

**U.S. Department of Labor**

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**Issue Date: 26 August 2008**

In the Matter of

Case No. 2008-LDA-00022

J. W.<sup>1</sup>

OWCP No. 02-145316

Claimant

v.

LEAR SIEGLER MANAGEMENT SERVICE CO.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier

Gary Pitts, Esq.

Houston, Texas

For the Claimant

Tally Perez, Esq.

Houston, Texas

For the Employer/Carrier

Before: JEFFREY TURECK

Administrative Law Judge

**DECISION AND ORDER<sup>2</sup>**

This case concerns a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651 *et seq.*, an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("the Act"), brought by J.W. ("Claimant") against Lear Siegler Management Service Co. ("Employer") and Insurance Company of the State of Pennsylvania ("Carrier"). A formal hearing was held on January 30, 2008, in Kansas City, Missouri. At the hearing, Claimant's Exhibits 1-25 and Employer's Exhibits 1-12 and 14-26 were admitted into evidence. TR 11-12. Only Claimant testified. In addition, the record was initially held open until March

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<sup>1</sup> Effective August 1, 2006, the Department of Labor instituted a policy that decisions and orders in cases under the Longshore and Harbor Workers' Compensation Act that will be available on this Office's website shall not contain the claimant's name. Instead, the claimant's initials will be used.

<sup>2</sup> Citations to the record of this proceeding will be abbreviated as follows: CX – Claimant's Exhibit; EX – Employer's Exhibit; and TR – Hearing Transcript.

31, 2008, in order for the parties to submit additional evidence. TR 5, 95. Employer timely filed supplements to Employer's Exhibit 26, and also submitted Employer's Exhibits 27-30. In an April 17, 2008, *Order Closing Record*, I admitted Employer's Exhibit 26, pages 2-4, and Employer's Exhibits 27-30 into evidence. In the same order, I extended the deadline for Claimant to file a copy of Schedule C to his 2007 federal income tax return until April 30, 2008. Since Claimant timely filed his entire tax return, the document was admitted into evidence as Claimant's Exhibit 26. Following the record's closing, the parties submitted post-hearing briefs. Based upon the evidence contained in the record of this proceeding, I make the following Findings of Fact, Conclusions of Law, and Order.

## **ISSUES**

The parties dispute the nature and extent of any permanent disability resulting from Claimant's October 26, 2005, work-related accident.

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

### *Background*

Claimant, 32, is a resident of Belton, Missouri. TR 13. After graduating from high school in 1993, Claimant served in the United States Marine Corps for two and a half years. TR 14. Following his honorable discharge, Claimant worked as a delivery driver, a waiter, a loan officer in the mortgage industry, and a technician installing security systems. TR 14-15. Calling upon skills he developed during his military service, Claimant joined Employer's ranks on January 15, 2005, as a light-wheel mechanic performing preventative maintenance on military vehicles in Iraq. TR 14, 18; EX 17, at 40. With the exception of two vacations, Claimant worked continuously for Employer from his hiring until October 26, 2005. EX 17, at 42.

During the early morning of October 26, 2005, Claimant slipped and fell off the back of a vehicle he was servicing and injured his lower back, left shoulder, left wrist, and right knee. TR 18-19. Claimant fell between three and four feet onto the concrete floor of his work area. EX 17, at 49. Claimant immediately reported the injury to his foreman and, at the foreman's direction, sought medical treatment. *Id.* at 51. He was placed on light-duty status, but he expressed dissatisfaction with the care he received from Employer's medic and the Army physicians who treated him. *Id.* at 52-53; *see* CX 2, at 1-2. Moreover, Claimant testified that Employer had no light-duty work available for him to perform during his convalescence in Iraq. CX 2, at 1; EX 17, at 52. Unwilling to remain in a war zone to undergo physical therapy, Claimant asked to return to the United States for medical treatment. EX 17, at 53-54. Claimant arrived in the United States on November 5 or 6, 2005. *Id.* at 52. Claimant has not worked for Employer since his accident. *Id.*

### *Medical Evidence*

On November 14, 2005, Dr. Michael Tentori, whose office is in Kansas City, Missouri, began treating Claimant for his back, shoulder, wrist, and knee pain. CX 2, at 15. Dr. Tentori noted that x-rays for each body part were negative and diagnosed strains, contusions, and lumbar

radiculopathy. *Id.* at 17. Dr. Tentori prescribed several medications for Claimant's symptoms as well as physical therapy. *Id.* at 18. He restricted Claimant from lifting over 15 pounds, pushing or pulling over 30 pounds, prolonged standing or walking, climbing stairs or ladders, kneeling, squatting, or stooping, reaching above the shoulders, and using his left hand. *Id.* He also stated that Claimant should sit 50 percent of the time. *Id.* Claimant attended three physical therapy sessions at Concentra Medical Center. *See id.* at 53. During the third session, on November 16, 2005, the therapist noted that Claimant was "not progressing . . . secondary to complaints of pain and inability to tolerate exercise." *Id.* Accordingly, she recommended discontinuing therapy. *Id.* Claimant returned to Dr. Tentori the same day reporting worsening low back and left shoulder pain, unimproved wrist pain, and improved knee symptoms. *Id.* at 54. Dr. Tentori ordered MRIs to "rule out significant pathology," discontinued physical therapy, and did not alter Claimant's restrictions and medications. *Id.* at 55. Opining that Claimant's mild decreases in left arm and grip strength might have been voluntary, Dr. Tentori noted his inability to rule out symptom magnification. *Id.* at 55, 56. On November 30, 2005, Claimant returned to Dr. Tentori reporting no improvement with his low back, left shoulder, and left wrist symptoms. *Id.* at 88. Dr. Tentori noted that Claimant's November 22, 2005, shoulder and back MRIs were negative and that Claimant's left wrist MRI lacked evidence "of acute abnormality." *Id.* at 89; *see id.* at 81-83. Dr. Tentori noted five out of six positive Waddell's signs while examining Claimant's back and again mentioned his inability to rule out symptom magnification. *Id.* at 89. Dr. Tentori ordered resumption of physical therapy and decreased both Claimant's medication and activity restrictions. *Id.* at 90. After attending four physical therapy sessions, Claimant reported worsening back symptoms on December 5, 2005. *Id.* at 108. The therapist wrote that Claimant's "subjective complaints are greater than [the] objective findings." *Id.* at 110. She also wrote, "Questionable effort noted throughout therapy sessions." *Id.* Claimant testified that he "didn't care for" Dr. Tentori's practice and that he did not believe he completed the prescribed course of physical therapy. TR 19-20; EX 17, at 55-56.

On December 14, 2005, Dr. Charles Rhoades began treating Claimant for his left wrist and shoulder complaints. CX 2, at 119. Dr. Rhoades interpreted the diagnostic studies as negative, diagnosed contusions, and ordered additional diagnostic studies for Claimant's wrist and shoulder. *Id.* at 120-22. Dr. Rhoades also provided Claimant with light-duty restrictions that proscribed reaching, pushing, and pulling with the left arm as well as repetitive lifting above the shoulder. *Id.* at 122. On December 15, 2005, Dr. Lan Fotopoulos began treating Claimant for his back complaints. *Id.* at 127. Dr. Fotopoulos noted "a slight left-sided neural foraminal narrowing at L3-4" as well as "a very small disc bulging at L3-4" on the earlier MRI. *Id.* at 130. Dr. Fotopoulos ordered physical therapy and prescribed an additional medication to help Claimant sleep at night. *Id.* Dr. Fotopoulos also provided Claimant with light duty restrictions that proscribed repeated bending, lifting below the knee, kneeling, squatting, climbing, crawling, and lifting more than ten pounds. *Id.* at 123. On December 20, 2005, Dr. Stephen Kunz interpreted the bone scan of Claimant's wrist that Dr. Rhoades ordered as "negative for pathological findings." *Id.* at 131. On January 4, 2006, Dr. Michael Malis interpreted the shoulder MRI that Dr. Rhoades ordered as a "negative study." *Id.* at 138.

On January 6, 2006, Claimant's new physical therapist noted that, after six sessions, Claimant actually reported increased back pain. *Id.* at 145. However, Claimant also reported improving range of motion. *Id.* Accordingly, the therapist recommended continuing therapy.

*Id.* On January 11, 2006, Claimant returned to Dr. Rhoades reporting that his left wrist was improved. *Id.* at 152. Regarding his left shoulder, Claimant reported pain at the medial scapular border with overhead activities and during the night. *Id.* at 153. Dr. Rhoades diagnosed a contusion and scapulothoracic syndrome, prescribed physical therapy, and gave Claimant a shoulder injection. *Id.* Dr. Rhoades updated his light-duty restrictions to prohibit only repetitive lifting above the left shoulder. *Id.* at 148. On January 12, 2006, Claimant returned to Dr. Fotopoulos. *Id.* at 160. Dr. Fotopoulos ordered bilateral epidural injections and additional physical therapy and increased his December 15, 2005, work restrictions to include lifting above the shoulder and reaching, pushing, or pulling with the left arm. *Id.* at 160-63. On January 20, 2006, Claimant received a pair of transforaminal epidural steroid injections to treat his radiculopathy. *Id.* at 167. Dr. Fotopoulos wrote that he performed the procedure without complications and that Claimant “reported good improvement in pain symptoms post procedure.” *Id.* On February 9, 2006, Claimant returned to Dr. Fotopoulos reporting no improvement in symptoms and increased back pain for two weeks following the injections. *Id.* at 181. Dr. Fotopoulos maintained Claimant’s medication regimen but discontinued physical therapy. *Id.* at 181-82. Dr. Fotopoulos also gave Claimant a left glenohumeral joint injection, discussed the risks and benefits of performing a lumbar medical branch block, and decreased his January 12, 2006, work restrictions slightly to permit lifting above the shoulder and reaching, pushing, or pulling with the left arm. *Id.* at 182-83. On February 21, 2006, Dr. Fotopoulos gave Claimant bilateral medial branch block injections at L3-4, L4-5, and L5-S1 “as part of diagnostic evaluation and conservative management for lumbar facet mediated back pain.” *Id.* at 193. Again, Dr. Fotopoulos wrote that he performed the procedure without complications and that Claimant “reported good improvement in pain symptoms post procedure.” *Id.* On March 9, 2006, Claimant returned to Dr. Fotopoulos reporting no benefit from the branch block. *Id.* at 202. Rather, he actually reported increased pain in the days following the procedure. *Id.* Observing that none of the treatments provided pain relief, Dr. Fotopoulos concluded that Claimant had reached maximum medical improvement and recommended a functional capacity evaluation. *Id.* He also prescribed Claimant a narcotic pain medication and provided light-duty work restrictions that included alternate sitting/standing as needed for pain control; two hours standing per day; and no repeated bending, repetitive lifting above the shoulder, kneeling, squatting, climbing, crawling, or lifting more than 10 pounds. *Id.* at 200, 205.

On March 16, 2006, Claimant underwent a functional capacity evaluation at SERC Physical & Occupational Therapy. *Id.* at 211. Claimant demonstrated lumbar active range of motion deficits in all directions. *Id.* While the evaluator described the motion deficits as statistically valid and significant, she also described the lumbar findings as “borderline.” *Id.* Claimant also demonstrated sporadic weakness bilaterally in the lower extremities that the evaluator noted could not “be considered valid secondary to statistical inconsistencies.” *Id.* Claimant also demonstrated decreased range of motion in his left shoulder during abduction and decreased left shoulder strength during both abduction and flexion. *Id.* The evaluator found Claimant’s shoulder deficiencies to be statistically valid. *Id.* She also concluded that Claimant’s functional assessment placed him within the light physical demand category based on the Department of Labor’s classifications. *Id.* Based on the functional description for an automotive mechanic found in the *Dictionary of Occupational Titles*, the evaluator determined that Claimant could not perform the essential functions of his previous employment. *Id.* Specifically, she noted deficits in lifting above and below the waist, repetitive lifting, kneeling, squatting,

carrying, and bending. *Id.* The evaluator noted four out of five negative Waddell's variables, good effort level and cooperation, and moderate consistency of effort. *Id.* at 211-12.

On March 30, 2006, Claimant returned to Dr. Fotopoulos reporting no improvement in his symptoms. *Id.* at 232. Based on the functional capacity evaluation, Dr. Fotopoulos provided the following restrictions: lifting no more than 15 pounds from 14 inches to the waist, 40 pounds from the waist to the shoulder, and 30 pounds from the shoulder to above the head; carrying no more than 25 pounds; pushing no more than 115 pounds; and pulling no more than 83 pounds. *Id.* at 232-33, 235. After reviewing Claimant's work description, scope of activities, and functional job requirements, Dr. Fotopoulos found Claimant unable "to perform all the essential requirements of the job." *Id.* at 236.

