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Office of Administrative Law Judges
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Issue Date: 27 August 2010

Case No. 2009-LDA-515
OWCP No. 02-148581

In the Matter of:

DANNY BOWENS,

Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.,
c/o KBR,

Employer,

and

INSURANCE CO. OF THE STATE OF PENNSYLVANIA,
c/o WORLD SOURCE, A DIVISION OF AMERICAN
INTERNATIONAL UNDERWRITERS,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

Joel S. Mills, Esq.
Pitts & Mills
Houston, Texas
For the Claimant

Megan C. Misko, Esq.
King, Krebs & Jurgens, P.L.L.C.
New Orleans, Louisiana
For the Employer

BEFORE: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq., as extended by the Defense Base Act ("DBA"), 42 U.S.C. § 1651 *et seq.*, and the implementing regulations found at 20 C.F.R. Part 702, brought by the Claimant against his employer and its insurance carrier. By the terms of the DBA, the LHWCA applies "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work." 42 U.S.C. § 1651.

Danny Bowens ("Claimant") is seeking compensation and medical benefits from Service Employees International, Inc. ("Employer") and Insurance Company of the State of Pennsylvania ("Carrier") for a work-related injury suffered on April 24, 2006, in Iraq. A formal hearing in this matter was held before the undersigned on February 24, 2010, in Ashland, Kentucky. I afforded all parties the opportunity to offer testimony, question witnesses, and introduce evidence. Claimant and his wife testified at the hearing.

At the hearing, Claimant's Exhibits ("CX") 1-12 were admitted without objection and Employer's Exhibits ("EX") 1-15¹ were admitted without objection. Transcript

¹ At the hearing, Employer's counsel requested that the record remain open 30 days post-hearing to "take a deposition of likely Dr. Browning, the physician that has recommended the in-home pool and also aqua

("TR") at 6-8. The parties timely submitted their stipulations, which are hereby admitted as Joint Exhibit ("JX") 1.² (TR at 6). In addition, both parties timely submitted post-hearing briefs; and, thereafter, on May 12, 2010, Employer's/Carrier's counsel filed a document titled, Opposition Brief of Employer/Carrier, "to address issues discussed in Claimant's Post-hearing Brief that were not addressed at formal hearing conducted on February 26, 2010, or presented to Employer/Carrier as contested issues before receiving Claimant's brief." (Opposition Brief of Employer/Carrier at 1). Having received no objection to the Opposition Brief of Employer/Carrier, I will consider this additional brief.

The following findings of fact and conclusions of law are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

STATEMENT OF THE CASE

Claimant entered into an employment agreement with Employer on September 28, 2005, with an effective date of October 11, 2005. (EX 1 at 1, 13). He departed the United States on October 11, 2005, en route to Iraq. (TR at 15). In Iraq, Claimant operated a heavy truck in support of the United States military; his responsibilities included hauling supplies such as heavy equipment, tanks, trucks, humvees, and water. (TR at 15-16; CX 3 at 14).

On April 24, 2006, Claimant was part of a truck convoy that departed Camp Anaconda between midnight and 12:30 a.m. (TR at 17). After about 30 miles, his truck was hit by enemy "fire" to include a rocket propelled grenade. (TR at 17-18). Claimant sustained severe injuries to various parts of his body, including his left leg and foot, hip, groin, and bladder. (TR at 17-19). Claimant is predominately wheelchair bound; he has limited range of motion and relies on his wife and son for much of his daily care. (TR at 28, 39, 51, 63-66, 70, 71, 83). He has not returned to work since his injury. (EX 7 at 7).

Claimant filed a timely claim for compensation on April 23, 2007. (CX 1 at 1). On June 19, 2009, Employer filed a Notice of Controversion of Right to Compensation.

therapy for Claimant." (TR at 8). Without objection, I granted Employer's request. *Id.* Employer has not submitted any evidence, post-hearing, and the record is closed.

² Stipulation number 9, permanent disability, states "N/A." (JX 1). By letter, filed on May 11, 2010, the parties stipulated that Claimant is at maximum medical improvement and is permanently and totally disabled. Accordingly, JX 1 is amended to reflect the aforementioned change.

(EX 11 at 1). Claimant requested a formal hearing and the claim was transferred to the Office of Administrative Law Judges on August 6, 2009.

ISSUES

The issues before me are:

1. Whether Claimant is entitled to medical benefits to include the installation of a therapeutic pool at his home for medical usage pursuant to § 7 of the Act;
2. Claimant's average weekly wage.
3. Whether Claimant's counsel is entitled to attorney fees and expenses under the Act.

(TR at 9-11).

During the hearing, the parties were asked if there were any remaining unresolved medical expense issues other than the installation of a 12 by 12 indoor pool at Claimant's house for daily aqua physical therapy. (TR at 9-10). Claimant's counsel initially stated that the only issue he was aware of that was outstanding was the repayment to Claimant for the cost of a bedrail. (TR at 9). Later, Claimant's counsel noted that he found "one document from Dr. Browning which may get cleared up in the [post-hearing] deposition where he talks about a special van chair for [Claimant] because he has trouble getting in and out of the van." (TR at 10). Finally, Claimant's counsel stated the issue of payment of medical mileage is an issue. (TR at 10-11).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations:

At the hearing, the parties submitted the following stipulations:

1. The Act (33 U.S.C. § 901 *et seq.*), as amended by the DBA (42 U.S.C. § 1651 *et seq.*), applies to this claim.
2. Claimant and Employer were in an employer-employee relationship at the time of the injury.
3. Claimant's injuries arose out of and in the scope of employment.
4. Claimant's injuries occurred on April 24, 2006, in Iraq.

5. Employer was notified of Claimant's injuries on April 24, 2006.
6. Timely notice of the claimed injuries was given to Employer.
7. Claimant filed a timely notice of the claim (Form LS-203) on April 23, 2007.
8. Employer filed a Notice of Controversion (Form LS-207) on June 19, 2009.
9. The date of the informal conference was May 28, 2009.
10. Claimant was temporarily and totally disabled beginning April 25, 2006; this stipulation was later amended by letter filed on May 11, 2010, in which both parties agreed that Claimant has reached maximum medical improvement and is permanently and totally disabled.
11. Benefits were paid from April 25, 2006, and continuing.
12. Medical benefits were paid- "bedrail may be outstanding."

(JX 1; TR at 5-6; Pre-Hearing Statements filed by Claimant's and Employer's/Carrier's counsel on January 26, 2010).

