U.S. Department of Labor

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Issue Date: 12 October 2005

Case No.: 2004-LHC-00928

In the Matter of

THOMAS CATANIA,
Claimant

v.

SEA-LAND SERVICE, INC.
Employer

Appearances:
Jorden N. Pedersen, Esq., for Claimant
Robert N. Dengler, Esq., for Employer

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S. § 901 et seq. ("the Act"), and the regulations promulgated there under. A hearing was held before me in New York City on March 29, 2005.

At the hearing, Claimant's exhibits 1-27 and Employer's exhibits 1-12 were admitted into evidence. Post-hearing, Claimant submitted a March 29, 2005 report of Dr. Steinway marked as CX 28, and an April 25, 2005 report of Charles Kincaid marked as CX 29. Post-trial briefs were submitted on behalf of both parties.

STIPULATIONS

The parties have stipulated to the following:

1. This claim is subject to the Act;
2. An accident occurred on March 5, 1999;
3. Claimant and Employer were in an employee-employer relationship at the time of the accident and injury;

4. Employer was timely notified of the injury;
5. Employer timely filed first report of injury;
6. Claimant timely filed a claim for compensation with the United States Department of Labor;
7. Employer timely filed a notice of controversion with the United States Department of Labor; and
8. Employer paid Claimant temporary total disability compensation benefits from 5/6/99 through 7/21/03 at the rate of $643.33 per week. Since 7/22/03, Employer has paid permanent partial disability benefits at the rate of $377.00 per week.

The parties stipulated in their briefs to an average weekly wage of $965.00 and total disability rate of $643.33 per week.

ISSUES

The issues presented for decision in this case are:

1) The nature and extent of Claimant's disability
2) Whether Claimant is entitled to reimbursement for methadone under Section 7
3) Whether Employer is entitled to relief under Section 8(f)

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant testified that at the time of the accident he was working as a gang shore member for Sea-Land Service, Inc., whom he began working for full-time in approximately 1989. (Tr. at 21). Claimant's prior work experience consisted of truck driving, pizza delivery, an electrician's assistant, a deck hand, and general labor type jobs. (Tr. at 19-20). His education included a GED and one year of college courses at Ulster County Community College. (Tr. at 18).

As a gang shore member, Mr. Catania was required to do heavy work. (Tr. at 22-23). The subject accident occurred on the morning of March 5, 1999 as Claimant was loading a vessel and tripped on the netting, causing him to fall on his hands and knees and neck. (Tr. at 23-24). Immediately he felt pain in his neck and back and reported the accident to his employer. (Tr. at 24).

Claimant first sought medical attention with Dr. Eugene Pirog, whom he had treated with prior to this accident, for anxiety following Claimant's mother's death for which Dr. Pirog prescribed Xanax. (Tr. at 25, 30, 56). After the accident, Dr. Pirog gave Claimant injections in his elbows and medication. He also recommended that Claimant obtain an MRI. (Tr. at 25). After obtaining the MRI, Claimant was sent to by his insurer to Dr. Shutello at the Edison-Metuchen Orthopaedic Group. Dr. Shutello sent Claimant for physical therapy and further diagnostic testing. (Tr. at 26). Claimant received physical therapy at Old Bridge Physical Therapy for his neck, arms, back and legs. (Tr. at 26). Besides Dr. Shutello, he also saw Dr. Patti and Dr. Anghel from the same group. Dr. Patti recommended he have surgery, and Dr.

Anghel gave Claimant epidural shots in the back. (Tr. at 27). Claimant was also prescribed Percocet and Xanax. Claimant continued to receive physical therapy until July 1999. (Tr. at 27).

In September 1999, Claimant underwent surgery on his neck, performed by Dr. Carl Giordano who is Board certified by the American Board of Orthopedic Surgeons. (Tr. at 28). After Dr. Giordano, Claimant was sent to Dr. Rosenberg, who suggested pain management for Claimant's chronic pain, but Claimant was unable to receive such. (Tr. at 29).

In approximately 2002 Mr. Catania moved to Crystal River, Florida. (Tr. at 30). Claimant continued to see Dr. Pirog on an occasional basis, but does not currently see him. (Tr. at 63-64). Dr. Pirog would refill Claimant's prescriptions of Percocet 10 milligrams and Xanax 2 milligrams. (Tr. at 30). He then treated with doctors in Florida. Claimant saw Drs. Corbett and McPhee, both of whom prescribed Percocet and Xanax and suggested pain management. (Tr. at 31-32). Claimant testified that his back went out at one point, for which he was treated at Citrus Memorial Hospital in Inverness, Florida. Since this time, Claimant has received pain management with Dr. Reheem. (Tr. at 33). Dr. Reheem prescribes Methadone 10 milligrams and Xanax 1 milligram; Claimant states he takes both medications 3-4 times a day depending on how he feels. (Tr. at 33).

Mr. Catania lives by himself and conducts chores around his home: cooking, laundry, shopping, and occasional yard work and cleaning of his pool. (Tr. at 35, 48). Since the accident, Claimant purchased a boat which he operates on the water himself. (Tr. at 49). Claimant states that he drives, up to 2 hours on a "good" day. (Tr. at 35). In one year since the accident, Claimant drove from his home in Crystal River, FL to New Jersey seven times, one time by himself and the other times with a companion who shared driving duties. (Tr. at 46). Claimant states that he finds it a little easier to walk since losing 50 lbs. from July 2004 to the date of the hearing, March 2005. (Tr. at 36). Claimant states that he uses a cane when traveling any great distance. (Tr. at 50).

Claimant states that he has approximately 10 "good days" a month. (Tr. at 59). He has not returned to work since the accident and states that he feels he is unable to work due to varying levels of pain and the effects of his medications. (Tr. at 36).

Claimant was questioned regarding the surveillance video of him. Claimant asserted that the furniture he is shown moving is light patio furniture that weighed approximately five pounds. (Tr. at 39-40). He also stated that the walk to the gym depicted in the video is approximately ¼ of a mile. (Tr. at 39). The Claimant states that he did arm curls inside the gym, and that because this proved too difficult, he terminated his membership approximately two and a half weeks after joining. (Tr. 52).

Mr. Catania presently complains of pain in his neck radiating into his shoulders and arms, and pain in the center of his back and lower back radiating into his legs. (Tr. at 33). Claimant describes this pain as being daily, sometimes preventing him from getting out of bed. (Tr. at 34). Claimant states that he lost weight and that his condition has improved somewhat since the accident, in that he is able to walk better and his reflexes have improved. (Tr. at 34, 45-46).

Debra Catania's Testimony

Ms. Catania was married to Claimant in 1983 and divorced from him in 2003. They have three children together. (Tr. at 69). Ms. Catania currently resides approximately two miles from Claimant and sees him five or six days out of the week. (Tr. at 71).

Ms. Catania states that Claimant's ability to focus deteriorated post-accident, but improved once he stopped drinking. (Tr. at 72-73). Due to lack of focus, Ms. Catania stated that she helps Claimant sort mail and make phone calls. (Tr. at 79-80). Ms. Catania stated that Claimant has good days and bad days; on good days she sees him doing laundry and sweeping, on bad days he lies in bed. (Tr. at 73). Ms. Catania and Claimant drove from Florida to New Jersey in 2004. They took turns driving and made stops every hour to two hours. (Tr. at 75). Ms. Catania stated that Claimant uses a cane during periods of extended walking or standing. (Tr. at 77).

Under the terms of their divorce, Ms. Catania is supposed to receive child support from Claimant. She states that he is unable to pay the full amount and pays what he can. (Tr. at 80). Ms. Catania works two jobs for about 35 hours a week. (Tr. at 82).

Medical Evidence

Dr. Eugene Pirog

Claimant began treating with Dr. Pirog in 1998, prior to the accident. (EX 2). Records indicate that on February 10, 1998 , Claimant told Dr. Pirog that he was "on the verge of a nervous breakdown," upon which Dr. Pirog prescribed Xanax. (EX 2). On April 21, 1998, the doctor wrote that Claimant complained of a stiff neck and indicated that he had taken a friend's Percocet. (EX 2).

