



July 16, 2008

File Number: 07-168382

Re: Willie J Jones

**RECEIVED**  
JUL 21 2008

Franke & Salloum, PLLC

Willie J Jones  
Northrop Grumman Ship Systems, Inc.  
Sue Esther Dulin, Esq.  
Paul Howell, Esq.  
Office of the Solicitor  
Honorable Patrick Rosenow

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have been dated and filed in the District Director's Office. Procedures for appealing are described on Page 2 of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits, the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within 10 days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, P. O. Box 37601, Washington, DC 20013-7601.

Sincerely,

A handwritten signature in black ink, appearing to read "David A. Duhon".

David A. Duhon, District Director

Enclosure

**Include your address, ZIP code, and file number on all correspondence.**

File Number: 07-168382  
Re: Willie J Jones

**Longshore and Harbor Workers' Compensation Act, as extended**

A petition for reconsideration of a decision and order must be filed with the Office of Administrative Law Judge, who issued the attached decision and order, within 10 days from the date the District Director files the decision and order in his/her Office.

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D.C., within 30 days from the date upon which a decision and order has been filed in the Office of the District Director, or within 30 days from the date final action is taken on a timely-filed petition for reconsideration. If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal or protective appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30-day period described above, whichever period last expires. A copy shall be served upon the District Director and on all other parties by the party who files a notice of appeal. Proof of service shall be included with the notice of appeal.

The date compensation is due is the date the District Director files the decision and order in his/her Office.

**U.S. Department of Labor**

Office of Administrative Law Judges  
St. Tammany Courthouse Annex  
428 E. Boston Street, 1<sup>st</sup> Floor  
Covington, LA 70433-2846

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



**Issue Date: 15 July 2008**

**Case No.: 2007-LHC-1256**

**OWCP No.: 07-168382**

**In the Matter of:**

**W. J.,<sup>1</sup>**

**Claimant**

**v.**

**NORTHROP GRUMMAN SHIP SYSTEMS, INC.,  
Employer**

**APPEARANCES:**

**SUE ESTHER DULIN, ESQ.**

On Behalf of the Claimant

**PAUL B. HOWELL, ESQ.**

On Behalf of the Employer

**BEFORE:**

**PATRICK M. ROSENOW**

Administrative Law Judge

**DECISION AND ORDER**

**PROCEDURAL STATUS**

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act)<sup>2</sup> brought by Claimant against Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 16 Apr 07. All parties were represented by counsel. On 19 Dec 07, a hearing

<sup>1</sup> Pursuant to a policy of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the internet posting of agency adjudicatory decisions for benefit claim programs.

<sup>2</sup> 33 U.S.C. §§901-950.

was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following.<sup>3</sup>

Witness Testimony of

Claimant

Michelle Edwards

Joe Walker

Exhibits<sup>4</sup>

Joint Exhibit (JX) 1

Claimant's Exhibits (CX) 1-25

Employer's Exhibits (EX) 1-22

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

**STIPULATIONS**<sup>5</sup>

1. Claimant was injured on 24 Sep 03 under circumstances that bring him within the jurisdiction and coverage of the Act.
2. The injury occurred in the course and scope of employment.
3. An Employer/Employee relationship existed at the time of the accident.
4. Employer was given notice of the injury on 24 Sep 03.
5. Employer controverted the claim on 9 Jan 06, 30 Aug 06, and 20 Nov 06.
6. Claimant reached maximum medical improvement (MMI) on 15 Sep 05.

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<sup>3</sup> I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

<sup>4</sup> Page one of CX-6 and EX-1 was withdrawn and not considered. Some exhibits appeared to be *en globo* collections of records. Counsel were cautioned that in the case of any exhibit in excess of 25 pages or the deposition of any witness also testifying live, (CX-5, 8, 12, 19; EX-14, 16, 20) only those pages specifically cited to would be considered a part of the record upon which the decision would be based. Tr 16 CX-23 and EX-8 were admitted for the limited purpose of showing the communication was made or conference occurred and not the truth of the matter asserted or the recommendation made. Tr.11.

<sup>5</sup> JX-1; Tr. 27.

7. Claimant was paid temporary total disability benefits of \$661.77/week from 29 Jan 04 through 4 Jan 06.
8. Claimant was paid temporary partial disability benefits of \$466.21/week from 5 Jan 06 through 20 Aug 06.
9. Claimant has never been able to return to his usual employment.
10. Claimant suffered no loss of earnings until at least 15 Sep 05.
11. Claimant suffers a 20% whole body disability.

### **FACTUAL BACKGROUND**

Claimant was a long time employee of Employer when he injured his back at work on 24 Sep 03. He was unable to return to work for an extended period and eventually had back surgery. He has never been able to return to his original job.

### **ISSUES & POSITIONS OF THE PARTIES**

#### **Nature and Extent of Disability**

There is no dispute about Claimant's entitlement to disability compensation from the date of his injury to 15 Sep 05 or that he has been unable to return to his original job. Claimant argues that in spite of his attempts to return to work for Employer in jobs they offered him, he is simply unable to do so. He further maintains that Employer has shown no outside suitable alternative employment (SAE), and even if it had, he made good efforts to try to find work without success.

Employer argues that it has shown outside SAE earning up to \$280/week for Claimant as of 15 Sep 05 and that as of 21 Aug 06, Employer made SAE available to Claimant at its workplace, paying the same wage he was earning at the time of his injury. In the alternative, Employer also argues outside SAE was also available at that time, and Claimant did not make a good faith effort to find employment.<sup>6</sup>

#### **Average Weekly Wage (AWW)**

Employer argues that although Claimant was a salaried employee, Section 10(a) is appropriate and his average weekly wage can be calculated by taking his earnings for the 52 week prior to his injury, converting his hours of work and vacation into days and

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<sup>6</sup> Both parties agree that in the event the Court finds Employer established outside SAE, the post injury earning capacity must be discounted to account for the inflation between the date of the SAE wages and the date of injury. See *Richardson v. Gen. Dynamics Corp.*, 19 BRBS 48 (1986).

dividing the former into the latter to arrive at a daily wage, which can then be multiplied by the statutory figure of 260 and divided by 52 to arrive at an average weekly wage. Employer calculates the AWW to be \$992.65.

Claimant responds that since he was a salaried employee and his weekly pay had increased to \$1,118.70 in the 12 weeks prior to his injury, the use of Section 10(a) is unfair and Section 10(c) should be used instead. Claimant maintains that simply using the wage he earned in the last 12 weeks of his employ would be a fair calculation and argues for an AWW of \$1,118.70.

## LAW

While the Act is construed liberally in favor of the claimant,<sup>7</sup> the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,<sup>8</sup> which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.<sup>9</sup>

### Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.<sup>10</sup> 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.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."<sup>11</sup> Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.<sup>12</sup> 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.

<sup>7</sup> *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

<sup>8</sup> 5 U.S.C. § 556(d).

<sup>9</sup> *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S.Ct. 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

<sup>10</sup> *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1989).

<sup>11</sup> 33 U.S.C. § 902(10).

<sup>12</sup> *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

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.<sup>13</sup> A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.<sup>14</sup> Any disability suffered by a claimant before reaching maximum medical improvement is considered temporary in nature.<sup>15</sup>

The question of extent of disability is an economic as well as a medical concept.<sup>16</sup> 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.<sup>17</sup>

### Suitable Alternative Employment

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof shifts to employer to establish suitable alternative employment.<sup>18</sup> Addressing the issue of job availability, the Fifth Circuit developed a two-part test by which an employer can meet its burden:

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?<sup>19</sup>

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."<sup>20</sup> The employer must establish the precise nature and terms of job

<sup>13</sup> *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).

<sup>14</sup> *Trask*, 17 BRBS at 60.

<sup>15</sup> *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.

<sup>16</sup> *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 Corp.*, 25 BRBS 128, 131 (1991).

<sup>17</sup> *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).

<sup>18</sup> *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

<sup>19</sup> *Id.* at 1042.

<sup>20</sup> *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

opportunities it contends constitute suitable alternative employment in order to establish that the claimant is physically and mentally capable of performing the work and that it is realistically available.<sup>21</sup> 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.<sup>22</sup> A showing of only one job opportunity may suffice under appropriate circumstances.<sup>23</sup> Conversely, a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.<sup>24</sup> 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."<sup>25</sup>

### Average Weekly Wage (AWW)

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,<sup>26</sup> which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.<sup>27</sup>

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.<sup>28</sup> Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.<sup>29</sup> But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate.<sup>30</sup>

<sup>21</sup> *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).

<sup>22</sup> *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).

<sup>23</sup> *P & M Crane Co.*, 930 F.2d at 430.

<sup>24</sup> *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.

<sup>25</sup> *Turner*, 661 F.2d at 1038, quoting *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

<sup>26</sup> 33 U.S.C. § 910(a)-(c).

<sup>27</sup> *SGS Control Services*, 86 F.3d at 441; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, (0 BRBS 70) (7th Cir. 1979).

<sup>28</sup> 33 U.S.C. § 910(a).

<sup>29</sup> 33 U.S.C. § 910(b).

<sup>30</sup> *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

A worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best adequately reflect a claimant's earning capacity at the time of the injury.<sup>31</sup>

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.<sup>32</sup>

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).<sup>33</sup> The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.<sup>34</sup> Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.<sup>35</sup> In calculating annual earning capacity under subsection 10(c), the Administrative Law Judge may consider: the actual earnings of the claimant at the time of injury,<sup>36</sup> the earnings of other employees of the same or similar class of employment,<sup>37</sup> claimant's earning capacity over a period of years prior to the injury,<sup>38</sup> multiply claimant's wage rate by a time variable,<sup>39</sup> all other sources of income,<sup>40</sup>

<sup>31</sup> *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).

<sup>32</sup> 33 U.S.C. § 910(c).

<sup>33</sup> *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

<sup>34</sup> *See Barber*, 3 BRBS 244.

<sup>35</sup> *Gatlin*, 935 F.2d at 822.

<sup>36</sup> 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

<sup>37</sup> 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.

<sup>38</sup> *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).

<sup>39</sup> *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 287 (1980). (if this method is used, must be one which reasonably represents the amount of work which

overtime,<sup>41</sup> vacation and holiday pay,<sup>42</sup> probable future earnings of claimant,<sup>43</sup> or any fair and reasonable representation of the claimant's wage-earning capacity.<sup>44</sup>

Under subsection 10(c), the Administrative Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).<sup>45</sup>

## EVIDENCE

*Claimant testified at trial and at deposition in pertinent part that:*<sup>46</sup>

He was born in August 1946 and is married. He got through the ninth grade and made C's, D's, and F's. He can read and write but never got a GED. He stopped going to school because he thought hard work would make up for education and he had to help support his family. He went to blueprint school while at Ingalls Shipbuilding. He was drafted in the sixties but was found physically and mentally incapable of serving in the military.

Currently, he reads the newspaper and the Bible occasionally. He has trouble with big words. If there is something that he needs to know, he asks his wife or uses the dictionary. His wife keeps the checkbook and pays the bills. He can barely count and make change. She deals with the family business.

There was very complicated paperwork involved in his job with Employer, but they used abbreviations and everybody knew what they meant. He also took the dictionary on the job. He learned the job from on the job training. He has hearing loss and wears a hearing aid. It causes trouble sometimes. When he is on the phone he has to turn it down or take it off.

He has no experience being a cashier. When he was hurt in 2003, there was no computer system, but when he returned in 2006 everything was computerized. He never learned the computer system for entering worker hours and had to draft somebody to help.

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normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).

<sup>40</sup> *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).

<sup>41</sup> *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).

<sup>42</sup> *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991).

<sup>43</sup> *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Gilliam v. Addison Crune Co.*, 21 BRBS 91, 93 (1987).

<sup>44</sup> See generally, *Flanagan Stevedores, Inc. v. Gallagher and Director, O'WCP*, 219 F.3d 426 (5th Cir. 2000).

<sup>45</sup> *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

<sup>46</sup> Tr. 59-206; EX-20 (as cited, see n.3).

After he left school, he went to the Pascagoula veneer mill and hauled pulpwood for a while. That was physical work but he advanced to truck driving. Then he worked as a ply board breaker. It was physical work. Then he went to Florida and worked at a golf course as a dishwasher. He returned to the Pascagoula veneer mill for a while and then hired on with Employer. His seniority day with Employer was 9 May 67.

He started out as a paint helper for a few years, and progressed to a laborer. Then he moved to sheet metal helper and eventually took a position as a planner. He was a planner for four or five years when downsizing moved him back to sheet metal. As a planner, he filed paperwork. He got a work order telling him what had to be installed on that ship at a particular time. He was able to read the purchase orders. He got the bill, found out what the drawing was, ordered the drawing, put the bill and the drawing in a folder, and put it in a cabinet and marked it up. He had to use the phone and write it up on a piece of paper. He was a planner for two or three years.<sup>47</sup>

He was continuously and permanently employed with Employer from 1967.

Eventually he was promoted to a supervisor and general foreman. As a general foreman he had approximately six supervisors working under him. They each had ten to fifteen people working for them. He had to go to all the meetings about the hull. He had to review the budgeting package, write up progress and attendance reports, and turn in the head count. He never got any bad reviews as a general foreman; his reviews were average. He worked five or six years in that job.

The work was downsized again and he was cut back to a supervisor. He was a supervisor for two or three years. At one point in time he had up to thirty people, but usually it would be from ten to fifteen. He had to maintain a great deal of paper work, and he had to write up everything he did.

On the date of his injury, he was a supervisor. At the time of his injury, he had no problems performing the full duties of his job. He had to make sure all the materials were on the jobsite, make sure the assembly was ready to be worked and the lights were on, and make sure everything was prepared and his welding machine was moved over to the jobsite. He had to tote material, haul welding lines, haul spools, and haul duct. Some of it weighed more than fifty to a hundred pounds. He had to climb, crawl, stoop and bend. He received four-weeks of vacation each year, but never took it all. At first Employer allowed him to accumulate vacation days, but then they had a "use it or lose it" rule.

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<sup>47</sup> Inconsistencies in the testimony.

He was on the dayshift from 0700 to 1530. He was working eight hour shifts five days a week. He was on salary and was not paid overtime, but if his crew worked overtime, he would get paid overtime. That happened occasionally. He had to work more than 56 hours in a week in order to get overtime.

On 24 Sep 03, he was a supervisor in the bay on an assembly in the 400 area. It was mid-morning. He lifted up a piece of large vent duct and pulled something in his back. His legs went numb and he flopped down on his rump. He told a fellow employee that he might need to call somebody to help because he hurt something. He was checking the piece of duct to make sure he did not need to send anyone else up to help put the duct in the hole because it was a large piece of duct. He had pain in his lower back and right and left leg. He reported the injury to his supervisor and got a pass to the yard hospital. They treated him for a pulled muscle with a heating pad and performed different stress tests. He went back to work and finished the day.

He was in pain that night. The next day he stopped by to check work and then went back to Employer's clinic. They gave him physical therapy. For about three or four weeks he tried getting physical therapy while trying to work. He finally told Employer he could not take it any more. The pain was getting worse and he was falling behind at work.

He went to see his family doctor, Dr. Feinberg, who had been treating him for diabetes. Dr. Feinberg sent him to an orthopedist, Dr. Black. Employer approved that and he went to Dr. Black, who said he did not treat backs. He ordered an MRI, and sent him to Dr. Graham. Dr. Graham took him off work and arranged physical therapy and two injections from Dr. Aldridge. When the injections did not help, Dr. Graham recommended surgery.

He had lower back surgery in May 2004 at Ocean Springs Hospital, Singing River Hospital. At that time he was having pain in his lower back and right and left leg. After the surgery his legs still hurt but had improved. The back pain lessened but still hurt. It was not nearly as bad as it was prior to the surgery. That improvement lasted until he started trying to obtain jobs as he was instructed. Once they ceased payments, he had to look for a job and went downhill from there.

As long as he did not exert his back and legs, they were fine. When he tried to do things, his back and legs went out. He would be crying in front of his grandchildren and wife.

He enjoyed working at the shipyard. It was a good place and he made good money. He needed ten to fifteen more years before he retired. He still hurts day and night.

He told Dr. Graham he did not see how he could work with the pain. Dr. Graham referred him to Dr. Couch for a pain management. He had a functional capacity evaluation before starting with Dr. Couch. The FCE was at Ocean Springs around June 2005. After the FCE he remained off work.

Mr. Tommy Sanders came and interviewed him. He told Mr. Sanders he did not see how he could hold a job with the pain he was in every day. He explained he needed to get on the couch or in bed to lay down, with pillows under his leg. He sits in a recliner, which provides some relief, but does not eliminate all of the pain. He takes pain medicine every day. Dr. Graham gave him Lortab.

He first saw Dr. Couch about 7 Mar 06. Dr. Couch gave him a shot in his back. He could feel it in his back and going down in his legs. The shot does not last long or take all the pain away, but it helps. He is scheduled for another shot next Friday. The right leg does not bother him much; the pain is in his lower back and left thigh down to the knee.

After he talked to Mr. Sanders, he received a letter saying that there were some job openings. He called one of the places and they asked if he had any skill in operating a computerized cash register. He said he did not. There was also a job hauling sandwiches in a truck, but he knows the way his back would hurt if he had to drive a truck around, twisting and turning. He tried to get a job lined up with relatives, but could not do that job either. It was in the law business. Because of the availability of those jobs, his benefits were reduced significantly by Employer.

The main reason he did not try to find work outside of Employer's shipyard was because he was in too much pain and on medications.

Employer called him back to work and he reported to Ms. Melinda Wiley. He received EX-18 and returned to work a day or two early. When he got there and saw Ms. Wiley he was trembling and tearful. He was hurting by the run around he went through just getting to her. She gave him a paper and told him to go to the hospital inside the yard. The paper she gave him said he was restricted to "No lifting over twenty pounds, no pushing or pulling twenty pounds or more," and that was all. It was not like the restriction he previously had. He should have been restricted to occasional walking, occasional stooping, occasionally bending, and occasional climbing. Dr. Graham said he could not help him because they had to go by the FCE.

He told Ms. Wiley he could not work and had to go home, rest, and get off his feet. She said he could not leave and if he did he would be terminated unless he called his doctor to get an excuse for that day. He made multiple trips walking between the parking lot and the hospital, which was three-quarters to a mile. The walking hurt his back and both legs severely. The pain was off the scale at that time. That is why he told her he did not think he could work the rest of that day.

He went home, got in the bed, and took more pain pills. He was in awful pain when he had to go back to work the next day. Mr. Jeff Pierce picked him up at the gate and drove him to the office, which helped a lot. They put him to work at his salary and hours. He was temporarily working at Mr. Pierce's office at first doing some clerical paperwork, like writing up forms and putting work orders in folders. It was mostly sitting. He was still having the back pain even with the sitting, but it was better than walking across that yard. He told Mr. Pierce he was doing fairly well at that job.

Even if he is able to sit in a chair most of the day, he still needs to lie down occasionally. The prolonged sitting causes pain.

The job in Mr. Pierce's office lasted approximately two weeks and during that time he took some vacation. He then went to trades management. At that time they were working ten-hour shifts four days a week. He was in charge of a clean-up crew working the whole shipyard. He had to walk in from the parking lot then on his own. It was about three-quarters to a mile. His work consisted of walking and standing; he had to find a place to sit such as a block, a stool or cement. There was no lower back support. He was walking and standing more because he had to watch his crew and they were spread out over two acres. He had 10-15 people under his supervision. He handled the paperwork and made sure they were in the right place. He always required help putting their hours in the computer. He worked that job for three or four weeks.

He told Mr. Walker that the work involved too much standing and walking, but he said "I don't want to know about your pain. I just want to know if they're working you within your restriction." He answered he did not know what his restriction was. He only saw Mr. Walker twice. Mr. Walker did not test him on reading and writing. He only asked if they were working him within his restrictions. His total discussion with Mr. Walker was three to five minutes at the most.

He returned to see Dr. Graham and Dr. Couch. Dr. Graham said they had to go by the FCE. He told Dr. Graham they were not going by the restrictions and asked for the drive-in pass. Dr. Graham gave him a pass, but said he was unable to help otherwise. Employer did not honor the drive-in pass from Dr. Graham. They gave him more paperwork to fill out. He had to keep walking while he tried to get

those papers filled out. Dr. Couch put him on more medicine. He was taking Lortab, Avinza, and Mobic. He also had a muscle relaxer. He took those medicines at work.

He gave Employer's clinic a list of all his medications, but they called him to say he failed a drug test. They wanted him to bring in the pills. He did and that satisfied them.