On June 27, 2006, Dr. Ronald Zipper, a board-certified orthopedic surgeon (*id.* at 246), examined Claimant and reviewed his medical records at Employer's request. *Id.* at 247. During his examination, Dr. Zipper found that Claimant exhibited signs of symptom magnification or malingering. *Id.* at 255. Specifically, Dr. Zipper noted that swiveling Claimant's hips with no movement at the spine—Hoover's sign—"inappropriately elicited subjective low back pain." *Id.* at 250, 254. Likewise, Dr. Zipper noted that the reverse Phalen's test—a carpal tunnel syndrome test—inappropriately elicited subjective low back pain. *Id.* at 251. Dr. Zipper also noted "an inappropriately positive flip test" and inappropriate low back pain complaints during supine versus seated straight-leg raising. *Id.* at 251, 254. Dr. Zipper also cited evidence of symptom magnification or malingering in Claimant's records. For example, he noted that, during the March 16, 2006, functional capacity evaluation, Claimant had pain limitations "without physiologic or significant biomechanical substitution patterns present." *Id.* at 254; *see id.* at 211. Dr. Zipper also observed that Claimant "was on the borderline of exceeding Waddell's criteria for true symptom magnification" during his own examination. *Id.* at 254.

Based on his examination and review of the records, Dr. Zipper concluded that Claimant "sustained a sprained left wrist, sprained left shoulder, and sprained low back, with a contusion to the right knee (resolved)" on October 26, 2005. *Id.* He found no objective evidence of "cervical and/or lumbar radiculopathy or upper or lower extremity compression neuropathy." *Id.* He also found "no instability patterns . . . about the shoulders" and described Claimant's wrist and knee examinations as "within normal limits." *Id.* Dr. Zipper did note that pain limited Claimant's active cervical shoulder and lumbar ranges of motion. *Id.* Dr. Zipper agreed with Dr. Fotopoulos that Claimant had reached maximum medical improvement. *Id.* He also agreed that Claimant could not return to his usual and customary position as a mechanic based on the job's description and Claimant's pain limitations. *Id.* at 255. However, Dr. Zipper explained that no objective findings substantiated work restrictions. *Id.* While Dr. Zipper also observed that "no objective findings support the need for ongoing medical treatment," he recommended that Claimant take over-the-counter anti-inflammatory medications as needed. *Id.*

On November 14, 2006, Dr. Fotopoulos revised Claimant's permanent work restrictions. CX 1. Dr. Fotopoulos recommended that Claimant sit, walk, reach, kneel, climb, lift, and squat for only 2-3 hours per workday; he recommended that Claimant only stand for 4-6 hours per workday. *Id.* Dr. Fotopoulos provided weight restrictions of 115 pounds for pushing, 83 pounds for pulling, and 25 pounds for lifting. *Id.* He also recommended that Claimant work only 8

hours per day. *Id.* However, during his December 27, 2007, deposition, Dr. Fotopoulos again altered his recommended restrictions. He eliminated any restriction on walking and standing, and doubled the time Claimant could reach, stoop, climb, squat, and kneel. EX 2, at 30.

Since reaching maximum medical improvement, Claimant sought treatment for his work-related injuries on at least two occasions. On May 21, 2007, Dr. Kevin Litwin interpreted shoulder and spinal x-rays as normal. EX 29, at 7. The report lists “chronic pain” as the reason for the x-rays and Dr. Gary Gustafson as Claimant’s physician. *Id.*<sup>3</sup> On October 5, 2007, Claimant asked Dr. Douglas Bradley for a prescription for Vicodin to treat his chronic back and shoulder pain. EX 30, at 7. Dr. Bradley prescribed the requested drug and cautioned Claimant regarding overuse. *Id.* He also told Claimant that he would not prescribe “escalating dosages or strengths in the future.” EX 30, at 7.

Claimant testified that, in the three or four weeks leading up to the hearing, he continued to experience “a lot of pain” in his lower back and left shoulder. TR 21. The record contains a calendar on which Claimant documented his fluctuating pain levels between November 2006 and December 2007. TR 22; *see* CX 24. Claimant testified that he last saw Dr. Fotopoulos in March 2006 and that he has not tried to schedule an appointment with or request additional pain medication from Dr. Fotopoulos since then. TR 32-33.

## DISCUSSION

### *Nature and Extent of Disability*

Claimant seeks compensation for a permanent loss of wage-earning capacity resulting from his October 26, 2005, work-related injuries. Based on an average weekly wage of \$1,374.88, Employer paid Claimant \$18,331.80 in temporary total disability benefits from October 27, 2005, until March 15, 2006. EX 20, at 4.<sup>4</sup> Employer has also paid Claimant \$10,999.06 in permanent partial disability benefits, an amount Employer argues is an overpayment. *Id.*; *see* CX 12. Employer disputes the nature and extent of any permanent disability that Claimant’s work-related back and shoulder injuries may have caused. The Act defines disability as the “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) (2006). Since Claimant seeks compensation for unscheduled injuries, he must show a physical impairment coupled with an economic loss. *Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 110 (BRB 1991); *see* § 908(c)(21). Claimant has the initial burden to prove that his unscheduled work-related injuries precluded him from returning to his usual employment. *See Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171, 172 (BRB 1986). Upon a finding that the work-related injury precluded a return to the usual employment, the employer must prove that suitable alternative employment exists to avoid a finding of total disability. *See Manigault v. Stevens*

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<sup>3</sup> The record contains a February 13, 2008, letter from Dr. Gustafson. *See* EX 29, at 1. In his letter, Dr. Gustafson explained that he could not locate Claimant’s treatment records and offered copies of charge records with dates of service instead. *Id.* Dr. Gustafson circled charge codes for myalgia and lumbar issues on June 13 and May 14, 2007. *Id.* at 4, 6.

<sup>4</sup> The period during which Employer paid Claimant for temporary total disability actually extended beyond the date on which the parties stipulated Claimant reached maximum medical improvement, March 9, 2006. *See* TR 6.

*Shipping Co.*, 22 BRBS 332, 334 (BRB 1989). If Employer proves that suitable alternative employment exists, Claimant may still obtain an award of total disability by proving that, despite engaging in a diligent search, he failed to obtain suitable alternative employment. *See Hooe v. Todd Shipyards Corp.*, 21 BRBS 258, 260 (BRB 1988). Otherwise, Claimant can obtain a partial disability award based on a demonstrated loss of wage-earning capacity. *See* § 908(c)(21).