The next entry in Dr. Pirog's records is on March 8, 1999, three days after the accident, when Claimant first sought treatment. Dr. Pirog administered injections into Claimant's elbows and ordered an MRI of Claimant's cervical spine. (CX 13). Claimant regularly saw Dr. Pirog for refills of his prescriptions. On March 28, 2002, the record states "Patient moving to Florida." (CX 18). Subsequent to moving, the records show Claimant came up from Florida to see Dr. Pirog and received refills of his medications. On a visit in 2003, Claimant indicated that he had pneumonia which caused him to lose weight. (CX 18).

MRI of the Cervical Spine dated March 18, 1999

An MRI of the cervical spine revealed "Central disc protrusion C5-C6 and C6-C7 with very mild focal spinal cord compression in the midline at C5-C6 and without foraminal encroachment at either level." (CX 4).

Edison-Metuchen Orthopaedic Group

There are three reports from this group. (CX 8). In the first one, dated May 13, 1999, Dr. Shutello writes that he reads the May 4, 1999 MRI of the lumbosacral spine as showing an "extremely large" disk at L5-S1. This MRI has not been supplied by the Claimant. (CX 5). Dr. Shutello reports on a May 5, 1999 EMG as showing "only an incidental left medial nerve neuropathy in the region of his left wrist." (CX 8). This EMG is also absent from Claimant's Exhibits. (CX 6).

Claimant also saw Drs. Patti and Anghel. Dr. Anghel stated that he performed an EMG/NCV study in both upper extremities which showed no evidence of cervical radiculopathy. (CX 8). On May 25, 1999 Dr. Anghel noted improved neck pain due to physical therapy. (CX 8). He also noted that the cervical spine range was "slightly limited in extension" and that there was no evidence of muscle atrophy in the upper extremities. (CX 8). Dr. Anghel also found normal active muscle stretch reflexes in the upper and lower extremities. (CX 8).

Dr. Anghel suggested epidural injections for the lower back and continued therapy. (CX 8). In a letter dated June 15, 1999, the doctor stated that the first epidural injection improved Claimant's tolerance for sitting, but did not decrease his pain to any significant degree. The doctor noted a "recent fall which resulted in injury to the right side of the chest." (CX 8). It is unclear if this is referring to the accident of March 5th or a subsequent fall. Unlike his previous report, Dr. Anghel states that the only area of improvement thus far was in the right elbow. (CX 8).

Dr. Anghel prescribed Claimant Percocet and Xanax. On May 25, 1999, the doctor notes that Claimant "exhausted his supply of 30 pills of percocet in ten days as well as 30 pills of Xanax 2mg." The doctor noted that the Claimant is large man and needs pain management to handle his complaints of generalized pain. (CX 8).

Dr. Carl Giordano

Claimant saw Dr. Giordano for an initial evaluation on August 3, 1999. (EX 1). At that time, Dr. Giordano ordered additional MRIs of the cervical and lumbar regions because he felt that the first ones were of poor quality. Dr. Giordano examined Claimant and found Claimant had a decreased range of motion in his back but was able to flex and touch the midtibial region. He also found lateral side bending and rotation to be normal and that Claimant was capable of toe raising and heel walking. Dr. Giordano's impression was that Claimant suffered a mild strain that was not a severe injury. He stated, "Mr. Catania's symptoms may far exceed the mechanism of his injury or organic pathology on his physical exam or imaging studies."

Dr. Giordano's letter dated August 12, 1999 describes Claimant's new MRIs, which revealed cervical stenosis at C5-C6 and C6-C7 with spinal cord compression, foraminal and nerve root compression. The lumbar MRI revealed a degenerative disc disease at L4-L5 and L5-S1 with disc protrusion at L5-S1. Dr. Giordano stated that some of Claimant's cervical problems were pre-existing and exacerbated by the work injury. He cites prior injuries, including one to Claimant's head suffered in a motor vehicle accident. He states that, "Because of some aspect of

this gentleman's affect, it is difficult to state what component of his pain and symptoms is from myeloradiculopathy and what component may be exaggerated." (EX 1).

