

**U.S. Department of Labor**

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**Issue Date: 22 September 2009**

**CASE NO.: 2009-LDA-271**

**OWCP NO.: 02-135102**

**IN THE MATTER OF**

**J. W.<sup>1</sup>**

**Claimant**

**v.**

**SERVICE EMPLOYEES INTERNATIONAL, INC.**

**Employer**

**and**

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA**

**Carrier**

**APPEARANCES:**

**GARY B. PITTS, ESQ.**

**On behalf of Claimant**

**JERRY R. McKENNEY, ESQ.**

**On behalf of Employer/Carrier**

**BEFORE: C. RICHARD AVERY**

**Administrative Law Judge**

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<sup>1</sup> 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.

## DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651 *et. seq.* (The Act), brought by Claimant against Service Employees International, Inc. (Employer), and Insurance Company of the State of Pennsylvania (Carrier). The formal hearing was conducted in Covington, Louisiana on June 9, 2009. Each party was represented by counsel, and each presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments.<sup>2</sup> The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-13, and Employer's Exhibits 1-47.<sup>3</sup> This decision is based on the entire record.<sup>4</sup>

### Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651 *et. seq.* applies to this claim.
2. Injury/accident occurred on or about August 30, 2003;
3. Claimant's injury occurred within the zone of special danger;
4. There was an employer/employee relationship at the time of the alleged injuries;
5. Employer was advised of Claimant's injuries on August 30, 2003;
6. The claim for benefits was timely filed;

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<sup>2</sup> The parties were granted time post-hearing to file briefs.

<sup>3</sup> Employer/Carrier submitted Motions to Supplement the Record on July 1, 2009 and August 21, 2009. Those motions are hereby granted.

<sup>4</sup> The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript- (Tr. \_\_); Claimant's Exhibits- (CX \_\_, p. \_\_); and Employer's Exhibits- (EX \_\_, p. \_\_).

7. Notices of Controversion were timely filed on November 21, 2008 and March 3, 2009;
8. Informal Conferences were held on November 6, 2007 and February 4, 2009;
9. Employer/Carrier paid compensation benefits to Claimant as follows:
  - a. Temporary total disability benefits at the rate of \$500 per week paid from August 31, 2003 to November 29, 2005 (totaling 58,714.50); and
  - b. Permanent partial disability benefits paid totaling \$77,785.50 until suspended on November 21, 2008; and
10. Claimant has not returned to his usual employment. (JX-1).

### **Issues**

The unresolved issues in this proceeding are:

1. Causation of Claimant's injuries to his hips, right foot, and right ankle;
2. Nature and extent of Claimant's injuries;
3. Average weekly wage; and
4. Entitlement to Section 7 medical benefits. (JX-1).

### **Statement of the Evidence**

#### **Claimant's Testimony**

Claimant is forty-two years old. He finished the eleventh grade in his home state of Texas and received a GED. He then served in the Army for seven years. Following his discharge, Claimant worked in construction and then in a warehouse where he learned the skills of a materials and property coordinator. In the early 1990s, Claimant began working overseas, and in the years that followed, he was

employed off and on in Kosovo, Macedonia, Kaposvar, Hungary, and finally, in May of 2003, in Kuwait and Iraq. Claimant testified he enjoyed the work and travel, as well as the rate of pay. With Employer, Claimant started as a forklift operator, but shortly became a materials handler and coordinator working at least twelve hours a day, seven days a week.

On August 30, 2003, however, Claimant was driving a vehicle escorting a convoy when he struck a truck stalled in the middle of the road. The vehicle Claimant was driving was destroyed, and Claimant received numerous injuries, including fractures to his ribs, legs, and hands. Following the accident, Claimant was taken to a hospital in Kuwait, then to a hospital in Germany for nine days, and finally he returned to a hospital in Houston, Texas. Surgery was performed in his left leg, and a rod was inserted. Claimant's numerous other fractures were allowed to heal, and Claimant testified that he was often in a wheel chair or on crutches over the course of the next two years.

Because of the rod inserted in Claimant's leg, Claimant's left leg is seventeen millimeters longer than his right leg, which causes him to walk with a limp. This awkward gait produces pain in Claimant's hips and knees, and he seeks relief through surgery. Claimant's treating physician, Dr. Lindsey, wants to correct the condition by either lengthening Claimant's right leg or by shortening the rod in his left leg; however, Employer has refused the surgery. Employer's physician, Dr. Kaldis, who has seen Claimant twice, suggests orthotics. Claimant, however, says he has tried those on several occasions without success because of scarring on his feet and ankles.

Claimant denies he is at maximum medical improvement and says his pain reaches a peak after only a few hours. He takes pain and sleep medications and uses a TENS unit. He knows he cannot return to his previous job, which involved physical activities such as climbing over inventory, and he believes he could not work more than a few hours at a time. He has not worked since the accident and acknowledged that, although he met with a counselor with the Department of Labor in 2005, he did not follow through due to his pain and Dr. Lindsey's recommendation of surgery. At the time of the accident, Claimant was under a one-year contract with Employer, but planned to work at least five years there.

On cross-examination, Claimant acknowledged that videos offered by Employer/Carrier correctly depict him fishing, boating, walking on the beach, and doing household repairs on May 18, 19, and 20, 2009, but he denies he was able to do any of those activities for a long period of time. (EX-44; EX-45). Claimant also acknowledged he had broken his right ankle in a motorcycle accident in 1988,

but denied it had given him much trouble until his recent accident. He pointed to the fact he passed two pre-employment physicals, was running for exercise, lifting weights, and working long hours prior to his August 30, 2003 accident. He also has chronic shoulder pain from an earlier sports injury, but denies that it has kept him from doing anything.

## **Medical Evidence**<sup>5</sup>

### **Claimant's Pre-Deployment Physicals (EX-5)**

Claimant underwent two pre-deployment physicals for Employer. The first was conducted on July 6, 1999, and the second on April 24, 2003. Each time, Claimant was found medically qualified for deployment. (EX-5, p. 4, 15). On both occasions, Claimant disclosed the prior injuries he suffered after his 1988 motorcycle accident, which included broken bones and bone and muscle grafts to his right foot and leg. (EX-5, pp. 5, 15, 17-18).

### **Medical Records from Landstuhl Hospital (EX-25)**

Claimant was seen in Landstuhl Hospital in Germany following his August 30, 2003 accident. Records reveal Claimant suffered multiple fractures to his ribs and legs. His right leg was placed in a splint, and the left femur was placed in traction. Claimant was scheduled to return to Houston, Texas for treatment a few days later. (EX-25, p. 1).

### **Medical Records from Memorial Hermann Hospital (EX-10)**

Upon returning to the United States, Claimant was initially treated at Memorial Hermann Hospital. A radiology report dated September 9, 2003 describes a segmental, comminuted fracture of the midshaft of Claimant's left femur and noted an external fixator attached to the left femoral neck and intertrochanteric regions and a distal external fixator attached to the distal shaft. (EX-10, p. 15). Another radiology report was made on September 11, 2003, after an intermedullary rod and internal pin had been placed in Claimant's left femur. The report noted continued displacement of fragments at the intertrochanteric proximal fracture, but improved alignment of the intervening shaft fragment at the proximal fracture line. (EX-10, p. 21).

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<sup>5</sup> In addition to the medical evidence summarized below, the parties offered a number of other such exhibits which, while read, will not be summarized due to their lack of relevance to the decision reached in this case.

### **Medical Records of Dr. Dhiren Sheth (EX-13; EX-10)**

While at Memorial Hermann Hospital and for a period afterwards, Claimant was treated by Dr. Sheth. On September 11, 2003, Dr. Sheth performed surgery to remove the external fixator from Claimant's left femur and replace it with an intramedullary device. (EX-13, pp. 1-4). On September 24, 2003, Dr. Sheth reported Claimant's surgical incisions had healed and there was satisfactory alignment of the fractures in Claimant's left femur. He recommended physical therapy and medication for pain relief. (EX-13, p. 5).

At a follow-up on October 15, 2003, Dr. Sheth reported continued improvement with respect to the alignment of Claimant's left femur as well as Claimant's range of motion. (EX-13, p. 6). On November 19, 2003 Claimant told Dr. Sheth he was experiencing pain in his left thigh, left leg, and right ankle, and that he was concerned about a difference in the lengths of his legs. Dr. Sheth attributed this discrepancy to a previous fracture of Claimant's right tibia which he believed had shortened as it healed. Nevertheless, Dr. Sheth was satisfied with Claimant's progress. (EX-13, p. 7).

In January of 2004, Claimant continued to complain of pain in his left leg. Dr. Sheth noted a gap in the distal fracture site, as well as a fractured screw and recommended removal of the distal screws. (EX-13, p. 8). Dr. Sheth performed this procedure on February 12, 2004, but only a portion of the broken screw could be removed. (EX-13, pp. 9-10; EX-10, pp. 13-14). A follow-up on February 25, 2004 revealed Claimant had few complaints and wanted to return to physical therapy. (EX-13, p. 11). However, on March 24, 2004 Claimant came to Dr. Sheth complaining of pain in the left buttock and right ankle. (EX-13, pp. 13-14).

### **Medical Records of Dr. Ronald Lindsey (EX-6; EX-8)<sup>6</sup>**

Dr. Lindsey first saw Claimant on July 8, 2004. Claimant complained of pain in his left hip, left knee, and right ankle. Claimant explained the right ankle pain had begun when he started physical therapy in February of 2004 and had increased since that time. X-rays revealed the rod in Claimant's leg was in good position, but another of the screws was broken. (EX-6, p. 1). Dr. Lindsey performed surgery to remove the broken screw on July 21, 2004. (EX-8, pp. 1-2).

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<sup>6</sup> Employer/Carrier's index of exhibits indicates the deposition of Dr. Lindsey (EX-20) was pending; however, it was not submitted.

Claimant followed up with Dr. Lindsey on August 3, 2004. Claimant appeared to be recovering well, and Dr. Lindsey recommended Claimant begin physical therapy and resume “normal” activity, though Claimant was to refrain from strenuous or exertional activity. Claimant reported pain in his right ankle where he had been injured back in 1988. Dr. Lindsey noted that this pain appeared to be caused by the increased weight Claimant was placing on his right foot due to his current injuries and suggested Claimant be fitted for a custom shoe to prevent him from developing additional pressure sores. (EX-6, p. 7).

Dr. Lindsey noted continued improvement on August 17, 2004 and stated Claimant had “resumed activities of normal daily living.” (EX-6, p. 8). However, Claimant continued to suffer from pain in his feet, and on August 31, 2004, Dr. Lindsey told Claimant additional surgeries would likely be necessary to address his injuries. However, Dr. Lindsey felt it would be in Claimant’s best interests to delay these procedures for as long as possible. (EX-6, p. 10).

On October 12, 2004, Dr. Lindsey diagnosed Claimant with tarsal tunnel syndrome in his right foot as a result of his August 30, 2003 trauma. (EX-6, p. 13). Dr. Lindsey later confirmed this diagnosis and performed a release procedure on Claimant on January 6, 2005. (EX-8, p. 9). At a follow-up appointment on January 18, 2005, Dr. Lindsey noted Claimant was recovering well but did have some residual pain and difficulties with weight bearing. (EX-6, p. 15).

Claimant continued to improve, and on March 1, 2005, Dr. Lindsey recommended Claimant resume physical therapy. (EX-6, p. 16). On April 14, 2005, the physical therapist reported Claimant was making excellent progress. (EX-6, p. 18). However, by August 15, 2006, Claimant’s pain in his right ankle had returned, and Dr. Lindsey noted Claimant’s right tarsal tunnel syndrome had recurred despite the surgical release. (EX-6, p. 22).

### **Medical Records of Dr. Michael Kaldis (EX-7; EX-21)**

Dr. Kaldis first examined Claimant on July 13, 2005. At that time Claimant mostly complained of pain in his right foot and reported his left leg felt great. X-rays revealed Claimant’s right foot was severely flat and deformed. Dr. Kaldis recommended a new custom shoe and referred Claimant to Dr. Suchowiecky for pain management. (EX-7, p. 7). At a follow-up on August 1, 2005, Claimant continued to complain of pain, and Dr. Kaldis noted Claimant would be given permanent restrictions due to the injury to his left leg. (EX-7, p. 8).

Dr. Kaldis saw Claimant again on December 17, 2008. Claimant's primary complaints at that time were pain in the left leg, hip, and knee, as well as in the right ankle. Dr. Kaldis' physical examination of Claimant revealed a leg length discrepancy of approximately one and a half inches. Nevertheless, Dr. Kaldis noted Claimant's strength had improved since his last visit in 2005. (EX-7, pp. 1-2). In addition to Dr. Kaldis' examination of Claimant, he reviewed Claimant's medical records and compiled an independent evaluation report on December 22, 2008. In the report, Dr. Kaldis' opined Claimant's leg length discrepancy could be treated by orthotics rather than surgery. Moreover, Dr. Kaldis stated Claimant was permanently incapable of returning to work as a materials handler and that the restrictions against climbing, running, kneeling, or squatting were permanent as well. (EX-7, p. 5).

Dr. Kaldis was deposed on August 5, 2009. (EX-21, p. 1). During that deposition, Dr. Kaldis stated he disagreed with Dr. Sheth's conclusion that Claimant's leg length discrepancy was caused by the injury to Claimant's right ankle in 1988. (EX-21, p. 9). After reviewing his records, Dr. Kaldis reiterated his position that Claimant's leg length discrepancy should be treated with orthotics rather than surgery. (EX-21, pp. 19-20, 31-32). Dr. Kaldis testified Claimant reached maximum medical improvement on July 25, 2006, but admitted this date came from his review of Claimant's medical records and not his own physical evaluation of Claimant. (EX-21, p. 4).

### **Medical Records of Dr. Tova Alladice (EX-27)**

Dr. Alladice first treated Claimant on August 28, 2007. Her physical examination of Claimant at that time revealed Claimant's gait to be antalgic with his left pelvis high in standing. She measured Claimant's left leg to be approximately four centimeters longer than his right. She also noted Claimant's restricted range of motion in his right ankle. (EX-27, pp. 6-7).

At a follow-up appointment on October 9, 2007, Claimant reported increased pain in his left hip and knee. She attributed this pain to the use of a soft cast which his orthopedist had given him to address his leg length discrepancy. (EX-27, p. 17). Claimant reported continued pain on February 13, 2008, which Dr. Alladice attributed to Claimant's gait. Therefore, she recommended additional exercises to address the mechanical stresses caused by Claimant's leg length discrepancy. (EX-27, p. 24).

On March 25, 2008, Claimant reported he had crafted his own heel lift and had begun using it, though it had caused some increased pain in his hip and back. Again Dr. Alladice attributed Claimant's pain to his leg length discrepancy. (EX-27, p. 32). Shortly thereafter, Claimant had to stop using the homemade lift because it was causing bruising on his toes. (EX-27, p. 40). In May of 2008, Claimant reported improvement and increased activity, but his condition worsened by July of that year. (EX-27, p. 48, 61). Claimant continued to report pain caused by his gait, and on October 22, 2008, he reported a "pop" in his right ankle which had caused increased pain and sensitivity. (EX-27, p. 86).

On December 4, 2008, Claimant told Dr. Alladice he had attempted to increase his activity, but this had resulted in increased pain in his feet and ankles. A CT scan of Claimant's right foot and ankle revealed significant post-traumatic arthritis. (EX-27, p. 98). Claimant continued to experience increased pain, and on May 12, 2009, Dr. Alladice noted a significant restriction in Claimant's hips secondary to the leg length difference. (EX-27, p. 143).

### **Occupational Evidence**

#### **Department of Labor – Vocational Rehabilitation File (EX-23)**

Claimant's participation in the Department of Labor vocational rehabilitation program began on August 29, 2005. Clarence Hulett, a consultant, provided a variety of leads to move Claimant back into the work force. (EX-23, p. 22). On August 15, 2006, Mr. Hulett noted Claimant's failure to cooperate in the program by failing to maintain and submit job search logs. (EX-23, p. 67).

On December 2, 2005, Mr. Hulett issued a labor market survey, incorporating Dr. Kaldis' assessment that Claimant was able to return to any job that did not require running, kneeling, or climbing. Mr. Hulett identified the following ten positions:

- 1. Assembly/Warehouse Supervisor** with Primitives Furniture. Requires high school diploma and experience with furniture retail. Involves interfacing with customers, setting up showroom displays, and receiving. Salary: \$15 per hour. (EX-23, p. 121).
- 2. Warehouse Position** with The Royal Hill Company. Must have experience in supervising employees and inventory. Requires ability to complete forms and hold meetings. Salary: \$13 per hour. (EX-23, p. 121).

