

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 March 2009

CASE NO.: 2008-LDA-167

OWCP NO.: 02-151781

IN THE MATTER OF:

R. M.¹

Claimant

v.

KELLOGG BROWN & ROOT,
SERVICE EMPLOYEES INTERNATIONAL

Employer

and

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

Carrier

APPEARANCES:

GARY B. PITTS, 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 Kellogg Brown & Root, 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 November 3, 2008, in Shreveport, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 23 exhibits, Employer/Carrier proffered 24 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.²

Post-hearing briefs were received from Claimant and the Employer/Carrier. 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), and I find:

1. That Claimant was injured on September 9, 2006.
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 September 9, 2006.

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

5. That Employer/Carrier filed Notices of Controversion on September 26, 2007 and March 10, 2008.
6. That an informal conference before the District Director was held on February 27, 2008.
7. That Claimant received temporary total disability benefits from September 16, 2006 through September 14, 2007 at a compensation rate of \$978.08 for 52 weeks for a total of \$50,860.16.
8. That medical benefits for Claimant have been paid, except for certain unreimbursed mileage, pursuant to Section 7 of the Act.
9. That Claimant reached maximum medical improvement on October 16, 2007.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.
2. Claimant's average weekly wage.
3. Entitlement to and authorization for medical care and services, including associated mileage.
4. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing and was deposed by the parties on June 27, 2008. (EX-16). Claimant was 61 years old at the time of the hearing. (Tr. 17). He did not complete high school, but obtained a GED in the U.S. Navy. He served in the military for 3.5 years as an aviation structural mechanic and received an honorable discharge. (Tr. 18-19).

Vocationally, he has worked various jobs in construction, forestry, in a poultry plant and ice plant. He termed them "Arkansas jobs." (Tr. 19). He was also self-employed with a café, a convenience store, poultry house and in the ice business. He went to Iraq to work in an ice plant. He left the United States for Iraq on March 15, 2004. (Tr. 20). With the exception of R & R periods, Claimant worked in Iraq for Employer for 2.5 years. (Tr. 21). He intended to work in Iraq until he could retire in about five years. (Tr. 22).

Claimant was working the night shift at a new ice plant when he sustained his work injury. He testified that he climbed a ladder to rake off ice in a bin to prevent it bogging down. Upon his descent, the ladder slid and he fell about ten feet to the cement flooring. He suffered various abrasions to his arm and leg. (Tr. 23-24). He stated he did not know where he was hurt, but he could not move. His co-workers sought help and he was transported by military Humvee to an Army medical facility. He lost consciousness and awoke in a helicopter which transported him to a hospital in Baghdad and then Balad. (Tr. 25-26). After four days in Balad, he was evacuated to Landstuhl Regional Medical Center in Germany. Nine days after his accident he underwent surgery for fractured hip by Dr. Gruenwald in Little Rock, Arkansas. (Tr. 27). He affirmed that he was placed at maximum medical improvement on October 16, 2007. (Tr. 28).

Claimant testified that he earned \$90.00 working a general election and \$65.00 for a school election since reaching maximum medical improvement. (Tr. 28-29). He began a part-time job collecting rent for Twin Oaks Apartments in Grannis, Arkansas, about three weeks before the formal hearing. He works two days a week, 16 hours a week and is paid \$7.50 an hour. He stated there is a possibility that the job may become full-time. (Tr. 29).

Claimant performs home exercises such as walking, riding a stationary bicycle and walking on a treadmill. He can walk about 100 to 200 yards. (Tr. 30). He now walks with a limp since his job accident/injury. He had no problems with his pelvis, hip socket or legs before going to Iraq. (Tr. 31).

Claimant testified he applied for work at about ten places trying to get a job. He applied at Casita for a security guard position and a State job as an interviewer/recorder. He also applied at an Easy-Mart in Wickes, Arkansas. He explained that he limited his search to a ten-mile radius because of the

expense of gasoline. He also applied for security guard jobs at a "chainsaw place," and at Tyson. He was not offered a job at any location. His hometown of Grannis, Arkansas has a population of 500 and has four businesses, a chicken plant and a post office. (Tr. 35, 37). The closest larger city is De Queen, Arkansas which has a population of 5,000 and is 17 miles away; Mena, Arkansas is 33 miles away with a population for 5,000 as well. The closest large city is Texarkana, Arkansas which is 73 miles from his home. (Tr. 35).

Claimant testified that he has been told by his doctors that he may need a hip replacement in the future because of post-traumatic arthritis. (Tr. 37). He confirmed that the mileage listed on CX-15 beginning on May 14, 2007 has not been reimbursed by Employer/Carrier. (Tr. 38, 45).

Regarding the labor market survey set forth in EX-24, Claimant testified that he did not think he could performed the job in Chad, Africa in his present physical condition. He affirmed he would return to his former job in Iraq if he could. (Tr. 39). He indicated he could try to do the manager, business development leader job for the Wal-Mart Supercenter in Western Arkansas. The closest Wal-Mart Supercenter is located in De Queen, Arkansas, at which he applied for employment but received no response to his application. (Tr. 40-41). He also applied for the front desk clerk position with the Arkansas State Government in Wickes, Arkansas, about two months before the formal hearing, but was not hired. (Tr. 41).

He testified that he had no experience in clerical work but possibly could do the cashier job at the Department of Finance in Mena, Arkansas. (Tr. 42-43). He did not apply for any jobs in Mena, Arkansas because of the distance from his residence and testified that the Easy Mart manager job in Mena involved a lot of lifting, carrying and stocking which he did not think he could do. The manager works 60 to 80 hours per week and is expected to fill in for any employee who does not report for work. (Tr. 42). He stated the front desk clerk job at the Budget Inn "probably fit [his] profile," but he had not applied for the job. (Tr. 43).

On cross-examination, Claimant confirmed that his present part-time job is one that he feels he can physically perform. He also thinks he could physically perform the same job on a full-time basis. (Tr. 46).

Claimant's Wife

Claimant's wife testified that they have been married for 38 years and Claimant was in great physical condition before going to Iraq. Claimant presently does not "do a whole lot. He can't do a whole lot." He walks with a limp now. (Tr. 53). Claimant informed her that he loved his job in Iraq and "was going to be there until they turned the lights out." (Tr. 53-54). If he had not been injured, she thought Claimant would probably still be in Iraq. (Tr. 54).

The Medical Evidence

On September 9, 2006, Claimant was examined at F2 Liberty Clinic for right leg pain after his fall at work. He reported severe pain to the right leg. (EX-5, pp. 1-3).

On September 10, 2006, Claimant was evaluated to the 447th EMEDS for complaints of right hip fracture and severe pain in his right hip. (CX-1, p. 3; EX-5, p. 43). X-rays revealed a right acetabular fracture. Claimant was transferred to the 10th Combat Support Hospital. (CX-1, p. 4).

On September 11, 2006, Claimant was transported to Balaud awaiting a flight to Landstuhl Regional Medical Center in Germany. He was provided with medications for pain. (EX-5, pp. 9, 15). On September 14, 2006, Claimant was evaluated at Landstuhl Regional Medical Center where it was determined he had a right acetabular fracture by report. (EX-5, p. 48).

On September 16, 2006, Claimant was aeromedically evacuated from Landstuhl to the University of Arkansas Medical Center in Little Rock, Arkansas by Air Med International. (EX-6). On September 16, 2006, he underwent a CT Scan of the pelvis at the University of Arkansas Medical Center which reflected a fracture of the right acetabulum. (EX-12, pp. 15-16). On September 18, 2006, Claimant underwent an open reduction internal fixation of the right acetabulum by Dr. Johannes Gruenwald. (EX-12, pp. 25-27). He followed-up with Dr. Gruenwald as an outpatient. (EX-12, pp. 1-5, 8-14). Claimant also pursued physical therapy after surgery. (EX-12, pp. 28-31; EX-13). He was given home exercises which he continues to follow. (EX-13, p. 3). On October 5, 2006, Dr. Gruenwald opined that Claimant was not to bear weight on his right leg and not lift any weight greater than ten pounds. (CX-1, p. 7).

On September 5, 2007, Dr. Gruenwald released Claimant from his clinic to return as needed. (CX-1, p. 9). On October 17, 2007, Dr. Gruenwald determined that Claimant was doing well one year after his hip fracture and open reduction internal fixation. He opined that Claimant had reached maximum medical improvement, but was not able to return to his original high-risk job of climbing ladders and being exposed to unprotected heights. He concluded that Claimant would be well served to return to some type of job of a sedentary nature which would allow him to work on even ground in an office or shop setting. He reiterated that Claimant could never return to a job similar to what he was performing before his accident. (CX-1, p. 12; EX-11, p. 1). On October 17, 2007, Dr. Gruenwald also completed a Form OWCP-5c which indicated Claimant had reached maximum medical improvement but could not return to his usual job and was able to perform sedentary work, but only for eight hours per workday. (CX-10, p. 1).

