

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 May 2010

CASE NO.: 2009-LDA-00532

OWCP NO.: 02-135150

**ROY MCNAIR,
Claimant**

v.

**SERVICE EMPLOYERS INTERNATIONAL,
Employer**

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
c/o AIG WORLD SOURCE,
Carrier**

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest**

APPEARANCES:

Gary B. Pitts, Esq.
Pitts & Mills
On behalf of Claimant

Michael D. Murphy, Esq.
Mark C. James, Esq.
Henslee Schwartz
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, and its extension, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq.*, brought by Roy McNair, (Claimant), against Service Employers International,

(Employer), and Insurance Company of the State of Pennsylvania c/o AIG World Source, (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on February 24, 2010, in Houston, Texas.

At the hearing, all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced sixteen (16) exhibits, which were admitted, including: Claimant's Medical Records; LS-203 filed April 5, 2004; Claimant's Employment Agreement with Employer; LS-202 filed December 11, 2003; LS-207 filed March 14, 2004; Photographs of Claimant's PPE Gear; Claimant's Wage History with Employer; LS-208 filed January 31, 2007; DOL Vocational Rehabilitation Documents; Claimant's Federal Tax Returns; LS-207 filed December 27, 2004; Letter from Employer Regarding Medical Leave; Claimant's LS-18 filed March 9, 2009; Employer/Carrier's LS-18 filed December 18, 2009; Information Conference Recommendations (limited to Section 28 purposes); and Employer/Carrier's Responses to Discovery.

At the hearing, Employer/Carrier introduced the testimony of Wallace Stanfill, and introduced twenty (20) exhibits, which were admitted, including: Relevant LS Forms; Claimant's Statements; Claimant's Employment Agreement; Claimant's Answers to Interrogatories; Claimant's Answers to 8(f) Interrogatories; Claimant's Wages & Earnings; Carrier's Payments to Claimant; Vocational Rehabilitation Records; Deposition and Medical Records of Dr. Vivek Kushwaha; Functional Capacity Evaluation of ERGO Rehab; Functional Capacity Evaluation of Baton Rouge Physical Therapy; Section 8(f) Application and Relevant Exhibits; and Exhibits Related to Employer's Attrition Argument.¹

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, the undersigned makes the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and the undersigned finds:

1. The LHWCA, 33 U.S.C. § 901 *et seq.*, as amended, applies to this claim.
2. The Claimant injured his lower back in a cumulative trauma ending on November 27, 2003.
3. Claimant's injury occurred overseas.
4. Claimant's injury arose out of and in the course of the worker's employment with Employer.

¹ References to the exhibits are as follows: Trial Transcript – Tr. ____, p.____; Joint Exhibit - JX- ____, p.____; Claimant's Exhibit – CX-____, p. ____; ALJ Exhibit – ALJX-____.

5. There was an Employer/Employee relationship at the time of the injury.
6. Employer was timely notified of the injuries
7. The claim was timely filed.
8. Employer's Notice of Controversion was timely filed.
9. An informal conference was conducted on January 27, 2009, and July 17, 2009.
10. Claimant was paid temporary total disability benefits from December 27, 2003, to April 11, 2005, at a weekly compensation rate of \$257.70.
11. Claimant was paid temporary total disability benefits from April 12, 2005, to November 5, 2007, at a weekly compensation rate of \$400.00.
12. Claimant has been paid permanent partial disability benefits from November 6, 2007, to present and continuing, at a weekly compensation rate of \$200.00.
13. Medical benefits have been paid in the total amount of \$38,279.15.
14. Claimant was temporarily and totally disabled from December 27, 2003, to July 14, 2008.
15. Claimant has been permanently disabled since July 15, 2008.
16. Claimant reached maximum medical improvement on July 14, 2008.
17. Claimant has not returned to his usual job.
18. Claimant has a current wage-earning capacity of \$340.00 per week, or an \$8.50 per hour earning capacity based upon a 40-hour work week.²

II. ISSUES

1. Nature and Extent of Disability
2. Average Weekly Wage
3. Special Fund Relief
4. Attorney Fees and Expenses³

² This stipulation was entered into by the parties on April 30, 2010.

³ Stipulations and Issues were entered in the record as ALJX-1.

III. STATEMENT OF THE CASE

A. Facts of the Case

Claimant suffered a cumulative trauma injury to his back in 2003 while working for Employer in Iraq. Prior to his work in Iraq, Claimant suffered a neck and two shoulder injuries. Upon his return home, Claimant underwent a fusion of his L3-L5 vertebral area. Claimant was placed at maximum medical improvement on July 14, 2008, but was not released to work until January 10, 2010. Claimant has not worked since returning to Iraq.

