

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433-2846

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



Issue Date: 01 May 2012

Case No.: 2011-LHC-01467

OWCP No.: 07-190469

In the Matter of:

**DIRON WILLIAMS,
Claimant**

v.

**LEBEOUF BROTHERS TOWING, LLC/
BOURG DRYDOCK AND SERVICES,
Employer,**

and

**LOUISIANA WORKERS' COMPENSATION
CORPORATION,
Carrier**

APPEARANCES:

GREGORY S. UNGER, ESQ.
On Behalf of the Claimant

DAVID K. JOHNSON, ESQ.
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act),¹ brought by Claimant against Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 18 May 11. All parties were represented by counsel. On 22 Nov 11, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:²

Witness Testimony of
Claimant³

Exhibits⁴
Joint Exhibit (JX) 1
Claimant's Exhibits (CX) 1-27
Employer's Exhibits (EX) 1-10

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

FACTUAL BACKGROUND

Claimant fell off a ladder at work on 27 Nov 07 and was injured. He never returned to work for Employer and worked only briefly following his injury. He developed bilateral carpal tunnel syndrome and eventually had cervical and bilateral carpal tunnel release surgeries. He subsequently developed hyperhidrosis of his palms.

STIPULATIONS⁵

1. Claimant injured his neck and developed bilateral carpal tunnel syndrome on 27 Nov 07 at the machine shop at Bourg Dry Dock. The injury was in the course of his work and employment with Employer, during an employee/employer relationship, and under circumstances that bring it within the coverage of the Act.
2. There was timely notice, claim, and controversion.

¹ 33 U.S.C. §§901 *et seq.*

² I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

³ Tr. 32-71.

⁴ Counsel were cautioned that since a number of exhibits (specifically CX-3, 12, 15-18, 20-22, 24, 26, and EX-5 and 8) appeared to be *en globo* collections of records, counsel must cite during the hearing or in their post hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr. 7.

⁵ JX-1; Tr. 8-15.

3. An informal conference was held with the District Director on 22 Mar 11.
4. Employer has paid temporary total disability from 28 Jan 08 to present at a rate of \$493.34 per week.
5. Medical benefits have been paid in the amount of \$84,793.98.
6. Claimant has not returned to his usual job.

ISSUES IN DISPUTE & POSITIONS OF THE PARTIES

The unresolved issues to be adjudicated are Claimant's average weekly wage (AWW) and the cause of his hyperhidrosis and alleged lumbar/low back problems. Claimant argues his hyperhidrosis and lumbar problems are related to his fall and subsequent treatment. He seeks medical treatment for those conditions and contends that he is temporarily totally disabled (TTD). He also argues that his actual average weekly wage (AWW) should be \$800.

Employer denies that Claimant's hyperhidrosis or any lumbar spine problems are causally related to his work accident. Employer submits that it has been overpaying Claimant, since his AWW was actually no more than \$243.39 per week. Employer did not specifically address the nature and extent of any disability.

LAW

Causation

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of and in the course of employment[.]"⁶ In the absence of substantial evidence to the contrary, it is presumed the claim of an employee comes within the provisions of the Act.⁷ The presumption takes effect once a claimant establishes a *prima facie* case by proving he suffered some harm or pain and that a work-related condition or accident occurred that could have caused the harm.⁸

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which *could have caused* the harm or pain.⁹ These two elements establish a *prima facie* case of a compensable injury supporting a claim for compensation.¹⁰

⁶ 33 U.S.C. §902(2).

⁷ *Id.* at §920(a).

⁸ *Gooden v. Dir., OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998).

⁹ *Id.*, citing *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981), *aff'd sub nom. Kelaita v. Dir., OWCP*, 799 F.2d 1308 (9th Cir. 1986).

¹⁰ *Id.*

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.¹¹ The presumption does not apply, however, to the issue of whether a physical harm or injury occurred¹² and does not aid the claimant in establishing the nature and extent of disability.¹³

To establish that the injury is work-related, the claimant does not have to prove the employment-related dangers or exposures were the sole or even predominant cause of his injury.¹⁴ The mere existence of a prior injury does not establish that the current condition is a result of that injury or that the pre-existing condition was not aggravated by the work accident.¹⁵

Once the presumption applies, the burden shifts to the employer to rebut with substantial evidence to the contrary that the claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by them.¹⁶ "Substantial evidence" means evidence that is sufficient to sever the causal connection between the injury and the employment.¹⁷ The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).¹⁸ When the claimant alleges aggravation of or contribution to a pre-existing condition, the employer has to establish that the claimant's condition was not caused or aggravated by that employment.¹⁹ The testimony of a physician that no relationship exists between an injury and claimant's employment, however, may be sufficient to rebut the presumption.²⁰

¹¹ See *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Dir.*, OWCP, 681 F.2d 359 (5th Cir. 1982).

¹² *Devine v. Atl. Container Lines, G.I.E.*, 25 BRBS 15, 19 (1990).

¹³ *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441, 443 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112, 119 (1979).

¹⁴ See *Indep.t Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966).

¹⁵ *Banks v. Service Employers Int'l, Inc.*, (Unpublished) BRB No. 06-0486 (March 14, 2007).

¹⁶ In *Brown v. Jacksonville Shipyards Inc.*, the Eleventh Circuit articulated a "ruling out" standard for rebutting the Section 20(a) presumption. Under this interpretation, the employer must rule out the possibility of a causal relationship between a claimant's employment and her injury. 893 F.2d 294, 297 (11th Cir. 1990). This standard has been unequivocally rejected by both the First and Fifth Circuits, and has been abrogated by the BRB. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997) ("[t]he employer need not rule out any possible causal relationship between the claimant's employment and his condition. This would go far beyond the substantial evidence standard set forth in the statute"); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999) ("the plain language of the statute uses the phrase 'substantial evidence to the contrary.' To place a higher standard on the employer is contrary to statute and case law"); *O'Kelley v. Dep't. of the Army/NAF*, 34 BRBS 39, 41 (2000) (an employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption).

¹⁷ *O'Kelley*, 34 BRBS at 41.

¹⁸ See *Smith v. Sealand Terminal, Incl*, 14 BRBS 844, 845-46 (1982).

¹⁹ *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

²⁰ *O'Kelley*, 34 BRBS at 42; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129-30 (1984).

Once an employer offers sufficient evidence to rebut the presumption, it is overcome and no longer controls the outcome of the case.²¹ If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.²²

Nature and Extent

Once it is determined that a claimant suffered a compensable injury, the burden of proving the nature and extent of his disability rests with him.²³ The question of extent of disability is an economic as well as a medical concept.²⁴ Total disability is the complete inability to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. “Usual” employment is the claimant’s regular duties at the time of injury. In this case, the claimant does not need to establish that he cannot return to any employment at this point, only that he cannot return to his former employment.²⁵

Because the Act does not provide a set standard for determining the extent of disability, the degree of disability is determined on the basis of several factors, including physical condition, age, education, employment history, rehabilitative potential, and availability of work a claimant can perform.²⁶ The claimant’s credible complaints of pain alone may be enough to meet his burden, but a judge may find that an employee can do his usual work despite complaints of pain, numbness, weakness, and others when a doctor finds no functional impairment.²⁷

If the claimant can establish a *prima facie* case of total disability, the burden of proof shifts to the employer to establish that suitable alternative employment exists, and that the claimant is capable of performing it.²⁸ If the employer meets that burden, the focus shifts back to the claimant to demonstrate that he conducted a diligent search of available jobs and demonstrated a willingness to work, but the jobs were not attainable.²⁹ If the claimant cannot prove as much, then at most his disability is partial, not total.³⁰

²¹ *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).

²² *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997).

²³ *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

²⁴ *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 842 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

²⁵ *Elliott v. C&P Tel. Co.*, 16 BRBS 89, 91 (1984).

²⁶ *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1037-38 (5th Cir. 1981).

²⁷ *Devor v. Dept. of the Army et al.*, 41 BRBS 77, 78 (2007); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 896-97 (1981).

²⁸ *Turner*, 661 F.2d at 1039.

²⁹ *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248, 252-53 (1987).

³⁰ *Southern v. Farmers Export Co.*, 17 BRBS 64, 67 (1985).

Permanent disability is one that has continued for a lengthy period of time and appears to be of an indefinite duration, compared to one in which recovery may be expected after a normal healing period.³¹ Any disability suffered by Claimant before reaching MMI is considered temporary in nature.³² The most common approach to determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. The determination of when MMI is reached is largely a question of fact, based on medical evidence presented at hearing and in the record.³³

The date of maximum medical improvement does not have direct linkage to the question of whether a disability is total or partial, because the nature and extent of a disability require separate analysis.³⁴ The date on which the employer establishes the existence of suitable alternate employment is the commencement date of the claimant's permanent partial disability benefits, and a claimant may collect permanent total disability benefits from the date of MMI to the date his permanent partial disability award commences.³⁵

In evaluating evidence, the ALJ must determine the credibility and weight to be attached to the testimony of the medical witnesses and is entitled to deference in doing so.³⁶ Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.³⁷ However, an ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinion of the treating doctor.³⁸ A claimant's credibility may be relevant if in developing their opinions, doctors relied on what the claimant told them.³⁹

³¹ *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

³² *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 n. 5 (1985), citing *Trask*, 17 BRBS 56.

³³ *Trask*, 17 BRBS at 60-61.

³⁴ *Rinaldi* 25 BRBS at 130 (remanding case to ALJ to determine the date on which employer established suitable alternative employment, and thus the commencement date of claimant's permanent partial disability benefits).

³⁵ *Id.* at 131.

³⁶ *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1990); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 157 (1993).

³⁷ *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 (2003) (in matters under [ERISA], 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 ALJ is bound by the expert opinion of a treating physician as to the evidence of a disability "unless contradicted by substantial evidence to the contrary"))).

³⁸ *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997).

³⁹ *Cunningham v. Astrue*, No. C10-1081-RAJ-BAT, 2011 WL 1154543, at *6 (W.D. Wash., 2011) (Social Security administrative law decision).

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,⁴⁰ which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed toward establishing a claimant's earning power at the time of injury.⁴¹

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.⁴² Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.⁴³ Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

If neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then Section 10(c) is appropriate.⁴⁴

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.⁴⁵

According to the language of the Act, administrative law judges have broad discretion in determining annual earning capacity under subsection 10(c).⁴⁶ The objective of subsection 10 is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.⁴⁷ Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.⁴⁸

⁴⁰ 33 U.S.C. § 910(a)-(c) (2011).

⁴¹ *SGS Control Servs. v. Dir.*, *OWCP*, 86 F.3d 438, 441 (5th Cir. 1996).

⁴² 33 U.S.C. § 910(a) (2011).

⁴³ 33 U.S.C. § 910(b) (2011).

⁴⁴ *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

⁴⁵ 33 U.S.C. § 910(c)(2011).

⁴⁶ *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549, 550 (1981).

⁴⁷ *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, 249 (1976).

⁴⁸ *Gatlin*, 936 F.2d at 822.

In calculating annual earning capacity under subsection 10(c), administrative law judges may: consider the actual earnings of the claimant at the time of injury,⁴⁹ the earnings of other employees of the same or similar class of employment,⁵⁰ claimant's earning capacity over a period of years prior to the injury;⁵¹ multiply claimant's wage rate by a time variable;⁵² and consider all other sources of income,⁵³ overtime,⁵⁴ vacation and holiday pay,⁵⁵ probable future earnings of claimant (in extraordinary circumstances),⁵⁶ or any fair and reasonable representation of the claimant's wage-earning capacity.⁵⁷ A worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best reflect his earning capacity at the time of the injury.⁵⁸

EVIDENCE

*Claimant testified at the hearing in pertinent part:*⁵⁹

From 2005 onward, he worked for about 20 different employers. He would work when there was work and would find something else to do when there wasn't. After Katrina he started working for Plant Performance. He did not work every week in 2007 because he was doing contract work. So sometimes he'd be away on a three week job, then there might be two weeks before another job starts. That's the nature of contract work. He wanted to work closer to home, so he took a pay cut to work for Employer. He was hired by Employer on 13 Nov 07 to work as a full-time electrician and made \$20 an hour. Before 27 Nov 07 he never had any problems with his wrist or with hyperhidrosis.

⁴⁹ 33 U.S.C. § 910(c) (2011); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

⁵⁰ 33 U.S.C. § 910(c) (2011); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980).

⁵¹ *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58, 61 (1976) (all the earnings of all the years within that period must be taken into account).

⁵² *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 287 (1980) (if this method is used, it must be one that reasonably represents the amount of work that normally would have been available to the claimant).

⁵³ *Harper v. Office Movers/E.I. Kane Inc.*, 19 BRBS 128, 130 (1986) (additional sources of income are properly considered when the claimant's ability to earn wages in both the covered job and the other job was affected by the work-related injury); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).

⁵⁴ *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981).

⁵⁵ *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 105 (1991).

⁵⁶ *Walker v. Wash. Metro. Area Transit Auth.*, 793 F.2d 319, 321, (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

⁵⁷ *See generally, Flanagan Stevedores, Inc. v. Gallagher, Dir. OWCP*, 219 F.3d 426, 434 (5th Cir. 2000).

⁵⁸ *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882, 886 (1981).

⁵⁹ Tr. 32-71.

On 27 Nov 07, he was working in the machine/mechanic shop, which is located next to the water where the boats and barges dock. He had been told by Freddie, the head electrician, to run conduit. To do that, he had to use a ladder to put conduit on top of the distribution panel. It was an aluminum folding ladder about eight feet high. He was working on a box that was about eight to nine feet above the floor. He was as high as he needed to be on the ladder to work on it. When he started to install the conduit he fell backward. He tried to break the fall with his hands and landed on his back. He was then transferred to the Family Doctor Clinic for urinalysis and an examination. Employer sent him over to Occupational Medical Services, too.

He worked one day of light duty between the accident and when he was fired. Tim Norman wanted him to install some lights. He told Norman he couldn't do any lifting, and that his neck was bothering him. His last day of work was 30 Nov 07. Norman set up an appointment for him, but when he went to the doctor on December 4, they said Employer was not going to pay for the visit. That's when he went back there and they told him he was fired. On 3 Dec 07, Employer fired him, alleging "poor work quality." He went to Tyrone General Medical Center on 13 Dec 07, complaining about wrist pain. It had wakened him; his wrist and the tips of his fingers were burning.

For about two weeks in December 2007, after being fired by Employer, he worked for WillStaff at Houma Armature and for Tracer. He quit WillStaff. He was hired around the holidays and there wasn't much to do, so there was a lot of sitting around. When it came time to do the actual physical work, he told his supervisor he couldn't do that because his back was bothering him and was told he didn't need to come back if he couldn't do it. After he left Houma Armature, he doesn't remember calling WillStaff back, but he used to go through the want ads and call around, looking for work. He doesn't know if there would be any record of him calling WillStaff or vice versa after that. He knows he never talked to them directly.

He left WillStaff because he got another opportunity to work as an electrical foreman for Tracer, which was good because he just had to sign in guys and line them up. But once he got assigned a task and had to physically do work, he couldn't. He knew once he had to lift anything, he wouldn't be able to perform. He worked for Tracer for about three weeks, most of January 2008. He was very clear with his supervisor and told him he'd been in an accident and was just looking for work. He was told he could be hired as a foreman but it could be two days, two weeks, two months or two years. He was let go. He has not worked anywhere since. He doesn't think he has received unemployment benefits. He may have gotten unemployment benefits in 2007.

He made \$7,000 in 2008 being self-employed, running a lawn service with his father and brother. He didn't work with the service that year, it's just in his name. He's not saying he didn't earn it, just that he didn't actually do the work. His brother and father physically performed the work, because he was injured. They were helping him out. He didn't start getting workers' compensation until February or March 2008.

Dr. Haydel was his physician of choice and treated him for his hands, neck, and back. Dr. Haydel said he had carpal tunnel, performed an anterior cervical discectomy, and then operated on his left and right carpal tunnels. To his knowledge, all these surgeries were paid for by OWCC.

The first time he noticed the excessive sweating on his palms, he was seeing Dr. Haydel for the second time. It was July or August 2009. It's degrading to have to shake hands, to greet people in church, to give his fiancée a massage, or to help his son with homework. He made a good living as an electrician, but he can't do that with the problem. He has been open to everything his doctors wanted to try—creams, gloves.

Dr. Abbas told him he could do a VATS procedure, but said he would probably start sweating in other areas, since it wasn't taken care of earlier. He hasn't heard if the VATS procedure has been approved. He is now also experiencing sweating of his feet, which started in October 2010, when he was being seen by Dr. Brooks. As of today, he has excessive sweating under his arms and groin area, too. Dr. Brooks was not surprised he had excessive arm pit sweating and groin sweating because the hyperhidrosis of his hands had gone unresolved for so long.

He could work as long as it was something simple and not repetitive. He cannot work as an electrician now because of the excessive perspiration of his hands, but also because of his neck and lumbar injuries. The only treatment authorized has been injections for his neck, but he has not had any lumbar treatment. Dr. Brooks wanted to treat his back, but it was denied. All they would let him do were the facet injections for his neck.

He has not injured his neck, wrist, or low back in any way after 27 Nov 07. As far as medical expenses go, some co-payments have come out of pocket.

He was examined by Dr. Nutik twice, once in 2008 and once on 7 Oct 09. If Dr. Nutik's later report says he examined his feet and found sweating, that would be a lie, because he wasn't experiencing sweating of his feet then.

Medical Records from the Family Doctor Clinic state in pertinent part:⁶⁰

Claimant presented on 27 Nov 07 and reported he was working on a panel while standing on a ladder and fell over five feet, injuring his back. He was diagnosed with a lumbar spine strain and was placed on light duty with a lifting restriction of no more than 10 pounds through 4 Dec 07.

Dr. Robert Davis' records from Occupational Medical Services, L.L.C. state in pertinent part:⁶¹

He saw Claimant on 29 Nov 07 for his chief complaints of posterior neck and low back pain. Claimant stated he had fallen off a ladder backward, from a height of about eight to 10 feet. Claimant complained of localized pain in his posterior neck and lower back region, but did not appear to be in acute distress and ambulated easily, though stiffly. An examination of the cervical spine indicated no evidence of external trauma. Claimant stated he was unable to move his neck in any direction due to pain, but was noted to move his neck without impairment with distraction, however. The same was true for the lumbar spine. With distraction, Claimant was noted to bend over and place his pants and shoes on without any noted pain or discomfort. He diagnosed Claimant with cervical and lumbar pain with clinical findings suggestive of symptom magnification and recommended cervical and lumbar MRIs. He returned Claimant to regular-duty work as tolerated.

He spoke to Claimant on 30 Nov 07 and told him the MRIs did not reveal any disc herniation or nerve root impingement. Claimant voiced no complaints. He saw Claimant again on 24 Jan 08 for his chief complaints of low back pain and left shoulder pain. Claimant reported that he had not returned to work since they last spoke and appeared in no acute distress. He found Claimant's clinical exam did not correspond with his physical findings and requested an orthopedic evaluation.

Medical records from Terrebonne General Medical Center state in pertinent part:⁶²

Claimant was seen in the emergency department on 13 Dec 07 complaining of pain and burning sensations in his left hand and wrist. He reported falling last month and an onset of symptoms about 14 days prior. He was diagnosed with a left wrist sprain, was given pain medication and a splint, and told to follow up with a physician the following day. Claimant was seen again in the emergency department on 13 Mar 08, complaining of fever and cough. He had a history of carpal tunnel syndrome.

⁶⁰ CX-14; EX-2.

⁶¹ CX-15; EX-2.

⁶² CX-16.

Medical Records from Leonard J. Chabert Medical Center state in pertinent part:⁶³

Claimant was seen in the emergency department on 26 Dec 07 complaining of increasing bilateral hand pain after falling off a ladder three weeks prior. An X-ray revealed no acute process and he was diagnosed with hand arthralgia and given steroids.

Claimant returned on 15 Jan 08 and complained of bilateral hand swelling and pain, after he finished the steroid dose. His right hand was diffusely swollen with reduced range of motion, and his left was swollen and he could not make a fist. He was diagnosed with arthritis, given pain medication, and told to follow up with his primary care physician.

Dr. Lawrence Haydel testified in deposition and his records from Houma Orthopedic Clinic state in pertinent part:⁶⁴

He is Claimant's treating orthopedic surgeon. He first saw Claimant on 28 Jan 08. Claimant stated that he had fallen off a ladder at work in November 2007 and complained of neck, lower back, and hand pain. Claimant had stiffness and pain in his hands and complained of burning in the tips of his middle and ring fingers. His impression was that Claimant had cervical and lumbar strain and bilateral hand strain from his fall.

An MRI of Claimant on 18 Feb 08 revealed abnormalities at three different levels. C3-4 and C5-6 were not as bad as the C6-7 level. It would be hard to tell if any of that was there before his fall, but those protrusions can occur from a traumatic event. On 19 Feb 08, he referred Claimant for an EMC/NCS study of the neck and upper extremities to evaluate his hand symptoms and placed him on different pain medications. Claimant said his neck pain was the same and the back pain was improved. He still had pain and stiffness in his hands.

On 4 Mar 08, Claimant continued to complain of pain in his neck and back and numbness in his hands. His impression of Claimant was cervical disc lumbar strain and bilateral carpal tunnel syndrome as a result of his work injuries. The carpal tunnel finding was consistent with the EMG and nerve study. Claimant said he had never had a problem with carpal tunnel before his fall. Based on his history and the findings on the nerve study, if Claimant never had a problem before he fell, the fall would be the cause. Carpal tunnel can result from a single traumatic event. A cervical disc problem can also exacerbate carpal tunnel. He referred Claimant for an epidural injection of the cervical spine and provided him with wrist splints.

⁶³ CX-17.

⁶⁴ CX-19, 18.

On 8 Apr 08, Claimant reported some improvements in his neck pain with the epidural injections, but continued to have low back pain and symptoms of carpal tunnel bilaterally. He wanted Claimant to continue the epidurals and go to physical therapy for his back and neck.

On 8 Apr 08, he noted Claimant had been on an off-work status since 27 Nov 07 and was currently attending physical therapy. Claimant remained totally incapacitated at that time, and through 13 May 08. On that day, he noted Claimant's carpal tunnel symptoms were reported to be the same, with nocturnal pain and numbness and positive Tinel's bilaterally. He instructed Claimant to continue to use the braces at night and continue medication. He discussed the option of carpal tunnel release surgery if the symptoms did not improve. Claimant reported his back pain had improved. He thought the lumbar problems would go away after a reasonable period of treatment.

On 17 Jun 08, Claimant still had pain in his neck and numbness in his hands and was showing more improvement in the back than in the other areas. He thought the conservative management of Claimant's carpal tunnel had failed and his recommendation was bilateral carpal tunnel release surgery. The typical recovery time for carpal tunnel release surgery is about six weeks. As of 7 Jul 08, the carpal tunnel release surgeries had not been approved, so he continued with conservative management. Claimant still had pain in his neck that was burning into his left arm, the symptoms of carpal tunnel, and some low back pain.

On 15 Sept 08, he reported Claimant had considerable complaints of numbness in both hands, neck pain and posterior tenderness. A February MRI had shown disc protrusions at C6-7 and C5-6. Since Claimant had failed all modes of conservative treatment, his recommendation was surgery for C5-6 and C6-7. On 29 Oct 08, he performed an anterior cervical discectomy and fusion to treat Claimant's C5-6 and C6-7 disc herniations.

On 15 Dec 08, Claimant continued to have neck pain and had not yet received physical therapy, pending approval by workmen's comp. Claimant continued to complain of right hand numbness and a carpal tunnel release had still not been approved.

Claimant's neck pain was slowly improving as of 13 Jan 09 and he was receiving therapy. Claimant continued to complain of right hand numbness and a previous nerve study was positive for carpal tunnel. He performed a right carpal tunnel release on 5 Feb 09. On 16 Feb 09, he noted Claimant's symptoms were improving and he was to increase his activities as tolerated, returning in three weeks for an evaluation and possible work return.

On 16 Mar 09, he noted Claimant continued to have left hand numbness with nocturnal pain and a positive nerve conduction study confirming carpal tunnel in that hand. A left carpal tunnel release was performed 29 Apr 09. Claimant's symptoms improved after the surgery and on 8 Jun 09, he released Claimant to return to work in a light duty capacity, anticipating an increase as Claimant continued to improve.

On 20 Jul 09, he noted Claimant continued to complain about his hands and still had problems with sweating of the hands, with no numbness. Claimant's carpal tunnel symptoms were much improved and he wanted to try therapy again to strengthen his hands.

On 31 Aug 09, he referred Claimant to Dr. Gervais for neurological evaluation of his hyperhidrosis. He noted Claimant had sweating of his palms since his injury and released Claimant to medium-duty work.

On 15 Sep 09, he discussed the case with Claimant and the case manager, recommending once again an evaluation by a neurologist and possibly a hand specialist. On 28 Sep 09, he noted Claimant continued to have sweating of his palms that had not improved. He discussed nerve blocks to see if it would correct the problem.

On 22 Feb 10, Claimant returned with continued neck pain and hyperhidrosis. An MRI showed the fusion site looked good from C5-C7. Other levels showed minor bulges but no disc herniations or nerve impingement. Claimant said he thought the sweating of his palms could be from the cervical surgery, but he has had the hidrosis of the palms from the first day he was seen in the office, preexisting any operations to his hands or neck. He recommended stellate blocks, which were also recommended by the neurological consults Claimant obtained.

On 23 Mar 10, he told Claimant he could no longer refill his pain medications and he had to stay with anti-inflammatories and muscle relaxers. He had nothing further to offer him as an orthopedic surgeon. The only further treatment for his hands was the stellate ganglion blocks.

The records of Dr. Michael Haydel state in pertinent part:⁶⁵

He is board-certified in pain management and anesthesiology. He saw Claimant on 10, 17, and 31 Mar 08, and 7, 14, and 21 Apr 08. Claimant reported his pain problems were caused by an employment-related accident on 29 Nov 07 and that he had constant, excruciating, stabbing and throbbing pain with numbness, tingling, and burning sensation. He described associated headaches and said his pain was worse at night. Claimant stated his neck pain was greater than his lower back pain, and his pain increased with standing, walking, damp weather, and

⁶⁵ CX-20.

bending. His impression was cervical disc disease with cervicalgia, and the treatment plan was cervical epidural steroid injections.

On 7 Apr 08, Claimant reported significant improvement in his left upper extremity numbness, but had continued burning in his right upper extremity. He received another injection. On 14 Apr 08, Claimant reported a return of numbness and tingling/throbbing in both upper extremities, with right worse than left. He received another injection. On 21 Apr 08, Claimant reported continued pain, numbness and tingling in his hands, right shoulder pain, and headache. He received another injection.

Dr. Gordon Nutik's records and reports state in pertinent part:⁶⁶

He saw Claimant for a second medical opinion on 24 Sep 08 and reviewed some of his medical records in preparation. Claimant reported being injured when he fell eight to ten feet off a ladder and landed on his back, rolled over, and tried to break his fall with his hands. Claimant stated his neck and lower back were bothering him at the time and then he got numbness in his fingers at night. Claimant had been in a car wreck in August 2005 and went to therapy for soreness in his neck and back for two to three weeks, then got better and was given a full release. Claimant described pain in the back of his neck and on his right side, like a toothache. He complained of a radiating burning sensation down the whole right arm and into his third and fourth fingers, which felt numb. He said his whole left hand bothers him mostly at night. Claimant had low back pain.

He felt Claimant may have had a cervical disc herniation at C6-7 with right-sided root involvement and may have sustained or worsened a preexisting bilateral carpal tunnel syndrome. He may have sustained or worsened a preexisting low back strain. With failure to improve with conservative treatment, surgery on Claimant's wrists and neck would be appropriate. He did not feel a functional capacity evaluation would be beneficial at that time, and did not think Claimant was at MMI concerning his neck or wrists.

He saw Claimant again after his anterior cervical fusion and bilateral carpal tunnel releases, on 7 Oct 09. Claimant had experienced mild improvement concerning his range of neck motion and did not appear to have any residual sensory deficit in his hands. He thought Claimant should have reached a point of maximum improvement concerning the neck and wrist surgeries. Claimant presented with hyperhidrosis of his palms, which he stated had gotten worse since the carpal tunnel releases. In addition, Claimant appeared to have similar hyperhidrosis of his feet. He did not have a diagnosis as to the hyperhidrosis, but it appeared to involve more than the hands. He had difficulty making a direct relationship of that to the carpal tunnel or neck surgeries, and could make no connection between them from an orthopedic standpoint. He felt Claimant should be able to work at a light-duty

⁶⁶ EX-3.

level, though he may have restrictions due to the hyperhidrosis, which appeared to be a significant problem for him.

Records from Barnes Rehabilitation Center state in pertinent part:⁶⁷

Claimant was seen 12 Aug 09 and had a history of injuries from a fall from approximately eight to ten feet. He underwent bilateral carpal tunnel releases and cervical fusions. He presented with significant hyperhidrosis in both hands. He complained of burning sensations radiating distally from the posterior aspect of his left shoulder along the C7 dermatome.

On 15 Sep 09, an occupational therapy progress evaluation noted Claimant continued to receive therapy since his initial evaluation. Claimant continued to report significant sweating of his bilateral hands and decreased endurance in his bilateral upper extremities during prolonged overhead use. There was decreased hyperhidrosis in his hands with IF stimulation of the posterior upper quadrants, and the therapist thought Claimant would continue to benefit from this treatment to minimize hyperhidrosis.

On 28 Sep 09, Claimant continued to present with significant hyperhidrosis in the bilateral hands, and continued to have minor complaints of cramping in his hands during prolonged resistive flexion.

The medical records of Dr. Christopher Wright state in pertinent part:⁶⁸

He saw Claimant on 8 Jan 10 for evaluation of hyperhidrosis in his palms. Claimant reported a fall from 15 feet on 27 Nov 07, and reported that he developed severe bilateral palmar sweating after carpal tunnel surgery. Claimant acknowledged that he had some sweating of his feet, but that it was not nearly as bad as his hands. Claimant reported that he had suffered severe social difficulties. He also reported pain and numbness bilaterally, pricking, burning sensations in the tips of his fingers, and that discomfort keeps him up at night. He observed Claimant's palms regularly throughout the examination. If Claimant did not wipe his hands every few seconds, he got a significant and visible amount of sweat beads on his palms and fingertips. Because of this, Claimant can clearly not work as an electrician because it would put him at high risk of electrical injury. The symptoms of hyperhidrosis were ongoing for the past eight or nine months.

He thought Claimant actually had reflex sympathetic dystrophy, also known as complex regional pain syndrome. He suspected this was directly related to the hand injury sustained in the fall and less likely related to the carpal tunnel surgery. Claimant clearly had symptoms prior to this, but they became much worse after the surgery. It was not clear if the surgery was the antecedent event that caused the problem or if it was part of the natural evolution of this particular disease process.

⁶⁷ CX-27.

⁶⁸ CX-21.

Reflex sympathetic dystrophy is characterized by allodynia with neurological pain in a limb with a proximal injury. There are significant pseudomotor changes that happen with this particular entity, which can include edema, swelling, redness, or even increased sweating. His suspicion was that the pain Claimant is experiencing in his hands is not related to carpal tunnel and is more related to a case of reflex sympathetic dystrophy. Dr. Haydel's recommendation of stellate ganglion blocks was a reasonable option for this sort of issue. He prescribed Claimant Topamax, which can have the effect of decreasing sweat output, but it was denied by workers' comp. He suspected the combination of the fall on Claimant's hands, followed by carpal tunnel surgery, was the etiology of his hyperhidrosis.

He followed up with Claimant on 2 Mar 10. An EMG from 19 Jan 10 revealed mild bilateral carpal tunnel syndrome, mild ulnar neuropathies across his wrist and mild right-sided ulnar neuropathies across the wrist and at the elbow. An EMG from 26 Feb 08 revealed mild bilateral C6 and C7 radiculopathies as well as mild bilateral carpal tunnel syndrome. His impression was the hyperhidrosis probably related to either reflex sympathetic dystrophy or sympathetic plexus injury in the cervical spinal area. On 24 Mar 10, he stated Claimant had seen Dr. Michael Haydel for evaluation for sympathetic nerve blocks or stellate ganglion blocks, but wasn't comfortable with that and wanted a second opinion. He was going to send Claimant to Dr. Brooks at the Headache and Pain Center. He thought Claimant would benefit from stellate ganglion blocks. If those were effective, the sympathetic surgery could be done.

He saw Claimant again on 5 May 10, who continued to have problems with severe hyperhidrosis. He was taking Diamox, Clonidine, and Drysol with no relief. He had a left stellate ganglion block done by Dr. Michael Haydel that was totally ineffective. Claimant clearly has palmar hydrosis and he thought it was most likely related to reflex sympathetic dystrophy as a result of trauma. He thought it was related to the work injury to his cervical spine and possible complex regional pain syndrome and hypersympathetic activity. Because multiple medications and stellate ganglion blocks were ineffective, he recommended treatment with subcutaneous Botox in his palms and fingers.

On 19 Nov 10, he stated that he thought Claimant might be a good candidate for thoracic sympathectomy. If that was ineffective, he planned to bring Claimant back in and consider Botox in both hands.

The medical records of Dr. Wael Karim state in pertinent part:⁶⁹

He saw Claimant on 13 Feb 10 for a second opinion. Claimant reported falling off a ladder at work and subsequently experiencing neck pain and upper extremity numbness and tingling. Because of neck pain and the numbness, he had an MRI of his cervical spine that showed some disc herniation. Claimant had cervical spine surgery and two carpal tunnel release procedures. Claimant apparently started to complain of increased sweating on the upper extremity and palm area. He did not know if this happened prior to or only after the carpal tunnel release surgery, because Claimant was unclear about the onset of the symptoms.

Claimant complained of a worsening of his palm sweating symptoms and said a physician noted some sweating on his feet, but he denied it. On physical examination, he noted Claimant had “severe and mild” sweating activities on the palms of both hands. The bottoms of Claimant’s feet were dry and he saw no sweating on either of them. Claimant definitely had hyperhidrosis. In his opinion, it may be related to some injury or irritation of the sympathetic fiber that usually comes from the C8-T1 area and goes all the way up toward the brain. It may have been aggravated by a surgery or in the fall. He doubted the carpal tunnel surgery had anything to do with the sweating, but could not completely rule it out. He did not see sweating of the feet, but would not be surprised to see it, as it could be related also to his neck problems. In his opinion, it was mostly a cervical spine problem and not just a hand problem. He strongly recommended Claimant have a sympathetic block to see if it would help, and also suggested a beta-blocker.

The medical records of Dr. Trent Massengale state in pertinent part:⁷⁰

He is a dermatologist and saw Claimant 23 Jul 10 for his chief complaint of hyperhidrosis of his right and left palms. Claimant stated he did not have any problems with hyperhidrosis prior to his cervical surgery. Upon physical examination, the Claimant was found to have severe hyperhidrosis of the palms with secondary changes such as maceration. There are numerous reports of nerve injury resulting in hyperhidrosis. It was his opinion that this injury and secondary surgery were the most likely causes of the hyperhidrosis.

⁶⁹ CX-22.

⁷⁰ CX-23.

The medical records of Dr. Brandon Brooks state in pertinent part that:⁷¹

He saw Claimant 26 Jul 10 for complaints of pain in his neck, hands, and lower back. Claimant reported his pain was affecting his sleep and mood and began in 2007 when he fell off a ladder at work. Claimant's past medical history was significant for arthritis and depression, and he had undergone surgery for his cervical spine and carpal tunnel release. During this time Claimant reported his hands had also become extremely cold, constantly sweaty, and that he had swelling and weakness in both.

On physical examination, he noted a temperature change over Claimant's skin just before his wrists and hands on both sides. Additionally, Claimant's hands were extremely moist and were sweating. Examination of the cervical spine revealed facet joint compression tenderness, as well as paravertebral tenderness from C3 through T1 bilaterally. Claimant's strength was 5/5 in his upper extremities except for his grip, which appeared to be diminished secondary to his hyperhidrosis. He made plans to see Claimant back for a trial of cervical facet injections to see if those can help him with his neck and shoulder pain. He offered to refer Claimant to a surgeon for a possible sympathectomy.

He saw Claimant again 2 Aug 10. Claimant had cervical spondylosis and hyperhidrosis of his hands. He put Claimant on Lyrica to help with his pain in general, as well as for any neuropathic pain he may have. He referred him to Dr. Johnny Perez for a surgical opinion regarding a possible sympathectomy for his hyperhidrosis and awaited approval to perform medial branch blocks to help with his chronic neck pain.

He also saw Claimant 23 Aug 10, who reported no relief from the bilateral cervical facet joint block on 13 Jul 10. He again recommended a surgical evaluation for a sympathectomy with a thoracic surgeon for assessment of candidacy for a video-assisted thoracic sympathectomy (VATS). He performed bilateral C4, C5, and C6 medial branch blocks on 31 Aug 10 and gave Claimant a pain diary to document his pain relief.

On 23 Sept 10, Claimant again reported no relief from his posterior neck pain, bilateral shoulder pain, and left arm pain after undergoing facet blocks and medial branch blocks. He wanted to refer Claimant to Dr. Abbas Abbas to evaluate his candidacy for VATS for treating the sympathetic over-activity of his upper extremities, causing hyperhidrosis. He would see Claimant back after the evaluation and would consider procedures to treat his lumbar spine pain once that was done.

⁷¹ CX-24 (I have included in my summary more pages than were cited by Claimant, in the interest of completeness, particularly with respect to Claimant's alleged lumbar injuries).

He ordered lumbar MRIs and X-rays on 4 Oct 10 in response to Claimant's reports of increased lower back pain. The requests for lumbar diagnostics were denied. He diagnosed Claimant with lumbar spondylosis and lumbar radiculopathy, and stated he may benefit from an epidural steroid injection in his lumbar spine.

On 1 Nov 10, Claimant returned to the clinic with continued pain in his neck, shoulders, and left arm, and continued hyperhidrosis of his hands. There was no mention of his lumbar spine, but Claimant stated that since 6 Oct 10, he started to have profuse sweating of both of his feet. Claimant's referral to a thoracic surgeon for a sympathectomy had not been approved yet. He referred Claimant to Dr. Wright in neurology to see if he had other recommendations for the progressive hyperhidrosis that was affecting his lower extremities now. Another consideration was a workup for pheochromocytoma.

On 4 Jan 11, he noted that Claimant was referred to Dr. Abbas for evaluation of his hyperhidrosis and opinion for a possible thoracic sympathectomy. Dr. Abbas recommended the bilateral VATS. Claimant had not had any success with conservative measures. Hopefully, the VATS procedure would be considered and would reduce Claimant's symptoms and allow him to use his hands as he would like. From his standpoint, he had nothing further to offer Claimant in terms of treating his hyperhidrosis.

Notes from 19-20 Jan 11 state that he again inquired about approval to treat Claimant's lumbar spine. He learned he was still not approved, and suggested Claimant speak to his workmen's comp adjuster.

The medical records of Dr. Abbas Abbas state in pertinent part:⁷²

Dr. Brooks requested a consultation on Claimant, whom he saw 29 Nov 10, and who reported falling from a 20-foot ladder in 2007. Claimant had cervical blocks and C5-6, C6-7 fusion for his neck and shoulder pain and around the same time, had bilateral carpal tunnel releases. Claimant has had dripping and sweaty palms since then, and in October 2010, began having excessively sweaty feet. On physical examination, Claimant's palms were wet and his fingertips were cold to the touch. His bilateral feet were also moist and his toes were cool to the touch. He diagnosed Claimant with palmar and plantar hyperhidrosis and recommended a bilateral VATS sympathectomy.

⁷² CX-25.

Various diagnostic imaging reports state in pertinent part:⁷³

An MRI of Claimant's lumbar spine was performed 29 Nov 07. Apart from epidural lipomatosis at L5-S1, the MRI was normal, with normal disc hydration and preservation of disc space height; no endplate spondylosis or facet arthrosis, and normal central canal, lateral recesses, and intervertebral neural foramina.

An MRI of Claimant's cervical spine was performed 29 Nov 07. The impression was: straightening of normal cervical lordosis, which may reflect spasm; C3-4 small central posterior noncompressive disc protrusion, normal central canal, left uncovertebral joint arthrosis with no radicular impingement demonstrated; C5-6 disc dessication with small central posterior noncompressive disc protrusion; C6-7 central posterior disc protrusion with central canal stenosis and a limited functional reserve of the central canal.

An MRI of Claimant's lumbar spine was performed 18 Feb 08. The impression was no compressive discopathy, no cord compression, central canal stenosis or foraminal stenosis. Claimant has a congenitally-narrowed spinal canal secondary to short pedicles.

An MRI of Claimant's cervical spine was performed 18 Feb 08. The impression was tri-level disc displacements at C3-4, C5-6, and C6-7, most pronounced at C6-7 where a shallow right paracentral protrusion indents the thecal sac without cord compression or central canal stenosis. Mild biforaminal narrowing was noted secondary to uncinata hypertrophy.

Nerve conduction studies on 26 Feb 08 revealed slowing in the median palmar SNAPs across Claimant's wrists. Both median CMAPs were delayed at the wrists. EMG revealed partial denervation in right C7-C6 myotomes. The study revealed right C7-C6 radiculopathies. There were also bilateral median neuropathies at the wrists, rights greater than left. A trial of non-invasive therapies was suggested with surgical options if those failed.

Turner Industries employment records state in pertinent part:⁷⁴

Claimant was terminated on 27 Apr 07 for a violation of company policy after he left the plant without talking to the foreman.

⁷³ CX-13.

⁷⁴ EX-9.

Records from Louisiana Workers' Compensation Corporation state in pertinent part:⁷⁵

Claimant reported falling off a ladder and injuring his back on 27 Nov 07. He returned to work 28 Nov 07. Claimant was paid weekly at a rate of \$493.34, based on an average weekly wage of \$740 beginning 25 Feb 08, and was paid for various medical expenses totaling at least \$77,806.75.

Claimant's Tax and Social Security Records state in pertinent part:⁷⁶

In 2005, Claimant earned \$39,942.61 while working for Plant Performance Services, L.L.C., Ameri-Force, Inc., Cajun Constructors, Inc., Performance Contractors, Inc., Triad Electric & Controls, Inc., Industrial Design & Construction, Inc., Chailland, Inc., Turner Industries Group, L.L.C., Jacobs Field Services North America, Inc., and Repron, Inc.

In 2006, Claimant earned \$47,834.10 while working for EIU, Inc., Test Automation & Controls, Inc., MEI Technical Services, Inc., Plant Performance Services, L.L.C., and Turner Industries Group, L.L.C.

In 2007, Claimant earned \$22,628.75 while working for Plant Performance Services, L.L.C., Turner Industries Group, L.L.C., self-employment, Ardent Services, L.L.C., Capital Consultants, Inc., Advantage Human Resourcing, Inc., Employer, Oilfield Professional Contractors, Inc., Conrad Aluminum, L.L.C., and Berry Contracting, L.P.

Payroll records from Bourg Dry Dock state in pertinent part:⁷⁷

Claimant worked 13-16, 19-21, 26-28, and 30 Nov 07 and made a total of \$1,380.00.

Capital Consultants employment records state in pertinent part:⁷⁸

Claimant's start date was 19 Jun 07 at a pay rate of \$18.50 per hour. He worked a total of 21 hours and earned a gross pay of \$388.50.

Employment records from WillStaff state in pertinent part:⁷⁹

Claimant applied to work 12 Dec 07. He was hired at Houma Armature on 14 Dec 07 and fired on 31 Dec 07. He was paid at a rate of \$20 per hour.

⁷⁵ CX-1-3.

⁷⁶ CX-4.

⁷⁷ EX-4.

⁷⁸ EX-7.

⁷⁹ EX-6.

Louisiana Unemployment Compensation records state in pertinent part:⁸⁰

Claimant applied for unemployment benefits on 11 Dec 07.

Oilfield Production Contractors' employment records state in pertinent part:⁸¹

Claimant's gross pay for the period ending 21 Sep 07 was \$1,490.

Various Department of Labor forms state in pertinent part:⁸²

Claimant was injured at 7:45 a.m. on 27 Nov 11 when he fell off a ladder and injured his back while taking measurements. Claimant's LS-203 was received 19 Nov 10 and stated that Claimant's fall from the ladder resulted in injury to his neck and back and hyperhidrosis, resulting in permanent disability.

ANALYSIS

The primary disputes are over whether Claimant's alleged low back injuries and hyperhidrosis are causally related to his work incident and the proper calculation of his average weekly wage.

Causation

Lumbar Injury

Claimant credibly testified that when he fell off the ladder, he landed on his back and that his back started to hurt afterward. The record indicates that the lumbar problems have not been as acute as the cervical, carpal tunnel, and hyperhidrosis conditions, were not recognized by the Employer, and have not been a focus of his medical treatment. Nonetheless, the Family Doctor Clinic diagnosed Claimant with a lumbar strain on the date of the fall and Claimant reported low back pain when he saw Dr. Davis on 29 Nov 07. Even though the doctor found no evidence of external trauma and thought Claimant might be showing signs of symptom magnification, he diagnosed him with lumbar pain, and requested MRIs. Although those imaging tests did not reveal any disc herniation or nerve root impingements, when Dr. Lawrence Haydel first saw Claimant in January 2008, he diagnosed him with lumbar strain. In May 2008, when Claimant still reported some low back pain, Dr. Haydel stated the lumbar problems would go away after a reasonable period of treatment.

⁸⁰ EX-8.

⁸¹ EX-10.

⁸² CX-9, 11.

The weight of the evidence establishes that that at least for some period Claimant suffered lumbar pain after his fall. It also shows that pain could have been caused by the fall. Thus, Claimant has established a *prima facie* case and invoked the presumption of causation. I do not find that Employer rebutted that presumption and therefore find Employer liable for the lumbar injury.⁸³

Hyperhidrosis

The record leaves no doubt that Claimant suffers from hyperhidrosis.⁸⁴ Moreover, the medical evidence is consistent that the condition could have been caused by the injuries sustained in the fall or the medical treatment of those injuries. Dr. Wright equivocated on his opinion of its exact causation, but did opine that the condition was caused by the work injury, the surgeries, or a combination of the fall plus the surgeries. Dr. Karim stated he did not know if the hyperhidrosis happened prior or after the carpal tunnel release surgeries, because Claimant was unclear about its onset, but believed that either the fall or the surgeries could have aggravated Claimant's sympathetic fiber, causing the hyperhidrosis. He thought it was related to Claimant's cervical spine problems, though not his hand problems. Dr. Massengale thought that Claimant's fall and subsequent cervical surgery were the cause of the hyperhidrosis.

The medical evidence is clearly sufficient to establish a *prima facie* case and invoke the presumption of causation. Although Dr. Nutik stated he had difficulty relating the plantar hyperhidrosis to Claimant's carpal tunnel or cervical surgery, that was insufficient to rebut the presumption, and I find Claimant established that his hyperhidrosis was a consequence of his fall at work.⁸⁵

The question then becomes the nature and extent of any disability resulting from the hyperhidrosis. Since the medical evidence clearly indicates Claimant cannot return to his original job as an electrician, he is presumed totally disabled in the absence of evidence of suitable alternative employment. Employer offered none and Claimant is

⁸³ The nature and extent of any disability due to the lumbar injury is uncertain and is in any event moot because of the other injuries in the case.

⁸⁴ Employer argues that the fact Claimant gave slightly different descriptions of the fall casts into doubt any of his treating physicians' assessments of causation. I do not find those minor inconsistencies to be discrediting or particularly relevant. There is also some question of whether the fall itself could have directly led to hyperhidrosis, or whether the subsequent cervical surgery was the root. In either case, Employer could be found liable for disability and medical compensation for Claimant's condition. Employer does not contest that the fall from the ladder caused Claimant's cervical and carpal tunnel injuries. Claimant testified that the first time he began to notice the hyperhidrosis was July or August 2009, after his cervical and carpal tunnel surgeries. In his 28 Jul 08 deposition, Dr. Haydel did not mention any symptoms of hyperhidrosis. In July 2009, however, Dr. Haydel noted Claimant was "still" experiencing hyperhidrosis. In August 2009, he referred Claimant to a neurologist, Dr. Gervais, for that problem. In his office notes, Dr. Haydel wrote that Claimant had hyperhidrosis of his palms from the first day he was seen in the office, pre-dating any operations to his hands or neck. In August 2009, records from Barnes Rehabilitation Center stated that Claimant presented with significant hyperhidrosis in both hands. Aside from Dr. Haydel's comment, there is no other medical evidence that Claimant began suffering from hyperhidrosis until July 2009.

⁸⁵ Even if the presumption had been rebutted I would have made the same finding by a preponderance of the evidence.

therefore totally disabled. Moreover, based on the evidence presented, it appears Claimant has not reached MMI as to his hyperhidrosis condition, because he has not exhausted his treatment recommendations, which include a VATS procedure. Claimant became temporarily partially disabled at the time of his injury, but was able to work with no loss of wage-earning capacity until 31 Dec 07, after which he became temporarily totally disabled, and remains so.⁸⁶

AWW

Claimant urges that his AWW should be calculated based on the \$20 per hour he was being paid by Employer at the time of his injury. He states that because Claimant did not work substantially the whole year prior to his accident, Section 10(c) is the proper framework for calculating AWW. Employer agrees that using Section 10(c) is proper, but that Claimant's AWW should be based on his earnings during 2007 prior to the injury, which totaled \$11,922.75, for an AWW of \$243.39. In the alternative, Employer argues that I should average Claimant's earnings for 2005-2007 in order to find the appropriate AWW. Claimant has received TTD benefits in the amount of \$493.34 since 25 Feb 08, based on an AWW of \$740.00.

Claimant only worked for Employer on eleven days prior to the accident, and was paid \$20 per hour, for a gross income of \$1,380 from that position. Due to the nature of his employment as a contract electrician, he worked for numerous employers during the previous year, had some self-employment earnings, and also collected unemployment for a time. I agree with Employer that due to Claimant's unique employment history, the most accurate way to calculate AWW is to survey his earnings in multiple previous years. According to a Social Security statement of earnings records, in calendar year 2005, Claimant earned \$39,942.61. In 2006, not including \$1,967 received as unemployment compensation, Claimant earned \$47,934.10. In calendar year 2007, not including \$5,482 received as unemployment compensation, Claimant earned \$22,628.75. Averaging the AWWs of those three years yields a figure of \$707.73 and a compensation rate of \$471.82.

⁸⁶ There was evidence in the record that Claimant worked for a brief period following the injury and was also paid by relatives for being part of a lawn service for which he really didn't work. The lawn service certainly appears to be at best sheltered employment, but the work Claimant performed for Houma Armature was factored into his disability assessment. Claimant worked for Houma Armature between 13 Dec 07 and 31 Dec 07 with no loss of wage-earning capacity, as he earned \$20 per hour there, also. He testified, however, that he was not actually engaging in his usual electrician's work there, because it was around the holidays so there was a lot of "sitting around."

ORDER AND DECISION

1. Claimant's cervical, bilateral carpal tunnel, lumbar injuries and hyperhidrosis are the result of his fall on 27 Nov 07 from a ladder while working for Employer.
2. Claimant became temporarily partially disabled as of his injury, but with no loss of wage earning capacity through 30 Dec 07. Claimant has been temporarily totally disabled since 31 Dec 07.
3. Claimant's AWW at the time of injury was \$707.73 and Employer shall pay Claimant temporary total disability benefits from 31 Dec 07 to the present and continuing based on that AWW.
4. Employer shall pay all reasonable, appropriate, and necessary medical expenses in accordance with Section 7, to include any remaining related lumbar injuries and the hyperhidrosis.
5. Employer shall receive credit for any compensation heretofore paid, as and when paid. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.⁸⁷
6. The District Director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

⁸⁷ 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. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267, 271 (1984).

7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.⁸⁸ A 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. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.

ORDERED this 1st day of May, 2012 at Covington, Louisiana.

A

PATRICK M. ROSENOW
Administrative Law Judge

⁸⁸ 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, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.