Claimant has established that his injuries preclude a return to his usual employment as a mechanic, as both Employer's expert, Dr. Zipper, and Claimant's treating physician, Dr. Fotopoulos, concluded that Claimant cannot return to his pre-injury job. Claimant also testified that he could no longer lift wheels, tires, oil jugs, or car batteries under his restrictions. TR 88. Since the medical evidence in this regard is undisputed, the burden shifts to Employer to establish the existence of suitable alternative employment.<sup>5</sup>

#### *Suitable Alternative Employment*

To meet its burden, Employer must establish "the general availability of job opportunities within the geographical area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing." *See Hooe*, 21 BRBS at 260. Attempting to establish the existence of suitable alternative employment, Employer offered two labor market surveys and accompanying reports prepared by Brenda Umholtz ("Umholtz"), a certified rehabilitation counselor. *See* EX 10. In drafting her June 7, 2006, labor market survey, Umholtz interviewed Claimant "to determine his level of motivation, vocational interests, educational and work history, and . . . transferable skills." EX 12, at 7. Based on Claimant's responses and Dr. Fotopoulos's March 30, 2006, restrictions, Umholtz determined that, given his numerous transferable skills, Claimant could "obtain employment in a wide variety of occupations that require similar aptitudes and strengths." *Id.* at 7, 13. Umholtz described Claimant's employment options as "varied and numerous" and concluded that Claimant could "locate employment within his abilities, restrictions, past wage range, and geographical area." *Id.* at 13, 14. In reaching her conclusions, Umholtz considered Claimant's assets and limitations for obtaining employment. In particular, she noted Claimant's "steady work history" and reported "good references." *Id.* at 13. She also emphasized that Claimant's past positions "required skills in customer service, problem solving, time-management and handling the public appropriately," all of which she found "necessary for many entry-level and mid-level positions in a variety of occupations." *Id.* While Umholtz found Claimant's "stated motivation towards employment" significant, she cautioned that she could only assess Claimant's actual motivation level after she determined whether Claimant applied for the positions profiled in her labor market survey. *Id.* at 10, 14. Noting that Claimant was "appropriate in his verbal communication with a neat appearance," Umholtz also described Claimant's personality as an asset in his job search. *Id.* at 14. Umholtz identified Claimant's prolonged absence from the workforce as his only real limitation. *Id.* However, Umholtz opined that, since most employers would understand that Claimant required time to readjust to the "world of work" in the United States, his extended unemployment "very minimally impacted" his employability. *Id.* She also found Claimant's physical limitations relatively insignificant "due to the availability of employment positions within his restrictions and abilities." *Id.*

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<sup>5</sup> Employer submitted reports from two companies it retained to conduct surveillance on Claimant. *See* EX 21; EX 22. The surveillance reports contain nothing suggesting Claimant could return to his usual employment.

In her June 2006 labor market survey, Umholtz focused on jobs in the financial sector. *See* EX 12, at 14. Umholtz identified five available positions in the Kansas City metropolitan area: sales/loan consultant with First Horizon National Corporation; finance representative with Victor L. Phillips Company; financial services and insurance sales manager with Farmers Insurance; loan consultant with IndyMac Bank; and account manager at Verdigris Marketing Group. EX 12, at 1-5.<sup>6</sup> These are all sedentary positions. While none of the employers required college degrees, representatives of three indicated that they preferred them. *Id.* Three positions were compensated on a 100% commission basis, and another paid a base salary plus commission. *Id.* at 1, 3-4. The average starting salary for the five positions, including average commission earnings, was \$73,000 annually or \$1,403.85 per week. *Id.* at 1-5.<sup>7</sup> While all of the employers had at least one opening available, one employer had 25 and another had 50. *Id.* Three employer contacts encouraged Claimant's application because of his mortgage sales experience. *Id.* at 2-4. One Employer indicated it would not hire applicants with DUI convictions, felonies, or bankruptcies. *Id.* at 3. All of the positions profiled were within 34 miles of Claimant's home. *Id.* at 17.

Employer has not established the existence of suitable alternative employment as of June 7, 2006. First, the three positions that paid exclusively on a commission basis—loan consultant with First Horizon, sales manager with Farmers Insurance, and account manager at Verdigris Marketing—do not qualify as suitable alternative employment because the projected earnings are too speculative. While Employer argues the contrary on the ground that Claimant has over two years of experience working on a commission basis in the mortgage industry (*see* TR 23, 38-42), the evidence does not establish Claimant's level of success in those jobs. It appears that neither party made much of an attempt to develop concrete evidence of Claimant's prior earnings in the industry. The record lacks relevant W-2 or 1099 forms, and Claimant's testimony is ambiguous and uncertain. *See* TR 16 ("I'd say in a year -- the only thing that comes to mind is \$14 thousand."). Likewise, Umholtz's statement that Claimant reported earning between \$40,000 and \$80,000 in commissions as a loan officer prior to going to Iraq is aberrant and doubtless mistaken, particularly given the fact that Claimant left the industry to work as a mechanic in Iraq. *See* EX 12, at 8; TR 42. Most recently, Claimant worked for Kansas City Mortgage on a commission basis during some of November and December 2006. TR 23. Claimant testified that he earned nothing during this period; his 2006 tax return reflects the same. *Id.*; EX 27, at 4. However, whether Claimant worked long enough to earn any commissions remains unclear. Mortgage sales are complex transactions that are not initiated one day and finalized the next. Accordingly, the fact that Claimant earned nothing from his short 2006 tenure has little value in assessing his ability to earn future commissions. Since I cannot determine how Claimant fared in commission-only positions, Employer has not demonstrated that similar positions would be suitable.

Second, the loan consultant position with IndyMac Bank does not qualify as suitable alternative employment because its earnings are also too speculative. EX 12, at 4. Umholtz's profile indicates that the position paid a base salary plus commission. *Id.* The exact amount of

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<sup>6</sup> Employer's Exhibit 12 contains an early version of the first labor market survey that contains a sixth position. *See* EX 12, at 6. Umholtz testified that she ultimately decided to exclude the position from her survey. EX 11, at 30-31.

<sup>7</sup> I calculated average starting salaries using the mean of the average starting salary ranges listed. *See* EX 12, at 1-5.

the base salary is unclear. Umholtz wrote that the base salary was “typically” between \$1,000 and \$2,000 per month and that the average total compensation was between \$70,000 and \$100,000. *Id.* Since the position had an undetermined base salary, and most of the projected earnings came from commission, Employer has not established that the position at IndyMac Bank is suitable.

Third, it is doubtful that Claimant actually qualified for the only salaried position Umholtz identified in her June 2006 labor market survey: finance representative with Victor L. Phillips Company. Umholtz’s profile indicates that the position entailed “developing and selling finance and insurance products to customers.” *Id.* at 2. In particular, the employer sought candidates “with knowledge of credit underwriting, UCC, financing and leasing.” *Id.* at 2. While the employer did not require a college degree, it had a preference for candidates with a bachelor’s degree in business, finance, or accounting. *Id.* That the employer’s representative told Umholtz that Claimant’s mortgage sales experience would aid his application does not qualify the position as suitable alternative employment. *See id.* Certainly, related experience would be better than no experience. However, the record establishes only that Claimant sold mortgage products for a little over two years. Furthermore, the record lacks any evidence regarding the extent of Claimant’s knowledge in the areas listed in the profile. Since Claimant lacks a college degree, let alone a degree in business, finance, or accounting, Employer has not established that the position would have been available to Claimant or that he could have performed the job. Accordingly, I find that Employer did not establish the existence of suitable alternative employment as of June 7, 2006.

After Claimant failed to obtain alternative employment following the first labor market survey, Employer requested that Umholtz prepare a second labor market survey. In preparing her October 29, 2007, labor market survey, Umholtz reviewed records from Claimant’s vocational rehabilitation (discussed *infra*), Department of Labor informal conference reports, Claimant’s LS-18, and medical records generated after her first labor market survey, notably the additional restrictions Dr. Fotopoulos outlined in his November 14, 2006, report. *Id.* at 18. She again concluded that Claimant “could readily obtain employment within his geographical area.” *Id.* at 21. Furthermore, she opined that he “could obtain employment within his past salary range of \$1375.00/week if he were appropriately and significantly motivated to do so and engaged in [a] proper job search.” *Id.* To bolster her assertion that Claimant “is qualified for relevant positions with many job vacancies” in the region, Umholtz quoted statistics from the Kansas Department of Labor’s 2007 *Job Vacancy Survey*. *Id.* at 20. She noted that “sales representative” ranked fourth on its list of the top 25 occupations with the highest number of job vacancies in the Kansas City area. *Id.* Likewise, she noted that “customer service representative” ranked fifth. *Id.* Umholtz then identified five similar available positions in the Kansas City metropolitan area: branch manager with Community Loans of America; financial services sales representative with Country Insurance and Financial Services; financial specialist with Wachovia Bank; teller with Enterprise Bank; and sales and marketing associate with Superior Consulting International, Inc. *Id.* at 19, 22-26. Again, none of the positions had physical requirements beyond standing and sitting. *Id.* at 22-26. While none of the employers required college degrees, representatives of three indicated that they preferred applicants possessing them. *Id.* Each representative also confirmed that, despite a preference for degree-holders, the employer had hired candidates for the same position who lacked degrees. *Id.* at 23-

24, 26. Only one position paid a base salary plus commission; the four others were salaried positions. *Id.* at 22-26. The average starting salary for the five positions, including average commission earnings, was \$36,356.80 or \$699.17 per week. *Id.*<sup>8</sup> While all of the employers had at least one opening, one had “several” and another had 5-10. *Id.* Contacts for each employer confirmed that Claimant “met their qualifications” and encouraged Claimant’s application because of his mortgage sales experience. *Id.* at 19, 22-26. All of the positions profiled were within 31 miles of Claimant’s home. *Id.* at 22-26.

Employer has established the existence of suitable alternative employment as of October 29, 2007. Four of the five positions profiled were salaried positions. While the sales representative position with Country Insurance and Financial Services paid a base salary plus commission, the total earnings were not nearly as speculative as they were for the loan consultant position with IndyMac Bank that Umholtz’s identified in 2006. Specifically, the Country Insurance position paid \$36,000 in base salary and an average annual commission between \$4,000 and \$29,000. *See id.* at 23. Furthermore, Umholtz confirmed with representatives of each employer that Claimant qualified for the positions profiled. She also confirmed that several employers that preferred degree-holders had recently hired applicants without degrees. Notably, the Wachovia representative reported that he was a former mortgage broker who was hired for the position without a degree. *Id.* at 24. Finally, based on the position profiles, Claimant clearly has the minimal experience and knowledge required to obtain and perform these jobs. Accordingly, I find that Employer has established the existence of suitable alternative employment paying an average weekly wage of \$699.17 as of October 29, 2007.

### *Diligent Job Search*

Claimant may rebut Employer’s showing by proving that he failed to obtain suitable alternative employment despite diligently searching for a job. Since achieving maximum medical improvement, Claimant worked briefly for Kansas City Mortgage on a commission basis and earned no money. TR 23. He has earned some money through self-employment. TR 23; *see* CX 26. Claimant’s self-employment involves reselling items online that he purchases at live auctions. TR 23-25. Claimant’s 2007 tax return indicates that his business yielded a net profit of \$55. CX 26, at 4. Claimant argues that, because he has been unable to obtain employment, his residual wage-earning capacity is quite low. Assuming that he could conduct his online business more efficiently, Claimant argues that his residual wage-earning capacity is \$100 per week.

Claimant has offered records from his Department of Labor vocational rehabilitation program to support his claim of a diligent job search. After requesting vocational rehabilitation from the Department of Labor on June 13, 2007, Claimant began meeting with Robert Miller (“Miller”), a certified rehabilitation counselor, on August 7, 2007. CX 22, at 1, 3-5. At the outset, Miller helped Claimant prepare a resume, provided sample interview questions,

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<sup>8</sup> I calculated an average starting salary for the branch manager position with Community Loans of America by multiplying the average starting hourly wage by 40. *See id.* at 22. For the three positions for which a starting salary range was listed, I used the range’s mean for each. *See id.* at 23-24, 26. For the teller position with Enterprise Bank, I used the average starting salary for hires with “some cash handling/customer service experience” listed in the labor market survey. *See id.* at 25.

conducted a transferable skills analysis, confirmed that Employer had no available openings for Claimant's restrictions, developed a job placement plan, and identified categories of jobs in which Claimant was interested and for which he qualified. *Id.* at 3-21. These categories included customer service clerk, general clerk, and administrative assistant. *Id.* at 12. On August 17, 2007, Claimant signed an agreement to search for jobs six hours per day while devoting "much of this time" to contacting employers in person. *Id.* at 11. He also agreed, *inter alia*, to submit an application each day and make a minimum number of employer contacts each week. *Id.*<sup>9</sup> Claimant also agreed to maintain a detailed daily record of these activities. *Id.* On August 28, 2007, Miller surveyed the administrative assistant openings in the Kansas City area. *Id.* at 22-26. Miller determined that "there are ample opportunities for employment in Kansas City for an administrative assistant." *Id.* at 26. In particular, he identified six available positions for which Claimant qualified that paid between \$9 and \$11 an hour. *Id.*

The notes from Miller's meetings with Claimant indicate that Claimant interviewed for positions at a sporting goods store and an eyeglasses store in late August 2007. *Id.* at 28.<sup>10</sup> On August 31, 2007, Miller noted that Claimant "is contacting 15-20 places per week and cooperating with the vocational process." *Id.* On September 5, 2007, Miller noted that Claimant had an interview for a retail position and had been applying to the positions identified in Miller's August 28, 2007, survey. *Id.* On September 20, 2007, Miller noted that Claimant "has been contacting 10-15 employers per week and re-contacting old employers." *Id.* at 35. Claimant reported that he had failed a math test for a management position at the aforementioned sporting goods store, interviewed for a position with the U.S. Postal Service that required more lifting than his restrictions allowed, and interviewed at Verdigris Marketing, one of the employers Umholtz identified in her first labor market survey. *Id.* Miller also noted that Claimant had applied "for management, sales, customer service, office, clerk, and insurance positions." *Id.* On September 27, 2007, Miller noted that Claimant had job interviews during the preceding week for a "light warehouse" position, a sales position, and two retail positions. *Id.* He again noted that Claimant "continues to contact 10-15 employers per week and is getting interviews." *Id.* During that encounter, Miller also reviewed "typical interview questions as well as various places to look for employment" with Claimant. *Id.* at 35-36. On October 4, 2007, Miller noted that Claimant had a second interview for the warehouse position and had re-contacted an earlier lead. *Id.* at 36. Claimant also agreed to contact an employer for which he had previously interviewed. *Id.* Miller noted that Claimant had "contacted all the leads that I provided him last week" and was "doing something every day to look for work." *Id.*

On October 10, 2007, Miller noted that Claimant had contacted 11 employers per week along with re-contacting old employers. *Id.* at 38. Miller also noted that Claimant interviewed for a front desk position with a fitness company only to learn after the interview that "they were not hiring." *Id.* Claimant also interviewed for a clerk position with the IRS and submitted a resume to the U.S. Marine Corps office where his mother works. *Id.* On October 18, 2007, Miller noted that Claimant had applied for 15 jobs since their last meeting. *Id.* Miller noted

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<sup>9</sup> The record contains two versions of the agreement, one in which Claimant agreed to apply for between one and three jobs per week and one in which Claimant agreed to apply for one job each day. CX 22, at 9, 11. Claimant testified that he agreed to apply for one job each day. TR 72.

<sup>10</sup> It appeared that Miller relied heavily on Claimant's representations during their meetings in documenting Claimant's rehabilitation.

Claimant's frustration about his failure to obtain employment and wrote that Claimant "is doing everything possible to obtain employment." *Id.* On October 25, 2007, Miller noted that Claimant had contacted all leads that he provided and had applied to 16 jobs since their last meeting. *Id.* at 39. Miller noted the possibility that Claimant could still obtain employment with the Marines' office. *Id.* Miller again reviewed interview techniques with Claimant. *Id.* On November 1, 2007, Miller noted that Claimant had applied for 16 jobs since their last meeting and had interviews with the IRS and a loan company. *Id.* Miller noted that Claimant expressed concerns about the impact his poor credit was having on his job search; Miller opined that Claimant's credit and his arrest and probation for DUI were "probably not helping him." *Id.*; see EX 17, at 81-82.<sup>11</sup> Claimant reported that he was "trying to set up payments with the IRS to clear up" his delinquent tax record, a plan Miller thought "should help somewhat." CX 22, at 39. Miller noted that he would fax or e-mail recommendation letters to all of Claimant's contacts he made over the previous month. *Id.*

On November 14, 2007, Miller noted that Claimant had contacted 16 employers during the previous week and had an interview with an employer that had two retail positions available. *Id.* at 41. Claimant also reported that he might have another interview as a delivery driver. *Id.* Miller reminded Claimant to make certain the job's lifting requirements did not exceed his restrictions. *Id.* Claimant also reported that he had not heard anything further about the still-open positions at the IRS and Marines' office but that he remained hopeful. *Id.* On November 26, 2007, the final day of Claimant's job placement plan, Miller contacted Claimant to inquire about his job search; Claimant reported that he "continues to contact 10-16 employers per week" and that he had not heard about the outcome of his recent interviews. *Id.* In his final report, Miller noted that Claimant "has been cooperating fully with the program and doing everything asked of him." *Id.* at 42. He opined that the only reason he can see for Claimant's failure to obtain employment is his bad credit. *Id.*

In addition to Miller's records, Claimant relies on his hearing and deposition testimony to support his claim of a diligent job search. Claimant testified that he has applied for a wide variety of jobs. TR 25-26. Specifically, he testified that he applied for 200 jobs. TR 64. When asked for examples, Claimant testified that he applied to work as a cashier, loan officer, automobile parts store manager, bailiff, police clerk, librarian, and internet salesperson. TR 26. He also testified that he submitted all of the applications found in the 148-page Claimant's Exhibit 25. TR 27. Claimant testified that he applied for all of the jobs identified in Umholtz's first labor market survey twice, once after receiving them and once after his March 22, 2007, deposition. TR 27-28. He testified that he received no job offers from the applications contained in Claimant's Exhibit 25 or from the jobs identified in Umholtz's first labor market survey. TR 28. When asked if any of the employers told him why they did not hire him, Claimant testified that, in one instance, he was told he had a light warehouse job with a company called Silpada. *Id.* Claimant testified that his interviewers asked him to "go home and fax them the work restrictions and that cancelled the deal right there." *Id.* Claimant testified that Miller recently referred him to an organization called Jewish Vocational Rehabilitation for additional assistance obtaining employment, but they had not yet provided him with any job referrals. TR 29-30.

