U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 30 November 2006

Case No. 2006-LDA-00049

In the Matter of

M.D.,

Claimant,

v.

URS/LEAR SIEGLER, INC.,

Employer,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.[1]

APPEARANCES:[2]

---

[1] The caption has been modified to reflect the full names of the parties.

[2] The Director, Office of Workers' Compensation Programs, a party in this proceeding, was not present or represented by counsel at the hearing. By failing to appear at the hearing, the Director is deemed to have waived any additional issues that have not been previously contested at the close of this record. By referring this matter for hearing the District Director is further deemed to have completed evidentiary development and adjudication as required by the regulations. 20 C.F.R. § 725.421.

Lee J. Bloomfield, Esq.
Brian S. Katz, Esq.
Bloomfield & Katz
Memphis, Tennessee
For the Claimant

Michael T. Quinn, Esq.
Laughlin, Falbo, Levy & Moresi
San Francisco, California
For the Employer

BEFORE: Larry S. Merck
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, and as extended by the Defense Base Act, 42 U.S.C. §1651, *et seq.* (hereinafter referred to collectively as "the Act"), brought by M.D. ("Claimant"), against his former employer, URS/Lear Siegler, Inc. ("Employer"), and its insurance carrier, Insurance Company of the State of Pennsylvania/AIG Worldsource ("Carrier"). The Defense Base Act (DBA), 42 U.S.C. § 1651 et. seq. is an extension to the Longshore and Harbor Workers' Compensation Act. The Defense Base Act was originally intended to cover civilians employed at overseas military bases, was later extended to cover civilians working on overseas construction projects for the United States government or its allies, and was finally extended to protect employees fulfilling service contracts tied to such a construction project or to a national defense activity. Claimant alleges that as a result of surgery to repair a knee injury, which is compensable under the Act, he developed pulmonary emboli ("PE") that caused a seizure, resulting in severe injuries to his shoulder and hip. Claimant alleges that these injuries are also compensable under the Act because they are causally related to complications from the surgery to repair his knee.

Claimant, represented by counsel, appeared and testified at the formal hearing held on May 9, 2006 in Paducah, Kentucky. I afforded all parties the opportunity to offer testimony, question witnesses, and introduce evidence. At the hearing, Claimant's exhibits 1 through 13; Employer's exhibits 1 through 13, 15, 16, and 18; Joint exhibit 1, and Administrative Law Judge's exhibits 1 through 7 were admitted into evidence without

objection. (TR 11, 19, 26, 37, 44, 124).[3] Claimant objected to Employer's exhibits 14, 17, and 19, and filed a Motion to Exclude the Evidence admitted in those exhibits. (TR 25-26; CX 11). In an Order dated July 10, 2006, I denied Claimant's motion to exclude this evidence. After the hearing, both parties submitted timely post-hearing briefs; and thereafter, I closed the record. I based the following findings of fact and conclusions of law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties have been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

STATEMENT OF THE CASE

Background:

On March 14, 2003, while installing a satellite telephone dish in Kuwait, Claimant fell from a ladder and injured his right knee. Employer concedes that Claimant's knee injury is compensable under the Act. However, Claimant alleges that as a result of the surgery to repair his knee, he later developed PE that caused a seizure, during which he sustained severe injuries to his right shoulder and right hip. Claimant alleges that these injuries are compensable under the Act because they are causally related to his knee injury. Claimant filed his claim under the Act. Claimant requested a formal hearing and the claim was transferred to the Office of Administrative Law Judges on February 24, 2006.

Issue:[4]

---

[3] In this Decision and Order, "CX" refers to Claimant's exhibits, "EX" refers to Employer's exhibits, "JX" refers to Joint exhibits, "ALJX" refers to Administrative Law Judge's exhibits, and "TR" refers to the transcript of the hearing.

[4] While the resumption of temporary total disability payments for expenses incurred in relation to Claimant's knee injury is listed as an issue to be resolved, the record reflects that Employer/Carrier resumed paying Claimant's temporary total disability payments and paid all outstanding medical bills related to the knee injury. Claimant did not address this issue in his closing brief. In its brief, Employer states that it has paid all outstanding temporary total disability and medical expenses related to Claimant's knee injury, and Employer also states that temporary total

The only issue before me is whether the seizure and its sequelae are causally-related to Claimant's knee injury, and therefore compensable under the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations:[5]

At the hearing, the parties submitted the following stipulations:

1. The Act applies to this claim;

2. Claimant and Employer were in an employer-employee relationship at the time of the injury;

3. The injury to the knee arose out of and in the scope of employment;

4. The knee injury occurred on March 14, 2003, in Kuwait, and the seizure and the resulting injuries occurred on April 16, 2004, in Hopkinsville, Kentucky;

5. The date when Employer was advised of or learned of the injury to the knee was March 14, 2003;

6. Timely notice of the injury was given to Employer;

7. Employer filed a First Report of Accident on August 20, 2003;

8. Claimant filed a timely notice of the claim;

9. Temporary total disability existed from August 15, 2003, and is continuing;

10. Benefits are paid at the rate of $996.54 per week;

11. Claimant was provided medical benefits for the knee injury only;

---

disability payments are continuing.

