

**U.S. Department of Labor**

Office of Administrative Law Judges  
2 Executive Campus, Suite 450  
Cherry Hill, NJ 08002

(856) 486-3800  
(856) 486-3806 (FAX)



**Issue Date: 30 July 2008**

Case No.: 2007-LDA-00166

OWCP No.: 02-144819

In the Matter of:

**R.B.**

Claimant

v.

**SERVICE EMPLOYERS INTERNATIONAL**

Employer

and

**INSURANCE COMPANY OF THE STATE OF  
PENNSYLVANIA**

Carrier

Appearances: BARRY R. LERNER, Esquire  
For the Claimant

BRIAN E. WHITE, Esquire  
For the Employer

Before: ADELE HIGGINS ODEGARD  
Administrative Law Judge

**DECISION AND ORDER**

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, *et seq.*, (“the Act”) and implementing regulations found at 20 C.F.R. part 704, brought by the Claimant against his former Employer and the Employer’s insurance carrier. Except where specifically modified, the Defense Base Act incorporates the provisions of the Longshore and Harbor Workers’ Compensation Act, (“LHWCA”) 33 U.S.C. § 901 *et seq.*, with regard to the payment of medical expenses and compensation for disability of employees engaged in employment outside the United States pursuant to a contract with the United States or an executive department thereof.

This matter was referred to the Office of Administrative Law Judges on May 14, 2007, and assigned to me on May 31, 2007. I conducted a hearing on this claim on November 29, 2007 in Rochester, New York. All parties were afforded a full opportunity to present evidence and

argument, as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. part 18.

The Claimant presented 13 exhibits at the hearing (Claimant's Exhibit's ("CX") 1 through 13).<sup>1</sup> The Employer presented Employer's Exhibits ("EX") 1 through 33.<sup>2</sup> I authorized the record to remain open for the Claimant to submit a response to the Employer's vocational expert's report (T. at 17). On January 11, 2008, the Claimant submitted a report and curriculum vitae of its vocational expert, John Williams, Ed.D. I hereby admit these documents as CX 14.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits, the testimony at hearing, and the arguments of the parties.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Stipulations**

At the hearing, the parties stipulated to the following:<sup>3</sup>

1. Jurisdiction under the Act;
2. Compensability of the Claim;<sup>4</sup>
3. Timely Notice;
4. The Parties are subject to the Act;
5. The Claimant was involved in an accident in Iraq on October 26, 2005.

(T. at 6-8).

These stipulations have been admitted into evidence, and are therefore binding upon the Claimant and Employer. See 29 CFR § 18.51; Warren v. National Steel & Shipbuilding Co., 21 BRBS 149, 151-52 (1988). Coverage under the Act cannot be conferred by stipulation. See Littrell v. Oregon Shipbuilding Co., 17 BRBS 84, 88 (1985). However, I find that such coverage is present here.

---

<sup>1</sup> Employer's counsel objected to CX 4. I overruled this objection (Hearing Transcript ("T.") at 8-11).

<sup>2</sup> I admitted EX 3 (Claimant's LS-203) and EX 25 (Information from the Claimant's federal income tax records), pending later receipt. Exhibit 3 was received post-hearing; by letter dated May 28, 2008, the Employer withdrew EX 25. I sustained the Claimant's objection to EX 5, a copy of the Employer/Carrier's Form LS-208. The parties discussed the submission of a legible Form LS-208 (T. at 15). However, no document was ever received.

<sup>3</sup> The parties also noted that they had settled, under Section 8(i), a claim involving the Claimant's injury for a broken left foot, which arose from a separate incident, and was unrelated to the injury before me.

<sup>4</sup> The parties noted that the Claimant had been paid maximum compensation up to the date of the hearing (T. at 7).

I have carefully reviewed the foregoing stipulations and find that they are reasonable in light of the evidence in the record.

### **Contentions of the Parties**

The Claimant, who was employed as a heavy truck driver in Iraq, asserts that he was injured in a truck collision during his employment. He asserts that he sustained multiple physical injuries, including injury to his left shoulder, right foot, and both knees, as well as to his back. He also asserts that the incident caused post-traumatic stress disorder (PTSD), a psychological condition. The Claimant avers that he is disabled from both his physical injuries and his psychological condition.

The Employer conceded the Claimant was involved in a truck accident on the date in question. In contrast to the Claimant, however, the Employer avers that the Claimant did not suffer a compensable injury and is not disabled under the Act. The Employer disputes the Claimant's credibility, and avers that the Claimant's current complaints are all based solely on the Claimant's subjective reporting of his condition, and are not supported by objective medical evidence.

### **Employer's Purported Waiver of Issues**

I find the Employer, at the time of the hearing, agreed that some disability resulted from the Claimant's injury, and confirmed that the nature and extent of the Claimant's disability were in dispute (T. at 7). However, in the post-hearing brief, the Employer took a position at odds with its earlier statement, and stated that the "fact of injury/illness" and "causation" were in dispute. Employer's brief at 2.

The "Rules of Practice and Procedure" at 29 C.F.R. part 18, govern hearings for compensation under the Act. Section 18.51 states the following regarding stipulations: "The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding .... Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto."

To my knowledge, the parties never entered into any written stipulations in this matter. The issue, then, is whether the Employer's oral concession, made at the hearing, constitutes a stipulation as to whether the Claimant has some degree of disability. I find the Employer's statement, an accession to my summary of the issues to be determined, is not an unequivocal agreement as to pertinent facts. Therefore, I find the Employer's statement does not constitute a stipulation.<sup>5</sup> I further find the Claimant and his counsel have not been prejudiced by any ostensible stipulation by the Employer. Specifically, I note the Claimant's counsel has fully addressed the issue of causation regarding the Claimant's physical and mental condition.

---

<sup>5</sup> Employer's counsel is a highly experienced litigator, and should have known the possible implication of his statement to me and to his opposing counsel.

## Issues

1. Whether the Claimant was injured as a result of the truck accident in Iraq on October 26, 2005;
2. Whether his injuries, if any, resulted in disability;
3. Whether the Claimant has reached maximum medical improvement;
4. Claimant's entitlement to medical benefits for continued treatment;
5. Claimant's average weekly wage;
6. Employer's liability for penalties and interest.<sup>6</sup>

## Claimant's Testimony

The Claimant testified under oath at the hearing. He discussed the vehicle accident, stating that he was driving a vehicle, as part of a convoy in "the middle of the night[], and it was basically no lights...[p]itch black." The convoy had stopped; all of the vehicles were stopped, with the lights off. Then, the Claimant testified, at one point he did not see the vehicle in front of him. He stated the following: "I didn't see nothing but black air in front of me, because they pulled up.... I don't even know how fast I was going. It was late, and I was tired, I guess. But I realized the convoy wasn't in front of me, so I took and engaged my vehicle and went up the road, and I didn't see a vehicle in front of me because he wasn't tapping his brake lights [to] let me know he was there. So I run smack right into him." Then, the Claimant stated, "So, I got out of my vehicle, was able to walk around. The next thing I know, I'm on the ground, and they're holding my neck straight and still, and they med-evac'ed me out of there. That's to the best of my recollection." (T. at 27-29).

The Claimant testified that, as part of the hiring process, he had to take a physical, which he passed. He also stated that he disclosed to the Employer, before he was hired in February 2005, that he disclosed depression about three years earlier, when his wife died. He testified that after he disclosed his prior depression, the Employer did not ask him to see a psychiatrist or psychologist. He stated that from the time he was hired until the time of his accident, there was no time that he was physically unable to perform his required job activities. In addition, the Claimant stated that prior to being hired by the Employer he was not under active care or treatment related to his shoulder, knee or back. Concerning his pre-employment physical, he stated he was seen by a doctor working for the Employer, and that doctor did not advise him of any physical or mental limitations. The Claimant stated that before he was hired by the Employer, he drove trucks for ten years, and was not aware of any physical inability to drive during that time (T. at 30-33).

The Claimant stated when he returned to the United States, he was treated by Dr. Abbese, his family doctor, who then referred him to Dr. Orsini, Dr. Lewis, and Dr. Digiovanni.<sup>7</sup> He stated Dr. Lewis would like to inject his knees with Synvisc, but this treatment has not been

---

<sup>6</sup> The Claimant asserts that the Employer failed to pay his temporary total disability benefits in a timely fashion for a period of approximately six weeks, in May and June 2007 (CX 4; Claimant's brief at 17-18).

<sup>7</sup> In the hearing transcript, Dr. Abbese's name is misspelled as "Obassi." See, e.g., T. at 33.

authorized by the insurance company. The Claimant also testified to left shoulder complaints, and stated Dr. Lewis wanted to treat that with physical therapy. The Claimant said he believed the shoulder complaints resulted from the October 26, 2005 vehicle accident, "with the seat belt on me and the armor on me." The Claimant stated he is no longer being treated by Dr. Orsini, and said Dr. Orsini does not know what to do to help him, and recommended that he find a pain specialist (T. at 33-39).

The Claimant stated he is receiving care for his psychological condition at Lewis County Mental Health, to which he was referred by Dr. Abbasey. He stated he visits twice a month, and sees a therapist. The Claimant stated he believes his psychological problems cause him problems with his family and with other people. In addition, the Claimant stated, he also has trouble sleeping; he said that watching the television news about Iraq upsets him (T. at 39-46).

The Claimant stated that he has not made efforts to seek employment since he returned home, and he does not think he could do part-time sedentary work. Currently, the Claimant testified, he is not taking pain medication because he was told it is destroying his liver (T. at 46-47).

The Claimant stated that since returning to the United States, he has been paid \$2,082.22, every two weeks, but he was not paid during a period from May 1, 2007 until June 11, 2007. He also stated that he has not had any new injuries or accidents since returning to the United States. He stated his knees and his back seem to be getting worse. He stated that he has fallen before, on the stairs, and at his doctor's suggestion that he not go up stairs, he now sleeps downstairs (T. at 47-52).

On cross-examination, the Claimant testified that he was driving trucks for nine years before working for the Employer, and during that time, he was involved in several motor vehicle accidents. Concerning whether he viewed his work for the Employer as a permanent job, the Claimant stated: "No, I saw this as me going over there for three to four years and building a nice nest egg and just helping out and doing that right thing." He agreed that he was making more money working for the Employer than he made before (T. at 52-59).

The Claimant also discussed his living conditions in Iraq. He described the types of accommodations he was provided. For several weeks, he testified, he lived in a converted shipping container with several other people, but eventually he was given his own living space in a "hutch." He stated that some people he knew were killed by enemy fire, but he did not remember their names. He stated his truck had been attacked, but not disabled. Concerning the specific trip on which he was injured, the Claimant stated he felt he did not have proper training to drive a flatbed vehicle, but was told that he had to drive or be demoted, so he said "I guess if I have to go I have to go.... I can't fight the system" (T. at 59-77).

The Claimant stated that prior to working for the Employer, he never had any pain in his knees. He stated he did have "little petty things" like "falling down off of bicycles," but "[i]t wasn't pain to where I couldn't walk on it. It wasn't pain to where I had to go see a doctor." He also stated that when he was previously in car or truck wrecks, he never went to see a doctor, remarking "I didn't get hurt" (T. at 77-80).

Upon my questioning, the Claimant stated he did not recall the date he arrived in Iraq, but after being hired by the Employer he stayed in Texas for more than a month before departing. He stated he was not paid by the Employer until his plane left for Iraq. He stated he believed he was paid on a salary basis, and that he received some training before leaving for Iraq. He also stated he arrived back in the States about a week after his accident, and he was paid during that time. The Claimant stated he has used a cane for more than a year, at the recommendation of Dr. Lewis, because putting weight on his left knee “hurts horrendous.” The Claimant stated he is currently able to drive a “[v]ery short distance,” stating “it irritates my back, it irritates my knees from sitting in the position. You know, it’s just very irritating to me, so I – If I go a very short distance, I can usually make it there and make it back.” He stated his problems with his foot in Iraq did not impact his ability to drive (T. at 86-91).

On redirect examination, the Claimant stated he worked six or seven days a week in Iraq. He confirmed he received various bonus pays from the Employer, in addition to his base pay. He recalled his employment for the Employer in Iraq began on February 23, 2005. The Claimant stated his earnings with his prior employer, Heartland Express, were about \$600 to \$800 per week. The Claimant stated that he was responsible for expenses incurred on the road, such as for motel rooms and meals, when he worked for Heartland and for another previous employer (T. at 91-97).

The Claimant also testified by deposition, in August 2007. Both parties submitted the transcript of his testimony (CX 7/EX 27).<sup>8</sup>

At his deposition, the Claimant stated he received a misdemeanor conviction for unlawful imprisonment, stemming from a domestic violence incident; according to the Claimant, the incident was precipitated when he physically restrained his wife from leaving their home, after she threatened to commit suicide. The Claimant also stated he had been depressed after the death of his wife in 2003, and had been prescribed medication for his depression. He discussed his history of motor vehicle accidents, and stated he had never been injured in any of the accidents he had been in before he went to Iraq. The Claimant testified he went to a school to qualify to drive a truck; he stated he has a commercial driving license [CDL] and produced it at the deposition. The Claimant discussed his employment history, and stated his first job as a truck driver was in 1996. He stated his most recent employment, prior to the Employer, was with Heartland Express, and he began work for that company in the “eighth month of 2003” (CX 7 at 9-41).

The Claimant stated he planned to work for the Employer for three years, to make money to pay down his debts and make his family’s life better. The Claimant confirmed the effective date of his contract with the Employer was February 23, 2005, but stated he was in Houston for at least a couple of months waiting to be flown to Iraq. The Claimant stated he stayed at Camp Anaconda in Iraq, and worked as a heavy truck driver, and primarily transported ice. When the accident occurred, however, he was driving a flatbed truck, which he had never driven before. He said he told his foreman he did not want to go on the mission, because he did not have a good

---

<sup>8</sup> I will cite the Claimant’s deposition testimony as CX 7.

feeling about it, but the foreman told him if he refused to go, he would be sent home. The Claimant agreed that his lack of experience contributed to his feeling of uneasiness about the mission (CX 7 at 41-53).

Regarding the truck accident, the Claimant testified it was dark, and he was driving in a convoy. He stated another vehicle in the convoy, a Humvee, had broken down, and the convoy stopped. He stated he saw the vehicle in front of him put on his brake lights, and then he put on his brakes and came to a stop as well. He stated he was travelling without lights and even blocked his vehicle's internal lights, so as to be less visible to potential attackers. The Claimant stated he did not recall how much space there was between his vehicle and the vehicle in front of him. He sat in his vehicle for a long time, up to two hours, waiting for the convoy to resume. After the Humvee was fixed, the convoy resumed; the Claimant stated he recalled he received notification over the radio. Then, later, the convoy stopped again. He was sitting for a little time. He did not receive any radio notification, and he could not see anything in front of him. So he put the truck in gear and started rolling, and then he ran into the flatbed truck in front of him. The Claimant stated he got out of the truck, and people were surprised he was alive. Then the next thing he knew, the Claimant stated, he was on the ground, injured (CX 7 at 53-62).

The Claimant stated his truck had been shot at, and people had thrown rocks at his truck, when he was in Iraq. He stated he had never seen anyone from a convoy he was in get killed, but there were people he knew who had been attacked and killed in convoys. After the accident, the Claimant said, he was transported by helicopter to a military hospital (CX 7 at 63-65).

On examination by the Employer's counsel, the Claimant stated he returned to the United States on Halloween, and first saw a doctor in November. At the time, the Claimant stated, his upper spine was hurting, as well as his right foot and his knees. The Claimant stated his lower back and left shoulder were presently causing him pain, and he was also having problems with his "mind." He stated that Dr. Lewis was treating him for his knees, and recommended Synvisc injections. According to the Claimant, Dr. Lewis told him that the Synvisc injections are not a long-term cure, but will give temporary pain relief, and that eventually his knees will require surgery. The Claimant stated Dr. Orsini was treating him for his lower back, and told him there was nothing more he could do for him; the Claimant stated he would like to see Dr. Patel for specialized treatment, which included testing to see if surgery is warranted (CX 7 at 65-75).

The Claimant stated he believed his overall condition was getting worse. He stated he uses a cane, because it helps him with his knees, but is starting to develop soreness in his right shoulder from use of the cane. The Claimant stated that his personality has also changed and that his family and friends now complain that he is very angry and stressed, and is not the same person he was before. The Claimant stated he is angry at everything, and is most of all angry at himself for going to Iraq and putting himself in the situation in which he got hurt. He stated he is seeing counselors. The Claimant stated he feels aggressive and angry. The Claimant complained about a six-week period in which he was not receiving compensation, as a result of an oversight by the Employer's carrier, and stated the situation angered him (CX 7 at 76-93).

## Medical Evidence

The medical evidence submitted by the Claimant and the Employer/Carrier includes the following:

### MRI Report (CX 3)

The Claimant submitted a report of an MRI of his left shoulder, dated February 2006, which stated the following Impression:

1. Mild distal supraspinatus tendonopathy.
2. Interstitial tear of the infraspinatus tendon with muscle strain more proximally.
3. Mild hypertrophic arthropathy involving the acromioclavicular joint.
4. Abnormal morphology anterior inferior glenoid labrum suggestive of remote injury and/or degenerative changes.

### Dr. Richard Lewis (CX 8, 9; EX 15)

The Claimant submitted the transcript of the deposition of Dr. Lewis, dated October 2007 (CX 8), and a medical opinion letter from Dr. Lewis concerning the condition of the Claimant's knees (CX 9).<sup>9</sup> Dr. Lewis is Board-certified in orthopedic surgery. In addition, the Employer/Carrier submitted medical treatment records regarding Dr. Lewis's treatment of the Claimant, covering the time period between November 2005 and June 2007 (EX 15). Dr. Lewis's opinion letter, dated October 2007, states:

As a matter of clarification, his left knee is the more severe radiologically. His left knee has been non-responsive to steroid injection. He has osteoarthritis in both knees. We should try Visco supplementation on the left knee that has failed to respond to steroids. We should probably also do Visco supplementation on his less arthritic, but very symptomatic right knee that frequently requires injections of steroid. For clarification, this patient needs Visco supplementation in both knees. If only one were allowed, the left would be the preferable one to start with. The left knee may be beyond visco (sic) treatment, and the right knee is more likely to respond. The left knee should be attempted in my opinion.

At deposition, Dr. Lewis testified that he started seeing the Claimant in November 2005, upon referral from another physician, when the Claimant presented with complaints of pain in both knees.<sup>10</sup> Dr. Lewis opined that the Claimant had osteoarthritis, stating X-rays indicated a loss of joint space, and "[t]hose changes could not have possibly occurred over the short interval between the accident and the visit. They are more chronic changes. They would have had to evolve over a longer period of time....it was a preexisting condition." He agreed that the Claimant reported no history of knee problems before this accident. Dr. Lewis stated that "asymptomatic knees [can] become symptomatic knees" after an incident and remarked: "Well, we see this all the time. We see people with asymptomatic arthritis that a fall or a blow, or even

---

<sup>9</sup> The Employer also submitted the transcript of Dr. Lewis' deposition (EX 29). I will cite Dr. Lewis' deposition as CX 8.

<sup>10</sup> Dr. Lewis testified he could recall the name of the physician who referred the Claimant; however, as Dr. Lewis' treatment notes indicate a copy was to be sent to Dr. Abbasey, I will presume Dr. Abbasey made the referral.

a twist of the knee just sheds some .... sheds an extra load of debris into the joint that the compensated joint can no longer handle, and suddenly the joint gets swollen;" he stated the Claimant's complaints were consistent with the accident aggravating his condition (CX 8 at 4-8).

Dr. Lewis also discussed his treatment of the Claimant, stating that he recommended a steroid injection, to which the Claimant had a "minimal response" on the left, and had a "much more beneficial effect" on the right side. He also discussed the Claimant's shoulder symptoms, which the Claimant "claimed that he had shoulder symptoms from the time of the accident and that he had never had them prior to the accident." Dr. Lewis stated he treated the Claimant with an injection, to which the Claimant "had a terrible experience. It never gave him any benefit." He stated that an MRI of the Claimant's shoulder "showed that he had some inflammation in the rotator cuff tendon at the insertion of the supraspinatus muscle, and it showed some increased signal in another part of the rotator cuff, consistent with muscle strain. But basically, it was not a terrible, terrible shoulder that would explain his terrible, terrible symptoms." Dr. Lewis indicated he related the Claimant's shoulder symptoms to the truck accident, based on the presentation and history (CX 8 at 9-12).

Dr. Lewis stated that someone with the Claimant's shoulder symptoms should "avoid using the hand over the shoulder level. They should not do overhead work on a regular basis. They can reach up, but should not do it consistently." Concerning the Claimant's knees, Dr. Lewis stated he requested authorization to perform injections of Hyalgan or Synvisc, and suggested that as the next treatment, short of surgery. Dr. Lewis stated that during the Claimant's "last visit, he was having a lot of pain and he was not functioning well regarding his knees." Dr. Lewis also stated, concerning the Claimant's knees, "I would not allow him to squat, knee or deep knee bend. He shouldn't climb ladders. He could – he could probably drive, but not all day. He could – he would need to have a portion of his day sedentary, but he would need to be able to get up and walk around and move his legs around when he needs to." Concerning future treatment, Dr. Lewis stated, in the absence of authorizations "I have no course of treatment left. I have nothing left to offer, except continuing to give the steroid injections, which will, in a few months or years, stop working. And then I'll refer him to somebody for a joint replacement, and then it will be their decision." Finally, he stated that, to the best of his knowledge, the Claimant has been compliant with treatment, and stated the Claimant has not reached maximum medical improvement (CX 8 at 12-22).

Dr. Isaac Koilpillai and Related Records from Livingston County Mental Health Services  
(CX 10, 11; EX 20)

Dr. Koilpillai of Livingston County Mental Health Services submitted written responses to several questions concerning the Claimant's condition, on forms dated September 26, 2007 (CX 10). He stated the Claimant's condition was "post traumatic stress disorder," and that he had "[h]igh levels of anxiety. Startles easily and has recurrent nightmares. At times [he] feels that people have bad intentions toward him. He also has a back condition that is disabling." Dr. Koilpillai stated the Claimant can work "0" hours per day, and he did not anticipate that number increasing. He stated that the Claimant is not able to perform his usual job due to "his levels of anxiety and levels of back & knee pain." Dr. Koilpillai stated the Claimant's prognosis was "limited improvement," and stated "prognosis guarded for return to last functional levels." He

stated the Claimant is “unable to tolerate the presence of others,” and he has “high levels of anxiety and fear.” He stated he prescribed the following medications to the Claimant: Zoloft, for anxiety/depression; Lunesta for sleep/insomnia; and Prazosin for anxiety/nightmares. Dr. Koilpillai stated that “[d]ue to [the Claimant’s] physical pain and limitations in activities he feels powerless & helpless which further amplifies symptoms of PTSD.”

The Claimant also submitted approximately 60 pages of records related to his mental health treatment, covering the time period between September 2006 and October 2007 (CX 11). These records contain notes from a staff psychiatrist, Dr. Anthony Racaniello, and other individuals who provided therapy but who do not appear to be physicians. The Employer also submitted a set of records concerning the Claimant’s treatment at Livingston County Mental Health Services, which are largely similar to the records received from the Claimant (EX 20).

These records indicate a psychiatric evaluation, dated October 2006, completed by Dr. Racaniello. Dr. Racaniello reported that the Claimant’s chief complaint was “Difficulty sleeping and flashbacks of Iraq.” The report indicated the Claimant had first reported psychological problems to his primary care physician, Dr. Abbasey, and that Dr. Abbasey believed the Claimant had PTSD and was depressed and anxious, and prescribed Zoloft. Dr. Racaniello also noted the Claimant complained of physical pain related to the truck accident in Iraq, and mentioned the Claimant’s expressions of frustration regarding the processing of his worker’s compensation claim. The report also indicated “no history of counseling.”

Dr. Racaniello listed the following Axis I Diagnoses: “1. PTSD (provisional); 2. Consider Adjustment Disorder with Depression and Anxiety; 3. Partner Relational Problem (wife). 4. R.O.[Rule Out] Depressed Mood Secondary to Medical Condition, Physical Trauma.” On Axis IV, Dr. Racaniello noted: “Psychosocial Stressors are moderate/severe; return from Iraq secondary to traumatic injuries for evaluation; marital problems; financial issues.”

The treatment notes from Livingston County indicate the Claimant received treatment about twice per month. Although some sessions include the Claimant’s reports about Iraq-related stressors (e.g., seeing a war report on television that created feelings of overwhelming anxiety and panic), others related to family problems (e.g., arguments with spouse over personal relationships)(CX 11, EX 20).

Dr. Chirag Patel (CX 12, 13)

The Claimant presented treatment records from Dr. Patel covering the time period between March 2007 and April 2007 (CX 12), and the transcript of Dr. Patel’s deposition from October 2007 (CX 13). Dr. Patel is Board-certified in anesthesiology, and is Board-eligible in pain management.

The treatment records note the Claimant was treated for chronic low back pain, and state Dr. Patel’s impression that the Claimant presented “with a chronic history of low back pain. His exam is remarkable for facet median arthropathy. His MRI demonstrates a disk herniation with impingement of the L5 nerve root. His exam is not remarkable for this” (CX 12).

In his deposition, Dr. Patel stated the Claimant was referred by Dr. Abbasey, his primary care physician. Dr. Patel testified that he met with the Claimant twice, for complaints arising “[b]ecause of his accident in Iraq.” At the first appointment, Dr. Patel testified, he observed muscular tenderness upon physical examination. Dr. Patel stated the Claimant’s “range of motion for his lumbar spine was limited to 30 degrees for flexion an[d] limited extension. As he extended back and rotated, he had more pain with extension and with right rotation, extending of the lumbar spine, right rotation than he had on the left. Actually, he had nothing on the left. No pain when I extended him to the left. His extremities strength was intact. I didn’t find any sensation loss. I found that his reflexes were intact.” Concerning whether these findings were consistent with the Claimant’s history of a motor vehicle accident in Iraq, Dr. Patel stated: “His pain was a little different, which is common, which can occur. His MRI showed a disk herniation with impingement of his nerve root. He underwent two injections of his back with, I think, minimal to – with variable results of his pain. He had pain mostly in his low back. And his exam was consistent with low back pain” (CX 13 at 6-7).

Dr. Patel described his treatment plan, which included a diagnostic injection of the facet joints or the nerves surrounding the facet joints, which might alleviate pain temporarily. If that was positive, Dr. Patel proposed performing a rhizotomy, which he described as “basically burning of the nerves that would provide almost about a year of relief of his pain or more.”<sup>11</sup> Dr. Patel stated that the Claimant was in favor of such treatment, but it was not authorized by the Carrier, therefore it has not been performed (CX 13 at 8-11).

On examination by Employer’s counsel, Dr. Patel stated that he had not spoken personally with Dr. Orsini, the Claimant’s treating physician, although he did review Dr. Orsini’s records, and believed Dr. Orsini provided appropriate care for the Claimant’s pain. He stated he reviewed the MRI report but did not review the actual films himself. Based on the MRI, Dr. Patel confirmed the Claimant had an osteophyte complex, not a disk herniation, and stated that “[o]steophyte complex is bony changes in the body. It’s arthritic changes that might be creating some narrowing of the neuro foramina.” He also stated that the Claimant’s short pedicles and sacralized disk are conditions he was born with, and were not a result of a trauma or event. Dr. Patel stated he could not predict the potential outcome of his recommended treatment, and remarked: “If he has had two epidural steroid injections, he proceeds on with this facet injection, it doesn’t help his pain, I would then say he would needs (sic) to see a surgeon to see if there is something he can do to help alleviate some of the pain in his back.” He also stated that he performed a straight-leg raising test on the Claimant “to determine if there is any nerve root irritation in his back,” and the results were “negative bilaterally.” (CX 13 at 11-18).

On re-examination by Claimant’s counsel, Dr. Patel stated that if the Claimant “underwent two epidural steroid injections and it reduced the inflammation associated with this pain in his legs, straight-leg raise can be negative after that....There is no more nerve root irritation. And that is why I wanted to proceed on with the facet injection, because his exam in his lower extremity wasn’t as significant as his low back was.” Dr. Patel stated that short pedicles did not make the Claimant more likely to have back pain than someone with normal

---

<sup>11</sup> The deposition transcript misspells the procedure as “risotomy” (CX 13 at 10).

pedicles. He also stated that his recommended treatments are not experimental, and are routinely approved by insurance companies. (CX 13 at 18-19).

Nicholas H. Noyes Memorial Hospital (EX 19)

The Employer submitted medical records reflecting the Claimant's treatment at Noyes Memorial Hospital. Some of these records deal with an unrelated emergency room visit in 1998 (for chest or rib pain). The records also include a copy of Dr. Patel's treatment record from March 2007, summarized above, as well as a copy of an additional treatment record from Dr. Patel, dated April 2007.<sup>12</sup> At the April 2007 visit, Dr. Patel evaluated the Claimant because of continuing complaints of pain, and increased the dosage for one of the Claimant's pain medications (Lyrica) and kept the dosage of the other (Percocet) at the same level.

These records also include a copy of treatment notes dated November 4, 2005, by Dr. Douglas Mayhle at the "After Hours Care Center." The notes indicate the Claimant was attempting to see Dr. Abbasey, his primary care provider, due to complaints of pain in left shoulder, neck, right foot, and back. Dr. Mayhle's treatment notes indicate he reviewed the Claimant's CT scans and X-rays and noted osteoarthritis of the first metatarsal of the right foot, but otherwise noted nothing remarkable. Dr. Mayhle prescribed "Ultracet" and recommended follow-up with Dr. Abbasey. Dr. Mayhle's diagnosis was: "Diffuse myalgias, questionable fictitious presentation."

Dr. Salman N. Abbasey (EX 12)

The Employer presented medical treatment records from Dr. Abbasey, covering the time period from November 2005 to September 2007. The records indicate the Claimant saw Dr. Abbasey, a primary care physician, approximately 18 times for matters that the Claimant related to his employment in Iraq.<sup>13</sup> The Claimant was referred to Dr. Abbasey after his visit to the After Hours Clinic, with the first recorded visit to Dr. Abbasey on November 7, 2005.<sup>14</sup>

These records indicate Dr. Abbasey referred the Claimant to specialists. In addition, however, the Claimant continued to see Dr. Abbasey, who wrote prescriptions for pain medications, such as naproxyn and Percocet. The first notation regarding the Claimant's mental health concerns was recorded at a visit in February 2006. At that time Dr. Abbasey referred the Claimant to Livingston County Mental Health, but he also continued to provide care to the Claimant, including prescribing Zoloft.

Dr. John A. Orsini (EX 13, 28)

The Employer submitted medical treatment records from Dr. Orsini (EX 13). This exhibit also includes correspondence between Dr. Orsini and Dr. Abbasey regarding the

---

<sup>12</sup> The treatment note for the April 2007 visit is not included in CX 12.

<sup>13</sup> The records indicate the Claimant also saw Dr. Abbasey for unrelated minor health problems, such as a sore throat.

<sup>14</sup> The treatment records in this exhibit are out of chronological order.

Claimant. In a November 9, 2005 letter, Dr. Orsini described his examination of the Claimant and stated his impression as follows:

Diffuse spine strain injury after a motor vehicle collision, cervicalgia, thoracic pain, and lumbago. We are to begin some physical therapy, as well as getting him onto some anti-inflammatory medication around the clock. We will give him Naprosyn 500 b.i.d. He will take that in addition to the Percocet. He will begin some physical therapy for mobilization and stretching and strengthening, and see him in follow-up in 4 weeks. In addition, he will see Dr. Lewis for left shoulder, bilateral knee pain, and he will (sic) one of the foot and ankle specialists with regard to his right heel pain.

In a December 23, 2005 letter to Dr. Abbasey, Dr. Orsini stated his impression after follow up:

He has back and leg symptoms with the back symptoms likely musculoligamentous and/or discogenic with possible right S1 radiculopathy with neuropathic allodynia. The alternative is that there may be a peripheral nerve injury around the right ankle resulting in neuropathic pain ....

Dr. Orsini testified by deposition in August 2007 (EX 28). Dr. Orsini stated that he is trained as a physiatrist, and that he works mostly in spine medicine.<sup>15</sup> He stated that he started treating the Claimant in the autumn of 2005. Dr. Orsini testified the claimant presented “with complaints of pain in the neck and in the lower back, as well as some pain in the lower extremities.... I was asked to address his axial pain or neck and back pain, and whether some pain he was having in one of his feet...was related possibly to a pinched nerve from the back.” Dr. Orsini stated: “In terms of objective findings, his complaints were persistent and consistent. In terms of objective findings – well, I guess I don’t have enough of those records to tell you what the objective findings were at the time of the injury.” Dr. Orsini stated he did not note an acute fracture or injury of the spine, from X-rays, and also stated that he was not certain whether the Claimant’s foot and ankle complaints were a component of his back injury (EX 28 at 2-8).

Dr. Orsini stated:

After review of the MRI, it looked like there was some displacement of the L5 nerve root in the lateral recess, so inside the spinal canal, towards the right side of the spinal canal. And technically, that should not affect the age reflex that was noted to be abnormal on the EMG study, but it did raise the question of whether or not some of the leg symptoms might be related to some irritation of that L5 nerve root without any evidence of structural damage to the nerve, based on the EMG testing. So, briefly, the idea being that the nerve is irritated, possibly from the structural change seen in the MRI, but not structurally damaged in and of itself.

EX 28 at 9-10.

Dr. Orsini opined that nerve root displacement could be caused by the trauma of a vehicle accident, stating:

If all we saw there was a soft tissue disc herniation that looked like a fairly fresh disc herniation pushing on the nerve root, I would say definitively that mostly is the cause. In this case, however,

---

<sup>15</sup> Dr. Orsini indicated he would provide his curriculum vitae to be attached as an exhibit to the deposition. However, the record contains no curriculum vitae from Dr. Orsini.

there is a small bone spur there along with a disc; sometimes referred to a disc osteophyte complex. And when I see something like this, it makes me think there was probably some component of this there before, but since he didn't have any symptoms like this before, I hypothesized that perhaps this trauma somehow caused this disc osteophyte complex to hit the nerve, contuse it, or worsen that disc osteophyte complex, and cause the symptoms to become – to manifest themselves, that weren't there before.

EX 28 at 10-11.

Concerning whether the impact of the Claimant's pre-existing osteophytes on the nerves would have been accelerated by the Claimant's motor vehicle accident, Dr. Orsini testified:

There's no good science to back up any of these hypotheses. But one would say you've got a physical entity that's very hard, a bone spur, next to a soft tissue entity, a nerve that may be there for years without causing any problem, and a sudden trauma causes a rapid movement of the osteophyte or the stretching the nerve over it, and the nerve becomes injured and painful as a result.

EX 28 at 19.

Dr. Orsini stated he did not get a history from the Claimant that mentioned prior back problems (EX 28 at 19-20). Dr. Orsini also stated that his view in August 2006 was that there "was a good possibility" that the Claimant's right foot complaints were related to his nerve irritations. He stated that he treated the Claimant with steroid injections. EX 28 at 13-14.

Regarding the Claimant's condition at his last visit, in March 2007, Dr. Orsini stated:

[H]e was still reporting some pretty significant levels of pain, he is telling me the pain killers give him very little relief from pain, and it prevents him from walking more than ¼ of a mile and he can only lift very light weights, and he can't stand for more than thirty minutes. So, he is still pretty limited in terms of his perceptions of his own ability, that's for sure.

EX 28 at 17-18.

As to whether surgery might be available to alleviate pain and help make the Claimant more functional, Dr. Orsini stated:

That's a question for a surgeon. If I saw something that I thought was readily amenable to a surgical intervention, I would have sent him directly. With this kind of a problem ...we try to hold off on doing something when the amount of pathology is not huge and neurologically he's always been very stable. There hasn't been any evidence of any neurologic loss of function there.

EX 28 at 18.

On cross-examination from the Employer's counsel, Dr. Orsini stated that the Claimant's symptoms were not an "unusual presentation for someone to come in with after a motor vehicle accident." However, "[t]ypically, they will improve more significantly than [the Claimant] did." Dr. Orsini testified:

I think it would be fair to say that his complaints of pain seem more significant than one would expect based upon the objective findings....[T]he kinds of things we see on his physical exam and on his MRI are things that we commonly see in people who have much lower levels of pain. There was no evidence of any severe acute injury. The degree of pathology seen on his MRI, in the broad spectrum of things I see every day is mild .... One would expect it to be a temporary irritation in most cases. And, I am often left scratching my head when I have a patient with ongoing pain with relatively mild pathology like this, and I cannot explain it entirely rationally scientifically, but I can tell you that I see it on a daily basis.

EX 28 at 21-22.

On the issue of whether the Claimant's symptoms have resolved since the time of his motor vehicle accident, Dr. Orsini stated:

It's only possible if one assumes that he's being disingenuous about his symptoms. And in no way am I implying that I think that's the case .... I treat patients with pain every day. You have to separate the fact that I don't know for sure when someone is being honest about their pain or not honest about their pain .... And there are rare cases when I become fairly convinced that someone is becoming disingenuous. This is not one of those cases.

EX 28 at 26-27.

Dr. Orsini also commented that based on the objective findings, he would expect the Claimant to have steadily improved, but was not surprised that the Claimant has not improved, because the Claimant's condition seemed to have plateaued. When asked about work restrictions, Dr. Orsini stated that, based on the Claimant's self-report of his condition, he is unsure whether the Claimant could drive a truck. Based on the Claimant's MRI, however, Dr. Orsini would conclude that the Claimant could drive a truck (EX 28 at 27-32).

Dr. David A. Shrier (EX 16)

The Employer submitted a report of MRI of the Claimant's lumbar spine, performed in June 2006 by Dr. David Shrier (EX 16). Dr. Shrier's impression was as follows:

1. There is a transitional lumbrosacral joint which likely indicates partial sacralization of L5....
2. There are spondylotic changes with disc dessication and degeneration at T12-L1, L2-3, and L4-5. There are retrolistheses of T12 over L1 and L4 over L5.
3. At L4-5, there is a superimposed right paracentral posterior disc osteophyte complex with mild displacement of the superior aspect of the L5 nerve root in its lateral recess. There is also mild to moderate right sided neural foraminal stenosis at this level.
4. At L2-3 and L3-4, the spinal canal is lower limits of normal secondary to developmentally short pedicles....

Dr. Orsini and Dr. Patel discussed this MRI in their depositions, as noted above.

Dr. Benedict Digiovanni (EX 14)

The Employer submitted medical treatment records from Dr. Digiovanni at Strong Health Department of Orthopedics reflecting the Claimant's visits in December 2005 and May 2006 (EX 14). These notes discuss the Claimant's multiple complaints, and make particular mention of the Claimant's foot/heel pain. At the second visit, Dr. Digiovanni recommended assessment at the Strong Pain Management Center, for evaluation and treatment of possible complex regional pain syndrome.<sup>16</sup>

Physical Therapy Professionals and Andrew Mattle, P.T. (EX 17, 18)

The Employer submitted an evaluation by Andrew Mattle, dated February 2006, (EX 17), and handwritten records from Physical Therapy Professionals, covering the period between February 2006 and July 2006 (EX 18). The records also include letters from Mr. Mattle to the Claimant's treating physicians, Dr. Lewis and Dr. Orsini.

These records indicate the Claimant received physical therapy approximately once weekly for several months. Mr. Mattle's evaluation and correspondence indicate the Claimant complained of foot and ankle pain, as well as pain in the shoulder, knees, and lower back.

Tri-County Family Medicine (EX 21)

These records concern the Claimant's medical treatment dating back to 1998, prior to his employment for the Employer (EX 21). They include repeated mention of the Claimant's treatment for knee pain and mental health concerns, including (but not limited to) post-traumatic stress disorder. For example, a treatment note from October 1998 indicates the Claimant's past history "has had some complaints of what was thought to be left medial meniscal damage on the left side and right elbow injury from his interest in martial arts.... Review of systems of his right elbow and left knee pain are chronic." One week later a treatment note indicates "[The Claimant] is also more concerned about his left knee pain and his inability to walk any significant length. He use (sic) to get a lot of swelling on his knees and also it locks and gives out on him. He stated that he injured it in a karate match a few years ago and it was suggested that he get an MRI at that time as they felt he had some torn cartilage in his knee." A treatment note from November 1998 states the Claimant was to get an MRI of his knee for "severe knee pain and locking and giving out." A treatment note from April 2000 indicates the Claimant was complaining about "knee pain over the tibial tuberosity in both knees." At that time he was prescribed Vioxx for his knee pain. A treatment note from December 2001 reflects the Claimant reported "L [left] knee pain 8-10 years." Notes from January 2002 also reflect left knee pain.

The treatment notes also indicate the Claimant reported depression and anxiety in November 2003, after the death of his wife, and that he was prescribed various drugs. A treatment note from March 2004 indicates the Claimant came in for a "recheck of what is

---

<sup>16</sup> The letterhead for Dr. Digiovanni is the same as the letterhead for Dr. Orsini (Strong Health, Department of Orthopedics), so I presume these two physicians are in an associated group practice.

probably obsessive-compulsive disorder and post-traumatic stress disorder. He mainly described emotional volatility.” The Claimant was also seen in April and October 2004 for mental health issues. He was prescribed Effexor. The records indicate the Claimant reported, in January 2005, that he stopped taking Effexor the previous month, because he was feeling well.

Dr. Thomas LeTourneau (EX 30)

At the request of the Employer, Dr. LeTourneau conducted “a comprehensive psychiatric assessment...as an independent medical examiner” in October 2007, and submitted a written report (EX 30). Dr. LeTourneau met with the Claimant and administered tests, performed a records review, and recorded a psychological history. Dr. LeTourneau’s report states he is a psychiatrist; however, his professional credentials are not otherwise of record.

According to Dr. LeTourneau’s report, the Claimant reported a “benign psychiatric history.” Specifically the Claimant denied “any prior history of psychiatric hospitalizations, treatment with psychotropic medication, visits with mental health professionals, anxiety, or suicide attempts.” The Claimant admitted depression after the death of his wife, and told Dr. LeTourneau he saw his minister but otherwise had no treatment, and his depression lifted spontaneously after 4-5 months.

In his report, Dr. LeTourneau stated: “Based on the information available to me, I would conclude that this claimant’s allegations of symptomatic discomfort and functional impairment are not credible.” Specifically, Dr. LeTourneau cited the scores the Claimant attained on multiple tests. According to Dr. LeTourneau, these test scores indicated either that the Claimant was not putting forth a true effort, or was exaggerating his symptoms. Dr. LeTourneau also made the following diagnosis: “[the Claimant] complains of a variety of symptoms which would lead to diagnoses of depression and anxiety. However, these are self-report disorders – i.e., the accuracy of the diagnosis depends on the reliability of the claimant as an informant. Evidence-based testing indicates, with excellent statistical confidence and on every instrument administered, that he is a very unreliable informant, and that he is grossly exaggerating/malingering his symptoms.” Dr. LeTourneau also stated that “Based on the ABA Guidelines, I would conclude that there is no psychiatric disability. I base this conclusion on the lack of credible evidence supporting psychiatric impairment. Indeed, the objective evidence points to the claimant’s gross exaggeration of symptoms and functional deficits.”

Dr. E. Robert Wilson (EX 31, 33)

In October 2007, at the Employer’s request, Dr. Wilson performed an evaluation of the Claimant, which included both a physical examination and a review of applicable medical records, and submitted a written report (EX 31). Dr. Wilson, who is an orthopedic surgeon and is Board-certified in orthopedic surgery, also testified by deposition, in November 2007 (EX 33).

In his written report, Dr. Wilson stated:

[The Claimant’s] behavior before, during and after the examination was rather unusual ....

He walked with a very unusual gait and had propensity for leaving his belongings on the floor.... At time his knees would seem to buckle but he recovered himself immediately. He demonstrated very limited neck motion. He flexed his left shoulder to 140 [degrees]. He externally rotated his left shoulder to 50 [degrees]. He internally rotated his left shoulder to 80 [degrees]. He flexed his right shoulder to 160 [degrees]. He externally rotated his right shoulder 10 [degrees]. He internally rotated his right shoulder 80 [degrees]. All other joints of both upper extremities had a full painless range of motion. .... Muscle power in the upper extremities appeared to be intact. [The Claimant] walked with a cane. He would not put the cane down to let me examine his back. Knee and ankle jerks were present. Babinski reflexes were downgoing. Lower extremity sensation as tested with a ten gram nylon monofilament was intact. Vibratory sense in the lower extremities was intact. Supine, [the Claimant] kept his left knee flexed 30 [degrees]. He would further flex it to 110 [degrees]. His right knee extended fully. It would flex to 130 [degrees]. There is no calf or thigh atrophy noted. Both ankles and both subtalar joints had a full painless range of motion. His toes moved freely. Earlier in the examination, it was noted that [the Claimant] would rub his left knee almost constantly and would exhibit bobbing motions of his trunk.

Dr. Wilson concluded that the Claimant's "unusual behavior is not consistent with any orthopaedic disease or injury. The one positive aspect of his examination is the report of the MRI scan of 06/24/06." Dr. Wilson stated his impression as follows: "On the basis of this report, according to table 15-3 of the Guides to the Evaluation of Permanent Impairment of the American Medical Association Press (5<sup>th</sup> Edition), I would say that [the Claimant] had a 5% impairment of the whole person."

At deposition, Dr. Wilson stated, consistent with his written report, that the Claimant had a 5% impairment of the whole person, related solely to his back, based on Table 15-3 of the Guides to the Evaluation of Permanent Impairment of the American Medical Association Press, Fifth Edition. Dr. Wilson opined that the Claimant showed a L4-5 disk spur complex on his June 2006 MRI, and stated that the Claimant "probably had a pre-existing problem, but I think it was worsened by the accident" (EX 33 at 9-11).

Dr. Wilson discussed the Claimant's "unusual behavior" during the exam, which he described as being "completely inconsistent with any orthopedic disease that I've ever seen." Dr. Wilson stated he was aware that Dr. Mayhle stated the Claimant had "diffuse myalgias of questionable fictitious presentation." Concerning Dr. Orsini's 40 pound lifting restriction, Dr. Wilson state this would be "an extremely mild disability" (EX 33 at 13-17).

Dr. Wilson stated he tried to examine the Claimant's knees: "[a]t the time I examined him, I couldn't tell" whether the Claimant suffered trauma to the knees as a result of his October 2005 motor vehicle accident. Dr. Wilson stated he "could not do a valid examination," and that the Claimant "would keep that left knee flexed 30 degrees and he wouldn't straighten it out." He also stated that the Claimant's "x-rays show mild knee osteoarthritis," that "[t]here's nothing in the x-rays which would indicate that he had an... actual injury," and this arthritis preexisted his 2005 accident. Dr. Wilson stated that "[p]eople with sore knees can stand up and walk on them," therefore the Claimant's ability to walk around after his accident "would not be conclusive" (EX 33 at 18-21).

Dr. Wilson stated that the guides define malingering as "being a conscious and willful feigning or exaggeration of a disease or effect of an injury in order to obtain specific external

gain.... It is usually motivated by external incentives such as receiving financial compensation, obtaining drugs or avoiding work or other responsibilities.” Dr. Wilson confirmed it was his opinion that the Claimant was malingering, and also stated: “But bear in mind that I think that his disk disease is valid. I think that his disk disease was present—you know, was there and that it caused the right foot pain” (DX 33 at 22-23).

Regarding whether the Claimant had a shoulder injury, Dr. Wilson stated “I have no objective evidence one way or the other. His behavior just made it impossible for me to determine that.” Dr. Wilson also stated he could not tell whether the truck accident aggravated the Claimant’s shoulder, due to the Claimant’s behavior during the examination. Concerning possible restrictions for the shoulder, Dr. Wilson stated “I couldn’t tell. I couldn’t say what was the matter. His overall behavior was so unusual that it would be impossible to give an objective determination of what he could and couldn’t do.” Concerning the Claimant’s knees, Dr. Wilson stated he would not give the Claimant any work restrictions based on his knees. He also opined concerning knee treatment that “Synvisc is used as the last stage before total knee replacements. [The Claimant] has not had, as far as I know, MRIs of his knees. I have no idea what pathology might be in his knees except for the mild degenerative changes seen on X-rays. I think the use of Synvisc is premature.” As to the Claimant’s foot pain, Dr. Wilson opined that it was related to his back, as he thought the Claimant “had a right lumbar radiculitis that caused the foot pain” (EX 33 at 24-30).

On examination by the Claimant’s counsel, Dr. Wilson stated that he “thought the bone spur was pre-existing, but that the accident seemed to have caused some problems with it,” and that he thought the right foot pain the Claimant described was consistent with the radicular components of the bone spur. Dr. Wilson stated the MRI of the Claimant’s shoulder suggested shoulder symptoms, but that the Claimant’s “overall behavior left this in total confusion. There was no objective way to correlate the tests with the MRI;” he stated that these objective findings were “of doubtful significance [and] didn’t show any gross pathology. It just showed an aging shoulder in a person who had done manual work throughout his life.” Dr. Wilson stated “with regards to the shoulder, I don’t think that there’s enough pathology there to warrant any sort of surgery. With regards to the knees, I certainly would get at least MRI studies of the knees before suggesting anything like Synvisc.” As to the facet injections and rhizotomy suggested by Dr. Patel, Dr. Wilson stated: “I personally don’t think it would help. I have no objection to him trying these local injections. But in this case, I don’t think it would help.” Dr. Wilson stated he would recommend exercise for the Claimant’s back pain, stating “[a]s a general rule, exercise is one of the most reliable treatments for low back pain and low back syndromes. But I could not promise that this would work with [the Claimant]” (EX 33 at 30-44).

Dr. Wilson stated he was asked to use AMA guidelines in his assessment, and reiterated he assigned his 5 percent impairment based on a one level disk process. Further, he stated that the AMA Guide does contain a section for pain, but he stated he did not consider the Claimant’s subjective complaints of pain in determining his rating because the Claimant’s “behavior was somewhat difficult to deal with.” Dr. Wilson opined that “[w]ith his back condition, it’s probably not a good idea” for the Claimant to return to his prior employment in Iraq (EX 33 at 48-55).

On re-direct examination, Dr. Wilson stated that the 5 percent impairment would relate to the Claimant's back and his right foot, and also stated that "under the New York State guidelines, I would probably give [the Claimant] a 25 [pound] lifting restriction," which would be a permanent restriction under the state guidelines. Dr. Wilson also stated: "we know the [bone] spur had to be present before the motor vehicle accident. So I know it had to be pre-existing. I think the symptomatology may have started with the motor vehicle accident" (EX 33 at 61-64).

On re-examination by the Claimant's counsel, Dr. Wilson stated that the MRI showed objective findings related to back pain, however he stated "[t]hat's the only thing. The rest of the examination was a travesty.... That was the only thing where I put a clear causal relationship with regards to this accident on." Dr. Wilson also commented: "If I were presented with definite evidence of any sort of trauma in any of these areas, I could buy it. But otherwise, his behavior overshadows everything else" (DX 33 at 69-71).

#### KBR Medical Records (EX 11)

These records include information the Employer compiled at the onset of the Claimant's employment in February 2005, such as Claimant's initial physical examination and medical questionnaire. These reflect the Claimant reported "depression" from 2003, as well as a history of asthma. Notably, the Claimant did not indicate any history of knee or back pain, or any joint problems.

In addition, this exhibit includes documents related to the Claimant's medical treatment in Iraq after his motor vehicle accident in October 2005. The Claimant was hospitalized for several days at a military medical facility, where X-rays and CT scans were taken. The Claimant was noted to have right knee and foot pain, as well as neck pain. Later, the Claimant was noted to have left knee and shoulder pain. The Claimant was diagnosed with soft tissue injuries. On October 28, 2005 he was released, to return to full duty 14 days after the injury.

#### **Other (Non-Medical) Evidence**

The Claimant submitted other evidence, including: written recommendation from OWCP Claims Examiner, requesting that the Carrier authorize psychiatric treatment, dated December 13, 2006 (CX 1); the Claimant's Form LS-18, dated May 10, 2007 (CX 2); correspondence from Claimant's counsel to Carrier's counsel concerning payment of benefits, dated June 12, 2007, and a copy of a check in the amount of \$6,246.66 from the Carrier to Claimant, dated June 8, 2007 (CX 4); and a report from the Claimant's vocational expert, Dr. John Williams, accompanied by Dr. Williams' curriculum vitae (CX 14).

The Employer submitted other evidence, including the following: The Claimant's Employment agreement, dated February 2, 2005, and effective February 23, 2005 (EX 1); Employer/Carrier's LS-202, dated November 1, 2005 (EX 2); Claimant's LS-203, dated December 1, 2006 (EX 3); Employer/Carrier's LS-206, dated November 17, 2005 (EX 4); Employer/Carrier's LS-210, dated November 3, 2005 (EX 6); Claimant's personnel file from the Employer (EX 22); Claimant's wage information regarding his employment for the Employer (EX 23); the Employer's incident report, dated October 26, 2005 (EX 24); Claimant's Social

Security Administration Earning Records (EX 26); and a vocational rehabilitation assessment from the Employer's vocational expert, William Quintanilla (EX 32).

Both parties submitted the Claimant's deposition transcript, summarized above (CX 7/EX 27).

### Vocational Evidence

The Employer's Vocational expert, William Quintanilla, submitted a "Vocational Rehabilitation Assessment" dated November 20, 2007 (EX 32). According to his letterhead, Mr. Quintanilla possesses an M.Ed. degree and a L.P.C. certification. He is the Director of Rehabilitation for Rehabilitation Resources, Inc., located in Houston, Texas.

Mr. Quintanilla's report indicates he reviewed the medical evidence summarized above, as well as the Claimant's deposition transcript. He did not interview the Claimant. The report reflects that the Claimant has a high school education, is a Navy veteran with an honorable discharge, and holds a commercial driver's license. The report also indicates the Claimant has a criminal conviction for unlawful imprisonment. Mr. Quintanilla referred to the occupation of Heavy Truck Driver in the U.S. Department of Labor Dictionary of Occupational Titles, and noted the occupation was classified as medium work, exerting 50 pounds of force occasionally and 25 pounds frequently.

Taking into considerations the work restrictions mentioned by the treating and evaluating physicians, as well as the Claimant's experience and education, Mr. Quintanilla identified five positions appropriate for the Claimant, including the following: security guard (two positions), at \$9.40 and \$10.00 per hour; quality inspector, at \$12.00 to \$15.00 per hour; dispatcher, at \$13.00 per hour; "OTR" truck driver, at \$17.31 to \$19.23 per hour. Except for "OTR truck driver" for which a location was not specified, the positions were located in the Rochester, New York area. The report did not specifically indicate that any positions were available with the employers listed, but in each instance the report stated: "call to apply." Based on his assessment, Mr. Quintanilla concluded that adequate employment opportunities existed, and he stated the Claimant has a wage-earning potential of up to \$19.23 per hour.

The Claimant submitted an "Assessment of the Credibility of the Vocational Rehabilitation Assessment done of [the Claimant] by Mr. William Quintanilla", completed by Dr. John Williams, D.Ed, dated January 10, 2008 (CX 14).<sup>17</sup> Dr. Williams' curriculum vitae reflects he possesses a doctoral degree in Counselor Education with an emphasis on rehabilitation from the Pennsylvania State University. Among his other professional qualifications, Dr. Williams is a diplomate of the American Board of Disability Analysts and the American Board of Vocational Experts, and is a Certified Rehabilitation Counselor.

---

<sup>17</sup> In a letter accompanying this submission, which was filed after the hearing, the Claimant's counsel stated: "We did not believe that a labor market survey was either necessary or appropriate since it our position that the claimant is not at overall MMI; however, we did want to respond to Mr. Quintanilla's analysis and findings."

In his report, Dr. Williams conducted an analysis of each of the positions Mr. Quintanilla listed in his vocational assessment. Among other things, his analysis set out the typical activities of the jobs and listed the physical requirements. Dr. Williams concluded that Mr. Quintanilla “documents no efforts to articulate the physical or mental/behavioral demands of the specific occupations he identifies as being appropriate for [the Claimant] in his labor market survey.” Dr. Williams also concluded that, based on the Claimant’s physical restrictions (limits on climbing, stooping, etc.) it “would be quite difficult” for the Claimant to return to driving a heavy truck, and the average demands of being an inspector (lifting, crouching stooping, reaching) would exceed the Claimant’s physical restrictions. According to Dr. Williams, it appears the Claimant could perform a select number of guard occupations, and could perform the physical demands of a dispatcher, but there is no evidence the Claimant could deal with the stress of dealing with people on the radio or telephone. Dr. Williams also commented that the Claimant has “difficulty dealing with people,” so it would be necessary for a rehabilitation professional to assist him in developing skills to interview for a position. He stated that if the Claimant’s ability to deal with people does not improve in the future, then at best, the Claimant can perform the duties of a security guard full time, at a wage of \$10.00 per hour. However, Dr. Williams also stated, “it is problematic to suggest [the Claimant] can work at any job on a sustained basis. It is most probable that he will not work in any capacity and earn income.”

### **The Claimant’s Credibility**

I observed the Claimant throughout the hearing, which lasted close to three hours. At times, the Claimant exhibited obvious signs of pain, such as wincing. He walked with a pronounced limp, while using a cane for support. He seemed to be most uncomfortable sitting, and less uncomfortable standing or walking around. I could not determine, based on my observation, whether the Claimant actually was in pain or whether he was demonstrating signs of pain for my benefit.

Regarding his own injuries, taking into consideration that the Claimant is not medically trained, I find the Claimant’s testimony was not credible. At times, his testimony was contradicted by the record. For example, the record establishes that the Claimant sought medical treatment for painful knees before he was ever employed by the Employer (EX 21). However, the Claimant did not reveal any knee conditions to his employer at his physical examination. At the hearing, the Claimant continued to deny that he had any significant knee injuries or symptoms prior to the accident (T. at 77).

Upon my observation of the Claimant’s testimony, I found him to be generally credible when describing his recollections of the accident in Iraq which forms the basis for his claim. I also find he was generally candid and credible when discussing such matters as his living conditions. However, I observed the Claimant was vague or inaccurate when discussing other matters. For example, the Claimant claimed that several co-workers in Iraq had died, and that he lost “good friends.” On questioning, the Claimant was unable to remember their names, stating that he tried to forget that (T. at 62-66). In addition, at times the Claimant’s testimony was also at odds with the record regarding his work history, and reflected a tendency to exaggerate. For instance, the record indicates the Claimant signed a contract on February 2, 2005 and departed

for Iraq the following February 23. However, at the hearing the Claimant stated that he waited for “more than a month” before departing (T. at 86).

Based on my observations, I cannot conclude that the Claimant was entirely credible in his testimony. As the record also establishes, the Claimant did not fully disclose his relevant medical history, especially regarding his knees and his psychological state, to examining and treating physicians. In addition, several physicians (notably Dr. Wilson and Dr. LeTourneau) have asserted that the Claimant is intentionally exaggerating his symptoms. Even Dr. Orsini, the Claimant’s physician, has remarked that the Claimant’s symptoms seem to be more severe than the objective physical evidence would suggest. The accuracy of the Claimant’s statements to physicians will be discussed in more detail below.

Based on the record, as well as my observations, I conclude the Claimant has a tendency to exaggerate, and consequently was not accurate in his testimony. It is not clear to me whether these traits are a result of a deliberate intent to falsify, or are a result of his psychological conditions, such as PTSD. In either event, I find, consequently, that the Claimant is not credible. Therefore, I assess with special caution the Claimant’s assertions, and in particular his statements on subjective issues, such as his level of pain.

### **Injury Arising Out of Employment**

Section 2(2) of the LHWCA, 33 U.S.C. § 902(2), defines an “injury” as an “accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury ...” Section 20(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. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984).

Once this prima facie case is established, a presumption is created under § 20(a) that the employee’s injury or death arose out of employment. A claimant’s subjective credible complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the § 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236, aff’d sub nom Sylvester v. Director, OWCP, 681 F.2d 359 (5th Cir. 1982).

In order to establish the second element, that is, to show that conditions at work could have caused, aggravated or accelerated the harm or pain, a claimant needs to show specifically that conditions existed at work that could have caused or aggravated the harm or pain. A claimant under the Defense Base Act must satisfy the same requirements to prove causation as any other claimant under the LHWCA. See Piceynski v. Dyncorp, 31 BRBS 559 (ALJ), remanded at BRB No. 97-1451 (July 17, 1998), reconsidered at 36 BRBS 134 (ALJ) (1999). In Defense Base Act cases, the “condition or course of employment” standard has been subsumed

into the “zone of special danger” doctrine. O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951). As first enunciated by the Supreme Court: “The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident [citation omitted]. 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 arose.” Id., at 506-07. If the conditions of employment create a zone of special danger out of which the injury arises, then a causal connection exists. See Ilaszczat v. Kalama Services, BRB No. 01-0774 (June 19, 2002).

Once the presumption is invoked, the burden of proof shifts to the Employer to rebut it with substantial countervailing evidence that the Claimant’s condition was not caused or aggravated by his employment conditions. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991). The Benefits Review Board has held: “Unequivocal testimony of a physician that no relationship exists between the injury and claimant’s employment is sufficient to rebut the presumption.” Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18, 20 (1995). In order to rebut the presumption, the employer must introduce substantial evidence that a pre-existing condition was not aggravated by the Claimant’s employment. Conoco, Inc., v. Director, OWCP, 104 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); see also Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Id. In such instance, the administrative law judge must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail, because the claimant has not met the ultimate burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

### Discussion

As discussed above, the Claimant has asserted multiple conditions, including injuries to his shoulder, back, foot, and knees, as well as psychological injuries (PTSD) stemming from his employment for the Employer in Iraq. Based on the evidence of record, I find that the Claimant has established the first element of a prima facie case: that is, the Claimant has demonstrated that he has both physical and psychological conditions that could have occurred as a result of his employment. The Claimant has demonstrated that he has physical abnormalities in his back, knees, and shoulder.<sup>18</sup> See CX 3, 9, 12; EX 13. I also find the Claimant has established the first element of a prima facie case regarding his psychological condition, which is that he currently has a psychological impairment (CX 10, 11; EX 20).

The Claimant also has established the second element of his prima facie case, at least with regard to his physical injuries. That is, the Claimant has demonstrated that the vehicle accident in Iraq in which he was involved, may have led to his current physical impairments.

---

<sup>18</sup> Based on the evidence before me, I find the weight of the medical evidence is that any injury to the Claimant’s foot is related to his back injury, so I will subsume my discussion of any foot injury into my analysis of the Claimant’s back condition. See, e.g., EX 28 at 13-15 (Dr. Orsini); EX 33 at 22-23 (Dr. Wilson).

See CX 8 at 4-8 (Dr. Lewis)(knees); EX 28 at 10-19 (Dr. Orsini)(back); CX 8 at 9-22 (Dr. Lewis)(shoulder).

As to his psychological state, the issue of whether the Claimant has established his prima facie case requires additional discussion. The Claimant testified about the conditions that he faced in Iraq, including poor living conditions and threat of attack (T. at 59-65; CX 7 at 63-64). While I have reservations about the Claimant's credibility, I note his testimony on these matters is not contradicted by the Employer.

The record establishes the Claimant was employed as a heavy truck driver and was based at Camp Anaconda, Iraq (EX 1). I find that conditions in Iraq, especially conditions facing truck drivers, could cause psychological impairments. I recognize that U.S. military forces are currently engaged in action against hostile forces, and that many attacks have taken place against truck convoys. See 29 C.F.R. § 18.201 (which permits an administrative law judge to take judicial notice of adjudicative facts). I also find there is additional evidence of record, in addition to the Claimant's testimony, supporting my finding. For example, the Claimant's employment agreement informed him his assignment location "may be a potentially hazardous environment" and provided that his base salary would be paid if he were "taken and held prisoner, hostage or otherwise detained by a hostile force." The Claimant's employment agreement also indicated he was to be paid "danger pay" of 25%. I also find, therefore, that, for the purposes of compensation under the Defense Base Act, the Claimant's employment in Iraq took place in a "zone of special danger." I further find, therefore, that the Claimant has established that conditions in Iraq could have caused psychological harm; therefore, I conclude the Claimant has established a prima facie case regarding psychological injury.

Because the Claimant has established his prima facie case, the burden shifts to the Employer to rebut the Claimant's case.<sup>19</sup> The Employer contends the Claimant's complaints are not grounded in physical findings, but are based solely on the Claimant's subjective complaints. Moreover, to the extent that the Claimant has physical and psychological injuries, these pre-date the Claimant's employment. The Employer also asserts the Claimant is not credible, and so his complaints are not credible either. Employer's brief at 19.

Because the Claimant has alleged several different injuries, and the evidence of record varies as to his different alleged injuries, I will discuss the Employer's rebuttal to each of the different alleged injuries in turn.

Knees. Dr. Lewis, a Board-certified orthopedic surgeon, stated that the Claimant has osteoarthritis in both knees, with the left more severe radiologically, and that this was a pre-existing condition that evolved over a long period of time (EX 15; CX 8). He also stated that it is possible for asymptomatic knees to become symptomatic, based on trauma such as a fall or a

---

<sup>19</sup> In its brief, the Employer first asserts the Claimant has failed to establish a prima facie case, because "there is no credible evidence to support that any of Claimant's continuing conditions are the result of the truck incident in Iraq." Employer's brief at 19. For the reasons set forth above, I have found the Claimant has established a prima facie case, and so I reject the Employer's contention in this regard.

blow to the knee (CX 8). Dr. Wilson concurred that the Claimant had “mild knee osteoarthritis,” which pre-dated the 2005 truck accident, and also stated that he could not make any other conclusion regarding whether the Claimant suffered trauma to the knees (EX 33).

At the hearing, the Claimant denied any history of knee pain or significant knee injury (T. at 77). However, medical treatment records indicate that, prior to his employment for the Employer, between 1998 and 2001, the Claimant intermittently sought medical treatment for pain in his knees, most particularly his left knee (EX 21).

The Employer’s proffer of evidence establishing the Claimant had pre-existing knee pain, coupled with the Claimant’s lack of credibility on this issue, rebuts the presumption of a work-related injury. Therefore, I will assess the evidence as a whole regarding this issue. I also find there is no medical evidence that the Claimant sustained any additional knee injury, discernable on X-ray or MRI, as a result of the truck incident in Iraq. Based on the evidence of record, therefore, I find the Claimant’s current knee osteoarthritis was a pre-existing condition.

However, I am mindful a work-related injury that causes the aggravation of a pre-existing condition is compensable. Pittman v. Jeffboat, Inc., 18 BRBS 212, 214 (1986); see also Banks v. Service Employers Int’l Inc., BRB No. 06-0486 (Mar. 14, 2007)(unpub.) The Claimant asserts that the Employer’s evidence has not overcome the § 20(a) presumption, and does not completely rule out a work-related aggravation of a pre-existing abnormality. Claimant’s brief at 11.

There is medical evidence that the Claimant’s osteoarthritic knee condition may have been aggravated by the truck accident. Dr. Lewis testified it is possible that a fall or a blow, consistent with a blow to the knee the Claimant may have sustained in the truck accident in Iraq, could cause an otherwise asymptomatic knee to become symptomatic. Under such circumstances, this would constitute a work-related aggravation of a pre-existing injury. However, Dr. Lewis’ opinion is based on assumptions which are at odds with the facts. The evidence is clear that the Claimant’s knees were not “asymptomatic.” To the contrary, medical treatment records indicate the Claimant had “symptomatic” knees several years prior to his employment for the employer. In addition, there is some question as to how “symptomatic” the Claimant’s knees actually may be. Employer’s expert, Dr. Wilson, was unable to conduct an examination of the Claimant’s knees, and he suggested the Claimant may be malingering.

Based on the foregoing, I am unable to determine that the Claimant has a work-related aggravation of his knee condition. As noted above, the Claimant is known to lack credibility regarding the issue of his history of knee pain. In addition, he has a history of pre-employment knee pain remarkably consistent with his current physical condition (osteoarthritis in his knees, left more severe than right).

Based on the foregoing, I find the Claimant has failed to establish a work-related knee injury.

Back. The weight of the medical evidence is that the Claimant has a pre-existing back abnormality back due to a congenital condition (short pedicles, sacral fusion) or degenerative

changes (osteophyte complex), or both (CX 13 at 13-16; EX 16; EX 28 at 19-122; EX 33 at 9-11). Both the Employer's medical expert, Dr. Wilson, and the Claimant's physician, Dr. Orsini, opined that the truck incident may have aggravated the Claimant's existing abnormality by making his asymptomatic condition symptomatic. Dr. Orsini also commented that the Claimant's complaints of pain was not what he would expect, given the nature of the physical abnormalities; however, he did not conclude that the Claimant's subjective pain complaints were totally inconsistent with the physical findings. See EX 28 at 23-27. Dr. Wilson commented that, even though he concluded the Claimant was malingering in general, he believed the Claimant's disk disease was "valid;" and Dr. Orsini commented he did not believe the Claimant was disingenuous (EX 33 at 22-23; EX 28 at 26-27).

The Employer's evidence, which includes Dr. Wilson's concession outlined above, fails to rebut the presumption that the Claimant's back condition is related to his employment. Based on the foregoing, notwithstanding the Claimant's general lack of credibility, I find the weight of the evidence establishes that the Claimant's current subjective complaints of back pain are supported by objective medical evidence. I also find the weight of the evidence establishes that the truck accident in Iraq aggravated the Claimant's pre-existing back condition. I find, therefore, that upon consideration of all of the evidence on this issue, the Claimant has established a work-related injury to his back.

Shoulder. The medical evidence establishes the Claimant had some degree of shoulder abnormality, based on the MRI taken in February 2006, four months after the truck accident (CX 3). Dr. Wilson referred to the Claimant's condition as "truck driver's shoulder," and remarked that the Claimant's shoulder condition is consistent with that of a person who has done manual labor throughout his life. Dr. Wilson also stated he could not make any conclusion about the cause of the Claimant's reported shoulder pain, because of the Claimant's behavior at the examination (EX 33 at 36-37). Dr. Lewis observed the Claimant's shoulder, and stated he believed the Claimant's shoulder condition was related to the truck accident (CX 8 at 12). Dr. Wilson examined the Claimant in late October 2007. Dr. Lewis' most recent treatment note regarding the Claimant's shoulder, dated late September 2007, states that the Claimant reported the shoulder "is still not right" and is "weak" (CX 8 at 44 (exhibit to deposition)). This treatment note indicates that Dr. Lewis believed the Claimant had probably reached permanency regarding his shoulder condition, and there was no other nonoperative treatment to offer.<sup>20</sup>

The Claimant's general lack of credibility creates difficulties in assessing the evidence regarding his shoulder condition. Dr. Wilson's inability to make an assessment of the Claimant's shoulder, due to the Claimant's behavior during his examination, suggests malingering or exaggeration. As Dr. Wilson noted, there was only a mild degree of tendon injury in the Claimant's shoulder, in an MRI taken more than 18 months prior to his examination. In his deposition, Dr. Lewis did not explain why the Claimant should still be suffering from problems with his shoulder, 2 years after the truck accident in Iraq. Due to the Claimant's general lack of credibility, I am somewhat skeptical about the veracity of the Claimant's reported problems at his most recent examination by Dr. Lewis.

---

<sup>20</sup> The treatment note recorded a "positive impingement sign." According to Dr. Wilson, this test is subjective, because it relies on the patient's report of pain (EX 33 at 34-36).

I find the Employer's evidence on this issue rebuts the presumption of a work-related injury, or aggravation of injury, to the Claimant's shoulder. Based on the medical testimony and the MRI, it appears the Claimant had a chronic shoulder problem. Although it is certainly conceivable his condition may have been aggravated by his truck accident in Iraq, there is no reliable evidence to explain why the Claimant's shoulder problem has persisted for so long, given the relatively minor degree of permanent damage in his shoulder.

In light of the Claimant's general lack of credibility, and considering the weight of all the evidence, I find the Claimant has not established that he currently has a shoulder condition caused by or aggravated by the truck accident.<sup>21</sup>

Psychological Injury. Medical treatment notes establish that the Claimant had psychological conditions, including PTSD, before he departed for Iraq (EX 21). There is also evidence that the Claimant currently may have PTSD, based on the statement Dr. Koilpillai completed (CX 10). The treatment notes from the Livingston County Mental Health Services indicate the Claimant received treatment regularly from at least September 2006, onward, and he was diagnosed with PTSD, among other conditions (EX 20). However, Dr. LeTourneau's report, submitted by the Employer, indicates Dr. LeTourneau's opinion that the Claimant has no psychiatric condition whatever (EX 30).

I find the report from Dr. LeTourneau, submitted by the Employer, constitutes rebuttal of the Claimant's prima facie case regarding psychological injury. Dr. LeTourneau has stated an unequivocal opinion that the Claimant does not evidence a psychiatric disorder.

As noted above, there is evidence the Claimant currently has psychological problems, including PTSD, as evidenced by both Dr. Koilpillai's statement and the treatment notes from Livingston County facility.<sup>22</sup> However, medical records also indicate the Claimant received treatment for mental health issues prior to his employment with the Employer. These records also indicate this treatment exceeded the treatment for depression to which the Claimant has admitted, and include a diagnosis for PTSD (EX 21).

Additionally, the Claimant's general lack of credibility raises concerns regarding the reliability of the opinions of the professionals who treated him after his return from Iraq (CX 11, EX 20). I have examined the records before me regarding the Claimant's treatment at Livingston

---

<sup>21</sup> I have considered whether the Claimant's use of a cane has caused him pain in his left shoulder. At the hearing, the Claimant testified that he uses a cane due to pain in his left knee. I have found the Claimant's knee condition not to be work-related. In addition, there is no medical evidence of record as to any relationship between the Claimant's shoulder pain and use of a cane. Therefore, to the extent the Claimant has shoulder pain because his knee pain requires him to use a cane, I find the Claimant's shoulder pain is also not work-related.

<sup>22</sup> In this regard, I have considered only those aspects of the Claimant's reported behaviors that seem to be related to his Iraq experience (e.g., fear of "Muslims"). I also note that, to the extent the treatment records reflect the Claimant's self-report of symptoms, they may be unreliable, based on the Claimant's general lack of credibility and/or tendency to exaggerate.

County Mental Health Services. These records do not indicate the Claimant ever reported his complete psychiatric history, such as his prior diagnosis of PTSD. It is not clear, therefore, whether Dr. Koilpillai and the other mental health professionals at Livingston County knew of the Claimant's previous history, when administering treatment. Because Dr. Koilpillai's opinion regarding the Claimant's current psychiatric condition is conclusory and seems to be based on false assumptions regarding the Claimant's mental health history, it is of little value.

Dr. LeTourneau's report also reflects that the Claimant did not admit to Dr. LeTourneau that he had received any treatment for psychiatric/psychological issues or had been prescribed medication for mental health concerns, prior to his employment for the Employer. The results of the test instruments Dr. LeTourneau cited in his report led him to conclude that the Claimant either is malingering or did not put forth sincere effort to cooperate with the evaluation.<sup>23</sup> As noted above, there are significant indicators casting doubt on the Claimant's credibility in general. This lends additional credence to Dr. LeTourneau's conclusions.

I am mindful that the burden is on the Claimant to establish a work-related injury. However, even if I disregard any evidence of malingering, I find the Claimant's concealment of his prior psychological history from both Dr. LeTourneau and his treating mental health professionals makes it impossible for me to conclude that the Claimant's current psychological condition was either related to or aggravated by his employment. As noted above, the evidence of record establishes the Claimant was diagnosed with psychiatric conditions, including PTSD, several years before he was ever employed by the Employer.

Based on the foregoing, therefore, I find the Claimant has not established that his current psychological condition is caused by, or is related to or aggravated by, his employment for the Employer.

### **Disability Arising from the 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." § 902(10). The Claimant bears the initial burden of establishing a prima facie case of disability. Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

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 job due to his job-related injury. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988). He 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, 91 (1984). A doctor's opinion that return to the employee's usual work would aggravate his condition may support a finding of total disability. Care v. Washington Metro Area Transit Authority, 21 BRBS 248, 251 (1988). Once the claimant has

---

<sup>23</sup> I have considered whether the Claimant's failure to cooperate fully may be a manifestation of his psychological impairment, but in light of the Claimant's overall tendency to exaggerate, it appears more likely that the Claimant may have been attempting to exaggerate his symptoms.

established he cannot return to his usual work, he has established a prima facie case of disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 96 (1991), aff'd mem sub nom., Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

#### Discussion

The Claimant was employed as a “Heavy Truck Driver” in Iraq (EX 1). As set forth above, I have found the Claimant has established that he has a back condition, caused or aggravated by his work-related injury. According to the medical evidence, the Claimant is probably unable to continue to work in his previous employment, due to his employment-related back condition. Notably, Dr. Wilson has stated that, based on the Claimant’s back condition, it is probably not a good idea for him to return to Iraq (EX 33 at 55).

The remaining medical opinions discuss the Claimant’s work restrictions in light of all of his claimed impairments, including conditions I have found the Claimant has failed to establish are work-related. For example, Dr. Orsini stated that, based upon the Claimant’s reported symptoms, the Claimant was likely limited to sedentary work, but based upon the MRI evidence alone, the Claimant could likely drive a truck (EX 28 at 32). However, Dr. Orsini was unable to conclude whether the Claimant was able to drive a truck, and did not address whether the Claimant would be able to drive a truck in Iraq. His opinion is not inconsistent with Dr. Wilson’s conclusion.

Based on the foregoing, therefore, I find the Claimant has established that he is disabled due to his work-related back condition.

#### **Maximum Medical Improvement**

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). An injured employee’s impairment may be found to have changed from temporary to permanent when the employee’s condition reaches the point of MMI. James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). A claimant is permanently disabled if after reaching MMI, he has a residual disability. Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988). The date that MMI is reached is to be determined by medical factors without regard to a claimant’s economic situation. Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

If additional medical treatment is contemplated, the claimant has not reached MMI. McCaskie v. Aalborg Ciserv Norfolk Inc., 34 BRBS 9, 12 (2000).

#### Discussion

Because I have found the Claimant has established a work-related injury only with regard to his back condition, my discussion of this issue is limited to the Claimant’s back.

As Dr. Patel's report and deposition testimony indicate, additional treatment for the Claimant's back condition is recommended (CX 12, 13). Dr. Patel testified the recommended treatment is not experimental (CX 13 at 19). Dr. Patel's recommendations are not contradicted. Dr. Wilson stated he did not think the recommended treatment would help the Claimant, but had no objection to "trying." (EX 33 at 42-43).

Based on the evidence of record, therefore, I find the Claimant has not yet reached maximum medical improvement with regard to his work-related back condition.

### **Alternative Employment**

A claimant has had a loss of wage-earning capacity when he can no longer perform certain jobs because of his injury. Sproull v. Stevedoring Svcs. of America, 25 BRBS 100, 110 (1991). Once a prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. 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. Palombo v. Director, OWCP, 937 F.2d 70, 73 (2d Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). Suitable alternative employment must take into consideration factors such as the relevant labor market, the Claimant's educational background and skills, and the Claimant's physical limitations based on his disability. American Stevedores v. Salzano, 538 F.2d 933 (2d Cir. 1976), aff'g 2 BRBS 178 (1975). The date upon which a claimant reaches maximum medical improvement is not relevant to the issue of whether a disability is total or partial. Palombo v. Director, OWCP, 937 F.3d 70, 76 (2d Cir. 1991).

### **Discussion**

The Employer's vocational assessment, summarized above, concluded that the Claimant had a wage earning capacity of up to \$19.23 per hour as an "OTR Truck Driver." The Employer's assessment listed jobs paying from \$9.40 per hour (security guard) up to the \$19.23 per hour cited. Most of the jobs listed are in the Rochester, New York, area; however, no location is specified for the "OTR Truck Driver" job. The highest paid job for which a specific location is listed is "quality inspector" in Rochester, at a wage of \$12.00 to \$15.00 per hour.

Because the Employer's vocational assessment lists the evidence considered, it appears to be based principally on the medical evidence of record. However, the assessment does not discuss the physical requirements for any of positions listed. It is unclear, then, whether the Claimant's work-related back condition would prevent him from working in any of the positions the Employer listed. In addition, although the Employer's vocational assessment lists the Claimant's educational background and employment history, it does not indicate whether the Claimant possesses the qualifications for the specific jobs listed.<sup>24</sup> Moreover, the Employer's vocational assessment does not indicate whether any of the positions listed are actually available.

---

<sup>24</sup> The Employer's vocational assessment does not address whether the Claimant may not be qualified for a security guard position, due to his misdemeanor conviction. However, the Claimant's conviction occurred after his employment for the Employer. The Employer is not

The Claimant's vocational rehabilitation analysis points out the deficiencies in the Employer's report, noted above. In addition, the Claimant's vocational assessment also asserted "it is most probable" the Claimant was not presently employable, due in part to his difficulties in getting along with others. However, Dr. Williams, the Claimant's vocational expert, conceded the Claimant could perform security guard functions at a wage of up to \$10.00 per hour, but stated "this is not supported by the current [physical] work restrictions."<sup>25</sup> CX 14 at 14.

The Employer's vocational assessment takes into consideration the Claimant's skills, education level, and physical requirements, and so meets the minimum requirements under the Act. See Hogan v. Schiavone Terminal, Inc., 23 BRBS 290, 292 (1990). In general, the deficiencies in the Employer's vocational assessment, such as the issue of whether positions are actually available, are cured by the Claimant's vocational assessment. I do not agree with Dr. Williams' contention that the Claimant is currently not employable as a security guard, based on his work restrictions. The evidence Dr. Williams amassed regarding security guard functions that some, but not all, security guard positions have physical requirements the Claimant could not meet (such as the requirement to be on one's feet the entire shift). The evidence indicates that, as of the date of the Employer's vocational assessment, there were some security guard positions available, at a wage of \$10.00 per hour, that the Claimant was capable of performing, even with his work-related back impairment. There is no indication why the Claimant cannot perform this type of work full time.<sup>26</sup>

Based on the evidence above, I find the Claimant has a current wage-earning capacity of \$10.00 per hour, and is capable of working full time (40 hours per week). I find, therefore, the Claimant has a wage earning capacity of \$400.00 per week. I also find the earliest date Employer has established this capacity was November 20, 2007, the date of the Employer's vocational assessment. See Palombo v. Director, OWCP, 937 F.3d 70, 73 (2d Cir. 1991).

### **Average Weekly Wage and Rate of Compensation**

The average weekly wage is reached by dividing the Claimant's average annual earnings by 52. In § 10, the LHWCA sets forth the methods to determine a claimant's average annual earnings, in pertinent part, as follows:

- (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the

---

required to address potential disqualifications based on post-employment criminal behavior. See Livingston v. Jacksonville Shipyards, 32 BRBS 123, 125 (1998).

<sup>25</sup> The "work restrictions" Dr. Williams considered included restrictions related to conditions I have found not to be employment-related (e.g., Claimant's knees).

<sup>26</sup> Dr. Williams' analysis also indicates that some positions were available even if an individual had trouble dealing with people. From a vocational standpoint, it is not entirely clear whether the Claimant's interpersonal problems are related to his psychological impairment or a merely an aspect of his personality.

average daily wage or salary for a five day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee 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 the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

### Discussion

The purpose of the varying statutory provisions is to ensure that a claimant is compensated fairly for lost income. Proffitt v. Service Employers Int'l, Inc., BRB No. 06-0306 (BRB: Aug. 14, 2006), slip op. at 7. For a computation under Section 10(a), it is necessary that the Claimant have worked in the same employment in which he was working at the time of the injury, during substantially the whole of the year preceding the injury. It is not necessary that the Claimant have worked for the Employer the whole of that time. As the record reflects, the Claimant was hired by the Employer to work as a truck driver, which was his previous profession (EX 26). Computing from the date the Claimant departed for Iraq to the date he returned to the United States, the Claimant worked for the Employer for approximately 36 weeks, or slightly less than nine months.<sup>27</sup> This in itself is not “substantially the whole of the year.”

Notwithstanding that the Claimant’s profession as a truck driver before his employment with the Employer, I find that the Claimant’s employment for Heartland Express from 2003 to 2005 was not substantially the same as his employment for the Employer. First, as the Claimant testified and is well known, the working conditions in driving a truck in Iraq differ widely from driving a truck in the United States. In Iraq, the Claimant would be expected to drive a truck as a member of a large convoy, over unimproved roads, under the threat of attack from hostile fire. Working for Heartland Express in the United States, the Claimant would operate a truck on his own, driving from city to city on routes of his choosing, over modern roadways, and not under threat of attack. In addition, the method of payment differed. When working for the Employer, the Claimant received a base salary, plus extra pays for hardship and/or hostile fire conditions,

---

<sup>27</sup> The Claimant testified he departed for Iraq on February 23, 2005 (T. at 98). This is the same date the Claimant’s employment contract was executed (EX 1). The Claimant testified he returned to the United States on “Halloween” and was paid up to that date (EX 27 at 67; T. at 89). The Claimant’s pay records indicate the Employer paid him \$581.53 in February 2005 and continued to pay him through October (EX 23).

and he received housing and meals. When working for Heartland Express, the Claimant was paid per mile of travel, and he was expected to pay for his expenses.

Based on my foregoing findings, I conclude that the Claimant was not working in the same employment for substantially the whole of the year prior to his injury. Therefore, it is inappropriate to utilize § 10(a) to determine the Claimant's average weekly wage.

Based on the record, I find it is also inappropriate to utilize § 10(b) to determine the Claimant's average weekly wage. Use of this section requires me to refer to other wages, earned by other employees of the Employer. The record before me is devoid of such evidence. In addition, the calculations used in this section presume a claimant works either five or six days a week. The uncontradicted evidence in this case is the Claimant worked six or seven days a week (T. at 93). Consequently, I cannot conclude he is either a "six day" or "five day" per week worker.

I am left, therefore, with § 10(c). An administrative law judge has wide, but not unlimited, discretion to determine a claimant's annual earning capacity under § 10(c). See Zimmerman v. Service Employers Int'l, Inc., BRB No. 05-0590 (BRB: Feb. 22, 2006). The goal of this section is to arrive at a figure that fairly reflects a claimant's potential capacity to earn, including the wages contemplated in employment for the employer. Proffitt v. Service Employers Int'l, Inc., BRB No. 06-0306 (BRB: Aug. 14, 2006), slip op. at 7. Therefore, it is proper to take into consideration that an injury in Iraq may cost an individual the ability and opportunity to earn higher wages, at least for the duration of the term of his employment contract.

Based on the evidence of record, I find the Claimant was employed by the Employer in Iraq from February 23, 2005 to October 31, 2005, a period of 35 6/7 weeks, or slightly more than 8 months.<sup>28</sup> According to the employment agreement, the Employment was "at will," but the Employer estimated the likely "duration of assignment" to be 12 months. During this time, according to the Employer's pay data, the Claimant earned a total of \$62,466.78 (EX 23). On a pro-rata basis, this amount equates to \$1,742.11 per week. This amount well exceeds the Claimant's base salary of \$3,000 per month. I presume this amount includes additional pays such as overtime and "hazardous duty" pays, which are included in determining an individual's average weekly wage. Denton v. Northrop Corp., 21 BRBS 37, 46-47 (1988).

---

<sup>28</sup> The Employer asserts I should use the period between February 2, 2005 and the date of the accident, a period of approximately 40 weeks. The Claimant asserts I should use the period between February 23, 2005 and the date of the accident, a period of approximately 34 weeks. I chose February 23, 2005 as the inception date of the Claimant's employment, because the Employer's pay data corroborates the Claimant's contention he was not paid until he departed for Iraq, on February 23, 2005. I chose October 31, 2005 as the end date, because the Employer's pay data establishes the Claimant was paid through the month of October, and in fact the Claimant received his highest pay in that month. This is consistent with the Claimant's testimony that he departed Iraq on "Halloween."

In its brief, the Employer urges I use a “blended” approach to determining the applicable average weekly wage, and cites me to the case of Meyer v. Service Employers Int’l, Inc., Case No. 2005-LDA-00077 (ALJ: Feb. 7, 2006).<sup>29</sup> In that case, the claimant was a truck driver who was injured in Iraq after about 4½ months of employment for the Employer. The administrative law judge, using § 10(c), used the claimant’s total wages for the year prior to the injury and divided them by the number of weeks the claimant worked during that timeframe. According to the administrative law judge, such a formula “allows Claimant to benefit from the higher wages of Iraq while recognizing the fact that employment in Iraq was for no set period of time under an at will employment contract but with an understanding it would last 12 months.” Id., slip op. at 14.

I have considered the procedure used by the administrative law judge in Meyer and choose not to adopt it. Unlike the administrative law judge in that case, I do not find the fact that the Claimant was employed on an “at will” basis to be important. The very same contract that stated the employment was at will also stated the anticipated term of employment was 12 months (EX 1). Under such circumstances, an employee has a reasonable expectation that, barring his own misconduct or circumstances beyond the employee’s control (such as the employer’s loss of its contract with the government), the employment would last at least 12 months. In addition, the Claimant in the case before me served in Iraq for a period almost twice as long as the claimant in the Meyer case. Lastly, and most importantly, taking into consideration the principle that the purpose of compensation is to fully compensate an employee for wages lost from the position he held with his employer at the time of his injury, I conclude that the use of a “blended” calculation would insufficiently compensate this claimant, because it would inaccurately diminish the value of the Claimant’s employment in Iraq. In this regard, I have taken into consideration that the evidence indicates the Claimant had entered into an employment relationship with the Employer, but was not paid, for a period of several weeks, between February 2, 2005 and February 23, 2005. Including those weeks, in which the Claimant was under contract to the Employer but earned no income, in any calculation of the Claimant’s average weekly wage would skew the ultimate outcome, to the Claimant’s detriment.

Based on my finding that the Claimant’s employment in Iraq was not substantially the same as his employment for Heartland Express, and considering the dates of the Claimant’s employment, I find that the most appropriate determination of the Claimant’s average weekly wage, using § 10(c), is to divide the Claimant’s total earnings for the employer [\$62,466.78], by the number of weeks the Claimant was in Iraq under his contract of employment [35 6/7], as set forth above. This computation leads to a determination of an average weekly wage of \$1,742.11 per week.

#### Compensation Entitlement

Under § 8(b), the compensation for temporary total disability is 2/3 of the employee’s average weekly wage. Under § 906(b)(1), the maximum amount of disability compensation payable is 200% of the applicable national average weekly wage, at the time of the injury, as determined by the Secretary of the Department of Labor. The Claimant was injured on

---

<sup>29</sup> This case has limited precedential value, as it was not appealed to the Benefits Review Board.

October 26, 2005. For the period between October 1, 2005 and September 30, 2006, the national average weekly wage is \$536.82. Therefore, the maximum disability compensation is \$1,073.64. Average weekly wages of \$1,555.68 and greater will net the maximum compensation rate of \$1,073.64.

At the hearing, the parties indicated the Claimant was paid at the “max comp” rate up to the date of the hearing (T. at 6). However, the evidence indicates the Claimant was paid at a weekly rate of \$1,041.11. The Claimant testified that he received compensation payments in the amount of \$2,082.22 every two weeks (T. at 47). The Claimant’s testimony is substantiated in that the check the Employer tendered for six weeks’ of compensation was for \$6,246.66, which is six times \$1,041.11 (CX 4).

Based on the foregoing, I find the Employer underpaid the Claimant during the period of the Claimant’s total disability.

As set forth above, I have found that the Claimant has not yet reached maximum medical improvement regarding his back condition. However, I also have found, consistent with the medical opinion, that the Claimant is not totally disabled. Based on the vocational information, I have found that the Claimant has a wage earning capacity of \$400 per week, representing 40 hours per week at \$10.00 per hour.

Under § 8(e), in case of a temporary partial disability resulting in decrease of earning capacity, the compensation shall be two-thirds of the difference between the average weekly wage and the Claimant’s wage-earning capacity, to be paid during the continuation of the temporary disability, up to a period of five years.

Based on the foregoing, therefore, I find the Claimant is entitled to temporary partial disability compensation in the amount of \$895.18 per week, commencing on November 20, 2007, and continuing.

### **Entitlement to Medical Benefits**

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care. § 907(b); see 20 CFR § 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. The record in this case indicates that the Employer has paid the medical expenses incurred by the Claimant to date. The record also indicates that the Employer has not authorized additional medical treatment for the Claimant (CX 8 at 14-20, CX 9(knees); CX 8 at 12 (shoulder); CX 12, CX 13 at 8 (back); CX 7 at 90 (psychological)).

As set forth above, the evidence establishes additional medical treatment for the Claimant’s back condition, as recommended by Dr. Patel, is appropriate (CX 12; CX 13). I therefore find the Claimant is entitled to further medical treatment for his employment-related back condition, including but not limited to the specific procedures Dr. Patel recommended.

As set forth above, I have also found the Claimant is unable to establish that his shoulder, knee, and psychological conditions were caused by, or aggravated by, his employment. The Claimant has requested the Employer authorize additional medical treatment for these conditions. Because the Claimant has not established that these conditions are work-related, I find the Employer is not responsible for additional medical treatment.

### **Interest**

In this case, the Claimant requests payment of interest, based on compensation payments the Employer paid late, in 2007. The record indicates that on June 8, 2007, the Employer tendered payment of \$6,246.66, covering the period from May 1, 2007 to June 11, 2007. At the hearing, the parties stipulated the Claimant received this check on June 12, 2007 (T. at 10).

The purpose of interest is not to penalize an employer but, rather, to make claimants whole, as an employer has had the use of the money until an award issues. Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc., 22 BRBS 47, 50 (1989); see also Renfroe v. Ingalls Shipbuilding, Inc., 30 BRBS 101, 104 (1996). Interest is mandatory and cannot be waived in contested cases. Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833, 837 (1982). The Claimant is not entitled to interest upon the additional compensation received pursuant to §14 (e). Cox v. Army Times Publishing Co., 19 BRBS 195, 198 (1987).<sup>30</sup>

### **Discussion**

Based on the evidence, I find the Claimant's receipt of compensation in the amount \$6,246.66 on June 12, 2007 constituted the following: one payment (covering the period between May 1 and May 14, 2007) 28 days late; one payment (covering the period between May 15 and May 28, 2007) 14 days late; and one payment covering the period between May 29, 2007 and June 11, 2007) timely received.

Therefore, I find that the Employer is liable for the interest assessed on the two late benefits payments. See Ion v. Duluth, Missabe and Iron Range Railway Co., 31 BRBS 75, 79-80 (1997). In addition, pursuant to § 14(e), I find the Employer is liable for a penalty of 10% for the compensation payment, covering the period between May 1 and 14, 2007, that was more than 14 days late.<sup>31</sup>

### **Attorney's Fee**

Section 28 of the Act provides that an award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. 33 U.S.C. § 928.

---

<sup>30</sup> Section 14(e) states that an additional 10% shall be added to any installment of compensation payable without an award that is not paid within 14 days after it becomes due.

<sup>31</sup> The Claimant did not request an award under § 14(e). However, because the language of this provision states that "there shall be added" a 10% penalty to compensation payments that were more than 14 days overdue, I find that imposition of the penalty is mandatory.

Having successfully established his right to compensation, including entitlements to medical care, the Claimant's attorney is entitled to an award of fees under section 28(a) of the Act. 33 U.S.C. § 928(a); 20 CFR § 702.134(a). Maguire v. Todd Pacific Shipyards Corp., 25 BRBS 299, 303 (2002).

The Claimant's attorney has not yet filed an application for attorney's fees. The Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten 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**

The Claimant's Claim for benefits is GRANTED. Therefore, I ORDER:

1. The Employer is to pay temporary partial disability compensation to the Claimant, commencing November 20, 2007 and continuing, in the amount of \$895.18 per week.
2. The Employer is entitled to credit for overpayments of compensation already made.
3. The Claimant is entitled to recover additional amounts during his period of temporary total disability, due to the Employer's underpayment of the correct rate of compensation.
4. The Employer is liable for interest with regard to late payments of compensation, as well as a § 14(e) penalty on the single compensation payment that was more than 14 days late.
5. The Employer shall pay the reasonable costs of continuing medical treatment for care related to the Claimant's back condition.
6. The Employer is to pay Claimant's attorney's fees, as established by supplemental order.

The District Director is authorized to make the appropriate calculations necessary to implement this Order.

SO ORDERED.

**A**

**ADELE H. ODEGARD**  
Administrative Law Judge

Cherry Hill, New Jersey