The stipulations were admitted into evidence. (TR at 5-6); *see* 20 C.F.R. § 18.51. I have carefully reviewed the foregoing stipulations and I find that they are reasonable in light of the evidence in the record and are binding on the parties. *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). As such, the stipulations are hereby accepted as findings of fact and conclusions of law.

SUMMARY OF THE EVIDENCE

Hearing Testimony:

Testimony of Claimant

On February 24, 2010, Claimant testified on his own behalf at the formal hearing. (TR at 12-58). He is a resident of Kentucky, 59 years old, married, and has two adult children. (TR at 12, 74-75; EX 7 at 1-2). He dropped out of high school in the eleventh grade and joined the Marine Corps in 1967. (TR at 13). In 1968, while serving in the Marine Corps, he earned his G.E.D. (TR at 13; EX 7 at 2). Claimant served as a supply clerk and completed his active duty in October 1969. (TR at 13). After his military service, he held different types of jobs, to include plumbing, managing apartment complexes, and driving trucks. *Id.*

Claimant signed an employment contract with the Employer and departed the United States en route to Iraq on October 11, 2005. (TR at 15; CX 3). The contract reflects that the expected duration of Claimant's assignment was one year; however, he understood that the contract could be terminated at any time. (EX 1 at 1-2). He intended to work overseas for Employer for two years. (TR at 15, 31-32). Claimant worked in Iraq as a heavy truck driver; his responsibilities included hauling supplies, such as heavy equipment, tanks, trucks, humvees, and water. (TR at 15-16; CX 3 at 14). Claimant was informed that he would be paid \$7,600.00 per month because his employment was in a war zone where truck drivers were on the "front line." (TR at 14-15).

On April 24, 2006, Claimant was part of a truck convoy that departed Camp Anaconda between midnight and 12:30 a.m. (TR at 17). About thirty miles into the drive, Claimant's truck was hit by enemy fire that included a rocket propelled grenade. (TR at 17-18). Claimant suffered a severely damaged left leg that included a cut artery and a shattered bone, which was exposed to his hip; he also injured his left foot, bladder, and prostate and sustained nerve damage. (TR at 17-19; EX 7 at 3). He was initially transported to Balad, Iraq, then to Germany, and finally to the United States. (TR at 17-18).

Drs. Laura Phieffer and Benjamin Hackett, surgeons at The Ohio State University Medical Center ("OSU") operated on Claimant's left leg and placed a rod in the upper part of the leg. (TR at 18-19; EX 12 at 26-27). Later, Claimant had a skin graft placed over the wound and shrapnel removed from his right leg. (TR at 33). As a consequence of his injuries, a stent was placed in Claimant's urinary tract, and he will be required to undergo certain surgical procedures on his bladder for the rest of his life. (TR at 33-34).

Claimant was referred to Dr. Matkovic, a Professor of Physical Medicine and Rehabilitation and Nutrition at OSU, for intensive physical therapy. (TR at 34-35; EX 12 at 59-60). The land-based physical therapy exercises included stretching out Claimant's muscles, rubbing and massaging his left leg and arm muscles, and walking using support bars to help him use his left foot. (TR at 38-39). Claimant never reached a point where he could use his left foot during the land-based physical therapy at OSU. *Id.* He was taking pain medications during his stay at OSU, even while he was performing his physical therapy exercises. (TR at 39).

Dr. Matkovic also prescribed aqua therapy for Claimant. (TR at 21; CX 2 at 10). Claimant received maximum benefit from aqua therapy because it strengthened his legs and left foot. (TR at 21-22). A therapist would put him in a chair, lower the chair into the water, stand by, and instruct him to do certain leg exercises for about one hour per session; the therapist would only assist him when he was getting in or out of the water

or when he tried to walk in the water. (TR at 23, 54, 55). He was unable to walk prior to aqua therapy; however, because of the aqua therapy, he was able to walk with the use of a cane. (TR at 23-24).

When Claimant returned to Kentucky, he did not have access to aqua therapy. (TR at 40). Instead, a physical therapist tried to work on his arms and legs. (TR at 24). These sessions were excruciating despite the numerous pain medications that Claimant was taking. (TR at 24). He was able to walk with a cane when he was released from OSU, but since his return to Kentucky, his condition has deteriorated to the point where he was now almost wheelchair-bound and has very little sensation and mobility of his left foot. (TR at 39).

Claimant returned to OSU for in-patient physical therapy and aqua therapy on three occasions, which each lasted for four or five weeks. (EX 12 at 59; TR at 39-40, 55). He exceeded expectations as a result of the aqua therapy and was able to get out of his wheelchair and walk with a cane. (TR at 40). However, his condition would deteriorate when he returned home, because the out-patient physical therapy did not include water-based physical therapy. (TR at 39-40). At the time of the hearing, Claimant testified that he had not received out-patient land-based physical therapy in his home for several months because the physical therapy center in Louisa, Kentucky informed him that he had reached the "maximum level of physical therapy." (TR at 42-43).

Claimant believes that the nearest aqua therapy center from his home may be located in Cabell County, which is about an hour and a half to a two hours away by car. (TR at 25). Due to his injuries he could not drive and it was very difficult for him to ride in a car for that length of time. (TR at 20, 25-26). When he was driven to an appointment with Dr. Browning, his family physician, in Louisa, Kentucky, the 25 mile trip to the doctor's office would exhaust him to the point that he would sleep for nearly two days. (TR at 20, 25-26). Additionally, Claimant gets "blood pressure sores" from turning in the seat to get out of the family van. (TR at 26). For example, Claimant stated that "it about killed me" to ride to his hearing. (TR at 27).

Dr. Browning prescribed a special van chair to aid him in getting in and out of his van and a gel pad "donut" for him to sit on. (TR at 26). Dr. Browning also prescribed a sleep apnea study for Claimant's breathing difficulties, which are believed to be related to his injury in Iraq. He did not have a breathing problem prior to his injuries in Iraq. *Id.* Also, Claimant stated that he desired psychological counseling and treatment for post-traumatic stress disorder ("PTSD"), depression, and anxiety. (TR at 22, 26-27, 52). However he has been unable to find a local psychologist or a psychiatrist to see him for treatment. *Id.* Finally, he testified that Dr. Browning told him that he

needed a flu and pneumonia shot “because of [his] weakness secondary to [his] injuries.” (TR at 28).

A pool installed in his house for therapeutic use would enable Claimant to continue with his aqua therapy. (TR at 28-29; 38; 51-52). He was aware that someone would have to assist him with the aqua therapy exercises, and to get him in and out of the chair lift that would lower him into the pool. *Id.* Claimant knows which aqua therapy exercises he needs to perform, and he would perform these exercises three to four times a day if he had easy access to a pool. (TR at 50, 54-55). He noted that either his son or his wife was always available, and that his son was strong enough to place him onto the chair lift. (TR at 28-29). If his son were not available, the local Home Health agency could send somebody to assist him. (TR at 55).

On cross-examination, Claimant testified that as a result of two prior truck accidents that he had two cervical fusions and drew Social Security disability benefits for about four years in the 1990s. (TR at 30-31; EX 12 at 1-19). However, prior to going to Iraq, he was healthy and did not have any pain or neck problems. (TR at 31, 53).

Testimony of Julie A. Bowens

Claimant’s wife, Julie A. Bowens, also testified at the hearing. (TR at 58-87). She has been married to Claimant for nearly 39 years. (TR at 59). She has not worked since 2002. (TR at 75).

Mrs. Bowens participated in many of Claimant’s in-patient physical therapy sessions at OSU. (TR at 59). Her role with Claimant’s aqua therapy was assisting him with his exercises, fitting and buckling the harness around him, lifting and lowering him into the chair lift, observing his therapy exercises, and helping him to walk in the pool. (TR at 60).

If a pool were installed in their house, she knew the exercises that Claimant would need to perform in the water. (TR at 63, 78). If she needed further training, Mrs. Bowens stated that Three Rivers Home Healthcare and Physical Therapy would most likely be able to provide proper training. *Id.* If the pool were easily accessible to Claimant, he would be able to perform aqua therapy every day for half an hour, several times throughout the day. (TR at 86). She was aware that the gas and electric bills would substantially increase to keep the pool functioning inside the house. (TR at 87). If the chair lift to the pool became damaged and needed repair, Mrs. Bowens stated that her son could lift Claimant in and out of the water because the depth of the water would only be three to six feet for the 12 by 12 foot pool. (TR at 79).

Mrs. Bowens wanted the pool located inside the house for easy accessibility. (TR at 80). A room could be added to the house to accommodate an indoor pool. (TR at 80-81). A pool located outside the house, without some type of covered walk-way, would be difficult during the wintertime because the inclement weather would make it hard for her to physically move Claimant. (TR at 81-82).

Mrs. Bowens stated that after the injuries suffered by her husband on April 24, 2006, he could not remember things explained to him after one or two hours; as a result, he is dependent on her and their son. (TR at 65-66). Claimant began speaking slowly and became slow at everything. (TR at 66). She administered all the medications to her husband. (TR at 66-68). The medications cause some drowsiness for him, but not to the point where he cannot function. (TR at 69).

Mrs. Bowens drives Claimant to his appointments. (TR at 63). They have owned three vans since his injuries in Iraq. (TR at 75). The current van was modified and fitted with a vehicle lift that could accommodate Claimant's motorized wheelchair in and out of the van. *Id.* However, Mrs. Bowens has not been able to use the vehicle lift because it has not been working for over a year; additionally, the motorized wheelchair has not worked for over a year. (TR at 51, 75-76). Mrs. Bowens submitted all of her paperwork for reimbursement of medical mileage, but she has not been reimbursed since 2007. (TR at 64).

Claimant could tolerate traveling by car for about 25 miles; anything over 25 miles gave him great discomfort and pain. (TR at 63). She estimated that it would take her almost two hours to drive from their house to the nearest aqua therapy center in Huntington, West Virginia. (TR at 64). She stated that intermittent in-patient physical therapy was unfeasible, even if Employer reimbursed all costs for Claimant's stay, as well as for her stay, because the doctors recommended daily water-therapy for Claimant for maximum and continuing benefit. (TR at 56, 80).

Mrs. Bowens testified that Claimant saw a counselor in Louisa to discuss his PUTS, traumatic brain injury, and memory problems. (TR at 83-84). This counselor was not an actual psychiatrist; the psychiatrist in Louisa would not see Claimant because she did not take Claimant's federal workers' compensation. (TR at 84).

Medical Evidence:

Dr. Laura Phieffer

Dr. Laura Phieffer, Director of Orthopaedic Trauma at OSU, evaluated Claimant and diagnosed him with a "left subtrochanteric open femur fracture" from a grenade

injury in Iraq with “residual neurological deficit” and “radicular pain.” (CX 2 at 2; EX 12 at 20-21). On May 10, 2006, Dr. Phieffer operated on Claimant using a “cephalomedullary nailing” procedure and a “wound vac placement.” *Id.* On May 31, 2006, Drs. Phieffer and Hackett performed a “split thickness skin grafting” of Claimant’s left hip wound. (CX 2 at 2; EX 12 at 26-27). Dr. Phieffer discharged Claimant for acute rehabilitation on June 5, 2006. (EX 12 at 30).

On July 10, 2006, Dr. Phieffer conducted a post-operative examination of Claimant and noted that the skin graft had “matured”; all surgical incisions showed no warmth or erythema, and there was minimal swelling in the leg. (CX 2 at 3-5; EX 12 at 23-25). Dr. Phieffer recorded the following: (1) radicular pain down his left lower extremity and into his foot; (2) swollen leg during the course of the day; (3) radicular pain into the dorsum and the plantar aspect of his foot; and (4) continued pronouncement of a foot drop on the left lower extremity. *Id.*

Dr. Phieffer noted that Claimant had been admitted to an emergency room in Kentucky due to uncontrolled pain that occurred approximately two weeks prior to this visit. (CX 2 at 4; EX 12 at 24). She prescribed a thigh-high compression stocking to help improve Claimant’s venous and lymphatic flow. *Id.*

On July 19, 2006, Drs. Phieffer and Pittner removed shrapnel from Claimant’s right thigh. (EX 12 at 28-29). On September 25, 2006, Dr. Phieffer saw Claimant for a post-operative evaluation. (CX 2 at 2; EX 12 at 22-23). She made the following observations: the nerve injury will require a long time for recovery and an implantable device for pain medication was an option. (CX 2 at 3; EX 12 at 23). Dr. Phieffer opined that Claimant is far from a full recovery and that it would take a minimum of two years before he would come close to maximum medical improvement and he would need multiple procedures in the future that were secondary to his neurological injury. *Id.*

On April 2, 2007, Dr. Phieffer concluded that Claimant had a severe lower extremity injury with radiculopathy and was permanently disabled; it was Dr. Phieffer’s medical opinion that Claimant would never return to work because of his injuries. (EX 12 at 21). She specifically noted that “just by his left leg alone Claimant is ready to be qualified for permanent disability.” She also noted that Claimant’s injuries have caused significant lower back pain due to his inability to utilize his left lower extremity. *Id.*

Dr. Velimir Matkovic

Dr. Velimir Matkovic, a professor of Physical Medicine and Rehabilitation and Nutrition at OSU, in letters dated May 8, 2008, and April 10, 2009, stated that he had

provided intensive rehabilitation services for Claimant at OSU during his in-patient stays starting on May 18, 2006, November 6, 2006, and October 23, 2007. (EX 12 at 59-60). Dr. Matkovic recorded the following diagnoses: mild traumatic brain injury; PTSD/depression/anxiety; neurogenic bladder; RSD; bilateral shoulder tendonitis; neuropathic pain; decreased memory, muscle spasms; lower back pain; right shoulder sprain/strain; bilateral hearing loss; vision changes; pressure ulcer; respirator depression; and right shoulder rash. (EX 12 at 59). He noted that Claimant was on constant pain medication management, along with extensive out-patient physical therapies since his discharge from OSU. (EX 12 at 59-60).

Dr. Matkovic opined that Claimant needed extensive physical therapies for “appropriate [range of motion] and ambulation” to reduce his pain and prevent joint contractures. (EX 12 at 59; CX 2 at 10, 13). Dr. Matkovic further opined that without continuing aqua therapy Claimant’s motor functions would decline, which would be extremely detrimental to his overall health. (EX 12 at 59; CX 2 at 13).

On October 29, 2007, Dr. Matkovic prescribed a 12 by 12 foot therapeutic pool with a lift to be installed at Claimant’s house, based on Claimant’s difficulties with transportation, potential inclement weather, and the isolated area where Claimant resides. (CX 2 at 10). On April 29, 2008, Dr. Matkovic again prescribed the placement of 12 by 12 foot aquatic pool with lift in Claimant’s home or on his property. (CX 2 at 12).

Dr. Lee A. Balaklaw

On August 17, 2006, Dr. Lee A. Balaklaw, Diplomate of the American Academy of Pain Management, evaluated Claimant and his pain management program. (EX 13 at 3-7). Dr. Balaklaw noted that Claimant was on the following pain medications: Ibuprofen, 600 milligrams, every six hours; Colace, 100 milligrams, twice daily; Dilaudid, 6 milligrams, every three hours; Iron, 325 milligrams; Lovenox, 60 milligrams, subcu.; Lyrica, 150 milligrams, twice daily; Methadone, 5 milligrams, every six hours; Nicotine patch; Senokot, twice daily; Valium, 5 milligrams, every four hours; Percocet, 7.5 milligrams, in hospital; Lactulose; Cymbalta, 60; Zanaflex, 2 milligrams, per day at home; Baclofen, 10 milligrams, three times daily; and Detrol, 4 milligrams, two times daily (stop while in hospital). (EX 13 at 3).

Dr. Balaklaw made the following diagnoses: neuropathy, neuropathic pain, nocieptive pain, left foot drop, multi-trauma left leg and foot, paraspinous muscle spasm, myofascitis, left ankle impingement/instability, left hip and knee arthritis, spasticity, muscle spasm left leg, retained foreign body right thigh posteriorly, hamstring tightness right thigh posteriorly, early complex regional pain syndrome,

impending phlebitis, lumbar displaced disc, lumbar facet arthritis, sleep deprivation, and sciatica-left. (EX 13 at 5-6).

Dr. Balaklaw on several occasions between August 17, 2006, and September 12, 2006, recommended or readjusted Claimant's pain medications as part of his treatment plan. (EX 13 at 6-8, 11-15, 19, 27-29, 30-31). He also noted that a narcotic implanted pump may be necessary for Claimant in the near future. (EX 13 at 7). On December 26, 2006, Dr. Balaklaw recorded that there was nothing at the present time that he could further offer to Claimant from a "pain management prospective." (EX 13 at 33).

Dr. Lloyd M. L. Browning

Dr. Lloyd M. L. Browning has been Claimant's family physician for many years; he evaluated him on a regular basis after he returned from Iraq. (CX 2 at 26). Dr. Browning prescribed the following for Claimant as part of his continuing care: (1) a sleep apnea study on July 9, 2007, and on September 7, 2007, (CX 2 at 6-7, 9); (2) on July 19, 2007, he prescribed a bedrail for Claimant; Claimant's wife purchased the bedrail on July 24, 2007, for \$123.49, (CX 2 at 8); (3) on October 19, 2009, he prescribed a flu shot for Claimant (CX 2 at 25); and (4) on December 15, 2009, Dr. Browning prescribed a gel pad "donut" for Claimant's coccydynia. (CX 2 at 27).

In a letter dated November 24, 2009, Dr. Browning noted that as a result of the injuries that occurred in Iraq, Claimant had undergone several surgeries, but still had symptoms of severe pain in the lower back, left hip and leg, as well as in the bladder, and urethra. (CX 2 at 26). Dr. Browning further noted that Claimant was suffering from PTSD, depression, and that Claimant was taking strong analgesics and anti-anxiety medications. He recorded that Claimant was unable to elevate out of his wheel chair, but assisted could stand for short periods of time. *Id.*

Additionally, Dr. Browning reiterated that Claimant "needs to have sleep studies and probably a C-Pap or bipap machine." (CX 2 at 26). Claimant needs a "van for the handicapped with side approach and lift" because his wife and son were having to lift him into his van. Dr. Browning further noted that Claimant's condition was "heavy care" and Claimant required dependent care by his wife and son and that their "job is a 24/7 ordeal" and that they "should be compensated." Finally, Dr. Browning opined that Claimant would benefit from using an exercise pool for increased mobility and decrease of his stiffness. *Id.*

Dr. Grant Jones

Dr. Grant Jones, a physician at OSU, evaluated Claimant on December 27, 2006, for reported pain in his shoulders. (EX 12 at 51). Dr. Jones noted that Claimant complained of pain in his shoulders once he started walking even with the support of a “walker.” After obtaining a patient history and a physical examination, Dr. Jones noted the following: post-traumatic stiffness bilateral shoulders; bilateral acromioclavicular joint osteoarthritis; and early post-traumatic bilateral glenohumeral joint osteoarthritis. He ruled out underlying rotator cuff tears. *Id.*

Dr. Jones’s treatment plan for Claimant included arthrograms to fully evaluate the stiffness of Claimant’s shoulders; however, prior to arthrograms, Dr. Jones recommended that Claimant be treated with subacromial injections bilaterally, followed by physical therapy programs for both of Claimant’s shoulders. (EX 12 at 51-52). During this visit, Claimant received 8 milliliters of lidocaine, 1 milliliter of dexamethasone, and 1 milliliter of Kenalog. (EX 12 at 52).

Dr. Jones evaluated and treated Claimant on February 28, 2007, and April 25, 2007. (EX 12 at 49-50). Dr. Jones’s treatment plan for Claimant included continued stretching and strengthening exercises for Claimant’s shoulders. (EX 12 at 49). Dr. Jones also injected Claimant’s subacromial spaces with 8 cubic centimeters of lidocaine, 1 cubic centimeter of dexamethasone, and 1 cubic centimeter of Kenalog. *Id.*

Delinda Adkins, Physical Therapist

Delinda Adkins, a physical therapist at Three Rivers Medical Center, in a letter dated March 12, 2008, stated that Claimant received physical therapy services at Three Rivers Medical Center for pain and weakness in extremities and poor balance. (CX 2 at 11). Ms. Adkins noted that Claimant had a tendency to become stiff and sore between his physical therapy appointments. Claimant reported that he had received aqua therapy while at OSU and that it had been helpful. Ms. Adkins stated that aqua therapy can be beneficial for strengthening, related to the buoyancy of the water; it can also promote muscular relaxation and increased circulation. If Claimant were provided a pool, it would be beneficial for him to have a chair lift installed in the pool to allow his wife to safely transfer him in and out of the water. *Id.*

Three Rivers Medical Center

Claimant was admitted to Three Rivers Medical Center on August 5, 2008, after his wife and son tried to awaken him and were unable to do so. (CX 2 at 14-23). Claimant was seen by the on-call emergency department physician, Dr. Mark B.

Kingston. (CX 2 at 16; EX 13 at 76). After taking a patient history and examining Claimant, Dr. Kingston opined that Claimant had acute bronchitis; chronic obstructive pulmonary disease and acute exacerbation; post-traumatic weakness in legs; post-traumatic urethral stenosis; and depression. (CX 2 at 16; EX 13 at 79). The physician's progress notes on August 6, 2008, indicate that a sleep apnea test was necessary. (CX 2 at 22-23).

DISCUSSION

It is well-settled that in arriving at a decision, the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In general, the employer is responsible for all medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978).

It is well-settled that modifications to a claimant's home following a work-related injury, including ramps, widened doorways, and handicapped-accessible plumbing fixtures, constitute covered medical expenses under the Act. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86, 94-95 (1989). Moreover, should a claimant's work-related injuries be so severe as to require domestic services, the employer must provide them, even to the extent of reimbursing a family member who performs them. *Gilliam v. Western Union Telegraph Co.*, 8 BRBS 278, 279-280 (1978); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975) (wife as provider). Claimant has the burden of showing that the modifications and services sought are reasonable, necessary and

appropriate given his injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979); see 20 C.F.R. §§ 702.401, 702.402. However, the administrative law judge may consider whether the record contains evidence that some other type of treatment or facility would serve claimant's needs as well. See generally *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Pool Installation for Aqua Physical Therapy at Claimant's Home:

Dr. Matkovic, a professor of Physical Medicine and Rehabilitation and Nutrition, provided intensive rehabilitation services for Claimant at OSU. (EX 12 at 59-60). On April 24, 2008, he prescribed a 12 by 12 foot pool with a lift for Claimant. (CX 2 at 12). By letter, dated May 8, 2008, he explained:

Mr. Bowens has been on constant medication management along with extensive out-patient therapies since his discharge. Due to his difficulties with transportation and the isolated area where he resides, it is very difficult for him to participate in out-patient therapies, especially in inclement weather. It is my request that you please consider the placement of a 12' x 12' indoor pool into Mr. Bowens' home/property. He is in need of extensive therapies to allow him the appropriate [range of motion] and ambulation he needs to reduce his pain and prevent joint contractures. Without continued aqua therapy Mr. Bowens' motor functions will undoubtedly decline which would be extremely detrimental to his health.

(EX 12 at 59).

By letter, dated April 10, 2009, Dr. Matkovic again recommended placement of a 12 by 12 foot indoor pool in Claimant's home or on his property based on similar reasons described in his letter of May 8, 2008. (EX 12 at 60). Dr. Matkovic was extensively involved with Claimant's rehabilitation process from 2006 at OSU; accordingly, I give considerable weight to his medical opinion.

Since Claimant's return to Kentucky in 2006, his family physician, Dr. Browning, has been involved with the care and treatment of his injuries that occurred in Iraq. (CX 2 at 26). Dr. Browning recommended aqua therapy to treat Claimant; in particular, Dr. Browning noted that using an exercise pool would increase Claimant's mobility and decrease his stiffness. *Id.* As Claimant's primary care physician for many years, Dr. Browning has an understanding of Claimant's physical condition. Therefore, I give full probative weight to his medical opinion on this issue.

Claimant and his wife testified that he began land-based and water-based physical therapies while he was recuperating from his leg surgery at OSU. (TR at 20, 34-35, 59-62). He was able to walk with a cane after receiving aqua therapy. (TR at 23-24, 40). When he returned to Kentucky, he only received land-based physical therapy. (TR at 41). Claimant's condition deteriorated, despite the physical therapy, to the point that he is almost completely wheel-chair bound and has very little sensation and mobility in his left foot. (TR at 40-41). I find Claimant and his wife to be very credible and give substantial weight to their testimony.

Based on Drs. Matkovic's and Browning's evaluations, Claimant's and his wife's testimony, and the other medical evidence of record, I find that daily water therapy is not only reasonable, but necessary, appropriate, and within the meaning and intent of § 7 of the Act.

As the Administrative Law Judge, I may additionally consider whether the record contains evidence that some other type of treatment or facility would serve claimant's needs as well. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Employer and Carrier do not dispute that Claimant needs ongoing physical therapy, either in land-based or water-based forms. (Post-Hearing Brief of Employer/Carrier at 4). However, they argue that the installation of a pool in Claimant's home is not a reasonable option for the following reasons: (1) the cost of the installation of the pool and the length of delay that might result in repairing a broken mechanical lift chair; (2) the safety of Claimant and his family associated with the use of an indoor pool; particularly the possibility that Claimant would unexpectedly fall, because of his difficulty standing on his own; (3) the risk associated with the many pain medications Claimant takes while participating in aqua therapy; and (4) the inadequacy of Claimant's wife's and son's training to oversee Claimant's water therapy at home. (Post-Hearing Brief of Employer/Carrier at 4-8). Instead, Employer and Carrier are willing to accommodate Claimant and his wife by having them transported to whatever facility they choose for aqua therapy. (Post-Hearing Brief Employer/Carrier at 4).

The cost for the purchase, installation, and maintenance of a 12 by 12 foot pool for aqua therapy, to include a mechanical lift chair, harness, and an appropriately trained person to conduct the aqua therapy in Claimant's home, are medical expenses associated with Claimant's disability and compensable under the Act. Therefore, I do not find Employer's arguments as to cost persuasive, given the physical condition of the Claimant.

With regard to Employer's/Carrier's second concern, I find that safety of Claimant and his family is a valid concern. However, this concern should be addressed at the time of the installation of the pool to include any needed safety devices. I reiterate that the purpose of installing a pool in Claimant's home is to provide Claimant with accessible aqua therapy that he can comfortably utilize without adding to his current amount of pain and discomfort. Having Claimant and his wife transported by a vehicle for daily aqua therapy that is of considerable distance from their home is an unreasonable request in light of Claimant's medical condition.

With regard to Employer's/Carrier's third concern, Claimant and his wife both testified that Claimant was medicated during all of his previous physical therapy sessions. (TR at 39, 68-69). Claimant underwent both land-based and water-based physical therapies while he was medicated. *Id.* Furthermore, both Dr. Matkovic and Dr. Browning have prescribed the pool and the aqua therapy for Claimant with full awareness of Claimant's medical and medication histories. (CX 2 at 10, 12-13, 26; EX 12 at 59-60). Therefore, I find that Employer's/Carrier's third concern unconvincing.

With regard to Employer's/Carrier's final concern, Claimant's wife testified that the physical therapists at OSU preferred that she be present during Claimant's session for the "hands-on" experience. (TR at 59-61). Given that Claimant is dependent on the care of his family, it is not surprising that the physical therapists would encourage Claimant's wife to assist with his physical therapy exercises at home. I find that Employer and Carrier are required under the Act to ensure an adequately trained person is available to assist with Claimant's aqua therapy. *Id.*

It is obvious that Claimant needs daily aqua therapy so that he might be restored, as best as possible, to the *status quo ante* that he enjoyed prior to his injury. Claimant will probably not be able to regain the use of his legs as he once did, but with the use of aqua therapy in his home, there is ample evidence of record that such a course of therapy will alleviate some of Claimant's ongoing pain and improve his condition. Accordingly, I find that Employer and Carrier have not provided a reasonable alternative to purchasing, installing, and maintaining at least a 12 by 12 foot pool for aqua therapy to include a mechanical lift chair, harness, and appropriately trained personnel.

Reimbursement for a Bed Rail and Medical Mileage:

At the hearing Claimant's wife testified that Claimant had not been reimbursed medical mileage since 2007. (TR at 64). She stated that she had sent all of the medical mileage to a representative of Carrier. *Id.* Claimant's Exhibit 12 reflects medical mileage from May 7, 2007, to August 8, 2007, in the amount of 900 miles. Claimant is

entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for a work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989). Employer/Carrier offers no rebuttal to Claimant's claim for reimbursement, and I find Employer/Carrier to be responsible for this expense.

As to the reimbursement for a bedrail, Claimant's counsel stated that Employer/Carrier had not repaid Claimant for the cost of a bedrail in the amount of \$123.49. (TR at 9; CX 2 at 8). Employer's counsel replied that the request for repayment had been submitted and Carrier should pay that bill. *Id.* Employer/Carrier offered no rebuttal to Claimant's claim for reimbursement, and I find Employer/Carrier to be responsible for this expense.

Other Medical Benefits and Services:

Although not identified as issues at the hearing, Claimant's counsel in his post-hearing brief requested the following additional medical benefits and services: a special handicapped van with a side approach and a lift modification, a sleep apnea study, psychiatric care, a flu shot, and a gel pad. (TR at 9-11; Claimant's Post-Hearing Brief at 4-6). Employer and Carrier contest the consideration of the aforementioned medical benefits and expenses as not ripe for consideration. (Opposition Brief of Employer/Carrier at 2-3).

Sleep Study

Claimant testified that while he was at OSU, he was told that he was breathing four times a minute when sleeping; the medical professionals at OSU told him that his breathing problems were related to his injuries from Iraq. (TR at 27). Claimant stated that he had asked for a sleep study but it had not been performed. *Id.* On July 9, 2007, Dr. Browning recommended that Claimant undergo a sleep study to determine if he had sleep apnea. (CX 2 at 6-7). On September 7, 2007, Dr. Browning recorded in a medical note that Claimant was observed breathing 8-10 times a minute; it was difficult to arouse from sleep, and he snored loudly. (CX 2 at 9). Dr. Browning recommended a sleep study. *Id.* Employer and Carrier responded in their opposition brief that the prescription for a sleep study was addressed at the informal hearing; however, there is no indication that a request for a sleep study was ever presented to Carrier for approval or denied. (Opposition Brief of Employer/Carrier at 2).

Flu Shot and Gel Pad

On October 19, 2009, Dr. Browning prescribed a flu shot and opined that it would be "beneficial due to [Claimant's] weakened state secondary to his W.C. injury."

(CX 2 at 25; Claimant's Post-hearing Brief at 4). On December 18, 2009, Dr. Browning wrote a prescription for a gel pad to ameliorate Claimant's coccydyma. (CX 2 at 27; Claimant's Post-Hearing Brief at 4).

Employer and Carrier responded as follows: these prescriptions were not mentioned at the formal hearing as issues, they were never discussed at any conference between the parties, and there was no mention in Claimant's Post-Hearing Brief that these prescriptions were denied. (Opposition Brief of Employer/Carrier at 2).

Special Handicapped Van

Claimant testified that he has not driven since he returned from Iraq. (TR at 19-20; Claimant's Post-hearing Brief at 5). Mrs. Bowens testified that they have gone through three vans since Claimant's injury, and currently the wheel chair lift on their van no longer works. (TR at 75; Claimant's Post-Hearing Brief at 5). On November 24, 2009, Dr. Browning opined that Claimant needed "a van for the handicapped which has a side approach and a lift." (CX 2 at 26; Claimant's Post-Hearing Brief at 4). Dr. Browning based his conclusion on the following: "Mr. Bowen[s] is not able to elevate out of his wheelchair but [if] assisted can stand for short periods. His wife and son must help him elevate out of any chair and must lift him into his van." (CX 2 at 26). Accordingly, Claimant's counsel avers that Dr. Browning's "prescription" for a special van for the handicapped with side approach and lift is reasonable and necessary based on Claimant's injuries.

