

U.S. DEPARTMENT OF LABOR

Office of Workers' Compensation Programs
Longshore and Harbor Workers' Compensation
One Congress Street, 11th Floor
Boston, MA 02114
(617) 565-2103



December 7, 1994

File Number: 1-110983
Claimant: Mary Muelhausen
Date of Injury: 12/13/89
OALJ #: 94-LHC-0041

Mary Muelhausen

VS.

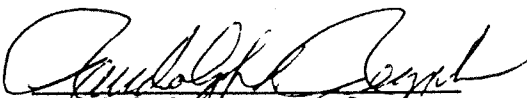
Bath Iron Works Corporation

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

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

The employer/insurance carrier is hereby advised that if the order awards compensation benefits, the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within 10 days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, 800 K Street, Suite 500, Washington, D.C. 20001-8001.

Sincerely,


Randolph L. Regula
District Director, LHWCA

LS-20

Enclosure:

File Number: 1-110983
Claimant: Mary Muelhausen

Longshore and Harbor Workers' Compensation Act, as extended

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that on December 7, 1994, the foregoing Compensation Order was filed in the Office of the District Director, First Compensation District, and that a copy thereof was on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mary Muelahausen
P.O. Box 215
Harrington, ME 04643

Bath Iron Works Corporation
700 Washington Street
Bath, ME 04530

Constitution State Service Co.
P.O. Box 4727
Manchester, NH 03108

Sunenblick, Reben, Benjamin & March
P.O. Box 7060 DTS
Portland, ME 04112


Norman, Hanson & DeTroy
415 Congress Street
P.O. Box 4600 DTS
Portland, ME 04112

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

Judge Frederick D. Neusner
Office of Administrative Law Judges
800 K Street, N.W.
Washington, DC 20001-8002

Associate Solicitor of Labor for Employees Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington D.C. 20210

Joseph F. Olimpio
Director/LHWCA
U.S. Department of Labor, Rm. C-4315
200 Constitution Ave., N.W.
Washington, DC 20210


District Director,
First Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

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

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

Form LS-19a



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:
In the Matter of :
:
MARY MUELHAUSEN, :
Claimant :
:
v. :
:
BATH IRON WORKS CORP., :
Employer, :
:
and :
:
DIRECTOR, OWCP, :
Party-in-Interest :
.....

Date : November 30, 1994
Case No. : 94 LHC 0041
OWCP No. : 01-110983

Before: Frederick D. Neusner
Administrative Law Judge

Claimant by C. W. March, Esq.
Employer by M. J. LaFond, Esq.

DECISION AND ORDER

This is a claim for benefits under the Longshoremen's and Harbor Workers' Act (33 U.S.C §§901, et seq.), hereinafter the "Act", and the regulations promulgated thereunder (See 20 CFR §§702.101, et seq.). Following referral by the District Director on September 17, 1993, a hearing was held in Portland, Maine, on April 20, 1994, when the parties appeared and presented evidence and argument on the referred issues.

Issues. The issues referred for the Claimant are (1) "Whether claimant is entitled to permanent total disability benefits," (2) "In alternative whether claimant is entitled to permanent partial disability," (3) "In alternative whether claimant is entitled to temporary total disability benefits, and (4) "medical benefits related to the injury." ¹ The issues referred for the Employer were (1) "Nature and extent of disability;" (2) "Res judicata;" (3) "Full faith credit;" (4) "Collateral estoppel;" (5) "Section 8(f) relief;" and (6) "Suitable alternative work." To the extent that these issues were litigated with evidence and argument, they will be taken up in

¹ See Claimant's amended pre-hearing statement, dated March 11, 1994.

the findings of law and fact that follow.²

FINDINGS OF FACT AND LAW

Stipulations. The parties stipulated that they are subject to the Act and that the Claimant and the Employer were in an employee/employer relationship on December 13, 1989, when the Claimant was injured, and that her injury arose out of and as a result of her work in the course of that employment. The parties also agreed that the Claimant's notice of her injury to the Employer and her application for compensation benefits were timely, and that the Employer's first report of accident and its controversion were timely.

The parties then agreed that the Claimant's average weekly wage at the time of injury was \$322. The compensation rate for this average weekly wage is \$215 per week under § 8(b) of the Act. The parties agreed that the Claimant was temporarily totally disabled from December 13, 1989, through May 14, 1990,³ and that the Employer had paid the Claimant \$108 per week as disability benefits for total disability from December 13, 1989, through May 14, 1990. In addition, from May 14, 1990, until the date of the hearing the Employer paid the Claimant \$21 per week, which Employer's counsel explained was equal to compensation benefits for an impairment of ten percent. The parties stipulated that these compensation benefits were paid in accordance with the provisions of the workers' compensation statute of the State of Maine. In addition to agreeing as to the nature and the exertional demands of the Claimant's usual shipyard duties, the parties agreed that the Claimant never returned to her usual employment with the Employer. Tr 22. Subject to fn 3, these stipulations are accepted and found as facts.

Claimant. Born January 4, 1961, the Claimant was living in Raymond, Maine, at the time of the hearing. Although she did not complete high school, the Claimant was awarded a GED equivalency certificate in 1978, when she was a junior in the high school she was then attending. The Claimant worked for about six months as a tax assessor field worker and an aquarium tour guide during one summer. Other than these jobs, the Claimant's position with the

² See Employer's pre-hearing statement, dated February 28, 1994.

³ The date stipulated for the end of temporary total disability and the beginning of permanent total disability is not accepted, and another date was accepted for the reasons stated *infra*.

Employer was the only work she did outside her home. Tr 53-54.

Usual Employment. The Claimant was employed by the Employer's shipyard on August 22, 1988, and remained there until the date of the injury. Before being hired for a position in the shipyard, the Claimant was trained at the Brunswick Vocational Technical Center as a shipfitter. The Employer hired Claimant when she completed this training. As a shipfitter engaged in fabricating hulls, she worked with bulkheads, wedges, mauls, pneumatic tools, and welding equipment. She testified that her primary job was to bring the shaped pieces of steel aboard the ship, fit them into the assigned locations, and tack weld them into position on the hull, adding that her duties were regarded as heavy work. Tr 25-30; CX 17.⁴

Injury. While working as a shipfitter the Claimant was welding in a confined space aboard a vessel in the Employer's shipyard on December 13, 1989, when she suffered symptoms of low back pain that caused her to discontinue her work and seek medical assistance. Despite treatment by a chiropractor, she did not resume her usual employment, and for reasons that are not related to this injury was fired by the Employer about one month later. Tr 34-35. Since December 13, 1989, the Claimant has been examined and treated by a family practitioner, an orthopaedic specialist, a neurosurgeon, a neurologist, a gynecologist, and a urologist, and also by an osteopath, chiropractic practitioners, a physical therapist, and a rehabilitation therapist. Tr 38-51.⁵ After examining the Claimant on March 14, 1994, Dr. Mehalic, a neurosurgeon certified by the American Board of Neurosurgeons, concluded that, based on the Claimant's history of events that

⁴The following is quoted from EX 45, Ex 4, which is identified as "Shipfitter job description":806.381-046 SHIPFITTER (ship-boat mfg.) alternate titles: fitter Lays out and fabricates metal structural parts, such as plates, bulkheads, and frames, and braces them in position within hull of ship for riveting or welding: Lays out position of parts on metal, working from blueprints or templates and using scribe and handtools. Locates and marks reference lines, such as center, buttock, and frame lines. Positions parts in hull of ship, assisted by RIGGER (ship-boat mfg.). Aligns parts in relation to each other, using jacks, turnbuckles, clips, wedges, and mauls. Marks location of holes to be drilled and installs temporary fasteners to hold part in place for welding or riveting. Installs packing, gaskets, liners, and structural accessories and members, such as doors, hatches, brackets and clips. May prepare molds and templates for fabrication or non-sandadd parts. May tack weld clips and brackets in place prior to permanent welding. May roll, bend, flange, cut, and shape plates, beams, and other heavy metal parts, using shop machinery, such as plate rolls, presses, bending brakes, and joggle machines.
GOE:05.05.06 STRENGTH:H GED:R4 M3 L2 SVP:8 DLU:77

⁵On January 27, 1989, before the accident on which this claim is based, the Claimant was struck on the head suffering an injury that produce the symptoms she reported symptoms in the area of her neck that she reported to Dr. Mehalic. She gave some form of medical notice of this event to the Employer on February 15, 1989, even though she did not lose any time from work due to that injury. Tr 31-32. During September of 1989, the Claimant again hurt her neck in a motor vehicle collision, but did not lose any time from work following that mishap, either.

occurred shortly before their onset, he could find that the symptoms she first experienced December 13, 1989, were causally connected with her work as a shipfitter at Employer's shipyard. EX 45, pp 4, 15-20. He concluded that the Claimant could not then perform her usual duties as a ship fitter. EX 45, pp 20-21. He based this opinion on medical restrictions that limited the Claimant to light work that required the lifting of no more than twenty-five to thirty pounds and that did not require repetitive bending or twisting. In reaching the opinion that the Claimant was limited to light work, the doctor relied in part on his own experience in examining and treating shipyard workers whose vocations were comparable to that of the Claimant. *Id.*, pp 12, 20.

20(a) presumption.⁶ The Benefits Review Board has repeatedly held that it is an error of law, if the judge fails to consider the § 20(a) presumption where it is applicable to establish the work related etiology of the Claimant's injury.⁷ Under § 20(a) the Claimant must establish *prima facie* that she suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused that harm. **Murphy v. SCA/Shayne Brothers**, 7 BRBS 309 (1977), *aff'd mem*, 600 F2d 280 (D.C.Cir., 1979); **Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981); and see **U.S. Industries/Federal Sheet Metal v. Director, OWCP**, 455 U.S. 6-08, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F2d 455, 12 BRBS 237 (D.C.Cir., 1980). Claimant's medical evidence of record satisfies the requirement in **U.S. Industries** that she allege an injury arising out of and in the course of her employment. **Dangerfield v. Todd Pacific Shipyards Corp.**, 2 BRBS 104 (1989). The Claimant has alleged an injury⁸ within the meaning

⁶ 33 U.S. C. §920(a) provides that in any proceeding for the enforcement of a claim for compensation under the Act it shall be presumed, in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of the Act; (b) that sufficient notice of such claim has been given; (c) that the injury was not occasioned solely by the intoxication of the injured employee; and (d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

⁷ **Adams v. General Dynamics Corp.**, 17 BRBS 258 (1985); **Dower v. General Dynamics Corp.**, 14 BRBS 324 (1981). The § 20(a) presumption applies in determining whether the Claimant's injury arose in the course of her employment. **Travelers Insurance Co. v. Donovan**, 221 F2d 886 (D.C. Cir., 1955) (citing **O'Leary v. Brown-Pacific-Maxon, Inc.**, 340 U.S. 504 (1950)). If the injury occurred during the course of employment, the presumption that the injury arose out of the worker's employment is strengthened. **Wheatley v. Adler**, 407 F2d 307 (D.C.Cir., 1968) (*en banc*).

⁸ See as to the onset of this injury **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), *aff'd sub nom Gardner v. Director, OWCP*, 640 F2d 1385, 13 BRBS 101 (1st Cir., 1981).

of § 20(a) of the Act. As the Claimant's work as a shipfitter required her to participate in the lifting and manipulation of heavy objects and to work in confined places where she had to engage in heavy physical exertion, she has established *prima facie* the existence of working conditions that could have caused the accident and has invoked the presumption of § 20(a). Tr 32-34; EX 45.⁹

To rebut the presumption that Claimant's injury was caused by her shipyard employment the Employer must sustain the burden of proof by going forward with substantial countervailing evidence. *Swinton v. J. Frank Kelly, Inc.*, 554 F2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), cert den 429 U.S. 820 (1976).¹⁰ To establish the absence of a causal nexus, the Employer must produce facts, not speculation, in order to overcome this statutory presumption of compensability, since reliance on mere hypothetical probabilities in rejecting a claim is contrary to this presumption. *Dearing v. Director, OWCP*, -- F2d --, 27 BRBS 72 (CRT) (4th Cir., 1993); *Steele v. Adler* 269 FSupp 376 (D.D. D.C., 1967); *Dower v. General Dynamics Corp.* 14 BRBS 324 (1981). As the court explained in *Swinton*, *supra*, the Employer's negative evidence must be sufficiently specific and comprehensive to sever the potential connection between the Claimant's injury and the job-related accident she described in her testimony under oath before me. *Swinton*, 554 F2d 1075, 4 BRBS 466.

Taking note of the stipulations of the parties and of the opinions of the medical providers of records, I find that of the plethora of medical doctors and providers who examined and treated the Claimant after the injury, the opinion of Dr. Mehalic in EX 45 is definitive, as it is the most persuasive and is corroborated by the opinion of the Board certified orthopaedic surgeon. First, it is the most recent and the most persuasive opinion of record. Second, Dr. Mehalic is the only Board certified neurosurgeon to examine the Claimant and offer an opinion addressed to the injury of which she complains. Finally, no credible medical evidence of record supports the Employer's rebuttal of the causal nexus between the Claimant's injury and

⁹ See generally *Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275 (1981); *Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981); *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981).

¹⁰ If the presumption is rebutted, the judge must weigh all the evidence and resolve the causation issue on the record as a whole. *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

the conditions under which she was working at and before the date she suffered the symptoms of her injury.¹¹ Since the Employer has failed to rebut the § 20(a) presumption and has stipulated that the injury arose out of and in the course of her employment, I find that it is causally connected with her disability and that the Claimant has established the causal connection between her injury and her employment by the Employer.

Res Adjudicata. The Employer's form LS-18 asserted res adjudicata, full faith and credit, and collateral estoppel as issues, all of which arose out of the decision of a compensation commissioner of the State of Maine in the determination of a claim for benefits due to this injury under the state compensation statute. As all of these issues relate to the same a parallel matter before that state agency, they are facets of a single special defense and will be taken up together and referred to as "res adjudicata."

There is no evidence of record that sets out the evidence underpinning findings of fact reached by the state agency in EX 04, 05, 07, and 08, and as a consequence, that tribunal's decisions appear in this record as unsupported assertions of fact and law. It follows that these exhibits do not prove subordinate facts and that they establish only that the parties appeared before that state agency and litigated the facts of a parallel claim to a conclusion. This, in turn, relates to the Employer's observation that the instant claim was filed after the state forum denied Claimant's appeal.

Employer's special defense confronts and is rejected on the basis of holding in **Calbeck v. Travelers Insurance Co.**, 370 U.S. 114, 120, (1962), in which the United States Supreme Court decision disposed of Employer's challenge to state and federal dual jurisdiction when it held that Congress had authorized "federal compensation for all injuries to employees on navigable waters," regardless of whether a particular claimant was able to recover under state law. As the U.S. Court of Appeals for the First District pointed out in vacating **Simpson v. Director, OWCP**, 13 BRBS 970 (1981),

[A]lthough a state court opinion could collaterally estop the litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was simply not relevant in cases under the federal act. See generally, 4 Larson's Workmen's Compensation Law § 89.53(b) (1981).

¹¹ Compare the injuries to her neck and cervical area in fn 4.

For these reasons the Employer's special defense based on the state claim are dismissed as inconsistent with § 3(a) of the Act. **Calbeck, supra.**¹² On the other hand, § 3(e) of the Act entitles the Employer to credit for such compensation benefits as it may have paid to the Claimant under an order of the Workers' Compensation Commission of the State of Maine.

Disability. The Claimant may be found disabled under § 2(10) of the Act, if she is unable to earn the wages she was paid at the time of injury in the same or any other employment. It is well-established that in the context of the Act "disability" is an economic concept based on the medical evidence weighed in determining the worker's entitlement to compensation benefits. See **American Stevedores v. Salzano**, 538 F2d 933 (2d Cir., 1976), *aff'g Salzano v. American Stevedores, Inc.*, 2 BRBS 178 (1975); **American Mutual Insurance Co., v. Jones**, 426 F2d 1263 (D.C. Cir., 1970). As the permanent nature of Claimant's disability is a medical determination, the medical evidence has been given greater weight in determining whether or not she received the maximum benefits of her medical treatment and the date when the physicians found that no further improvement in her condition could reasonably be expected to occur. **James v. Pate Stevedoring Co.**, 22 BRBS 271, 274 (1989).¹³

As Claimant noted in her brief, under **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), she may be found to be totally disabled within the meaning of the Act, if her residual vocational capacity after the injury requires that she return to limited work and none is available. The Claimant was given conservative care and therapy for several months by various providers after the injury, and eventually was examined by medically qualified physicians who found her unable to perform the usual duties of her employment. EX 21, 26, 28, 29, 30. It is first noted that the chiropractors and the osteopath who examined

¹²A worker may file under both the Act and the state workers' compensation statute simultaneously or successively. **Laundry v. Carlson Mooring Serv.**, 643 F2d 1080(5th Cir., 1981), *reh den* 647 F2d 1121. Moreover, since the Employer's brief did not argue *res judicata*, full faith and credit, or collateral estoppel, this special defense was abandoned.

¹³ If a physician does not specify the date of maximum medical improvement, the trier may use the date the physician rated the extent of the worker's permanent impairment. **Jones v. Genco, Inc.**, 21 BRBS 12, 15 (1988). In the absence of any other relevant evidence, the judge may use the date the claim was filed. **Whyte v. General Dynamics Corp.**, 8 BRBS 706, 708 (1978). Evidence of the Claimant's capacity to perform alternative employment does not determine the permanency of his injury, and a vocational rehabilitation expert's determination that the worker is unable to return to work is not a medical judgment and cannot form the basis for a finding of permanency of disability. **Berkstresser v. Washington Metropolitan Area Transit Authority**, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom, Director, OWCP v. Berkstresser*, 921 F2d 306 (D.C. Cir., 1990); **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 3446, 448 (1981).

and treated the patient supported the 1990 finding of Dr. Greene, an orthopaedic surgeon, who then said that her impairment was a muscular injury that disabled her from performing her usual shipyard employment, from which he expected her to recover. Based on this diagnosis, he estimated the time she would be disabled and restricted to light duty in terms of the number of months she would require to heal. EX 26, with which compare EX 03, 17, 18, 19, 20, 21, 22, 23, 24, 25. Later, the patient was examined by Dr. Sutherland, who noted that she had not improved despite the passage of many months. At that time Dr. Sutherland made the same finding that Dr. Mihalic subsequently reported in 1994, observing that the x-ray study showed the interspace at L5-S1 was "quite narrow with respect to the other spaces." Finding on March 29, 1991, that despite treatment and her diligent cooperation Claimant had not improved in more than a year, Dr. Sutherland made a preliminary finding that her impairment was "permanent" adding that Claimant's vocational exertional capacity was "borderline light." He related the pain from which she was suffering at that time to her injury of Decembr 13, 1989, lending definitive authority to a finding of that nexus. EX 06, pp 08, 17, 35, 39, 40, 41. On August 1, 1991, Dr. Sutherland concluded that, despite her active participation in physical therapy, the Claimant had now reached the "medical end-point" and had a "borderline light physical capacity."

While accepting this finding as authoritative, Drs. Greene and Sutherland did not have before them the data known to Drs. Sears and Mihalic when they arrived at diagnoses based primarily on the damage to the organs that supported and protected the Claimant's spinal nerves and branches. Their observation that the neurological symptoms had persisted many months was restated in a January 20, 1993, Dr. Sears report as a neurologist, but since he had not yet seen her CT films, however, this physician limited himself to a cautious statement as his "impression" that she was suffering from a "chronic pain syndrome with lumbosacral strain without evidence of clear-cut myofascial syndrome at this time." EX 32.

Finally, in his examination of March 14, 1994, Dr. Mehalic arrived at the definitive diagnosis of a bulging disc and herniation in the left side in a paracentral L5/S1 displacement, producing intermittent compression to the left, which affected the patient's S1 nerve root. He said that Claimant would be employable in light activities in which her lifting would be limited to twenty-five to thirty pounds, if she could find work within such restrictions. EX 45, pp 5, 11-12, 18. When asked in a deposition whether he would recommend that Claimant return to her duties as a ship fitter, he said that would not be his recommendation at that stage because that type of employment

would aggravate her bulging disc and nerve root irritation. He agreed that the object of his work restrictions was to prevent the disc from herniating further, which would cause Claimant's condition to become neurosurgically acute. *Id* pp 21-22.¹⁴ Based on the deposition testimony and other evidence by Drs Sutherland and Mehalic, I infer that the Claimant could not perform her usual duties on the dates they examined her, since she was at all times restricted to a level of physical exertion that was inconsistent with the job of a ship fitter. EX 45, pp 15-21.¹⁵

In view of the medical qualifications and examination reports of the physicians cited above, it is concluded *prima facie* that on and after December 13, 1989, and continuing until the date of this hearing the Claimant was limited to light duty work, and for this reason was disabled from the performance of her usual duties as a shipfitter/fabricator by reason of this work-related accident.¹⁶ Subject to my finding as to whether or not suitable alternate employment existed during that period, it is also found that the Claimant's temporary total disability to perform the duties of her usual shipyard employment began on December 13, 1989, the date of injury, and continued through August 1, 1991. Again, subject to my further findings as to the existence of suitable alternate employment, it is concluded that

¹⁴ It is noted that Dr. Mehalic was satisfied with the patient's candor, as were the other physicians who examined her. See EX 45, p 19. It must be noted at this point that on February 24, 1994, Dr. Deming performed an MRI examination and diagnosed "Central and left paracentral subligamentous disc herniation with minimal compression of the left S1 root." This supports the finding that the Claimant's disability is a "disc herniation," rather than a bulge that is not herniated, as was reported after the November 3, 1993, CT procedure of the spine. At that time his conclusion was, "Mildly bulging posterior annulus fibrosus at L5-S1."

¹⁵ Notwithstanding the medical evidence of a medically trained orthopaedic surgeon and a Board certified medically trained neurosurgeon discussed above, the Employer contends that the diagnosis and prognosis of Dr. Findlay, a doctor of osteopathy, should be given definitive weight in the finding as to the Claimant's continuing disability. It argues that the patient should be found to have recovered as of May 14, 1990, the date Dr. Findlay released her from his care, and that her claim for benefits subsequent to May of 1990 should be denied because the effects of the work injury had ended. As Dr. Findlay's qualifications are in osteopathy and not in medicine, the record has been examined for evidence that suggests the superiority of osteopathy to medicine as a curative art, or that supports a finding that Dr. Findlay has any specialized skill as an osteopath that equals or is superior to the respective qualifications of Dr. Sutherland in orthopaedic surgery and Dr. Mehalic in neurological surgery. More particularly, I have given weight to the circumstance that Dr. Findlay did not examine the patient after May 14, 1990. As a result the findings of Drs. Sutherland and Mehalic were based on a superior opportunity to observe the patient. Consequently, I find that their more recent examinations are more credible, since they demonstrate that both the subjective and the objective symptoms of pain and disability persisted for several years after Dr. Findlay formulated his opinion. As a result, the proposed stipulation as to this date is rejected.

¹⁶ For definition of light duty work see EX 45, Ex 04. The physicians' findings of permanence are further supported by the circumstance that the Claimant's impairment continued for a lengthy period of time and strongly appeared to be of lasting or indefinite duration, given the nature of the injury and the physical exertion demanded by the Claimant's usual shipyard work. *Watson v. Gulf Stevedore Corp.*, 400 F2d 649, 654 (5th Cir., 1968), cert den 394 U.S. 976 (1969).

after May 14, 1990, and continuing until the date of hearing and thereafter the Claimant remained unable to perform the duties of her usual shipyard employment and so is totally and permanently disabled within the meaning of the Act.

Suitable alternate employment. As the Claimant has been found *prima facie* to be temporarily and permanently totally disabled, the Employer has the burden of proving that she can engage in suitable alternate employment within the meaning of the Act. **Diamond M Drilling Co. v. Marshall**, 577 F2d 1003, (5th Cir., 1978). Pursuant to the standard of proof fixed by the U.S. Court of Appeals for the First Circuit in **Air America v. Director, OWCP**, 597 F2d 773, 10 BRBS 505 (1st Cir., 1979), *aff'g and rev'g in part Kerch v. Air America, Inc.*, 8 BRBS 490 (1978), the Employer may now establish that "it is obvious" that there are jobs available that a worker of this Claimant's age, education and experience can perform within his physical limitations.¹⁷

After the close of the hearing the Employer was given the opportunity to submit its evidence of suitable alternate employment in documentary form. Instead of offering a market survey and similar evidence, the Employer elected to file a letter that described the alternative forms of employment that it could provide in its shipyard for the benefit of the Claimant and other persons similarly situated. Prepared by the Employer's "Director of Workers' Compensation Department and Case Management," this was admitted as EX 46. According to the Employer's brief, "Had Mary Muelhausen not been terminated for violating company policy she could have been accomodated as well [as the injured employees EX 46 describes at pp 5-7] at her same rate of pay." Emp Br, p 5. This hypothesis is rejected for the reasons that follow.

EX 46 implies that but for its having discharged the Claimant, the Employer would have offered the Claimant work that she could have performed within the medical restrictions that the various attending physicians and other medical providers recommended in the exhibits discussed above. The Alternative Work Program described in EX 46, called "Department 50," was limited to the employees with work related who had the capacity to be rehabilitated and restored to their previous job assignments. According to the Employer's Medical Director,

¹⁷ See **Miller v. Prolerized New England Co.**, 14 BRBS 811, 819 n 9 (1981), which the First Circuit affirmed for reasons unrelated to this proposition at 691 F2d 45, 15 BRBS 23 (CRT) (1st Cir., 1982).

...[The light duty program in Department 50] is also for people that have the capacity to get well enough to go back to their own previous job. *They're not allowed to enter that program, if there's reason to believe they will not get well enough to go back to their own department in the previous job. (Emphasis added.)*

EX 18, pp 14-15.¹⁸ As it is clear that from the date she was injured the Claimant's impairment did not at any time permit her to return to work as a shipfitter/fabricator, it must be found that the Employer has failed to demonstrate that she would have qualified for assignment to Department 50 after the nature and extent of her medical restrictions was known at all times germane to this proceeding.

The events that Claimant related indicate that at no point was she offered this type of light work, even though she followed her doctor's instructions and reported for duty without delay. Dr. Rogers certified that the Claimant was able to perform half time light duty work on January 19, 1990. At that time Employer was entitled to reduce its exposure to pay compensation benefits to her by assigning the Claimant to work in Department 50 or any comparable program. EX 21, 46.¹⁹ The Claimant testified credibly and without contradiction, however, that she was never offered light duty work in the Portland facility, saying that her lead man "laughed in my face and said with a four-hour, ten-pound capacity that it was a joke for me as a ship fitter to even report to the job." She said that when she brought her "light duty" recommendation to her lead man, David Wiley, he told her there was nothing for her in the Portland yard, and directed her to ask the shipyard clinic nurse whether work would be available in Employer's Bath shipyard, which is located in a different geographical labor market. The nurse later told Claimant that Employer had no work available for her in Department 50. She then added that there might be work in another department in the Bath facility but did not offer such a position to the Claimant. Even if Employer had offered her a position in Bath, however, the Claimant explained that she would have been

¹⁸It is unclear as to whether there was a formal program for rehabilitation or other forms of compensation loss mitigation in January of 1990, when Dr. Rogers first released the Claimant to return to the Employer's shipyard subject to medical restrictions. Such a program apparently was in operation in 1992, when Dr. Parrotte testified and in June 13, 1994, when DX 46 was written by Mr. Ferguson. CX 19,, EX 46.

¹⁹ In CX 18 the Claimant filed a statement by the Employer's medical director, who described the same type of program as Mr. Ferguson discussed in EX 46.

prevented from accepting it by her work restrictions, which limited her to a twenty minute sitting capacity, explaining that travel from her home in the Portland area to Bath would require one and a half hours of automobile travel to work and a similar journey home every day. Tr 64; and see EX 21.

The Claimant further testified that on January 24, 1989, she was summoned by the Employer to appear at its Portland shipyard concerning apparently unrelated documents in her personnel file. After completing her business in the management office on that date, the Claimant was leaving the plant when Mr. Dubois, a supervisor, approached her and, addressing her in grossly inappropriate language, demanded to know where her safety glasses were, although she was not in an area where she normally would have expected to wear the safety glasses when this episode occurred.²⁰ Apparently the Claimant responded to Mr. Dubois' offensive inquiry in equally offensive terms, since the Employer fired the Claimant on February 2, 1990, contending that she had violated a company rule or policy that is not identified in this record. Tr 36-38. While there appears to have been collateral litigation relating to her unsuccessful attempts to be restored to the Employer's roster of shipyard employees, its details are not disclosed in this record. In fact, no evidence beyond the Claimant's testimony accounts for her termination from Employer's labor force, which is the basis for Employer's rebuttal of the

²⁰ Since the Claimant was on sick leave status and was not engaged in the performance of her usual duties as a shipyard employee at the place and time this occurred, this inquiry on its face was irrelevant and provocative. The Employer appears to rely on *Brooks v. Director, OWCP*, 27 BRBS 100 CRT (1993), in which the Circuit Court of Appeals for the Fourth Circuit affirmed the holding under the facts of that case that the suitable alternate employment that employer ordinarily offered its employees was unavailable to that employee after it fired him upon discovering that he had violated company rules by failing to disclose his previous back injury at the time it hired him. Although the court in that case sustained the Board in upholding the discharge of Mr. Brooks because he had violated a company policy, the "company policy" on whose "violation" the instant Employer now relies was neither stated nor proven in this proceeding. No clue as to such a policy appeared in the findings of tribunals that heard the claim for state compensation, which were included in EX 04, 05, 07 and 08. If this Claimant asserted her entitlement to restoration as an employee of this Employer before another tribunal, that fact was not proven in this record, as explained above. On the other hand, Mrs. Muelhausen did not assert a prejudicial treatment within the meaning of § 49 of the Act. Consequently, no evidence of the facts on which she might have based any such grievance was offered in the instant proceeding. Because no findings can be made in any part of this record that will connect up the *Brooks* case with the facts the parties have proven in this hearing, its holding does not apply to these parties. It must be concluded that the light duty that was medically prescribed was neither available in Employer's shipyard nor offered to the Claimant by the Employer at any time after her physicians temporarily and permanently restricted her physical exertion as a result of this job related injury. In addition, other than the Claimant's evidence of her efforts to find suitable alternate employment and her repeated unsuccessful efforts to work for various employers, there is no evidence of suitable alternate employment to support Employer's response to the *prima facie* finding of total disability *supra*. EX 16, describing Claimant's unsuccessful efforts to secure suitable alternate employment, has been examined with her testimony. Her evidence supports the finding that alternate employment was not available to her, since she was not hired when she provided the prospective employers a candid disclosure of the medical restrictions of record and, when she tried to work at the jobs she succeeded in getting, she found they were beyond her capacity to perform.

prima facie finding of total permanent disability.²¹ Since the Claimant did not seek relief under § 49 of the Act, no further finding as to the circumstances of her removal as a shipyard employee is relevant to the issues referred. It follows that the Employer has not established that suitable alternate employment was available to the Claimant at its Portland shipyard either before or after she was fired, regardless of the merits of that dispute.²²

Because it is not required either to rehire the Claimant or to act as an employment agency for her, the Employer may identify specific jobs that were available to the Employee within her local community in order to prove the existence of actual, not theoretical, employment opportunities in the geographical area germane to this proceeding. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir., 1981); **Ferrell v. Jacksonville Shipyards**, 12 BRBS 566, 570 (1980). The record contains no further evidence of suitable alternate employment, however. Consequently it is found that the Employer did not sustain its burden of proving the existence of suitable alternate employment.

Entitlement. As the Employer has failed to sustain its burden of proving the existence of suitable alternate employment for the reasons hereinabove discussed, it is concluded that since the date of her injury the Claimant has been totally disabled within the meaning of the Act and is entitled to temporary and permanent total disability benefits.

It was found *supra* that Claimant was temporarily unable to perform the duties of her usual shipyard employment from December 13, 1989, until August 1, 1991, when she was found to be permanently disabled when the medical restrictions on her physical exertion were recognized to be permanent in nature. It follows (1) that the Claimant is entitled to compensation

²¹ The caption on CX 18 has been noted as indicating the existence of such litigation. While her unsuccessful attempts to be restored to the roster of workers at the Employer's plant is mentioned, no evidence other than her testimony describes the circumstances of Claimant's termination from the Employer's labor force. The Claimant's testimony is accepted as definitive, and the unsubstantiated assertions of various attorneys, referring to such litigation both off and on the record, are given no weight, as her credible statements under oath before me are the best and only evidence available.

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benefits for temporary total disability from December 13, 1989, through August 1, 1991, and she is entitled to compensation benefits for permanent total disability from August 1, 1991, through the time of trial and continuing; and (2) that pursuant to § 3(e), the Employer is entitled to credit for the payments it made to the Claimant under the authority of the Maine Workers' Compensation Act.²³

Accordingly, the following order will issue.

ORDER

1. Employer is ordered to pay the Claimant compensation benefits at the compensation rate of \$215 per week, for temporary total disability during the period beginning December 13, 1989, and ending on August 1, 1991, subject to offset and credit pursuant to §3(e) of the Act for state compensation benefits that the Employer paid to the Claimant during the period of her temporary total disability.

2. Employer is ordered to pay the Claimant compensation benefits at the compensation rate of \$215 per week, for permanent total disability during the period beginning August 1, 1991, and continuing until the further order of the U. S. Department of Labor under the Act, subject to offset pursuant to §3(e) for state compensation benefits that the Employer paid to the Claimant during the period of her permanent total disability.

3. Employer is ordered to pay the Claimant such medical benefits as are provided by §7 of the Act.

4. The Employer shall pay directly to counsel for Claimant such fee for representation services and costs of litigation as shall hereinafter be ordered upon approval of an application for approval of an attorney fee and costs, which counsel for Claimant may submit under 20 CFR 702.132. That application for approval of an attorney fee must be served on counsel for the Employer and upon the Deputy Commissioner, as required under 20 CFR 702.233(a) and (b). A certificate attesting to such service must be attached to the application for approval the of attorney fee.

²³While this finding as to § 3(e) of the Act is inconsistent with Employer's special defense based on res adjudicata, awarding this relief under the Act is consistent with the rejection of that special defense for the reasons hereinabove stated.

All parties served shall have ten days from the date of service to oppose, reply or comment upon this application.


FREDERICK D. NEUSNER
Administrative Law Judge

Notice. Any party dissatisfied with this Decision and Order may appeal to the Benefits Review Board within thirty (30) days from the date of this decision by filing a written Notice of Appeal with the Benefits Review Board, Suite 500, #800 K Street, N. W., Washington, D. C., 20001-8002. See 20 CFR §725.481.