



**Issue Date: 25 September 2015**

**CASE NO.: 2014-LHC-01955**

**OWCP NO.: 08-139768**

**In the Matter of:**

**THERESA ENHELDER,  
Claimant**

**v.**

**ARMY & AIR FORCE EXCHANGE  
WACO DISTRIBUTION CENTER,  
Employer**

**and**

**ARMY & AIR FORCE EXCHANGE  
C/O CONTRACT CLAIMS SERVICES,  
Carrier**

**BEFORE: LARRY W. PRICE  
Administrative Law Judge**

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, (herein the Act), brought by Theresa Enhelder (Claimant) against Army & Air Force Exchange Waco Distribution Center (Employer) and Army & Air Force Exchange c/o Contract Claims Services (Carrier).

On May 21, 2015, a formal hearing was held in Houston, Texas. The parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing memoranda. Claimant offered Exhibits 1-38, and Employer offered Exhibits 1-14 and 17-33, all of which were admitted into evidence. The parties' Stipulations were also admitted into evidence. This decision is based upon a full consideration of the record.<sup>1</sup>

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<sup>1</sup> References to the record are as follows: Transcript – Tr.; Claimant's Exhibits – CX; Employer's Exhibits – EX; Stipulations – ALJ 1.

## **I. STATEMENT OF THE CASE**

Claimant has a history of chronic back pain from May 2008 and received treatment then and in 2010 and 2011. On June 13, 2013, she had an accident at work. She claims that her workplace accident aggravated her pre-existing injury to the extent that she now needs spinal surgery. Employer contends that the workplace accident could not have resulted in Claimant's need for spinal surgery and was, at most, a strain or sprain. Employer also contends that Claimant is capable of returning to employment.

## **II. STIPULATIONS**

The parties have stipulated, and I find:

1. The Act applies to this claim.
2. Claimant injured her low back on June 13, 2013 at Employer's warehouse in Waco, Texas.
3. The injury arose out of and in the course of Claimant's employment with Employer.
4. There was an employer/employee relationship between the parties at the time of the injury.
5. Claimant timely notified Employer of the injury.
6. Employer's Notice of Controversion was timely filed.
7. The informal conference was conducted on August 6, 2014.
8. Claimant's average weekly wage at the time of injury was \$499.16.
9. The Claimant was temporarily and totally disabled from June 14, 2013 through January 12, 2014, and was paid accordingly.
10. Claimant has not returned to her pre-injury employment.
11. Claimant has engaged in alternative employment as follows:
  - a. Employer from January 13-February 18, 2014, earning \$2,738.06, and;
  - b. Geneva's Place from June 1, 2014 to April 30, 2015, earning \$5/hour.

## **III. ISSUES**

The remaining issues to be resolved are:

1. Causation of Claimant's current lumbar symptoms.
2. Nature and extent of disability after February 19, 2014, including maximum medical improvement and post-injury wage earning capacity.
3. Section 7 medical benefits.
4. Claimant's entitlement to attorneys' fees and expenses.

#### **IV. RELEVANT EVIDENCE**

##### **Claimant's Testimony**

At the time of her injury in 2013, Claimant worked for Employer as a material handler, loading and unloading the conveyor belts and operating the console. In that capacity, Claimant lifted up to 75 pounds at times. On June 13, 2013, Claimant moved two heavy boxes weighing 75 pounds from the floor to the conveyor. She lifted the boxes and twisted to the conveyor belt on her right. She went on break and had a hard time getting up. Claimant's foreman saw her manner of walking, and she told him that she hurt her back. She asked her foreman not to report an injury. He reported the accident despite Claimant's request. (Tr. 10-14).

The same day of the accident, Claimant presented for treatment at Texan Urgent Care Clinic. She received a prescription and returned to work. Later, Claimant complained of pain into her leg and sought treatment at Injury One. She was then restricted from work. (Tr. 14-16).

Claimant's treating physician is Dr. Stephen Gist at Injury One in Waco, Texas. He has referred Claimant for physical therapy, prescribed medication, and recommended lumbar epidural steroid injections. Claimant testified that the injections did not help at all. Dr. Gist recommended a second ESI but it was not approved. (Tr. 16-17).

In October 2013, Claimant was examined by Dr. William Blair, Employer's second medical opinion physician. Dr. Blair performed a physical examination and told Claimant she did not need an MRI. He determined that Claimant could return to work in early January 2014. Dr. Gist did not agree with Claimant's full-duty release. (Tr. 18-20).

Claimant returned to work as directed by Employer. At that time, Claimant was under restrictions from Dr. Gist on lifting, bending, squatting, sitting, and standing. Employer did not accommodate these restrictions. Claimant testified that she had to take hydrocodone and muscle relaxers to deal with the pain of working full-duty. She complained to her supervisor, who told her to continue working. Claimant continued to treat with Dr. Gist. (Tr. 21-26).

After working six to eight weeks, Claimant was called to the office. Employer had apparently received Dr. Gist's latest restrictions. Employer told Claimant it could not accommodate her restrictions, and Claimant was sent home. She was placed on leave without pay until April 2015, when it exhausted. (Tr. 26-27).

