U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 February 2009

CASE NO.: 2008-LDA-244

OWCP NO.: 02-172369

IN THE MATTER OF:

K. C.[1]

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
c/o American International Underwriters

Carrier

APPEARANCES:

BARRY R. LERNER, ESQ.
For The Claimant

JERRY R. MCKENNEY, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

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[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

This is 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., (herein the Act), brought by Claimant against Service Employees International (Employer) and Insurance Company of the State of Pennsylvania, c/o American International Underwriters (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 25, 2008, in Corpus Christi, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered six exhibits, Employer/Carrier proffered 11 exhibits post-hearing which were admitted into evidence. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. That there existed an employee-employer relationship at the time of the alleged accident/injury. (Tr. 9).

2. That the Employer was timely notified of the alleged accident/injury. (Tr. 8-9).

3. That no informal conference before the District Director was held in this matter. (Tr. 11).

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; and Employer/Carrier's Exhibits: EX-___.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Entitlement to medical care and treatment pursuant to Section 7 of the Act.

5. Claimant's average weekly wage.

6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was 54 years of age at the time of the formal hearing. He graduated from high school and completed three years of college credits. His vocational background indicates he worked with his brother in the roofing business before being hired by Employer. (Tr. 16). In June 2006, he was hired as a labor foreman for Employer. (Tr. 17). He underwent a physical exam which he passed. He acknowledged he had prior back injuries from auto accidents, but no work restrictions. (Tr. 18). He also testified that he underwent prior psychiatric care in 1995 when his mother was struggling with cancer. (Tr. 19).

Claimant was assigned to Kirkuk, Iraq, Base C-7, on July 4, 2006. (Tr. 19-20, 46). As labor foreman, he would travel into the City of Kirkuk and pick up Iraqi workers and bring them back onto base to clean latrines and showers for the troops. He was also assigned to work at the car wash, where recovered vehicles would be cleaned of "all kind of body fluids" or repaired. (Tr. 20-21). He also cleaned the facilities at the flight line and hospital where troops were recovering from their injuries. When the base "would get hit, we would repair it. You know, roads." He supervised 30 to 50 men. (Tr. 21). Claimant worked seven days per week, 12 hours a day and was required to perform

physical labor as a foreman. (Tr. 22). When the Iraqis did not show up for work, Employer's employees had to clean the latrines, showers and bathrooms. He wore body armor which weighed 75 pounds when he traveled to Kirkuk and one-half the work day. He was required to lift up to 50 pounds performing his duties. (Tr. 23, 26).

Claimant testified that January 2008 was the "toughest period for" him. He was able to perform his duties psychiatrically or mentally up until January 2008. (Tr. 22). Except for vacation and R & R periods, he worked continuously from July 2006 to January 2008. (Tr. 24).

Claimant testified he suffered on-the-job injuries. He burned his hair and arms from a Humvee which was in flames and treated the burns with ointments. (Tr. 24). He was dehydrated on one occasion and suffered hemorrhoids for which he was treated. He injured his heel or foot but could not define "a particular date" or "one particular incident" of injury. He thought he had a bruised right foot from wearing the body armor and going through all kinds of difficult terrain. He reported to the KBR Medical Clinic where he was given Motrin which he used when his foot would flare up. (Tr. 25-26).

He testified that around the first of January 2008, he was lifting boxes off of the back of a truck and an explosion blew him off the truck. The mortar round landed a good distance away and Claimant admitted he was not in harm's way from the explosion, only the concussion. (Tr. 50-51). He thought he had pulled a muscle in his mid-back and went to the Employer's medical clinic and was diagnosed with lower back pain or mid-back pain and given Motrin. He was told to take a day off and put ice on his back which he did. No x-rays or scans of the back were conducted. (Tr. 26-27, 51).