[5] *See* JX 1.

12. The last payment of benefits was made on March 6, 2006, and the current state of payments is contested;[6]

13. Claimant has not returned to his regular employment with the employer since the date of injury;

14. Claimant's knee injury was deemed a compensable and proper disability and medical benefits were provided up to March 10, 2006, with the exception of a bill due and owing to Orthopedic Specialties, Inc. for a knee brace in the amount of $1,006.29.[7]

15. Claimant suffered a dislocated and fractured right shoulder and right hip during the April 16, 2004 seizure, which Employer disputes is causally related to the industrial knee injury.

16. Claimant's average weekly wage at the time of the injury is unclear; and,

17. Employer timely filed a notice of controversion on May 18, 2004.

These stipulations have been admitted into evidence and are therefore binding upon Claimant and Employer. *See* 20 C.F.R. § 18.51; *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law. The administrative law judge has discretion to decline to accept all of the parties' stipulations into evidence. *Warren*, 21 BRBS at 151. However, stipulations regarding an incorrect application of law are not binding. *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990).

---

[6] *See supra* note 4.
[7] *See supra* note 4.

Summary of the Evidence

Claimant's Testimony:

Claimant testified on his own behalf at the formal hearing. (TR 112-139). Claimant is a resident of Hopkinsville, Kentucky, and is currently unemployed. (TR 112). He was previously employed by URS/Lear Siegler, Inc., and was stationed in Iraq and Kuwait. On March 14, 2003, Claimant fell from a ladder and injured his knee while working for Employer in Kuwait. (TR 113). He returned to the United States in August 2003, and had the knee examined. *Id*. He underwent surgery in October to repair a torn anterior cruciate ligament (ACL) and a partially torn meniscus. (TR 114).

After the surgery, Claimant was bedridden for four to five days, although he was able to move about the house if he needed to do so. (TR 114). He used crutches to get around for three weeks after that, and he wore a knee brace until April 16, 2004. (TR 114-115, 132). Approximately one week after his knee surgery, Claimant began physical therapy at In Motion in Hopkinsville, Kentucky. (TR 115, 120). He attended therapy sessions three days each week for approximately forty-five minutes to an hour, with the level of activity during these sessions gradually increasing. (TR 115-116). Claimant testified that he complied with all physical therapy instructions, although there was not always an aide present with him during his physical therapy sessions. (TR 116, 121). Other than participating in physical therapy and driving his daughter to school, Claimant had no other physical activity. (TR 116).

After the knee surgery, Claimant began experiencing an "uncomfortable type" mild pain in the right side of his chest approximately once every three weeks. (TR 117-118). He experienced this pain five to six times between the time of the surgery and April 16, 2004. (TR 117-118). Claimant only reported the pain to his wife. (TR 118). On April 16, 2006, Claimant had a storage building delivered, but told the workmen that they could leave without finishing the installation, as he was not feeling well and needed to lie down. (TR 118-119). Earlier that same week, Claimant testified that he experienced a radiating pain in his calf that spread to the back of his knee. He reported this pain to his wife, to his therapist aide at the rehab center, and to Dr. David Bealle, the orthopedic surgeon who performed his knee surgery. (TR 120; EX 15).

