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Issue Date: 28 August 2009

CASE NO.: 2009-LDA-192

OWCP NO.: 02-141115

IN THE MATTER OF

H. S.¹

Claimant

v.

TITAN CORPORATION

Employer

and

INSURANCE COMPANY OF THE STATE

OF PENNSYLVANIA

c/o AIG WorldSource

Carrier

APPEARANCES:

GARY PITTS, ESQ.

On Behalf of the Claimant

MICHAEL THOMAS, ESQ.

On Behalf of the Employer

BEFORE: C. RICHARD AVERY

Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Defense Base Act extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq., (The Act),

¹ Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

brought by Claimant against Titan Corporation (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The formal hearing was conducted in Dallas, Texas on May 13, 2009. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.² The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-19 and Employer/Carrier's Exhibits 1-45. This decision is based on the entire record.³

Stipulations

The parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Orthopedic injury/accident occurred on March 12, 2005 in the course and scope of Claimant's employment with Employer;
2. Employer was advised of Claimant's injury on March 12, 2005;
3. Notice of Controversion was filed on October 9, 2007;
4. Informal Conferences were held on June 21, 2007 and January 6, 2009; and
5. MMI as to back injury was reached April 1, 2007.

Issues

The unresolved issues in this proceeding are:

1. Whether Claimant's psychological condition is related to his injury of March 12, 2005;
2. Nature and Extent of Claimant's injury;
3. Average Weekly Wage (AWW); and
4. Claimant's entitlement to Section 7 medical benefits. (JX-1).

² The parties were granted time post hearing to file briefs, and while Employer/Carrier submitted Exhibits 43, 44 and 45 post hearing, Exhibit 46 was not offered.

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- (Tr. __); Joint Exhibit- (JX __, pg.__); Employer's Exhibit- (EX __, pg.__); and Claimant's Exhibit- (CX __, pg.__).

Statement of the Evidence

Testimonial Evidence

Claimant

Claimant is 58 years old. He grew up in Iraq and came to the United States in his early twenties as a political refugee. Prior to his arrival in the states he was in the Kurdish Military and worked as a nurse/medic in Iran. Once in the states, Claimant drove taxis, worked in a restaurant and owned two convenient stores. He speaks English, Kurdish, Farsi and Arabic, but except for his native language (Kurdish) he does not read the other languages as well.

A few months after the Iraq invasion, and because he wanted to help America in the war, Claimant, in August 2003 went to Iraq as a translator. Except for R&R's he served until he was hospitalized for his back condition on March 12, 2005.

During his time in Iraq, Claimant testified he accompanied soldiers in the field and orally translated for them. He wore a uniform and protective gear and was on call 24/7, but carried no weapon. As far as the job, he said it did bother him and he was just hoping to make a difference.

Prior to going to Iraq, Claimant said he had no back trouble and had passed his physical without incident. However, once in Iraq he was often a passenger in all terrain vehicles that ran over rough ground at such high speeds that his back began bothering him to the point he finally ended up in the hospital on March 12, 2005.

Upon release from the hospital, with a fifteen pound lifting limitation, he was sent back to the states. Once home, the first medical treatment Claimant sought was on April 7, 2005, at the Presbyterian Hospital where his wife works. The MRI revealed disc protrusions at L-4-5 and Claimant underwent surgery on April 15, 2005. According to Claimant, his surgery failed to relieve the pain in his legs despite post-surgical physical therapy, and he still suffers from the pain.

Claimant said his hope had been to make a quick recovery and return to Iraq, but four months later he was no better, and because of his apparent depression his doctor referred him for a psychological evaluation.

In the time that has followed, Claimant maintains he is no better mentally nor physically. He dislikes any noise and wants to be alone. In 2007 he moved out of the home he had shared with his wife and children and he was hospitalized for depression from December 19 until December 29, 2008. Except for medication, which Claimant dislikes, Employer has been of no assistance to him since October 9, 2007.

Claimant testified he is not sure where his depression comes from. He does not know whether it is out of fear, pain or uncertainty. All he knows is he has no life and is not in this world. He just wants to be alone. He has a driver's license, but drives very little. He does cut his grass, but mentally or physically does not believe he can work. He is not qualified to do written translating in his opinion and does not want to do oral because he does not want to deal with the public.

On cross-examination, Claimant acknowledged he has not worked since 2005 nor seen a medical doctor for his back since last seeing Dr. Marlin in 2007. He also agreed that Carrier has not refused further back treatment, rather he has simply not sought any since Dr. Marlin ceased seeing workers' compensation patients. As far as the PTSD or depression which some doctors have just diagnosed, Claimant agreed he was never in combat, but he was shot at by smugglers and has flash backs of Iraq and nightmares of killing or being killed. On one occasion he choked his wife.

Medical and Other Evidence⁴

Claimant's Exhibit 1 and Employer's Exhibit 17 contain not only Dr. Jerry Marlin's records, but other medical records as well which are found elsewhere in the record. According to this evidence, lumbar discectomy at L-4-5 was performed by Dr. Jerry Marlin on April 15, 2005. On June 2, 2005, Claimant was still complaining to Dr. Marlin of pain, and on September 1, 2005, Dr. Marlin requested an FCE feeling Claimant would reach MMI within six months of surgery. The results of the FCE was to recommend sedentary employment. On November 2, 2005, Dr. Marlin opined that Claimant should not return to Iraq and recommended a neuropsychological evaluation since the MRI showed no significant abnormalities.

At Dr. Marlin's request, Dr. Reed, a pain specialist, saw Claimant on November 21, 2005, and found Claimant to be "fixated" on pain. He recommended concentration be given to the psychological aspects of the pain complaint rather than epidural injections. Subsequently, Dr. Benzel MacMaster performed an IME on December 14, 2005, and found no objective cause for Claimant's complaints, but he could not rule out psychological causes.

On December 29, 2005, Dr. Marlin agreed a psychological evaluation was necessary because he suspected depression, and he also opined that Claimant could not return to any "labor position" at that time. The evaluation was denied by Carrier, and on February 2, 2006, upon seeing Claimant in his office, Dr. Marlin noted Claimant to be "non-depressed," yet Dr. Marlin still wanted the psychological aspects of Claimant's pain

⁴ Regarding the medical evidence, there was much duplication offered by the parties, and while I reviewed it all I have attempted to set it out in a succinct fashion.

evaluated. In his letter of October 10, 2006, Dr. Marlin says Claimant is depressed because of chronic back pain and “may also have a post-war type syndrome as well.” Once more he recommended psychiatric consultation and did so again on November 16, 2006. On December 19, 2006, Dr. Marlin completed a form stating Claimant was “not expected” to return to work.

Dr. MacMaster saw Claimant again on November 27, 2007. He found the degree of pain and dysfunction claimed by Claimant was not supported objectively. Dr. MacMaster found Claimant depressed and not disabled because of his herniated disc “to an extent.” He placed Claimant at maximum medical improvement no later than April 1, 2007, capable of work and opined Claimant had exhausted all reasonable medical treatment for his back.

After viewing a May 2007 video of Claimant engaged in various activities including mowing his lawn, Dr. MacMaster confirmed his opinion Claimant needed no further treatment for his back and was able to return to light duty. He corrected his opinion of maximum medical improvement date to January 5, 2006.

Dr. Tom Mayer saw Claimant on May 13, 2008, for consultation. He found Claimant to have depressive symptoms, denial, deficit of functioning and abnormal mental status (PTSD). However, he noted Claimant was mainly focused on settlement of his claim, believing cooperation with rehabilitation would adversely affect the same. If that is true and secondary gain is causing him to be non-compliant, then Dr. Mayer thought Claimant to be at maximum medical improvement.

Dr. Marlin, on August 28, 2008, while noting Claimant did not need further back surgery at the time, did feel Claimant needed depression management and post war evaluation for suspected post Iraq war depression. Thereafter, and for a third time, Dr. Macmasters saw Claimant on November 3, 2008, and noted some additional degenerative changes at L4-5, but no herniation. He thought no additional surgery was needed and found no reason Claimant could not do light work due to his low back condition for which Claimant was at maximum medical improvement. He also opined “a great deal of what concerns” Claimant is the size of his settlement. While Claimant has a “chronic pain syndrome,” Dr. MacMaster does not believe the cause to be his low back.

Claimant’s Exhibit 12 contains fifty-seven pages of psychological records. An appointment log suggests Claimant first saw Dr. Manuel Balbona for psychotherapy on January 2, 2007. The notes following each of Claimant’s visits with Dr. Balbona are most difficult to decipher. Medication during this treatment was managed by Dr. Sue Sherrod, a psychiatrist, who on October 29, 2007, wrote “man is improved, both his PTSD and depression.” Earlier she had assessed Claimant having PTSD and noted Claimant wanted to be alone and memories of the war were always with him. Neither of these two providers offered any testing of Claimant.

Dr. Bob Gant performed a psychological and neuropsychological evaluation of Claimant at the request of Employer/Carrier, on January 3, 2008. Dr. Gant was suspicious of a PTSD diagnosis because of the lack of a specific traumatic event, and concluded his lengthy report by saying he was “unable to confirm a diagnosis of PTSD” and that “the etiology of his psychological problem is uncertain,” though he found no logical basis to relate these problems to Claimant’s job in Iraq. He also noted Claimant focused on monetary benefits which rendered the testing results invalid.

Dr. Howard Cowan first saw Claimant on April 30, 2008, for a psychiatric evaluation. He diagnosed PTSD, major depressive disorder and post lumbar laminectomy syndrome. On May 21, 2008, he noted Claimant was taking Neurontin with benefit. Claimant was hospitalized in December 2008 and released with instruction on December 29, 2008. He had been admitted for major depressive disorders and PTSD by history.

Following the FCE on September 12, 2005, Dr. Radie Perry commented on the results. He adopted the conclusion of the physical therapist that Claimant was capable of sedentary work but not able to return to his previous job as a linguist in Iraq. He also noted Claimant made an effort to perform for the task, but he could not explain structurally why Claimant was having the pain he reported. A neurological examination on December 12, 2005, found only mild to moderate radiculopathy.

A Labor Market Survey ordered by Employer and dated June 29, 2006, is found at Employer’s Exhibit 25. Ten sedentary jobs were identified with the wages ranging from \$7.00 to \$10.50 per hour. Prior to that on April 17, 2006, an earlier Labor Market Survey had been performed utilizing Claimant’s skills as a translator taking into consideration his education and limitations as noted by the FCE of September 12, 2005. Eight jobs paid by the hour or page for interpretation and one paid as much as \$50.00 per hour. A ninth job with the U.S. Embassy in Iraq had a salary range of \$100,000.00 to \$160,000.00 per year. An updated Labor Market Survey was performed March 26, 2008, identifying eighteen jobs, some of which paid as much as \$500.00 per week. (EX-39).

The surveillance video of Claimant dated May 29, 2007, was shown to Dr. MacMaster and is found at Employer’s Exhibit 37. The video filmed over several days in May of 2007, depicts Claimant mowing his lawn, taking out trash, getting in and out of his vehicle and pumping gas.

Dr. Benzel MacMaster’s deposition was taken post-hearing on May 27, 2009. (EX-43). He went over his three reports and again opined the disc herniation Claimant suffered was as a result of his being bounced around on rough terrain while traveling in Iraq. He was of the opinion Claimant had reached maximum medical improvement by a second examination of Claimant in December 2007. He thought Claimant capable of work, saw no need for further orthopedic treatment and concluded Claimant suffered

chronic pain syndrome which could be supported by depression. Again, Dr. Macmatters stated he could make no physical findings for Claimant's pain and thought the video contradicted Claimant's complaints. He also reviewed the job surveys and thought from an orthopedic standpoint Claimant was capable to perform them all. On cross-examination he acknowledged on November 27, 2007, he had noted Claimant's overall effects suggest some degree of depression, and he agreed a patient can have depression following surgery. However, Dr. MacMaster stated he would defer psychiatric issues to the psychiatrist and psychologist.

Dr. Bob Gant's deposition was taken post hearing on May 19, 2009. (EX-44). Dr. Gant is a board certified neuropsychologist. He describes his experience with PTSD and explains the first element one looks for is a life threatening event, whether real or perceived. It is not, however, typically diagnosed for someone who simply has a stressful job.

Dr. Gant met Claimant over two days, January 3 and 4 of 2008, for a total of 11-12 hours consisting of interviews and testing to determine an objective rather than a subjective analysis of Claimant's mental state. After all this, Dr. Gant testified he does not have a diagnosis of Claimant, for lacking was Claimant's cooperation because of what Claimant maintained was lack of memory. He also pointed out that neither Drs. Balbona nor Sherrod administered any tests while rendering their diagnosis of Claimant as suffering PTSD. In his interview, Dr. Gant said Claimant's main voice of concern was his back pain. In testing, Claimant gave random answers and appeared to pay no attention.

When asked if he thought Claimant may have other psychiatric conditions or problems, Dr. Gant answered "maybe", but until his litigation is over it is impossible to validate Claimant's genuine psychiatric problems, obviously implying a secondary gain motive. As far as work restrictions from a psychological basis, Dr. Gant opined there were none. He also thought Claimant had the cognitive capacity to perform the jobs identified and he noted that Claimant was a "likeable guy" who interacted well with the people in Dr. Gant's office. As far as previously reporting Claimant's need to avoid people, Dr. Gant explained he was really referring to Claimant's marital relationship with his wife.

On cross-examination, Dr. Gant acknowledged depression is not unusually following surgery and pain, and one of the symptoms can be apathy. Also, Dr. Gant did not disagree with Dr. Mayer's report of May 13, 2008, wherein Dr. Mayer opined Claimant's chronic pain syndrome had medical/psychological features with psycho-psychological and depressive symptoms. Dr. Gant added, however, that chronic pain is treatable.

The deposition of Beverly Brooks, a vocational consultant, was taken post-hearing on June 2, 2009. (EX-45). She met Claimant at Employer's request on December 9, 2009 and performed a vocational evaluation. She took Claimant's history, reviewed his medical records and administered tests in basic math and reading. Claimant had been a linguist doing primarily oral translating for the Army. Before that he had managed two food marts and driven taxis. He tested sixth grade in math and average reading skills. Claimant has transferable skills and speaks English, Kurdish, Farsi and Arab.

Ms. Brooks said she initially used the FCE of September of 2005 and later Dr. MacMaster's restrictions. She looked for sedentary work Claimant could perform. Totally she has performed three job surveys. In the April 17, 2006 report (EX-25), Ms. Brooks primarily identified translator positions. The jobs found were freelancing Claimant could perform from home and earn as much as \$1000.00 per week. The ninth position in that survey identified the U.S. Embassy in Iraq which paid a greater salary of up to \$160,000.00 per year, and she pointed out that Claimant's language skills are much in demand.

In the addendum to that earlier report, dated June 26, 2006, Ms. Brooks identified less skillful for jobs such as cashier, security monitor, etc., paying \$7.00 to \$10.50 per hour full time, and the eighth position identified as cashier job would allow Claimant to sit and stand as needed.

The next survey, dated October 26, 2006, and attached as exhibit 8 of Ms. Brooks' deposition, identified jobs including that of an assistant instructor teaching Arabic as well as a translator; however, these would require relocating. Her final job survey is dated March 26, 2008 and found at Employer's Exhibit 39. In that survey she identifies both translator and lower end jobs. Translating from home on a three-way conference call Claimant could earn \$300.00 to \$500.00 per week at a rate of \$30.00 per hour.

A second job translating paid \$200.00 to \$300.00 per week and the two jobs identified could be combined, for should Claimant register for these two positions he could earn \$500.00 to \$800.00 weekly. If he registered with more than one agency he potentially could earn over a \$1000.00 per week.

In short, Ms. Brooks found Claimant employable and that a translator position is the best use of his skills within his restrictions; however, she stated that his motivation was very questionable. She also pointed out that she took into account Claimant's psychological issues and looked for jobs with limited public contact and limited concentration levels. Also, while she did not test Claimant for his translation skills, she verified them, both as to written and oral, with Employer who had required such skills before previously hiring him. She really believed that Claimant's ability to return to work simply depends on his motivation.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the “true doubt” rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee’s employment. *Darnell v. Bell Helicopter Int’l, Inc.*, 16 BRBS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one “arising out of or in the course of employment.” 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Both in Joint Exhibit 1 and at trial (Tr. p. 74-80), though denying Claimant suffers any permanent disability which would entitle him to compensation benefits, Employer/Carrier concede Claimant's back injury was work related and their responsibility. There is no such stipulation, however, as to the cause or extent of Claimant's psychological condition.

Psychological

While I acknowledge the nomenclature to attach to Claimant's psychological condition is somewhat vexing, I agree with Employer/Carrier the medical and factual evidence in this claim does not support a specific finding of PTSD. That said, however, I do find the totality of the medical and factual evidence supports a finding of depression secondary to Claimant's back injury.

Turning first to PTSD, I question whether there is evidence sufficient to trigger the presumption that Claimant suffers such a condition as a result of his employment in Iraq, but even if the presumption is triggered I find it rebutted and when considered as a whole the evidence does not support a conclusion of PTSD.

Dr. Marlin, for the first time following Claimant's back surgery, suspected Claimant suffered depression and recommended a neuropsychological evaluation, however, neither he nor Dr. MacMaster, as orthopedists, possess the training or experience to render a specific opinion as to Claimant's psychological condition. While Drs. Sherod and Balbona appear to diagnose PTSD, Dr. Balbona's notes are illegible, no objective testing was performed by either and no basis was offered for such diagnosis. Likewise, Claimant's December 2008 admission to the Emergency Room complaining of psychiatric problems was based on his reported history of PTSD, not that of the attending physician. Drs. Tom Mayer and Howard Cowan saw Claimant in 2008 and each off handedly mentioned PTSD among other depressive disorders, but neither tested Claimant nor provided a basis for the specific diagnosis of PTSD. Also, Claimant himself testified he does not know the origin of his depression, whether it is caused by fear, pain or uncertainty.

The only doctor to thoroughly evaluate and test Claimant over a two day period was Dr. Bob Gant, a neuropsychologist. He could not find evidence to support a diagnosis of PTSD. Claimant reported no trauma, flash backs or evidence of hyperarousal. Claimant did, however, appear to have memory deficient, and failed to fully cooperate with the psychological testing provided, thus causing Dr. Gant to suspect "presentation management and/or symptom magnification."

Consequently, based on the medical evidence of record, I do not make a specific finding of PTSD arising out Claimant's Iraq employment.

Depression

Even though unwilling to find the evidence in this instance supports a specific diagnosis of PTSD, I find that the same evidence supports a finding that as a result of his back injury and surgery, Claimant suffers a secondary injury of depression.

In the recent case of Amerada Hess Corp., et al. v. Director, OWCP, et al., 543 F.3d, 755 (5th Cir. 2008), the Fifth Circuit held that the Section 20 presumption does not apply to secondary injuries which arose naturally or unavoidably out of the primary injury. However, in this instance Claimant does not need the assistance of a Section 20(a) presumption for there is no evidence from which to draw any other conclusion than Claimant is depressed as a result of his back condition:

1. Dr. Marlin did not note Claimant's depression until after Claimant's surgery, but thereafter on more than one occasion reported psychological symptoms of depression and recommended anti-depressive medication;

2. Dr. Ken Reed, a pain management specialist, found Claimant "fixated" on his pain and thought Claimant best served with a pain program that concentrated on psychological aspects of pain;

3. Dr. MacMaster opined Claimant had chronic pain syndrome and had some degree of depression, which he said was not unusual to see depression after surgery;

4. Dr. Mayer found Claimant extremely depressed and too thought his chronic pain syndrome had both medical and psychological aspects;

5. Dr. Sherod reported Claimant had depression;

6. Dr. Bob Gant, while denying a diagnosis of PTSD, agreed it was not unusual to have depression following surgery and with chronic back pain;

7. Dr. Howard Cowan assessed Claimant as having major depressive disorders and provided medications; and

8. After admission to Presbyterian Hospital, Claimant was diagnosed as having a major depressive disorder.

In sum, the evidence supports a finding that Claimant, in addition to his acknowledged back injury, suffers depression and the depression he suffers is a natural result of his work related back injury and the surgery that followed.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

At the hearing (Tr. p. 74-80) and in the Joint Exhibit (JX-1), the parties placed Claimant at maximum medical improvement on April 1, 2007, as far as his back was concerned. As to Claimant's depression, however, there was no such agreement reached, and in the absence of any medical opinion providing such a date and in view of the fact Claimant apparently still suffers from depression and could benefit by additional treatment, I find that as to his depression Claimant has not reached maximum medical improvement.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

Claimant has not worked since March 12, 2005, and no doctor has suggested he could return to his former job in Iraq. Consequently, the Claimant having demonstrated he could not return to his previous pre-accident employment due to his work related back injury, the burden shifts to the Employer to show the existence of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

While Dr. Marlin seems to express some doubt about Claimant's ability to work, I find the more reasoned opinion to be the FCE of September 12, 2005, and Drs. MacMaster's and Mayer's opinions that Claimant could perform light duty work so far as his back is concerned. Opinions which the surveillance video taken in May 2007 also supports.

Regarding his psychological condition, there is no expert opinion that I can find of record that Claimant's depression prevents him from working. Consequently, as early as the September 2005 FCE, I find Claimant to have been capable of light work, and I find Employer/Carrier have met their burden through the April 17, 2006, job survey of Ms. Brooks that suitable alternative employment existed then and has continued with the passage of time.

Claimant has prior work experience managing food marts, driving taxis and as a linguist/translator. Taking these transferrable skills into consideration, along with Claimant's ability to perform light work, as early as April 17, 2006, Beverly Brooks identified nine translator/linguist positions including one in the U.S. Department of State Embassy in Iraq with an annual salary of \$100,000.00 to \$160,000.00 per year. However, while it is not expected of Claimant to return to Iraq, the other eight jobs identified fit well into Claimant's skills, and seven of the jobs allow him to work at home earning as much as \$50.00 per hour as an oral translator and up to .14 cents per word for a transcript translation.

As Ms. Brooks explained, doing this work from home and registered with more than one of the seven companies, Claimant could earn as much as a \$1,000.00 per week. If, as Claimant testified he truly does not want to have public contact, this at home type employment using his very valuable skills (translation) with no labor involved could not be a better fit. Certainly, it is more preferable than the less skilled and lower paying jobs Ms. Brooks identified such as cashier and security monitor paying \$7.00 to \$10.00 per hour and requiring Claimant to leave the comfort of his home.

As to Claimant's ability to perform written as well as oral translation of the languages he speaks, Ms. Brooks, though not testing Claimant for the skill, she verified such skills with Claimant's former employer who had required proficiency in translating both the oral and written word before hiring Claimant.

In sum, I find that as of April 17, 2006, Employer/Carrier have demonstrated suitable alternative, freelance employment for which Claimant was and is physically and mentally capable to accomplish with an earning capacity of \$1,000.00 per week. The only reason Claimant is not so employed in a time when his translation skills are needed, is because he has demonstrated no attempt to acquire any of these positions or any of similar such positions shown by Ms. Brooks in her subsequent job surveys.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

In this instance, both parties agree Section 10(c) is the appropriate method to calculate Claimant's average weekly wage at the time of his back injury on March 12, 2005. In fact the parties are within \$45.00 of each other as to the correct figure to be used. However, since Employer/Carrier has used the divisor of 52, I agree with Employer/Carrier's position and find Claimant's average weekly wage to be \$2,294.38 (\$119,308.00 divided by 52).

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen*, 16 BRBS 10.

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a Claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or District Director. See 33 U.S.C. § 907(c); 20 C.F.R. § 702.406. The employer is ordinarily not responsible for the payment of medical benefits if a Claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the Claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53; *Swain*, 14 BRBS at 664.

Employer/Carrier have acknowledged their obligation for medical treatment provided Claimant for his back injury. As to Claimant's psychological depression however, Employer/Carrier have denied such responsibility. Based upon my earlier findings that Claimant's depression is a secondary injury, I likewise find Employer/Carrier responsible for all reasonable and necessary past and future psychological/psychiatric treatment provided in connection with Claimant's depression.

ORDER

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

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from March 12, 2005 until April 17, 2006 based on an average weekly wage of \$2,294.38;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from April 17, 2006 and continuing based on an average weekly wage of \$2,294.38 and a weekly wage earning capacity of \$1,000.00;

(3) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses resulting from Claimant's back injury of March 12, 2005 and the depression arising therefrom;

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

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

(6) Claimant's counsel shall have twenty days from receipt of this ORDER in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have ten (10) days from receipt of the fee petition in which to file a response;

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

So ORDERED this 28th day of August, 2009, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