On January 3, 2008, Claimant presented to an Army doctor with problems sleeping at night. He stated he "had gotten into it with a couple of [his] colleagues; you know, just real short-tempered and I think there was an undercurrent . . . people thought I had a little bit too much sand in my head." The psychiatrist told him he was "going to have to go back to stateside for 30 days." Claimant stated he did not want to leave theater, but the doctor told him "when you come back, if you need to take some meds . . . I will issue them to you." (Tr. 28). He informed his supervisor, Jimmy Smith, that he needed to go home for 30 days. (Tr. 29).

Upon return to Corpus Christi, Texas, Claimant was in contact with Carrier representatives and "they made it sound like I should do what I was here to do, and that they would take care of it." He was under the impression that he was to find a psychiatrist, but decided to seek care for his foot and back as well with a family practitioner, Dr. Marsha Allen. He acknowledged his "walking orders that I knew I had to fulfill was seeing a shrink." (Tr. 30, 48). He arranged an appointment with Dr. Daniela Badea-Mic, a psychiatrist, who prescribed medications and informed him that "this is not going to be a 30-day thing." (Tr. 31-32). Carrier never paid for his treatment with Dr. Badea-Mic. He, his family and his COBRA health insurance paid the billings from Dr. Badea-Mic. (Tr. 32). Claimant testified that he was terminated from Employer in March 2008, but did not receive any explanation in writing about the reasons for the termination. He was told telephonically by Janet Little of Employer that he was being terminated. (Tr. 33). He never received any compensation from Employer/Carrier. (Tr. 35). He stated he was in daily contact with Employer/Carrier representatives as well as his supervisors in Iraq. (Tr. 36).

Claimant testified that Dr. Badea-Mic was not going to authorize his return to Iraq in 30 days because he needed to be treated for post-traumatic stress. Dr. Potter, an orthopedist, told him "not to be lifting, doing active things." (Tr. 37-38). Claimant identified his psychotropic medications as: Seroquel, Lexapro, Alprazolam; Zolpidem and Propranolol HC. Dr. Potter prescribed Celebrex and Zanaflex for his foot and back. (Tr. 39-40). He has paid for his medications on his own, but cannot afford to do so. He stated he was not able to attend as many appointments as Dr. Badea-Mic wanted to schedule because of finances. He could not afford the transforaminal epidural steroid injection proposed by Dr. Potter for his heel. (Tr. 40-41).

Claimant testified that upon his return to the United States he underwent an x-ray of his back which showed a T-12 fracture. Dr. Potter indicated he could only treat the pain. (Tr. 42). Claimant stated that if he reached a level at which he could function, he wanted to return to work for Employer. (Tr. 43).

On cross-examination, Claimant stated he left Iraq on January 6 or 7, 2008. (Tr. 44). He understood he was on medical leave of absence, but did not receive any pay checks after returning home. (Tr. 45). Claimant testified that he

felt capable of returning to his job with Employer in Iraq. His back still bothers him and he does not know if his back would keep him from doing his regular job. (Tr. 45-46). His foot pain is still with him, but is manageable and would not keep him from working. (Tr. 46).

He stated he treated with Dr. Gary in 1995 and was prescribed anti-depressants. (Tr. 46). Concerning his presentation to MAJ Aramanda, the Army psychiatrist, Claimant related a series of events over time that accumulated to the point where he was stressed out. (Tr. 48). Claimant and the Army psychiatrist thought Claimant needed a break. (Tr. 49). Although Claimant thought he was given paperwork to process out of Iraq, none was produced for the record. (Tr. 55).

Claimant testified that he had arguments with the "head guy" for First Kuwaiti, a vendor company which supplied laborers, over workers hired to work in Dubai who ended up in the combat zone and complained to Claimant about their plight. (Tr. 56-57). Claimant admitted he was starting to lose his temper a lot and did not have the tolerance he could have had. (Tr. 58).

The Medical Evidence

KBR Medical Clinic

On October 23, 2007, Claimant presented to the C7 KBR Medical Clinic complaining of neck, lower back, right thigh and right foot pain. He reported the pain was from the use of body armor while picking up local Nationals at the gate. He stated his symptoms had been occurring for an extended period of time with no specific initial incident date. He was diagnosed with a muscle strain and given Motrin, an analgesic balm and was to return to work without restrictions. (EX-5, pp. 2-3).

On January 1, 2008, Claimant reported to the C7 KBR Medical Clinic stating he had hurt his back that morning while climbing into the back of a pickup. While stepping over the gate, he lost his footing and fell backwards landing on the ground. He thought he "was all right," but as the day went on his back steadily became worse. He complained of sharp needle pain in the mid-back approximately at the T11-T12 area. On physical

examination, Claimant exhibited no bruising, abrasions or contusions, but had point tenderness at the T11-T12 area. He was diagnosed with a muscle strain. Claimant was instructed to rest and apply ice on his back and was given Motrin. (EX-5, p. 20).

On January 3, 2008, Claimant reported to the KBR Medical Clinic stating "he wanted to go home on medical leave because he was extremely depressed, in a very dark place." He stated he spoke with his wife and felt it was in his best interest "to have his mental health elevated in the states, and also have his back evaluated while at home." He was assessed as a psychiatric emergency and voluntarily agreed to talk to the Army combat mental health clinic. He would neither deny nor confirm if he felt suicidal or homicidal. It was determined Claimant had a "non-occupational medical condition which requires a higher level of care." His primary diagnosis was depression. Claimant was transferred to the 85th Medical Detachment Combat Stress Clinic. Claimant was given sick days and advised to get some rest. The Medical Detachment reported it "was going to put in paper work for 30 day medical leave to states for elevation and treatment." (EX-5, pp. 8-9, 16).

MAJ Larry B. Aramanda

On January 3, 2008, MAJ Aramanda prepared a "Memorandum For Director, KBR, FOB Warrior," Subject: Employee Fitness, relating to Claimant. On January 3, 2008, Claimant was evaluated by the 85th Medical Detachment (Combat Stress Control) for fitness to continue with his current duties. MAJ Aramanda opined that Claimant was "experiencing an acute stress response to multiple events that has a significant impact on his mood and functioning." He further opined that such conditions are generally temporary in nature and no long term effects are expected. MAJ Aramanda recommended that Claimant be "given a 30 day leave in the US to recover/regroup before returning to work." He noted that if Claimant had any symptoms remaining after the 30-day convalescence he may return to the Combat Stress Control team for treatment. (CX-6). The referenced "multiple events" were not explicated.

Northshore Medical Imaging

Dr. Marsha Allen referred Claimant for a x-ray of the lumbar spine which was conducted on January 31, 2008. Dr. Isabel Menendez, the interpreting radiologist, opined that the study showed "wedging of the T12 vertebral body in keeping with

a compression fracture, age undetermined." She further opined that she was "uncertain of the chronologic age of this fracture." The rest of the lumbar intervertebral discs appeared to be within normal limits. (CX-5; EX-8). The medical records of Dr. Allen, Claimant's family practitioner, are not of record.

Dr. Ryan N. Potter

On June 18, 2008, Claimant presented to Dr. Potter with chief complaints of "thoracic back pain, R [right] foot and heel." He reported an onset of gradual pain without trauma starting on January 18, 2008. His pain was described as a "6" on a scale of 10. Standing, sleeping and walking provoked the pain and Claimant reported morning stiffness as an associated symptom. Dr. Potter noted an interventional procedure as "cortisone injection to foot." An x-ray revealed a "T-12 compression fracture in Iraq." (CX-4, p. 1; EX-7, p. 1). Physical examination disclosed normal motor and sensory testing as well as negative straight leg raising. (CX-4, p. 4; EX-7, p. 4). Dr. Potter's impressions were: 1) calcaneal osteophyte; 2) T-12 compression fracture; 3) thoracic back pain; and 4) chronic pain syndrome. (CX-4, p. 5; EX-7, p. 5).

In his only medical report of record, Dr. Potter proposed a right heel spur injection, an MRI of the thoracic spine and lumbar spine, a "TESI at T-12 under fluoro," and prescribed Celebrex, Percocet and Zanaflex. (CX-4, p. 6; EX-7, p. 6). Dr. Potter rendered no opinion regarding causation of Claimant's injuries and assigned no work restrictions to Claimant based on his presentation.

Dr. Daniela Badea-Mic

On April 3, 2008, Dr. Badea-Mic prepared a hand-written progress note of "significant events since [Claimant] last seen." The initial evaluation of Claimant by Dr. Badea-Mic is not of record. It is noted that Claimant is sleeping better but continues with "flashbacks and overreacting to sounds." He complained of mood swings and sleepiness during the day. He reported feeling guilty for leaving Iraq and "all the good people out there." He continued to have nightmares about "car washer (removing body debris from cars). His medications were Lexapro, Inderol, Xanax, and Ambien. Dr. Badea-Mic discontinued Ambien and Inderol. His attitude was considered "fair" and his mood "dysthymic" and he had no suicidal or homicidal ideation.

He was alert, oriented, with intact attention and concentration and fair insight and judgment. He was diagnosed on AXIS I with "Post Traumatic Stress Disorder, Severe (PTSD)." (EX-9, pp. 7-8). No opinion on causation was offered nor were any work restrictions assigned.

On May 21, 2008, Claimant was again evaluated as set forth in a hand-written progress note of Dr. Badea-Mic. She notes Claimant continues "fighting with himself in the sleep to the point that his wife won't sleep with him." He reported still having flashbacks, but had not started counseling. His medications were Lexapro, Xanax and Seroquel. His attitude was considered "good" and his mood "dysthymic." The remainder of the progress form was similar to the earlier progress notes. His diagnosis remained the same. (EX-9, pp. 5-6).

Claimant cancelled his appointment for July 23, 2008 because of the weather. (EX-9, p. 3). On September 4, 2008, Dr. Badea-Mic again evaluated Claimant. He reported seeing a therapist on three occasions and was "feeling very good about it." His medications and diagnosis remained the same. No work restrictions were assigned by Dr. Badea-Mic. (EX-9, pp. 1-2).

Dr. John D. Griffith

At the behest of Counsel for Employer/Carrier, Dr. Griffith, prepared an opinion-report after reviewing various documents listed in his report. He notes that Claimant was not in combat and was not wounded while in Iraq and was without psychiatric problems for over a year during his tour. He observed Claimant's behavior and treatment between January 8, 2008 and April 3, 2008, is not documented. (EX-10, p. 1).

Dr. Griffith noted that on January 1, 2008, Claimant claimed he was blown off of a truck by the concussion of a mortar blast, but the medical record indicates he actually tripped and fell. He was given time off and treated with Ibuprofen. Three days later Claimant applied for treatment for a mental disorder. Id. An x-ray was done on January 31, 2008, which showed a fracture of his spine at T-12, but of uncertain age. He noted Claimant has a history of back trauma in 1993. (EX-10, p. 2).

Dr. Griffith reviewed the "check forms" prepared by Dr. Badea-Mic. He noted Claimant was referred for psychotherapy but his treatment is not documented. Although Claimant testified at the formal hearing that Dr. Badea-Mic would not certify him to return to work because "this is not going to be a 30-day thing," her records do not document or explained such a restriction.

Dr. Griffith opined that the diagnosis of post-traumatic stress disorder is not justified. He further opined that an event sufficient to justify the diagnosis of PTSD is not identified by the Claimant or Dr. Badea-Mic. He determined that Claimant's reaction is not noted which must involve "intense fear, helplessness or horror." He noted that the diagnosis of PTSD cannot be made on the basis of symptoms alone because such symptoms are commonplace among persons not exposed to trauma.

Dr. Griffith concluded that no tests or procedures were performed to rule out symptom magnification or malingering which is required by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, (DSM-IV). He indicated an examination of symptom magnification and malingering was warranted because of discrepancies in the medical records and Claimant's testimony at formal hearing concerning the causation of his back injury as well as undocumented "flashbacks." He also questioned the standard of care regarding medications prescribed for Claimant, such as Xanax, which he opined may be the cause of many of Claimant's symptoms. He opined that Claimant "would be expected to have recovered by now (as perhaps he has) if compensation were not an issue." (EX-10, pp. 2-3).

The Vocational Evidence

On November 24, 2008, Wallace A. Stanfill, a certified rehabilitation counselor, performed a vocational rehabilitation assessment and labor market survey in this matter at the behest of Employer/Carrier. (EX-11). He did not conduct a personal interview with Claimant, but reviewed various medical records and the hearing transcript as a basis for his opinions. He reviewed Claimant's physical and medical status, social, military, educational background and employment history. He concluded that Claimant's current medical condition should allow him to return to work in his previous occupation as a labor foreman "with the caveat that his emotional status would require close monitoring." He further opined that Claimant could resume work in his past position with Chastain Roofing. (EX-11, p. 5).

Mr. Stanfill opined that based on Claimant's educational background and work experiences, he would also be considered employable in various generic, non-detailed light to medium semi-skilled and skilled supervisory jobs. A wide range of other occupations of a more unskilled nature involving minimal stress, including, such as, fork lift operator, stocker, security guard, electronics worker, and cashier were also listed for which Claimant could compete. (EX-11, p. 6).

A labor market survey was conducted of available jobs in the Corpus Christi, Texas area, as well as with overseas contractors with alternative international contract work, which were considered suitable for Claimant. Job openings for a custodian supervisor and housekeeping supervisor for unspecified employers were identified. (EX-11, p. 7). Six job opportunities were identified by Mr. Stanfill in varying degrees of specificity. A labor foreman position for PAE Government Services of Los Angeles, California, to work in Djibouti, Iraq (sic), paying a salary of $3,400.00 per month was identified. (EX-11, pp. 7-8). A parks operations technician for the City of Corpus Christi with a salary range of $16,750.00 to $18,740.00 was also described. (EX-11, pp. 8-9). A custodian job for the Corpus Christi Independent School District was identified with an annual salary from $17,285.00 to $25,580.00, along with a groundskeeper II job at Texas A & M Corpus Christi with a salary range of $15,576.00 to $18,408.00 a year. (EX-11, p. 9). A machine operator job and a port security guard position, without any description of job duties, were also identified. (EX-11, p. 10).

The Contentions of the Parties

Claimant contends he suffered two traumatic injuries, a heel injury which was minor and not disabling, and a low back injury for which he received medical care while in Iraq through Employer. During the treatment process, Claimant alleges he was examined by an Army psychiatrist who thought he should return home for psychiatric care and treatment for 30 days. Claimant left Iraq with the expectation he would receive psychiatric care but Carrier never authorized medical care. He contends he is temporarily totally disabled and since Employer/Carrier did not pay any compensation "there is no requirement for an informal conference."

He contends he still has back and foot pain, but believes the pain is manageable and he would like to try to return to work for Employer. He acknowledged that his foot injury is not disabling. He asserts his average weekly wage should be computed based on his W-2 earnings for 2007 yielding an average weekly wage of $1,569.41 and a corresponding compensation rate of $1,046.27.

Employer/Carrier argue that the record contradicts Claimant's contention that he is unable to work because of his stress injury/PTSD. Employer/Carrier further contend that the only claim properly before the undersigned is Claimant's stress/PTSD claim since no claim for compensation relating to his alleged foot and back injuries has ever been filed. Employer/Carrier assert that Claimant's treating psychiatrist never opined regarding the work-relatedness of his putative PTSD diagnosis nor his ability to return to work in any capacity and never attempted to rule out malingering. Alternatively, it is argued that the medical records contradict Claimant's testimony about the cause of his back injury and no physician has placed any restrictions on Claimant for his alleged traumatic injuries about returning to work.

Employer/Carrier argue that suitable alternative employment has been established for Claimant in his local community which demonstrates, given his lack of any work restrictions, that he has no loss of wage-earning capacity. Employer/Carrier would calculate Claimant's average weekly wage based on his earnings for the 52-week period before his alleged January 2008 injury which yields a wage of $1,410.85 and a corresponding compensation rate of $940.57.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

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). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical/psychological 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. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Under the Defense Base Act, an employee need not establish a causal relationship between his actual employment duties and the event that occasioned his injury. O'Leary v. Brown-Pacific-Mason, Inc., 340 U.S. 504, 506-507 (1951). "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose. Id. The zone of special danger is well-suited to cases, like this one, arising under the Defense Base Act, since conditions of employment place the employee in a foreign setting where he is exposed to dangerous conditions. See N. R. v. Halliburton Services, ___BRBS___ (BRB No. 07-0810)(June 30, 2008). An employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger. Id., (slip opinion, p. 9). The specific purpose of the zone of special danger doctrine is to extend coverage in overseas employment such that considerations including time and space limits or whether the activity is related to the nature of the job do not remove an injury from the scope of employment. O'Leary, 340 U.S. at 506; see Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 481 (1947).

1. Claimant's Back Injury

In the present matter, Claimant testified that he injured his back on or about January 1, 2008, when lifting boxes off of the back of a truck and the concussion from an explosion blew him off the truck. He experienced what he thought was a pulled muscle and went to the Employer's medical clinic where he reported stepping over the gate of a pickup, losing his footing and falling backwards landing on the ground. No mention of a mortar explosion or concussion is found in the medical report. The physical examination revealed point tenderness at the T11-

T12 area and he was diagnosed with a muscle strain. He was instructed to rest, apply ice to his back and was given Motrin. Upon his return to the United States, his family practitioner, Dr. Marsha Allen, ordered a x-ray which revealed a fracture at the T-12 intervertebral body.

Dr. Potter examined Claimant on June 18, 2008, for thoracic and right foot/heel pain. Claimant described his pain as a 6 on a pain scale of 10. However, he reported the onset of his pain as January 18, 2008. Physical exam disclosed normal motor and sensory testing and negative straight leg raising. Dr. Potter proposed an MRI of the thoracic spine and prescribed medications for Claimant's pain. He did not preclude Claimant from working and did not assign any work restrictions.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a **prima facie** case that the alleged injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. Bonin v. Thames Valley Steel Corp., 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding an ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have caused his alleged injury); Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-215 (1976).

Despite the discrepancy in how Claimant injured his back, whether from a concussion of a mortar round or a fall from a truck, he credibly testified to an injury and pain caused by his working conditions. Thus, I find Claimant has established a **prima facie** case that he suffered a back injury under the Act, having established that he suffered a harm or pain on January 1, 2008, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Claimant's Psychological/Post-Traumatic Stress Disorder

Claimant's testimony establishes that he was having trouble sleeping while in Iraq and had "gotten into it with a couple of his colleagues." He stated he had become short-tempered and people thought he had too much sand in [his] head." He testified that he did not want to leave Iraq, but the Army psychiatrist told him he would have to return back to stateside for 30 days. He was diagnosed with depression at Employer's clinic.

Contrary to Claimant's testimony, the medical records of Employer's clinic reveal that Claimant reported to the clinic on January 3, 2008, and stated he wanted to go home on medical leave because he was extremely depressed and "in a very dark place." He thought it was in his best interest to have his mental health evaluated in the United States. He was transferred to the Combat Stress Clinic where MAJ Aramanda concluded Claimant was experiencing acute stress to multiple events which were never specified. MAJ Aramanda recommended that Claimant be given a 30-day leave in the United States to recover/regroup before returning to work. Upon his return home, Claimant sought treatment with Dr. Badea-Mic who diagnosed PTSD and prescribed medications and psychotherapy.

Based on the foregoing, I find Claimant has also established a **prima facie** case that he suffered a psychological injury under the Act, having established that he suffered a harm or pain on January 3, 2008, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., supra.

3. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical/psychological harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such

conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

Substantial evidence is evidence that provides "a substantial basis of fact from which the fact in issue can be reasonably inferred," or such evidence that "a reasonable mind might accept as adequate to support a conclusion." New Thoughts Finishing Co. v. Chilton, 118 F.3d 1028, 1030 (5th Cir. 1997); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

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). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

Claimant's Back Injury

Employer/Carrier argue that there is not a proper claim for a back injury before the undersigned. Claimant only filed a claim for mental stress on January 8, 2008. (EX-1, p. 1). Employer/Carrier argue that prejudice has been established because a claim for a back injury was not timely noticed and they did not have an opportunity to fully investigate the claim.

However, in his LS-18 filed on April 18, 2008, Claimant alleged a "fracture at T12 in a fall due to an explosion" as well as "PTSD due to multiple events" as the "facts of the claim." He did not alleged a heel or foot injury which is therefore not before the undersigned. (EX-2, p. 1). On February 8, 2008, Employer/Carrier filed their LS-202, First Report of Injury or Occupational Illness, regarding a strain of Claimant's upper back area which was reported to Employer on January 1, 2008. (EX-2, p. 3).

All pending issues should be adjudicated in one proceeding to avoid piecemeal litigation and procedural delays. See 20 C.F.R. § 702.338. Moreover, a formal hearing must address issues noted by the parties in pre-hearing statements (LS-18) pursuant to 20 C.F.R. § 702.317. An administrative law judge must fully inquire into matters that are fundamental to the disposition of the issues of the case. Employer/Carrier were provided ample time post-hearing to address any evidentiary issues regarding Claimant's back injury. Therefore, I find Employer/Carrier's argument that Claimant's back injury is not properly before me to be without merit. The issue of his back injury and entitlement to compensation and medical care therefor was fully litigated at the hearing.

The only evidence proffered by Employer/Carrier in rebuttal of Claimant's back injury are comments from Dr. Griffith regarding the discrepancy between Claimant's testimony of the occurrence and the medical clinic notes of the event. He also suggested a comparison of the x-ray of the T-12 fracture with x-rays from Claimant's 1993 auto accident treatment. I find such evidence to be insufficient to rebut Claimant's **prima facie** case of a back injury caused by his working conditions on January 1, 2008.

Claimant's Psychological Injury

Employer/Carrier rely upon the opinion report of Dr. Griffith as rebuttal of Claimant's psychological injury. He opined that the diagnosis of PTSD is not justified, observing that an event sufficient to justify the diagnosis is not identified by Claimant or Dr. Badea-Mic. He further noted that no tests or procedures were performed to rule out symptom magnification or malingering which is required by the DSM-IV, which he opined were warranted because of the discrepancies between the medical records and Claimant's testimony. I find that Employer/Carrier have produced substantial evidence to rebut the presumption that Claimant suffers from PTSD based on the medical opinion of Dr. Griffith.

4. Weighing All the Evidence Regarding PTSD

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

The DSM-IV describes the essential feature of PTSD as the "development of characteristic symptoms following **exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person.**" (Diagnostic Criteria for 309.81, PTSD, p. 424)(emphasis added).

Characteristic symptoms resulting from extreme trauma include persistent re-experiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness, and persistent symptoms of increased arousal. Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault, being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.

Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. Traumatic events can be re-experienced in various ways, commonly the person has recurrent and intrusive recollections of the event or recurrent distressing dreams during which the event is replayed. Stimuli associated with the trauma are persistently avoided. Id.

A differential diagnosis requires that **malingering be ruled out** in those situations in which financial remunerations, benefits eligibility and forensic determinations play a role. Id., at 427.

In the present matter, I find and conclude that Dr. Badea-Mic's diagnosis of PTSD is not supported by the instant record. Claimant was given a 30-day medical leave for an unspecified "stress response" to unexplicated "multiple events." Claimant's testimony does not support any specific exposure to an extreme traumatic stressor involving direct personal experience of an event that involved actual or threatened death or serious injury or any other threat to his physical integrity. He did not testify about witnessing an event that involved death, injury or a threat to the physical integrity of another person.

Although Claimant testified that Dr. Badea-Mic informed him that his treatment "is not going to be a 30-day thing," her treatment records are devoid of any such comment or conclusion and Dr. Badea-Mic assigned no work restrictions to Claimant. The treatment records for Claimant's psychotherapy are absent from the record and cannot support such a diagnosis. As Dr. Griffith noted, there is no evidence that Dr. Badea-Mic performed any tests or procedures to rule out symptom magnification or malingering in a benefit claim eligibility context.

Furthermore, contrary to Claimant's argument in brief, there is no medical evidence that Claimant's prior depressive disorder was aggravated by his exposure to events or circumstances in Iraq which could have caused a re-emergence of such a disorder or condition. There is no medical opinion of record that Claimant suffers from depression whether as an aggravation or as a natural progression of his past psychological condition.

Accordingly, I find and conclude that Claimant failed to establish by a preponderance of the evidence that he suffered a work-related psychological injury resulting in a post-traumatic stress disorder or depressive disorder or any other psychological injury while employed by Employer in Iraq. See Greenwich Collieries, supra.

B. Nature and Extent of Disability

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

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant candidly testified that he felt capable of returning to his former job with Employer in Iraq. Although he stated his back still bothers him, no work restrictions were assigned to Claimant by any treating physician. He did not

testify that his back condition precluded his return to work with Employer. There are no medical records establishing any impairment to Claimant's back preventing his return to his former job. The record is devoid of any evidence that Claimant's back injury is disabling.

Moreover, the x-ray evidence of the T-12 fracture noted it is "age undetermined" and there is no opinion of record that the fracture is a result of trauma rather than the chronological degenerative disease process. Further, there is no medical opinion that the symptoms experienced by Claimant aggravated or exacerbated his prior back condition. There is no record evidence that any medical condition or accompanying work restrictions precluded Claimant's return to employment after his 30-day leave of absence from Iraq. I so find.

Accordingly, Claimant is only entitled to compensation for his 30-day medical leave and medical costs associated with his compensable back injury. For purposes of this Decision and Order, I find Claimant's 30-day medical leave commenced on or about January 8, 2008, since Claimant testified he left Iraq around January 7, 2008. Therefore, I find and conclude that at the end of his 30-day leave of absence, on or about February 8, 2008, Claimant no longer suffered a wage-earning loss related to any work-related medical condition.

D. Suitable Alternative Employment

Since Claimant has not successfully established a **prima facie c**ase of total disability or an inability to return to his former job with Employer, the burden of proof is not shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Therefore, it is not necessary to consider the vocational evidence proffered by Employer/Carrier.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director,

OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings. Based on the wage data of record, an average daily wage cannot be computed.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

Section 10(c) of the Act provides:

> If either [subsection 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).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

I find Claimant's wage earnings as reflected in his W-2 form for the year 2007 best reflects his earning capacity for the 52-week period prior to the time of his back injury on January 1, 2008. His earnings were $81,609.49. (EX-3, p. 2). Those earnings yield an average weekly wage of $1,569.41 ($81,609.49 ÷ 52) and a corresponding compensation rate of $1,046.27 ($1,569.41 x .66667).

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

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

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the

expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Having found Claimant suffers from a back injury as a result of his January 1, 2008 fall, he is entitled to and Employer/Carrier are responsible for reasonable and necessary medical care and treatment related to such back injury of January 1, 2008.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, there is no record evidence that Employer/Carrier filed a notice of controversion.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[3] Thus, Employer was liable for Claimant's disability compensation payment on January 15, 2008, 14 days after Claimant notified Employer of his back injury. A notice of controversion should have been filed by January 15, 2008, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on January 15, 2008, and is liable for Section 14(e) penalties from January 15, 2008 until February 8, 2008, the end of his 30-day absence of leave.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is 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 grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board

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[3] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[4] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application. **It is noted that no informal conference was held before the District Director which may affect the award of attorney's fees in this matter.**

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[4] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **May 2, 2008,** the date this matter was referred from the District Director.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for total disability for a closed period from January 8, 2008 to February 8, 2008 based on Claimant's average weekly wage of $1,569.41, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's January 1, 2008, work-related back injury, pursuant to the provisions of Section 7 of the Act.

3. Employer/Carrier shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing from January 15, 2008 to February 8, 2008, as provided herein.

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

5. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 2nd day of February, 2009, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge