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**Issue Date: 18 February 2009**

CASE NOS.: 2008-LDA-65, 2008-LDA-66, 2008-LDA-67 and 2008-LDA-68

OWCP NOS.: 02-144877, 02-144782, 02-147119 and 02-147210

In the Matter of:

J.W.,  
Claimant,

v.

IAP WORLDWIDE SERVICES,  
Employer,

and

INSURANCE CO. OF THE STATE OF PENN./  
AIG Worldsource, and ACE AMERICAN INSURANCE CO.,  
Carriers.

Appearances:

Gary B. Pitts, Esq.  
For the Claimant

Michael W. Thomas, Esq.  
For the Employer and Insurance Co. of  
the State of PA/AIG Worldsource,

Keith L. Flicker, Esq.  
For the Employer and ACE American Ins. Co.,

Before: Stephen L. Purcell  
Associate Chief Judge

**DECISION AND ORDER — AWARDING BENEFITS**

This proceeding arises from a claim under the Defense Base Act (“DBA”), 42 U.S.C. § 1651 *et seq.*, an extension of the Longshore and Harbor Workers’ Compensation Act (“Act” or “LHWCA”), 33 U.S.C. § 901 *et seq.* J.W. (“Claimant”) is seeking compensation and medical

benefits from IAP Worldwide Services (“Employer”), Insurance Company of the State of Pennsylvania/AIG Worldsource (“AIG”) and ACE American Insurance Company (“ACE”) (or collectively “Carriers”) for alleged work-related injuries suffered on May 11, 2005, May 31, 2005, June 18, 2005 and August 23, 2005.

A formal hearing was held in this case on March 14, 2008 in New Orleans, Louisiana at which all parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. At the hearing, Claimant offered Exhibits 1 through 24,<sup>1</sup> which were admitted into evidence. AIG offered Exhibits 1 through 5 and ACE offered Exhibits 1 through 3, which were also admitted into evidence at the hearing. Additionally, Administrative Law Judge Exhibits 1 through 4 were admitted into evidence without objection.<sup>2</sup> The parties subsequently filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

## I. STIPULATIONS

The parties have stipulated and I find:

1. The parties are subject to the Act.
2. Claimant and Employer were in an employee-employer relationship at the time of the alleged injuries on May 11, 2005, May 31, 2005, June 18, 2005 and August 23, 2005.
3. Any injury that occurred on those dates arose out of Claimant’s employment with IAP.
4. Insurance coverage under the DBA for IAP changed on June 22, 2005 from ACE to AIG.
5. Employer was timely notified of Claimant’s alleged injuries.
6. Claimant filed timely claims.
7. Employer filed timely first reports of injury and Notices of Controversion with respect to each alleged injury.
8. Temporary total disability compensation benefits have been voluntarily paid to Claimant by AIG from August 29, 2005 to present at the weekly rate of \$910.25 pursuant to a stipulation between the Carriers.

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<sup>1</sup> The following abbreviations will be used as citations to the record: “CX” for Claimant’s Exhibit, “AIGX” for Employer/AIG Exhibits, “ACEX” for Employer ACE Exhibits, “JX” for Joint Exhibits, “ALJX” for Administrative Law Judge Exhibits, “Tr.” for Transcript, “Cl. Br.” for Claimant’s Post-Hearing Brief, and “AIG. Br.” for AIG’s Post-Hearing Brief, and “ACE. Br.” for ACE’s Post-Hearing Brief.

<sup>2</sup> At the conclusion of the hearing, I granted the joint motion of ACE and AIG to conduct further discovery and supplement the record. I also directed the parties to file post-hearing briefs regarding the issue of whether a claim for posttraumatic stress disorder (“PTSD”) raised by Claimant’s counsel should be excluded on the joint motion of ACE and AIG. Carriers’ motion to exclude the PTSD claim was granted by me in an order dated June 3, 2008. Post-hearing discovery was concluded by the Carriers, and the following exhibits were submitted by ACE and AIG: AIGX 6-32; ACEX 4. Those exhibits are admitted without objection.

9. If AIG is ultimately determined to be the responsible carrier, ACE will have no liability.
10. If ACE is ultimately determined to be the responsible carrier, AIG will be reimbursed for benefits paid to Claimant by ACE.
11. Claimant reached MMI on February 1, 2007.

Tr. 6-11, 26-27.

## **II. ISSUES**

The following unresolved issues were presented by the parties:

1. The nature and extent of Claimant's alleged disability.
2. The applicable average weekly wage.
3. Whether AIG or ACE is the responsible carrier.
4. Whether Employer is entitled to Section 8(f) relief.

ALJX-2, ALJX-3, ALJX-4; Tr. 12.

## **III. STATEMENT OF THE CASE**

### **Testimonial and Non-Medical Evidence**

#### *Claimant's Hearing Testimony*

Claimant resides in the Northern Territories in Australia, was 59 years old at the time of the hearing, and completed seven and one-half years of formal education. Tr. 30-31. He has worked in a variety of occupations including fiberglass worker, baker's apprentice, pastry cook, septic system installer, brick worker, driller and shot firer in underground mines, concrete worker and trench digger. Tr. 31-32. For eleven years before going overseas, he owned his own trenching business. Tr. 32.

In 1978, Claimant was involved in an automobile accident during which he was thrown through the windshield of a vehicle and suffered a fracture of his neck at C1 and C3. Tr. 32-33. He was unable to work for nine months as a result of the accident. Tr. 33.

In 1987, Claimant was involved in another automobile accident when he struck a buffalo crossing the road. Tr. 33. He was out of work as a result of that accident for over two and a half years, and spent three or four months at the Darwin Rehabilitation Center. *Ibid.* Thereafter, he worked for approximately two years as a technician looking after kidney machines. Tr. 34. He went from there to doing concrete work. *Ibid.* He subsequently joined the Army Reserves for two years as an engineer. *Ibid.*

From 1991 until 2004 when he went to Iraq, Claimant was working full time without physical restrictions. Tr. 34. He took and passed a pre-employment physical examination for IAP before going to Iraq. Tr. 35. Claimant is married, has two children, and four grandchildren, one of whom lives with him “on and off.” Tr. 36.

Claimant arrived in Iraq around December 16, 2004 and left there January 22, 2005 to return home for a couple of months after his wife was diagnosed with breast cancer. Tr. 36-37. He returned to Iraq on March 16, 2005 and remained there until August 29, 2005. Tr. 37. He worked for IAP as a truck driver in Iraq driving eighteen wheel Mercedes Benz semi trailers. *Ibid.* The trucks he drove were carrying, among other things, timber, food, and vehicles from Kuwait City to American and Australian base camps in and around Baghdad. Tr. 38-39. He was unarmed and wore a helmet and chest plate for protection while driving, but the vehicles themselves did not have any armor. Tr. 39.

On May 11, 2005, Claimant’s convoy was late leaving Kuwait City because of a sandstorm. Tr. 40. They drove through areas of blowing sand with very poor visibility, and he eventually ran into the rear end of a truck stopped in front of him while doing about 80 kilometers per hour. Tr. 40-41. Claimant hit the windshield of his truck with his jaw, neck and left shoulder and “sort of blanked out for a minute.” Tr. 42. He also struck his legs on the steering wheel, and they “went black for about a week and a half, two weeks.” *Ibid.* He was seen by a doctor at the next camp who told him he was “alright” and they “just carried on.” *Ibid.* When they stopped at Mosul, a woman named Ms. Parker asked him if he wanted to see a doctor, and he said “No, I’m feeling quite good [but] I’m sore, very sore.” *Ibid.* He continued working but his arms were sore during the next two trips and he went to the doctors at one of the camps. Tr. 43. The doctor told him he “had very bad torn shoulder muscles.” *Ibid.*

On May 31, 2005, Claimant had another accident. Tr. 43. A vehicle ran into the back of a truck two vehicles behind the one being driven by Claimant and caused a “chain reaction” collision. *Ibid.* The truck behind Claimant’s was pushed into his vehicle giving him a “slight jolt backwards.” Tr. 44. Claimant testified “it didn’t really hurt me that much . . . [j]ust made me sore again that was all.” *Ibid.*

On June 18, 2005, Claimant was driving out of Kuwait when the load on another truck shifted. Tr. 44-45. After the convoy pulled to the side of the road, Claimant was helping the driver of the other truck strap the load down when he felt like he had pulled his arm muscle again. Tr. 45. He reported the incident to his “C.O.” and continued working but thereafter used his right arm most of the time, which he had been doing since the first accident. *Ibid.*

On August 23, 2005, Claimant picked up a four-wheel drive forklift in the industrial area of Kuwait City for delivery to the airport. Tr. 45. He was helping to tie it down to the truck bed, pushing down on a pipe to cinch up the chain around the forklift, when he “felt like [he] cut through a 440-volt electric cable.” Tr. 46. He felt a sharp pain from his neck down his left arm and fell off the truck. Tr. 46-47. He went to see the doctors at the airbase on August 24<sup>th</sup> because he could not get in on the 23<sup>rd</sup>. Tr. 47. Claimant testified that he was pretty sure he also went to the doctors on August 27<sup>th</sup>, “seeing three different doctors to start with, and then went back and seen another one.” *Ibid.*

Claimant kept a journal while he was in Iraq. Tr. 47-48; CX 14. He kept it to show he had been there and to pass down to his grandchildren. Tr. 48. He made all the entries in the journal himself, and the journal contains notations regarding the four accidents in which he was involved and his efforts to get medical care for his shoulder and arm. Tr. 48-49. He got referral notices from the Army doctors to take home with him so he could see his local doctors. Tr. 49.

When Claimant returned to Australia, he saw his family physician, Dr. Forrest, who referred him to Dr. Vrodos, a neurosurgeon. *Ibid.* He got a foraminal injection in January 2006 which did not help. Tr. 50. He underwent cervical spine surgery on February 16, 2006 at Memorial Hospital in Adelaide which was performed by Dr. Vrodos. *Ibid.* Claimant has continued to experience continuous pain since then. *Ibid.* He still gets shooting pains in his left side, which he describes as “electric shocks” that wake him up at night. Tr. 50-51. He is taking a variety of medications for his condition. Tr. 51-52. His pain impairs his concentration, sleep and ability to do chores around the house. Tr. 52-53.

Claimant lives in a rural area outside of Darwin. Tr. 75. Since coming home, he has sold the truck and equipment he used in his DitchWitch business, and he has mortgaged his house three times. *Ibid.* He has not worked since the doctor “took [him] off work” on August 25, 2005 when he was in Iraq. *Ibid.* He does not believe he could hold a job because of his physical problems and inability to concentrate. Tr. 76.

On cross-examination, Claimant reiterated that he was slammed into the windshield of his vehicle during the May 11, 2005 accident. Tr. 76. He injured his neck, shoulder, sternum and legs in that accident. Tr. 77. His neck and shoulder problems have been constant since then. Tr. 77. Anytime he pushes or pulls anything “the wrong way” with his left arm, he experiences increased pain in his arm. *Ibid.* Claimant further testified that he did not really injure his neck in the subsequent accident on May 31, 2005. *Ibid.* It just made him “sore” from what may have been “a little whiplash.” *Ibid.* By June 18, 2005, he was “getting slight tingles [in his left arm . . .], but the electric shock started coming harder and harder.” Tr. 77-78. He fell almost a meter to the pavement on August 23, 2005, but he did not injure himself because of the fall. Tr. 78. After the May 11, 2005 accident, he first went to the doctor on June 23, 2005 when his condition continued to deteriorate. *Ibid.* The pain he was experiencing got “a little more severe” every day after May 11<sup>th</sup>. Tr. 79. The doctor prescribed massages which provided temporary relief. *Ibid.* His condition has continued to worsen since he returned to Australia. *Ibid.*

It was after Claimant’s return from Iraq that he “started getting the really bad tingling in [his] left arm,” despite the fact that he has not engaging in any pushing, pulling, or similar activities with his left arm. Tr. 80. He believes it was the May 11<sup>th</sup> accident which caused his left arm and neck problems and rendered him unable to work. Tr. 80-81.

Claimant’s contract of employment with IAP ended on August 28, 2005, but his last day of work was August 23, 2005. Tr. 81. After he returned from Iraq, he had intended to resume his work activities with his own business, Two J’s Trenching. *Ibid.* He earned \$47,645.16 with IAP from December 15, 2004 to September 5, 2005. Tr. 81-82. The Australian tax forms

Claimant filed for 2000 through 2005 reflect a loss each year for Two J's Trenching. Tr. 85-86; CX 17.

Claimant's work in Iraq as a truck driver was heavy work. Tr. 95. He was partly responsible for loading the truck and would have to crawl underneath vehicles loaded onto his truck and chain them down. Tr. 95-96. He also drove trucks loaded with containers. Tr. 96. The loose cargo the trucks carried was typically not loaded correctly in the yards, and the drivers had to shift and retie the loads when they came loose. *Ibid.* The trucks he drove had sleeper cabs and forty-foot trailers attached to them. Tr. 97. It is approximately six feet between the back of the cab and the windshield. *Ibid.* Driving the trucks was "[m]entally . . . very hard, and physically you're forever changing gears." Tr. 98. The convoys of trucks in which he drove ranged from 16 to 36 trucks and travelled close together at high speeds. Tr. 99. He would be physically exhausted at the end of a run. Tr. 100.

Claimant testified that he was in very good health and did not have any problems with his neck or left shoulder before going to Iraq. *Ibid.* He described the "electric shocks" he experienced as "like a shooting pain just goes right – thump, just a split second." Tr. 101. He also testified that they were very painful, and he described what he experienced in August as fifty times stronger than what he felt in June. *Ibid.*

Claimant was responsible for strapping cargo down, undoing all the straps and chains when they reached their destination, and helping unload the cargo. Tr. 102. The runs he made were approximately 880 kilometers from start to finish and took approximately two and one half days to complete. Tr. 103. Sometimes the drivers "carried on for 24 hours, nonstop driving." *Ibid.*

Claimant testified he is no longer physically capable of performing his prior job as a truck driver. Tr. 103. He described his pain as travelling down his neck and down his left side. Tr. 104. All four accidents in Iraq affected his left side. Tr. 104-05. He has been sore "all the time" since his truck ran into the back of another truck on May 11, 2005 and he hit the windshield. Tr. 105. He does not remember feeling an "electric shock" at that time. *Ibid.* The left side of his face struck the windshield. Tr. 106. The windshield did not break, nor did he cut his head. *Ibid.*

According to his diary, Claimant went to breakfast and then the Post Exchange on May 12, 2005, the day following his accident. Tr. 108. He was "on convoy" and, although his diary does not mention it, he went to see the medical officer at the location where they had stopped. Tr. 109. He worked continuously for the next three weeks when he had his second "less serious" accident on May 31<sup>st</sup>. Tr. 110-11. He did not experience any "electric shocks" on that occasion. Tr. 111. He again worked continuously thereafter, performing his normal duties for the next two and a half weeks when he had his third accident on June 18<sup>th</sup>. Tr. 111-12. He was pulling on a strap to tighten a load of lumber when he felt like he pulled a muscle. Tr. 112-137. He used his full body weight, 94 kilos, when pulling on the strap. Tr. 113. That is when he felt the "electric shock" which started in the back of his shoulder and travelled down the outside of his arm to his fingertips. Tr. 114. He continued to work between then and August 23<sup>rd</sup> when he was tasked with transporting a four-wheel drive forklift. Tr. 117. When he was pushing on a pipe with his

full body weight to tighten the chains securing the forklift to the truck bed, he felt a “shooting pain” like an electric shock down his side which was fifty times stronger than what he experienced on June 18<sup>th</sup>. Tr. 119-21. He fell from the truck to the roadway as a result of the pain. Tr. 121. He finished his shift because they had no one to replace him, but he has not worked since. Tr. 121-22. When he was exerting pressure on the pipe tightening the chain on the forklift, he was using his right arm and simply rested his left arm on the pipe with “no pressure on it.” Tr. 132-33.

### *Claimant’s Deposition Testimony*

Claimant was deposed via telephone on September 13, 2006 by counsel in this case. ACEX 3. With respect to the May 11, 2005 accident, Claimant testified that “we got involved with civilians, American Army braking in front of me with no brake lights, and I had no trail of the brakes and rear-ended the back end of another truck, avoiding the civilians.” ACEX 3 at 19. The accident occurred during a dust storm, and Claimant slammed into the windshield with his neck and shoulder. *Ibid*. He reported the accident to the Army and his convoy supervisor but did not see a doctor before returning from Iraq to Kuwait because he “didn’t feel that bad.” *Id.* at 20. It was his left shoulder that he hurt, and also injured his sternum and bruised his legs. *Id.* at 22. Claimant testified:

We were driving on convoy. We just had crossed the border. We were in the (inaudible), as I said before, civilians running into area traffic. The team cut in front of me. He slammed on the brakes, which had no stop lights. He used one of his trailer brakes. By the time I seen what was going on, it was too late and I cut him with the right-hand side of the truck.

*Id.* at 27. Since the May 11<sup>th</sup> accident, Claimant’s sternum is “pushed out about three-quarters of an inch.” *Id.* at 25.

Before a second accident on May 31, 2005, Claimant’s sternum, neck and shoulder had been getting better, but they were still bruised and his left shoulder “was very sore.” *Id.* at 24. On that date, Claimant’s convoy had stopped while insurgents and Iraqi police were engaged in a fire fight further up the road when a U.S. military vehicle headed towards the action ran into a truck which was stopped two vehicles behind Claimant’s truck. *Id.* at 27-28. Claimant’s vehicle was bumped by the truck behind his, and he hurt his neck which was still “a bit sore from the previous accident.” *Id.* at 29.

Before June 18, 2005, Claimant “felt okay,” his neck “wasn’t that sore,” but his left shoulder was painful because he “had a lot of pulled muscles.” *Id.* at 30. He testified his shoulder pain up to that time was a continuation of what he had been feeling after the May 11<sup>th</sup> accident. *Ibid*.

On June 18<sup>th</sup>, Claimant was on a mission when the “loads moved on the trucks.” *Id.* at 32. According to Claimant, they stopped and “were strapping them back down again . . . [when] I just felt as though I pulled my shoulder muscles.” *Ibid*. Claimant described what he felt as the same sort of feeling he experienced in his first accident, and testified “it just felt like a pulling in

me shoulder, that's all. And down near my left arm." *Ibid.* He also testified "it was like a shooting pain . . . . [l]ittle electric shocks" which went "[r]ight to me fingertips." *Id.* at 33. Claimant was "tender" the following day. *Ibid.* He had more pain in his left shoulder and arm on June 19<sup>th</sup> than he did following the day of his May 11<sup>th</sup> accident. *Id.* at 34. June 18<sup>th</sup> was the first time he felt the "electric shocks" which continued through the remainder of his employment with Employer. *Id.* at 35. He felt them only when he was doing something strenuous with his shoulder, like strapping or chaining down a load. *Ibid.* The straps are two and one half inches wide and tightened around the load using a ratchet mechanism and a torque bar. *Id.* at 36. Claimant injured his left shoulder and arm on June 18, 2005 but not his neck. *Ibid.*

On June 22, 2005, Claimant made a doctor's appointment because his pain was getting worse. *Id.* at 37. He saw an Army doctor the following day. *Ibid.* The doctor told Claimant he had "badly pulled" his shoulder muscles, and advised him to get shoulder massages at least two or three times a week. *Id.* at 38. He did not take any time off work because of this injury. *Id.* at 39.

On August 23, 2005 Claimant sustained another injury while chaining down a forklift on his truck. *Id.* at 39, 41-42. He testified that "it felt like it cut through an electric cable and I went one way off the side of [the] truck and the pipe went the other way." *Ibid.* Claimant also testified that his shoulder, but not his neck, hurt during July 2005. *Id.* at 40. He described the "electric shock" he felt on August 23, 2005 as both "a billion times" and "50 times" worse than what he felt previously. *Id.* at 42-43. He did not hurt anything other than his left shoulder on August 23<sup>rd</sup>. *Id.* at 43.

Claimant went to the clinic on August 24, 2005 and saw Dr. Dang. *Id.* at 44. Dr. Dang told him he thought he was pinching a nerve in his shoulder and told him to return the following day to see another doctor. *Id.* at 45. Dr. Dang also told him not to return to work for 48 hours. *Ibid.*

On August 25, 2005, Claimant returned to the clinic and saw Dr. Kardouni. *Id.* at 45. He did a few tests and made an appointment for Claimant to see a therapist. *Id.* at 46. He was not sure what the problem was and recommended an MRI. *Ibid.* Claimant went to physiotherapy that morning at 9:00 a.m. and was "stretched." *Ibid.* He testified "all of a sudden I had no pain at all . . . [s]o he said there was something wrong with my neck." *Id.* at 47. When he was asked how long he was without pain, Claimant testified "[u]ntil he stopped stretching me." *Ibid.* Claimant returned to physiotherapy on August 27<sup>th</sup> and was again treated with stretching and massage. *Ibid.* Claimant returned to the doctors on August 28<sup>th</sup> to get a referral because he had been told he was going home because Employer's contracts were over. *Id.* at 48.

When he arrived home on August 31<sup>st</sup> his shoulder was "[h]urting badly" and the "electric shocks" were getting worse. *Id.* at 50. He made an appointment to see Dr. Keith Forrest, his family doctor. *Ibid.* He was also treated by Dr. Nick Vrodos, a neurosurgeon. *Id.* at 51. His neck and shoulder pain was more severe and more frequent after he returned home, and he had difficulty sleeping because of the pain. *Id.* at 53-54. On occasion he felt an "electric shock" down his left arm, the left side of his chest, and down his left leg. *Id.* at 55. He had

“twinges” of this shooting pain down his side beginning August 23, 2005 while in Kuwait. *Id.* at 56-57.

Dr. Vrodos operated on Claimant’s neck in March 2008 and “found a broken spur on [Claimant’s] left-hand side of [his] neck.” *Id.* at 57. Dr. Vrodos told Claimant the broken spur had not previously been visible on his x-rays, MRIs or CAT scans, and that it was responsible for Claimant’s difficulties because “it was rubbing on the nervous system all the time, and . . . the nerves are badly damaged.” *Id.* at 57-58. “[H]e said it probably was done due to the accident, the first accident on May 11<sup>th</sup>.” *Id.* at 58. Dr. Vrodos also performed a laminectomy. *Ibid.* Claimant has been on medication since the surgery. *Id.* at 60. He has not been able to work since returning home. *Id.* at 67. Claimant has sold all of the assets of his DitchWitch business to pay taxes and other bills and has mortgaged his home. *Id.* at 71-72.

#### *Vocational Evidence of Howard Stauber*

A July 10, 2008 letter from Howard Stauber, Vocational Rehabilitation Consultant, to AIG’s counsel notes that he conducted two labor market surveys in this case, one for the Australia/Howard Spring/Northern Territory Area and another involving the international job market. AIGX 27. With respect to the Howard Spring/Northern Territory survey, Mr. Stauber identified job openings from February 2007 to the present based on his contact with potential employers from July 2 through July 10, 2008. *Id.* at 0517. Mr. Stauber interviewed Claimant by telephone on July 2 and 8, 2008 to obtain information regarding his vocational strengths and reviewed his personnel records, deposition transcript, and medical records. *Id.* at 0518. Wages reflected in the report were in Australian dollars, and the report noted that \$1.00 U.S. was the equivalent of approximately \$1.30 Australian. *Id.* at 0520. Current hourly wages as well as hourly wages in February 2007 for each position are also noted. *Ibid.* The current hourly wage range for the listed positions was \$15.00 to \$21.00, while the range for February 2007 is noted as \$14.25 to \$20.00. *Id.* at 0523. With respect to his international labor market survey, Mr. Stauber listed various available jobs at a current hourly wage range of \$12.00 to \$30.00 and an hourly wage range for February 2007 of \$11.50 to \$28.50 in U.S. dollars. *Id.* at 0530.

Another letter dated July 10, 2008 from Mr. Stauber to AIG’s counsel notes that he is enclosing job descriptions for each of the positions identified in his labor market surveys. AIGX 27 at 0531.

A third letter dated July 10, 2008 from Mr. Stauber summarizes his two telephone interviews of Claimant on July 2 and 8, 2008. AIGX 27 at 0535-37. The summary notes, *inter alia*, that the distance between Claimant’s residence in Howard Spring, and Darwin City where job openings identified in Mr. Stauber’s labor market survey are located, is approximately 35 kilometers. *Id.* at 0535. The summary further notes that Claimant can drive that distance without interruption. *Ibid.*

Howard Stauber was deposed by telephone in this matter on July 11, 2008. AIGX 31. Based on his review of the records he was provided, he put together a profile of Claimant’s functional capacities, tolerances and limitations, and then validated that profile during his

telephone interviews of Claimant by discussing his findings with Claimant. *Id.* at 10-11. He found Claimant to be “cooperative and straightforward” during his interviews. *Id.* at 13.

Mr. Stauber testified that the Internet “was an invaluable tool” in his efforts to locate jobs available to Claimant. *Id.* at 11. His initial Internet search produced about 20 or 25 broad categories of jobs which he narrowed to the five or six referenced in his report. *Id.* at 19. He subsequently followed up with each prospective employer by telephone. *Id.* at 20. In each instance, he confirmed the existence of a job both then and retroactively, as well as the particular qualifications for the job. *Id.* at 22. Mr. Stauber also confirmed the wage range for each job then and in February 2007. *Id.* at 31-32. He did not list any job in his labor market survey which was not available both in February 2007 and when the report was prepared. *Id.* at 32.

Mr. Stauber testified that Claimant’s age of 60 would not, in his opinion, inhibit his ability to find work. *Id.* at 47-48. He acknowledged that Claimant was married, lived in Australia, and had never worked outside of Australia with the exception of his work for Employer in Iraq and Kuwait. *Id.* at 48-49.

#### *Other Non-Medical Evidence*

A summary of wages paid by Employer to Claimant from December 15, 2004 through November 5, 2005 shows net income of \$44,495.11. AIGX 5.

An entry in Claimant’s handwritten diary dated May 11 notes that he ran into the back of another truck in Iraq. CX 14 at 28. The entry further notes that “no brakes on trailer and truck brakes were not very good.” *Ibid.* Another entry dated May 31 notes that “the trucks at back ran up each other then into me.” CX 14 at 46. On June 18, Claimant noted in his diary that he had to rechain the load on his truck because the load had shifted. CX 14 at 54. Finally, an entry on August 23 notes that Claimant “pulled muscles in shoulder while chaining down fork lift.” CX 14 at 80.

A “Contractor Incident/Accident Report Form” dated June 22, 2005 notes that Claimant “pulled muscles on left shoulder & top of arm” at approximately 10:30 a.m. that date. CX 6. The report further notes that Claimant’s injury was caused by “undoing chains that had been put on wrong way with pipe and stopping it from hitting people on other side.” *Ibid.*

An August 7, 2005 letter to Claimant from Employer’s Director of Kuwait Operations states that his “position within the contract is no longer required” and that the letter “constitutes the minimum 15 days notice as required per contract, with the effective contract closing date being midnight 25<sup>th</sup> August, 2005.” CX 10.

A September 20, 2005 email from Claimant to Employer regarding “insurance claim” notes that Claimant was having trouble with his left shoulder as a result of two truck accidents which were reported by the U.S. Army and his convoy supervisor. CX 13. He reported experiencing a “dull ache” in his left shoulder until an incident where he felt as though he had gotten an “electric shock” and fell from his truck while chaining down a large fork lift loaded on the trailer. *Ibid.*

## Medical Evidence

### *Medical Records and Reports*

An April 30, 2001 cervicothoracic spine MRI revealed marked spondylotic change throughout the cervical spine and at scattered disc levels within the thoracic spine. AIGX 18 at 0327. There was no posterior disc bulging or canal stenosis. *Ibid.* There was also no thoracic foraminal stenosis. *Ibid.*

A health record dated August 24, 2005 from ASG-Kuwait TMC Camp Arifjan reflects Claimant was seen that date complaining of left shoulder popping, cracking sounds, and pain which felt like pins and needles on and off for five weeks. CX 1 at 3. Physical findings with respect to the shoulders bilaterally included tenderness on palpation, muscle spasm, and pain on motion. *Ibid.* Ibuprofen, hydrocodone and diazepam were prescribed, and Claimant was instructed to consult a physical therapist. *Id.* at 3-4. Claimant was noted as being “Sick at Home/Quarters” for 48 hours, and his injury was listed as work related with an onset date of August 24, 2005. *Id.* at 4.

A health record dated August 25, 2005 from ASG-Kuwait TMC Camp Arifjan reflects Claimant was seen that date complaining of localized joint pain in the shoulder. CX 1 at 5; ACEX 2. Examination of the shoulders continued to reveal tenderness on palpation. *Ibid.* Examination of the cervical spine showed abnormal motion with decreased left cervical rotation times 50 percent with “onset of N/T at [left upper extremity], also has [symptoms] with cervical ext[ension].” *Ibid.* Sensory examination abnormalities were noted as well as decreased bicep reflexes on the left compared to right. *Ibid.* Comments listed on the report were “[rule out] thoracic outlet syndrome; [patient] may leave country on 29 AUG; will come to clinic for cervical traction as available prior to departure; [patient] also instructed in [left] upper trap and scalene stretches; ice daily.” *Id.* at 6. Claimant was released with work/duty limitations of no lifting with the left arm, no wearing a helmet, and no driving for two weeks. *Id.* at 6-7.

A September 9, 2005 cervical spine MRI report notes mild scoliosis and widespread spondylotic changes with mild disc protrusions but no significant central or foraminal stenosis. AIGX 16 at 0305.

A Work Health Workers’ Compensation Medical Certificate – First Certificate from Dr. Forrest notes that Claimant was examined on September 12, 2005. AIGX 8-A at 0158. The form reflects a date of injury of August 23, 2005, a description of the injury as “pain in the neck radiating into the left arm and leg” and a description of how the injury occurred as “hi[t] from behind by a truck.” *Ibid.* Claimant was determined to be totally unfit for work from September 2, 2005 through October 15, 2005. *Id.* at 0159.

A Work Health Workers’ Compensation Progress Medical Certificate by Dr. Forrest notes that Claimant was seen on October 14, 2005. AIGX 8-A at 0160. Claimant was again determined to be totally unfit for work through November 14, 2005. *Ibid.*

An October 18, 2005 cervical spine x-ray report notes bony spurring of the C3 vertebral body “potentially related to the patient’s history of previous trauma.” AIGX 16 at 0303. Degenerative disc changes throughout the cervical spine were also noted with mild arthropathy of the facet joints. *Ibid.* A cervical spine CT scan performed at the same time showed advanced degenerative disc changes at C2-3 with associated end plate osteophytes and “mild rotation between C1 and C2 which is most likely positional.” *Ibid.* Degenerative disc changes at C3-4 were also noted with “[m]ild right C4 exit canal stenosis . . .” *Ibid.* There was a “tiny” disc protrusion at C4-5 with mild left to moderate right C4 exit canal bony stenosis. *Ibid.* Finally, there was an irregular contoured posterior disc osteophyte bar producing mild central stenosis at C5-6, and mild bilateral C6 bony exit canal stenosis. *Ibid.*

An October 27, 2005 letter from Dr. Greg Harris to Dr. Vrodos notes that Claimant has “complicated but severe cervicogenic/brachial plexus neuropathic pain that started a few weeks ago with a traction injury to his left arm.” AIGX 19 at 0344. The letter further notes that Claimant had a “background of fractures to C1 and C3 in 1978, severe multilevel degenerative disc disease and more recently a motor vehicle accident in June which his head hit the windscreen.” *Ibid.* The letter goes on to state:

Despite this episode he did not have any significant neck or arm pain until he was pulling down on a rope to secure a load 2 weeks later, and had a severe burning pain in the tip of his left shoulder that has escalated to radiate down his lateral arm and into his fingers. He has noticed some weakness of grip, and his pain is provoked by ipsilateral neck extension as if there is a compressive lesion involved. His pain is relieved by raising his arm over his head. He is woken by pain most nights.

*Ibid.* He described the findings of recent x-rays and imaging studies and requested that Dr. Vrodos provide an opinion and advice regarding surgery and cervical injections. *Ibid.*

A Work Health Workers’ Compensation Progress Medical Certificate by Dr. Forrest notes that Claimant was seen on November 11, 2005. AIGX 8-A at 0161. Claimant was again determined to be totally unfit for work through December 11, 2005. *Ibid.*

A consult letter dated December 16, 2005 from Dr. Nick Vrodos, Neurosurgeon, notes that Claimant was seen on referral from Dr. Greg Harris. CX 1 at 9. The letter notes Claimant sustained injuries related to two truck accidents in Iraq on May 11, 2005 and May 31, 2005. *Ibid.* Claimant described pain running along the back of his shoulder to the triceps region and paraesthesiae and aching to the wrist and fingertips with all fingers being numb. *Ibid.* Physical examination revealed tenderness on deep palpation over the anterior aspect of the left shoulder, left biceps jerk and brachio-radialis reflexes which were “diminished if not absent,” and some difficulty with shoulder abduction with “even more pain with extension and lateral flexion of his head to the left.” *Ibid.* Dr. Vrodos reviewed x-rays which showed widespread degenerative changes but reasonable alignment. CX 1 at 10. A CT scan showed left C5-6 foraminal narrowing and left C6-7 foramen which appeared “quite patent.” *Ibid.* An MRI of the cervical spine was “sub-optimal” but suggested left C5-6 and possibly C6-7 foraminal narrowing. *Ibid.* Dr. Vrodos’ assessment was left C6 radiculopathy more than C7. *Ibid.* He referred Claimant

for left C6 and C7 nerve root blocks with Neurolept sedation, and an ultrasound of the left shoulder. *Ibid.*

A January 12, 2006 left shoulder ultrasound report notes some degenerative features within the acromioclavicular joint. CX 1 at 11.

A January 24, 2006 report reflects that Claimant received left C6 and C7 foramina blocks by Dr. Pillai. CX 1 at 12.

A February 9, 2006 letter from Dr. Vrodos to Dr. Harris notes that the root blocks relieved to some extent Claimant's numbness but "he still has significant pain, which is quite unbearable." CX 1 at 13; AIGX 16 at 0297. Dr. Vrodos noted that the pain had persisted since last May and was significantly affecting his quality of life. *Ibid.* He opined that there was no option available other than a surgical decompression and that surgery had a 90 percent chance of providing "good relief of arm pain." *Ibid.*

A March 31, 2006 letter from Dr. Vrodos to Dr. Keith Forrest notes that a left posterior C5-6 and C6-7 foramintomy and rhizolysis was performed on Claimant February 16, 2006 at Memorial Hospital in Adelaide. CX 1 at 15. Dr. Vrodos further notes that Claimant "has had significant improvement of his numbness but he describes persistent pain in his left upper limb, which seems to be positional." *Ibid.* He recommended that Claimant persist with his current pain management strategy and a CT scan of the cervical spine be performed in May to check on the degree of foraminal decompression. *Ibid.* Dr. Vrodos told Claimant that he could "slightly increase activities but avoid any significant jolting or heavy lifting." *Ibid.*

A May 10, 2006 CT scan was interpreted by Dr. Vrodos as confirming a wide decompression at the left C5-6 and C6-7 foraminae. CX 1 at 16-17. Dr. Vrodos wrote that Claimant seemed to be getting better and more active but noted that "he still has occasions with pain and spasm to the neck." *Id.* at 17. Claimant was directed to follow up with Dr. Vrodos in two months. *Ibid.*

A July 14, 2006 letter from Dr. Vrodos to Dr. Forrest notes that Claimant continued to have neuropathic pain in the left upper extremity, described as a shooting pain from his left middle finger up his arm which sometimes extended to the back of his head and to his jaw. CX 1 at 19. Activities such as bicycling, wading in water, and use of an "ab-strengthening machine" caused pain and discomfort. *Ibid.* Arm pain was worse with twisting. *Ibid.*

A December 19, 2006 letter from Dr. Keith Forrest to Dr. Vrodos asks that the letter be accepted as an ongoing referral for Claimant's care in relation to his neck injury and subsequent surgery. CX 1 at 22. He sent a similar letter dated April 23, 2007 to Physiotherapy Service NT Health Department asking that Claimant continue to receive treatment for his neck pain and sleep disturbance. CX 1 at 31.

Paul Foster of Palmerton Physiotherapy Clinic authored a functional capacity evaluation of Claimant dated July 22, 2007. CX 1 at 33. He noted that Claimant was injured in Iraq in June 2005 while working as a truck driver and tying down a load on his vehicle. *Ibid.* Based on his

examination of Claimant on July 18, 2007, he opined that Claimant “is not fit for any work duties, either sedentary or manual.” *Ibid.*

An undated Work Capacity Evaluation Form OWCP-5c completed by Dr. Forrest notes that Claimant is unable to work. CX 1 at 35-36. The form further describes the duration of Claimant’s restrictions as “indefinite.” *Ibid.*

An April 29, 2008 medical report by George S. Glass, M.D., P.A., notes that he performed a “Psychiatric/Substance Abuse Evaluation” of Claimant on March 17, 2008. AIGX 25. He opined that Claimant is not suffering from PTSD and that his complaints of PTSD have been partially influenced by his suggestibility and a motive for secondary financial gain. *Id.* at 0501.

A May 7, 2008 email from Pat Ward to AIG’s counsel contains a copy of a letter dated May 6, 2008 from J. Martin Barrash, M.D. to AIG’s counsel. AIGX 24 at 0487-88. The letter notes that Dr. Barrash has reviewed “voluminous” medical records, x-rays and other objective studies at counsel’s request, and he interviewed and examined Claimant on March 18, 2008. *Id.* at 0487. Based on his examination and records review, Dr. Barrash concluded that “the first motor vehicle accident that this patient experienced when he hit the windshield causes the problems which he has.” *Ibid.* He further stated that Claimant “had spondylosis which became symptomatic and never really abated following the motor vehicle accident.” *Ibid.* Dr. Barrash opined that Claimant’s “fate was sealed” following the first incident and “[h]e need to have surgery but was able to put it off for several months until such time as he could not take it anymore and had to be subjected to surgical intervention.” *Ibid.* Finally, he concluded that Claimant “continues to have complaints though little in the way of findings.” *Ibid.*

According to a May 27, 2008 letter from Dr. Barrash to AIG’s counsel, he has reviewed the evaluation of Claimant performed by Dr. George Glass on April 29, 2008 and concurred with Dr. Glass’s evaluation. AIGX 24 at 0486.

According to a June 10, 2008 letter from Dr. Barrash to AIG’s attorney, Dr. Barrash reviewed and “completely agree[s] with” the assessment of Dr. George Glass. AIGX 24 at 0485. He further stated that, in his opinion, Claimant’s first injury “was the only injury of any significance” and the three subsequent incidents “really changed little to nothing.” *Ibid.* Based on his examination of Claimant on May 6, 2008, Dr. Barrash concluded that any neurological findings he then noted were residuals from the injury and subsequent surgery, those deficits and findings were stable, and they would not preclude Claimant from engaging in light to medium work. *Ibid.*

A Work Capacity Evaluation Form OWCP-5c dated June 16, 2008 and completed by Dr. Jay Martin Barrash states that Claimant is “[p]robably physically but not mentally” capable of performing his usual work with limitations of no heavy lifting and no driving of 8 hours continuously. AIGX 24 at 0484. Specific limitations further noted on the form include: sitting eight hours; walking and standing four hours; reaching, including above shoulder, as well as twisting and bending/stooping two hours; operating motor vehicles six to eight hours; pushing

and pulling 50 pounds; lifting 25 pounds four hours; squatting two hours; kneeling four hours; and climbing two hours. *Ibid.*

Dr. Steven L. Nehmer reviewed various medical and other records at the request of ACE's counsel and authored a medical opinion dated August 6, 2008 regarding this matter. ACEX 4. According to Dr. Nehmer, Claimant sustained four injuries, one each on May 11, 2005, May 31, 2005, June 18, 2005 and August 23, 2005. *Id.* at 1. He further noted that Claimant had "a significant preexisting history of injury to [his] cervical spine" and an MRI on April 30, 2001 revealed "marked spondylosis change throughout the cervical spine." *Id.* at 2. Based on his review of the documents he was provided, Dr. Nehmer concluded

that [Claimant] had significant cervical spine osteoarthritis prior to his initial injury in May 2005. He developed symptoms following the motor vehicle accident in May 2005, which were transient, mild and did not limit his activities, including work. This was true of the second motor vehicle accident in May 2005, as well as the work-related injury of June 2005. It was following the injury of August 23, 2005 that his symptoms were increased very significantly, he became unable to work, and he required subsequent treatment including injections and surgery.

*Ibid.* Dr. Nehmer goes on to state that the May 11<sup>th</sup> accident caused a "minor flare-up" of Claimant's preexisting osteoarthritis symptoms, which was "slightly" aggravated by the May 31<sup>st</sup> and June 18<sup>th</sup> incidents. *Ibid.* He further concludes that the August 23<sup>rd</sup> incident resulted in a "very significant aggravation of Claimant's condition which caused him to become disabled from work. *Ibid.* Dr. Nehmer wrote:

In particular, the August 2005 aggravation increased [Claimant's] symptoms significantly and caused him to become disabled from working as a truck driver. That the final work event in August 2005 caused him to be unable to perform his duties as a truck driver is evidenced by [Claimant's] own testimony on pages 121-22 of the hearing transcript, in which [Claimant] states that he never again worked as a truck driver for his employer following the August 2005 incident, and that he has not been able to work at all since that time.

*Id.* at 2-3. He further noted that he strongly disagreed with the opinion of Dr. Barrash that the only causative event for Claimant's neck problem was the May 11, 2005 motor vehicle accident. *Id.* at 3. Dr. Nehmer opined that Dr. Barrash's "logic is flawed, for he does not (and can not) explain why a flare-up of a condition can not be further aggravated by subsequent accidents." *Ibid.* He further stated that Dr. Barrash believed the August 23, 2005 incident could not have aggravated Claimant's condition because Claimant was not using his left upper extremity at the time of the incident, but noted that the injury sustained by Claimant was in his neck and "[t]he use of either upper extremity in a manner requiring force could aggravate a condition in the neck . . . ." *Ibid.*

*Deposition Testimony of Dr. Keith Forrest*

Dr. Forrest was deposed on March 6, 2008 via telephone by counsel in this case. AIGX 20. Dr. Forrest is a non-specialist family physician and has been practicing medicine in Australia since 1983. *Id.* at 8, 10. He first saw Claimant on September 8, 2004 for an “ongoing” medical condition. *Id.* at 14. The last time he saw Claimant was March 3, 2008. *Ibid.* He complained about continued pain in his neck and down the left shoulder which was intermittent. *Id.* at 15.

At the time of his last visit, Dr. Forrest reviewed Claimant’s prior clinical history and confirmed that he sustained a fractured C1 and C3 vertebrae in 1978, after which he was in traction in the hospital for four months. *Id.* at 16. Claimant was also involved in an automobile accident in 1987 involving a collision with three buffalo, after which he was hospitalized for nine days. *Ibid.*

On September 2, 2005, Claimant met with Dr. Forrest and informed him that he had been involved “in a driving accident in May.” *Id.* at 17. Dr. Forrest provided medication and a referral to a physiotherapist for Claimant’s condition. *Id.* at 25. Dr. Greg Harris provided a referral to Claimant for a neurosurgeon. *Ibid.*

Dr. Forrest’s records include copies of the records of Dr. Graham Chin dated February 20, 2001 through March 30, 2002. *Id.* at 27. Dr. Chin reported the findings of an MRI of the cervical spine, and also noted multiple complaints by Claimant of “pins and needles and electric-shock-type pain . . . .” *Ibid.* The MRI was performed on June 26, 2001. *Ibid.* Dr. Chin was Claimant’s family physician before Dr. Forrest. *Id.* at 29.

When Dr. Forrest saw Claimant on September 2, 2005, Claimant told him that “he had been hit [from] behind while driving in May and that he had sustained a sore neck and shoulders, numbness radiating into the left hand and the dorsum of the hand.” *Id.* at 30. Dr. Forrest is aware of two motor vehicle accidents in which Claimant was involved while in the Middle East. *Id.* at 31. He is not aware of the specific job requirements of Claimant’s work as a truck driver there. *Ibid.*

Claimant’s complaints on September 2, 2005 were of soreness in the neck and shoulders and numbness radiating into the dorsum of his left hand. *Id.* at 32. Those symptoms are consistent with his degenerative condition and foraminal narrowing in his cervical spine. *Ibid.* In Dr. Forrest’s opinion, Claimant’s symptoms are a result of age, past trauma to his neck, the fracture of two cervical vertebrae, and degenerative changes in the neck precipitated by that trauma. *Ibid.* He further believed that Claimant’s symptoms were “exacerbated by the incident in Iraq . . . [when] he was hit from behind while he was driving a truck.” *Id.* at 33.

By “exacerbated,” Dr. Forrest did not “mean to say that the observable, radiological, degenerative condition was in any way changed by the incident in Iraq.” *Id.* at 34-35. He felt that he did not have sufficient expertise to say whether the events in Iraq resulted in a permanent change to his condition or symptoms. *Id.* at 35.

Claimant reported symptoms of numbness in his arm which, according to Dr. Forrest, could be caused by foraminal narrowing where the nerve roots exit the cervical spine. *Id.* at 36. Dr. Forrest did not have an opinion regarding whether Claimant's work in Iraq aggravated that condition. *Id.* at 36-37. He could also not offer an opinion that was certain on whether Claimant's episodes of pain on June 18, 2005 or August 23, 2005 were exacerbations or new symptoms, but he thought that what Claimant experienced after May 11, 2005 was an exacerbation of the condition on May 11<sup>th</sup>. *Id.* at 40-41. He could not state, however, whether any exacerbation was a permanent worsening of the condition. *Id.* at 42.

Dr. Forrest did not believe Claimant's condition was stable, but he did believe that it was not likely to improve as of six to 12 months after his neck operation on February 6, 2006. *Id.* at 43-44. As far as work restrictions, Dr. Forrest concluded that Claimant "should avoid any jolting activities that could put a shock to the neck, that he should avoid heavy lifting or forceful pulling or pushing with his arms." *Id.* at 45. He also could not engage in "activities that require a high level of cognitive performance[,] . . . repetitive turning of the neck, stretching of the neck, holding the neck in an extreme position of flexion, extension, rotation or lateral flexion, holding his arms in any sustained position for a long period of time . . . . [or] persist at a physical or repetitive task for a protracted period of time without taking a break to stretch and relieve discomfort." *Id.* at 45-46. Claimant would need to move and change positions every half-hour, and weight restrictions with respect to lifting, pushing and pulling would be about four kilograms.<sup>3</sup> *Id.* at 46, 48. According to Dr. Forrest, Claimant will require ongoing analgesic therapy, medical pain relief, regular doctor visits, and perhaps physical therapy, such as physiotherapy or massage. *Id.* at 48.

Dr. Forrest did not have any notation in his records of the incident on June 18, 2005 involving Claimant where he experienced an electric type shock while pulling on a pipe. *Id.* at 50. He similarly did not have any notation regarding the incident on August 23, 2005 during which Claimant experienced a similar, but more severe, pain and fell off his truck. *Ibid.* The fact that Claimant continued to work after the three incidents prior to August 23<sup>rd</sup> would have no bearing on Dr. Forrest's opinion regarding causation but would be relevant to severity. *Id.* at 54. Dr. Forrest could not make an assessment based on the records available to him which of the four incidents described by Claimant resulted in his inability to work. *Id.* at 56. He went on to state, however, that it would appear the incident on August 23<sup>rd</sup> "caused him to cease work." *Id.* at 57.

Regarding the terms "exacerbate" and "aggravate," Dr. Forrest testified that he would use them "in exactly the same way." *Id.* at 57-58. Assuming that Claimant was not symptomatic when he went to Iraq, and was able to perform his duties as a truck driver until the four incidents he described, it is Dr. Forrest's opinion that Claimant's symptoms were aggravated by those incidents. *Id.* at 58. When asked about the four separate incidents, however, Dr. Forrest testified that the May 11<sup>th</sup> incident "contributed" to Claimant's neck condition but he could not say that the subsequent incidents "contributed or aggravated" his ongoing condition. *Id.* at 67.

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<sup>3</sup> One kilogram is equal to 2.2 pounds. Four kilograms is thus the equivalent of 8.8 pounds.

## IV. DISCUSSION

### Fact of Injury and Causation

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of or in the course of employment.” 33 U.S.C. § 902(2). A work-related aggravation of a pre-existing condition is an injury pursuant to § 2(2) of the LHWCA. *See, e.g., Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989); *Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989) (Decisions and Order on Remand); *Gardner v. Bath Iron Works Corp.*, 11BRBS 556 (1979), *aff’d sub nom. Gardner v. Dir., OWCP*, 640 F.2d 1385 (1<sup>st</sup> Cir. 1981). The employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5<sup>th</sup> Cir. 1986); *Indep. Stevedore Co. v. O’Leary*, 357 F.2d 812 (9<sup>th</sup> Cir. 1966); *Kooley v. Marine Indus. N.W.*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards*, 19 BRBS 15 (1986); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986).

The Act provides a presumption that a claim comes within its provisions. *See* 33 U.S.C. 920(a). This presumption “applies as much to the nexus between an employee’s malady and his employment activities as it does to any other aspect of a claim.” *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). This statutory presumption, however, does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a “*prima facie*” case. The Supreme Court has held that “[a] *prima facie* ‘claim for compensation’ to which the statutory presumption refers must at least allege an injury that arose in the course of employment as well as out of employment.” *United States Indus./Fed. Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 615, 14 BRBS 631, 633(CRT) (1982), *rev’g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). Moreover, “the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer.” *Id.*

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) 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. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326 (1981). Claimant’s uncontradicted credible testimony alone may constitute sufficient proof of a physical injury. *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff’d*, 620 F.2d 71 (5<sup>th</sup> Cir. 1980); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Anderson v. Todd Shipyards*, *supra*, at 21; *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). The claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Indus./Fed. Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631 633 (1982). The claimant’s theory of causation must go beyond “mere fancy.” *See Champion v. S&M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). Once the *prima facie* case is established, a presumption is created under Section 20(a) that the employee’s injury or death arose out of employment.

To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of, or severing the connection between, such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier, supra*. Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Carpenter v. California United Terminals*, 38 BRBS 56 (2004). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2nd Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Holmes, supra*; *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

In evaluating the evidence, it is within the fact-finder's discretionary power to determine the weight to be accorded the evidence of record and to draw inferences from it. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his judgment. *See, e.g., Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979).

Claimant alleges injuries from four separate incidents occurring on May 11, 2005, May 31, 2005, June 18, 2005 and August 23, 2005. Neither AIG nor ACE contests the fact that Claimant sustained injuries arising out of his employment with IAP. Their dispute is simply over whether the incident on August 23, 2005 involved an aggravation of Claimant's neck and shoulder problems or represented symptoms which were the natural progression of his condition.

Counsel for AIG, for example, states that "[t]he first industrial injury [to Claimant] was caused by a motor vehicle accident on May 11, 2005." Post-Hearing Brief of IAP Worldwide Services and Insurance Company of the State of Pennsylvania/AIG Worldsource ("AIG Br.") at 2. He goes on to state:

It is undisputed that claimant suffered an injury on 5/11/05. This incident triggered pain and symptomology in Claimant's left upper extremity that has steadily progressed, regardless of activity, since that date, even after Claimant stopped working.

*Id.* at 7.

Counsel for ACE states: "Claimant suffered four injuries during the course of his employment with Employer in Iraq, which injuries occurred on the following dates: May 11, 2005; May 31, 2005; June 18, 2005 and August 23, 2005." Post-Hearing Brief of IAP Worldwide Services and ACE American Insurance Company ("ACE Br.") at 6. ACE's attorney goes on to argue that "Claimant's August 23, 2005 injury was a significant aggravation of his prior condition which caused him to become disabled from work." *Id.* at 21.

Claimant has credibly testified that he was involved in a motor vehicle accident on May 11, 2005 when he drove into the back of a truck stopped in front of him during a sandstorm while travelling at approximately 80 kilometers per hour. Tr. 40-41. Claimant further testified that he was propelled into the windshield of his truck, striking his jaw, neck and left shoulder, and rendered momentarily unconscious. Tr. 42. The record further confirms that Claimant was also involved in a second motor vehicle accident on May 31, 2005 when a vehicle ran into the back of a truck which was stopped two vehicles behind the one Claimant was driving, causing a chain reaction. Tr. 43-44. According to Claimant, he felt a “slight jolt backwards” and subsequently experienced increased soreness in his neck and shoulder. Tr. 44. On June 18, 2005, Claimant was strapping down a load on a truck when he felt a shooting pain in his left arm as if he had pulled a muscle. Tr. 45. Similarly, on August 23, 2005, Claimant was pushing on a pipe to cinch up the chain on a load when he felt a sharp pain from his neck down his left arm and fell off the truck. Tr. 46-47.

The record thus shows that Claimant suffered physical harm or pain on four separate occasions, whether characterized as an original injury or the aggravation of a pre-existing condition. See *Gardner v. Dir.*, OWCP, 640 F.2d 1385, 13 BRBS 101 (1<sup>st</sup> Cir. 1981)(“Whether circumstances of [claimant’s] employment combined with his disease so as to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his preexisting condition); *Delaware River Stevedores, Inc. v. Dir.*, OWCP, 279 F.3d 233 (3<sup>rd</sup> Cir. 2002)(holding that “[i]f the conditions of a claimant’s employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act” and “where claimant’s work results in a temporary exacerbation of symptoms, the employer at the time of the work events leading to this exacerbation is responsible for the resulting temporary total disability”); *Kelaita*, 799 F.2d at 1312 (holding employer responsible for the injury because the employee suffered “pain flare-ups ... related to his work” at the last place of employment); see also *Independent Stevedore Co. v. O’Leary*, 357 F.2d 812 (9<sup>th</sup> Cir. 1966) (rejecting Employer’s argument that the natural progression of the employee’s arthritis would have resulted in total disability irrespective of the work accident, and holding that, for purposes of compensation liability, to hasten death or disability is to cause it); *Ricker v. Univ. Maritime Serv. Corp.*, BRB No. 04-0700 (May 23, 2005)(Unpublished)(citing *O’Leary*, *supra* and *Gardner*, *supra*); cf. *Berry Brothers Gen. Contractors, Inc. v. Dir.*, OWCP, No. 07-60370, 2008 WL 59523 (5<sup>th</sup> Cir. Jan. 3, 2008)(Unreported)(upholding an ALJ’s finding that claimant’s knee injury was due to the natural progression of a prior injury where there was “no indication in the record that [claimant] suffered from increased pain, a flare-up of pain, or a worsening of his condition caused by his work for a subsequent employer”). I find Claimant’s testimony of his physically demanding work conditions to be credible, and that those conditions could have caused Claimant’s neck and left shoulder pain on May 11, 2005, May 31, 2005, June 18, 2005 and August 23, 2005. Claimant has thus established a *prima facie* claim under the Act.

Once an employee establishes a *prima facie* case, it is the employer’s burden to rebut it by substantial evidence showing that Claimant’s condition was not caused or aggravated by his employment. *O’Kelley*, *supra*. “Substantial evidence” means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co. v. N.L.R.B.*, 85 F.3d

1258 (7<sup>th</sup> Cir. 1996). 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). See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive evidence *proving* the absence of, or *severing, the connection* between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

Respondents have offered no substantial evidence which would rebut the Section 20(a) presumption that Claimant sustained a May 11, 2005 injury arising out of his employment with IAP. As noted above, Carriers simply question whether Claimant's May 11, 2005 injury naturally progressed and resulted in Claimant's disability thereafter, or whether he suffered an aggravation of that injury on August 23, 2005.

### **Responsible Carrier**

According to AIG's counsel, ACE has failed to produce evidence to support its allegation that Claimant sustained any aggravation on August 23, 2005. AIG Br. at 15. As might be expected, his views on the weight to be accorded the opinions of Drs. Nehmer and Barrash differ significantly from those of ACE's attorney. *Id.* at 16-23. AIG's counsel implies that Dr. Nehmer is nothing more than a lowly orthopedic surgeon who never examined Claimant, and his opinion is entitled to no weight because he "has not demonstrated sufficient knowledge of Claimant's condition and the incidents alleged on the four dates of injury to provide a basis for his opinion." *Id.* at 16. AIG's attorney goes on to argue that Dr. Barrash, who he views as a highly skilled and educated neurosurgeon, examined Claimant, conducted diagnostic testing, and thoroughly reviewed and understood the relevant medical evidence prior to rendering his opinion. *Id.* at 16-17. Even if Dr. Nehmer's opinion is accorded some evidentiary weight, according to AIG's counsel, the opinion is poorly reasoned, based on an inaccurate understanding of the evidence, and fails to establish that any aggravation of Claimant's condition during the period of AIG's coverage was permanent. *Id.* at 17-22. Counsel thus argues that, given "the absence of any opinion unequivocally stating that the August 23, 2005, incident was anything but a temporary flare-up of pain, ACE cannot carry its burden of persuasion." *Id.* at 22 (emphasis in original).

In contrast to the arguments of AIG's attorney, counsel for ACE asserts that "the medical evidence and testimony presented in this matter demonstrate that Claimant's August 23, 2005 injury was a significant aggravation of his prior condition which caused him to become disabled from work." ACE Br. at 21. He accurately notes that, "[d]espite suffering three injuries in May and June 2005, Claimant missed no time from work." *Ibid.* It was the August 23, 2005 injury, according to ACE's attorney, which rendered him physically unable to continue his employment as a truck driver in Iraq, and AIG, as the carrier providing coverage at the time, is therefore liable for Claimant's disability. *Id.* at 21-22. In support of his argument, ACE's Counsel touts the medical opinion of Dr. Nehmer, and disparages that of Dr. Barrash. *Id.* at 22-24.

In cases involving multiple traumatic injuries and different employers (or, as here, the same employer but different carriers), the question of which entity is liable is answered by

determining whether a claimant's disability results from the natural progression of the initial traumatic injury or is, instead, caused by a subsequent traumatic injury which aggravates the initial injury. *Buchanan v. International Transportation Services*, 33 BRBS 32, 35 (1999); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9<sup>th</sup> Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646, 649-50 (1979), *aff'd sub nom. Employers National Ins. Co. v. Equitable Shipyards*, 640 F.2d 383 (5<sup>th</sup> Cir. 1981). The relevant evidence must be weighed, with each employer or carrier bearing the burden of persuasion. *Buchanan, supra.*, 33 BRBS at 35. In the event neither is able to persuade the factfinder that its evidence is entitled to greater weight, liability falls on the later employer or carrier. *Id.* at 36. "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." *Kelaita, supra.*, 799 F.2d at 1311.

In *Kelaita*, the court found substantial evidence supporting the administrative law judge's conclusion that a claimant's original right shoulder injury could have been aggravated or contributed to while working for a second employer. The court wrote:

In his decision on remand, the ALJ listed several evidentiary factors that led him to conclude that working conditions at General [the second employer] could have aggravated or contributed to Kelaita's shoulder injury. The work at General involved activities similar to those performed at Triple A [the first employer], Kelaita's continued work at General had a negative impact on his pain, some of Kelaita's pain flare-ups at General were related to his work. From all the evidence, the ALJ reasonably inferred that the work at General was not significantly different from the work at Triple A, that Kelaita was required to use his right arm in his work at General and that the work at General could have aggravated and contributed to Kelaita's injury resulting in his painful flare-ups. Our independent review of the record indicates that the ALJ's inferences and conclusions were supported by substantial evidence.

*Kelaita, supra.* at 1312.

Similarly, the Court of Appeals for the Seventh Circuit has determined that "the aggravation rule does not require that a later injury fundamentally alter a prior condition." *Marinette Marine Corp. v. OWCP*, 431 F.3d 1032, 1035 (7<sup>th</sup> Cir. 2005). According to the court: "It is enough that it produces or contributes to a worsening of symptoms." *Ibid.*

Likewise, in *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233 (3<sup>rd</sup> Cir. 2002), the appellate court affirmed the Benefits Review Board's conclusion that

[i]f the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act.

*Id.* at 241 (quotation marks omitted). The court further agreed with the Board's conclusion that "where claimant's work results in a temporary exacerbation of symptoms, the employer at the

time of the work events leading to this exacerbation is responsible for the resulting temporary total disability.” *Ibid.*

The record in this matter confirms that Claimant had a pre-existing condition as a result of two automobile accidents before he ever went to work for employer. One accident occurred in 1978 when Claimant was thrown through the windshield of his vehicle, fractured his cervical spine, and was thereafter off work for nine months. Tr. at 32-33. In 1987, Claimant struck a buffalo with his car and was out of work for another two and one half years. *Ibid.*

Despite his two serious automobile accidents, and lengthy periods of convalescence, Claimant continued to work and passed a pre-employment physical provided by Employer for that employment. Tr. 34-35. While there is some evidence that Claimant had neurological symptoms in 2001-2002 prior to his employment with Employer (AIGEX 20 at 27), there is no evidence that he had pain necessitating an ongoing use of medications, surgery or work restrictions. Claimant then began working in December 2004 as a truck driver for IAP in Kuwait and Iraq. Tr. 36. He transported a variety of heavy loads from Kuwait City to military bases in and around Baghdad using eighteen wheel tractor-trailers. Tr. 37-39. Claimant’s employment as a truck driver was heavy work, and he was involved in loading and unloading cargo and securing the loads to his trucks. Tr. 95-96. Driving the trucks was difficult mentally, as well as physically, and he was exhausted after completing his runs. Tr. 98-100. Runs typically took about two and a half days to complete, and they sometimes required driving non-stop for 24 hours at a time. Tr. 103.

While working on May 11, 2005, Claimant was involved in a vehicular accident where he slammed into the back of a stopped truck while traveling at about 80 kilometers per hour and was hurled into the windshield of his own truck. Tr. 40-41. He continued working thereafter, but his arms were sore during the next two trips and he went to the doctors at one of the camps. Tr. 43. The doctor told him he had “very bad torn shoulder muscles.” *Ibid.*

Before his second accident on May 31, 2005, Claimant’s sternum, neck and shoulder had been getting better, but they were still bruised and his left shoulder “was very sore.” ACEX 3 at 24.

On May 31, 2005, Claimant’s truck was rear-ended by another vehicle giving him a “slight jolt backwards.” Tr. 44. Claimant testified “it didn’t really hurt me that much . . . , [j]ust made me sore again that was all.”<sup>4</sup> *Ibid.*

Before June 18, 2005, according to Claimant, he “felt okay” and his neck “wasn’t that sore,” but his left shoulder was painful because he “had a lot of pulled muscles.” ACEX 3 at 30. He also testified that his shoulder pain up to that time was a continuation of what he had been feeling after the May 11<sup>th</sup> accident. *Ibid.*

On June 18, 2005, Claimant was helping the driver of another truck strap down a load when he felt as though he had pulled a muscle in his arm. Tr. 45. He continued working, but he

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<sup>4</sup> During his deposition, Claimant also testified that his vehicle was bumped by the truck behind his, and he hurt his neck which was still “a bit sore from the previous accident.” ACEX 3 at 29.

thereafter used his right arm most of the time, which he had been doing since the first accident. *Ibid.* Claimant described what he felt at the time as the same sort of feeling he experienced in his first accident, and he testified “it just felt like a pulling in me shoulder, that’s all. And down near my left arm.” ACEX 3 at 32. He also testified, however, “it was like a shooting pain . . . [l]ittle electric shocks” which went “[r]ight to me fingertips.” *Id.* at 33. Claimant was “tender” the following day. *Ibid.* He also had more pain in his left shoulder and arm on June 19<sup>th</sup> than he did following his May 11<sup>th</sup> accident. ACEX at 34. June 18<sup>th</sup> was also the first time he felt the “electric shocks” which continued through the remainder of his employment with Employer. *Id.* at 35. He felt them only when he was doing something strenuous with his shoulder, like strapping or chaining down a load. *Ibid.*

On June 22, 2005, Claimant made a doctor’s appointment because his pain was getting worse. ACEX 3 at 37. He saw an Army doctor the following day. *Ibid.* The doctor told Claimant he had “badly pulled” his shoulder muscles, and advised him to get shoulder massages at least two or three times a week. *Id.* at 38. He did not take any time off work because of this injury. *Id.* at 39. His shoulder continued to hurt during July 2005. ACEX 3 at 40.

On August 23, 2005, Claimant was helping to secure a forklift to the bed of his truck and was pushing down on a pipe to cinch up a chain when he “felt like [he] cut through a 440-volt electric cable.” Tr. 46. He felt a sharp pain from his neck down his left arm and fell off the truck. Tr. 46-47.

Claimant went to see the doctors at the airbase on August 24<sup>th</sup> because he could not get in on the 23<sup>rd</sup>. Tr. 47. He saw Dr. Dang. ACEX 3 at 44. Dr. Dang told him he thought he was pinching a nerve in his shoulder and told him to return the following day to see another doctor. *Id.* at 45. Dr. Dang also told him not to return to work for 48 hours. *Ibid.*

On August 25, 2005, Claimant returned to the clinic and saw Dr. Kardouni. ACEX 3 at 45. He did a few tests and made an appointment for Claimant to see a therapist. *Id.* at 46. He was not sure what the problem was and recommended an MRI. *Ibid.* Claimant went to physiotherapy that morning at 9:00 a.m. and was “stretched.” *Ibid.* He testified “all of a sudden I had no pain at all . . . [s]o he said there was something wrong with my neck.” *Id.* at 47. When he was asked how long he was without pain, Claimant testified “[u]ntil he stopped stretching me.” *Ibid.* Claimant returned to physiotherapy on August 27<sup>th</sup> and was again treated with stretching and massage. *Ibid.* Claimant also returned to the clinic on August 28<sup>th</sup> to get a referral because he had been told Employer’s contracts had expired and he was going home. *Id.* at 48.

The above-cited credible evidence demonstrates that Claimant’s work-related duties at IAP were physically demanding and remained the same from May 2005 through August 2005. This evidence further demonstrates that Claimant sustained cumulative traumatic injuries to his neck and left shoulder on four separate occasions which caused painful flare-ups and aggravated his pre-existing cervical spine condition. After being thrown into the windshield of his truck on May 11, 2005, Claimant began experiencing neck and shoulder pain. Claimant experienced additional pain thereafter as a direct result of his work activities on May 31, 2005, June 18, 2005, and August 23, 2005. Following the June 18<sup>th</sup> incident, Claimant had more pain than he had

experienced previously, and whenever he was doing anything strenuous, like strapping down a load on his truck, he began to experience shooting pain, described as “electric shocks,” down his left arm. Claimant sought medical attention after June 18<sup>th</sup> but, as was the case after his May 11<sup>th</sup> and May 31<sup>st</sup> injuries, he did not take any time off work. However, after the August 23<sup>rd</sup> incident, the doctor Claimant saw in Kuwait ordered him not to return to work for at least 48 hours. Claimant’s contract with IAP expired shortly thereafter, and after he returned to Australia, Claimant’s pain became even more frequent and more severe than it had been before. He has not worked since.

Claimant’s medical records further support a finding that Claimant sustained four injuries while working for IAP which aggravated his pre-existing cervical spine condition, although various inaccuracies contained in those records make it difficult to assess the degree of aggravation caused by any one particular incident. Dr. Harris, for example, noted in October 2005 that Claimant had “complicated but severe cervicogenic/brachial plexus neuropathic pain that started a few weeks ago with a traction injury to his left arm.” AIGX 19 at 0344. He further noted that Claimant had a “background of fractures to C1 and C3 in 1978 [and] severe multilevel degenerative disc disease,” and he referenced a motor vehicle accident where Claimant’s “head hit the windscreen” which he incorrectly recorded as happening in June rather than May. *Ibid.* Dr. Harris went on to state:

Despite this episode he did not have any significant neck or arm pain until he was pulling down on a rope to secure a load 2 weeks later, and had a severe burning pain in the tip of his left shoulder that has escalated to radiate down his lateral arm and into his fingers. He has noticed some weakness of grip, and his pain is provoked by ipsilateral neck extension as if there is a compressive lesion involved. His pain is relieved by raising his arm over his head. He is woken by pain most nights.

*Ibid.* While it is not clear whether the left arm “traction injury” to which Dr. Harris refers is the June 18 or August 23, 2005 injury, what is clear is that Claimant was engaged in the same type of physically demanding activity on both occasions and experienced substantial shooting pain from his neck down his left arm. It is also clear that the degree of pain experienced by Claimant on August 23<sup>rd</sup> was substantially greater than what he experienced on June 18<sup>th</sup> and he continued to experience substantial pain thereafter.

Claimant also testified that when Dr. Vrodos operated on his cervical spine he “found a broken spur” on the left-hand side of Claimant’s neck. ACEX 3 at 57. According to Claimant, Dr. Vrodos told him the broken spur had not previously been visible on his x-rays, MRIs or CAT scans, and he said that it was responsible for Claimant’s difficulties because “it was rubbing on the nervous system all the time, and . . . the nerves are badly damaged.” *Id.* at 57-58. Claimant further testified that Dr. Vrodos concluded “it probably was done due to the accident, the first accident on May 11<sup>th</sup>.” *Id.* at 58. Dr. Vrodos’ description of the harm caused by the loose bone spur in Claimant’s neck suggests that Claimant’s symptoms would be aggravated anytime he was doing anything strenuous with his arms, such as pushing or pulling straps and chains when tying down loads.

The medical records and deposition testimony of Dr. Forrest also suggest that Claimant's four traumatic injuries aggravated his pre-existing neck condition, although, as with other physicians, Dr. Forrest's records and testimony reflect inaccurate data regarding the dates and facts surrounding Claimant's four specific injuries. For example, Dr. Forrest testified during his deposition that he was aware of only two motor vehicle accidents in which Claimant was involved while in the Middle East, and that his pre-existing neck condition from the 1978 and 1987 automobile accidents was "exacerbated" by his accidents there. AIGX 20 at 16, 31, 33. He did not feel qualified to state whether those incidents resulted in any permanent change in Claimant's condition or symptoms. *Id.* at 35, 36-37. Although his records do not describe the incidents on June 18, 2005 and August 23, 2005 in which Claimant was involved, he testified that it would appear the August 23<sup>rd</sup> incident caused Claimant to cease work, but he could not determine which of the four incidents described by Claimant resulted in his inability to work. *Id.* at 50, 56-57. Dr. Forrest considers the terms "exacerbate" and "aggravate" interchangeable. *Id.* at 57-58. In his opinion, the May 11<sup>th</sup> incident "contributed" to Claimant's neck condition, but he could not say whether the subsequent incidents "contributed [to] or aggravated" his ongoing condition. *Id.* at 67.

As noted above, each Carrier bears the burden of establishing the other's liability by a preponderance of the evidence. However, the medical evidence discussed above is simply not convincing one way or the other. None of the treating physicians had a clear understanding with respect to the facts and circumstances surrounding each of the four injuries sustained by Claimant while working for IAP, yet each of them suggests that his pre-existing condition was aggravated by his work in the Middle East. The only treating physician directly questioned about this issue was Dr. Forrest and, as noted above, he believed Claimant's last injury on August 23<sup>rd</sup> caused him to stop working, but he also believed the May 11<sup>th</sup> incident "contributed" to Claimant's condition. At the same time, he testified that he could not say which of the four injuries caused Claimant to stop working. His testimony is both internally inconsistent and equivocal. The only other physicians who were specifically asked to determine whether Claimant's impairment is due to the natural progression of his pre-existing condition or the result of an aggravation of that condition are Drs. Barrash and Nehmer.

Dr. Barrash graduated from the University of Maryland School of Medicine in 1966, is Board-certified in Neurological Surgery and is associated with St. Luke's Hospital in Houston, Texas. AIGX 23. Based on his examination of Claimant and records review, Dr. Barrash concluded that "the first motor vehicle accident that this patient experienced when he hit the windshield causes the problems which he has." AIGX 24 at 0487-88. He further opined that Claimant "had spondylosis which became symptomatic and never really abated following the motor vehicle accident." *Ibid.*

Dr. Nehmer graduated from New Jersey Medical School in 1980, is Board-certified in Orthopedic Surgery, and maintains a solo general orthopedic surgical practice in Union, New Jersey. ACEX 4 at 4. He reviewed various medical and other records and authored a medical opinion dated August 6, 2008 in which he concluded that Claimant sustained four injuries, one each on May 11, 2005, May 31, 2005, June 18, 2005 and August 23, 2005. ACEX 4 at 1. He further noted that Claimant had "a significant preexisting history of injury to [his] cervical spine" and an MRI on April 30, 2001 revealed "marked spondylotic change throughout the cervical

spine.” *Id.* at 2. Based on the information he reviewed, he concluded Claimant “developed symptoms following the motor vehicle accident in May 2005, which were transient, mild and did not limit his activities, including work.” *Ibid.* He reached the same conclusion regarding the injuries on May 31<sup>st</sup> and June 18<sup>th</sup>, and concluded that the August 23, 2005 injury constituted a “very significant aggravating event which caused [Claimant] to be disabled from work.” *Ibid.*

While AIG’s counsel suggests that the opinion of Dr. Barrash should be accorded more weight than the contrary opinion of Dr. Nehmer, simply because the former specializes in neurology and the latter specializes in orthopedics, I find no compelling reason to do so. Claimant’s cervical spine condition is the result of both orthopedic and neurologic problems, and both physicians are Board-certified in their respective fields. I thus find them equally qualified to opine on the issue presented. Evaluating these two opinions solely on the rationales expressed therein, I find both opinions to be conclusory, inadequately documented, internally inconsistent, and/or inconsistent with other relevant evidence.

For example, while he recognizes that cervical spondylosis is a “progressive condition” which will progress irrespective of “what one does,” Dr. Barrash does not answer the question of whether that condition can be aggravated or accelerated as a result of trauma to the cervical spine. He simply opines that Claimant’s “first motor vehicle accident . . . causes the problems he has” and gives no rationale explaining how he reached this conclusion. Similarly, Claimant’s need for surgical intervention, according to Dr. Barrash, is due solely to the first accident, and he describes the incidents on May 31, 2005, June 18, 2005, and August 23, 2005 as “nothing more than continuation of the problem he already had . . .” He similarly concludes, without further explanation, that Claimant’s “fate was sealed” after the May 11<sup>th</sup> accident, despite admitting that Claimant was able to continue working thereafter until his fourth accident on August 23, 2005. In addition, despite the fact that he reviewed “voluminous medical records,” including x-rays and other imaging studies, and conducted his own physical examination and testing of Claimant on March 18, 2008, Dr. Barrash did not cite to a single finding or test result in his report which might support his opinion. I thus find this opinion is entitled to little weight.

Dr. Nehmer, unlike Dr. Barrash, did not physically examine Claimant. He did, however, like Dr. Barrash, review substantial medical and other evidence prior to formulating his opinion. Given Dr. Barrash’s failure to cite any examination findings in support of his opinion, I see no reason to credit that opinion more than the opinion of Dr. Nehmer which is based solely on a review of relevant medical records and testimony. However, like the opinion of Dr. Barrash, the written opinion of Dr. Nehmer also contains various flaws which diminish the weight to which it is entitled.

For example, after noting that Claimant had a “significant preexisting history of injury” to his cervical spine, Dr. Nehmer states that “[f]ollowing the motor vehicle accident of May 2005, [Claimant] apparently *did not have any symptoms.*” ACEX 4 at 2. In support of this conclusion, he relies on a single statement by Claimant during his deposition that he “felt okay” between the May 11, 2005 and June 18, 2005 incidents. *See* ACEX 3 at 30, ln. 8. However, in that same deposition response, Claimant testified that, although he “wasn’t that sore,” his primary problem was that he felt as though he “had a lot of pulled muscles [in his left shoulder].” *Ibid.* He similarly testified elsewhere in his deposition that his neck and shoulder had been

getting better after May 11<sup>th</sup> but they were still bruised and his left shoulder “was very sore.” ACEX 3 at 24. Claimant further testified during his deposition that his shoulder continued to hurt during July 2005. ACEX 3 at 40. Claimant thus clearly had ongoing symptoms of left shoulder pain after the May 11, 2005 accident.

Dr. Nehmer also stated in his opinion letter that Claimant “developed symptoms following the motor vehicle accident in May 2005, which were transient, mild and did not limit his activities, including work. This was true of the second motor vehicle accident in May 2005, as well as the work-related injury of June 2005.” ACEX 4 at 2. Again, however, Dr. Nehmer’s conclusions regarding Claimant’s symptoms are inconsistent with Claimant’s credible testimony. As noted above, Claimant’s left shoulder was “very sore” after May 11<sup>th</sup> and before May 31<sup>st</sup>. ACEX 3 at 24. His left shoulder remained painful up to June 18<sup>th</sup>, and he was in more pain the following day than he had been after May 11<sup>th</sup>. ACEX 3 at 30, 35. Furthermore, June 18<sup>th</sup> was the first time Claimant felt “electric shocks,” those “electric shocks” continued thereafter when he was engaged in strenuous work involving his arms and shoulders, and he began using his right arm most of the time. ACEX 3 at 34-35, Tr. 45. Claimant’s symptoms were thus not transient, and they in fact changed the manner in which he was able to work.

While these discrepancies in Dr. Nehmer’s report diminish the weight to which his opinion is entitled, Dr. Nehmer, unlike Dr. Barrash, at least reported the findings of diagnostic testing obtained both before Claimant’s employment with IAP and after he returned to Australia, which testing confirmed a change in Claimant’s cervical spine condition between April 2001 and October 2005. ACEX 4 at 2. Dr. Nehmer also recognized that: each of the four injuries sustained by Claimant in May, June and August 2005 aggravated his neck condition; the pain experienced by Claimant on August 23<sup>rd</sup> was “50 times worse” than the pain from his June 18<sup>th</sup> injury; Claimant could not continue working as a truck driver after August 23<sup>rd</sup> because of his pain; and following that injury “he required subsequent treatment including injections and surgery.” *Ibid.* In addition, Dr. Nehmer found Dr. Barrash’s opinion flawed inasmuch as Dr. Barrash found Claimant’s May 11<sup>th</sup> accident aggravated his pre-existing cervical spine condition but never “explain[ed] why a flare-up of a condition can not be further aggravated by subsequent accidents.” *Id.* at 3. He also noted that Dr. Barrash incorrectly assumed that, because Claimant was not using his left upper extremity at the time of the August 23<sup>rd</sup> injury, he could not have aggravated his cervical spine condition. According to Dr. Nehmer: “The problem that [Claimant] had, and the injury sustained, was in his neck. The use of either upper extremity in a manner requiring force could aggravate a condition in the neck, and in my opinion this is what occurred to [Claimant] on August 23, 2005.” *Ibid.*

I find the opinion of Dr. Nehmer to be somewhat better reasoned, documented, and supported by the evidentiary record than the contrary opinion of Dr. Barrash. I thus accord it more weight. Inasmuch as the other medical evidence previously discussed is inconclusive regarding whether Claimant’s August 23, 2005 work-related injury aggravated his cervical spine condition, I further find that Dr. Nehmer’s opinion tips the evidentiary scale in favor of ACE and that AIG is the responsible carrier with respect to compensation for, and medical treatment of, this condition.

In the alternative, AIG argues at length that it should only be found liable for a period of temporary disability on the ground that Claimant sustained only a temporary flare-up of pain on August 23, 2005 which “subsided and thereby completely resolved by the time claimant returned to his duties on 8/23/05 and finished his shift.”<sup>5</sup> AIG Br. at 23. AIG cites, *inter alia*, *New Haven Terminal Corp. v. Liberty Mutual Ins. Co.*, 337 F.3d 261, 270 (2<sup>nd</sup> Cir. 2003), for the proposition that barring a permanent aggravation, the later carrier would only be responsible for a period of temporary disability. AIG Br. at 21-23. AIG asserts that Dr. Nehmer did not expressly opine that the aggravation of August 23, 2005 was permanent and argues that “AIG should be given the benefit of this ambiguity.” AIG Br. at 20-23. Contrary to AIG’s assertion, Dr. Nehmer’s opinion is not ambiguous on the question of whether the aggravation of August 23, 2005 was only temporary, as he characterized it as “a very significant aggravating event which caused [Claimant] to be disabled from work.” ACEEX 4 at 2. Furthermore, the record reflects that Claimant’s pain persisted until the time of his surgery and was the causal or precipitating factor in the surgery. Indeed, AIG acknowledges that Claimant’s pain on August 23, 2005 “was more severe than he had experienced before, but less severe than he experienced in the future . . .” AIG Br. at 18 (emphasis in original). Furthermore, AIG’s medical expert, Dr. Barrash, has stated that the neurological findings he noted during his examination of Claimant on May 6, 2008 were residuals from the injury of May 11, 2005 *and subsequent surgery*. AIGX 24 at 0485. Thus, to the extent that the surgery itself contributed to Claimant’s impairment, it does not sever the causal connection between his residual disability and his employment with AIG. When a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence of the work injury. *See generally, Bludworth Shipyard v. Lira*, 700 F.2d 1046 (5<sup>th</sup> Cir. 1983).

In reaching my decision that AIG is the responsible carrier in this matter, I note, as previously mentioned, that the medical opinions of Drs. Nehmer and Barrash both contain inaccuracies and inadequately supported conclusions which unnecessarily complicate the process of weighing one against the other and make this a close call. I also note, however, that each Carrier bears the burden of persuading me that liability for Claimant’s impairment rests with the other, and in the event they are unsuccessful in doing so, liability is assigned to the later carrier consistent with the case law defining responsible employers and carriers in occupational disease context. *Buchanan v. International Transportation Services*, 33 BRBS at 36. Thus, even if I were to accord these two medical opinions the same evidentiary weight, liability for Claimant’s impairment would still rest with AIG.

### **Nature and Extent of Disability**

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with Claimant. *Trask v. Lockheed Shipbuilding*

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<sup>5</sup> It is unclear what period of “temporary disability” AIG is referring to, since based on its account Claimant’s temporary aggravation completely resolved by the time he returned to his duties that same day. *Cf. Delaware River Stevedores, supra* (“where claimant’s work results in a temporary exacerbation of symptoms, the employer at the time of the work events leading to this exacerbation is responsible for the resulting temporary total disability”); *Coley, supra*.

*Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). 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.” 33 U.S.C. 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). 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. *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 curium*), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask, supra* at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services v. Director, OWCP, supra* at 443.

Claimant’s counsel argues that Claimant cannot return to his job as a truck driver in Iraq. Cl. Br. at 7. He further argues that Claimant has reached maximum medical improvement, there has been no showing of suitable alternate employment, and Claimant is thus totally and permanently disabled as a result of his work-related injuries. *Id.* at 7, 15.

Counsel for ACE admits that Claimant can no longer perform his duties as a truck driver because of the August 23, 2005 injury. ACE Br. at 21. He further states that “Claimant is still disabled from work, as he is physically unable to return to his employment as a truck driver in Iraq.” *Ibid.*

According to counsel for AIG, Claimant sustained minimal, if any, loss of wage-earning capacity and he is not totally disabled. AIG Br. at 30. He notes that the parties have agreed that Claimant reached MMI no later than February 1, 2007 and argues that only Drs. Forrest and Barrash have established any work restrictions based on Claimant’s condition. *Ibid.* He further argues that AIG has produced evidence which establishes the availability of suitable alternate employment based on the restrictions proposed by Drs. Forrest and Barrash as modified by Claimant. *Id.* at 31-32.

#### *Nature of Disability and Maximum Medical Improvement*

The date on which a claimant’s condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve.

*Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition, even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub nom, Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

During his March 6, 2008 deposition testimony, Dr. Forrest, Claimant's primary care physician, testified that Claimant reached MMI sometime within six to 12 months following his cervical spine surgery in February 2006. AIGX 20 at 43-44. He further testified that MMI had been reached "at least by February of 2007." *Id.* at 45. A Work Capacity Evaluation Form OWCP-5c signed by Dr. Forrest also reflects that Claimant has reached MMI.<sup>6</sup> *Ibid.* Based on the foregoing, consistent with the stipulation of the parties, I find that Claimant's disability became permanent on February 1, 2007. Any disability that existed prior to that date was thus temporary in nature.

#### *Extent of Disability*

It is a claimant's burden to establish that he is unable to return to his former employment due to his work injury. At this initial stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). The same standard applies regardless of whether the claim is for temporary total or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.* (Walker II), 19 BRBS 171 (1986). The claimant's credible complaints of pain may constitute substantial evidence to meet his burden of proof. *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 343 (1988).

If the claimant makes this prima facie showing, the burden then shifts to the employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989) (involving injury to a scheduled member); *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd*, (No. 86-3444)(11th Cir. 1987)(Unpublished).

The record confirms that Claimant's neck and shoulder symptoms became more pronounced after August 23, 2005. Claimant testified that, following his return to Australia, he experienced continuous pain in his neck and shoulder which was more severe and more frequent than it had been previously. He also testified that his pain interrupts his sleep, he is taking various medications to relieve his symptoms, and his pain impairs his ability to concentrate and

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<sup>6</sup> On July 11, 2007, Claimant's counsel sent an email to his client asking him if he knew when Dr. Forrest would be able to state that Claimant had reached maximum medical improvement ("MMI"). Employer/Carriers' Petition for 8(f) Special Fund Relief ("Emp. 8(f) Pet."), Ex. 8. A Work Capacity Evaluation Form OWCP-5c produced to Respondents' counsel after January 18, 2007 reflects that Claimant has reached MMI.

to perform even routine tasks. After examining Claimant on September 12, 2005 Dr. Forrest, his treating physician, determined that Claimant was totally unfit for work from September 2, 2005 through October 15, 2005. AIGX 8-A at 0159. Dr. Forrest reached similar conclusions with respect to Claimant's inability to work through December 11, 2005. AIGX 8-A at 0160-0161. On February 9, 2006, Dr. Vrodos, the physician who ultimately performed Claimant's neck surgery, noted that Claimant "still has significant pain, which is quite unbearable." CX 1 at 13; AIGX 16 at 0297. Dr. Vrodos also noted that the pain had persisted since last May, was significantly affecting his quality of life, and concluded that there was no option available other than a surgical decompression. *Ibid.* Surgery was performed on Claimant's cervical spine on February 16, 2006 by Dr. Vrodos.

Based on Claimant's credible complaints of neck and shoulder pain following his August 23, 2005 injury, the medical evidence showing that nerve block injections and cervical spine surgery were necessary to treat those symptoms, and the physical limitations imposed on Claimant thereafter, I find that Claimant has made a *prima facie* showing that he is unable to return to his former job as a truck driver for IAP. It is thus Employer/Carriers' burden to establish the availability of suitable alternate employment.

#### *Suitable Alternate Employment*

As noted above, if a claimant is able to demonstrate that he is unable to return to his former job, then the burden shifts to the employer to show that suitable alternate employment is available. *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). The employer must demonstrate the availability of specific jobs within the local community which claimant is capable of performing given his physical restrictions and educational and vocational background. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). If the employer establishes the existence of such employment, the employee's disability is partial, not total. *Director, Office of Worker's Compensation Programs v. Berkstresser*, 921 F. 2d 306, 312 (D.C. Cir. 1991).

Claimant's counsel argues that Employer/Carriers have failed to establish the availability of suitable alternative employment. Cl. Br. at 15. He asserts that Claimant is "effectively outside of the competitive job market" because, *inter alia*, he is 60 years of age, has a 7<sup>th</sup> grade education, has extensive physical disabilities which will get worse, has difficulty sleeping, and takes pain medication daily. *Ibid.*

As noted previously, ACE's counsel agrees that Claimant is no longer physically able to perform his prior employment with IAP as a truck driver. ACE Br. at 21. No argument is offered with respect to suitable alternate employment. Instead, ACE's attorney simply posits that "AIG is responsible for provision of benefits in connection with [Claimant's] disability." ACE Br. at 22.

AIG's counsel asserts that only two doctors, Dr. Forrest and Dr. Barrash, have established work restrictions with respect to Claimant's injuries. AIG Br. at 30. He argues that,

regardless of which physician's limitations are ultimately applied, Claimant is capable of returning to work. *Ibid.* AIG's attorney has offered two labor market surveys in an effort to establish suitable alternate employment; one for the Australia/Howard Spring/Northern Territory Area and another involving the international job market. AIGX 27.

With respect to counsels proffer of its "international" labor market survey, I note that none of the jobs referenced therein are located in either Iraq or Kuwait where Claimant's injuries occurred.<sup>7</sup> I also note that this is not a case in which Claimant has established a history of extensive overseas employment both before and after the injuries which are the subject of the claim. *See, e.g., Patterson v. Omniplex World Services*, 36 BRBS 149, 153 (2003) (ALJ erred in limiting relevant labor market to 50-mile radius of claimant's residence in United States where the claimant had extensive overseas employment both pre- and post-injury). With the exception of the time he spent working for IAP in Iraq and Kuwait when the injuries at issue herein occurred, all of Claimant's prior work was in Australia where he resided before going to work for IAP. Claimant returned to Australia after IAP's contract ended, and he has remained there since. In light of the fact that AIG has offered no argument or evidence to suggest otherwise, I find that this evidence is insufficient to sustain its burden to show the existence of available jobs either where the injury occurred or where Claimant resides.

In contrast to its "international" labor market survey, AIG's labor market survey for the Darwin City area, which is less than 20 miles from Claimant's residence in Howard Springs, identifies ten jobs available from February 2007 to the present which are within Claimant's physical limitations. AIGX 27. The ten jobs fall into one of four job categories identified as: bench assembler/packager positions; dispatcher/operations service; general office clerk/receptionist positions; and customer service representative positions. *Id.* at 519. Mr. Stauber, the vocational specialist who prepared the survey, noted wages for each position in Australian dollars which, at the time it was prepared, had an exchange rate of approximately \$1.30 Australian dollars for \$1.00 U.S. dollar. *Id.* at 520. The Australian wages listed for these positions ranged from \$14.25 to \$20.00 per hour as of February 2007 and \$15.00 to \$21.00 per hour as of July 2008. *Id.* at 523.<sup>8</sup> The survey also notes various work restrictions compiled by Mr. Stauber based on his review of Claimant's personnel records, deposition transcript, and medical records, and his telephone conversations with Claimant. AIGX 27 at 518-19; AIGX 31

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<sup>7</sup> AIG has failed to offer any argument which might support the use of its "international" labor market survey in this matter, and instead relies on the ten positions identified by Mr. Stauber in and around Darwin City, Australia. *See* AIG Br. at 32-35. Even if its international labor market survey included jobs in Iraq and Kuwait, I note the Board has overruled prior decisions in which it held that an employer need show only suitable alternate employment was available to the claimant within the area where the injury occurred if he moved thereafter. *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23, 27 (2001). Relying on more recent federal circuit court decisions, the Board determined that it was appropriate to consider a variety of factors, such as those cited by the Fourth Circuit including a "claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence and the degree of undue prejudice to employer in proving suitable alternate employment in a new location." *Id.* at 25. Likewise, it noted the First Circuit held that a "claimant's chosen community is presumptively the best place for measuring claimant's wage-earning capacity" and that it was the employer's "burden of showing that the original move, or a refusal to move again, is unjustified, or that (reasonableness aside), the prejudice to the employer is just too severe." *Id.* at 26.

<sup>8</sup> The amounts shown converted at the rate noted above result in wages of approximately \$10.88 to \$15.38 per hour in U.S. dollars for February 2007 and approximately \$11.54 to \$16.15 for July 2008.

at 10-11. They allow sitting continuously for up to 8 hours and standing and walking for no more than 4 hours but prohibit jolting/vibration activities, frequent or repetitive at or above shoulder reaching, lifting greater than 25 pounds, pushing or pulling greater than 50 pounds, stretching or repetitive turning of the neck, holding the neck in extreme flexion, extension rotation or lateral flexion, holding arms in a stationary position for prolonged periods, frequent or repetitive forward bending from the waist, stooping, kneeling, or squatting, and activities requiring a high level of cognitive (i.e., memory) performance. AIGX 27 at 519. Mr. Stauber further notes that Claimant is able to operate a motor vehicle at work. *Ibid.*

Mr. Stauber spoke with Claimant on two occasions for approximately 70 minutes total before completing his labor market surveys. AIGX 27 at 535. During these interviews, Claimant was cooperative and communicated clearly with Mr. Stauber. *Ibid.* He told Mr. Stauber, *inter alia*, that he continues to treat with Dr. Forrest, has a valid driver's license and is capable of driving without interruption from his residence in Howard Spring to Darwin City, approximately 35 kilometers away. *Ibid.* Claimant also told Mr. Stauber that he missed work but did not believe it was medically possible for him to return to work because of his pain and use of prescription medicines. *Id.* at 536. Mr. Stauber opined that Claimant's age of 60 would not inhibit his ability to find work. AIGX 31 at 47-48.

The Work Capacity Evaluation Form OWCP-5c completed by Dr. Barrash on June 16, 2008 notes limitations of no heavy lifting, able to sit eight hours, walk and stand four hours, reach above shoulder level and twist/bend/stoop/squat/climb up to two hours, operate a motor vehicle six to eight hours, push and pull 50 pounds, lift up to 25 pounds, and kneel up to four hours. AIGX 24 at 484.

During his March 6, 2008 deposition, Dr. Forrest testified that Claimant "should avoid any jolting activities that could put a shock to the neck, that he should avoid heavy lifting or forceful pulling or pushing with his arms" or engage in "activities that require a high level of cognitive performance[,] . . . repetitive turning of the neck, stretching of the neck, holding the neck in an extreme position of flexion, extension, rotation or lateral flexion, holding his arms in any sustained position for a long period of time . . . . [or] persist at a physical or repetitive task for a protracted period of time without taking a break to stretch and relieve discomfort."<sup>9</sup> AIGX 20 at 45-46. He also testified that Claimant would need to move and change positions every half-hour, and weight restrictions with respect to lifting, pushing and pulling would be about 8.8 pounds. *Id.* at 46, 48.

I find Mr. Stauber's assessment of Claimant's work restrictions are generally consistent with the opinions of Drs. Barrash and Forrest, as well as the information Claimant personally provided to Mr. Stauber when he was interviewed by phone. While I note that Mr. Stauber adopted Dr. Barrash's restrictions on the weight that Claimant could lift (25 pounds) and push/pull (50 pounds) rather than the restrictions imposed by Dr. Forrest of approximately 8.8

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<sup>9</sup> As noted previously, an undated Work Capacity Evaluation Form OWCP-5c completed by Dr. Forrest notes that Claimant is unable to perform his prior work for IAP, he has reached MMI, and he has "indefinite" restrictions of "[a]ll activities for restricted duration less than one hour per day." Emp. 8(f) Pet., Ex. 8. I find this form is outweighed by Dr. Forrest's deposition testimony inasmuch as the form is vague and subject to various interpretations whereas his testimony is much more specific and definite regarding Claimant's capabilities.

pounds, I note that the jobs identified by Mr. Stauber do not require lifting, pushing or pulling of more than 5 to 10 pounds. Furthermore, the jobs are classified as sedentary, allow for the employee to change positions from sitting to standing as needed, and do not require activities that are precluded by any other restrictions imposed by Dr. Barrash or Dr. Forrest.

While Claimant has testified that he does not believe he is capable of performing any work because of his ongoing pain and use of prescription medications, I find that testimony is outweighed by the medical opinions of both physicians, especially that of Dr. Forrest inasmuch as he has treated Claimant for his cervical spine and shoulder problems since Claimant returned to Australia and is familiar with Claimant's medical history, diagnostic test results, physical examination findings, and medication regimen. Based on the foregoing, I find that Employer has demonstrated the availability of employment within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Employer has thus established suitable alternate employment available to Claimant as of February 1, 2007.

As noted above, Claimant has acknowledged that he has not attempted to find work since he returned to Australia based on his belief that he is incapable of engaging in gainful employment. Inasmuch as Claimant has not met his burden to prove he diligently tried and was unable to find work, *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987), his disability is at most partial, not total, from February 1, 2007 forward. See 33 U.S.C. § 908(c); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

### **Average Weekly Wage**

According to Claimant's counsel, Claimant earned a total of \$47,645.16 during the 207 days he actually worked for Employer between December 15, 2004 to January 22, 2005 and March 15, 2005 to August 29, 2005.<sup>10</sup> Cl. Br. at 15. He notes that 207 days is equivalent to 29.57 weeks and dividing Claimant's income by that amount results in an average weekly wage (AWW) of \$1,611.27. *Ibid.* Noting that Claimant worked seven days per week, he asserts that Section 10(c) of the Act applies and argues that Claimant's actual wages earned while working for IAP may be used to compute the AWW here. *Id.* at 16. He also cites various decisions in which the contract rate has been used to establish the applicable AWW. *Ibid.* According to counsel, Section 10(c) further allows consideration of wages earned by similar employees working in the same employment, and he notes that responses to interrogatories produced by Employer and ACE state: "[Claimant's] annual salary of \$84,000 was comparable to that of his peers." *Ibid.* He goes on to note that dividing \$84,000 by 52 weeks results in an AWW of \$1,615.38 which is substantially the same as his demonstrated actual AWW of \$1,611.27.

Counsel for AIG agrees with Claimant's counsel that Sections 10(a) and (b) of the Act are inapplicable to this case.<sup>11</sup> AIG Br. at 24 He also agrees that the adjudicator has broad

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<sup>10</sup> Claimant, as noted previously, left the Middle East during his employment with IAP to assist his wife between January 23, 2005 and March 14, 2005 after she had been diagnosed with breast cancer. Tr. 36-37; CX 14 at 11-12, 82.

<sup>11</sup> Counsel for ACE did not address the issue of average weekly wage in his post-hearing brief.

discretion to determine AWW under Section 10(c) of the Act. *Id.* at 25. However, rather than use Claimant's actual IAP wages for the days worked or his annual contract rate, AIG's counsel argues that a "blended wage based on the full 52 weeks of earnings prior to the date of injury is appropriate." *Id.* at 26. He asserts that Claimant actually earned "negative income" for the first few months of this period, and his wages of \$47,645.16 earned from August 23, 2004 through August 23, 2005 should be divided by 52 weeks to compute an AWW of \$916.25. *Id.* at 26-27.

Under the LHWCA, the amount of a disabled employee's award of benefits depends on the average weekly wage the employee earned while employed. Pursuant to Section 10 of the LHWCA, an employee's AWW can be calculated in several ways. Section 10 establishes three alternative methods for determining a claimant's average annual earning capacity, which is then divided by 52 to arrive at the average weekly wage. Where neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied, Section 10(c) is a catch all provision for determining a claimant's earning capacity.

If a claimant was employed for substantially the whole year prior to the injury, average annual earnings are calculated pursuant to Section 10(a) by determining the average daily wage during the period worked, and multiplying that number by either 260, if the employee was a five-day worker, or 300, if the employee was a six-day worker. If, however, an employee has not worked substantially all of the previous year, one must next look to Section 10(b). Under Section 10(b), AWW is determined by looking at the wages earned by employees of the same class, in the same or similar employment, and in the same or a neighboring location.

Where neither Section 10(a) nor 10(b) can be properly applied, Section 10(c) requires the average annual wage used to calculate the average wage "shall reasonably represent the annual earning capacity of the injured employee." In the instant case, both Employer and Claimant are in agreement that Section 10(c) should apply, although they offer different models of application.

Section 10(c) does not provide a precise method for determining an employee's annual earning capacity, but it does state the employee's previous earnings should be considered, as well as the earnings of similarly situated employees. The essential purpose of the average weekly wage determination is to reflect a claimant's annual earning capacity at the time of the injury. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 (1<sup>st</sup> Cir. 2005) at 610, *quoting Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 1031 (5<sup>th</sup> Cir. 1998).

The ALJ has broad discretion in determining the annual earning capacity under Section 10(c). The prime objective of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. The amount actually earned by a claimant is not controlling.

Neither Section 10(a) nor Section 10(b) may be applied in this case in light of the fact that Claimant's undisputed testimony establishes that he was a seven-day a week worker. Section 10(c) of the Act provides:

If either [Section 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous

earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

IAP hired Claimant to work for it as a truck driver in Iraq and Kuwait for the period December 15, 2004 until August 29, 2005 at an annual salary of \$84,000, and that salary was comparable to the wage earned for work performed by Claimant's peers at IAP. CX 20 at 4-5. After he began working in the Middle East for Employer, Claimant returned for approximately seven weeks between January 23, 2005 and March 14, 2005 because he needed to attend to his wife who had been diagnosed with cancer, and he thus only worked 207 days between December 15, 2004 and August 29, 2005. The wages he earned during those 207 days totaled \$47,645.16. Using Claimant's wages for the time he actually worked to compute an AWW results in an AWW of \$1,611.27. This amount is only a few dollars less than the \$1,615.38 AWW computed using the wages provided in Claimant's employment contract, and it is comparable to the wages paid to other IAP employees providing the same or similar services. Claimant and his fellow truck drivers worked long hours in extremely hazardous conditions in a war zone which presented significant physical, as well as mental, challenges. The wages offered by employers to attract workers under these conditions are understandably higher than wages required to attract employees for similar work elsewhere in the world. Based on the foregoing, I find that the wages Claimant was due under his contract of employment with IAP reasonably represent his annual earning capacity at the time of his August 23, 2005 injury. Dividing that amount by 52 weeks results in an AWW of \$1,615.38.

### **Wage Earning Capacity**

Section 8(c)(21) provides that an award for an unscheduled permanent partial disability, such as the one presented here, is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. The ultimate objective of the "wage-earning capacity formula is 'to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured.'" *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 795, 16 BRBS 56, 61 (CRT) (D.C. Cir. 1984) (quoting 2 Larson, The Law of Workmen's Compensation § 57.21, at 10-101 to 10-102 (1982)). A claimant's wage-earning capacity in a job found to constitute suitable alternate employment should be adjusted to represent wage rates in effect at the time of the injury. *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691, 695 (1980). Averaging the wages of jobs found to constitute suitable alternate employment ensures that the post-injury wage earning capacity reflects each job that is available. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT)(9<sup>TH</sup> Cir. 2002); *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT)(9<sup>TH</sup> Cir. 2002); *Avondale Industries v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT) (5th Cir. 1998); .

Claimant has earned no actual wages since he left his employment with IAP in August 2005, and he admits that he has made no effort to obtain employment since then. The ten jobs listed in Employer's labor market survey, as noted previously, reflect hourly wages for February 2007 ranging from a low of \$14.25 to a high of \$20.00.<sup>12</sup> The median of these two extremes is \$17.13.<sup>13</sup> However, a more accurate assessment of the average hourly wage can be computed by adding the lowest wage of each of the jobs together and dividing by ten to determine the median hourly wage at the bottom of the scale, doing the same for the highest wages for these jobs, and then determining the average of these two extremes. This method produces an average hourly wage of \$17.58.<sup>14</sup> Based on the foregoing, I find that Employer has established a wage-earning capacity for Claimant of \$703.20 per week<sup>15</sup> as of February 1, 2007. Inasmuch as this amount represents earnings in Australian dollars, converting the amount to U.S. dollars results in a wage-earning capacity of \$540.92.<sup>16</sup>

As noted above, it is necessary to adjust the wage-earning capacity established by suitable alternate employment from the date that employment has been shown to be available based on the wage rates in effect at the time of the injury. This is done by determining the difference in the National Average Weekly Wage (NAWW) at the time of the injury versus the NAWW at the time of the employment. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). In August 2005, the time of Claimant's work-related injury, the NAWW was \$523.58.<sup>17</sup> By February 2007, the month in which Employer has established suitable alternate employment, the NAWW had increased to \$557.22, *i.e.*, a difference of \$33.64. That amounts to a 6.42 percent increase in the NAWW between August 2005 and February 2007.<sup>18</sup> Adjusting Claimant's wage-earning capacity in February 2007 of \$540.92 downward by 6.42 percent to reflect his wage-earning capacity as of August 2005 results in a wage-earning capacity of \$506.19.<sup>19</sup>

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<sup>12</sup> Two of the ten jobs listed in Employer's labor market survey, *i.e.*, two position under the heading "Bench Assembler/Packer Positions" identified as "Assembler/Packager" with Integrated Group Limited and Kelly Services, are noted as beginning at part-time employment (20-25 hours per week) with possible full-time employment (38-40 hours per week) after 3 months. AIGX 17 at 520-521. The Board has recognized that part-time employment may constitute suitable alternate employment, *Royce v. Elrich Construction Company*, 17 BRBS 157, 159 (1985). The wages for these positions are thus included in my calculation of wage-earning capacity.

<sup>13</sup>  $\$14.25 + \$20.00 \div 2 = \$17.125$  rounded up to \$17.13.

<sup>14</sup> Total low wages for ten jobs of  $\$166.50 \div 10 = \$16.65$ ; total high wages for ten jobs of  $\$185 \div 10 = \$18.50$ ;  $\$16.65 + \$18.50 = \$35.15 \div 2 = \$17.575$  rounded up to \$17.58.

<sup>15</sup>  $\$17.58$  per hour x 40 hours per week = \$703.20.

<sup>16</sup>  $\$703.20 \div 1.30 = \$540.92$ .

<sup>17</sup> The Department of Labor determines the NAWW by looking at Sections 6(b)(3) and 2(19) of the LHWCA, 33 U.S.C. §§ 906(b)(3), 2(19). Section 6(b)(3) directs the Secretary to determine the NAWW for the three consecutive calendar quarters ending June 30, and that such determination shall be the new NAWW for the year beginning October 1 and ending September 30 of the next year. Pursuant to Section 2(19), the NAWW is based upon the earnings of production or nonsupervisory workers on private nonagricultural payrolls as obtained from the Bureau of Labor Statistics. These earnings figures for the three consecutive quarters ending June 30 are averaged to obtain the NAWW. A table compiled by the Department of Labor reflecting the NAWW through September 30, 2009 is available at: <http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>.

<sup>18</sup>  $(\$557.22 - \$523.58) \div \$523.58 = .0642 \times 100 = 6.42$  percent.

<sup>19</sup>  $\$540.92 \times .0642 = \$34.73$ ;  $\$540.92 - \$34.73 = \$506.19$ .

## **Credit for Overpayment**

Counsel for AIG notes that Respondents have been paying Claimant temporary total disability in the amount of \$910.25 per week since August 29, 2005. AIG Br. at 36. He further states that Claimant's entitlement to temporary total disability ceased as of February 1, 2007, when Claimant reached MMI, and argues that Respondents are therefore entitled to a credit for any overpayment of benefits after that date against any unpaid disability installments that may now be due. *Ibid.*

Section 14(k) of the Act provides: "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." In *McCabe Inspection Service, Inc. v. Willard*, 240 F.2d 942 (2d Cir. 1957), the Second Circuit held that an employer was entitled to a credit against an award where it had paid the claimant compensation at his full wage rate for a time and was later adjudged liable for a period of temporary total disability and a scheduled award at a lower compensation rate. The court wrote:

The Act "should be administered and interpreted so as to encourage employers to comply with all of its requirements with celerity and not to penalize those who humanely and more than sufficiently meet the demands of the law. *State Compensation Insurance Fund v. Pillsbury*, [27 F. Supp. 852 (S.D.Cal. 1939)]. . . ."

*Id.* at 943. The Board has construed *McCabe* as including within its reasoning an employer who has voluntarily paid advance compensation in the form of scheduled benefits and is later adjudged liable for permanent partial disability under the loss of wage earning capacity concept of Section 8(c)(21). *Scott v. Trans World Airlines*, 5 BRBS 141, 145 (1976). Thus, to the extent temporary total disability compensation already paid by Respondents to Claimant in this matter exceeds the amount of compensation to which he is found entitled in this order, I agree with AIG's counsel that Respondents are entitled to a credit.

## **Special Fund Relief Pursuant to Section 8(f) of the Act**

On April 8, 2008, a Petition for 8(f) Special Fund Relief was received by the Office of Administrative Law Judges from AIG's counsel and filed in this matter. A copy of Respondent's petition was served April 4, 2008 via mail on, *inter alia*, counsel for the Director, Office of Workers' Compensation Programs. No response to the petition has been filed by the Director.

In his post-hearing brief, AIG's counsel states that, in the event Claimant is found to have suffered an injury or aggravation of his neck and shoulder condition on August 23, 2005, then Respondents' liability is limited to 104 weeks from February 1, 2007 pursuant to Section 8(f) of the LHWCA. AIG Br. at 36-42. A copy of AIG's brief was served October 23, 2008 via mail on counsel for the Director. Counsel for the Director has not responded, nor was he represented at the formal hearing held in this case on March 14, 2008 in New Orleans, Louisiana.

### *Timeliness of 8(f) Petition*

Section 8(f)(3) of the Act provides:

Any request, filed after the dates of enactment of the Longshore and Harbor Workers' Compensation Amendments of 1984, for apportionment of liability to the special fund . . . , shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense . . . , unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

However, Section 702.321(a)(3) of the Department's regulations provides that:

Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to later seek relief under section 8(f) of the Act. . . . The failure of an employer to present a timely and fully documented application for section 8(f) relief may be excused . . . where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director.

20 C.F.R. §702.321(a)(3).

With respect to the timeliness of Respondent's petition for Section 8(f) relief, AIG's counsel states that Dr. Forrest, Claimant's treating physician, was deposed in this case on March 6, 2008 and testified that Claimant had reached maximum medical improvement. Emp. 8(f) App. at 2. He further states that there were no prior findings of MMI, permanency was not an issue in this case before the claim was forwarded to OALJ, and Respondents promptly filed their petition for Section 8(f) relief once they became aware of the fact that permanency had become an issue. *Ibid.* The record supports counsel's assertions, and I thus find that Respondent's petition for Section 8(f) relief is timely.

### *Mertis of 8(f) Petition*

Section 8(f) of the Act shifts part of the liability for a claimant's disability from the employer to the Special Fund, established under Section 44 of the Act, when the disability is not due solely to the injury which is the subject of the claim. In construing Section 8(f), the courts have repeatedly stated that Section 8(f) was enacted to avoid discrimination against handicapped workers, which would naturally flow from the aggravation rule. *See, e.g., Dir., OWCP v. Campbell Indus.*, 678 F.2 836, 839, 14 BRBS 974 (9<sup>th</sup> Cir. 1982). Federal and Board case law has established that, in order to qualify for this relief, an employer must make a three-part showing: (1) the claimant had a pre-existing permanent partial disability; (2) such pre-existing disability, in combination with the subsequent work injury, contributes to a greater degree of permanent disability; and (3) the pre-existing disability was manifest to the employer. *Dir.*,

*OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Dir., OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), *rev'g Glover v. C & P Telephone*, 4 BRBS 23 (1976). The statutory language provides the first two requirements; the courts have added the third requirement. It is the employer's burden to prove each of these elements. *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 668 (9th Cir. 2000); *Dir., OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 114 (4th Cir. 1982); *Campbell Indus., supra*; *Bullock v. Sun Shipbuilding & Dry Dock Co.*, 13 BRBS 381 (1981). Upon proof that these elements have been met, the employer will be liable for only 104 weeks of compensation and the Special Fund will accept liability for the remainder of compensation awarded. 33 U.S.C. § 908(f)(2)(A). The Special Fund is not liable for medical benefits. *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675, 677 (1978).

Under the aggravation rule, unless Section 8(f) applies, the employer must pay the full award regardless of the employer's contribution to the disability. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982), *aff'g* 14 BRBS 520 (1981); *Ashley v. Todd Shipyards Corp.*, 10 BRBS 42, 48-49 (1978), *aff'd*, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980). The schedule award or 104 weeks due under Section 8(f) must be paid in addition to payments for temporary total and temporary partial disability. *Romanowski v. I.T.O. Corp.*, 4 BRBS 59 (1976).

(1) Pre-existing Permanent Partial Disability.

Case law on the interpretation of disability in terms of § 8(f) includes an often cited definition of existing permanent partial disability under Section 8(f):

To summarize, the term "disability" in new [post 1972] § 8(f) can be economic disability under § 8(c) (21) or one of the scheduled losses specified in § 8 (c) (1) - (20), but it is not limited to those cases alone. "Disability" under new Section 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

*C & P Tel. Co v. Director, OWCP (Glover)*, 564 F.2d 503, 513, 6 BRBS 399 (D.C. Cir. 1977). "Section 8(f) is to be read broadly, and this provision thus may encompass persons who are 'disabled' but who do not meet the standards of 'disability' set forth in other statutory schemes." *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989).

The permanent partial disability must predate the employment-related injury. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32, 37 (1992). The mere fact of past injury, however, does not itself establish disability. Rather, "[t]here must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991) (where there is both evidence of complete recovery from a prior back injury and evidence of permanent partial disability, the ALJ must decide the issue of

seriousness); *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985).

Claimant has testified that he was involved in a motor vehicle accident in 1978 where he was thrown through the windshield of the car and fractured his cervical spine at C1 and C3. Tr. 32-33. He was unable to work for nine months as a result of the accident. Tr. 33. In 1987, he was again involved in a serious automobile accident and was out of work for over two years. Tr. 33-34. In addition to being hospitalized, he spent another three or four months undergoing physical therapy at the Darwin Rehabilitation Center because of his injuries. Tr. 34. Medical records which pre-date his employment with IAP substantiate Claimant's testimony.

An April 30, 2001 MRI of Claimant's spine revealed marked spondylotic change throughout the cervical spine. AIGX 18 at 327; Emp. 8(f) Pet., Ex 7. Similar findings were noted at scattered disc levels within the thoracic spine. *Ibid.*

A July 11, 2001 brain MRI report notes a history of skull fracture in 1978 and 1987 and Claimant's ongoing complaints of dizzy spells and memory loss. Emp. 8(f) Pet., Ex. 7.

Dr. Keith Forrest, Claimant's treating physician, first saw Claimant on September 8, 2004 for an "ongoing" medical condition and knew that Claimant had sustained a fractured C1 and C3 vertebrae in 1978, after which he was in traction in the hospital for four months. AIGX 20 at 14, 16. He was also aware that Claimant was involved in another serious automobile accident in 1987, after which Claimant was hospitalized for nine days. *Id.* at 16. Dr. Forrest's records include copies of the records of Dr. Graham Chin, Claimant's prior treating physician, which reported the findings of an MRI of the cervical spine on June 26, 2001, and also noted multiple complaints by Claimant of "pins and needles and electric-shock-type pain . . ." *Id.* at 27. He opined that Claimant's complaints of soreness in the neck and shoulders, and numbness radiating into the dorsum of his left hand, were consistent with his degenerative condition and foraminal narrowing in his cervical spine resulting from age, past trauma to his neck, the fracture of two cervical vertebrae, and degenerative changes in the neck precipitated by that trauma. *Id.* at 32.

Dr. Nehmer reviewed Claimant's medical records and determined that he had significant cervical spine osteoarthritis prior to his initial injury with IAP in May 2005. ACEX 4 at 2. Dr. Harris also reviewed Claimant's prior medical records and wrote to Dr. Vrodos, the physician who performed Claimant's neck surgery, that Claimant had a "background of fractures to C1 and C3 in 1978, severe multilevel degenerative disc disease and more recently a motor vehicle accident in June which his head hit the windscreen." AIGX 19 at 344. Dr. Barrash similarly concluded that Claimant multiple injuries and neck fractures with cervical osteoarthritis from his prior motor vehicles.. AIGX 22 at 425-26.

Post-injury medical records confirm the permanency of Claimant's cervical spine condition. *See, e.g.*, AIGX 16 at 305 (September 9, 2005 cervical spine MRI report noting widespread spondylotic changes with mild disc protrusions, mild scoliosis, and no significant central or foraminal stenosis); AIGX 16 at 303 (October 18, 2005 cervical spine x-ray report showing, *inter alia*, bony spurring of the C3 vertebral body "potentially related to the patient's history of previous trauma," degenerative disc changes throughout cervical spine with mild

arthropathy of the facet joints; October 18, 2005 CT scan of cervical spine showing advanced degenerative disc changes at C2-3 with associated end plate osteophytes).

The evidence in this matter clearly establishes that Claimant suffered a permanent partial disability prior to beginning work as a truck driver for IAP. The evidence further shows that Claimant's pre-existing condition was permanent and serious enough to motivate a cautious employer to discharge Claimant because of a greatly increased risk of an employment-related accident and compensation liability.

(2) Contribution to Permanent Disability.

In order to establish entitlement to Section 8(f) relief, the employer must show that the claimant's present permanent disability, if total, is not due solely to the work-related injury or that the present permanent disability, if partial, is materially and substantially greater than that which would have resulted from the work-related injury alone without the contribution of the pre-existing permanent partial disability. *Lockheed Shipbuilding*, 951 F.2d at 1144. In order to establish the contribution element for purposes of Section 8(f) relief where the employee is permanently partially disabled, employer must show by medical evidence or otherwise that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. Consequently, it is insufficient for employer to show that the pre-existing disability rendered the subsequent disability greater. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 126 (1996).

Dr. Barrash testified that Claimant's present condition is "made worse because of the prior injuries [from his motor vehicle accidents before working for IAP] than it would be if he'd only had the May 11, 2005, accident." AIGX 22 at 424-26. Similarly, Dr. Nehmer concluded that Claimant's preexisting osteoarthritis symptoms were very significantly aggravated by Claimant's August 23, 2005 injury and resulted in Claimant becoming disabled. ACEX 4 at 2. After Claimant returned to Australia from the Middle East, Dr. Forrest, his treating physician, concluded that Claimant was totally unfit for work. AIGX 8-A at 159-61. Dr. Vrodos, after examining Claimant and reviewing his medical history and test results, ordered nerve root injections. CX 1 at 10. He subsequently noted that the root blocks relieved to some extent Claimant's numbness but "he still has significant pain, which is quite unbearable." CX 1 at 13. He further noted that the pain had persisted since May of 2005, it was significantly affecting his quality of life, and concluded there was no option available other than a surgical decompression. *Ibid.*

Claimant's testimony and his medical records establish that, prior to beginning work for IAP in Iraq and Kuwait, Claimant's neck and shoulder problems were not causing significant impairment. Nevertheless, Claimant's medical records and the opinions of both medical experts indicate that Claimant's pre-existing spondylosis and trauma from previous car accidents were major contributing factors to his present disability, which resulted from the combination of his pre-existing condition and work-related injuries. Since sustaining injuries on May 11, 2005, May 31, 2005, June 18, 2005, and August 23, 2005, Claimant has had persistent severe pain in his neck and left shoulder which required cervical nerve block injections and surgical

intervention and rendered him unable to work. The medical and other evidence of record referenced above thus establish that Claimant's disability is materially and substantially greater than it would have been as a result of his IAP work injuries alone and without the contribution of the pre-existing permanent partial disability.

(3) Disability Manifest to Employer.

As noted above, Respondents may limit their liability under Section 8(f) if Claimant had a pre-existing disability that was manifest to Respondents. The manifest requirement may be satisfied either by an employer's actual knowledge of the pre-existing condition or by medical records in existence prior to the subsequent work injury from which a claimant's condition was objectively determinable, *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984), *i.e.*, even if it did not have actual knowledge of the preexisting condition. *White v. Bath Iron Works Corp.*, 812 F.2d 33, 35 (1st Cir. 1987) ("regardless of the employer's actual knowledge, a condition has been considered 'manifest' if it was diagnosed and identified in medical records available to the employer."). *See also Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 456-57 (3d Cir.1978) (preexisting medical infirmities that "were readily discoverable by any employer who looked at [claimant's] medical record" rendered the disability manifest); *Director, OWCP v. Brandt Airflex-Corp.*, 645 F.2d 1053, 1062 (D.C.Cir.1981) (disability is manifest when "medical records plainly stated [claimant's] impairment"). Any rule providing that the pre-existing condition must be manifest to the employer at the time of the employee's initial employment would frustrate the purpose of Section 8(f). *Director, OWCP v. Cargill, Inc.*, 16 BRBS 137(CRT) (9<sup>th</sup> Cir. 1983).

Claimant's prior medical records clearly document Claimant's pre-existing cervical spine condition, and those records were in existence and discoverable by Respondents prior to December 2004 when Claimant began working for IAP. *See, e.g.*, AIGX 18 at 327 (April 30, 2001 cervical spine MRI); AIGX 20 at 27 (referring to February 20, 2001 through March 30, 2002 records of Dr. Graham Chin, Claimants treating physician, documenting cervical spine condition including June 26, 2001 MRI results).

Based on the foregoing, I find that Respondents have established that Claimant had a pre-existing permanent partial disability, his pre-existing disability, in combination with his subsequent injuries while working for IAP, contributed to a greater degree of permanent disability than would otherwise exist, and Claimant's pre-existing disability was manifest to the employer.

### **Recovery of Costs**

In his post-hearing brief, Claimant's attorney notes that Claimant incurred substantial costs (\$3,538.89) associated with his travel to and from Australia to attend the formal hearing in New Orleans, Louisiana and submit to an examination by Respondent's evaluating doctors in Houston, Texas. Cl. Br. 18-19.

In *Bradshaw v. J.A. McCarthy, Inc.*, 3 BRBS 195 (1976) the Board stated:

Section 28(d) of the Act only pertains to the reasonable and necessary costs of witnesses and not to the recovery of costs in general. See S. Rep. No. 92-1125, 92d Cong., 2d Sess., p. 23 (1972).

However, we do agree with the Director's contention that, in keeping with the humanitarian intent and spirit of the 1972 Amendments to the Act, reasonable and necessary miscellaneous costs may be awarded a claimant. Costs are allowances to a party for the expenses incurred in prosecuting or defending a suit. 20 C.J.S. Costs § 1. In amending Section 28 of the Act, we are of the opinion that Congress intended to place the financial burden of the litigation upon the employer in certain instances where claimant has been successful. 33 U.S.C. § 928(a) and (b). Therefore, to insure that the successful claimant receives the compensation due him under the Act undiminished by litigation expenses, we hold that in those cases where an attorney's fee is awarded, reasonable and necessary costs and expenses incurred during the course of a proceeding by a claimant may also be assessed against the employer.

*Id.* at 201 (emphasis in original). Similarly, in *Morris v. California Stevedore and Ballast Co.*, 10 BRBS 375 (1979), the Board determined that the statute defining costs for purposes of litigation in federal district courts was inapplicable to administrative proceedings under the LHWCA and wrote:

[W]e infer a Congressional intent to relieve successful claimants of the burden of litigation expenses. We conclude that successful compensation claimants should be reimbursed costs in the discretion of the administrative law judge and that the items which are reimbursable are not limited to those listed in 28 U.S.C. § 1920.

*Id.* at 385.

Neither ACE's attorney, nor AIG's counsel, have discussed Claimant's entitlement to the above-referenced expenses in their post-hearing briefs. I find that it is both necessary and appropriate to allow Respondents to comment on this aspect of the claim before deciding it. Therefore, Claimant's attorney is instructed to incorporate his request into any petition for attorney fees and costs submitted pursuant to this decision and order as discussed below. Respondents will thereafter have the opportunity to agree with, or contest, payment of these costs.

### **Interest**

Although not specifically authorized in the LHWCA, it had been an accepted practice that interest at the rate of six percent (6%) per annum was assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other ground*, *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979).

However, the Board has now concluded that inflationary trends in our economy have rendered a fixed six percent (6%) rate no longer appropriate to further the purpose of making Claimant whole, and held that “the fixed percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961.” This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See, Grant v. Portland Stevedoring Company*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

### **Attorney Fees and Costs**

No award of attorney’s fees for services to the Claimant is made herein since no application for fees has been made by Claimant’s counsel. Counsel is hereby allowed thirty (30) days from the date of service of this Decision to submit an application for attorney’s fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Employer has twenty (20) days following the receipt of such application within which to file any objections thereto. The LHWCA prohibits the charging of a fee in the absence of an approved application.

### **ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, it is hereby ordered that:

1. Employer and AIG shall pay to Claimant temporary total disability compensation pursuant to Section 8(b) of the LHWCA for the period August 29, 2005 to January 31, 2007 based on an average weekly wage of \$1,615.38 with a corresponding weekly compensation rate of \$1,076.92.

2. Employer and AIG shall thereafter pay compensation for 104 weeks beginning February 1, 2007 for Claimant’s permanent partial disability based upon his average weekly wage of \$1,615.38 and a wage earning capacity of \$506.19.

3. After the cessation of payments by Employer and AIG, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act.

4. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

5. Employer shall pay Claimant for all past, present and future reasonable medical care and treatment arising out of his work-related injury pursuant to Section 7(a) of the LHWCA.

6. Employer and AIG shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

7. Employer and AIG shall receive credit for all amounts of compensation previously paid to Claimant as a result of his work-related injury. Employer and AIG shall also receive a refund, if appropriate, of all overpayments of compensation made to Claimant herein.

8. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

STEPHEN L. PURCELL  
Associate Chief Judge

Washington, D.C.