

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 July 2006

CASE NO.: 2006-LDA-33

OWCP NO.: 02-138039

IN THE MATTER OF:

WILLIAM MANNING

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

JOHN L. SCHOUEST, ESQ.

BRIAN E. WHITE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

(herein the Act), brought by William Manning (Claimant) against Service Employers International, Inc. (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on March 8, 2006, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered nine exhibits, Employer/Carrier proffered 23 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer/Carrier on or before the due date of June 19, 2006. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on October 4, 2004.
2. That Claimant's injury occurred from a zone of special danger during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.
4. That the Employer was notified of the accident/injury on October 4, 2004.
5. That Employer/Carrier filed a Notice of Controversion on December 13, 2004.

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____; and Joint Exhibit: JX-____.

6. That an informal conference before the District Director was held on December 12, 2005.
7. That Claimant received temporary total disability benefits from October 7, 2004 through November 5, 2004, for a total of \$1,384.60. (Tr. 17).
8. That no medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.
4. Claimant's average weekly wage.
5. Entitlement to and authorization for medical care and services.
6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the hearing and was deposed by the parties on March 1, 2006. (EX-20). He was 60 years old at the time of the hearing. He is a high school graduate and attended Del Mar Technical College. He enlisted in the U.S. Marine Corps and served in Vietnam for 17 months. (Tr. 20-21; EX-20, p. 6). Before beginning employment with Employer, he worked mainly construction. He was unemployed for seven months before being hired by Employer as a labor foreman. (Tr. 24; EX-20, p. 8).

He was hired by Employer on May 29, 2004, and deployed to Iraq arriving in Baghdad on June 2, 2004. (Tr. 23). As a labor foreman, he escorted and supervised civilian contractors. (Tr. 24; EX-20, pp. 13-14). He was stationed east of the Green Zone

near the police academy where Iraqi police candidates were trained. Enemy attacks occurred daily varying from five to 16 mortar attacks a day. (Tr. 25).

Claimant's contract of hire provided for hazard pay, foreign service pay and a clothing allowance. (Tr. 26-27; EX-1). He testified that his original contract provided for a 25% increase in his hourly wage for hazard and foreign service pay. (Tr. 27-28). He calculated a summary of pay due based on his timesheets amounting to \$38,062.40 for his service with Employer. (Tr. 28; CX-8). He stated he was required to work a minimum of 84 hours per week. (Tr. 29; EX-20, pp. 5, 13).

On October 4, 2004, Claimant was injured when a barrage of mortars hit the camp at which he worked. He was 11-12 feet from the mortar when it exploded. (Tr. 37). He was hit with pieces of shrapnel and pieces of buildings, by a fireball and gas which burnt the side of his head. He stated he received immediate treatment from the U.S. Army medics and was transported by helicopter to the Green Zone medical unit for care. (EX-20, p. 15). He testified he had "holes in my legs, neck, pieces (of shrapnel) in my nose, pieces in my cheeks, limbs, neck, in my limbs." A big piece of shrapnel was removed from his arm. X-rays and a MRI were taken and he received a cast for his right arm. He was evacuated to Camp Anaconda, an Air Force medical unit, and thereafter evacuated to Frankfurt, Germany for treatment. (Tr. 31-32). He remained in Germany for about a day and a half. He stated Employer wanted him to return to Texas for better medical treatment, but has received "absolutely zero medical treatment" since his return. He returned to the Houston, Texas on October 10, 2004. (Tr. 23; EX-20, p. 16).

Claimant testified that upon his return to the United States he spent three hours at the Houston airport trying to contact the Employer who did not meet him at the airport. He telephoned the numbers given to him by his Employer's representatives, which were numbers for a travel coordinator in Boston. (Tr. 32). A fellow marine saw he had been injured and brought him home. He was taken to the VA Hospital Emergency Room. He stated he has received "minimal" treatment with the VA in the form of medications. (Tr. 34-35; EX-20, p. 18). He went to the VA Hospital six or seven times, and was recuperating, but he still had a ringing in his head, a headache, "just throbbing that goes along with this type of concussion wound." (EX-20, p. 19).

Claimant's attorney referred him to Dr. Richard Evans in July 2005. (Tr. 35; EX-20, p. 22). Employer/Carrier has not approved treatment for any providers to which Claimant sought care. He attended a medical examination scheduled by Employer/Carrier with Dr. Fulford on June 27, 2005, who recommended Claimant be seen by an Ophthalmologist as well as an ENT doctor. Employer/Carrier has not approved either recommended specialist. (Tr. 36). Claimant also attended an examination with Dr. Whitsell for an independent medical examination scheduled by the U.S. Department of Labor in November 2005. He also recommended evaluations by an Ophthalmologist, an ENT specialist and a neurological consult. Employer/Carrier have not approved evaluations by any of the recommended specialists. (Tr. 36-37).

Claimant described an injury to his nose from shrapnel as a result of the explosion which has affected his nasal breathing, taste and sense of smell. (Tr. 37; EX-20, p. 30). He had no problems with his nose before going to Iraq. (Tr. 38). He has a dead spot on his left index finger with metal fragments in his left wrist, thumb and "second finger" at the middle joint. (Tr. 38-39). He stated his grip, feel and touch have been affected in that he cannot pick up things and it "feels like it's stretching" when he bends his fingers. (Tr. 39).

His neck is still painful from retained shrapnel and he lost teeth in the explosion. He stated he was "spitting teeth in the dirt for about ten minutes." No dental care or treatment has been provided. (EX-20, p. 30).

His hearing in his right ear has been affected but has not been tested since the explosion. (Tr. 39). He passed his pre-employment physical with Employer and had no hearing problems at that time with normal speech frequencies. (Tr. 40; EX-3, p. 7). He stated he could hear "bombs real good," but had problems with normal conversation. He occasionally experiences double vision in his right eye since the accident. Since the accident, his body has expelled metal fragments on 15 to 16 occasions, including a piece shown to the undersigned at the hearing which "worked its way out" of his left leg. (Tr. 42-44).

He testified that he has a piece of metal in his right arm or shoulder for which he was prescribed a cast because of injury to "some sort of muscle or whatever." (Tr. 44). He continues to have problems lifting or reaching with his shoulder. (Tr. 44-45). He lost 40 pounds from his weight of 165 when he deployed to Iraq which he attributes to lack of food. (Tr. 45).

He stated he had flash wounds from the explosion which burnt off his hair and has had metal expelled from the side of his head with headaches and balance problems. (Tr. 46). He had three to four pieces of metal expelled from the right side of his neck which caused soreness and tightening, but is currently better. (Tr. 47).

Claimant stated that he has lost feeling in his left leg which swells up and the soreness has "got up to my hip," and affected the muscles in his back which is getting worse. (Tr. 47; EX-20, p. 31). He stated he has recurring memory loss problems at times having trouble remembering his name. He has also had problems with concentration and sleeping. (Tr. 49).

Claimant testified that the whole ordeal has been stressful in that he has been without compensation, food and essentially homeless since his return from Iraq. (Tr. 51). He planned to work for Employer for three years in Iraq to get him into retirement. (Tr. 52).

On cross-examination, Claimant testified that his basic salary was \$2,583.00 for 40 hours of work per week and acknowledged his contract also provided for five percent foreign service bonus, 25 percent area differential and 25 percent "danger" or hazard pay for a total of 55% of supplemental pay. (Tr. 58; EX-1, p. 14). He also affirmed that at the time of his work injury he was on duty performing his regular job and had not "strayed from his job or doing something [he was not] supposed to be doing." (Tr. 61).

Claimant affirmed that he received treatment in theater for injuries to his right arm and metal fragments were taken from his stomach, legs, hip, side and arm. (Tr. 62). He testified that his right arm has not healed properly and that he has pieces of shrapnel between two muscles which cause agitation on movement. He stated that doctors who have reviewed his x-rays seemed satisfied with the mending of the bone of his arm. (Tr. 63).

Claimant stated he informed doctors in Germany and at the VA that his back and neck were hurting. (Tr. 64-65). He still has pain in his left lower leg and right hip and calf for which he made reports to treating physicians and medication was prescribed. (Tr. 65). He explained that the test administered by the doctor at the independent medical exam for Department of Labor to determine if he was magnifying his symptoms was never

completed. (Tr. 67; EX-20, p. 24). He admitted terminating certain tests during the FCE because of his inability to perform them and because they were beyond his capability, but did not refuse to do anything. (EX-20, p. 25). He further acknowledged that while working in Iraq he had fallen in a ditch two weeks before the mortar attack and injured his back and side. (Tr. 67-68, 80). He claims his back was aggravated by the mortar explosion. (Tr. 81).

Claimant also acknowledged that he spoke with Jim Hile of Employer/Carrier in October or November 2004 who informed Claimant that if he wanted medical attention or money, he would have to hire an attorney. (Tr. 69-73). Claimant seeks as a remedy medical treatment, his property left in Iraq returned, compensation and the difference in his salary which he alleges from Employer/Carrier. (Tr. 73-74). Claimant has not worked since returning from Iraq nor looked for work. (Tr. 74). He testified he could not currently perform the duties of a labor foreman because the job required 8-12 miles of walking daily and he can only walk at most 200 yards with difficulty. (EX-20, p. 23).

Claimant could not explain the earnings percentages reflected in EX-14 which shows total earnings of \$27,403.33, of which \$21,197.97 constituted regular pay, \$2,563 or 12.09% is designated as hazard pay, \$2,634.79 or 12.42% represented area differential pay and \$530.44 or 2.5% represented overseas allowance, a total percentage of 29.26 rather than 55%. (Tr. 78-79).

Claimant testified that he worked 84 hours per week while in Iraq which was mandatory, but was not paid an overtime rate for hours worked in excess of 40 hours per week. (Tr. 86-87). He acknowledged that he agreed to work at a straight time rate for hours over 40 hours per week and, if such a rate is legal, it was fair to him. (Tr. 88). He stated that "sometimes" a 750-pound dumpster had to be dragged 25 to 30 feet to a truck to be unloaded and he physically helped Iraqi workers drag the dumpster, unload trucks and shovel sand as part of his duties. (Tr. 90-91, 98; EX-20, pp. 14-15).

Claimant last worked at an auto sales job six to seven months before being hired by Employer. (Tr. 92; EX-20, p. 7). He worked part-time and may have earned about \$150.00 per week. (Tr. 94). He also affirmed that he had "some issues with the IRS" and tax problems. (Tr. 93). Claimant's income tax records were requested by Employer but not offered into the record.

(Tr. 99). Claimant stated initially he filed income tax returns about every three years, but later clarified that he filed on a yearly basis. (Tr. 101).

The Medical Evidence

On October 5, 2004, Claimant was treated by MAJ Reagan R. Parr, M.D., an orthopedic surgeon with the 31st Combat Support Hospital at Baghdad, Iraq. The treating notes indicate Claimant was struck by mortar fragments in extremities, sustained injuries to his right humerus (fracture), and multiple superficial fragment wounds to the extremities. He underwent irrigation and debridement of his wounds, his fracture was splinted. He was given medications for pain and infection. (CX-1, p. 2). On October 6, 2004, Claimant was evacuated to "higher echelon for continued care and recovery." (CX-1, p. 4).

On October 6, 2004, Claimant arrived at Camp Anaconda for treatment enroute to Germany. His fractured humerus and lower extremity wounds from fragments were noted. Claimant denied any numbness or tingling in his lower extremities. The diagram of documented injuries and pain reflects wounds to Claimant's nose, right shoulder, abdomen, right hip, thigh and calf, left forearm, wrist and hand/fingers, and left thigh and calf. (CX-1, p. 7). He was evacuated to Ramstein Air Force Base in Germany on October 6, 2004. (CX-1, p. 6).

Upon arrival at Landstuhl Regional Medical Center, Germany, on October 7, 2004, Claimant was taken to x-ray and the open humerus fracture was verified with small fragment wounds to his right lower extremity and abdomen. He was further irrigated, debrided and splinted. He was given medications in preparation for his flight to Houston, Texas, to follow-up with "local MD upon arrival." (CX-1, pp. 9, 11).

Houston Veteran's Administration Medical Center

On October 12, 2004, Claimant reported to the VA Emergency Room for treatment. He complained of swelling and pain in his right arm and was treated conservatively. X-ray reports revealed comminuted fracture of the proximal humeral shaft and metallic densities noted in the soft tissues in the upper arm. (EX-8, p. 9). He was sent to Prosthetics and fitted with a "Brace arm clamshell." (EX-8, pp. 4-5).

On October 18, 2004, Claimant presented at the VA Medical Center for consultation. It was noted that he was 10 days

status-post mortar injury with complaints of pain in his upper right arm. A clamshell brace and pain medications were prescribed. (EX-8, pp. 1-5). Claimant was to follow-up in two weeks with prosthetics for his clamshell brace. (EX-8, p. 6).

On November 2, 2004, Claimant was evaluated again at which time his right arm wound was healing well. The impression was: (1) comminuted non-displaced fracture humeral shaft with metal fragments within bone and soft tissues; and (2) metal fragments noted in soft tissues around the second and third digits and distal forearm of left hand/arm. He was instructed to perform passive range of motion of the elbow to prevent stiffness and follow-up in three weeks. (EX-8, pp. 3, 7).

Dr. Robert Fulford

On June 27, 2005, Claimant was evaluated by Dr. Fulford at the request of Employer/Carrier. He specifically noted that his examination of Claimant was for evaluation purposes only and not for medical care or treatment. Claimant's chief complaint was multiple shrapnel wounds with right arm pain, neck pain, low back pain, left hip pain, knee pain and headaches. He also complained of vision changes and hearing loss.

On physical examination, Dr. Fulford noted that Claimant's right shoulder shows "marked limitation" of internal and external rotation, and mild restriction of extension, lateral bending and rotation of the cervical spine. He noted that Claimant had "painful, retained foreign body in the left index finger, middle phalanx, radial border." (EX-10, p. 3). Multiple perforations were shown in the forehead, base of the skull, over the shoulder, at the right elbow, above and below the "flexor crease," left anterior thigh, left distal thigh, left leg proximal and "mid, as well as right, mid and medial thigh." (EX-10, p. 4). X-rays revealed a large metallic retained foreign body in the middle upper third of Claimant's right humerus, as well as several surrounding smaller metallic fragments outside the bone.

Dr. Fulford's impressions were healed open fractured right humerus, retained foreign body in the humerus, multiple foreign bodies retained terrorist bomb mortar fragments, back pain and knee pain. He recommended Claimant be seen by Ophthalmology and ENT specialists for his vision changes and auditory loss, which he attributed to aging. He opined that Claimant was at maximum medical improvement with respect to his right humerus. He further opined that the retained metallic foreign bodies may

cause problems in the future and may continue to expel themselves in the future. (EX-10, pp. 4-5). He opined that Claimant "can be released to return to duties in Iraq." (EX-10, p. 5).

Dr. Fulford ordered a Functional Capacity Evaluation (FCE) which was accomplished on June 27, 2005, that he interpreted as indicating Claimant could perform heavy work. (EX-10, p. 1).

Work Status Evaluators performed the FCE on June 27, 2005. The testing reveals that Claimant reported pain in his lower back, left hip, right arm, left shoulder and right forearm while performing static strength testing. (EX-11, pp. 3-4). Claimant also reported pain in his low back and right shoulder doing dynamic lifting. Claimant terminated the testing based on complaints of fatigue, excessive discomfort and an inability to complete the required number of movements while achieving an age-determined target heart rate. (EX-11, p. 7). Grip strength testing produced reported pain in Claimant's left hand and forearm. (EX-11, pp. 10-11).

In the functional abilities evaluation, Claimant completed the tasks of walking, carrying, pushing/pulling, balancing, crawling, reaching to front, and standing and sitting without any reported symptom complaints or behaviors. (EX-11, pp. 16-21). It was concluded that Claimant qualified for the heavy work category "within the restricted work plane," but, when considering "competitive unrestricted vertical and horizontal work planes, he qualified for the medium work category. (EX-11, p. 1). There was no further explanation or clarification of the work capacity conclusions. There was no corresponding assessment of Claimant's capacity to perform his former job with Employer.

Dr. Richard A. Evans

On July 27, 2005, Claimant presented to Dr. Evans with complaints of pain in his left leg, hip, lower back, right shoulder, first and second fingers of the left hand, nose as well as diminished hearing and a constant ringing in his ears. (CX-1, p. 20; EX-12, p. 1).

On physical examination, Claimant displayed diminished hearing and tenderness was detected in the trapezius muscle of the neck with "some spasm in the body of the muscle that curves horizontally onto the shoulders." There was also limitation of the range of motion of the neck. Decreased range of motion in

the right shoulder was also noted as well as pain and scarring on the left lower leg, and decreased range of motion of the first and second fingers of the left hand. (EX-12, p. 2). Marked tenderness over the lumbar spinous processes and marked spasm in the erector spinae and sacrospinalus muscles of the low back were detected. Tenderness was palpated over the lumbar spine. (CX-1, p. 21; EX-12, p. 3).

Dr. Evans's impressions were (1) status-post broken right shoulder; (2) tinnitus; (3) cervical disc disorder without myelopathy; (4) lumbar disc disorder without myelopathy; (5) lumbar radiculitis; and (6) shrapnel injury to left leg. Medications were prescribed, an ENT evaluation for hearing was recommended and Claimant was placed "off work." (CX-1, p. 21; EX-12, p. 3).

Dr. Robert Whitsell

Dr. Whitsell, performed an independent medical examination of Claimant at the behest of the U.S. Department of labor on November 15, 2005. (CX-1, p. 22).

Claimant provided a work history and described his medical treatment after his work accident. He related that most of his medical care since returning from Iraq had been received at the VA Hospital. Claimant presented with complaints of pain in his left leg, lower back, headaches, neck pain, some right arm and shoulder pain and left hand pain. (CX-1, p. 23).

On physical examination, Claimant had tenderness over his shoulders and reduced range of motion of the left shoulder. Dr. Whitsell notes that muscle strength was difficult to assess secondary to Claimant's complaints of pain. Claimant's grip strength was measured and revealed reduced testing of the right hand due to deconditioning. Dr. Whitsell's diagnoses were: (1) multiple shrapnel wounds to the head, face, neck, right shoulder and humerus, both hands, back and both legs; (2) fracture, right humerus, healed; and (3) multiple retained soft tissue shrapnel fragments. (CX-1, pp. 24-25).

Dr. Whitsell opined that Claimant would benefit from a good exercise program for rehabilitation of his right upper extremity. He further opined that after rehabilitation, Claimant would be at maximum medical improvement for his humerus injury. Dr. Whitsell withheld an opinion regarding Claimant's return to work until after a recommended FCE. He opined that Claimant should be seen for further rehabilitation regarding his

right upper extremity and agreed with the need for an Ophthalmology and ENT consult as well as a neurological consultation. (CX-1, p. 27).

On November 15, 2005, Claimant underwent a second FCE with MES Solutions. Various testing resulted in the examiner concluding that Claimant gave an inconsistent effort on grip strength testing, exhibited high scores on pain avoidance behavior/beliefs, scored a 58% on a low back pain questionnaire of "severe" disability and had a documented 5/5 on the Waddell's Questionnaire, indicative of inappropriate responses suggesting symptom magnification. Although the raw data placed Claimant at the "light-medium" physical demand level of work, it was concluded that a more consistent effort may have placed him at the medium level. (CX-1, p. 29). Lifting tasks were terminated by Claimant based on complaints of fatigue, excessive discomfort, fear avoidance or inability to complete the required number of lifts. (CX-1, p. 32).

Based on Claimant's description of his former job and his demonstrated performance during the FCE, it was determined that Claimant could not perform the lifting, carrying, standing and walking requirements of a labor foreman for Employer. (CX-1, p. 34). There is no record evidence that Dr. Whitsell reviewed the FCE and provided a follow-up opinion or recommendation regarding Claimant's capacity to return to work subsequent to the November 15, 2005 FCE.

The Contentions of the Parties

Claimant contends he suffered injuries to "about every part of his body," after a mortar attack in Baghdad, Iraq. He received emergency treatment in theater and was evacuated to Landstuhl American Army Hospital, Germany. He claims that Employer/Carrier have not provided any medical care or treatment since his return to the United States. He contends he has not been paid any compensation even though he cannot return to work and has not reached maximum medical improvement. He asserts his average weekly wage should be computed under either Section 10 (b) or (c).

Employer/Carrier contend that Claimant sustained injuries which included shrapnel wounds and a broken right arm. They claim that Claimant has reached maximum medical improvement from the wounds and broken arm and has no continuing impairment from those injuries. They question causation of other alleged injuries suffered by Claimant which were asserted seven or eight

months after his return to the United States, such as claims for low back and neck injuries, loss of hearing and dental problems. They argue there is no medical evidence to substantiate such injuries or to link such injuries to his accident in Iraq. They also argue that average weekly wage should be compute under Section 10(c) using a composite of Claimant's actual earnings with Employer and his earnings in prior years.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216

(2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

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

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

In the present matter, Employer/Carrier contest Claimant's contentions that he sustained injuries to his low back, neck, left leg and hip, vision, hearing and teeth. They argue there is no medical evidence to substantiate such injuries or to link such injuries to his October 4, 2004 work accident in Iraq.

The medical records in evidence presented by the parties are devoid of any complaints by Claimant of injuries to his left leg, hip, neck, back, vision or hearing made to providers at the

301st Combat Support Hospital on October 5, 2004, to medical personnel at Landstuhl Medical Center in Germany or to the VA Hospital in Houston, Texas in October and November 2004. There is no documentation that Claimant made such complaints to any medical provider until his examination with Dr. Fulford in June 2005. Claimant also claims he suffered a fall in which he injured his back two weeks before the explosion, but there are no medical records of treatment. Arguably, the explosion impact may have aggravated his alleged back condition, but Claimant did not present any such documented complaints until June 2005.

