U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 January 2009

Case No.: 2008-LDA-102

OWCP No.: 02-138354

In the Matter of

D. V.,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer

and

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

APPEARANCES:

GARY B. PITTS, ESQ.
On Behalf of the Claimant

JOHN L. SCHOUEST, ESQ.
BEN GATES, ESQ.
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act (the Act),[1] brought by D.V. (Claimant) against Service Employers International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o AIG Worldsource (Carrier).[2]

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 26 Aug 08 a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witness, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant

Exhibits[4]
Claimant's Exhibits (CX) 1-13
Employer's Exhibits (EX) 1-13, 17-18[5]
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[6]

1. Claimant was injured on 10 Oct 04 in a zone of special danger.

2. There was an employee/employer relationship at the time of the injury.

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[1] 42 U.S.C. § 1651 *et. seq*. (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. § 901 *et seq.*).
[2] For simplicity both Employer and Carrier are collectively referred to herein as Employer.
[3] I have reviewed and considered all testimony and exhibits admitted in to the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Some exhibits appeared to be *en globo* collections of records. Counsel were cautioned that in the case of any such exhibit or the deposition of any witness also testifying live, (CX-2, EX-12) only those pages specifically cited to would be considered a part of the record upon which the decision would be based. Tr.7.
[5] At hearing, Employer's counsel indicated EX-14-16 and 19, which related to subjects about which there was no real controversy, would be offered post hearing. (Tr. 6) None were ever submitted.
[6] JX-1, Tr. 7-10.

3. Employer was notified of the injury on 10 Oct 04.

4. No formal notice of controversion was filed.

5. Claimant's average weekly wage at the time of injury was $1,846.46.

ISSUES

1. Nature and extent of Claimant's injury.

2. Maximum medical improvement (MMI).

3. Additional medical treatment.

FACTUAL BACKGROUND

Claimant worked for Employer as a truck driver in Iraq. He began experiencing back and leg pain. When he reported an episode of nocturnal urinary incontinence, he was returned to the United States in November 2004. He had surgery in June 2005. In August 2006, Employer commissioned a vocational evaluation that indentified a number of jobs. In February 2007, Claimant started working part time at an auto supply store.

POSITIONS OF THE PARTIES

Claimant argues that he has not yet reached MMI. He seeks total disability through the date he began working at the auto parts store and partial disability from that date, based on a post injury weekly earning capacity of $259.89. He also seeks additional back surgery.

Employer responds that Claimant has reached MMI and has sufficiently recovered from his work related injury to allow him to return to his original job. In the alternative, it suggests that his post injury weekly earning capacity is $576.92. Employer opposes the requested surgery, arguing that it is not reasonable, necessary, or appropriate.

LAW

Causation

While that the Act is normally construed liberally in favor of the Claimant,[7] the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[8] which specifies that the proponent of a rule or position has the burden of proof and thus the burden of persuasion.[9]

In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner.[10]

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."[11] In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[12] The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident that could have caused the harm occurred.[13]

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain.[14] These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.[15]

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[7] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[8] 5 U.S.C. § 556(d).
[9] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[10] *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).
[11] 33 U.S.C. § 902(2).
[12] 33 U.S.C. § 920(a).
[13] *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).
[14] *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).
[15] *Id.*

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.[16]

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that a claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.[17] "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.[18] Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).[19]

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.[20] If an administrative law judge (ALJ) finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.[21] The presumption does not apply, however, to the issue of whether a physical harm or injury occurred[22] and does not aid the claimant in establishing the nature and extent of disability.[23] Section 20(a) does not provide a presumption of compensability or injury.[24] A claimant still must establish the existence of an injury.[25]

Generally, the opinion of a treating physician is entitled to greater weight than the opinion of a non-treating physician.[26] However, an ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinions of the treating doctor.[27]

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[16] *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP,* 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

[17] *See Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

[18] *Avondale Industries v. Pulliam*, 137 F.3d 326,328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

[19] *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

[20] *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

[21] *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994).

[22] *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

[23] *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

[24] *Devine*, 25 BRBS at 19-20.

[25] *Id*.

[26] *Downs v. Director, OWCP*, 152 F.3d 924, (9th Cir. 1998); *see also Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000) (Social Security administrative law decision).

[27] *Duhagan v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997).

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[28] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[29] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[30] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[31] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[32] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[33]

The question of extent of disability is an economic as well as a medical concept.[34] To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[35]

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[36] Once a claimant is capable of performing

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[28] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).
[29] 33 U.S.C. § 902(10).
[30] *Sproull*, 25 BRBS at 110.
[31] *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).
[32] *Trask*, 17 BRBS at 60.
[33] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[34] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[35] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).
[36] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.[37] If the claimant makes this *prima facie* case, the burden shifts to employer to show suitable alternative employment.[38] The presumption of disability ends on the earliest date that the employer establishes suitable alternate employment.[39]

Maximum Medical Improvement

The traditional (albeit not exclusive) method for determining whether an injury is permanent or temporary is the date of maximum medical improvement.[40] The date of maximum medical improvement is a question of fact based upon the medical evidence of record.[41] An employee reaches maximum medical improvement when his condition becomes stabilized.[42]

Suitable Alternative Employment

If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.[43] Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[44]

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[37] *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984).
[38] *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).
[39] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 (2d Cir. 1991).
[40] *Turney v. Bethlehem Steel Corp.*,17 BRBS232, 235 n. 5 (1985); *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, (1980); *Stevens v. Lockheed Steel Shipbuilding Co.*, 22 BRBS 155,157 (1989).
[41] *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).
[42] *Cherry v. Newport News Shipbuilding & Dry Dock Co.* 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 915 (1979).
[43] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).
[44] *Id*. at 1042.

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[45] The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish the claimant is physically and mentally capable of performing the work and that it is realistically available.[46] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record.[47] A showing of only one job opportunity may suffice under appropriate circumstances.[48] Conversely, a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[49] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[50]

The Act is designed to compensate for "incapacity because of injury to earn the wages which the employee was receiving at the time of injury."[51] Incapacity is the difference between the average weekly wage (AWW) and the post injury wage earning capacity.[52]

Calculation of the post injury wage earning capacity involves (1) determining whether the claimant's actual post injury wages reasonably and fairly represent his wage-earning capacity and, if not, (2) determining the dollar amount which fairly and reasonably represents the claimant's wage-earning capacity.[53] The burden of proof is on the party arguing that the claimant's actual post-injury wages do not reasonably and fairly represent his wage-earning capacity.[54]

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[45] *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).
[46] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).
[47] *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); s*ee generally, Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).
[48] *P & M Crane Co.*, 930 F.2d at 430.
[49] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[50] *Turner*, 661 F.2d at 1038, *quoting Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).
[51] 33 USC § 902(10).
[52] 33 USC § 908.
[53] *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979).
[54] *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988).

Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[55]

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.[56] Medical care must also be appropriate for the injury.[57]

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[58]

EVIDENCE

Claimant testified at trial in pertinent part that:[59]

> He was born in Radcliff, Kentucky. His father was in the military and he moved to Fort Knox, Kentucky. In approximately 1982 he moved to Louisiana. He is thirty-eight and dropped out of high school two weeks short of graduation and never obtained a GED. After high school he went to work for Brown & Root in Beaumont, Texas. He was in construction as an electrician, cable puller, and conduit runner. After eight months he moved back to Louisiana and did odd jobs. He then moved to Houston and worked for Thompson's Professional Group surveying for five years.
>
> In 1997 he moved back to Louisiana and got a job at Marco Plywood Mill in Chopin, Louisiana making plywood. He then left Marco and went to truck-driving school and worked as a cross country truck driver for five years before he went overseas. He hauled different loads, including hazmat. He had special training and was certified for that. He did no-touch freight. There were times he would have to go to a food warehouse, and they would require drivers to unload. The

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[55] 33 U.S.C. § 907(a).
[56] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).
[57] 20 C.F.R. § 702.402.
[58] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984).
[59] Tr. 23-59.

company hired a lumper to unload the trailer. There were very few occasions, maybe once every two hundred, where he unloaded the trailer.

