

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 April 2009

CASE NO.: 2008-LDA-00235

OWCP NO.: 02-154045

IN THE MATTER OF

J.C.,

Claimant

vs.

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

and

**INSURANCE CO. OF THE STATE OF PENNSYLVANIA,
Carrier**

APPEARANCES:

GARY B. PITTS, ESQ.

On behalf of Claimant

JAMES L. AZZARELLO, ESQ.

On behalf of Employer/Carrier

BEFORE: LARRY W. PRICE

Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq., brought by Claimant against Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Houston, Texas, on August 13, 2008. All Parties were afforded a full opportunity to adduce

testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit (JX) 1
2. Claimant's Exhibits (CX) 1 – 19¹
3. Employer's Exhibits (EX) 1 – 5, 7 – 12²

The Parties stipulated to the following issues:

1. Date of injury/accident: October 16, 2006
2. Injury in the course and scope of employment
3. Employer/Employee relationship at time of accident
4. Date Employer advised of injury: December 29, 2006
5. Date Notice of Controversion filed: April 4, 2008
6. Date of informal conference: March 24, 2008
7. Benefits paid: \$20,583.25
 - (1) Temporary total from December 14, 2006 through June 20, 2007: \$19,448.91
 - (2) Temporary partial from May 13, 2008 through May 23, 2008: 1,134.34
8. Medical benefits paid: Partial

The following issues remain disputed:

1. Nature and extent of disability
2. Entitlement to medical benefits
3. Average weekly wage
4. Attorney's fees and costs, and penalties³

¹ Claimant submitted CX 20 and 21 post-hearing without objection, which are hereby admitted.

² The record was left open for Employer to submit post-hearing EX 13 and 15 – 25. Employer submitted EX 13, Claimant's deposition transcript post-hearing, which is hereby admitted. The Parties later requested the post-hearing record remain open an additional sixty days for the deposition of Dr. J. Martin Barrash, M.D. Employer submitted EX 14, the deposition transcript of Dr. Barrash post-hearing, which is hereby admitted.

³ The Parties did not address the issue of penalties in the transcript or their post-hearing briefs and, therefore, the issue is not addressed in the Court's Decision and Order Awarding Benefits.

SUMMARY

Claimant was injured while working for Employer in Afghanistan on October 16, 2006, when he lifted a box of laundry detergent and heard a pop in his back. Claimant was treated by the army medic and given Ibuprofen and heat packs for his pain between the date of the injury and December 1, 2006, when Claimant left Afghanistan for his scheduled R&R. Between December 27, 2006 and November 30, 2008, Claimant was treated by several physicians, all of whom have varying opinions on the nature and extent of Claimant's disability. Thus, the primary issue before the Court is the nature and extent of Claimant's disability.

CREDIBILITY FINDINGS

The Court has considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, the Court has taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See, e.g., Frady v. Tenn. Valley Auth., 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995) (citing Dobrowolsky v. Califano, 606 F.2d 403, 409-10 (3d Cir. 1979)); Ind. Metal Prods. v. Nat'l Labor Relations Bd., 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony but may choose to believe only certain portions of the testimony. See Altemose Constr. Co. v. Nat'l Labor Relations Bd., 514 F.2d 8, 15 n.5 (3d Cir. 1975).

The credibility findings are based upon a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The Court found all the witnesses to be credible.

FINDINGS OF FACT

Claimant was born on April 26, 1981. [EX 13, p. 7]. Claimant served in the Navy for three and a half years and then worked at a shipyard and a moving company before going to work for Employer in November of 2005 as a general laborer. [Tr. p. 13, 22, 29; EX 13, p. 10-11, 25-26]. Claimant arrived in Afghanistan on November 15, 2005, and was stationed at Camp Phoenix before being sent to Camp Lightening Gardez two months later. [Tr. p. 14; EX 13, p. 13]. Claimant worked twelve hours a day, seven days a week. [Tr. p. 14; EX 13, p. 13]. As a general laborer, his duties included cleaning restrooms, digging trenches for electrical cables, and shoveling snow. [Tr. p. 15].