Claimant treated with Dr. David Martincheck for pain management. She also treated with a neurosurgeon, Dr. Stephen Neece, at Dr. Gist's referral. Dr. Neece recommended a fusion or laminectomy and discectomy at L4-5. (Tr. 28-30).

In November 2014, Claimant was evaluated by Dr. Kevin James to get a second opinion on the surgery recommendation. Dr. James recommended a fusion at the L4-5 level. Claimant never had the surgery. (Tr. 31-33).

Claimant acknowledged her history of back pain prior to 2013. She treated in May 2008 for back pain radiating into her right hip. She does not recall much of her treatment in 2008. In September 2010, Claimant experienced a flare-up of back pain while at work, which had persisted through the weekend. She had an MRI and received lumbar ESI shots. Claimant missed a few months of work. She found the ESI shots effective. She was released to full duty without restrictions in February 2011. From that time until her injury, Claimant did not seek any medical treatment for any back pain. (Tr. 33-37).

Claimant elected not to have surgery in 2010 because she felt recovered. Presently, her pain has not improved. She feels pain every day in her lower back and radiating down her right leg. Claimant testified that she initially felt better but experienced an exacerbation of her pain when Employer returned her to work in January 2014. (Tr. 38-40).

In May 2015, Claimant met with a vocational expert, Nicole Dunaway. She followed up with the job leads identified in the report. Claimant signed up on WorkInTexas.com. She does not have a G.E.D. or high school diploma. She cannot type well. She has no computer skills. Claimant had a CNA certificate, but it expired years ago. To recertify, she would have to take the course again. She also testified that she made contact on several of the identified positions but was either unqualified or received no response. (Tr. 43-52).

Claimant testified that she would like to return to her pre-injury employment but is physically unable to do so. She is in constant pain. Her medications make her drowsy for several hours. She continues treating with Dr. Gist once a month. Claimant participated in a work hardening program in March 2015 but felt no improvement in her back. (Tr. 52-55).

Claimant's husband owns Geneva's Place, a small bar. She works there on Wednesday nights. She sits the majority of the time. Claimant earns very little in tips. (Tr. 55-57).

Claimant does not recall telling her first doctor that she had pre-existing back pain. She also does not recall telling the physician at Texan Urgent Care, Dr. James, or Dr. Blair about her history of back pain. But, Dr. Gist was fully informed. Claimant also testified that she told Dr. Neece about her prior back injury. (Tr. 58-60).

Claimant and her husband own several motorcycles. She rode her 2004 model about five times between 2008 and 2010. She did not ride it at all between 2010 and 2013. She used to ride with her husband but not regularly. Claimant testified that she has not ridden in over two years. She usually stayed home with a child while her husband went riding. (Tr. 60-62).

Dr. James told Claimant that she does not have a pinched nerve but that a gel-like fluid is pressing on her nerves causing the pain at the L4-5 level. He recommended a lumbar fusion but would not proceed unless Claimant quit smoking and passed a nicotine test. Claimant has not quit smoking. (Tr. 62-65).

Claimant does not recall details of her medical reports or treatment in 2008. She does not recall whether she was taken off of work or when her first MRI was taken. Her physician noted chronic back pain. Claimant testified that she probably reported muscle pain for which she would take over the counter medication on occasion. She vaguely recalls complaining of lower back pain and bilateral lower extremity pain following an ESI in July 2008. (Tr. 67-77).

In 2010, Claimant reported back pain to her physician and noted that she worked in a bar. She does not recall telling her doctor that she was self-employed. She received an injection and was excused from work for a few days. Claimant does not recall being informed that she had a tear. She did not report the injury as a work injury. She wore a back brace and took medication to help her sleep at night. Claimant recalls receiving two or three injections in 2010. Around this time, Claimant's physician told her that surgery was an option. She was off of work for several months. Claimant did not make a worker's compensation claim because she did not want an injury on her record. (Tr. 78-86).

In the past, Claimant reported two shoulder injuries to Employer without suffering adverse consequences. She also got overheated at work one day. At some point, Claimant had a heart attack at home and was off of work. She returned to work the following week. (Tr. 86-88).

Claimant does not work regularly at Geneva's Place. If she could not work, her husband would not hire another bartender because Wednesdays are not profitable nights. The bar does not earn any money for Claimant and her husband. (Tr. 92-95).

Claimant has not been looking for work. She testified that she is trying to get better so she can return to her job. Her only physical limitations relate to the lower back. Claimant does not recall if her doctors would return her to work after a fusion surgery. She does not know if she could actually work given her medications. Claimant testified that she could possibly work in a movie theater, gas station, or security position. She has not asked any friends or family if they knew of job openings other than her daughter. Claimant took a typing test at her daughter's place of employment in 2010 but did not pass. (Tr. 95-101).

Claimant testified that she could not do the conveyor belt job today. She cannot climb stairs and ladders. She looked for the jobs identified by the labor market survey sent to her. She also went online to the Texas Workforce Commission's website. (Tr. 102-04).

Claimant testified that she could not show for a job consistently, five days per week, given her current condition and the medications she takes. (Tr. 107).

