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Issue Date: 13 November 2006

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In the Matter of

F.G.[1]
Claimant
v.
PARSONS CORPORATION
Employer
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest
…….

Case No. 2006 LDA 00032
OWCP No. 2-142235

Decision and Order

This matter arises pursuant to a claim for benefits under the Longshore Act as extended by the Defense Base Act filed by F. G. of Wesley Chapel, Florida. Tr. 32. On June 14, 2005, while working for Parsons as a subcontracting administrator on a U.S. government contract in Russia, F.G. slipped and fell on wet floor injuring his low back and right wrist. Tr. 31; Tr. 98. At the time, Claimant's work involved the construction of a plant in Chelyabinsk designed to neutralize stockpiles of the chemical agent, saran. Tr. 32. Three physicians in Russia, and his treating physician in the U.S. have recommended surgery; however, his requests for such treatment have been denied. Tr. 24. In this proceeding, Claimant seeks temporary partial disability on a continuing basis, but at least until November 8, 2005, Tr. 30-31, medical treatment, a determination of his average weekly wage (AWW), Tr. 24-29, and a determination of his post-injury wage earning capacity. Tr. 29.

Employer contends that Claimant had long-standing pre-existing degenerative problems in his low back, left hip, and leg, with intractable pain

[1] Beginning on August 1, 2006, the Department of Labor mandated that decisions rendered in Black Lung Benefits Act and Longshore and Harbor Workers' Compensation in Act cases no longer display the claimant's full name in the decision or in the caption.

before he went to Russia, and his injuries from the fall at work on June 14, 2005, caused only a temporary exacerbation of his pre-existing condition. As a result, Employer argues that it owes no benefits beyond those already paid, Tr. 33, and emphasizes that Claimant's physician has authorized unrestricted travel and has released him to return to his job, allowing him to return to Russia. Tr. 34. Employer notes further that Claimant has returned to his usual employment as a subcontract administrator, the same job he has occupied for over ten years.

Findings of Fact

F.G., age 59, at time of the hearing worked for Parsons Water and Construction Company in a modified light duty job as a subcontract administrator. Tr.64-65. Before he went to Russia, he worked for Parson's E&C. His hourly rate was $39.78, and his earnings for the year were $129,415.50, including overtime. Tr.71-72, 74. Just prior to his trip to Russia, Claimant was on vacation. Tr. 73. He decided to go to Russia for the extra money to apply to his mortgage. Tr. 74-75, 77. By contract, as reflected in a December 9, 2004 job offer, Cx 24, his base 40-hour salary was $7,171 weekly, Tr. 75; EC-12, but the contract provided a weekly incentive of $1,793, plus a 25% hardship allowance, and a 15% of base salary completion bonus, plus monthly housing allowance and a cost of living allowance or COLDA. Tr. 75-77. When he returned to U.S., he received a portion of the job completion bonus, an allowance, and possibly a portion of the COLDA. Tr.117, 119. In the U.S., the Employer does not provide the COLDA. Tr. 120.

In Russia, Claimant initially lived in a hotel and received a living allowance. Tr. 73; Tr.120. When he moved to the project site at the Russian chemical weapons destruction facility, Tr. 75, 114, the living allowance was greatly reduce, Tr. 121, but he started receiving overtime. Tr.73. The per diem stopped but cafeteria services were provided free, Tr. 121, and he still received the COLDA. Tr. 122-123. Claimant expected to work a lot of overtime, Tr.74, but had no scheduled or guaranteed overtime. Tr. 113.

On June 14, 2005, Claimant slipped and fell on a wet floor at work. Tr. 80-81. Almost immediately, he experienced back spasms, Tr. 81, and went to Dr. Slavov, a physician who worked for Parsons. Tr. 81. Dr. Slavov ordered an MRI at Chelyabinsk Hospital which showed a 5 millimeter retrolisthesis at L3. Tr. 83. Dr. Slavov recommended surgery, Tr. 84, and obtained a lumbar corset for Claimant. Tr. 84-85. Claimant did not, however, want surgery in Russia. Tr. 84.

S.G., Claimant's wife, testified that before her husband went to Russia, he had back problems and back pain, but she was never told that he needed back surgery. Tr. 54-55. After the injury, his sex life changed, he had problems walking, experienced constant pain, and his back condition appeared to be worse. Tr. 56, 59. She thought Claimant would receive the surgery recommended by his doctor and that they would return to Russia where he earned considerably higher pay. Tr. 57-58. She testified that she planned to travel to Russia to be with him and that they planned to stay for two or three years. Tr. 53-54.

The record shows that Claimant had pre-existing back problems dating back twenty years. Tr. 78; 126. He claims his problem did not get worse before he went to Russia. Tr. 126. He acknowledged that he visited a chiropractor in February, 2005, before he went to Russia, Tr. 127-28, but claims his pain was minor. Tr. 127, 134. He testified that, prior to the accident, his doctors, then Drs. Delatorre and Herson, never recommended surgery, and he does not recall that surgery was discussed with him as an option. Tr. 79.

Prior to the incident in Russia, Claimant was able to carry files, travel, Tr, 80, passed a pre-employment physical which included touching his toes, and he took a stress test that involved walking and running which Claimant could not complete due to fatigue, not back problems. Tr.88. Post-injury he testified could not take the same test due to his back. Tr. 89. Claimant also testified that the contract files he worked with, at times, weighed eight to ten 10 pounds and he could carry a few files at a time prior to the accident. Now he can only carry one. Tr. 67. He has trouble performing his job due to constant pain and the medications he must take. Tr. 68. He consistently received good performance reviews before the accident, Tr.69, but since then he has been placed on probation. Tr. 69-70

Following conservative treatment for his injuries in Russia, and later in the U.S. upon his return home, Dr. Cassidy eventually released Claimant to return to modified duty desk work with no travel for three months, Tr. 141, and Claimant resumed working for Parsons on August 1, 2005, Tr.116, performing essentially the same type of work he had been performing. Tr. 141-2. Thereafter, on November 8, 2005, following a functional capacity examination Dr. Cassidy released Claimant for unrestricted travel. Tr. 144. According to Claimant, Dr. Cassidy told him he thought Claimant should have surgery before returning to Russia, Tr. 144-45; however, Dr. Cassidy could not recall making such a recommendation.

Claimant testified that his right leg is now involved so he believes his condition is worsening. Tr. 146. He did not wear a corset before the injury, but needs one now. Tr. 172. On a form Claimant filled out for Dr. Dellatore, he described his back, left leg, and hip pain as "sharp," Tr. 147-48, and that his back pain dated back a year and leg pain dated back 3-4 years. Tr. 148-49.

In February, 2005, Claimant told Dr. Herson that he had low back and hip pain, numbness, and tingling in left leg. Tr.151. Claimant attributed his condition to aging and his pre-existing conditions. Tr.151. Claimant indicated he had severe pain at level 9. Tr. 153. The right leg pain noted on Dr. Weinstein's form was incorrect. The pain was in the left leg. Tr. 157.

Medical Evidence

Dr. Jose Delatorre, an orthopedic, saw Claimant pre-injury on February 23, 2005, for low back and left leg pain which Claimant reported at level 8 and 9 intensity. Ex 2, at Emp. 2; Ex 3. He recommended therapy which provided some improvement, ordered an MRI, and referred Claimant to Dr. Herson. Ex 2 at Emp Ex 2; Ex 3.

An MRI on February 23, 2005, was interpreted by Dr. Raul Otero, a radiologist, as showing degenerative disk disease at L3/L4 and L4/L5 and a 3 mm retrolesthesis at L3/L4. Cx 5; Ex 2 at Emp Ex 7; Ex 3.

Dr. Sergei Slavov treated Claimant following his injury. Cx 2 at 0150-56; Ex 3. In a report he prepared, dated June 17, 2005, Cx 1 at ex D, he described his examination of Claimant following the June 14, 2005 injury. He ordered an MRI on June 14, which was performed the next day. The MRI on June 15, 2005, was interpreted by Dr. Lyudmila Rostovtseva as showing, *inter alia*, a 5 mm retrolesthesis of L3 and a 5 mm disc protrusion at L3/L4. Cx 1 at Ex B; Cx 6; Ex 3. Dr. Slavov stabilized Claimant with medication and a corset, and recommended surgery. Cx 1 at Ex D;

Dr. John Cassidy, a neurosurgeon, was deposed on March 16, 2006. Cx 1. He first saw Claimant June 28, 2005, and four or five times thereafter. Cx 1 at 5, 16; Cx 2; Ex 4. Claimant had pain on the left side of his back, extending into the groin and anterior of his thigh. An MRI imaging study from Russia showed nerve root compression at the L3/L4 level. Cx 1 at 5. Dr. Cassidy recommended surgery and ordered a new MRI and CAT scan in preparation for surgery.

An MRI administered on June 30, 2005, was interpreted by Dr. Cyndee Bloom as showing, *inter alia*, a large disc bulge at L3/L4 and 5 mm retrolestheis at L3/L4. Cx 1 at 069-72; Cx 7; Ex 3.

At his deposition, Dr. Cassidy reviewed an MRI interpretation dated February 25, 2005, which reported a 3 millimeter retrolisthesis, but no protrusion. Cx 1 at 6. Retrolisthesis is, Dr. Cassidy explained, indicated when a vertebra moves backward in respect to another vertebra. Cx 1 at 16. A post-injury June 5, 2005, MRI report found a 5 millimeter retrolisthesis and two protrusions which indicate a worsening of the condition found on February 25, 2005 MRI. Cx 1 at 7. Dr. Cassidy's own MRI confirmed the 5 millimeter retrolisthesis shown on the Russian MRI, Cx 1 at 34, and in Dr. Cassidy's opinion, a 3 to 5 milliliter retrolisthesis is consistent with the injury and with a natural progression. Cx 1 at 33.

Dr. Cassidy acknowledged that he did not actually review any pre-injury MRI films. Cx 1 at 28. He reviewed the reports, and relied upon the physician who actually read the films and interpreted the results. Cx 1 at 28. He further acknowledged that he would have preferred to review the films himself to determine if a progression or worsening had occurred, Cx 1 at 29-30, but he was not relying solely on the reports. He noted that Claimant's subjective pain was consistent with L3 nerve root compression and was either new or more prominent. Cx 1 at 31-32. He did agree, however, that even in the absence of the fall in Russia, Claimant's condition could have progressed to the level warranting surgery. Cx 1 at 32, 37. Nevertheless, Dr. Cassidy opined that the first MRI study showed a pre-existing condition, and the injury aggravated, accelerated and contributed to the pre-existing condition. Cx 1 at 8, 37.

Following an FCE which recommended sedentary work with a ten pound occasional lifting restriction, Dr. Cassidy released Claimant to return to his office job. Cx 1 at 10-11; Cx 1 at 064-068.

Dr. Cassidy thought the injection therapy recommended by Dr. Weinstein was reasonable but would not provide long term relief. Cx 1 at 13-14, 18. He based his opinion on Claimant's history of receiving only temporary relief from epidural injections, and he noted the transforaminal injections work no better than epidurals. Cx 1 at 18-19. In his opinion, since Claimant had three transforaminal injections and received only temporary relief, surgery was indicated. Cx 1 at 21; Cx 2. Dr. Cassidy recommended a spinal fusion at L3/L4. Cx 1 at 8-9, 17; Ex 3. Dr.

Weinstein agreed that the epidurals in March of 2005, provided no significant relief. Ex 2 at 21.

In Dr. Cassidy's opinion, Claimant's condition is, in part, due to his "advanced" pre-existing condition, Cx 1 at 21-22, but the injury he sustained at work was "perfectly consistent with his protracted, subsequent exacerbation of his pain. As such, I believe the work-related injury is the principle cause of the patient's need for surgery." Cx 1 at 14, 37; Cx 2. The surgery recommended by Dr. Weinstein, involving L3 to L5 or S1 laminectomies was more extensive than the surgery Dr. Cassidy recommended. Cx 1 at 14; Ex 2 at 39. Dr. Cassidy agreed that even without surgery, Claimant could return to sedentary work, and, on November 8, 2005, he provided Claimant a return to work certificate with no restriction on traveling which authorized overseas travel. Cx 1 at Ex 3; Cx 1 at 23-24; Cx 2. He did not recall telling Claimant not to return to Russia. Cx 1 at 11-12.

Dr. Marc Weinstein, an orthopedic surgeon, examined Claimant, prepared a report dated July 15, 2005, and was deposed on March 30, 2006. Cx 2; Ex 2. He testified that he reviewed Claimant's work and injury histories, medical records, including pre-injury complaints of low back pain, recent symptoms, and MRI results. He considered the MRI's administered in February of 2005, and June of 2005, of poor quality; but he did note degenerative disk changes, worse at L3/L4 and a disk herniation at L3/L4. He agreed that June 30, 2005 film showed a five millimeter retrolisthesis. Ex 2 at 28. In his opinion, however, the MRIs showed no significant differences, Ex 2 at 11-18; 20-21, because a 2 mm difference may, in his opinion, be within the margin of error in measuring the retrolethesis pre- and post-injury and is, he opined, insignificant. Ex 2 at 27-30. He found no "clinically significant difference" between the films. Ex 2 at 29, 30-31. In his opinion, it is difficult to measure a 2 mm difference on the MRIs, Ex 2 at 28, but he deferred questions about such measurements to radiologists. Ex 2 at 29. He did not know whether 2 mm was within the error of measurement. Ex 2 at 30. Dr. Weinstein acknowledged that he did not attempt to measure the retrolisthesis on the films and found no "clinical utility" in measuring the retrolithesis. Ex 2 at 29. He acknowledged that in a questionnaire, Claimant noted that walking and standing aggravates his pain, Ex 2 at 33-34, and that before the injury, Dr. Herson did not recommend surgery. Ex 2 at 34-35; 46.