Dr. Giordano recommended surgery on C5-C6 and C6-C7 and gave Claimant Lorcet for his pain. Records from Morristown Memorial Hospital reveal that this surgery was conducted on September 7, 1999 by Dr. Giordano. (EX 1).

At a follow-up visit, dated September 17, 1999, Dr. Giordano describes how Claimant informed him that his brother has spinal cerebellar ataxia and possibly multiple sclerosis. Dr. Giordano explains that this information upset him because Claimant had not disclosed this earlier, even upon direct questioning regarding neurological abnormalities in his family history, and because this altered Dr. Giordano's opinion regarding Claimant's injuries. Upon learning about this family history, Dr. Giordano felt that Claimant's symptoms were associated with an underlying spinal cerebellar ataxtic disorder, and not a work injury. In the doctor's opinion, such a fall would draw attention to the disorder that the patient had not paid attention to before, thus causing him to believe the fall and the symptoms were related when they were not. Therefore, on October 5, 1999, Dr. Giordano suggested to Claimant that he undergo a neurological evaluation by a neurologist. (EX1).

Claimant underwent a neurological evaluation by Dr. Nazar Haidri, who is Board certified by the American Board of Psychiatry & Neurology. Dr. Haidri concluded that symptoms are related to the subject accident, with pre-existing degenerative changes and pre-existing symptoms aggravated by the subject accident. (CX 14).

Dr. M. Allam Reheem

Claimant first saw Dr. Reheem on October 13, 2004. Dr. Reheem is Board certified by the American Board of Anesthesiology. The report from that date reveals a very limited physical examination of Claimant, from which Dr. Reheem stated, "(Claimant) has a decreased range of motion to the cervical and lumber spine ... Strengths are 5/5 and equal." (CX 26). There is no evidence that Dr. Reheem reviewed any records. Dr. Reheem then prescribed Methadone 5mg. and Xanax 1mg.

At the next appointment, two weeks later, Dr. Reheem notes a decreased range of motion and increases the Methadone to 10 mg. At the following appointment on November 24, 2004, Dr. Reheem notes that the methadone is causing weight loss, there is decreased range of motion and bilateral shoulder pain. (CX 26).

Dr. Mitchell Steinway

Dr. Steinway is Board certified by the American Board of Orthopaedic Surgery. Claimant was examined by Dr. Steinway on December 9, 2003. Dr. Steinway reviewed the Claimant's medical record and conducted a physical examination. Dr. Steinway noted atrophy in the upper extremity of triceps and biceps and deltoid musculature. It was noted there is no atrophy in the lower extremities. The doctor wrote that Claimant, "strongly felt he was unable to

work as a longshoreman or any other job that required traveling or prolonged sitting, bending or kneeling. The patient stated that he was just unable to perform these activities." (CX 20).

Dr. Steinway diagnosed the Claimant with spinal stenosis, lumbar and cervical radiculopathy, and a moderately severe functional disability in ambulation and squatting, stooping and kneeling maneuvers. Dr. Steinway's opinion is that Claimant is totally and permanently disabled. (CX 20).

Dr. Steinway was deposed on June 14, 2005. He reiterated his belief that Claimant would be unable to do any type of work on a consistent basis. (Tr. at 36). Dr. Steinway then stated, "Assuming that his medication did not adversely affect his ability to concentrate and not feel depressed, he could conceivably perform a light enough position to perform light duty." (Tr. at 43). He also said that much of his work is convincing patients that they are not as sick as they think they are and that this may be the case with the Claimant. (Tr. at 58-59).

Relative to the Claimant's use of Methadone, Dr. Steinway stated that he did not agree with this course of treatment. Rather, he said, the common method of treatment for someone with cervical lumbar radiculopathy, possible neurological problems and possible depression is to try other pain management and "vigorous physical therapy." Overall, Dr. Steinway's opinion was that it was inappropriate for the Claimant to take Methadone. (Tr. at 45-46).

