

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 December 2012

CASE NO.: 2012-LHC-00606
OWCP NO.: 05-127005

In the Matter of:

LARRY T. WYATT,

Claimant,

v.

CP & O, LL/,
PORTS INSURANCE COMPANY, INC.,

Employer/Carrier,

And

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-In-Interest.

APPEARANCES: Gregory Camden
Attorney for the Claimant

Christopher Hedrick
Attorney for the Employer

BEFORE: KENNETH A. KRANTZ
Administrative Law Judge

DECISION AND ORDER

This proceeding arose upon the filing of a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("Act" or "LHWCA"), and is governed by the implementing regulations found at Code of Federal Regulations, Title 29, Part 18, and Title 20, Chapter VI, Subchapter A. A formal hearing was held on June 1, 2012, in Newport News, Virginia. The Director did not have a representative

present. The Claimant submitted Exhibits 1 through 46.¹ The Employer objected to Exhibits 43 and 44. I overruled this objection to the Claimant's exhibits. The Employer submitted Exhibits 1 through 15. The Claimant objected to Exhibit 15 and 16, stating that he received some pieces of the Exhibit within 30 hours and some pieces within 15 minutes before the hearing. Claimant's attorney discovered during the hearing that he had received Exhibit 16 the previous year, and he removed his objection to that exhibit. Claimant continued to object to Exhibit 15. I admitted the Exhibit 15 and 16 and allowed for posthearing development. (TR 14). Claimant indicated that he did not anticipate post-hearing developments. (TR 63). The Administrative Law Judge's exhibits 1 through 4 were admitted without objection. (TR 7). Both parties submitted post-hearing briefs.

STIPULATIONS

1. The LHWCA, 33 USC § 901 *et. seq.*, as amended, applies to this claim.
2. The Claimant injured his back and left leg on February 13, 2008.
3. The injury occurred at the Newport News Terminal.
4. The injury arose out of and in the course of the worker's employment with the Employer.
5. There was an employer/employee relationship at the time of the injury.
6. The Employer was timely notified of the injury.
7. The claim was timely filed.
8. The Notice of Controversion was timely filed.
9. The District Director's Informal Conference was held on January 5, 2011 and October 26, 2011.
10. The worker's average weekly wage at the time of injury was \$339.80.
11. The Employer has paid the Claimant temporary total disability from February 14, 2008 to March 24, 2010 at a rate of \$290.09 per week.
12. The Employer has paid the Claimant permanent partial disability from March 25, 2010 to present at a rate of \$105.70.
13. The Employer has paid the Claimant's medical benefits.

¹ The following abbreviations will be used as citations to the record:

CX – Decedent's Exhibit
EX – Employer's Exhibit
AX – ALJ's Exhibits
TR – Transcript of the June 1, 2012 hearing

14. The worker has not returned to his usual job.

(JX 1)

ISSUES

1. Whether the Claimant is entitled to temporary total disability from October 14, 2010 to the present and continuing.

(JX 1)

PROCEDURAL HISTORY

On October 7, 2010, I entered an order awarding compensation based on the stipulations of the parties. (CX 39 at 1). The order stated that, as of March 25, 2010 and continuing, the Claimant had a residual wage earning capacity of \$181.25 per week, resulting in a permanent partial compensation rate of \$105.70 per week. (CX 39 at 4).

BACKGROUND

The Claimant, a fifty-six year old man at the time of the hearing, worked at Newport News Marine Terminal. (TR 19). The Claimant testified that he performed the position of hustler driver and was a member of the International Longshoreman Association for approximately fifteen years. (TR 19). The Claimant testified that business was slow when he worked at the terminal, resulting in an average weekly wage of only \$339.80.

The Claimant testified that on February 13, 2008, an accident occurred when he was driving his hustler. One of the Claimant's coworkers broadsided the Claimant with a forklift. (TR 20). The Claimant was thrown from his truck. His hard hat and glasses were thrown into the street. After the accident, the claimant had a L5/S1 microdiscectomy, a L5/S1 revision, and a left knee surgery. (TR 21-22). The Claimant testified that the two back surgeries did not relieve his symptoms (TR 26).

Regarding recent medical treatment, the Claimant testified that he had not seen Dr. Andrus for over nine months. (TR 23). In addition, the Claimant testified that he last saw Dr. Carlson in 2010 or early 2011. The Claimant explained that he saw an orthopedic surgeon named Dr. Fiore in Richmond. The Claimant testified that he went to see Dr. Fiore because he was not interested in the back stimulator implant. He believed the implant was merely to "cover up the pain or help with the pain." (TR 23). The Claimant testified that Dr. Fiore recommended removing the hardware in the Claimant's back. (TR 24). The Claimant testified that he wanted to undergo surgery. (TR 24).

The Claimant testified regarding his pain. The Claimant testified that he experiences pain in his back and down to his left foot. When asked about his ability to drive, the Claimant responded that he can still drive. The Claimant noted that he had experienced back problems in the past. Unrelated to any work injury, the Claimant previously underwent back surgery to repair a lower disk. (TR 22). The Claimant was initially denied social security benefits, but was

awarded benefits upon reapplying. The Claimant testified that Dr. Carlson had not altered his permanent restrictions. (TR 26).

Testimony of Mr. Albert

Mr. Albert testified that he is self-employed and has been practicing in the area of vocational rehabilitation for forty-seven years. He further testified that he worked with the Department of Veterans Affairs to provide job development expectations and vocational evaluations to veterans. Mr. Albert testified that he is certified by the Department of Labor, Office of Workers Compensation Programs.

Mr. Albert explained his process for performing a labor market survey. Mr. Albert testified that the process involved understanding the Claimant's work restrictions and contacting employers regarding the restrictions to determine what positions might be available. (TR 37). Mr. Albert testified that he conducted the first labor market survey for the Claimant in February of 2010. Mr. Albert testified that, prior to conducting another survey, he received vocational test results and had the opportunity to speak with the Claimant over the phone. (TR 37). Mr. Albert performed a second and third labor market survey in May and July of 2010. In these reports, Mr. Albert reported that the Claimant could work at least 25 hours per week at minimum wage.

Mr. Albert testified that he performed another update to the labor market survey in July of 2011. Mr. Albert testified regarding the positions listed on the survey. He testified that the Hall Automotive position required a high school diploma, which the Claimant does not possess. Mr. Albert testified that the position was not appropriate. (TR 40). Regarding his process, Mr. Albert testified that he physically visited the Hardee's, Lanier, and Cracker Barrel to discuss the position with employees on site. (TR 41).

Mr. Albert testified that he used Dr. Carlson's restrictions, which were medium level work restrictions. Mr. Albert emphasized that none of the listed positions constituted medium level work. Further, Mr. Albert testified that he believed all of the positions fell well within Dr. Carlson's restrictions. Mr. Albert testified that Dr. Carlson approved the positions. Dr. Albert testified that his July 2011 update did not alter his opinion regarding the Claimant's residual wage-earning capacity.

When asked about the Summary of Jobs Approved by Dr. Carlson and Dr. Andrus, Mr. Albert explained that the list was simply a summary for him to remember previously approved jobs. Mr. Albert testified that he felt the jobs included on the list would be the best fit for the Claimant. However, Mr. Albert did testify that he would remove two of the jobs from the summary. Mr. Albert testified that the RJR Elite and Hall Automotive positions should have been removed. He testified that upon attempting to confirm with RJR Elite, the employer provided inconsistent information regarding the availability of the position. (TR 43). Mr. Albert testified that the Hall Automotive position should be withdrawn, as the position required a high school diploma or GED.

Mr. Albert testified that he believed that the Claimant could compete with anyone for entry-level positions. Mr. Albert explained that he selected "entry-level work in which the jobs

involved limited time for learning and limited skill levels.” (TR 44). Regarding the February 2010 labor survey, Mr. Albert testified that the Claimant’s likelihood of being placed in the jobs from the February 2010 survey was much less likely than the positions he discussed previously. (TR 44).

The Claimant questioned Mr. Albert regarding the positions on the labor market survey. The Claimant questioned Mr. Albert as to whether the cashier positions listed involved customer service as a fundamental aspect. Mr. Albert testified that the most important element for the positions was a willingness to work the hours and perform the necessary tasks. (TR 48). Furthermore, Mr. Albert testified that, in terms of customer service, the positions would involve being “cordial, maybe have a smile and that’s about it.” (TR 50). When asked as to whether he informed the employers that the Claimant had a fifth grade ability in math, Mr. Albert testified that he informed Hardee’s and possibly Lanier about that limitation. (TR 51).

Mr. Albert testified that employers would appreciate the Claimant’s strong work ethic and reliability. (TR 61). Mr. Albert also testified that the Claimant’s clean criminal record would be extremely important to some employers. (TR 61). Regarding the Claimant’s chance of securing a position, Mr. Albert testified that the Claimant would be in the competitive range from a verbal communication standpoint. (TR 61).

SUMMARY OF THE EVIDENCE

Deposition of Mr. Albert

Mr. Jerry Albert was deposed on June 18, 2010. (EX 14 at 1). Mr. Albert testified that his company, Momentum Healthcare, has been in existence since September 2002. (EX 14 at 5). Mr. Albert testified that six employees work for Momentum, two of whom are vocational counselors. Regarding the Claimant’s case, Mr. Albert testified that another certified rehabilitation counselor, Mr. Agonis, had performed some of the analysis. (EX 14 at 5). Mr. Albert testified that he is OWCP certified. (EX 14 at 7).

Mr. Albert testified that he created several reports for the Claimant on February 18, 2010, May 17, 2010, and June 11, 2010. When asked whether the June 11, 2010 report superseded the earlier reports, Mr. Albert stated, “I think the best way to explain that to you is in the earlier reports I deleted some jobs that I felt were inappropriate for [the Claimant] based on test scores that Coastal Rehab provided to [the Claimant].” (EX 14 at 8). When asked as to whether all of the jobs in the reports should be considered or just the June 11, 2010 jobs, Mr. Albert responded “I don’t think you need to cover all the earlier ones.” (EX 14 at 8).

Mr. Albert testified that several of the positions in his labor market surveys needed to be deleted. Specifically, Mr. Albert testified that the job with HMS Host would not be appropriate. (EX 14 at 9). Mr. Albert testified that after discussing the Claimant with the director, she stated that she would not realistically consider the Claimant for the position, given his low math scores. (EX 14 at 9). When questioned as to whether the Claimant would have an appropriate personality for the Cracker Barrel host position, Mr. Albert testified that he was not certain if the Claimant’s personality was right for the position, but that he thought it was appropriate from the

standpoint that the position took approximately a week to learn and was within the Claimant's ability level. (EX 14 at 14).

Regarding the Lanier position, Mr. Albert testified that the job involved taking a stub, inserting it into a machine, and handing the change back to the customer. (EX 14 at 15). Mr. Albert testified that he spoke to a cashier, manger, and supervisor about the position. Mr. Albert verified that a man with the Claimant's profile would be an appropriate individual to at least apply for the position. When Mr. Albert informed the AMF manager that the Claimant had low math and reading scores, the manager stated that the claimant would still be considered. (EX 14 at 16). Although the position listed high school graduate preferred, Mr. Albert testified that the AMF manager informed him that the Claimant would have been considered. Regarding the AMF and Cracker Barrel positions, Mr. Albert testified that he did not know for certain when they last had a position open.

Regarding the Hardees position, Mr. Albert testified that the manager informed him that the Claimant would have been considered but that there were currently no openings. When asked which full time positions were open and available to the Claimant in the past, Mr. Albert listed AMF bowling, Hardees, and Cracker Barrel. (EX 14 at 19). Mr. Albert testified that he was looking for positions within 35 miles of the Claimant's home.

Mr. Albert testified that he created the February 2010 and May 2010 labor market surveys without the Claimant's educational information. Mr. Albert testified that he used the Claimant's transferable skills and searched for a position that a semi-skilled individual could perform. (EX 14 at 22). Mr. Albert testified that, for his last report, he had the benefit of Coastal's testing. (EX 14 at 24).

Mr. Albert testified that he had not contacted Dr. Andrus, the new treating physician, to see if she wanted to change the Claimant's restrictions. (EX 14 at 27). Mr. Albert testified that he spoke to the Claimant on June 4, 2010 for about 45 minutes. Mr. Albert testified that the phone conversation with the Claimant helped him to better understand the Claimant's background. While talking with the Claimant, Dr. Andrus learned that the Claimant did not have a criminal history, that he owned a reliable vehicle, and that he had certain physical capacities. (EX 14 at 30). Mr. Albert testified that the physical restrictions, and not the Claimant's complaints of pain, formed the basis of his job selection process. (EX 14 at 30).

Deposition of Mr. DeMark

Mr. DeMark was deposed on June 15, 2010. (CX 20 at 1). Mr. DeMark testified that he met with the Claimant once and spoke with him on the phone once. He testified that he had Ms. Chaney's testing report, medical records, and a functional capacity evaluation, when he met with the Claimant. Mr. DeMark met the Claimant on May 5, 2010, after Ms. Chaney performed her evaluation. (CX 20 at 6).

Mr. DeMark testified that he spoke to the Claimant immediately prior to the deposition. The Claimant informed him that his condition has worsened. His medication was causing periods of dizziness. The Claimant further informed him that his worst pain constituted a nine

on a scale of one to ten and his regular pain was a six. The Claimant told Mr. DeMark that he was unable to drive due to the dizziness. (CX 20 at 11). The Claimant stated that he had not applied to the jobs listed on the labor market survey.

Mr. DeMark testified that he performed several tasks to analyze the Claimant's transferrable skills. (CX 20 at 22). Mr. DeMark examined the Claimant's resume and ran a search on a transferable skill computer program. When asked how he determined that the Claimant diligently searched for work, Mr. DeMark responded that the Claimant provided him with a one page job survey sheet addressing jobs to which he had applied. (CX 20 at 24). Mr. DeMark admitted that he did not follow up with the hiring authorities to investigate whether the Claimant applied to the positions in question.

To find possible employment avenues, Mr. DeMark ran a search of positions with the listings from the Virginia Employment Commission. (CX 20 at 38). Mr. DeMark did not contact any employers about the Claimant, nor did he contact any of the Claimant's former employers. (CX 20 at 40).

Mr. DeMark testified that the Claimant did not have the necessary skill to perform a receptionist, salesperson, dispatcher, or appointment setter position. (CX 20 at 25). Mr. DeMark stated that the primary skills associated with such positions were "business practices, working with computers, and working with the public." (CX 20 at 25). In Mr. DeMark's opinion, the Claimant's work history did not evidence an ability to perform these skills. Mr. DeMark testified that commuting over 20 to 30 miles in the Hampton Roads area would be unreasonable for a minimum wage position. (CX 20 at 32).

Deposition of Ms. Heidi Chaney

Ms. Heidi Chaney was deposed on June 15, 2010. (CX 21 at 1). Ms. Chaney testified that she is an employee of Coastal Vocational Services. (CX 21 at 5). Ms. Chaney testified that she administered the Wide Range Achievement Test and the Slosson individual test. (CX 21 at 11).

Ms. Chaney testified that she did not ask the Claimant whether he had worked in a job that required reading, writing, or mathematics. (CX 21 at 15). Ms. Chaney testified that she did not ask the Claimant whether he had a commercial driver's license, whether he was a heavy equipment operator, or whether he was powered industrial truck certified. (CX 21 at 17). For the Wide Range Achievement Test (WRAT), Ms. Chaney testified that the Claimant was compared against the adult population of the United States, within his age range. (CX 21 at 19).

Deposition of Dr. Fiore

Dr. Fiore testified that he is board certified in orthopedic surgery. (CX 36 at 4). Dr. Fiore stated that the Claimant informed him that he had a previous L5-S1 disectomy followed by a L5-S1 fusion. The Claimant informed Dr. Fiore that the only improvement after the surgery was decreased numbness and less pain in his toes. (CX 36 at 4). Dr. Fiore testified that the Claimant described his pain as a ten.

Dr. Fiore testified that the Claimant had some stenosis at L4 due to ligament and facet joint hypertrophy. (CX 36 at 6). Despite this diagnosis, Dr. Fiore stated that he was “not sure that that is really what is causing his symptoms though. That wouldn’t usually cause chronic back and leg pain.” (CX 36 at 6). Dr. Fiore indicated that the Claimant’s screws are improperly placed and could be causing problems, although he stated that it was difficult to tell if this was causing the Claimant’s pain, given that the Claimant’s pain was not different before the surgery. (CX 36 at 7).

Dr. Fiore testified that the radiologist did not note the problem with the screws. (CX 36 at 7). Dr. Fiore stated, “the radiologist isn’t a spine surgeon. . . they are not looking for the details that we do. . . it’s not uncommon for them not to mention something like that.” (CX 36 at 8).

Dr. Fiore noted:

[I]f we do anything, we would go ahead and take out the instrumentation that’s in there. I would explore that fusion while I was there and go up that next level and decompress that. But I said if we do anything- because I told him, once you are in this space here where you’re not better after an operation- two operations, not much better, the statistics go down whether or not I can help you, but I still think it is a reasonable thing to do.

(CX 36 at 9).

When discussing the spinal cord stimulator, Dr. Fiore stated, “if you put a spinal cord stimulator in there, sooner or later you are going to do the operation.” (CX 36 at 10). Dr. Fiore indicated that the spinal cord stimulator procedure was a much less significant procedure than what he was recommending. (CX 36 at 12).

Regarding his work status, Dr. Fiore stated that the Claimant was at a nine out of ten for pain and should not be released to more than light duty. (CX 36 at 12).

Deposition of Dr. Carlson

Dr. Carlson was deposed on August 15, 2011. (CX 37 at 1). Dr. Carlson testified that he is board certified in spine surgery. (CX 37 at 5). Dr. Carlson explained that he performed a microdiscectomy in 2008 and a revision surgery in 2009. (CX 37 at 7). Dr. Carlson stated that after the 2009 surgery, the Claimant was much improved. However, Dr. Carlson testified that his improvement “went away as of his 3/24/09 note, [he] began to have left hip pain, leg pain on and off at that time.” (CX 37 at 7).

Dr. Carlson testified that on April 27, 2010, the Claimant was suffering from left lower extremity pain, hip pain, and thigh pain. (CX 37 at 7). Dr. Carlson testified that after this appointment, the Claimant was to see him on an as needed basis and to continue to work within his restrictions. Dr. Carlson testified that he did not detect any difference in the Claimant’s physical condition from April 2010 to January 13, 2011. (CX 37 at 10).

On January 13, 2011, Dr. Carlson met with the Claimant to discuss the Claimant's myelogram. (CX 37 at 11). Dr. Carlson testified, "his symptomatology really hasn't changed over the past several years, and that even with changes on his CT myelogram above his fusion, the likelihood of those changes, that were not there prior to his fusion, now causing his symptomatology in his left leg would be extremely unusual." (CX 37 at 12). Dr. Carlson determined that "further surgery at 4-5 would not be helpful." (CX 37 at 12). Dr. Carlson testified that after he shared this information with the Claimant, the Claimant indicated that he would like to get another functional capacity evaluation to prove that he could not work. The Claimant indicated that he was not interested in further treatment. Dr. Carlson testified that, with the exception of the spinal cord stimulator, he did not recommend any further surgery. (CX 37 at 13). Dr. Carlson stated, "it would be unlikely that the third surgery would help," given that "going through the muscle several times of the back will continue to provide some back pain and create new scar tissue, new beds of problems." (CX 37 at 16).

Regarding the myelogram, Dr. Carlson testified that he did not see an impingement that suggested that the screws were pressing on the Claimant's facet joint. (CX 37 at 14). Dr. Carlson testified that it was typical for two doctors to disagree about whether screws are impinging. (CX 37 at 21). Dr. Carlson also testified that he did not believe that the L4-5 level was causing the Claimant's leg pain. (CX 37 at 15). Dr. Carlson testified that an MRI is an effective tool to look at soft tissue changes and recurrent disc herniations. Dr. Carlson testified that, based on the May 2010 MRI, he believed that no further diagnostic testing was necessary. (CX 37 at 18). Dr. Carlson indicated that he did not order a myelogram because the Claimant did not have a change in his symptoms and complaints. (CX 37 at 23).

Deposition of the Claimant

The Claimant testified that the last physician he had seen for the treatment of his back was Dr. Andrus. (EX 9 at 5). The Claimant further testified that he last saw Dr. Carlson on January 13, 2011. (EX 9 at 9). Regarding his treatment, the Claimant testified that he did not have any pending appointments with Dr. Carlson. When questioned about the epidural injection, the Claimant testified that he did not want the injection because it had not helped him in the past. (EX 9 at 9).

The Claimant testified that he was driving, although he noted that his vertigo occasionally prohibited him from driving. (EX 9 at 6). Regarding his education, the Claimant testified that he did not receive his high school diploma or his GED. (EX 9 at 7). The Claimant testified that he had not made any efforts to find work since October of last year. (EX 9 at 8).

The Claimant testified that he is 55 years old and receives retirement from the Employer. (EX 9 at 9). To exercise, the Claimant walks up to a quarter of a mile. (EX 9 at 11). The Claimant testified that he has a three-prong cane that he uses only as a backup, in case he gets tired as he walks. (EX 9 at 12). The cane was not medically prescribed. (EX 9 at 12).

Orthopaedic and Spine Center Medical Records

On February 21, 2008, the Claimant saw Dr. Carlson for lower back pain and occasional left posterior thigh pain. The Claimant informed Dr. Carlson that on February 13, 2008, a coworker was backing up a trailer on a forklift, when he hit the side of the Claimant's truck. (CX 1 at 1). The Claimant informed Dr. Carlson he had no previous symptoms. The Claimant also informed Dr. Carlson that he had a L5-S1 microdiscectomy in 2001.

The Claimant informed Dr. Carlson that he was feeling somewhat better. The Claimant experienced numbness in his left foot, and climbing stairs caused his knee to feel like it was giving out. (CX 1 at 1). In addition, the Claimant's left knee popped out at times. Dr. Carlson noted that nothing made the pain better and the pain was especially bad in the evening. Dr. Carlson stated that the Claimant suffered from left-sided hip pain after a contusion. Dr. Carlson expected that this would heal with time. He suggested physical therapy. Dr. Carlson stated that the Claimant should remain out of work until the next appointment. (CX 1 at 2).

On March 3, 2008, Dr. Carlson saw the Claimant for lower back pain and left lateral sided knee pain. The Claimant informed Dr. Carlson that his back was improving with physical therapy. The Claimant suffered from pain in the lateral aspect of his knee. Dr. Carlson noted that the Claimant had tenderness around the left proximal tibia laterally. Dr. Carlson stated that the Claimant had "left lateral-sided pain mainly related to tendinous strain which should improve with time." (CX 1 at 3).

On March 13, 2008, Dr. Carlson saw the Claimant. Dr. Carlson noted that the Claimant's back seemed to be improving. The Claimant felt he was improving on the left side, although he still had some pain going down his left heel. Dr. Carlson stated that the Claimant was improving with physical therapy. Dr. Carlson noted that the Claimant was to return to work in a light duty, limited standing and limited sitting capacity. (CX 1 at 5).

The Claimant saw Dr. Carlson on April 3, 2008. Dr. Carlson stated that the Claimant's "lower back and left leg are still giving him problems, and he is still having pain and difficulty doing his activities of daily living." (CX 1 at 6). Dr. Carlson noted that the Employer placed the Claimant on full rather than light duty, which aggravated the Claimant's back. Dr. Carlson stated that he needed to get an MRI scan of the lumbar spine to ensure that the Claimant did not have recurrent disk herniation. Dr. Carlson stated that the Claimant should be kept out of work until the follow up appointment. (CX 1 at 6). The MRI revealed "L5-S1 "postoperative changes with moderate left epidural fibrosis and possible small recurrent left disc protrusion, and with mild left facet joint hypertrophy with moderate right and moderately severe left neural foraminal stenosis." (CX 1 at 7). The Claimant also had a "L-5 mild annular bulging and left facet joint hypertrophy." (CX 1 at 7).

On April 17, 2008, the Claimant had a transforaminal epidural steroid injection at the L5-S1 injection site. On May 1, 2008 Dr. Carlson noted that the injection helped the Claimant for a few days, but the pain returned shortly thereafter. Dr. Carlson noted the significant pain in the Claimant's knee. (CX 1 at 14). Knee pain, combined with leg pain from the thigh to the calf, made it difficult for the Claimant to walk.

An MRI of the Claimant's left knee revealed an oblique tear posterior horn medial meniscus, a two centimeter tear of cartilage along the lateral femoral trochies, and a small area of superficial chondrosis. (CX 1 at 17).

Radiographs taken on May 7, 2008 revealed a dural sac, retrolisthesis, and multilevel degenerative disc disease. (CX 1 at 20). Dr. Carlson ordered a foraminal injection in the left sided L5-S1. (CX 1 at 24). This injection did not provide pain relief, and Dr. Carlson suggested proceeding with surgical intervention. (CX 1 at 27). On July 23, 2008, the Claimant underwent a L5-S1 microdiscectomy. (CX 1 at 33).

On July 31, 2008, Dr. Carlson stated that the Claimant's pain was improving and that the Claimant was ambulating better. (CX 1 at 35). On August 28, 2008, the Claimant stated that the pain was gone in the lateral aspect of his leg, but he did experience tingling down his left calf and left foot. (CX 1 at 37). Dr. Carlson stated that "at this point, he can begin sedentary duty."

On September 25, 2008, Dr. Carlson stated that the Claimant continued to have problems with his "left lower extremity more related to his knee than to his nerve." (CX 1 at 40). Dr. Carlson performed a corticosteroid injection of the left knee to alleviate the pain. Dr. Carlson discussed possible surgical intervention for the left knee.

On October 16, 2008, Dr. Carlson saw the Claimant, who had continued problems with his left lower extremity numbness and tingling. Dr. Carlson noted that the Claimant still had pain in his back and leg, with numbness and tingling in his left foot and the lateral aspect of his knee. (CX 1 at 42). Dr. Carlson stated that the Claimant was to remain out of work until further notice. (CX 1 at 43).

The EMG revealed findings consistent with a left L5 radiculopathy. (CX 1 at 44). On November 13, 2008, Dr. Carlson discussed treatment options with the Claimant and his wife. (CX 1 at 45). Dr. Carlson mentioned foraminal injections and surgical intervention. (CX 1 at 45). Dr. Carlson stated that the Claimant was to remain out of work until December 9, 2008. On December 9, 2008, Dr. Carlson noted that the Claimant was still experiencing significant problems and significant pain. (CX 1 at 47). The Claimant informed Dr. Carlson that he wanted to proceed with operative intervention. (CX 1 at 47). Dr. Carlson stated that the Claimant was to remain out of work until after his surgery. (CX 1 at 48).

The Claimant underwent L5 through S1 decompression and fusion with posterior lumbar interbody fusion on February 4, 2009. (CX 1 at 56). Prior to the surgery, Dr. Carlson noted that the Claimant began to suffer lower extremity pain and numbness with tingling in his foot several months after the surgery in July of 2008. (EX 8 at 56). The Claimant tolerated the procedure well. (EX 8 at 62). The Claimant was transferred to postoperative care without complication. (EX 8 at 62).

On February 20, 2009, Dr. Carlson saw the Claimant for a post-operative appointment. Dr. Carlson noted that the Claimant's "pain is much improved" and "he is quite happy." (CX 1 at 49). Dr. Carlson stated that a "review of his x-ray examination reveals excellent alignment of the lumbar spine hardware and anatomy." (CX 1 at 49). Dr. Carlson stated that the Claimant "seems

to be improving.” He instructed the Claimant to be as active as was comfortable, but not to lift more than 20 pounds. On March 24, 2009, Dr. Carlson noted that the Claimant should return to “work in at least light duty in six weeks’ time.”(CX 1 at 58). Dr. Carlson noted that the Claimant complained of left hip pain and pain in the left leg, but noted that the Claimant stated these symptoms were much improved since the surgery. On April 28, 2009, Dr. Carlson noted that the Claimant should start “sedentary duty four hours a day.”(CX 1 at 59). On June 1, 2009, the Claimant visited the office with complaints of buttock and knee pain. (CX 1 at 60).

Records Post Knee Surgery

On July 2, 2009, the Claimant indicated to Dr. Carlson that he would like to proceed with operative intervention for his knee, and a knee surgery was performed. (CX 1 at 62). On July 30, 2009, Dr. Carlson stated that the Claimant “is doing quite well. . . at this point, he can be as active as he would like.”(CX 1 at 63). On August 27, 2009 Dr. Carlson suggested that the Claimant should return “to light duty at work.”(CX 1 at 64). Dr. Carlson emphasized that the Claimant should not lift over 20 pounds.”(CX 1 at 64). Dr. Carlson suggested a work hardening program. (CX 1 at 64).

On September 25, 2009, Dr. Carlson saw the Claimant. The Claimant told Dr. Carlson that he had been “placed in assorted positions that caused irritation in his back.”(CX 1 at 65). Dr. Carlson noted that the Claimant experienced problems with the left side of his back, but stated that he had reached maximum medical improvement. (CX 1 at 65).

On October 30, 2009, Dr. Carlson saw the Claimant to review his Functional Capacity Evaluation. (CX 1 at 66). Dr. Carlson noted that the FCE showed some irritation related to the testing. Dr. Carlson stated, “He is limited to peak material to 50 pounds, occasional floor-to-shoulder material handling to 35 pounds, and frequent material handling to 10 pounds.”(CX 1 at 66). Dr. Carlson stated that the Claimant could not return to hustler driving, due to the vibration. Dr. Carlson stated that the results were valid and should be converted to permanent restrictions. (CX 1 at 66).

On December 4, 2009, Dr. Carlson noted that the Claimant continued to suffer from problems with his left lower extremity. Dr. Carlson noted that the Claimant was thinking about going on disability. (CX 1 at 67).

On April 27, 2010, the Claimant visited Dr. Carlson with complaints of left lower extremity pain. The Claimant informed Dr. Carlson that his knee was doing well, but that he was troubled by pain in his hip and left thigh. (CX 1 at 70). Dr. Carlson noted that the Claimant was on Voltaren and Skelaxin. Dr. Carlson recommended seeing a pain management physician. Dr. Carlson stated that the Claimant could continue under the same restrictions. (CX 1 at 70).

On May 6, 2010, the Claimant met with Dr. Lowery for the first time. (CX 1 at 72). The Claimant told Dr. Lowery that the pain had been constant since the February 2008 injury. (CX 1 at 72). Dr. Lowery believed that the Claimant had “failed back syndrome with persistent back and lower extremity pain status post lumbar fusion.” (CX 1 at 74). Dr. Lowery noted that the Claimant suffered from left lower extremity radicular pain and lumbar degenerative disc disease.

(CX 1 at 74). The MRI of the lumbar spine revealed “L5-S1 postoperative changes with suspected bilateral neural foraminal narrowing,” and “L4-L5 mild disc bulging with bilateral facet joint arthrosis, worse on the left, resulting in mild-moderate spinal stenosis.”(CX 1 at 76).

On January 13, 2011, the Claimant met with Dr. Carlson. Dr. Carlson noted that a CT/myelogram revealed foraminal stenosis. Dr. Carlson “had a long discussion about treatment options for this, including operative and nonoperative intervention.” (CX 1 at 79). Dr. Carlson suggested a spinal cord stimulator. (CX 1 at 79). During their meeting, the Claimant requested another Functional Capacity Evaluation to prove his inability to work. (CX 1 at 79). At that point, the Claimant indicated that he did not desire further intervention.

On February 15, 2011, Dr. Andrus discussed several options with the Claimant. (CX 1 at 83). Dr. Andrus considered a lumbar epidural, which she stated would be “both diagnostic as well as therapeutic.” The Claimant denied the epidural. In addition, Dr. Andrus prescribed Lyrica. (CX 1 at 83). Dr. Andrus stated that the Claimant could continue with medium level physical demand work. (CX 1 at 84). On March 15, 2011, Dr. Andrus increased the Claimant’s Lyrica dosage. (CX 1 at 92). The treatment records from April 12, 2011 indicate that the Claimant quit using Lyrica because of worsening vertigo. (CX 1 at 94). Due to the Claimant’s vertigo, Dr. Andrus did not add any new pain medications. (CX 1 at 97). Dr. Andrus submitted a form stating that the Claimant was seen on March 15, and could continue with medium physical demand level work, as per the October 26, 2009 functional capacity evaluation. (EX 4 at 5).

On April 12, 2011, Dr. Andrus examined the Claimant. (EX 4 at 9). The Claimant complained primarily of back and leg pain. Dr. Andrus stated that the Claimant had “declined interventional management and consideration of neuromodulation.” (EX 4 at 9). Dr. Andrus noted that the Claimant ceased use of Lyrica, as he felt Lyrica contributed to his vertigo. (EX 4 at 9). Dr. Andrus stated that the Claimant’s pain was an eight out of ten, but explained that at its worse it is a ten out of ten in severity with numbness and aching sensation in the left leg. (EX 4 at 9).

In summarizing his treatment, Dr. Andrus stated:

The patient failed epidurals and physical therapy and then went on to lumbar fusion but has continued to have pain since that time. We tried him on Neurontin which he was not able to tolerate due to cognitive side effects. . . He has deferred any further interventional therapy including neuromodulation for his pain.

(EX 4 at 9).

Dr. Andrus stated that the Claimant could continue with medium physical demand level work, as per the October 26, 2009 functional capacity evaluation. (EX 4 at 13).

The Claimant met with Dr. Andrus on June 7, 2011 to discuss pain management options. (EX 4 at 14). The Claimant described his pain as an eight out of ten. Dr. Andrus described the pain as “aching, numb, shooting pain across the lumbrosacral junction radiating to the lateral

posterior thigh and calf.”(EX 4 at 14). Dr. Andrus stated that the pain improved with sitting and was worse when walking. The Claimant stated that the pain interfered with his sleeping. (EX 4 at 14). Dr. Andrus noted that the Claimant could continue with permanent work restrictions as per the October 26, 2009 functional capacity evaluation. (EX 4 at 17).

Consultations with Dr. Fiore

The Claimant met with Dr. Fiore on September 23, 2010. (CX 24 at 1). Dr. Fiore recommended that the Claimant have a myelogram performed to look for “solidity of the fusion and to get a better feel for the extent of the decompression.”(CX 24 at 2). Dr. Fiore indicated that he would make further recommendations after viewing the myelogram.

Dr. Fiore saw the Claimant on October 14, 2010, the same day the myelogram was performed. Dr. Fiore noted that the myelogram revealed “fairly severe stenosis at L4-5.”(CX 24 at 3). In addition, Dr. Fiore noted that the screws from the fusion were impinging into the facet joint. Dr. Fiore stated that “if we do anything on him” it would be to remove the instrumentation and perform a posterolateral fusion and laminectomy. (CX 24 at 3).

Bon Secours Health System St. Mary’s Hospital Record

The Claimant had a myelogram performed at St. Mary’s Hospital in Richmond, Virginia on October 14, 2010. (CX 23 at 1). The test revealed the Claimant’s “marked spinal stenosis at the L4-L5 level primarily due to ligamentous and facet joint hypertrophy.”(CX 23 at 1). The test also revealed moderate spinal stenosis at the L5-S1 level. There was an abundance of bony growth at the facet joint fusion at L5-S1. (CX 23 at 2).

Dr. Byrd’s Medical Opinion

Dr. Byrd met with the Claimant on August 17, 2011. He noted that the Claimant answered “questions appropriately and does not appear to magnify his symptoms.”(CX 38 at 3). Dr. Byrd indicated that the Waddell testing was appropriate.

Dr. Byrd described the Claimant as “status post intra-laminar decompression L5-S1 with residual of the L-5 lamina remaining.”(CX 38 at 3). Dr. Byrd did not believe that there was significant destruction of the facet joint by the screws. (CX 38 at 3).

Dr. Byrd stated:

There has been significant change at L4-5 with resultant significant stenosis L4-5 following the L5-S1 fusion, which supports my opinion that the accelerated wear at the L4-5 level is directly related to the surgery done at L5-S1. As regards the pedicle screws at L-5 while there is some encroachment of the facet joints it appears to myself that the screws have been properly placed though this encroachment may be causing a measure of the patient’s low back pain.

(CX 38 at 4).

Dr. Byrd acknowledged that Dr. Carlson was skeptical about whether further surgery would prove beneficial. (CX 38 at 4). Dr. Byrd stated that in his discussion with the Claimant, the Claimant indicated that since the fusion surgery, he suffered from persistent left and right lower extremity pain. Dr. Byrd believed that this pain related to the stenosis at L4-5. (CX 38 at 4). Dr. Byrd recommended a removal of the Claimant's pedicle instrumentation L5-S1 and exploration of a fusion at L-5, if the patient believed his symptoms were severe enough to warrant further surgery. (CX 38 at 4). Dr. Byrd believed that, due to the pain, the Claimant is not capable of working.

Coastal Vocational Services Educational Testing

WRAT-4

	Reading	Spelling	Arithmetic
Raw Score	47	26	35
Standard Score	77	69	83
Percentile	6	2	13
Grade Equivalent	5.7	3.9	5.7

(CX 14 at 3)

Slosson Intelligence Test

Chronological Age	54
Raw Score	119
Intelligence Quotient	82
Percentile Rank	13

Ms. Chaney, the rehabilitation counselor performing the tests, reviewed the Claimant's employment and accident history.

Ms. Chaney noted:

[The Claimant's] scores indicate that he is low or below average in the areas of reading/word recognition, spelling, and math. His IQ score is classified as below average. [The Claimant] would have difficulty performing work that involves reading, writing, or mathematics. The combination of [the Claimant's] lack of transferable skills and his poor educational background make him a poor candidate for returning to work within his restrictions.

(CX 14 at 4).

Ms. Chaney is a rehabilitation counselor for Coastal Vocational Services. (CX 15 at 1). She is certified by the United States Department of Labor, Office of Workers' Compensation Programs. (CX 15 at 2). She received her Masters of Science in Education (Counseling) at Old Dominion University. (CX 15 at 2).

Vocational Evaluation

Mr. DeMark performed a vocational evaluation on May 5, 2010. (CX 16 at 1). Mr. DeMark reviewed the Claimant's medical history, family and social background, educational background, vocational testing, and vocational background. (EX 16 at 2).

Mr. DeMark stated:

The combination of [the Claimant's] lack of transferable skills, competition from other workers, and his poor educational background make him a poor candidate for returning to work within his restrictions. Competition from other workers in his labor market who are better educated, younger, and more physically able make the job search extremely difficult, if not impossible.

(CX 16 at 3).

Mr. DeMark stated that the Claimant had sought work with diligence. (CX 16 at 3). Dr. DeMark emphasized that the Claimant did not have the "transferable skills to work as a receptionist, sales person, dispatcher, or appointment setter." (CX 16 at 3). Furthermore, Mr. DeMark noted that the Claimant's history of back problems would dissuade a cautious employer from hiring the Claimant. (CX 16 at 3). Mr. DeMark stated that the Claimant's "vocational difficulties stem from the accident of February 13, 2008 and will continue for the remainder of his life." (CX 16 at 4).

On June 14, 2010, Mr. DeMark responded to Mr. Albert's amended labor market survey. Mr. DeMark indicated his disagreement with Mr. Albert. Mr. DeMark emphasized his belief that the Claimant would not be competitive in sales or customer service.

He stated:

[The Claimant] must compete for work with others who are more qualified, younger, and who live in closer proximity to the employers. Many of these jobs are beyond a reasonable commute and are not in his local area. The combination of [the Claimant's] lack of transferrable skills, competition from other workers, and his poor education background make him a poor candidate for returning to work within his restrictions.

(CX 18 at 1).

Mr. DeMark did not believe that the Claimant was competitive for any of the positions in Mr. Albert's amended report. Mr. DeMark further disagreed with Mr. Albert's labor market survey of June 11, 2010 for the same reasons. (CX 19 at 1).

July 2011 Labor Market Survey

Position and Salary	Qualifications	Availability and Duties	Physical Demands
Car Spa, Greeter, \$7.25 per hour Virginia Beach, Virginia	-high school or GED not required Must have communication skills and be able to pass background and drug tests.	July 15, 2011 Establish total customer satisfaction. Greet customers. Explain and recommend car wash service offerings to customers.	-Alternating standing, walking, and sitting. Mostly standing -Lifting of up to 10 pounds. -Occasional bending. -Occasional reaching.
Jacob's Entertainment, Bet taker, \$7.25 per hour Chesapeake, VA	No high school or GED required. Must be 18 or older.	July 11, 2011 Provide customer service to patrons. Assume responsibility for all monies. Issue all tickets quickly and accurately. Cash all tickets presented. Make change quickly.	-Alternate standing, walking, and sitting. -Lifting up to 10 pounds. -Occasional reaching. -Push/pull with the arms.
Lanier Parking, Cashier, \$7.50 per hour	High school or GED not required.	July 11, 2011 Worker will be trained to	-Alternate walking and sitting, no standing.

Norfolk, VA	Basic communication skills desired. Must be 16 or older.	process payments for garage parking at local facilities. Worker will sit on booth while on job.	-Occasional bending. -Occasional reaching.
Chick-Fil-A Dining Room Host, Cashier \$7.50 per hour Hampton, VA	High school or GED not required. Must be sixteen or older.	June 3, 2011 Provide friendly customer service and assisting guests with fast food orders and check out. Occasional light cleaning duties.	-Half standing, and half walking. -No lifting over 20 pounds. -Occasional bending, reaching, and stooping. -Position disapproved by Dr. Andrus.
Moe's Southwest Grill, Host, Cashier, Line Cook \$7.25 per hour Virginia Beach, VA	High school or GED not required.	June 3, 2011 Worker will be trained to complete various duties. Hours may be split among four locations. Must have flexible schedule and be able to provide customer service.	-Mostly standing but some walking. -Occasional bending, climbing, and stooping. -Position disapproved by Dr. Andrus.
KFC, cashier and kitchen helper, \$7.25 per hour,	High school or GED not required, must be 16 or older	June 3, 2011 Worker will be trained for	-Half standing and half walking.

Virginia Beach, VA	and have a good work ethic	various duties. Will assist with cashiering and food prep duties.	-Lifting up to 20 pounds. -Occasional bending and stooping - Disapproved by Dr. Andrus.
Quiznos Sub Shop, Sub Maker and Cashier, \$7.25 per hour Virginia Beach, VA	High school or GED not required Driver's license and own vehicle required	June 3, 2011 Worker will occasionally perform deliveries. Provides customer service to guests and assists with sandwich order processing.	-Alternating standing, walking, and sitting, mostly standing. -Push, pull with arms. -Lifting up to 20 pounds. -Occasional bending and reaching. -Position disapproved by Dr. Andrus.
Cracker Barrel, host, \$7.25 per hour Chesapeake, VA Both full and part time available.	High School or GED not required Must be 16 or older.	June 1, 2011 Engage guests in friendly conversation, pass out menus, write options on board, pour coffee, full and part time available	-Alternate standing and walking, with mostly standing. -Lifting up to 20 pounds. -Occasional bending and reaching. -No push, pull with arms.

			-Approved by Dr. Andrus.
<p>Hall Automotive, Greeter, \$8.00 per hour</p> <p>Chesapeake, VA</p> <p><i>Position later removed by Mr. Albert. He testified that the position required a high school diploma.</i></p>	<p>Must have high school diploma or GED.</p> <p>Must have valid driver's license.</p> <p>Must be able to drive manual cars.</p> <p>Must pass background check.</p>	<p>May 27, 2011</p> <p>Greeting customers as they enter the service department.</p> <p>Preparing vehicles to be serviced.</p> <p>Moving vehicles not currently being serviced and keeping an orderly area.</p>	<p>-Alternate standing, walking, and sitting.</p> <p>-Lifting up to 20 pounds.</p> <p>-Occasional bending and reaching.</p> <p>-Push, pull with arms.</p> <p>- Disapproved by Dr. Andrus.</p>
<p>Friendly's, Greeter \$7.35 per hour</p> <p>Chesapeake, VA</p>	<p>No high school diploma or GED requirement.</p> <p>Must be at least 16.</p>	<p>May 27, 2011</p> <p>Perform daily inspection of hostess stand, verify supplies, stock station with menus, determine customer needs and accommodate, place names on wait list.</p>	<p>-Alternate standing and walking with mostly standing.</p> <p>-Lifting up to 10 pounds.</p> <p>-Occasional bending and reaching.</p> <p>-Push, pull with arms.</p> <p>-Approved by Dr. Andrus.</p>
<p>Cracker Barrel, Cashier, \$7.25 per hour</p> <p>Virginia Beach,</p>	<p>No high school diploma or GED required.</p> <p>Must be at</p>	<p>May 27, 2011</p> <p>Cash out guests after their meal or</p>	<p>-Standing and sitting, 90% standing.</p>

<p>VA</p> <p>Both full and part time positions available.</p>	<p>least 18.</p> <p>Must have basic knowledge of math- numbers and money will come into play as employee cashes out guests</p>	<p>store purchase.</p> <p>Occasional light cleaning duties.</p>	<p>-Occasional bending and reaching.</p> <p>-Lifting up to 10 pounds.</p> <p>-Approved by Dr. Andrus.</p>
<p>Hardees, Cashier, \$7.25 per hour</p> <p>Chesapeake, VA</p> <p>30-40 hours per week</p> <p>Hours of work are based on schedule and performance.</p>	<p>No high school diploma or GED requirement. Must be at least 16.</p>	<p>May 27, 2011</p> <p>Hours of work are based on schedule flexibility and performance.</p> <p>Worker is responsible for completing opening and/or closing duties of the store. Will also help with cashiering and light cleaning duties</p>	<p>-Alternate standing and walking, with 60% standing.</p> <p>-Lifting up to 20 pounds.</p> <p>-Occasional bending and reaching.</p> <p>-No push/pull with arms.</p> <p>-Position approved by Dr. Andrus.</p>
<p>Food Lion, Retail Pricing Associate \$8.00 per hour</p> <p>Virginia Beach, VA</p>	<p>No high school diploma or GED requirement</p> <p>Must be 18 or older.</p>	<p>May 27, 2011</p> <p>Replace tags for each item that changes price in all departments.</p> <p>Scan the product or tag for each price change to ensure accuracy.</p>	<p>-Alternate between standing and walking.</p> <p>-Lifting up to 10 pounds.</p> <p>-Occasional bending and reaching.</p> <p>-Push, pull with arms.</p> <p>-Approved by Dr.</p>

			Andrus.
<p>Popeye's Chicken and Biscuits, Cashier, \$7.25 per hour</p> <p>Virginia Beach, Virginia</p> <p>Hours of work are based on availability.</p>	<p>No high school diploma or GED requirement</p> <p>Must be 16 or older</p>	<p>May 23, 2011</p> <p>Worker will be responsible for performing cashiering duties at a fast food restaurant. Provide change using cash register information and a brief verbal interaction with guest.</p>	<p>-Standing and walking, 90% standing.</p> <p>-Occasional bending and reaching.</p> <p>-Lifting of up to 10 pounds.</p> <p>-Approved by Dr. Andrus.</p>
<p>Moe's Southwest Grill, Host, \$7.25 per hour</p> <p>Newport News, VA</p> <p>Openings in part-time and full-time.</p>	<p>No high school diploma or GED requirement.</p> <p>Must be 16 or older.</p>	<p>May 23, 2011</p> <p>Observe dining room guests and respond immediately to their needs. Provide drink refills and condiments. Deliver dining room and drive-through orders to guests as needed.</p>	<p>-Alternate between standing and walking.</p> <p>-Lifting up to 20 pounds.</p> <p>-Occasional bending and reaching.</p> <p>-No push/pull with arms</p> <p>-Approved by Dr. Andrus.</p>

(EX 16).

All positions were approved by Dr. Carlson. (EX 7 at 5-19).

June 2010 Labor Market Survey

Position and Salary	Qualifications	Availability and Duties	Physical Demands
Hardee's, Cashier, \$7.25 per hour, 16-24 hours	High school diploma not required.	July 2, 2010	-70% standing and 30% walking.

per week Portsmouth, VA	Must be 16 or older.	Position is responsible for tending to the cash register at a busy fast food restaurant. Must be able to provide good customer service and accurate change to customers.	-Lifting up to 20 pounds. -Occasional bending. -Frequent reaching.
Hardee's, Cashier, \$7.25 per hour, 16-24 hours per week Chesapeake, VA	High school diploma or GED not required.	July 2, 2010 This position is responsible for tending to the cash register at a fast paced restaurant and providing good customer service and accurate change to customers.	-70% standing, and 30% walking. -Lifting up to 20 pounds. -Occasional bending. -Frequent reaching. -Push, pull with arms.
Hardee's, Cashier, \$7.25 per hour, 16-24 hours per week Chesapeake, VA Opening shift	High school diploma or GED not required	July 2, 2010 This position is opening shift. Hours of work start at 4 am. Position is responsible for tending to cash register in fast food restaurant with light cleaning and set up duties.	-60% standing, and 40% walking. -Lifting up to 20 pounds. -Occasional bending. -Frequent reaching. -Push, pull with arms.
Lanier Parking Systems, \$7.25 per hour, 13-22 hours per week Virginia Beach, VA	High school diploma or GED not required.	June 28, 2010 Job is spent directing traffic at the VA Beach Ampitheater. Worker must be able to stand for extended periods of time outdoors and assist concert goers with directions for event and parking.	-Standing for 80%, walking for 20%. -Occasional bending, reaching, stooping. -Lifting up to five pounds. -Push, pull with arms.
Hardees, Cashier, \$7.25 per hour, 16-24 hours per week Cape Charles, VA	High school diploma or GED not required 16 and older.	June 25, 2010 Job is spent assisting customers with check out procedures in busy fast food restaurant. Must provide good	-90% standing, 10% walking. -Lifting up to 20 pounds. -Occasional bending

		customer service and be able to handle cash. Occasional light cleaning and kitchen duties may be required.	and reaching. -Push/pull with arms.
Cracker Barrel, Host, \$7.25 per hour, 16-32 hours per week Hampton, VA	High school diploma or GED not required. 16 and older.	June 25, 2010 Full time and part time positions currently open. Job is spent greeting restaurant guests, providing good customer service, and seating guests appropriately.	-80% standing, 20% walking. -Lifting up to 20 pounds. -Occasional bending. -Frequent reaching. -Push, pull with arms .
Hardee's, Cashier, 20-40 hours per week, \$7.25 per hour Hampton, VA	High school diploma or GED not required 16 and older	June 24, 2010 The location has numerous positions available for part-time and full time. Job is spent assisting busy restaurant with customer service and check out procedures.	-Standing 90%, walking 10%. -Lifting up to 20 pounds. -Occasional bending, stooping, squatting. -Frequent reaching. -Push/pull with arms.
Hardee's, Cashier, 16-24 hours per week, \$7.25 per hour, Chesapeake, VA	High school diploma or GED not required 16 and older	June 24, 2010 Worker is responsible for assisting with customer service and check out procedures in busy fast food restaurant. Occasionally assisting other staff members in kitchen may be necessary.	-90% standing, 10% walking. -Lifting up to 20 pounds. -Occasional bending, stooping, squatting. -Frequent reaching. -Push/pull with arms.
Hardee's, Cashier, 16-24 hours per week, \$7.25 per hour Virginia Beach, VA	High school diploma or GED required 16 and older	June 24, 2010 Worker will assist at checkout of busy fast food restaurant processing payments and providing good customer service.	-90% standing, 10% walking. - Lifting up to 20 pounds. -Frequent reaching.

		Occasional assistance in kitchen with light clean up may be required.	-Push/pull with arms.
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(EX 16).

DISCUSSION

Section 22 of the Act permits an ALJ to review and modify a compensation order “[u]pon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 8(f)), on the ground of a change in conditions or because of a mistake in a determination of fact.” 33 U.S.C. § 922. Here, Claimant applied for modification.

Section 22 provides the only means for changing otherwise final decisions, and 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* 33 U.S.C. § 922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 301, 30 BRBS 1, 5(CRT) (1995). It is well established that the party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 139, 31 BRBS 54, 61–62(CRT) (1997); *R. V. v. Friede Goldman Halter*, 43 BRBS 22, 23 (2009). Modification under Section 22 reflects a statutory preference for accuracy over finality, *see R. V.*, 43 BRBS at 25, and the courts have stated that the ALJ has broad discretion to correct mistakes of fact “whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh’g denied*, 404 U.S. 1053 (1972); *see also Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497 (4th Cir. 1999).

A request for modification under § 922 of the Act is not to provide a back-door route to retry a case but allows for the consideration of newly submitted evidence or to further reflect on the evidence initially submitted. The trier of fact must balance the need to render justice against the need for finality in decision making. *Sharpe v. Director, OWCP*, 495 F.3d 125, 133 (4th Cir. 2007). When determining whether to reopen a case on modification, an ALJ should consider any pertinent factors to consider whether a modification would be in the interest of justice. *Id.*

Modification based on a change in condition may be granted where a claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

Change in Physical Condition

The Claimant may seek a modification based on a change in physical condition from the previous order. The previous order was issued on October 7, 2010. The Claimant argued that a modification was proper because, since the order, two physicians have recommended that the Claimant undergo further surgery. (TR 15). The Claimant emphasized that the Claimant is totally disabled due to his failed back surgery syndrome. (TR 15). Claimant asserted, “it’s our position that the Claimant remains totally disabled as a result of this injury until he can have

additional surgery to remove the hardware.”(TR 15). At the hearing, the Employer argued that there is “no basis for a change in condition application because nothing’s changed since the time this order was entered in October of 2010.” (TR 17).

The Claimant has presented medical evidence that postdates the order. The Claimant met with Dr. Fiore on October 14, 2010. (CX 24 at 3). Dr. Fiore reviewed the results of the myelogram. He noted that the myelogram revealed fairly severe stenosis at L4-5. Dr. Fiore stated that, “if we do anything on him,” it would be to remove the instrumentation and perform a posterolateral fusion and laminectomy. (CX 24 at 3). When questioned as to whether any operative intervention was warranted, Dr. Fiore testified, “once you are in this space here where you’re not better after an operation- two operations, not much better, the statistics go down whether or not I can help you, but I still think it’s a reasonable thing to do.” (CX 36 at 9).

By contrast, Dr. Carlson testified that there was no difference in the Claimant’s physical condition between April 2010 and January 2011. (EX 6 at 10). Dr. Carlson did not recommend further surgery.

At his deposition, Dr. Carlson testified:

[H]is symptomatology really hasn’t changed over the past several years, and that even with changes on his CT myelogram above his fusion, the likelihood of those changes, that were not there prior to his fusion, now causing his symptomatology in his left leg would be extremely unusual.

(CX 37 at 12, emphasis added).

Dr. Carlson indicated that he did not advocate additional surgery. He stated, “it would be unlikely that the third surgery would help.”(CX 37 at 16). Dr. Carlson stated, “going through the muscle several times of the back will continue to provide some back pain and create new scar tissue, new beds of problems.”(CX 37 at 16). Dr. Carlson further testified that he did not see an impingement that suggested the screws were pressing on the Claimant’s facet joint. (CX 37 at 14). Dr. Carlson stated that no further diagnostic testing of the Claimant is necessary. (CX 37 at 18). He explained that he did not order a myelogram because the Claimant’s symptoms and complaints had not changed. (CX 37 at 23).

On November 11, 2011, Dr. Carlson responded to Dr. Byrd’s opinion that the Claimant should undergo surgery if the pain was great enough to warrant it. Dr. Carlson characterized Dr. Byrd’s opinion as “reasonable and thoughtful.”(EX 12 at 1). Despite this contrary opinion, Dr. Carlson reiterated his concerns.

Dr. Carlson noted:

[M]y reservations concerning surgical intervention for extension fusion at L4-5 and decompression at his L4-5 level are that he has continued to have left lower extremity pain despite all interventions including the surgical intervention. . .

(EX 12 at 1).

Dr. Carlson concluded that “further extension fusion would not be helpful and most likely would not lead to resolution of his pain.”(EX 12 at 1).

Dr. Byrd met with the Claimant on August 17, 2011. (CX 38 at 1). Dr. Byrd noted that it appeared that Dr. Carlson was “skeptical that further surgery would relieve the patient’s symptoms.”(CX 38 at 4).

Addressing Dr. Carlson’s skepticism, Dr. Byrd noted:

However, in my discussions with the patient he states that since the fusion surgery he has had persistent left lower extremity pain, but in addition has had the occurrence of right lower extremity pain, which again I believe is related to the stenosis at L4-5. As regards further treatment it would be my recommendation that if the patient believes his symptoms to be severe enough to proceed with surgery that I would recommend that he undergo removal of his pedicle instrumentation L5-S1 and exploration of the fusion at L-5.

(CX 38 at 4).

Dr. Carlson has followed the Claimant’s back problems since before the February 18, 2008 workplace accident. In addition, Dr. Carlson performed the two back surgeries related to the accident. Dr. Carlson has had the benefit of extensively following and treating the Claimant’s back symptoms. Dr. Carlson attended the George Washington University Medical School. (EX 6 at 33). Dr. Carlson served as an instructor in orthopaedic surgery at Harvard University. (EX 6 at 32). In addition, Dr. Carlson is Board Certified in Orthopaedic Surgery. (EX 6 at 32). Dr. Carlson has significant research and teaching experience.

Dr. Fiore attended medical school at the Chicago Medical School. He was an orthopaedic resident at the Medical College of Virginia. He has published four articles. (CX 35 at 4). Dr. Fiore is Board Certified, although his CV does not state his area of Board Certification. (CX 35 at 1). Although Dr. Fiore has impressive credentials, he met with the Claimant on only two occasions. (CX 36 at 13). Dr. Fiore did not consult with Dr. Carlson or Dr. Andrus regarding their treatment of the Claimant. (CX 36 at 14).

As the physician who provided treatment to Claimant throughout the relevant period, Dr. Carlson has had the opportunity to observe the Claimant over time. Dr. Carlson saw the Claimant on February 21, 2008, shortly after the February 13, 2008 injury. (CX 1 at 1). Dr. Carlson continued to follow Claimant with monthly appointments throughout 2008. On July 23, 2008, Dr. Carlson performed a microdiscectomy on the Claimant. On February 4, 2009, Dr. Carlson performed revision surgery, and in July of 2009, Dr. Carlson performed knee surgery on Claimant. In forming his opinion against further operative intervention, Dr. Carlson had the benefit of observing Claimant’s condition over an extended period of time. Dr. Carlson’s records and letters reflect a more comprehensive understanding of Claimant’s condition. By

contrast, Dr. Fiore met with the Claimant only twice, and did not consult with the Claimant's treating physicians regarding his history. As Dr. Carlson's opinion is consistent, well-reasoned, and based on observation of the Claimant over a long period, I place the greatest weight on Dr. Carlson's opinion.

In addition, the doctors recommending surgery are tentative in their opinions. Dr. Fiore stated that he would perform the surgery if he "did anything on him." Dr. Fiore testified, "once you are in this space here where you're not better after an operation- two operations, not much better, the statistics go down whether or not I can help you." (CX 36 at 9). When the Employer asked whether Dr. Fiore agreed that "a lot of time folks that have gone through multiple back surgeries without improvement, they are just not going to get any improvement," Dr. Fiore responded "correct." (CX 36 at 15). Dr. Fiore did state, "I'd hate to leave him the way he is knowing that there's a reasonable chance that we could make him better." (CX 36 at 9). However, Dr. Fiore also stated that, after the surgery in question, "he may not get the improvement he wants." (CX 36 at 10). Dr. Fiore also noted that the Claimant's history made successful surgery statistically less likely. (CX 36 at 9). Dr. Byrd recommended further surgical intervention if the Claimant "believes his symptoms are severe enough to proceed with surgery." (CX 38 at 4).

Claimant presented medical evidence from two doctors regarding further surgery. Dr. Byrd and Dr. Fiore recommended surgery only tentatively. Dr. Carlson, the physician with significant knowledge of the Claimant and his treatment history, recommended against surgery even after carefully considering Dr. Byrd's opinion. The physician with the greatest familiarity with the Claimant's history recommended against the surgery, and the remaining two physicians recommend surgery tentatively. The Claimant argued that he would establish total disability by demonstrating that he required surgery. (TR 15). As I have found that the medical evidence does not establish that the Claimant requires further surgery, the Claimant has not met his burden of demonstrating a change in condition.

As the party seeking modification, the Claimant bears the burden of proof. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The Claimant has not met his burden of demonstrating a change in physical condition, and has also not demonstrated that the interest of justice would be served by modifying the prior Decision and Order.

Change in Economic Condition

Modification based on a change in condition may be granted where a claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Claimant has not presented evidence that the Claimant's economic condition has changed since the October 7, 2010 order.

CONCLUSION

I have determined the following based on a complete review of the record in light of the argument of the parties, testimony of the witnesses, applicable statutory provisions, regulations, and pertinent precedent. Claimant argued that he would establish a change in condition by

demonstrating that he required further surgery. Claimant offered the opinion of two doctors regarding a need for further surgery; however the doctors offered tentative opinions. In addition, these opinions were contradicted by Dr. Carlson, the physician with the greatest knowledge of the Claimant's persistent back and lower extremity pain. Claimant failed to establish a change in physical or economic condition and to demonstrate why modification is necessary to render justice under the Act.

ORDER

It is hereby ORDERED that the current "Claimant's Request for Modification" is **DENIED**.

KENNETH A. KRANTZ
Administrative Law Judge

Newport News, Virginia
KAK/ecd/mrc