

U.S. Department of Labor

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Issue Date: 20 March 2007

CASE NO.: 2006-LDA-119

OWCP NO.: 02-144721

IN THE MATTER OF

J.C.¹,

Claimant,

v.

**SERVICE EMPLOYEES INTERNATIONAL,
Employer**

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier**

APPEARANCES:

GARRY PITTS, ESQ.

On behalf of Claimant

RICHARD GARELICK, ESQ.

On behalf of Employer/Carrier

BEFORE: C. RICHARD AVERY

Administrative Law Judge

¹ Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Claimant against Service Employees International (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The formal hearing was conducted in Houston, Texas on September 20, 2006. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.² The following exhibits were received into evidence: Joint Exhibit 1³, Claimant's Exhibits 1-8, and Employer's Exhibits 1-18.⁴ This decision is based on the entire record.

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of alleged injury/accident is December 2, 2004.
2. The injury occurred in the course and scope of employment.
3. An employer/employee relationship existed at the time of the alleged accident.
4. Employer was advised of the injury on December 2, 2004.
5. Notice of Controversion was filed February 17, 2005.
6. An informal conference was held April 27, 2006.
7. The average weekly wage at the time of injury is disputed.
8. Nature and extent of disability is disputed:
 - (a) Temporary total disability: Yes
 - (b) Temporary partial disability: None
 - (c) Benefits were paid from December 21, 2004 and continuing at the rate of \$537.00 per week.

² The parties were granted time post hearing to file briefs. Subsequently, the parties jointly requested and were granted an extension, until February 26, 2007, to file briefs, which were timely submitted.

³ Subsequent to the hearing, the parties submitted a document labeled Joint Exhibit 2, that contained Claimant's earnings while in Iraq.

⁴ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages (TR. pp __); Joint Exhibit (JX- __); Employer's Exhibit (EX- __); and Claimant's Exhibit (CX- __).

9. Medical benefits were paid.
10. Date of maximum medical improvement is disputed.

Issues⁵

The unresolved issues in this proceeding are:

1. Nature and Extent of disability
2. Average weekly wage
3. Attorney fees, penalties and interest

Statement of the Evidence

Claimant

Claimant testified at the hearing. He is 67 years old and grew up in Parkside, Arkansas. He has always worked as a truck driver. He first went to work overseas for Employer in September 2003. In January 2004, Claimant was in Baghdad and a brick was thrown through the windshield of his truck injuring his eye. He was evacuated back to the states to have his eye taken care of. He returned to Iraq in August 2004, about a week after the doctor treating his eye injury released him to return to work. Claimant continued to drive trucks for Employer, delivering Army tanks to various locations throughout Iraq.

On December 2, 2004 Claimant was again injured. He was working with chains to secure the Army tanks and a chain came lose and caused Claimant to fall four or five feet to the ground. He landed on his shoulder, right side and hip and hit his head. Immediately following the accident Claimant continued working and finished the remaining hour and a half left of his shift. He stated that he felt sore and went straight to bed when he got home. He woke up a couple of hours later and his right arm and hand were numb. Throughout the next day Claimant's hand and arm would continue to go numb on occasion. Claimant went to see a paramedic and was given some pills to take for fourteen days. However Claimant's hand and arm continued to have periods of numbness. After about a week, Claimant returned to the paramedic and told him that the pills were not helping. Around December 19, 2004 Claimant was sent to the International Hospital in Kuwait. The doctor in Kuwait told Claimant he should return to the states to see a specialist.

⁵ Employer raised Section 8(f) as an issue at the hearing; however, subsequently Employer, in a letter to the Court, withdrew 8(f) as an issue for consideration in this case.

Around December 21, 2004 Claimant returned to Arkansas. He went to see his usual physician, Dr. Abased in Clinton, Arkansas. Dr. Abased took x-rays and suggested that Claimant try therapy. However, the insurance company would not pay for therapy and wanted Claimant to instead see a specialist and referred him to Dr. Ledbetter, an orthopedic, in Little Rock, Arkansas. Claimant subsequently saw Dr. Ledbetter three times. Dr. Ledbetter ordered a nerve test for Claimant, which determined that Claimant had two pinched nerves. Dr. Ledbetter did not recommend surgery for Claimant as it was too risky. Claimant underwent therapy for a period of time and then returned to Dr. Ledbetter in August 2005. Claimant stated that Dr. Ledbetter told him he was not going to get any better and placed him at maximum medical improvement. Dr. Ledbetter did say that the therapy was helping Claimant and without it his neck would get stiff and hurt, which Claimant stated it does. Dr. Ledbetter requested that Claimant be able to continue with the physical therapy but never heard back from the insurance company.

Dr. Ledbetter told Claimant he could no longer drive a truck. Claimant has not worked since his return to the states. He stated that there is nowhere to work in Clinton, a town of about 2,000-3,000. Claimant explained that the ten jobs identified by the vocational rehabilitation expert were all located near Conway which is almost a hundred mile round trip from Clinton. Claimant was notified about five jobs initially and then received five more on the night before the hearing.

Of the initial five jobs, Claimant inquired at the highest paying one at Conway Human Development Center, which paid \$8.07 an hour. Claimant explained that this job involved working with adults with the mental capacity of children. Claimant testified that he went to Conway and spoke with someone at the Human Development Center explaining that he was looking for a job. He told them about his physical restrictions and he was turned down for the job because it involved a lot of physical activity.

Claimant stated that commuting to Conway would probably cost about \$20.00 per round trip, not including wear and tear on his car. Claimant next addressed the other four jobs, all located in Conway, identified by the vocational rehabilitation expert. There was a job as a deli server at Wal-Mart that would involve primarily standing, some lifting up to 50 pounds, and hand motions necessary for preparing food. Claimant stated that he could probably do everything required of the job except for the extended standing. He noted that

when he stands for too long his neck begins to hurt and he has to sit down.⁶ Claimant explained that he went to Wal-Mart with his wife recently and after about 25 minutes of shopping his neck was hurting him very bad and he had to find a bench to sit on and wait for her to finish. He stated that he could not work at a job that required him to stand for eight hours a day.

Claimant testified that his brother works in Conway and the commute costs him about \$100.00 a week in gas. If Claimant worked 24 hours a weeks at \$6.00 an hour he would make \$144.00 a week. Minus a \$100.00 a week in gas costs and Claimant would be left with \$44.00 a week.

The third job discussed was a parts clerk at Advanced Auto Parts. Again Claimant stated that the only physical problem would be too much standing up. However, this job would not be economical either, considering the gas expenditure, because it was a part time job paying \$5.15 an hour. The fourth job was a greeter at Wal-Mart, which was part-time, paying \$6.00 an hour, and required standing. Claimant stated that this job would not be feasible economically or physically. The fifth job was another part-time position (about 20 hours a week) at a nursing home that required bathing residents, housekeeping, and assistance with dressing and walking the residents. Claimant did not feel that this job fit his physical limitations because the standing and assistance of the residents in the event they stumbled would be a problem. Nor did the job make sense economically considering the gas expenditure.

Claimant next addressed the second group of jobs, all located in Conway, identified by the vocational rehabilitation expert. The first job was a full-time position as a public safety security officer at the University of Central Arkansas, which paid \$17,736.00 a year. The physical requirements included “primarily standing and walking.” Claimant stated that this did not fit within his physical limitations.

The second job was a part-time position paying \$7.00 an hour as a line server and cook at Hendrix College. Again, Claimant stated this job was not suitable because it would require too much standing and would not be economical given the commute.

⁶ He also stated that the FCE limited him to sitting.

The next job identified was a counter sales clerk at Cross Auto Supply, which paid \$8.00 an hour for forty hours a week. Claimant stated that this would also be a problem because of the standing.

The fourth job was a security guard position at Securitas, which paid \$8.00 an hour for 32 hours a week. The physical requirements involved walking stairs (although elevators are usually available) and walking various areas to provide security. Claimant confirmed that this job would also be a problem because of the standing involved.

Lastly, a position as a laundry worker at Conway Health Care and Rehab was available paying \$6.50 an hour for 37.5 hours a week. The physical requirements included lifting but noted that workers could lift laundry in small increments. Claimant stated that he was sure the job would require him to stand all the time. He did not think lifting small amounts of laundry would be a problem.

Claimant reiterated that he did not feel any of the 10 jobs identified by the vocational rehabilitation expert fit within his physical limitations, nor did he think it would be economical to commute to Conway for any of the jobs.