B. Testimony of Claimant

Claimant is a fifty-three year old gentleman who maintained a career as a truck driver prior to being employed by Employer. (Tr. 25). Claimant decided to work overseas due to the large increase in wages and the lack of any expenses associated with the job. (Tr. 25). Claimant testified his ultimate goal was to remain employed overseas for a while. Claimant further testified he was well aware of the terrain he would be driving on while working in Iraq. Claimant went to Iraq on a one-year contract beginning October 6, 2003. (Tr. 27). Prior to shipping overseas, Claimant passed a pre-employment physical. (Tr. 26).

Claimant's overseas employment consisted of driving refrigerated trucks and participating in sustained movement convoys. (Tr. 26-27). Claimant worked seventeen-to-twenty hours a day for seven days-a-week. (Tr. 38). During his work day, he was required to wear protective personal equipment, which weighed approximately forty pounds. (Tr. 28). Claimant testified the protective equipment was not designed for the type of work he was performing, and caused him injuries while he was driving. (Tr. 29).

Claimant testified he was never told that he needed lower back surgery prior to going overseas. (Tr. 29). He admitted to having neck surgery in 1976 and right shoulder surgery in 1994. Claimant believed he was in great shape prior to going to Iraq because he passed a rigorous employment physical. He further believed that if he had a health issue, Employer would not have let him go to Iraq. Claimant had no prior work restrictions before his accident. Ultimately, Claimant suffered a cumulative injury to his back while working for Employer, requiring him to be sent home for medical treatment. (Tr. 30).

Regarding his medical treatment, Claimant underwent a L3-L5 back fusion, performed by Dr. Vivek Kushwaha (Dr. Kushwaha), in October 2006. (Tr. 30). Claimant has since treated with Dr. Kushwaha and Dr. Alan Moore (Dr. Moore), the later providing pain management. (Tr. 31). Claimant was prescribed oxycodon and hydrocodone by his physicians, receiving approximately fifty doses of hydrocodone every three months. Claimant has also been prescribed Celebrex. Claimant testified he is not addicted to pain medication.

Claimant has not worked since leaving Iraq. (Tr. 33). Claimant believed he could go out and handle a job, but did not believe he would be able to pass any initial physicals. (Tr. 34). Claimant testified he had not been medically released to work, and believed he would have

problems working in a strenuous work setting. (Tr. 35-36). When asked what restrictions he relied upon during his vocational searches, Claimant testified he relied upon the OWCP-5c submitted by Dr. Kushwaha that stated he was not released to work.

On cross-examination, Claimant testified he wore his Kevlar vests when he was not driving due to the hazards of Iraq. (Tr. 42). He admitted to not sustaining any injuries during any supposed falls while working, and believed his injury was caused by driving over severely rough terrain.

Claimant admitted he had a right shoulder injury in 1994 or 1995 to repair a torn rotator cuff. (Tr. 44). He was out of work for approximately one year due to that injury, and filed a state workers' compensation claim to receive benefits during that time period. Prior to that shoulder surgery, Claimant underwent neck surgery in 1976. Claimant further admitted to undergoing a second right shoulder surgery in 2009. (Tr. 46).

Claimant testified he met with Susan Rapant (Ms. Rapant) from the Office of Workers' Compensation Programs in 2007 to participate in vocational services. (Tr. 47). Claimant admitted to not applying to any employment opportunities since coming home from overseas, including the jobs shown on Employer's Labor Market Survey. (Tr. 47). Claimant explained that he had not searched for jobs because he did not believe Dr. Kushwaha had released him to work. (Tr. 48).

Regarding his prescription medications, Claimant testified receiving hydrocodone from Dr. Kushwaha approximately three months prior to the hearing. He further testified to receiving a limited number of hydrocodone pills from the VA Hospital after his second shoulder surgery. (Tr. 50). Claimant explained that he took hydrocodone in moderation. He contended the VA Hospital records were inaccurate regarding the amount of prescription medication he received. (Tr. 55). He further contended that Dr. Kushwaha did not treat him for any of his right shoulder problems, and he had not visited Dr. Kushwaha since some time in 2009.

Claimant testified to not reporting any income from 1996-1999, despite his belief that he worked during that time frame. (Tr. 57). Claimant admitted to being out of work for a period of time, but was unable to remember the exact years at hearing. (Tr. 58).