Mr. Pitt told him there was a job opening on a ship. He said he wanted no part of that. Mr. Pitt told him, "We have two openings; either you go on the ship as your regular job, or you go to the shop on the second shift." He told Mr. Pitt he was unable to perform these jobs because of the pain, and he was afraid the pain medications would make him sleepy, which would be dangerous. They told him that they were going to put him in the shop, as a foreman on the second shift, ten hours a day, and four days a week. He decided to take some vacation before deciding what to do. He was hoping he would get better, but it only got worse. He could not even walk to the mailbox. It continued to worsen and he told his wife, "Well, I'm going to have to go out on disability."

His pain has not improved since he left that shipyard; it only got worse.

The job they offered in the shop involved a lot of walking and standing. He would be in charge of everything from the front door of the sheet metal shop to the back. It is large area. With the pain he was having, he probably would have flipped out from the pressure. He would have to go around and make sure all the work the employees were doing was right. He would have to get on his knees, squat, stoop or bend to get down and look at the job.

There were stairs for the main office up front. He had to climb the stairs 20 steps up and down at least twice a day. He also had to climb ladders.

He had planned to continue to work for ten to fifteen more years. But for the pain and the problems at work, he would not have retired.

His leg kept hurting and Dr. Graham was not sure whether it was related to his back, so he went to the Alabama Orthopedic Specialist. They did a test and he took the results to Dr. Couch. On 29 Sep 06, Dr. Couch performed a caudal procedure. It is the same procedure he has set for Friday.

Now, his pain is in his lower back and leg right. His pain rates 9.5 out of 10.0. Prolonged sitting and activity aggravates it. He needs to recline and take pain medicine. If he does not manipulate it, it stays numb; it never goes below a three on a pain scale, but it is bearable. If he walks, stoops, bends, or climbs it gets

worse. It is a sharp stabbing pain. The pain in his back is like grinding bone against bone. He spends most of his time on his recliner, couch, and bed. He takes medication five times a day. It makes him drowsy. The pain wakes him up every night at least two to three times. His condition has been worsening since he left the shipyard.

He earned \$1,118.70/week for the weeks ending 6 Jul 03 to 21 Sep 03. He received a raise during that period of time to compensate for the insurance change. On 29 Sep 02, his hourly rate was \$23.289, then he got a raise to \$24.034 and another to \$24.846. When he returned his hourly rate was \$25.639.

He did not work seventy hours the week ending 17 Sep 06.

He can stand maybe fifteen to twenty minutes at the most before he has to sit. He can walk maybe two hundred feet before he has to stop and sit. In an eight hour day, he has to spend two to three hours in a flat bed. Bending increases his pain; it hurts when he bends. Ten pounds is the most that he will lift. Climbing ladders increases his pain level. Stairs cause pain in his leg and back.

Before his injury, everybody was talking about retirement. They said workers could retire when they were fifty-eight, but they found out workers lose their retirement money if they retire before 62.

Following the incident, he worked and went to the hospital and to the doctor. He had to return and do the reports and document the time. He made his regular wage, worked his regular hours and had his regular crew.

He went to Dr. Feinberg because that was the only doctor he'd been seeing. He chose to see Dr. Feinberg. When Dr. Feinberg suggested he see an orthopedic, he chose Dr. Black. When he needed a neurologist, he chose Dr. Graham, who pulled him from work.

He had surgery on 6 May 04. Afterwards, he saw Dr. West in Mobile. He does not recall that Dr. West said he could do light or sedentary work, just that he could not go back to his original work. He was not aware Dr. West suggested that he may need to have a functional capacities evaluation.

He had a functional capacities evaluation performed on 18 Jul 05. He is not aware that the FCE said he can sit, stand, or walk up to two-thirds of a day. He could occasionally bend, up to a third of the day, but would suffer the consequence after the fact. He told Dr. Graham he needed to lay down occasionally. He was not aware that after the functional capacities evaluation, Dr. Graham released him to return to work on 15 Sep 05. Dr. Graham said he had to go by whatever the FCE

said. After he was released to return to work on 15 Sep 05, he applied for one job and called the shipyard to see about getting his job back.

He told the service station manager he did not have the skills to operate the cash register. He then looked at the sandwich truck, and he knew he could not ride around in that truck for eight hours with his back.

Since 15 Sep 05, he has not filled out a written application for employment anywhere other than the places identified by the vocational consultant. He went to a security company but the lady said they had no openings. That was within the last month. He also called another security agency on the phone and they said they were not hiring.

He knows his body and he cannot work. There is no point in him wasting people's time. He has never filed an application for employment at Classy Chassis. He never filed a written application for employment at Southern Belle Sandwich Company, but had a telephone interview with one of the people at the sandwich company. They said they were not hiring.

He was able to get up to walking a mile a day at one time.

He could have learned how to run a cash register; the problem was he physically could not do the job. He does not think he could physically do any of the jobs that have been identified. He knows he would not. The pain is too much.

He had a negative feeling towards the results of his surgery. He thought it was going to improve his condition more than it did.

Right now he is at 10.2 out of 10.0 for pain. He did not take any medication because he did not want to be drowsy.

He went to every therapy the doctor sent him to that workman comp approved and does not know why the records say he did not.

He went to Dr. Graham and asked for a disability hunting license. Dr. Graham brought him to his senses and pointed out if he could go hunting he could go back to work. He therefore asked for a parking pass. At the time he asked for the hunting waiver, he could not have hunted, but was hoping to get better. He was trying to save money by obtaining the parking pass at the same time. He had to get a number of forms filled out for the pass and never finished doing so before he quit. He has not hunted since and gave his hunting dogs away. The last time he talked to Dr. Graham in September 2006, it was as if someone had told the doctor not to help him, but just make him go back to work.

Mr. Pierce would send a truck for him if he needed to go somewhere. After the fact, a man at the hospital said they could provide him with a ride. He has seen other people with golf carts.

He never filed a written application for employment at Ace Security or Ryan's Steakhouse. He did talk to Ryan's Steakhouse in Mobile in the last month or so, but they were not accepting applications at this time. He went to Kap, on Demetropolis Road in Mobile, to apply for a security job, but they were not accepting applications. He applied for the jobs on 12-13 Nov 07.

He is worse today than he was on the day of his functional capacity evaluation. He was a lot better then. He probably could have done some of the jobs at that time, if there was limited walking, standing, stooping and bending.

***Claimant's job search worksheet indicates in pertinent part that:***<sup>48</sup>

On 12 Nov 07, he went to Ace Security to apply for a security officer position, but they had no openings. On 13 Nov 07, he went to Ryan's and submitted an application for a dishwasher/cook job, but was told it included lifting and bending. On 13 Nov 07, he went to Kap Security to apply for a security officer position, but they had no openings.

***Dr. Arthur Black's records indicate in pertinent part that:***<sup>49</sup>

He saw Claimant on 11 Nov 03. Claimant complained of baseline achy low back pain becoming excruciating with any significant activity. Claimant said physical therapy did not help, although he had not been to many sessions. Claimant had full range of motion and normal sensation, reflexes and strength in both legs. He ordered an MRI for Claimant. An MRI on 15 Jan 04 showed severe spinal stenosis at L4-5 related to a central disc herniation without root compromise.

He saw Claimant again on 19 Jan 04. Claimant reported the pain was worsening and starting to radiate down both legs. He said he continued to work, but with pain. Claimant had full range of motion and normal sensation, reflexes and strength in both legs. He cleared Claimant to continue with his regular work and referred him to Dr. Graham.

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<sup>48</sup> EX-22.

<sup>49</sup> CX-7; EX-13.

*Dr. Eric Graham's records indicate in pertinent part that:*<sup>50</sup>

He first saw Claimant on 2 Feb 04. Claimant reported severe pain 5% in the back and 10% in the legs, with the left leg worse than the right. The pain was aggravated by activity. Claimant said he could walk no more than half a block and was unable to shop without a cart. Claimant had decreased lumbar range of motion secondary to pain. Leg range of motion was normal and without pain. His assessment was that Claimant had a herniated disc. He put Claimant on medication and recommended an epidural injection.

On 1 Apr 04, Claimant returned, having had 2 injections with Dr. Aldridge. Claimant reported minimum relief and said he wanted to proceed with surgery. A L4-5 surgery was planned and on 22 Apr 04, Claimant had his pre-operative appointment. Following a delay in surgery approval, Claimant had a second pre-operative appointment on 13 May 04.

He performed the L4-5 surgery on 26 May 04. Two weeks post surgery, Claimant was progressing normally and reported his leg pain was greatly improved and other symptoms were moderate.

On 8 Jul 04, Claimant complained of some severe leg and back pain, with the back worse than the leg. Claimant stated the pain improved with ambulation, he had made some progress, and had good and bad days.

On 19 Aug 04, Claimant reported his back pain never completely resolved and he continues to suffer leg discomfort, albeit different in character. Claimant stated his leg pain prevents him from ambulating much; he was still taking Lortab and Soma, and was becoming frustrated.

On 18 Nov 04, Claimant reported doing well, but not pleased that he still had back pain, although no associated leg pain. The pain was aggravated with activity and improved with rest. Claimant reported walking up to a mile a day and he believed Claimant was frustrated by the lack of a complete recovery. He recommended aggressive physical therapy.

He next saw Claimant on 6 Jun 05. Claimant had failed to go to the therapy he had recommended and while Claimant's legs were better, his back pain had worsened. Claimant reported the pain as 95% back and 5% leg with aggravation with activity and improvement with rest. He believed there was nothing else he could do for Claimant and recommended pain management and an FCE to determine work restrictions.

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<sup>50</sup> CX-8 (as cited, see n.3); CX-10; EX-14 (as cited, see n.3).

An FCE was conducted on 18 Jul 05 and found Claimant to have given good effort. It showed Claimant could perform light duty with lifting, carrying, pushing, or pulling 20 pounds occasionally and 10 pounds frequently, and walking or standing.

On 15 Sep 05, Claimant reported back pain aggravated with bending or lifting, but no leg discomfort. Claimant said he was quite active and walking over a mile a day, taking Lortab 5 for discomfort. He found no signs of symptom magnification by Claimant. He found Claimant to be at maximum medical improvement and able to perform light work with occasional lifting, carrying, pushing, or pulling 20 pounds.

On 29 Dec 05, Claimant reported his back pain had worsened in the area of his graft harvest site. He assessed Claimant as having a neuroma and injected it. Claimant reported 100% relief.

On 21 Sep 06 Claimant returned to discuss his Workman's Compensation case. Claimant was dismayed at the job he was being asked to do and believed it was beyond his FCE limitations. Claimant was concerned about ladder climbing and walking long distances and argued with him about the FCE limitations. Claimant believed a parking pass would help him avoid the extended walk to work and he completed the form for Claimant. Claimant also wanted a disability handicap sticker and he agreed to take Claimant at his word that he could not walk more than 200 feet without resting. He refused, however, to help Claimant obtain a disability hunting license.

On 6 Sep 07, Claimant again contacted him about his work restrictions. Claimant reported crying every day and quitting his job. He informed Employer that Claimant needed to be able to take breaks as needed and change standing or sitting positions for 15 minutes. When offsite, Claimant also needed a bench with lumbar support. Claimant also should be restricted based on his objective reports that he can not walk more than 200 feet.

***Dr. Edward Aldridge's records indicate in pertinent part that:***<sup>51</sup>

On 11 and 20 Feb 04, Claimant had lumbar epidural steroid injections.

***Dr. James West's records indicate in pertinent part that:***<sup>52</sup>

On 4 Apr 05, he conducted an examination of Claimant at the request of Employer. Claimant complained of back pain aggravated by walking and standing and ameliorated by lying down. His impression was that Claimant had degenerative lumbar disc post lumbar surgery. He assessed Claimant as having a 12% whole body impairment and being able to work in a light or sedentary job with no heavy lifting.

***Ocean Spring Physical Therapy records indicate in pertinent part that:***<sup>53</sup>

An FCE was conducted on 18 Jul 05 and found Claimant to have given good effort without symptom magnification. It showed Claimant could perform light duty with lifting, carrying, pushing, or pulling 20 pounds occasionally and 10 pounds frequently, and walking or standing.

***Dr. Patrick Couch's records indicate in pertinent part that:***<sup>54</sup>

He first saw Claimant on 7 Mar 06. Claimant related that following his surgery he did well for 5 or 6 months but then had pain in his scar in his left thigh and in his right foot. Claimant complained of worsening back pain. Claimant reported headaches, vision and hearing problems, dizziness, urinary problems, stomach pains, nausea, shortness of breath, chronic fatigue, and vomiting. Claimant also indicated that his pain completely interfered with his general activity, walking ability, normal work routine, sleep, enjoyment of life, and ability to concentrate. Claimant stated that walking, standing, lifting, sitting, and bending made his pain worse. He recommended a caudal racz procedure, which was performed on 31 Mar 06.

On 6 Apr 06, Claimant reported the racz was wearing off and he could feel tingling in his left back and pain increases with physical labor. Another racz was performed on 31 May 06.

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<sup>51</sup> CX-9.

<sup>52</sup> EX-15.

<sup>53</sup> CX-11.

<sup>54</sup> CX-12, EX-16 (as cited, see n.3).

On 14 Jun 06, Claimant reported that he was doing well, but had increasing evening pain. He did not want another injection at that point. Claimant returned on 14 Jul 06 reporting that the last injection had helped a lot, but that it had worn off and he would like another. On 2 Aug 06, Claimant had a lumbar facet block at L3 through S1. Claimant reported pain relief.

On 11 Aug 06, Claimant reported sleeping easily, but that his back would lock up and give him difficulty getting up from a prolonged seated position. On 11 Sep 06, Claimant complained that working and climbing is about to kill him and that he has no work restrictions. Another racz was performed on 29 Sep 06.

On 22 Oct 06, Claimant reported that the pain had initially decreased with the racz, but then returned and he had to stop working because of the pain and his inability to concentrate. On 27 Dec 06, Claimant reported that back pain still bothered him but not as badly and he had a good week. On 26 Jan and 26 Mar 07, Claimant reported an increase in pain and asked for another racz, which was performed on 24 Apr 07.

Another racz was performed on 1 Aug 07 and on 20 Aug Claimant asked for sleep medications.

***Grand Bay Medical Center records indicate in pertinent part that:***<sup>55</sup>

On 16 Aug 06, Claimant was seen for diabetes. On 11 Oct 06, Claimant was seen for left thigh pain aggravated by movement or bearing weight. He complained of chronic lower back pain. He was seen for nausea, dizziness, and constipation.

***Alabama Orthopedic records indicate in pertinent part that:***<sup>56</sup>

On 30 Oct 06, he was seen for severe left thigh pain, starting in May 2004. He stated everything makes the pain worse and nothing makes it better. He complained of fever, chills, fatigue, sleep problems, headaches, hearing problems, shortness of breath, numbness/tingling, and depression. An EMG on 17 Nov 06 was abnormal for lateral femoral cutaneous neuropathy but no focal or generalized peripheral distal neuropathy or left lower radiculopathy. On 22 Dec 06, Claimant was continued on Lyrica and was referred back to Dr. Couch for possible blocks.

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<sup>55</sup> CX-13.

<sup>56</sup> CX-14.

*Michele Edwards testified at trial in pertinent part that:*<sup>57</sup>

She is a registered nurse working as Employer's return-to-work coordinator. She replaced Melinda Wiley. Before coming to Employer, she was self employed and also worked for Resource Opportunities. She has a medical case management and human resources background, but no formal training in personnel management.

When employees return to work from an injury, they report to the Westbank hospital with the medical information from their doctor, and in turn they are sent to the return-to-work coordinator for consideration of placement. Employer then tries to see if they can place the employee back to work safely and effectively. In general those are meaningful fulltime jobs. Some are heavy and some are light. If the work injury has permanent limitations on the employee, the jobs are permanent. Employer tries to return them to work in the same craft; they can cross crafts. As long as they have not been terminated and as long as they are not coming back as a rehire, they return to work with their full rights as an employee without any loss of seniority and at the same or greater pay.

Employees are to keep a form with their limitations with them. Claimant's form is EX-18, page 2. Ms. Wiley kept excellent records on Claimant.<sup>58</sup>

Employees who are applying for a medical drive-in pass obtain the paperwork from Westbank hospital to bring to their doctor. The doctor fills out the medical information on the form and the patient/employee signs that he has given permission for those medical records to be released to Employer. After that form is completed, the employee brings it back to Westbank hospital and it is reviewed.

When employees are placed back to work with permanent restrictions, they do not know how long the jobs will last. The fire watch program was an example. Some employees placed in those jobs were put off work when the fire watch jobs closed.

When an employee comes back with his doctor's note, Employer looks at it, writes up the restrictions, confers with the trades management people, and identifies jobs the employee can do within his limitations, keeping him in the same skill/craft if possible. That may be an open-ended assignment and may not be a long term placement.

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<sup>57</sup> Tr. 208-234.

<sup>58</sup> EX-18.

*Joe Walker testified at trial and his records indicate in pertinent part that:*<sup>59</sup>

He is a vocational rehabilitation counselor, certified with the U.S. Department of Labor. OWCP authorized him to do return-to-work monitoring for Employer. He has been serving as a designated counselor there since September 1989. He explains to injured employees that he is there to help monitor the return-to-work activity, to talk to them and their supervisor, and to oversee the work they are performing.

From 1979 to 1986 he worked with Crawford Health and Rehabilitation Services as a vocational consultant. Their major clients were Employer, OWCP, Social Security, and Employees National Insurance Company. Employer accounted for 40%. He has been self-employed since and took Employer's business with him. Right now 80% of his work is for Employer involving the return-to-work program.

EX-19 is the file of his work with Claimant. Based on his involvement in Claimant's case, and considering Claimant's age, education, vocational background and medical limitations, he believes the jobs Claimant was offered by Employer in August of 2006 were suitable. The assignments were suitable as light modified work, within the work restrictions as outlined on the work restriction form. The sheet metal foreman position was ongoing in the shop on a continuous basis. The jobs paid more than Claimant was making at the time of his injury. EX-19 is incorrect in that the five percent wage greater than a first class at the bottom of page four really should say ten percent.

He believes the sheet metal foreman position within the sheet metal shop described in EX-17 at page 8 is more light duty instead of just sedentary, based on the frequency of standing and walking. They have to be on the floor to identify materials and provide oversight. The job would still be suitable for Claimant, though.

He reviewed the vocational rehabilitation report of Ms. Kelly Hutchins.<sup>60</sup> He does not agree with her that Claimant is not employable. Ms. Hutchins gave more weight to Claimant's subjective complaints of depression and pain than he does, particularly compared with the functional capacity evaluation. She also mentioned hearing loss, but Claimant has no work limitations based on that.

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<sup>59</sup> Tr. 234-277; CX-17; EX-19.

<sup>60</sup> EX-18.

He thinks Claimant's transferable skills as a sheet metal foreman would carry over. Ms. Hutchins did not address whether she was going from a medium range to a medium range, a medium range to a light range, or a medium range to a sedentary range.

He did not do a detailed transferable skills analysis cross-referenced with Claimant's previous relevant work by code and identify any job titles. He did not perform any vocational testing on Claimant or administer a WRAT-3. He did not really talk with Claimant as much as he ordinarily does with people that he oversees.

After Hurricane Katrina, on 29 Aug 05, was an unsettled period of time. Employer did not have a second shift for quite some time. Employer offered Claimant the foreman position in the sheet metal shop at the end of September 2006. He does not know who held that position prior to Claimant.

He has not seen an OWCP-5 work restriction form in this case. He saw Employer's work restriction form, the September 2005 medical report from Dr. Graham, and the functional capacity evaluation from Gulf Coast Physical Therapy. He thinks he saw them after Claimant processed in and the work restriction form was completed. The work restriction form was based on the medical reports from Dr. Graham and the functional capacity evaluation report.

He met with Claimant twice in September 2005. Claimant complained of too much standing and walking from the trades manning area to the Westbank medical facility and the reclamation area. Claimant also related to him that he had back and leg pain at work and was unable to take breaks as needed or lie down and take medication.

He reported to the Department of Labor that he was concerned about Claimant's ability to sustain work, based on Claimant's subjective complaints and statements. Claimant does not share the opinion of Dr. Graham or the functional capacity evaluation and did not feel that he could tolerate work through the day. If one believes Claimant's complaints of pain and his description of his physical abilities there is no work he can perform on a forty-hour week continuous sustained basis.

If Claimant were as motivated as a reasonably prudent person who wanted to return to work within his limitations there would be light work that he could do.

*Kelly Hutchins' rehabilitation reports indicate in pertinent part that:*<sup>61</sup>

She conducted a vocational assessment of Claimant at the request of his attorney. She reviewed his medical records, the FCE, and the vocational assessments of Tommy Sanders and Joe Walker.

She met with Claimant on 30 Oct 07. Claimant told her his daily physical activities are limited by his leg and back pain. He reported that stooping, bending and walking greatly increase his pain and that prolonged sitting causes severe pain. He stated he can only stand for less than 15 minutes at a time and walk only 200 feet. He said he can sit for 30 minutes, but then has stabbing pain upon rising. He conceded he can drive, but believes he is not a safe driver and prefers not to drive, noting that he has trouble turning to see traffic. Claimant estimated he could lift 5 to 10 pounds, but would not try to lift more than that. Claimant said he does household chores for 30 minutes, but then has to rest 30 minutes to an hour. He told her he spends most of his day in a recliner and naps up to three times a day. He reported pain medications lower his pain to 3 or 4 out of 10, but make him sleepy and unable to concentrate. Claimant also noted he suffers from depression and is having problems with memory.

Claimant told her he went to school through the 9<sup>th</sup> grade, but never obtained a GED and that even though he eventually learned how to figure angles for his job, his math skills are poor. He stated he had a hard time returning to work at Employer. He was able to do the job with Mr. Pierce because it was a simple paperwork job and he got a ride from the parking lot and could stand and sit as needed. He said the clean up crew supervisor job was not an office job and required him to walk and stand with few opportunities to sit, causing him pain to the point of tears. He managed it by taking vacation time. He explained he could not do the sheet metal job Employer offered because it was second shift and he could not drive on medication and had no ride. He stated he could not make it through an entire shift of any type of job, unless he could lie down and put pillows under his legs. He said he might flip out if he had to wait on the public and make change, such as with a job as a cashier. He said he would injure himself getting in and out of the sandwich truck and the security job would require just as much standing and walking as the shipyard job.

She conducted testing that showed Claimant to be at the 4<sup>th</sup> grade level for spelling, 5<sup>th</sup> grade for reading, and 6<sup>th</sup> grade for math.

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<sup>61</sup> CX-18.

She believed Claimant is unable to perform the sandwich truck job because of his pain, depression, and lack of clerical skills. The same was true of the fuel booth cashier and security guard positions. She noted Claimant said he was unable to do the jobs offered by Employer. She found that based on his pain, depression, and limited academic skills, Claimant is not employable at any level.

*Tommy Sanders' rehabilitation reports indicate in pertinent part that:*<sup>62</sup>

He performed a vocational assessment and labor market survey for Claimant at the request of Employer. He reviewed Claimant's medical records and FCE report, and interviewed Claimant on 29 Nov 05. Claimant expressed doubts as to his ability to maintain regular work, since he needed to lie down occasionally throughout the day.

Based on Claimant's background, doctor's restrictions and FCE findings, he believed Claimant was qualified for security/gate guard, fuel booth cashier, light delivery, parking lot attendant, and perhaps supervisory positions with Employer or other shipbuilding companies.

He noted the following jobs were available on 19 Dec 05 and informed Claimant of them:

Driving sandwich delivery truck and delivering sandwiches paying \$8.00/hour.

Fuel booth cashier paying \$7.00/hour.

Security guard with a 10-15 minute walking round each hour paying \$7.00/hour.

He also noted that on 15 Sep 05, the following jobs were available:

Security Guard paying \$7.00/hour.

Car Wash cashier paying \$6.00/hour.

In November 2006, he went to Employer and interviewed a number of personnel to determine if the work Employer had offered Claimant was appropriate. He determined that the clean-up crew supervisor position Claimant filled for a number of weeks was light duty and allowed sitting, walking, and standing, with lifting, at the most, a notebook. He also determined that the second shift foreman position was essentially a sedentary job in a 10x12 office with a desk and a telephone. Claimant would be able to alternate walking and sitting and periodically climb one

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<sup>62</sup> EX-17.

set of stairs to attend a meeting. He opined that the job was within the limitations assigned Claimant.

In October 2007, he found the following positions as available and within Claimant's capabilities:

Security guard alternating standing, sitting, and walking paying \$7.00/hour.  
Food bar attendant with frequent standing, walking, and lifting up to 10 pounds.

Security guard alternating standing, sitting, and walking paying \$6.00/hour.

***Employer's records indicate in pertinent part that:***<sup>63</sup>

On 8 Aug 06, Employer offered Claimant a job at his previous rate of pay effective 21 Aug 06. Claimant was cleared by Employer to perform light work with limited lifting, carrying, pushing, and pulling up to 20 pounds. On 15 Aug 06, Claimant came to Employer trembling and tearful, saying he could not work. He did not go to Employer's medical clinic for reinstatement. He was told to provide new documentation or risk termination. Claimant worked 40 hours for the week ending 27 Aug 06, and took vacation the next week.

***Claimant's pay records indicate in pertinent part that:***<sup>64</sup>

On 23 Mar 03, Claimant's pay rate changed from \$23.289 to \$24.034 per hour. On 8 Jun 03, Claimant's pay rate changed from \$23.034 to \$24.846 per hour. He earned \$1,118.70 every week from the first week of July 2003, to his injury.

Claimant worked 40 hours for the week ending 27 Aug 06 and took 40 vacation hours the next week. He worked 80 hours for the two weeks ending 17 Sep 06. He took 10 vacation hours and worked 30 hours for the week ending 24 Sep 06. He worked 40 hours for the week ending 1 Oct 06. He took 40 vacation hours for the weeks ending 8 and 22 Oct 06. During that time, Claimant earned a weekly wage of \$1,025.56.

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<sup>63</sup> CX-20; EX-18.

<sup>64</sup> CX-24; EX-1.

## ANALYSIS

### Nature and Extent of Disability

In as much as the parties agree that Claimant was injured at work and is unable to return to that original job, Claimant enjoys the presumption of total disability and Employer bears the burden of establishing SAE. Employer argues that it has done so, relying on Claimant's FCE results, the treating doctors' restrictions, and vocational counselor assessments. Claimant disagrees, citing his inability to function in accordance with the FCE or doctor's restrictions. In short, the FCE and Claimant's doctors say that he can do light duty and the vocational counselors say that the jobs identified fall within the FCE and doctors' restrictions. Claimant says he has to lie down repeatedly throughout the day and simply cannot do the identified jobs because of pain, fatigue, and medicinal side effects.<sup>65</sup>

Consequently, this case centers on Claimant's credibility and the inconsistency between his subjective statements and his doctors' opinions, which are based partly on his subjective reports and partly on objective test results. At trial, Claimant's appearance and demeanor neither inspired confidence nor created doubt in his credibility. The FCE reported that Claimant gave full effort and showed no signs of symptom magnification, but at the same time Claimant was arguing with his doctor that he could not perform within the FCE restrictions, he was inquiring about a disability hunting license. Claimant was eligible for retirement from Employer, arguably giving him less motive to return to work.

I find that Dr. Graham's opinions provide the most probative evidence. He was Claimant's treating physician and had many chances to observe and talk to Claimant over an extended period. He had the opportunity to evaluate the objective tests. He had a lengthy discussion with Claimant about Claimant's concern that the FCE did not reflect Claimant's true limitations. He was there first hand to assess whether Claimant was just seeking a disability hunting license to save money in the event Claimant became well enough to hunt. His opinion was corroborated by Dr. West and consistent with the FCE. No doctor opined that Claimant should be taken off all work. Ultimately, Dr. Graham was best situated to assess how much weight to give Claimant's subjective complaints and I afford his opinions the most probative value as to Claimant's physical capabilities.