Claimant stated that since he has quit physical therapy his condition has gotten worse. He has complied with all of the doctor's orders, but the insurance carrier has not authorized him to continue therapy.

Claimant testified that while in Iraq, he was making between nine and 10 thousand dollars a month, sometimes as much as 12 thousand depending on how many hours he worked. He had planned to work for about three or four years in Iraq and then he would have had enough money to retire.

On cross-examination Claimant was asked how much money he would have to make at a job in Conway for it to be economical considering the commute. He responded, "That is a hard question to answer. Even a \$10.00 an hour job would not – you couldn't really drive back and forth for an hour. I mean, a man could live off a \$10.00 an hour job, I guess, if the job was close by. He didn't have to drive, but I'm too old to get up and move and sell my house and buy another house." (TR. 35) Claimant stated that the cost of gas to get back and forth to Conway made the jobs not economically sensible.

Claimant conceded that he never made as much money in the states as he made working in Iraq, and that is why he went to Iraq. Claimant had no expectations of making that amount of money working in the states.

Claimant was next referred to EX-7, which contained information about Claimant's wages both from his initial time in Iraq beginning in September 2003 through January 2004 and then from his second trip in August 2004 through December 2004. Claimant stated that EX-7 did not accurately reflect his earnings and that he actually made more than that. His tax returns were evidence of his actual earnings. He stated that the first time he was in Iraq he made more money, sometimes \$12,000 a month, because he was working longer hours.

Functional Capacity Evaluation (FCE) (EX-4)

An FCE was performed on September 5, 2006. The results of the test indicated that Claimant gave unreliable effort, with 44 of 57 consistency measures within expected limits. The FCE report stated that Claimant did not put forth consistent effort during his test. Claimant demonstrated the ability to perform work in the Light category with occasional lift/carry of up to 30 pounds. He could perform sitting on a constant basis and occasional walking and standing. The report noted "[Claimant] reports that several of the above activities were difficult for reasons other than his cervical condition. These activities included crouching, kneeling, climbing stairs and stand/sit. [Claimant] reported that these activities caused pain in his knees and hip." (EX-4, pp. 2)

Ms. Brenda Umholtz (EX-18)

Ms. Umholtz, a certified rehabilitation counselor, testified by deposition on November 16, 2006. She has been doing labor market surveys since 2000. In April 2006 Carrier in this case requested that she perform a labor market survey. In preparation for conducting her survey, Ms. Umholtz reviewed medical documentation relating to Claimant's work-related injury and met with Claimant in April 2006.⁷ She questioned Claimant regarding his educational and employment history. Claimant received his GED while he was in the Navy in the 1950s and has primarily worked as a truck driver throughout his career.

During her interview of Claimant, Ms. Umholtz administered a vocational personality assessment that revealed Claimant to be an ERS (enterprising, realistic

⁷ During her interview of Claimant Ms. Umholtz asked him questions about his daily activities. He stated that he takes care of eight horses, tends to a garden and hunts and fishes. (EX-5)

and social) vocational personality. Ms. Umholtz considered the results of this assessment as well as Claimant's age, educational background, work history and physical limitations in conducting her labor market survey. Ms. Umholtz utilized the information from Dr. Ledbetter regarding Claimant's physical limitation while conducting her survey.

Ms. Umholtz identified five available positions that were set forth in her report dated May 25, 2006. Each position was in Conway, Arkansas. The first position was at Wal-Mart. Ms. Umholtz contacted Denise in human resources on May 25, 2006. She was told that there was one part-time (24 hours a week) position open as a deli server that paid \$6.00 an hour. The physical requirements of the job were described as primarily standing, some lifting – 50 pounds occasional and customer service.

The second position was at Conway Human Development Center. This position was for 40 hours per week at a starting wage of \$8.07 an hour, which increased after a two week training period to \$8.50 an hour. This job would involve Claimant working with individuals with physical disabilities. He would assist/teach them skills for daily living.

The third position was with Advanced Auto Parts. Ms. Umholtz spoke with Joe on May 11, 2006 who informed her that there was a part-time (20-35 hours per week) sales clerk position available with a starting wage of \$5.15 an hour. Joe explained that the position would require standing and walking and that any heavy lifting, if necessary, could be done by two people.

Fourth, there was a job as a greeter available at Wal-Mart as of May 11, 2006. Again, this was a part-time position (20-32 hours per week), which paid \$6.00 an hour. This position required permanent standing but no lifting.

The last position listed in Ms. Umholtz's original labor market survey was with Home Instead. Ms. Umholtz stated that she spoke with Pam on May 12, 2006 who told her that a part-time (averaging 20 hours per week) caregiver position was open with a usual starting wage of \$6.50 an hour. This job involved assisting individuals with daily tasks such as dressing, housekeeping or medical reminders. No lifting over 25 pounds was required.

Ms. Umholtz testified that on or about June 21, 2006 she contacted each of these employers and was told that Claimant had not applied at any of the jobs.

On September 13, 2006, Ms. Umholtz conducted a follow-up labor market survey at the request of Carrier and identified five additional jobs, also in Conway, Arkansas, she considered Claimant capable of obtaining.

Ms. Umholtz spoke with Chris Bentley, on September 13, 2006, at the University of Central Arkansas. He told her there was a full-time (40 hour) position open for a public safety security officer that paid \$17,736 a year (\$8.51 an hour). This position required primarily standing and walking with no lifting requirements.

The next position was at Hendrix College as a part-time (20 hours a week with a possible increase to 38 hours a week after 90 days) line server or cook. The position was available as of September 13, 2006 and paid at least \$7.00 an hour. The requirements included serving food and occasional lifting of trays with food.

Third, Ms. Umholtz identified a position at Cross Auto Supply on September 12, 2006. A full-time (40 hours per week) counter sales position was available with a starting wage of \$8.00 an hour. The employer stated that they could accommodate any lifting restrictions and had hired employees with restrictions in the past. There were no physical qualifications for the job per the employer and they were willing to make accommodations.

The fourth position identified on September 7, 2006 was for a full-time (32 hours per week) security guard with Securitas. The starting wage was \$8.00 an hour. This job required Claimant to walk stairs, although elevators were available if needed.

The last job identified was a laundry worker position with Conway Health Care and Rehabilitation. This position was available as of September 7, 2006 and was a full-time position (37 ½ hours per week) that paid \$6.50 an hour. Lifting was required, but the worker could lift in small increments.

On cross-examination, Ms. Umholtz stated that she was unable to locate any jobs in Clinton, Arkansas. She stated that Conway is 39 miles from Clinton, Arkansas. Ms. Umholtz testified that she did not consider Claimant's age to be a problem in his future employment. She asked a few potential employers about his age and none considered it a problem.

Medical Records of Claimant since December 2, 2004 (CX-1)

Dr. Ledbetter initially saw Claimant on April 12, 2005. After examining Claimant, Dr. Ledbetter's impression was that Claimant had limited rotation in his neck and had aggravated a pre-existing condition of DDD and cervical spondylosis. He noted that Claimant seemed to be getting relief with physical therapy and recommended three to four more weeks of therapy.

On May 17, 2005, Claimant returned for a follow-up examination. Physical therapy was benefiting Claimant although he still had some numbness and radiculitis in his arm, but not as often or as bad as prior to therapy.

On June 14, 2005, Dr. Ledbetter reported that Claimant still had radiculitis into his right arm with numbness in the arm in the distribution of C5-6 and C6-7 and some weakness. Although Claimant's grip strength had improved, Dr. Ledbetter did not think he was able to return to driving trucks in Iraq. Dr. Ledbetter ordered an EMG.

Dr. Ledbetter reviewed the results of Claimant's EMG with him on June 28, 2005. The results showed a radiculopathy at C6-7 and a CTS. Dr. Ledbetter opined that Claimant had a double crush syndrome and needed a CTR. He continued Claimant on physical therapy.

On July 25, 2005 Dr. Ledbetter reported that Claimant's radiculopathy remained about the same and that Claimant had reached maximum improvement with the physical therapy. Dr. Ledbetter did note that Claimant's CTS would improve if he had CTR.

On August 26, 2005 Dr. Ledbetter placed Claimant at MMI with a 6% whole body impairment rating. Dr. Ledbetter reported that Claimant "can return to an alternative duty job, but he cannot be driving a truck or other vehicle." (CX-1, pp. 5)

Dr. William Blankenship (EX-15)

Dr. Blankenship testified by deposition on January 4, 2007. He gave an extensive professional background, which included board certification in orthopedics and culminated in his current practice as an orthopedic. He does in-house orthopedics but does not do surgeries.

Dr. Blankenship, at the request of Concentra Integrated Services, performed an independent medical examination of Claimant on July 7, 2006 and prepared a

corresponding report. Dr. Blankenship took a history of Claimant that included his December 2, 2004 injury as well as his medical treatment prior to this injury.

At the time of this examination, Claimant complained of neck pain and paresthesias or numbness in the upper extremity. Dr. Blankenship did not find any evidence of muscle spasm in his neck. Claimant's range of motion was restricted in all planes. Dr. Blankenship noted that this is a subjective factor and he does not put much credence in this result because anybody can restrict his/her motion. Claimant's reflexes in the upper extremity (biceps, triceps and brachioradialis) were depressed but equal. He had a negative Adson's test, which checks for pulses from the arteries of the heart when the neck is turned. Dr. Blankenship did not find any decreased metacarpal muscles in Claimant's hand. (Which can be indicative of nerve involvement causing the muscles to decrease.) Dr. Blankenship noted that Claimant's right forearm muscle was larger than the left which indicated that there was no nerve involvement coming from the neck down the arm – because the muscle of the affected side had not atrophied.

Dr. Blankenship reviewed Claimant's MRI and report of January 13, 2005. The MRI was of the brain and cervical spine. The report indicated that Claimant's brain tissue was normal. He did have some arthritis in the cervical area with bilateral foraminal narrowing noted particularly in the C5-6 and C6-7 area due to some disc spurs. There was also a note from the Orthopedics Associates indicating that Claimant had significant carpal tunnel syndrome on the right side and an indication of radiculopathy at C6-7. Dr. Blankenship noted that this could account for some of Claimant's symptoms⁸ in the upper extremities.

Dr. Blankenship diagnosed Claimant with a contusion of the right shoulder, contusion of the right hip and a possible strain of the cervical spine with right upper extremity radiculopathy. He also related these injuries to the December 2, 2004 injury.

Dr. Blankenship stated that he believed Claimant had reached maximum medical improvement as of the date of his evaluation on July 7, 2006.⁹ He also noted that Claimant's capacity to work would best be determined by a functional capacity evaluation (FCE). Following his evaluation of Claimant, Dr. Blankenship

⁸ Claimant complained of pain in the neck and entire upper right extremity as well as numbness in his right hand, particularly the ring and fifth fingers.

⁹ Dr. Blankenship did note that he used the July 7, 2006 date because this was the only time he examined Claimant.

was sent a copy of an FCE performed on September 5, 2006. He adopted the findings, which indicated Claimant could perform light duty work.

Dr. Blankenship was next questioned regarding the specific jobs identified by Ms. Umholtz in her labor market survey.¹⁰ Employer's counsel read the job characterization quoted by Ms. Umholtz in her report and then asked Dr. Blankenship if he thought Claimant would have been able to perform the job at the time he evaluated Claimant. With regard to all five jobs, Dr. Blankenship testified that he thought Claimant would have been able to do the work at the time he saw him. Each job description required a majority of standing, but Dr. Blankenship stated "that's not an issue. That doesn't affect the carpal tunnel." (EX-3, pp. 28) It should be noted that two of the jobs were for companion/care-giver positions with the Conway Human Development Center and Home Instead and Dr. Blankenship approved these jobs as long as the activities were within the light-duty range.

Dr. Blankenship submitted a supplemental report on October 6, 2006 commenting on an EMG and nerve conduction study that were performed on Claimant subsequent to his July 7, 2006 examination of Claimant. Dr. Blankenship opined that the results could be indicative of carpal tunnel syndrome. He also noted "it's been written that there are people who have carpal tunnel syndromes that also have pain that go up in their arm. I'm sorry, their forearm and arm, even up to their neck." (EX-3, pp. 31) Based on Claimant's history, Dr. Blankenship related this condition to Claimant's December 2, 2004 injury.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which

¹⁰ Only the five jobs identified in her initial survey were addressed.

resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant testified that on December 2, 2004 he injured himself while working as a truck driver in Iraq for Employer. Employer was advised of the injury that same day. Both Employer's counsel and Claimant's counsel have stipulated that Claimant was injured on December 2, 2004 in the course and scope of employment and that the injury was reported the same day. (JX 1)

Based on the facts and the party's stipulation, I find that Claimant has established a prima facie case of compensability with regard to the injury he suffered on December 2, 2004 in that he has established that he suffered a harm and that working conditions existed which could have caused the harm.

No evidence was offered to rebut this presumption. Thus, based on the facts and stipulations of the parties I find that Claimant's injury was one arising out of or in the course of his employment.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In the present case, the parties dispute when Claimant reached MMI. Claimant, at the hearing and in his post-trial brief, stated that Dr. Ledbetter, his treating physician, placed him at MMI as of August 26, 2005. Employer contends that MMI was reached on July 7, 2006, the dated that Dr. Blankenship placed Claimant at MMI.

I agree with Claimant and find that he reached MMI as of August 26, 2005, the date his treating physician, Dr. Ledbetter, placed him at MMI. Dr. Blankenship only saw Claimant on one occasion for purposes of performing an independent medical evaluation; he was not treating Claimant. He even stated in his deposition that he placed Claimant at MMI as of July 7, 2006 because that was the first time he had examined Claimant and thus he could not comment on Claimant's condition prior to this date.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows he is unable to

return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, there is no dispute that Claimant cannot return to his previous employment in Iraq. On August 26, 2005, Dr. Ledbetter reported that Claimant "can return to an alternative duty job, but he cannot be driving a truck or other vehicle." Employer has not presented any evidence to rebut Dr. Ledbetter's finding that Claimant can no longer drive a truck. The FCE performed on Claimant found Claimant capable of light duty work and Dr. Blankenship adopted these findings. Therefore, Claimant has established a *prima facie* case of disability and the burden shifts to Employer to show the existence of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable

alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this case, Employer has offered a total of ten jobs, taken from Ms. Umholtz's original and supplemental labor market surveys, that it contends are suitable alternative employment for Claimant. Claimant, on the other hand, asserts that none of these jobs are suitable for Claimant based on his physical restrictions as well as the geographical location.

Employer identified a mix of part-time and full-time positions with wages ranging from about \$5.15 to \$8.50 an hour. Claimant testified at the hearing that he could not do any of the jobs identified because each of them required a majority of standing. Claimant stated that standing up makes his neck hurt. He also referred to the FCE and its restrictions of occasional standing to support his contention that the jobs identified by Employer did not meet his physical limitations. The FCE report, however, noted that several of the activities that Claimant reported were difficult, were difficult for reasons other than his cervical injury. "These activities included crouching, kneeling, climbing stairs and stand/sit. [Claimant] reports that these activities caused pain in his knees and hips. He also had complaints of low back pain during testing." (EX-4, pp. 2) The FCE results also indicated that Claimant was not putting forth consistent effort.

Furthermore, "standing" was never mentioned in Dr. Ledbetter's medical records, nor has Claimant presented any other medical evidence to support his contention that he cannot work because standing irritates his condition. In fact, to the contrary, Dr. Blankenship, when questioned about the various job descriptions, stated that standing was not an issue that would affect carpal tunnel. (EX-3, pp. 28) He reviewed each job description and opined that Claimant should be capable of performing the jobs as long as the requirements remained within the light duty

category.¹¹ Also, as part of the labor market survey, Claimant himself noted that he continues to remain active and hunts and fishes.

Also, even though some of the jobs did require permanent standing, a number of jobs did not. For example, in her second labor market survey, Ms. Umholtz identified a job at Cross Auto Supply for a counter sales clerk. Here, the employer noted that they could accommodate lifting restrictions and had in fact hired individuals with restrictions in the past. They were willing to make accommodations. Claimant's contention that this job would probably require standing is not sufficient to preclude him from further investigating the job. From the job description provided to Ms. Umholtz this job appears to fall within Claimant's physical restrictions.

Notwithstanding the probability of suitable jobs within Claimant's physical limitations, I find Employer has failed to meet its burden of finding suitable alternative employment that is realistically available to Claimant. In other words, despite the fact that Employer has shown jobs Claimant is arguably capable of performing considering his age, education, work experience, and physical restrictions Employer has failed to show the availability of such job opportunities within the geographical area where the Claimant resides.