On October 16, 2006, Claimant was injured while unloading a pallet of laundry detergent. Claimant testified that when he leaned down to grab a box of laundry detergent weighing about twenty pounds his back popped. [Tr. p. 15; EX 13, p. 13-14]. Claimant was seen by an Army medic and given Ibuprofen and heat packs. [Tr. p. 15-16; EX 13, p. 14]. Claimant was restricted from working for a week, but testified that when the pain did not subside, he would go back to the medic to get more Ibuprofen and heat packs. [EX 13, p. 15]. Claimant testified that he saw

the army medic two or three more times between the first week of his injury and when he left Afghanistan on or about December 1, 2006, for his scheduled "R&R." [EX 13, p. 16].

On December 27, 2006, Claimant saw Dr. James D. Golden, D.C., a chiropractor, with complaints of pain in the lower lumbar spine and the lumbosacral joint. [CX 1, p. 1; EX 8, p. 1; EX 13, p. 17]. Claimant testified that his lower back pain at this time was a very sharp, stabbing pain, that would pop and then he would feel pain radiating into his legs. [EX 13, p. 19]. Dr. Golden recommended an MRI to rule out HNP, noting that without it, a precise diagnosis could not be given, possibly resulting in ineffective treatment and prolonged pain and suffering. Dr. Golden's diagnosis was displacement of intervertebral disc, site unspecified, without myelopathy, and he restricted Claimant from lifting, prolonged bending, and stooping. [CX 1, p. 3; EX 8, p. 3]. Claimant testified that he saw Dr. Golden about three more times before finding a new physician. [EX 13, p. 18].

Following Dr. Golden, Claimant began seeing Dr. Fariborz Nazari, M.D., who ordered the MRI, which was performed on January 22, 2007. [CX 1, p. 11-12; EX 13, p. 19]. The MRI impression was:

1. Levoscoliosis with some straightening of the lumbar spine. Multi-level degenerative disc changes, bilateral inferior foraminal narrowing without spinal stenosis throughout the lumbar levels.
2. 2-3 mm broad disc protrusion with moderate bilateral inferior foraminal narrowing at L4-5 levels.
3. Approximately 3 mm broad central to left paracentral disc protrusion/subligamentous disc extrusion with few millimeter retrolisthesis, moderate loss of disc height, moderate left and mild to moderate right inferior foraminal narrowing at L5-S1 level. Additional findings at each disc level discussed above. [CX 1, p. 11-12].

On May 9, 2007, Claimant met with Dr. Golden, at the referral of Dr. Nazari, for an impairment rating and an assessment of maximum medical improvement. On that date, Claimant's complaint was episodic mild low back pain with activity and he denied radiation into the lower extremities. Dr. Golden noted that at the time of the examination, Claimant had no low back pain. Dr. Golden's diagnosis was lumbar intervertebral disc displacement and lumbar strain and sprain. He further opined that Claimant had reached maximum medical improvement as of this date and had a permanent impairment rating of five percent. [CX 1, p. 26-30; EX 8, p. 6-10].

On June 13, 2007, Dr. Nazari completed a form sent by Employer in which he cleared Claimant to work without restrictions. [CX 1, p. 31; EX 9, p. 1].

On August 29, 2007, Claimant was seen by Dr. Stephanie M. Schwartz, M.D., who diagnosed Claimant with "chronic lumbar sprain and occasional severe exacerbation with lumbar spasms" and sacroiliac inflammation. [CX 1, p. 32]. Claimant returned to Dr. Schwartz on September 10, 2007 for lumbar radiculopathy. Dr. Schwartz opined that Claimant needed an MRI of the lumbar spine for further evaluation and treatment. [CX 1, p. 33].

In late September of 2007, Dr. Nazari cleared Claimant to return to work, but with the following restrictions: no kneeling/squatting, bending/stooping, or pushing/pulling, and standing and sitting where limited to four hours per day. He also restricted Claimant from lifting/carrying objects more than ten pounds. [CX 1, p. 35-36].

Claimant testified that he took a job as a scaffolding helper in October of 2007. [Tr. p. 23; EX 13, p. 26-27]. Claimant stated that he worked that job for three and a half weeks, but had to quit because his back went out on him again. Claimant testified that he was paid \$11.00 per hour and worked forty five to fifty hours per week. [Tr. p. 23; EX 13, p. 27].

On October 13, 2007, Claimant had an MRI of the lumbar spine. The impression was degenerative disc disease at L5-S1, mild bulging disc at L5-S1, mild spondylosis, and findings suggesting muscle spasm/strain. [CX 1, p. 37].

By letter dated November 1, 2007, Dr. Nazari noted Claimant's injury was a lumbar strain and opined that he was not yet at maximum medical improvement due to the amount of pain he was in. He further found that it would be beneficial for Claimant to get approved for ESI injections and to follow up with a pain management physician. [CX 1, p. 39]. Claimant testified that he did not like his treatment with Dr. Nazari and that after his nurse case manager came to an appointment with him, she helped get him an appointment with Dr. Ahmed A. Khalifa, M.D., an assistant professor at UT Medical School. [Tr. p. 19; EX 13, p. 21-22].

Claimant testified that he took a job as a pizza delivery driver in January of 2008. [Tr. p. 23-24; EX 13, p. 27]. Claimant stated his pay was probably around \$10.00 per hour, including tips, for a thirty to thirty five hour work week, and that he worked in this position for about six months. [Tr. p. 24].

On February 7, 2008, Dr. Khalifa diagnosed Claimant with (1) bulging L5-S1 per the MRI and (2) sacroiliac joint dysfunction/injury secondary to number one. [CX 1, p. 42-44]. Dr. Khalifa opined that Claimant was legitimately in pain and under significant stress and further found that Claimant was clearly not at maximum medical improvement, opining that there was treatment to make a difference in his symptoms and function. Dr. Khalifa opined that Claimant needed sacroiliac joint blocks to control the inflammation and pain and needed a work hardening program to address psychological and vocational issues. Dr. Khalifa discouraged Claimant from delivering pizzas and informed him that he could not release him to work at that time, but Claimant testified that he had no money so he continued with his light duty pizza delivery position. [CX 1, p. 44; EX 13, p. 27]. Claimant testified that he has seen Dr. Khalifa about four times. [EX 13, p. 6, 22].

By letter dated April 1, 2008, Dr. J. Martin Barrash, M.D., informed Counsel for Employer/Carrier that he thought Claimant had a symptomatic SI joint on the left side and noted that it was quite tender on palpation. He recommended an SI joint injection to try and relieve Claimant's discomfort. [CX 1, p. 45-46; EX 10, p. 1-2; EX 14, p. 6]. Dr. Barrash testified that when he examined Claimant, he was "exquisitely tender at the SI joint on the left side." Dr. Barrash did not think Claimant had significant back problems and testified that Claimant's prior

treatments had been ineffective because there had not been any SI joint treatment. [EX 14, p. 8-9].

After reviewing and studying Claimant's January 22, 2007 MRI, Dr. Barrash informed Counsel for Employer/Carrier by letter dated April 14, 2008, that it showed minimal annular bulging of no significance and again though Claimant's problem was in his SI joint. [CX 1, p. 47; EX 10, p. 3; EX 14, p. 9]. Dr. Barrash testified that this review led him to conclude that the SI joint was the culprit of Claimant's pain, not his back. [EX 14, p. 10].

After having a bilateral SI joint injection, Claimant returned to Dr. Barrash on May 21, 2008. [CX 1, p. 48; EX 10, p. 4; EX 14, p. 10-11]. By letter dated this same date, Dr. Barrash informed Counsel for Employer/Carrier of his findings following that visit. Dr. Barrash noted that Claimant had complete relief for several hours following the injection but that the pain became severe for about twenty four hours. However, as the steroids dissipated into the joint, Claimant "gradually and progressively felt better to the point whereupon at this time, he occasionally feels a catch and a little tension but there is no pain." [CX 1, p. 48; EX 10, p. 4; EX 14, p. 11]. Dr. Barrash testified that the severe pain Claimant felt for about twenty four hours was from the injection itself. [EX 14, p. 32-33]. During the examination, Dr. Barrash noted and testified that he almost pushed Claimant over because he was pushing so hard on Claimant's SI joints with no pain or discomfort felt by Claimant. Dr. Barrash discharged Claimant and stated that he was to return only if he had recurrence of his pain. [CX 1, p. 48; EX 10, p. 4; EX 14, p. 11]. Dr. Barrash testified that since Claimant had a good result from the procedure, he did not expect him back. [EX 14, p. 12].

Claimant returned to Dr. Barrash on June 25, 2008, and Dr. Barrash informed Counsel for Employer/Carrier of the findings from that visit by letter that same date. Dr. Barrash noted that on examination, there was no tenderness of the SI joint and that Claimant only had periodic pain, but not as severe as before. He noted that Claimant stated he occasionally had some muscle spasm and popping but it was becoming less. Dr. Barrash discharged Claimant from his care and opined that he could return to normal activities without any restrictions, i.e., full work duty, and that Claimant had reached maximum medical improvement at this point in time. [CX 1, p. 49; EX 10, p. 5; EX 14, p. 13-14].

Dr. Barrash testified that Claimant returned to his office on July 22, 2008, after having an acute muscle spasm or pain in his back causing him to fall down some steps. [EX 14, p. 14-15]. The fall caused Claimant to again be tender in the right SI joint and Dr. Barrash testified that when Claimant fell, he probably irritated the joint again. [EX 14, p. 15]. Dr. Barrash testified that he recommended another SI joint injection on the right side, but he was not sure whether Claimant received it. [EX 14, p. 16]. At Claimant's deposition, he testified that Dr. Barrash gave him a request to receive bilateral injections in each SI joint. [EX 13, p. 5-6].

Following his pizza delivery job, Claimant began working for Cryogenic Vessel Alternatives (CVA) on August 4, 2008, as a welder making \$11.00 per hour and working about fifty hours per week. [Tr. p. 24-25; EX 13, p. 28-29]. Claimant testified that physically, he is doing ok with this line of work, and is watching how he does things there. He stated that he is able to avoid heavy lifting for the most part and that the equipment is on wheels so he can wheel

it around and he does not have to climb ladders or stairs, or carry equipment over his shoulder. [Tr. p. 25; EX 13, p. 29]. On cross, Claimant testified that he can continue to do this job as long as he is getting the right type of treatment from any physician, but also stated that he is able to work for CVA without any problems. [Tr. p. 27-28].

Concerning the injections, Claimant testified that the first time he had the injections, from Dr. Khalifa, they were not successful, but the second time he had them they seemed to help out. [Tr. p. 21; EX 13, p. 5-6]. At the time of the deposition, on August 8, 2008, Claimant had not yet had the third injection. [EX 13, p. 5-6]. At the formal hearing, Claimant testified that the injection from Dr. Barrash helped for about the first thirty days afterwards, but the relief provided very gradually faded away. [Tr. p. 21]. On cross-examination, Claimant testified that the injections have alleviated his pain and have helped him to be able to work. [Tr. p. 28]. Claimant testified that he wanted to continue receiving the injections as long as they help. [EX 13, p. 24-25].

Dr. Barrash testified that between July and November of 2008, Claimant made several appointments where he either did not show up or called ten minutes prior or twenty minutes after the appointment time to cancel. [EX 14, p. 16-17]. By letter dated November 30, 2008, Dr. Barrash wrote Counsel for Employer/Carrier and informed him that Claimant had missed three appointments with his office. Dr. Barrash testified that he had fired Claimant as a patient, giving him thirty days to find suitable medical care. [EX 14, p. 17, Exhibit No. 7].

Prior to the thirty days expiring, Dr. Barrash saw Claimant one final time on November 30, 2008. [EX 14, p. 18, Exhibit No. 7]. Prior to this date, on November 26, 2008, Dr. Barrash signed a slip placing Claimant off work until he could get an SI joint injection. [EX 14, p. 17, Exhibit No. 6]. On the date of the appointment, Claimant complained of worsening pain over the previous two weeks and Dr. Barrash noted Claimant was having to use a cane. Claimant also informed Dr. Barrash that the last injection he had in September did not help. [EX 14, p. 19-21, Exhibit No. 7]. However, it was not known what injection Claimant was referring to as the last SI injection Dr. Barrash ordered was in May of 2008. [EX 14, p. 19-20]. After an examination, Dr. Barrash noted Claimant was “exquisitely tender on the right SI joint and has no tenderness of any significance on the left.” Dr. Barrash opined that the SI joint problem had come back, and another SI joint injection was arranged, which Dr. Barrash hoped would hold Claimant over until he could be seen by Dr. Schwartz. [EX 14, p. 19-21, Exhibit No. 7]. At Dr. Barrash’s deposition, taken January 14, 2009, he testified that he did not know whether or not Claimant had received the third injection. [EX 14, p. 39].

Dr. Barrash testified that Claimant’s SI joint dysfunction is not a permanent condition, and that the vast majority improve and go away with the first injection, but occasionally a second injection has to be done, and rarely, but sometimes, a third injection is needed. [EX 14, p. 22]. He further noted that it is not a surgical condition and that virtually all get well with the injections. [EX 14, p. 22-23, 27-28]. Dr. Barrash testified that when he saw Claimant in November, he did not think he was at maximum medical improvement since he was in need of another injection. [EX 14, p. 37].

Dr. Barrash testified that if Claimant follows through with his treatment/recommendations, he should be able to return to full, functional duty, within two weeks after the injection, and that other than the SI joint injection, no other treatment would cure his condition, although ultrasounds or therapy may make him feel better. [EX 14, p. 23, 25-26]. He further testified that he does not foresee these injections continuing into the future for several years and opined that it was his medical opinion that the SI joint injections were the way to treat Claimant at this point. [EX 14, p. 35-36, 40].

DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that 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 (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

Nature and Extent of Disability

The Parties stipulated, the record establishes, and I find that Claimant suffered an injury on October 16, 2006, in the course and scope of his employment with Employer, while working overseas. Therefore, I find that Claimant has sustained a compensable injury under the Act.

Although the Parties stipulated that Claimant suffers from a compensable injury, the burden of proving the nature and extent of the disability rests with Claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1985). Under the Act, the term “disability” means “incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment” 33 U.S.C. § 902(10). Thus, a claimant must have an economic loss coupled with a physical or psychological impairment in order to receive an award for disability. Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 110 (1991).

The Act distinguishes disabilities with respect to their nature (permanent or temporary) and their extent (partial or total). Pool Co. v. Cooper, 274 F.3d 173, 175 n.2 (5th Cir. 2001). The date of maximum medical improvement (MMI) is the traditional method of determining whether a disability is permanent or temporary and it is primarily a medical determination. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56 (1985); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989); Manson v. Bender Welding & Mach Co., 16 BRBS 307, 309 (1984). A claimant is considered temporarily disabled until he attains MMI. Cooper, 274 F.3d at 175 n.2.

Various physicians have opined on whether or not Claimant has reached MMI: On May 9, 2007, Dr. Golden opined that Claimant had reached MMI. [CX 1, p. 26-30; EX 8, p. 6-10]. On June 13, 2007, Dr. Nazari cleared Claimant to work without restrictions. [CX 1, p. 31; EX 9, p. 1]. However, on November 1, 2007, Dr. Nazari opined that Claimant had not yet reached MMI due to the amount of pain he was in and thought it would be beneficial for Claimant to receive ESI injections. [CX 1, p. 39]. On February 7, 2008, Dr. Khalifa opined that Claimant was not at MMI and found he needed sacroiliac joint blocks to control inflammation and pain and a work hardening program to address psychological and vocational issues. [CX 1, p. 44; EX 13, p. 27]. On June 25, 2008, Dr. Barrash opined that Claimant had reached MMI and could return to normal activities without any restrictions. [CX 1, p. 49; EX 10, p. 5; EX 14, p. 13-14]. However, Dr. Barrash testified post-hearing, on January 14, 2009, that when he saw Claimant in November of 2008 he did not think Claimant was at MMI since he was in need of another injection. [EX 14, p. 37]. Claimant testified at the hearing that his pain was episodic, mild to severe in either his left or right side, around the SI joints. [Tr. p. 16-17].

I find that the evidence does not support a finding that Claimant has reached MMI. I accord little weight to Dr. Nazari's original release of Claimant to return to work on June 13, 2007 because he later rescinded this release and set constraints on Claimant's return. Dr. Barrash's evaluation of Claimant in November of 2008 is the most current medical opinion and, therefore, the most relevant to Claimant's current condition. I accord it more weight than the opinions of Dr. Golden and Dr. Khalifa, both of whom have not seen Claimant since his second SI joint injection ordered by Dr. Barrash. Dr. Barrash's testimony and Claimant's testimony of continued pain support the Court's finding that Claimant's injury has not reached MMI and, therefore, that Claimant's disability remains temporary in nature.

The extent of a claimant's disability, however, is primarily an economic concept and the availability of suitable alternative employment is used to distinguish partial from total disability. Cooper, 274 F.3d at 175 n.2. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 342-43 (1988). A claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The Court must consider Claimant's medical restrictions in comparison to the requirements of his usual job. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). A physician's opinion that a claimant's return to his usual work would aggravate his condition is sufficient to support a finding of total disability. Care v. Wash. Metro. Area Transit Auth., 21 BRBS 248 (1988); Boone v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 1 (1988); Lobue v. Army & Air Force Exch. Serv., 15 BRBS 407 (1983). Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipbuilding Co., 22 BRBS 332, 334 (1989).

On June 25, 2008, Dr. Barrash discharged Claimant from his care and opined that he could return to full duty work with no restrictions. [CX 1, p. 49; EX 10, p. 5; EX 14, p. 13-14]. On November 30, 2008, Dr. Barrash opined that Claimant's SI joint problem had returned and ordered another SI joint injection. [EX 14, p. 19-21, Exhibit No. 7]. Dr. Barrash testified that if Claimant follows through with his treatment/recommendations, he should be able to return to full, functional duty, within two weeks after the injection, and that other than the SI joint injection, no other treatment would cure his condition. [EX 14, p. 23, 25-26]. Thus, according to Dr. Barrash's most current medical opinion, the Court finds that Claimant cannot return to his usual employment until he receives an SI joint injection. Therefore, as Claimant cannot return to his regular or usual employment due to his work-related injury, I find that Claimant has established a prima facie case of total disability.

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332, 334 (1989). To meet this burden, an employer must establish the existence of realistically available job opportunities within the geographical area in which the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. Turner, 661 F.2d at 1042-43; Edwards v. Director, OWCP, 999 F.2d 1374, 1375 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994).

Employer has failed to present any evidence or argument to establish the availability of suitable alternative employment other than the jobs Claimant has actually worked. Concerning the periods of time that Claimant is entitled to temporary partial disability benefits, Employer argues Claimant voluntarily underemployed himself starting June 13, 2007, when he was given a full duty work release from Dr. Nazari and, therefore, ask the Court to calculate periods of temporary partial disability benefits using Claimant's current wage-earning capacity from his work with CVA. [Employer/Carrier's Brief, p. 13-14]. The post-injury wage-earning capacity of a partially disabled claimant is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 908(h). If they do not, or if he has no actual earnings, the administrative law judge may fix a reasonable wage-earning capacity based on factors such as the degree of physical impairment, his usual employment, and the possible natural future effect of the disability. Devillier v. Nat'l Steel and Shipbuilding Co., 10 BRBS 469 (1979). The party that contends the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. Burch v. Superior Oil Co., 15 BRBS 423 (1983). I do not find that Employer has met its burden here. As previously discussed, Dr. Nazari subsequently placed restrictions on Claimant's work release and, even more recently, Dr. Barrash testified that Claimant could return to his usual employment once he receives a third SI joint injection. Furthermore, no evidence has been presented to the Court showing there were other jobs available for which Claimant was qualified at CVA or elsewhere. Thus, I do not agree with Employer that Claimant voluntarily underemployed himself thereby producing actual earnings not reflective of his wage-earning capacity.

In sum, from December 14, 2006 until September 30, 2007, Claimant is entitled to temporary total disability benefits based on Claimant's average weekly wage of \$1,150.45, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b). From October 1, 2007 until October 28, 2007, during which time Claimant worked as a scaffolding helper, Claimant is entitled to temporary partial disability benefits based on two-thirds of the difference between Claimant's average weekly wage of \$1,150.45 and his reduced weekly earning capacity of \$499.12,⁴ in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e). From October 29, 2007, when Claimant could no longer perform the scaffolding job, until January 20, 2008, a period of unemployment, Claimant is entitled to temporary total disability benefits based on Claimant's average weekly wage of \$1,150.50, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

From January 21, 2008 until August 3, 2008, during which time Claimant worked as a pizza delivery driver, Claimant is entitled to temporary partial disability benefits based on two-thirds of the difference between Claimant's average weekly wage of \$1,150.45 and his reduced weekly earning capacity of \$300.00,⁵ in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

From August 4, 2008 to the present and continuing, Claimant is entitled to temporary partial disability benefits based on two-thirds of the difference between Claimant's average weekly wage of \$1,150.45 and his reduced weekly earning capacity of 550.00,⁶ in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for determining an injured employee's average annual earnings, which are then divided by 52 pursuant to Section 10(d) to arrive at an average weekly wage (AWW). 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing an employee's earning power at the time of the injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137, 139 (1990).

Section 10(a) applies if the injured employee "worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury" 33 U.S.C. § 910(a). "Substantially the whole of the year" refers to the nature of the employee's employment. Mulcare v. E.C. Ernst, Inc., 18 BRBS 158, 160 (1986). The amount of compensation due under Section 10(a) is determined by using the employee's actual daily wage. Empire United Stevedores v. Gatlin, 936 F.2d 819, 821 (5th Cir.

⁴ Claimant earned \$1,996.50 between October 1, 2007 and October 28, 2007 (28 days or 4 weeks). [CX 11, p. 2]. Dividing \$1,996.50 by 4 weeks equals \$499.12 per week.

⁵ Claimant earned \$6,299.37 between January 21, 2008 and August 3, 2008 (196 days or 28 weeks). [CX 21, p. 1-14]. Dividing \$6,299.37 by 28 weeks equals \$224.97 per week. However, this amount does not include the tips Claimant earned while working at this position. Claimant testified that his pay was about \$10.00 per hour, including tips, for a thirty to thirty five hour work week. [Tr. p. 24]. Thus, \$10.00 per hour multiplied by thirty hours per week equals \$300.00 per week.

⁶ Claimant testified that he began working as a welder for CVA on August 4, 2008, earning \$11.00 per hour and working around fifty hours a week, which equals \$550.00 per week. [Tr. p. 24-25; EX 13, p. 28-29].

1991). Thus, there must be evidence the administrative law judge can use to determine the average daily wage the injured employee earned during the preceding twelve months. Proffitt v. Serv. Employers Int'l, Inc., 40 BRBS 41, 43 (2006).

Where Section 10(a) is inapplicable, Section 10(b) applies if the injured employee has not worked in such employment during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(b). In such a case, the injured employee's AWW "is based on the employment history of a typical worker in similar employment and in the same locality." Hall v. Consol. Employment Sys., Inc., 139 F.3d 1025, 1030 (5th Cir. 1998). Accordingly, the record must contain evidence of a substitute employee's wages. See Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 104 (1991).

As Claimant testified to working twelve hours a day, seven days a week, Section 10(a) and Section 10(b) are not applicable. When Section 10(a) or Section 10(b) cannot "reasonably and fairly be applied," Section 10(c) will govern. 33 U.S.C. § 910(c). Section 10(c) is typically applied in situations where the injured employee's "work is 'inherently discontinuous or intermittent, . . . and when 'otherwise harsh results' would follow were an employee's wages invariably calculated simply by looking at the previous year's earnings.'" Hall v. Consol. Employment Sys., Inc., 139 F.3d 1025, 1030 (5th Cir. 1998) (quoting Empire United Stevedores v. Gatlin, 936 F.2d 819, 822 (5th Cir. 1991)). The administrative law judge has broad discretion in determining AWW under Section 10(c). Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 105 (1991). The objective is to reach a fair and reasonable approximation of the injured employee's earning capacity at the time of injury. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986). Earning capacity is "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." Mijangos, 19 BRBS at 20 (quoting Jackson v. Potomac Temporaries, Inc., 12 BRBS 410 (1980)).

Claimant began working for Employer on November 13, 2005, under a one year contract, and was injured on October 16, 2006. [Tr. p. 15; EX 5, p. 1, 13; EX 13, p. 13-14]. Claimant urges the Court to calculate his AWW by using his earnings between January 1, 2006 and October 16, 2006, which produces an AWW of \$1,225.60.⁷ Employer/Carrier urge the Court to calculate Claimant's AWW by using his earnings between November 13, 2005 and October 16, 2006, and divide this amount by 52 weeks, producing an AWW of \$1,061.95.⁸ Although I agree with Employer/Carrier that Claimant's AWW must be calculated by using his earnings between November 13, 2005 and October 16, 2006, I do not agree that these earnings should be divided by 52 weeks.

The Board has recently held that under certain fact situations, a claimant's AWW must be based solely on his overseas earnings in order to reflect his earning capacity in the employment in which he was injured. K.S. v. Serv. Employees Int'l, Inc., BRB No. 08-0583 (March 13, 2009); see also Proffitt v. Serv. Employers Int'l, Inc., 40 BRBS 41 (2006). Similar to the claimant's in K.S. and Proffitt, Claimant was injured prior to the expiration of his one year

⁷ Between January 1, 2006 and October 16, 2006 (289 days or 41.29 weeks), Claimant earned \$50,605.20. [EX 2, p. 1; Claimant's Brief, p. 13]. Dividing this amount by 41.29 weeks equals an AWW of \$1,225.60.

⁸ Between November 13, 2005 and October 16, 2006 (336 days or 48 weeks), Claimant earned \$55,221.62. [EX 2, p. 1; Employer's Brief, p. 19]. Dividing this amount by 52 weeks equals an AWW of \$1,061.95

contract with Employer, and there was no evidence presented to the Court that Claimant did not intend to fulfill his one year contractual obligation. In addition, Claimant earned higher wages overseas because he was working in a dangerous environment. Claimant's earning capacity should therefore be based upon the full amount of the earnings lost due to the injury. Like the Board found in K.S., if the Court followed the Employer/Carrier's AWW computation, Claimant would be compensated for his injury at a lesser rate than the wage paid by the job in which he was injured, which would distort his earning capacity by reducing it to a lower level than Employer agreed to pay Claimant to work under the conditions in Afghanistan. Id. at 7. Therefore, I find that the calculation of Claimant's AWW must be based solely on his earnings in the 48 weeks he worked in Afghanistan prior to his injury. Dividing the \$55,221.62 Claimant earned between November 13, 2005 and October 16, 2006, by 48 weeks equals an AWW of \$1,150.45.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, I issue the following compensation order. The specific dollar computations for the compensation award shall be administratively performed by the District Director.

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from December 14, 2006 until September 30, 2007, based on an AWW of \$1,150.45, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).
2. Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from October 1, 2007 until October 28, 2007, based on two-thirds of the difference between Claimant's AWW of \$1,150.45 and his reduced weekly earning capacity of \$499.12, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).
3. Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from October 29, 2007 until January 20, 2008, based on an AWW of \$1,150.45, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).
4. Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from January 21, 2008 until August 3, 2008, based on two-thirds of the difference between Claimant's AWW of \$1,150.45 and his reduced weekly earning capacity of \$300.00, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).
5. Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from August 4, 2008, to the present and continuing based on two-thirds of the difference between Claimant's AWW of \$1,150.45 and his reduced weekly

earning capacity of \$550.00, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.
7. Following the credit offset, Employer/Carrier shall pay interest on any sums determined due and owing at the rate provided by 28 U.S.C. § 1961.
8. Counsel for Claimant, within twenty days of receipt of this Order, shall submit a fully supported fee application, a copy of which must be sent to all opposing counsel, who shall then have ten days to respond with objections thereto.

So ORDERED.

A

**LARRY W. PRICE
ADMINISTRATIVE LAW JUDGE**