## **Medical Evidence**

### *Prior Medical Treatment*

On May 5, 2008, Claimant presented to the Hillcrest Family Health Center complaining of right-sided low back pain with right hip radiculopathy. She returned for treatment when the symptoms did not abate with pain medication. Her treating physician, Dr. Gerald Salinas, recommended an MRI of the lumbar spine. The MRI revealed mild disc desiccation and a mild underlying annular bulge. (EX-31, pp.1-4). Dr. Salinas referred Claimant to Dr. Masaki Oishi, a neurosurgeon. Dr. Oishi diagnosed Claimant with low back pain and radiculopathy secondary to degenerative disc changes. He recommended a lumbar ESI to manage Claimant's lower back pain conservatively. Claimant reported partial relief and presented for a repeat ESI in July 2008. When Claimant reported little to no relief, Dr. Oishi recommended treatment options such as physical therapy, chiropractic care, and surgery. Claimant took the recommendations under advisement. (EX-31, pp.10-20).

On September 13, 2010, Claimant returned to Dr. Salinas with severe back pain. Dr. Salinas ordered a repeat MRI, prescribed medications, and referred Claimant to Dr. Oishi. The MRI showed mild disc desiccation and bulge at L4-6 and an annular tear that "does not result in significant neural encroachment." (EX-31, pp.24-27). Claimant treated with Dr. Oishi on September 15, 2010. As before, Dr. Oishi diagnosed Claimant with low back pain and radiculopathy secondary to degenerative disc changes and recommended an ESI. Claimant obtained a back brace and medication to help her sleep. On November 16, 2010, she treated with Dr. Oishi and reported several weeks of relief following the ESI. Dr. Oishi determined that Claimant was clinically stable at that time. He noted that Claimant may be a candidate for repeat ESIs and released her from treatment. (EX-31, pp.40-46). Dr. Oishi authorized Claimant to return to work on November 22, 2010, with restrictions on lifting no more than 20 pounds, no bending or stooping, and a requirement to wear a back brace periodically. Claimant's restrictions were to continue for three months. (EX-33, pp.8-10). On January 5, 2011, Claimant presented for an ESI referred by Dr. Oishi. (EX-31, p.49). Dr. Oishi released Claimant to return to work with no restrictions on February 18, 2011. (EX-33, p.22).

### *Texan Urgent Care*

Claimant presented at Texan Urgent Care on June 13, 2013, complaining of moderate back pain after having lifted two boxes at work. She reported a prior history of chronic back pain. Claimant had taken a hydrocodone, which helped ease the pain. The physical examination revealed abnormality on palpation, muscle spasms, and painful mobility. The examining physician ordered x-rays of the lumbosacral spine, issued work restrictions for lifting and prolonged sitting and standing, and recommended ice/heat therapy and range of motion exercises. (CX-2, pp.1-2; EX-11, pp.1-4).

Claimant followed up on June 20, 2013. She reported back pain radiating to the right leg. She was diagnosed with worsening bilateral sciatica and lumbar sprain. Her x-rays showed multilevel degenerative disc disease but no acute trauma. (CX-2, pp.7-10; EX-11, pp.5-8).

James Galbraith, M.D. and Stephen Gist, M.D.<sup>2</sup>

On July 11, 2013, Claimant treated with Dr. Galbraith for her back pain. He diagnosed Claimant with lumbar strain and recommended physical therapy, three times per week for four weeks, and an x-ray of the lumbar spine. Dr. Galbraith released Claimant to modified duty with no lifting over 20 pounds. (CX-3, pp.1-3). Claimant followed up with Dr. Galbraith on August 1 following a PT evaluation at Injury 1 of Waco. Dr. Galbraith again recommended physical therapy, which had yet to begin pending authorization from Claimant's adjuster, and released Claimant to work with the same restrictions. (CX-3, p.4).

On September 28, 2013, Dr. Gist took Claimant's history and performed a physical evaluation. He noted Claimant's old back injury. He diagnosed Claimant with lumbar strain with radiculopathy. Dr. Gist recommended an MRI, work hardening program, and prescription medication. He released Claimant to work with restrictions on lifting no more than 10 pounds. (CX-6, pp.1-2).

Following Claimant's first round of physical therapy, Dr. Gist re-evaluated her on November 9, 2013. He noted that the MRI results showed a broad-based disc bulge at L4-5, moderate narrowing of blood recess, and a small central annular tear. He diagnosed Claimant with lumbar strain and an annular tear. Dr. Gist planned to treat Claimant conservatively and recommended another twelve sessions of physical therapy. He released Claimant to work with restrictions on lifting no more than 20 pounds, bending, and stooping. (CX-6, pp.3-4; CX-8, p.1).

On December 14, 2013, Claimant returned to Dr. Gist for a follow up appointment. He noted that Claimant would be a candidate for a work hardening program following epidural injections for her radicular symptoms. He also noted that Claimant could be a surgical candidate if the injections failed. Dr. Gist released Claimant to work with the same restrictions on lifting. (CX-6, pp.5-6).

On January 9, 2014, Dr. Gist responded to a series of questions posed to him by Employer's adjuster. He stated that Claimant has chronic low back pain and bulging discs, and is probably a surgical candidate. He disagreed with Dr. Blair that Claimant could return to work given her MRI results and aggravation of symptoms with lifting. Dr. Gist also stated that Claimant required further medical treatment. (CX-15).

Claimant again followed up with Dr. Gist on January 18, 2014. Dr. Gist noted that Claimant returned to full duty based on Dr. Blair's assessment. He also noted that Claimant had been doing well with therapy and light duty restrictions and had worsened upon returning to work. Dr. Gist maintained his opinion that Claimant was not safe to return to work without restrictions. He reiterated his recommendation for injections, work hardening therapy, and light duty work with restrictions. Dr. Gist evaluated Claimant again on February 15, 2014. At that time, Claimant continued to work full duty. Dr. Gist reiterated his opinion that Claimant's full duty employment was exacerbating her back pain situation. He referred Claimant to Dr. Neece for surgical evaluation and again recommended epidural injections. He released Claimant to

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<sup>2</sup> Dr. Gist is a licensed physician in internal medicine. (CX-26, pp.1-10).

work with restrictions of no lifting of any kind, kneeling, squatting, bending, or stooping. (CX-6, pp.8-9, 12-13).

On March 15, 2014, Dr. Gist noted that Claimant's injections provided only minimal improvement and that Claimant was seeing Dr. Martincheck for pain management. He also noted that Claimant's employer had not honored her work restrictions. On May 10, 2014, Dr. Gist noted that Claimant began treatment with Dr. Neece, who recommended surgery for the annular tear. He continued her work restrictions. (CX-6, pp.14-17).

Claimant returned to Dr. Gist on June 7, 2014. She had been discharged from pain management due to lack of reimbursement. She had not had any surgery by that time. Dr. Gist reiterated his opinion that Claimant required a lumbar fusion. He restricted her from working entirely and increased her medication. Dr. Gist noted that Claimant would not be safe to work on the medications. On June 28, 2014, Dr. Gist released Claimant to work with restrictions for her low back and recommended that she proceed with surgery, which was on hold due to a dispute. (CX-6, pp.19-25). Dr. Gist's restrictions included: sitting, standing, pushing/pulling, walking, and reaching no more than four hours per day; no kneeling, squatting, bending, stooping, or climbing; twisting no more than two hours per day; working no more than eight hours per day, and; sit/stretch breaks for ten minutes per hour. (CX-7, p.8).

Claimant had a second MRI on August 7, 2014. The results showed disc desiccation, disc bulge, and posterior annular tear at L4-5, and were essentially unchanged since her earlier MRI in October 2013. (EX-22).

Claimant resumed treatment with Dr. Gist to participate in a work hardening program beginning January 17, 2015. Claimant had completed the program on March 14, 2015. Dr. Gist noted that Claimant's lifting ability decreased from 30 pounds to 15 pounds and remarked that Claimant's symptoms increased with activity. (CX-28, pp.1-8; EX-24).

### *Injury 1 of Waco*

Claimant presented for an initial rehab evaluation at Injury 1 of Waco on July 12, 2013, as referred by Dr. Galbraith. After a physical evaluation, the evaluator recommended a course of six PT visits over a few weeks and recommended an MRI. The evaluator also amended Claimant's work release form. (CX-4, pp.1-4).

At Dr. Galbraith's referral, Claimant presented for a psychological evaluation at Injury 1 on August 29, 2013. The counselor found that Claimant would benefit from therapy to address injury-related stressors. (CX-5).

On September 4, 2013, Claimant returned for a physical therapy re-evaluation. The PT noted that Claimant had not received therapy due to a lack of response from Claimant's adjuster. She determined that physical therapy was necessary nonetheless and placed Claimant on a rehabilitation plan of three days per week for four weeks, which would continue based on Claimant's tolerance and progress. (CX-4, pp.5-10).

Claimant began her first round of physical therapy on September 9, 2013, and presented for twelve sessions, ending on October 4, 2013. (CX-4, pp.11-23). She was re-evaluated by the physical therapist on October 8, 2013. Claimant noted that she could walk a little better since completing the twelve sessions of rehab. The PT noted that Claimant continued to suffer with a moderate amount of pain and diminished physical function. Claimant was referred to her doctor for further evaluation and treatment recommendations. The PT stated that a lumbar MRI was “highly warranted and medically necessary.” (CX-4, pp.24-25).

On November 13, 2013, Claimant was again re-evaluated for physical therapy following the recommendation of her treating physician. Claimant began her second round of physical therapy on November 22, 2013, and presented for twelve sessions, ending on December 20. At her last session, Claimant was re-evaluated and referred to her physician. The PT noted that Claimant completed her therapy with a moderate reduction of her pain to 2/10, which increased to 5/10 with activity. (CX-4, pp.27-42).

William E. Blair, Jr., M.D.<sup>3</sup> – Second Medical Opinion

At Employer’s request, Dr. Blair conducted an SMO evaluation on October 23, 2013. He reviewed Claimant’s medical records and performed a physical examination. Dr. Blair then responded to questions posed to him by Employer. He noted no signs of dysfunctional pain behavior or malingering. He also noted that Claimant gave “excellent effort” during her examination and that her Waddell signs were negative. Dr. Blair determined that Claimant’s MRI results were longstanding and found no medical evidence of causation to the work accident. He also determined that there was no evidence showing that Claimant sustained an aggravation of her pre-existing condition. Dr. Blair opined that Claimant sustained a soft-tissue injury without neurological findings, particularly, “nonspecific low back pain involving predominantly the sacroiliac junction and lumbar muscular insertion over the right iliac crest.” Dr. Blair did not detect any medical condition that would explain the longevity of Claimant’s symptoms. He found that Claimant had reached MMI. Dr. Blair noted that Claimant had a lifting limitation of 20 pounds. He recommended returning Claimant to work with that limitation and gradually increasing her lifting limitation 5-8 pounds per week until she reached full duty status. (EX-13).

On January 6, 2014, Dr. Blair provided an addendum to his opinion to respond to additional questions posed by Employer. He opined that Claimant could have return to her usual duty status within 14-28 days post-incident. He also stated that Claimant has no medical condition precluding her return to work. Dr. Blair did not find any medical basis for Claimant’s continuing treatment or a “probative objective pain generator.” (EX-17).

Dr. Blair provided a second addendum, again to respond to additional questions posed by Employer, on April 28, 2014. He undermined Dr. Gist’s opinion, stating that chronic low back pain and a bulging disc are common and do not require surgical intervention. He also stated that surgery is necessary only if there is proven and objective radiculopathy, which does not exist for Claimant. Dr. Blair also found no evidence of any SI joint inflammation or lumbar radiculopathy, which would necessitate ESIs and SI joint injections. He pointed to medical

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<sup>3</sup> Dr. Blair is certified by the American Board of Orthopaedic Surgery. (EX-21).

literature indicating that ESIs provide no long-term effectiveness. Dr. Blair opined that Claimant's treating physicians relied entirely on her subjective complaints to impose work restrictions and that Claimant is essentially taking advantage in order to maintain an off-work status. (EX-20).

#### Functional Capacity Evaluations

Claimant underwent several FCEs, the first on October 28, 2013. The results showed Claimant to be in the sedentary to light lifting category with lifting no more than 15 pounds occasionally and 10 pounds frequently. The evaluator noted that Claimant could not safely perform her pre-injury job. (CX-9, pp.1-5).

On December 23, 2013, Claimant underwent the second FCE. She was found to be capable of light lifting, restricted to 20 pounds occasionally and 10 pounds frequently. Again, the evaluator determined that Claimant could not perform her regular job duties. (CX-13, pp.1-4).

On January 23, 2015, Claimant's FCE concluded that she should be listed in the light duty category. (CX-28, pp.24-29). A physical performance evaluation was conducted nearly a month later, on February 27, 2015. The evaluator amended his finding and placed Claimant in the sedentary lifting category. He noted that she could lift only 15 pounds, which is below the light level. (CX-28, pp.44-48).

#### David Martincheck, M.D.<sup>4</sup>

Claimant began treating with Dr. Martincheck for pain care on February 11, 2014. Dr. Martincheck prescribed pain medication and recommended an ESI. Claimant had the ESI on March 11. She followed up with Dr. Martincheck on April 9, 2014, and reported that the injection had not helped. A right L4-5 and L5-S1 ESI with a right SI joint injection was then recommended. At Claimant's next appointment on May 7, Dr. Martincheck noted that Claimant would be treating with a neurosurgeon to discuss her surgical options. (CX-16, pp.1-5, 9-14).

#### Trenton Weeks, D.C.

Dr. Weeks evaluated Claimant on February 18, 2014, and issued a report on the status of MMI and Claimant's impairment. He reviewed Claimant's medical records, took Claimant's history, and performed a physical examination. Dr. Weeks determined that Claimant had not reached MMI and noted that she required continuing medical treatment. (CX-17).

On May 20, 2014, Dr. Weeks conducted a follow up examination. Again, he found that Claimant had not reached MMI and required continuing treatment. (CX-20).

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<sup>4</sup> Dr. Martincheck is a licensed physician who practices in the areas of anesthesiology and pain management. (CX-26, pp.11-21).

Stephen Neece, M.D.<sup>5</sup>

Dr. Neece evaluated Claimant for surgery on April 11, 2014. He recommended a fusion at L4-5 or a L4-5 laminectomy with discectomy at the least, considering Claimant's unresponsiveness to other treatment. Claimant followed up with Dr. Neece on May 9, 2014. Dr. Neece clarified his earlier report and stated that Claimant's condition was related to her workplace injury, specifically, that a "twisting motion while lifting is the precise mechanism necessary to sustain an annular tear and herniation of the nucleus pulposus." Dr. Neece reiterated his opinion that Claimant should have a fusion at L4-5 to resolve her symptoms, which had persisted despite conservative treatment of a nearly year. (CX-19).

Kevin James, M.D.<sup>6</sup>

Claimant presented for an evaluation with Dr. James on November 6, 2014. Dr. James recommended a fusion at L4-5 as conservative treatment had failed. He also stated that Claimant would have to submit a negative test for nicotine in order to get the surgery approved and to ensure proper healing. (CX-25).

### **Vocational Evidence**

At Employer's request, Nicole Dunaway met with Claimant on May 1, 2015.<sup>7</sup> She reviewed the DOL vocational rehabilitation documents and medical records outlining Claimant's restrictions, including FCE reports. Dunaway interviewed Claimant for approximately one hour, gathering details of Claimant's work history with Employer, in construction, and as a CNA. Dunaway concluded that Claimant had transferrable skills and may work in a sedentary or light duty capacity with restrictions on lifting, bending, stooping, kneeling, prolonged standing, and prolonged walking. (Tr. 113, 116-21; EX-28, pp.2-9).

Dunaway identified twelve jobs in the Waco area (Tr. 125-33; EX-28, pp.12-25):

Tech-Patient Care in Waco, Texas. Posted on WorkinTexas.com. Light duty. Assisting with treatments, tending to patients, and cleaning rooms. High school diploma or equivalent training required. \$9 per hour.

Scheduler Associate-Fulfillment Center with Cargill in Waco, Texas. Light duty. Preparing production schedules, preparing distribution schedules, communicating with departments, and managing inventories. Two years of similar work

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<sup>5</sup> Dr. Neece is certified by the American Board of Neurological Surgery. (CX-26, pp.22-23).

<sup>6</sup> Dr. James is certified by the American Board of Orthopaedic Surgery. (CX-26, pp.24-25).

<sup>7</sup> Dunaway is a self-employed rehabilitation consultant. She has a master's degree in rehab psychology counseling, a certified rehabilitation counselor certificate, and a clinical case manager certificate. She has received assignments from the Department of Labor. Dunaway works throughout central Texas, including Waco. (Tr. 111-13; EX-29).

experience with strong computer skills required. Pay depends on experience and could be \$11-12 per hour.

MRT Scheduler/Liason with EMSI in Hewitt, Texas. Sedentary duty. Facilitating medical record retrieval. Call center experience or medical background, customer service and written communication skills, and computer skills required. Pay depends on experience and could be \$11-12 per hour.

Non-Clinical Healthcare with Spherion in Waco Texas. Sedentary to light duty. Checking in patients, scheduling appointments, data entry and ad hoc support. Basic computer skills required and 3-6 months of experience preferred. Pay not specified and could be \$12-13 per hour

Phlebotomist with Labcorp in Waco, Texas. Sedentary to light duty. Obtaining samples from patients, preparing samples, and shipping specimens for processing. High school diploma or equivalent, phlebotomy certification, completion of phlebotomy training course, and two years of experience required. Pay depends on experience and could be \$15 per hour.

Phlebotomist Pathology PRN with Scott & White Health in Waco, Texas. Light duty. Laboratory experience preferred but no experience required. Assisting with inventory of the blood bank on a weekly basis. Pay depends on experience and could be \$15 per hour.

Office Clerk/Scheduler with Home Depot in Waco, Texas. Sedentary to light duty. Reporting financial records, maintaining employee files and schedules, and ordering supplies. Administrative skills required. Pay not specified and could be \$9-10 per hour.

Mobile Phlebotomist/Nurse Aide with ProLab in Waco, Texas. Light duty. Collection and processing of specimens and completing phlebotomy documentation. Medical training and ability to be certified in phlebotomy required. Pay depends on experience and could be \$15 per hour.

Patient Care Technician with FMCNA in Waco, Texas. Light duty. Working with the hemodialysis health care team in providing dialysis therapy for patients. Completion of FMCNA dialysis training program and CPR certification required and prior patient care experience preferred. Pay depends on experience and could be \$11-12 per hour.

Admin Assistant/On Line Research in Customer Service for Sears Holdings in Waco, Texas. Sedentary duty. Communicating with managers and vendors, researching marketing information, and filling other administrative duties. Computer and customer service skills required. Pay depends on experience and could be \$10 per hour.

Office Tech III with Texas Department of Transportation in Waco, Texas. Sedentary duty. Performing skilled clerical and administrative duties and working with confidential and sensitive communications. High school diploma or equivalent required. Pay ranges from \$2,453.25-3,771.41 per month.

Scheduling Coordinator in Hewitt, Texas. Posted with Texas Workforce. Sedentary duty. Calendaring healthcare providers. Excellent oral and written communication skills and experience in Microsoft Office required. Pay ranges from \$14-16 per hour.

Dunaway recommended to Claimant that she explore obtaining her G.E.D., renewing her CNA certificate, and entering the Texas disability rehabilitation program (DARS). She testified that Claimant should search for a job at the Workforce Center and follow-up on submitted resumes and applications. Dunaway opined that Claimant is employable as a full-time worker in the Waco area earning at least minimum wage. (Tr. 134-39; EX-28, pp.26-28).

## V. LAW AND DISCUSSION

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

### A. Credibility

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

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

At the hearing, I found Claimant to be a wholly credible witness, and I found her manner impressive. Accordingly, I afford Claimant's testimony all due weight.

## **B. Compensable Injury**

The Act provides that compensation shall be payable where a disability results from an injury. 33 U.S.C. § 903(a). Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury..." 33 U.S.C. § 902(2).

### Claimant's Prima Facie Case

Under the Act, Claimant has the burden of establishing a *prima facie* case of a compensable injury. The claimant must prove that she suffered some harm or pain and that an accident occurred or working conditions existed that could have caused the harm or pain. *U.S. Industries/Federal Sheet Metal v. Director, OWCP* (Riley), 455 U.S. 608, 14 BRBS 631, 633 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998). Once established, the *prima facie* case gives rise to the presumption of causation under 20(a). *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000).

The Fifth Circuit has "repeatedly held that an employer takes an employee as he finds him." *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983). Thus, a statutory employer is liable for the consequences of a work-related injury that aggravates a pre-existing condition. *Bludworth Shipyard, supra*; *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012 (5th Cir. 1981). An employer is liable for the consequences of a work-related injury that aggravates a pre-existing condition. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012 (5th Cir. 1981).

Here, there is no dispute that Claimant suffered some back injury while at work. Prior to the claimed low-back injury, Claimant was capable of working her full-time, heavy duty job with little to no difficulty. She had been released to work without restriction on February 18, 2011. From that point forward, Claimant performed heavy-duty work with few complaints. While she obtained medication on occasion for transitional low back pain, she testified that she worked without restrictions, regularly lifted boxes weighing up to 75 pounds, and did not seek any treatment for her back pain until the present accident. After the accident, Claimant had to take pain medications every day to manage her pain while working. Claimant's testimony, which I have found credible, indicates that her back pain increased to the point she could no longer lift heavy boxes without pain. Moreover, Dr. Neece stated that the mechanism of injury directly related to Claimant's current condition.

Claimant has, thus, established that she suffered back pain and that an accident occurred at work on June 13, 2013. Thus, she has invoked the 20(a) presumption.

### Employer's Rebuttal Evidence

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). In describing the employer's burden, the Fifth Circuit explained:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption—the kind of evidence a reasonable mind might accept as adequate to support a conclusion—only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

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

The substantial evidence standard is “less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence.” *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003). Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Yet, the testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

When aggravation of a pre-existing condition is alleged, as here, the presumption still applies. To rebut it, the employer must establish that the claimant's work events neither directly caused the injury nor aggravated the pre-existing condition. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

Employer argues that Claimant's current low back diagnoses are not compensable because Claimant's back condition was only transitionally aggravated and the diagnoses are not causally related to her workplace injury.

Employer points to Claimant's pre-existing back treatment. Claimant had treated in 2008, 2010, and 2011. The MRIs taken show degenerative disc changes and, by 2010, an annular tear. At that time, Dr. Oishi noted that Claimant was a surgical candidate. However, Claimant was ultimately released from treatment without any work restrictions, and Claimant testified that she rejected surgery as an option because her condition had improved with conservative treatment. Evidence of Claimant's prior back treatment, thus, is insufficient to rebut the 20(a) presumption.

Employer also cites Dr. Blair's second medical opinion evidence. Dr. Blair opined that Claimant suffered a soft-tissue injury, which should have resolved 14-28 days post-incident, and found no objective medical evidence for Claimant's continuing pain complaints. Under *Kier v. Bethlehem Steel Corp.*, Dr. Blair's opinion is sufficient to rebut the 20(a) presumption.

### Weighing the Evidence

If an employer has rebutted the 20(a) presumption, the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, the administrative law judge must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, *supra*; *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Director, OWCP v. Greenwich Collieries*, *supra*.

Claimant has cited the medical opinions of Drs. Gist, Neece, and James. Each physician has examined Claimant and found that she exacerbated her pre-existing degenerative disc disease and annular tear and needs continuing medical treatment. Particularly, Dr. Neece found that the mechanism of injury directly related to Claimant's current condition and noted that Claimant's symptoms had persisted for a year. Further, as stated above, Claimant's back pain significantly increased after the work injury in June 2013. Her pre-existing condition, which had resolved to the extent that Claimant was able to work without restriction, deteriorated after the accident. Claimant previously declined surgical intervention in 2011 because her condition had improved, and she wanted to return to work. She had no medical treatment from 2011 until June 2013, although she kept hydrocodone on hand for pain flare-ups. Significantly, Claimant's symptoms have not abated since the accident and, instead, have worsened, particularly since her temporary return to work in January 2014.

Dr. Blair found no objective medical evidence to support Claimant's subjective pain complaints. However, Dr. Blair's opinion is not entirely credible. Initially, he noted that Claimant gave "excellent effort" during her examination, her Waddell signs were negative, and she exhibited no signs of dysfunctional pain behavior or malingering. Later, in his addendum on April 28, 2014, Dr. Blair determined that Claimant had apparently "demonstrate[d] dysfunctional pain behavior" in order to "obtain authorization of work restrictions, limitations and accommodations" and to "participate in any endeavors in which she wishes to engage." Without the benefit of a further evaluation and despite having earlier found her to be credible, Dr. Blair essentially revised his opinion of Claimant's motives. He also entirely discounted Claimant's subjective pain complaints and failed to consider Claimant's inability to work without pain after the subject accident. Nor did he consider that Claimant's pain complaints increased after her

return to full-duty, at his recommendation, in January 2014. For these reasons, I reject Dr. Blair's opinions.

Claimant has coupled her testimony, which I have found credible, with the objective medical evidence and opinions of her treating physicians. Based on the above and the record as a whole, I find that Claimant's back condition and diagnoses are related to her workplace injury. Her predominately asymptomatic low back condition was aggravated and worsened by the accident.

### **C. Nature and Extent of Disability**

The burden of proving the nature and extent of his disability rests with the claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity. Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

#### 1. Permanency and Claimant's Prima Facie Case of Total Disability

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, n. 5 (1985); *Trask v. Lockheed Shipbuilding Construction Co.*, *supra*; *Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981).

Where the treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the ALJ to conclude that the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). If there is any doubt as

to whether the employee has recovered, such doubt should be resolved in favor of the claimant's entitlement to benefits. *Fabijanski v. Maher Terminals*, 3 BRBS 421, 424 (1976).

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991).

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

In this case, Drs. Gist, Weeks, Neece, and James all opined that Claimant would benefit from continuing medical treatment, including surgery, and could not return to her usual employment. The latest FCE noted that Claimant could lift only 15 pounds, which qualifies as sedentary duty. Furthermore, Claimant's return to work in January 2014 established that she cannot perform her usual employment without significant pain. Only Dr. Blair, whose opinion I have rejected, found that Claimant had reached MMI and could return to full-duty work without restrictions.

Based on the above, I find that Claimant's lumbar disability is temporary. Claimant has been unable to obtain the necessary medical treatment for her low back injury, which may yet improve her condition. Because she has not been given the opportunity to obtain full medical treatment, I cannot determine whether her orthopedic condition has plateaued or whether, through use of the recommended treatment, her condition may improve. Claimant has also established a *prima facie* case of total disability. Her physical restrictions, as reflected in the latest FCE and the temporary return to work, demonstrate that Claimant is not capable of returning to her pre-injury employment.

## 2. Suitable Alternative Employment

Having established a *prima facie* that Claimant is totally disabled, the burden now shifts to Employer to show suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

- 1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which

he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

*Id.* at 1042-43.

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *See generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Once the employer demonstrates the existence of suitable alternative employment, as defined by the *Turner* criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *Turner, supra* at 1042-1043; *P & M Crane Co., supra* at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." *Turner, supra* at 1038, quoting *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

The latest FCE noted that Claimant could lift only 15 pounds, which qualifies as sedentary duty. Nicole Dunaway identified four jobs in the sedentary duty lifting category: MRT Scheduler/Liason with EMSI; Admin Assistant/On Line Research in Customer Service for Sears Holdings; Office Tech III with Texas Department of Transportation, and; Scheduling Coordinator. However, neither the vocational report nor Dunaway's testimony indicated whether the identified employers would accommodate Claimant's full restrictions, which included sitting, standing, pushing/pulling, walking, and reaching no more than four hours per day; no kneeling, squatting, bending, stooping, or climbing; twisting no more than two hours per day; working no more than eight hours per day, and; sit/stretch breaks for ten minutes per hour.

Moreover, considering the temporary nature of Claimant's condition, Claimant's medications and resulting side effects, and the recommendation for surgery by several of her physicians, Claimant is not reasonably capable of performing these identified positions, could not reasonably be expected to compete for these positions, and is not realistically and likely to secure the jobs.<sup>8</sup>

Accordingly, Employer has not established suitable alternative employment.

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<sup>8</sup> In its brief, Employer did not address Claimant's employment at Geneva's Place. Claimant testified that she works at the bar on Wednesday nights earning little in tips and no other money. I find these earnings too speculative, uncertain, and negligible to determine the impact on Claimant's post-injury wage earning capacity.

## **D. Medical Benefits**

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

The employer must raise the reasonableness and necessity of treatment before the judge. *Salusky v. Army Air Force Exch. Serv.*, 3 BRBS 22 (1975). The judge is required to make specific findings of fact regarding an employer's claim that a particular expense is non-compensable. *Monrote v. Britton*, 237 F.2d 756 (D.C. Cir. 1956). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. *Id.*

Herein above, I have found Claimant's lumbar injuries compensable. Claimant's low back condition has not reached MMI, and her physicians have ordered continuing treatment, including surgery, which Claimant has been unable to obtain. Accordingly, I find that the treatment rendered thus far by Claimant's physicians is reasonable and necessary. I further find that continuing treatment, including surgery, is necessary and reasonable. Employer is, thus, responsible for treatment of Claimant's lumbar injuries, as well as reimbursement for medical treatment rendered thus far and mileage.

## **VI. CONCLUSION**

Claimant's back injury is compensable. Her back injury has not resolved or reached MMI, and she is unable to return to her pre-injury position. Employer has not established suitable alternative employment. Thus, she has been temporarily and totally disabled from the date of the injury, June 13, 2013, and continuing. Employer paid the appropriate rate of compensation from June 13, 2013 through January 12, 2014 in addition to wages for the temporary period of Claimant's return to work from January 13-February 18, 2014. Claimant is therefore entitled TTD benefits from February 19, 2014 and continuing. Claimant is also entitled to medical treatment, including surgery, for her lumbar injuries, as well as reimbursement for medical treatment rendered thus far and mileage.

## **VII. ORDER**

Based upon the foregoing and upon the entire record, I hereby order:

1. Employer shall pay Claimant indemnity benefits for temporary total disability from February 19, 2014 to the present and continuing, based on Claimant's average weekly wage of \$499.16.
2. Employer shall pay for all reasonable and necessary medical expenses, including surgery, pursuant to 33 U.S.C. § 907, including reimbursement for medical treatment rendered thus far and mileage.
3. Employer shall receive credit for all compensation heretofore paid, if any, as and when paid.
4. Employer shall pay interest on all past due compensation amounts to be calculated by the District Director.
5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges, a copy of which must be served on opposing counsel, who shall then have twenty (20) days to file objections thereto.

All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

**So ORDERED.**

**LARRY W. PRICE**  
**Administrative Law Judge**