

U.S. Department of Labor

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Issue Date: 22 February 2008

CASE NO.: 2007-LDA-00124

OWCP NO.: 02-147462

IN THE MATTER OF

**L.G.,
Claimant**

v.

**SERVICE EMPLOYEES INTERNATIONAL, INC.,
Employer**

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o AIG WORLDSOURCE,
Carrier**

APPEARANCES:

**Gary B. Pitts, Esq.,
On behalf of Claimant**

**John Schouest, Esq.,
Limor Ben-Maier, Esq.,
On behalf of Employer**

**Before: Clement J. Kennington
Administrative Law Judge**

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, (2000) and its extension, the Defense Base Act, (DBA), 42

U.S.C. § 1651 *et. seq.*, brought by L.G. (Claimant) against Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o AIG Worldsource (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on November 7, 2007 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant and his wife, B.G. testified and introduced 22 exhibits which were admitted, including various DOL forms (LS-18, 203, 207, OWCP-5c) medical records from Employer, International Clinic, University of Texas Medical Branch; narrative reports of treating physicians (Drs. Paul Remmers, Russell LaForte); Claimant's 2005 and 2006 tax returns.

Employer introduced 25 exhibits which were admitted including various DOL forms (LS-18, 202, 203, 207, 210); Claimant's employment agreement with Employer; Claimant's response to Employer's discovery request; Claimant's pre and post-deployments medical records, personnel file, wage information and income tax returns for 2000 through 2006, Social Security earnings records; articles from National Heart Lung and Blood Institute and Merck Manual on deep vein thrombosis; reports from Dr. Richard Garza and vocational expert William L. Quintanilla; Claimant's employment records with Taylor International; copy of Claimant and his wife's deposition.¹

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

I. STIPULATIONS

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

1. Claimant was allegedly injured on April 12, 2006 while working as an employee of Employer.
2. Employer was advised on the injury on April 15, 2006.
3. Employer filed a notice of controversion on June 2, 2006.
4. An informal conference was held on January 4, 2007.

¹ References to the transcript and exhibits are as follows: trial transcript-Tr.____; Claimant's exhibits-CX-____, p.____; Employer exhibits-EX-____, p.____; Administrative Law Judge exhibits-ALJX-____; p.____. The DOL forms submitted by Claimant were listed as CX-14 to 18. Those form submitted by Employer were listed as EX-2 to 7.

5. Employer paid no benefits.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Fact of injury/illness from the zone of special danger;
2. Nature and extent of injury/illness;
3. Causation;
4. Section 7 benefits;
5. Average weekly wage; and
6. Attorney fees and expenses.

III. STATEMENT OF THE CASE

A. Claimant and His Wife's Testimony:

Claimant is a 57 year old male born on December 28, 1950 in Edgewood, Texas. Claimant grew up and attended elementary, high school and college in Galveston, Texas. He served 4½ years in the U.S. Air Force, received an honorable discharge and then began work as a contractor, welder and eventually in 1982 oilfield cook. From 1992 to 2002, Claimant served as private duty chef for Pennzoil's CEO. (Tr. 19-21). In March, 2004, Claimant signed a one year contract with Employer agreeing to cook for the military in Kabul, Afghanistan where he remained for one year progressing from cook to chef leader. As chef leader he fed 800 people, 7 days per week, 12 hours per day. In March, 2005, Claimant returned to Texas and took a 4 month break. (Tr. 22, 23).

On August 4, 2005 Claimant signed a second one year contract with Employer agreeing to cook for the military in Iraq. (EX-1). Claimant arrived in Iraq on September 15, 2005 and was stationed at several locations including Camp Parker, Camp War Eagle and Sawgut City. (Tr. 26, 27). His duties required him to be on his feet about 75% of the time frequently walking or standing on unpaved surfaces which became more difficult in the rainy season due to mud build up. (Tr. 27). This contract provided for a base monthly pay of \$2,583.00, a bonus of \$129.15, an area differential of \$645.75 and a hazard pay of \$645.75 for a total gross pay of \$4,003.65. (EX-14, pp. 5, 29). Claimant's total gross pay from August 10, 2005 to April 15, 2006 was \$48,371.10. (EX-5). Claimant's income tax records from 2000 to 2006 show the

following gross earnings: 2000-\$23,400; 2002-\$23,400; 2003-\$9,450; 2004-\$53,786; 2005-\$43,780; and 2006-\$30,249. (EX-16).

In December, 2005, Claimant's feet began to swell and hurt. After taking a vacation with his wife in the Philippines, Claimant returned to Iraq in February, 2006. Upon his return the swelling and pain increased. He sought medical attention in Kuwait where he underwent Doppler studies and returned to the U.S. on April 16, 2006 for further medical diagnosis and medical treatment. (Tr. 30, 31, 49).

In the states Claimant first sought medical help from Dr. Paul Remmers, who diagnosed deep vein thrombosis and prescribed Coumadin. (Tr. 32). Claimant took Coumadin for 6 months after which he was treated by Dr. Russell LaForte, assistant professor of medicine at UTMB (Tr. 50, 51). Dr. LaForte issued a report on May 31, 2007 diagnosing deep vein thrombosis of the right leg with continued right leg swelling and pain possibly representing post-phlebitis syndrome. (CX-13). Dr. LaForte found Claimant unable to stand for long periods without leg and foot swelling and pain. (Tr. 35, 36).

By January 1, 2007, Claimant was cleared to return to work. Claimant re-applied to Employer, but was turned down due to elevated sugar levels. In March, 2007, Claimant passed a physical and on April 15, 2007 went to work for Taylor International as a steward in charge of meals, time keeping, and ordering supplies. (EX-25). Claimant worked on a rig docked in Eagle Side, Texas on a schedule of 28 days on and 14 off. (Tr. 54-58). One week before the hearing he resigned because the job became more demanding requiring work from 4 a.m. to 10 p.m. This job paid \$1,200.00 per week and contrary to Claimant's work abroad required minimal walking. (Tr. 59, 60). Claimant then took a security gate guard work sitting down, checking people in and paying \$10.00 per hour. (Tr. 39, 40, 52, 53). In Iraq, Claimant made between \$8,000.00 and \$9,000.00 per month.

Claimant testified that were it not for his leg condition he would have finished his second contract and signed up for another with Employer. (Tr. 33, 34). On cross, Claimant testified that although the pain and feet swelling started December, 2005, he did not report it until April, 2006. Claimant had no recollection of being tested for thrombosis prior to his employment with Employer. (Tr.48). Claimant's wife, B.J., confirmed the fact that Claimant had swollen feet while they were on vacation in the Philippines. (Tr. 62). Further, Claimant had some feet swelling prior to his overseas work. However, when she met her husband in the Philippines the swelling was much greater. (Tr. 63). This problem has continued until the present preventing him from doing routine things around the house like mowing the lawn. (Tr. 64).

B. The Medical Exhibits and Vocational Record

Prior to his first deployment to Afghanistan, Claimant on March 9, 2004 took and passed a physical. (EX-10). In like manner, Claimant took and passed a second physical before his deployment to Iraq on August 1, 2005. (EX-11). Claimant's medical record in Iraq commence with a clinic visit on April 12, 2006 during which Claimant complained of a significant swollen leg since February, 2006. On exam, Claimant had notable right leg, non-pitting edema to the

knee which was highly suspicious for deep vein thrombosis. (CX-1; EX-12).

On April 7, 2006 Claimant had an MRI of the right leg which showed subcutaneous inflammatory edema rather than DVT. (CX-2). A venous duplex assessment of April 22, 2006, showed minor thrombus suggestive of old attack of superficial thrombo phlebitis. (CX-5). On April 27, 2006, Claimant was examined at University of Texas Medical Branch Hospital (UTMB) in Galveston and diagnosed with right leg DVT. (CX-6). A subsequent exam at UTMB on May 15, 2006, revealed a similar finding of right leg DVT. (CX-8). On July 25, 2006, Dr. Remmers examined Claimant and assessed right leg DVT which was getting better slowly with anti-coagulent medication. (CX-9, 10, 11).

On November 14, 2006, Dr. Remmers issued a statement declaring he was Claimant's primary care physician who saw Claimant in clinic on October 31 for a right leg DVT which occurred due to his previous occupation. Further, as a result of the DVT Claimant was unable to stand for prolonged periods of time and was instructed to remain off work until January 1, 2007. (CX-12; EX-13, pp. 100, 101).

On May 31, 2007, Dr. Laforte issued a statement indicating Claimant had right leg DVT due to his previous occupation in February, 2006. As of May 31, 2007 Claimant continued to have chronic swelling and pain possibly representing post-phlebitis syndrome and a 6 to 10% disability because of an inability to stand for prolonged periods of time. (CX-13; EX-13, pp. 99, 398). On June 1, 2007 Dr. Laforte filled out an OWCP5c form indicating Claimant had limitations in walking, standing, bending, stooping, operating vehicles, squatting, kneeling and crouching needing 30 minute breaks every 2 hours. (CX-14). On June 11, 2007, Claimant was seen by Dr. Richard Garza. The exam showed mild right lower leg extremity edema secondary to DVT. However doppler studies were normal. (EX-22). In a second report dated October 31, 2007, Dr. Garza advised that doppler studies were normal. However, he believed Claimant had leg pain with standing and suggested keeping his right leg elevated and wearing support stockings. Dr. Garza believed Claimant could work, but needed to monitor his hours of standing. (EX-23).

Employer submitted two articles (EX's 20, 21) on deep vein thrombosis. EX-20 from the National Heart Lung and Blood Institute defined deep vein thrombosis as a blood clot that formed in a vein-deep in the body with most deep vein clots occurring in the lower leg or thigh. Clots that occur in veins close to the surface of the skin were called superficial venous thrombosis or phlebitis. (EX-20). The article lists a variety of factors that increase chances of developing DVTs. Commonly used tests to diagnose DVTs include duplex ultrasound and venography as well as MRIs and computed tomography. DVTs can be treated by anticoagulants, vena cava filters and compression stockings. EX-21 is an article from the Merck Manual on DVTs and notes that DVTs may be asymptomatic or cause pain and swelling in an extremity. Many factors can contribute to DVT including age, smoking, estrogen receptor modulators, heart failure, immobilization, etc.

Employer also introduced EX-13, Claimant's medical treatment records since age 9. This exhibit which consisted of 413 pages was at times disorganized, difficult to read and contained documents having minimal relevance such as pages 1-39 with pages 40 to 42 detailing treatment

for a right ankle contusion cause by steel plate, which was dropped on Claimant's ankle on May 15, 1979. This injury required minimal treatment with no residuals.

Pages 49-55 relate Claimant's treatment by Dr. Laforte on a March 21, 2007 office visit for diabetes mellitus (type 2) and venous thrombosis. Pages 56 to 62 detail treatment on a February 6, 2007 office visit for the same condition. The record reveals other office visits for similar treatment on July 15, September 15, 19, October 2, 31, 2006, January 5, 29, 2007 with periodic positive venous doppler studies. The clinic record for April 12, 2006 mentions that Claimant in 2002 had been treated for fluid buildup on the legs by a family physician at UTMB who prescribed HCTZ. This medication was successful in treating the fluid buildup.

In its brief Employer cited pages 78 and 79 for the proposition that by October 31, 2006 Dr. Remmers had found Claimant's condition resolved with no need for further treatment. That report found: (1) Claimant's right leg DVT resolved with 6 months of Coumadin; (2) Claimant was more active with less leg pain and some swelling; and (3) Claimant could return to work but should avoid prolonged standing and prolonged daily shifts with leg elevation as needed to counteract swelling. At page 64, Dr. Laforte reported on January 29, 2007 that Claimant's DVT condition was stable and had resolved. However, Claimant was at risk for recurrence and had to be careful with long plane rides. Subsequent reports from February 5, 2007 show recurrent swelling and pain. (EX-13, pp. 60, 61). As of May 31, 2007, Dr. Laforte noted that Claimant continued to be plagued with chronic swelling and post phlebitis syndrome representing a 6 to 10% disability due to an inability to stand for prolonged periods of time. (EX-13, p. 99).

Regarding the vocational record, vocational expert, William Quintanilla issued a vocational assessment on November 2, 2007. (EX-24). Mr. Quintanilla identified a variety of jobs which Mr. Quintanilla deemed appropriate including cook supervisor and restaurant manager as well as his current job with Taylor International which paid \$42,336.00. In addition, he identified security guard jobs paying \$7.50, \$8.50, \$10.50 per hour, production manager paying \$8.00 to \$13.00 per hour; restaurant manager paying between \$16.83 and \$26.20 per hour; computer assembly paying \$7.89 to \$14.71 per hour; purchasing agent paying \$8.50 per hour and kitchen manager and cook paying \$10.00 per hour.

IV. DISCUSSION

A. Contention of the Parties

Claimant contends he sustained and/or aggravated a right leg deep vein thrombosis while working for Employer in Iraq, a zone of special danger. Claimant first noticed this condition in December, 2005, which was accompanied by painful leg swelling. The condition became progressively worse in February, 2006, after Claimant returned from R & R in the Philippines to Iraq. On April 12, 2006 Claimant reported the condition to a Dr. Kehoe and eventually in the later part of April, 2006, was sent back to the U.S. for testing and treatment.

Employer ceased paying Claimant on April 30, 2006. Claimant seeks temporary total

disability benefits from May 1, 2006 through March 21, 2007. On March 22, 2007, Claimant went to work for Taylor International ordering supplies, making menus and keeping inventory. Claimant worked for Taylor International from March 22, 2007 to October 13, 2007 (205 days or 29.29 weeks) totaling 744 regular hours at \$11.00 per hour and 891 hours of overtime at \$16.50 per hour for total earnings of \$33,885.50 or an AWW of \$781.34. When the work schedule became too demanding Claimant left Taylor and one week later obtained a security guard job paying \$10.00 per hour, 40 hours per week for AWW of \$400.00. Claimant contends an average of these AWWs or \$590.67 represents a fair estimation of his wage earning capacity.

Claimant further contends he is entitled to temporary partial disability from March 22, 2007 to the present based on an AWW of \$1,764.80. This is based upon 120 days or 17.14 weeks of work for Employer from January 1, 2006 until April 30, 2006 when his pay ceased. During this period he earned \$30,248.73. Claimant also seeks Section 7 medical benefits, interest on unpaid compensation plus attorney fees and expenses.

Employer on the other hand contends: (1) Claimant was never diagnosed with deep vein thrombosis and in fact specific tests performed on him ruled out such a diagnosis. (EX-13, pp. 117, 118, 163-165, 197, 198, 360-362); (2) Claimant never suffered a compensable injury and in fact admitted continuous leg and foot swelling prior to his employment with Employer due to 30 years as a chef which is nothing more than a symptom of getting older; (3) Claimant cannot return to his former job because of diabetes and not any alleged work injury; (4) Claimant failed to work any leg injury from December, 2005 to April 12, 2006 which is consistent with a long standing chronic condition and not a new acquired or aggravated condition; (5) Claimant's leg condition resolved by October 31, 2006 or January 25, 2007 as opined by Drs. Remmers or Laforte (EX-13, pp. 64, 78, 79); (6) since leaving Employer Claimant has worked at his pre-injury earning capacity with no residuals reaching MMI on either October 31, 2006 or January 25, 2007 with entitlement to only a scheduled award of 17.28 weeks of compensation; (7) Employer established suitable employment by the labor market survey of William Quintanilla showing Claimant capable of earning as much as \$26.20 per hour or \$1,048.00 per week; (8) Claimant is not entitled to medical expenses since he was not injured on the job and if he was his entitlement to medical expenses ended on October 31, 2006; and (9) finally Claimant's average weekly wage should be based on Section 10 © using an average of his earning since 2000 of \$31,640.40 divided by 52 = \$608.48 or his earning with Employer from August 10, 2005 until April 25, 2006 of \$48,371.10 divided by 36 6/7 weeks = \$1,312.40 with a corresponding compensation rate of \$ 847.93.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467(1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297(5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and

supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945(5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183(1999).

Based on the record as a whole including my observations of the witnesses, I am convinced that Claimant and his wife were sincere and honest witnesses. Claimant demonstrated a strong work ethic working long hours on his feet despite swelling and pain. The pain and swelling continue to prevent him from performing his past chef work due to prolonged standing demanded by such work.

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406(5th Cir. 2000), *on reh'g*, 237 F.3d 409(5th Cir. 2000); *Morehead Marine Services, Inc., v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295(D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168(1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d)(2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a)(2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d)(2002); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281(1994); *American Grain Trimmers, Inc., v. Director, OWCP*, 181 F.3d 810, 816-17(7th Cir. 1999).

Section 20 provides that 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 - (a) that the claim comes within the provisions of this Act. 33 U.S.C. § 920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a 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); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40(2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19(1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88(5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068(5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90(1995) (failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45(1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28(1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481(5th Cir. 1986)(emphasis in original). *See also, Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290(5th Cir. 2003) *cert. denied* 124 S. Ct. 825 (Dec. 1, 2003)(stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690(stating that the hurdle is far lower than a Aruling out@ standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628(1982), *aff'd mem.*, 722 F.2d 747(9th Cir. 1983)(stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv., Corp.*, 29 BRBS 18, 20(1995)(stating that the unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption. If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87(1935); *Port Cooper/T Smith Stevedoring Co., v. Hunter*, 227 F.3d 285, 288(5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20(1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281(1994).

In this case, I find that Claimant established a *prima facie* case by showing a physical harm, feet swelling and pain and a working condition, prolonged standing and walking, which could have cause the harm thereby invoking a Section 20(a) presumption. Employer attempted to rebut that presumption by emphasizing Claimant's past history of feet swelling. However, Employer fails to note that Claimant's current swelling and pain were unique unlike anything he had experienced before which were diagnosed as DVT by both Drs. Remmers and Laforte. Employer offered no medical testimony to contradict their assertion. Even assuming Employer rebutted such a diagnosis, I find Claimant established by a preponderance of credible evidence including the physician reports that Claimant suffered from DVT which was related to his work.

D. Nature and Extent of Injury

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(5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407(1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157(1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91(1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148(1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56(1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18(1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446(1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1038; *P&M Crane Co. v. Hayes*, 930 F.2d at 429-30; *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444(5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89(1984)(emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171(1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265(1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73(D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131(1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP, v. Vessel Repair, Inc.*, 168 F.3d 190, 194(5th Cir. 1999)(crediting employee

reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45(5th Cir. 1991) (crediting employee statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43(4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296(1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. See *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233(1984).

Claimant seeks temporary and total disability from May 1, 2006 to March 21, 2007 finding employment with Employer with Taylor International on March 22, 2007. The record however, shows a stabilization in Claimant's condition by October 31, 2006 according to Dr. Remmers. It was at this point that Claimant reached MMI. Claimant did not go to work for Taylor International until March 21, 2007. Claimant was unable to perform his former job with Employer after he left Employer's payroll on April 30, 2006. Thus, Claimant is entitled to temporary total disability from May 1, 2006 through October 31, 2006. Thereafter, from November 1, 2006 to March 21, 2007, he was entitled to permanent total disability followed by a schedule award under Section 8 © (4) of 20.5 weeks of compensation for injury to his right foot pursuant to *Potomac Elec.Power Co., v. Director,OWCP*, 449 U.S. 268(1980); *Winston v. Ingalls Shipbuilding Inc.*, 16 BRBS 168(1984).

E. Average Weekly Wage

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

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a); *see also Ingalls Shipbuilding, Inc., v.*

Wooley, 204 F.3d 616, 618(5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36(1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of Athree hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker. 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3(5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327(4th Cir. 1998).

2. Section 10(b)

Here Section 10(a) is inapplicable the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031(5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822(5th Cir. 1991).

3. Section 10(c)

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

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

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426(5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the

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

Since Claimant worked 7 days per week and there is no evidence of comparable employees, I find that Section 10(a) and Section 10(b) cannot be used to calculate Claimant's AWW. Rather, I find it appropriate to use his wages from August 10, 2005 (Claimant was hired on August 4, 2005 and ceased work on April 25, 2006) to April 25, 2006, a period of 36 6/7 weeks, and divide that number in Claimant's gross earnings of \$48,371.10 to equal an AWW of \$1,312.40 with a compensation rate of \$847.93

F. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86(1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60(1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296(1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58(1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222(1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300(1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36(1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

Employer would have me terminate medical benefits as of MMI. However the record shows, continue treatment after that date due to the fact that residuals continue to exist including foot swelling and pain. Accordingly, I find Claimant entitled to continue treatment at Employer's expense past MMI as long as such treatment is both reasonable, necessary and related to Claimant's DVT condition.

G. 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 1 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.

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

V. ORDER

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

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from May 1, 1996 to October 31, 2006 based on an average weekly wage of \$ 1,312.40, and a corresponding compensation rate of \$847.93.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from November 1, 2006 to March 22, 2007, based on an average weekly wage of \$1,312.40, and a corresponding compensation rate of \$847.93.
3. Employer shall pay to Claimant a scheduled award under Section 8 © (4) of the Act of 20.5 weeks at 2/3 Claimant's average weekly wage commencing March 23, 2007.
4. Employer shall pay Claimant for all past and future reasonable and necessary medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.
5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § (1961).
6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge