

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 10 December 2010**

**Case No.: 2009-LDA-00258**

**OWCP No.: 08-148632**

*In the Matter of:*

**DENNIS CHRISTIAN,**  
Claimant

v.

**SERVICE EMPLOYERS INTERNATIONAL, INC.,**  
Employer and,

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

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

Michael D. Murphy, Esq.  
For Employer and Carrier

Before: Russell D. Pulver  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This case arises from a claim for compensation brought under the Defense Base Act, 42 U.S.C. § 1651, as an extension of the Longshore and Harbor Workers' Compensation Act ("the Act"). 33 U.S.C. § 901 *et seq.* The Act provides compensation to certain employees engaged in U.S. Department of Defense related employment for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability. Dennis Christian ("Claimant") brought this claim against his employer, Service Employers International, Inc. ("SEII") and its insurance carrier, Insurance Company of the State of Pennsylvania (collectively "Respondents") for injuries sustained on May 28, 2006, while he worked as a truck and bus driver in Iraq.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. On November 2, 2009, I convened a formal hearing in Houston, Texas. The parties had a full and fair opportunity to

present evidence and arguments on the issues. The following exhibits were admitted into evidence: ALJ Exhibits ("AX") 1-9; Joint Exhibits ("JX") 1-7; Claimant's Exhibits ("CX") 1-5; and SEII's Exhibits ("RX") 1-24. Hearing Transcript ("TR") at 5-7. The Claimant and Claimant's wife testified on Claimant's behalf.

Claimant, Employer and the District Director submitted post-hearing briefs. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

### **STIPULATIONS**

The parties stipulate and I find:

1. Jurisdiction exists under the Act. AX 9.
2. Claimant has suffered an injury to his right shoulder and body generally that arose out of and in the course of his employment on May 28, 2006. *Id.*
3. At the time of the injury, an employer-employee relationship existed between Claimant and Employer. *Id.*
4. The claim was timely noticed and timely filed. *Id.*
5. Claimant's average weekly wage at the time of injury was \$1,606.01. *Id.*
6. Claimant has been paid total disability compensation at the rate of \$1,070.67 per week from June 1, 2006, through the present. *Id.*
7. Claimant reached maximum medical improvement with regard to his shoulder injury on October 7, 2008. *Id.*
8. Claimant has not returned to his usual job. *Id.*

### **ISSUES**

1. Nature and extent of Claimant's disability. AX 9.
2. Whether Claimant is entitled to reimbursement for medical expenses including mileage. *Id.*
3. Whether Claimant is entitled to Section 7 medical benefits for his alleged psychological condition. *Id.*
4. Whether Respondents must pay attorney's fees and interest on the compensation award, if any. *Id.*
5. Whether Respondents are entitled to relief under Section 8(f) of the Act. *Id.*

## FINDINGS OF FACT

### *Claimant's Testimony*

The Claimant is a 51-year-old man who has worked as a truck driver since he graduated from high school. TR at 26-28. Claimant was hired by SEII to work for twelve months in Iraq as a truck and bus driver.<sup>1</sup> *Id.* at 28-29. He arrived in Iraq at the end of January, 2006. *Id.* Claimant stated that he was assigned to one of the more violent areas of Iraq where he drove outside of the perimeter wire carrying various goods on flat bed trucks. *Id.* at 29-30.

Claimant testified that he was in an automobile accident in 1975 leaving him unconscious for 23 days. *Id.* at 31. He stated that he did not suffer any serious injury to his shoulder in that accident. *Id.* at 30-31. He stated that he also injured his back, arms and shoulders in an accident stacking concrete blocks on a trailer in June of 2005, but was released to return to full duty in less than three months. *Id.* at 32. Claimant testified that he passed SEII's pre-employment physical and worked without any restrictions until the date of his accident on May 28, 2006. *Id.* at 32-33. Claimant stated that he injured his right shoulder on May 26, 2006, when he was pulling himself up to the driver's seat of a bus by the steering wheel when he felt a pop in his shoulder. *Id.* at 33. Claimant was sent home two days later. *Id.*

Claimant had an MRI of his shoulder done about a month after returning home and then had surgery performed on his right shoulder by Dr. Jennings on August 17, 2006. *Id.* at 33-34. Claimant testified that he did pretty well following the surgery until after a couple of months when he felt another pop in his right shoulder while doing his prescribed physical therapy. *Id.* at 34. Claimant had another MRI arthrogram on December 11, 2007, which revealed another tear in the right shoulder which Dr. Jennings initially treated with shots for the pain before recommending further shoulder surgery. *Id.* at 35. Claimant testified that no doctor has strongly recommended further shoulder surgery as the success of further surgery is questionable. *Id.* at 36.

Claimant stated that he has intermittent pain which prevents him from doing much although he tries to do some work in his garden. *Id.* at 37. He stated that he is right-handed but has had to learn to do more with his left hand. *Id.* Claimant takes a blood pressure medication due to his weight as well as Wellbutrin for depression and a medication to help with sleep. *Id.* He also takes Ambien for sleep on some difficult nights. *Id.* at 38. Claimant testified that he also takes Naproxen for pain and Tramadol which were prescribed by Dr. Jennings. *Id.* He stated that Dr. Boley, his psychiatrist, prescribed the Ambien and his other sleep aide, while the Wellbutrin was prescribed by his family doctor, Dr. Blattman. *Id.* at 38-39. Dr. Blattman referred Claimant to Dr. Boley for his moodiness and irritability. *Id.* at 39. Claimant admitted some benefit to seeing Dr. Boley about every four weeks and the medication Dr. Boley has prescribed. *Id.* Claimant testified that he has incurred expense in seeing Dr. Boley which Respondents have not paid as well as some unreimbursed mileage expenses for seeing Dr. Jennings. *Id.* at 40; CX 3. Claimant stated that he has gained about 50 pounds due to some of his medications and his physical inactivity. TR at 40-41.

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<sup>1</sup> SEII was under contract with the United States military to provide support services to the troops stationed in Iraq.

Claimant testified that he contacted all of the potential employers listed in the vocational report furnished by Respondents. *Id.* at 45. He stated that Pro Security Group told him it was not hiring. *Id.* at 45-46. Claimant testified that he had trouble walking for long periods due to his having gained almost 100 pounds since he went overseas although he could not recall ever taking to any doctors about restrictions on walking. *Id.* at 46-47, 62-63. He stated that Labor Ready had no jobs nor did the City of Waco although the City indicated it might have dispatcher jobs available in about a year. *Id.* at 47. He stated that he got neither response from Silverhawk Security nor any return call from Cargill. *Id.* at 47, 51. Claimant testified that neither Waco U-Pull-It Auto Parts nor Jack of All Trades were currently hiring. *Id.* at 47-48. He stated that the job at Radio Shack as a sales associate required walking the floor for eight hours which he can not perform due to his weight. *Id.* at 48. He stated that the City of Lacy Lakeview had no openings and that the Waco Tribune had closed down and moved from Waco to Austin. *Id.* Claimant testified that he could not type nor do computer work so could not work for Convergys in McGregor, Texas. *Id.* at 49. He stated that neither Guardsmart Security nor TPS Auto Parts had openings. *Id.* Claimant noted that Dr. Jennings had restricted his driving such that he could not perform a delivery truck driver job. *Id.* at 49-50. Claimant stated that he drove only about four miles each way to visit his wife at her job. *Id.* at 50. Claimant testified that he was told by Kelly Services that the assembly jobs involved standing all shift such as stacking cases of Cokes onto pallets which Claimant could not physically perform. *Id.* He stated that neither Job Link nor Woodway Public Safety had openings. *Id.* at 50-51. Claimant testified that he did not contact Bird Kultgen Ford as he did not believe he would be a good car salesman due to his irritability and having to stand for long periods. *Id.* at 51-52. Claimant testified that he might be able to work as a hot shot driver if he had the money to buy a truck although he did not know whether he could pass a DOT physical with the medications he is taking. *Id.* at 52. He also thought he might be able to teach truck driving but noted that the only truck driving school in the area now had only three instructors compared to the 27 or 28 instructors working there when Claimant taught in the 1980's. *Id.* at 52-54.

Upon cross-examination, Claimant admitted that in his deposition he had testified that all of his driving in Iraq was inside the wire. *Id.* at 56-57. Claimant explained that his first two weeks in Iraq he drove outside the perimeter but then was reassigned to driving a bus inside the perimeter as he was one of the few drivers who had a "P" endorsement. *Id.* at 90-91. Claimant agreed that he was receiving worker's compensation payments from his accident stacking blocks on a trailer with Hillin Sand and Gravel from June 16, 2005, through July 24, 2005. *Id.* at 58-59, 62; RX 23 at 5-9. He had no explanation why he had applied for work with Ferguson on June 30, 2005, without listing his employment with Hillin on his application to work for Ferguson. TR at 59-60; RX 24. Claimant then testified that he must have applied with Ferguson because the doctor told him that he was going to release him to return to work. TR at 60-61.

Claimant testified that he did not apply for any jobs until he received the vocational report of Respondents since he did not know he had been released to return to work despite Dr. Jennings' report indicating that Claimant could return to work with restrictions. *Id.* at 63-65; CX 1 at 121. Claimant agreed that he had weighed over 300 pounds in June of 2004 but insisted that he had gotten back down to nearer his usual weight of about 220 to 230 pounds prior to going overseas to work. TR at 66-68, 88-89. Claimant stated that he had not gone to the Texas Employment Commission to inquire about jobs prior to October of 2009. *Id.* at 68.