He heard that Employer was hiring drivers for Iraq and called them. He got a job, stopped in Kuwait for approximately three to four weeks, and was shipped to Iraq. Before he went overseas, he did not have a problem with his back. Employer gave him a physical, which he passed. He was in southern Iraq driving fuel tankers from southern Iraq up to Camp Anaconda, which is north of Baghdad.

After eight months he moved to a position in Alkut driving hazmat. He would still go on convoys occasionally. He would go up to Babylon and travel with the military and still have to wear the vest. The trucks he drove were Mercedes Benz cabover construction-style trucks. They had 32-metric-ton suspension. It was like riding a desk down the highway. He felt every little bump. The roads were pretty rough.

After he started the hazmat position, he started having sharp leg pains. He talked to Employer's medic, who thought it was the sciatic nerve. His right leg would just freeze. The pain was so intense he could not move it. He would just have to stand there and wait for it to pass. He would have a sharp pain from the small of the back all the way down through the right leg to the tip of his toes.

He went to the military doctor, a colonel. The colonel had him bend over, but he was limited by the pain. The colonel also thought it was the sciatic nerve and prescribed pain medications and recommended a different mattress. The colonel thought it would pass. However, after he wet his bed one night, the colonel sent him home immediately.

Had he not been injured, he planned on doing another year and maybe staying for a third. He had an MRI on 22 Nov 04 when he returned to the States.

On 30 Jun 05, he had surgery at L-5, S-1. He no longer has leg pain. He has constant lower-back pain. He has not had a really decent good night's sleep since. He cannot get comfortable or lie on his back or stomach for an extended period of time. The pain fluctuates from three to eight or nine out of ten. Sometimes he has tears in his eyes.

In August 2006 he decided he should start looking for a job. He met with Carla Seyler to discuss jobs. She gave him a test and asked him a series of questions. Then she mailed him a list of jobs. He applied for quite a few of those jobs and did not get any response. One was a service writer at a Chevrolet dealership. One was an assistant manager for Enterprise Rental Car. He did that one online and never got a response. There was one job at Fort Polk to play Iraqi civilians. He

applied for that position, but the doctor did not approve it, because he would have to lie on the ground without any movement for that duration. He did not hear back from them.

He did not apply for every one of the jobs that she recommended. He just was not interested in some of them. He does not want to be a bus driver in Lake Charles. It is a 45 to 50 mile one-way trip from home to Lake Charles, so any job there would involve two hours of commuting. With the price of gas and wear and tear on the vehicle, he is better off with the job he has. There were other positions he did not particularly care to do. He did not apply for every job that was approved by Dr. Holliday, but did apply for the majority of them.

He was involved in a car accident in December 2007. He was rear-ended by a vehicle. That aggravated his back pain. He called Dr. Vaughan's office and talked to one of his nurses. She said it did not sound like it was hard enough to really do any damage. He did not go to the emergency room or the doctor. He already had recommendations from Dr. Foret and Vaughn for surgery. After about a week the pain returned to where it was before the car accident.

He talked to other people about additional surgery. Some say it was the best thing that ever happened. Some say it is the worst thing. He is leery, but would have it if it would relieve the pain.

He went back to work on 12 Feb 07 at O'Reilly Auto Parts. He started out part-time working the counter and sales. Being on his feet for an extended period of time became unbearable. When a driving position came open in May he took it so he would not be on his feet as much.

He tried to work eight-hour shifts, but by the end of the day, it just hurt to walk and move. His back hurts badly from standing on his feet on the concrete and walking in and out of the store. The store hours are from 7:30 till 9:00. Deliveries are worked from 8:00 till 5:00. He works from 8:00 to 2:00. Even with driving the truck around, he cannot work a full day. Getting in and out of the vehicle, up and down the stairs is too much.

He has restrictions to lift not over 20 to 25 pounds. If his job requires that he lift more than that, he figures a way to work around it. He has been able to live within his restrictions in this job. He has been there for about a year and a half. He makes $7.70 an hour and works approximately 30 hours a week. His biweekly pay ranges from $370 to $410.

He drives a 2000 Ford Ranger. There is a gap between the three-and-a-half load dock and the Ford’s cargo deck. The dock is a little bit higher than the top of the

tailgate of the truck. He cannot set the dolly off the dock and into the bed of the truck. When he has an item over the 25-pound restriction he gets help or gets the truck as close as he can and just lets the item fall into the truck.

O'Reilly delivers to automotive shops and dealerships. If a customer needs help with a heavy item like a battery, he gets help from his manager or asks the customer to help. He does not do mechanic work, only sales.

He would like to find other work, but there are really not a lot of job opportunities in DeRidder, Louisiana. The nearest large cities are Alexandria, approximately 70 miles away, and Lake Charles, approximately 50 miles away.

He applied to the jobs that are listed in CX-7.

When he worked for Thompson's Professional Group, he did land surveying and lead-based paint and asbestos inspections. He was certified for that but those certifications have expired. He could not do asbestos inspections anyway, because it involves bending, which he cannot do. He could not go back to land surveying because he would have to carry tools weighing twenty pounds through the woods. He would also have to bend to set iron rods for control points and hammer them into the ground.

He has not sought any treatment in the past year or so for his back. He was told that workmen's comp was not going to pay for any treatments or medications. The carrier stopped paying for everything in October 2006. He goes to Dr. Vaughn every six months and they said they cannot do anything, because nobody is paying for it. Dr. Vaughan wants to try some injections, which he has tried in the past and without any relief. That was prior to surgery. He also had a few after the surgery. Dr. Vaughn also wants to do more x-rays. Dr. Vaughn is carrying the bill for the visits, but he has to pay for his own pain medications. He has no health insurance at O'Reilly. He takes Lortabs, but not daily, because he does not have enough. He takes them as needed, which is normally at nighttime, to try to help him sleep. They cost 20 or 25 dollars every six months.

He cannot go back to his previous job as a truck driver because that requires staying in that seat anywhere from eight to ten hours a day. At O'Reilly's, his longest delivery is seven miles. He drives up to the shop, delivers the part, turns around and comes back to the store. It may be 15 or 20 minutes before his next delivery. He is not continuously in the vehicle for eight to 10 hours a day. He averages 10 to 15 deliveries in a day. If there was a job doing short-distance big-rig driving, he might be able to do that, if he did not have to load and unload freight. He is not aware of any big-rig 18-wheeler jobs where he could just work six hours a day or stop every seven miles and get out and stretch.

If he sits for long periods of time, his back starts bothering him. If he stands for long periods of time, his back starts bothering him. Probably 30 to 45 minutes is the longest he can stay in one position.

Claimant's medical records show in pertinent part that:[60]

On 10 Oct 04, Claimant presented to Employer's medical staff with complaints of lower back and right leg pain after a convoy from Babylon to Bagdad. He was assessed as having sciatica and given Toradol. Over the next two weeks he reported no relief and was given pain medications. On 29 Oct 04, he was examined by an Army doctor who assessed him as suffering from sciatica or possible lumbar disc problem, prescribed prednisone and advised Claimant to avoid carrying weight. On 3 Nov 04, another army medic examined Claimant, who had reported urinary incontinence. The medic diagnosed Claimant as having a L5-S1 disc protrusion and recommended evacuation for an MRI and possible neurosurgical consultation.

An MRI on 22 Nov 04 indicated Claimant had a moderate midline protrusion at L4-5 with an associated congenital spinal stenosis, broad based minimal disc protrusion at L5-S1 and chronic disc desiccation at L4-5 and L5-S1. Claimant saw Dr. Murphy on 29 Dec 04 and reported lumbar and right leg pain with no further incontinence. Dr. Murphy recommended physical therapy and steroid injections and stated Claimant remained unable to return to his previous work. Claimant returned to Dr. Murphy on 18 Feb 05 and reported he had elected to have no injection and experienced no relief with the physical therapy. Dr. Murphy assessed Claimant as suffering from a protrusion at L4-5 with lower right radiculopathy. Claimant was hesitant to undergo surgery, but was willing to undergo injections. Claimant reported the injections provided no relief.

Claimant underwent a discectomy on 30 Jun 05. A large broad contained protrusion was found at L4-5. On 8 Jul 05 he returned to Dr. Murphy reporting muscle spasms, but an absence of lower extremity pain. On 22 Aug 05, Claimant was referred to physical therapy for spot surgical treatment to improve back pain and function. Claimant underwent physical therapy from 13 Sep 05 through 19 Oct 05 and at discharge reported some improvement but with residual pain. Claimant was reported to have mild to moderate limitation in work activity.

A lumbar MRI on 16 Nov 05 indicated Claimant had postoperative L4-5 changes with no significant spinal stenosis or compromise and slight possibility of discitis. Claimant returned to Dr. Murphy on 23 Nov 05 and reported continued lumbar

[60] EX-12; CX-2 (as cited, see n.4).

back pain with numbness, but no pain in his left leg. On 4 Jan 06, Claimant returned to Dr. Murphy who informed him that tests ruled out discitis. Claimant complained of continued pain and stated he could not return to his previous work. Dr. Murphy recommended surgical arthrodesis.

On 13 Apr 06, Claimant was evaluated by Dr. Vaughn at the request of Employer. Claimant reported shooting back pain with aching, but no leg pain. Dr. Vaughn found no atrophy and negative straight leg raise tests. Dr. Vaughn opined that Claimant reached maximum medical improvement (MMI) about six months after his 30 Jun 05 surgery and was at a static point from which he will never completely resolve all of his symptoms from his work injury in October 2004. Dr. Vaughn recommended follow on facet injections, but saw no reason for further surgery and suggested a functional capacity evaluation (FCE), which he believed would show Claimant to be capable of light or possibly medium activities. On 31 May 06, Dr. Murphy reviewed Dr. Vaughn's report. He disagreed with Dr. Vaughn's opinion as to the indication for further surgery, but agreed that in the absence of that surgery, Claimant is at MMI.

Claimant underwent bilateral facet injections on 6 Sep 06 and saw Dr. Murphy on 20 Sep 06. Claimant reported the injections provided relief for two days, followed by recurrence. Dr. Murphy continued to recommend arthrodesis, but noted that if it was not approved by Employer, Claimant would need to have a FCE.

Claimant underwent a FCE on 9 Oct 06. The FCE reported that Claimant could engage in moderate work activity with frequent lifting of up to 10 pounds and maximum lifting of 20 pounds. It also indicated Claimant is restricted from repetitive bending or lifting from the floor weights of more than 20 pounds.

On 17 Jan 07, Dr. Murphy again saw Claimant, who reported continued back pain aggravated by exertion and intermittent left leg numbness. Dr. Murphy referred Claimant to chronic pain management.

Various Department of Labor Forms show in pertinent part that:[61]

Claimant was injured on 10 Oct 04 and his pay stopped on 8 Nov 04. He was paid temporary total disability from 8 Nov 04 to 22 Oct 06 based on an AWW of $1,846.46.

On 14 Mar 07, Dr. Troy Vaughn found Claimant unable to work more than four hours per day due to back pain. He reported that Claimant had not reached MMI and recommended a functional capacity evaluation and further treatment.

[61] EX-1-4, 10; CX-1, 4-5, 13.

On 9 Apr 07, Claimant's vocational rehabilitation case file was closed as he was medically unable to participate.

Ms. Carla Seyler's Vocational rehabilitation reports state in pertinent part that:[62]

She conducted a vocational evaluation for Employer and met with Claimant on 12 Jul 06. She interviewed him and reviewed his medical records. Claimant indicated he completed the 12th grade. She noted that in April 2006, Dr. Holladay cleared Claimant for light to possibly medium level work.

Based on her evaluation she completed a labor market survey on 30 Aug 06 that reported the following jobs as appropriate for Claimant:

Car Dealer Service Advisor – requires high school diploma or GED; involves alternating sitting, standing, and walking, lifting up to 20 pounds, and some driving.

Casino Surveillance Operator - requires high school diploma or GED; generally seated with occasional standing and walking; lifting no more than 20 pounds.

Bus Driver - requires high school diploma; involves driving and occasional lifting up to 30 pounds.

Villager Role Play for Military Training - requires high school diploma or GED; may involve lying down for one to two hours and ambushing soldiers.

Vending Machine Route Truck Driver - high school diploma or GED is highly preferred; involves lifting up to 30 pounds and frequent bending and reaching.

Car Rental Manager Trainee - requires high school diploma or GED; involves renting, moving and cleaning cars.

Airport Car Rental Agent - requires high school diploma or GED; involves renting cars to customers.

Frozen Food Delivery Route Driver - high school diploma or GED is preferred; involves driving a route, standing, sitting, walking, stepping up

[62] EX-7.

2-2½ feet onto the truck; is in Jennings, LA but has no current openings; salary is based on commissions after three months.

Medical Specimen and Supplier Courier - high school diploma or GED is preferred; drives from stop to stop; involves lifting up to 20 pounds; is in Lake Charles, LA.

On 25 Oct 06, she reported that Dr. Holladay had approved the Car Dealer Service Advisor, Casino Surveillance Operator, Car Rental Manager Trainee, Airport Car Rental Agent, and Medical Specimen and Supply Courier positions. She also noted that of the jobs approved by Dr. Holladay, Claimant had not applied for the Casino or Rental Agent positions.

On 8 Nov 06, she sent a letter to Claimant informing him of Dr. Holladay's approval of some of the jobs she had identified.

Dr. Lynn Foret's independent medical examination report states in pertinent part that:[63]

On 20 Jun 07, she took a history from and examined Claimant. He complained of low back pain and had limited range of motion. Her impression was post L4-5 micro discectomy with lower back, buttock, and left leg pain. She recommended epidural injections over six months, and if that failed, probable spine stabilization.

Pay records from O'Reilly's Auto Parts indicate in pertinent part:[64]

Claimant started work on 12 Feb 07 at $7.00 per hour. Through 8 Nov 07 he earned $10,024.00.

Video Surveillance shows in pertinent part that:[65]

Claimant walked from a truck to the auto parts store. He stood outside the store, smoking. He drove a truck.

Letters from Claimant's counsel indicates in pertinent part that:[66]

On 27 Aug 08, Claimant requested surgery as recommended by his treating doctor.

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[63] EX-9.
[64] EX-13, CX-6.
[65] EX-8.
[66] CX-14-15.

ANALYSIS

Causation

Although the parties agreed that Claimant was injured while working for Employer in a covered status, Employer submits that he recovered from that injury and any current back problems and related disability are as result of a subsequent event. Employer suggests Claimant's subsequent motor vehicle accident as a possible subsequent intervening event.

It is clear that the record as a whole, including Claimant's testimony and the treatment records of Dr. Murphy are sufficient to invoke the Section 20 presumption as to Claimant's past and current back problems. I do not find the evidence related to the December 2007 car accident to be sufficient to rebut the presumption. Assuming *arguendo*, that it did, I would find that the record taken as a whole would allow Claimant to carry his burden and establish by a preponderance of the evidence that Claimant's current and past back problems were a consequence of his injury in October 2004. I found Claimant to be a credible witness and he stated that after about a week following the car accident his symptoms returned to baseline. He did not go to the doctor following the accident and at the time of the accident already had received a recommendation for additional back surgery.

Nature and Extent of Disability

Employer's argument that Claimant could return to his original employment is contrary to Claimant's credible testimony as corroborated by the weight of the medical evidence. Claimant testified that he could not work full days and Dr. Vaughn reported that Claimant was limited to four hours per day.[67] That limitation alone is sufficient to prevent Claimant from returning to Iraq.

Accordingly, the burden is on Employer to establish suitable alternative employment (SAE). Claimant's self-obtained employment with the auto parts store is clear evidence of suitable alternative employment and a post injury earning capacity of $259.89 per week.[68] Employer bears the burden of establishing a post injury earning capacity that differs from that amount.

Although Employer submitted a number of jobs that it argued met Claimant's physical limitations, the vast majority of them required a high school diploma or GED. Employer cites the vocational counselor's report that Claimant indicated to her that he finished high school as evidence that he is qualified for those jobs. However, he testified

[67] Claimant did testify that he works up to 30 hours per week, which would be in excess of the doctor's restriction.
[68] As argued by Claimant and corroborated by pay records indicating that during the approximate 40 week period from 12 Feb 07 to 8 Nov 07, Claimant earned $10,024.00.

that while he got within two weeks of graduation, he did not receive a diploma and does not have a GED. I do not find that to be totally inconsistent with a possible remark to a counselor that he "finished" high school. In any event, I find the weight of the evidence in the record to be that he lacks a diploma or GED and any job requiring those is not SAE.

That leaves the vending route, frozen food delivery and medical courier positions, all of which had a preference for a diploma or GED. The frozen food position had no openings and neither it nor the vending route was approved by Dr. Holladay. There was no indication that the courier position was open to part time employment, and even if it was it would involve a two hour round trip commute to Lake Charles, which is unreasonable for a part time work day.

With the failure of Employer to establish any SAE, Claimant's current work remains the most probative evidence of his post injury earning capacity and degree of economic disability. Employer argues that the surveillance video at the very least establishes that Claimant could be working more hours at his current job. However, the evidentiary value of the video is limited by its short scope and the absence of long term context. I find Claimant's testimony and the restrictions of Dr. Vaughn to be more probative.

Thus, I find that Claimant's weekly post injury earning capacity, due to the injury suffered while working for Employer, is $259.89.

Medical Treatment and MMI

Dr. Murphy's recommendation that Claimant undergo surgical arthrodesis is sufficient to establish a *prima facie* claim for medical care. While it is true that Dr. Vaughn does not agree with that recommendation, Dr. Murphy is Claimant's treating physician and has seen Claimant over a much longer period. Moreover, Dr. Foret's assessment seems to be consistent with that of Dr. Murphy. Accordingly, I give their opinions the greater weight and find that the recommended surgical arthrodesis is reasonable, appropriate, and necessary.

Given that finding, it follows that Claimant has not yet reached MMI.

DECISION

1. Claimant was injured on 10 Oct 04 while working for Employer under circumstances that bring the injury within the coverage of the Act.

2. Claimant is and has been unable to return to his original employment because of that injury.

3. On 12 Feb 07, Claimant was able to obtain suitable alternative employment with a weekly post injury earning capacity of $259.89.

4. Claimant is not yet at maximum medical improvement, pending surgical arthrodesis recommended by Dr. Murphy

ORDER

1. Employer shall pay Claimant compensation for temporary total disability from 10 Oct 04 through 12 Feb 07 based on Claimant's average weekly wage of $1,846.46.

2. Employer shall pay Claimant compensation for temporary partial disability from 13 Feb 07 through the present and continuing based on Claimant's average weekly wage of $1,846.46 and a post injury earning capacity of $259.89.

3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's 10 Oct 04 back injury, pursuant to the provisions of Section 7 of the Act, including the surgical arthrodesis recommended by Dr. Murphy and associated care.

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

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[69]

6. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[70] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the

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69 Effective 27 February 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.,* 16 BRBS 267 (1984) .

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

event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

ORDERED this 12th day of January, 2009, at Covington, Louisiana.

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PATRICK M. ROSENOW
Administrative Law Judge