On April 16, 2004, Claimant went to dinner at his wife's parents' house despite feeling ill. (TR 125). During dinner, Claimant blacked out as he reached across the table for a biscuit. (TR 125-126). The next thing he recalled was being put into the ambulance, although he does not actually recall the trip to the hospital. (TR 126). Claimant's wife testified that during dinner Claimant rose up, grabbed his chest, and made a strange sound. (TR 137). When he began to turn blue, Claimant's sister-in-law, who is a registered nurse, unsuccessfully attempted to perform the Heimlich maneuver because she believed that Claimant was choking. *Id.* Claimant's wife testified that blood and pieces of her husband's tongue came out of his mouth because he had bitten his tongue during the seizure. (TR 138). When Claimant's body became rigid, his sister-in-law realized that Claimant was having a seizure and told the family to get him on the floor. *Id.* Claimant jerked rigidly on the floor, while his wife tried to turn his head to the side so that he would not choke on the blood; however, because Claimant's body had become so rigid, she could not move his head. *Id.*

Claimant testified that after the seizure his chest pains stopped. (TR 132). He also testified that he had never had seizures before this incident and he has no family history of seizures or blood clotting. (TR 126-127). He had taken Prozac intermittently for a few years, but had never experienced a seizure as a side effect of using the drug. (TR 127-128). However, Claimant does not recall whether or not he was taking Prozac at the time of the seizure. (TR 129). At the hearing, Claimant testified that he was currently taking the blood-thinning drug Coumadin and that he had taken Prevacid for heartburn for years. (TR 132-133).

Claimant received a bill for his knee brace that was not paid by Employer or its insurance company. (CX 8). Claimant also received a check in late April for past due temporary disability benefits for the period of March 10, 2006 to April 20, 2006. (CX 10). Claimant is in need of another knee surgery and a shoulder surgery which Employer has not yet approved, and Claimant does not currently have any medical insurance to pay for those surgeries. (TR 129-130, 133).

An administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir.

1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). I find that Claimant is an entirely credible witness, and I give his testimony great weight in making my decision.

Medical Evidence:

Dr. Travis Calhoun is a licensed and practicing physician in the State of Kentucky, and is Board-certified in Internal Medicine. He currently practices at the Jennie Stuart Medical Center, and is the Chief Medical Officer of Pennyroyal Hospice. (CX 12). Dr. Calhoun was also Chief of Staff at Jennie Stuart Medical Center in 2004, when Claimant was admitted to the emergency room for treatment of his seizure and the resulting hip and shoulder injuries. *Id.* Dr. Calhoun began treating Claimant sometime in the mid-1990's as a family doctor and internist. (TR 46). At the hearing, Dr. Calhoun testified that Claimant was generally healthy, with no unusual health problems until April 16, 2004, when he experienced the seizure. (TR 47).

Claimant has provided the medical treatment records of Dr. Calhoun, which were admitted into evidence at the hearing. (CX 2). Prior to Claimant's knee injury, Dr. Calhoun had seen him for chronic headaches and a stress fracture in his foot; otherwise Claimant was healthy. (TR 47; CX 2). In August 2003, Dr. Calhoun examined Claimant's injured right knee, and ordered an x-ray and magnetic resonance imaging (MRI). Dr. Michael Clark reviewed the x-ray and MRI of the knee and determined that Claimant's ACL had been torn, but there was no fracture or dislocation. (CX 2). Thereafter, Dr. Calhoun referred Claimant to Dr. David Bealle, who performed surgery on the knee on October 14, 2003. (TR 47-48).

Claimant submitted the treatment records of Dr. Bealle at the hearing, where they were formally admitted into the record. (CX 4, EX 15). Dr. Bealle reviewed Claimant's x-ray and MRI and also determined that Claimant had a torn ACL with an associated tear of the posterior horn of the medial meniscus. *Id.* Dr. Bealle's records show normal progress after the surgery, without any complications. *Id.* However, on April 14, 2004, six months after the surgery, Claimant complained to Dr. Bealle of weakness, mild instability, and intermittent pain in his right knee. *Id.* In February 2005, Dr. Bealle noted his concern that the ACL reconstruction had failed, and in January 2006, he recommended surgery to once again repair the ACL tear. *Id.* Aside from the failure of the ACL reconstruction, Dr. Bealle noted that there was nothing unusual about his recovery, and that the surgery itself had proceeded normally. *Id.*

On April 16, 2004, Claimant was admitted to the emergency room at Jennie Stuart Medical Center after having had a seizure and suffering related injuries to his hip and shoulder. The treatment records were admitted into evidence at the hearing. (CX 5; EX 12). Dr. Tariq Sayyad was the Emergency Room doctor who treated Claimant. Dr. Sayyad initially determined that there were three possible causes of Claimant's seizure: 1) since he had a history of headaches for three days prior to the seizure, he could have a problem within his brain; 2) he could have had a PE and become hypoxic, which caused the seizure; or, 3) he choked on something and had a seizure and "subsequently that developed aspiration pneumonitis and now he is hypoxic because of that." *Id.*

According to Dr. Calhoun, the CT scan of Claimant's head returned negative results, ruling out the possibility of a problem with Claimant's brain. *Id.* Blood tests revealed that Claimant's blood oxygen levels were low, indicating hypoxia, and his white blood cell count was normal, indicating a lack of any inflammatory process or pneumonia (CX 5, 6; EX 12). Also, the trachea was clear of any food particles, which implies that he did not aspirate. *Id.* In his deposition, Dr. Calhoun suggested that these findings effectively rule out the possibility that Claimant was hypoxic due to aspiration or inflammation. (CX 6).

CT scans and x-rays, interpreted by Dr. Charles Ross, revealed signs of PE. (CX 5; EX 12). The final diagnosis was right-sided PE and hypoxia. *Id.* According to Dr. Ross, x-rays of Claimant's chest show "minimal bibasilar atelectasis," and "scattered interstitial fibrosis...in both lungs." *Id.* Dr. Ross opined that there is an "increase in bibasilar atelectasis with patchy infiltrates in the right lung base, with overall improvement on 04/17/04." *Id.* Dr. Ross also interpreted the CT scan of the Claimant's chest, stating, "[m]ultiple thrombi are demonstrated lodged within the pulmonary arteries in the right lung base posteriorly associated with patchy infiltrates in the right lung base." *Id.* He concluded that there were "multiple bibasilar acute PE's, most pronounced on the right." *Id.* Claimant also sustained injuries to his right hip and right shoulder during the course of the seizure. *Id.* When reviewing the x-rays of Claimant's shoulder and hip, Dr. Ross found that the hip was fractured and the right shoulder was dislocated and fractured. *Id.*

Dr. Calhoun was also in charge of Claimant's care during his stay at Jennie Stuart Medical Center, and also diagnosed

Claimant with pulmonary emboli (CX 5, 6). During his deposition he explained that Claimant's blood oxygen levels were low, which "strongly implied" the cause of the seizure (CX 6). The x-rays and CT scans of his chest also revealed signs of PE. *Id.* Claimant had no history of seizures or blood clots, nor did he have any family history of these issues. *Id.* Dr. Calhoun testified in his deposition that Claimant was overall a healthy young man. *Id.* As there were no other risk factors for clotting, Dr. Calhoun opined that the only possible cause of Claimant's PE was the knee surgery that took place in October 2003, and Claimant's inactivity resulting from this surgery. *Id.*

Because of the complication of having had a PE, Claimant was transferred to Vanderbilt University Medical Center on April 18, 2004, for specialty care for his shoulder and hip injuries. *Id.* These treatment records were admitted into evidence at the hearing. (CX 3). While at Vanderbilt, an ultrasound was performed on Claimant's "lower extremities", which produced negative results for deep vein thrombosis ("DVT"). *Id.* No further tests were performed to either rule out or confirm the diagnosis of PE resulting from DVT. However, the Vanderbilt doctors continued to administer blood thinning medication and proceeded as though Claimant did indeed have PE. *Id.* Claimant also underwent surgery on April 20, 2004, to repair his fractured hip, and again on April 27, 2004, to repair his shoulder. *Id.* In January 2005, Claimant underwent a repeat hip surgery to repair two screws that had broken, and he may need to have a full hip replacement. (CX 2).

On April 17, 2006, Dr. Thomas Leonard, who is Board-certified in Internal Medicine, gave his deposition for Employer. (EX 19). Although he did not examine Claimant himself, he reviewed all pertinent records to form his opinion. *Id.* Dr. Leonard believes that the diagnosis of PE "makes no sense." *Id.* He testified that there is a slight chance that a patient could develop PE after surgery; however, he noted that Claimant's recovery from surgery was perfectly normal, and the fact that his episode occurred six months after the surgery makes the diagnosis of PE extremely improbable. *Id.* In addition, Dr. Leonard noted that the clots that cause PE come from the veins in the upper part of the leg, and not the calf. *Id.* He also pointed out that traditional CT scans are not good tests for diagnosing PE, and no other tests were performed to support the diagnosis of PE. *Id.* Dr. Leonard attempted to contact Dr. Ross at Jennie Stuart Medical Center to discuss Claimant's CT results, but was unable to reach him. *Id.*

Instead, Dr. Leonard spoke to Dr. Michael Clark, one of Dr. Ross's associates in the Radiology Department, who agreed to review the original CT scan. *Id.* Dr. Clark was unable to find PE on the scan, and opined that the abnormalities he saw were related to atelectasis. *Id.* After Dr. Leonard's deposition took place, he was able to contact Dr. Ross, who agreed to reevaluate the CT scan of Claimant's chest. (EX 17). In an appended report, Dr. Ross stated, "[i]n retrospect, there is a suggestion of scattered [PE] in the lung bases. However, this is not felt to be definitive at this time and the infiltrates are more likely related to an inflammatory process." *Id.*

Dr. Leonard opined that the seizure was the main event, and was not a result of PE. (EX 19). He believes that "...what happened was he seized, for whatever reason, he aspirated, had atelectasis, and that seizure caused metabolic acidosis. The hypoxia was due to the atelectasis, and there were never any [PE]." *Id.* He further opined that the abnormal x-rays were also a result of Claimant's aspiration, and not [PE]. *Id.* Dr. Leonard also opined that a possible cause of the seizure was the Prozac that Claimant had been taking, as Prozac has been known to cause seizures in some patients. *Id.* He opined that if Prozac were not the cause, then the seizure was idiopathic, arising from an unknown cause. *Id.* Dr. Leonard stated that ten percent of the adult population suffers seizures at some point in their lives; and therefore, idiopathic seizures are not uncommon. *Id.*

At the hearing, Dr. Calhoun responded to Dr. Leonard's assertion that other possible causes of Claimant's seizure were more probable than PE. Dr. Calhoun admitted that "these are low probability events to begin with," but stated, "I don't think that you can explain an event by something more improbable than something that's relatively improbable." (TR 55-56). In Dr. Calhoun's opinion, experiencing a seizure out of the blue in an otherwise healthy young man is a most improbable event. (TR 56). Dr. Calhoun disagreed with Dr. Leonard's statement that ten percent of all adults experience seizures at some point in their lives. (TR 67). He stated:

> If you were epileptic from childhood...then that denotes prior history. Or if you had a family history or had head trauma, that is included in that ten percent. So I disagree. While I agree with the ten percent statistic, I disagree with the idea that a seizure free, healthy thirty-five year old person has a de novo ten percent chance of having a seizure. *Id.*

In addition, Dr. Calhoun challenged the notion that Prozac caused Claimant's seizure. He noted that in a study submitted to the FDA by the manufacturer, there was a higher incidence of seizures in those taking a placebo than those taking Prozac. (TR 70). Therefore, Dr. Calhoun concluded that, in lay terms, you are more likely to have a seizure from taking a placebo than if you are taking Prozac. (TR 69-71). Dr. Calhoun testified that he believes that both the pleuritic-type chest pain and the pain in the right calf that Claimant experienced after surgery were significant signs of PE; and therefore, PE is the more likely explanation for the seizure. (TR 56-57).

Since giving his initial deposition testimony, Dr. Calhoun has changed his original opinion about his diagnosis of PE somewhat. At the hearing, Dr. Calhoun testified that he now believes that there was a showering of small emboli over a period of time instead of one large embolus, which accounts for the amount of time between the surgery and the seizure event. (TR 57-58). He defended his diagnosis by pointing out that Claimant's white blood cell count was normal, which does not occur in patients with pneumonia and inflammatory processes. (TR 64). In addition, neither Dr. Calhoun nor Dr. Sayyad heard signs of aspiration in Claimant's chest, nor did they find any food particles or fluid in the trachea, which rules out aspiration as a probable cause of Claimant's hypoxemia (TR 64-66). Dr. Calhoun also pointed to the fact that Claimant responded positively to blood thinning medication as another indication that PE was the more likely cause of the seizure. (TR 70-71). In explaining why a Doppler test, or ultrasound, of Claimant's right leg taken approximately three days after the seizure produced false negative results for DVT, a typical contributing cause of PE, Dr. Calhoun stated that "...one sometimes will not see the clot in the veins if one is scanning those veins because [the clots] have broken off." (TR 59-60). Furthermore, Dr. Calhoun explained that, with the help of blood thinning medications, Claimant's body had enough time to break up and partially dissolve the clots in the three-day period between the seizure and the ultrasound. (TR 72-73).

Dr. Leonard pointed out in his deposition that Jennie Stuart Medical Center used traditional CT scanning, which "is just not a suitable test for making this diagnosis." (EX 19). However, Dr. Calhoun stated that, in fact, Claimant had a spiral CT performed when he arrived in the emergency room, which is the "state-of-the-art standard of care for diagnosing pulmonary embolism." (TR 62-63). When Dr. Calhoun asked Dr. Ross about

his appended report of the CT scan, Dr. Ross admitted that the CT scan could just as easily be read as PE as it could an inflammatory process. (TR 75). Dr. Ross admitted that he could not give a definitive diagnosis either way without any clinical information. (TR 74-75).

Coverage by the Act:

For Claimant's injuries to be covered under the Act, he must initially establish a *prima facie* case that he suffered an injury, as it is defined by the Act. An injury is defined in Section 2(2) of the Act as an accidental injury "...arising out of or in the course of employment, and such occupational disease or infection as arises naturally out of such employment..." 33 U.S.C. 902(2). *See also*, *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Under the Defense Base Act, however, the "condition or course of employment" standard has been expanded to the "zone of special danger" doctrine. The U.S. Supreme Court described the "zone of special danger" doctrine as:

> The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury occurred.

O'Leary v. Brown-Pacific-Maxon, 340 U.S. 604, 506-507 (1951). The parties have stipulated that the claim is covered by the Act. (JX 1).

Injury Arising Out of Employment:

Section 20(a) of the Act, 33 U.S.C. § 920(a), provides a presumption that a claim comes within the provisions of the Act "in the absence of substantial evidence to the contrary." To establish a *prima facie* claim for compensation, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port*

Cooper/T. Smith Stevedoring Co., Inc. v. Hunter, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. 33 U.S.C. § 920(a); *Hunter*, 227 F.3d at 287.

In order to show harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152 (2nd Cir. 1991). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Schoener v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 630, 632 (1978). Under the aggravation rule, an entire disability is compensable if a work-related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

Dr. Calhoun testified by deposition on May 4, 2005, provided treatment records that support his opinion, and testified at the hearing on May 9, 2006. (CX 2, 6). At the hearing, Dr. Calhoun testified that, despite evidence presented by Employer to the contrary, he has not changed his opinion that PE, which were caused by post-operative complications after Claimant's knee surgery, are the most likely cause of the seizure that resulted in Claimant's hip and shoulder injuries. (TR 55). Additionally, Dr. Calhoun's opinion is supported by his experience as Claimant's family physician over the years, consideration of Claimant's family and medical history, Claimant's symptoms prior to the seizure, and results of an x-ray and CT scan that were performed shortly after Claimant was brought to the emergency room after the seizure.

An administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). I find that Dr. Calhoun is an entirely credible witness and I give his testimony great weight in making my decision. I find that Dr. Calhoun's opinion is well-reasoned and well-documented.

Accordingly, I find that Claimant has made a *prima facie* showing that his seizure and the resulting injuries are causally related to his knee injury, and therefore, he is entitled to the Section 20 presumption.

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts--not mere speculation--that the harm was *not* work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-688 (5th Cir. 1999). The burden then shifts to the employer, who can rebut the presumption by showing that either (1) exposure to injurious stimuli did not cause the harm, i.e., the employee's occupational disease, or (2) the employee was exposed to injurious stimuli or working conditions while performing work covered under the Act for a subsequent employer. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 485 (5th Cir. 2003), *citing Avondale Industries, Inc., v. Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992). If the employer presents specific and comprehensive evidence sufficient to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

Employer submitted the deposition testimony of Dr. Leonard in an attempt to discredit Dr. Calhoun's opinion and to suggest that other possible factors contributed to Claimant's seizure. Dr. Leonard's opinion is discussed in greater detail above. Dr. Leonard testified in his deposition that he no longer treats patients, but has only done "med/legal" for the past twelve years. (EX 19). Although Dr. Leonard did not examine Claimant himself, he reviewed the other medical evidence of record. *Id.* As a result of his review, he believes that Claimant did not suffer from PE, but may have experienced a primary seizure on an idiopathic basis, or that the seizure could have been a side-effect of the drug Prozac, which Claimant had taken in the past. (EX 14). Dr. Leonard stated that "[PE] are not uncommon following leg surgery, but commonly occur within two to four weeks of the surgical procedure. To suggest that [PE] evolved six months after a surgical procedure is statistically most improbable." (CX 1; 11). Furthermore, Dr. Leonard contends that the CT scan conducted at Jennie Stuart Medical Center is not the appropriate test to diagnose PE. *Id.*

As discussed above, Dr. Calhoun strongly disagrees with Dr. Leonard's assertion that Claimant's seizure was caused by other

factors, such as epilepsy or the drug Prozac. (TR 66-71). Additionally, Dr. Calhoun believes that a showering of small PE over six months culminated in the seizure on April 16, 2004, which would explain the amount of time between the surgery and the seizure. (TR 57-58). Moreover, Dr. Calhoun addressed the alleged inadequacy of Claimant's diagnostic testing at Jennie Stuart Medical Center, stating that Claimant underwent a spiral CT, which is state-of-art in terms of diagnosing PE, and not a traditional CT, as Dr. Leonard had believed to be the case when forming his opinion. (TR 62-63). Furthermore, Dr. Calhoun spoke to Dr. Ross after he had submitted his appended report. (TR 75-78). In their conversation, Dr. Ross felt that there was no more likelihood that Claimant did or did not suffer from PE, based on his second reading of Claimant's CT, and that he felt pressured by Dr. Leonard to conclude that the infiltrates visible in the scan were more likely the result of an inflammatory process. Because Dr. Ross makes no definitive findings, (EX 17) I give his conclusion little weight.

An administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. The judge may rely upon his/her personal observation or judgment to resolve conflicts in the medical evidence. A judge is not bound to accept the opinion of a physician if rational inferences cause a contrary opinion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). The trier of fact determines the credibility of the medical witnesses. Such determinations are to be respected on appeal. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). The judge determines the credibility and weight to be attached to the testimony of a medical expert. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Accordingly, based on the reasons outlined above, I find that the medical opinion of Dr. Leonard is not well-reasoned or well-documented, and I give it little weight.

Employer fails to present reliable evidence that Claimant's seizure and its sequelae are unrelated to complications of his knee surgery. Dr. Leonard was of the opinion that the seizure and resulting injuries were unrelated to Claimant's compensable knee injury. However, I find that his testimony is not sufficient to rebut that of Dr. Calhoun, which I find credible and persuasive. Therefore, I find that Employer has not rebutted the Section 20 presumption. Accordingly, I find that Claimant has made a *prima facie* showing that his seizure and the resulting injuries to his shoulder and hip are causally related to the compensable knee injury that he sustained while working

for Lear Seigler in Kuwait. Having made this showing, the Section 20 presumption is invoked, which Employer has failed to rebut with substantial evidence. As a result, I find that Claimant's knee and post-seizure injuries were contributed to by his employment at URS/Lear Siegler, Inc.[8]

Nature and Extent of Claimant's Disability:

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Insurance Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized, *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981).

A finding that a disability is permanent is also important for other reasons. A claimant's entitlement to benefits for a scheduled disability begins on the date of permanency. The date on which a claimant's condition has become permanent is

[8] Even if the medical opinion of Dr. Leonard was sufficient to rebut the Section 20 presumption, if I weighed all the evidence together, I would continue to find that Claimant's seizure and the resulting hip and shoulder injuries are causally related to his employment at URS/Lear Siegler, Inc. I would grant the opinion of Dr. Calhoun more weight than that of Dr. Leonard for the reasons discussed above.

primarily a medical determination. In this case, the claim is limited to temporary total disability benefits for injuries resulting from Claimant's seizure, and permanent disability is not at issue, as the parties agree that MMI has not yet been reached. (TR 32). The parties stipulated that temporary total disability for Claimant's knee injury existed from August 15, 2003, and is continuing. (JX 1). As I find that Claimant's seizure and any resulting injuries are causally related to Claimant's compensable knee injury, Claimant is entitled to temporary total disability payments for all such injuries. Claimant's date of entitlement for his seizure-related injuries dates back to August 15, 2003, the date from which temporary total disability existed for the underlying knee injury.

Compensation for Disability:

Thirty-three U.S.C. Section 908(b) provides the standard for computing Claimant's benefits. In cases of disability total in character, but temporary in quality, sixty-six and two-thirds percent of the average weekly wages shall be paid to the employee during the continuance of temporary total disability.

The parties have stipulated that Claimant's average weekly wage at the time of his knee injury is unclear. (JX 1). However, the parties further stipulated that Claimant receives $996.54 per week in temporary total disability payments for his knee injury. Applying the formula set out in 33 U.S.C. Section 908(b), I find Claimant's average weekly wage is $1,494.96.[9] Accordingly, because Claimant's seizure-related injuries are causally related to his knee-injury, he is entitled to continue receiving $996.54 for the duration of his temporary total disability in relation to all related injuries.

Medical Expenses:

Claimant also claims that he is entitled to ongoing Section 7 medical benefits for his knee injury and for any injuries sustained as a result of the related seizure.

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); 20 C.F.R. §§ 702.401, 702.402. In general, the employer is

[9] Average weekly wage x 66.667% = temporary total disability payment: $1,494.96 x 66.66% = $996.54.

responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). The Board has interpreted this provision broadly. *See, e.g., Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94-95 (1989) (holding employer liable for modifications to claimant's house as medical expenses).