Despite a lack of complaints or medical treatment there is a compelling argument that Claimant likely would have suffered injuries to his low back, left leg and hip, neck, vision and hearing from his working conditions of October 4, 2004, which **could have caused** such harm or pain. Although there is no documented medical evidence of any complaints or symptomatology until June 2005, eight months after the work accident, Claimant continuously sought medical treatment from Employer/Carrier and was refused or denied. Dr. Evans's office staff confirmed that their efforts to contact Joe Johnson at "AIG" went unanswered and unreturned. (CX-4). If Employer/Carrier had provided appropriate medical care and treatment, perhaps Claimant's symptoms could have been timely and properly assessed. Claimant's credible testimony that he suffered injuries to his back, left leg and hip, neck vision and hearing in the October 4, 2004 mortar explosion is uncontradicted.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

Thus, I find and conclude Claimant has established a **prima facie** case that he suffered an "injury" under the Act to his back, left leg and hip, neck, vision and hearing, having established that he suffered a harm or pain on October 4, 2004, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982).

It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer/Carrier have presented no substantial evidence which rebuts the Section 20(a) presumption. Dr. Fulford offered no opinions about causation regarding Claimant's complaints of back, neck, or left leg and hip pain. He arguably attributed such complaints to a "terrorist bomb." He attributed Claimant's vision and auditory problems to age without any testing, but recommended consultations therefor.

3. Conclusion or Weighing All the Evidence

Even assuming **arguendo** that Employer/Carrier had rebutted the presumption, I find and conclude that when weighing all of the evidence or record, the opinions of Drs. Evans and Whitsell buttress the conclusions that Claimant's symptomatology could have been caused by his working conditions of October 4, 2004, and therefore are work-related.

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from compensable injuries as a result of his fractured right arm and multiple shrapnel wounds and retained fragments, and I have found that Claimant sustained injuries to his back, left leg and hip, neck, vision and hearing, nevertheless the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §

902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a 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); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., *supra*; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Dr. Evans, with whom Claimant began treating in July 2005, took Claimant "off work." He recommended an ENT consultation which was never approved by Employer/Carrier. Contrary to Dr. Fulford's opinion regarding MMI, Dr. Whitsell opined that Claimant required rehabilitation of his right upper extremity, after which Claimant would have reached MMI for his humerus injury. I find Dr. Whitsell's opinion, as an independent medical examiner, more persuasive and reasoned in view of Claimant's on-going problems with his right upper extremity. Moreover, contrary to Dr. Fulford, Dr. Whitsell withheld any opinions about Claimant's return to work. He also recommended neurological, Ophthalmology and ENT consultations for Claimant's persisting medical complaints. In view of Employer/Carrier's failure to authorize rehabilitation of Claimant's right upper extremity and the consensus of medical opinions that further medical consultations are warranted, I find and conclude that Claimant has not reached MMI.

Claimant credibly testified that he could not return to nor perform his former job duties which is supported by the findings of the FCE of November 15, 2005. Only Dr. Fulford has concluded Claimant could return to his former job in Iraq apparently based on his opinion that Claimant has reached MMI with respect to his humerus injury and without regard for his other orthopedic complaints for which no diagnostic testing was ordered. I find Dr. Fulford's opinion to be unreasoned and place no probative

value thereon. Dr. Evans took Claimant off all work and Dr. Whitsell has rendered no opinion concerning Claimant's capacity to return to his former job.

In view of the complete disregard by Employer/Carrier for Claimant's medical condition upon returning from Iraq, I find and conclude that Claimant has not reached maximum medical improvement for his various injuries sustained in the October 4, 2004 mortar explosion and is entitled to receive temporary total disability compensation benefits based on an average weekly wage of \$1,579.60 and a compensation rate of \$1,047.16, as discussed below.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, as in the instant case, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, 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 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is

realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 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 Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Employer/Carrier have presented no evidence of suitable alternative employment, nor have they offered Claimant his former job based on Dr. Fulford's opinion, therefore, Claimant remains entitled to temporary total disability compensation benefits.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power **at the time of injury**. SGS Control Services v. Director, OWCP, *supra*, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the **same employment** for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of such **immediately preceding** year in the same or in similar employment in the same or a neighboring place. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average **daily** wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Moreover, Claimant worked as a labor foreman for Employer from May 29, 2004 until he left Iraq on October 6, 2004, or 18 and 4/7 weeks, which is not "substantially all of the year," and was otherwise essentially unemployed in the year prior to his deployment and injury which does not comport with the requirements for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979) (36 weeks is not substantially all of the year). *Cf.* Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature

of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Accordingly, I find that neither Section 10(a) and 10(b) should be used to calculate Claimant's average weekly wage. A daily wage cannot be computed under either section based on the wage data of record. Although Claimant's hourly wage records were requested, Employer/Carrier failed to produce legible copies of such records. The record testimony and wage records also reveal Claimant was neither a five-day nor six-day worker. Moreover, Section 10(b) is inappropriate since no wages of similarly situated employees who worked substantially the whole of the **immediately preceding** year are of record, only wages earned at the same time or prospectively after Claimant's injury.²