Employer and Carrier responded to Claimant's request for a special handicapped van, as follows:

Not only was this not raised as a contested issue or medical benefit on the record at the formal hearing, Mrs. Bowens talked about the modifications that had already been made to their van. A lift was previously installed on Claimant's van, but it simply needs to be repaired by the company that installed it. Carrier was unaware of the problems with Claimant's mechanical devices prior to the formal hearing and was also unaware of the renewed request for van modifications, as those modifications have already been performed. This simply is not a contested issue at this time and it was a surprise to Employer/Carrier to see it addressed in Claimant's Post-Hearing Brief. Therefore, Employer/Carrier respectfully requests that this issue of modifications to Claimant's van not be considered by the court at this time.

(Opposition Brief of Employer/Carrier at 2).

Psychiatric Care

Claimant's counsel requested psychiatric care for Claimant and noted that Mr. Bowens testified that he has not seen a psychiatrist since he left OSU. (Claimant's Post-Hearing Brief at 5). Claimant stated that he believes his wife asked his physician for a referral, but there are no psychologists or psychiatrists in Louisa to provide follow up care. (TR at 26-27, 51-52). Employer and Carrier responded that psychiatric treatment has never been refused by the Employer/Carrier and Claimant did receive psychiatric care after his injury. (Opposition Brief of Employer/Carrier at 3).³

Special Van Chair

During the hearing, Claimant's counsel referred to a document in which Dr. Browning had discussed a special van chair for Mr. Bowens because it was difficult for him to get in and out of his van. (TR at 10). He then stated "that's something we'll discuss a little bit today, but as I said, it may get cleared up through the deposition." *Id.* As previously noted, there was no deposition testimony of Dr. Browning offered post-hearing and this potential issue was not further addressed.

Discussion

Section 7(b) of the Act vests the authority to supervise medical care with the Secretary of Labor. 33 U.S.C. §907(a), (b). Under the regulations, "[t]he Director, OWCP, through the district directors and their designees shall actively supervise the medical care of an injured employee covered by the Act." 20 C.F.R. § 702.407. The district directors' supervisory functions include requiring periodic medical reporting; determining the necessity, sufficiency, and character of medical care furnished; determining whether change in service providers is necessary; and evaluating medical questions regarding the nature and extent of the covered injury and medical care required. 20 C.F.R. § 702.407; *see also* §702.401-702.422.

Although the authority vested by Section 7(b) to supervise medical care rests with the delegate of the Secretary—the district directors—an administrative law judge retains the role as fact finder when disputed issues of fact concerning medical benefits arise (such as the need for specific assistance or treatment) and such issues must be resolved by the administrative law judge. *See Sanders v. Marine Terminals Corp.*, 31 BRBS 19, 22-23 (1997).

³ Claimant testified that he had seen a psychiatrist one time while at OSU. (TR at 26).

Section 7(a) of the Act provides that employers “shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. 907(a). However, a claimant is not entitled to recover payments for medical services or supplies obtained unless the employer has either refused or neglected a request to furnish such services. 20 C.F.R. § 702.421. Furthermore, in order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). It is the claimant’s burden to establish the necessity of treatment rendered for his or her work-related injury. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Under Section 7(d) of the Act, a claimant may be reimbursed for medical expenses already paid if certain criteria are satisfied. 33 U.S.C. § 907(d). Specifically, an employee may not recover amounts he expended for medical or other treatment or services unless either (1) the employer refused or neglected a request to furnish such services (and the employee has complied with the requirements of the Act and regulations); or (2) the nature of the injury required such treatment and services and the employer (having knowledge of the injury) neglected to provide or authorize it. *Id.*; *see also* 20 C.F.R. § 702.421. Fees for medical services are usually limited to prevailing community charges, as determined by the district directors under a fee schedule, and treatment may not be reimbursed for providers who refuse to so limit their charges, unless services were rendered in an emergency. 20 C.F.R. § 702.413-702.417.

In this case, the issue of the special van chair was raised at the hearing by Claimant’s counsel, but no further evidence or argument on the issue was received, and a deposition of Dr. Browning was never submitted. Also, the request for a flu shot, gel pad, sleep study, suitably equipped handicapped van, and psychiatric care were not raised at the hearing. Accordingly, Employer did not submit evidence on these issues. Moreover, Employer has apparently not declined coverage for the suitably equipped handicapped van, van chair, flu shot, sleep study, or psychiatric care. For these reasons, I find that ordering Employer and Carrier to pay for the medical expenses raised in Claimant’s post-hearing brief would be premature at this time.

Disability Compensation

Disability under the Act is defined as incapacity because of injury to earn wages that the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the

extent (total or partial). The parties have stipulated that Claimant is permanently and totally disabled. (JX 1).

Average Weekly Wage:

Compensation for total or partial disability is based on the claimant's pre-injury "average weekly wages." See 33 U.S.C. §§ 908 and 910. Section 10 of the Act provides guidance when the average weekly wage is contested. The parties agree that Claimant's average weekly wage is appropriately calculated using § 10(c) of the Act, based on Claimant's annual earning capacity at the time of his injury. (Claimant's Post-Hearing Brief at 9-11; Post-Hearing Brief of Employer/Carrier at 8-9). That section provides:

such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

Section 10(d)(1) further provides that: "[t]he average weekly wages of an employee shall be one fifty-second part of his average annual earnings." Under § 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410 (1980) (average weekly wage represents amount of potential to earn absent injury). Thus, an administrative law judge may consider only those wages earned following a promotion or increase in wages. *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

In this proceeding, Claimant argues that his average weekly wage under § 10(c) should be calculated based on his earnings in Iraq divided by 196 days or 28 weeks, which is the number of days he received overseas pay under his contract of employment. Claimant was paid by Employer from October 11, 2005, through April 24, 2006. Because he earned a total of \$48,907.87 in the 196 days he worked prior to his injury, he asserts that his average weekly wage is \$1,746.71. (Claimant's Post-Hearing Brief at 10).

Employer and Carrier argue that these overseas earnings, if used alone, would result in a distorted average weekly wage and allow a windfall to the injured workers. (Post-Hearing Brief of Employer/Carrier at 9-11). Employer argues that using a “blended approach” under § 10(c) to calculate the average weekly wage of workers employed abroad is fair. *Id.* at 11-12. Using this method, Employer argues that Claimant’s average weekly wage should be calculated “blending all of his earnings in the 52 or 104 weeks prior to his injury, not just those earned overseas.” (Post-Hearing Brief of Employer/Carrier at 15). In calculating Claimant’s average weekly wage over a 52 week period, Employer’s counsel asserts that the Claimant earned a total of \$56,984.71 between April 24, 2005, and April 24, 2006, which equates to an average weekly wage of \$1,095.86; and calculating Claimant’s average weekly wage over a 104 week period, Employer’s counsel asserts that Claimant earned a total of \$87,804.47, which equates to an average weekly wage of \$844.27. (Post-Hearing Brief of Employer/Carrier at 12-14).

The calculation of Claimant’s average weekly wage is governed by the Board’s recent decision in *K.S. v. Service Employers International Inc.*, 43 BRBS 18 (2009), *aff’d on recon. en banc*, BRB No. 08-0583 (Sept. 25, 2009). In that case, the Board addressed the application of § 10(c) to earnings of a DBA employee injured abroad while working under a contract of employment similar to Claimant’s. After working two and one-half months in Iraq and Kuwait, the worker in *K.S.* was injured and returned to the U.S. In subsequent proceedings, an Administrative Law Judge rejected the claimant’s contention that his average weekly wage should be based solely on his earnings in Kuwait and Iraq and adopted the employer’s “blended” average weekly wage calculation based on the combination of claimant’s overseas and U.S. earnings and during the 52-week period prior to the injury. Under circumstances similar to those at issue here, the Board specifically rejected any type of “blended approach,” and held that the average weekly wage of a worker employed pursuant to a one-year overseas contract must be based solely on overseas earnings when calculating the average weekly wage under § 10(c).

The Board specifically reaffirmed its reasoning in *Proffitt v. Serv. Employers Int’l, Inc.*, 40 BRBS 41 (2006), which explained that exclusive use of overseas wages, “appropriately reflects the increase in pay claimant received when he commenced working for employer in Iraq” and “fully compensates claimant for the earnings he lost due to his injury.” *Id.* It relied on *Proffitt*, concluding that: “average weekly wage must be calculated based solely on his overseas earnings in order to reflect [the claimant’s] earning capacity in the employment in which he was injured,” [and] “[i]n this regard, the facts of this case are indistinguishable from those in *Proffitt*.” As in *K.S.*, *Proffitt* is equally applicable here.

In *K.S.*, the Board reasoned: “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.” *Id.* at 6. Moreover, in this case, as in *K.S.*, the Claimant had a one-year contract of employment with the Employer; terminable by either party. The Board also noted that the claimant’s potential to maintain the higher level of earnings afforded by his overseas work was cut short by his injury. The Board explained:

[T]he claimant’s job was not everlasting, he had a one-year contract, there is no evidence to suggest he would not have fulfilled this term absent injury, and claimant expressed his intent to continue working in Iraq for a longer period. The one-year contract term is consistent with the Act’s focus on annual earning capacity, and his earnings under this contract thus provide the best evidence of claimant’s capacity to earn absent injury. Under these circumstances, claimant’s average weekly wage must be based exclusively on the higher wages earned in the job in which he was injured in Iraq, particularly since these wages were the primary reason for his accepting employment under the dangerous working conditions that existed there.

Id. at 4-5.

As in *K.S.*, the claimant in the present case worked full-time, and had a one-year contract with no guarantee of duration. Further, the evidence indicates Claimant intended to work in Iraq for two years. Under these circumstances, *K.S.* requires that Claimant’s potential post-injury, overseas earnings under the contract be taken into consideration. Moreover, the Board specifically stated: “We reject adoption of the ‘blended approach’ in cases involving a one-year contract because it treats similarly situated employees differently, as the amount of each average weekly wage computation would depend upon how long into the contractual year a claimant’s injury occurred.” *Id.* at 6, n.5. Indeed, the Board in *K.S.* specifically considered and rejected virtually every argument that Employer and Carrier have asserted in support of their average weekly wage calculation. I conclude that Claimant’s average weekly wage must be based on his actual and potential overseas earnings.

Claimant’s actual average daily earnings represent a reasonably accurate reflection of his “potential” contract earnings which were lost due to the injury. Thus his average actual daily earnings will be used in calculating the earning potential he lost under the contract due to his work-related injury. The record shows that Claimant began his work in Iraq on October 11, 2005, and continued to work and earn wages

until April 24, 2006, for a total of 196 days or 28 weeks. He earned \$48,907.87. Thus, I find that the Claimant's average weekly wage under Section 10(c) is \$1,746.71.

Interest:

The Board has held that interest is mandatory under the Act on all unpaid benefits which have accrued since the date of the injury; it is calculated on a simple, not compound, basis. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Smith v. Ingalls Shipbuilding Division, Litton Systems Inc.*, 22 BRBS 46 (1989). The purpose of interest is not to penalize employers but, rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 47, 50 (1989).

Accordingly, to the extent that an upward adjustment is made to Claimant's average weekly wage, he is entitled to interest from the date each past benefit payment was due until the date it was paid. In addition, he is entitled to additional interest on the unpaid interest that accrued on the unpaid benefits.

Attorney's Fees:

Having successfully established Claimant's right to compensation, his attorney is entitled to an award of fees under Section 28(a) of the Act. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991). The regulations address attorney's fees at 20 C.F.R. §§ 702.132-135. Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application.

The parties have twenty (20) days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Accordingly, the claim of Claimant, Danny Bowens, for benefits is **GRANTED**. I therefore **ORDER** that:

1. The Employer/Carrier shall pay for all reasonable and necessary medical expenses associated with Claimant's disability condition, pursuant to Section 7 of the Act, including the cost to purchase, install, and maintain at

least a 12 by 12 foot pool for aqua physical therapy at Claimant's home, to include a mechanical lift chair, harness, and an appropriately trained person to conduct the physical therapy.

2. Employer/Carrier shall reimburse Claimant for the cost of a bedrail purchased on July 24, 2007, in the amount of \$123.49, and all medical mileage payments due within thirty (30) days of the date of service of this Order.
3. Employer shall pay Claimant permanent total disability compensation, based on an average weekly wage of \$1,746.71.
4. Claimant is entitled to interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. § 1961.
5. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.
6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on Claimant and opposing counsel, who shall have twenty (20) days to file any objections.

A

LARRY S. MERCK
Administrative Law Judge