Dr. Weinstein agreed that the fall could have caused back pain and an increase in the retrolisthesis, Ex 2 at 30; however, he diagnosed pre-existing lumbar degenerative disc disease at L3 to S1, "somewhat exacerbated by the

injury." Ex 2 at 18, 22. He clarified that he uses the term "exacerbation" when an injury is temporary and "aggravation" when it is permanent. Ex 2 at 22,23.

Dr. Weinstein recommended physical therapy and transforaminal injections at L3/L4, which, he opined, would return Claimant to his pre-injury state. The record shows that Dr. David Herson, Dr. Weinstein's associate, in his June 24, 2005 report, also recommended injection treatments, which he administered in March, 2005, when Claimant reported pain levels as high as 8 and 9 out of ten, Ex 2 at 12; 19; 44, and administered again, post-injury, on August 19, 2005 and September 2, 2005. Ex 3 at 54-57.

In Dr. Weinstein's opinion, Claimant's need for surgery for the L4 foraminal herniation is not job-related. Ex 2 at 18. He would treat Claimant's injury-related temporary condition with injections and his non-work-related degenerative disease with surgery. Ex 2 at 24, 35. The record shows that neither Dr. Weinstein nor Dr. Herson followed-up to determine whether the post-injury injections returned Claimant to his pre-injury baseline. Ex 2 at 35-36; 41; 44. Only Dr. Cassidy saw Claimant after the post-injury injection treatments. Ex 2 at 44.

Wrist Injury

Claimant testified that he also injured his right wrist when fell on June 14, 2005. Tr. 97-98. On August 11, 2005, he underwent an initial orthopedic examination at the Florida Medical Clinic where he was examined by a physician's assistant under the supervision of Dr. Richard Gray who ordered an MRI. During a follow-up visit with Dr. Gray on September 15, 2005, Claimant was prescribed a neoprene thumb splint and pain medication. Cx 9; Cx 11.

Wage Data

Pre-Injury

In the year preceding the June 14, 2005 injury, Claimant worked as a senior contract administrator for Parsons E&C Group and as subcontract administrator at Parsons. From the pay period that ended on June 18, 2004, which included days worked back to June 11, 2004, through the pay period which ended on December 31, 2004, he earned $73,934.06 at the E&C Group. Ex 5.15-20.[2] From January to

[2] Employer's exhibit Ex 5.15-20, was filed post-hearing and hereby entered into the record without objection.

March 25, 2005, he earned $18,800.16 which included $13,438.08 paid leave. Ex 5 at 5.2

The record shows that Claimant's earnings at Parsons overlapped, for one pay period, his last pay period at Parsons E&C. During the period March 18, 2005, through June 10, 2005, he earned $43,213.48 with Parsons. Ex 5; Cx 13; Cx 16; Emp. Br. at 25. In addition, Claimant received a completion bonus in the amount of $4,170.20 which was paid post-injury, but was earned for his work in Russia. Consequently, Claimant's earnings in the year preceding his injury totaled $140,067.90,

The record further shows that, at Parsons E&C, Claimant worked five days a week, 8 hours per day with substantial overtime which he often did not report. Tr. 71-72, 110-111, 113. In Russia, he testified that he also worked five, 8-hour days each week. Tr. 112-113.

Claimant testified that between January and March 25, 2005, while at Parsons E&C, he "used up [his] accrued vacation time." Tr. 72. He was between jobs and was "not physically working," but was on vacation, and was paid by Parsons E&C. Tr. 72-73.

The record shows that wages of three allegedly similar employees from June 11, 2004 to June 24, 2005. Employee A earned $208,195.34, (54 weeks) with a corresponding AWW of $3,855.47; Employee B earned $149,108.12 with a corresponding AWW of $2,867.46; and Employee C earned $185,516.26 (50 weeks) for a corresponding AWW of $3,710.33. Cx 19; Cx 20.

Post-injury Earnings

Claimant's post-injury earnings from the pay period ending June 24, 2005, which includes 10 days post-injury pay equaling $4,609.80 ($6,453.72÷14=$460.98 per day times10=$4609.80) through March 17, 2006, totaled $74,875.55 for 35 weeks of work, excluding the job completion payment which was credited to his AWW. Documents in evidence, therefore, establish that Claimant has a post-injury wage earning capacity of $2,139.30 per week. Ex 6; Cx 14.

Discussion

Initially, Claimant seeks medical benefits, including surgery, for the consequences of the June 14, 2005, injury that he contends accelerated and contributed to the aggravation of his pre-existing low back condition. Employer disagrees. It concedes in its post-hearing brief that Claimant slipped and fell on a wet floor at work, injuring his back, but it argues that he suffered only a temporary exacerbation of his longstanding, pre-existing degenerative disk disease and congenital scoliotic condition. Employer insists that there is "no objective evidence to demonstrate any traumatic injury or worsening of Claimant's condition" as a result of the fall, Emp. Br. at 12,18, and Claimant's subjective pain complaints are not credible. Emp. Br. at 14-17. In Employer's view, Claimant has been fully compensated and any need for surgery is due to "his pre-existing condition and not because of the slip and fall incident."

Section 20 Presumption

Section 20(a) of the Act provides Claimant with a presumption that his condition is causally related to his employment if he shows that he suffered harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See*, Merill v. Todd Pacific Shipyards Corporation., 25 BRBS 140 (1991), *aff'd,* 892 F.2d 173, (2d Cir. 1989). Although Employer does not address, nor even mention the presumption in its brief, the Board and the courts have held that the Section 20(a) presumption is applicable to medical benefits. Jenkins v. Maryland Shipbuilding & Dry Dock Co., 6 BRBS 550 (1977), rev'd on other grounds, 594 F.2d 404, (4th Cir. 1979). Further, invocation of the presumption may be predicated upon credible testimony that an incident occurred or conditions existed at work that could have precipitated the injury. Conoco, Inc. v. Director, 33 BRBS 187 (CRT) (1999); Damiano v. Global Terminal & Container Service, 32 BRBS 261 (1998); Marinelli v. American Stevedoring, Ltd, 34 BRBS 112 (2000).

We begin the discussion here by noting that Employer acknowledges that Claimant injured his low back when he fell at work on June 14, 2005. Further, physicians in Russia and the U.S. have confirmed that surgery is appropriate treatment for the injury. Thus, Dr. Slavov, who treated Claimant in Russia and stabilized him with medication and a corset, recommended surgery. Upon his return to the U.S., Claimant sought treatment, first from Dr. Herson, and then turned to Dr. Cassidy, his treating neurosurgeon. Dr. Cassidy acknowledged that Claimant's current situation is due, in part, to his "advanced" pre-existing

condition, but noted that the injury was perfectly consistent with the protracted, subsequent exacerbation of the pain Claimant experienced. Like Dr. Slavov, Dr. Cassidy recommended surgery and opined, based upon physical examination results, MRI data, and the medical and symptom history data, that Claimant's work-related injury is the principle cause of his need for surgery.

Thus, the accident at work, coupled with the resulting low back injury and the opinions of Drs. Slavov and Cassidy are sufficient to invoke the presumption in Section 20 of the Act of a causal nexus between the accident in Russia and Claimant's low back condition. Independent Stevedore v O'Leary, 357 F.2d 812 (9th Cir. 1966); Conoco v. Director, 33 BRBS 187 (1999); Kelaita v. Triple Machine Shop, 13 BRBS 326 (1981). Further, although Dr. Gray did not specifically address the etiology of the wrist injury, his office notes show that Claimant's history included the June 14, 2005 fall on an outstretched hand, and Claimant testified credibly that the accident was the occasion that injured his wrist. The evidence is, therefore, sufficient to invoke the presumption of a causal link between Claimant's wrist condition and the June 14, 2005, accident. Flanagan v. McAllister Brothers, Inc., 33 BRBS 209 (1999), (claimant's credible testimony may properly invoke the presumption); Conoco, Inc. v. Director, 33 BRBS 187 (CRT) (1999); Quinones v. H.B. Zachery, Inc. 32 BRBS 6 (1998).

Rebuttal

Upon invocation of the presumption that Claimant's current low back condition is due to his work-related accident, it is Employer's burden, within the jurisdiction of the Eleventh Circuit Court of Appeals where this case arises, to rule out a causal relationship between Claimant's employment and the injury. Brown v. Jacksonville Shipyard, 893 F.2d 294 (11th Cir. 1990); *but see*, Conoco v. Director, 194 F. 3d 684 (5th Cir. 1999) (requiring employer to go forward with substantial countervailing evidence to rebut the presumption). *See also*, Merill v. Todd Pacific Shipyards Corporation., 25 BRBS 140 (1991), *aff'd*, 892 F.2d 173 (2d Cir. 1989). In determining whether Employer has actually ruled out a causal relationship between Claimant's employment and the injury, it is necessary to consider the entire record, not just substantial countervailing evidence that would tend to sever the causal nexus. Thus, it appears that the analysis required to rule out a work-related etiology is quite similar to the analysis required in other Circuits after the presumption has been triggered and rebutted. *See,* Del Vecchio v. Bowers, 196 U.S. 280 (1935). It would seem to require an analysis which takes into consideration the record evidence viewed in its entirety.

Initially, Employer relies upon the opinion of Dr. Weinstein who opined that Claimant's current condition, and his need for surgery, is due entirely to his pre-existing underlying degenerative disk disease and scoliotic condition. In his view, there is no clinically significant difference between Claimant's pre- and post-MRIs, and no difference in his reported symptoms. As a result, he believes Claimant's accident on June 14, 2005, caused a temporary exacerbation of his pre-existing condition which should be treated with injection therapy, not surgery. In Dr. Weinstein's opinion, any surgery Claimant needs now is due to his pre-existing condition. The question under Brown v. Jacksonville Shipyard, however, is whether Dr. Weinstein's analysis is sufficient to rule out the causal link between the accident, Claimant's current condition, and the need for surgery.

Clinical Evaluations

Initially, Employer insists that Dr. Weinstein's evaluation meets the "rule out" test because there is no objective evidence of any traumatic worsening of Claimant's condition, and thus Employer challenges key clinical predicates which underlie the etiological assessments upon which Claimant relies; the progression of retrolithesis indicated on the MRIs, and Claimant's credibility in recounting his pre-existing condition and pain symptoms.

Employer emphasizes that both Dr. Slavov and Dr. Cassidy relied upon MRI test report findings, pre- and post-injury, to conclude that the injury worsened Claimant's condition as indicated by a pre-injury 3 mm retrolisthesis which lengthened to 5mm post-injury. Employer argues that Dr. Weinstein is the only physician who actually read the pre- and post-injury films, as opposed to relying upon interpretations by other physicians, and notes that Dr. Weinstein concluded that: "the films display no objective evidence (of a) material or significant change between the February MRI and the MRIs that were performed after the slip and fall incident." Emp. Br. at 13. In Employer's view, "reports from different doctors looking at different films is not a sound basis for comparison; rather the films themselves provide the best evidence as to whether or not there was a progression of the retrolisthesis between the time of the February MRI and the MRIs that were performed in June of 2005." Emp. Br. at 12-13 (emphasis in original).

The record shows that Dr. Weinstein reviewed the pre- and post-injury MRI films, and he "didn't notice any difference when [he] looked at them." He testified that he found no "clinically significant difference" between the films. He agreed that the June 30, 2005 film showed a five millimeter retrolisthesis, but in his opinion, it is clinically insignificant whether or not the pre-injury MRI showed a

3mm or five mm retrolisthesis. In addition, Dr. Weinstein found no clinically different symptoms pre- and post- injury. He thus recommended physical therapy and transforaminal injections at L3/L4, which he opined would return Claimant to his pre-injury state.

Interpreting the MRIs

Employer emphasizes that Dr. Weinstein is the only physician who actually reviewed all three MRI films and that reliance on "reports from different doctors looking at different films is not a sound basis for comparison…." Emp. Br. at 12. The evidence, however, does not support Employer's contention.

Both Dr. Weinstein and Dr. Cassidy agreed, based upon post-injury MRI films which both personally reviewed, that Claimant's post-injury retrolisthesis was 5 mm. The question, then, is whether the per-injury film showed a 3mm retrolithesis, and, if it does, whether the 2 mm difference between the pre- and post-MRIs is clinically significant.

Dr. Otero was the radiologist who interpreted the February 23, 2005 MRI as revealing degenerative disc disease at L3/L4 and L4/L5 and a 3 mm retrolesthesis at L3/L4. Dr. Otero prepared the report Dr. Cassidy relied upon.[3] To be sure, Dr. Cassidy testified that he would have preferred to have actually reviewed the pre-injury MRI film rather than rely on Dr. Otero's report; but neither he nor Dr. Weinstein actually dispute Dr. Otero's evaluation. Indeed, Dr. Cassidy accepted Dr. Otero's findings, and Dr. Weinstein acknowledged that he never measured the retrolisthesis on the February 23, 2005 film. To the contrary, Dr. Weinstein observed that he would have difficulty measuring a 2 mm difference on the MRIs. As such, he deferred questions about such measurements to a radiologist, such as Dr. Otero, and he did not know whether a 2 mm difference was within the margin of measurement error. On this record then, no credible evidence was adduced that actually contradicted or disputed Dr. Otero's finding that the pre-injury MRI showed a 3mm retrolithesis at L3/L4.

Measured or not, however, Dr. Weinstein testified he found no "clinical utility" in measuring the retrolithesis, because he compared the films and found no clinically significant difference regardless of any actual difference a careful

[3] The record contains no indication that either party attempted to depose Dr. Otero. Consequently, unless his evaluation is otherwise shown to be unreliable by substantial medical evidence, it may be relied upon as a credible medical evaluation of the MRI in this proceeding. Richardson *v.* Perales, 402 U.S. 389, 402 (1971).

measurement might reveal. In his opinion, the condition Dr. Cassidy proposed to treat surgically is simply the underlying scoliotic abnormality.

Dr. Cassidy disagreed. At his deposition, he reviewed the MRI interpretation by Dr. Otero which reported a 3 mm retrolisthesis on the February 25, 2005 MRI, and his own post-injury MRI which confirmed the 5 mm retrolisthesis. He testified that the MRIs indicated a worsening of the condition and noted that an increase from 3 to 5 mm in the retrolisthesis was consistent with the injury and with a progression of Claimant's pre-existing condition. Thus, Dr. Cassidy and Dr. Weinstein disagreed with respect to whether a 2 mm difference in the pre- and post-injury retrolisthesis is clinically significant. Dr. Weinstein thought not, but agreed that the accident could have caused back pain and could have caused an increase in the retrolisthesis which he did not measure.

In addition to discounting the MRI data as indicating any clinically significant difference in the retrolisthesis pre- and post-injury, Dr. Weinstein also opined that a regime of injection treatment would be sufficient to return Claimant to his pre-injury condition. Dr. David Herson, Dr. Weinstein's associate also recommended injection treatment in his June 24, 2005 report, which he administered on August 19, 2005, and September 2, 2005. Yet, neither Dr. Weinstein nor Dr. Herson followed-up to determine whether the post-injury injections actually returned Claimant to his pre-injury baseline. Dr. Cassidy is the only physician who examined Claimant after the injection treatments, and he opined that Claimant's condition still requires surgery and was still attributable, in large part, to the accident.

Finally, Dr. Weinstein found no clinically different symptoms pre- and post-injury. At his deposition, however, he acknowledged that Claimant noted differences in his symptoms to the extent that he experienced more pain while walking and standing and needed to wear a corset. Claimant noted further that surgery was recommended after the injury whereas before the injury, Dr. Herson did not recommend surgery. It, therefore, appears that Dr. Weinstein was mistaken in his observation that Claimant manifested no clinically different symptoms after the accident; however, Employer argues further that Claimant is not a credible source of evidence concerning his medical or symptom histories.

Claimant's Credibility

Given the opposing views of Drs. Weinstein and Cassidy, the essential elements of their diagnostic formulations need be considered; and one which

Employer deems crucial is Claimant's credibility in reporting his symptom history. Employer notes, for example, that Claimant had difficulty recalling precisely when he first experienced the onset of right leg pain, the names of health care providers he visited over the years, and the degree of pain he experienced before and after the accident. In addition, Employer believes Claimant gave inconsistent accounts of the effectiveness of the epidural blocks administered by Dr. Herson. Emp. Br. at 14-17. Employer would, therefore, discount, if not completely dismiss, Claimant's account of his own condition as unreliable and lacking credibility which, in turn, diminishes the force of Dr. Cassidy's evaluation as grounded, as least in part, on an unreliable underpinning; chiefly, his patient's allegedly unreliable symptom history.

Yet, the extent to which a physician's evaluation is dependent on the quality of the patient's memory or veracity in reporting the onset of symptoms or the degree or situs of pain at any given time varies from case to case. In many back pain situations, subjective pain complaints and subjective responses to physical examination techniques are the only diagnostic leads a physician may have available. In such situations, the reliability of the medical evaluation obviously is dependent upon the reliability of the patient's report. Not infrequently in the absence of objective clinical findings, experienced physicians, who have reason to question the reliability or accuracy of a Claimant's subjective complaints, employ distraction techniques during their examinations to test or verify the veracity of the pain complaint. In this instance, neither Dr. Herson nor Dr. Weinstein questioned the level of pain Claimant reported; and while there are discrepancies in Claimant's account of the degree of pain he experienced over time and the onset of his leg pain symptoms, these discrepancies, as Employer acknowledges, were not intentional, Emp. Br. at 14, and do not, alone, reflect adversely on Dr. Cassidy's assessment.

While the record reflects Claimant's pain waxed and waned over time, and that he had difficulty recalling relative degrees of intensity from time to time, his testimony was consistent and credible in describing his post-injury condition and the new symptoms he experienced. Moreover, his testimony was both consistent and credible in describing the temporary relief he received from the last round of post-injury injections he received from Dr. Herson. Equally significant, Dr. Cassidy found objective clinical MRI and examination data which confirmed Claimant's subjective pain complaints. Based on the foregoing factors and Claimant's demeanor in testimony at the hearing, I conclude that he credibly described, to the best of his ability, his pre- and post-injury condition with sufficient accuracy to render his account credible; and I further conclude that Dr.

Cassidy's etiology assessment is not diminished because he relied, in part, on Claimant's subjective symptoms.

In summary, then, I have accorded greater evidentiary weight to Dr. Cassidy's opinion that Claimant's condition at L3/L4 is injury-related and requires surgery than the contrary opinion of Dr. Weinstein. Dr. Weinstein did not measure the increase in the retrolithesis, did not take into consideration Claimant's increased symptomatology, and did not evaluate him after the injections he recommended were administered. Dr. Cassidy, Claimant's treating physician, in contrast, evaluated all of these factors, and several more as discussed above, in concluding that the accident contributed to Claimant's current symptoms, and I accord substantial weight to his opinion.

Medical Treatment

The Employer argues further that Claimant's back injury improved after the accident and his condition has reverted to a pre-existing level caused by his scoliotic condition which was temporarily exacerbated by the accident. Thus, his current complaints and symptoms, Employer asserts, are all due to the pre-existing condition. Employer emphasizes further that Dr. Weinstein indicates that Claimant's ongoing complaints were the result of a pre-existing condition and not the fall. At his deposition, Dr. Weinstein opined that, after injection treatment, Claimant would revert back to his pre-existing condition and any need for surgery is attributable to the underlying pre-existing condition. For the reasons which follow, I find the evidence insufficient to support the contention that surgery is not needed to treat the consequences of the accident.

Employer acknowledges that neither Dr. Herson nor Dr. Weinstein evaluated Claimant's condition after the last round of post-injury injections, and consequently, the only medical evidence in this record which addresses Claimant's post-injury, post-injection status and the need for surgery is provided by Dr. Cassidy. As Claimant's treating physician he, quite clearly, concluded that Claimant does need surgery and that the surgery is related to the injury on the job. Since neither Dr. Weinstein nor Dr. Herson evaluated Claimant after the last round of injections; the record contains no evidence that the injections returned Claimant to his baseline condition, but contains substantial evidence that they did not.

Under these circumstances, the opinions of Drs. Herson and Weinstein do not constitute substantial evidence rebutting the presumption that Claimant's current condition is causally related to the June 14, 2005, injury as Dr. Cassidy

concluded.[4] For all of the foregoing reasons, I find and conclude that Employer has failed to rule out a causal nexus between the accident and the need for surgery in accordance with Brown v. Jacksonville Shipyard. Claimant is, therefore, entitled to reasonable and necessary medical care and treatment for the back injuries he sustained when he fell at work on June 14, 2005. *See*, 20 C.F.R. § 702.413; Bulone v. Universal Terminal & Stevedoring Corp., 8 BRBS 515, 518 (1978); Potenza v. United Terminals, Inc., 1 BRBS 150 (1974), aff'd, 524 F.2d 1136, 3 BRBS 51 (2d Cir. 1975); Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 98 (1991).[5]

Temporary Partial Disability

As noted above, in the claim filed in this matter, Claimant sought compensation for temporary partial disability. The record shows that he has not yet reached maximum medical improvement. Dr. Cassidy described the injection therapy recommended by Dr. Weinstein and administered by Dr. Herson as unsuccessful and thought surgery was indicated. Nor did Dr. Herson, who treated Claimant, or Dr. Weinstein, who evaluated him, place Claimant at MMI. On this record, then, Claimant's condition is not fixed, and according to Dr. Cassidy, it can be improved. His condition is, therefore, temporary.

Claimant also alleges that his disability is partial, and that his compensation should be predicated upon a loss of wage earning capacity amounting to $2,000.00 per month. Cl. Br. at 25. He contends that when he returned to the U.S., in July of 2005, he was placed in a light duty job earning substantially less than his average weekly wage. Employer believes Claimant has been fully compensated, but if he has suffered a loss of wage earning capacity, it is far less than Claimant alleges.

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[4] Claimant alleges that employer stipulated that it would pay for the wrist brace and reimburse claimant for the cost of the medications prescribed for his wrist. *See*, Cl Br at 18-19. Yet, Claimant provided no citation to such a stipulation in this record; and it appears Employer indicated only that "It really has not been an issue." Tr. 99. Apparently, these expenses have not been paid. Accordingly, pursuant to the above findings that the presumption applies to the wrist injury, and in the absence of any rebuttal evidence to the contrary, an appropriate order will be entered.

[5] Claimant underwent back surgery, post-hearing, and Employer moved to reopen the record for an IME to confirm whether and to what extent, if any, the surgery related to the injury. During a transcribed conference call on September7, 2006; however, the parties agreed that this record should not be reopened and that the decision in this matter should be rendered on the basis of April 4, 2006 hearing record. The parties understood that, as a consequence, post-hearing medical treatment will not be considered here, and, if disputed, will require further evidentiary proceedings. *See*, Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Monrote v. Britton, 237 F.2d 756 (D.C. Cir. 1956); Haynes v. Rederi A/S Aladdin, 362 F.2d 345 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967).

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Average Weekly Wage (AWW)

As a senior contract administrator at the Russian Chemical Weapons Destruction Facility - Shchuch'ye, Claimant was paid monthly, $7,171.00 in base salary, $1,793.00 as a salary incentive, $1,793.00 as a hardship allowance, a 15% completion bonus, a housing allowance, and a cost of living differential allowance (COLDA), among benefits. Cx 12. His actual earnings in Russia totaled $43,213.48, including $800.00 in moving expenses, $496.44 in PTO, and $8,159.12 in living allowances. Cx 13. Based upon his actual earnings in Russia, Claimant extrapolates that he would have earned $169,653.92 plus COLDA and bonus totaling $188,581.72 during the year the contract would have been in effect had he not been injured, and, therefore, his average weekly wage is $3,626.57. Cx 16. If his annual earnings are based upon contract parameters, he calculates that he would have earned $148,005.80 and his average weekly wage would be $2,846.27. Cx 16.

Claimant contends, however, that he is entitled to compensation based upon an AWW of $3,710.33. Acknowledging that he did not work overseas for a full year preceding the injury, Claimant argues that his "earning power at the time of injury" is best analyzed under Section 10(b) of the Act; and Claimant believes that a comparable employee, identified in the record as Employee C, whose AWW is $3,710.33, most closely approximates what he could expect to earn had he not been injured. Employer, however, rebuffs these assertions and insists that Claimant was initially paid compensation for temporary total disability at the maximum compensation rate, but for the 52-week period preceding the injury, he earned $135,947.70 which yields an AWW of $2,614.38 under Section 10(a) of the Act.

Same or Similar Employment

Claimant believes application of Section 10(a) is inappropriate because the job in Russia was not the same as his state-side job as evidenced by the pay scale difference between the two jobs. In his view, Section 10(a) would not accurately reflect his earning power at the time of the injury since his anticipated contract earnings as a Defense Base worker in a foreign country included incentives and bonuses which dramatically increased his earning power over the wages he could earn domestically.[6] Citing Mulcare v. E.C. Ernst, *supra*, Employer responded that

[6] The fact that Claimant worked for two different employers is irrelevant where the skills used in the two jobs are highly comparable. Hole v. Miami Shipyards Corp, 12 BRBS 38 (1980), rev'd on other grounds, 640 F.2d 769 (5th Cir. 1981). *See,* Mulcare v. E.C. Ernst, Inc, 18 BRBS 158, 159-60 (1986); Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983). Furthermore, wages earned by a claimant in employment

the statutory term: "substantially the whole year" refers to the nature of employment not a claimant's anticipated contract earnings or the geographic location of the employment or his employers.

In Mulcare, the Board affirmed a Section 10(a) AWW calculation which included the earnings of an electrician who worked for two different employers; part of the year in the U.S. and part of the year in Saudi Arabia. Although the work performed in Saudi Arabia was compensated at a different pay rate, the Board reasoned that the knowledge, skills, and experience claimant utilized in both locations were the same.

While Mulcare illustrates a situation in which an employer was attempting to exclude from the AWW calculation the higher wages earned pursuant to an overseas employment contract, Bolton v. Services Employers International, Inc., 2002 LHC 804 (ALJ, May 30, 2003),[7] considered the issue and applied Mulcare in a context quite similar the facts in issue here. In Bolton, a truck driver in Bosnia was injured one month into a lucrative employment contract; but Judge Kaplan rejected claimant's argument that his AWW should reflect his anticipated contract earnings, reasoning that although Claimant's job risks were different, his employment driving trucks in the United States was sufficiently similar to driving trucks in Bosnia to warrant the use of § 10(a). While the contract of employment was shorter in Bolton than the contract in this case, the rational employed in Bolton is equally applicable here.

Thus, Section 10(a) applies under circumstances in which the employee "worked in the employment ... whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); Empire United Stevedores v. Gatlin, 936 F.2d 819, (5th Cir. 1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 135-36 (1990); Mulcare v. E.C. Ernst, Inc., 18 BRBS 158 (1986). In this instance, the record shows that Claimant was a contract administrator at Parsons E&C in the U.S., and a subcontract administrator at Parsons in Russia. He testified further that the jobs were essentially the same; involved the same processes, required the same physical demands and skills, and entailed pre-qualifying bidders for various types of construction contracts, bid evaluation, negotiations, contract performance

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outside the coverage of the LHWCA may fall within Section 10(a) if they are earned in the same employment as at the time of the injury, regardless of whether it is maritime employment, or employment with an employer covered by the LHWCA. Roundtree v. Newpark Shipbuilding and Repair, 13 BRBS 862 (1981) at 866 n.6.

[7] Bolton is published at http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=206625

monitoring, change orders, and contract payments. Under these circumstances, the decision in Bolton provides persuasive guidance and the decision in Mulcare provides guiding precedents.

I am, of course, mindful that in Walker v. Washington, 793 F.2d 319 (D.C. Cir. 1986), the court noted that post-injury wages may, in exceptional circumstances, be employed in calculating an AWW; however, in this instance Claimant does not seek to utilize actual post-injury wages. His calculation involves a bit more speculation, requiring adoption of anticipated, but unearned, wages. Thus, in Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992) the Board, in calculating a claimant's pre-injury average weekly wage, rejected a bonus claimant would have received but for her work-related injury on the ground that only actual wages may be used. In addition, although Claimant worked pursuant to a contract, there is, unlike the situation in Rayner v. Maritime Terminals, Inc. , 22 BRBS 5 (1988), and McMennamy v. Young and Co., 21 BRBS 351 (1988), no evidence that it included guaranteed annual income payments. This record, therefore, lacks the indicia of exceptional circumstances, and I conclude that Claimant worked in the essentially the same employment during "substantially the whole of the year immediately preceding" the injury.

5-Day vs. 6-Day Per Week Worker.

Section 10(a) of the LHWCA provides:

> Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> > (a) If the injured employee shall have 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, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which

> he shall have earned in such employment during the days when so employed.

Section 10(a) differs from 10(b) and (c) in that it assesses the actual wages of the injured worker as the monetary base for determination of the amount of compensation. Thus, Section 10(a) can be applied only when the record evidence permits calculation of an average daily wage. Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137, 140 (1990); Taylor v. Smith & Kelly Co., 14 BRBS 489, 495 (1981). Claimant insists that application of Section 10(a) is inappropriate because the record shows the total hours worked but not the number of days worked, and because he sold back certain vacation hours which should not be treated as days worked. Cl. Br. at 20-21. Claimant argues that the record shows that he did not work five days every week, and in some weeks he did not work at all. Cl. Br. at 20.

While a review of the documents in evidence confirms Claimant's observation that the documents fail to indicate whether he worked five days a week or six days a week, and, as a consequence, do not permit the calculation of his average daily wage; Claimant otherwise errs in his conclusion that the record, considered as a whole, is inadequate to carry out the statutory calculation. Pay documents in evidence show the number of hours he worked during each two week pay period and his earnings, and Claimant testified at the hearing that he was a five-day per week worker who often worked overtime. The record evidence, accordingly, is more than adequate to calculate his average daily wage. As Claimant notes, some weeks he was on vacation and some weeks he worked less that five days, but the statute seeks an average; and, based on Claimant's testimony, that average may be predicated upon his customary five-day workweek and the documents in evidence. *See*, Eleazer v. General Dynamics Corp., 7 BRBS 75, 79 (1977)(a record need not contain all supporting wage records, since Section 10(a) refers to the nature of claimant's employment, not whether his actual wage records for substantially the whole of the year prior to his injury are available).

Vacation Pay

Claimant argues further that he did not take vacation days between January, 2005 and March, 2005. Rather, he sold back his vacation days and received cash for the hours sold back, and hours sold back should not be treated as days worked. Cl. Br. at 21. In Ingalls Shipbuilding, Inc. v. Wooley, 204 F.3d 616, (5th Cir. 2000), a claimant was permitted to treat 120 hours as four "vacation days," by which his total annual earnings would be divided to determine average weekly wage and "sell back" eleven days to his employer which were not be treated as "days worked." The court, however, declined to create a bright-line rule

concerning how all vacation compensation should be treated under Section 10(a). Instead, the court found it more appropriate to leave it to the fact-finder to determine whether a particular instance of vacation compensation counts as a "day worked" or whether it was "sold back" to the employer for additional pay.

On this record, I conclude that the evidence does not support Claimant's argument that he "sold back" vacation time. To the contrary, he testified that while at Parsons E&C, he "used up [his] accrued vacation time." He was between jobs and was "not physically working," but was on vacation time. Under these circumstances, vacation time was not "sold back" as "additional pay" received on a day Claimant was actually at work. Rather, according to his testimony, Claimant was paid for days he was actually on vacation. Under these circumstances, I conclude, consistent with Wooley, that Claimant's vacation days should be treated as days worked, in the same manner as the worker who earns accrued leave and during the course of a year takes a paid vacation. Under such circumstances, vacation pay earned and paid for vacation days taken in the year prior to the injury is properly included in the AWW calculation, *See*, Ceres Corporation v. Branch, 96 F.3d 1438 (4th Cir. 1996); Sproull v. Stevedoring Services of America, 86 F.3d 895 (9th Cir. 1996); Universal Maritime Service, Corp. v. Wright, 155 F.3d 311 (4th Cir. 1998); and the day of paid leave is properly counted as a day worked, not a day sold back for "additional pay."

The Appropriate Divisor is 52

Arguing that he had a nine-week "layoff" between his Parsons E&C job and the commencement of his Parson's job in Russia, Claimant contends that it would be improper to divide his earnings by 52. Cl. Br. at 24. Claimant cites several appellate cases which employ the actual number of weeks worked as the appropriate divisor when calculating AWW. Yet each of the cases Claimant cites is distinguishable from the situation here.

What the case law demonstrates is the willingness of the courts to make adjustments in the gross earnings divisor when the number of weeks worked annually is reduced by circumstances, such as lay-offs, strikes, or injury, which are essentially beyond a claimant's control. Hawthorne v. Director, 884 F.2d 318 (6th Cir. 1988) (divisor 52 after adding back earnings lost during weeks on strike); Staftex Staffing v. Director, 34 BRBS 444 (5th Cir. 2000) (divisor 27); Flanagan Stevedore v. Gallagher 219 F.3d 426 (5th Cir.2000) (divisor 48); *See also*, Bath Iron Works Corp. v. Preston, 380 F.3d 597, (1st Cir. 2004) (divisor 31); Curtis v. Atlantic Marine Inc., 2004 LHC 1609 (May 16, 2004)(divisor 46); Brien v.

Precision Valve/Bayley Marine, 23 BRBS 207 (1990). (injury). As the court observed in Tri-state Terminals, Inc. v. Jesse, 596 F.2d 752 (7th Cir. 1979): "it is important to consider other factors such as an employee's ability, willingness, and opportunity to work." Consequently, before adjusting an AWW calculation by a divisor of less than 52, it is necessary to determine why Claimant worked fewer than 52 weeks prior to the injury.

In this instance, as noted above, Claimant was not laid off for nine weeks, as he argued in his brief; he testified he was on vacation. I, therefore, conclude that Claimant's 52-week pre-injury earnings include his vacation pay, and that the correct divisor is 52. Wayland v. Moore Dry Dock, 25 BRBS 53 (1991); Brien v. Bayley Marine, 23 BRBS 207 (1990).

Pre-Injury Earnings

The record shows that in the year preceding the June 14, 2005 injury, Claimant worked at Parsons E&C five days a week, 8 hours per day with substantial overtime which he often did not report. He testified further that in Russia, he also worked five, 8-hour days each week. Specifically, the record includes his earnings from the pay period that ended on June 18, 2004, which included days worked back to June 11, 2004, through the pay period which ended on December 31, 2004. During this period, Parson E&C paid him $73,934.06. From January to March 25, 2005, Parson E&C paid him $18,800.16 which included $13,438.08 in paid time off. The record further shows that Claimant's earnings at Parsons overlapped for one pay period his last pay period at Parsons E&C. During the period March 18, 2005, through June 10, 2005, he earned $43,213.48 with Parsons.[8] In addition, Claimant received a completion bonus in the amount of $4,170.20 which was paid post-injury, but was earned for his work in Russia. This bonus is properly included in his AWW. *See*, Denton v. Northrop Corp., 21 BRBS 37 (1988). Consequently, Claimant's earnings in the year preceding his injury totaled $140,067.90, and his Section 10(a) AWW is $2,693.61.

[8] In computing an aww, the Board has held that overseas additives or overseas allowances, including foreign housing allowance and cost of living adjustment are included. *See* Denton v. Northrop Corp., 21 BRBS 37 (1988); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 8 (1984), completion awards, Denton, 21 BRBS at 47, vacation or holiday pay. *See also* Sproull v. Stevedoring Servs. of America, 25 BRBS 100 (1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Rayner v. Maritime Terminals, 22 BRBS 5 (1988); Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983). Also included is the pay for overtime hours (when the hours are a regular and normal part of claimant's employment), Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110, 112 (1989); Bury v. Joseph Smith & Sons, 13 BRBS 694, 698 (1981).

Post-Injury Wage Earning Capacity

Employer contends that Claimant's post-injury earnings from August 1, 2005 through March 17, 2006, a period of 34 weeks totaled $63,906.15, excluding a $4,170.20 completion bonus earned for work in Russia but paid in August, 2005. Employer, therefore, believes that Claimant's post-injury wage earning capacity amounts to $1,962.03 per week. Employer notes further that Claimant was cleared for unrestricted travel on November 8, 2005; and from that date forward he could have returned to his job in Russia, and, thus, would have experienced no further loss of wage earning capacity. Emp. Br. at 26. Claimant, in contrast, argues that his weekly earnings after the injury totaled $1,694.84. Cl. Br. at 25.

The record shows that upon his return from Russia, Dr. Cassidy placed Claimant on travel restrictions and light duty, and Employer placed Claimant in a light duty job managing internal units rather than outside subcontractors; however, the knowledge, skills, and abilities used in his previous jobs were substantially similar to Claimant's previous jobs with the Employer. Under these circumstances, Claimant's actual post-injury earnings provide the best indication of his residual post-injury wage earning capacity.

Thus, the record shows that Claimant's post-injury earnings from the pay period ending June 24, 2005, which includes 104 hours worked representing 4 days of pre-injury pay and 10 days of post injury pay equaling $4,609.80, ($6,453.72÷14=$460.98 per day times10 = $4,609.80), through March 17, 2006, totaled $74,875.55 for 35 weeks of work excluding the job completion payment which was included in the AWW. Documents in evidence, therefore, establish that Claimant had a post-injury wage earning capacity of $2,139.30 per week until November 8, 2005, when Dr. Cassidy lifted Claimant's overseas travel restriction. According to Claimant, Dr. Cassidy told him he thought Claimant should have surgery before returning to Russia; however, Dr. Cassidy could not recall making such a recommendation. The record, therefore, indicates that commencing November 8, 2005, the injury no longer adversely impacted Claimant's wage earning capacity.

Since his AWW is $2,693.61 and his post-injury wage earning capacity is $2,139.30, Claimant sustained a temporary partial disability resulting in a loss of wage earning capacity in the amount of $554.31 per week. Accordingly:

ORDER

IT IS ORDERED Employer pay to Claimant, for periods of temporary total disability already paid, additional compensation based upon an average weekly wage of $2,693.61; provided however, that Employer shall receive credit for the compensation it has paid but shall pay interest on any additional amounts owed to Claimant, and;

IT IS FURTHER ORDERED that Employer pay to Claimant compensation for temporary partial disability commencing August 1, 2005, to November 8, 2005, based upon a loss of wage earning capacity totaling $554.31, plus interest; and,

IT IS FURTHER ORDERED that Employer provide reasonable and necessary medical care and treatment for Claimant's low back and right wrist injuries due to the June 14, 2005 accident; including reimbursement for Claimant's out-of-pocket expenses for medical devises and medications prescribed for his wrist and back conditions.

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Stuart A. Levin
Administrative Law Judge