On February 4, 2008, Dr. Edward K. Gardner, an Otolaryngologist, completed a Work Capacity Evaluation indicating that Claimant was not capable of performing his usual job and was permanently restricted to no heavy lifting, no working at heights or around dangerous equipment. Dr. Gardner limited Claimant to sedentary work.³ (CX-11).

On January 16, 2008, Dr. Theresa Wyrick examined Claimant. She noted he walked with an antalgic gait, but without the use of assistive devices. He had full hip extension, full knee and ankle range of motion without pain. She opined Claimant would never be able to return to his old job of climbing scaffolding and working construction jobs at elevated heights. Claimant was considered more suited for sedentary jobs. She confirmed that Claimant had reached maximum medical improvement. She also discussed with Claimant the risk of post-traumatic arthritis in the right hip which ultimately could result in him needing a hip replacement due to severe pain and arthritic symptoms. (CX-1, p. 15).

On May 22, 2008, Dr. William F. Blankenship, a board-certified orthopedist, evaluated Claimant at the behest of Counsel for Employer/Carrier. He took a history of Claimant's accident and medical treatment. He reviewed medical records furnished by Employer/Carrier. His impression was "fracture,

³ Although the form also indicates in an illegible manner specific lifting, carrying and pushing/pulling restrictions, which arguably may be less than 10 pounds, Claimant was asked to seek clarification of the entries from Dr. Gardner, which he failed to do. (Tr. 50-51, 54).

right acetabulum." He noted that Claimant reported being placed at maximum medical improvement on September 6, 2007. Dr. Blankenship assigned a total impairment of 18% to the whole person and opined that a functional capacity evaluation would be helpful regarding Claimant's job activities. He further opined Claimant was not in need of any additional treatment at that time. (EX-17; EX-18). There is no functional capacity evaluation of record.

The record also reflects that Claimant suffered a massive vestibular injury in his right ear and sustained total deafness in his right ear. (EX-10, p. 1). On May 11, 2006, he underwent a right-sided stapedotomy for a right-sided conductive hearing loss. (EX-10, p. 20). Claimant does not seek compensation for his hearing loss in view of undetermined etiology and causation.

The Vocational Evidence

On August 22, 2008, Wallace A. Stanfill, a certified rehabilitation counselor, performed a vocational rehabilitation assessment of Claimant at the request of Employer/Carrier. He did not personally interview Claimant, but prepared his report based on information and records provided by Employer/Carrier. Mr. Stanfill summarized Claimant's physical/medical status to include his right ear hearing loss and equilibrium problems. He also considered Claimant's social, military, educational and vocational background.

Mr. Stanfill concluded, based on the medical opinion of Dr. Gruenwald, that Claimant "is considered capable of returning to work in his previous occupations of Logistics Coordinator, General Foreman, Grocery Store Owner/Manager or Ice Production Plant Owner/Manager. The doctor's work release would not appear to allow [Claimant] to return to his past job as an Ice Plant Operator." (EX-24, p. 6). He opined that Claimant's employment background provided him with a variety of sales, management and administrative skills which are transferable to a large number of other skilled and semi-skilled occupations in the sedentary to light physical demand category. (EX-24, pp. 6-7).

Mr. Stanfill performed a labor market survey to document current availability of employment in the Grannis/West Arkansas area for Claimant, including alternative international contract work. He noted three generic jobs identified by the Arkansas Department of Workforce Services of retail sales clerk in Mena, Arkansas; front counter clerk/courier in Mena, Arkansas; and a security/gate guard in Hatfield, Arkansas. (EX-24, pp. 7-8).

He identified two positions with PAE Government Services in Chad, Africa: (1) a logistics specialist with a monthly salary ranging from \$3,500 to \$4,000 and an assistant supply manager paying \$2,600 to \$3,000 per month, but without a description of the specific physical demands of the jobs.

He also identified a manager/business development leader-meat department for an undisclosed Wal-Mart store in Western Arkansas without any specific physical demands of the duties described and without any disclosure of remuneration. A front desk clerk position with the Arkansas State Government in Wickes, Arkansas, was identified paying \$18,453 to \$20,000 per year, but with no description of the physical requirements of the job. A cashier job with the Department of Finance and Administration in Mena, Arkansas was located, but no description of the physical demands of the position was identified. A general manager position with E-Z Mart in Mena was also identified without specific information of the physical demands of the job duties. A front desk clerk position at the Budget Inn in Mena was located paying \$7.50 per hour but with no physical requirements of the job identified. (EX-24, pp. 8-11).

Subsequent to the formal hearing, Claimant represents he applied for the following jobs which were all filled: front desk clerk at Budget Inn; cashier at Department of Finance; retail sales clerk in Mena; front counter clerk/courier in Mena; and security/gate guard in Hatfield. (CX-21).

The Contentions of the Parties

Claimant contends he is entitled to a closed period of temporary total disability compensation benefits from September 15, 2007 through October 17, 2007, when he reached maximum medical improvement. He asserts he is limited to sedentary work based on restrictions assigned by his treating physician, Dr. Gruenwald, and has looked for alternative employment. He avers that on or about October 13, 2008, or three weeks before the formal hearing, he obtained a part-time job working two days a week collecting rent for an apartment complex at \$7.50 per hour with the possibility for full-time employment in the future.

He also asserts entitlement to permanent total disability compensation from October 18, 2007 to October 13, 2008, and permanent partial disability compensation thereafter based on his residual wage-earning capacity. He claims mileage

reimbursement for 1,290 miles driven to and from physical therapy visits. He contends his average weekly wage should be calculated based on his earnings as reflected in his W-2 form for 2006, divided by the 36 weeks worked in 2006 before his work accident/injury, yielding a wage of \$1,620.23.

Employer/Carrier concede Claimant has a residual disability from his hip injury while working for Employer and is entitled to permanent partial disability based on his residual wage-earning capacity. Employer/Carrier contend they have demonstrated suitable alternative employment for Claimant. They assert his average weekly wage should be computed based on Claimant's earnings of \$76,290.57 in the 52-week period prior to his work injury, yielding a wage of \$1,467.13 and a compensation rate of \$978.08.

The parties agree that, although Claimant may have a hearing and equilibrium problem of unknown etiology and causation which may affect his capacity or functionality to work, he is not seeking a finding of compensability in this matter.

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. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, 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.

The parties also stipulated that Claimant reached maximum medical improvement on October 16, 2007.

Claimant was paid temporary total disability compensation benefits from September 16, 2006 through September 14, 2007, at a compensation rate of \$978.08. He did not reach maximum medical improvement until October 16, 2007. Dr. Gruenwald, Claimant's treating physician, opined that Claimant could not physically return to his former job which involved climbing ladders and being exposed to unprotected heights. He further opined that Claimant could only perform jobs of a sedentary nature. Therefore, I find, based on the instant record, that Claimant is entitled to continuing temporary total disability compensation benefits from September 15, 2007 through October 15, 2007, based on his average weekly wage of \$1,467.13, as discussed below.

Furthermore, based on the medical opinion of Dr. Gruenwald, I find that Claimant established a **prima facie** case of total disability upon reaching maximum medical improvement since he was unable to perform his former job with Employer.

B. 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).

Employer/Carrier presented vocational evidence through Mr. Stanfill who conducted a labor market survey on August 22, 2008. He agreed that Claimant could not return to his former job based on the opinion of Dr. Gruenwald. Notwithstanding the opinions of Drs. Gruenwald, Gardner and Wyrick that Claimant could only perform sedentary work, Mr. Stanfill concluded there were a large number of sedentary **and light jobs** available to Claimant. Employer/Carrier's physician of choice, Dr. Blankenship, recommended a function capacity evaluation of Claimant to better determine his job activities and capabilities, however no functional capacity evaluation was performed.

Of all the jobs identified by Mr. Stanfill, which he considered to be suitable for Claimant, none of the jobs were described in the precise terms and nature of the physical demands or requirements of the job to allow a comparison with Claimant's work restrictions. The undersigned must compare Claimant's physical restrictions and capacities with the requirements of the positions identified by Employer/Carrier in order to determine whether Employer/Carrier have met their burden of proof. See Ledet v. Phillips Petroleum Co., 163 F.3d 901, 32 BRBS 212 (CRT) (5th Cir. 1998); Hernandez v. National Steel & Shipbuilding Co., 32 BRBS 109 (1998). Moreover, not only were the physical demands of the jobs absent, the jobs were not identified as sedentary or light in exertional demand, the latter of which I find exceeded Claimant's capacity. Accordingly, since the undersigned cannot compare the precise terms and nature of the jobs identified with Claimant's restrictions and capabilities, I find and conclude that Employer/Carrier did not establish the suitability of any of the identified jobs in their labor market survey as alternative employment for Claimant. Assuming, **arguendo**, that Employer/Carrier's labor market survey established suitable

alternative employment, which I reject, I further find that Claimant exercised reasonable diligence to secure the identified and other employment without success.