Dr. Steinway diagnosed the Claimant with lumbar radiculopathy but noted that there was no atrophy in the lower extremities. (CX 20). At the deposition, Dr. Steinway said that one would expect to see such atrophy in someone with lumbar radiculopathy. (Tr. 67-68).

With regards to whether Claimant had a pre-existing injury, Dr Steinway is of the opinion that at the very least the accident aggravated and accelerated a cervical and lumbar disc disease. (Tr. at 37). He said,

> I can't say with any strong probability that the accident he had of 3/5/99 caused the disc herniations, but it's probable that a gentleman of this size had preexisting clinically quiescent disc abnormalities that became very symptomatic after the accident of 3/5/99 and thus a material cause of his permanent disability in my opinion.

Tr. at 37-38.

Dr. Steven L. Nehmer

Dr. Nehmer is Board certified by the American Board of Orthopaedic Surgery. Dr. Nehmer performed an IME at the request of the Employer. He evaluated the Claimant on April 7, 2003. Dr. Nehmer noted limited flexion and extension and tilting of the neck. (EX 5). Dr. Nehmer found no evidence of atrophy in the upper extremities or in his lower extremities. Dr. Nehmer's diagnosis was cervical stenosis requiring fusion at C5-C6 and C6-C7, and lumbar strain with degenerative disc and L5-S1 protrusion. He believes that the accident of March 5, 1999 aggravated a pre-existing degenerative condition.

Dr. Nehmer wrote that the Claimant was engaging in symptom magnification due to the fact that Claimant was sensitive to light touch and had pain with axial rotation. (EX 5). On April 25, 2003 Dr. Nehmer stated that Claimant was capable of working a sedentary job with a lifting restriction of 20 pounds.

Dr. Nehmer wrote a letter dated September 30, 2003 concerning his review of additional records, including ones concerning the Claimant's previous injury on October 28, 1994, Dr. Pirog's notes, and the 1999 x-ray and MRI of the cervical spine. Based upon the review of these records, Dr. Nehmer concluded that the Claimant had a permanent partial disability in his back and neck prior to the March 5, 1999 accident. He found that 75% of Claimant's permanent partial disability is due to his condition pre-existing the March 5, 1999 fall and 25% is causally related to the fall. Dr. Nehmer concluded that Claimant had reached maximum medical improvement. He found a rating of 15% permanent impairment, 10% relating to the cervical spine and 5% to the lumbar spine.

After viewing the surveillance video of the Claimant (discussed below), Dr. Nehmer wrote a letter dated September 29, 2004 increasing the Claimant's lifting restriction from 20 pounds to 75 pounds. He wrote, "This video reinforced my belief that (the Claimant) was engaging in symptom magnification at the time of his 4/7/03 evaluation" and "(The Claimant) could certainly return to work from an orthopedic prospective at the present time." (EX 10). At his deposition, Dr. Nehmer described the difference between the Claimant as he was in his office and in the video:

> The way he moved about the room, when I examined him, the way he moved his neck and back, his range of motion, the pain that he expressed with regard to tenderness when I examined him, none of those were consistent with the gentleman that I saw moving about on those days the video was taken, going for a long walk. He told me during his exam that he used a cane. When I saw him on the video he was not even remotely in need of a cane. He lifted a five-gallon container easily with one hand. He was cleaning a truck tire and a hitch, he bent forward from zero to 100 degrees on the video which was significantly more than he was bending during the exam.
>
> "[C]ertainly people have good days and bad days, but I was observing this gentleman on two days functioning very well. It was not a matter of him walking and managing to walk without a cane. He was walking for an extended period of time with a normal stride, almost a bounce in his step ... I don't think it is normal to have days where he demonstrated the physical activity I saw in the video and other days where he needs to be taking Percocet and/or Methadone ... He also described his pain to me ... as constant, every day. He did not state that he has episodes of feeling terrible pain and he also has times where he feels fine.

Tr. at 12-13, 29-30.

The Claimant was re-evaluated by Dr. Nehmer on September 29, 2004. Dr. Nehmer measured the Claimant's upper arms and found them to be symmetrical, and therefore found no evidence of atrophy. (EX 11).

Dr. Melvin Vigman

Dr. Vigman is Board certified by the American Board of Psychiatry and Neurology. Dr. Vigman performed an IME at the request of the Employer. Dr. Vigman examined Claimant and found the upper and lower extremities to have normal strength, sensation and reflexes. He noted the Claimant had local discomfort when flexing his neck. Dr. Vigman diagnosed the Claimant as having no neurological disease or damage. Dr. Vigman also opined that the Claimant is able to work from a neurological standpoint and that no further treatment was needed. (EX 6).

Surveillance

Surveillance conducted on August 13, 2004 and August 20, 2004 shows the Claimant inside and outside of his Florida home. The images show him moving some furniture inside a screened-in porch with the assistance of another person. He also is shown walking to a gym, and then he is inside the gym. I can not make out what he is doing in the gym, but the Employer and the Claimant agree that he was lifting weights. Then the Claimant is shown walking home and bending over to clean his car wheel.

Vocational Assessment

Christina Fannin

Christina Fannin is a Rehabilitation Specialist hired by the Employer in this case. She has a Masters of Health Science in Rehabilitation Counseling from the University of Florida and is a Certified Rehabilitation Counselor. (EX 9). She is employed by Speedy Re-Employment and Medicare Set-Asides. Ms. Fannin conducted a phone interview with the Claimant on November 10, 2004. (EX 9). Ms. Fannin describes the Claimant as very cooperative throughout the hour long assessment. Ms. Fannin elicited biographical data, medical history, work history, and the Claimant's subjective limitations. Claimant stated that he is able to sit for approximately two hours straight, walks without a cane, lifts two and a half gallons of chlorine once or twice a day, and that he cleans his house for approximately one and a half hours straight and makes and cooks one meal a day (not in the microwave or pre-made). The Claimant stated that he is unable to clean on his hands and knees, crawl or kneel, and that he has blurred vision as a result of his medications. (EX 9).

Ms. Fannin also mentions the diagnoses from Dr. Steinway, Dr. Nehmer, and Dr. Giordano. She uses the limitation of 20 pounds set by Dr. Nehmer to reach her conclusion that the Claimant is suited for sedentary or light work ranging from part time to full time. (EX 9). Ms. Fannin's report, dated November 17, 2004, lists three categories of jobs found: front desk clerk, office related, and other types of employment. (EX 9). A front desk clerk position at Park Inn requires the employee to greet customers and check them in, and allows the employee to alternate between sitting, standing and walking. It pays $8-9 an hour. A job at Plantation Inn &

Golf Resort as a Host requires the employee to escort patrons to their tables, and allows the employee to alternate between sitting and standing, with no lifting over ten pounds. It pays $10 an hour. A job at Regal Cinemas as a ticket-taker is a sedentary position, alternating between sitting and standing, in which the employee takes the patron's money and issues the ticket. It pays $6.50-$8 an hour. There are additional positions listed as well. (EX 9).

Charles A. Kincaid

Mr. Kincaid interviewed the Claimant on October 2, 2001. Mr. Kincaid has a Ph.D. in Rehabilitation Counseling from Syracuse University and is a Certified Rehabilitation Counselor. (CX 16). Mr. Kincaid elicited the Claimant's relevant background including his work history, education and medical history. Claimant indicated current limitations as constant pain in his neck, lower back, legs and hands, an inability to lift, climb, bend, kneel, stand and drive for prolonged periods, etc.

Mr. Kincaid used the McCroskey Transferable Skills Program which cross-referenced the Claimant's abilities with available jobs. (CX 16). This study was conducted in New Jersey, prior to Claimant's move to Florida. As a result of this examination, Mr. Kincaid concluded that "the seriousness of (Claimant's) functional impairments has eliminated his ability to compete for jobs in the New Jersey labor market." (CX 16).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The nature and extent of Claimant's disability

Under the LHWCA, a claimant establishes a prima facie case of total disability when he shows that he cannot return to his usual employment due to his work-related injury. Here, both Claimant and Employer agree that Claimant can not return to his former employment. The burden then shifts to the employer to show there is Suitable Alternative Employment ("SAE") that the claimant is capable of performing. The employer does not have to act as an employment agency, guaranteeing the claimant a job. Rather, the employer has to show the existence of actual available positions for which the claimant would be suited considering his age, education, work experience, and physical restrictions. Trans-State Dredging v. Benefits Review Board (Tarner), 731 F.3d 199 (4th Cir. 1984). While generally a labor market survey is performed, even a single opening is sufficient if the job is available to the Claimant, even if the job may have to be modified to accommodate the Claimant. Lacey v. Raley's Emergency Road Service, 23 BRBS 432 (1990). The job also does not have to remain open long enough for the Claimant to apply. Martiniano v. Golten Marine Co., 23 BRBS 363 (1990).

Additionally, there exists a complimentary burden on the part of the claimant to diligently pursue employment. Hence the oft quoted "The employer does not have to lead the claimant to water, only establish that water is nearby which the claimant may drink if he reaches for it." New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (1981). If employer presents evidence of suitable alternative employment, then claimant is deemed to be partially disabled, as opposed to totally disabled. I find for the reasons stated below that Employer has established the existence of SAE, and that therefore Claimant is only partially disabled.

There is no doubt that Claimant cannot return to his position with Sea-Land Service. Objective evidence and the opinions of all doctors involved support this conclusion. However, objective evidence does not show that Claimant is unable to work altogether. Rather these opinions that Claimant is totally disabled are based in large part on his subjective complaints. The doctors in this case are equally qualified, and yet disagree on the Claimant's physical abilities. The Act does provide a presumption that a claim comes within the provisions of the Act. *See* 33 U.S.C. 920(a). Here, however, that presumption is destroyed by the Claimant's own actions. One cannot ignore that it is Claimant's subjective complaints that form the foundation for the opinion that Claimant is totally disabled; that even Claimant's own treating physician, Dr. Giordano, questioned whether he was engaging in symptom magnification; that Claimant has been less than truthful with his physicians regarding medical history; and, finally, that Claimant's own actions are at odds with his subjective complaints.

Claimant maintains that he is unable to perform some of the jobs listed in the vocational assessment of Christina Fannin due to his personality and appearance. As stated above, age, education, work experience and physical restrictions are relevant factors the employer must consider. It is not the Employer's job to find the Claimant a job he would love, but rather, to show there are positions that the Claimant is capable of doing.

The Employer has demonstrated suitable alternative employment which meets with Claimant's job restrictions and therefore has shown Claimant is partially disabled. I find that Claimant is capable of performing the following jobs listed in the vocational assessment conducted by Ms. Fannin:

JOB TITLE	EMPLOYER	LOCATION	RATE OF PAY
Desk Clerk	Park Inn	Homosassa Springs, FL	$8-9/hour
Host	Plantation Inn	Crystal River, FL	$10/hour
Cashier	Regal Cinemas	Crystal River, FL	$6.50-8/hour
Desk Clerk	Central Motel	Inverness, FL	$6-7/hour

Section 8(h) of the Act provides that an injured employee's wage-earning capacity after injury under Section 8(e) shall be determined after consideration is given to "the nature of his injury, the degree of physical impairment, his usual employment, and any other factors of circumstances in the case which may affect his capacity to earn wages in his disabled condition." 33 U.S.C. § 908(h). Where the claimant seeks benefits for total disability and the employer established suitable alternate employment, the earning established for the alternate employment show the claimant's wage-earning capacity. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 234 (1984).

Based upon Ms. Fannin's vocational assessment, Claimant is eligible for positions averaging $8/hour. Therefore, Claimant's rate of permanent partial disability is $430.00. This figure is arrived at by subtracting the Claimant's residual earning capacity ($320.00) from his average weekly wage ($965.00), and then calculating 2/3 of that figure.

II. Reimbursement for medication

Section 7 (a) pf the LHWCA 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. Section 907 (a)

This has been interpreted to mean that the employer must provide for expenses that are reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 523, 539 (1979). What is reasonable and necessary to treat an injury is determined by the Claimant's physician.

In Amos v. Director, Office of Workers' Compensation Programs, the Board reversed the ALJ's decision denying a request for shoulder surgery under the LHWCA. Amos v. Director, Office of Workers' Compensation Programs, 153 F.3d 1051 (1998). Claimant in that case received two different medical opinions; his treating physician suggested surgery, while one of the examining physicians advised against it. Both doctors had comparable credentials. The Board determined that it was the claimant's right to chose which course of treatment to take when faced with two valid medical alternatives. Amos, at 1054.

In the present case, Claimant was prescribed Methadone. Methadone is a synthetic narcotic. Normally, Methadone is prescribed for narcotic addictions, however, it may also be prescribed for severe pain. Claimant was prescribed Methadone by Dr. Reheem. Prior to taking this medication, Claimant had taken Percocet and Xanax. Presumably, these medications did not afford Claimant relief from his pain. Dr. Reheem is Board certified by the American Board of Anesthesiology. While Dr. Steinway and Dr. Nehmer may not agree with this course of action, unless they can establish that it is unreasonable, the decision to treat with this medication is between Claimant and his physician. Therefore, the Employer shall reimburse Claimant for the expense of his Methadone prescription.

III. Section 8(f) Relief

In order to be entitled to Section 8(f) relief, and employer must show (1) the claimant had a pre-existing permanent partial disability, (2) which is manifest to the employer prior to the subsequent compensable injury, and (3) which combines with the subsequent injury to result in a materially and substantially greater disability than that which would have resulted from the subsequent injury alone. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1940); Director, OWCP v. Berkstresser, 921 F. 2d 306, 309, 24 BRBS 69 (CRT)(D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). An employer need not have actual knowledge of the pre-existing injury, rather constructive knowledge will suffice where there existed medical records in existence at the time of the subsequent injury from which the condition was objectively determinable.

In the instant case, Claimant sustained an injury in 1994 to his neck that caused him to be on disability, for which Claimant was compensated by his employer. It was described by Dr. Berkowicz as a severe cervical strain. (EX 8). Dr. Nehmer also stated that Claimant had a permanent partial disability of both his neck and back prior to the accident on March 5, 1999. He stated that the Claimant's present condition is materially and substantially greater than it would have been absent the previous injury. (EX 5). For Section 8(f) relief the employer must show (1) the claimant had a pre-existing permanent partial disability, (2) which is manifest to the employer prior to the subsequent compensable injury, and (3) which combines with the subsequent injury to result in a materially and substantially greater disability than that which would have resulted from the subsequent injury alone. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1940); Director, OWCP v. Berkstresser, 921 F. 2d 306, 309, 24 BRBS 69 (CRT)(D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). Employer has met the three part requirement for Section 8(f) relief. Therefore, Employer's liability is limited to 104 weeks of compensation; thereafter the Special Fund is to make compensation payments.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS ORDERED THAT:

1. Claimant is entitled to compensation based upon his average weekly wage for total temporary disability from March 5, 1999 to September 30, 2003, the date of maximum medical improvement.

2. Claimant is entitled to continuing permanent partial disability from September 31, 2003 based upon the stipulated average weekly wage of $965.00, an adjusted residual wage earning capacity of $320.00 and a corresponding compensation rate of $430.00.

3. Claimant is entitled to such reasonable, appropriate and necessary medical care referenced herein and shall be reimbursed for any unpaid medical bills that are determined to be reasonable, appropriate and necessary for Claimant's work-related injury under Section 7.

4. Employer is entitled to relief under Section 8(f) of the Act and upon expiration of 104 weeks after September 30, 2003, the date of maximum medical improvement, such compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. § 944.

5. Claimant's counsel is entitled to attorney's fees and costs as set forth in 20 CFR 725.366 (a).

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have thirty (30) days to file any objection thereto.

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

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

EXAMINED:
U.S. DEPARTMENT OF LABOR
DLHWC – D.O. 2

OCT 18 2005

RONALD A. KUCENSKI, C.E.