Claimant testified that he experienced gun and mortar fire when he was landing at Balad and Mazul airports but only heard distant mortar fire while he was actually driving in Iraq. *Id.* at 69-70, 92-93. Claimant reported that he began experiencing nightmares within weeks of returning home from Iraq which he thought might be PTSD. *Id.* at 69. Claimant testified that he did not report the nightmares to Dr. Jennings and other doctors since they were treating him for his right shoulder. *Id.* at 70-71. He stated that he did not report nightmares to Dr. Drazner in July of 2007, because Dr. Drazner was "from some other country, I'm not going to tell him nothing." *Id.* at 72. Claimant did not recall Dr. Drazner asking him about any psychological complaints despite Dr. Drazner reporting psychologically Claimant had no complaints. *Id.* at 73; CX 1 at 43. Claimant testified that he was not aware that his Functional Capacity Evaluation of March 25, 2009, did not place any restrictions on standing or walking. TR at 73-74; RX 6. Claimant had no explanation as to why the FCE testing was invalid for his left hand just as it was for his injured right upper extremity. TR at 75-76; RX 6. Claimant testified that he did not recall telling Dr. Hinojosa that he wasn't interested in returning to work as it might jeopardize his claim. TR at 76-77. He admitted he may have asked Dr. Hinojosa for Hydrocodone as that was the only medication that relieved his pain prior to his receiving Tramadol which has also worked for his pain relief. *Id.* at 77. Claimant stated he did not think much of Dr. Hinojosa although he could not remember who referred him to Dr. Hinojosa. *Id.* Claimant did recall telling Dr. Hinojosa that he did not want to take further physical therapy in late 2007 because it hurt too much. *Id.* at 77-78. Claimant testified that he refused to take Tramadol when Dr. Hinojosa suggested it in place of the narcotic Hydrocodone because he was unfamiliar with Tramadol at that time. He did later start taking Tramadol upon Dr. Jennings' advice. *Id.* at 78-79. Claimant has had no shoulder surgery in 2008 or 2009 and has taken no physical therapy in 2009. *Id.* at 80.

Claimant has applied for Social Security disability twice since this accident but has been refused on the basis that there is other work he can perform. *Id.* at 80-82; RX 12A. Claimant stated that he could perform some type of work if it complied with his doctor's restrictions and did not require him to stand for long periods of more than thirty to forty-five minutes. TR at 83-84. Claimant stated that he contacted the employers listed in the vocational report only one time each. *Id.* at 85. Claimant admitted that the surveillance tapes show him mowing his lawn on a riding mower and operating his ski boat. *Id.* at 85-86. Claimant testified that his wife actually loads the ski boat onto the trailer and also does most of the maintenance on the boat although the surveillance tape depicts Claimant performing some maintenance on the boat. *Id.* at 87. Claimant agreed that he is able to mow his lawn, work in the garden, ride his motorcycle, clean out his garage and that he does not take any narcotic medications. *Id.* at 87-88.

#### *Testimony of Claimant's Wife*

Claimant's wife testified that she met Claimant in November of 2002 and that they were married in March of 2005. TR at 14. She stated that prior to his injury, Claimant had been happy and in a good mood and enjoyed being around others. *Id.* at 16. She testified that upon his return from overseas, Claimant was irritable with mood swings and no longer enjoyed working in the yard or around the house. *Id.* at 16, 19. Claimant's wife stated that they no longer went out dancing, shot pool or rode motorcycles. *Id.* She testified that Claimant had no right shoulder complaints in the six months prior to his going to Iraq although Claimant did miss about two and a half months of work after injuring his back stacking blocks in June of 2005. *Id.* at 17. She stated that she knew Claimant had a bad motorcycle accident in 1975 where he was in a coma for

almost a month but was not aware of any other accidents. *Id.* at 18. Claimant's wife testified that although Claimant had occasionally mumbled or giggled in his sleep prior to his accident, Claimant now yelled out in his sleep much worse than before. *Id.* at 19. She stated that Claimant had been seeing a psychologist, Dr. Boley, at his own expense. She testified that Claimant was somewhat better following trials of several different medications but that Claimant had gained 40 to 50 pounds in the past year as a side effect of the medications and his physical inactivity due to his shoulder. *Id.* at 20. Claimant's wife noted that although Claimant continued to ride his motorcycle, and had bought a new motorcycle since his return from overseas, Claimant was unable to ride the motorcycle for long distances. She also noted that Claimant could steer his ski boat but had not actually skied since his return. *Id.* at 21-25.

### ***Summary of Medical Evidence***

#### ***Dr. Jerry A. Benham***

Claimant was seen by Dr. Jerry A. Benham at the emergency room in Waco, Texas on November 25, 2001, complaining that he injured his right knee "when he fell." RX 9 at 10. Dr. Benham noted that claimant had two previous anterior cruciate ligament reconstructions on the right leg; and Dr Benham then performed a repair of Claimant's right patella tendon. *Id.* at 8. In Dr. Benham's follow up report of December 3, 2001, he reported that Claimant stated he had injured himself in an automobile accident near New Braunfels when a car struck him from the rear at 70 miles per hour. *Id.* at 6. Dr. Benham noted that Claimant complained of pain in his neck and shoulder as well, particularly on the left side. *Id.* On February 7, 2002, Dr. Benham again repaired Claimant's right patellar tendon. *Id.* at 5. On December 13, 2005, Dr. Benham again saw Claimant for left ankle pain which interfered with his walking and standing. *Id.* at 1. Dr. Benham noted that Claimant had a left tibia fracture in 1976 and had since developed posttraumatic arthritis in his left ankle. *Id.* Dr. Benham prescribed Claimant Relafen and recommended weight loss. *Id.*

#### ***Dr. Cathryn D. Burbridge***

Dr. Cathryn D. Burbridge saw Claimant on March 4, 2003, for complaints of tenderness in the "left paracervical area extending into the left trapezius area." RX 16 at 1. She prescribed Claimant Lodine and use of moist heat and light massage and instructed Claimant to return if he had any worsening of symptoms in his upper extremities. *Id.*

#### ***Dr. Timothy W. Schiller***

Claimant was seen by Dr. Timothy W. Schiller in Waco, Texas on June 11, 2004. RX 20. Claimant's weight was recorded as 307 and ½ pounds. *Id.* Claimant was taking medication for hypothyroidism and had been offered dietary counseling but he refused the referral indicating that he wanted Phentermine or some other dietary medication. *Id.* Dr. Schiller refused to prescribe Phentermine and referred Claimant for an endocrinology consult. *Id.*

#### ***Scott and White Occupational Medicine Clinic***

On June 9, 2005, Claimant initially saw physician's assistant Paul Gonzalez at Scott and White Occupational Medicine Clinic whom he told he was moving bricks when he "felt something strain and just kind of go all the way up and down his back." RX 18 at 4. Claimant gave a history

of chronic neck pain for the last 15 years. *Id.* Gonzalez prescribed pain medication and muscle relaxants and restricted his work activities. *Id.*

Claimant was seen on several occasions at Scott and White Occupational Medicine Clinic for further treatment following his June 9, 2005 accident. On July 25, 2005, Dr. Don A. Mackey noted that Claimant had improved with shoulder and thoracic injections but that claimant still had range of motion difficulty which claimant noted when doing anything other than driving such as strapping, tarping and stacking loads. *Id.* at 1. Claimant indicated to Dr. Mackey that he was contemplating changing jobs so that he only had to drive and did not have to handle loads. *Id.* at 2.

*Physical Therapist Brent Dunbar*

Claimant was initially evaluated by physical therapist Brent Dunbar on June 13, 2005 in Waco, Texas following a work injury in which he had to restack 260 concrete blocks after hitting his brakes to avoid a vehicle that pulled out in front of him. RX 6 at 7. Claimant complained of pain in his back and right shoulder and had significantly reduced range of motion in the right shoulder. *Id.* A two week program of physical therapy was recommended to increase Claimant's range of motion and strength in his right shoulder. *Id.* at 8.

*William E. Blair, Jr.*

Dr. William E. Blair, Jr., a board certified orthopedic surgeon, issued a "Final Medical Report" regarding his treatment of Claimant's right shoulder following his work related accident of June 9, 2005 when he injured his right shoulder stacking concrete blocks. RX 17 at 2. Dr. Blair opined that claimant had suffered a tendinitis/bursitis impingement symptom complex which had resolved with conservative treatment and subacromial injection. *Id.* Dr. Blair noted that Claimant had experienced "residual pain and discomfort" in his right shoulder in late August, 2005, when he was starting his lawn mower. *Id.* Claimant reported to Dr. Blair that he had switched employers and wanted an impairment evaluation even though Dr. Blair advised an MRI should Claimant's right shoulder symptoms increase in the future. *Id.* at 3. Dr. Blair noted that the lawn mower incident "obviously had irritated his underlying process" and suggested that Claimant could follow up "under his own insurance if necessary." *Id.* Dr. Blair thereafter assigned a 4% whole body permanent partial disability rating or 9% to the right upper extremity based solely on diminished range of motion. *Id.* at 4. Dr. Blair noted there were some mild degenerative changes over the AC joint but motor strength and sensory parameters were normal. *Id.* at 5.

On October 3, 2005, Claimant returned to see Dr. Blair reporting that Naprosyn had "not only resolved many of the symptoms associated with his shoulder, but other arthritic joints in his body." *Id.* at 1. Claimant was found to have the same diminished range of motion but normal strength and very little crepitus. *Id.* Dr. Blair noted that claimant had changed jobs and no longer engaged in "his previous work activities" which Dr. Blair opined may have played "some positive role in his diminished residual symptom complex." *Id.* Dr. Blair recommended Claimant use the Naprosyn only when necessary and continue a home exercise program. *Id.*

*Dr. Scott Blattman*

Claimant saw Dr. Scott Blattman in Waco, Texas on December 28, 2005, prior to claimant leaving for Houston for training prior to deployment to Iraq. RX 19. Claimant reported

that he had been experiencing fatigue and weight gain. *Id.* at 1. Dr. Blattman noted Claimant's weight as 288 pounds and he recommended Claimant improve his diet and exercise and take his medications regularly to control his essential hypertension. *Id.* at 2.

*Dr. Camille Hinojosa*

On June 14, 2006, Dr. Camille Hinojosa, of Hillcrest Baptist Medical Center in Waco, Texas, evaluated the Claimant for right shoulder pain following his return from Iraq on about June 1, 2006. CX 1 at 7. Claimant indicated he was anxious to receive treatment so as to return to work in Iraq within 60 days or other wise he might lose his job in Iraq. *Id.* Dr. Hinojosa ordered an MRI which was performed on June 22, 2006, indicating a right shoulder rotator cuff tear and bursitis. *Id.* at 11; JX 1. Dr. Hinojosa recommended Claimant see an orthopedic surgeon for repair. CX 1 at 11, 12.

Dr. Hinojosa saw Claimant again on September 27, 2007, when Claimant was seeking primarily pain medication. JX 5 at 1. Claimant related that he had been denied further surgery by Respondents and had been advised that he may have to go to court to receive back pay and medical treatment and that he should remain on disability without seeking employment until then. *Id.* Claimant stated he was depressed since he was not working and felt that perhaps the physical therapy had caused "something to come loose in the shoulder." *Id.* Dr. Hinojosa prescribed Claimant non-narcotic pain medication rather than the Hydrocodone he sought. *Id.* at 2. She also encouraged Claimant to seek employment to relieve his depression and she gave work limitations including no more than two hours of reaching, no reaching overhead and lifting no more than 10 pounds. *Id.* On November 1, 2007, Claimant returned to see Dr. Hinojosa complaining that the Tramadol she had prescribed did not work and the Naprosyn made him nauseous. Dr. Hinojosa discontinued both medications and refilled Claimant's Hydrocodone. RX 7.

*Dr. Bryan S. Drazner*

On July 10, 2007, Dr. Bryan S. Drazner, who specializes in physical medicine and rehabilitation and pain management, evaluated Claimant at the request of Respondents. RX 10; JX 4 at 1. Dr. Drazner performed a thorough review of Claimant's medical records as well as a complete physical examination. He concluded that Claimant had suffered a work-related tear of his right rotator cuff which was most likely superimposed upon pre-existing tear of the rotator cuff. Dr. Drazner opined that further MRI arthrogram of the right shoulder was indicated but that any further surgery should be performed by a shoulder orthopedic surgeon rather than by Dr. Jennings, a general orthopedic surgeon. JX 4 at 7. Dr. Drazner concluded that Claimant was capable of driving a vehicle but should not engage in significant loading or unloading and that a functional capacity evaluation be performed once Claimant had stabilized. *Id.* at 8.

A MRI arthrogram was taken of Claimant's right shoulder on December 11, 2007 at Dr. Drazner's direction. JX 6 at 1. The MRI study revealed:

1. Complete tears of the supraspinatus and infraspinatus tendons with musculotendinous retraction and fatty atrophy.

2. Extensive partial articular surface tear of the subscapularis tendon.
3. Subluxation of the long head of the biceps tendon with tendinopathy within the intra-articular portion.

JX 6 at 2.

Dr. L.D. Jennings

On July 25, 2006, Dr. L.D. Jennings evaluated the Claimant on referral from Dr. Hinojosa. Dr. Jennings examined Claimant and reviewed the June 22, 2006 right shoulder MRI and recommended surgical repair of the right rotator cuff as soon as authorization could be obtained from the Carrier. JX 2. On August 14, 2006, Dr. Jennings saw Claimant for a pre-operative visit and warned Claimant that his expected recovery from surgery would be 9 months to a year and that there was a possibility that he could re-tear the rotator cuff and perhaps require shoulder replacement surgery in the future. CX 1 at 14.

On August 17, 2006, Dr. Jennings performed surgical repair on Claimant's right shoulder which he termed "extremely difficult repair of large global rotator cuff tear, completely retracted, performed through an open incision." JX 3 at 1. Dr. Jennings continued to see Claimant in surgical follow up and started Claimant on physical therapy in early November of 2006. CX 1 at 15-18. On December 5, 2006, Dr. Jennings noted some continuing pain being experienced by Claimant as well as limited range of motion of the repaired shoulder. *Id.* at 19. On January 3, 2007, Dr. Jennings again saw Claimant and noted that although the surgical repair was successful, his prognosis for Claimant was guarded due to the large tear and "the length of time he was forced to go without having his repair." *Id.* at 20. On a February 7, 2007 examination of Claimant, Dr. Jennings noted Claimant had some increasing pain and loss of motion which he opined was secondary to tendonitis of the shoulder. *Id.* at 21. By May 2, 2007, Dr. Jennings was concerned due to the lack of Claimant's progress that Claimant may have a re-tear of his rotator cuff and ordered a MRI arthrogram of the right shoulder. *Id.* at 25. A right shoulder MRI performed on Claimant on May 23, 2007, revealed "large recurrent tear of the rotator cuff and rotator cuff repair." *Id.* at 27. Thereafter, on June 6, 2007, Dr. Jennings saw Claimant and advised a further right shoulder surgery to visualize the rotator cuff and perform any repair necessary which Dr. Jennings scheduled for June 28, 2007. *Id.* at 29.

Dr. Jennings apparently next saw Claimant on August 12, 2008 when he noted that Claimant had been denied further treatment for his right shoulder including the surgery recommended by Dr. Jennings in June of 2007, and further opined that such surgery would probably be unsuccessful since too much time had elapsed which Dr. Jennings termed as "criminal" conduct. JX 7. Dr. Jennings initiated injections in the right shoulder and continued medication. *Id.* On September 9, 2008, Dr. Jennings again saw Claimant with a diagnosis of re-tear of the rotator cuff and severe biceps tendonitis. CX 1 at 44. Dr. Jennings prescribed anti-inflammatory medications and physical therapy and opined that Claimant was totally disabled. *Id.* Dr. Jennings injected Claimant's right bicep again on October 7, 2008. *Id.* at 53. On November 4, 2008, Dr. Jennings reported that Claimant was too young for shoulder replacement surgery but could benefit from biceps tenodesis although he recommended waiting as Claimant

was making some progress. *Id.* at 59. On December 2, 2008, Dr. Jennings reported that he felt Claimant needed a reverse shoulder procedure in order "to give him some more options for use of that arm because at the present time, I think that he is completely disabled. *Id.* at 67. On December 10, 2008, Dr. Jennings completed a Work Capacity Evaluation in which he opined that Claimant could work zero hours per day indefinitely and that claimant had reached MMI. *Id.* at 72. Dr. Jennings noted that Claimant could not push, pull, lift, squat, kneel, climb nor reach at all during a work day and that Claimant should not drive for work. *Id.* Dr. Jennings again saw Claimant on February 9 and on April 14, 2009, with continuing complaints of pain and weakness of the right shoulder for which Dr. Jennings suggested possible further surgery in the future. *Id.* at 78, 81. On April 14, 2009, Dr. Jennings completed another Work Capacity Evaluation in which he indicated that Claimant could perform work with restrictions against reaching and reaching above the shoulder; operating a motor vehicle at work; lifting over 20 pounds; and no pushing, lifting, squatting, kneeling or climbing. *Id.* at 82.

*Dr. Benzel C. MacMaster*

Dr. Benzel C. MacMaster, a board certified orthopedic surgeon, saw Claimant on February 9, 2009, for a "Required Medical Exam." RX 9 at 1; JX 8 at 1. Dr. McMaster performed an examination of Claimant and reviewed his MRI studies. He concluded that Claimant had suffered a tear of his right rotator cuff and now suffered from osteoarthritis in the right shoulder. JX 8 at 4. Dr. MacMaster opined that claimant was not a candidate for further surgery to his shoulder, primarily due to his young age and thus was at MMI. *Id.* Dr. MacMaster concluded that Claimant could perform work that did not require repetitive motion with the right shoulder, any lifting with the right hand or any reaching above shoulder height. *Id.* at 5. Dr. MacMaster also noted that he had viewed surveillance video of Claimant showing Claimant getting into and driving an auto and motorcycle with no demonstrative pain behavior while performing these activities. *Id.*

In a September 25, 2009 report, Dr. MacMaster addressed several issues raised by Respondents' counsel. RX 9. Dr. MacMaster opined that Claimant had a 12% impairment to the upper extremity due to loss of motion as compared to the 9% impairment noted by Dr. Blair in his report of September 6, 2005. *Id.* at 4. Dr. MacMaster further opined that Claimant could perform many of the work duties within the light category "as long as they do not require overhead reaching, repetitive reaching with his right upper extremity or climbing on ladders which would require him to extend his right arm above his head. *Id.* Dr. MacMaster also noted that Claimant had aggravated a pre-existing injury to his right shoulder in Iraq since the initial MRI in June of 2006 indicated muscle atrophy which could not have occurred in a period of less than a month, thus indicating pre-existing neurovascular injury to Claimant's right shoulder. *Id.* at 5. Dr. MacMaster opined that Claimant would be better capable of using his right shoulder had there not been the pre-existing injury noting that Dr. Jennings could most likely have effected a better repair of the rotator cuff had the pre-existing injury not led to the atrophic tissue in Claimant's shoulder. *Id.* In a follow up letter prepared by Respondents' counsel, Dr. MacMaster indicated his agreement that Claimant would have lesser work restrictions had there not been the pre-existing injury to his right shoulder, specifically, that Claimant would be able to perform light work with no overhead restrictions. *Id.* at 3.

*Dr. Scott E. Blattman*

On August 1, 2008, Claimant was examined by Dr. Scott E. Blattman, a physician with Hillcrest Clinic Bosque in Waco Texas. CX 1 at 30. Claimant reported to Dr. Blattman that he had anger and depression that had been present since he returned from Iraq. *Id.* at 31. Claimant described having insomnia and dreams of bombs and gunfire at night. *Id.* Dr. Blatt diagnosed Claimant with PTSD and depression and recommended Claimant see a professional psychologist. *Id.* at 32. Dr. Blattman continued to follow Claimant periodically and prescribed anti-depressant medication as well as ambient for sleep. *Id.* at 38-43. Dr. Blattman noted Claimant's complaints of fatigue and weight gain on several occasions in 2008 but noted that claimant had not followed his recommended treatment regimen of diet and exercise. *Id.* at 50. On September 30, 2008, Claimant reported to Dr. Blattman that he was a little better taking Prozac but still had a problem with sleeping. *Id.* at 52.

Dr. Jason M. Boley

On October 21, 2008, Claimant saw Dr. Jason M. Boley at the DePaul Clinic in Waco, Texas. Claimant gave a history of having PTSD for two years since he returned from Iraq. CX 1 at 55. Claimant reported that he had been increasingly irritable and moody with lapses in attention. He stated that he only slept one and a half to two hours each night and had nightmares each night about "guns going off and bombs blowing up." *Id.* Claimant told Dr. Boley that he did not suffer any specific traumatic event in Iraq, but rather related it to "7 ½ months of driving trucks in a convoy under gun and mortar fire..." *Id.* Claimant reported that he was under stress from being unable to work and due to the difficulty in healing of his right shoulder. *Id.* Claimant reported that his father had PTSD. *Id.* at 56. Dr. Boley diagnosed Claimant with chronic PTSD as a result of his work in Iraq and Major Depressive Disorder, Single Episode, Mild to Moderate, based on his physical problems and inability to work. *Id.* at 56. Dr. Boley increased Claimant's dosage of Prozac and urged that claimant take Ambien for sleep. *Id.* at 57. At the urging of Claimant's attorney, Dr. Boley suggested Claimant take an MMPI for purposes of his disability claim. *Id.* On November 11, 2008, Dr. Boley reported that Claimant was under his care for PTSD "as a result of his experiences in Iraq" and noted that his symptoms likely "contribute to his declining physical health." *Id.* at 60.

Dr. Boley continued to treat Claimant weekly through November and December of 2008. *Id.* at 61-71. On December 9, 2008, Dr. Boley completed a psychiatric work capacity evaluation indicating that Claimant was unable to work at all due to his PTSD and particularly noted that "exposure to any aspect of the trauma he experienced (e.g., driving a truck) is likely to exacerbate his symptoms." *Id.* at 71. Dr. Boley did indicate that he felt Claimant would improve and be able to work an eight hour day within three months. *Id.* The last visit noted with Dr. Boley on February 10, 2009, indicated no improvement with PTSD and that Claimant's medications were being increased. *Id.* at 80. Dr. Boley reported on April 29, 2009, that he could not rule out "the possibility of malingering" as suggested by Dr. Yohman's report without further testing by a psychologist. JX 13.

Dr. J. Robert Yohman

On March 30, 2009, the Claimant saw Dr. J. Robert Yohman, a board certified neuropsychologist at the request of Respondents. RX 4 at 1; JX 9 at 1. Dr. Yohman reviewed Claimant's medical treatment records, interviewed Claimant and administered a battery of

psychological tests to Claimant. JX 9 at 1. On the basis of this information, Dr. Yohman opined that claimant was suffering from a Pain Disorder with Both Psychological Factors and a General Medical Condition, that is, his recurrent right rotator cuff injury. *Id.* at 7. Dr. Yohman opined that Claimant was not suffering from Post Traumatic Stress Disorder (PTSD) as he did not report any PTSD symptoms until January of 2008 and his symptoms were more indicative of his inability to control the shoulder pain than any emotional distress related to the work conditions in Iraq. *Id.* at 7-8. Dr. Yohman noted that his test results showed a tendency on the part of Claimant to exaggerate his symptoms which could reflect motives of secondary gain. *Id.* at 8-9. Dr. Yohman reported that Claimant was most in need of pain management which he felt would relieve most, if not all, of Claimant's depression and irritability. *Id.* Dr. Yohman opined that Claimant's pain complaints were his primary barrier to work and that there were no psychological barriers to his performing any work that his physical limitations would allow. *Id.* at 10-11. Dr. Yohman also noted that Claimant denied that his father had PTSD as claimant had told Dr. Boley. *Id.* at 4.

### ***Labor Market Survey***

Respondents have submitted a thorough labor market survey, authored by William L. Quintanilla, a Certified Rehabilitation Counselor. RX 11 at 37-40. In drafting the survey, Mr. Quintanilla interviewed Claimant on May 20, 2009. *Id.* at 40. He also had access to personnel, wage and medical records. *Id.* at 40-41. Mr. Quintanilla summarized Claimant's medical, social and employment history. *Id.* at 41-46.

Based on the opinions of Drs. Jennings and MacMaster, Mr. Quintanilla concluded that Claimant could not return to work as a bus driver or truck driver, both of which are classified in the medium exertional level. *Id.* at 46. Mr. Quintanilla did conclude that Claimant should be capable of employment at many jobs within the light exertional level which would not require extensive overhead use of the right upper extremity. *Id.* He identified jobs that he thought Claimant could appropriately perform, taking into consideration Claimant's age, education, work history, transferable skills, physical limitations, and work restrictions. *Id.* at 47-51. Given Claimant's work history and current residence, Mr. Quintanilla focused his search on the Waco, Texas area *Id.*

Mr. Quintanilla first performed a historical labor market survey to identify specific job openings available from August 12, 2008 through December 31, 2008. These identified positions included: law enforcement dispatcher for the City of Lacy Lakeview, Texas, and also for Woodway, Texas; outside sales person for the Waco Tribune; customer service associate for Convergys in McGregor, Texas; non-commissioned security guard for Guardsmark and for Silver Hawk Security; parts delivery driver for TPS Auto Parts in Waco, Texas; production worker for Kelly Services in Waco, Texas; assembler for Job Link in Waco, Texas; and car salesman for Bird-Kultgen Ford in Waco, Texas. *Id.* at 47-49. These positions had starting wages between \$7.25 and \$11.63 per hour. *Id.*

Mr. Quintanilla also identified job positions for Claimant as of the time of his October 6, 2009 report. These job positions included: non-commissioned security guard for Pro Security Group, Inc. at \$8.00 to \$10.00 per hour and for Silver Hawk Security/Cargill at \$7.25 per hour; telemarketer for Labor Ready at \$9 to \$11 per hour; dispatcher for Waco Police Department at \$10.97 per hour; counter sales clerk for Waco U-Pull-It Auto Parts at \$9 per hour; assembler for

Jack of All Trades at \$8 to \$10 per hour; and sales associate for Radio Shack at \$7.25 to \$10.00 per hour. *Id.* at 49-51.

In an addendum report dated October 7, 2009, Mr. Quintanilla noted that Dr. MacMaster had indicated that if Claimant had not had a pre-existing injury to his right shoulder, then Dr. MacMaster felt that Claimant's work restrictions would limit him to light work but without restrictions against working overhead. *Id.* at 54. Based on that opinion by Dr. MacMaster, Mr. Quintanilla opined that under that scenario, Claimant would have been able to perform a wider range of light work including such jobs as office cleaner, selective assembly jobs, mail clerk and selective light painting jobs with entry-level wages up to \$10.86 per hour and mean wages up to \$15.76 per hour. *Id.* at 26-28, 54-55. Mr. Quintanilla referenced figures from the Texas Workforce Commission on wages by profession which indicated starting wages for such positions ranging from \$6.77 to \$10.86 per hour and mean wages from \$7.72 to \$15.76 per hour. *Id.* at 53.

### ***Deposition Testimony of William Quintanilla***

William Quintanilla is a Certified Rehabilitation Counselor. RX 11 at 5. He has testified many times and currently splits his practice about 60% for the defense and 40% for the plaintiff. *Id.* at 5-6. He holds a Master's Degree and has worked for the Texas Rehabilitation Commission, Veterans Administration and the U.S. Department of Labor as a vocational rehabilitation counselor. *Id.* at 6-8. Mr. Quintanilla testified that he considered the psychological components of Claimant's claim in arriving at his reports. *Id.* at 8-9. He stated that he personally met with Claimant for several hours at Claimant's home prior to preparing his report. *Id.* at 10. Mr. Quintanilla testified that he relied upon Dr. Jennings' work restrictions as well as those of Dr. MacMaster and the FCE performed on Claimant as all essentially confirmed Claimant's restriction to light work with restricted repetitive overhead work. *Id.* at 12-13. He confirmed that he had reviewed Claimant's prior medical reports indicating his right shoulder injury in June of 2005 and the doctor's assignment of a 4% whole person impairment. *Id.* at 15-17. Mr. Quintanilla stated that Claimant seemed very interested in returning to work and that he had referred Claimant to the Division of Assistive Rehab Services of the Texas Rehabilitation Commission and to the Texas Workforce Commission to aid him in searching for work. *Id.* at 18-19. Mr. Quintanilla testified that he believed Claimant was capable of employment at a number of light and sedentary jobs that did not require repetitive overhead work such as those identified in his labor market survey. *Id.* at 20-24.

Mr. Quintanilla noted that although Dr. Yohman had opined that psychologically Claimant could return to his former job as a truck driver, Mr. Quintanilla recognized that the physical restrictions imposed upon Claimant by Drs. Jennings and MacMaster would preclude such return to work as a truck driver. *Id.* at 28-29. Mr. Quintanilla stated that he had noted improvement in Claimant's psychological condition through therapy and medications and would expect even further improvement if Claimant returned to work as that would add stability to his emotional situation. *Id.* at 29-30. He did agree that some of the positions which he identified for Claimant may be less appropriate if Claimant is uncomfortable with public contact such as sales positions. *Id.* at 31. Mr. Quintanilla did not believe that Claimant's lack of work for the past three years would be a detriment to his obtaining an entry level unskilled position such as those contained in his report. *Id.* at 31-32. He testified that although unemployment is high, he has always been able

to find entry level unskilled job openings such as those set out in his report. *Id.* at 33. Although the job categories identified in his report do not specify exactly how many such openings are available, Mr. Quintanilla stated that there are quite a few such jobs statistically. *Id.* at 34.

### ***Other Documentary Evidence***

Respondents' records indicate that Claimant has been paid total temporary disability benefits from June 1, 2006, to September 30, 2009, initially at the rate of \$500.00 per week which was later adjusted to \$1,070.67 per week. RX 22.

### ***Surveillance Tape***

Surveillance tape of Claimant and reports of the investigators retained by Respondents were submitted for dates of surveillance including April 17, 18, 21 and 22, 2007; January 15, 16, 17, 28, 29, and February 1, 2009; and June 11, 12 and 13, 2009. RX 8.<sup>2</sup> The surveillance shows Claimant performing a number of activities including mowing his lawn on a riding lawnmower, driving a car and motorcycle, washing and performing routine maintenance on his car, boat and motorcycle, and other activities involving walking, sitting, occasional bending and even kneeling. The surveillance reports indicate many hours of surveillance during which Claimant was apparently inside of his home. On several occasions, the tapes show Claimant performing activities involving some reaching with his left hand and arm. However, the investigator was apparently advised initially that Claimant had injured his left arm rather than his right arm. *Id.* at 29. This misconception persisted throughout the 13 days of surveillance. *Id.* at 14, 3. This mistaken information obviously led the investigator to point out Claimant's use of his left hand for activities such as closing his car engine hood and raising his left hand overhead to close his garage door. *Id.* at 15, 23, 30, 35. This would also explain the investigator's notations that Claimant's "motions and movements did not appear to be limited or restricted to any noticeable degree." *Id.* at 6, 9, 16, 23, 25, 27, 30, 32, 36, 38. Perhaps if the investigator had been informed that Claimant had in fact injured his right shoulder and was right handed, then the investigator may have had a different view of the surveillance, and particularly, Claimant's obvious usage of his left non dominant hand rather than his right hand for more strenuous activities. In any event, the surveillance tape does furnish some support for the various doctor's opinions that Claimant can perform light work that does not require much use of his right hand and arm.

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<sup>2</sup> I was unable to view the DVD's submitted as RX 8 apparently due to technical problems in the DVD's I was furnished. However, I did review in detail the investigator's reports and description of the various activities which I accept as accurate given Claimant's testimony at the hearing that he had reviewed the surveillance and admitted performing the actions shown. TR at 85-88. Since I find the surveillance only pertinent as additional evidence of Claimant's physical ability to perform certain types of light work, which was also conceded by Claimant in his testimony, I do not believe the inability to actually review the surveillance tapes affected any portion of this Decision and Order. *Id.* at 83-84.

## CREDIBILITY

### *Credibility of the Medical Experts*

Much turns on resolving factual disputes between the medical experts in this case. The administrative law judge determines the credibility and weight to be attached to the testimony of a medical expert whole or in part. The judge, in fact, can base one finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion. *Pimpinella v. Universal Mar.Serv., Inc.*, 27 BRBS 154 (1993)(ALJ may rely on one medical expert's opinion on the issue of causation and another on the issue of disability). Further, it is solely within the judge's discretion to accept or reject all or any part of any testimony, according to his judgment. *Perini Corp. v. Hyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969). In evaluating expert testimony, the judge may rely on his/her own common sense. *Avondale Indus., Inc. v. Director, OWCP*, 977 F.2d 186 (5th Cir. 1992).

It is nonetheless generally true that the opinion of a treating physician may be entitled to greater weight than that of a non-treating physician. See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n. 3 (2003)(rule similar to the Social Security treating physicians rule, according such physicians special deference); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998)(greater weight afforded to treating physician because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual"). A treating physician's testimony is not, however, automatically entitled to greater weight when the issue is other than the course of medical treatment to be followed. *Duhagan v. Metro. Stevedore Co.*, 31 BRBS 98 (1997). It is the judge who determines credibility, weighs the evidence, and draws inferences; the judge in fact need not accept the opinion of any particular medical examiner. See *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993)(judge determines credibility of expert and weight to attach to expert's opinion). A judge is not bound to accept the opinion of a physician if rational inferences urge a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O. Hearne*, 223 F.2d 755 (4th Cir. 1955).

### Dr. Jennings

The opinions of Dr. Jennings were credible. Nothing in the reports from Dr. Jennings justifies overturning the deference to which his opinions as treating physician are entitled. Dr. Jennings opined that Claimant had reached MMI with respect to his right shoulder injury by December 10, 2008. Dr. Jennings thereafter gave Claimant work restrictions that limited him to light work with no reaching overhead or significant use of his right hand and no significant driving. I found no other medical evidence offered herein compelling enough to controvert these opinions and thus accept them in this matter.

Dr. Drazner

I find the report of Dr. Drazner to be somewhat limited in terms of credibility. Unlike Dr. Jennings, Dr. Drazner did not examine Claimant over multiple visits. He did, however, review the pertinent medical records and agreed generally with the opinions of Dr. Jennings as to treatment of Claimant's shoulder up to that point. While he disagreed with the proposed additional surgery by Dr. Jennings on Claimant's shoulder, Dr. Jennings eventually agreed that Claimant may be better off without additional surgery. I find Dr. Drazner's opinion that Claimant's right shoulder injury was superimposed upon his pre-existing injury suffered in June of 2005 to be credible. However, I do not accept Dr. Drazner's opinion that Claimant could return to driving as long as he did not perform significant loading and unloading as that opinion appears inconsistent with the opinions of Dr. Jennings and Dr. MacMaster that Claimant should limit use of his right arm in work activities.

Dr. MacMaster

Dr. MacMaster's report was credible. Again, unlike Dr. Jennings, Dr. MacMaster did not examine Claimant over multiple visits. He did, however, review the pertinent medical records and agreed generally with the opinions of Dr. Jennings as to treatment of Claimant's shoulder up to that point. I agree with Dr. MacMaster's opinions that Claimant suffered a re-injury of his pre-existing right shoulder injury which originally occurred in June of 2005 and with the work restrictions suggested for Claimant by Dr. MacMaster as these restrictions were essentially similar to those suggested by Dr. Jennings. I am reluctant to accept Dr. MacMaster's opinion that Claimant would have lesser work restrictions regarding overhead work had he not had the pre-existing injury to his shoulder from June of 2005, as this opinion appears to be more in the nature of supposition than supported medical opinion. However, for the reasons addressed hereinafter, I find that this opinion is not determinative of the Section 8(f) issue.

Dr. Blattman

While Dr. Blattman could be considered a treating physician, his reports are primarily offered in support of his opinion that Claimant was suffering from PTSD. As Dr. Blattman is not trained in psychology or psychiatry, I give this opinion by Dr. Blattman no credence.

Dr. Boley

Dr. Boley's reports were generally credible. As a treating physician, his opinions are to be given some deference. However, I am reluctant to accept Dr. Boley's opinion that Claimant's psychological problems were partially the result of PTSD. I do agree with Dr. Boley's opinion that Claimant suffered from depression as a result of his right shoulder injury and the pain and disability which he suffered therefrom. However, I find no credible basis for the diagnosis of PTSD since Claimant made no complaint of such problems until over two years following his return from Iraq; his description of nightmares related to driving in convoys does not match Claimant's actual experience in Iraq when he worked primarily within the camp and heard gunfire and explosions only from a distance; and Claimant does not seem to have the recurrent intrusive experiences from his actual time in Iraq that are the hallmark of PTSD. Further, it appears that Dr.

Boley and Dr. Blattman simply accepted Claimant's assertion that he had PTSD rather than assessing Claimant's condition against the diagnostic criteria for PTSD. I do credit Dr. Boley's opinion that Claimant was suffering from work related depression although probably better diagnosed as a pain disorder as opined by Dr. Yohman. I also credit Dr. Boley's opinion that Claimant's psychological condition prevented his performing any work until approximately three months following Dr. Boley's visit with Claimant on December 9, 2008.

Dr. Yohman

Dr. Yohman's report was credible. Unlike Dr. Boley, Dr. Yohman did not examine Claimant over multiple visits. He did, however, review the pertinent medical records and conduct his own psychological testing. I specifically credit Dr. Yohman's opinion that Claimant suffered from Pain Disorder with Both Psychological Factors and a General Medical Condition rather than from PTSD. I agree with Dr. Yohman's opinion that Claimant's psychological difficulties arose from his difficulty in coping with the pain and disablement resulting from his significant shoulder injury rather than from PTSD. I agree that Claimant's responsiveness to therapy and medication reinforces the diagnosis of pain disorder rather than PTSD. Finally, I credit Dr. Yohman's opinion that as of the date of his report, March 30, 2009, Claimant had no work restrictions as a result of his psychological condition but rather only restrictions based on his physical injury. I find this opinion to be in accord with that of Dr. Boley who opined that Claimant should be capable of work from a psychological standpoint within three months of Dr. Boley's visit with Claimant on December 9, 2008.

Conclusion

After considering the opinions of all the physicians, I credit the opinions of Drs. Jennings, Drazner and MacMaster that Claimant suffered a recurrent injury to his right shoulder on May 28, 2006. I credit the opinions of Dr. Jennings and MacMaster that Claimant reached MMI from the right shoulder injury on October 7, 2008, and thereafter retained the physical capacity to perform light work with no overhead reaching and no significant use of the right upper extremity. I credit Dr. Yohman's opinion that Claimant suffered from a pain disorder related to his right shoulder injury and not from PTSD. I further credit the opinions of Drs. Boley and Yohman that Claimant became permanent and stationary psychologically as of March 30, 2009, and had no psychological work restrictions thereafter.

***Credibility of Vocational Expert***

Mr. Quintanilla

Mr. Quintanilla's report and testimony were credible in most respects. I accordingly find that Mr. Quintanilla identified at least four jobs that Claimant was capable of performing in his October 6, 2009 report as discussed more fully hereinafter.

### *Claimant*

Inconsistencies and reported statements to medical providers somewhat mar Claimant's credibility. Indeed, Dr. Yohman noted Claimant was not a reliable historian. CX 5 at 10-12. Certainly, Dr. Yohman pointed out inconsistencies in Claimant's reports as well as test scores which "cast bit of a shadow of doubt" on Claimant's reports of symptomology. TR at 91-92; RX A at 38-39. Even, Dr. Sussman noted some sub maximal effort on his testing. CX 17 at 399-400. However, no physician, found Claimant to be a malingerer. Thus, Claimant's credibility on these questions is of muted importance given that multiple medical doctors evaluated him and rendered opinions based, at least in part, on objective findings. Furthermore, the legal issues do not turn solely on his testimony, as discussed below. However, with respect to Claimant's efforts to obtain suitable alternative employment, I find Claimant's credibility significantly lacking as discussed hereinafter.

### **CONCLUSIONS OF LAW**

The Act is construed liberally in favored of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any particular medical or other expert witness. *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

This dispute encompasses several issues. First the parties dispute the fact of injury and causation with respect to Claimant's psychological condition. AX 9. Second, the parties dispute the nature and extent of Claimant's alleged injury. *Id.* Third is whether Claimant is entitled to reimbursement for certain medical expenses and whether Claimant is entitled to Section 7 medical benefits for psychological treatment. *Id.* Respondents furthermore seek relief under Section 8(f). *Id.* Meanwhile, Claimant seeks attorney's fees and interest. *Id.*

#### ***Fact of Injury and Causation***

The parties dispute the fact and causation of Claimant's alleged psychological injury. The causation analysis proceeds in three steps, woven into which is a discussion of the fact of Claimant's injury. First, Claimant must establish a prima facie case, thereby invoking the Section 20(a) presumption of causation. Second, Respondents may rebut the Section 20(a) presumption by producing substantial evidence tending to disprove Claimant's prima facie case. Third, if Respondents succeed in their rebuttal, then I must evaluate all of the evidence and reach a decision based on the record as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Glover v. Aerojet-General Shipyard*, 6 BRBS 559 (1977); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *but cf. Maher Terminals v. Director, OWCP*, 992 F.2d 1277, 1284-85 (3d Cir. 1993), 27 BRBS 1 (CRT) (APA prohibits application of true doubt rule to LHWCA).

#### **Prima Facie Case**

Section 20(a) entitles Claimant to a presumption that his "claim comes within the provisions of this Act." 18 U.S.C. § 920(a). To invoke this presumption, however, Claimant

must first establish a prima facie case. A prima facie case comprises two elements. Claimant must first prove that he suffered some harm or pain. *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979). He must then prove that an accident occurred or working conditions existed that could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981); *see also generally U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608, 615-17, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A..T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). Claimant bears the burden to establish each element of his prima facie case by affirmative proof; the Section 20(a) presumption provides no aid to this effort and operates only after he has established his prima facie case. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

To satisfy the harm element of a prima facie case, Claimant must offer affirmative evidence that something went “wrong within [his] human frame.” *Shoener v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 630, 632 (1978); *McGuigan v. Washington Metropolitan Area Transit Authority*, 10 BRBS 261, 263 (1979) (benefits were awarded to an employee who felt a “pop” in his back, later diagnosed as a ruptured disc, while carrying a fifty-pound tool box up a flight of stairs on an offshore oil rig). Complaints of subjective symptoms and pain may suffice as affirmative proof establishing this element. *Eller & Co. v. Golden*, 620 F. 2d 71 12 BRBS 3 (CRT) (5th Cir. 1980), *aff'g* 8 BRBS 846 (1978)) (holding claimant's subjective complaints of pain to suffice in establishing prima facie case and, in conjunction with corroborating objective evidence, to constitute substantial evidence sufficient to uphold decision below once prima facie case rebutted); *but see Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981) (citing *Mitchell v. Bath Iron Works Corp.*, 11 BRBS 770, 774 (1980)), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982) (BRB and Fifth Circuit held that claimant's subjective complaints established physical harm element of prima facie case, but without any corroborating medical evidence did not constitute substantial evidence of the same). Claimant need not show that some external force acted upon him to cause the harm, moreover. *Shoener*, 8 BRBS at 632.

To satisfy the causal element of a prima facie case, an ordinary Longshore claimant need only introduce affirmative evidence of the existence of working conditions that could conceivably have caused the harm alleged. *See Champion v. S&M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982). Under the Defense Base Act, however, the causation element is broadened, such that the requisite “working conditions” include the entire “Zone of Special Danger” created by the “obligations or conditions” of the claimant's employment abroad. *O'Keeffe v. Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Gillespie v. General Elec. Co.*, 21 BRBS 56 (1988); *Smith v. Board of Trustees, S. Ill. Univ.*, 8 BRBS 197, 199 (1978). The “Zone of Special Danger” is so broad, in fact, that it encompasses nearly any harm sustained while abroad in the employ of a covered employer, including harm that results from purely recreational activities, *e.g. O'Leary*, 340 U.S. 507; *Smith v. Board of Trustees, S. Ill. Univ.*, 8 BRBS 197, 199, or even purely coincidental disease-related harm, *e.g. Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982) (heart attack while off duty in barracks provided by employer in Thule, Greenland); *Smith*, 8 BRBS at 199 (1978)

(gastrointestinal attack during off-duty round of golf). The Ninth Circuit in fact reversed, albeit without opinion, the Board's prior view that the "Zone of Special Danger" doctrine only applies to the peculiar risks arising in foreign settings. *Preskey v. Cargill, Inc.*, 12 BRBS 917 (1980), *rev'd mem.*, 667 F.2d 1031, 14 BRBS 340 (9th Cir. 1981). Claimant's causal theory must go beyond "mere fancy," nonetheless. See *Champion v. S&M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968).

The causal element analysis also sometimes involves the natural progression doctrine, as in this case. The natural progression doctrine applies when an employee sustains harm at work whose "natural or unavoidable result" then leads to subsequent harm or aggravation outside work. *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954); *Mijangos v. Avondale Shipyards*, 19 BRBS 15, 18 (1986). The natural progression doctrine renders the employer liable for the entire disability and medical expenses arising from both injuries. *Cyr*, 211 F.2d at 457; *Mijangos v. Avondale Shipyards*, 19 BRBS at 18.

Here, testimony from Claimant and his wife as well as the opinions of both Drs. Boley and Yohman suffice to establish both the harm and causal elements of a prima facie case regarding the alleged psychiatric injury. Claimant testified that he had suffered psychological symptoms including nightmares and sleep difficulties within a few weeks of returning from Iraq. TR at 69. Claimant's wife also testified that Claimant exhibited irritability and mood swings as well as sleep difficulties upon his return from Iraq. Id. at 16, 19. Drs. Boley and Yohman both opined that claimant was suffering from a psychological condition related to his work in Iraq although they differed in their exact diagnosis. This testimony suffices to establish both the harm and causation elements of Claimant's prima facie case, especially in view of the expansive "Zone of Special Danger" doctrine.

The evidence and opinions of Drs. Boley and Yohman similarly suffice to establish a prima facie case under a natural progression theory regarding the alleged development of depression or pain disorder as a result of Claimant's physical injury to his right shoulder. Claimant and his wife testified that Claimant had no psychological difficulties prior to his accident in Iraq. Dr. Boley opined that Claimant had PTSD and Major Depressive Disorder related to his injury suffered in Iraq. While I decline to accept the diagnosis of PTSD, I do accept that Claimant developed psychological symptoms whether termed depression, as opined by Dr. Boley, or pain disorder, as diagnosed by Dr. Yohman. Under either theory, Claimant's psychological symptoms appear clearly related to his right shoulder injury suffered in Iraq and his difficulty in adjusting to the pain and disablement accompanying that injury. Claimant thus plausibly has linked his psychological condition to his work-related right shoulder injury. This again is all the Act requires at the prima facie level. Claimant thus more than satisfies his Section 20(a) burden.

### Rebuttal

An Employer may rebut the Section 20(a) presumption by presenting substantial evidence tending to sever the potential connection between the disability and the work environment. *Hensley v. Washington Metro. Area Transit Auth.*, 655 F.2d 264, 267, 13 BRBS 182, 185 (D.C. Cir. 1981), *rev'g* 11 BRBS 468 (1979), *cert. denied*, 456 U.S. 904 (1982); *Cairns*

*v. Matson Terminals*, 21 BRBS 252, 252 (1988); *Webb v. Corson & Gruman*, 14 BRBS 444, 447 (1981). Furthermore, it is well-settled that mere hypothetical probabilities are insufficient to rebut the presumption, *Smith v. Sealand Terminal*, 14 BRBS 844, 846 (1982), and that the presumption is not rebutted merely by suggesting an alternate way that the claimant's injury might have occurred, *Williams v. Chevron U.S.A.*, 12 BRBS 95 (1980).

For example, in *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, the Board vacated a judge's determination that an employer failed to rebut the presumption because three doctors maintained that the claimant's cancer resulted solely from smoking and not asbestos exposure. 19 BRBS 138, 139 (1986). These medical opinions rebutted the Section 20(a) presumption because they were specific and comprehensive and thereby severed the connection between the claimant's injury and his employment. *Id.*

Regarding Claimant's theory that his psychological injury progressed naturally from his right shoulder injury, Employer may rebut the Section 20(a) presumption by producing substantial evidence that his Claimant's psychological injury bore no causal connection to his work injury. *See James v. Pate Stevedoring Co.*, 22 BRBS 271. Employer also may rebut the presumption by showing that Claimant's onset of psychological symptoms resulted from a separate, intervening cause. *See, e.g., Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987)

Medical evidence generally plays a central role in evaluating the employer's substantial evidence rebuttal burden, and so it does here. Equivocal medical evidence as to causation does not suffice to satisfy an employer's burden; *any* medical evidence tending to sever the causal link does not necessarily constitute *substantial* evidence. *See MacDonald v. Trailer Maine Transp. Corp.*, 18 BRBS 259 (1986) (upholding ALJ's determination that employer failed to satisfy substantial evidence burden by solely presenting physicians' testimony that doubted, but could not rule-out, a causal link between claimant's injury and employment). To the contrary, Respondents may satisfy their burden by producing unequivocal credible medical evidence. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *see also Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11 (CRT) (1st Cir. 1982), *aff'g Sprague v. Bath Iron Works Corp.*, 13 BRBS 1083 (1981) (Section 20(a) rebutted by medical evidence that osteotongelitis caused by staph infection and not by alleged work-related leg wounds); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982) (medical report sufficient to establish heart attack did not arise out of exposure to carbon monoxide at work rebutted presumption); *Orkisz v. U.S. Army Tank Automotive Command*, 13 BRBS 948 (1981), *aff'd*, 708 F.2d 726 (6th Cir. 1982) (medical evidence sufficient to establish that the claimant did not sustain a compensable injury as a result of a slip and fall at work rebutted Section 20(a)); *Clymer v. E-Systems*, 13 BRBS 1067 (1981), *rev'd mem.*, 694 F.2d 720 (5th Cir. 1982), *cert. denied*, 464 U.S. 956 (1983) (physician's testimony that claimant's hypertension and diabetes mellitus would have occurred regardless of employment and were not aggravated by his work environment sufficient to rebut).

Here, Respondents ultimately fail to meet their substantial evidence burden. Indeed, the only evidence Respondents submit to rebut Claimant's psychological claim is to point out that Claimant did not seek treatment for psychological injury until over two years after his accident; records indicating Claimant applied for work with Ferguson while he was still receiving workers compensation from his June 2005 accident with Hillen; the reported statement of Claimant to Dr.

Hinojosa that Claimant did not wish to seek employment as that might jeopardize his claim; and the opinion of Dr. Yohman that Claimant appeared to exaggerate his symptoms which could be indicative of secondary gain behavior. However, I find none of this evidence substantial enough to meet Respondents' burden, at least with regard to whether Claimant suffered a work related psychological injury. The fact that Claimant did not seek psychological treatment for over two years appears consistent with the pain disorder/depression diagnosis which I find to be credible in this case. Obviously, Claimant's pain disorder or depression arising out of his pain and disablement would grow over time as the medical treatment of his right shoulder failed to achieve the desired results and Claimant was forced to accept the permanent nature of some residual pain and an inability to do certain physical movements with his right arm. While Claimant may have some tendency to exaggerate his symptoms and ability with respect to perform work functions, that does not overcome the clear medical evidence and opinions of Drs. Boley and Yohman that Claimant suffered some psychological injury arising from his shoulder injury and the relatively unsuccessful treatment thereof.

What the record lacks is any credible evidence that unequivocally tends to disprove a causal link between Claimant's work and his psychiatric condition. Further absent, in the alternative, is any credible and unequivocal evidence tending to establish an intervening cause. I find, accordingly, that Respondents have failed to meet their substantial evidence burden, and likewise have failed to rebut the Section 20(a) presumption.

Respondent offers no evidence sufficiently credible or weighty that urges a contrary conclusion. I therefore find that Claimant has established causation for his psychiatric injury, even irrespective of the Section 20(a) presumption.

### ***Nature and Extent of the Disability***

The claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (Feb. 14, 1985). An injured worker's disability becomes permanent if and when his condition reaches the point of "maximum medical improvement" or "MMI." *James v. Pate Stevedoring Co.*, 22 BRBS 271, 275 (1989). Any disability before reaching MMI is temporary in nature. *Id.* In this case, the parties stipulated that Claimant reached MMI as to his right shoulder injury on October 7, 2008, which corresponds with the date on which Claimant received the last active treatment by Dr. Jennings, consisting of a biceps injection. Although Dr. Jennings did not assign his work restrictions until later in December of 2008, the undersigned accepts the October 7, 2008 date for the right shoulder. With respect to MMI on Claimant's psychological condition, the undersigned accepts the opinion of Dr. Yohman that Claimant was psychiatrically better and capable of returning to any work that fit within his physical limitations as of the date of his report, March 30, 2009. This comports with Dr. Boley's opinion stated in his December 9, 2008, report that Claimant should be capable of working an eight hour day in about three months thereafter. Accordingly, I find that Claimant reached MMI on March 30, 2009 with respect to his psychiatric injury. Thus, Claimant's disability remained temporary until March 30, 2009, when he reached MMI on all injuries.

The extent of a claimant's disability is determined by his/her ability to work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). If a claimant meets the evidentiary burden of

establishing that s/he is unable to perform his usual employment because of his/her injuries, then the evidentiary burden shifts to the employer to establish the availability of other jobs that the claimant could perform and secure. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 292 (4th Cir. 2002). If the employer meets its burden by showing suitable alternative employment, the evidentiary burden shifts back to the claimant to prove a diligent search and willingness to work. See *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). The claimant can prevail in establishing total disability by demonstrating that s/he diligently tried and was unable to secure employment. *Fox v. West State Inc.*, 31 BRBS 118 (1997); *Turner*, 661 F.2d at 1043. If the claimant does not demonstrate diligence, at the most his/her disability is partial and not total. See 33 U.S.C. § 908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Here, Claimant contends that he has been totally disabled since his accident of May 28, 2006. Respondents argue that Claimant was able to work in alternative available employment as early as October 7, 2008, and thereafter as shown by Mr. Quintanilla's labor market survey of October 6, 2009.

A claimant's usual employment is his/her regular duties at the time s/he was injured. A claimant's employment immediately prior to the injury is his/her "usual" employment, even if his/her duties had lasted a mere four months and the claimant has had other jobs in the near past. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978). If the physician recommends surgery and light-duty work and the claimant experiences pain while performing many activities, he has also met his burden. *Carter v. General Elevator Co.*, 14 BRBS 90 (1981); see also *Offshore Food Serv. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Serv. v. Benefits Review Bd.*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975).

Much turns on resolving factual disputes between the medical experts in this case. In cases under the Act, the judge determines the credibility and weight to be attached to the testimony of a medical expert whether whole or in part. It is solely within the judge's discretion to accept or reject all or any part of any testimony, according to his judgment. *Perini Corp. v. Hyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969). In evaluating expert testimony, the judge may rely on his/her own common sense. *Avondale Indus., Inc. v. Director, OWCP*, 977 F.2d 186 (5th Cir. 1992). The judge, furthermore, may base one finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993) (ALJ may rely on one medical expert's opinion on the issue of causation and another on the issue of disability).

It is nonetheless generally true that the opinion of a treating physician deserves greater weight than that of a non-treating physician. See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n. 3 (2003) (rule similar to the Social Security treating physicians rule, affording such physicians special deference); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998) (greater weight afforded to treating physician because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual"). A treating physician's testimony is not, however, automatically entitled to greater weight when the issue is outside the course of medical treatment to be followed. *Duhagan v.*

*Metropolitan Stevedore Co.*, 31 BRBS 98 (1997). It is the judge who determines credibility, weighs the evidence, and draws inferences; the judge in fact need not accept the opinion of any particular medical examiner. See *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993) (judge determines credibility of expert and weight to attach to expert's opinion). A judge is not bound to accept the opinion of a physician if rational inferences urge a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O. Hearne*, 223 F.2d 755 (4th Cir. 1955).

Here, Claimant meets his initial burden based on the testimony of Drs. Jennings and MacMaster as well as Mr. Quintanilla that Claimant is restricted to light work with no overhead reaching nor significant use of the right upper extremity. While Dr. Drazner suggested Claimant could drive as long as he did no significant loading or unloading, Respondents have not seriously argued that Claimant could return to his former position as a truck/bus driver. The burden thus shifts to Respondents to show the availability of suitable alternative employment. The BRB's suitable alternative employment test requires two showings:

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure?

*Berezin v. Cascade General, Inc.*, 34 BRBS 163, 165 (2000) (quoting *Stevedores v. Turner*, 661 F.2d 1031, 1042-1043 (5th Cir. 1981)). The BRB has also held that vocational counselors must identify specific available jobs; general labor market surveys alone are not enough. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380, 384 (1983); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981); see also *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). In the Fifth Circuit, an employer need only show that “work [is] available to a claimant which is within that claimant’s physical and educational ability, age, experience, etc. to perform and secure.” *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). The burden then switches to the claimant to show that with “due diligence,” he was unable to secure any of the employer’s suitable alternative employment.

In this case, the labor market survey by Mr. Quintanilla is quite extensive and identifies a number of specific job openings that fell within the work limitations set out by Drs. Jennings and MacMaster. I discard Mr. Quintanilla's historical labor market survey covering the period from August 12 through December 31, 2008, since I find, as noted hereinabove, that Claimant did not reach MMI psychologically until March 30, 2009, and thus was unable to perform full time work until that date. I do credit Mr. Quintanilla's labor market survey set forth in his October 6, 2009 report. I specifically find that Claimant was capable of performing the following jobs set forth in that report: security guard for Pro Security Group; dispatcher for City of Waco Police Department; security guard for Silver Hawk Security; and assembler for Jack of All Trades. RX 11 at 49-51. Giving Claimant the benefit of the doubt, I do not find Claimant capable of performing the following jobs due to his psychological condition limiting his ability to interact with the public: customer service representative for Labor Ready; counter sales clerk for Waco U-Pull-It Auto

Parts; and sales associate for Radio Shack. Thus, I find that Claimant was capable of performing the security guard, dispatcher and assembler positions identified by Mr. Quintanilla.

Further, I find that Claimant did not diligently seek work within his limitations. Claimant never attempted to contact any potential employers until he received the report of Mr. Quintanilla shortly before the hearing in this matter. TR at 63-65, 68. Although Mr. Quintanilla suggested that Claimant contact the Division of Assistive Rehab Services of the Texas Rehabilitation Commission and the Texas Workforce Commission Claimant failed to do so. RX 11 at 18-19. Claimant testified that he felt unable to perform the standing that may be required in some of the identified positions due to an alleged 100 pound weight gain since returning from Iraq. TR at 46-47, 62-63. However, the medical records indicate that Claimant's weight has not varied significantly from the time shortly before he went overseas to the present contrary to Claimant's testimony. RX 19 at 2; TR at 66-68, 88-89. Further, no physician has ever mentioned any walking or standing restrictions. Claimant's credibility with regard to diligently searching employment opportunities is further undermined by his comments to Dr. Hinojosa suggesting that he was more interested in maximizing his success in this claim than he was in looking for suitable alternative employment. JX 5 at 1. Claimant testified that he could perform some type of work if it complied with his doctor's restrictions. TR at 83-84. Further, the surveillance tapes demonstrate Claimant retains sufficient physical capabilities to perform the types of light work identified by Mr. Quintanilla. While Claimant testified that he could not obtain any of the positions identified by Mr. Quintanilla, I find his efforts in that regard were half-hearted at best. Claimant stated that he contacted the employers listed in the vocational report only one time each. *Id.* at 85. Thus, I do not find that Claimant diligently searched for employment and accordingly find that there was suitable alternative employment available for Claimant as of the date of Mr. Quintanilla's report, October 6, 2009. As a result, I find Claimant to have been permanently totally disabled from March 30, 2009, the date of MMI, until October 6, 2009, the date of Mr. Quintanilla's report showing the existence of alternative suitable employment. Thereafter Claimant was permanently partially disabled.

The Fifth Circuit has found it appropriate to average the hourly wages of jobs found to be suitable employment for a claimant in order to calculate wage earning capacity. The court reasoned that averaging ensures that the post-injury wage earning capacity reflects each job that is available. See *Avondale Industries v. Pulliam*, 137 F.3d 326 (5th Cir. 1998). I find that approach reasonable in this matter. The average of the starting salaries for the four jobs found suitable is \$8.56 per hour yielding an average weekly wage of \$342.40. Subtracting this residual wage earning capacity from the AWW of \$1,606.01 yields a weekly wage loss of \$1,263.61 entitling Claimant to a permanent partial disability compensation rate of \$842.41.

### ***Medical Benefits***

The Act requires an employer to furnish medical benefits for such period as the nature of the injury or process may require. 33 U.S.C. § 907. A claimant establishes a *prima facie* case for compensable care when a physician describes the care as necessary for a work-related condition. *Turner v. The Chesapeake and Potomac Tel. Co.*, 16 BRBS 255 (1984). Medical expenses incurred since the industrial injury may be assessed against the employer if they are reasonable and necessary. 33 U.S.C. § 907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402. Claimant has presented a claim for reimbursement in connection with medical treatment and travel for medical treatment both for his shoulder injury and for his psychological injury. In view of the foregoing stipulations and findings, Claimant is entitled to medical assessment and treatment as reasonable and necessary under Section 7 of the Act for both his right shoulder and psychological injuries including reimbursement for all such treatment.

### ***Entitlement to Section 8(f) Relief***

Respondents assert their entitlement to Section 8(f) Relief.

Section 8(f) limits an employer's liability under the "aggravation rule" in certain circumstances. 33 U.S.C. § 908(f). The "aggravation rule" makes an employer liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc). Section 8(f) limits an employer's liability to a discrete period after which the Special Fund assumes payment obligations to the worker. 33 U.S.C. § 908(f). In the case of unscheduled injuries resulting in permanent total disability, as here, the liable employer must pay compensation for 104 weeks before the Special Fund takes over. *Id.*

An employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a preexisting permanent partial disability; (2) such preexisting disability, in combination with the subsequent work injury, contributes to a greater degree of permanent disability; and (3) the preexisting disability was manifest to the employer. 33 U.S.C. 908(f); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 222 (1988). The provisions of Section 8(f) are to be liberally construed. *See Director v. Todd Shipyard Corporation*, 625 F.2d 317 (9th Cir. 1980).

In the Section 8(f) context, "existing permanent partial disability" is not the same term of art used elsewhere in the Act. Instead, it is a broadly defined term, meaning that the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability *The C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977) (emphasis added) ("*Glover*"), *overruled on other grounds by Director, OWCP v. Cargill*, 709 F.2d 616 (9th Cir. 1983); *Atlantic & Gulf Stevedores v. Director, OWCP*, 542 F.2d 602, 606-08, 4 BRBS 79, 83-86 (3d Cir. 1976), *rev'g* 1 BRBS 541 (1975). The *Glover* criteria is otherwise known as the "cautious employer test."

An employer may obtain relief under Section 8(f) of the Act where a combination of the Claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1989); *Pino v. International Terminal Operating Company, Inc.*, 26 BRBS 81 (1992); *Thompson v. Northwest Enviro*

*Services, Inc.*, 26 BRBS 53 (1992). Employment related aggravation of a preexisting disability will suffice as contribution to a disability for purpose of Section 8(f) and the aggravation will be treated as a second injury in such cases. *Director v. General Dynamics Corp.*, 705 F.2d 562 (1st Cir. 1983); *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317 (9th Cir. 1980); *Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378 (D.C. Cir. 1979); *Director, OWCP v. Sun Shipbuilding & Dry Dock Co.*, 600 F.2d 440 (3rd Cir. 1979).

Where a claimant is permanently partially disabled, employer must also prove that the claimant's current level of disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1). See *Sproull v. Director, OWCP*, 86 F.3d 895 (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 306 (5th Cir. 1997); *Director v. Newport News Shipbuilding & Dry Dock Co.[Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122 (1995), 131 F.3d 1079 (4th Cir. 1997) (vocational rehabilitation expert can prove materiality prong of the contribution element); *Two R Drilling v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990); *Marine Power & Equipment v. Dept. Of Labor [Quan]*, 203 F.3d 664, (9th Cir. 2000).

The District Director's position is that while Respondents have shown that Claimant had a pre-existing partial disability which was manifest to Employer prior to the second injury, Respondents have not shown that the current disability has resulted from a combination of the pre-existing disability and the employment related injury in a greater degree of disability than would have resulted from the employment related injury alone. The District Director contends that the evidence shows that Claimant's disability and resulting loss of earning capacity are related solely to the employment related injury. In this regard, the District Director points out that Claimant was capable of performing his job as a truck driver after the previous injury to his right shoulder while working for Hillin up until the present injury to his right shoulder occurred on May 28, 2006. The District Director further notes that Claimant is unable to return to his usual occupation of truck driver following the May 28, 2006 injury and has been restricted to light work with no overhead work all as a result solely of the May 28, 2006 injury.

Respondents argue that the addendum report of Dr. MacMaster supports the position that Claimant would not have had the overhead restrictions had it not been for the pre-existing injuries to Claimant's right shoulder. In view of Dr. MacMaster's essentially "signing off" on the opinion posited to him by Respondent's counsel that Claimant's restrictions on overhead work would not have been necessary without his pre-existing shoulder injury and the obvious speculative nature of such opinion, I am reluctant to credit Dr. MacMaster's addendum report. However, I am also persuaded by the District Director's further contention that even crediting Dr. MacMaster's opinion, the vocational evidence submitted by Mr. Quintanilla in support of Respondents' 8(f) claim does not show a significant impact on Claimant's residual earning capacity. As noted hereinabove, I have found that Claimant has a residual earning capacity of \$8.56 based on the four positions which I found Claimant could perform in Mr. Quintanilla's labor market survey report of October 6, 2009. Mr. Quintanilla's Addendum Report of October 7, 2009, identifies six occupations that he opines Claimant could perform if he had no overhead restrictions on his work based on Dr. MacMaster's opinion in his addendum report that Claimant

would have had no such overhead work restrictions had Claimant's shoulder not been previously injured. RX 11 at 54-55. Mr. Quintanilla then references a Texas Workforce Wage Survey to establish both mean wages and entry wages for these six occupations. *Id.* at 53. Since Claimant is inexperienced in all of these fields, I chose to apply the entry wages rather than the mean wages of all workers in these industries, just as I used the entry wages in calculating Claimant's residual wage earning capacity.<sup>3</sup> Averaging the entry wages for these six occupations yields an average of \$8.56, the exact hourly figure that I have found to be Claimant's residual wage earning capacity with his actual work restrictions including no overhead work. Accordingly, I agree with the District Director that even accepting the rather speculative opinion of Dr. MacMaster that Claimant would have no overhead work restrictions absent the pre-existing injury to his shoulder, Respondents have not proven any greater degree of disability caused by the pre-existing injury to the right shoulder than would have occurred from the May 28, 2006 injury alone.

For permanent partial disability the employer need only show that an increased permanent partial disability resulted when the prior and subsequent injuries are combined. *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d at 307. This is still subject to the Congressional mandate that it be a "material and substantially" greater level of disability. *Id.* n. 6; 33 U.S.C. §908(f)(1); *Director, OWCP v. Bath Iron Works Corp.[Johnson]*, 129 F.3d 45 (1st Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303 (5th Cir. 1997). In this case, Respondents have not shown an increased permanent partial disability as a result of the pre-existing shoulder injuries as Claimant's residual earning capacity would be the same even in the absence of the pre-existing injuries to his right shoulder. Accordingly, Respondents are not entitled to Section 8(f) relief.

### ***Interest***

A claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co. v. Directors OWCP*, 594 F.2d 986 (4th Cir. 1979). Accordingly, interest on any unpaid compensation owed by Employer should be included in the District Director's calculations of amounts due.

### ***Attorney's Fees***

Thirty days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees. *See* 20 C.F.R. § 702.132. A service sheet showing the service has been made upon all the parties, including the Claimant, must accompany this application. The parties have fifteen days following the receipt of any such application within which to file any objections.

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<sup>3</sup> Respondents argue that the mean wages for the six occupations cited in the addendum report should be used as the average of the mean wages for these six occupations is \$11.36 which Respondents contend represents a substantial increase over Claimant's residual earning capacity which I determined to be \$8.56 per hour. However, I decline to use the mean wages figures as none of the evidence submitted by Respondents gives mean wage figures for the occupations identified by Mr. Quintanilla in his October 6, 2009 report and relied upon in calculating Claimant's residual earning capacity. Accordingly, the only available information for both sets of occupations is the entry level wage figures which I have used herein.

## **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED**:

1. The Respondents shall pay the Claimant compensation for temporary total disability from June 1, 2006 through the date of MMI, March 30, 2009, at the compensation rate of \$1,070.67 per week.
2. Thereafter, Respondents shall pay the Claimant compensation for permanent total disability from March 31, 2009 through October 6, 2009, at the compensation rate of \$1,070.67 per week.
3. Respondents shall pay the Claimant compensation for permanent partial disability from October 7, 2009, and continuing at the compensation rate of \$842.41 per week.
4. Pursuant to Section 7 of the Act, Respondents shall pay all outstanding medical claims and costs related to Claimant's injuries, including his psychological injuries, and shall furnish all future reasonable and necessary medical treatment of the injuries.
5. Respondents are entitled to credit for all disability and claims payments previously made in connection with the May 28, 2006 accident.
6. Respondents shall pay interest on Claimant's unpaid compensation benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.
7. Respondents shall not be entitled to the relief set forth at Section 8(f) of the Act, transferring payment responsibilities to the Special Fund in accordance therewith.

**IT IS SO ORDERED.**

A

Russell D. Pulver  
Administrative Law Judge

*San Francisco, California*