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Issue Date: 07 February 2018

CASE NO.: 2013-LHC-00937

OWCP NO.: 14-157015

In the Matter of:

JOHN SCARBROUGH,
Claimant,

v.

SHANNON WAGNER,
dba SEATTLE MARINE CONSTRUCTION AND
SEABRIGHT INSURANCE COMPANY,
Employer and Carrier,

and

DISTRICT DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest.

DECISION AND ORDER FOLLOWING REMAND

This claim arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("the Act"). Following a formal hearing in Portland, Oregon, I issued a Decision and Order Awarding Benefits to Claimant on January 30, 2015 ("2015 D&O"). Charles Robinowitz, Attorney at Law, represented John Scarbrough ("Claimant"). Nina Mitchell, Attorney at Law, represented Shannon Wagner dba Seattle Marine Construction and Seabright Insurance Company (collectively "Employer"). Susan Brinkerhoff, Attorney at Law, represented the District Director. Claimant appealed the Decision and Order to the Benefits Review Board, which remanded the matter on the issue of the denial of total disability benefits after May 7, 2012. *Scarbrough v. Shannon Wagner*, BRB No. 15-0199 (Feb. 23, 2016) (unpub.).

On August 12, 2016, after the file was returned from the BRB, I issued an Order Following Remand. Both parties filed briefs on remand and permissible reply briefs. The record on remand closed on September 23, 2016.

In summary, on January 10, 2012, Employer hired Claimant to work a temporary job setting tile on the *Ocean Peace*, a vessel that was in port and under construction. On January 19, 2012,

Claimant slipped and fell while entering the *Ocean Peace* and suffered a work-related injury to his back and right knee. Claimant worked the remainder of the day and completed the tile work he was assigned. Even though the tile work was done, Employer continued to employ Claimant to work as a carpenter and painter until February 13, 2012. The entire work on the *Ocean Peace* was completed on February 19, 2012. After working for Employer, Claimant went to work for Crestline Trucking as a truck broker on March 1, 2012. Claimant continued to seek medical treatment for back and right knee pain and, on May 7, 2012, he had surgery on his right knee. In the 2015 D&O, I determined that Claimant voluntarily quit his employment at Crestline Trucking on May 14, 2012, which the BRB affirmed on appeal.[1] Claimant's right knee reached MMI on July 26, 2012, with 12% rating, but his back remained temporary in nature. In the 2015 D&O, I denied disability benefits for Claimant's back and also any benefits for the period after his knee surgery on May 7, 2012.

I have thoroughly reviewed the record and affirm the prior factual findings in the 2015 D&O, which are incorporated by reference to this decision on remand. In this remand decision, I have included some of the factual findings from the prior 2015 D&O for context and have edited others to include additional information after reviewing the record.[2] After reviewing the record, I had concerns about Claimant's overall credibility, but, as explained below, I find that Claimant is entitled to temporary total disability for the period of July 16, 2013, to October 21, 2013, with additional periods of temporary partial disability.

I. Factual Findings on Remand

1. At the November 2013 hearing, Claimant was 47 years old, and lived in Corvallis, Oregon. TR at 88. Claimant was a contractor by trade, and primarily worked as a painter and tile setter, but he also had experience in floor care services and remodeling houses, and ran a DJ business prior to 2006. TR at 30, 91-92, 95-97, 151. Claimant is a high school graduate and attended some college. TR at 89-90. At the time of the hearing, Claimant was attending an online university. TR at 90.

2. On January 10, 2012, Claimant started working for Employer as a temporary tile worker for a project involving the ship *Ocean Peace* at the Vigor Shipyards in Portland, Oregon. TR

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[1] Claimant continues to argue, as he did on appeal, that it was error to base any findings on an unemployment hearing held by the Oregon Employment Department ("OED") where Claimant did not participate. Claimant Cl. Br. at 2-4. Claimant was perplexed that the BRB did not address his specific argument on appeal related to Oregon Revised Statute 657.273. Claimant Cl. Br. at 3-4. The evidence from the OED was admitted at the 2015 hearing without objection. Claimant raised the same objection on appeal and now seeks to re-litigate the finding affirmed by the BRB on appeal. Oregon Revised Statute 657.273 states that "the decisions, findings, conclusions, final orders and judgments that arise out of hearings . . . (2) are not admissible as evidence in any other civil action or proceeding" except in situations not relevant here. Or. Rev. Stat. Ann. § 657.273. At the 2015 hearing, the records from OED were considered to the extent that they included information from Crestline Trucking provided at the unemployment hearing and admitted into evidence without objection. Claimant sought to limit the scope of the records in his 2015 closing brief, most particularly related to the issue of whether he voluntarily quit or was terminated from Crestline. The evidence relied upon in 2015 was properly admitted into the record and the Crestline evidence was relevant to issues related to Claimant's wage earning capacity and now, without legal support or argument, Claimant simply continues to argue matters resolved on appeal. I will not revisit issues decided by the BRB. The decision and findings of the OED were not considered on remand.

[2] I will refer to any factual findings relied upon in the 2015 D&O by reference to 2015 D&O followed by the factual finding number.

at 114, 336-38; CX 7at 10. He got the job by responding to an ad on Craigslist and emailing a resume to Employer. TR at 111, 113-14. On January 19, 2012, Claimant slipped and fell while entering the *Ocean Peace*, hitting his butt and lower back and hurting his right knee. TR at 121. Claimant completed his work assignment for the day and did not otherwise miss work for Employer as a result of the injury. TR at 114, 122.

3. On January 23, 2012, Claimant went to the doctor for back pain and saw Dr. Robin Page-Echols, who was a resident at Samaritan Family Medicine Residency Clinic in Corvallis. CX 19 at 45. At the time of the visit, Claimant had bruising on his upper buttocks, had experienced numbness and numbing pain in his right big toe for several days, and pain on his left side. *Id.* Claimant also reported that his right knee had been painful before the January 2012 accident, but had become more painful since his fall, even though he had begun wearing knee pads at work. *Id.* Dr. Page-Echols noted bilateral sciatic notch tenderness, but no other back, spinal, or walking abnormalities. CX 19 at 45-46. Dr. Page-Echols noted that Claimant's left knee was negative for all tests, and that Claimant's right knee had some tenderness at the medial joint line but no other issues. CX 19 at 46. Dr. Page-Echols diagnosed Claimant with right side lumbar radiculopathy, a lumbar back strain, and knee pain with a possible medial meniscus injury. CX 19 at 47. He prescribed oxycodone and cyclobenzaprine. CX 19 at 48. On January 23, 2012, Dr. Page-Echols wrote Claimant a letter clearing him to return to work:

> "Please allow [Claimant] to come back to work at modified duty, with an upright position if possible. Limit frequent changes of position and excessive bending at the waist. If he is having increased pain despite these modifications, he may need to limit the hours he is working per shift and may need to come back to the doctors [sic] office for further evaluation."

CX 69 at 270; EX 22 at 305-320.

4. After leaving Employer, Claimant worked as a truck broker for Crestline Trucking in Shady Cove, Oregon, from March 1, 2012, through May 14, 2012, where Claimant said he was paid $2,500 per month plus commission.[3] TR at 136-38; CX 9 at 19; EX 46 at 849, 851. Claimant said he got the job because friends called and told him about the position. TR at 136. Following his May 7 surgery, Claimant did not work the remainder of the week, then returned to work on May 14 and quit at the end of the day. EX 46 at 845. The position at Crestline Trucking was a desk job and involved making phone calls and looking at a computer screen to arrange for loads to be picked up by trucks. TR at 136-37. Claimant said at Crestline that he was able to manage the job until he had knee surgery, and that he did not quit Crestline due to pain. TR at 138, 181. He also said that his physical limitations did not affect his ability to work. TR at 184. Claimant described Crestline as a "great job" that was supposed to be a permanent job and he would have still be there had he not been fired. TR at 136-38, 181. Claimant thought he could continue to do construction work, and even applied for construction jobs during the summer of 2012, sending out 40-50 resumes, but thought it would depend on the work and the boss if it were work he could do, though he said he

[3] Crestline Trucking provided evidence to OED that Claimant was paid $2,200 per month, and, starting on May 31, 2012, would have been paid minimum wage or commission, which ever was higher. EX 46 at 851-52. Crestline reported to the OED that Claimant averaged $440 per week during his 11 weeks of employment. EX 46 at 849.

could work with pain. TR at 152, 193. Claimant last prepared his resume in 2009 or 2010. TR at 98; *see* CX 12.

5. From January 16, 2014, until February 4, 2014, Claimant worked for Stride Construction, where he was paid $18 per hour and earned a total of $2,760.75. CX 77 at 330-34; CX 78 at 342. Claimant's work was coded for workers' compensation purposes as a mix of flooring, painting/wallpaper, and ceramic tiling, with some warehouse and delivery work. CX 77 at 331, 333; CX 78 at 342. From March 12, 2014, until April 18, 2014, Claimant worked for Paul Davis Restoration, where his work included floor covering installation, demolition, finish carpentry, siding and gutter installation, cleaning, painting and other tasks. CX 78 at 335-341. Claimant was paid $18 per hour and earned a total of $7,425.00. CX 78 at 335.

6. Claimant continued to perform remodeling work for his mother Diane Davis and her husband after the January 2012 injury, though the work had become time consuming and progressed slowly. TR at 70-71. Ms. Davis continued to give Claimant $200 per week until October 2012. TR at 84. She also paid Claimant's child support until a few months before the hearing. *Id.*

7. Prior to his injury, Claimant said he worked odd jobs from June to December 2011. TR at 115. Claimant's amended income tax returns showed he had income from construction work of $10,680 in 2011 and $3,226 in 2010. CX 11 at 21A, 21E. Claimant earned $5,490 at Employer from January 10, 2012, through February 13, 2012. CX 6 at 8; TR at 132-33. According to Claimant, in the last 10 years, he had only worked for three companies, including Employer and Crestline, and he paid no taxes between 2003 and 2009. TR at 158, 164.

Medical Treatment

8. On February 2, 2012, Claimant saw Dr. Matthew Bauer, a resident at Samaritan Family Medicine Residency Clinic. CX 20 at 49. Claimant complained of continuing low back discomfort from the January 19 accident, though the bruising had resolved and Claimant was not experiencing any numbness, tingling, or muscle weakness. *Id.* Dr. Bauer noted decreased sensation in the first and second toes of Claimant's right foot and tenderness in Claimant's right knee and lumbar spine. CX 20 at 49-52. Dr. Bauer noted that Claimant's primary complaint was knee pain, and ordered X-rays and an MRI. CX 20 at 52. Dr. Bauer expressed a desire to reduce Claimant's narcotic pain medication intake, and prescribed tramadol for Claimant's back pain. *Id.* Claimant was not taken off work by Dr. Bauer.

9. On February 14, 2012, Claimant saw Dr. Tobin Rummel, who was his primary care doctor at that time, and complained of low back discomfort and other symptoms "consistent with exacerbation of prior radicular pain" and continued right knee pain. CX 23 at 57. Dr. Rummel referred Claimant to orthopedics for an evaluation of his knee, but did not mention Claimant could not return to work. CX 23 at 58. On February 29, 2012, Dr. Page-Echols saw Claimant, who was complaining of increased back pain, shooting pain in his right buttock, and right great toe numbness. CX 51 at 145. Dr. Page-Echols prescribed methadone for pain relief. CX 51 at 147.

10. Claimant saw Dr. Page-Echols again on March 12, 2012, and was still suffering from back pain, which worsened when Claimant sat for long periods in the car. CX 52 at 149. Claimant saw Dr. Page-Echols on March 26, 2012, for hernia-groin pain, but also discussed his back. He was

taking more of the narcotic pain medication than prescribed and violated his medication management agreement. CX 44 at 125.

11. On March 20, 2012, Claimant was seen by Dr. Donald Pennington at Samaritan Orthopaedics and Sports Medicine Center for a surgical evaluation. CX 24 at 62. Dr. Pennington recorded that Claimant was experiencing pain of seven or eight out of ten, and that Claimant's right knee was swelling, popping, and giving away. CX 24 at 61. Dr. Pennington observed that Claimant's right knee was slightly effused and painful to palpitation at the medial joint line. *Id.* Dr. Pennington diagnosed Claimant with a right medial meniscal tear, a lateral meniscal tear, and chondromalacia patellofemoral articulation. CX 24 at 62.

12. On May 7, 2012, Dr. Pennington performed a right knee arthroscopy with partial medial meniscectomy and chondroplasty. CX 26 at 65. On May 15, 2012, Dr. Pennington said Claimant's surgical incisions were healing well and agreed with Dr. Page-Echols's opinion that physical therapy would benefit Claimant. CX 30 at 79-80. At a follow-up to his right knee arthroscopy on July 26, 2012, Claimant reported to Dr. Pennington that his knee had been doing well except for an episode of swelling after he worked as a DJ at a track event. CX 32 at 86. Dr. Pennington observed that Claimant was healing well and said that Claimant should return in eight weeks only if needed. *Id.* Dr. Pennington noted that Claimant's back and paresthesia from the back were going to limit him more than his knee. CX 32 at 86.

13. On June 6, 2012, Dr. Page-Echols saw Claimant again, who was still suffering from pain, weakness, and tripping related to his back injury. CX 53 at 154. Dr. Page-Echols ordered an MRI to evaluate Claimant for back surgery. CX 54 at 161. On June 26, 2012, Claimant saw Dr. Page-Echols for further back pain/sciatica and knee pain. CX 31 at 81. Claimant reported that his right knee was painful and that he hadn't been doing PT. The medical record reports that Claimant went to a triathlon on June 29, 2012, and had been having increased neck and back pain since then. CX 31 at 81. On July 17, 2012, Claimant reported the he was helping set tile at this parent's home, but was having some increased pain. CX 54. On August 21, 2012, Claimant saw Dr. Page-Echols with continued back and knee pain. CX 55 at 164. Claimant found that his back pain was worse when standing for long periods of time and stepping on his left foot, but was better with ice, heat, and stretching. CX 55 at 163. MRIs taken on August 28, 2012, revealed a congenitally small canal, mild degenerative disk disease, mild central spinal stenosis, and mild disk bulging in Claimant's spine. CX 56 at 168.

14. On October 30, 2012, Claimant was seen by Daniel Stenger, a physician's assistant, who noted that Claimant continued to experience knee pain which was consistent with residual chondromalacia, with possible influence from residual muscle weakness, lack of rehab, and ongoing low back symptoms. CX 33 at 87-88. Claimant had not been authorized for PT and had not been compliant with exercises on his own. CX 33 at 87. Claimant had continued low back problems with pain radiating into right leg laterally at the thigh and lower leg with associated numbness and tingling in the lateral margin of his right foot. CX 33 at 87.

15. Claimant saw Dr. Page-Echols on November 15, 2012, to receive a steroid injection in his right knee. CX 34 at 90. During the visit, Claimant told Dr. Page-Echols that his knee pain had worsened since the surgery and his back pain remained problematic; he was unable to be active, and he was still experiencing numbness in his right great toe and occasionally in his second toe. CX 34 at 89.

16. Claimant saw Mr. Stenger again on December 17, 2012, and told him that the November 15 injection had been effective for about one week, but that his pain had recently increased significantly. CX 35 at 93. Claimant continued to complain of low back pain which would sometimes radiate into the right leg at the thigh and lower leg, as well as tingling and numbness. *Id.* Claimant saw Mr. Stenger on January 10, 2013, and his pain had improved. CX 36 at 100.

17. On January 22, 2013, Claimant saw Dr. Page-Echols for a medication and pain review. CX 57 at 169. Claimant was experiencing stiffness in his legs and increasing numbness, with complaints of poor sleep secondary to his back pain. *Id.* However, Claimant said that he was able to do some work at his parents' house. *Id.* Dr. Page-Echols noted that Claimant's symptoms appeared to be increasing and prescribed amitriptyline to help Claimant sleep. CX 57 at 171. CX 57.

18. A follow up appointment with Mr. Stenger on February 21, 2013 showed little change in Claimant's condition. CX 37 at 103. Mr. Stenger noted that Claimant's attempts at strengthening his knee through exercises were limited by his radicular complaints. *Id.* Claimant said that his knee was not as a big of a problem as his back, but it was still painful. *Id.*

19. Claimant saw Dr. Page-Echols again on March 21, 2013, with increased back pain and no change in activities or recent trauma. CX 58 at 173. Dr. Page-Echols recorded that Claimant was continuing to experience right leg pain and was also having some pain in his left leg. Claimant expressed interest in increasing his pain medication dosages, but Dr. Page-Echols was unclear as to what benefit that might give and was concerned with his escalating the dosage. CX 58 at 174. Dr. Page-Echols referred Claimant to pain management for consideration of Claimant's medical management and spinal injections. *Id.* Dr. Page-Echols also stopped Claimant's amitriptyline due to concerns about over-sedation. CX 58 at 175.

20. Dr. Page-Echols saw Claimant again on April 30, 2013. CX 60 at 177. Due to his lack of insurance, Claimant was unable to see a pain management specialist but had been relatively stable neurologically over the prior year. CX 60 at 179. On May 23, 2013, Claimant saw Dr. Page-Echols again related to back pain. CX 60 at 183. He also asked for letter regarding child support and told the doctor that he had been doing countertops and labor, but lost his job due to back pain issues and was not able to work. *Id.* Claimant had gone back to school to find a job with less labor. *Id.*

21. On July 16, 2013, Dr. Evans, who took over Claimant's treatment from Dr. Page-Echols, observed that Claimant did not appear fit for most work, and prescribed a trial of prednisone. CX 68 at 245, 259; CX 74 at 287. Claimant reported radicular pain that traveled down both legs and was taking Neurontin, with some numbness in his right big toe but no other numbness in feet or legs. EX 40 at 700. Dr. Evans observed that Claimant appeared uncomfortable in position, had stiff motion and slow movements, and reported that Claimant's pain was worsening with time. CX 74 at 287-88. On August 4, 2013, Claimant went to the ER with an acute back strain as a result of reaching under a cabinet at home. CX 74 at 287. He saw Dr. Evans again on August 5, 2013, after two ER visits and said that his back was the worse it had ever been. CX 74 at 287. Claimant was given a temporary increase in oxycodone because he ran out early. EX 40 at 708. Claimant had an MRI at Dr. Evans's request on August 21, 2013, which revealed little change from prior MRIs. CX 74 at 295-96. On August 22, 2013, Claimant saw Dr. Evans with edema in both

legs, which had improved significantly by a visit with Dr. Evans on August 29, 2013. CX 74 at 302. Dr. Evans noted that Claimant's radicular pain was closer to baseline as well. EX 40 at 699.

22. On September 16, 2013, Dr. Evans wrote a letter to Claimant's attorney noting that, "I am of the opinion that follow-up surgical opinion as well as other options of care is needed prior to declaration of any stationary status. Long term, these injuries and current conditions represent a state in which it would be advised that [Claimant] not return to shipyard work or any manually laborious work for that matter." EX 40 at 730. He also opined that Claimant's symptoms "have been debilitating to his mobility and function not allowing him to work." CX 61 at 188. Dr. Evans opined that based upon Claimant's condition, he should not perform manual labor work. *Id.*

23. In a follow up letter dated October 3, 2013, Dr. Evans set work limitations for Claimant that he not engage in repetitive bending or stooping, engage in minimal twisting activity such as common daily movements, no repetitive twisting, no lifting, pushing, or pulling weight greater than 20 pounds, limit kneeling to avoid concurrent stooping and bending, engage in squatting as tolerated, and to allow for change in position between sitting and standing up to once every fifteen minutes. CX 62 at 189. Dr. Evans noted that Claimant had persistent complaints of right great toe numbness since January 23, 2012, and had not improved. *Id.* Dr. Evans thought the numbness may be related to changes at L4-5 level because of noted mild spinal stenosis and neuroforaminal narrowing, and his prior MRI showed mild canal stenosis and facet arthropathy. *Id.* He suggested further review by a radiologist to distinguish the significance of neuroforaminal changes to account for the right toe paresthesia. *Id.*

24. Dr. Evans saw Claimant again on October 17, 2013, and observed that Claimant had less need for a staff or cane, and that Claimant was over his acute pain and was close to baseline. CX 74 at 306-07. Dr. Evans opined that Claimant's back issues had a causal relationship to his 2010 and 2012 work injuries, and that Claimant remained disabled at "some level" from manual work. CX 74 at 306-07. Dr. Evans thought Claimant should be seen by a neurosurgeon for follow-up even with unchanged MRI findings. *Id.* at 736.

Dr. Evans' Deposition

25. Dr. Evans gave a deposition on November 5, 2013. CX 76 at 313. He is a board certified practitioner of family medicine at Samaritan Family Medicine in Corvallis, and he treated Claimant for his lower back complaints beginning on July 16, 2013. CX 76 at 314-15, 317. Dr. Evans last examined Claimant on October 17, 2013, and at that time was of the opinion that Claimant's back had returned to his baseline prior to flare-ups in July and August 2013. CX 76 at 318. Dr. Evans thought Claimant needed a neurosurgery evaluation because he continued to show symptoms related to his injuries, and further evaluation was necessary before saying he was at MMI. CX 76 at 318. Claimant had not been able to pursue a neurosurgery evaluation due to financial constraints. CX 76 at 319. Dr. Evans did not believe that Claimant could return to construction work or to tile and carpentry work in the shipyard. CX 76 at 318-19. Dr. Evans opined that Claimant has been at least moderately limited for repetitive use of his lumbar spine since 2010, and that Claimant's spine was vulnerable to injury prior to the January 2012 accident. CX 76 at 321.

Dr. Pennington's Deposition

26. Dr. Pennington gave a deposition on September 19, 2013. CX 67 at 229; EX 36. He is a board certified orthopedic surgeon and treats the sports teams of Oregon State University for orthopedic injuries. CX 67 at 237. Dr. Pennington thought Claimant had reached MMI on July 26, 2012, for the right knee, and his treatment after July 26, 2012, was not related to his work injury, but rather to Claimant's pre-existing osteoarthritis. CX 40 at 108, 110; CX 67 at 237. Dr. Pennington also said that Claimant would have no current physical limitations related to the January 2012 knee injury. CX 40 at 110. On September 24, 2013, Claimant's attorney submitted five questions to Dr. Pennington that he forgot to ask at the deposition. CX 40 at 108-09. In response to the question, "do you feel that [Claimant] could have returned to either shipyard construction work or general construction work before he was medical stationary due to the right knee," Dr. Pennington replied on September 26, 2013, "I do not feel that [Claimant] could have returned to the shipyard construction work or general construction work before he was medically stationary." CX 40 at 110. Dr. Pennington did not place any limitations on Claimant's right knee. *Id.* Claimant did not need any further treatment for his right knee, but did for his ongoing osteoarthritis. CX 40 at 110.

Dr. Page-Echols's Deposition

27. Dr. Page-Echols gave a deposition on September 19, 2013. CX 68 at 244; EX 37. Dr. Page-Echols is board certified in family medicine, and has been practicing as a full physician since completing his residency in June 2013; he treated Claimant as a resident from January 2012 until May 2013. CX 68 at 245, 248. Dr. Page Echols opined that Claimant's subjective symptoms appeared to be out of proportion to the objective findings and did not correlate to the symptoms such as reflexes and other strength findings, but his sensory deficits could correlate to MRI findings. CX 68 at 250, 253, 260-61. He also noted that Claimant's right great toe and foot numbness correlated with MRI scans of Claimant's back and with a diagnosis of radiculopathy. CX 68 at 250-51. Dr. Page-Echols thought Claimant should engage in routine activities like cooking and cleaning, but avoid activities that required lifting, bending, and twisting. CX 68 at 259. Dr. Page-Echols said that he was hoping Claimant could go back to full time work in the shipyards after the incident, but he was not sure if that would have been a good idea. CX 68 at 261. Dr. Page-Echols wrote a letter putting Claimant on modified duty because Claimant was having financial issues and wanted to keep working. CX 68 at 260. Dr. Page-Echols said: "I know we were hoping that he would go back to full-time duty but based on his symptoms, I'm not sure if that would have been a good idea. I don't know if I can say much more than that." CX 68 at 261.

Dr. Woodward's IME and Deposition

28. Dr. Anthony Woodward performed an IME of Claimant on October 22, 2012, at Employer's request. EX 23 at 403. After reviewing additional medical records and imaging studies, Dr. Woodward amended his IME report on November 9, 2012. EX 23 at 423. Dr. Woodward is board certified in orthopedic surgery and was in active practice for approximately twenty-four years, but since 1997 has been performing only IMEs on a full-time basis. EX 35 at 545; EX 48 at 888, 911-12. Between January 22, 2012 and February 7, 2012, there were only four days that Claimant did not work 10 to 13 hour days and Claimant worked overtime even after the work incident. EX 23 at 414, 419. Dr. Woodward opined that Claimant did not have a permanent aggravation of his pre-existing spinal condition as a result of the January 2012 accident. EX 23 at 418. Claimant also had pre-existing, but not disabling, chronic low back pain, which made it more likely he would report

additional low back injuries. EX 23 at 420. However, based upon his work schedule, Claimant's work capacities were not limited before or after the January 2012 accident. *Id.* After reviewing additional records, Dr. Woodward diagnosed Claimant with a lumbar strain/contusion which had resolved. EX 23 at 431.

29. Dr. Woodward gave a deposition on September 9, 2013. EX 35 at 543. He currently performs about 200 IMEs each year. EX 35 at 545. Dr. Woodward faced three malpractice claims while in private practice; two of the claims were dismissed, and the third, for an amputation of a leg, was settled out of court. *Id.* After the amputation, which occurred in the 1990s, Dr. Woodward's emergency room privileges for unassigned patients were restricted for one year. *Id.* He did not think that the small right paracentral disc bulge at L5-S1 that he saw on the MRI of August 25, 2012, had any medical significance to Claimant's low back problems. EX 35 at 550. It was a very small bulge, and those who do not have back pain often have disc bulges. EX 35 at 550. He noted a lumbar strain contusion that resolved because a later doctor said the bruising had resolved, and a lumbar strain should resolve within 3 months. EX 35 at 551, 553-54. He noted a slight difference in techniques, but there was no difference in the MRI from 2011 and 2012, except that the 2012 had less abnormality. EX 35 at 552. Lumbar tissue is soft tissue and Claimant's injury was not severe enough to show on MRI, and the naturel course was to heal within a few weeks. EX 35 at 553. Claimant has chronic low back pain, which will persist with or without a new injury, and the general advice for low back pain sufferers is to do whatever they can. EX 35 at 553. He opined that Claimant had no physical work limitations related to his accident. EX 35 at 549.

30. On November 22, 2013, Dr. Woodward was deposed again for perpetuation purposes. EX 48 at 887. Dr. Woodward explained that Claimant's big toe numbness indicated a nerve injury close to the toe, as opposed to near the spine itself, and the lack of any observable pathology or lesion on Claimant's spine suggested no spine injury. EX 48 at 892. Dr. Woodward disagreed with Dr. Evans to the extent that Dr. Evans believed that Claimant's accident played a role in his current back condition. *Id.*

Claimant's History of Back Complaints

31. On July 6, 2010, Express Employment Professionals, a temporary staffing agency, hired Claimant, and the next day sent him to a Hewlett-Packard facility where he injured his back moving cubicles. TR at 98-99; EX 5 at 38; EX 10 at 97. Prior to the incident at Express Employment, Claimant said his back was in "fair" condition, with only occasional pain; he took no medication and had not had any medical treatment for back injuries. TR at 99.

32. When Claimant saw Dr. Ferguson on November 29, 2010, Dr. Ferguson noted that he could not explain Claimant's continued pain. EX 10 at 127. No improvement was noted on Dr. Ferguson's examination of December 7, 2010. EX 10 at 130. On December 21, 2010, Claimant and Dr. Ferguson discussed the results of Claimant's IMEs, and Dr. Ferguson agreed that Claimant had degenerative lumbar disc disease. EX 10 at 132. Dr. Ferguson restricted Claimant's work duties to no more than five minutes of walking or standing at a time. EX 10 at 155. On January 14, 2011, Dr. Ferguson noted that he would like for Claimant to see a neurosurgeon. EX 10 at 135.

33. On March 15, 2011, Dr. F. Clifford Roberson, a neurosurgeon, recommended that Claimant have a right L5-S1 microdiscectomy, which he reiterated on June 23, 2011, in response to Dr. Williams' second medical evaluation of Claimant. EX 13 at 216, 237. On June 15, 2011, Dr.

Ferguson discontinued treatment of Claimant after seeing video of Claimant lifting groceries, mowing the lawn, and playing volleyball. EX 10 at 176, 179. Dr. Roberson stated on September 6, 2011, that he no longer thought that surgery on Claimant's lower back was advisable. EX 13 at 240.

Vocational Evidence

Employer's Expert -- Ms. Broten's Analysis and Deposition

34. Elizabeth Broten prepared a labor market survey dated October 22, 2013, at the request of Employer. EX 38 at 653. Ms. Broten has a Master's degree in Social Work, is a licensed clinical social worker and a vocational rehabilitation counselor in Oregon; she has been certified as a vocational counselor since 1986. TR at 247; EX 30 at 523. Ms. Broten interviewed Claimant on September 24, 2013, and also reviewed Claimant's medical records, resume, and educational documents. EX 38 at 653-54. At the time she interviewed Claimant, he lived in Corvallis, Oregon. EX 38 at 654. She thought the work history Claimant provided to her was incomplete and that he minimized the details of his work skills described in his resume and omitted employers he worked for. EX 38 at 655. Claimant is a high school graduate, with some college. EX 38 at 657. She thought Claimant could work in sedentary-light jobs that are customer service and management relates, with clerical components. EX 38 at 674. Ms. Broten found Claimant to be personable and a good communicator, but thought that he had minimized his skills and abilities during their interview even though she thought Claimant lacked the skill set to work as a shipyard carpenter. TR at 252-53, 258. Ms. Broten explained that, when evaluating Claimant's skills, she inferred from Claimant's enrollment in online classes and a computer course that he had some computer skills. TR at 265-66. Ms. Broten identified jobs using a twenty to twenty-five pound lifting restriction and allowing for interchangeable positioning between sitting, standing, and walking. TR at 269; EX 38 at 656. Claimant described these limitations to Ms. Broten, as she was not provided with specific physical limitations until October 21, 2013, the day her report was due. TR at 269, 319; EX 38 at 656-57. After receiving Dr. Evans's description of Claimant's physical limitations, Ms. Broten finalized her report, re-contacting some employers using the limitations of lifting no more than twenty pounds occasionally and no repetitive stooping, climbing, bending, twisting, or crawling, as well as allowing for interchangeable positioning. TR at 319; EX 38 at 656. She primarily reviewed jobs in the sedentary to light range. EX 38 at 657. When Ms. Broten spoke to potential employers, she told them Claimant could not work construction jobs. TR at 269.

35. Ms. Broten identified eleven positions in Corvallis, Albany, Salem, Eugene, and Portland, Oregon. EX 38 at 663-74. Ms. Broten noted Claimant had a serviceable vehicle and Albany, Salem, and Eugene are 13, 40, and 49 miles respectively from Corvallis.[4] EX 38 at 654. Ms. Broten identified positions in Portland because Claimant had been injured in Portland. EX 38 at 653. All of the positions identified had current openings or had been open during the previous 60 days. TR at 283. In her report, she usually included the names and phone numbers of her contacts at each job, but she did not do so in this case because she thought Mr. Stipe, who was Claimant's vocational expert, would have hostile or threatening communications with her contacts, and she did not think the lack of contact information would impede Mr. Stipe. TR at 271, 317.

[4] *See* MAPQUEST, http://www.mapquest.com/ (last visited Jan. 16, 2015).

36. The positions she identified included: retail sales associate, cashier, and customer service specialist positions at Petco in Corvallis and Albany, paying $9-$9.50/hour; a video rental clerk position at Blockbuster Video in Albany, paying $8.95/hour; a customer service representative position at U-Haul in Corvallis, paying $9/hour; a front desk clerk position at Motel 6 in Corvallis, paying $8.95/hour; a retail sales associate position in Corvallis, paying $13-$14/hour, and a retail store manager trainee position in Salem, paying $30,000-$90,000 annually, at Firestone Car Care; a bank teller position, paying $12.38-13.46/hour, and a financial advisor trainee position, paying a competitive salary and commissions up to $40,000-$50,000 per year, at Wells Fargo in Corvallis and Albany; a customer service advisor position at Jiffy Lube in Corvallis and Albany, paying $9.50/hour; a product support specialist position at Garmin AT in Salem, paying $14/hour; dispatch, security guard, and gate guard positions at Securitas in Eugene, Albany, and Portland, paying $9-$11/hour; a rental customer service position at Hertz Rental Car in Portland, paying $9.20-$9.70/hour; and a mall security officer position at the Lloyd Center/Integrated Systems Security in Portland, paying $11.33/hour. EX 38 at 663-74.

37. Ms. Broten spoke to staff at Petco who said the positions were in the process of being modified and would be performable by someone with Claimant's physical limitations. TR at 272-73. Ms. Broten said employees at Blockbuster told her that they were able to sit during slow periods and that the job could be modified to avoid lifting of thirty-five pound boxes. TR at 274-75. Similarly, Ms. Broten testified that her contact at U-Haul told her that a lifting restriction like Claimant's could be accommodated. TR at 275. Ms. Broten explained that her contact with Motel 6 specifically told her that Motel 6 hires employees with disabilities to work their front desks. TR at 276-77. Since submitting her labor market survey, Ms. Broten identified an additional position as a front desk clerk at a Best Western in Corvallis and Albany. TR at 277. Ms. Broten agreed that the positions which she identified at Firestone Car Care would involve lifting no more than thirty pounds. TR at 279. She also said that tellers at Wells Fargo were able to sit on stools, and lifting of heavy weights could be accommodated. TR at 280-81. According to her Wells Fargo contact, the financial advisor trainee position did not require a bachelor's degree, and Claimant's entrepreneurial background would be a positive. TR at 282-83. Even though the Jiffy Lube position required prior customer service experience, Claimant met that requirement, and though the position would require some driving to move cars, it primarily consisted of guiding cars into repair bays and client interaction, allowing Claimant to change positions frequently. TR at 288-89. For the product support specialist with Garmin, Ms. Broten's contact indicated that a headset could be worn and an adjustable height desk used, allowing Claimant to change position frequently. TR at 290. Ms. Broten said that Securitas would also be able to accommodate Claimant's physical limitations. TR at 291. She noted in her labor market survey that the Securitas location in the Corvallis area had only a part-time position. EX 38 at 672. Ms. Broten's contact at Hertz told her that the position she identified allowed sitting. TR at 292. At Lloyd Center/Integrated Security Systems, Ms. Broten spoke with a contact who told her that there was no lifting required in the position, and while the job required climbing of stairs and patrolling a parking lot, the stairs did not need to be climbed quickly and a mall vehicle was used for patrols. TR at 293-94.

38. Ms. Broten submitted her job analysis report to Dr. Evans, who reviewed the positions and approved them on October 31, 2013, in light of Claimant's limitations. EX 43. Dr. Evans approved the positions of: bank teller at Wells Fargo; product service specialist at Garmin AT; consumer care advisor at Jiffy Lube, provided that the position did not include cross-covering of service tech positions; front desk clerk at Motel 6; and video rental clerk at Blockbuster video, with a comment questioning whether the job description, which mentioned VCRs and videotapes,

was out of date. EX 43 at 773-78, 783-89, 793-95. Dr. Evans did not approve the position in rental customer service at Hertz Rent-a-Car due to concerns about repetitive stooping and bending motions involved in washing and cleaning cars. EX 43 at 779-82. Dr. Evans also did not approve the position of retail store manager trainee at Firestone Car Care as the position required pushing, pulling, and lifting thirty pounds, more weight than Dr. Evans had recommended. EX 43 at 790-92.

39. Claimant said he applied for "every one of the jobs" identified by Ms. Broten except for the jobs located in Portland, because he considered the commute to be impractical. TR at 150-52. Claimant said he called the jobs and asked how to apply. *Id.* at 151. Wells Fargo had two positions. He faxed his information to one and went in and got an application and then faxed it back for the other. *Id.* He applied in person to Jiffy Lube, faxed a resume to Motel 6, which was now a Comfort Inn, and applied online for the rest of the jobs. *Id.* He also sent out 40-50 resumes for construction jobs in the summer of 2012. TR at 152.

Claimant's Expert -- Mr. Stipe's Analysis and Deposition

40. Scott Stipe, a vocational expert hired by Claimant, has a Master's degree in Rehabilitation Counseling and is a licensed professional counselor in Oregon, a certified rehabilitation counselor, and a Diplomate, American Board of Vocational Experts. CX 13 at 24. Taking into account Claimant's work background, Mr. Stipe thought that Claimant would have had an earning capacity of $1000 per week had he not been injured. TR at 199. Mr. Stipe based this earning capacity calculation on information from labor market contacts and from the State of Oregon Employment division regarding workers with backgrounds similar to Claimant's. TR at 198-99. Based on this information, Mr. Stipe opined that a wage of $25 per hour appropriately represented Claimant's earning capacity had he not been injured. TR at 199; CX 8 at 17.

41. Mr. Stipe testified that he also investigated each of the job openings identified by Ms. Broten, and found many unsuitable for Claimant. TR at 203. The Petco and U-Haul jobs identified by Ms. Broten were unsuitable for Claimant because both required him to lift more than 20 pounds and Claimant would be unable to frequently change position between sitting and standing in either position. TR at 203-04, 205. Mr. Stipe opined that the Blockbuster and Wells Fargo teller jobs would be unsuitable for Claimant because frequent sitting was not allowed in either position. TR at 205, 206. The Jiffy Lube position was unsuitable because it required person-to-person sales experience, which Claimant did not have, and would not permit frequent sitting. TR at 207. The position at Garmin was unsuitable for Claimant because it required experience with technical computer issues and would not permit frequent changes between sitting and standing, and the Securitas job was unsuitable because it did not allow for frequent change between sitting and standing. TR at 208-09. The Hertz Rental Car position was unsuitable because it did not allow sitting, as was the mall security guard job because of the high physical demand requirements, such as climbing stairs, walking for an eight hour day, pushing wheelchairs, patrolling on a mountain bike, and lifting 25-50 pounds. TR at 210-11. Mr. Stipe thought Claimant was most suitable for the Wells Fargo or Motel Six jobs, but he thought it was improbable that Claimant would be hired for either job if he diligently applied. TR at 212-14.

42. Mr. Stipe said that, due to Claimant's lack of computer skills and limited touch-typing ability, it was unlikely that he would be hired for the Motel 6 position. TR at 213. Mr. Stipe had similar reservations about Claimant's suitability for the Hertz Rent-A-Car position. TR at 222. Due to Claimant's lack of retail background, cash handling experience, and computer skills, Mr.

Stipe thought that Claimant would likely not be hired by Wells Fargo as a bank teller. He also said that the Wells Fargo financial advisor trainee position required the applicant to start as a teller, and that the position almost always required a college degree. TR at 218-19. Claimant's lack of customer service and cash handling experience was cited by Mr. Stipe as a reason that Claimant would be unlikely to be hired at Petco, Blockbuster Video, or U-Haul. TR at 215-17. Mr. Stipe opined that Claimant's lack of automotive experience made him a poor candidate for the Jiffy Lube position. TR at 220. Mr. Stipe said that Claimant's lack of computer, customer service, and data entry skills made him an unlikely candidate for the Garmin AT position. TR at 220-21. While Mr. Stipe allowed that the security guard positions at Securitas and the Lloyd center might be able to make accommodations for Claimant's limitations, the jobs which allowed for sitting rather than walking or bicycling would not be available to a new hire. TR at 221-22.

II. Analysis and Legal Conclusions

On remand, the BRB noted that "the administrative law judge did not address the effects of claimant's right knee treatment and surgery on his ability to perform his usual work as of the date of the surgery, May 7, 2012." *Scarbrough v. Shannon Wagner*, BRB No. 15-0199, slip op. at 5 (Feb. 23, 2016) (unpub.). The BRB also noted: "If claimant established his inability to perform his usual work due to his work injury for any period, he has made out a prima facie case of total disability and is entitled to total disability benefits unless employer established the availability of suitable alternate employment during any period in which claimant was unable to work." *Id.* citing *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

A. Nature and Extent of Claimant's Disability

The initial burden of proving the nature and extent of disability lies with Claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902(10). A disability compensation award requires a causal connection between the claimant's physical injury and his inability to obtain work.

The extent of disability is classified as total or partial, depending on the claimant's ability to continue to work in light of his or her disability. A claimant is presumed to be totally disabled where he can establish that a work-related injury prevents his from performing or returning to his usual employment. *Edwards v. Dir., OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993) *cert. denied*, 511 U.S. 1031 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988). A claimant has the burden of proving a prima facie case of total disability by showing he cannot return to his regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1984). A claimant's "usual" employment is the job and regular duties he was performing at the time he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). A claimant's credible complaints of pain alone may be enough to meet this burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983). The Section 20 presumptions do not apply to the analysis of nature and extent. *Carlisle v. Bunge Corp.*, 33 BRBS 133, 138 (1999), *aff'd*, 227 F.3d 934 (7th Cir. 2000). To determine whether a claimant has carried his prima facie burden of establishing an inability to return to usual employment, the ALJ must compare "the medical

opinions regarding claimant's physical limitations with the requirements of his usual work" at the time of the injury. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

1. May 7, 2012, to July 26, 2012

a. Claimant was totally disabled

Claimant contends that he is entitled to temporary total disability from May 7, 2012, to July 26, 2012, because he was unable to work at his usual job at the time of injury. Employer contends that Claimant is not entitled to any additional disability. After reviewing the entire record, I am persuaded that Claimant has shown he was totally disabled for the period May 7 to July 26, 2012.

Claimant left his employment with Employer on February 13, 2012, which was consistent with the temporary nature of his hire by Employer. After leaving Employer, Claimant was unemployed until March 1, 2012, when he went to work at Crestline Trucking as a truck broker. Claimant said working at Crestline was a great job. F.F. ¶ 4. The job physically was a desk job making phone calls and looking at a computer for loads and trucks in that were in the area. *Id.* Claimant said it was supposed to be a permanent job and he would still be there if he were not terminated. *Id.* Claimant has a long history of intermittent work and his work at Crestline was consistent with his work history. F.F. ¶¶ 5-7. Claimant continued to complain of knee and back pain while employed at Crestline, and eventually had knee surgery on May 7, 2012. Claimant contends that he was unable to work at Crestline after the surgery and did not return to work there until May 14, 2012, when he voluntarily quit his job.[5] Claimant's knee reached MMI on July 26 2012.

At his deposition, Dr. Pennington said Claimant could not have returned to work as a general construction laborer or tiler-setter until July 26, 2012, the date Claimant's right knee reached MMI. F.F. ¶¶ 26. Claimant reported to Dr. Page-Echols that he had participated in a triathlon in June 2012 and also told Dr. Pennington that he had done some DJ work during the same period. It was apparent that Claimant was capable of much more activity prior to July 26 but neither Dr. Pennington nor Dr. Page-Echols addressed this information. In reference to Claimant's right knee, Dr. Pennington said in a letter dated September 26, 2013, that "I do not feel that [Claimant] could have returned to shipyard construction work or general construction work before he was medically stationary." F.F. ¶ 26. There was contrary evidence by Dr. Woodward, who was Employer's expert, but as I determined in the 2015 D&O, I found his testimony less persuasive than that of the treating doctors, and particularly that of Dr. Pennington. 2015 D&O at 28-30.

Moreover, Dr. Page-Echols said Claimant should not return to tile-setting when he first examined him on January 23, 2012, even though he released Claimant to what he called "modified duty" but was essentially full duty. He suggested that Claimant work with the ability to change positions frequently and avoid excessive bending, but he stopped short of imposing work restrictions. F.F. ¶ 3. Dr. Page-Echols tried to keep Claimant working because he knew about his financial issues. *Id.* At his September 2013 deposition, Dr. Page-Echols said Claimant should avoid

[5] Claimant argued at the original hearing that he was terminated, but I determined previously that he voluntarily quit his work at Crestline, which was affirmed on appeal. *Scarbrough v. Shannon Wagner*, BRB No. 15-0199, slip op. at 4 (Feb. 23, 2016) (unpub.).

lifting, bending, and twisting, which are inconsistent with tile-setting and construction laborer work. *Id.* Dr. Page-Echols said he did not think it would be a good idea for Claimant to return to work, but he was not sure he could say more than that. *Id.* At his deposition in November 2013, Dr. Evans opined that Claimant was not capable of returning to tile work, painting, or carpentry, either at a shipyard or in construction, but he did not elaborate on his answer. F.F. ¶ 25.

On the whole, I find that the medical information from the treating doctors established that Claimant was unable to do his usual work and was totally disabled for the period of May 7 to July 26, 2012. I was not persuaded by Claimant's testimony alone, and but for the medical testimony, would not have found him disabled while working at Crestline. The evidence showed that Claimant overstated his subjective complaints and Dr. Page-Echols articulated that Claimant's subjective complaints did not comport with any objective findings. F.F. ¶ 27. Further, Claimant continued to work in construction for Employer even though Dr. Page-Echols suggested he should not, and Dr. Woodward pointed out that between January 22, 2012 and February 7, 2012, while Claimant worked for Employer, there were only 4 days that he did not work 10 to 13 hour days, which included overtime after the work incident. F.F. ¶ 28.. I find Claimant's credibility suspect and his ability to work those additional hours after his back and knee injury belies the extent of his injury and suggests that he was not as disabled as he said he was.

Even though I found Claimant's credibility to be suspect, I am nevertheless persuaded by the medical testimony, particularly the opinion of Dr. Pennington that Claimant was unable to work his usual employment until his knee reached MMI. Therefore, I find Claimant established that he was totally disabled from May 7 to July 26, 2012.

b. Claimant had wage earning capacity

Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate 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. *Hairston*, 849 F.2d at 1196; *Edwards*, 999 F.2d at 1375. The ALJ must establish a precise dollar amount for post-injury wage-earning capacity. *Harrison v. Todd Pac. Shipyards*, 21 BRBS 339, 345-46 (1988); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988). Even though Employer did not establish suitable alternative employment for the period of May 7 to July 26, 2012, the record shows that Claimant was working in alternative employment on his own accord and the wages from his employment can fairly and reasonably establish his wage earning capacity. *See Ron M. Brooks v. Newport News Shipbuilding and Dry Dock Company*, 26 BRBS 1, 6 (1992) (Claimant's actual post-injury employment can constitute suitable alternate employment.).

Regarding the period at Crestline, the position was suitable for Claimant as it was a sedentary job and did not require him to bend, kneel or otherwise engage in the activities he did while working on the *Ocean Peace*. Claimant said the job was mostly a desk job looking at a computer screen and he thought it was a great job. Claimant did not leave his work at Crestline for any reason related to pain or his back or knee injuries, and I do not find that Claimant had any work restrictions for the period of May 7 to July 26, 2012. Dr. Page-Echols said on January 23, 2012, that Claimant should work modified duty, with an upright position if possible, and limit frequent changes of position and excessive bending at the waist. F.F. ¶ 3. Even if the Dr. Page-Echols limitations were considered work restrictions, the Crestline position fell within those limitations. When Claimant saw Dr. Pennington on July 26, 2012, Claimant reported that his knee had been sore after working a DJ job

and told Dr. Page-Echols that he attending a triathlon on June 29, 2012. F.F. ¶ 13.This information was not fully developed in the record, but I find that a reasonable inference was that Claimant was active and able to engage in more physical activity and exercise than his doctors considered.

At the time he was working at Crestline, Claimant said his position paid $2,500 per month. More persuasive evidence, however, was offered by his Crestline employer that his salary was $2,200 per month, though he averaged $440 per week while employed there. F.F. ¶ 4. His position reverted to minimum wage or commission, whichever paid more, on May 31, 2012, which was when his 90 day training period ended.[6] *Id.* There was no credible evidence that Claimant would not have successfully completed the training period but for his decision to leave the position. Claimant's attorney argued that without evidence from Crestline that it would have kept him past 90 days, it was incumbent upon Employer to show suitable alternative employment. I disagree. The record demonstrates that Claimant had a fulltime position that he said he enjoyed, and was not manual labor. There was no evidence that the job was only temporary or would not have continued after the training period ended. Claimant was off work from May 7 to May 13, 2012, due to his surgery and therefore had a temporary total disability for that period. He returned to work on May 14, 2012, and then quit his job. F.F. ¶ 4. Therefore, because Claimant found suitable alternative work that as within any limited restriction he had for working at that time, I find that Claimant was only partially disabled for the period of May 15, 2012, to July 26, 2012.

c. Claimant had a temporary partial disability

Section 8(h) provides that the post-injury wage earning capacity of a partially disabled employee pursuant to Section 8(e) shall be equal to the employee's actual earnings if they fairly and reasonably represent wage earning capacity. If they do not, or if he has no actual earnings, the ALJ may fix a reasonable wage earning capacity "having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend into the future." 33 U.S.C. § 908(h). The statute mandates a two-part analysis: 1) If the employee is working post-injury, do his actual wages fairly and reasonably represent his wage earning capacity? 2) If they do not, or he is not working, what is the reasonable dollar amount of his wage earning capacity, giving due regard to the nature of his injury, the degree of his physical impairment, his usual employment, and any other factors affecting his ability to earn wages in his disabled condition, including the future effects of the disability? *See*, *e.g.*, *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796-97 (D.C. Cir. 1984), *vac'g and remanding* 15 BRBS 233 (1983); *Burch v. Superior Oil*, 15 BRBS 423, 426 (1983); *Devillier v. Nat. Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The ALJ need not consider the second prong if the first prong is met.

Where claimant is working, the same factors are considered in addressing whether his actual earnings equal his wage earning capacity as are used in addressing an alternate earning capacity. *Devillier*, 10 BRBS at 656. The party contending that the employee's actual earnings are not

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[6] Claimant has argued that any evidence from the OED hearing should not be used in this hearing. *See* FN 1, *supra.* I do not find that argument persuasive. The OED statute referenced by Claimant speaks to the findings made by the tribunal in the hearing, not to the evidence offered at the unemployment hearing. Here, the evidence relied upon by Crestline at the unemployment hearing was also submitted in this matter. I find it persuasive, and that it actually benefits Claimant related to his wage earning capacity. Based upon Claimant's testimony, his wage earning capacity at Crestline was $625 ($2,500 per month/4). I am more persuaded by the evidence from Crestline about his earnings.

representative of his wage earning capacity has the burden of establishing an alternative reasonable wage earning capacity. *See*, *e.g.*, *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1043 (5th Cir. 1992); *Misho v. Dillingham Marine & Manufacturing*, 17 BRBS 188, 190 (1985). The ALJ must establish a precise dollar amount for post-injury wage-earning capacity. *Harrison v. Todd Pac. Shipyards*, 21 BRBS 339, 345-46 (1988); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988). The wage-earning capacity must be discounted to reflect the wages the post-injury job would have paid at the time of claimant's injury using the percentage change in the National Average Weekly Wage ("NAWW") between the time of injury and the time the wage for the job was given. *Quan v. Marine Power & Equip.*, 30 BRBS 124, 127 (1996); *Richardson v. Gen. Dynamics*, 23 BRBS 327, 330-31 (1990).

Claimant's wage earning capacity while employed at Crestline from March 1, 2012, to May 14, 2012, was $440 per week, which I find fairly and reasonably represents his post-injury wage earning capacity. Claimant voluntarily took the position at Crestline, which was reasonable in light of the nature of his knee and back complaints. Claimant said it was a great job and that his ability to work was unaffected by his back and knee. Temporary partial disability benefits are calculated as two-thirds of the difference between the injured workers' wage earning capacity while temporarily partially disabled and his average weekly wage ("AWW") before the injury. 33 U.S.C. § 8(e). Claimant's AWW at the time of his injury at $428.07. 2015 D&O at 42-44. Because Claimant earned more money at Crestline than he did while working for Employer, he had no loss of income related to his injuries and is not entitled to any further disability for the period of May 15 to July 26, 2012. When his training period ended on May 31, 2012, Claimant would have earned the Oregon minimum wage, which, in 2012, was $8.80 per hour or $352 per week.[7] Therefore, from May 15, 2012, to May 30, 2012, I find that Claimant had a temporary partial disability based upon an AWW of $428.07 and a wage earning capacity of $440 per week. From May 31 to July 26, 2012, Claimant had a temporary partial disability based upon an AWW of $428.07 and a wage earning capacity of $352 per week.[8]

2. July 27, 2012, to July 16, 2013

Claimant contends that there was no evidence of suitable employment shown by Employer until September 16, 2013, and that he is therefore entitled to total disability until that date. Claimant contends that based upon the testimony from both Dr. Evans and Dr. Page-Echols, he could not have performed his usual employment at any point after January 2012, and that it would not be rational to find otherwise. Claimant's Closing Br. on Remand at 6-7.

On the whole, I am not persuaded that Claimant was unable to work in his usual work from July 26, 2012, until July 16, 2013, when Dr. Evans said Claimant had work restrictions related to his back. F.F. ¶ 21. Claimant was under continual treatment by his doctors, but the treatment appeared to be more for purposes of medication management. Claimant's subjective complaints of pain did not align with what his doctors observed on the objective examinations and he appeared to be

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[7] In 2012, the Oregon minimum wage was $8.80 per hour, or $352 per week. In 2013, the minimum wage increased to $8.95 per hour, or $358 per week. In 2014, the minimum wage went to $9.10, or $364 per week, and in 2015, it was $9.25, or $370 per week.
http://www.oregonlive.com/business/index.ssf/2014/01/oregons_minimum_wage_1968_to_2.html (last visited Jan. 26, 2018).

[8] There was no change in the NAWW from January 2012 to July 2012.
https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Feb. 6, 2018).

engaging in symptom magnification for purposes of keeping his opioid medications, which were increasing in dosage. F.F. ¶ 27. I do not find Claimant's subjective complaints to be persuasive in light of the medical opinions and his ability to perform activities, such as triathlons and DJ work. F.F. ¶¶ 12-13. In May 2013, Claimant told Dr. Page-Echols that he had been working installing countertops but was unable to continue due to his back pain. F.F. ¶ 20. There was no evidence provided about who Claimant worked for during that time. Further, there was some evidence that in 2011, prior to the injury in this case, Claimant's treating doctor at that time changed his opinion about Claimant's need for surgery after observing sub rosa video of Claimant engaged in much more activity that he had told his doctor, including playing volleyball. F.F. ¶ 33. Dr. Page-Echols reported on April 30, 2013, that Claimant had been neurologically stable for the past year. F.F. ¶ 20. The evidence also showed that Claimant had returned to what Dr. Evans described as baseline as of August 21, 2013, and that the MRI taken on that day compared to a previous MRI had shown no change, but in fact showed some improvement. F.F. ¶ 21. Claimant reported some ongoing right toe numbness, which was different than previously reported and the doctors thought he should be evaluated by a neurosurgeon and is the primary reason that I am not finding Claimant's back at MMI.

Dr. Page-Echols, Claimant's treating physician, did not have an opinion about whether Claimant should have continued to work construction, but probably did not think it was a good idea. F.F. ¶ 27. The same is true for Dr. Evans, who treated Claimant much later in the process. Both doctors opined that Claimant should not have worked in construction, but they did so in a conclusory manner. Dr. Page-Echols essentially released Claimant to work construction at Employer because Claimant needed to work yet did not explain why he did not give Claimant restrictions on his back for the remainder of the time he treated him or explain why he did not impose specific work restrictions. Dr. Page-Echols did not elaborate upon or ask Claimant to explain his work involving counter tops in May 2013 which is inconsistent with an inability to work in construction type of work. Dr. Page-Echols also opined that Claimant's subjective complaints did not correspond to his objective observations, yet did not explain how that impacted his opinion that Claimant should not have worked in construction or even why he was getting increased opioid medications. While both Dr. Page-Echols and Dr. Evans were credible and I gave their opinions substantial weight, I find that on this point, their respective positions are less than persuasive and I decline to give either position any weight. The reports reflect that Claimant participated in a triathlon in June 2012, which was known to at least Dr. Page-Echols, yet was also unaddressed in his opinion. Further, Dr. Pennington, who primarily treated Claimant's knee and opined that Claimant's back was likely to cause more issues than his knee, did not impose any work restrictions on Claimant following finding him at MMI for his right knee on July 26, 2012.

As previously noted, I find Claimant's credibility to be suspect. Claimant did not establish that he could not return to his usual employment in construction work, which he was doing when he was injured. After the accident, Claimant continued to work for Employer performing his usual work for nearly a month, including overtime and 12 to 13 hour days which is inconsistent with someone unable to work in construction. He was tiling on a boat when he was injured, but he also did painting, carpentry and other miscellaneous construction tasks. Claimant stopped working for Employer on February 13, 2012, because the project for which he was hired was complete. He did not leave due to his injury or an inability to work. After the injury, Claimant completed the tile work and then worked other jobs for Employer that did not require him to continually kneel. Claimant obtained a new job at Crestline Trucking on March 1, 2012, but there was no evidence to establish he took that job due to his injuries. He was referred for the job by friends. Instead, the evidence

established that Claimant needed to work to pay his bills and routinely moved job to job when a particular position ended. When Claimant left his job at Crestline Trucking, he continued to search for construction jobs and said he sent 40-50 resumes to construction companies during the summer of 2012, which again is inconsistent with an inability to work those jobs. F.F. ¶ 39. Based upon the totality of the record, I find that Claimant has not established an inability to do his usual work from July 27, 2012, to July 16, 2013. Therefore, I find that Claimant was not disabled for that period.[9]

3. July 16, 2013 to October 21, 2013

After examining Claimant on July 16, 2013, Dr. Evans reported that Claimant did not appear fit for most work. F.F. ¶ 21. Claimant reported radicular pain that traveled down both legs and was taking Neurontin, with some numbness in his right big toe but no other numbness in feet or legs. *Id.* Dr. Evans observed that Claimant appeared uncomfortable in position, had stiff motion and slow movements and reported that Claimant's pain was worsening with time. *Id.* Dr. Evans gave Claimant restrictions on October 3, 2013, of no repetitive bending, twisting, or stooping; limited kneeling to situations that do not involve concurrent stooping or bending; no lifting, pushing, or pulling over 20 pounds; squatting as tolerated; and frequent change positions from standing to sitting, which may occur up to every 15 minutes. F.F. ¶ 23.

Based upon a consideration of the entire record, and relying more heavily on the testimony from Dr. Evans, I find that the Claimant had the following work restrictions as of October 3, 2013: no repetitive bending, twisting, or stooping; kneeling limited to situations that do not involve concurrent stooping or bending; no lifting, pushing, or pulling over 20 pounds; squatting as tolerated; and frequent change of positions from standing to sitting as needed. Dr. Evans had articulated that Claimant should be able to change positions up to every 15 minutes, but I did not find sufficient justification for including a 15 minute timeframe in his limitations. Claimant should have the ability to change positions as needed, which I find is consistent with the limitations set by Dr. Evans.

Based upon the testimony of Dr. Evans, I find that Claimant again had a temporary total disability beginning on July 16, 2013, when Dr. Evans said Claimant was not fit for work in most positions. I infer from this opinion that general construction, his work at the time of injury, was included. As discussed below, Employer did not show suitable employment until October 22, 2013. Therefore, I find that Claimant had a temporary total disability from July 16, 2013, to October 22, 2013, based upon an AWW at the time of injury of $428.07.

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[9] Alternatively, if for some reason the finding is in error, I would have found that Claimant's employment at Crestline was suitable alternate employment and that he had a wage earning capacity based upon Oregon minimum wage after May 31, 2012. Therefore, for the period July 27, 2012, to December 31, 2012, I would have found that Claimant had a temporary partial disability based upon an AWW of $428.07 and a wage earning capacity of $352 per week. In 2013, the minimum wage increased to $8.95 per hour, or $358 per week. *See* FN 7, *supra.* For the period on January 1, 2013, to July 16, 2013, I would have found that Claimant had a temporary partial disability based upon an AWW of $428.07 and a wage earning capacity of $358 per week, when discounted to 2012, was $344.04 ($647.60 / $662.59 = .977. Using that ratio to discount, $358 x .977 = $349.77). The NAWW at the time of Claimant's January 19, 2012 injury was $647.60. The NAWW from October 1, 2012, to September 30, 2013, was $662.59. *See* https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Feb. 6, 2018).

4. October 22, 2013, to January 15, 2014

a. Suitable Alternative Employment

Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate 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. *Hairston*, 849 F.2d at 1196; *Edwards*, 999 F.2d at 1375. As explained below, I find that Employer has shown suitable alternative employment as of October 22, 2013.

The employer need not obtain a job for claimant, but must establish the availability of realistic job opportunities which claimant could secure if he diligently tried. *Edwards*, 999 F.2d at 1376 n.2; *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473, 477 (1978). For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability and they must be jobs that are regularly available. *Edwards*, 999 F.2d at 1376; *Stevens*, 909 F.2d at 1258; *Hairston,* 849 F.2d at 1196. A showing that a claimant might be physically able to perform general work is insufficient. *Hairston,* 849 F.2d at 1196. The employer must point to specific jobs that the claimant can perform; employer cannot meet its burden by simply showing that claimant can perform general sedentary work. *Bumble Bee Seafoods*, 629 F.2d at 1329-30; *Edwards*, 999 F.2d at 1375. The ALJ must establish a precise dollar amount for post-injury wage-earning capacity. *Harrison v. Todd Pac. Shipyards*, 21 BRBS 339, 345-46 (1988); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988). The ALJ must determine the claimant's physical and psychological work restrictions based on the medical opinions of record and then apply those restrictions to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maint. Indus. Inc.*, 17 BRBS 99, 103 (1985). The credible testimony of a vocational rehabilitation specialist is sufficient to meet the burden of showing suitable alternative employment. *Minick v. Levin Metals Corp.*, 14 BRBS 893, 896 (1982).

Ms. Broten prepared a labor market survey for Claimant on October 22, 2013. F.F. ¶¶ 34-37. She noted that she had generally researched positions in September 2013, and that the positions were available within 30-60 days of the research. F.F. ¶ 35. I found Ms. Broten's report to be thorough, considered the appropriate information, and she contacted the various employers to discuss the positions and work requirements. I found her report and testimony to be credible and I gave it substantial weight. In her report, she usually included the names and phone numbers of her contacts at each job, but she did not do so in this case because she thought Mr. Stipe, who was Claimant's vocational expert, would have hostile or threatening communications with her contacts, and she did not think the lack of contact information would impede Mr. Stipe. TR at 271, 317. Apparently the two had a history, and I do not find the absence of contact information to detract from Ms. Broten's credibility.

Claimant contends that Ms. Broten also did not evaluate Dr. Evans's report on Claimant's limitations before she prepared her report. Cl. Closing Br. on Remand at 9-10. Dr. Evan's issued the report on October 3, 2013, and carrier had it on October 8, 2013, at the latest. *Id.* Claimant also argues that Ms. Broten does not have a national certification and that she did not include contact information for those she spoke with at the various jobs. Cl. Closing Br. on Remand at 9. Listing the names of contacts is standard practice according to Mr. Stipe, Claimant's vocational witness, even though Ms. Broten explained it was because she has had issues with Mr. Stipe and how he treats her contacts when he calls. *Id.* at 9. Mr. Stipe said Claimant's job prospects were possible, not

probable for the positions Motel 6 (or Comfort Suites) and Wells Fargo. TR at 211-14. Claimant applied for the jobs, which he contends shows he was diligent in seeking work. F.F. ¶ 39.

Claimant's expert, Mr. Stipe, was also credible, but I was not persuaded by his critique and criticism of Ms. Broten's report. I also found that Mr. Stipe gave too much weight to Claimant's subjective views, which as I previously explained, I found less credible. I do not share the same concerns that Claimant has articulated related to Ms. Broten's credibility. I find that she is well-qualified and has significant experience in the area of labor market surveys, and that she prepared a thorough, well-documented and detailed report here, considering the relevant information about Claimant's potential ability to work. She also sent positions she determined fit Claimant's work restrictions to his treating doctor, who approved the majority of the positions. Claimant's expert, Mr. Stipe, while qualified, did not adequately explain why the positions approved by Dr. Evans would not be suitable for Claimant in light of his doctors' agreement. Mr. Stipe under estimated Claimant's abilities particularly related to his computer competency. At the time Mr. Stipe was working with Claimant, Claimant was a student in an online university, which suggests he had computer competency which Mr. Stipe did not appear to consider. Mr. Stipe also ignored information about Claimant's work history, including that Claimant worked on a computer at Crestline, and his wage earning history and opined that but for his injury, Claimant would have been making much more money than he ever had in the last 10 years. F.F. ¶¶ 7, 40. I am more persuaded by the reports and opinions of Ms. Broten over Mr. Stipe, who, as noted, gave too much weight to Claimant's subjective complaints, appeared to disregard or minimize contrary evidence in the record, and did not persuasively explain why the treating doctor information should be given less weight than his opinions.

Ms. Broten identified eleven positions in Corvallis, Albany, Salem, Eugene, and Portland, Oregon. F.F. ¶¶ 36-37. However, I only considered positions in Albany, Salem and Eugene, which were 13, 40, and 49 miles respectively from Corvallis. F.F. ¶ 35. Typically, the relevant community or geographic area where the employer must show suitable employment is where the claimant resides or resided at the time of injury, but is based on the specific facts of the case. *B.H. v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129, 131 (2009); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23, 25-26 (2001); *Wilson v. Crowley Maritime*, 30 BRBS 199, 203-04 (1996). However, when a claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381-83 (4th Cir. 1994). Even though Claimant had been injured in Portland, I did not consider any employment in that area. EX 38 at 653. At the time of his injury, he worked only temporarily in Portland for Employer.

The positions identified by Ms. Broten fit within the work restrictions identified by Dr. Evans, and I determined to be his then-current work restrictions. Ms. Broten submitted her job analysis report to Dr. Evans, who reviewed them in light of Claimant's limitations on October 31, 2013. F.F. ¶ 38. Dr. Evans approved five jobs and I am basing Claimant's wage earning capacity as

of October 22, 2013, upon those five positions.[10] *Id.* I recognize that Claimant believed he stood only a possible, but not probable chance of obtaining the positions if he applied, but I find that Ms. Broten interviewed Claimant, reviewed the medical reports in the record, contacted the employers, and submitted possible jobs to the treating doctor. Ms. Broten's assessment of Claimant's abilities was reasonable based upon her interview with Claimant and his prior work history. The positions were available and within the Claimant's work restrictions and were primarily entry level positions. Relying upon Ms. Broten's expertise and discussions with the potential employers, I find Claimant was viable candidate for the positions.

b. No diligent job search

If the employer has established suitable alternate employment, the burden shifts back to the claimant who can still establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Edwards*, 999 F.2d at 1376 n. 2; *Hairston,* 849 F.2d at 1196; *Berezin v. Cascade Gen., Inc.*, 34 BRBS 163, 164 (2001). However, a claimant is not required to show that he tried to get the identical jobs the employer showed were available. *Palombo v. Dir., OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). He "merely must establish that he was reasonably diligent in attempting to secure a job within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Id.* (internal citations omitted). However, it is doubtful that merely calling companies that require an application to be submitted online shows diligence in seeking a position. *See, e.g.*, *Osman v. Mission Essential Personnel*, BRB No. 17-0077 (Sept. 14, 2017) (*unpublished*) (the claimant demonstrated due diligence by spending an hour each day looking for work, applied for every single part-time job she identified, posted her resume on more than one website, and documented her job search in a job search log).

Claimant said he applied for the jobs identified by Ms. Broten except for the jobs located in Portland, because he considered the commute to be impractical. F.F. ¶ 39. He also sent out 40-50 resumes for construction jobs in the summer of 2012. *Id.* However, after considering all the evidence, I find that Claimant did not engage in a diligent job search. Other than contacting the employers found by Ms. Broten about how to apply, and then completing the application process, there was no evidence to suggest that he was otherwise diligent about finding employment or following up with the prospective positions. His resume had not been updated since 2009 or 2010. *Id.* Claimant was attending an online university and had access to a computer, but there was no information that he utilized any of the online options to find suitable work. I note that he found his position at Employer by searching Craigslist and submitting a resume to Employer. F.F. ¶ 2. There was no evidence of any follow up or follow through for the positions, and there was no evidence that Claimant did anything other than submit applications and only to the positions identified by Ms. Broten. I do not find that rises to the level of a diligent job search. I do note that Claimant found work in January 2014 in construction that appears to have been outside the work restrictions given by Dr. Evans. Claimant's credibility is lacking and his work history does not support his conclusory statements that he engaged in a job search. I find that Claimant did not engage in a diligent job search.

[10] Dr. Evans reviewed the jobs submitted by Ms. Broten and approved: bank teller at Wells Fargo; product service specialist at Garmin AT; consumer care advisor at Jiffy Lube, provided that the position did not include cross-covering of service tech positions; front desk clerk at Motel 6; and video rental clerk at Blockbuster video. F.F. ¶ 38.

c. Wage Earning Capacity after October 22, 2013

If the actual post-injury earnings of a partially disabled employee do not fairly and reasonably represent the employee's wage earning capacity, or if he has no actual earnings, the ALJ may fix a reasonable wage earning capacity "having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend into the future." 33 U.S.C. § 908(h). The statute mandates a two-part analysis: 1) If the employee is working post-injury, do his actual wages fairly and reasonably represent his wage earning capacity? 2) If they do not, or he is not working, what is the reasonable dollar amount of his wage earning capacity, giving due regard to the nature of his injury, the degree of his physical impairment, his usual employment, and any other factors affecting his ability to earn wages in his disabled condition, including the future effects of the disability? *See*, *e.g.*, *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796-97 (D.C. Cir. 1984), *vac'g and remanding* 15 BRBS 233 (1983); *Burch v. Superior Oil*, 15 BRBS 423, 426 (1983); *Devillier v. Nat. Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The ALJ need not consider the second prong if the first prong is met.

Where claimant is working, the same factors are considered in addressing whether his actual earnings equal his wage earning capacity as are used in addressing an alternate earning capacity. *Devillier*, 10 BRBS at 656. The party contending that the employee's actual earnings are not representative of his wage earning capacity has the burden of establishing an alternative reasonable wage earning capacity. *See*, *e.g.*, *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1043 (5th Cir. 1992); *Mishoe v. Dillingham Marine & Manufacturing*, 17 BRBS 188, 190 (1985). The wage-earning capacity must be discounted to reflect the wages the post-injury job would have paid at the time of claimant's injury using the change in the National Average Weekly Wage ("NAWW") between the time of injury and the time the wage for the job was given. *Quan v. Marine Power & Equip.*, 30 BRBS 124, 127-28 (1996); *Richardson v. Gen. Dynamics*, 23 BRBS 327, 330-31 (1990). The ALJ must establish a precise dollar amount for post-injury wage-earning capacity. *Harrison v. Todd Pac. Shipyards*, 21 BRBS 339, 345-46 (1988); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988).

The Wells Fargo position paid $12.38 per hour, Garmin paid $14 per hour, Jiffy Lube paid $9.50 per hour, Motel 6 paid $8.95 per hour, and Blockbuster paid $8.95. When those wages are averaged, they equate to an average hourly rate of $10.76 or $430.40 per week, and when discounted to 2012, equates to $413.61.[11] Therefore, from October 22, 2013, to January 15, 2014, Claimant had a temporary partial disability based upon an AWW of $428.07 and a wage-earning capacity of $413.61 per week.

The evidence showed that Claimant voluntarily sought and was employed in construction type work for the period January 16, 2014, to February 4, 2014, and March 12, 2014, to April 18, 2014, and was paid $18 per hour or $720 per week during both periods, which when discounted, equates to a wage earning capacity of $691.92 in January 2012.[12] I find that for the periods he

[11] The NAWW at the time of Claimant's January 19, 2012 injury was $647.60. The NAWW at the time of Ms. Broten's October 22, 2013 Labor Market Survey was $673.34. $647.60 / $673.34 = .961. Using that ratio to discount, $430.40 x .961 = $413.61. https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Feb. 6, 2018).

[12] The NAWW at the time of Claimant's January 19, 2012 injury was $647.60. The NAWW from January to April 2014 was $673.34. $647.60 / $673.34 = .961. Using that ratio to discount, $720 x .961 = $691.92. https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Feb. 6, 2018).

worked outside of his work restrictions that his actual hourly wage fairly and accurately represented his earning capacity. Because Claimant's wage earning capacity exceeded his AWW, he is not entitled to any disability for January 16, 2014, to February 4, 2014, and March 12, 2014, to April 18, 2014.

Claimant voluntarily sought employment outside of the restrictions presented by Dr. Evans, which is consistent with Claimant under-stating his abilities to his treating doctors. I am not persuaded that Claimant did not have a higher earning capacity given his ability to work at those other positions. Given my dim view of his credibility, I also find it likely that he overstated his subjective complaints. There was no indication that he worked in spite of pain or that he was otherwise unable to find work outside of construction. In fact, his brief work history from January 2014 to April 2014 is consistent with his work history and limited employment over the last few years. F.F. ¶ 7. Section 8(h) provides that the post-injury wage earning capacity of a partially disabled employee pursuant to Section 8(e) shall be equal to the employee's actual earnings if they fairly and reasonably represent wage earning capacity. 33 U.S.C. § 908(h). Because the evidence showed that Claimant was able to earn more than minimum wage in 2014, I find that an average of his wage earning capacities best reflects Claimant's earning potential. I am making this finding giving due regard to the nature of his back injury, that his usual employment in the construction area and that he seeks out that employment even though his doctors do not advise that he should, and that he is able to work construction when he decides he wants to. Dr. Evans said that as of October 2013, Claimant had returned to baseline and had only "some level" of disability related to manual labor. F.F. ¶ 24. Claimant was able to work even with his back condition.

Therefore, for the period of February 5, 2014, to March 11, 2014, Claimant has a temporary partial disability based upon an AWW of $428.07 and a wage-earning capacity of $552.77, which is the average of his discounted wage earning capacities of $691.92 and $413.61. I find that given the record in this matter, $552.77 fairly and reasonably represents Claimant's post-injury wage earning capacity. Because Claimant's wage earning capacity exceeded his AWW, he is not entitled to any disability for February 5, 2014, to March 11, 2014, or for April 19, 2014, forward.

B. Attorney Fees and Costs

The Act provides for the payment of attorney's fees to a claimant's attorney as well as costs when "successful prosecution of a case" has occurred. *See* 33 U.S.C. § 928. When fees are awarded, costs are also assessed. 33 U.S.C. § 928(d). Consequently, Claimant's counsel may submit a fee petition in accordance with the schedule outlined below. *See* 33 U.S.C. § 928; 20 C.F.R. § 702.132. Counsel should engage in a serious and good faith effort to amicably resolve any dispute concerning the amount of fees requested. *See Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("We emphasize, as we have before, that the determination of fees "should not result in a second major litigation."")

ORDER

1. Claimant suffered a work-related injury to his low back and right knee on January 19, 2012, while working for Employer. Claimant's knee injury reached MMI on July 26, 2012. Claimant's low back injury has not reached MMI.

2. Claimant's average weekly wage at the time of the January 19, 2012 low back and knee injuries was $428.07.

3. Employer shall pay Claimant the following:

a. Temporary total disability from May 7, 2012, to May 13, 2012, based upon an AWW of $428.07.
b. Claimant was not disabled on May 14, 2012.
c. Temporary partial disability from May 15, 2012, to May 30, 2012, based upon an AWW $428.07 and a wage earning capacity of $440 per week.
d. Temporary partial disability from May 31, 2012, to July 26, 2012, based upon an AWW of $428.07 and a wage earning capacity of $352 per week.
e. Claimant was not disabled for the period July 27, 2012, to July 15, 2013.
f. Temporary total disability from July 16, 2013, to October 21, 2013, based upon an AWW of $428.07.
g. Temporary partial disability from October 22, 2013, to January 15, 2014, based upon an AWW of $428.07 and a wage earning capacity of $413.61.

4. Because Claimant's wage earning capacity exceeded his AWW, he is not entitled to any disability from January 16, 2014, forward.

5. The District Director shall make all calculations necessary to carry out this Order, including calculating mandatory compound interest on any accrued benefits at the rate prescribed by 28 U.S.C. § 1961.

6. Employer is entitled to reimbursement for all overpayments of compensation benefits made to Claimant, to the extent that the District Director finds there were overpayments made in this matter.

7. Claimant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Claimant's behalf. Claimant's counsel is ordered to serve an initial petition for fees and costs on opposing counsel within 30 days of the date of this Order is served by the District Director. All counsel are ordered to initiate a verbal discussion within 14 days after receipt of the fee petition in an effort to amicably resolve any dispute concerning the amount of fees requested. The discussion must include prior attorneys, if any, in addition to the current attorney. Counsel must make good faith efforts to resolve the fee dispute before filing the fee petition with me. If counsel are able to agree on the amount of fees and costs to be awarded, they are ordered to promptly memorialize their agreement in writing and to file it with me.

If counsel cannot resolve all their disputes, Claimant's counsel is ordered to file a Final Application for Fees and Costs that comports with 20 C.F.R. § 702.132 within 30 days of the date the initial fee petition was served. The Final Application for Fees and Costs should incorporate any changes agreed to during the discussions. Within 21 calendar days after service of the Final Application, Employer's counsel shall file and serve a Statement of Final Objections detailing the objections to the fees and costs sought and the basis for the objections. Claimant's counsel may file a reply to Employer's opposition 14 days after the opposition is served. No other reply briefs are permitted.

8. The parties are ordered to notify this office promptly if an appeal is filed.

RICHARD M. CLARK
Administrative Law Judge