Pursuant to Section 7(b) of the Act, an employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b); 20 C.F.R. § 702.403. When a claimant wishes to change treating physicians, the claimant must first request consent for a change and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406(a); *see Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or District Director has given prior consent. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406(a).

Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. 33 U.S.C. § 907(d); *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299, 301 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007, 1010 (1981*), rev'd. on other grounds*, 682 F.2d 968 (D.C. Cir. 1982). Specifically, Section 7(d) provides:

> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless–
>
> (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or
>
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or

> foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. § 907(d). When an employer refuses a claimant's request for authorization, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 113 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989); *See also* 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982) (awarding reimbursement for medical expenses after being discharged by employer's physician); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10, 15-16 (1983) (allowing medical costs only if the claimant first notified the employer).

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care. 33 U.S.C. § 907(b); *see* 20 C.F.R. § 702.407. Administrative Law Judges have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury. They do not have the authority to specify a particular facility to provide future treatment. *McCurley v. Kiewest Co.*, 22 BRBS 115, 120 (1989). On the other hand, where a claimant sought authorization for a single medical procedure which the employer denied, the judge does have the authority to determine the reasonableness and necessity of the procedure and issue an order directing the employer to pay for it. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).

Employer must pay for the medical treatment already incurred by Claimant, as well as for future treatment of Claimant's work-related injuries. Interest shall be assessed on all overdue medical expenses. *See Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75, 79-80 (1997). However, the Fifth Circuit has held that while a claimant is entitled to medical benefits, he cannot receive an award for medical benefits absent evidence of medical expenses incurred in the past or treatment necessary in the future. The court added that a worker can file a claim for medical benefits if and when treatment becomes necessary in the future. In this case, Employer has maintained that Claimant's post-seizure injuries were not work-related and declined to pay medical expenses. Because I find that the seizure and the resulting injuries are related to the uncontroverted knee injury, all medical expenses

related to Claimant's knee injury, as well as those related to his post-seizure injuries are compensable under the Act.

Claimant has not submitted any documented evidence of diagnostic tests or recommended treatment for his post-seizure injuries. Accordingly, I cannot award Claimant past medical benefits at this time, for there is no evidence in the record regarding medical expenses.[10]

Interest:

The Claimant is entitled to interest on any accrued unpaid compensation benefits. *Canty v. S.E.L. Maduro,* 26 BRBS 147, 153 (1992); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom. Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The purpose of interest is not to penalize employers but, rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 594 F.2d 986, 987 (4th Cir. 1979); *Renfroe v. Ingalls Shipbuilding, Inc.,* 30 BRBS 101, 104 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.,* 22 BRBS 47, 50 (1989). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982).

Therefore, Employer is liable for interest on the delayed payment of temporary total disability payments for the period of March 10, 2006 to April 20, 2006.

ENTITLEMENT

In sum, Claimant has established that the April 16, 2004 seizure is causally-related to his March 14, 2003 knee injury, which is compensable under the Act. Accordingly, Claimant is entitled to temporary total disability payments and medical expenses, through present and continuing.

[10] At the hearing, Claimant submitted an unpaid medical bill for a knee brace at CX 8. I have reviewed the bill, but the record is unclear as to whether it has been paid at this time. Claimant's post-hearing brief makes no mention of the bill and Employer's brief states that all past due medical bills have been paid. If this bill has not been paid, Claimant may submit it to Employer, who is required to pay in accordance with this opinion.

Attorney's Fees:

Having successfully established his right to compensation, Claimant's attorney is entitled to an award of fees under Section 28(a) of the Act. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991). The regulations address attorney's fees at 20 C.F.R. §§ 702.132 – 135. Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. The parties have ten (10) days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Accordingly, the claim of M.D. for benefits is GRANTED. I therefore ORDER:

1. The Employer/Carrier shall continue to pay temporary total disability compensation to Claimant in the amount of $996.54 a week, based on an average weekly wage of $1,494.96, in accordance with Section 8(b) of the Act, 33 U.S.C. § 908(b).

2. Claimant is entitled to interest on accrued unpaid compensation benefits and medical expenses, other than Section 14(e) penalties. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. § 1961.

3. The District Director shall make all calculations necessary to carry out this order.

4. Employer/Carrier shall pay Claimant for all future reasonable and necessary medical care and treatment arising out of his work-related injury, pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a). Since Claimant failed to submit documented evidence of past medical expenses, he must submit a separate application for past medical benefits.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on Claimant

and opposing counsel, who shall have ten (10) days to file any objections.

Larry S. Merck
Administrative Law Judge