



ISSUE DATE: 30 SEPTEMBER 2011

OALJ CASE No: 2009-LDA-00208, -00209, -00210
OWCP CASE No: 02-166171, -179464, -180901

In the Matter of:

ALLAN J. BARNETT,
Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.,
Employer,

and

INSURANCE CO. OF THE STATE OF PA.,
Carrier.

Appearances: Joel S. Mills, Esq.
For the Claimant

Scott R. MacInnes, Esq.
For the Employer / Carrier

**Decision and Order Awarding Claimant Temporary Total Disability
and Medical Benefits**

I. Summary

This decision awards temporary total disability compensation under the Longshore and Harbor Worker's Compensation Act¹ (the Act) as extended by the Defense Base Act,² for all the injuries claimed. In July 2007, the Employer³ hired the Claimant to drive heavy trucks in Iraq. In August 2007, the Claimant injured his left wrist, left ankle, right shoulder and low back when he fell from his truck. The Employer acknowledges the fall. It abandoned its earlier challenge to his

¹ 33 U.S.C. § 901, *et seq.*

² 42 U.S.C. § 1651, *et seq.*

³ The Employer and its Carrier are collectively referred to as "the Employer."

shoulder injury, but still controverts his claim for medical care and compensation for his back pain, saying it is unrelated to his employment and stems from an earlier back surgery in 2005.

II. Summary of Findings

The Claimant injured his left wrist, left ankle, right shoulder and low back when he fell from his truck on August 13, 2007. He returned to work from November 2007, until August 2008, when he stopped due to pain. He has only reached maximum medical improvement for his ankle injury, from which he has fully recovered with no lasting restrictions.

The Claimant cannot return to his job as a heavy truck driver in Iraq in his present condition. The Employer has not identified any suitable alternative job opportunities because it believes he can return to his previous job with no restrictions, a position the medical evidence, viewed as a whole, doesn't support. The Claimant is entitled to disability benefits of \$1,114.44 per week for the period he was disabled in 2007, and \$1,160.37 per week from August 28, 2008, the maximum compensation rates for each year.

The Claimant established a *prima facie* case of temporary total disability for his wrist, shoulder, and back injuries. He testified via deposition that his lower back pain increased from a "one to two" on a scale of ten to a "six or seven" after he fell in July 2007, and that his doctors have told him he cannot work his previous job. To disprove any link between the Claimant's employment and his back injury, the Employer relies solely on Dr. Richmond's deposition testimony. But that testimony doesn't discredit the Claimant's statements, and only states that the Claimant suffered no structural damage to his spine from his July 2007 fall. Dr. Richmond did not believe the Claimant was malingering or exaggerating his symptoms, and acknowledged that the heavy body armor the Claimant was required to wear could have exacerbated the back pain, and that the fall may also have exacerbated his pain, given the pre-existing condition of his back. In these circumstances, the Employer has failed to rebut the § 20(a) presumption that the back injury claim falls within the Act.

The Employer also argues the Claimant's compensation should be calculated based on his yearly income before his August 2007 injury, which primarily came from driving trucks in the United States. This blended approach, it says, is more appropriate than relying solely on his significantly higher income from working in Iraq. It has preserved its argument for further review, but binding legal authority from the Benefits Review Board rejects its approach to calculating the benefits.

III. Background

The parties stipulated that the matter should be decided on the exhibits and briefs,⁴ without a trial.⁵ The record includes deposition testimony from the Claimant⁶ and two doctors — Joseph Sheppard, M.D.,⁷ one of Claimant's treating physicians, and Jeffrey Richmond, M.D.,⁸ an independent medical examiner the Employer retained. The Claimant's medical records include reports from the 446th ASMC Outpatient Facility,⁹ the University Medical Center in Tucson,¹⁰ and from Domingo Cheleutte, M.D.,¹¹ Brandon Massey, M.D.,¹² Benjamin Kocher,¹³ Joseph Sheppard, M.D.,¹⁴ Arturo Camacho, M.D.,¹⁵ Peter Campbell, M.D.,¹⁶ Carol Brailsford, M.D.,¹⁷ and Jack Dunn, M.D..¹⁸ In addition, the record contains documents related to Claimant's income¹⁹ and vocational rehabilitation.²⁰

IV. Issues

After considering the stipulations that follow, the following issues remain for resolution:

1. whether Claimant's employment caused or aggravated his back problems; and

⁴ Claimant's Brief on Submission; Employer/Carrier's Closing Brief Regarding Average Weekly Wage and Compensability of Lower Back [hereinafter Employer's Brief on Submission].

⁵ See Order Regarding Record and Post Trial Briefs (July 24, 2009).

⁶ C. Ex.-16. This Decision and Order cites to the record this way: citations to the Claimant's exhibits are abbreviated as C. Ex.-[exhibit number] at [page number]; the Employer's exhibits are abbreviated as E. Ex.-[exhibit number] at [page number].

⁷ C. Ex.-15.

⁸ E. Ex.-24.

⁹ C. Ex.-1 at 2.

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 8.

¹² *Id.* at 9-11, 21-30, 34-36, 41, 44, 53.

¹³ *Id.* at 15.

¹⁴ *Id.* at 20, 30-33, 37,

¹⁵ *Id.* at 42-43.

¹⁶ *Id.* at 45-50.

¹⁷ *Id.* at 51-52.

¹⁸ E. Ex.-26 at 275-293.

¹⁹ E. Ex.-11.

²⁰ E. Ex.-12.

2. what is the average weekly wage (AWW) payable for both periods of the Claimant's temporary total disability.

V. Facts

A. Stipulated Facts

In their pretrial statements and submitted briefs, the parties stipulated the following facts:

1. the Act applies to this claim;²¹
2. an employer/employee relationship existed at the time of the alleged injury;²²
3. the Claimant fell while exiting his truck in Iraq on August 13, 2007;²³
4. the injuries to the Claimant's left wrist, left ankle and right shoulder arose out of and in the course of his employment;²⁴
5. the claim was timely noticed and timely filed, and the Employer's controversion was timely filed;²⁵
6. the Claimant is entitled to compensation and medical benefits for the injuries to his left wrist, left ankle and right shoulder;²⁶ and
7. the Claimant has not yet reached maximum medical improvement for the injuries to his wrist, shoulder and low back.²⁷

²¹ Pretrial Statement of Brown & Root-SEII/WorldSource at § 4(a) [hereinafter Employer's Pretrial Statement]; Pretrial Statement of Allen J. Barnett at § 4(a) [hereinafter Claimant's Pretrial Statement].

²² Employer's Pretrial Statement at § 4(b), Claimant's Pretrial Statement at § 4(b).

²³ Employer's Pretrial Statement at § 2; Claimant's Pretrial Statement at § 2

²⁴ Employer's Pretrial Statement at § 4(d); Claimant's Pretrial Statement at § 4(d). Initially the Employer controverted the right shoulder injury as well, but it ceased to do so after Claimant was examined by Joseph Sheppard, M.D.. *See* Employer's Brief on Submission at 2.

²⁵ Employer's Pretrial Statement at § 4(e); Claimant's Pretrial Statement at § 4(e).

²⁶ Employer's Pretrial Statement at § 4(f); Claimant's Pretrial Statement at § 4(f). As described above, Employer initially disputed that it owed compensation for the Claimant's shoulder injury, but later relented. *See* Employer's Brief on Submission at 2.

²⁷ Employer's Pretrial Statement at § 4(h); Claimant's Pretrial Statement at § 4(h).