Nevertheless, on October 13, 2008, Claimant was hired on a part-time basis by Twin Oaks Apartments, to collect rent. He works two days or 16 hours per week at \$7.50 an hour or \$120.00 a week. (See CX-22). Claimant testified that he can perform this job and could physically do the work on a full-time basis, if offered. I find Claimant's work at Twin Oaks Apartments to be suitable, alternative employment and a realistic measure of his wage-earning capacity in sedentary work subsequent to his accident/injury.

Therefore, I further find and conclude that Claimant is entitled to permanent total disability compensation benefits from October 16, 2007 to October 12, 2008, based on his average weekly wage of \$1,467.13. He is also entitled to permanent partial disability compensation benefits from October 13, 2008, to present and continuing based on two-thirds of the difference between his average weekly wage and his wage-earning capacity of \$120.00 per week.

C. 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. Claimant worked seven days per week and therefore, I find Sections 10(a) and 10(b) to be inapplicable in the instant matter.

In addition, Claimant worked for 36 weeks for 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).

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.

Moreover, in Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be computed under Section 10(c) 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.**

Based on the foregoing, 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.

Claimant contends that his average weekly wage should be calculated only on his earnings for the year of 2006 as reflected in his W-2 form for 2006. (CX-5). However, the record reveals that Claimant worked the entire year for Employer before his accident/injury of September 9, 2006, earning \$76,290.57. (EX-2). I find his yearly earnings prior to his injury should be the basis of his average weekly wage. Thus, dividing the yearly earnings by 52 weeks, I find Claimant's average weekly wage to be \$1,467.13 with a corresponding compensation rate of \$978.08 ($\$1,467.13 \times .66667$).

D. 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).

Costs incurred for transportation for medical purposes, such as mileage and parking fees, are recoverable under Section 7(a) of the Act. Day v. Ship Shape Maintenance Co., 16 BRBS 38 (1983).

Claimant testified that Employer/Carrier provided medical care and treatment for his work injuries and paid mileage for some of his travel to seek medical treatment and physical therapy. He contends that Employer/Carrier did not reimburse him for mileage for 26 trips to physical therapy as set forth in CX-15, from May 14, 2007 to June 2008, a total of 1,290 miles. I find his request is uncontested. Accordingly, I find and conclude that Employer/Carrier are liable for the mileage expense of Claimant as set forth in CX-15 at a rate equal to that paid to witnesses appearing in federal court or \$.485 per mile through June 14, 2007, and \$.505 for June 2008.⁴

⁴ The rate paid to witnesses in federal court is established by 28 U.S.C. § 1821 as equal to that established by the Administrator of General Services under his authority pursuant to 5 U.S.C. § 5704(a)(1) and may not exceed the single standard mileage rate established by the Internal Revenue Service. The Administrator of General Services has established rates equal to the IRS mileage rate for automobile expense, which is \$.485 per mile for the period February 1, 2007 through March 19, 2008, and \$.505 thereafter through August 1, 2008. U.S. General Services Administration: <http://www.gas.gov/Portal/gas/ep/content>.

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, Employer/Carrier paid temporary total disability compensation benefits to Claimant from September 16, 2006 through September 14, 2007. Employer/Carrier filed a notice of controversion on September 26, 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.⁵ Thus, Employer was liable for Claimant's total disability compensation payment on September 23, 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 have been filed by October 7, 2006, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer/Carrier paid compensation to Claimant until September 14, 2007, and filed a timely notice of controversion on September 26, 2007, and is not liable for Section 14(e) penalties.

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

⁵ 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.⁶ 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.

⁶ 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 **March 24, 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 temporary total disability from September 16, 2006 to October 15, 2007, based on Claimant's average weekly wage of \$1,467.13, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from October 16, 2007 to October 12, 2008, based on Claimant's average weekly wage of \$1,467.13, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from October 13, 2008, and continuing based on two-thirds of the difference between Claimant's average weekly wage of \$1,467.13 and his reduced weekly earning capacity of \$120.00 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2008, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 9, 2006 work injury, including mileage as discussed in this Decision and Order, pursuant to the provisions of Section 7 of the Act.

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

7. 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).

8. 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 5th day of March, 2009, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge