

U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)



Issue Date: 09 October 2008

CASE NOS.: 2008-LDA-104
2008-LDA-105

OWCP NOS.: 02-146765
02-261292

IN THE MATTER OF:

K. F.¹

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL

Employer

and

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

Carrier

APPEARANCES:

KURT A. GRONAU, ESQ.

For The Claimant

JERRY R. MCKENNEY, ESQ.

For The Employer/Carrier

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

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 April 30, 2008, in Oklahoma City, Oklahoma. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered nine exhibits, Employer/Carrier proffered 16 exhibits which were admitted into evidence along with two Joint Exhibits. 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 by the due date of August 25, 2008. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, 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 (JX-1) regarding an alleged hernia injury, and I find:

1. That the Claimant was injured on October 17, 2004.
2. That Claimant's injury occurred during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.
4. That the Employer was notified of the accident/injury on February 6, 2007.

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

5. That Employer/Carrier filed a Notice of Controversion on December 17, 2007.
6. That an informal conference before the District Director was held on December 4, 2007.
7. That Claimant received temporary total disability benefits from December 6, 2006 through May 10, 2007, at a compensation rate of \$750.00 for 22 weeks.
8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.
9. That Claimant reached maximum medical improvement on April 2, 2007.

The parties also stipulated (JX-2) regarding an alleged stress/drug toxicity injury, and I find:

1. That the Claimant was injured on February 19, 2006.
2. That there existed an employee-employer relationship at the time of the accident/injury.
3. That the Employer was notified of the accident/injury on February 19, 2006.
4. That Employer/Carrier filed a Notice of Controversion on December 17, 2007.
5. That an informal conference before the District Director was held on December 4, 2007.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury of stress/drug toxicity.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement for his alleged stress/drug toxicity injury.
4. Claimant's average weekly wage.

5. Entitlement to and authorization for medical care and services for his alleged stress/drug toxicity injury.
6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at formal hearing and was deposed by the parties on April 18, 2008. (EX-9). He testified he quit high school to work in a restaurant in 1984. He joined the National Guard in 1986 and served for seven years. He stated he also worked at a plastics manufacturer and at Tinker Air Force Base, AAFES Exchange from 1986 to 1993. (Tr. 22). He worked as a civilian employee of the National Guard from 1986 to 1990, when he volunteered to serve in Operation Desert Storm. (Tr. 22-24). While in the National Guard, he received training as a material control and accounting specialist and fuel specialist. (Tr. 24).

After Desert Storm in May 1991, Claimant resumed his duties as a civilian employee of the National Guard. (Tr. 25). He performed fuel missions, HOT missions refueling helicopters for drug interdiction support missions and transportation services for OCS candidates. (Tr. 26). Claimant testified he failed a urinalysis test for marijuana which he attributed to his wife's use, and not his, although he admitted to taking "a hit or something like that, but it was not habitual use." (Tr. 28). The National Guard offered him an opportunity for rehabilitation, but he declined and received a General Discharge. He stated his wife's career was "doing well" and she was being transferred to another location and wanted him to give up his position with the National Guard. (Tr. 29-30).

Claimant also later worked for a paint manufacturer and U-Haul before beginning employment with Employer in July 2004. (Tr. 30-31). He applied for a job as a fuel specialist and deployed on July 17, 2004. (Tr. 32). During the employment physical, Claimant was drug tested and passed his physical. He developed asthma after Desert Storm for which he uses an

inhaler, Preventyl or Albuterol. (Tr. 33). He deposed that between the time he left military service and employment with Employer he had no psychological, psychiatric or mental health treatment nor did he have any hernia incidents in the military. (EX-9, pp. 13-14).

Claimant's first duty station in Iraq was in Mosul where he worked a bulk fuel farm with two Turkish subcontractors. He was required to work 12-hour days, seven days per week, but often worked 16-hour days. (Tr. 35). He testified that he had personnel issues while in Mosul in May 2005 involving fuel theft and bribery by fuel managers and supervisors which were investigated by his Employer and the U.S. Army. (Tr. 37). Claimant, along with other employees, provided a statement regarding fuel discrepancies which resulted in supervisors being fired by Employer. (Tr. 40). Several supervisors returned to Iraq with another company a month later and Claimant had "run ins" with them at the dining facility. He stated his job was affected by the supervisors spreading the word that he and other employees were "tattletales," causing him to spend more time away from his office to avoid other employees. (Tr. 41).

Claimant stated he volunteered to work in Taji, Iraq where he served from July 20, 2005 to December 26, 2005, as an operator receiving and issuing fuels and maintaining pumps. (Tr. 42). Claimant also stated he was denied his R & R in November 2005 because of a lack of personnel to maintain the bulk fuel farm. (Tr. 43).