3. **Warehouse Assembly** with Staffmark. Must be able to perform light repetitive tasks. Salary: \$15 per hour. (EX-23, p. 121).
4. **Assembly/Warehouse Manager** with Alabama Furniture. Responsible for assisting store management in the effective operation of the store and service center to increase sales and productivity. Salary: \$12 per hour. (EX-23, p. 121)
5. **Assembly Warehouse Supervisor** with Delwatch Technologies. Must supervise the manufacturing processes and assembly of finished products, provide daily monitoring of production metrics, and plan work center equipment operating schedules. Salary: \$18 per hour. (EX-23, p. 122).
6. **Assembly Position** with IQ Systems. Salary: \$14 per hour. (EX-23, p. 122).
7. **Assembly Position** with Coastal Casting Service. Duties ranging from grinding to learning inspection and final inspection procedures. Salary: \$12 per hour. (EX-23, p. 122).
8. **Assembly/Production Supervisor** with Randstad. Salary: \$14 per hour. (EX-23, p. 122).
9. **Assembly/Warehouse Supervisor** with Coca-Cola Enterprise Bottling. Duties involve entering inventory data and visually inspecting all incoming and outgoing vehicles. (EX-23, p. 123).
10. **Assembly/Warehouse Manager** with SLS Wholesale. Salary: \$12 per hour. (EX-23, p. 123).

On March 17, 2008, Claimant's vocational rehabilitation case was closed, as it was no longer medically feasible for him to participate in the program due to anticipated surgery. (EX-23, p. 4).

### **Vocational Rehabilitation Report of Wallace A. Stanfill (EX-16)**

Mr. Stanfill met with Claimant on December 5, 2005 and prepared a report summarizing his findings on January 16, 2006. Mr. Stanfill summarized Claimant's medical history, noting his August 30, 2003 accident in Kuwait and

subsequent surgery to his left femur. (EX-16, p. 1). Mr. Stanfill also summarized the multiple revisions to that procedure, as well as Claimant's endeavors with orthotics and physical therapy. (EX-16, p. 2)

At the time of the assessment, Claimant reported continued pain and weakness in the right ankle, as well as pain in the left leg from the hip to the knee. (EX-16, p. 2). Claimant estimated he could lift between forty and fifty pounds, walk for up to two-hundred yards, stand for forty minutes, sit for fifteen minutes, and climb stairs. (EX-16, p. 3).

Claimant told Mr. Stanfill he had completed the tenth grade, obtained a GED, and served in the Army for several years. Claimant described his duties as a Material Coordinator with Employer, as well as his prior engagements with employer both in Texas and abroad. (EX-16, p. 4) Mr. Stanfill described all of Claimant's previous work as requiring medium to light physical exertion. (EX-16, p. 5). Mr. Stanfill relied on Dr. Kaldis' conclusion that Claimant was able to return to work as of November 29, 2005, as long as he did not have to kneel, climb, or run. (EX-16, pp. 5-6).

Based on Claimant's age, education, work experience, and physical capabilities (as assessed by Dr. Kaldis), Mr. Stanfill conducted a labor market survey to find suitable employers in the Houston, Texas area with job openings. Mr. Stanfill identified the following positions:

1. **Lead General Warehouse Foreman** with Home Depot. Salary: \$38,500 per year.
2. **Warehouse Supervisor** with TNT Logistics. Salary: \$35,000 to \$40,000 per year.
3. **Warehouse Manager** with W & O Supply. Salary: \$38,000 per year.
4. **Warehouse Manager** with Sepia Photo Promotions. Salary: \$30,000 per year.
5. **Senior Materials Handler** with Hanover Compression, Inc. Salary: \$32,600 per year.
6. **Shift Supervisor** with Star Furniture. Salary: \$32,000 to \$36,000 per year.

7. **Warehouse Foreman** with Dixie Plywood. Salary: \$31,000 to \$34,000 per year.
8. **Material Expeditor** with Perry Homes. Salary \$29,000 per year. (EX-16, pp. 7-8)

Mr. Stanfill's report did not provide any information regarding duties or physical demands of these positions.

### **Functional Capacity Evaluation (EX-15)**

A functional capacity evaluation of Claimant was completed on February 23, 2006. Claimant was found to be able to perform tasks at the light physical demand level, which restricts occasional lifting to twenty pounds, frequent lifting to ten pounds, and does not allow for constant lifting. The evaluation summary acknowledged Claimant was unable to return to his job with Employer, which required medium to heavy work. (EX-15, p. 2).

### **Supplemental Report (EX-17)**

Mr. Stanfill updated his assessment of Claimant on June 9, 2009. He did not re-interview Claimant, rather, his update was based on additional medical records, as well as a deposition of Claimant conducted on May 6, 2009. (EX-17, p. 1). Mr. Stanfill completed a new labor market survey, again relying on Dr. Kaldis' assessment that Claimant could return to any position that did not require running, climbing, or kneeling. (EX-17, p. 2). Mr. Stanfill identified the following positions:

1. **Logistics & Supply Technician** with Lear Siegler EG & G Division. This position would require the employee to be stationed in Iraq. Duties include establishing and maintaining automated and manual accounting records, maintaining the stock locator system, and administering document control procedures. In addition, the employee would be required to process inventories, surveys, and warehousing documents and be capable of providing general technical support. This position offers a salary of \$30.29 per hour for the first forty hours, including differentials and hazard pay. (EX-17, p. 3).

2. **Toll Collector** with Harris County Toll Road Authority. This position requires the employee to operate a toll booth and prepare reports of daily work activity. The employee must be able to work any shift assigned. The position pays a salary of \$12 per hour. (EX-17, p. 3).
3. **Assistant Dispatcher/Call Taker** at Harris County Toll Road Authority. This position requires the employee to process incoming calls for the Patron Emergency Assistance Team, Constables, and Management Coordinators. The employee will also handle calls related to maintenance requests. The salary offered is \$12 per hour. (EX-17, p. 4).
4. **Parks & Recreation Gate Tender** with City of Baytown. The employee opens and closes the park daily, maintains the entrance, collects fees, and answers questions. The City reserves the right to require the employee to work overtime. Moreover, the employee may be required to perform duties for the benefit of the general public during emergency situations. The salary offered is \$9.20 to \$10.82 per hour. (EX-17, p. 4).
5. **Security Guard** with Pinkerton Government Services. The employee observes and reports incidents at an assigned client site. The employee is required to make frequent patrols on foot or in a vehicle and check for unsafe conditions, security violations, etc. The employee must also be able to respond to emergency situations. The position offers a salary of \$10.50 per hour. (EX-17, p. 4).
6. **Materials Technician/Material Management Specialist** with Clearlake Regional Medical Center. This worker provides a variety of administrative support functions and controls and coordinates equipment, supplies, and future planning. Among other duties, the employee is required to restock all supplies and inventory as needed. This job offers a salary of \$14.00 to \$18.00 per hour. (EX-17, p. 5).
7. **Stockroom Expediter** with Applied Industrial Technologies. The employee is required to perform duties to receive and verify incoming parts, materials, and supplies; maintain stock areas; prepare sales orders; and pick up and deliver orders, stock, and supplies. The employee is also required to load and unload vehicles as necessary, and perform other administrative and janitorial duties. The salary offered in \$28,000 to \$32,000 per year. (EX-17, pp. 5-6).

## **Other Evidence**

### **Claimant's Employment Agreement (EX-4; CX-2)**

Claimant entered into an employment agreement with Employer on May 21, 2003. (EX-4, p. 13; CX-2, p. 13). According to the agreement, Claimant's base salary was to be \$2,250 per month. (EX-4, p. 2; CX-2, p. 2).

### **Claimant's Wage Data (EX-2)**

Wage records indicate Claimant worked for Employer from May 24, 2003 through August 30, 2003 and earned \$24,886.09 during that time. (EX-2, p. 6).

## **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 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 (Maher Terminals)*, 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 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 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).

In this instance, there is no dispute Claimant injured his left leg on August 30, 2003 in a work-related motor vehicle accident; however, Employer/Carrier allege Claimant’s current suffering arises from secondary injuries not covered by the Act. Specifically, Employer/Carrier assert Claimant’s hip pain and right foot and ankle pain are secondary injuries that did not arise from his work-related accident. The Fifth Circuit has recently held secondary injuries are not covered by the Act unless a Claimant can show the secondary conditions “naturally or unavoidably” resulted from the covered injury. *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 763-64 (5th Cir. 2008). The evidence in this case suggests Claimant’s current hip pain and problems in his right foot and ankle were the natural and unavoidable result of his August 30, 2003 accident.

Claimant reported hip pain at his first visit with Dr. Lindsey on July 8, 2004. (EX-6, p. 1). He had previously reported pain in his left thigh and buttock to Dr. Sheth. (EX-13, pp. 7, 13-14). Dr. Lindsey attributed this pain to Claimant’s leg length discrepancy, as well as a broken screw in Claimant’s leg. (EX-6, p. 1). Claimant also reported hip pain to Dr. Alladice on October 9, 2007 and February 13, 2008. Dr. Alladice attributed this pain to Claimant’s altered gait caused by his leg-length discrepancy, as well as a soft cast he had been given to address the discrepancy. (EX-27, p. 17, 24). As recently as May 12, 2009, Dr. Alladice reported significant restriction in Claimant’s hips secondary to the leg length difference. (EX-27, 143). Therefore, the weight of the medical evidence points to Claimant’s leg length discrepancy as the cause of his continued hip pain.

Despite these opinions, Employer/Carrier allege Claimant’s leg length discrepancy did not result from his August 30, 2003 accident, and thus any resultant injuries are not covered by the Act. Employer/Carrier rely on Dr. Kaldis’ testimony that he believed the discrepancy was caused by differing bone lengths in Claimant’s legs, rather than the rod in Claimant’s left femur. (EX-21, p. 9).

However, Claimant testified that prior to the accident he had been very active with no physical limitations, running several miles and lifting weights for exercise. (Tr. 28-29). Moreover, neither of Claimant's pre-deployment physicals revealed any leg length discrepancy or alteration to Claimant's gait. (EX-5, p. 4, 15). It was only after the device was placed in Claimant's leg that Dr. Sheth noted the discrepancy. (EX-13, p. 7). Therefore, I find Claimant's leg-length discrepancy, and thus his hip pain, are covered under the Act as the natural and unavoidable result of his work-related accident on August 30, 2003.

Employer/Carrier also argue Claimant's current problems in his right foot and ankle are solely the result of his 1988 motorcycle accident, and thus not compensable under the Act. However, when a work-related injury aggravates or combines with a previous injury or underlying condition, the entire resultant condition is compensable. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986). In this case, it appears Claimant's altered gait aggravated the prior injury to his ankle, as it caused him to place more weight on his right foot. Dr. Lindsey reached this conclusion in August of 2004 when he first recommended orthotics to address Claimant's limp (EX-6, p. 7). When Claimant's condition later worsened into tarsal tunnel syndrome, Dr. Lindsey also attributed this to Claimant's gait and not the natural progression of a pre-existing problem. (EX-6, p. 13). Dr. Alladice also considered Claimant's current right ankle and foot pain to be a result of his leg-length discrepancy. (EX-27, pp. 6-7, 17, 98). Therefore, I find Claimant's current right foot and ankle injuries are compensable under the Act, as they are traceable through the leg-length discrepancy to Claimant's work-related accident.

### **Nature and Extent**

A claimant bears the burden of proving 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 (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of 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 MMI 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. Williamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

Here, Claimant testified he believes he has not yet reached MMI. (Tr. 42). On the other hand, Dr. Kaldis testified Claimant reached MMI on July 25, 2006. However, on further questioning, Dr. Kaldis admitted this date was based on his review of Claimant's medical records and not his own physical examination of Claimant. (EX-21, p. 4). None of Claimant's other doctors have given a definitive statement as to MMI. While Dr. Lindsey urged Claimant to resume normal activities as early as 2004, he also advised Claimant further surgery would be necessary to treat his injuries. (EX-6, pp. 8, 10). Dr. Alladice's records make no mention of MMI. Consequently, I find Claimant has not yet reached MMI. Therefore, his disability remains temporary in nature.

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 a work related injury establishes a *prima facie* case of disability. The burden then shifts to employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 420, 424, 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.

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 the employer to find specific jobs for the claimant or act as an employment agency; 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 by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991).

In this case, Claimant has met his burden of proving disability. Even Dr. Kaldis, Employer/Carrier's own doctor, admits Claimant is permanently unable to return to his former job as a materials handler. (EX-21, p. 4). Therefore, the burden shifts to Employer/Carrier to show suitable alternative employment.

Mr. Hullet with the Department of Labor issued a labor market survey on December 2, 2005, in which he identified ten jobs for Claimant. According to the report, Mr. Hullet took into account the restrictions against running, kneeling, or climbing placed on Claimant by Dr. Kaldis. (EX-23, pp. 121-23). However, the survey provides little information on the physical demands of the ten identified positions, and the Department ultimately closed Claimant's file due to their belief that it was no longer medically feasible for Claimant to participate in the vocational rehabilitation program. (EX-23, p. 4).

A second labor market survey was prepared by Mr. Wallace Stanfill on January 16, 2006. However, this survey was also insufficient to establish suitable alternative employment, as it provides no information about the physical demands of the identified jobs, and several of the positions are materials handler positions, a job which Dr. Kaldis advised Claimant was no longer physically capable of filling. (EX-16, pp. 7-8).

Dr. Stanfill prepared another labor market survey on June 9, 2009, this time identifying seven jobs for which Claimant may be eligible. (EX-17, pp. 1-6). Of these seven jobs, I find several unsuitable. For example, the gate tender position and security guard positions would require Claimant to act quickly in an emergency, which would violate the restriction placed on Claimant against running. In addition, a few of the jobs would require Claimant to restock supplies and inventory which would likely require him to kneel, squat, or climb. However, the videos offered by Employer/Carrier make evident Claimant is capable of some physical activities, and I find that the toll taker and dispatcher positions would not violate the restrictions placed on Claimant by his doctors.

In sum, I find Employer/Carrier established suitable alternative employment was available to Claimant as of June 9, 2009. I also find Claimant's wage earning capacity to be commensurate with the wages earned by the toll collector position, or \$12.00 per hour, which amount to an average weekly wage earning capacity of \$480.00.

### **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).

Section 10(a) and Section 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.), *cert. denied*, 469 U.S. 818 (1994). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment, not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. Gen. Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady, then Section 10(a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was "substantially the whole of the year," where the work was characterized as "full

time, steady, and regular”). The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-56 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991). This would be the case where the claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of a substitute employee’s wages. See, *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Both Sections 10(a) and 10(b) apply to an employee who worked five or six days a week. Because Claimant worked for Employer for seven days a week, both Sections 10(a) and 10(b) are inappropriate methods for determining Claimant’s average weekly wage. (Tr. 23-24). Therefore, Section 10(c) must apply.

Section 10(c) is a catch-all to be used in instances when neither 10(a) nor 10(b) are reasonably and fairly applicable. If employee’s work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation awarded under the Act is determined by considering his previous earnings in the employment in which he was working at the time of the injury, the reasonable value of the services of other employees in the same or most similar employment, or other employment of the claimant, including the reasonable value of services of the employee if engaged in self-employment. 33 U.S.C. § 910(c); *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997). When Section 10(c) is used in a Defense Base Act case, the calculation must be based solely on the Claimant’s overseas earnings. *K.S. v. Service Employees Int’l Inc.*, BRB No. 08-0583 (2009).

As stated above, Section 10(c) must apply in this case because Sections 10(a) and 10(b) only apply where a claimant works less than seven days a week. Applying Section 10(c), and taking into account the mandate of *K.S. v. Service Employees Int’l Inc.*, BRB No. 08-0583 (2009), I find that the average weekly wage calculation in this case must be based solely on the Claimant’s overseas earnings. Claimant’s wage records reveal Claimant worked for Employer from

May 24, 2003 through August 30, 2003, a period of fourteen weeks and one day (14.143 weeks). During that time he earned \$24,886.09 (EX-2, p. 6). This results in an average weekly wage amount of \$1,759.60 ( $\$24,886.09 \div 14.143$  weeks).

### 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 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, refusal, or 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 v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

Section 7(c)(2) of the Act provides 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. *Id.*

In this case, Claimant urges Employer/Carrier should be held responsible for his reasonable and necessary medical expenses, and in particular, a surgical procedure to resolve his leg length discrepancy by either shortening the left leg or lengthening the right. Employer/Carrier rely on Dr. Kaldis' testimony that the discrepancy could be treated with orthotics. (EX-21, pp. 19-20, 31-32). However, Claimant testified he has tried a number of devices with little or no success. Indeed, many of the lifts and custom shoes Claimant has tried in the past have only served to exacerbate Claimant's pain by causing bruising and pressure sores on his foot and ankle. (Tr. 32). Conversely, Dr. Lindsey advised Claimant additional surgeries would be necessary to address his injuries and continuing pain. (EX-6, p. 10). Specifically, Dr. Lindsey recommended a procedure to address the leg length discrepancy. (Tr. 31). Therefore, I find Claimant is entitled to reasonable and necessary medical expenses, including a surgical procedure to resolve his leg length discrepancy.

### **ORDER**

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

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from August 30, 2003 to June 9, 2009, based on an average weekly wage of \$1,759.60;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from June 9, 2009 and continuing based on a weekly wage earning capacity of \$398.40;<sup>7</sup>

(3) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses resulting from Claimant's injuries of August 30, 2003, including the procedure to correct Claimant's leg-length discrepancy;

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

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<sup>7</sup> Since the August 30, 2003 injury, the National Average Weekly Wage has increased from \$498.27 to \$600.31 in 2009, an increase of 17%. Reducing Claimant's \$480.00 earning capacity in 2009 by 17% equals \$398.40

(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 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.

**ORDERED** this 22nd day of September, 2009, at Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**