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**Issue Date: 26 May 2011**

**CASE NO.: 2009-LDA-392**

**OWCP NO.: 02-177305**

**IN THE MATTER OF**

**CLIFTON L. ANDERSON**  
**Claimant**

**v.**

**SERVICE EMPLOYEES INTERNATIONAL**  
**Employer**

**and**

**INSURANCE COMPANY OF THE STATE**  
**OF PENNSYLVANIA**  
**Carrier**

**APPEARANCES:**

**GARY B. PITTS, ESQ.**  
**On behalf of Claimant**

**BETH E. ABRAMSON, ESQ.**  
**On behalf of Employer/Carrier**

**BEFORE: C. RICHARD AVERY**  
**Administrative Law Judge**

## DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651, *et. seq.*, (the Act), brought by Clifton Anderson (Claimant) against Service Employees International (Employer) and Insurance Company of the State of Pennsylvania (Carrier). A formal hearing was held on May 6, 2010, in Covington, Louisiana. Each party was represented by counsel, and each presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments.<sup>1</sup> The following exhibits were received into evidence: Joint Exhibit 1; Claimant's Exhibits 1-14; and Employer/Carrier's Exhibits 1-37. This decision is based on the entire record.<sup>2</sup>

### Stipulations

Prior to the hearing, the parties entered into the following joint stipulations of facts and issues:

1. Claimant sustained an injury on May 30, 2008;
2. There was an employer/employee relationship between Employer and Claimant at the time of the injury;
3. Employer was advised of the injury on May 31, 2008;
4. A Notice of Controversion was filed on June 30, 2008;
5. An Informal Conference was held on April 28, 2009; and
6. Employer has paid Claimant temporary total disability benefits for the period from June 10, 2008 to the present. (JX-1).

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<sup>1</sup> The parties were granted time to file post-hearing briefs, as well as attempt mediation, which was unsuccessful, thus the delay in issuing this decision.

<sup>2</sup> The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript (Tr. \_\_); Joint Exhibits (JX-\_\_, p. \_\_); Claimant's Exhibits (CX-\_\_, p. \_\_); and Employer/Carrier's Exhibits (EX-\_\_, p. \_\_).

## Issues

The parties have presented the following issues for adjudication:

1. Causation;
2. Nature and Extent;
3. Average Weekly Wage;
4. Medical Benefits; and
5. Section 8(f). (JX-1).

## Statement of Evidence

Claimant is fifty-seven years old. He was born in Mississippi and raised in Louisiana. His formal education ended after the eighth grade, at which time he began working, primarily in the field of heating and air conditioning. (Tr. 15-16). As to previous injuries, Claimant testified he broke his right arm in 1975, had a right foot problem in 1999, pulled a neck muscle in August 2007, and had surgery on his right shoulder in May 2006. (Tr. 16-17). Claimant also testified that he injured his back in September 2004 while working for Bob's Heating and Air, requiring him to be off work for two weeks. (Tr. 33, 37). He again injured his back in February 2005, at which time he remained off work for two months. (Tr. 40).

On September 25, 2007, Claimant underwent a pre-deployment physical and was found medically qualified for work. (CX-1, p. 1). At that time, Claimant reported he had previously undergone surgery on his right shoulder for bone spurs. (CX-1, p. 1). On October 3, 2007, Claimant departed the U.S. to work for Employer in Iraq. (Tr. 19).

Claimant testified that his job with Employer required him to wear protective gear weighing between sixty-five and seventy pounds at all times. (Tr. 23). On May 30, 2008, as he was preparing to use a pressure washer to remove sand from an air conditioning unit, he slipped and fell in the back of his truck. (Tr. 26). He stated that he completed his work that day, but by the next morning, he could not get out of bed due to pain and stiffness in his lower back. (Tr. 26).

On May 31, 2008, Claimant was treated at Employer's clinic, at which time he complained of stiffness, poor range of motion, and lower back pain radiating downward into the right thigh. (CX-1, p. 4). Claimant continued to complain of pain over the next several weeks, and an MRI dated July 6, 2008 found moderate disc protrusion and degenerative disc disease at L-4/5 and L-5/S-1. (CX-1, p.10).

Claimant was placed on bed rest and eventually was returned stateside, where he fell under the care of Dr. Casey, an orthopedic, who recommended medication, rather than surgical intervention. (CX-1, p. 11). Claimant then sought treatment from Drs. Bass and Daniels. Dr. Daniels made an initial recommendation that Claimant undergo surgery on June 24, 2008. (EX-33, p. 62). On May 4, 2009, Dr. Bass indicated Claimant required back surgery. (EX-9, p. 17).

At the referral of Dr. Cuadra, who had treated Claimant in the past, Claimant saw Dr. Sanchez for a consultation regarding his back pain. After examining Claimant and reviewing his records, Dr. Sanchez recommended a core decompression of Claimant's left hip, which was performed on August 5, 2008. (EX-13, pp. 14-16). On April 3, 2009, Dr. Sanchez performed the same operation on Claimant's right hip. (EX-13, pp. 19, 25-27).

On May 25, 2009, Dr. Sanchez ordered a lumbar MRI, which was performed on June 2, 2009, and found annular disc bulging, central canal stenosis, and bilateral foraminal encroachment at the L-4/5 level. (EX-13, pp. 31-32). The scan also showed a left posterior disc extrusion resulting in nerve root contact and mild posterior displacement. (EX-13, p. 32). On June 5, 2009, Dr. Sanchez noted Claimant was experiencing severe S1 root symptoms and recommended a microdiscectomy, which was scheduled for June 18, 2009. (EX-13, pp. 34-35).

On June 16, 2009, Dr. Ralph Katz performed a decompressive lumbar laminectomy at the L5-S1 level on the left side. (EX-13, pp. 39-42). In the operative report, Dr. Katz noted Claimant had "a large disc herniation affecting the left S1 root." (EX-13, p. 40). Claimant's leg pain seemed to dissipate following the operation, and Dr. Katz recommended physical therapy and pain management. (EX-13, pp. 44-45).

On September 24, 2009, Claimant began seeing Dr. Arnold Feldman for pain management at the referral of Dr. Katz. (EX-18, pp. 3-14, 19). Dr. Feldman noted Claimant was experiencing muscle spasms in his paraspinal muscles, and he diagnosed Claimant with an unstable herniated lumbar disc and unstable lumbar pain. (EX-18, pp. 13-14). He recommended a series of steroid injections and a possible discogram. (EX-18, p. 14).

On September 30, 2009, Dr. Feldman noted Claimant's low back pain was causing him severe functional impairment, diagnosed Claimant with post-laminectomy syndrome, and recommended an endoscopic laminectomy. (EX-18, pp. 53-54). On October 20, 2009, Dr. Feldman performed a discectomy and foraminotomy at the L-4/5 level. (EX-18, pp. 112-113). In November 2009, Claimant reported that this procedure had significantly reduced his pain, although it was steadily increasing again. (EX-18, p. 181). On May 7, 2010, Dr. Feldman assessed Claimant as having vertebral column arthropathy, a herniated lumbar disc, lumbar region post-laminectomy syndrome, and radiculopathy. (EX-18, p. 352).

Dr. Daniels was deposed on April 27, 2010. (EX-33). He indicated that when he had seen Claimant prior to his deployment, Claimant did not complain of back pain. (EX-33, pp. 28-29). When Dr. Daniels saw Claimant on February 20, 2008 (after Claimant had been in Iraq for four months), Claimant did report back pain. (EX-33, p. 29). Dr. Daniels testified that on April 22, 2008, Claimant reported he had been sent home from Iraq due to his back pain, which he believed was caused by driving through ruts and crevices in the road. (EX-33, pp. 31-32). According to Dr. Daniels, Claimant first began to complain of hip pain on July 23, 2009. (EX-33, pp. 45-46).

Dr. Daniels also testified that if Claimant's May 30, 2008 fall led to ongoing back problems, it should be considered an aggravation of Claimant's pre-existing back condition. (EX-33, pp. 60-61). He also indicated that this fall could have caused Claimant's hip injury. (EX-33, p. 64).

Dr. Bass was deposed on April 27, 2010. She first treated Claimant at her clinic on July 9, 2004. (EX-34, p. 4). However, she testified that Claimant's condition changed sometime between his April 27, 2008 visit and his June 24, 2008 visit. (EX-34, p. 21). She opined that Claimant more than likely aggravated his pre-existing condition when he fell on May 30, 2008. (EX-34, p. 21). Dr. Bass also noted Claimant had made no complaints of hip pain prior to May 2008, and it is possible Claimant's hip pain was due to his at-work injury. (EX-34, p. 22).

Dr. Katz testified on April 23, 2010, that he first saw Claimant on May 25, 2009. (EX-31, p. 6). He also opined Claimant had aggravated his pre-existing back condition in the May 30, 2008 falling incident. (EX-31, p. 19).

Dr. Cuadra was deposed on April 29, 2010, and testified that the trauma Claimant sustained on May 30, 2008 could have played a part in Claimant's hip condition. (EX-32, p. 22). He also indicated that Claimant had not merely sustained a soft tissue injury, but he had also injured his spine. (EX-32, p. 25).

Dr. Feldman, who has provided Claimant with pain management, testified he believes Claimant's underlying condition was accelerated by his injury in Iraq. (EX-35, p. 31).

With respect to work restrictions, Dr. Katz testified he would have restricted Claimant from work from May 25, 2009, through August 13, 2009. However, Dr. Katz stated he is not aware of Claimant's current medical condition nor of the physical requirements of his job with Employer, and therefore, he would want Claimant to undergo a functional capacity evaluation (FCE) before assigning any work restrictions. (EX-31, pp. 12, 20-21). Dr. Katz also indicated Claimant had likely reached maximum medical improvement (MMI) with respect to his back, but he was unsure about Claimant's hip condition. (EX-21, pp. 15, 19).

Dr. Cuadra also indicated Claimant would need to undergo an FCE before work restrictions or an impairment rating could be assigned. (EX-32, p. 31). Dr. Feldman testified he did not believe Claimant could return to his position with Employer. (EX-35, pp. 29, 31). Dr. Feldman also stated he believed Claimant had reached MMI as of May 13, 2010. (EX-35, p. 29). Claimant testified he has not worked since returning home from Iraq in June 2008. (Tr. 56-57).

Claimant ultimately underwent a functional capacity evaluation (FCE) on July 8, 2010, which found Claimant capable of sedentary work with the following restrictions:

1. Occasional lifting of up to five pounds;
2. Avoid frequent lifting;
3. Occasional carrying of up to four pounds;
4. Avoid sustained or repetitive trunk flexion;
5. Limit kneeling or crouching. (EX-36, p. 5).

However, the FCE report noted Claimant exerted submaximal effort, therefore making the results less than reliable. (EX-36, pp. 1, 4).

On July 28, 2010, Carla Seyler, a certified rehabilitation counselor, issued a report based on her vocational rehabilitation evaluation of Claimant. (EX-37). In her report, Ms. Seyler identified the following positions which she believed constituted suitable alternative employment for Claimant:

1. Service Technician: The individual is trained to test and evaluate air-conditioning motors to determine what service is needed and whether or not parts need to be replaced. The individual will perform preventative maintenance and some repairs or replacement of basic motor components. The worker must be able to use hand tools. The individual will alternately stand and walk and can occasionally sit. He will lift up to fifty pounds occasionally and twenty to twenty-five pounds more frequently. He will rarely to occasionally bend. The worker frequently works at a table and uses his upper extremities. The job pays \$10.00 per hour, depending on experience.

2. Assembler: The individual will operate machines to cut locking lugs and snap rings. He will assemble, prefit, paint, and crate rental tools and stage the tools under supervision. The individual will alternately stand and walk and can sit during breaks. He will work at table height. He will lift up to fifty pounds occasionally and twenty to thirty pounds more frequently. The individual will rarely to occasionally bend. The job pays \$10.00 to \$12.00 per hour.

3. Parts Sales Clerk: The individual will assist customers with selecting auto parts and other products. He will index parts information based on the particular vehicle. He will pull parts from inventory and stock merchandise on a regular basis. The worker will alternately stand and walk and may occasionally climb. He will lift up to fifty pounds occasionally. He will occasionally reach overhead. There is no bending. The job pays \$9.00 to \$10.00 per hour.

4. Security Officer: The individual will monitor gambling operations to secure the safety of guests, employees, and casino areas. He will escort employees in the parking area. He will verify the identification of guests and notify proper authorities as required. The individual will alternately stand and walk during his shift and occasionally sit. He will lift up to twenty pounds occasionally. There is no bending, stopping, or overhead work. The job pays \$9.00 to \$10.00 per hour.

5. Service Associate: The worker provides customers with information regarding cash advances and other services. He will help the customers complete paperwork accurately. He cashes checks, as well as sells money orders, wire transfer services, and postage stamps. He will maintain, balance, and close the cash register. The worker will alternately sit, stand, and walk throughout the workday. He will lift less than ten pounds. He will rarely bend. There is no overhead work. The job pays \$8.00 to \$10.00 per hour.

6. Slot Attendant: A casino needs an individual to provide customer service regarding jackpots. He will fill machines and handle some minor malfunctions. He will walk the guests to the cage area to obtain change or payouts. The individual will alternately stand and walk. Regular breaks are provided, and the worker can sit for fifteen minutes at a time. He will occasionally bend and stoop. There is no overhead work. This job pays \$9.00 to \$10.00 per hour.

7. Surveillance Agent: The individual is based in a surveillance room and will monitor television screens to view the casino floor. He will notify security officers and contact authorities during emergencies. He will notify other supervisory staff if suspicious activity is noted. The worker will frequently sit and can alter his posture as needed. He must be able to move his head in order to view the monitors. He must be able to use his hands and fingers in order to control the camera through levers and buttons. He will lift less than ten pounds. The job pays \$11.00 per hour.

8. Service Dispatcher: A tire company needs an individual to answer incoming calls regarding customer needs. He will dispatch drivers to specified locations. He provides prices to customers after researching parts information on a computer. He will schedule appointments for customers regarding services and sales. This is an office-based sedentary job. The individual can alternately sit or stand as needed. He will lift less than ten pounds, and no bending is required. The job pays \$10.00 to \$12.00 per hour.

9. Dispatcher: The individual coordinates schedules and routes in order to effectively dispatch twenty vacuum trucks. He will use a computer, a phone, and a radio. He will accept job orders, determine the number of trucks needed, and determine where to send the trucks to the job. The individual works on a 7 on/7 off schedule. Living quarters are provided. This is a sedentary, office based job on land. The individual will lift less than ten pounds. He will alternately sit, stand, and walk. There are no strenuous physical demands. The job pays \$4,000.00 per month. (EX-37, pp. 6-9).

On July 30, 2010, Dr. Katz approved each of these jobs, stating that Claimant's physical condition would allow him to perform the tasks required by all nine identified positions. (EX-37, pp. 20-22). Dr. Feldman, however, found Claimant could not perform any of these jobs. (EX-37, pp. 16-18).

### **Findings of Fact and Conclusions of Law**

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. My evaluation of the evidence has been guided by the principle that the proponent of a rule bears the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

As trier of fact, I may accept or reject any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). The "true doubt rule," which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act, and thus has not been employed in my review of this claim. *Greenwich Collieries*, 512 U.S. at 281.

### **Causation**

Section 20(a) of the Act provides a claimant with a presumption his disabling injury is causally related to his employment if the claimant can prove the following two elements: (1) he suffered an injury or harm, and (2) employment conditions existed which could have caused, aggravated, or accelerated his condition. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003) (citing *Conoco v. Director, OWCP*, 194 F.3d 684, 687 (5th Cir. 1999)). Once a claimant has made this *prima facie* showing, the burden shifts to the employer to rebut the presumption with substantial evidence employment conditions did not cause the injury. *Ortco Contractors, Inc.*, 332 F.3d at 287. "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982) (quoting *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1006 (5th Cir. 1978)). If the employer meets this burden, he rebuts the Section 20(a) presumption, and the administrative law judge must then weigh

all the evidence and render a decision supported by substantial evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).

In this case, I find Claimant has made the requisite *prima facie* showing. Claimant testified that on May 30, 2008, while preparing to use a pressure washer, he slipped and fell in the back of his truck, landing on his lower back. (Tr. 26). The next day, Claimant was treated at Employer's clinic, where he presented with stiffness, poor range of motion, and lower back pain radiating downward into his right thigh. (CX-1, p. 4). Once he returned stateside, Claimant also began experiencing hip pain, which required surgical intervention. (EX-13, pp. 14-16, 19, 25-27). Claimant also required back surgery due to a bulging disc which was causing severe nerve root problems at the L5-S1 level. (EX-13, pp. 34-35, 39-42). Based on this evidence, I find Claimant has proven he suffered injuries to his hips and lower back that could have been caused by employment conditions, and thus he is entitled to the Section 20 presumption of causation.

Employer/Carrier attempt to rebut this presumption by arguing that Claimant's underlying back condition (and not the incident in May 2008) is the cause of his injuries to his lower back and hips. Employer/Carrier note that Claimant reported back pain to Dr. Daniels in February 2008 (prior to the incident in May). (EX-33, p. 29). Employer/Carrier also contend that, because Claimant's physicians were initially unaware of Claimant's underlying condition, they automatically attributed it to the May 30, 2008 incident. However, I find this argument amounts to mere speculation, and fails when weighed against the evidence to the contrary.

Even if Employer/Carrier had rebutted the presumption, the evidence—when weighed as a whole—indicates Claimant's pre-existing back condition was aggravated by his May 30, 2008 fall, thus making his resulting injuries to his hips and lower back compensable under the Act. Following the incident, Claimant complained of stiffness, poor range of motion, and pain in his lower back, which eventually extended into his hips. (CX-1, p. 4).

Dr. Daniels indicated Claimant's current back problems should be considered an aggravation of his pre-existing back condition, and that the incident in May 2008 could have caused Claimant's hip injuries as well. (EX-33, pp. 60-61, 64). Dr. Bass concurred in her April 2010 deposition, as did Drs. Katz, Cuadra, and Feldman. (EX-34, pp. 21-22; EX-31, p. 19; EX-32, pp. 22, 25; EX-35, p. 31).

Based on this evidence, I find Claimant's fall on May 30, 2008, aggravated his pre-existing back condition, and caused injuries to his lower back and hips which are compensable under the Act.

### **Average Weekly Wage**

Section 10(a) of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). Each of these methods seeks to establish a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 343 (1992).

Section 10(a) applies when a claimant worked "substantially the whole of the year" for either the same or another employer. 33 U.S.C. § 910(a). When Section 10(a) is inapplicable, Section 10(b) uses the earnings of a substitute employee engaged in the same or similar employment to determine the earning power of the claimant. 33 U.S.C. § 910(b). Both Section 10(a) and Section 10(b) only apply to claimants who work five or six days per week. 33 U.S.C. § 910. Section 10(c) applies when neither Section 10(a) nor Section 10(b) would provide a fair and reasonable calculation of the claimant's earning power at the time of the injury. 33 U.S.C. § 910(c).

Both parties agree Claimant's average weekly wage should be calculated under Section 10(c). Claimant earned \$47,326.88 from Employer in period from October 3, 2007 (when he began working for Employer), through June 5, 2008 (when he was placed on medical leave). (CX-7, p. 8). Employer/Carrier divide this figure by fifty-two weeks to reach an average weekly wage of \$910.13. Claimant, on the other hand, divides this figure by only 30.857 weeks worked to reach an average weekly wage of \$1,533.74. Because I find Claimant's calculation more accurately reflects his actual earnings while working for Employer, I find Claimant's pre-injury average weekly wage to be \$1,533.74.

### **Nature and Extent**

A claimant bears the burden of proving the nature and extent of his work-related injury. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1986). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60 (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537, 540 (1977)). The date of MMI is defined as the date on which the employee has received the maximum benefit of medical

treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. The date of MMI is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guar. Ass'n. v. Abbot*, 40 F.3d 122, 125 (5th Cir. 1994). If MMI has not yet been reached, the disability is temporary.

In his April 23, 2010 deposition, Dr. Katz testified he believed Claimant had reached MMI with respect to his back, but he was unsure about Claimant's hip condition. (EX-21, pp. 15, 19). Dr. Feldman, however, stated he believed Claimant reached MMI as of May 13, 2010. Because Dr. Feldman has been providing Claimant with pain management with respect to his injuries as a whole, I find he is in the best position to determine Claimant's progress and need for future treatment. Thus, I agree with his assessment and find Claimant reached MMI as of May 13, 2010.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). A claimant must first make a *prima facie* case of disability by showing he is unable to return to his former job due to his work-related injury. Once he has done so, the burden shifts to the employer to show the existence of suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The claimant remains entitled to total disability compensation until the date upon which the employer establishes the availability of such employment, at which point the disability becomes partial. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

To establish suitable alternative employment, an employer must prove the existence of realistically available job opportunities. The employer must take into account factors such as the claimant's age, education, employment history, and physical capabilities. *Turner*, 661 F.2d at 1042. The employer must also demonstrate the Claimant could realistically secure the alternative employment if he diligently tried. *Id.* at 1042-43. The *Turner* standard does not require the employer to seek out specific job offers for the claimant, but the employer must outline the specific terms, nature, and availability of the identified suitable alternative employment. *Id.* at 1041; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 94 (1988). Failure to present evidence of job availability supports a determination of total disability if the claimant is incapable of returning to his former job. *Roger's Terminal & Shipping Co. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986) (citing *Odom Construction Co. v. U.S. Dept. of Labor*, 662 F.2d 110, 116 (5th Cir. 1980)).

Claimant has not returned to the workforce since leaving Iraq in June 2008, and none of his treating physicians have specifically released him to work, preferring to await the results of a functional capacity evaluation (FCE). On July 8, 2010, Claimant underwent an FCE and was found capable of only sedentary work, although the results of that report have been called into question because the examiners noted they believed Claimant was exerting submaximal effort. (EX-36, pp. 1-4).

On July 28, 2010, a labor market survey identified nine jobs which Employer/Carrier argue constitute suitable alternative employment for Claimant. (EX-37, pp. 6-9). While Dr. Katz has approved each of these positions, Dr. Feldman felt none of them were appropriate given Claimant's condition. (EX-37, pp. 16-18, 20-22). Given the findings of functional capacity evaluation, as well as my observations of Claimant at the formal hearing, I feel Claimant is capable of at least sedentary work within the restrictions outlined in the FCE. Thus, I find the Surveillance Agent and Service Dispatcher positions constitute suitable alternative employment for Claimant.<sup>3</sup> The hourly wage offered by these positions is \$11.00 per hour, yielding Claimant a residual weekly earning capacity of \$440.00.

Based on the foregoing, I find Claimant is entitled to temporary total disability compensation benefits for the period from May 30, 2008, to May 13, 2010, based on his average weekly wage of \$1,533.74. From May 13, 2010, to July 28, 2010, Claimant is entitled to permanent total disability compensation benefits, and from July 28, 2010 and continuing, Claimant is entitled to permanent partial disability compensation benefits based on the difference between his pre-injury average weekly wage of \$1,533.74, and his residual weekly wage earning capacity of \$440.00.

## **Medicals**

In order for medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). A claimant establishes a *prima facie* case for treatment necessary for the claimant's work-related injury. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). When an employer or carrier learns of an employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial, free choice of

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<sup>3</sup> While the Dispatcher position is also physically suitable, it offers wages significantly higher and out of proportion with those offered by the other positions, and thus, it will not be used in calculating Claimant's residual earning capacity.

physician, he may change physicians only with prior written approval from his employer or carrier, or from the district director. 33 U.S.C. § 907(c).

Having found Claimant's injuries to his hips and lower back compensable, I find he is entitled to all reasonable and necessary medical treatment related to those injuries.

### **Section 8(f)**

Section 8(f) of the Act provides an employer may limit his liability for compensation payments if the following three elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due solely to that injury, but is a combination of both that injury and the pre-existing permanent partial disability. *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990). The purpose of Section 8(f) is to prevent employer discrimination in the hiring of disabled workers, and to encourage the retention of such workers. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 839 (9th Cir. 1982). The provisions of Section 8(f) are to be construed in favor of the employer. *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977).

A pre-existing permanent partial disability for purposes of Section 8(f) can be either: (1) a scheduled loss under Section 8(c) of the Act; (2) an economic disability arising out of a physical infirmity; or (3) a serious physical disability which would motivate a cautious employer to dismiss the employee because of a greatly increased risk of an employment-related accident and compensation liability. *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977); *Cononetz v. Pacific Fisherman, Inc.*, 11 BRBS 427 (1979). The mere fact of a past condition does not establish a pre-existing disability; the problem must affect the employee's ability to function. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222 (D.C. Cir. 1985); *General Dynamics v. Sachetti*, 681 F.2d 37, 40 (1st Cir. 1982).

In this case, the District Director contends that Employer/Carrier have failed to establish Claimant suffered from a qualifying pre-existing permanent partial disability. Claimant testified that he injured his back on two separate occasions prior to his May 30, 2008 at-work injury. (Tr. 33, 37, 40). In addition, Drs. Daniels, Bass, and Katz all testified that Claimant had underlying degenerative issues in his lumbar spine which were aggravated by that injury. (EX-33, pp. 60-

61; EX-34, p. 21; EX-31, p. 19). However, there is no evidence to suggest that this pre-existing condition was significant enough to be considered a qualifying pre-existing disability for purposes of Special Fund relief.

Dr. Daniels testified Claimant did not complain of back pain prior to his deployment. (EX-33, pp. 28-29). Claimant underwent a pre-deployment physical on September 25, 2007, in which he failed to report any pre-existing disability relating to his lumbar spine and was found medically qualified for work with Employer. (CX-1, p. 1). Moreover, Claimant testified that, prior to his injury, he was required to wear protective gear weighing between sixty-five and seventy pounds, which he was able to do without incident. (Tr. 23).

Based on the foregoing, and in light of Employer/Carrier's failure to provide evidence to the contrary, I find Claimant's pre-existing back problems fail to rise to the level of "a serious physical disability which would motivate a cautious employer to dismiss the employee because of a greatly increased risk of an employment-related accident and compensation liability." *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977); *Cononetz v. Pacific Fisherman, Inc.*, 11 BRBS 427 (1979). Because Employer/Carrier have failed to demonstrate the existence of a qualifying pre-existing disability, they are likewise unable to meet the other requirements for Section 8(f) relief. Therefore, I find they are not entitled to such relief.

### **ORDER**

It is hereby **ORDERED, ADJUDGED, and DECREED** that:

(1) For the period from May 30, 2008, to May 13, 2010, Employer/Carrier shall pay to Claimant temporary total compensation benefits based on Claimant's pre-injury average weekly wage of \$1,533.74;

(2) For the period from May 13, 2010, to July 28, 2010, Employer/Carrier shall pay to Claimant permanent total disability compensation benefits based on Claimant's pre-injury average weekly wage of \$1,533.74;

(3) For the period from July 28, 2010, and continuing, Employer/Carrier shall pay to Claimant permanent partial disability compensation benefits based on the difference between his pre-injury average weekly wage of \$1,533.74, and his residual weekly wage earning capacity of \$440.00;

(4) Employer/Carrier's application for relief under Section 8(f) of the Act is DENIED;

(5) Employer/Carrier shall pay or reimburse Claimant all reasonable and necessary past and future medical expenses resulting from Claimant's at-work injuries;

(6) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(7) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this **ORDER** at a rate provided for in 28 U.S.C. § 1961;

(8) Claimant's counsel shall have twenty days from receipt of this **ORDER** in which to file a fully-supported attorney fee petition and simultaneously serve a copy on opposing counsel. Thereafter, Employer/Carrier's counsel shall have ten days from receipt of the fee petition in which to file a response; and

(9) All computations of benefits and other calculations which may be provided for in this **ORDER** are subject to verification and adjustment by the District Director.

So **ORDERED** this 26<sup>th</sup> day of May, 2011, at Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**