B. Facts Drawn from the Proof

1. Claimant's Personal, Employment and Medical History Before Working in Iraq

The Claimant, who was born in 1964,²⁸ graduated from high school in 1982²⁹, and then served in the U.S. Navy as a radioman from 1983 until July 1987.³⁰ He was trained to drive trucks in January 1998,³¹ and began driving trucks later that year.³² The Claimant worked for a number of employers between 1998 and 2005, typically for several months per employer.³³

While driving a dry cement truck for Southern Tank in 2005, he injured his low back as he opened the tank of his truck.³⁴ Jack Dunn, M.D. recommended surgery based on a physical examination of the Claimant and an MRI scan showing “a fairly significant herniated disk.”³⁵ The surgery, a left L4-5 and right L4-5 micodisectomy and a left L5-S1 foraminotomy, was performed sometime in July 2005.³⁶ Dr. Dunn's treatment records show that by August 31, 2005 the Claimant was healing well, walking 3 miles a day, and was ready to be evaluated for return to work.³⁷ The Claimant was released to work with no restrictions shortly thereafter.³⁸ Between the 2005 back surgery and the August 13, 2007 accident, the Claimant occasionally suffered back pain that he characterized as a “one or two” on a scale of one to ten.³⁹

2. The Claimant's Work in Iraq

In July 2007, the Claimant began driving heavy trucks in Iraq for the Employer.⁴⁰ For the first two weeks, he drove flatbed trucks.⁴¹

²⁸ C. Ex.-1 at 1.

²⁹ C. Ex.-16 at 11.

³⁰ *Id.* at 13.

³¹ *Id.* at 12.

³² C. Ex.-7 at 1 (Resume of Allan Barnett). The resume only goes back as far as 1999, and there is a gap in Claimant's deposition testimony from about 1988 until that time.

³³ *Id.*

³⁴ C. Ex.-16 at 16.

³⁵ E. Ex.-26 at 278–279.

³⁶ *Id.* at 276–277.

³⁷ *Id.* at 275.

³⁸ C.Ex.-16 at 16.

³⁹ *Id.* at 15.

⁴⁰ *Id.* at 17. Claimant testified that he worked for “KBR,” but for purposes of this claim, Service Employees International is the Employer.

⁴¹ *Id.* at 19.

He drove tanker trucks for the remainder of his time in Iraq.⁴² His job duties included climbing up and down the ladder on the side of the truck to get in and out of the vehicle, driving, and “dropping and hooking” different tankers.⁴³ Dropping and hooking involves dropping the landing gear at the front of the tanker and hooking and unhooking the trailers and air hoses.⁴⁴ The process requires some physical strength, and depends on the individual trailer—the Claimant was not able to estimate how much strength—although some trailers can be “very hard” to drop and hook.⁴⁵ The Claimant had to climb ladder onto the top of his tanker truck, at a height of approximately 10 to 15 feet.⁴⁶

The Claimant also was required⁴⁷ to wear what was known as personal protective equipment (PPE): a bulletproof vest that covers the torso on all sides, is about 1.5 inches thick, and weighs approximately 60 pounds.⁴⁸

3. The Claimant’s August 13, 2007 Injury and Medical Treatment Until His Return to Work in November 2007

On August 13, 2007, the Claimant fell while attempting to exit his truck.⁴⁹ The Claimant was descending the ladder on his tanker when he lost his right hand grip.⁵⁰ Falling about two feet to the ground, he landed on his back.⁵¹ He tried to break his fall with his left hand, which became pinned beneath him as he fell.⁵² He realized within seconds that he had hurt his wrist.⁵³ He wore his 60-pound PPE when he fell.⁵⁴

Other drivers in the Claimant’s convoy saw him on the ground and called the KBR ambulance.⁵⁵ He was taken to the Army Hospital

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 19–20.

⁴⁶ *Id.* at 18.

⁴⁷ *Id.* at 42.

⁴⁸ *Id.* at 40; C. Ex.-17 at 19.

⁴⁹ C. Ex.-16 at 40.

⁵⁰ *Id.* at 42.

⁵¹ *Id.* at 41.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 42.

⁵⁵ *Id.* at 41.

in Camp Cedar, given morphine,⁵⁶ and quickly transferred to Camp Talil, about 10 miles away, for x-rays.⁵⁷ The doctors at Camp Talil concluded that the Claimant's left wrist was broken, that his left ankle was sprained, and recorded that he complained of backache.⁵⁸ The Claimant did not complain about his right shoulder because he was still stunned and "shot up with morphine."⁵⁹ On the recommendation of the doctors, the Claimant was flown by plane to Kuwait, where he boarded a commercial aircraft bound for the United States the following day.⁶⁰

4. University Medical Center Care Following the August 13, 2007 Accident

a. Emergency Room Treatment

Immediately after arriving in the United States, the Claimant's family took him to the emergency room of the University Medical Center (UMC) in Tucson, Arizona.⁶¹ By then he felt pain in his right shoulder as well.⁶² On August 16, 2007, doctors at UMC x-rayed his lumbar spine, right shoulder, and left ankle⁶³, and set his wrist.⁶⁴ The lumbar x-ray showed no significant abnormalities⁶⁵ in the form of fractures, dislocations, or osseous lesions.⁶⁶ Spinal alignment was anatomic, with well preserved disk spaces and vertebral heights.⁶⁷ Soft tissue appeared unremarkable.⁶⁸ The x-rays of the Claimant's left ankle and right shoulder similarly showed nothing out of the ordinary.⁶⁹

⁵⁶ *Id.* at 45.

⁵⁷ *Id.*; C. Ex.-1 at 1.

⁵⁸ *Id.*

⁵⁹ *Id.* at 46.

⁶⁰ *Id.* at 45.

⁶¹ *Id.* at 47.

⁶² *Id.* at 48.

⁶³ The treating record states that x-rays were performed on the left ankle, but the results, detailed in lower part of that page, say "right ankle" instead. An x-ray of the left ankle is more consistent with the injury and the Camp Talil report. *See* C. Ex.-1 at 1, 3.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

b. Further Treatment Before the Claimant's Return to Iraq

Dr. Massey, who treated the left wrist.⁷⁰ found the Claimant had a “very complex” left distal radius fracture that required surgery to implant a volar plate, and external fixation.⁷¹ Dr. Massey implanted the plate on August 22, 2007.⁷² The Claimant had physical therapy thereafter.⁷³ About two months later, on October 16, 2007, Dr. Cheleuitte cleared the Claimant to return to work with regard to his ankle problem, with no restrictions.⁷⁴ Also on October 16, 2007, Dr. Massey cleared the Claimant for return to work with regard to his wrist injury, with no restrictions.⁷⁵ The Claimant received no further treatment for his shoulder because he was recovering from his left wrist surgery, wasn't doing any physical exertion, and therefore had no pain.⁷⁶ The record does not show any treatment for the Claimant's back at this time.

5. The Claimant's Return to Work in Iraq

The Claimant returned to work in Iraq in November 2007.⁷⁷ At the time he returned to work, he characterized his wrist as having returned to “about 50 percent” of normal.⁷⁸ He was able perform his regular work duties, including driving and climbing ladders.⁷⁹ After several months of work, however, his shoulder, wrist, and “pretty much . . . everything” started hurting.⁸⁰

On April 8, 2008, the Claimant reported to a clinic in Iraq, complaining of mild back pain, lower abdominal pain, and “a frequency in urination.”⁸¹ On August 18, 2008, the Claimant visited another clinic in Iraq, chiefly complaining of problems with his wrist. ⁸² The examiner noted a small bulge to the ulnar side of the left wrist.⁸³ The

⁷⁰ E. Ex.-2 at 8.

⁷¹ *Id.*

⁷² *Id.*

⁷³ C. Ex.-16 at 49.

⁷⁴ C. Ex.-1 at 9.

⁷⁵ *Id.* at 10.

⁷⁶ C. Ex.-16 at 50.

⁷⁷ *Id.* at 50.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ C. Ex.-1 at 12.

⁸² *Id.* at 13.

⁸³ *Id.*

examiner saw a limited range of motion and decreased grip strength in the *right* wrist.⁸⁴ The examiner thought it was possible that the pin in Claimant's left wrist may have been backing out of the plate.⁸⁵

The examiner also examined Claimant's low back, finding "slightly tender bilateral muscles" with no radiation into the legs, and limited range of motion while bending, flexing or extending.⁸⁶ A memorandum dated August 20, 2008, by Benjamin Kocher, Battalion Physician Assistant, recommended the Claimant be evacuated to the United States to be assessed by his treating physician.⁸⁷ Claimant's last day of work was August 28, 2008.⁸⁸ He returned to the United States by September 16, 2008.⁸⁹

C. Medical Evidence

I will first review the proof establishing that the wrist and shoulder conditions arose from compensable industrial injuries before discussing the reasons the back condition is likewise compensable.

1. Broken Wrist

On September 26, 2008, Dr. Massey took the Claimant off work until December 26, 2008, because of the wrist injury.⁹⁰ In a report dated October 3, 2008, Dr. Massey wrote that the Claimant continued to complain of pain at the volar aspect of his wrist and of pain along the ulnar aspect of his left and forearm.⁹¹ Reviewing an MRI, Dr. Massey found a triangular fibrocartilage complex (TFCC) tear and some slight ulnar positivity.⁹²

Dr. Massey recommended surgery to remove the hardware placed in the wrist in August 2007.⁹³ He also recommended a left wrist arthroscopy to determine whether the Claimant would benefit from surgical ulnar shortening osteotomy.⁹⁴ Dr. Massey told the Claimant

⁸⁴ *Id.* It is not clear whether this is a typographical error or whether the examiner inspected both wrists.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 15.

⁸⁸ C. Ex.-16 at 17.

⁸⁹ The record contains no more specific information about his repatriation. The Claimant must have returned by September 16, 2008, because there is a record of a medical consultation in Tucson then. *See* C. Ex.-1 at 16.

⁹⁰ C. Ex.-1 at 21.

⁹¹ E. Ex.-2 at 6.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

he might need to consider a career change if surgery did not fully alleviate his problems.⁹⁵

Dr. Massey removed the hardware from the Claimant's wrist on October 23, 2008, and also performed a left wrist arthroscopy and left ulnar osteotomy.⁹⁶

Nearly a year later an MRI report of September 9, 2009, from Andrew Royster, M.D. indicates that the Claimant was still suffering from a TFCC tear; the report doesn't indicate why that MRI was done.⁹⁷

The Claimant rated the pain in his wrist as of the time of his June 5, 2009 deposition as "a seven or an eight" on a scale of one to ten.⁹⁸ He cannot do yard work, and he cannot lift more than about five or ten pounds without pain in his wrist.⁹⁹

Employer does not controvert the Claimant's wrist injury.¹⁰⁰

2. Torn Shoulder

a. September 16, 2008 Report and X-rays

Shortly after the return to the United States, on September 16, 2008, Dr. Sheppard examined the Claimant for his shoulder pain.¹⁰¹ The Claimant had been experiencing shoulder pain since the August 13, 2007 fall.¹⁰² In particular, the Claimant felt a painful "popping" of his shoulder, especially when he tried to reach out forward or to the side.¹⁰³

Dr. Sheppard's examination revealed minimal tenderness to palpation over the acromioclavicular joint, 5/5 muscle strength in all the muscles of the rotator cuff, and minimal signs of impingement.¹⁰⁴ X-rays showed some acromioclavicular arthritis, but otherwise no acute bony abnormality. Dr. Sheppard thought it was likely the

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ C. Ex.-1A at 1.

⁹⁸ C. Ex.-16 at 51.

⁹⁹ *Id.*

¹⁰⁰ Employer's Brief on Submission at 2.

¹⁰¹ *Id.* at 16. The report appears to be co-authored by Jolene Clark, M.D., but it is signed by Dr. Sheppard.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Claimant's rotator cuff was intact but believed an MRI was warranted to check.¹⁰⁵

b. October 31, 2008 MRI and Report

On October 31, 2008, the Claimant had an MRI of the shoulder.¹⁰⁶ Dr. Sheppard read it as showing a 1 cm. full thickness tear of the distal anterior fibers of the supraspinatus tendon.¹⁰⁷ On November 4, 2008, he wrote that with a reasonable degree of certainty, the tear was related to the Claimant's work.¹⁰⁸ He recommended rotator cuff reconstruction surgery, estimating approximately 3 to 6 months off work following the surgery, depending on the recovery.¹⁰⁹

c. IME with Peter Campbell, M.D.

The Employer requested that Peter Campbell, M.D. perform an independent medical examination (IME) to determine the extent and nature of the Claimant's wrist and shoulder injuries.¹¹⁰ It was done on January 23, 2009.¹¹¹

For the Claimant's shoulder injury, Dr. Campbell noted that the medical records immediately after the August 13, 2007 accident do not report shoulder pain.¹¹² However, Dr. Campbell reviewed the right shoulder x-ray done at UMC in August 2007, and thought that "there must have been some concern if the x-ray was ordered."¹¹³ He opined that, assuming the Claimant's report was accurate, "he certainly could have had a traumatic rotator cuff tear in August of 2007 which was further aggravated when returning to Iraq and performing activities with his personal protective equipment in place."¹¹⁴

d. IME with Jeffrey Richmond, M.D.

Jeffrey Richmond, M.D. examined the Claimant at the Employer's behest¹¹⁵ on February 25, 2009, to assess the extent and

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 32.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 45.

¹¹¹ *Id.*

¹¹² *Id.* at 50.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ E. Ex.-1 at 1.

nature of his shoulder and back injuries.¹¹⁶ Dr. Richmond learned that the Claimant's main shoulder complaints were popping and catching in the superior aspect of the shoulder with any motion, and pain with lifting.¹¹⁷

Physical examination of the Claimant's shoulder showed a full range of motion, with 5/5 external rotation strength.¹¹⁸ Dr. Richmond reported mild acromioclavicular (AC) joint tenderness, and mild Hawkins/Neer impingement signs.¹¹⁹ Dr. Richmond read the plain x-rays to show AC joint arthrosis that he characterized as a "fairly common finding in a person the claimant's age, particularly someone who performs physical work."¹²⁰ He explained that this condition is one stage in a process which leads the rotator cuff to degenerate and tear.¹²¹

Dr. Richmond was uncertain about the discrepancy between the shoulder x-ray, which showed no tearing of the rotator cuff, and the MRI that showed a 1cm. tear.¹²² He read the MRI to show a glenoid-labrum tear that was more significant to him than the rotator cuff tear, based on his physical examination and the Claimant's symptoms.¹²³ He did not think the fall likely caused either the labral or rotator cuff tears since the Claimant hadn't grabbed onto anything with his right hand as he fell.¹²⁴ The fall could have aggravated preexisting tears, but in the absence of any acute structural pathology, he believed the Claimant's symptoms should disappear with physical therapy.¹²⁵

To Dr. Richmond "no definitive causal relationship between this pathology and the fall in 2007 can be established."¹²⁶ He also thought the 60 pounds of protective equipment the Claimant wore was "not very unlikely" [sic] to have caused or had a lasting effect on the Claimant's condition.¹²⁷ Summarizing his findings, Dr. Richmond wrote that the Claimant shows evidence of shoulder dysfunction and

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

pathology, but that “it would be difficult to definitively relate this to the fall in Iraq.”¹²⁸ “Without a history of traction-like injury to the extremity, which the Claimant specifically denied,” Dr. Richmond found the condition more consistent with a degenerative process than a traumatic injury.¹²⁹

e. Deposition of Joseph Sheppard, M.D.

The Employer deposed the physician treating the Claimant’s shoulder, Dr. Sheppard.¹³⁰ The Claimant said that he injured his shoulder in a fall in Iraq, but Dr. Sheppard hadn’t asked for precise details.¹³¹

Dr. Sheppard testified to what he had said in his earlier report: plain x-rays of the Claimant’s shoulder didn’t show the full thickness rotator cuff tear that an MRI revealed.¹³² These discrepancies between normal x-rays and MRI scans are common.¹³³ Based on the MRI Dr. Sheppard recommended rotator cuff reconstruction surgery.¹³⁴

Dr. Sheppard believed that an individual of the Claimant’s age would most likely tear his rotator cuff in some sort of traumatic injury.¹³⁵ The popping of the shoulder the Claimant complained about was “probably one of the most common” side effects of a rotator cuff tear.¹³⁶ He did not think wearing the PPE would cause a rotator cuff tear, but it could aggravate an existing tear.¹³⁷ He also testified that it was not unusual for rotator cuff tear pain to appear after the initial traumatic injury, particularly in cases when other injuries are sustained at the same time.¹³⁸ In Dr. Sheppard’s opinion, the Claimant’s rotator cuff tear was consistent with a fall.¹³⁹

¹²⁸ *Id.* at 5.

¹²⁹ *Id.*

¹³⁰ C. Ex.-15 at 2.

¹³¹ *Id.* at 12-13.

¹³² *Id.* at 16.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 19.

¹³⁶ *Id.*

¹³⁷ *Id.* at 21.

¹³⁸ *Id.* at 23.

¹³⁹ *Id.*

f. Deposition of Jeffrey Richmond, M.D.

The parties deposed the Employer's examiner, Dr. Richmond, on October 16, 2009.¹⁴⁰ He testified, consistent with his earlier report, that the Claimant's shoulder MRI showed a 1cm. full-thickness tear of the anterior aspect of the supraspinatus tendon.¹⁴¹ He also saw some bursal-surface fraying of the infraspinatus, and a large tear involving the glenoid labrum,¹⁴² with evidence of "some other degenerative changes in the acromial-clavicular joint."¹⁴³

He testified that the rotator-cuff and glenoid-labrum tears could result from acute trauma, but the degenerative changes visible in the MRI suggested to him the injuries resulted from a gradual process, not a single, acute injury.¹⁴⁴ When a tear of that sort comes from acute trauma, it most likely comes from a longitudinal pulling on the arm, such as from hanging onto something.¹⁴⁵ The Claimant specifically denied grabbing anything with his right hand as he fell.¹⁴⁶

Dr. Richmond thought the MRI showed a history of degenerative changes in the Claimant's shoulder "that are part of a spectrum of disorders that can lead to pathology like this."¹⁴⁷ He admitted it was possible that an acute injury may have "pushed . . . over the edge" a shoulder predisposed to the sort of injuries the Claimant had.¹⁴⁸ Work could have played a role in the Claimant's injury, although he didn't think it was the sort of injury that could be attributed to having worked a specific job for a specific time period.¹⁴⁹ He thought it unlikely, but not impossible, that using the PPE would cause the degenerative changes seen on the Claimant's MRI.¹⁵⁰ It was possible that wearing the PPE might have caused the rotator cuff tear, if the Claimant's shoulder already were weakened and predisposed to those injuries. But he repeated his opinion that the rotator cuff tear was more likely due to a gradual process rather than a single traumatic event.¹⁵¹

¹⁴⁰ E. Ex.-24.

¹⁴¹ *Id.* at 16.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 17.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 18.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 18–19.

¹⁵⁰ *Id.* at 19.

¹⁵¹ *Id.* at 20.

Finally, Dr. Richmond opined that surgery to the Claimant's shoulder likely would require him to avoid the sort of work he did in Iraq for six months.¹⁵²

Based on Dr. Campbell's report and Dr. Sheppard's deposition, the Employer ceased to controvert the claim for the shoulder injury, and authorized surgery.¹⁵³ I find that the Claimant's shoulder injury arose out of and in the course of his employment.

3. Back

a. Treatment with Arturo Camacho, M.D.

On November 18, 2008, Dr. Camacho treated the Claimant's back,¹⁵⁴ for the chief complaint of low back pain.¹⁵⁵ Dr. Camacho knew of the Claimant's back surgery in 2005.¹⁵⁶ The Claimant told Dr. Camacho that he was injured in a fall in Iraq more than a year earlier, in August 2007.¹⁵⁷ He described his back pain as relatively constant, but worse in the mornings, and after prolonged sitting.¹⁵⁸ Pain occasionally radiated into the right lower extremity along the posterior aspect of the Claimant's right thigh.¹⁵⁹

Dr. Camacho read the MRI of the Claimant's lumbar spine to show moderate degenerative changes, with loss of the normal lumbar lordotic curvature.¹⁶⁰ He saw minimal desiccation at L4-L5 level and postoperative changes at L5-S1 especially on the left side, where the facet joint had virtually disintegrated.¹⁶¹

Based on the MRI, Dr. Camacho judged that the Claimant's low back pain was primarily mechanical.¹⁶² He opined that the pain could have been caused by lumbar spine instability, in particular at the L5-S1 level where the Claimant had the 2005 surgery.¹⁶³ He recommended a lumbar fusion at L5-S1, but Claimant was "very adamant that he is

¹⁵² *Id.* at 23.

¹⁵³ *See* Employer's Brief on Submission at 2.

¹⁵⁴ C. Ex.-1 at 42.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 43.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

against any lumbar type surgery” and wished to return to Iraq as soon as his other injuries allowed him to do so.¹⁶⁴

b. Treatment with Caryl Brailsford, M.D.

Because Dr. Camacho relocated, the Claimant sought further treatment on June 6, 2009¹⁶⁵ with Dr. Brailsford.¹⁶⁶ He told her he injured his back in a fall in Iraq.¹⁶⁷ He said he has back pain when standing, when he bends over, and that his back locks up.¹⁶⁸ He complained of occasional numbness and tingling and a warm sensation going down his legs.¹⁶⁹

Dr. Brailsford saw that the Claimant rotated his toes inwardly as he walked.¹⁷⁰ Examination elicited pain at the L5 level and in the left lumbar paraspinal muscles while the Claimant stood.¹⁷¹ There was also pain over the L5 spinal segment when he was prone.¹⁷² She reviewed an MRI that showed her an annular tear at the L3-L4 disk, along with the changes at L4-5 and L5-S1 levels from the earlier surgery, with no evidence of recurrent herniation or stenosis.¹⁷³ She judged he was suffering from post-laminectomy syndrome, with complaints of instability.¹⁷⁴ She thought that the annular tear at L3-L4 was not consistent with his symptoms and that his pain was localized more in the L4-5 and L5-S1 segments.¹⁷⁵ She recommended spine stabilization, and injection therapy if that did not provide relief.¹⁷⁶

She wrote that it was difficult to determine causation, especially without full medical records, but that “certainly a fall significant enough to cause a shoulder rotator cuff injury and a wrist fracture will cause force to his spine as well.”¹⁷⁷

¹⁶⁴ *Id.*

¹⁶⁵ C. Ex.-1 at 51.

¹⁶⁶ C. Ex.-16 at 61.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 52.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

c. IME by Jeffrey Richmond, M.D.

As already described, on February 25, 2009, Dr. Richmond assessed the nature and extent of the injuries to the Claimant's shoulder and low back.¹⁷⁸ He wrote that the Claimant's chief low back complaints included soreness in the morning, restricted bending, and a "warm feeling" in the back of his thighs, with no symptoms below the knee.¹⁷⁹

Dr. Richmond's physical examination of the Claimant's low back revealed no tenderness or scoliosis, and the Claimant was able to flex forward and touch his ankles.¹⁸⁰ Dr. Richmond also saw the healed incision from the Claimant's 2005 back surgery.¹⁸¹

Dr. Richard did not see the Claimant's low back MRI.¹⁸² Based on the physical examination, Dr. Richard found no significant spasm or limitations in motion.¹⁸³ He concluded there was no neurological damage,¹⁸⁴ or evidence of any impairment to the lumbar spine.¹⁸⁵

d. Deposition of Jeffrey Richmond, M.D.

Dr. Richmond¹⁸⁶ commented at his deposition on the causes, nature, and extent of the Claimant's back injury, in addition to what he said about Claimant's shoulder.¹⁸⁷

Dr. Richmond testified that at the IME, the Claimant primarily complained of pain in his left wrist, but also mentioned "milder" pain in his back and shoulder.¹⁸⁸ He agreed with the Employer's lawyer that the clinical records he reviewed didn't mention back pain until several months after the initial back pain complaint the Claimant had made to examiners in Iraq.¹⁸⁹ As a clinician he customarily records all a patient's symptoms, and the absence of back pain complaints over those months could show that it was not a major complaint, or that there was no significant back injury.¹⁹⁰

¹⁷⁸ E. Ex.-1 at 1.

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 4.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ E. Ex.-24.

¹⁸⁷ *Id.* at 5-15.

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 8-9.

If the Claimant had injured his back acutely in the August 13, 2007 fall, he would have expected the MRI to show disk disruption, disk herniation, or the remnants of a fracture (had there been one).¹⁹¹ Instead, he saw degenerative changes, without significant protrusion or herniation.¹⁹² This led him to conclude the Claimant hadn't suffered acute structural changes to the spine.¹⁹³

From the MRI he couldn't rule out an acute back injury when the Claimant fell, but he saw no evidence of a significant spine injury then.¹⁹⁴ If such an injury had occurred, Dr. Richmond thought it likely the injury would resolve on its own, or with a limited course of physical therapy, within weeks to a few months.¹⁹⁵

Asked whether the Claimant's PPE might have caused spine pain, Dr. Richmond agreed that any time one carries something heavy, back pain may result.¹⁹⁶ He didn't think it would cause structural damage to the spine, or long-term back pain.¹⁹⁷ Dr. Richmond didn't find any evidence that pre-existing degenerative back changes had limited the Claimant, although he thought they showed the Claimant's predisposition to back problems.¹⁹⁸ He didn't think the 2005 surgery destabilized the Claimant's back, although it could have if too much of the facet joint were removed.¹⁹⁹

Addressing the Claimant's back pain, Dr. Richmond noted the Claimant said the 2005 surgery eliminated "most" of his back pain, implying that the Claimant may have suffered chronic back pain before the August 13, 2007 industrial fall.²⁰⁰ He somewhat tautologically characterized the symptoms as "purely subjective," and insisted that he couldn't comment on the severity or nature of Claimant's pain.²⁰¹ He noted that "carrying anything heavy on someone's back could conceivably cause a backache."²⁰²

On causation, Dr. Richmond believed that "his fall in 2007 would not be responsible for his back pain a year out or more[,] when I

¹⁹¹ *Id.* at 9–10.

¹⁹² *Id.* at 10–11.

¹⁹³ *Id.* at 11.

¹⁹⁴ *Id.* at 11–12.

¹⁹⁵ *Id.* at 12–13.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 14.

¹⁹⁹ *Id.* at 37.

²⁰⁰ *Id.* at 15.

²⁰¹ *Id.* at 15–16, 34.

²⁰² *Id.* at 35.

saw him.”²⁰³ He emphasized that the MRI showed no structural changes to the Claimant’s back.²⁰⁴

Dr. Richmond did testify that Claimant’s fall might have worsened the Claimant’s back pain, because of the preexisting degeneration in the back.²⁰⁵ He saw no objective evidence, however, of any permanent change to the back.²⁰⁶

In short, Dr. Richmond found no objective evidence to confirm or disprove that the Claimant suffered from back pain. He also had no reason to think Claimant was malingering or being less than truthful about his back pain.²⁰⁷ Dr. Richmond concluded that the objective medical evidence about the Claimant’s back would not lead him to impose work restrictions.²⁰⁸

Dr. Richmond acknowledged that an MRI would not show all reasons a patient might feel back pain.²⁰⁹ He suggested that flexion-extension x-rays would be more effective for showing spinal instability, and that a CT scan with myelography might complement the MRI.²¹⁰ Aside from these potential laboratory tests, Dr. Richmond identified the possibility of discogenic back pain, something he described as “not well understood,” that involves pain thought to arise from degenerative disk disease.²¹¹ When asked whether the August 13, 2007 fall could lead to subjective pain symptoms of the kind the Claimant described, Dr. Richmond emphasized that “I don’t feel his pain; I can’t answer to what he’s feeling.”²¹²

VI. Analysis

The Claimant was temporarily totally disabled from August 13, 2007 until November 2007. He then returned to work until August 28, 2008, when he became temporarily totally disabled again, and remains so. He is entitled to compensation at the maximum statutory rate applicable at the time he suffered each of his two injuries, and to medical benefits for all evaluation, treatment, and other expenses

²⁰³ *Id.* at 39.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 43.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 35.

²⁰⁸ *Id.* at 45.

²⁰⁹ *Id.* at 42.

²¹⁰ *Id.*

²¹¹ *Id.* at 50.

²¹² *Id.* at 43.

reasonably necessary to treat them. The following section explains those findings.

A. Nature and Extent of Disability

Under the Act, disabilities fall into four categories—temporary partial, temporary total, permanent partial, and permanent total²¹³—and an adjudicator must determine whether a disability is permanent or temporary and whether it is total or partial. Permanency is a medical determination, not dependent on economic factors or the claimant’s employability.²¹⁴ Whether a disability is total or partial, however, is a medical and economic question under the Act’s definition of “disability;”²¹⁵ it asks whether the injured worker can perform any suitable employment, given his or her age, education, skills and work experience. Total disability benefits are available only when the injury leaves the injured worker with no wage-earning capacity.²¹⁶ This is a case of temporary total disability.

1. The Claimant’s Disability is Temporary

Neither party contends that the Claimant has reached maximum medical improvement (MMI),²¹⁷ and I do not find that he has. This means his disability is temporary.

2. The Claimant is Totally Disabled

In order to present a *prima facie* case of total disability under § 8 of the Act, a claimant bears the initial burden to prove he cannot return to his usual and customary employment; once he does, the burden shifts to the employer to show suitable alternative employment is available.²¹⁸ If an employer fails to meet that burden, a claimant is

²¹³ See 33 U.S.C. § 908(a)–(e); see also *Stevens v. Director, Office of Workers’ Compensation Programs*, 909 F.2d 1256, 1259 (9th Cir. 1990).

²¹⁴ See, e.g., *Louisiana Guar Ins. Ass’n v. Abbott*, 40 F.3d 122, 125–26 (5th Cir. 1994) (citing *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 60–61 (1985)).

²¹⁵ 33 U.S.C. § 902(10) defines “disability” as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”

²¹⁶ *Id.*

²¹⁷ Claimant’s Pretrial Statement at 4(h); Employer’s Pretrial Statement at 4(h).

²¹⁸ *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1996 (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 764–65 (4th Cir. 1979). “Usual employment” means the Claimant’s regular job duties at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (BRB 1982).

totally disabled.²¹⁹ A claimant's credible complaints of pain may be enough to meet the initial burden,²²⁰ although an adjudicator may find a claimant capable of doing his usual work despite pain when a physician finds no functional impairment.²²¹

I find the Claimant has met his *prima facie* burden, and cannot return to his usual and customary employment with the Employer now, due to the unresolved wrist, shoulder and back injuries. The Claimant credibly testified that he is not able to work due to pain, which he felt as a "seven or eight" on a scale of ten for his wrist and a "six or seven" for his low back and right shoulder.²²² The Employer does not question the Claimant's honesty and there is no reason to think he is malingering.²²³ Moreover, at the time of submission the Claimant was set to undergo shoulder surgery that no party disputes will require further time off work.²²⁴ According to Dr. Richmond that surgery would likely preclude work for about 6 months, and perhaps more, given the sort of work the Claimant did in Iraq.²²⁵

The Employer has not attempted to show suitable alternate employment, or to show that the Claimant can return to driving tanker trucks in Iraq now.²²⁶ Accordingly, it has not rebutted the Claimant's *prima facie* case and I find Claimant temporarily totally disabled. The Employer does not appear to contest this determination.

²¹⁹ See, e.g., *Hairston* 849 F. 2d at 1996 (9th Cir. 1998) ("If [the employer] failed to meet its burden of showing the availability of suitable alternate work, [the claimant's] disability should have been considered permanent and total."); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (BRB 1989) (holding once the claimant establishes a *prima facie* case, even when an injury is scheduled, if the employer fails to meet the burden to show suitable alternative employment, the claimant is entitled to permanent total disability).

²²⁰ *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (BRB 1989); *Richardson v. Safeway Stores*, 14 BRBS 855, 857-58 (BRB 1982); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (BRB 1981); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (BRB 1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

²²¹ *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 897-98 (BRB 1981).

²²² See C. Ex.-16 at 52-53, 57.

²²³ See E. Ex.-24 at 35.

²²⁴ See Employer's Brief on Submission at 2.

²²⁵ E. Ex.-24 at 21-23.

²²⁶ Dr. Richmond was of the view that if Claimant makes a good recovery from all his surgeries and problems, there is no objective reason why he could not resume his employment. See E.Ex.-24 at 31-32. This may be so, but both parties agree that Claimant hasn't reached MMI and that this proceeding is to determine the Claimant's temporary disability status.

B. Responsibility for the Claimant's Low Back Injury

The Employer contests the Claimant's back injury, which it characterizes as unrelated to the Claimant's employment. For the reasons given below, I find the Claimant's back injury is attributable at least in part to his employment.

In order to establish a *prima facie* case under the Longshore Act, a claimant must show he suffered harm or pain²²⁷ and that an accident occurred at work or working conditions existed that could have caused the harm or pain.²²⁸ The Claimant must show both elements by affirmative proof²²⁹ before invoking the § 20(a) presumption that the "claim comes within the provisions of this Act."²³⁰

Here, the Employer does not dispute that the Claimant suffered a work injury.²³¹ As described in Section IV. b. 3-5 of this decision, on August 13, 2007, the Claimant fell. He returned to work in November 2007, until his pain forced him to stop on August 28, 2008, about a year later. The physical injuries sustained in his August 13, 2007 fall have yet to reach MMI, and his return to work for about 10 months exacerbated his pain. The fall that broke his wrist and injured his shoulder could have caused the back pain he says plagues him. The Claimant has established a *prima facie* case and invoked the § 20(a) presumption for all his injuries, including to his back.

Having done so, the burden shifts to the Employer to offer substantial evidence that the Claimant's disability isn't the result of a work-related injury. An employer may rebut the § 20(a) presumption with evidence that the disability didn't result from a work-related injury.²³² This is true even when an accident aggravated a pre-existing condition; the employer must present substantial evidence that the claimant's injury wasn't caused or aggravated by the employment.²³³ "The statutory presumption applies as much to the nexus between an employee's malady and [the] employment activities as it does to any

²²⁷ *Murphy v. SCA / Shane Bros.*, 7 BRBS 309, 311, 314 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979).

²²⁸ *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 330-31 (1981).

²²⁹ *Id.*; see also *Director, OWCP v. Greenwich Colliers*, 512 U.S. 267, 281 (1994). See generally *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. at 608 (1982) (discussing a *prima facie* case and the application of the § 20(a) presumption.

²³⁰ 33 U.S.C. § 920(a).

²³¹ Employer's Pretrial Statement at 4(c), (d).

²³² *Id.*

²³³ *Rajote v. Gen. Dynamics Corp.*, 18 BRBS 85, 86 (1986).

other aspect of a claim.”²³⁴ Substantial evidence must sever the causal connection between the injury and employment.²³⁵

Speculation isn’t substantial evidence. Hypothetical probabilities won’t do,²³⁶ but “[t]he unequivocal testimony of a physician that no relationship exists between a claimant’s disabling condition and the claimant’s employment is sufficient to rebut the presumption.”²³⁷

To dispute the cause of the Claimant’s low back injury,²³⁸ the Employer speculated that the Claimant’s preexisting back problems may be responsible for his pain, and that in any case his back complaints are unrelated to the injuries he sustained in Iraq.²³⁹

The Claimant had back surgery in 2005 to address back pain. The Claimant forthrightly acknowledged this to every doctor who examined his back. That surgery relieved “most” of his back pain, so that before the August 13, 2007 fall, he felt occasional back pain he characterized as a “one or two” on a scale of ten. His ability to drive a heavy truck in Iraq before he fell supports the idea that any back pain he had was mild.

Merely showing that the Claimant had a pre-existing back condition, however, doesn’t get the Employer anywhere. Under the definitions in the Act, an aggravation of a pre-existing condition creates a new, compensable injury.²⁴⁰ If the Claimant suffered an earlier injury or had a pre-existing condition, neither of those things proves—nor tends to prove—that his August 13, 2007 accident didn’t make his condition more symptomatic.

In *Bath Iron Works v. Fields*,²⁴¹ a recent case reviewed by the First Circuit, the Benefits Review Board found an employer had failed to rebut the § 20(a) presumption with substantial evidence with its proof that the claimant’s osteoarthritis was caused by age and obesity. That employer didn’t address whether employment conditions made his osteoarthritis symptomatic, resulting in disabling pain. Whether

²³⁴ *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976).

²³⁵ *See Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

²³⁶ *See, e.g., Steele v. Adler*, 269 F. Supp. 376, 379 (D.D.C. 1967).

²³⁷ *Dearing v. Director, OWCP*, 27 BRBS 72 (CRT) (4th Cir. July 9, 1993) (unpublished) (citing *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129–30 (1984)).

²³⁸ Employer’s Brief on Submission at 2, 11.

²³⁹ *Id.* at 11.

²⁴⁰ 33 U.S.C. § 902(2).

²⁴¹ 599 F.3d 47 (1st Cir. 2010).

the Employer has rebutted the presumption is a legal, not factual question.²⁴² The First Circuit stated the governing point succinctly:

As the Board explained, “[i]f claimant's work caused his underlying condition to become symptomatic or otherwise worsened his symptoms, claimant has sustained a work-related injury.” The concurring judge elaborated by noting [the medical expert] had addressed “only the disease process, not whether the condition would have become symptomatic if claimant had not been bending over or kneeling on the concrete floor to sort scrap metal.”²⁴³

In order to overcome the § 20(a) presumption, the Employer relies solely on the report and deposition testimony of Dr. Richmond,²⁴⁴ whose causation testimony is equivocal. On the one hand, he did testify that “to my impression, his fall in 2007 would not be responsible for his back pain a year out or more[,] when I saw him.”²⁴⁵ But when questioned more closely, Dr. Richmond also held the view that the Claimant’s fall might have caused back pain that was worse because of the Claimant’s preexisting degenerative back condition.²⁴⁶

Dr. Richmond also repeatedly emphasized that his testimony was premised on the lack of objective evidence of structural changes in the Claimant’s spine, and that he could not testify about the Claimant’s subjective pain. Questioned about whether the Claimant’s symptoms could be consistent with his August 13, 2007 fall and his degenerative back problems, Dr. Richmond wouldn’t make a definitive judgment, responding that “I don’t feel his pain; I can’t answer to what he’s feeling.”²⁴⁷ Dr. Richmond also testified that he had no reason to think that the Claimant was untruthful or malingering.

Addressing the question of whether the Claimant’s PPE might have made his back pain worse, Dr. Richmond responded that carrying anything heavy can result in back pain. He did not think the Claimant’s PPE could have caused any structural changes to the Claimant’s back, but those complaints are not of a structural nature.

Dr. Richmond’s testimony is therefore largely unresponsive to the legal issue: are the Claimant’s low back pain complaints related to his work in Iraq. To the extent that Dr. Richmond addressed pain at all, he admitted it was possible that the Claimant’s fall might have

²⁴² *Id.* at 55.

²⁴³ *Id.* at 54.

²⁴⁴ *See* Employer’s Brief on Submission at 11.

²⁴⁵ *Id.* at 39.

²⁴⁶ *Id.* at 43.

²⁴⁷ *Id.* at 43.

made his back pain worse given the condition of his back. Rather than being the “[t]he unequivocal testimony of a physician that no relationship exists between a claimant’s disabling condition and the claimant’s employment,”²⁴⁸ Dr. Richmond’s testimony establishes that the Claimant may have had a pre-existing condition his employment worsened. And the Employer remains liable under the Act if the Claimant’s pre-existing condition made his work-related injuries worse than they otherwise would have been.²⁴⁹ There is no requirement in the statute, regulations or case decisions that a claimant must show some change to the structure of the back—one that a physician might feel in the course of a physical examination, or see reading a diagnostic study like an x-ray, MRI or CT scan.

Because Dr. Richmond did not testify that no relationship existed between the Claimant’s employment and his low back pain, the Employer hasn’t rebutted the 20(a) presumption. I find that the Claimant’s low back pain is attributable at least in part to his work for the Employer, and is a covered injury.

C. Average Weekly Wage

The parties disagree about how to compute the average weekly wage for both periods of disability. Claimant argues it is \$2,205.88 for both.²⁵⁰ The Employer claims it is only \$894.37.²⁵¹ For the reasons given below, the correct figure, measured by his earnings in Iraq, is \$2,213.45. His compensation rate computed from the average weekly wage is high enough to be limited by the statutory maximum.

Under § 8(a) of the Act, the compensation rate for permanent total disability is 66 2/3% of a claimant’s average weekly wage (AWW).²⁵² The AWW is calculated as of the time the claimant was injured.²⁵³ Section 10 of the Act establishes three methods to calculate the Claimant’s average annual earnings. All look at a claimant’s wages

²⁴⁸ *Dearing*, at 72.

²⁴⁹ 33 U.S.C. § 902(2). When a pre-existing condition makes a work-related injury worse than it otherwise would have been, the Act does allow the Employer to shift responsibility for payment to the Special Fund after 104 weeks of paying permanent disability payments in certain circumstances. 33 U.S.C. § 908(f). This case deals only with temporary disability payments, for which employers cannot get § 8(f) relief.

²⁵⁰ Claimant’s Brief on Submission at 16.

²⁵¹ Employer’s Brief on Submission at 8.

²⁵² 33 U.S.C. § 908(a).

²⁵³ 33 U.S.C. § 910.

in the 365 days before the injury.²⁵⁴ Under § 10(d), the annual earnings are divided by 52 to arrive at the AWW.²⁵⁵

Section 10(a) is the presumptively proper method when the Claimant's work has been regular and continuous over substantially the whole of the year before the injury.²⁵⁶ Application of § 10(b) is appropriate where, like § 10(a), the Claimant's employment has been regular and continuous, but the Claimant didn't work for substantially the whole of the year.²⁵⁷ In the Ninth Circuit, § 10(a) presumptively applies whenever a claimant has worked more than 75% of the working days in the year before the injury.²⁵⁸ Section 10(b) applies when a claimant hasn't worked substantially the whole of the year in the job in which he or she was injured, but the parties have produced evidence about the pay of comparable workers in the same or similar employment in order to determine the AWW.²⁵⁹ In determining a complainant's AWW, an adjudicator must first consider § 10(a), then § 10(b), and only if neither § 10(a) nor § 10(b) can be "reasonably and fairly . . . applied," § 10(c).²⁶⁰

The Claimant had worked for the Employer for just about a month before his first injury on August 13, 2007. After returning to work in November 2007, he worked another 10 months, until August 28, 2008.

The pay stubs and W-2s submitted by the parties do not allow for the calculation of a daily wage; the smallest unit of denomination is a month, which in any case does not appear to precisely correspond to the hours or days worked per month. Accordingly, because § 10(a) requires an adjudicator first to calculate an average daily wage and then multiply it by a specified number meant to approximate the number of working days in a year, I cannot use § 10(a).²⁶¹

²⁵⁴ 33 U.S.C. § 910(a)–(c).

²⁵⁵ 33 U.S.C. § 910(d). Even when calculating a claimant's AWW under § 10(c), an adjudicator must calculate the claimant's average annual earnings and then divide by 52. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve / Bayley Marine*, 23 BRBS 207, 211 (1990).

²⁵⁶ 33 U.S.C. § 910(a).

²⁵⁷ 33 U.S.C. § 910(b).

²⁵⁸ *Matulic v. Director, OWCP*, 153 F.3d 1051, 1058 (9th Cir. 1998).

²⁵⁹ *Id.*

²⁶⁰ 33 U.S.C. § 10(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842 (9th Cir. 1980), *rev'd* 8 BRBS 692 (1978); *see also* § 10(a)–(b).

²⁶¹ *Id.* (specifying a claimant's "average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker . . .")

The Claimant's status as a seven-day-per-week worker ²⁶²also precludes a § 10(a) calculation. Even if a daily wage could be calculated from the evidence, § 10(a) requires that an adjudicator first calculate a claimant's average daily wage and then multiply it by a specified number meant to approximate the number of working days in a year.²⁶³ The Act only specifies multipliers for those workers who work five days or six days per week; it doesn't contemplate seven-day work weeks.²⁶⁴

Neither party has presented evidence of the wages of workers in similar positions, so I cannot apply § 10(b). Neither § 10(a) nor § 10(b) can be reasonably or fairly applied, so I turn to § 10(c) to determine the Claimant's average annual earning capacity.²⁶⁵ The parties agree that § 10(c) is the appropriate method to determine the Claimant's AWW in this case.²⁶⁶

They disagree about the data to include in the calculation. The Claimant urges me to base his AWW calculation solely on his 2008 W-2 forms; they report he earned \$75,630.29 during 2008. The Claimant argues that he worked only until August 28 of that year and so I should prorate his AWW from that period, resulting in an AWW of \$2,205.08.

The Employer, by contrast, asks me to determine the Claimant's AWW by looking at his income for the one-year period before his first injury, the fall on August 13, 2007. Because the Claimant had worked for the Employer for only a few weeks then, most of his income in the preceding year came from employment in the United States at a much

²⁶² See C. Ex.-5 at 1.

²⁶³ See 33 U.S.C. § 10(a).

²⁶⁴ *Id.* (specifying a claimant's "average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker . . .")

²⁶⁵ In both *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), and *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986), the BRB upheld the application of § 10(c) even though both workers had worked in covered employment substantially the whole of the year prior to sustaining an injury. In *Le* the claimant received a raise five weeks before sustaining fatal work-related injuries, but had worked substantially the whole of the year, so the employer objected to the ALJ's use of 10(c) instead of 10(a). 18 BRBS at 177. The BRB upheld the ALJ's decision. *Id.* *Mijangos* followed *Le*, upholding the ALJ's decision to calculate the claimant's AWW under 10(c) where he had a history of annual wage increases including one during the year leading up to his injury. 19 BRBS at 20.

²⁶⁶ Employer's Brief on Submission at 8. Claimant doesn't specifically state that 10(c) is the appropriate method of determining Claimant's AWW, but his calculations follow the 10(c) method. See Claimant's Brief on Submission at 15-16.

lower rate of pay. The Employer's method results in an AWW of \$894.37. That argument fails for three reasons.

The Employer's suggested method for calculating the AWW doesn't focus on the earning capacity the Claimant lost, when it should. The Employer hired him to drive trucks in Iraq at much higher pay than he had earned in the United States. Putting aside that driving trucks in Iraq is not the same as driving trucks in this country, the Employer asks me to ignore its own higher valuation of the Claimant's labor in determining his AWW. Had he not been injured he would have continued to earn the premium rates for driving in Iraq—that is what he lost.

The Employer's position is all the less convincing because the Claimant returned and actually earned those high Iraq rates for a long while before he became temporarily disabled again. The purpose of § 10(c) is to make an equitable estimate of the Claimant's earning capacity at the time of his or her disability. After his first accident the Claimant returned and earned the premium war zone rates for about 10 months.

Finally, the Employer's argument is foreclosed by the BRB's *K.S.*²⁶⁷ decision. In *K.S.*, the claimant also was a truck driver in Iraq,²⁶⁸ who injured his left hand on the job a few months after starting work.²⁶⁹ The ALJ awarded benefits based on an AWW calculated under § 10(c) from all of the claimant's income in the preceding 52 weeks, which consisted mainly of employment in the United States.²⁷⁰ The BRB reversed, finding that a "claimant's average weekly wage must be calculated based solely on his overseas earnings in order to reflect his earning capacity in the employment in which he was injured."²⁷¹ The BRB went on to explain that "where, as here, claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest that his earning capacity should not be calculated based upon the full amount of the earnings lost due to the injury."²⁷²

The Employer does not directly address the applicability of the *K.S.* decision in its brief. To the extent that the Employer seeks to preserve its objection to the rationale of *K.S.* for review in the Article III courts, it has done so. But I couldn't ignore factually and legally

²⁶⁷ *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 20.

²⁷² *Id.*

indistinguishable binding precedent, even were I inclined to accept the Employer's argument.

I basically accept the Claimant's position that his AWW should be calculated using only his earnings with the Employer. The Claimant has two periods of temporary total disability, the first from August 13, 2007 until November 2007, and the second ongoing from August 28, 2008. Ideally, I would be able to fix an AWW based on pay records corresponding to each period. As I described already, the only pay records the parties submitted list monthly payments from August 31, 2007 to August 2008, and a 2008 W-2 form. I have no data to determine the Claimant's wages with the Employer before his August 13, 2007 accident upon which to base the AWW for that period. Given this fact, and given that neither party argues that the Claimant's wages changed significantly before and after the accident, I will use the same data to calculate both AWWs. Similarly, nothing in the record pinpoints when in November of 2007 the Claimant returned to work, and so I choose November 15th as the date of the end of Claimant's first period of disability.

The Claimant's 2008 W-2 shows his 2008 income was \$75,630.29. The Employer's pay records for 2008 show about \$10,000 less. The Employer submitted the W-2 form to the U.S. government for use in taxation, giving it some circumstantial guarantee of trustworthiness, and the Employer does not dispute the authenticity of the document it created. I will use the numbers from the W-2 form.

The Claimant argues for an AWW of \$2,205.88. He arrives at it by simply dividing his 2008 income by the number of weeks he worked in 2008. Technically speaking, § 10(c) requires me to estimate an annual average wage and then divide by 52. This process actually works to Claimant's advantage –pro-rating Claimant's 2008 W-2 income over a one year period yields an annual average wage of \$115,099.84, which amounts to an AWW of \$2,213.45. Multiplying by 66 and 2/3%, the compensation rate is \$1,474.16.18. For the Claimant's August 2007 injury, the statutory maximum rate was \$1,114.44, and it was \$1,160.36 for the Claimant's August 2008 aggravation injury.

D. Section 7 Medical Benefits

Under § 7 of the Act, an employer must furnish medical, surgical, and other treatment for an industrial injury "for such period as the nature of the injury or the process of recovery may require."²⁷³ The Employer does not deny that it must provide medical care for industrial injuries. The Act covers the injuries to the Claimant's left

²⁷³ 33 U.S.C. § 907(a); 20 C.F.R. §§ 702.401, 702.402.

wrist, left ankle, right shoulder and low back. The Employer is obligated to reimburse the Claimant for any out-of-pocket expenses incurred for this care, and pay any outstanding medical bills. Those bills aren't limited to the Director's fee schedule because the Claimant had to find care where he could at market rates due to the Employer's controversion. The Employer must provide treatment going forward, including the diagnostic procedures and therapies his treating physicians judge appropriate.

VII. Conclusion and Order

The Claimant suffered compensable work-related injuries for which the Employer is liable. He was temporarily totally disabled from August 13, 2007 until November 5, 2007, and he is temporarily totally disabled from August 28, 2008 until he reaches MMI. It is ORDERED that:

1. The Employer Service Employees International and its Carrier, Insurance Company of the State of Pennsylvania, must pay or reimburse the Claimant for all medical expenses arising from the Claimant's work-related injuries pursuant to § 7 of the Longshore Act, including the cost of ongoing medication and therapy for chronic pain, and mileage to and from medical appointments;
2. The Employer Service Employees International and its Carrier, Insurance Company of the State of Pennsylvania, must pay the Claimant temporary total disability from August 13, 2007, through November 15, 2007 at the rate of \$1,114.44 per week, plus interest on any unpaid installments from the time they became due;
3. The Employer Service Employees International and its Carrier, Insurance Company of the State of Pennsylvania, must pay the Claimant temporary total disability from August 28, 2008, until he is no longer temporarily totally disabled under the Act, at the rate of \$1,160.36 per week, plus interest on any unpaid installments from the time they became due;
4. The Employer Service Employees International and its Carrier, Insurance Company of the State of Pennsylvania, are entitled to a credit for any compensation already paid;
5. The District Director must make all calculations necessary to carry out this Order and the parties must

submit any additional documents needed to aid the District Director in this calculation; and

6. The Claimant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Claimant's behalf. A fee petition that comports with 20 C.F.R. § 702.132 must be filed within 21 days from the date this order is served by the District Director. The Employer must file his objections within 14 days after the fee petition is served. The parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections within 14 days after objections are served. Both parties are charged with the duty to arrange the meeting. The Claimant's counsel must file a report within 7 days thereafter that identifies the objections have been resolved, those that have been narrowed, and those that remain unresolved. The report also may reply to any unresolved objections.

So Ordered.

A

William Dorsey

ADMINISTRATIVE LAW JUDGE

San Francisco, California