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<sup>11</sup> Claimant testified that he filed for bankruptcy in 1999. TR 67. He also testified that two of the three rental properties he owns are in foreclosure. TR 90, 93.

On cross-examination, Claimant testified that, prior to working with Miller, he documented his job search activities “but not in that detailed a form.” TR 47. Regarding the job search log he kept while working with Miller, Claimant testified that he documented every time he applied for a job or contacted an employer. TR 48. Likewise, Claimant testified that he documented any follow-up communications he had with employers in the log. *Id.* When asked how many times he verbally communicated with a contact for a prospective employer, Claimant laughed and testified that employers send applicants to computers if they attempt to apply in person. TR 49. Claimant then testified that he learned about the jobs he applied for from Miller, employment websites, and publications. *Id.* Claimant explained that he would apply for jobs through an online service by either having the service submit his resume for him or by following a link to the employer’s website to fill out an online application. TR 50-51. However, when asked why his job search materials only contained printouts from the online service, he replied, “Okay. Well I don’t know[.] I applied for them.” *Id.* Claimant also testified that he would not contact the employer after applying electronically; rather, he would “just wait and see if they contacted” him. *Id.* Claimant stated that he applied to work as a store manager, security officer, librarian, doughnut maker, and dental assistant yet had no experience in any of those fields. TR 55-57. Claimant also testified that he applied for delivery driver positions despite the fact that he has been convicted of DUI since returning from Iraq. TR 57-58. Claimant acknowledged that he had experience as a waiter but that he did not apply for any jobs as a waiter. TR 59. He explained that he believed that he would be unable to perform the job because of his physical restrictions. TR 87-88. When asked why he did not apply for a job with his previous employer as a security system installation technician, Claimant testified that he was told that “they weren’t hiring” and that he believed the position’s requirements exceeded his physical restrictions. TR 38; EX 17, at 74-75.<sup>12</sup>

Claimant’s testimony regarding the jobs profiled in Umholtz’s July 2006 labor market survey was confused and inconsistent. At the hearing, he testified that he did not know when he first called to apply for the position with First Horizon Corporation. TR 65. Claimant testified that he reapplied for the position on September 10, 2007. TR 64. He testified that he first inquired about the position with Victor L. Phillips Company in September 2007 and learned that it was no longer available. TR 64-65. Claimant testified that he interviewed for the position with Farmer’s Insurance on September 11, 2007, although he could not recall when he applied for it. TR 65-66. Claimant then testified that the regional manager told him that his 1999 bankruptcy disqualified him for the position. TR 66-67.<sup>13</sup> Claimant testified that he applied for the position with IndyMac Bank by sending an e-mail. TR 68. He testified that he did not recall when he applied and that he made no further attempt to contact anyone about the position. *Id.* Finally, he testified that he believes he interviewed for the position with Verdigris Marketing Group on September 10, 2007. TR 68-69. Again, he testified that he does not recall when he applied for the position initially, although he obtained the interview after reapplying “sometime in 2007.” TR 69. Despite receiving a job offer, Claimant testified that he rejected it because the job required “a lot of overtime hours” and door-to-door sales. TR 69. However, on March 22, 2007, Claimant testified that he had applied for all of these positions prior to his deposition by

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<sup>12</sup> Claimant was correct in this regard. Umholtz contacted Claimant’s former employer and learned that the position was no longer within Claimant’s restrictions because it required lifting 30 pounds. EX 12, at 14.

<sup>13</sup> Claimant testified that his credit standing prevented him from obtaining a job with another insurance company. TR 90. Likewise, he testified that his tax delinquency prevented him from working for the IRS. *Id.*

either e-mailing or faxing his resume. EX 17, at 86-88. Claimant also testified that he interviewed for the position with Verdigris Marketing Group prior to the March 22, 2007, deposition but that he “never heard from them.” *Id.* at 88. Claimant testified that he did not apply for any of the jobs identified in Umholtz’s 2007 labor market survey. TR 70. Claimant also conceded that, as his search log reflects, he violated his job search agreement by failing to apply for one job each day during his vocational rehabilitation program with Miller. TR 72-73.

Finally, Claimant also relies upon his job search documentation to support his claim of a diligent search. *See* CX 25. Claimant’s documentation, where legible, consists of rejection letters, a cover letter, one of two pages of his resume, a completed application, handwritten search logs, and printouts of e-mails, online job descriptions, and electronic confirmations of application submissions, seemingly in no particular order. The exhibit contains some items that are only partially photocopied. While the exhibit contains documents from as early as June 14, 2006, the vast majority of the documents are dated between August and November 2007.

On August 16, 2006, Umholtz prepared a response to her 2006 labor market survey. *See* EX 11, at 50. She contacted each of the employers identified in the survey to determine whether Claimant had submitted applications. *Id.* at 113-18. She learned that Claimant had only applied for the positions with Victor L. Phillips Company and Farmers Insurance. *Id.* at 114-15. A representative from Farmers attempted to call Claimant for an interview and left several messages; Claimant never returned his phone calls. *Id.* at 115. Claimant also applied for the job with Victor L. Phillips after the deadline listed in the survey. *Id.* at 114. By that time, the position had been filled. *Id.* Importantly, Jenene Harvey with Verdigris Marketing Group reported that she did not have Claimant’s resume on file. *Id.* at 117. Based on her findings, Umholtz concluded that “it does not appear a sincere attempt was made in applying for the two positions” and “[t]hus, it does not appear a sincere attempt was made to locate employment.” *Id.* at 118.

During her deposition, Umholtz also discussed Claimant’s program with Miller. She testified that Claimant’s report that he was told an employer was not hiring after completing an interview for a position “concerned her.” *Id.* at 40. She also wondered whether Miller contacted employers to confirm that Claimant had actually applied for positions. *Id.* When asked to explain why Claimant had not obtained employment, Umholtz could not do so. *Id.* at 42-44. Umholtz also contradicted Claimant’s allegation that his prior bankruptcy and DUI prevented him from obtaining employment. Specifically, Umholtz testified that, prior to her deposition, she called Joshua Sharp at Farmers Insurance. *Id.* at 28. Umholtz testified that Mr. Sharp assured her that “a bankruptcy from 10 years ago would not prevent a hire at all.” *Id.* She also testified that conversations with a recruiter at Wachovia yielded the same response. *Id.* at 53. Similarly, Umholtz testified that bad credit would only hinder Claimant in some but not most cases. *Id.* at 41. Likewise, Umholtz testified that she telephoned a contact at “a national screening bureau that works consistently with employers in banking and finance” who told her that a DUI conviction is “usually not considered at all as a barrier towards employment.” *Id.* at 28. She testified that the same contact told her that “most employers are pretty receptive to hiring people with bankruptcies even as recent as . . . three years.” *Id.* at 28-29.

Employer has also offered evidence that Claimant “sabotaged” one of the few job opportunities he had. Specifically, Employer obtained Claimant’s application materials from Silpada Designs. *See* EX 23. When applying for a “light” jewelry warehouse position—one Claimant agreed was not in customer service—Claimant submitted a resume that listed his objective as obtaining a position in customer service. *Id.* at 8; TR 28, 54. The resume did not include his work experience as a security system installation technician. EX 23, at 8. Nevertheless, he was offered the job. Claimant testified that, after learning he “had the job,” someone at Silpada asked him to fax a copy of his physical restrictions. TR 28. In a January 29, 2008, e-mail, Nancy Staley, Silpada’s Vice President of Human Resources, wrote that Claimant provided an unsolicited copy of his work restrictions during his interview. EX 28, at 1. Unless he was unsure whether the job duties were within his restrictions (something which the Claimant has not alleged), it would appear that the only reason for Claimant to have given his list of restrictions to Silpada at that point would be to create doubt about his physical ability to do the job. Staley also noted that Silpada has no record of how the company informed Claimant that “he didn’t get the position.” *Id.*

For the foregoing reasons, I find that Claimant has not met his burden to prove that he failed to find suitable alternative employment despite a reasonably diligent job search. While Claimant need not apply for each job identified by Employer’s expert, Claimant must prove that he reasonably attempted to secure a job “within the compass of employment opportunities shown by the employer to be reasonably attainable and available.” *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981)). Mechanically applying for a high number of jobs is insufficient, by itself, to satisfy this burden; Claimant must show enthusiasm to obtain employment and reenter the workforce. *See Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ 1999); *Simmons v. I.T.O. Corp.*, 24 BRBS 442, 448 (ALJ 1991). Clearly, Claimant has submitted resumes for a high number of jobs. While Claimant testified that he applied for 200, I am generally skeptical of his claim. The mess that is Claimant’s Exhibit 25 makes it virtually impossible to confirm the precise number of jobs for which Claimant applied. In addition, Claimant’s testimony regarding his job search was often inconsistent and at times was contradicted by other evidence. Claimant admitted that he did not comply with his vocational rehabilitation program agreement, and his admission casts doubt on the accuracy of his reports to Miller and his testimony at the hearing.

Even assuming he applied for a sufficient number of jobs, Claimant’s testimony revealed that many of them were not “within the compass of employment opportunities shown by the employer to be reasonably attainable.” *See Palombo*, 937 F.2d at 74. Claimant admitted that he lacked relevant experience for many of the jobs for which he submitted his resume. While not dispositive of the diligence inquiry, Claimant admitted that he did not apply for any of the jobs identified in the 2007 labor market survey. The evidence also establishes that Claimant pursued the positions that he actually applied for with minimal effort and enthusiasm. Specifically, it appears that Claimant mainly conducted his job search from either his home computer or fax machine and rarely followed up in person or even on the telephone. Considering the ease with which an applicant can electronically submit a resume, it is no surprise that relying almost exclusively on this technique yielded so few opportunities. Claimant also displayed a lack of enthusiasm and diligence by failing to respond to several telephone messages from an interested

employer and by submitting an application after the clearly-identified deadline. Finally, he turned down a job within his work restrictions and apparently precluded his consideration for another job within his restrictions by needlessly pointing out his restrictions.

Claimant also argues that his post-injury conviction for DUI and failure to file his 2005 federal taxes—and its resulting impact on his credit score—may have impaired his pursuit of employment “within the compass of employment opportunities shown by the employer to be reasonably attainable.” Even if they had, the analysis remains unchanged. *See Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123, 125 (BRB 1998). Although the record contains conflicting evidence regarding the impact either actually had on Claimant’s search, *Livingston* holds that post-injury convictions that temporarily impede a claimant from obtaining otherwise suitable alternative employment will not render the employment unsuitable and relieve Claimant of his burden. *See Id.* Similar to Claimant’s conviction, which he testified would be wiped off his record after his probation period, Claimant’s credit score and its impact on his job prospects can improve over time with Claimant’s cooperation. *See* TR 58. Furthermore, the only credible, undisputed evidence that either actually precluded him from obtaining employment was Umholtz’s description of the opening with Farmers Insurance, a position I found unsuitable anyway. *See* EX 12, at 3. Since Claimant has failed to demonstrate a diligent search, his wage-earning capacity as of October 29, 2007, is \$699.17

### *Conclusion*

Employer shall pay Claimant compensation for temporary total disability from March 15, 2006, until October 28, 2007, the date upon which Employer established the existence of suitable alternative employment. Thereafter, Employer shall pay Claimant compensation for permanent partial disability in the amount of two-thirds of the difference between Claimant’s pre-injury average weekly wage (\$1,374.88) and his residual weekly wage-earning capacity (\$699.17). *See* § 908(c)(21).<sup>14</sup> Employer shall receive credit for the \$10,999.06 in permanent partial disability compensation it previously paid Claimant.

## **ORDER**

**IT IS ORDERED** that Employer shall pay to Claimant:

1. Compensation for temporary total disability from March 15, 2006, to October 28, 2007, based on an average weekly wage of \$1,374.88.
2. Compensation for permanent partial disability beginning on October 29, 2007, based on a loss of wage-earning capacity of \$675.71 a week.
3. Medical benefits for his injuries suffered on October 26, 2005.

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<sup>14</sup> In its LS-18, Employer indicated that it would present evidence on the issue of average weekly wage at the hearing. CX 18. At the hearing, Employer presented no such evidence. Employer also has not argued that the average weekly wage it used in calculating the benefits it voluntarily paid was incorrect.

4. Interest on all unpaid compensation from the dates due until paid, in accordance with 28 U.S.C. § 1961(a).

Credit shall be given for all previous payments of compensation and medical benefits.

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JEFFREY TURECK  
Administrative Law Judge