On January 2, 2006, Claimant was involuntarily transferred to Fallujah, Iraq. He testified that Fallujah was the worst duty station that could be drawn because it was recently established by the U.S. Marines and was still being mortared on a continuous basis. He lived in a General Purpose (GP) Large tent with no dining facility and little transportation. (Tr. 44). Since he was the first to arrive and was the only one in the tent, he set-up his sleeping quarters near the entrance and exit to the tent. As the operation grew into a 24-hour operation, employees were on different schedules and his sleeping patterns were affected by personnel traffic in and out of the tent and the slamming screen door. (Tr. 45).

Claimant testified that on October 14, 2004, he was "fixing berms" with sandbags being thrown up to the top of the berms when he felt a pain in his groin, but continued to work. (Tr. 38). He informed his supervisor the next day and was examined by a medic who told him he had a hernia. He was then put on

light duty in charge of handling all fuel samples, gauging bags and trucks and handling all the paperwork. He remained on light duty until he left Iraq in February 2006. (Tr. 39).

Claimant testified he had problems sleeping after his hernia injury because he had to sleep on his back. He sought an evaluation by Dr. Kashire in Dubai in August 2005 for sleep and pain medication. He was prescribed Elavil and Diazepam (generic for Valium). (Tr. 46-47, 53). Claimant stated he also purchased Benadryl at the PX which he preferred to take. (Tr. 47).

While at home in Oklahoma on R & R in August 2005, Claimant sought a medical evaluation concerning his hernia and laser surgery, however, it would have taken over 30 days to recover which would have exceeded his R & R time. He also had concerns about back tax considerations if he stayed beyond his R & R period. (Tr. 48).

Claimant stated in Fallujah he worked in a Conex which had wooden floors and metal shelving. Fuel had soaked into the wood floors and there was no ventilation. When the weather was good, the door could remain open. He stated the fumes were so bad welders could not cut a hole in the Conex to place a fan for ventilation. The Conex smelled like fuel (JPA, MoGas and diesel). Other technicians also complained about the poor ventilation. In February 2006, the door could not remain open because of sandstorms, which "cut the ventilation down to nil." (Tr. 50-51, 87).

On February 19, 2006, Claimant was working alone because the lab technician with whom he worked was on R & R. (Tr. 52). He lost consciousness and awoke in a B6 Clinic in Al Asad. He believed he became incapacitated from inhaling fumes in the Conex because the fumes would make him dizzy and light-headed if he stayed in the Conex for a long period of time. (EX-9, p. 57). Claimant testified he only used Benadryl and no prescription drugs such as Valium or Elavil. (Tr. 52). The Clinic records reflect that Claimant presented with a staggering gait, slurred speech and stated he took two Amitriptylene pills that morning. The medical report indicates Claimant's "supervisor" or a Human Resources (HR) representative accompanied him to the clinic and presented a "clear container of medications" which contained "Amitriptylene, Clonazepam, Valium, Ativan, Orlistat, Sibutamine, Viagra of unknown amounts or frequencies." (EX-5, p. 2). Claimant testified he could only identify Valium, Elavil and Viagra, which he had no reason to take. (Tr. 53-54). He

had never heard of Ativan, and his Albuterol inhaler was not listed. He was given his inhaler by the HR representative. (Tr. 54-55). Claimant did not know how he was transported or who brought him to Al Asad and did not know who retrieved his belongings. (Tr. 55).

Claimant was in Al Asad for eight to nine hours before being evacuated to Landstuhl Regional Medical Center at Ramstein Air Force Base in Germany. He remained at Landstuhl for two days and returned to Oklahoma upon release on February 22, 2006. (Tr. 56-57). He stated the Army doctor released him with a "clean bill of health." (Tr. 57). Claimant testified that Employer did not indicate that any adverse personnel action was being taken regarding any claim of drug overdose. (Tr. 57-58). Claimant was evaluated by Ms. Gloria Schratwieser, a counselor, for anxiety at the request of a HR representative for Employer, Ms. Janette Little. (Tr. 59; EX-12). Claimant never returned to Iraq or employment with Employer. (Tr. 59-60). He assumed he was terminated from Employer but never received any written communication concerning his termination. (Tr. 64).

Before his hernia surgery, Claimant applied for employment with "some overseas companies," but when the requirement for a physical exam came up he knew "that would not be a possibility." (Tr. 61). He applied online with "CSA, ITT, Fluor and KBR." (Tr. 64).

Employer arranged for Claimant to be evaluated by Dr. Munneke who informed Claimant he had bilateral hernias. (Tr. 61-62). On December 10, 2006, Claimant underwent hernia surgery by Dr. Totoro at Mercy Hospital in Oklahoma City. He stated he had no gainful employment from February 2006 to December 2006. He did not receive any compensation from Employer/Carrier before his hernia surgery. (Tr. 62). In late December 2006, Claimant began receiving compensation of \$750.00 per week. (Tr. 63).

After his surgery, Claimant applied for employment with Miller Brewing Company, Hobby Lobby, Century (a martial arts company) and Chromalloy. (Tr. 64-65; EX-9, p. 70). He is currently employed at Wal-Mart, which he began around February 1, 2008, earning \$9.50 per hour, 40 hours per week, as a freight stocker. (Tr. 21).

On cross-examination, Claimant acknowledged that he tested positive for marijuana on a urinalysis with the National Guard and was charged with Driving Under the Influence (DUI) in April 2006 for which he pled guilty and paid a fine. (Tr. 67, 70-71). Claimant testified he was not experiencing any personal stress problems while working in Mosul and liked the work. (Tr. 72). He stated his transfer to Taji was positive because he liked the job and got away from people with whom he had conflicts in Mosul. (Tr. 73). He developed stress over matters which occurred at home involving a house fire, his grandfather passing away and his daughter's car accident. (Tr. 73-74). His supervisor in Taji had Claimant escorted to an Army psychologist for evaluation after the house fire because he thought Claimant was under a lot of stress because of the situation at home. (Tr. 74-75). His supervisor, according to Claimant, was reprimanded and transferred to Fallujah. (Tr. 75). After the evaluation, Claimant was released to resume his work in Taji. (Tr. 77).

Claimant acknowledged he had a sleeping problem while in Iraq which he attributed to having to sleep on his back because of the hernia and had nothing to do with personal problems. (Tr. 77). He began taking Benadryl to help him sleep. Although he was prescribed Elavil (amitriptylene) he stated it did not agree with him and he only took three or four tablets. (Tr. 78, 79). He only took Elavil as a sleep medication and not for anxiety problems. (Tr. 78-79). He also took Valium three or four times and recanted that he only took Elavil one time. (Tr. 79). He stated he reported the prescribed medication and inhaler to Employer before his transfer to Fallujah. (Tr. 80). He affirmed he had two prohibited prescription medications in theater from August 2005 to November 2005 without declaring them to Employer. (Tr. 81).

Claimant testified that the environment in which he worked was stressful, describing multiple events: a mortar hitting in the vicinity of his quarters and putting a fragment through his television; being at the dining facility when it was blown up by a terrorist on December 22, 2004; a bullet coming through his roof; and continuous mortar attacks. (Tr. 83). Claimant testified that he had decided to quit Employer before his medical evacuation and seek other employment in a different location. (Tr. 85). He intended to take his next R & R, take care of his hernia surgery and give his resignation to Employer. (Tr. 85-86).

Claimant confirmed that he had no recollection of the events at Al Asad. He had no reason to think the medic's notation that Claimant told him he had taken two amitriptylene the morning of February 19, 2006, was incorrect. (Tr. 89). He stated he did not misuse prescription drugs, but acknowledged it was thought he was toxic with medicines on February 19, 2006. (Tr. 89-90). He stated he did not know the purpose of the medication Clonazepam which should not have been in his belongings. (Tr. 90). He acknowledged possessing only two prescribed medications, Elavil and Valium, and his inhaler. (Tr. 90-91). He denied possessing Clonazepam and Ativan. He also denied possessing Orlistat, Sibutramine and Viagra. (Tr. 91, 93). The latter five drugs were not in his gear and he did not know how they showed up at the Clinic. (Tr. 101). He affirmed that he had caffeine pills, a stimulant, purchased at the PX to help him stay awake when he worked nights. (Tr. 92). Claimant received Benadryl and inhalers from his Mother in the U. S. (Tr. 95).

Claimant affirmed that Dr. Munneke cleared him to return to full duty in April 2007. Claimant confirmed that as of the hearing date he did not consider himself to have any physical or psychological limitations. (Tr. 96). He stated he had the capacity to physically perform the jobs he worked in Mosul and Taji for Employer as of April 2, 2007. He also felt himself to be psychologically capable of returning to those jobs as of March 31, 2006, after consulting with Counselor Schratwieser. (Tr. 97).

The Medical Evidence

On February 19, 2006, Claimant presented to the B6 Clinic in Al Asad "in company of one of his supervisors" with a staggering gait, slurred speech and stated he "took two amitriptylene this AM." A clear container of medications also accompanied Claimant which included "Amitriptylene, Clonazepam, Valium, Ativan, Orlistat, Sibutamine, Viagra of unknown amounts or frequencies." The assessment was "multidrug overdose" with varying doses of the above medications missing from the drug count. Claimant was transported by helicopter to Balaud. (EX-5, p. 2).

On February 20, 2006, Claimant was evacuated to Landstuhl Regional Medical Center from Balaud. The Patient Movement Request indicates the primary diagnosis was "drug-induced delirium." The patient history reveals a "long history of migraine H/As, insomnia, anxiety and other persistent life

stressors." Claimant presented "with symptoms of intoxication-conscious, incoherent speech; denied intent . . . reported history of valium, elavil, klonopin and clonazepam. Claims mom has POA to obtain medications from OK VA, mail to Pt." A complete psychiatric evaluation was recommended for "med management." (EX-5, p. 6).

On February 22, 2006, MAJ Michael McBride of the Landstuhl Regional Medical Center outpatient psychiatric clinic examined Claimant who presented with complaints of insomnia over the past few months. It was noted that several days before the exam, Claimant had "requested medical help for confusion/disorientation." A toxicology screen was reported as positive for "benzos and TCA." Claimant reported intermittent use of Diazepam and Elavil. It is noted that Claimant's Employer was concerned "about SI (suicidal ideation) due to a number of stressors," however, Claimant denied SI/HI and wanted to return to work. MAJ McBride opined on physical exam that Claimant's thought processes were not impaired and he had no paranoid ideations, no delusions, no suicidal tendencies and no homicidal tendencies. Claimant was assessed with "insomnia related to Axis I/II mental disorder (nonorganic) and drug toxicity." Claimant was released without limitations and recommended to follow-up with psychiatry or primary care physician for insomnia. (CX-6, pp. 7, 9; EX-5, pp. 5, 7).

On March 31, 2006, Gloria Schratwieser, a licensed professional counselor, prepared a report of her March 23, 2006 mental status evaluation of Claimant for Employer. (EX-12). Claimant reported he was under extreme stress as a result of numerous family occurrences while in Iraq and was working towards resolution of his family problems. Ms. Schratwieser administered the Beck Depression Inventory on which Claimant scored 17 indicating borderline clinical depression and the Burns Anxiety Inventory on which he exhibited moderate anxiety. On the mental status exam, Claimant had no symptoms of a major thought or mood disturbance and good contact with reality. Claimant was counseled on three occasions to assist him in coping with his current circumstances and to learn basic anger/stress management after which Ms. Schratwieser opined he was able to better cope with his stress. She recommended he make every effort to work no more than six days a week and be allowed to resume his full duties. (EX-12, pp. 2-3).

On July 12, 2006, Deborah Harrington, a drug counselor with Common Sense Counseling & Assessment, Inc., prepared an Assessment/Evaluation report on Claimant apparently in response to his DUI charge. The report is partially illegible. He was deemed at low risk for alcohol and drug abuse. She opined that Claimant's stress score was elevated and "seems related to this incident, but does not seem significant or in need of treatment." (EX-11).

Dr. David G. Calenzani, a psychiatrist, evaluated Claimant for a psychiatric assessment and prepared an undated report at the behest of Counsel for Claimant. (CX-8). His pertinent diagnosis was Post-Traumatic Stress Disorder with multiple stressors and, a history of insomnia and anxiety. Claimant reported stress related to his employment in Iraq "due to poor interpersonal relations with others that led to feeling of persecution and paranoia, made worse by legal issues." (CX-8, p. 12). It is noted that the Army's investigation of fuel theft contributed to Claimant's stress and feelings. (CX-8, p. 13).

The mental status exam revealed Claimant's cognitive ability was intact, his memory, judgment and attention were good and there was no obvious depression. There were no suicidal or homicidal thoughts. Dr. Calenzani opined that Claimant's psychiatric condition arose from his tour in Iraq with "external and internal precipitants." He noted Claimant's condition "is improving at this time." He further opined Claimant could return back to work in Iraq. No recommendations for further treatment were offered. (CX-8, p. 14).

On November 13, 2006, Dr. John Munneke, at the request of Carrier, evaluated Claimant for his October 17, 2004 hernia injury. Claimant reported a pulling sensation in his left groin while working a sandbag detail in Mosul, Iraq. He reported pain at a level of three on a ten-point scale and that physical activity makes his pain worse. Physical exam revealed a large direct inguinal hernia in the left inguinal area. Dr. Munneke opined that Claimant's left inguinal hernia was a result of his job-related incident of October 17, 2004, and his need for further medical care to the left side of his groin. He recommended Dr. Jim Totoro, a general surgeon with special expertise in hernias, for repair of the left inguinal hernia. He noted Claimant also had a right inguinal hernia which required repair, but the right hernia was not related to or caused by his work in Iraq for Employer. (EX-10, pp. 7-8).

On November 20, 2006, Claimant was examined by Dr. Totoro who opined Claimant had bilateral inguinal hernias, the left larger than the right, for which repair was indicated. (EX-13, p. 11). On December 8, 2006, Dr. Totoro performed a direct bilateral inguinal hernia repair. (EX-13, pp. 2-3; EX-22). On December 19, 2006, Dr. Totoro examined Claimant who was doing very well and would be seen back on an as needed basis. (EX-13, p. 21).

On January 31, 2007, Dr. Munneke informed Carrier that Claimant could return to work with light duty restrictions of no lifting over 40 pounds after being released from Dr. Totoro's care and in six to eight weeks after release he could lift anything that he desires. He stated Claimant had no disability or impairment regarding his bilateral inguinal hernias. (EX-10, p. 4).

On April 7, 2007, Dr. Munneke examined Claimant in follow-up and opined that Dr. Totoro had done an excellent surgical job and Claimant could return to work without restrictions or limitations. He further opined Claimant would have no disability or impairment as a result of his bilateral hernias. (EX-10, p. 6).

The Vocational Evidence

On June 12, 2008, Wallace A. Stanfill, a certified rehabilitation counselor, performed a rehabilitation assessment on Claimant at the behest of Counsel for Employer/Carrier. (EX-20). He reviewed Claimant's deposition, medical records and employment records. He noted Claimant was currently employed at Wal-Mart as a retail stocker making \$10.00 an hour. Claimant had past relevant work experience in semi-skilled and skilled occupations involving light to heavy physical exertion. (EX-20, p. 5).

Claimant reported he felt recovered sufficiently from a mental standpoint to resume working as of March 29, 2006, when he completed a series of three counseling sessions. Given the medical opinions of record plus Claimant's demonstrated capacity to function in his current full-time stocker position, Mr. Stanfill opined that Claimant had recovered, both emotionally and physically, to the point that he can resume work in any of his prior occupations. It was noted Claimant had experienced no permanent limitations from a vocational standpoint. (EX-20, p. 6).

Mr. Stanfill performed a labor market survey in the Oklahoma City, Oklahoma area, as well as international contract work, since Claimant's most recent employment was with an overseas contractor. A fuel foreman for PAE Government Services with work in Djibouti, East Africa was identified with a salary ranging from \$3,000 to \$4,500 per month. (EX-20, p. 7). Raytheon Technical Services Company had a job opening for a fuels operator to deploy to a McMurdo or South Pole Antarctic research station from August or October 2008 through February 2009 with a salary of \$3,800 per month. He also identified positions of (1) warehouse worker with Associated Warehouse Grocers earning \$13.37 per hour; (2) machine operator with Great Plains Metal earning \$13.00 per hour; and (3) order filler/puller with Resource Manufacturing starting at \$11.00 an hour increasing to \$13.30 after a 45-day probationary period. The jobs were not described with any specificity as to duties or physical demands. (EX-20, p. 8).

The Contentions of the Parties

Claimant contends he is due temporary total disability compensation from February 20, 2006 to December 7, 2006, for a period of disability prior to his hernia surgery. He also contends he suffered a mental injury on February 19, 2006, when he lost consciousness at his worksite. He alleges his average weekly wage should be computed under Section 10(c) of the Act based on his earnings from March 2005 to March 2006 of \$78,261.13 resulting in an average wage of \$1,505.02. Claimant received compensation from December 6, 2006 to May 10, 2007, at a compensation rate of \$750.00 per week and further contends he is entitled to "temporary total disability compensation" from May 11, 2007 through February 1, 2008, when he commenced work in alternative employment.

Claimant also contends he is entitled to "permanent total disability compensation" from February 20, 2006 to December 7, 2006, and permanent partial disability from February 1, 2008 and continuing based on the difference between his wages at alternative employment with Wal-Mart of \$380.00 per week and his average weekly wage of \$1,505.02 or \$750.02 per week.

Employer/Carrier contend that Claimant did not suffer a work-related injury on February 19, 2006, but overdosed on multiple drugs. They assert that any mental stress Claimant suffered was related to his personal life not to work. Claimant's toxicity screen revealed "drug induced delirium" for which he was diagnosed with "multidrug overdose."

Employer/Carrier allege that there is no medical evidence that Claimant has any work-related injury related to a stress condition which prevented him from working.

Regarding Claimant's October 17, 2004 hernia injury, Employer/Carrier assert that Claimant continued to work light duty until February 2006 and did not seek medical care for his hernia until November 13, 2006, when he treated with Dr. John Munneke who opined in January 2007 that Claimant had no disability or impairment from his hernias. Employer/Carrier argue that Claimant's average weekly wage should be calculated by using a blended approach based on his pre-Iraq and Iraq wages under Section 10(c) of the Act yielding a rate of \$436.63.

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 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.

1. Claimant's Prima Facie Case

Based on the stipulations of the parties, and the medical opinions of record, I find Claimant suffered a compensable left inguinal hernia on October 17, 2004, for which Employer/Carrier are responsible.

On February 19, 2006, Claimant suffered an event of incapacitation or incoherence, which he has alleged to be mental stress, the etiology of which is in issue. Claimant attributes his loss of consciousness to the inhalation of fumes from the Conex in which he worked that would make him dizzy and light-headed. Claimant also testified to the lack of ventilation in the Conex caused, in part, by the need to close the door because of sandstorms. Claimant awoke in Al Asad where he was diagnosed with a drug-induced delirium. He was later evacuated to Landstuhl Regional Medical Center where he was assessed with an insomnia-related mental disorder (non-organic) and drug toxicity.

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).

Thus, given Claimant's uncontradicted testimony, I find Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on October 17, 2004 (hernia) and February 19, 2006 (mental stress), 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. 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 harm or pain and the working conditions which could have cause 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.

Employer/Carrier contend that Claimant overdosed on drugs on February 19, 2006, and any mental stress claim he may have was precipitated by personal life stressors, not his employment. Employer/Carrier rely upon the initial medical records of the incident: Claimant was initially assessed as suffering from a multi-drug overdose at Al Asad having related that he took two amitriptylene pills the morning of the event; Claimant's toxicology screen also revealed "positive for benzos and TCA;" and the primary diagnosis before movement to Landstuhl Regional Medical Center was "drug-induced delirium." Buttressing the foregoing diagnosis and assessment were the missing dosages of amitriptylene and Elavil. I find the foregoing sufficient to rebut the Section 20(a) presumption that Claimant's mental stress was work-related.

3. Weighing All the Evidence

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.

In N. R. v. Halliburton Services, BRB No. 07-0810 (June 30, 2008), the Board observed:

"Under the Act, an injury generally occurs in the course of employment if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. Palumbo v. Port Houston Terminal, Inc., 18 BRBS 33 (1986); Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593 (1981). However, in cases arising under the Defense Base Act, the United States Supreme Court has held the employees may be within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment creates a "zone of special danger" out of which the injury arises. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507 (1951) . . . The Court held that an employee need not establish a causal relationship between the

nature of his employment and the accident that occasioned his injury. Id. at 506-07. "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." Id. at 507. Rather, "all that is required [for compensability] is that the 'obligations or conditions of employment create the zone of special danger out of which the injury arose.'" O'Leary, 340 U.S. at 505.

N. R., slip opinion, pp. 4-5.

It is clear in the instant case that Claimant was in the performance of his job duties when he became incapacitated either by the fumes in the Conex or his drug-induced delirium, or both. Claimant was also clearly in the zone of special danger which accords coverage for his alleged injury. Employer/Carrier's argument that Claimant overdosed on drugs places Claimant at fault for his alleged injury. It is noted that Section 4(b) of the Act explicitly states that "compensation shall be payable irrespective of fault as a cause for the injury."

Section 3(c) of the Act contains the only provision under the Act for barring benefits due to an employee's conduct. It provides: "no compensation shall be payable if the injury was occasioned **solely** by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. § 903(c).

Claimant acknowledged only intermittent use of Diazepam and Elavil and denied, as nonsensical, the consumption of two amitriptylene pills on the morning of the incapacitation event of February 19, 2006. He denied any intent to injure or harm himself which is supported by MAJ McBride's conclusions on clinical exam that Claimant's thought process was not impaired and he had no suicidal tendencies. The drug toxicity screening is not inconsistent with Claimant's admissions of use of drugs for insomnia for which MAJ McBride opined he should seek further treatment. Claimant was released from Landstuhl Regional Medical Center without limitations to follow-up with a psychiatry or primary care physician.

Claimant's testimony is uncontradicted that the work place in which he was assigned, the Conex, was soaked with fumes from the various fuel products handled by Claimant and Employer. He credibly testified that he would suffer from dizziness and light-headedness from working in the Conex. Employer/Carrier presented no countervailing evidence to rebut the etiological cause advanced by Claimant that the fumes contributed to his unconsciousness or incapacitation.

I find and conclude that Claimant's February 19, 2006 incapacitation occurred in a zone of special danger and constitutes a harm or injury for which Employer/Carrier are responsible. Claimant's harm or injury was not solely caused by self-induced intoxication, but also arguably in part, based on Claimant's credible testimony, by the work place fumes contained within the Conex where he was assigned to work. Accordingly, I find Claimant suffered a compensable harm or injury on February 19, 2006, when he became incoherent or incapacitated.

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable hernia injury and I have found that he also sustained a harm or injury on February 19, 2006 from, in part, workplace fumes, however 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.

The Hernia Injury

The parties agreed, consistent with the opinion of Dr. Munneke, that Claimant did not sustain any permanent disability or impairment as a result of his work-related left inguinal hernia. Claimant was paid temporary total disability compensation from December 6, 2006 to May 10, 2007. Claimant contends he is also entitled to temporary total disability compensation for the period from February 22, 2006 to December 5, 2006. In brief, Employer/Carrier have essentially taken no position regarding this issue, but argue that Claimant is not entitled to any compensation for his alleged mental stress injury.

Upon Claimant's return to Oklahoma in February 2006, he contacted Employer concerning follow-up of his mental stress issues. Notwithstanding the parties' stipulation that Employer did not have notice of Claimant's hernia injury until February 6, 2007, I find notice was provided while Claimant continued to work for Employer on modified duty in Iraq. The record discloses that when Claimant left Iraq in February 2006 he was still working modified employment as a result of his hernia injury and did not have the capacity to perform his full work duties.

Eventually Claimant was scheduled for evaluation for his hernia injury with Dr. Munneke in November 13, 2006. Although no specific restrictions were placed on Claimant by Dr. Munneke, surgical repair was recommended by Dr. Totoro. I find Claimant

reached maximum medical improvement for his hernia injury and surgery on April 7, 2007, at which time he was released to return to work without restrictions or limitations. Claimant confirmed that in April 2007 he had the physical capacity to perform his former jobs for Employer in Mosul and Taji, Iraq.

Despite his inability to perform his former duties and in the absence of a showing of suitable alternative employment by Employer/Carrier, Claimant was not paid any compensation for his hernia impairment while awaiting Employer's scheduling of the medical exam by Dr. Munneke. I find Claimant was temporarily totally disabled from his hernia injury during his pre-surgical period from February 22, 2006 to December 6, 2006, and during his convalescence period from December 7, 2006 through April 7, 2007, and entitled to disability compensation based on his average weekly wage of \$1,507.33. I further find that as of April 7, 2007, Claimant no longer suffered a loss of wage earning capacity and was no longer entitled to any compensation as a result of his left inguinal hernia injury.

The Incapacitation/Mental Stress Injury

Claimant was scheduled to meet with Ms. Schratwieser on March 31, 2006. She determined that Claimant had extreme stress as a result of numerous family occurrences and was working towards resolution of the problems. On testing, he had borderline clinical depression and moderate anxiety, but had no major thought or mood disturbances. She counseled with Claimant on three separate occasions regarding his stress and coping mechanisms. She recommended his release to full work duties on March 31, 2006, with no recommendation for further treatment.

Claimant was not paid any compensation while awaiting scheduling of counseling with Ms. Schratwieser. I find Claimant was entitled to temporary total disability compensation for his incapacitation/mental stress issue from February 22, 2006 to March 31, 2006, when he was released to full work duties.

In July 12, 2006, Ms. Harrington performed an assessment of Claimant who was deemed a low risk for alcohol and drug abuse for which no treatment was needed.

Dr. Calenzani evaluated Claimant and diagnosed him with post-traumatic stress disorder "with multiple stressors," a history of insomnia and anxiety. No specific symptoms or bases for his diagnosis are discussed although he determined Claimant's unspecified "psychiatric condition" arose from his

tour in Iraq. As argued by Employer/Carrier, Dr. Calenzani's conclusions and opinions are not explicated and cannot be considered reasoned medical opinions. He reported no obvious depression and no suicidal or homicidal thoughts. Although he examined Claimant only one time, he opined that Claimant's condition was "improving at this time." Dr. Calenzani did not opine that Claimant had any psychiatric conditions which precluded his employment at any time and did not discuss Claimant's alleged mental stress/drug toxicity injury in Iraq. Nor did he restrict Claimant from returning to work in Iraq. Moreover, Dr. Calenzani did not recommend any further psychiatric treatment. In sum, his report does not establish that Claimant has, or had at any time, any work-related psychological/psychiatric injury which precluded him from working. I so find.

Furthermore, Claimant affirmed in testimony that he was psychologically capable of returning to former jobs for Employer in Mosul and Taji, Iraq as of March 31, 2006, after consulting with Ms. Schratwieser.

Accordingly, I find and concluded that after March 31, 2006, Claimant suffered no loss of wage earning capacity and was no longer entitled to any compensation related to his alleged February 19, 2006 mental stress/drug toxicity/incapacitation injury in Iraq.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting

Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

In view of the foregoing findings that after April 7, 2007, Claimant was released for full work duties and had no loss of wage earning capacity, I find and concluded that Employer/Carrier had no obligation to establish suitable alternative employment thereafter.

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. Since Claimant was a seven-day per week worker, I find neither Section 10(a) or (b) should be applied in this matter.

Claimant worked as a fuel distribution specialist from approximately July 17, 2004 until October 17, 2004, a period of only 13.14 weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979) (36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

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).

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that under Section 10(c) of the Act 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.

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.

Section 10(c) focuses on earning capacity rather than actual earnings. The U.S. Fifth Circuit Court of Appeals has observed that wages earned at the time of injury will best reflect a claimant's earning capacity at that time and it would be an "exceedingly rare case" where a claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful or unreliable. Hall v. Consolidated Equipment Systems, Inc., 139 F.3d 1025, 1031, 32 BRBS 91 (CRT) (5th Cir. 1998).

In brief, Claimant incorrectly asserts he worked for Employer in Iraq from February 19, 2004 to February 19, 2006, and that the best method of determining his average weekly wage is to use his earnings from March 2005 to March 2006 totaling \$78,261.13. (EX-2).³ Such gross earnings would yield an average weekly wage of \$1,505.02 (\$78,261.13 ÷ 52 weeks). Claimant lost no wages from the date of his hernia injury on October 17, 2004, until he left Iraq on February 21, 2006, since he continued to work modified employment.

³ However, Claimant testified he deployed to Iraq on July 17, 2004. (Tr.32).

Employer/Carrier argue that Claimant's average weekly wage should be based, in part, upon his earnings before he worked for Employer in Iraq. Further, they assert Claimant's wage should be computed based on the date of his October 17, 2004 injury and not the date of lost time of December 6, 2006, when he underwent surgery. Employer/Carrier correctly note for traumatic injury cases the appropriate time for determining an injured worker's earning capacity is the time at which the event occurred that caused the injury and not the time that the injury manifested itself. See Leblanc v. Cooper/T. Smith Stevedoring, Inc., 130 F.3d 157, 161 (5th Cir. 1997).

The record reflects that in 2001 Claimant earned \$7,622.00 (EX-7, pp. 1-8); in 2002 he earned \$15,659.00 (EX-7, pp. 9-14); and in 2003 he earned \$24,864.00 (EX-7, pp. 16-24). Employer/Carrier suggest that his total earnings be divided by 156 weeks (52 weeks x 3 years) which results in an average weekly wage of \$308.62. They further argue that Claimant's earnings with Employer for 2004 of \$36,176.00 or \$1,507.33 per week for 24 weeks should be blended with his pre-Iraq wages to yield an average weekly wage of \$654.94.

During the 13.14 weeks of employment with Employer, Claimant earned approximately \$19,806.31 (\$1,507.33 x 13.14 weeks). Clearly, Claimant's employment with Employer resulted in an enhanced earning capacity under his employment contract. In the absence of injury Claimant would have continued to earn similar wages as evidenced by his modified employment which continued under the same contract. Thus, I find and conclude that the most appropriate, fair and reasonable method of computing Claimant's average weekly wage is to award an average weekly wage commensurate with his earning power and potential at the time of his hernia injury. Accordingly, for this reason, I reject Employer/Carrier's blended wages approach to computation of an average wage. Therefore, I find and conclude that \$1,507.33 represents Claimant's average weekly wage at the time of his hernia injury on October 17, 2004.

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.

Since the parties have stipulated to the compensability of Claimant's hernia injury, Employer/Carrier are responsible for all appropriate, reasonable and necessary medical expenses arising from and related to Claimant's hernia injury of October 17, 2004, including the left inguinal hernia surgery performed by Dr. Totoro. Having found that Claimant also suffered an incapacitation/mental stress injury on February 19, 2006, Employer/Carrier are liable for the reasonable and necessary medical care/counseling Claimant received from Ms. Schratwieser through March 31, 2006, and Dr. Calenzani's lone evaluation.

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, Claimant continued to work modified employment after his October 17, 2004 hernia injury until his February 19, 2006 incapacitation/mental stress injury. No compensation was paid by Employer/Carrier until December 6, 2006, nor was a notice of controversion filed until December 17, 2007.

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.⁴ Thus, Employer was liable for Claimant's temporary total disability compensation payments on March 6, 2006. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should

⁴ Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

have been filed by March 20, 2006, 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 December 17, 2007, and is liable for Section 14(e) penalties from March 20, 2006 until December 6, 2006, when compensation was initiated and for the difference between payments actually made and sums due through April 7, 2007, consistent with this Decision and Order.

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 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.⁵ 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.

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 temporary total disability from February 22, 2006 to April 7, 2007, based on Claimant's average weekly wage of \$1,507.33, 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 October 17, 2004 hernia injury, and medical care/counseling received from Ms. Schratwieser and Dr. Calenzani for his February 19, 2006 incapacitation/mental stress 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 prior to April 7, 2007, as provided herein, exceed the sums which were actually paid to Claimant.

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

⁵ 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 **January 10, 2008**, the date this matter was referred from the District Director.

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 9th day of October, 2008, at Covington, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge