



*Issue Date: 04 December 2008*

*In the Matter of:*  
**W.C.B.**  
**Claimant**

v.

**Case No. 2007-LDA-00351**

**SERVICE EMPLOYER  
INTERNATIONAL, INC.**  
**Employer**  
**and**

**INSURANCE COMPANY  
OF THE STATE OF PENNSYLVANIA**

Appearances: Gary B. Pitts, Esq.  
For Claimant

Richard L. Garelick, Esq.  
For Employer

Before: Daniel F. Solomon  
Administrative Law Judge

## **DECISION AND ORDER**

This matter arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901, et seq., (the "Longshore Act" or "Act"), and the regulations promulgated thereunder. Claimant seeks permanent total disability benefits under the Longshore Act for a spinal injury that he sustained in the course of working for Service Employer International, Inc. ("Employer").

A hearing in this matter took place on March 19, 2008, in Oklahoma City, Oklahoma. March 19, 2008 Transcript "3/19/08 TR." At the hearing, Administrative Law Judge Exhibit "ALJX" 1, Claimant's Exhibits "CX" 1-14,<sup>1</sup> and Employer's Exhibits "EX" 1-24<sup>2</sup> were received and admitted into evidence. *Id.* at 7, 21-22. The record was ordered to remain open until June 2, 2008, for the admission of additional evidence. The Claimant and Ms. Linda Trent, on behalf of the Claimant, gave live testimony at the hearing. On June 2, 2008, Claimant filed a transcript of the deposition taken from Dr. Kaul on May 15, 2008, which I have marked and admitted into

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<sup>1</sup> While Claimant's exhibit 14, Dr. Stein's curriculum vitae, was admitted into evidence, it was not received at the hearing. Claimant was permitted to submit exhibit 14 post-hearing.

<sup>2</sup> While Employer's exhibit 15, a labor market survey, and exhibits 21-24, consisting of post-hearing depositions and expert qualifications, were admitted into evidence, they were not received at the hearing. Employer was permitted to submit these exhibits post-hearing.

evidence as CX 15. Several motions for an extension of time to submit post-hearing evidence and briefs were filed between June 3, 2008 and August 22, 2008, ultimately extending the deadline to September 5, 2008. On September 4, 2008, a telephone conference was held to resolve scheduling issues. September 4, 2008 Transcript “9/4/08 TR.” Both parties agreed—and I found good cause—to leave the record open until October 21, 2008, so the Claimant would have ample opportunity to apply for jobs listed in a recent labor market survey submitted by the Employer. *Id.* at 6. On October 8, 2008, Claimant submitted a rebuttal to Employer’s survey, which I have marked and admitted into evidence as CX 16. Both parties submitted timely post-hearing briefs.

### **Stipulations**

The parties have stipulated, and based on a review of the record, I accept that:

1. The parties are subject to the Longshore Act, as extended by the Defense Base Act, because at the time of the injury Claimant was working under a Defense Base Act contract that was performed overseas. ALJ 1; 3/19/08 TR at 4-5.
2. The date of the injury was October 11, 2004. ALJ 1; 3/19/08 TR at 5.
3. The injury arose in the course and scope of employment. ALJ 1; 3/19/08 TR at 5.
4. There was an employee/employer relationship at the time of the injury. ALJ 1; 3/19/08 TR at 5.
5. Claimant gave timely notice of the injury and timely filed a claim for compensation. ALJ 1; 3/19/08 TR at 5.
6. Employer/Carrier filed a timely notice of controversion on June 5, 2006. A supplemental notice of controversion was filed on May 30, 2007. ALJ 1; 3/19/08 TR at 5.
7. The nature and extent of disability arising out of the October 11, 2004 injury is contested by the parties. ALJ 1; 3/19/08 TR at 5.
8. Claimant has attained maximum medical improvement relative to the October 11, 2004 injury; however, the parties contest the date of maximum medical improvement. ALJ 1; 3/19/08 TR at 5.
9. Carrier has authorized medical benefits, although Claimant maintains certain casually related medical bills have not been paid by Carrier. ALJ 1; 3/19/08 TR at 5-6.
10. Claimant’s average weekly wage at the time of the injury was \$1,200.00. ALJ 1; 3/19/08 TR at 6.
11. Carrier has voluntarily paid temporary total disability compensation benefits at the rate for \$300 per week for the 80 week period from October 19, 2004 (date Claimant first lost pay from work) through May 1, 2006, for a total paid in the amount of \$24,000.00. Carrier also is about to voluntarily pay Claimant a lump-sum in the amount of \$40,000.00, which is designed to bring Claimant current on the compensation benefits that are due to him at the rate of \$800.00 per week for the 80 week period from October 19, 2004 through May 1, 2006. Accordingly, after Carrier makes the \$40,000.00 lump sum payment, Claimant will have received compensation benefits for a

total of 80 weeks at a rate of \$800 per week totaling \$64,000.00. ALJ 1; 3/19/08 TR at 6.

### **Remaining Issues**

The remaining contested issues in this case are:

1. The nature and extent of disability.
  - a. The date of maximum medical improvement.
  - b. Whether Employer has established suitable alternative employment, if necessary.

### **FACTUAL BACKGROUND**

#### **Claimant's Lay Testimony:**

Claimant has given testimony on two occasions in this matter, once by deposition, on January 6, 2006, and again at the hearing on March 19, 2008.

At the hearing, Claimant stated that he was 58 years old and had completed high school and some college. 3/19/08 TR at 24. Claimant graduated from high school in 1967. *Id.* at 62. While in high school, he did some work in construction on the weekends and over the summer. *Id.* After high school, he enrolled at Tulsa Technical College where he participated in their computer programming curriculum. *Id.* In May of 1969, he left college and voluntarily enlisted in the United States Marine Corp. *Id.* at 24-25, 63. While in the Corp, Claimant served as a rifleman and military policeman. *Id.* at 25. Claimant was honorably discharged after two years of service, in June of 1971. *Id.* at 25, 63. From 1971 to 1974, Claimant worked as a truck driver hauling anti-corrosion material for General Corrosion Services. *Id.* at 26, 64. In 1984, General Corrosion Services went bankrupt and Claimant went to work for SEH, Inc. as a manager supervising the construction of foam core panels. *Id.* at 64; EX 19. Claimant worked for SEH, Inc. until it shut down in August of 1988. 3/19/08 TR at 64. From August 1988 until January 1989, Claimant did construction work in Houston, Texas. *Id.* at 64-65; EX 19. From January 1989 to December 1990, he worked for BSG, Inc. writing and implementing hazard communication programs. 3/19/08 TR at 65; EX 19. From December 1990 to May 1991, he returned to truck driving for Arnco Transportation where he drove pneumatic tankers. *Id.* In June of 1991, Claimant started his own construction company. 3/19/08 TR at 65-66. Claimant ran all aspects of the business until May of 2003. *Id.* at 66-67. From May 2003 to November 2003, Claimant worked for Centurion Industries, Inc. installing fabricated steel roofing on buildings. *Id.* at 67; EX 19. From May 2004 to July 2004, Claimant worked as a truck driver for Northland Trucking. 3/19/08 TR at 69; EX 19. This was Claimant's last job before leaving to work in Iraq as a truck driver for the Employer. *Id.* at 26-27, 29.

Prior to going overseas to work for the Employer, Claimant explained that he was given a "pretty thorough" pre-employment physical evaluation. *Id.* at 28. He claimed to have passed his physical and expressed that prior to going overseas he never had any health issues. *Id.* He stated, "I'm one of those guys who has never been sick, never missed work because I was sick, [and] never been hurt on the job. I've never had a surgery." *Id.* When asked, Claimant specifically stated that he never experienced any pain in his neck or thoracic region prior to his injury overseas. *Id.* at 31. He further stated that he had never received any medical attention from any sort of accident affecting his neck or vertebral area. *Id.* Prior to leaving for Iraq, in

2004, he was working without limitation. *Id.* In addition to his physical, Claimant underwent a three week briefing period at which time he received instructions as to the working conditions and expectations in Iraq. *Id.* at 29-30. During these briefings, Claimant was instructed to always have his personal protective gear, which included his flack jacket and helmet, within three feet of his body. *Id.* at 30. Claimant estimated his flack jacket to weigh about forty pounds. *Id.* at 31.

In October 2004, Claimant began his journey to Iraq to begin working for the Employer. He flew out of Houston, Texas, on a chartered plane that refueled in Frankfurt, Germany, and then landed in Dubai. *Id.* at 32; EX 20 at 86-87. Once his plane landed in Dubai, Claimant was processed through security and placed on a shuttle bus that was supposed to take him to a hotel where he would stay until he received his deployment orders to Iraq. 3/19/08 TR at 33. It was during his ride on this shuttle bus that Claimant was injured. *See id.* at 33-36.

Claimant stated that he was sitting in the middle of the backseat of the 25-30 person bus, on the way to his hotel, when he was suddenly catapulted into the ceiling of the bus. *Id.* at 33. Claimant stated that everyone on the bus was displaced. *Id.* He remembered five of the passengers being hurt. *Id.* Claimant stated that after he hit the ceiling he saw a lot of stars and was “knocked . . . plum goofy.” *Id.* at 34. He remembered hearing bones breaking in his neck and back. *Id.* He was in extreme pain and believes that he was close to passing out. *Id.* Claimant was taken to a hospital in Sharjah where he was x-rayed. *Id.* at 36-37. After about a week of being hospitalized in Dubai, Claimant traveled back to the United States where his girlfriend, Ms. Linda Trent, took him to the emergency room in Winfield, Kansas, where he was treated by Dr. Kaul. *Id.* at 39.

When questioned about his current condition, Claimant responded that the spinous process in C6 and C7 of the lower vertebrae of his neck were severed and lodged in muscle tissue in his upper shoulder. *Id.* He noted having a T5 compression fracture in the vertebrae of his back and that several of the vertebrae around the T5 were bulging and out of place. *Id.* He attributed these conditions as the reason he was now two and a half inches shorter than before leaving for Iraq. *Id.* at 40. Claimant stated that presently there were no medical procedures available that could cure his condition. *Id.* at 41. At the time of the hearing, Claimant was taking two to four Darvocet pills a day to help manage his pain. *Id.* at 41, 44. On a scale of one through ten, Claimant described the level of pain he was feeling at the hearing to be a seven. *Id.* at 42. He clarified that this only represented the pain he was feeling in his back and did not include the headaches he has been having ever since his injury. *Id.* at 43, 74. He stated that with medication he could usually function at a pain level of five or six. *Id.* Claimant also explained that three years ago he would have valued the same pain he was feeling at the hearing as a three, but that was primarily because he was “living on adrenalin and . . . pain pills.” *Id.* In addition to the back pains and headaches, Claimant complained of constant diarrhea he believes is the result of damaged nerves from his injury. *Id.* at 78.

In response to questions about his current employment situation, Claimant acknowledged that he has been unemployed since he came back from Dubai. *Id.* at 50. Claimant stated that obtaining employment in his town would be difficult because a lot of the available jobs do not pay well, and employers do not want the responsibility attached to hiring him. *Id.* at 49. Regardless, he did not believe that he could keep a full time job as it would completely drain him. *Id.* at 50. However, on cross-examination, Claimant admitted that since his injury he had not searched for a job, and consequently had never been turned down for employment. *Id.* at 51. When questioned as to whether he could be a truck driver again, Claimant stated that he no longer had the mental and physical focus to do the job. *Id.* at 45. Claimant acknowledged being

able to, and on several occasions, having driven long distances in his standard transmission pick-up truck, but explained that the truck driving profession was very mentally and physically demanding. *Id.* at 45, 53-57. At the time of hearing, Claimant acknowledged having a commercial driver's license. *Id.* at 72. On cross-examination, Claimant was also confronted with a statement he made in his 2006 deposition stating that he had the mental ability to perform supervisory work in the construction industry. *Id.* at 69. In response, Claimant admitted that he had the knowledge needed to supervise, and could climb up on a roof to give instructions, but that, presently, he is so worn down that he could not perform at a level required by the construction business. *Id.* at 70.

**Ms. Linda Trent's Lay Testimony:**

On March 19, 2008, at the hearing, Ms. Linda Trent, Claimant's girlfriend, also gave live testimony. 3/19/08 TR at 84. Ms. Trent's occupation is an emergency room nurse. *Id.* at 87-88. She testified that she has known the Claimant for six and a half years and has lived with him for five and a half years. *Id.* at 84. Claimant and Ms. Trent were living together before he left for Iraq. *Id.* Ms. Trent described Claimant prior to his injury as being someone who never complained and was up at the crack of dawn working all day. *Id.* at 85. Ms. Trent stated that since he came back from overseas he has had more bad days than good. *Id.* at 86. Ms. Trent admitted that Claimant does not verbally complain, but asserted that she knows when he is having a bad day because he gets really pale on those days. *Id.* She also claimed that Claimant's eyes become teary and he has trouble moving on the bad days. *Id.* at 87. Ms. Trent described Claimant's movement as not being as fluid as it was before his injury. *Id.* When questioned about Claimant's level of concentration, Ms. Trent stated that Claimant used to be very focused and was able to decide what he needed to do and did it. *Id.* at 89-90. She stated that now, however, Claimant spends four hours accomplishing the same task that would have taken him an hour prior to his injury. *Id.* She stated that Claimant "just can't stay in one place long enough to finish something." *Id.*

**VOCATIONAL EVIDENCE**

**Labor Market Survey Report (EX 15A & 15):**

A Labor Market Survey of the Claimant's employment opportunities was performed by Ms. Tammy Ledesma on March 18, 2008. Claimant was found to have transferable skills from his work history as a truck driver and roofer. The results of the survey were produced with consideration to Claimant's 2006 functional capacity evaluation indicating that Claimant possessed the ability to work eight hours a day in the medium category of work. The report listed six possible positions of employment within Claimant's abilities, which were as follows:

<b>Occupation:</b> Security Guard	<b>Physical Demand:</b> Light
<b>Occupation:</b> Cashier/Sales Clerk	<b>Physical Demand:</b> Light
<b>Occupation:</b> Sales Associate	<b>Physical Demand:</b> Light
<b>Occupation:</b> Truck Driver/Light	<b>Physical Demand:</b> Light/Medium
<b>Occupation:</b> Front Desk Clerk	<b>Physical Demand:</b> Light
<b>Occupation:</b> Rental Clerk/Equipment	<b>Physical Demand:</b> Medium

Based on these six employment titles, the survey listed the following potential job vacancies available to the Claimant:

**Employer:** Wal-Mart (Blackwell, OK)  
**Potential Openings:** Several  
**Required Qualifications:** High school diploma or equivalent. Customer service skills.  
**Preferred Qualifications:** None  
**Duties:** Cashier/Sales Associate  
**Hiring Frequency:** Variable & Ongoing.  
**Wage:** \$7.00-\$8.00/hr

**Employer:** J.C. Penney Company, Inc. (Ponca, OK)  
**Potential Openings:** Several  
**Required Qualifications:** Excellent customer service skills and ability to communicate effectively. Mathematic ability.  
**Preferred Qualifications:** Prior retail sales or cashier experience  
**Duties:** Sales Associate  
**Hiring Frequency:** Variable & Seasonal  
**Wage:** \$7.00/hr

**Employer:** TLC Transportation Services  
**Potential Openings:** Several  
**Required Qualifications:** Valid driver's license. No tickets or accidents in past two years. Criminal history background check and drug test.  
**Preferred Qualifications:** None  
**Duties:** Home Grocery Delivery  
**Hiring Frequency:** Ongoing  
**Wage:** Paid up to \$10.00/hr

**Employer:** Diehl's Seventy Seven Ranch (Newkirk, OK)  
**Potential Openings:** One  
**Required Qualifications:** High school diploma or equivalent. Mathematical and basic computer skills. Excellent customer service skills.  
**Preferred Qualifications:** None  
**Duties:** Front Desk Clerk  
**Hiring Frequency:** Not Often  
**Wage:** \$7.00-\$8.00/hr.

**Employer:** Keeler Equipment Sales & Rental (Ponca, OK)  
**Potential Openings:** One  
**Required Qualifications:** Familiarity with equipment. Customer service skills. Basic computer. Ability to communicate with customers both verbally and in writing.  
**Preferred Qualifications:** None  
**Duties:** Rental Counter Clerk  
**Hiring Frequency:** Not often.

<b>Wage:</b>	\$6.00/hr.
<b><u>Employer:</u></b>	Burnett Security (Kaw City, OK)
<b>Potential Openings:</b>	Several
<b>Required Qualifications:</b>	High school diploma or equivalent. Drug test and criminal background check.
<b>Preferred Qualifications:</b>	Security or law enforcement experience
<b>Duties:</b>	Security Guard
<b>Hiring Frequency:</b>	Ongoing.
<b>Wage:</b>	\$8.00-\$10.00/hr.

The report acknowledges that the above-listed jobs do not meet Claimant's income requirement of approximately \$900.00 per week. The report notes that jobs near Claimant's residence are limited as he lives in a very small rural farming city with a population of 2,243 and an average median income of \$27,941.00. The surrounding cities are also remote and have limited opportunities.

**Claimant's Rebuttal to Employer's Market Labor Survey (CX 16):**

On October 8, 2008, Claimant filed a rebuttal to Employer's labor market survey claiming that he applied to the positions of employment on the survey without any success. Claimant argues that Employer has failed to establish suitable alternative employment. In support of his argument, Claimant submitted the following statements regarding his pursuit of the positions advertised in the survey:

**(1) Diehl's Seventy Seven Ranch Motel:**

- a. Owners Charlie and Gene were very personable but they explained that their motel is a family business and they don't need any help and rarely hire anyone for extra help.
- b. Interviewed on 9/8/08
- c. 10 miles from [Claimant's] home

**(2) Keeler Equipment Sales and Rental:**

- a. I talked to Martha who is a very stern woman with a strong commanding personality and she made it quite clear that she didn't know where I got my information that she was hiring but she did need help and that the work there was very physical with a lot of heavy lifting. She made it clear that no one at her place of business would get special treatment.
- b. Interviewed on 9/8/08
- c. 24 miles from [Claimant's] home

**(3) J.C. Penny Company Inc.**

- a. I met with Gloria who is the store HR Manager. Gloria was very professional yet personable; she explained that she was not in need of help at this time. We continued to visit and I explained that I had suffered a back injury and may not be able to meet a rigid work schedule and may have some other physical limitations. Gloria explained that she would not be able to hire me but explained that some of the larger stores may have special program to accommodate disabilities.
- b. Interviewed on 9/8/08

- c. 26 miles from [Claimant's] home.
- (4) **TLC Transportation Services**
  - a. I spoke with Linda and she informed me that their drivers are required to pass DOT physical and pass a drug screen which disqualifies me.
  - b. Phone interview on 9/9/08
- (5) **Burnett Security**
  - a. Jerry was unavailable so I left my contact information with Nancy who was a very nice lady. About two hours later a man by the name of James Grubb called and he stated that they just received an order for a hiring freeze and that he didn't have any idea why or how long it would last. However, he offered me an application if I wanted to place one on file. . . . Mr. Grubb also explained that I must be CLEET certified. He also stated the two different types of positions they have is a walking patrol or sitting in a guard shack and the company provides security 24/7/365. I can not justify the high cost of fuel just to place an application on file plus I have no idea what the requirements are to become CLEET certified in the State of Oklahoma although he did say it would take several trips to Oklahoma City.
  - b. Telephone interviewed on 9/9/08
- (6) **Wal-Mart—Blackwell, OK**
  - a. Online application
  - b. Application on 9/11/08
  - c. Approximately 27 miles from [Claimant's] home.

**Deposition of Ms. Tammy C. Ledesma:**

Ms. Tammy Ledesma, a vocational case manager for Coventry Workers' Compensation Services, was deposed in this matter on June 18, 2008. *See* EX 24. Ms. Ledesma has been working in vocational case management services since 1983. *Id.* at 8. In addition to her other duties, she performs labor market surveys for workers' compensation claims. *Id.* at 7-8. Ms. Ledesma was assigned to produce a labor market survey in this matter by the insurer, AIG. *Id.* at 9. In order to produce this survey, Ms. Ledesma was provided with Claimant's 2006 deposition and medical records, which included his functional capacity evaluation. *Id.* at 10. Ms. Ledesma did not interview the Claimant. *Id.* at 10-11. From the records provided to her, Ms. Ledesma claims she was able to extract Claimant's educational information, age, previous work experience, skills, aptitude, and physical limitations, which were all considered in her report. *Id.* at 11. Since she was analyzing Claimant's situation from out of state, Ms. Ledesma primarily used the internet to find employment opportunities that she believed Claimant was capable of handling. *See id.* at 12. Ms. Ledesma stated that she typically will try to find employment opportunities within a fifty mile radius of the employee's residence, but in Claimant's case, she identified jobs within twenty-two or twenty-three miles. *Id.*

Ms. Ledesma discussed the six jobs she identified in her survey as possible positions of employment for the Claimant. *See id.* at 13-22. She asserted that all six jobs were available at the time she identified them in late March of 2008. *Id.* at 14. The first position was a cashier or sales associate position at Wal-Mart, in Blackwell, Oklahoma, which is approximately 18 ½ miles from Claimant's residence. *Id.* at 15. The second position was a sales associate position with J.C. Penney in Ponca City, Oklahoma, which is approximately 14 miles from Claimant's residence. *Id.* at 16, 18. The third position was a home grocery delivery truck driver with TLC

Transportation Services in Kaw City, Oklahoma, which is approximately 18 ½ miles from Claimant's residence. *Id.* at 16-18. The fourth position was with Diehl's Seventy-Seven Ranch Motel as front desk clerk in Newkirk, Oklahoma. *Id.* at 18. The fifth position was with Keeler Equipment Sales & Rental in Ponca City, Oklahoma, as a rental counter clerk. *Id.* at 29. Ms. Ledesma described the duties of this position to include assisting and transporting rental equipment for customers, but she noted that forklifts and proper equipment would be available to the employees to transport the equipment. *Id.* at 21. The sixth position was with Burnett Security in Kaw City, Oklahoma, as a security guard. *Id.* Ms. Ledesma described this position as requiring the employee to maintain the safety of the property by checking windows and doors, checking people in and out, and reporting any unusual behavior. *Id.* at 22.

On cross-examination, Ms. Ledesma was further questioned regarding the duties of the positions she proposed in her survey and Claimant's physical restrictions. *See id.* at 23-33. Ms. Ledesma was asked if stocking and rearranging merchandise as part of one's duties at Wal-Mart would conflict with the Claimant's physical restrictions, as expressed in his functional capacity evaluation, of only lifting zero to ten pounds constantly. *Id.* at 23. She responded that it would depend on the physical demands of the department for which Claimant was hired. *Id.* at 23. Ms. Ledesma gave the same answer when was asked whether bagging of merchandise at J.C. Penney would conflict with Claimant's physical restrictions. *Id.* at 25. In regards to the grocery delivery position, Ms. Ledesma admitted that it's possible that some groceries could weigh over ten pounds, but pointed out that Claimant could spread the weight amongst the bags to have them weigh less than 10 pounds. *Id.* at 30-31. Ms. Ledesma acknowledged that the security guard position could require a lot of walking depending on the specific duties he was assigned. *Id.* at 31-32. She stated that Claimant may just have to sit at a post and check identification badges. *Id.* at 32.

Ms. Ledesma admitted that personally interviewing the Claimant would have been helpful to her report, but she did not find it to be necessary. *Id.* at 33-34. She found the information she was provided to be sufficient in producing an acceptable market survey. *Id.* at 34.

## MEDICAL EVIDENCE

### **Deposition of Dr. Anand Kaul:**

On May 15, 2008, Dr. Anand Kaul testified by deposition regarding this matter. CX 15. Dr. Kaul is a board certified internist. *Id.* at 4. Dr. Kaul first saw Claimant in the emergency room of his hospital, on October 24, 2004. *Id.* at 7. Dr. Kaul was called to tend to Claimant's care as Claimant did not have a primary doctor. *Id.* Dr. Kaul took a history from the Claimant at which time he learned of the incident in Dubai. *Id.* at 7-8. During this time, he found the Claimant to be a cooperative and straightforward patient. *Id.* at 15. Dr. Kaul stated that Claimant was eager to return to work, which he observed to be the opposite behavior of patients who exaggerate their claim. *Id.* Prior to physically examining the Claimant, Dr. Kaul ordered an x-ray of his neck, which revealed a fracture on the fifth and sixth spinous process and some possible compression in the thoracic spine. *Id.* at 8. While in the emergency room, Claimant was complaining of pain in his neck and thoracic spine, and some "vague numbness in the hands," which Dr. Kaul found to be consistent with his history and x-ray results. *Id.* at 9. Dr. Kaul diagnosed Claimant with a fractured fifth and sixth spinous process and multiple compressions in the thoracic spine. *Id.* He explained that the fracture in the fifth and sixth cervical disk blocking Claimant's foramina was consistent with Claimant's complaint of

numbness and tingling in his arm. *Id.* at 16-17. Dr. Kaul referred Claimant to a neurosurgeon to evaluate the need for surgery. *Id.* at 9. According to Dr. Kaul, the neurosurgeon agreed with his diagnosis of compressions and numbness, but found that there was no need for surgery as there were no neurological abnormalities. *Id.* at 10. Dr. Kaul's recommended course of treatment after this diagnosis was conservative care to include pain medicine and some heat and physical therapy. *Id.*

When questioned about the pain Claimant was experiencing, Dr. Kaul responded that based on his examination and the x-ray findings, he expected Claimant to be in more pain than Claimant described. *Id.* at 11. Dr. Kaul was then questioned about his November 1, 2006 report. *Id.* at 12. He explained that Claimant complained of having pain and illustrated the severity of his pain as being a five on a scale of zero to ten. *Id.* Dr. Kaul also elaborated on the physical restrictions he placed on Claimant in his report. *Id.* at 13. He explained that he found Claimant to be restricted to lifting 10-15 pounds repeatedly and maybe 20-30 pounds once. *Id.* at 13-14. Claimant was also restricted from sitting for hours at a time and twisting his body as is required in being a truck driver. *Id.* at 15. Dr. Kaul explained that his opinion on Claimant's physical restrictions was derived from a consideration of Claimant's functional evaluation, complaints, and x-ray results. *Id.* at 18-19.

On cross-examination, Dr. Kaul stated that he was not aware that Claimant's functional capacity evaluation noted that Claimant was capable of performing medium capacity work. *Id.* at 20. Dr. Kaul did recall the functional capacity evaluation placing several physical restrictions on the Claimant. *Id.*

Dr. Kaul was also questioned about a Labor Market Survey that was produced for the Claimant. *Id.* at 21. Dr. Kaul stated that some of the positions on the survey could be possible sources of employment for the Claimant. *Id.* at 22. He believed that Claimant could be a security guard, because "security guard[s] don't do anything." *Id.* Dr. Kaul stated that Claimant could work if his occupation did not involve bending, lifting heavy or repeated weights, or more than 25-30 minutes of driving. *Id.* at 22-23. Further reviewing the list of alternative work on the survey, Dr. Kaul stated that Claimant may not be able to be a grocery deliverer due to the lifting and driving involved. *Id.* at 24. He also believed that Claimant could work in Wal-Mart if given a position that did not require lifting. *Id.* at 24-25.

### **Deposition of Dr. Allan S. Fielding:**

On July 21, 2008, Dr. Allan Fielding testified by deposition in this matter. Dr. Fielding is a board certified neurosurgeon. EX 23 at 5. At the request of the insurer, Dr. Fielding examined the Claimant on July 6, 2007. *Id.* at 6. At the deposition, Dr. Fielding discussed the three page report he produced as a result of his July 6, 2007 examination. *Id.* Dr. Fielding's report included the "details of [his] examination, [Claimant's] history, the documents [he] reviewed, the radiographs that [he] took, and [his] opinions and conclusions." *Id.* 6-7. Dr. Fielding reviewed the patient history he recorded in his report. Dr. Fielding noted that Claimant "had few complaints," consisting of headaches, back and mid-thoracic pain extending up into the neck, and what he thought was an unrelated complaint of diarrhea. *Id.* at 8. Dr. Fielding further noted that Claimant had no complaints of numbness or weakness in his extremities. *Id.* In his physical evaluation of the Claimant, Dr. Fielding found Claimant to be a well-developed man who appeared to be comfortable. *Id.* at 9. Dr. Fielding did find Claimant to have a thoracic kyphosis, but believed it to be a result of Claimant's genetics or bad posture from years of truck driving.

*Id.* at 10. Dr. Fielding also noted muscular tenderness in Claimant's thoracic and cervical back. *Id.* Claimant's cervical foramen closure test was negative, which led Dr. Fielding to believe that there was no significant pressure on the nerves in Claimant's neck. *Id.* at 10-11. Dr. Fielding found that there was no ankylosis or significant problems in Claimant's joints, because he had full range of motion. *Id.* at 11. He explained that this meant that Claimant was "comfortable enough to move his head and neck into a variety of positions with no restrictions." *Id.* He found Claimant's strength and sensation to be normal. *Id.* at 12. Dr. Fielding did note muscular tenderness in Claimant's thoracic and cervical regions; however, he found the significance of this finding to be questionable, because, as he stated, one can elicit a pain response in any person if they press hard enough. *Id.* at 13. Dr. Fielding acknowledged that Claimant had spinous process fractures in his C7 and T1 that could be the cause of some residual muscular tenderness. *Id.* However, he noted that the "residual tenderness" would not constitute grounds for disability. *Id.*

In addition to physically evaluating the Claimant, Dr. Fielding reviewed a cervical spine x-ray, flexion and extension x-rays, and a CT scan all of which were performed on October 17, 2004. *Id.* at 14-15. Dr. Fielding also reviewed an EMG performed in February 2005, flexion-extension x-rays and a bone scan taken by Dr. Mellion, and an MRI. *Id.* at 16-17. He found the October 17, 2004 x-rays to be significant for a fracture in the C7 spinous process; however, he did not find any fracture in the C6 and noted that the x-ray did not show the T1 vertebrae. *Id.* at 14. He did not observe any evidence of instability from the 2004 flexion and extension x-rays. *Id.* He found the 2004 CT scan to be significant for a spinous process fracture of the C7 and T1. *Id.* at 15. However, "[t]he remainder of the thoracic spine was unremarkable, with the exception of some wear-and-tear change." *Id.* Dr. Fielding explained that "wear-and-tear" referred to degenerative changes that happened over time. *Id.* The 2005 EMG was normal. *Id.* at 17. Dr. Fielding noted that the cervical MRI scan and report "indicated a disk protrusion at C5-C6 on the left and a broad-based disk protrusion toward the right at C6-C7." However, he did not find this to carry any clinical significance because Claimant's examination "was normal and the EMG showed no evidence of pinching of the nerves." *Id.* Based on this information, Dr. Fielding reasoned that the disc protrusions and bulges were "asymptomatic wear-and-tear bulges unrelated to any type of specific trauma." *Id.* at 17-18.

In addition to reviewing Claimant's previous x-rays and test results, Dr. Fielding also took an x-ray of Claimant's spine, which he interpreted as revealing a spinous process fracture of the C7 and T1 vertebrae. *Id.* at 16. Dr. Fielding explained that the x-ray he took at his office still showed fractures because "spinous fractures don't heal like fractures . . . of [one's] forearm . . . or leg." *Id.* Dr. Fielding stated that it is not necessary for this type of fracture to completely reattach, because "[o]ver time spinous process fractures become virtually painless." *Id.*

Dr. Fielding stated that his final impression was that Claimant had "spinous process fractures of C7 and T1 due to his work-related incident." *Id.* at 18. He concluded that Claimant had some "mild residual discomfort," but that there was no evidence of instability or neurological abnormalities. *Id.* Dr. Fielding believed that Claimant reached maximum medical improvement and was able to return to full-time unrestricted work. *Id.* at 18-19. He believed that Claimant even had the capacity to return to work that required him to wear a flack jacket or armored vest that weighed 40-50 pounds and a helmet that weighed 10 pounds. *Id.* at 19. Based on his experience and what he observed on Claimant's radiographic films, Dr. Fielding stated that he would have anticipated Claimant fully recovering from his injury and being capable of full unrestricted work at least two months after the accident. *Id.* at 20. Dr. Fielding did state, more confidently, that Claimant was able to return to full unrestricted work in March of 2006.

*Id.* at 21. Dr. Fielding was aware of Claimant’s March 2006 functional capacity evaluation restricting him to medium capacity work when he gave this opinion, but noted that he disagreed with the evaluation’s results. *Id.* 20-21, 28. In fact, Dr. Fielding stated that he found most functional capacity evaluations to be inaccurate and not helpful. *Id.* at 28-29. In his opinion, Claimant is capable of working all of the jobs listed in the Labor Market Survey. *Id.* at 21-22.

On cross-examination, Dr. Fielding admitted that he was not Claimant’s treating physician and stated that he had only seen Claimant once. *Id.* at 22. Dr. Fielding stated that ninety percent of the evaluations he performed in litigated cases were for insurance companies. *Id.* at 26. He has been performing these types of evaluations for twenty-five years. *Id.*

During cross-examination, Dr. Fielding was questioned regarding Claimant’s functional capacity evaluation performed on March 8, 2006. *Id.* at 27. Dr. Fielding expressed his disagreement with the results of the test, but did not find the need to re-evaluate the Claimant with a second functional capacity examination. *Id.* at 28. Dr. Fielding stated that his opinion regarding Claimant’s functional capacity was based on his 25 years of practical experience and would not be influenced by another functional capacity examiner. *Id.* Dr. Fielding explained that “most neurosurgeons and orthopedics have found that the results from [functional capacity evaluations] underestimate a patient’s true capacity.” *Id.* Dr. Fielding believes that the test is mostly conducted for insurance companies. *Id.* at 29.

Dr. Fielding was later asked whether Claimant’s complaint of headaches was compatible with the kind of trauma he experienced in Dubai. *Id.* at 32. He responded that he did not know exactly why Claimant was experiencing headaches as he only evaluated his cervical and thoracic spine. *Id.* When questioned of the possibility of Claimant suffering from post-concussive syndrome, Dr. Fielding stated that he could not conclude that the headaches were a symptom of post-concussive syndrome, because there were no complaints or history of losing consciousness. *Id.* at 33-34. Dr. Fielding explained that the impact that caused Claimant’s injury would not necessarily also cause him to become unconscious. *Id.* at 35.

Dr. Fielding was questioned as to how he concluded in labeling Claimant’s pain as “mild residual discomfort.” *Id.* at 34-35. He explained that one’s pain is purely subjective and that he based his assessment on the level of pain Claimant expressed he was experiencing. *Id.* at 36-41. Dr. Fielding’s assessment is mainly based on the level of pain Claimant stated experiencing on a scale of zero to ten. *Id.* During his visit with Dr. Fielding, Claimant expressed being in pain at a level of three out of ten, which Dr. Fielding translated to being “mild residual discomfort.” *Id.* Dr. Fielding believed that pain described at a level of three to four was mild, four to seven was moderate, and seven to ten would be severe. *Id.*

### **Medical Records and Reports**

**Date**  
**10/17/2004**

**Physician/Facility**  
**William Newton Hospital**

**EXH**  
**CX 1 at 2-6**

Claimant was admitted to William Newton Hospital due his neck and back pain. At the hospital, x-ray and CT-scans of Claimant’s C-spine and T-spine were taken. The C-Spine x-ray revealed “fractures involving the posterior spinous process of C5 and C6,” with “associated narrowing of the C5-6 interspace which is likely post-traumatic.” The CT-scan showed avulsion fractures of the C6 and C7, but not evidence of C-spine instability. Neither the x-ray nor the CT-scan found any fractures in the T-spine. Claimant was discharged the same day with a C-collar and instructed to go to Wesley Medical Center for further care.

**10/17/2004**

**Wesley Medical Center**

**EX 5**

Claimant was admitted to Wesley Medical Center after being transferred from William Newton Hospital, in Winfield, Kansas. In Winfield, they found Claimant to have suffered from a cervical spine fracture. He was sent to Wesley Medical Center immobilized in a C-collar. Records indicate that Claimant denied “any loss of consciousness, headache, chest pain, palpitations, shortness of breath, abdominal pain, or trauma to his extremities. He also denied any numbness, weakness, or tingling in his extremities.” Claimant’s physical examination revealed tenderness in the C5-C6 area of his neck and in the T-spine of his back. Claimant was observed as having “full range of motion in his extremities without any discomfort.”

Claimant was diagnosed with fractures in the C7 and T1 spinous processes. Dr. Grundmeyer, a neurosurgeon, was consulted and he recommended that Claimant be discharged without the C-collar with pain management treatment. Claimant was discharged with instructions to follow-up with his doctor in one to two days. In the meantime, he was prescribed Loratab 5 #20 and Flexeril 10 mg #30 for pain.

**10/22/2004**

**William Newton Hospital**

**CX 1 at 7**

X-ray of the T-spine revealed kyphosis of the thoracic spine with mild loss of vertebral body height seen throughout the mid thoracic and lower thoracic spine.”

**11/8/2004**

**William Newton Hospital**

**CX 1 at 10**

This is a report from an MRI of the thoracic spine. Impressions from the MRI were that there was no acute bony abnormality visible. There was a diffuse loss of vertebral body height involving the mid and lower thoracic vertebral bodies, with mild anterior wedging.

**11/9/2004**

**Dr. Kaul/ Dr. Rosenquist**

**EX 6**

This is a report of an MRI performed on Claimant’s C-spine and T-spine.

Impressions from the C-spine included a posterior disc herniation at the C5-C6, which causes left foraminal stenosis and borderline central stenosis. Degenerative disc changes were present at C3-C4 and C4-C5 causing foraminal stenosis. A broad based posterior disc protrusion causing right foraminal narrowing was found at C6-C7.

Impressions from the T-spine noted a “diffuse loss of vertebral body height involving the mid and lower thoracic vertebral bodies with mild anterior wedging.” Small disc bulges were found at T3-T4, T4-T5, and T5-T6. There was no evidence of acute compression fractures. It was noted that the anterior wedging causes an exaggeration of the normal thoracic kyphosis.

**11/10/2004**

**Dr. Mellion**

**EX 7; CX 1 at 8-9, 11-12**

This is a report from Dr. Mellion, a neurologist, who evaluated Claimant at Dr. Kaul’s request.

The report notes that Claimant was complaining of “some occasional numbness and tingling in the posterior right upper arm in the region of the triceps and occasionally in the first, second, and third digits of the right hand.” He claimed to have some short-lived and self-limiting pain in the left clavicle and shoulder, which usually occurred with movement of the shoulder joint.

However, most of his pain was reported being in the neck and back, which was worse in the morning or when he increased his activity. At the time of Dr. Mellion's evaluation, Claimant had been treated with narcotic analgesics, but not any physical therapy or injections. Claimant's physical examination was remarkable for some tenderness in the interscapular and supraclavicular regions. He had "fairly good" mobility in his cervical spine and full motor strength in his upper extremities.

As part of his evaluation, Dr. Mellion reviewed plain film, flexion and extension films, a CT-scan, and an MRI of Claimant's cervical spine. He found that combined these revealed fractures in the C6 and C7 spinous process, with some increase space between the spinous processes at C-5-C6 and C6-C7 and minimal changes at C7-T1. Dr. Mellion found no evidence of any translational instability.

Based on his evaluation and findings, Dr. Mellion suspected that Claimant was symptomatic from his injuries in Dubai and probably had significant soft tissue injuries associated with the spinous process fractures. However, he did not recommend any operative intervention as he found no evidence of instability or neural compromise. Dr. Mellion "recommended that [Claimant] be seen and evaluated by a physical medicine and rehab specialist as his main concern is returning to work, which he will be unable to do until he is at full capacity." Dr. Mellion suggested that work training and occupational therapy could also be helpful.

**12/22/2004**

**Dr. Mills**

**EX 8; CX 1 at 24-33**

This is a report from Dr. Mills, a physical medicine specialist, who evaluated Claimant at Dr. Mellion's request.

At this visit, Claimant complained of "sharp and catching" pain in his neck and back. He also complained of occasional numbness and tingling in his arms, which traveled down to his hands and fingers. A review of Claimant's systems revealed that he was "[p]ostive for headaches, blurred vision, stomach distress, [and] bladder and bowel problems." Claimant told Dr. Mills that his greatest functional difficulty was moving his left upper extremity repetitively. At the time of the visit, Claimant was taking Darvocet and Ibuprofen for his pain. He was not on any other medication.

During both the structural and regional evaluation of Claimant's cervical spine, Dr. Mills recorded observing a "buffalo hump with a very minimal dorsal kyphosis." Claimant's range of motion "revealed some limitation in extension as well as forward flexion."

Dr. Mills administered a pain inventory to assess Claimant's pain. As part of the pain inventory, Claimant was required to complete a pain drawing which required him to use symbols to describe his sensations. Dr. Mills noted that "[t]he drawing did not reveal findings suggestive of symptom magnification." Using a pain disability index, Claimant measured his percent of disability in the different areas of life as follows:

Family/home responsibilities	60%
Recreation	60%
Social Activity	60%



examination revealed continued tenderness in the upper thoracic paraspinal and right mid-trapezius.

Claimant was instructed to continue physical therapy for an additional four weeks. Claimant was to follow-up with Dr. Mills in six weeks.

**3/16/2005**

**Dr. Mills**

**EX 11; CX 1 at 16**

This is a report of Claimant's follow-up visit with Dr. Mills after completing his physical therapy. Dr. Mills noted that Claimant was feeling 90% better, but continued to have headaches and neck and back pain, although the neck pain was worse than the back pain. Claimant was not taking any medication. Dr. Mills's physical examination revealed some tenderness in the cervical spine. Dr. Mills and Claimant's plan of treatment after this visit was to "try a TENS unit and general conditioning in a gym like setting." Dr. Mills was not opposed to Claimant's preference to avoid further medication and injections.

**4/28/2005**

**Dr. Mills**

**EX 12**

This is a report of Claimant's follow up visit with Dr. Mills on March 16, 2005. Dr. Mills noted that Claimant was receiving physical therapy, which he found to be helpful. Dr. Mills continued to observe tenderness in the cervical spine. At the time of the visit, Dr. Mills believed that Claimant had reached maximum medical improvement.

**5/3/2005**

**Dr. Stein**

**CX 1 at 18-23**

This is a report from an independent medical evaluation of the Claimant performed by Dr. Stein, a neurologist, at the request of Claimant's attorney. In completing his evaluation, Dr. Stein took a complete history from the Claimant, reviewed his prior medical records, and conducted a physical examination.

Dr. Stein noted that Claimant was having constant neck pain and headaches. On a scale of 0-10, Claimant's pain was reported as being a one when he first wakes up in the morning and escalating to a five intermittently. Numbness and tingling in the fourth and fifth fingers of the both hands, under the arms, and in the forearms was also noted. Claimant also complained of some diarrhea since his accident. Claimant's pain medication at the time of the evaluation consisted of Ibuprofen and Darvocet.

After reviewing Claimant's history, medical records, which included his x-rays, MRIs, and CT-scans, and his physical examination, Dr. Stein concluded that Claimant's "symptomatology is casually related to [his] bus injury in Dubai." Dr. Stein noted that Claimant's x-rays showed spinous process fractures of the C6 and C7, but with no evidence of instability. He found the "predominance of his current findings [to be] consistent with the fracture, soft tissue injury, and secondary, cervicogenic, headache." Dr. Stein did not have any definitive recommendations for Claimant's symptoms. In Dr. Stein's opinion, Claimant "should avoid work requiring repetitive or continuous activity with the arms at or above shoulder level." Dr. Stein further opined that Claimant should avoid heavy lifting and noted that wearing a heavy flack jacket and hard hat would aggravate his condition.

**3/8/2006**

**Healthsouth Wesley  
Rehabilitation Hospital**

**EX 13**

This is a report of a comprehensive functional capacity evaluation performed on Claimant at Dr. Kaul's request. According to the report, the results of the evaluation indicate that Claimant "demonstrated the ability to work eight hours in the medium category of work." Citing the *Dictionary of Occupational Titles*, the report describes the physical demand of "medium category work" as "[e]xerting 20 lbs. to 50 lbs. of force occasionally, and/or 10 lbs. to 25 lbs. of force frequently, and/or greater than [a] negligible [amount] up to 10 lbs. of force constantly to move objects."

**11/1/2006**

**Dr. Kaul**

**CX 1 at 36-37**

In a letter, Dr. Kaul provided an update of Claimant's condition after an evaluation on November 1, 2006. Dr. Kaul described Claimant's pain status as being a five out of ten in both his T5 and C6-C7. He found Claimant to be permanently disabled. He specified that Claimant would "not be able to lift more than 10 pounds or 5 pounds of weight." He also opined that Claimant could not sit in the same position, twist, tilt, or stand for a period long time.

**7/6/2007**

**Dr. Fielding**

**EX 14; CX 1 at 38-40**

Claimant was evaluated by Dr. Fielding at the request of AIG Claim Services. At this evaluation, Claimant complained of a headache, diarrhea, and constant back and mid-thoracic pain. Claimant described his pain on a scale of zero to ten as being a three on average and occasionally escalating to a five. At the time of the visit, Claimant was taking Darvocet and Advil.

Dr. Fielding's physical examination revealed a pronounced thoracic kyphosis. His examination of Claimant's neck was unremarkable. Very minimal muscular tenderness in the thoracic and cervical regions was noted. Claimant was observed as having full range of motion.

In addition to his physical examination, Dr. Fielding also reviewed Claimant's medical records to date. He found Claimant's October 17, 2004 cervical spine x-ray to show a fracture in the C7, but not C6. He found the CT-scan taken on the same date to reveal spinous fractures in the C7 and T1. Dr. Fielding took additional x-ray and flexion and extension films during his evaluation. These films similarly showed spinous fractures of the C7 and T1. The flexion and extension films showed no evidence of instability.

Dr. Fielding's impression was that Claimant did have spinous process fractures at C7 and T1 as a result of his work-related injury, which he believes to be the cause of Claimant's current complaints. Dr. Fielding described Claimant's "current complaints" as a "mild residual neck discomfort." He noted that Claimant was no longer under any treatment plan nor need he be as he had fully recovered from his fractures. Dr. Fielding found Claimant's treatment up until his evaluation to be reasonable and medically necessary. Based on his evaluation, Dr. Fielding opined that Claimant could return to full-time work without any restrictions. Dr. Fielding further noted that he would not have restricted Claimant from his work for as long as he had been restricted. He "would have typically restricted him from work for a brief period of time, possibly

1 to 2 months, until he was comfortable enough to return to work.” Dr. Fielding also found Claimant to have reached maximum medical improvement.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Prima Facie Case

To establish a *prima facie* case for compensation, the Claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287 (5<sup>th</sup> Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once the Claimant has established a *prima facie* case, the burden then shifts to the Employer to rebut the Claimant’s *prima facie* case with substantial countervailing evidence. See *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

There is no dispute as to the Claimant’s establishment of a *prima facie* case. The Employer accepts that Claimant suffered an injury during his course and scope of employment with the Employer. However, the Employer does contest the nature and extent of Claimant’s disability.

### Nature and Extent of Disability

Having established a work-related injury, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. See *Trask v. Lockheed Shipbldg. Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is defined in the Act as “incapacity because of an injury to earn the wages which the employee was receiving at the time of injury in the same or any other reemployment.” 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sprull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). The concept of disability is based on two classifications, the nature or duration of the disability (temporary or permanent) and the degree of disability (total or partial). *Palombo v. Director, OWCP*, 937 F.2d 70, 76 (2nd Cir. 1991)(citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C.Cir. 1991)). See also 33 U.S.C. § 908(a)-(e). Following these standards, an employee will be found to either have no loss of wage earning capacity, a total loss, or a partial loss.

#### Nature of Disability:

As noted above, the nature of a disability can be either permanent or temporary. A claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (“MMI”). See *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Trask*, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. MMI is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve, and it is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of MMI marks the end of the temporary period of disability, and any remaining injury thereafter is considered permanent. *Palombo*, 937 F.2d at 76. Determining the date of MMI is a question of fact based upon the medical evidence in the record. See *Ballestros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. General Dynamics Corp.*,

10 BRBS 915 (1979). In making a factual determination, I am entitled to weigh the medical evidence and draw my own inferences without being bound to accept the opinion or theory of any particular medical examiner. See *Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Both parties agree that Claimant has reached MMI, but they disagree as to the exact date. Claimant argues that he reached MMI on November 1, 2006, when Dr. Kaul determined that he was permanently disabled. See Claimant's Post-Hearing Brief "Claimant's Br." at 8. Employer argues that Claimant reached MMI by May 1, 2006 (the date Employer's Carrier ceased paying benefits and Dr. Fielding opined that Claimant resolved his injuries and could return to full unrestricted work) and no later than July 6, 2007 (the date Dr. Fielding examined Claimant and opined that his injuries were completely resolved). Employer's Post-Hearing Brief "Employer's Br." at 14. To resolve this dispute, I must make a factual determination as to which physician's opinion on MMI is most credible and substantiated by the record.

I find Dr. Kaul's opinion that Claimant reached permanent disability as of November 1, 2006, to be most probative and supported by the record. I afford Dr. Kaul greater weight on this matter as he is Claimant's treating physician and has personally evaluated and treated Claimant regarding his work related injuries on several occasions. See *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997)("An ALJ is nonetheless bound by the expert opinion of a treating physician as to the existence of a disability 'unless contradicted by substantial evidence to the contrary'"). As Claimant's treating physician, I find Dr. Kaul to be in the position of being the most familiar and having the most complete understanding of Claimant's condition.

The probative value of a treating physician's opinion as opposed to an evaluating physician, who only examined the Claimant once, is reflected in the record. Both Drs. Kaul and Fielding agree that as of October 17, 2004, Claimant was suffering from injuries caused by his accident, which required treatment. However, Dr. Fielding's opinion on when Claimant's injuries resolved differs from Dr. Kaul's and several other physicians in the record. On November 10, 2004, Dr. Mellion, a neurosurgeon, evaluated Claimant and found him to be symptomatic from his injuries in Dubai and recommended a physical medicine and rehab consult for treatment. This consult was performed by Dr. Mills on December 22, 2004. Dr. Mills also found Claimant to be symptomatic from his injuries in Dubai, which restricted him from work involving overhead activity, neck hyperextension, or having to wear a flack jacket or helmet. Dr. Mills recommended further testing and physical therapy. Dr. Mills's evaluation was over two months after the Dubai incident. Despite Dr. Mills's assessment, Dr. Fielding anticipated that Claimant could have fully recovered within two months of his injury and been capable of returning to full unrestricted work. While Employer does not argue that Claimant reached MMI two months after being injured, Dr. Fielding's belief that Claimant's injury could have been resolved that early exemplifies the advantage the treating physicians who saw Claimant during the several years prior to Dr. Fielding's evaluation had in developing their opinions.

I also afford greater weight to Dr. Kaul's opinion as it is best supported by the weight of evidence in the record. Prior to Dr. Kaul's determination that Claimant reached MMI, Dr. Mills, on April 28, 2005, opined that Claimant had reached MMI, and Dr. Stein, on May 3, 2005, stated

that he could not offer any definitive recommendations for treatment.<sup>3</sup> While the Employer would argue that these opinions also support Dr. Fielding's opinion that Claimant reached MMI as of March 2006, I find them to be most supportive of Dr. Kaul's opinion, as he, like Dr. Stein, found Claimant to continue to be symptomatic from his injury in Dubai, which restricted him from work. Contrastingly, Dr. Fielding's opinion of Claimant reaching MMI was based on his belief that Claimant's injuries were completely resolved and that he could return to full unrestricted work. As I will further discuss when analyzing the extent of Claimant's disability, I do not find the weight of the evidence to support this opinion. I do not find Claimant's injuries to be fully resolved. Therefore, I am not persuaded by Dr. Fielding's opinion that Claimant reached MMI in March 2006, or in the alternative, on July 6, 2007, because he has completely recovered from his injuries and is capable of full unrestricted work.

Employer argues that greater weight should be afforded to Dr. Fielding's opinion because he is "eminently more qualified than Dr. Kaul." I do take note, and have considered, Dr. Fielding's 25 years of experience as a board certified neurosurgeon and impressive curriculum vitae. Nevertheless, as discussed above, I find that despite not having Dr. Fielding's specialty expertise, Dr. Kaul's opinion is most probative as he was most familiar with Claimant's condition, particularly on November 1, 2006, when he determined that Claimant was permanently disabled.

With the above considerations in mind, I credit Drs. Stein and Kaul's opinion in finding that Claimant has residual physical restrictions caused by his work related injuries. I credit Dr. Kaul's opinion in finding that Claimant reached MMI on November 1, 2006. Accordingly, I find that Claimant is permanently disabled as of November 1, 2006.

#### Extent of Disability:

A three-step burden-shifting process is employed when analyzing whether the claimant is totally or partially disabled. *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2nd Cir. 1976). First, the claimant must establish a *prima facie* claim by establishing that he can no longer perform his former job due to his job-related injury. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5<sup>th</sup> Cir. 1996); *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56 (1985). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). 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). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5<sup>th</sup> Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5<sup>th</sup> Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job).

Once a *prima facie* case for total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment ("SAE"). *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5<sup>th</sup> Cir. 1991); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265

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<sup>3</sup> While neither party offered these two dates as possible dates of MMI, I have considered them as well. However, I find Dr. Kaul, Claimant's treating physician who is responsible for his overall care, to be in a better position to determine when Claimant reaches MMI.

(1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish SAE retroactively to the day Claimant reached maximum medical improvement, even if the jobs are no longer available at the time of the survey. *New Port News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4<sup>th</sup> Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). In establishing SAE, the employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides, which the claimant is capable of performing considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041 (5<sup>th</sup> Cir. 1981). See also *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2<sup>nd</sup> Cir. 1976); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 97 (1989); *Young v. Todd Pac. Shipyards*, 17 BRBS 201, 203 (1985). The employer must prove the availability of actual, not theoretical employment opportunities. *Turner*, 661 F.2d at 1042; *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). A failure to establish SAE results in a finding of total disability.

If the employer meets its burden in establishing SAE, the claimant is then provided with the opportunity of rebutting the Employer's showing of SAE by establishing that he diligently tried and was unable to secure such employment. *Palombo*, 937 F.2d at 73; *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5<sup>th</sup> Cir. 1986). The claimant must establish that he was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Palombo*, 937 F.2d at 74 (quoting *Turner*, 661 F.2d at 1043).

I credit Dr. Stein's report, Dr. Kaul's report and deposition, and Claimant's testimony in finding that Claimant can no longer work as a truck driver due to the neck and back injuries he incurred in Dubai. As discussed above, Dr. Stein, a neurologist, evaluated the Claimant on May 3, 2005, concluding that Claimant was symptomatic from his injuries in Dubai and consequently "should avoid work requiring repetitive or continuous activity with the arms at or above shoulder level." Dr. Stein further opined that Claimant should avoid heavy lifting and noted that wearing a heavy flack jacket and hard hat would aggravate his condition. Dr. Stein's findings were supported by Dr. Kaul's later evaluation on November 1, 2006. Dr. Kaul found Claimant to be permanently disabled and physically restricted him from lifting more than five or ten pounds of weight.<sup>4</sup> Dr. Kaul specifically noted that Claimant would "not be able to sit for a long time such as [when] driving a truck which he was doing before the accident . . . ." CX 1 at 36. He also noted that Claimant was restricted from twisting, tilting, or sitting back and forth. These restrictions would prohibit Claimant from returning to his job as a truck driver. Again, as Claimant's treating physician, I find Dr. Kaul's opinion to be the most probative.

I find Claimant's own testimony to also support a finding that he is no longer able to perform his former job as a truck driver. While I do not afford Claimant's testimony substantial weight, I do find it probative, particularly since most of the physicians who examined him found him to be cooperative and straightforward. At the March 19, 2008 hearing, Claimant expressed that he no longer had the mental focus and the physical ability to meet the rigorous demands of truck driving. He explained that simple tasks such as cooking overexerted him. Additionally,

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<sup>4</sup> In his deposition, Dr. Kaul stated that he would not have a concern with claimant lifting 10-25 pounds of weight frequently or 20-50 pounds occasionally. CX 15 at 25. I will accept these higher restrictions as what Claimant is capable of lifting as they reflect Dr. Kaul's most recent opinion as expressed in his 2008 deposition.

Claimant pointed out that he legally could not fulfill his duties as a truck driver while taking pain medication like Darvocet. I accept Claimant's assessment of his pain as a number of physicians, including Dr. Kaul, have noted that he is not exaggerating. Accordingly, I accept Claimant's need to take pain medication that disqualifies him from being employed as a truck driver.

I afford less weight to Dr. Fielding's opinion as he is not Claimant's treating physician and his opinion is contrary to the weight of the evidence. As discussed above, Dr. Fielding's July 6, 2007 opinion that Claimant's injury was *completely resolved* and that he may have been able to return to *full unrestricted work* as early as two months after his injury or by March 8, 2006, is contradicted by Claimant's functional capacity evaluation and Drs. Mellion, Mills, Stein, and Kaul's opinions. On November 10, 2004, Dr. Mellion, a neurologist, opined that Claimant was not able to return to work as he was not at full capacity. He recommended that Claimant see a physical medicine specialist for treatment that would return him to full capacity. On December 22, 2004, over two months after Claimant's injury, Dr. Mills, a physical medicine specialist, continued to restrict Claimant from work. On May 3, 2005, well after the time Dr. Fielding predicted Claimant could fully recover, Dr. Stein, a neurologist, found that Claimant should not engage in work that involved repetitive activity of the arms over the head or above the shoulder, heavy lifting, or wearing a flack jacket or helmet. On March 8, 2006, a functional capacity evaluation determined that Claimant could only perform "medium category work." Despite these determinations, Dr. Fielding testified that Claimant's injury was resolved and he was capable of returning to full unrestricted work by March 2006. Dr. Fielding acknowledged disagreeing with the functional capacity evaluation and reasoned that these types of evaluations were not accurate. However, I note that Dr. Fielding was unable to answer questions about the general factors and tests involved in a functional capacity evaluation. Accordingly, I do not find his discounting of Claimant's functional capacity evaluation to be persuasive. Last, Dr. Fielding's opinion that Claimant was fully recovered and able to return to work by March 2006 conflicts with Dr. Kaul's November 1, 2006 opinion that Claimant was permanently disabled.

Since I afford less weight to Dr. Fielding's opinion that Claimant may have been capable of returning to work as early as two months after his injury, and was capable of returning by March 2006, for not being supported by the weight of the record, I also afford less weight to his opinion that Claimant was fully recovered and capable of returning to work on the date of his July 6, 2007 evaluation. I further afford less weight to Dr. Fielding's opinion that Claimant was no longer disabled as of July 6, 2007, because the medical evidence he relied on in reaching his conclusion is substantially similar to that of the number of other physicians in the record who determined Claimant was still disabled. In his deposition, Dr. Fielding stated that Claimant exhibited a full range of motion, which he found to mean that Claimant could move his head and neck in a variety of positions with no restriction or pain. However, on October 17, 2004, approximately a week after his injury, at the Wesley Medical Center, Claimant was noted as having full range of motion in his extremities without any discomfort. Both Dr. Mellion and Stein, who like Dr. Fielding are neurologists, found no evidence of instability or neurological abnormalities. Nevertheless, they did not find Claimant fit to return to his former job. Additionally, Dr. Fielding considered all the radiographic films taken at the time of Claimant's injury, but unlike the other physicians in the record, he did not find them to show evidence of disability, but rather believed them to simply show degenerative changes. Dr. Fielding's own x-rays taken on July 7, 2006, continued to show fractures in the C and T vertebrae; however, Dr. Fielding dismissed the significance of these findings by stating that spinous process fractures rarely reattach, but over time become "virtually painless." It should be noted, that Dr. Fielding's

opinion does not comport with the level of pain Claimant expressed experiencing at the July 7, 2006 evaluation. Claimant told Dr. Fielding that his level of pain was a three on a scale of zero to ten, which could escalate to a five. Dr. Fielding labeled this pain as “mild residual discomfort,” but noted that he would consider a pain level of five as being moderate. Additionally, Claimant expressed a similar level of pain to Dr. Stein (one escalating to a five) and Dr. Kaul (three escalating to a five) both of whom found claimant to be disabled and unable to return to work.

Employer argues that Dr. Kaul’s opinion should be afforded less weight because it is simply a conclusory pronouncement of Claimant’s self-reported subjective pain. I disagree. It is evident from both Dr. Kaul’s deposition and the medical records, that Dr. Kaul reached his opinion after considering diagnostic tests, radiographic films, specialty consults, and Claimant’s subjective complaint’s of pain. Furthermore, I find that both Dr. Kaul and Dr. Fielding relied on Claimant’s subjective complaints. As Dr. Fielding explained in his deposition, he attached the words “mild residual discomfort” to Claimant’s condition as a result of the level of pain he expressed experiencing at the time of his visit.

Accordingly, I give substantial weight to Dr. Kaul’s opinion, but also credit Dr. Stein’s report and Claimant’s testimony in finding that Claimant has satisfied his burden in proving total disability by establishing that he is not capable of returning to his former position of employment.

While I find that Claimant is not able to return his former position of employment, I do find that he retains some residual functional capacity, which may afford him the opportunity to pursue other avenues of employment. I credit Dr. Kaul’s opinion in finding that Claimant could be employed in a position that does not require him to lift more than “10 to 25 pounds frequently, or zero to 10 pounds constantly or 20 to 50 pounds occasionally,” CX 15 at 25, or require him to sit or stand for long periods of time. CX 1 at 36; CX 15 at 20.<sup>5</sup> In crediting Dr. Kaul’s opinion I must also accept his assessment that Claimant has the ability to work as a security guard or cashier if the above restrictions are met. *See* CX 15 at 22-23.

Employer rebuts the presumption afforded to Claimant in proving disability by offering a labor market survey that lists six positions of employment that were allegedly available to the Claimant as of March 18, 2008. EX 15A. I accept Ms. Ledesma’s, the case manager who conducted Claimant’s survey, opinion that Claimant has transferable skills from his work history as a truck driver and roofer. However, I find two of the jobs listed in her survey to exceed Claimant’s physical restrictions and capabilities. I accept that TLC Transportation requires its drivers to pass a DOT physical and drug screening test, which would disqualify the Claimant. *See* CX 16. I also accept that the heavy lifting described to Claimant as a requirement during his interview with Keeler Equipment Sales & Rental exceeds his physical limitations. *Id.* Therefore, I find that the positions with TLC Transportation and Keeler Equipment Sales & Rental do not qualify as SAE for the Claimant. I find the remaining four positions of employment listed in Ms. Ledesma’s market survey, which include a cashier/sales associate position at J.C. Penny and

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<sup>5</sup> I find these restrictions to fall within the light to medium work defined in the *Dictionary of Occupational Titles, Appendix C*. While Claimant’s weight lifting restrictions fit into the medium work category, I find that his restrictions on sitting and standing, as set by Dr. Kaul, to be more in line with the Dictionary’s definition of light work.

Wal-Mart, a front desk clerk position at Diehl's Seventy Seven Ranch, and a security guard position with Burnett Security to be within Claimant's physical limitations and capabilities.<sup>6</sup>

Claimant rebuts Employer's SAE with a written statement describing his attempts at securing the six positions listed in the market survey. *See* CX 16. I find Claimant's rebuttal to successfully challenge two of the four remaining jobs. I accept that J.C. Penny in Ponca, OK, would not hire Claimant because of his disability. I also accept that Diehl's Seventy-Seven Ranch, which is a family owned business, was not looking to hire any outside help. However, I find that the listed positions at Wal-Mart and Burnett Security were within Claimant's educational, geographical, and physical limitations. With a diligent search, at the time these positions were found on March 18, 2008, Claimant could have secured employment with either of these employers.

Claimant stated that Burnett Security informed him that they had just recently issued a hiring freeze. Prior to this freeze Claimant could have possibly secured employment with Burnett Security. Claimant's application with Wal-Mart is still pending. Regardless, I find that Claimant did not satisfy his burden of performing a diligent search for alternative employment. At the hearing, Claimant testified that since he came back from Dubai he had not searched for a job. He believed obtaining employment in his town would be difficult because a lot of the available jobs did not pay well. In his rebuttal to the market survey, Claimant openly stated that he could not justify the high cost of fuel involved in placing an application at Burnett Security. Had Claimant performed a diligent search for alternative employment, he may have been able to secure a position as a security guard with Burnett Security or a cashier position with Wal-Mart.

After reviewing all the evidence, I find that the Employer has established two SAE positions, but that the Claimant did not demonstrate that he made a diligent effort to find work. Therefore, I find Claimant's disability to be partial.

### Compensation

Partial disability does not commence until the date Employer establishes the availability of suitable alternative employment. *Palombo*, 937 F.2d 70. Therefore, I find that Claimant was totally disabled prior to March 18, 2008, and partially disabled thereafter.

An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and his post-earning wage capacity. 33 U.S.C. § 908(c)(21). The parties stipulated that Claimant's average weekly wage was \$1,200.00, and that he has been paid temporary total disability compensation at a rate of \$300.00 per week between October 19, 2004 and May 1, 2006.<sup>7</sup> The two SAE positions available to the Claimant have an average earning capacity of \$8.25 per hour<sup>8</sup> or \$330.00 per week. The difference between Claimant's pre-injury average weekly wage and his post-injury wage earning capacity is \$870.00 (\$1,200.00 - \$330.40), which serves as the basis for Claimant's permanent partial disability award. *See* 33 U.S.C. § 908(c).

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<sup>6</sup> These positions are compatible with Claimant's physical restrictions as they are all defined as light work by the *Dictionary of Occupational Titles*. *See* DICTIONARY OF OCCUPATIONAL TITLES §§ 211.462-010, Cashier I; 238.367-038, Hotel Clerk; 372.667-034, Guard, Security.

<sup>7</sup> It was also stipulated that, at the time of the hearing, the Carrier was about to voluntarily pay Claimant a lump sum of \$40,000.00 in order to bring him current on the compensation benefits that were due to him at a rate of \$800.00 a week for the time period between October 19, 2004 and May 1, 2006.

<sup>8</sup> The Wal-Mart position listed a salary range of \$7.00-\$8.00 per hour, averaging at \$7.50 per hour. The salary at Burnett Security ranged from \$8.00-\$10.00 per hour, averaging at \$9.00 per hour. Averaging the \$9.00 per hour and \$7.50 per hour salaries results in an average earning capacity of \$8.25 per hour.

After a review of the record, I find that Claimant was entitled to temporary total disability benefits prior to November 1, 2006, based on an average weekly income of \$1,200.00. From November 1, 2006 to March 18, 2008, he was entitled to permanent total disability benefits, also based on an average weekly income of \$1,200.00. I find Claimant to be entitled to permanent partial disability benefits from March 18, 2008 continuing, based on the rate of \$870.00 per week.

## **ORDER**

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, I enter the following **ORDER**:

1. Claimant has established, and the parties have stipulated, that Claimant's average weekly wage at the time of his injury was \$1,200.00.
2. Claimant's date of maximum medical improvement is November 1, 2006.
3. Employer has established SAE that gives Claimant a post-injury wage earning capacity of \$330.00 per week.
4. Employer/Carrier shall pay Claimant compensation for temporary total disability from October 19, 2004 through October 31, 2006, based on an average weekly wage of \$1,200.00, in accordance to 33 U.S.C. § 908(b).
5. Employer/Carrier shall pay Claimant compensation for permanent total disability from November 1, 2006 (date of MMI) through March 17, 2008, based on an average weekly wage of \$1,200.00, in accordance with the provisions of 33 U.S.C. § 908(a).
6. Employer/Carrier shall pay Claimant compensation for permanent partial disability from March 18, 2008 (date of SAE) continuing, based on a rate of \$870.00 per week in accordance to the provisions of 33 U.S.C. § 908(c).
7. Employer shall receive credit for all compensation heretofore paid, as and when paid.
8. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
9. The District Director shall make all necessary calculations to effectuate this **ORDER**.
10. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**SO ORDERED**

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Daniel F. Solomon  
Administrative Law Judge