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

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.** Barber v. Tri-State Terminals,

² EX-23 reveals the gross monthly wages of three similarly situated employees for the following work periods: August 2004 to November 2004; April 2004 to October 2004; and May 2004 to May 2006. Arguably, the wages submitted by Employer are those of similar employees, however their employment contracts and terms of employment are not of record.

Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant contends his compensation rate should be \$1,047.16 per week, which is the maximum compensation rate established by the U.S. Department of Labor for the year in which his date of injury occurred. He proposes several alternative methods to calculate his average weekly wage under Section 10(c) of the Act.

He suggests his monthly contract rate of \$2,583.00 for 40 hours of work per week yields a yearly amount of \$30,996.00, which when divided by 2080 hours (40 hours per week x 52 weeks) yields an hourly wage of \$14.90. Claimant's employment contract also provided for supplements for foreign service bonus (5%), area differential pay (25%) and danger or war hazard pay (25%) or a total increase of 55% based only on his first 40 hours of work per week. (EX-1, pp. 2, 14). These supplements arguably increase his hourly rate to \$23.10 ($\$14.90 \times .55 = \8.20). (CX-2, pp. 30-31). He argues his monthly "adjusted gross pay" with supplements would be \$4,003.65 or \$48,043.80 annually, based on a 40-hour week.³

Claimant also contends he maintained a record of his hours from which he computed earnings of \$38,062.40 for the period from May 19, 2004 through October 6, 2004, or a period of 20.143 weeks⁴ which yields an average weekly wage of \$1,889.62 ($\$38,062.40 \div 20.143$) or the maximum compensation rate of \$1,047.16. (CX-8).⁵

³ My calculations result in a monthly total of \$3,696.00 (40 hours x \$23.10 = \$924.00 x 4 weeks) and an annual figure of \$44,352.00 ($\$3,696.00 \times 12$).

⁴ My calculations reveal Claimant was employed by Employer for 18 and 4/7 weeks.

⁵ Claimant's calculation is based on an hourly rate of \$16.15 and computes supplemental pay for all hours worked rather than only the contractual 40 hours each week. For these reasons, I find his calculation unpersuasive and not indicative of his average weekly wage at the time of his injury.

Lastly, Claimant argues that under the Davis Bacon Act he should have been paid time and one-half for overtime over 40 hours per week at a rate of \$34.65 per hour which yields an additional \$10,236.60 to be added to his earnings of \$38,062.40 or an average weekly wage of \$2,397.82. Thus, the maximum compensation rate of \$1,047.16 still applies.

The Davis Bacon Act, as amended, 40 U.S.C. § 276a, et seq., operates to ensure the payment of proper wages, fringe benefits, and overtime. The Davis Bacon Act is designed to give **local** laborers and contractors a fair opportunity to participate in **federal building programs**, to protect the employees of government contractors from substandard wages, and to promote the hiring of local labor rather than cheap labor from distant sources. United States v. Binghamton Construction Co., 347 U.S. 171, reh'g. denied, 347 U.S. 940 (1954). The Davis Bacon Act applies where the contract amount exceeds \$2,000, in which the **United States is a party** for the construction, alteration or repair of a **public building** within the **geographical limits of the United States**. Clearly, the Davis Bacon Act does not apply in these circumstances and Claimant's proposed calculations related thereto are not persuasive and are rejected.

Employer/Carrier contend that Claimant's average weekly wage should be calculated under Section 10(c) of the Act by recognizing his weekly earnings of \$1,487.04 (total earnings of \$27,403.33 ÷ 18.43 weeks) and adding his "forecasted AWW" or "historical AWW" of \$73.71 per week based on his wage history from 1992 to 2003 (total Social Security earnings of \$45,998.16 ÷ 12 years = \$3,883.18 per year ÷ 52 weeks) multiplied by the remaining 33.57 weeks of the 52-week period which yields \$2,474.59 (33.57 weeks x \$73.71) or a total projected earnings of \$29,877.92 (\$27,403.33 + \$2,474.59) or an average weekly wage of \$574.57 (\$29,877.92 ÷ 52 weeks) and a corresponding compensation rate of \$383.04.

In Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981), the Board held under Section 10(c) that a worker's average weekly wage should be based on his earnings for the seven or eight weeks he worked for the employer rather than on the entire prior year's earnings because a calculation based on the **wages at the employment where he was injured** would best adequately reflect the claimant's earning capacity **at the time of the injury**. Section 10(c) focuses on earning capacity rather than actual earnings.

The U.S. Fifth Circuit Court of Appeals has observed that wages earned at the time of injury will best reflect a claimant's earning capacity at the time and it would be an "exceedingly rare case" where a claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful or unreliable. Hall v. Consolidated Equipment Systems, Inc., 139 F.3d 1025, 1031, 32 BRBS 91 (CRT) (5th Cir. 1998).

Clearly, Claimant's employment with Employer resulted in an enhanced earning capacity under his employment contract. In the absence of injury it is undeterminable how long Claimant would have worked in Iraq for Employer, but arguably it would have been more than five months. However, Claimant may not have fulfilled his expectations to work in Iraq for the remainder of his work life.

Although the record discloses that Claimant earned \$27,403.33 in gross wages accordingly to Employer/Carrier while working in Iraq for 18 and 4/7 weeks, his actual payroll records were not made available for the record.

Under the extant circumstances, I find and conclude the most appropriate, fair and reasonable method of computing Claimant's average weekly wage is to award an average weekly wage commensurate with his earning power and potential at the time of his injury. For this reason, I reject Employer/Carrier's calculation based in part on Claimant's past 12 years of earnings. I also reject, in part, Claimant's calculations based on his Davis Bacon Act argument since it is inapplicable to the present circumstances and because he contractually agreed to be paid at a straight time rate for overtime hours while working in Iraq.

I find Claimant's projected contractual monthly earnings with Employer, including supplemental pay for 40 hours per week, amounted to \$3,696. However, Claimant worked a minimum of 84 hours per week, and agreed to be paid at a straight time rate for all hours over 40 hours. (EX-1, p. 2). Thus, an additional weekly amount of \$655.60 (44 hours x \$14.90) or monthly rate of \$2,622.40 (\$655.60 x 4) should be added to his basic monthly contract rate, yielding an average monthly contractual rate of \$6,318.40 (\$3,696.00 + \$2,622.40). This amount is comparable to the earnings of similarly situated employees who averaged from \$4,758.92 (six months of earnings), \$5,494.77 (four months of earnings), and \$6,484.47 (25 months of earnings). His projected contractual monthly earnings would yield an annual amount of

\$75,829.80 (\$6,318.40 x 12) or an average weekly wage of \$1,579.60.

Accordingly, I find and conclude that Claimant is entitled to the maximum compensation benefit rate of \$1,047.16 as a result of his October 4, 2004 accident and injury.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103

(1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

I find Employer/Carrier has completely ignored Claimant's right to medical care and treatment under Section 7 of the Act. His requests for treatment have gone unanswered. He is entitled to reasonable and necessary medical care and treatment for his work-related injuries to include rehabilitation for his right upper extremity, treatment for his shrapnel wounds, care and treatment for his back, left leg and hip, neck, vision and hearing loss and hand injuries which were sustained as a residual of his October 4, 2004 work accident/mortar explosion in Iraq. I so find and conclude. Employer/Carrier are responsible for all medical care and treatment heretofore denied Claimant.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Claimant was paid temporary total disability compensation benefits from October 7, 2004 to November 5, 2004, for a total amount of \$1,384.60. Employer/Carrier filed a notice of controversion on December 13, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.⁶ Thus, Employer was liable for Claimant's total disability compensation payment on

⁶ Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

October 18, 2004. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by November 1, 2004, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on November 1, 2004, and is liable for Section 14(e) penalties for the difference between the disability compensation paid to Claimant and the total disability compensation Claimant is owed from October 7, 2004 until December 12, 2004.

VI. INTEREST

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

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

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District

Director to submit an application for attorney's fees.⁷ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

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

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from October 4, 2004 to present and continuing, based on Claimant's average weekly wage of \$1,579.60 which yields a maximum compensation rate of \$1,047.16, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's October 4, 2004, work injury, consistent with this Decision and Order, pursuant to the provisions of Section 7 of the Act.

3. Employer/Carrier shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to December 13, 2004, as provided herein, exceed the sums which were actually paid to Claimant.

⁷ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **January 4, 2006**, the date this matter was referred from the District Director.

4. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 31st day of July, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge