

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 07 February 2006**

CASE NO.: 2005-LDA-77

OWCP NO.: 02-136492

IN THE MATTER OF

TODD MEYER,  
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.,  
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,  
Carrier

APPEARANCES:

Gary B. Pitts, Esq.  
On behalf of Claimant

John L. Schouest, Esq.  
Tammy Scelfo, Esq.  
On behalf of Employer

Before: Clement J. Kennington  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., and its extension, the Defense Base Act, 42 U.S.C. 1651 et

seq. (DBA) brought by Todd Meyer (Claimant) against Service Employers International, Inc., (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 6, 2005 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 10 exhibits which were admitted, including various DOL forms (LS - 203, 18), Claimant's medical and billing records, out-processing form dated July 24, 2004, W-2's and pay stubs, earnings from Tri-State, Employer's response to admissions, and interrogatories.

Employer introduced 19 exhibits which were admitted including DOL forms (LS-207, 208, 18) Claimant's personal records (personnel file, pre-employment physical and employment), clinic record and out-processing form, wage information from Employer and Claimant's former employer, medical records from Dr. Daniel Ahlberg, Dr. Paredes Rehabilitation and Physical Therapy Institute, Clinica Abreu, Nicollet Clinic and Houston, V.A. Hospital, Claimant's response to discovery, surveillance video, and recorded statement of Claimant.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

## **I. STIPULATIONS**

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on July 19, 2004, during the course and scope of his employment as an employee of Employer.
2. Employer was advised of the injury on July 20, 2004.
3. Employer filed a notice of controversion on October 27, 2004.
4. An informal conference was held on June 22, 2005.
5. Employer paid Claimant temporary total disability benefits from August 12, 2004 to April 4, 2005 at \$500.00 per week for a total of \$17,000.00.
6. Employer paid Claimant appropriate medical benefits.

## II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of disability.
2. Average weekly wage (AWW).
3. Date of maximum medical improvement (MMI).
4. Entitlement to temporary total disability since April 4, 2005.
5. If MMI has been reached, what is Claimant's wage earning capacity?
6. Attorney fees and expenses.

## III. STATEMENT OF THE CASE

### A. Claimant's Testimony

Claimant is a 37 year old male born on May 11, 1968. He has a 12<sup>th</sup> grade education followed by 4 years and a honorable discharge from the U.S. Navy, 1 year working in stockyards chasing and tying up cattle and hogs, 2 years as a security guard, 5 years driving trucks and doing construction work, and 8 to 9 years hauling containers as an over-the-road truck driver. This work was followed by driving trash, septic and water trucks for Employer in the Green Zone and near the Al-Rasheed Hotel in Baghdad, Iraq commencing March 3, 2004. (Tr. 16-24, EX-19). Claimant worked 7 days per week 10 to 16 hours per day in hazardous conditions wherein attacks or kidnapping could occur at any time and for which he received hazard duty pay (Tr. 26, EX-16., p.4).

On July 19, 2004, while driving a truck, Claimant accidentally ran into a Jersey barrier when a water bottle rolled under the break pedal and prevented him from breaking. As Claimant tried to dislodge the bottle he ran into the barrier. Claimant went into shock and about 2 hours later started to experience lower back pain. The following day KBR medics saw Claimant and told him he could go back to work. Claimant protested and was taken to a military hospital located in one of Saddam's palaces where he was given pain pills and told without administering x-rays or other diagnostic testing that he had a sprained back. Claimant was given bed rest for two days after which Employer had Claimant ride as a passenger in a vehicle for one day. The next day Claimant went on a two week scheduled vacation to the Dominican Republic. (Tr. 27-30, EX-19, pp. 10-15).

While in the Dominican Republic, Claimant saw Dr. Enrique Paredes for continued back and leg problems. Dr. Paredes had Claimant x-rayed and then sent him through physical therapy 3 to 5 days a week followed by numerous injections. (Tr. 31). Claimant remained in the Dominican Republic until October, 2004, at which time he flew back to his home in Minnesota where he saw neurosurgeon, Dr. Larkins who referred Claimant to orthopedist Dr. Schwender who in turn ordered a spinal MRI. (Tr. 32, 33). Claimant underwent 8 therapy sessions and was scheduled to, but did not undergo pars injections when Carrier refused to authorize such. (Tr. 34).

Claimant then sought medical treatment from the VA where he received pain medication including Vicodin, Naproxin, Methadone, and Methodcarboms. In addition, he has been given and benefited by use of a TENS Unit. (Tr. 35, 36). Claimant testified that his back pain fluctuates with activity with constant pain levels at a 8 out of 10. Pain is relieved by light yard work and has improved since the accident. However, Claimant is restricted to lifting 10 pounds. (Tr. 37, 38). Claimant admitted on one occasion to pulling trash cans down his mother's icy driveway, a distance of 100 feet with a 17 foot drop. (Tr. 39).

Claimant testified that he has sought but has been unable to find work until he receives permanent restrictions. While in Iraq, Claimant estimated he earned anywhere between \$6,000.00 to \$9,000.00 per month, as opposed to \$60,000.00 per year in the states working up to 70 hours per week. (Tr. 41, 42). Claimant testified that currently he finds it hard to walk or sit due to back pain and uses a cane for balance. (Tr. 43). Prior to working in Iraq, Claimant had a back sprain in 2002-2003 and missed 1-2 days of work but was never treated by a doctor or hospitalized for such a condition and passed a company physical before being hired. (Tr. 45).

On cross, Claimant admitted his employment was anticipated to last 12 months and had him driving in and out of the Green Zone. When driving outside the Green Zone, Claimant had a military escort. (Tr. 53). Claimant admitted that Dr. Schwender of the Park Nicollet Clinic on May 2, 2005 imposed lifting restrictions of 10 pounds with occasional reaching above shoulder and rare kneeling, squatting, and climbing, but otherwise releasing Claimant to work. (EX-11, p.1; Tr. 62). Claimant admitted moving trash cans as depicted on Employer's video (EX-18) and driving for Tri-State Delivery prior to his employment with Employer, but stated the trash cans in questioned weighed 12 to 13 pounds and had wheels on them. (Tr. 84). Further, Claimant intended to work at least 3-4 years for Employer. (Tr. 85).

## **B. Claimant's Medical Records**

Claimant's medical records while in Iraq were limited to a one page clinic note of July 20, 2004, indicating an injury with 2 days of bed rest followed by a return to clinic on July 22, 2004 for a re-check. (CX-1, p.2 CX-2, EX-4, 5). This is followed by x-rays in August, 2004, requested by Dr. Paredes due to continued complaints of sciatic and cervical pain showing straightening of cervical lordosis, spondylolisthesis at L5-S1, dorsolumbar scoliosis and possible fracture due to recent compression at T6-T7 with commendations for total rest, physical therapy medications, spinal support, dorsal MRI. (Id. at 9).

Claimant's next medical record was that of the Park Nicollet Clinic of St. Louis Park, Minnesota dated November 9, 2004, wherein Claimant saw Dr. Larkins complaining about back and right leg pain. Dr. Larkins examined Claimant and opined Claimant had lumbar spondylolysis which remained symptomatic after Claimant's motor vehicle accident. (Id. at 16, 17). X-rays of the lumbar spine were suggestive of early spondylolisthesis with thoracic s-rays showing no evidence of thoracic compression. (Id. at 18, 19).

A lumbar CT of December 22, 2004 showed bilateral spondylolysis at L4 and mild degenerative arthritis of lower lumbar facet joints. (Id. at 23). A subsequent spinal MRI of January of January 4, 2005 showed disc herniation at L1, T8-9, multilevel degenerative disc disease in the thoracic spine and bilateral pars defect at L4. (Id. at 25).

Claimant next saw Dr. Schwender on February 1, 2005, for complaints of low back and bilateral leg pain. Claimant appeared in no acute distress. Dr Schwender examined Claimant, reviewed the lumbar MRI and assessed spondylolysis with disc degeneration and low back and bilateral lower extremity pain with recommendations for pars injections. (Id. at 26, 27) Claimant next saw Dr. Schwender on May 3, 2005 with no change in symptoms, assessment or recommendations. (Id. at 31, 32).

On May 3, 2005 Dr. Schwender released Claimant to work with the following restrictions; lift occasionally 10 pounds, occasional lifting above shoulder, rare squatting, kneeling and climbing and occasional operation of power tools. (Id. at 36). On June 20, 2005, Dr. Ahlberg examined Claimant at Employer's request. Dr. Ahlberg found Claimant to be a well nourished 37 year old male, 6 feet 2 inches and weighing 180 pounds. Dr. Ahlberg reviewed Employer's video of Claimant and opined Claimant was doing "moderate physical exertion." Further, Claimant had congenital spondylolysis at L-4 with mild congenital degenerative lumbar scoliosis which were not with "reasonable medical certainty "caused by Claimant's July 19, 2004 accident. Dr. Ahlberg further opined without medical records, that the July 19, 2004 accident produced only a mild muscular strain which should have healed in 2 to 4 weeks without need for further care. Dr. Ahlberg found Claimant's chronic back complains unrelated to the accident and of non specific etiology while suggesting functional overlay and exaggeration of symptoms. Dr. Ahlberg recommended further workup for Claimant's chronic pain complaints including dynamic x-rays of the spine and psychological testing which has not been done. (Id. at 37-42; EX-8).

In addition to treatments by Drs. Schwender, Larkins, and Paredes, Claimant has been treated at the VA hospital in Minneapolis, Minnesota. Prior to the July 19, 2004 injury Claimant was treated by the VA in 1992 for right shoulder stiffness; 1995 for a 1988 right scapular football injury; 1996 for tonsillitis, left groin strain, cervical radiculopathy; 1998 for sternoclavicular joint pain; 2002 for cervical pain; 2005 for his 2004 truck accident and back injury, varicose veins and venous insufficiency of the right lower extremity. (Ex-12).

### C. Claimant's Earnings and Surveillance Video

Claimant's gross earnings from Employer in 2004 as reflected on W-2s for that period of 21 weeks from the beginning of March through July 24 were \$35,534.67. (CX-5). This sum represented hazard duty pay, area differential, overseas allowance and regular pay. (CX-6). Claimant's earnings from August 15, 2003 through February 13 2004 for Tri State during which he did over-the-road truck driving, a period of 28 weeks were \$19,729.22. (CX-7).

The surveillance videos of March 29, 30, 31 2005, lasting 1 hour and 52 minutes and 20 minutes and 43 seconds respectively, shows Claimant emptying a boat of water by means of a small container, carrying what appears to be small, plastic grocery bags filled with garbage down hill and placing such in a dumpster, picking up mail, rolling two garbage cans down hill, removing Christmas lights, carrying empty garbage cans up hill, helping to put up a tent or outdoor covering and changing a truck battery. (EX-18).

## IV. DISCUSSION

### A. Contention of the Parties

Claimant contends that his July 19, 2004 accident aggravated and accelerated pre-existing spondylosis causing severe pain and restricting him from work. Prior to the truck accident Claimant never missed more than one or two days of work for back pain, and had never been hospitalized or treated by a doctor for back pain. In assessing Claimant's back problems, Employer's chosen expert, Dr. Ahlberg employed the wrong legal standard of medical certainty rather than medical probability and failed to secure from Employer additional testing including dynamic lumbosacral x-rays, EMG studies, myelography and psychological testing to ascertain a cause of Claimant's symptoms. Further, Employer had no legal justification for stopping Claimant's medical care including a refusal to approve pars injections at L5 and stopping Claimant's temporary total disability payments effective April 4, 2005.

Alternatively if Claimant is at MMI, he is entitled to permanent total disability benefits since the restrictions imposed by Dr. Schwender prevent him from doing his past heavy truck driving work, and Employer has failed to show suitable alternative employment. Claimant's average weekly wage should be based upon Claimant's earnings in Iraq, (\$35,534.67) divided by the number of weeks he worked in Iraq, (21) resulting in an AWW of \$1,692.13 with a maximum compensation rate of \$ 1,030.78 per week citing *James Zimmerman v. Service Employers Int., Inc.*, 2004-LHC-927 (March 25, 2005).

Employer, on the other hand, contends Claimant currently suffers from purely degenerative changes and that any condition Claimant may have had as a result of the truck accident was minor and short lived resolving within 2 to 4 weeks of the accident. According to Employer, a surveillance video shows Claimant to be at MMI and capable of returning to work inasmuch as he was observed performing "moderate" physical exertion at his residence cleaning

up outdoors, bringing down a large amount of garbage down an inclined driveway to a dumpster, lifting garbage cans overhead to dump their contents into a dumpster, climbing a tree to unhook a string of lights and lifting and carrying a vehicle battery.

Besides relying upon surveillance video Employer based its medical assessment upon a one time examination of Claimant by orthopedist, Dr. Ahlberg who examined Claimant and reviewed medical records and a surveillance video. Dr. Ahlberg notes no difficulty walking, spasm, or pelvic tilt, a negative straight leg raising, no focal weakness and normal reflexes. Dr. Ahlberg opines Claimant has congenital spondyloysis at L4 with mild congenital lumbar scoliosis which is developmental in nature and not related to the July 19, 2004 truck accident. Further without medical documentation, and based upon his understanding of Claimant's history, Claimant sustained only a mild lumbar sprain which should have resolved with 2 to 4 weeks of the accident without the need for further treatment. Employer further contends that Claimant prior to his injury suffered and was periodically treated for back pain and allegedly had but failed to disclose previous back surgery.

Alternatively by May 3, 2005, when Dr. Schwender released Claimant to return to work, subject to certain restrictions, Claimant's temporary benefits should cease. Further, any restrictions imposed by Dr. Schwender should not extend beyond September 16, 2005 and that any AWW arrived at shoulder be determined under Section 10 (a) of the Act by taking what he made in the 52 weeks preceding the injury (\$55,263.89), and dividing that sum by 52 resulting in an AWW of \$1,062.77 with a corresponding compensation rate of \$708.44. citing *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980) *rev'd on other grounds*, 640 F.2d 769 (5<sup>th</sup> Cir. 1981) *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981).

## **B. Credibility**

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Assn., v. Bunol*, 211 F.3d 294, 297 (5<sup>th</sup> Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5<sup>th</sup> Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5<sup>th</sup> Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5<sup>th</sup> Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In the present case, I find Claimant's testimony to be generally credible although at times exaggerated regarding the intensity of pain or walking problems. Based upon Claimant's testimony and the medical reports of treating physicians, I am convinced that Claimant has continued to experience severe back pain since his July 19, 2004 truck accident which condition has severely restricted his work activities and prevented him from returning to his former truck driving duties. While Employer alleges that Claimant experienced back pain before and

allegedly had surgery for such, I am unable to find any medical reports including the exam of Dr. Ahlberg detailing any such back surgery. Moreover, a search of Claimant's extensive VA medical records shows at best rare occasions of back or cervical pain and no evidence that Claimant missed any significant amount of work because of such until the July 19, 2004 truck accident.

### C. Causation

Section 2(2) of the Act defines injury as accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2)(2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary

--

(a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5<sup>th</sup> Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5<sup>th</sup> Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2<sup>nd</sup> Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5<sup>th</sup> Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway*

*Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5<sup>th</sup> Cir, 1998)(pre-existing heart condition; *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

A claimant's un-contradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5<sup>th</sup> Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2<sup>nd</sup> Cir. 1989) (finding that a knee injury due to repetitive bending, stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5<sup>th</sup> Cir. 2000).

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5<sup>th</sup> Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5<sup>th</sup> Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290 (5<sup>th</sup> Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003). The Court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (citing *Conoco, Inc.*, 194 F.3d at 690). *See Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9<sup>th</sup> Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv., Corp.*, 29 BRBS 18, 20 (1995)(stating that the unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

In this case I find that Claimant clearly established a *prima facie* case of disability thereby invoking the Section 20 (a) presumption. Employer however rebutted that presumption with Dr. Ahlberg's statement that "with reasonable medical certainty" he did not believe Claimant's chronic back pain "were related to, caused by, or significantly exacerbated" by the July 19, 2004 accident. Thus, I am required to weigh the evidence as a whole. In weighing the evidence I note that all treating physicians attribute Claimant's back pain to the July 19, 2004 accident. Indeed Claimant passed Employer's pre-employment physical without a problem, and had no significant prior back complaints and none that prevented him from working long hours for Tri State.

While it is apparent that Claimant had pre-existing congenital spondylolysis, I find no basis for Dr. Ahlberg's conclusion that Claimant sustained only a mild lumbar strain which should have cleared up in 2 to 4 week because such a conclusion was allegedly reached without medical documentation, and based solely upon a limited view of Claimant's history which ignored a consistent history of pain complains only after the accident and treating source opinion which associated Claimant's condition to the accident. I find moreover, that Dr. Ahlberg's statement about the lack of need for further evaluation and his certainty that the accident had nothing to do with Claimant's back problem to be inconsistent with his recommendation for extensive medical testing including lumbosacral dynamic X-rays, EMG studies, repeat imaging and psychological testing to evaluate the cause of Claimant's back pain.

Based upon the record as a whole I am convinced Claimant has shown that the July 19, 2004 accident aggravated and continues to aggravate a congenital back condition causing severe pain and preventing him from truck driving. In reaching this decision, I have considered all evidence including the surveillance videos and Claimant's testimony regarding such. I was not impressed by Claimant's performance of so called "moderate works" and find Claimant's performance not at substantial variance with the restrictions imposed by Dr. Schwender.

#### **D. Nature and Extent of Disability**

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5<sup>th</sup> Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any

residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). In this case none of Claimant's treating doctors have indicated Claimant is at MMI. Rather, they have recommended continued treatment to improve his back condition. As such I find Claimant's back condition to be temporary in nature.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5<sup>th</sup> Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5<sup>th</sup> Cir. 1991); *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5<sup>th</sup> Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Claimant showed an inability to perform his past work by credible testimony of back symptoms plus severe restrictions imposed by Drs. Schwender and Paredes.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5<sup>th</sup> Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5<sup>th</sup> Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4<sup>th</sup> Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or

capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

*Turner*, 661 F.2d at 1042-43 (footnotes omitted).

In this case Employer showed no suitable alternative employment, and thus, Claimant has established temporary total disability. Contrary to Employer's assertions I find no reason to believe that Dr. Schwender's restrictions ceased as of September 16, 2005 especially since Employer refused to authorize pars injections.

## **E. Average Weekly Wage**

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. §910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staflex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5<sup>th</sup> Cir. 2000), *on reh'g* 237 F.2d 409 (5<sup>th</sup> Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied, Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc., v. Bunol*, 211 F.3d 294, 297 (5<sup>th</sup> Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5<sup>th</sup> Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9<sup>th</sup> Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

### **1. Section 10(a)**

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a); *see also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5<sup>th</sup> Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v.*

*Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker.” 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant’s average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5<sup>th</sup> Cir. 1997); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 327 (4<sup>th</sup> Cir. 1998). In this case Section 10 (a) does not apply because Claimant worked 7 days a week.

## 2. Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5<sup>th</sup> Cir. 1998). When the injured employee’s work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5<sup>th</sup> Cir. 1991). The record contains no evidence of comparable employees and thus Section 10 (b) does not apply.

## 3. Section 10(c)

If neither of the previously discussed sections can be applied reasonably and fairly, then a determination of a claimant’s average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5<sup>th</sup> Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9<sup>th</sup> Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

In this case I find it appropriate to use Claimant's earnings of \$55,263.89 and divide them by 49 weeks in which they were earned in the 52 week period prior to Claimant's July 19, 2004 injury. This results in an AWW of \$1,127.83 with a weekly compensation rate of \$751.89. Such a formula allows Claimant to benefit from the higher wages of Iraq while recognizing the fact that employment in Iraq was for no set period of time under an at will employment contract but with an understanding it would last 12 months. (Tr. 51, 52, EX-1). Thus, I find that Claimant's true earning capacity is a compromise between what Claimant made in Iraq and what he earned in the U.S. See *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319, 322 (D.C. Cir. 1986, cert. denied, 479 U.S. 1094 (1987) (Section 10 © is applicable where neither Section 10 (a) or 10 (b) would lead to a reasonable and fair result); *Goldbach v. Service Employers International Inc.*, 38 BRBS 595 (ALJ) 2004 (ALJ used both overseas and stateside wages under Section 10 ©).

## **F. Reasonableness and Necessity of Medical Treatment**

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Bath Iron Works Corp., v. Preston*, 380 F.3d 597 (1<sup>st</sup> Cir. 2004); *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989).

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). Here, Dr. Schwender recommended pars injections. Thus, one of Claimant's treating physicians recommended a specific procedure for recovery from a workplace accident and Claimant is willing to undergo that treatment, which establishes a *prima facie* case that the treatment is both reasonable and necessary.

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. ***Salusky v. Army Air Force Exchange Service***, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). In this case Employer presented only the medical opinion of Dr. Ahlberg who stated he would not recommend additional treatment. Dr. Ahlberg never addressed the reasonableness or necessity of pars injections. Assuming he did so tacitly, I find pursuant to ***Amos v. Director, OWCP***, 153 F.3d 1051 (9<sup>th</sup> Cir. 1998), that Claimant when faced with two or more valid medical alternatives, can in consultation with his doctor chart his own course. Accordingly, I find Employer obligated under Section 7 to provide for this procedure.

## **E Interest and Attorney Fees**

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.***, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." ***Grant v. Portland Stevedoring Company, et al.***, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from July 19, 2004 to present and continuing based on an average weekly wage of \$ 1,127.83, and a corresponding compensation rate of \$751.89. Employer shall receive a credit on previously paid compensation.
2. Employer shall pay Claimant for past and future reasonable medical care and treatment arising out of his work-related illness pursuant to Section 7(a) of the Act including pars injections recommended by Dr. Schwender.
3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.
4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

**A**

CLEMENT J. KENNINGTON  
Administrative Law Judge