from neglect. Therefore, I am inclined to give greater deference to Dr. Donovan's opinion of Claimant's future working capacity as his treating physician. Consequently, the only restrictions taken into account in determining if suitable alternative employment existed for Claimant are the work restrictions set out by Dr. Donovan.

Employer's vocational expert, Dawn Paradis, performed a labor market survey at the end of November or early December 2011. Ms. Paradis identified nine jobs in total, three of which Dr. Donovan approved as appropriate for Claimant's work restrictions. Dr. Donovan approved both of the parking attendant positions (paying \$8.00-\$10.00 and \$7.50 per hour, respectively) and the job with Jared's the Galleria of Jewelry (paying \$8.00 per hour). Dr. Kaldis approved of all the jobs identified in the labor market survey, including the welding and PCB assembler positions, which provided a higher hourly rate than the jobs approved by Dr. Donovan. Despite Claimant's job restrictions, I find that these restrictions do not preclude him from competing for such employment which he reasonably and likely could secure. Accordingly, I find and conclude Employer/Carrier established suitable alternative employment on December 2, 2011, based on the labor market survey of Ms. Paradis.

In the instant case, Claimant was reasonably diligent in pursuing such employment. He testified that he applied for six of the positions identified by Ms. Paradis and had an interview for a welder position arguably paying \$16.00 per hour on the day of the formal hearing. Claimant also testified he found a potential job in Mexico, repairing boats for a former employer. Following his injury in 2008, Claimant testified he has worked for three to seven employers as a welder. He also stated that he did not leave any of these jobs because of his work-related injury. Regardless of the temporary nature of these jobs, Claimant was able to pursue and secure positions as a welder and I find he has engaged in suitable alternative employment since the prior Decision and Order.

Nevertheless, Claimant is considered permanently totally disabled from August 9, 2010 to December 2, 2011, when Employer/Carrier established suitable alternative employment. The record is devoid of any earnings by Claimant after August 9, 2010, from any other employment sources.

Employer/Carrier's showing of suitable alternative employment can then be used to establish Claimant's current wage earning capacity. Dr. Donovan approved of three jobs identified in the labor market survey as appropriate positions for Claimant given his work restrictions. Claimant's average wage earning capacity in the parking lot attendant or jewelry polisher positions would be \$330.00 per week based on an average hourly rate of \$8.25 ($\$8.00 + \$10.00 = \$18.00 \div 2 = \$9.00 + \$7.50 = \$16.50 \div 2$) times 40 hours per week ($\$8.24 \times 40 = \330.00). Dr. Kaldis approved of all jobs identified in the labor market survey, some of which paid the same amount, or more, than Claimant's job prior to injury. However, Dr. Kaldis's assessment of Claimant's vocational ability will be given less weight than Dr. Donovan's opinion of Claimant's work restrictions because Dr. Kaldis conducted an independent medical examination and did not treat Claimant's symptoms. Consequently, Claimant's wage earning capacity would be \$330.00, as determined by the jobs approved by Dr. Donovan.

Claimant was diligent in pursuing other opportunities independent of the labor market survey. The position working for his former employer repairing boats in Mexico offered a wage earning capacity of \$413. Claimant was also able to secure several jobs as a welder following his injury in 2008. The average weekly wage for the three welding positions Employer/Carrier presented into evidence was \$493.33. At the time of his injury, Claimant's average weekly wage was \$417.92. Claimant is thus entitled to two-thirds of the difference between his average weekly wage at the time of the injury and his current wage earning capacity given his work restrictions assigned by Dr. Donovan. I conclude that the Employer/Carrier have established suitable alternative employment and Claimant is entitled to permanent partial disability compensation based on his loss of earning capacity of \$87.72 ($\$417.72 - \$330.00 = \87.72), based on the jobs approved by Dr. Donovan in the labor market survey which are compatible with Claimant's restrictions and work experience and capacity.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.³ A

³ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **September 15, 2011**, the date this matter was referred from the District Director.

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Having concluded that the Employer/Carrier established a **prima facie** case for modification, Employer/Carrier's request for modification is **GRANTED**.
2. Employer/Carrier shall pay Claimant compensation for permanent total disability from August 9, 2010 to December 1, 2011, based on Claimant's average weekly wage of \$417.92, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).
3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from December 2, 2011, and continuing based on two-thirds of the difference between Claimant's average weekly wage of \$417.92 and his reduced weekly earning capacity of \$330.00 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c) (21).
4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's February 27, 2008 work-related back injury, pursuant to the provisions of Section 7 of the Act.
5. Employer/Carrier shall receive credit for compensation heretofore paid, as and when paid, as reflected in this Decision and Order.
6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).
7. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

8. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 29th day of June, 2012, at Covington,
Louisiana

A

LEE J. ROMERO, JR.
Administrative Law Judge