Employer conducted extensive job searches that were limited to Conway, Arkansas. Claimant, however, lives in Clinton, Arkansas, which is about 39 miles from Conway. A round trip commute from Claimant's home in Clinton to a job in Conway would range from between 80 to 90 miles per day. At the hearing, Claimant testified that his brother works in Conway and the commute costs him about \$100.00 a week in gas. Considering that the jobs identified by Employer pay wages ranging between \$5.15 and \$8.50 an hour, it is not economical for Claimant to be expected to commute to Conway for employment.

Consequently, Employer has failed to show the existence of realistically available job opportunities within the geographical area where Claimant resides that Claimant would be capable of securing if he diligently tried.

¹¹ It should be noted that the two job descriptions for companion/care-giver positions with the Conway Human Development Center and Home Instead did not specify with much detail the activities that would be required by Claimant, and Dr. Blankenship approved these jobs as long as the activities were within the light-duty range.

Accordingly, I find that Claimant is totally permanently disabled as of August 26, 2005, the date of MMI. Prior to this period, Claimant was temporarily totally disabled.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newport Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked substantially the whole of the year preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was substantially the whole year, where the work was characterized as full time, steady and regular). The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute

employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at the time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, § 10(c), 33 U.S.C.A. § 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). *Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. *See Story v. Navy Exch. Serv. Center*, 33 BRBS 111(1999).

In this case, neither 10(a) nor 10(b) are applicable to my calculation of average weekly wage. Claimant did not work substantially the whole of the year prior to his December 2, 2004 injury as he spent much of the time recovering from a previous injury. Nor is there any evidence of co-worker's salaries with which to compare Claimant. Although Claimant requested this information, Employer failed to provide it. Therefore, since 10(a) and 10(b) do not apply, 10(c) is the appropriate method for calculating Claimant's average weekly wage.

The object of 10(c) is to arrive at a sum that reasonably represents the Claimant's annual earning capacity at the time of his injury. *See Story*, 33 BRBS 111. I have previously addressed the average weekly wage issue in the case involving Claimant's earlier, January 12, 2004 injury. 40 BRBS 1 (ALJ) (2006) Employer, however, requests that I revisit this issue. Employer now asserts that I should apply a "blending" of Claimant's overseas wages and his last stateside job before he went to Iraq. I do not find this argument to be convincing for the same reasons stated in my previous decision.

Claimant testified that he intended to stay in Iraq three or four years in order to save up retirement money. As before, I am impressed that Claimant returned to

Iraq after his initial injury of January 12, 2004. One week after Claimant was medically cleared to return to work from his eye injury, he went back to Iraq. He remained there until his subsequent injury at issue in this case. Claimant was clearly seizing the opportunity to make as much money working in Iraq as he could. As in my previous decision, I find that the use of Claimant's prior earnings would be unfair and unreasonable given his newly discovered earning power and his obvious effort to take advantage of those earnings. Furthermore, prior to going to Iraq, Claimant had been retired and was only working intermittently to earn extra money. When he went to Iraq he was working full-time shifts to earn as much money as possible. Blending these two incomes would not provide an accurate reflection of Claimant's earning capacity at the time of his injury.

Claimant and Employer submitted a summary of Claimant's earnings in Iraq post hearing. (JX-2) The exact number of weeks Claimant worked and the corresponding money earned cannot be ascertained from this record. Therefore, I adopt Claimant's calculation of average weekly wage and look to the two full, four-week pay periods before the December 2, 2004 accident. These are represented by pay periods 11 (\$7,400.58) and 12 (\$6,978.55) for a total gross income of \$14,379.13 during this eight week period.¹² \$14,379.13 divided by eight weeks equals an average weekly wage of \$1,797.39.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from December 21, 2004 to August 26, 2005 based on an average weekly wage of \$1,797.39¹³;

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability from August 26, 2005 and continuing based on an average weekly wage of \$1,797.39;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

¹² It appears that pay period 13 includes time after Claimant's December 2, 2004 accident and therefore is not included in my calculation.

¹³ It appears that following Claimant's accident on December 2, 2004 Claimant continued to receive a salary until his return to the states on December 21, 2004.

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 20th day of March, 2007, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge