

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: 16 April 2010

CASE NO.: 2009-LDA-00144

OWCP NO.: 02-143254

In the Matter of:

JEFFREY F. HAYSOM,
Claimant,

vs.

SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer,

and

INSURANCE CO. OF THE STATE OF PENNSYLVANIA / AIU HOLDINGS,
Carrier.

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

John T. Bennett, 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 (“DBA”), 42 U.S.C. § 1651, as an extension of the Longshore and Harbor Workers’ Compensation Act (together, “the Act”). 33 U.S.C. § 901 *et seq.* The Act provides compensation to certain civilian employees engaged in employment related to the United States Department of Defense for occupational diseases or unintentional work-related injuries, irrespective of fault, that result in disability. Jeffrey Haysom (“Claimant”) brought this claim against his employer, Service Employers International, Inc. (“SEII” or “Employer”) and its insurance carrier, Insurance Company of the State of Pennsylvania (collectively, “Respondents”) for injuries sustained on July 27, 2005, while he worked as a truck 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 January 8, 2009. On July 7, 2009, I convened a formal hearing in Seattle, Washington. 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”) 1-4; Claimant’s Exhibits (“CX”) 1-19; and Respondents’ Exhibits (“RX”) 1-35.¹ Hearing Transcript (“TR”) at 8-10. The Claimant testified on his own behalf as did his wife.

Claimant and Respondents each 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 3 and 4; TR at 5.
2. There is an employer/employee relationship between the parties. *Id.*
3. Claimant suffered an injury that arose out of and in the course of his employment with Employer on July 27, 2005. *Id.*
4. The claim was timely filed and noticed. *Id.*
5. Claimant’s date of MMI is September 15, 2008. TR at 6.
6. The Claimant’s average weekly wage is \$1,975.35, yielding a compensation rate of \$1,047.16, the maximum rate in effect at the time of injury. AX 3 and 4; TR at 5-6.

ISSUES

1. The nature and extent of the Claimant’s injury under the Act. TR at 6-7.
2. Whether KBR must pay attorney’s fees and interest on the compensation award, if any. *Id.*

FINDINGS OF FACT

Hearing Testimony of Claimant

The Claimant is a fifty-two year-old man who was hired by SEII to work for twelve months in Iraq as a heavy-truck driver.² TR at 14-17; CX 16; RX 22. Claimant has lived most of

¹ RX 34 and 35 were submitted after the hearing pursuant to the agreement of the parties. TR at 9-10.

² SEII was under contract with the United States military to provide support services to the troops stationed in Iraq.

his life in Yakima, Washington, a town of about 50,000 people. TR at 14. Claimant stated that he went to his junior year in college following a brief stint in the Army right after high school. *Id.* at 15-16. He testified that he then became a truck driver in the Northwest until he went to work for Employer. *Id.*

He arrived in Camp Cedar, south of Baghdad, Iraq, in November, 2004. *Id.* at 16. Claimant testified that he drove fuel tanker trucks to various Army bases within Iraq. *Id.* at 17. He stated that he had originally hoped to work in Iraq about a year and a half in order to pay off his mortgage. *Id.* Claimant testified that he was injured on July 27, 2005, when his convoy was attacked and an explosion struck the truck ahead of him and knocked him unconscious. *Id.* at 17-18; CX 8. Claimant stated that he did not remember much until he was back in Seattle, although he knows he was treated in Iraq and at the military medical facility in Landstuhl, Germany, before being sent home. TR at 18-19.

Claimant testified that he currently takes a number of medications, including Depakote for seizures, Invega and Prazosin for help sleeping, along with an anti-depressant. *Id.* at 19-20. He stated that he worked as a pest-control sprayer from February through November, 2006, when he was laid off. He testified that he sprayed the wrong residences a few times and got lost until he obtained a GPS device which helped. *Id.* at 20-21. He also worked about two weeks as a groundskeeper at Memorial Hospital in Yakima, but had problems pull-starting some equipment because of his shoulder; he also generally did not keep up a good pace in his work. *Id.* at 21-22; CX 10. He also tried a job with the United States Department of Agriculture grading hops but found he could not perform it due to the need to reach to the top of the five-foot bales, which hurt his shoulder. *Id.* at 22-23. He testified that he was actually offered the job after training, but declined because he was in Vancouver seeing a neurologist when the offer came, and furthermore felt he could not physically do the job because of his shoulder. *Id.* at 30-32. Claimant also testified that he considered a job with Agrifresh spraying orchards in late summer, 2008, but his doctor told him he should not work the number of hours that that job would have required over only a few weeks, so he did not take the job. *Id.* at 23, 27-28. Claimant stated that he had tried mowing for Double D Orchards rather than take the Agrifresh job, but after a few weeks he was let go since he could not keep the tractor on track and damaged some of the young trees. *Id.* at 22, 29. Claimant testified that he also worked perhaps a month as an unpaid volunteer at the Union Gospel Mission sorting clothes and cutting pieces of lumber into smaller pieces in December, 2008. *Id.* at 32-33. Claimant stated that he told the vocational counselor, Mr. Dexter, that he was not interested in working volunteer jobs without being paid. Claimant denied that he told Mr. Dexter that he did not want to pursue employment because it might affect his claim for compensation. *Id.* at 33-34.

Claimant testified that his doctor told him not to drive for the first year after returning from Iraq, but that he has now been driving for about three years since his doctor cleared him. *Id.* at 24. He stated that he does mow his acre-and-a-half property with a riding mower, which takes him about an hour. *Id.* at 25. Claimant also takes care of his four- and six-year-old grandchildren. *Id.* at 26. Claimant has driven his grandchildren some 400 to 500 yards down the road to the bus stop and to a preschool. *Id.* at 34-35. Claimant takes care of his goats, does dishes, laundry, cleans floors, and spends a good deal of time outdoors walking and bird watching. *Id.* at 26-27.

Hearing Testimony of Claimant's Wife

Valerie Haysom has been married to Claimant for twenty-eight years and has lived in Yakima, Washington the past fifteen years. TR at 36. She testified that the only psychiatric care Claimant had prior to going to Iraq was that he had seen a counselor once or twice concerning problems with their children. *Id.* She stated that Claimant was in good physical and mental health prior to going to Iraq. *Id.* Mrs. Haysom has worked doing medical coding for a doctor's office for the past four years since Claimant was injured, but had worked previously in medical offices and banks. *Id.* at 37-38.

Mrs. Haysom testified that Claimant has always been motivated to work, but, since his accident, he is easily fatigued and has problems with cognitive functioning. *Id.* She stated that when he tried working since his accident, Claimant was extremely fatigued, had trouble remembering and completing tasks and also has had problems controlling his temper in dealing with other people. Thus, she did not believe Claimant could keep any job. *Id.* at 39-40. Claimant also has problems with sleeping due to nightmares. *Id.* at 40-41. On cross-examination, Mrs. Haysom agreed that perhaps Claimant had underestimated his physical and intellectual limitations in seeking-out jobs following his accident and thus, had "bitten off a little more than he can chew." *Id.* at 41-43. She does not think Claimant could currently perform even a light, part-time job due to his fatigue, lack of cognitive function, and inability to deal with the public. *Id.* at 44.

Summary of Medical Evidence

Medical care prior to the Claimant's employment with SEII-Dr. Jeffrey S. Kaplan

Dr. Jeffrey S. Kaplan is Claimant's primary care physician. Claimant saw Dr. Kaplan on March 11, 1999, at which time he was diagnosed with depression. RX 29 at 14. Claimant was started on antidepressant medication and reported on September 23, 1999, that he was doing better. *Id.* at 12. Dr. Kaplan saw Claimant again on August 2, 2000, at which time Claimant was still taking Prozac, but stated he did not feel depressed. *Id.* at 11. Claimant again saw Dr. Kaplan on February 13, 2002, complaining of depression for at least the previous six weeks with difficulty sleeping. Claimant was again placed on antidepressant medication. *Id.* at 10. Dr. Kaplan saw Claimant on March 6, June 3, and July 18, 2002, at which time Dr. Kaplan noted Claimant's depression was "responding well to current therapy." *Id.* at 4-9. Dr. Kaplan's next office note, dated February 5, 2004, reports that Claimant's depression is "stable off medications for several months." *Id.* at 2.

Medical care overseas after the Claimant's accident

After being injured on July 27, 2005 by the explosion of an improvised explosive device ("IED"), Claimant was taken to the 86th Combat Support Hospital for a penetrating shrapnel wound to his right neck. He was orally intubated and then immediately taken to the operating room for a tracheotomy. An exploration of the neck and subsequent diagnostic studies showed right mandibular fracture with multiple tooth and bone fragments, and ligation of the right internal jugular vein that was transected to the level of the facial vein. *Id.* at 24, 33. Claimant was subsequently medically evacuated to Landstuhl Regional Medical Center in Germany on July 29,

2005, where he underwent further surgical exploration of his neck and was placed on a tube for feeding. *Id.* at 28. Claimant underwent a carotid endarterectomy to repair his carotid artery dissection and stenosis. Although Claimant could move all extremities, he had paresthesias of all extremities. *Id.* at 33. Claimant was transferred to Harborview Hospital in Seattle, arriving on August 2, 2005. *Id.* at 29, 34.

Medical care after the Claimant's return from Iraq

Harborview Medical Center

At Harborview, Claimant had a cognitive evaluation which revealed mild cognitive deficits. CX 1 at 34. Claimant had reduced hearing in the right ear and an audiological evaluation was recommended. *Id.* Claimant was discharged from Harborview on August 10, 2005, but was readmitted a week later with deep vein thrombosis. During both of these hospitalizations, Claimant was noted to display symptoms of PTSD including recurrent nightmares of his blast injuries. *Id.*

Dr. Jane Kucera Thompson

On December 12 and 20, 2005, the Claimant saw Dr. Thompson, a neuropsychologist. CX 1 at 32. Dr. Thompson administered a complete battery of tests from which she diagnosed Claimant with cognitive disorders, posttraumatic stress disorder (“PTSD”) and major depressive disorder. *Id.* at 43. While Dr. Thompson felt it was too early in Claimant’s recovery to ascertain the degree of his permanent disability, she did opine that Claimant has “injuries that will prove to be permanent.” *Id.* at 46. Dr. Thompson further noted that although PTSD was Claimant’s most immediate psychological issue, he might in the future consider individual or group therapy with “other brain-impaired men” to address his cognitive deficits. *Id.* Dr. Thompson recommended Claimant not drive due to poor concentration until he was tested for clearance to return to driving. *Id.* at 45-46. Claimant had such testing on July 12, 2006, and was cleared for driving. *Id.* at 48-53.

In a letter dated April 30, 2007, Dr. Thompson advised Claimant’s wife that Claimant had geographical disorientation, causing him to easily get lost driving around Yakima, which she noted was “common after right hemisphere brain injury, such as [Claimant] sustained in an IED attack while driving trucks in Iraq.” *Id.* at 60. She further noted that “being unable to be independent on his job” may eventually affect Claimant’s employability. *Id.* Dr. Thompson recommended a GPS device to assist Claimant in his job. *Id.* at 60-61.

Dr. Thompson saw Claimant again on October 31, 2007, at which time she administered further tests. Her diagnoses remained the same. However, she noted that PTSD was no longer the major issue, but rather the cognitive deficits as a result of his injury. *Id.* at 64-65. Dr. Thompson concluded on the basis of the tests that Claimant had not shown any improvement in processing speed in almost two years. Thus, she opined that Claimant was probably functioning at his maximum level of achievement. *Id.* at 69. With respect to Claimant’s expressed desire to try to take further college classes, she had suggested a number of accommodations including longer times to take tests and complete courses as well as taking only a few courses at a time in view of his cognitive deficits. *Id.* at 70-71.

On September 18, 2008, Dr. Thompson completed a Work Capacity Evaluation in which she opined that Claimant was limited to sedentary work for no more than six hours per day with no upper extremity strength or range of motion, “no attention to visual detail, limited contact with customers and no complex problem-solving or rapid decision-making.” *Id.* at 100. She related these limitations to Claimant’s right shoulder injury as well as his “extensive R hemisphere brain injury” leading to cognitive inefficiency and fatigue. *Id.*

On November 5 and 6, 2008, Dr. Thompson performed testing on Claimant in connection with a two day Physical Capacities Evaluation by Kathy Hata. Ms. Hata’s evaluation was directed at determining Claimant’s physical capability to perform work for an eight hour day while Dr. Thompson’s testing was aimed at evaluating Claimant’s “mental fatigue” as a result of the physical evaluation. *Id.* at 105. Dr. Thompson noted only mild declines in visual and auditory attentional capacity with some tiny improvements in other areas. Dr. Thompson attributed these testing results somewhat to Claimant’s medication and ingestion of caffeine prior to her testing. She opined that it was likely more profound cognitive declines would be seen if Claimant were actually working five days per week as compared to just two days of functional capacity evaluation. *Id.* at 106-107.

Dr. John J. Hwang

Claimant received physical therapy for right shoulder pain for about ten months following his return from Iraq as a result of his injuries. On October 11, 2006, Dr. John J. Hwang performed surgery on Claimant’s right shoulder to repair a partial tear of the rotator cuff and to decompress the acromioclavicular joint which had posttraumatic arthritis. CX 1 at 54-59; RX 20 at 11. On September 27, 2007, Claimant returned to Dr. Hwang with continuing complaints of persistent pain with overhead activity. Dr. Hwang opined that the rotator cuff tear had just not healed with the surgery and suggested either living with it or possibly trying a second surgery. *Id.* at 63. On March 11, 2008, Dr. Hwang released Claimant to return to light duty work effective March 12, 2008, but noted that Claimant could not perform a spraying job due to repetitive overhead work. *Id.* at 75, 78-79; RX 20 at 7. On September 15, 2008, Dr. Hwang clarified Claimant’s work restrictions indicating Claimant’s limitations included no heavy lifting and no repetitive motion or overhead activity with the right side due to his right shoulder problems. CX 1 at 99.

Dr. Rodney M. Thompson

Claimant was seen by Dr. Rodney M. Thompson, an audiologist, on November 21, 2007, for audiological evaluation. CX 1 at 73. The examination revealed slight to moderate hearing loss in the high frequencies. Due to Claimant’s difficulty in hearing in the presence of background noise, hearing aids were recommended. *Id.*

Dr. William S. Herzberg

On September 17, 2008, Dr. William S. Herzberg, a neurologist specializing in sleep medicine, evaluated the Claimant at Dr. Thompson’s request. CX 1 at 101-04. The Claimant reported symptoms of sleeping poorly with many dreams. He also explained that he could not do his job because he was too tired, suffering overwhelming fatigue from exertion. *Id.* Dr. Herzberg

diagnosed “obstructive sleep apnea syndrome, bruxism, REM behavior disorder, likely secondary to posttraumatic stress disorder.” *Id.* at 103. Sleep apnea was also diagnosed by a sleep study performed on June 18, 2008, at the behest of Claimant’s family doctors, Dr. Jeff Kaplan and Dr. Amy S. Edwards. *Id.* at 77, 80-93. On August 7, 2008, Dr. Edwards recommended Claimant start on CPAP and encouraged Claimant to apply for social security disability. *Id.* at 77. Dr. Kaplan reported on July 23, 2008, that he felt Claimant should try working initially for four hours per day and then increase the hours as Claimant was able to tolerate longer working days. *Id.* at 76.

Functional Capacity Evaluation by Kathy Hata, OTR/L

Kathy Hata performed a functional capacity evaluation (“FCE”) on Claimant on November 5 and 6, 2008, at the request of Dennis Dexter of Central Washington Rehabilitation. CX 7 at 1; RX 21. Ms. Hata determined that, on a physical level, Claimant demonstrated the ability to perform light to sedentary work, with restrictions against crawling, right overhead work, and ladder climbing. CX 7 at 2. Ms. Hata related a number of events during the evaluation during which Claimant expressed difficulties with attention, pace, and memory. Ms. Hata recommended that Claimant would benefit from “on-site supervision by therapists experienced in working with individuals with cognitive and visual/perceptive deficits.” *Id.* at 3.

Dr. Mary B. Reif

On January 23, 2009, Dr. Mary B. Reif, a neurologist, evaluated the Claimant at Respondents’ counsel’s request. CX 11. After taking a complete history from Claimant and his wife, examining Claimant and thoroughly reviewing Claimant’s medical records, Dr. Reif concluded that Claimant suffered “cognitive and emotional issues from the blast injury, causing the equivalent of a traumatic brain injury that makes him unemployable.” *Id.* at 17. Dr. Reif further opined that Claimant’s neurological disability would not improve and that he would never be capable of employment. *Id.* at 17-18. On April 24, 2009, after reviewing vocational rehabilitation records on Claimant, the FCE Ms. Hata performed and videotaped surveillance of Claimant, Dr. Reif generally agreed with the physical limitations suggested by Ms. Hata; however, Dr. Reif noted these additional documents go to his “*physical* limitations, and do not speak to the other issues associated with his injuries.” *Id.* at 21; RX 25.

Dr. Russell A. Vandenbelt

On June 1, 2009, Dr. Russell A. Vandenbelt, a neuropsychologist, evaluated the Claimant at Respondents’ counsel’s request. RX 34 at 1. Dr. Vandenbelt prefaced his report by stating that Respondents’ counsel had asked him “to assess the presence of any psychiatric disorder causally related to an injury of July 28, 2005, whether any preexisting psychiatric condition was aggravated by that injury, and to make any necessary treatment recommendations.” *Id.* at 2. After examining Claimant and thoroughly reviewing Claimant’s medical records, surveillance video and interpretation of an MMPI-2 administered in his own office that day, Dr. Vandenbelt opined that Claimant suffered from PTSD and Major Depression together with “persistent cognitive deficits,” all of which he related to Claimant’s blast injury with no evidence of any contributing preexisting disability. *Id.* at 23-25. Dr. Vandenbelt further opined that Claimant’s cognitive impairment would not improve. *Id.* at 24. Dr. Vandenbelt stated that Claimant would benefit

from a return to a more active work-life in terms of improving his self-esteem; he thus recommended that Claimant attempt to return to work. *Id.* at 25-27. However, Dr. Vandenberg noted Claimant's unsuccessful attempts to return to the work-force probably related primarily to him performing his tasks alone, without regular or active supervision or guidance. *Id.* at 25. Dr. Vandenberg opined that Claimant had the best chance at functioning well in "a structured supportive setting that provides him with well-defined tasks that can be accomplished in units of several hours and that do not require extensive problem solving or planning" with regular supervision and little contact with co-workers or the public. *Id.* Dr. Vandenberg concluded his report by stating "[Claimant] is likely to have a more optimistic outlook regarding his future if provided with a work setting and work assignments that matches current capacities." *Id.* at 27.

Deposition Testimony of Dennis M. Dexter

Dennis M. Dexter has been a vocational rehabilitation counselor for the past twenty-five years. He holds a Masters of Education Degree in guidance and counseling, and currently gets most of his work on referral from the Washington State and the United States Departments of Labor ("DOL"). RX 35 at 6-7, Ex 1 to RX 35. He testified that he normally handles primarily Federal Employees' Compensation Act cases from DOL since he is located inland. RX 35 at 8. He stated that he has reviewed medical reports of Claimant and noted that Claimant was not considered medically stationary during most of the time that he worked with him. *Id.* at 9-10.

Dexter stated that he was referred Claimant's case by DOL on December 14, 2007, and first met with Claimant on January 21, 2008. *Id.* at 11. Dexter stated that he made periodic progress reports to DOL, the last of which is dated March 13, 2009. *Id.* at 12. He stated that Claimant had shoulder problems, significant head injury and most significant from a vocational standpoint, sleep apnea, and sleep deprivation. *Id.* at 13. Dexter noted that he really felt vocational rehabilitation services were begun prematurely as Claimant had not reached MMI, but believed it was initiated because of Claimant seeking on his own to pursue a four-year degree at Yakima Valley Community College. *Id.* at 14. Dexter testified that he sought a FCE in November, 2008, in order to better assess Claimant's work limitations. *Id.* at 16.

Dexter testified that Claimant's employments were not terribly successful except for a spraying job that Claimant's doctor eventually restricted him from doing due to the overhead use of his shoulder. *Id.* Dexter stated that Claimant had declined a spraying job in order to work for Double D Orchards. However, Claimant fatigued as the day wore on, leading him to come too close to the trees, thereby damaging some of them; Double D. laid him off as a result. *Id.* at 19-21. Dexter stated that Claimant was offered an agricultural inspection job but declined it since he was in Vancouver for medical treatment with Dr. Hertzberg when the position was offered. *Id.* at 22, 31. Dexter testified that Claimant attempted to find employment on his own since Dexter felt unable to do much with the uncertainty of Claimant's medical capabilities, particularly the fatigue. *Id.* at 23. Dexter stated that he had difficulty in getting Claimant to try jobs that were less physically and mentally challenging. *Id.* at 24-25. Dexter testified that he wanted to try Claimant in jobs that were light in physical demand and where he could start part-time and then try to work up to full-time. He spoke with Claimant about jobs such as cafeteria cashier, dishwasher, kitchen helper, janitor, guard, gas station attendant, newspaper delivery or motel clerk, although he did not investigate actual openings for such jobs. *Id.* at 26-30. However, Claimant did not want to expend the "vocational effort for a job that was beneath what he thought his capability

was, and what his interest was,” but rather was looking for a position that would provide better career potential and wages. *Id.* at 27. In December, 2008, Claimant reported that he was working as an unpaid volunteer about four hours per day at the Union Gospel Mission using a skill saw to cut wood puzzles. *Id.* at 32-33. Dexter stated that Claimant had to quit doing the wood-work as it hurt his shoulder. *Id.* at 34-35. He testified that Goodwill stores at times have paid openings for employees to sort and price goods and discard trash. *Id.* at 35. Dexter stated he terminated vocational services to Claimant on March 13, 2009, because Claimant refused to consider the lower-paying jobs he suggested; Claimant deemed these to be dead-end positions. Claimant was concerned that once placed in such a dead-end position, he would get no further vocational assistance to secure a better-paying job. *Id.* at 36-37; RX 33. He expressed further concern that such a job might reduce his compensation payments.

Dexter testified that the jobs that he suggested to Claimant were minimum-wage jobs earning perhaps a little over \$8.00 per hour. RX 35 at 39. Dexter stated that since Claimant had successfully passed several algebra classes at the community college, he felt Claimant should have had the cognitive ability to work in certain minimum-wage positions. *Id.* at 40-41. However, Dexter stated that he was more concerned with Claimant’s fatigue, but could not determine whether it stemmed from sleep apnea or his cognitive deficits, or both. *Id.* at 41. Dexter stated that he never felt comfortable that Claimant could work forty hours per week. Thus, he had suggested trying twenty hours per week, and then building to perhaps thirty hours per week. *Id.* at 46-47. Dexter opined that he would not expect Claimant to succeed in obtaining a four-year degree in a reasonable amount of time, but perhaps he might eventually do so if he pursued it part-time. *Id.* at 49. Dexter stated that he views Claimant’s labor market limited to the Yakima area as Seattle is not within reasonable commuting distance. *Id.* at 51-53. Dexter agreed that it would be speculation as to whether Claimant could perform any job. *Id.* at 55-56. While Claimant does drive his automobile, Dexter testified that Claimant should not drive professionally due to his anger problems. *Id.* at 57-60. Dexter stated that Claimant consistently tried to work, but underestimated his limitations. *Id.* at 61.

Other Documentary Evidence

Respondents’ records indicate that Claimant has been paid total temporary disability benefits from July 29, 2005, to July 4, 2007, at the rate of \$1,047.16 per week. CX 3; RX 2; RX 3; RX 6. Respondents filed a Notice of Controversion on November 13, 2008. CX 4. Claimant was approved for Social Security Disability benefits with an effective date of November 21, 2007. CX 12; RX 8. Claimant reported earnings of \$3,552.50 from February 14, 2007, to June 1, 2007, from Double D Orchards. He reported income of \$1,149.50 from June 2, 2007, to July 10, 2007 at The Remedy Spray Services. RX 7; RX 23. Prior to deployment to Iraq, Claimant was administered a physical examination, which found him to be qualified to work for Employer. CX 1 at 2.

Surveillance films of Claimant

Respondents have submitted surveillance film of Claimant taken over the course of five days in October, 2008. As the investigator who took the films synopsis, Claimant performed a variety of physical activities including “moving items in the yard, mowing, and picking vegetables. He bent over many times and walked with ease as he pushed a wheelbarrow, carried a bucket,

pulled a large box and watered and fed farm animals.” RX 28 at 3. Claimant ambulates normally and exhibits no signs of physical limitations in the activities filmed. *Id.* at 1 and 2.

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).

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” (“MMI”). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 275 (1989). Any disability before reaching MMI is temporary in nature. *Id.* 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 injuries occurred in Iraq and unable to return to work of any kind since July 27, 2005. Respondents argue that Claimant has been able to work in alternative available employment.

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).

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 164-65, 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 by presenting the testimony of Drs. Thompson, Hwang and Kaplan that Claimant could attempt work on a part-time basis of four to six hours per day with significant restrictions including light to sedentary, simple work with no overhead use of the right arm and limited contact with the public. CX 1 at 76, 99-100. Dr. Thompson had found Claimant essentially medically stationary with regard to his cognitive deficits on October 31, 2007, although she clarified her work restrictions for Claimant on September 18, 2008. *Id.* at 69, 100. Dr. Hwang released Claimant to return to light work on March 11, 2008, but clarified his work restrictions on September 15, 2008. *Id.* at 75, 99. The timing of these opinions by Drs. Thompson and Hwang fully support the parties' stipulation that Claimant reached MMI from all his injuries on September 15, 2008. TR at 6. No lesser work restrictions have been suggested by any medical authority in this matter. Accordingly, I find that the work restrictions set out by Drs. Thompson, Hwang and Kaplan are appropriate permanent work restrictions for Claimant. Given these restrictions, Claimant clearly could not return to his previous position with Employer in Iraq as such a position is not simple and repetitive, nor does it fall in the sedentary to light exertional level. Indeed, Respondents make no argument that Claimant can return to his former employment.

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)). Regarding the second prong, Ninth Circuit case law compels employers to identify specific and actually, rather than theoretically, available jobs, a point with which the BRB agrees. *Berezin*, 34 BRBS at 166. The Ninth Circuit's view is that

[o]nce the claimant has proved that a work-related injury prevents him from performing his former job, the only remaining issue is the availability of other jobs he can perform. It is appropriate to place on the employer the burden of showing that there are available jobs which the claimant can perform. Otherwise, the claimant would have the difficult burden of proving a negative, requiring him to canvass the entire job market.

Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980) (citing *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976)). The Ninth Circuit reiterated this requirement, holding that employers must demonstrate the existence of specific job opportunities. *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *cert. denied*, 511 U.S. 1031 (1994). In the Ninth Circuit, the employer must further demonstrate that the claimant "would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *but see Fox v. West State Inc.*, 31 BRBS 118 (1997). 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 this case, Respondents have not provided a labor market survey or any other evidence of specific available job openings. Rather, Respondents rely on the fact that Claimant has tried working at several jobs. Thus, Respondents contend that Claimant's work attempts prove that he is able to perform work. However, Respondents argument falls short here as Claimant was unsuccessful at each of his work attempts. There is no evidence to show that Claimant did not perform to the best of his ability in these work efforts. Indeed, the testimony is to the effect that Claimant failed because each of these jobs exceeded his mental or physical limitations.

Respondents further offer the testimony of Mr. Dexter arguing the vocational counselor's testimony establishes that there are jobs which Claimant could perform such as cafeteria cashier, gate guard, kitchen helper, janitor, motel clerk, and other unskilled minimum-wage positions. Certainly, Mr. Dexter testified that he encouraged Claimant to try such jobs which he stated are available at times. However, Mr. Dexter specifically testified that he never conducted a job search or labor market survey to verify that there were any openings for any of these jobs within the labor

market area near Claimant's home. RX 35 at 26-30. Thus, Mr. Dexter agreed that whether Claimant could even perform any job would be speculative. *Id.* at 55-56. Clearly, Mr. Dexter's generalized testimony regarding jobs does not satisfy the specificity required by the BRB and the Ninth Circuit. See *Berezin v. Cascade General, Inc.*, 34 BRBS 163, 165 (2000); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *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). Indeed, Respondents' argument in this matter defies reasonable explanation. Respondents apparently argue that Claimant should deviate from his plan of trying to obtain a college degree, which might eventually result in a better-paying job within his fairly severe restrictions, in order to try a minimum-wage job with little, if any, chance of earning substantially better wages. Further, such a minimum-wage job would be undoubtedly more likely to trigger Claimant's physical and mental fatigue than would a position utilizing a college degree. This approach seems counterproductive since even if Claimant could work a minimum wage job full time at \$10.00 per hour, these earnings would still entitle Claimant to the maximum compensation rate in this case. This scenario completely ignores the realities that Claimant's physicians as well as Mr. Dexter have uniformly suggested part time work of twenty to thirty hours per week and Mr. Dexter indicated the actual hourly wage of such jobs in Claimant's locale is just above \$8.00 per hour.

While perhaps superfluous, I feel I should address in greater depth the opinions of the medical experts retained by Respondents in this matter. Dr. Reif, after a thorough review of the medical records and examination of Claimant, opined that Claimant would never be capable of employment due to his cognitive deficits, which she attributed to traumatic brain injury. CX 11 at 17-18; RX 25 at 22-23. When Respondents' counsel thereafter forwarded Dr. Reif additional records of Mr. Dexter's vocational efforts with Claimant and the surveillance films, Dr. Reif responded by indicating that the surveillance films only showed significant remaining physical capabilities of Claimant. Thus, Dr. Reif clearly refused to reverse her opinion as to Claimant's unemployability due to his mental deficits. CX 11 at 21.

Undeterred, Respondents sought a further opinion from Dr. Vandenbelt, employed by the same medical expert service as Dr. Reif. Dr. Vandenbelt never directly refuted Dr. Reif's opinion as to Claimant's unemployability. Dr. Vandenbelt did opine, however, that Claimant would benefit from a return to work "in a structured supportive setting" and concluded that Claimant "is likely to have a more optimistic outlook regarding his future if provided with a work setting and work assignments that matches current capacities." RX 34 at 25, 27.

I agree with both Drs. Reif and Vandenbelt, at least in part. I agree with Dr. Reif that Claimant is currently totally disabled due to his cognitive deficits, and that he may remain permanently disabled. I agree with Dr. Reif that the surveillance films are irrelevant since Claimant's overwhelming limitations are not physical, but rather mental. I also agree that Claimant's failures at the jobs he has attempted reflect his cognitive deficits as well as the factor of mental and physical fatigue. On the other hand, I also agree with Dr. Vandenbelt that Claimant would benefit from a return to work in a "structured supportive setting" as it would likely improve his outlook on life and his self-esteem.

I disagree, however, with Dr. Vandenberg's opinion that Claimant can and should return to work, given the available evidence. Respondents have not provided evidence of specific job openings that would fit the suggested requirements of Dr. Vandenberg. Indeed, a "structured supportive setting," as he proffers, seems to suggest sheltered employment, which would also not meet the test to be considered as suitable alternative employment. I disagree with Dr. Vandenberg's conclusion that placing Claimant in a minimum-wage job on a part-time basis is the most likely way to brighten Claimant's future outlook. Rather, I find that Claimant's efforts directed at gaining a college degree represent the more reasonable attempt to enhance his outlook as well as his employment chances.

As a result, I find Claimant to be totally and temporarily disabled from July 27, 2005 through September 15, 2008, and totally and permanently disabled since September 15, 2008.

Interest

The Claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation owed by the Respondents 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.

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. Respondents shall pay the Claimant compensation for temporary total disability from July 27, 2005, based on an average weekly wage of \$1,975.35, yielding the maximum compensation rate of \$1,047.16.
2. Respondents shall pay the Claimant compensation for permanent total disability commencing September 16, 2008.

3. Respondents shall pay interest on the 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.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California