

## APPENDIX – FORMS

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(DEMAND FORM LETTER)

Steven Smith, Esq.  
1000 First City Tower  
Houston, Texas 77002

Re: OWCP No. 8-60747; John Jones, Jr. vs. Union Corporation

Dear Mr. Smith:

Thank you for your December 10, 1988, letter in the above-styled case. I have reviewed this case at length and believe that a settlement value can be established based on the available medical testimony and the vocational report prepared by your expert Richard J. Ruppert.

In the present case the claimant was injured in 1983 while working for Union Corporation. He has had multiple surgeries and has "failed back syndrome". As you can see by the enclosed OWCP-5 form, the claimant cannot return to his prior occupation since he is limited to less than a full range of light work. Pursuant to New Orleans (Gulfwide) Stevedores vs. Turner, 661 F.2d 1031, 14BRBS 156 (5th cir. 1981), rev'g 5 BRBS 418 (1977), the claimant has established a prima facie case of total disability since the claimant cannot return to his regular or usual employment due to his work-related injury. In attempting to rebut this prima facie case of total and permanent disability, you have provided a labor market survey from Richard J. Ruppert which establishes a post-injury wage earning capacity which you contend in your December 10, 1988 letter amounts to \$400.00 per week. Assuming for purposes of settlement that Mr. Ruppert's figures are correct, then I believe that the present value of this case is as follows:

Claimant's age	41 years
Claimant's life expectancy	33.6 years
Present Value Multiplier at 8%	11.5869
Pre-injury Average Weekly Wage	\$689.13
Post-Injury Wage-Earning Capacity Per week	\$400.00
Loss of Wage Earning Capacity Per Week	\$289.13
Compensation Rate Due Per Week Based on	
Loss of Wage Earning Capacity (\$289.13 x .667)	\$192.85
Annual Compensation owed due to	
Permanent Partial Disability	\$10,028.20
Present Value of Case:	
\$10,028.20 x 11.5869	\$116,195.75

According to my calculations, this case has a present value of \$116,195.75 for purposes of settlement. I have spoken with Mr. Jones and he will settle this case in that amount with open medicals pursuant to Section 7 of the LHWCA.

Please review these figures and get back to me at your earliest convenience. I understand your position with regard to Mr. Jones' rehabilitation and potential wage earning capacity so you need not reiterate that position at length in a response. However, I also have average weekly wage/compensation rate issues, maximum medical improvement (MMI) issues and Turner issues which are relevant, but need to be put on the back burner if this case is to be resolved. Thank you for reviewing this matter and giving it your consideration. Since you possess considerable expertise in this area of law, I will not dwell on the obvious. If you need further information in order to evaluate this case, please give me a call at the telephone number found below.

Very truly yours,

LEWIS S. FLEISHMAN  
Attorney at Law

Client Phone: \_\_\_\_\_

Referred by: \_\_\_\_\_

### LONGSHORE QUESTIONNAIRE

1. OWCP Number: \_\_\_\_\_ 2. Carrier's No.: \_\_\_\_\_

3. Claimant's Name: \_\_\_\_\_

4. Date of Injury: \_\_\_\_\_

5. Claimant's Address: \_\_\_\_\_

6. Marital Status: \_\_\_\_\_ 7. Sex: (M) (F)

9. SSN: \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

10. Did injury cause lost time beyond day/shift of accident? \_\_\_\_\_

11. On date of injury give:

a. Hour work began: \_\_\_\_\_ a.m. p.m.

b. Hour of accident: \_\_\_\_\_ a.m. p.m.

c. Did you stop work immediately (y/n): \_\_\_\_\_

12. Date and hour pay stopped: \_\_\_\_\_ a.m. p.m.

13. Date and hour returned to work: \_\_\_\_\_ a.m. p.m.

14. Occupation (Job title: welder, ect.): \_\_\_\_\_

15. Injured while doing regular work? (y/n): \_\_\_\_\_ (If no explain in Item 24)

16. Wages earned when injured (including overtime allowances, ect.)

a. Weekly: \$ \_\_\_\_\_

b. Total earned year previous to injury: \$ \_\_\_\_\_

17. Has 3rd party or other claim been made due to injury?: \_\_\_\_\_

18. Number of-years you worked for this employer?: \_\_\_\_\_

19. Number of days usually worked per week?: \_\_\_\_\_

20. Name of Supervisor at time of accident?: \_\_\_\_\_

21. Earliest date supervisor/employer knew of accident?: \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_

22. Employed elsewhere during the week injured?: \_\_\_\_\_

If yes, where?:

23. Exact place where accident occurred:

24. Describe in full how the accident occurred:

25. Nature of injury:

26. Have you received medical attention for injury (y/n): \_\_\_\_\_  
If yes, give name and address of Dr., Clinic, Hospital etc.

27. Were you treated by physician of your choice (y/n): \_\_\_\_\_

28. Was such treatment provided by employer (y/n): \_\_\_\_\_

29. Are you still disabled due to this injury (y/n): \_\_\_\_\_

30. Have you worked during the period of-disability (y/n): \_\_\_\_\_

31. Have you received wages since becoming disabled (y/n): \_\_\_\_\_  
If yes, give dates:

32. Has injury resulted in permanent disability, serious disfigurement (y/n): \_\_\_\_\_  
If yes, describe:

33. Name of Employer:

36. If accident occurred outside the U.S., state whether you are a U.S. citizen(y/n): \_\_\_\_\_

38. Date of this claim: \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_

Educational Background:

Work History:

Previous Injuries and Claims:

Witnesses:

Third Party Suit Information:

Insurance Company Information:

(INFORMAL HEARING REQUEST FORM)

(Name of Claims Examiner)  
Claims Examiner  
United States Department of Labor  
12600 North Featherwood, Suite 105  
Houston, Texas 77034

Re: Claimant:  
Employer:  
DOI:  
OWCP:

Dear \_\_\_\_\_:

Please be advised that our office represents claimant, \_\_\_\_\_ in his LHWCA claim against \_\_\_\_\_ based on an accident which occurred on \_\_\_\_\_. In that regard, enclosed please find a copy of his the Power of Attorney.

We request a conference at this time to resolve the following issues:

1. Average weekly wages/compensation rate

Claimant continues to receive compensation at the rate of \$ \_\_\_\_\_ per week, as evidenced by the attached copy of his check. Accordingly, the carrier has calculated Mr. \_\_\_\_\_ average weekly wage at \$ \_\_\_\_\_. This would appear to be based on gross earnings of \$ \_\_\_\_\_. However, if you would look at the attached income tax documents, you will see that Mr. \_\_\_\_\_ has earned approximately \$ \_\_\_\_\_ or more during 20xx and 20xx. He earned \$ \_\_\_\_\_ during the four (4) months prior to his injury during 1986.

In the present case, we believe that Mr. \_\_\_\_\_ has an average weekly wage in excess of \$ \_\_\_\_\_ per week, yielding a compensation rate in excess of \$ \_\_\_\_\_ per week. Accordingly, Claimant has been underpaid in excess of \$ \_\_\_\_\_ per week since 20xx.

2. Nature and extent of disability

Claimant is permanently and totally disabled. Enclosed please find a copy of the social security disability award of permanent disability.

3. Attorneys fees penalties and interest

Claimant is owed past due compensation, annual adjustments for being permanently and totally disabled and interest on unpaid compensation. His counsel is entitled to attorney's fees.

Claimant has an absolute entitlement to compensation in this case since he has been underpaid. We have provided you with all the documentation for the above described issues that we

currently possess. If the carrier disputes the wage argument that we make, then we would appreciate their bringing a complete readout of Mr. \_\_\_\_\_ earnings for each and every week that he worked during the 52 weeks prior to his injury, including overtime.

We appreciate your scheduling this matter for a conference at your earliest opportunity. Thank you for your prompt attention to this matter.

Very truly yours,

LEWIS S. FLEISHMAN

LSF:cic  
Enclosures

cc: (Insurance Company)

(FORM LETTER -REQUEST FOR CERTIFIED COPIES OF DOL DOCS ON FILE)

Mr. Chris Gleasman  
District Director  
U.S. Department of Labor  
12600 North Featherwood, Suite 105  
Houston, Texas 77034

Re: OWCP No. \_\_\_\_\_

Dear Mr. Gleasman:

Please be advised that the \_\_\_\_\_ case is set for trial on \_\_\_\_\_, 20xx, at \_\_\_\_\_ (a.m./p.m.). I am presently assembling my trial exhibits and I need to obtain numerous Department of Labor documents under a certified seal for trial. I need copies of the following documents, under the usual cover letter with seal:

1. LS-18s;
2. LS-201;
3. LS-202;
4. LS-203;
5. LS-206;
6. LS-207;
7. LS-208; and
8. All medical reports of all the treating health care providers and hospital facilities that treated \_\_\_\_\_.

I must exchange all trial exhibits with counsel for Employer/Carrier no later than \_\_\_\_\_ 20xx, so time is of the essence.

Please let me know if there is fee for this request and I will immediately remit the funds. I can be reached at (713) 623-8919, to discuss this or any other matter. Thank you in advance for your prompt attention to this matter.

Very truly yours,

LEWIS S. FLEISHMAN

LSF/dg

## INTERROGATORIES

1. State in detail how you calculated Claimant's Average Weekly Wage and Compensation Rate under Section 10 of the LHWCA.
2. State the total amount of longshore earnings of Claimant during the 52 weeks immediately prior to his injury.
3. State whether you considered Claimant's vacation pay in calculating his Average Weekly Wage and, if not, why you failed to do so.
4. State whether in calculating Claimant's Average Weekly Wage you considered his container pay, royalty or supplemental pay of any kind earned in connection with Claimant's work as a longshoreman.
5. If you did not include in Claimant's Average Weekly Wage calculation any of the money referenced in the previous interrogatory, please state your reasons for omitting such sums.
6. State in detail the basis for terminating Claimant's weekly compensation.
7. State what the Carrier calculates to be the correct average weekly wage applicable in this case, and explain the basis for your calculation in detail.
8. Please state when you contend Claimant reached maximum medical improvement and the basis for your determination.
9. Please state whether any witness to the accident has made or given any statement to the Carrier, the Employer or the agents or employees either in connection with the claim made the basis of this suit; and, if so, state the date of each such statement, whether it was written or oral, to whom it was given, and state in verbatim the full contents thereof (or, if you prefer, attach a copy or copies thereof to your answers to these interrogatories).
10. Identify every expert witness who you may call as a witness at the trial of this cause, either in your direct case or on rebuttal, and state as to each expert witness the area concerning which he may testify, and identify every report or other document (including, but not limited to, medical reports) that you have obtained that has been prepared by such expert.
11. State whether you will or may present vocational testimony at the formal hearing in this case and, if so, the identity, present address and telephone number of the expert.
12. Please identify the specific alternate jobs or forms of employment which any vocational expert has considered in connection with the claimant.
13. Please state the medical testimony you are relying on to show that Claimant can return to work as a longshoreman.

14. Please state the name, address and telephone number of any person who will or may present eyewitness or photographic evidence or testimony at the formal hearing concerning Claimant's physical condition and ability to perform all forms of physical activity.

15. Please state whether you will or may introduce videotape or photographic surveillance testimony or evidence at the formal hearing in this case and, if so, the name, address and telephone number of the custodian of such evidence.

16. Do you plan on refusing or failing to disclose any photographic or surveillance evidence prior to the trial in the hope of surprising Claimant at the formal hearing with such evidence?

## Request for Production

The items requested are as follows:

1. Claimant's wage earnings for the 52 weeks preceding his accident and thereafter.
2. Claimant's-container pay or royalty records for the 52 weeks preceding his accident and thereafter.
3. Claimant's vacation pay records for the 52 weeks prior to injury.
4. Claimant's post—injury earnings.
5. All medical records or reports which you will or may introduce into evidence at the formal hearing in this cause.
6. All vocational rehabilitation opinions, memoranda, reports or testing which you will or may introduce at the formal hearing in this cause.
7. All Department of Labor papers which you will or may introduce at the formal hearing in this cause.
8. Any and all video tape and/or photographic images of Claimant which you will or may introduce at the formal hearing in this cause in your case in chief, in rebuttal, for purposes of impeachment or for any other reason.
9. Any and all statements, written or oral, made by Claimant in connection with this cause.

## BASIC OUTLINE QUESTIONS FOR DOCTOR'S DEPOSITION

### Standard Checklist of Issues

1. Are you licensed to practice medicine in the State of Texas?
2. Is your license on file with the appropriate authorities?
3. Please state the type of practice you are engaged in.
4. Please detail your education.
5. Areas of concentration in practice.
6. Do you from time to time attend seminars to keep abreast of recent developments?
7. Please describe some of the seminars recently taken concerning the (state injury).
8. Do you have a curriculum vitae?
9. Does it truly and accurately set forth your credentials (move to admit Exhibit 1 to deposition)?
10. In the course of your practice have you had occasion to treat (name of Plaintiff/patient)?
11. When did you first see him in your practice?
12. Do you know how it came to pass that (name of plaintiff/patient) sought you medical services in particular?
13. At the time of (name of plaintiff/patient)'s initial office visit did you take a history from him?
14. What is a history?
15. Why is it important to you as a treating physician?
16. What was the history you took from (name of plaintiff/patient)?
17. Dr. (name of Dr.), what is trauma?
18. Did Mr. (name of plaintiff/patient)'s history include a description of trauma to the (identify the injury/injuries).
19. Doctor, after you took all history from Mr. (name of plaintiff/patient) did you perform a physical examination?
20. What type of examination did you conduct?
21. What types of tests did you perform? What were the results of those tests?
22. What were your initial observations?
23. Doctor, what are subjective complaints?
24. How do you use subjective complaints as a treating physician?
25. What are objective findings?
26. How do you use them as a treating physician?

27. What were your objective findings after the initial examination of Mr. (name of plaintiff/patient).
28. After you took a history and performed your initial examination, did you arrive at a tentative diagnosis?
29. What was that diagnosis?
30. What was the basis of that diagnosis?
31. Can you describe in layman's terms what that initial diagnosis means?
32. After arriving at an initial diagnosis, what course of treatment, if any, did you prescribe for Mr. (name of plaintiff/patient).
33. Doctor, what does the term conservative care mean to you as a physician?
34. For how long a term, if at all, did you administer conservative care to Mr. (name of plaintiff/patient)?
35. Can you describe what the conservative care consisted of?
36. What were your observations concerning the effectiveness of such care on Mr. (name of plaintiff/patient)?
37. Doctor, when, if ever, did you decide to go beyond conservative care?
38. What were your reasons for doing so?
39. What, if any, tests were performed on Mr. (name of plaintiff/patient) in (state the date) other than a physical examination?
40. Doctor, what is an (name if testing, i.e. arthrogram)?
41. How is such a test performed on a person's (name the part or parts of the body)?
42. Why did you want to have such a test performed on Mr. (name of plaintiff/patient) in (state the date)?
43. Doctor, who performed the (name the test done) on Mr. (name of plaintiff/patient) in (state the date)?
44. What was the skill and technical training of the person or persons who conducted the (name of the test)?
45. What was the skill and technical training of the person or persons who interpreted the (name of the test)?
46. Did a qualified technician perform the (name of the test) under your direction and supervision?
47. Doctor, did the (name of the test) correctly portray the (state the injury) of Mr. (name of the plaintiff/patient)?

48. Was the (name of the test) taken in accordance with required standards of performing an (name of test)?
49. Doctor, I show you a report of the (name of the test done) performed on Mr. (name of plaintiff/patient) on (date of testing) at (name of hospital or other health care facility).
50. Do you recognize this report?
51. Is it a true and accurate copy of the original (name of the test performed) report prepared after the procedure was conducted?
52. Do you customarily rely on such documents in forming opinions regarding a patient's physical condition?
53. Doctor, is the (name of the test performed) report marked as Exhibit 2 contained in your patient records of Mr. (name of plaintiff/patient)?
54. Are the records of which Exhibit 2 is a part made in the regular course of your medical practice?
55. In the regular course of your practice do employees or representatives with personal knowledge of acts, events, conditions and other information contained in such records make such records or transmit information such as this document to be included in your records?
56. Were the entries made in Exhibit 2 made at or near the time of the occurrence of the acts, events or conditions described therein or within a reasonable time thereafter?
57. Does the source of the information or the method of preparing these records indicate their trustworthiness?
58. By what means or method was a copy of the (name of the test performed) report made?
59. Is Exhibit 2 an accurate reproduction of the (name of the test performed) report?
60. Where are the originals of the records of which Exhibit 2 is a copy kept?
61. Plaintiff offers Exhibit 2 into evidence.
62. Doctor, what did Mr. (name of the plaintiff/patient)'s (name of the test performed) show?
63. Can you show the ladies and gentlemen of the jury on the model you have before you what the (name of the test performed) showed?
64. Does the model you have pointed to fairly and accurately portray a (state the injury/ injuries) such as Mr. (name of plaintiff/patient)'s pre and post-surgery?
65. Is it helpful in showing the ladies and gentlemen of the jury the condition of Mr. (name of plaintiff/patient's) (state the injury or injuries, i.e. shoulder) pre- and post-surgery?

66. Doctor, what relationship, if any, was there between the (name of the test performed) results and your physical examinations of Mr. (name of plaintiff/patient)?
67. What relationship, if any, was there between the test results and Mr. (name of plaintiff/patient)'s subjective complaints?
68. Doctor, can you see pain?
69. How do you as a physician determine whether a person is in pain?
70. Were you able to observe whether Mr. (name of plaintiff/patient) was in pain prior to his surgery?
71. What are your observations regarding his pain after his surgery?
72. Doctor, when, if ever, did you perform surgery on Mr. (name of plaintiff/patient)?
73. Can you describe in detail the type of operation you performed on Mr. (name of plaintiff/patient)?
74. What is a (state the surgery performed, i.e. shoulder decompression)?
75. What is a (state injury, i.e. rotator cuff reconstruction)?
76. What were you trying to accomplish by the surgery?
77. How long was Mr. (name of plaintiff/patient) in the hospital in connection with his surgery?
78. After you released Mr. (name of plaintiff/patient) from the hospital what, if any, program of (state injury) rehabilitation did you prescribe for him? What were you trying to accomplish by the rehabilitation program?
79. What does the physical therapy that you prescribed consist of?
80. How often does Mr. (name of plaintiff/patient) go to the physical therapy unit?
81. Based on a reasonable degree of medical probability, how long will Mr. (name of plaintiff/patient) need to take physical therapy?
82. What is maximum medical improvement, doctor?
83. Has Mr. (name of plaintiff/patient) reached maximum medical improvement?
84. When do you anticipate that he will reach maximum medical improvement?
85. Have you an opinion based on a reasonable degree of medical probability whether Mr. (name of plaintiff/patient) will suffer any permanent physical impairment as a result of the trauma to this (state the injury/injuries)?
86. What is that opinion?
87. What do we mean by permanent physical impairment?
88. Doctor, are there guides to qualifying permanent physical impairment that you use as a physician?

89. What guides do you use as a treating physician?
90. Are they recognized by treating physicians such as yourself?
91. Doctor, what degree of permanent physical impairment will Mr. (name of plaintiff/patient) suffer as a result of his (state injury/injuries) trauma based on a reasonable degree of medical probability?
92. Doctor, what type of physical limitations, if any, have you placed on Mr. (name of plaintiff/patient) during the course of your treatment of him.

NOTE: HAVE THE DOCTOR FILL OUT THE OWCP 5 FORM AT THE DEPOSITION.

93. What was the basis of these physical limitations?
94. Do you expect within a reasonable degree of medical probability that you will continue to impose physical limitations on Mr. (name of plaintiff/patient)?
95. Doctor, do you have an opinion of whether Mr. (name of plaintiff/patient)'s accident of (state the date) was the producing cause of the (state the injury/injuries) condition for which you have been treating him?
96. Doctor, what is that opinion?
97. What is the basis of that opinion?
98. Doctor, was Mr. (name of plaintiff/patient)'s accident history consistent with being the producing cause of his (state injury/injuries, i.e. torn rotator cuff)?
99. Is that opinion based on a reasonable degree of medical probability?
100. Doctor, in your opinion will Mr. (name of plaintiff/patient) ever have a normal (state injury/injuries)?
101. Is that opinion based on a reasonable degree of medical probability?
102. Doctor, when (shoulder injury) soft tissue is torn does it heal with scar tissue?
103. Doctor, what type of internal soft tissue tearing, if any, did Mr. (name of plaintiff/patient) suffer in his (state injury/injuries, i.e. shoulder)?
104. Do you have an opinion based on a reasonable degree of medical probability whether that internal scar tissue will be a permanent fixture?
105. Doctor, in your practice are you ever called upon to separate out those who are hurt from those Who are not?
106. Describe that process if you will.
107. Did you ever form an opinion as to whether Mr. (name of plaintiff/patient) was actually suffering a traumatic-injury?
108. What was that opinion?

109. What was the objective basis of that opinion?

Physician's Services

1. Doctor, what is the total of the bills for physician's services rendered to Mr. (name of plaintiff/patient) by you thus far?
2. What services have been rendered by you?
3. Have you an opinion regarding whether the services were necessary as a result of treatment for the injury which Mr. (name of plaintiff/patient) described to you?
4. Do you have an opinion whether your charges are reasonable in light of charges for like services in and about the (state the county) area?
5. What is that opinion?
6. Have you finished treating Mr. (name of plaintiff/patient)?
7. What type of future physician's services do you anticipate based on a reasonable degree of medical probability?

(END)



U.S. Department of Labor Office of Administrative Law Judges  
Heritage Plaza, Suite 530  
111 Veterans Memorial Blvd.  
Metairie, LA 70005  
(504) 589-6201

**NOTICE OF CALENDAR CALL AND PRE-HEARING ORDER**

Please take notice that the following cases will be called, in order to be set for trial on:  
Date: December 6, 1993

Counsel for all parties should be prepared to advise the Administrative Law Judge of a precise trial time estimate. All matters will be heard as soon thereafter as possible during the week beginning December 6, 1993, at a time which will be announced at the conclusion of the calendar call. Unless otherwise ordered hearings will be held in the order set forth below.

Counsel for each party is ordered to read and comply with the pre-hearing order enclosed herewith.  
Cases to be Called Representative(s)

93-LHC-1256 08-101129 Estanilado Guarnelo v.  
Todd Shipyard Corp. Aetna Casualty & Surety Co. Russell Burwell Michael Murphy

93-LHC-1225 06-137101  
93-LHC-1226 08-96297

Allen N. Quebodeaux  
v.  
E.W. Saybolt Co.  
American Int'l Adjustment Co.

**APPENDIX FORM M**

**SERVICE SHEET**

Case Name: (ALL CASES LISTED ON CALENDAR CALL)

Case No.: (AS PER CALENDAR CALL)

Title of Document: NOTICE OF CALENDAR CALL AND PRE-HEARING ORDER A copy of the above document was sent to the following:

James White, Esq. Regional Solicitor 525 Griffin St.  
Suite 501  
Dallas, TX 75202

Michael D. Murphy, Esq. Fulbright & Jaworski 1301 McKinney Street Suite 5100  
Houston, TX 77010

W. Robins Brice, Esq. Royston, Rayzor, Vickery & Williams  
601 Milam, Suite 2200 Houston, TX 77002  
Steve Gordon, Esq. Stern & Associates 5821 Southwest Frwy. Suite 501  
Houston, TX 77057

Russell G. Burwell, III, Esq. Burwell & Enos  
1501 Amburn, Suite 9  
Texas City, TX 77591  
David P. Grabowski, Esq. Mariarty and Madigan 1111 Bagby, Suite 2510 Houston, TX 77002  
Sidney Deagan, III, Esq. 201 St. Charles Ave.  
Suite 2401  
New Orleans, LA 70170  
Dennis L. Brown, P.C. Attorney At Law  
24 Greenway Plaza  
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Houston, TX 77046

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Fulbright & JaWbrski  
Suite 5100  
Houston, TX 77010-3095  
Yancey White, Esq.  
White; Huseman, Pletcher & Powers  
P. O. Box 2707  
Corpus Christi, TX 78473  
Stephen M. Vaughan, Esq. Mandell & Wright  
712 Main  
Suite 1600  
Houston, TX 77002  
Douglas W. Poole, Esq. McLeod, Alexander, Powel & Apffel, P.C.  
P. O. Box 629  
Galveston, TX 77553

93-LHC-1563 -2-  
Pedro GodinezSteve Gordon  
08-102704 v.  
& L Refractory Co. Ed Patterson  
U.S. Fire Ins. Co.  
93-LHC-1261 Nicholas Watler Steve Gordon  
08-103108 v.  
T.L. Industries {/way (JAI6

Travelers Ins. Co.  
93-LHC-1523 Robert Johnson Stephen Vaughan  
08-096150 v.  
Fairway Terminal Corp. None  
Signal Mutual Indemnity  
Assn. Ltd.

93-LHC--1444 H.K. Ainsworth Stephen Vaughan  
07-123067 v.  
Marine Pipeline Douglas Poole  
Consultants  
Lumbermens Mutual  
Casualty Co.  
- •

93-LHC-1542 Victor Bernal John Maisel  
08-88122 V.  
Paltzer Shipyard Michael Murphy  
Aetna Casualty &  
Surety Co.

93-LHC-1562 Fermin Perez Ronald Kormanik  
08-090295 v.  
International Terminal Royston, Rayzor, etc  
Hartford Ins. Group

93-LHC-1564 Lynn L. Harris Ed Barton &  
08-97285 v. F. Michael Oakes  
Tuboscope Inc. None  
National Union Fire Ins.

Enrique Villegas  
v.  
Texla Marine & Machine Aetna Casualty & Surety Co.  
James A. McDaniel  
v.  
Port stevedoring Co. Inc. Texas Employers' Ins.  
Assoc.

**PRE-HEARING ORDER**

1. Unless otherwise ordered, all discovery shall be completed at least five days in advance of the calendar call.
2. The parties shall confer at least five days prior to the calendar call for the purposes of entering into stipulations concerning the issues which are not in dispute. The enclosed stipulation form shall be used as a guide in identifying the relevant issues which are disputed and undisputed.
3. No later than five days before the calendar call, each party shall serve on all parties and file a pre-hearing statement containing:
  - a. a brief statement of all issues and contentions on each issue;
  - b. names and addresses of witnesses who will testify at the

hearing;

c. names and addresses of witnesses whose testimony will be offered by deposition;

d. an exhibit list.

4. The exhibit list shall contain the exhibit number, a brief description of the exhibit, and the number of pages comprising the exhibit. Each exhibit shall be marked either with the letter designation "C" for claimant and "R" or "E" for respondents,

-4-

followed by the number designation of the exhibit. Each page of multiple page exhibits not internally paginated shall be numbered. Examples: (p. 1 of 5 pp.)(p. 4 of pp 14 pp.). - Each report, letter, memorandum, etc. shall bear a separate exhibit number. Documentary evidence may be proffered in bound volumes (insofar as practicable on 8 1/2" X 11" paper) the first page of which shall be a exhibit list identifying the documents contained therein. DO NOT PROFFER EXHIBITS IN LOOSE LEAF NOTEBOOK BINDERS. Each multipage exhibit that is not presented in a bound volume shall either be stapled together or otherwise affixed.

5. The parties shall deliver to the opposing parties, no later than five days before the calendar call, copies of all exhibits each intends to offer into evidence unless the exhibit-is known to be in the possession of the opposing party or unless the exhibit is intended to be used solely for impeachment.

6. The parties are invited to submit proposed findings of facts, conclusions of law and briefs in support of their respective positions post-hearing. Unless otherwise ordered, such submissions shall be due 20 days after the transcript is available or the record is closed whichever event occurs last. Unless good cause is shown or unless the parties otherwise stipulate, post-hearing depositions will not be permitted.

This office no longer provides interpreters for non-English speaking witnesses including claimants. The responsibility for obtaining the services of an interpreter is that of the requesting party.

QUENTIN P. MCCOLGIN Administrative Law Judge

Dated: 9

Metairie, QPMC:daq //47f3 Louisiana

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Victor Bernal Pam Caro  
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/404 Company  
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1912 Ave. K P. O. Box 681085  
Galena Park, TX 77457 Houston, .T.K 77286

Lynn L. Harris Wausau Insurance Co.  
P. O. Box 253 P. O. Box 27708  
China, TX 77613 Houston, TX 77227  
Enrique Villegas B & L Refractory Co.  
7320 Linden 2211 Walker  
Houston, TX 77012 Houston, TX 77003

Sidney Williams, Jr. 5143 Court Road Houston, TX 77053  
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U. S. Fire Ins. Co. c/o Crum & Foster. P. O. Box 721375. Houston, TX 77272  
T. L. Industries  
P. O. Box 1759 Nederland, TX 77627

Todd Shipyard Corp. Travelers Ins. Co.  
P. O. Box 3427 P. O. Box 61124  
Seattle, WA 98114 New Orleans, LA 70161-124  
Aetna Casualty & Surety Co. Fairway Terminal Corporation  
c/o Todd Shipyards Corp. P. O. Box 5305  
P. O. Box 3427 Houston, TX 77262-5305  
Seattle, WA 98114

Signal Mutual Indemnity  
Assn Ltd.  
c/o Abercrombie-Simmons-Gilpin 3100 Wesleyan, Suite 470 Houston, TX 77027 Texla Marine &  
Machine P. O. Box 1417  
Channelview, TX 77530

Marine Pipeline Consultants Aetna Casualty & Surety Co.  
1155 Dairy Ashford #703 Attn: Patsy Bell  
Houston, TX 77079 P. O. Box 911  
Houston, TX 77001  
Lumbermen's Mutual Casualty Co.  
Kemper, Inc. Sea Land Service Inc.  
P. O. Box 22307 P. O. Box 4426  
Houston, TX 77227 Houston, TX 77210

Platzer Shipyard  
P. O. Box 1417 Channelview, TX 77530  
Aetna Casualty & Surety P. O. Box 911  
Houston, TX 77001

Sea-Land Service, Inc. Crawford and Co. 3100 South Gessner Suite 500  
Houston, TX 77063  
Port Stevedoring Co. Inc. 2315 McCarty Dr. Houston, TX 77029

International Terminal 1606 Clinton Drive  
Galena Park, TX 77547  
Hartford Ins. Group P. O. Box 4626  
Houston, TX 77210  
Tuboscope, Inc.  
P. O. Box 808  
Houston, TX 77001  
National Union Fire Ins. Co. c/o Crawford & Co. 3100 S. Gessner Suite 500  
Houston, TX 77063

Texas Employers' Ins. Assoc. c/o Employers Casualty Corp. P. O. Box 1337  
Houston, TX 77251-1337  
Reporting Service

AIMM.m=r  
STIPULATIONS

1. Date of injury/accident
2. Description of injury
3. Did an employer-employee relationship exist at the time of the injury?
4. Did the injury arise in the course and within the scope of employment?
5. Date the employer was notified of the injury.
- Dates of notification of the injury/death pursuant to Section 12 of

too Act to the employer and to the Secretary of

Labor (dorm L3-201)

7. Date the Notice of Controversy filed. (LS-207) S. Date of Informal Conference.

9. Did disability result

••••

-101F Were medical; benefit under Section 7 \*CU, Act paid? •  
to..vbco-lamrs benefit paid and in What amount?

•

11. ItAciff Periods and amounts of disability compensation  
said

claimant. • Additionally, for each period in which compensation was paid,

•  
specify the nature of the disability. (See LS-208 and LS-208A)

-2-

Nature of Disability: Temporary total Temporary partial  
Permanent partial (non-schedule)  
Permanent partial (schedule)  
Permanent total

Time Period from to  
from to  
from - to  
from to

12.  
13. 14. Date in which Claimant returned to his regular employment.  
13. Unresolved issues:  
(a)  
(b)  
(c)  
(d)

(FORM - EXHIBIT LIST)

OFFICE OF ADMINISTRATIVE LAW JUDGES U.S. DEPARTMENT OF LABOR

Claimant

Employer CASE NO.

OWCP NO.

Carrier

CLAIMANT'S EXHIBIT LIST

- I. Certified Copies of all DOL documents on file with  
the Department of Labor  
2. Claimant's WGMA Earnings readout  
3. Claimant's income tax records  
4. Hospital Records for Claimant  
5. Deposition and Records of Dr.  
6. Records of  
7. Deposition and Records of  
8. Maritime Association - ILA Welfare Funds' records pertaining to  
Claimant's Dental Claims

-  
-

(FORM - WITNESS LIST)  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
U.S. DEPARTMENT OF LABOR

Claimant

Employer CASE NO.

OWCP NO.

Carrier

CLAIMANT'S WITNESS LIST

1. (Name of Claimant)
- 2.. (Name(s) of treating physicians)
3. (Name of Economic Expert, if any)
4. (Name of Voc. Rehab. Expert, if any)
5. Employer/Carrier's corporate representative

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- •

UNITED STATES DEPARTMENT OF LABOR  
EMPLOYMENT STANDARDS ADMINISTRATION

OFFICE OF WORKERS'

WILFRED RICHARD,

Claimant

VS.

COMPENSATION PROGRAMS

§ CASE NO. 91-LHC-2484

P.C. PFEIFFER CO., INC.,

Employer

AND

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,

Carrier

CLAIMANT'S

§ OWCP NO. 08-093365

POST-HEARING BRIEF

COMES NOW Claimant WILFRED RICHARD and files this his Post-Hearing Brief and respectfully shows as follows:

I.

This is a claim for compensation and benefits pursuant to the Longshore & Harbor Workers' Compensation Act, 33 U.S.C., §901, et. seq. (the "Act"). Claimant Wilfred Richard brings this claim against P.C. Pfeiffer Co., Employer and Signal Mutual Indemnity Association. Ltd., Carrier. A

formal hearing was held on December 3, 1991, in Beaumont, Texas. The parties were represented by counsel and afforded the opportunity to present evidence. At the close of the hearing, the court invited the parties to submit post-hearing briefs addressing the issues presented at trial.

## II.

### STATEMENT OF THE CASE

On December 2, 1988, Wilfred Richard was injured while working as a longshoreman in Beaumont, Texas. At the time of the injury, Claimant was working in the hold of a vessel pitching 110 pound sacks. Claimant ruptured a lower lumbar disc while in the process of lifting a sack from a pallet. (FH 30-41).

The Claimant has been treated by primarily one orthopedic surgeon since his injury. Dr. Stanley Jones operated on Claimant's back and has opined that he has reached maximum medical improvement. Dr. Jones has imposed physical restrictions upon Claimant that preclude him from returning to work at most longshore jobs that he performed prior to his injury. After his surgery, Claimant was unable to locate a non-longshore job despite placing numerous applications with employers in Beaumont and Houston,

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Texas. When military cargo work from Operation Desert Storm was temporarily available to Claimant during November 1991, he worked for a short period as a longshoreman. This work was not expected to be reasonably available in the future. (FH 68-70).

At the beginning of the formal hearing the parties stipulated as follows:

1. The parties are subject to the Act.
2. The Claimant and the Employer were in an Employer/Employee relationship at the time of the injury.
3. The injury arose out of and in the course of employment.
  
4. The injury occurred on December 2, 1988.
5. The Employer had timely notice of the injury.
6. The Claimant filed a timely claim for compensation.
7. The Employer filed a timely controversion and an informal conference was held prior to the referral of the case.
8. The Claimant had an average weekly wage of \$458.75 at the time of his injury. (Exhibit J-I).
9. The Employer voluntarily paid compensation for temporary total disability from December 3, 1988 until February 22, 1991. Claimant was paid 116 weeks of temporary total disability at \$305.83 per week for a total of \$32,476.28. (Exhibits J-I, FH 15).
10. The Employer continued to pay permanent partial disability from February 23, 1991 and continuing at \$131.50 per week based on a \$197.25 per week loss of wage earning capacity. (Exhibits J-1, FH 15).
11. The Employer has provided medical services pursuant to Section 7 of the Act.

At the formal hearing the record consisted of the jointly filed stipulations (FH 15, Exhibit J-1) Claimant's exhibits 1 through 15 and Employer's exhibits 16-24. Claimant, Dr. Larry Litel and Wallace Stanfill testified live at the formal hearing. Medical testimony was received by deposition from treating physician Dr. Stanley Jones. Claims adjuster Jerry Brooks also testified by deposition.

The parties have resolved numerous contested issues by stipulation. (FH 16-25). The central issue in the case is the nature and extent of Claimant's temporary and permanent disability. The Claimant was temporarily totally disabled from the date of

injury until the date of maximum medical improvement, which should be August 5, 1991. On the other hand, the Employer has taken inconsistent positions regarding the date of maximum medical improvement. In interrogatory answers, the Employer contends that the date of maximum medical improvement is February 22, 1991. At the formal hearing, and for the first time, the Employer produced testimony from Dr. Litel suggesting that the date of maximum medical improvement was either June or October 1990. (FH-113,111).

Next, the evidence shows that Claimant has been suffering from a permanent partial disability since the date of maximum medical improvement. The parties dispute the nature and extent of that disability. Claimant contends that his wage earning capacity is \$4.50 to \$5.00 per hour.

Alternatively, he contends that the Employer's loss of wage earning capacity figure of \$197.50 based on a \$6.50 residual wage rate is fair and reasonable. That is the figure arrived at by experienced claims adjuster Jerry Brooks and which serves as the basis of the payments which are being made by the employer.

On the other hand, the Employer now asserts that Claimant has no loss of wage earning capacity. (FH 25). Alternatively, the Employer contends that Claimant has a post-injury wage earning capacity of \$332.00 per week (40 hours per week at \$8.30 per hour), yielding a \$126.75 weekly loss of wage earning capacity. (FH 24).

## II.

### STATEMENT OF FACTS

Claimant Wilfred Richard is a forty-seven year old family man and resident of Beaumont, Texas. Claimant was raised in Beaumont and graduated from Hebert High School. Upon graduation from high school Claimant served three years in the Army Signal Corp. Claimant served honorably in Vietnam. In 1978 Claimant obtained an AA degree in drafting from Lamar University. He went to work as a draftsman for U.S. Steel from 1978 until 1982. Claimant was laid off and has never been able to find another draftsman job. Claimant has not worked as a draftsman for almost a decade and he has not kept abreast of computerized developments in the field. Nor has he completed any continuing education classes in drafting. (Caroline Fisher, vocational report dated 6/29/90, FH 26-29).

During 1982 Claimant began working as a longshoreman on the

- waterfront in the Golden Triangle area (Beaumont, Port Arthur and Orange). Although Claimant had nine years of seniority at the time of injury, he basically had a "hold card." A "hold card" describes waterfront seniority status that entitles a longshoreman to work at heavy manual labor in the hold of a vessel. The following chart

indicates the type and location of work that Claimant performed prior to his injury in establishing a \$458.75 per week average weekly wage.

(Cl. Exhibit 14, FH 31-38)

Claimant's pre-injury earnings were almost exclusively earned at ILA Local No. 21, performing sack work in the holds of vessels, and Warehouse Local No. 1316, performing sack work. (FH 31-39) Jerry Brooks, the carrier's representative, confirmed that he personally observed Claimant establish his average weekly wage by "throwing bags." (Cl. Exhibit 10, Brooks depo., p. 35). Prior to his injury Claimant also was a working gang foreman. These work opportunities were only occasional. Finally, Claimant performed military cargo work occasionally prior to his injury. This work comprised only a small portion of Claimant's pre-injury average weekly wage. The work was not available to Claimant because the work was occasional at the port and due to Claimant's seniority. (FR 31-39).

After sustaining his injury, Claimant was initially treated by Drs. Dominguez and Faulk in Beaumont, Texas. On May 31, 1989,

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Claimant was examined by Dr. Stanley Jones, who is the treating physician in this case. Dr. Jones is a board certified orthopedic surgeon, an associate clinical Professor at the University of Texas Medical School and a practicing orthopedist. (Cl. Exh. 6, Jones depo., p. 9, depo. Exhibit 1). Dr. Jones initially treated Claimant conservatively. Based on a combination of diagnostic tests and clinical observations, Dr. Jones determined that Claimant had suffered a herniated disc at the L4-5 level as a result of his accident. (Cl. Exh. 6, Jones depo. at 13 - 14). The Claimant

underwent surgery on August 8, 1989. Dr. Jones performed a laminectomy. Dr. Jones prescribed physical therapy and back strengthening for Claimant after the surgery. The carrier did not want to pay for a licensed physical therapy and suggested to Dr. Jones that a Nautilus Club membership be used as a substitute. (Cl. Exh. 6, Jones depo., Exhibit 5). This was done.

Dr. Jones explained that physical therapy and back strengthening are necessary after surgery to overcome weakness caused by inactivity and the surgery. Dr. Jones treated Claimant post-operatively and examined him during October and December 1989. On March 21, 1990, Dr. Jones observed that Claimant was having chronic low back pain with pain into the right hip and right lower extremity. At that time Dr. Jones prescribed a vocational rehabilitation program for Claimant and told him that he was not able to work. On July 23, 1990, Dr. Jones once again examined

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Claimant. He suggested that a functional capacity evaluation be performed (FCE). The examination was performed at Rehabilitation Services of Houston by licensed physical therapist Bina Lorfing. Claimant's compliance with the FCE was noted as excellent. The physical therapist who performed the FCE recommended that Claimant would benefit from a return to work program that includes total body reconditioning, back, leg and torso strengthening. (Cl. Exh. 6, Jones depo. Exhibit 10). There is no record that the carrier ever authorized such a return to work program.

On August 8, 1990, Dr. Jones once again examined Claimant. At that time he objectively determined that Claimant had lumbar muscle spasms. (Cl. Exh. 6, Jones depo. , p. 22-23). Claimant was not released to work by Dr. Jones at that time. Dr. Jones felt that Claimant needed vocational rehabilitation in order to work. On August 8, 1990, Dr. Jones opined that Claimant could not work eight hours per day and that he would reach maximum medical improvement on September 1, 1990. (Cl. Exh. 6, Jones depo Exhibits 11 and 13).

On October 4, 1990, the Claimant was seen by Dr. Larry Litel, the Employer's choice of physician, for a one time examination. Dr. Litel saw Claimant for approximately fifteen minutes in his office. (FH 122-137).. He took less than a page of notes and dictated a report. Claimant complained of pain in his back and both hips. He also complained of occasional right leg referral pain. Dr. Litel did not observe Claimant to have back spasm. Dr.

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Litel issued a report of examination dated October 11, 1990. Dr. Litel indicated that Claimant had achieved full medical benefits. He indicated that Claimant could do several types of jobs. Dr. Litel never personally informed Claimant regarding his opinions with respect to Claimant's ability to perform work. (FH 122-137).

On October 24, 1990, Dr. Jones issued a narrative report indicating that Claimant had reached maximum medical improvement on a Part time basis and would reach maximum medical improvement

overall by January 1, 1991. (Cl. Exh. 6, Jones depo Exh. 12). Dr. Jones completed an OWCP-5 form at that time and indicated that Claimant's work capacity would be medium, which is two or three classes below what a longshoreman should be able to perform. Dr. Jones completed an OWCP form at that time which indicated that Claimant could not work more than four to six hours per day and that Claimant would reach maximum medical improvement on January 1, 1991.

On November 21, 1990, Claimant returned to Dr. Jones' office. He continued to have low back stiffness with right leg numbness from the thigh to the calf. Claimant was attending school. Dr. Jones observed paravertebral muscle spasms in Claimant's low back and decreased range of motion. Dr. Jones instructed Claimant to be more diligent in his walking and exercise program. Dr. Jones noted in his December 31, 1990 narrative that Claimant was "unable to

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work at this time." (Cl. Exh. 6, Jones depo Exh. 17).

On April 26, 1991, Claimant again saw Dr. Jones. Dr. Jones indicated that Claimant's compliance was satisfactory and that his anticipated length of continued disability was to be determined. Dr. Jones noted at that time that Claimant was "off work-to be determined." (Cl. Exh. 6, Jones depo. Exh. 18).

On August 5, 1991, Dr. Jones released Claimant to light duty. (Cl. Exh. 6, Jones depo. p. 27). Dr. Jones felt that August 5,

1991, was the date of maximum medical improvement in this case. (Cl. Exh. 6, Jones depo. at p. 28, depo. Exh. 21). As of that date Dr. Jones felt that Claimant should not perform repetitive bending or stooping and lifting over forty to fifty pounds. Dr. Jones indicated that the OWCP-5 forms set forth the type of permanent restrictions that he felt Claimant should follow. (Cl. Exh. 6, Jones depo. at 29). Dr. Jones declined to ascribe a percentage of permanent physical impairment. He indicated that he does not do disability evaluations any more in his practice. (Cl. Exh. 6, Jones depo. at 30). Dr. Jones again confirmed Claimant's ability to work during the fall of 1991 in an additional work release. (Cl. Exh. 6, Jones depo. Exh. 20).

During June 1990, Claimant met with rehabilitation counselor Caroline B. Fisher regarding plan development. At that time Claimant had not been released to work. Claimant had already been

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tested by Employer's choice of vocational rehabilitation expert, Wallace Stanfill.

During the fall of 1990, Claimant enrolled at Lamar University. (Caroline Fisher report 8/31/90). He dropped out halfway through the semester due to an illness in his family. During December 1990, Ms. Fisher noted that Claimant had applied for several drafting jobs and felt he was not hired because he did not have CAD experience. During January Claimant's vocational case

was moved from training to placement. During March 1991, Claimant was referred to placement specialist Monica Hebert. Claimant met with Ms. Hebert and went to a job readiness program. He also had developed a resume. Claimant had looked for work but was unsuccessful in his efforts.

On July 10, 1991, Claimant's rehabilitation case was closed in a non-rehabilitation closure status based on Claimant's failure to fully cooperate in the return to work process.

Claimant met with the Employer's choice of vocational rehabilitation expert Wallace Stanfill during 1990. On June 12, 1990, Mr. Stanfill completed an initial vocational report. Since Claimant had not reached maximum medical improvement, Mr. Stanfill did not explore suitable employment for Claimant. On December 31, 1990, Mr. Stanfill completed his initial labor market survey. He identified the following jobs:

1. Lamar University Welding mechanic 1 job

The worker will assist in structural or frame welding and cutting and also aid in generator and electric pump motor repairs. \_

Salary: Annual starting salary of \$15,919.00. FH 152-1533

2. City of Beaumont Street Drainage Department

255 College Maintenance worker

Beaumont, Texas

Work in a labor crew for the general maintenance of the city streets and waterways. Unable to describe the physical demands of job.

Salary: Starting salary of \$5.00 per hour. FH 154-155

3. KBMT Television Maintenance worker/courier

525 Interstate 10 South

Beaumont, Texas

Driving a company provided vehicle to deliver messages and perform other light delivery jobs. Responsible for building and grounds maintenance, which includes trash pick-up, changing light bulbs, and other similar duties.

Salary: Spoke with Michael McKinnon. Does not know his position or whether he had hiring authority.

Salary: \$6.00 per hour

FH 155-157

4. Nancol Plastic Bag Company Loading pelletized drum

10005 Port Neches Ave. materials into trucks

Port Neches, Texas

FH-157-160

On October 24, 1991, Mr. Stanfill produced another status report which discussed various job alternatives. Initially, Mr. Stanfill discussed specific job openings with Espey, Houston and Associates, Inc., Mark A. Whitely and Associates, Petrocon Engineering, Inc., and the City of Beaumont. Mr. Stanfill noted that "the exact salaries offered by each of these positions are not

known other than the salary range with the position as a drafting technician with the City of Beaumont was \$7.79 to \$8.26 per hour. In the supplemental labor market report Mr. Stanfill identified the

following jobs:

1. St. Elizabeth Hospital Pharmacy  
2830 Calder Assistant/Courier  
Beaumont, Texas

Job description: Generally assisting the pharmacy staff and delivering orders throughout the hospital.  
Hourly salary: \$5.05 per hour

2. City of Beaumont Relief Job openings  
255 College  
Beaumont, Texas

Job description: Building attendant with the Parks and Recreations Department. Custodian Aide with the Public Safety Department. Casual laborers.

Hourly salary: \$5.00 per hour

3. Jefferson County Airport Airport Attendant  
North Highway 69 Nederland, Texas

Job description: None in labor market survey. None described at formal hearing. No contact person noted. (FH 165-166)

Salary: \$1239.41 per month.

At the formal hearing Claimant testified about his job search

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attempts during 1991. He indicated to the court the places he had searched for work his follow-up on the positions noted by Mr. Stanfill and his conversations with employers. At trial Claimant showed the court rejection slips from Fluor Daniel and StubbsOverbeck and Associates. He also presented a long list of places where he had applied for work and had been rejected. Claimant indicated that he had returned to work as a longshoreman during October 1991 to perform Army cargo work. He indicated that this work was temporary in nature due to Operation Desert Storm. (FH 50- 74).

IV.

#### DISCUSSION, FINDINGS AND CONCLUSIONS OF LAW

In arriving at a decision in this matter it is well settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiners. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *BANKS v. Chicago Grain Trimmers Assn., Inc.*, 390 U.S. 459, 467, reh. denied, 391 U.S. 929 (1968). It is recognized that all factual doubts must be resolved in favor of the

Claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968);

*Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir.), cert. denied, 395 U.S. 921 (1969).

Furthermore, it has been consistently held that the Act must be construed liberally in favor of the

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Claimant. *Voris v. Eikel*, 346 U.S. 328,333 (1953); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

V.

#### NATURE AND EXTENT OF DISABdILITY

#### A. Temporary disability

Under Section 8(b) of the Act, an employee found to be temporarily totally disabled is entitled to 66 2/3rds of his average weekly wage during the continuance thereof. Disability, under Section 8, is defined in Section 2(10) as "incapacity because

of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." It is often said that disability is an economic concept based on a medical foundation. *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd.*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S 962 (1968); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

Temporary disability is appropriate where recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *reh. denied sub nom.*, *Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (*per curiam*), *cert. denied*, *Gulf Stevedore Corp. v. Watson*, 394 U.S. 976 (1969). Similarly, a disability may not necessarily be of permanent quality until after rehabilitation and the condition has stabilized. *Edwards v. Zapata Offshore Co.*, 5 BRBS 429 (1977).

Total disability is defined as an incapacity to earn preinjury wages in the same work as at the time of injury or in other employment. To establish a *prima facie* case of total disability, the employee must only show that he cannot return to his regular or usual employment due to his work related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). If the employee meets his burden, the employer must then establish the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical

restrictions, and which job he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156, *reh.*, 5 BRBS 418 (1977)(5th Cir. 1981), *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977).

In the present case there is a dispute regarding the temporary nature of Claimant's disability. The dispute concerns the testimony of treating physician Dr. Stanley Jones and Dr. Larry Litel. Here the parties disagree about when Claimant's disability took on a permanent quality after surgery, rehabilitation and the condition had stabilized.

The Employer initially took the position in this case that the date of maximum medical improvement was February 22, 1991. In Interrogatory No. 8, the Employer responded as follows: Interrogatory No. 8

Please state when you contend Claimant reached maximum medical improvement and the basis for your determination.

Answer: 02/22/91

The Employer never stated the basis for this date of maximum medical improvement either in interrogatory answers or in deposition. (Cl. Exh. 10, Brooks depo. at 43-44).

At the formal hearing the Employer contended that Claimant had reached maximum medical improvement during June or October 1990. This position was supported by Dr. Litel's live testimony. Dr. Litel is a retired neurosurgeon. He saw Claimant one time during

October 1990. Dr. Litel visited with and examined Claimant for approximately fifteen minutes. He performed a neurological examination which checked for atrophy, reflex changes and nerve root impingement. He took less than a page of notes and dictated a report. Dr. Litel never did tell Claimant that he was released to work at the time of that October 1990 visit. (FH 121-137).

In his testimony, Dr. Litel voiced psychological opinions that he was not qualified to render and spoke in general terms about how he knew what was going on with "these patients." (FH 129). Further, his opinions regarding the cause of muscle spasm, which treating physician noted during 1991, were inconsistent. (FH 131 132, 138). Lastly, Dr. Litel was willing to form an opinion regarding Claimant's maximum medical improvement during June 1990, which was approximately five months before he had ever seen the Claimant or any of his medical records.

On the other hand, treating physician Dr. Stanley Jones was the treating physician in this case. He performed surgery on Claimant and was able to watch his progress. Dr. Jones has insight into Claimant's progress that Dr. Litel does not possess. He specifically kept Claimant off of work on two distinct occasions after Dr. Litel claims that maximum medical improvement had been attained. On December 31, 1990, Dr. Jones noted that Claimant was "unable to work at this time." Dr. Jones had recently noted

Claimant's complaints of radiation into the leg, stiffness and had documented Claimant's lumbar muscle spasms. Later, On April 26, 1991, Dr. Jones again indicated that Claimant was "off work to be determined." Here Dr. Jones had the opportunity to monitor Claimant's progress over a period of time prior to and after surgery. Dr. Jones plainly stated that Claimant reached maximum medical improvement on August 5, 1991. (Cl. Exh. 6, Jones depo. at 28). Accordingly, the court should adopt the treating physician's opinion in that regard.

In the present case, if the court adopts either of Dr. Litel's dates of maximum medical improvement, then Claimant will be penalized for following his treating physician's specific advice on at least two subsequent occasions that he should not work. Under the circumstances, the court must adopt August 5, 1991, as the date of maximum medical improvement and reject the various dates suggested by the Employer.

#### B. Permanent Partial Disability

Section 8(c), 33 U.S.C. §908(c) provides for compensation in cases of permanent partial disability. Since the injury here is to the lower lumbar area, it is an uncheduled injury. Awards for permanent partial disability not covered in the schedule are covered by Section 8(c)(21). Section 8(c)(21) compensates injured employees for the amount of wage earning capacity lost as a result of injury. Under that section, compensation is based on 66 2/3rds

percent of the difference between Claimant's average weekly wage at the time of the injury, determined under Section 10, and his wage earning capacity after the injury, determined under Section 8(h). In the instant case the parties have stipulated that Claimant's average weekly wage at the time of injury was \$458.75. Therefore, it is for the court to decide the post-injury wage earning capacity under Section 8(h).

In the present case the parties dispute the nature and extent of Claimant's permanent partial disability. Until the time of trial, the Employer took the position that Claimant's post-injury wage earning capacity was \$6.50 per hour, resulting in a residual earning capacity of \$261.50 per week and a permanent loss of wage earning capacity of \$197.25. (Cl. Exh. 10, Brooks depo. p. 37-42) (Defendant's answer to Interrogatory No. 6). Accordingly, the Employer has paid the Claimant permanent partial disability

benefits in the amount of \$131.50 per week, although there has not been consent to the entry of a formal order in that amount.

At trial Employer argued that Claimant suffers no loss of wage earning capacity or that his wage earning capacity is \$332.00 per week (\$8.30 per hour x 40 hours per week). (FH 23-26). The Employer's argument that Claimant suffers no loss of wage earning capacity is based on a temporary upswing in Claimant's longshore wages during November 1991 related to the return of military cargo from Operation Desert Storm. Claimant has demonstrated that the

three week slice of wages upon which the Employer relies is not representative of his longshore earning capacity. Claimant's pie chart exhibit and the testimony of Jerry Brooks show that the carrier is incorrect in stating that Claimant suffers no loss of wage earning capacity argument. (FH 69-70), (Cl. Exh. 10, Brooks depo. p. 31-35).

Claimant has a "hold card" which allows him to earn a living by pitching 110 lbs. sacks. This is how Claimant established his average weekly wage in this case. The Employer cannot now credibly assert that a temporary, three week upswing in business related to the war with Iraq demonstrates that Claimant can earn as much as a longshoreman after his injury as he did before it. (Cl. Exh. 6, Jones depo, Exh. 21).

In the present case Claimant's post-injury wage earning capacity as a longshoreman will neither equal nor exceed his wage

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earning capacity from alternative employment. Since Claimant has poor seniority, he cannot earn as much at longshore work as he can at suitable alternative employment. Accordingly, the task in this case is to identify the availability of realistic job opportunities within the geographic area where Claimant resides, which the Claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. In demonstrating the existence of suitable alternative employment, the Employer need

not obtain a job for Claimant, but must establish the actual availability of specific and realistic job opportunities which Claimant could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *P & M Crane Co. v. Hayes*, 930 F.2d 424, reh. denied en banc, 935 F.2d 1293 (5th Cir. 1991).

The administrative law judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The administrative law judge should determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, Motion for Recon. denied, 17 BRBS 160 (1985).

The vocational rehabilitation specialist's opinions must rely on the testimony of physicians whose opinions are credited by the administrative law judge. Otherwise, the labor market surveys and opinions of the vocational expert are not credible. *Dygert v. Manufacturer's Packaging Co.*, 10 BRBS 1036 (1979); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS at 196, 199-200 (1984).

In the present case Wallace Stanfill provided vocational opinions at the formal hearing. He testified about jobs contained

in two labor market surveys, along with drafting positions.

In his December 31, 1990 initial labor market survey, Mr. Stanfill identified four jobs that he stated Claimant was qualified to perform. The Lamar University job was for a Welding Mechanic 1. Mr. Stanfill could not describe the physical demands of the job. His report indicates that the worker "will assist in structural or frame welding and cutting and also aid in generator and electric pump motor repairs." Claimant has no background in this type of work. Moreover, the job by definition is not consistent with the physical restrictions imposed on Claimant. (FH 152-154).

Claimant applied for the Lamar University job in person. Claimant went to the maintenance shop where they were taking applications for first class welders. The job involved picking up angle irons and beams. Claimant indicated that he knows nothing about welding and could not perform the job. (FH 64-65).

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Next, Mr. Stanfill claimed that Claimant was qualified to be a maintenance worker with the City of Beaumont Street Drainage Department. According to Mr. Stanfill this job involved work in a labor crew for the general maintenance of the city streets and waterways. Mr. Stanfill could not produce the job description for this position. He could not describe this job either except to state that it was a labor crew job.

Claimant personally applied for the City of Beaumont Street Drainage Department job. Claimant was told that the job was a part

time job. Claimant indicated that the job involved putting asphalt down and cleaning up the sewer gutters. (FH 66-67).

Witness Stanfill identified a job at KBMT television in Beaumont in his December 31, 1990 survey. The job allegedly paid \$6.00 per hour. Mr. Stanfill stated that the job involved light vehicle delivery, building and grounds maintenance, trash pick-up, changing light bulbs, and other similar jobs. This job appears consistent with the physical restrictions of the treating physician.

Claimant personally applied for the KBMT television job. He spoke with Vernon LeJeune, who was the personnel man for the station. He indicated that Dennis McKinley, Mr. Stanfill's contact person, had not worked at the station in six months. Claimant described the job duties to the court at the formal hearing. Mr. LeJeune indicated that the job paid \$4.00 per hour, not \$6.00 as indicated by Stanfill.

Finally, witness Stanfill identified a job at Nancol Plastic Bag Company in his original survey. Mr. Stanfill did not provide a job description or satisfactory explanation of the job duties. This position was outside Claimant's physical restrictions (FH 157160).

Claimant also personally applied for the Nancol Plastics Bag Company job. He called the receptionist or secretary in Port Neches. He was given a telephone number in Houston. Claimant was

told that the job consisted of loading fifty-five gallon drums and putting them on pallets. The drums had to be wrapped and loaded onto trucks.

In reviewing the initial labor market survey, only the KBMT television job appears consistent with Claimant's physical abilities, training and qualifications. Although Claimant appears to be qualified for the KBMT job, the hourly pay for the job remains in dispute.

On October 24, 1991, Mr. Stanfill produced another status report outlining specific jobs. Mr. Stanfill discussed several drafting jobs in vague terms. However, he did not know the exact salaries offered by area employers. He could only cite a drafting technician position within the City of Beaumont which he did not credibly testify that Claimant was qualified to fill.

Witness Stanfill's updated labor market survey contained a St. Elizabeth Hospital assistant courier position which Claimant was qualified to perform. The position paid \$5.05 per hour. Also, Mr. Stanfill described City of Beaumont relief job openings as a building attendant and custodian aide that paid \$5.00 per hour. Mr. Stanfill insisted that Claimant was physically qualified to perform these jobs. Lastly, Mr. Stanfill could not describe the contact person or job description or qualifications for the airport custodian job at Jefferson County Airport. The position paid \$1239.41 per month.

At the formal hearing, Mr. Stanfill indicated that most of the jobs he had located in his surveys were in the \$5.00 per hour range. (FH 169). While he discussed certain draftsman positions, he did not talk to any such companies in Claimant's geographic area. (FH 201). When asked whether Claimant would have to be involved in entry level drafting positions at \$4.00 to \$6.00 per hour he indicated that Claimant was entry level in some aspects but not all. (FH 202). Mr. Stanfill indicated that draftsmen jobs varied from employer to employer, but on the average they would range from \$8.00 to \$9.00 per hour depending upon the person's background and the particular employer. (FH-185). In the present case, it is plain that Claimant has a residual earning capacity under the Turner and poi CKane Leasing cases as established by Mr. Stanfill. That earning capacity has been established despite the fact that Claimant has not found an actual

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alternative job. A fair and reasonable residual earning capacity in this case consists of jobs in the \$4.50 to \$5.00 per hour range. Therefore, the court should view the various jobs in this salary range as reflective of Claimant's post-injury earning capacity. Claimant is qualified to perform such jobs as the KBMT television courier job or the St. Elizabeth Hospital courier job. On the other hand, he is not physically or technically qualified to perform the other higher paying jobs discussed by Mr. Stanfill.

Under the circumstances, Claimant's permanent partial disability in this case should be calculated at two-thirds of the difference between his average weekly wage, \$458.75, and his residual wage earning capacity of \$180.00 to \$200.00 per week. Based on this calculation, Claimant suffers a loss of wage earning capacity of approximately \$258.75 per week. Alternatively, the court should adopt the \$6.50 per hour residual wage earning capacity figure which the Employer has chosen to pay Claimant in this case. That residual wage earning capacity produces a \$197.25 weekly loss.

VI.

#### ATTORNEY'S FEES AND INTEREST

In the instant case the Claimant has demonstrated his entitlement to an award of permanent partial disability. Under such circumstances, the Act provides for interest on Claimant's back award and the payment of attorney's fees.

##### A. INTEREST

The subject of interest on back awards of compensation has been considered by judicial and Board decisions. The Court decisions authorize Claimant to receive interest on all late payments of compensation. The board has stated the policy considerations behind such a requirement. In *Morris v, Washington Metropolitan Area Transit Authority*, 12 BRBS 208, 210 (1979), the Board noted that the imposition of interest works as a partial

restoration to the Claimant of the value this money would have had if the payments had been timely made. Here, to the extent that the Claimant has shown an entitlement to a back award of compensation, he is entitled to interest on past due compensation.

## B. ATTORNEY'S FEES

Section 28 of the Act sets forth when it is proper to award attorney's fees against the employer. The provisions have been interpreted by the board on a number of occasions. In *Smelcer v. National Steel and Shipbuilding Co.*, 16 BRBS 117, 118 (1984), the Benefits Review Board noted that "it is well settled that the assessment of an attorney's fee against the employer is permissible where there has been a successful prosecution of a claim resulting in the accrual of some benefit to the claimant." Similarly, in *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985) the Board found the employer liable under Section 28(b) where the claimant

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successfully prosecuted a permanent partial disability claim under Section 8(c)(21), even though due to the employer's overpayment of temporary total benefits the claimant did not realize the award for many years. The Board noted in *Turney* that the employer actively disputed the claim. In the present case the Employer paid Claimant temporary total disability until February 22, 1991. Thereafter the Employer has continued to pay Claimant \$131.00 in weekly permanent partial disability benefits. The Employer has not agreed to the entry of

a formal order and has contended that Claimant suffers no loss of wage earning capacity. (FH 25). Also, the Employer has asserted that Claimant reached maximum medical improvement during July 1990, October 1990 and February 1991.

On the other hand, Claimant's counsel has provided legal representation which has clearly demonstrated a continuing entitlement to compensation which will result in the entry of a formal order. Under the circumstances, Claimant's counsel is entitled to a reasonable attorney's fee pursuant to Section 28 of the Act. *supra.* at 232 (1985).

### CONCLUSION

Claimant Wilfred Richard has demonstrated his entitlement to temporary total disability benefits in this case between December 2, 1988 and the date of maximum medical improvement, which was August 5, 1991. Claimant also has shown an entitlement to permanent partial disability benefits. Claimant's post-injury longshore work connected with the retrograde of Operation Desert Storm materials does not fairly and accurately represent his wage-earning capacity. Here, Claimant has an earning capacity of \$4.50 to \$5.00 per hour as shown by vocational testimony. Alternatively, the residual wage earning capacity of \$260.00 per week which the employer has chosen as the basis for continuing permanent partial disability benefits is fair and reasonable. Next, Claimant is

entitled to interest on any past-due compensation. Finally, Claimant's counsel is entitled to an award of reasonable attorney's fees under Section 28 of the Act.

Respectfully submitted,

BY:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing CLAIMANT'S POST-HEARING BRIEF has been served on all interested parties or their counsel of record, pursuant to the Federal Rules of Civil Procedure and the Longshore and Harbor Workers' Compensation Act, on this the day of

1992.

LEWIS S. FLEISHMAN