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<sup>65</sup> There was some testimony and argument concerning Claimant's intellectual or educational ability to do the identified jobs, but based on Claimant's testimony, I find that the jobs were all suitable in terms of his education and training and his fundamental real reason for not doing them was pain.

Consequently, I find that the preponderance of the credible evidence in the record establishes that Claimant's physical limitations are as set forth in the FCE with the additional restrictions placed by Dr. Graham as of September 2007. Thus, as of 15 Sep 05, I find that Claimant could perform light duty with lifting, carrying, pushing, or pulling 20 pounds occasionally and 10 pounds frequently, and walking or standing. As of 6 Sep 07, Claimant additionally must be able to take breaks as needed and change standing or sitting positions for 15 minutes, have a seat with lumbar support, and not have to walk more than 200 feet. Employer bears the burden of establishing SAE within those limitations.

#### The September/December 2005 Positions

I found the vocational report of Mr. Sanders to be credible and find that the September security and car wash positions were within Claimant's capabilities, as stated by the FCE and his treating physician. The same is true of the December cashier and security positions.<sup>66</sup> I do not find the evidence establishes Claimant made a good faith effort to obtain those jobs.<sup>67</sup> Thus, I find that as of 15 Sep 05, SAE existed with a wage of \$7.00/hour.

#### The August 2006 Employer Positions

Both Mr. Sanders and Mr. Walker reported that the jobs offered by Employer in 2006 were within the limitations set by the FCE and Claimant's doctors. Ms. Hutchins opined that Claimant is unemployable because of his pain. She gives his subjective complaints far more weight than do Mr. Sanders or Mr. Walker. Most importantly, she gives those complaints far more weight than do his treating physicians. Thus, I find her opinion substantially less probative and credible than those of Mr. Sanders or Mr. Walker. The weight of the probative evidence is that as of 21 Aug 06, Employer offered Claimant SAE at a weekly wage of \$1,025.56.

I have also considered the additional restrictions set forth by Dr. Graham on 6 Sep 07 and it appears that the second shift job falls within those limits as to breaks, lumbar support and changing position. While Claimant testified that he could not work during that time because of pain, fatigue and the side effects of medication, there is no medical restriction corroborating that claim and I give it little weight compared to the stated restrictions of Dr. Graham.

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<sup>66</sup> I credit Claimant's testimony that driving a sandwich truck on a delivery route may have required too much twisting.

<sup>67</sup> Claimant's job search was largely pro forma and subject to and tainted by the premise that he could not work at all because of his need to recline. E.g., although he pointed to a lack of ability to operate a register as a reason he could not work as a cashier, he conceded the real reason was his back.

### Average Weekly Wage

The purpose of Section 10 and the average weekly wage is to most accurately reflect a claimant's earning potential at the time of his injury. Given that (1) Claimant was a long time salaried employee and not subject to fluctuations in hours worked; (2) in June prior to his September injury his salary increased; and 3) there was no evidence that he would possibly be subject to diminution of his salary; I find Section 10(a) would unfairly undervalue his probable his actual earning capacity with Employer at the time of his injury. Thus, I find that Section 10(c) is applicable.

Starting in July 2003, Claimant earned \$1,118.70 every week until he was injured. That weekly income accurately reflects his earning capacity and is annualized to an average annual income of \$58,172.40. It results in an AWW of \$1,118.70.

### ORDER AND DECISION

1. Claimant's average weekly wage at the time of his injury was \$1,118.70.
2. From 15 Sep 05 to 21 Aug 06 Claimant was permanently partially disabled with a weekly post injury earning of \$280.00. Employer shall pay Claimant compensation for that period based on an AWW of \$1,118.70 and a weekly post injury earning capacity of \$280.00 as of 15 Sep 05 (adjusted for the percentage increase in the national average weekly wage<sup>68</sup>).
3. From 21 Aug 06 to present and continuing Claimant has been permanently partially disabled with a weekly post injury earning of \$1,025.56. Employer shall pay Claimant compensation for that period based on an AWW of \$1,118.70 and a weekly post injury earning capacity of \$1,025.56 as of 21 Aug 06 (adjusted for the percentage increase in the national average weekly wage<sup>69</sup>).
4. Employer shall receive credit for all compensation heretofore paid, as and when paid.
5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.<sup>70</sup>

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<sup>68</sup> See *Richardson v. Gen. Dynamics Corp.*, 19 BRBS 48 (1986).

<sup>69</sup> *Id.*

<sup>70</sup> Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

6. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.
7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.<sup>71</sup> A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

**ORDERED** this 15<sup>th</sup> day of July, 2008 at Covington, Louisiana.



**PATRICK M. ROSENOW**  
**Administrative Law Judge**

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<sup>71</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.

CERTIFICATE OF FILING AND SERVICE

I certify that on July 16, 2008, the foregoing Compensation Order was filed in the Office of the District Director, Seventh Compensation District, and that a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Willie J Jones, 15096 Cat Deakle Rd., Grand Bay, AL 36541

Sue E. Dulin, Esq., P. O. Box 820, Gulfport, MS 39502


Northrop Grumman Ship Systems Inc., c/o F.A. Richard & Assoc., P.O. Box 1728, Pascagoula, MS 39568

Franke & Salloum, PLLC, Paul B Howell, Esq., P. O. Drawer 460, Gulfport, MS 39502

A copy was also mailed by regular mail to the following:

Office of the Solicitor, 525 S. Griffin St., Rm 501, Dallas, TX 75202

Judge Patrick Rosenow, Office of the Administrative Law Judges, St. Tammany Courthouse  
428 E. Boston St. 1<sup>st</sup> Fl., Covington, LA 70433



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David A. Duhon, District Director,  
Seventh Compensation District  
U. S. Department of Labor  
EMPLOYMENT STANDARDS ADMINISTRATION  
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the District Director files the decision or order in his office.

### Interest Calculator for 07-168382 Willie J Jones

Begin	End	WeeklyRate	CompAmt	SldPeriod	StrPeriod	SldInt	StrInt
01/29/2004	09/14/2005	\$84.03	\$7,142.55	42.50000	74.00000	\$133.96	\$477.73
09/15/2005	08/20/2006	\$92.95	\$4,514.71	24.28571	49.71429	\$47.51	\$202.86
08/21/2006	07/16/2008	\$62.10	\$6,174.51	49.71429	0.00000	\$135.93	\$0.00
Total			\$17,831.7	116.50000	123.71429	\$317.40	\$680.59

Interest 2.35%  
Paid Date 07/16/2008  
Total Int \$997.99

Benefit Payment Breakdown for 07-168382 Willie J Jones

Type	Obligor	Begin	End	CompRate	#Wks	Amount
TTD	Carrier	01/29/2004	09/14/2005	\$745.80	85.00000	\$63,393.00
PPL	Carrier	09/15/2005	08/20/2006	\$559.16	48.57143	\$27,159.20
TPD	Carrier	08/21/2006	07/16/2008	\$62.10	99.42857	\$6,174.51
	Carrier				233.00000	\$96,726.71
	Grand				233.00000	\$96,726.71