Regarding his medical history, Claimant did not remember being treated at the VA Hospital for chronic lower back pain on October 15, 1997. (Tr. 63). He also did not recall any complaints of back pain to the VA Hospital on August 13, 1997. (Tr. 63). Claimant did not remember having x-rays of his back taken on May 4, 1998. (Tr. 64). He was further unable to remember visits to the VA Hospital for back pain on May 13, and May 27, 1998. (Tr. 64). Claimant was unable to recall back complaints during functional capacity evaluation on February 13, 1999. (Tr. 65). Claimant did not dispute the accuracy of his medical records at hearing. Claimant admitted he did not mention his previous lower back problems during his pre-employment physical. (Tr. 65).

C. Testimony of Wallace Stanfill

Wallace Stanfill (Mr. Stanfill) is the vocational expert employed by Employer in this matter. Mr. Stanfill testified that after a review of Claimant's vocational file, he was unable to note any effort by Claimant to locate a job since Claimant reached maximum medical improvement in July 2008. (Tr. 72-73).

Regarding the United States Department of Labor's vocational file on Claimant, Mr. Stanfill testified Ms. Rapant had closed Claimant's file on February 23, 2007, because Claimant's treating physician indicated Claimant was not vocationally feasible. (Tr. 71). He further testified Claimant was instructed to contact Ms. Rapant when his medical condition improved, but Claimant had not contacted her at any time after his file was closed. (Tr. 73).

Mr. Stanfill testified he utilized the results of Claimant's functional capacity evaluation to determine Claimant's employment opportunities based on Dr. Kushwaha's deference to the evaluation's findings. (Tr. 76-77). Regarding the evaluation, Mr. Stanfill noted that the evaluation's findings placed significant limitations on any work above shoulder-level on Claimant's right or left side. Mr. Stanfill admitted with his current shoulder conditions, Claimant would be unable to perform his usual employment in Iraq. (Tr. 83).

Overall, Mr. Stanfill found medium-duty, light-duty, and sedentary jobs to be appropriate for Claimant. (Tr. 85). He did not believe Claimant's use of prescription narcotics would have any effect on him performing jobs at the medium-duty, light-duty, and sedentary level. (Tr. 80). Given Dr. Kushwaha's current medical opinion, Mr. Stanfill did not believe any of the jobs listed on his labor market survey, aside from the gate guard position, would be precluded from Claimant's obtainment. (Tr. 86).

With regards to the trucking positions found on his survey, Mr. Stanfill testified he found two types of trucking positions which Claimant would not have been precluded from had he not had multiple shoulder surgeries and a neck fusion. (Tr. 89-90). He believed Claimant could do some form of truck driving depending on the above-head work requirements. (Tr. 93).

Mr. Stanfill admitted that it was reasonable for a patient to rely on what his treating doctor had told him with regards to work limitations. (Tr. 92). Given the circumstances of this case, Mr. Stanfill did not find Claimant's reliance on Dr. Kushwaha's former medical opinion was reasonable.

D. Medical Evidence⁴

Claimant suffered a neck injury in 1976 during a high-school football game. While medical records involving this accident are absent from the evidence, Claimant underwent a

⁴ Claimant has appeared to suffer a litany of injuries and medical conditions in his lifetime. However, the undersigned shall focus the summary of medical evidence on those injuries pertinent to Claimant's current injury and Employer's request for Special Fund relief, including: Claimant's 1976 neck injury, Claimant's 1995 right shoulder injury and apparent back injury; Claimant's 1999 left shoulder injury; and Claimant's 2003 back injury.

cervical fusion of the C5-6 vertebral area as a result of this injury. (EX-13A, p. 34; EX-13B, p. 1; EX13C, p. 1). Claimant suffered a left shoulder injury in 1995. Claimant's left rotator cuff was repaired by Dr. John A. Thomas, but as of January 4, 1996, Claimant was still experiencing symptoms. (EX-13C, p. 1). Claimant would receive physical therapy and prescription medication from the VA for this injury.

Beginning on August 13, 1997, Claimant made several trips to the VA Medical Hospital, complaining of an assortment of medical issues. On several visits, Claimant arrived complaining of chronic pain in his lumbar spine.⁵ On November 12, 1997, Claimant was diagnosed with degenerative joint disease of his lumbar spine. (EX-13A, pp. 38-39). On May 13, 1998, a physician at the VA opined Claimant's lumbar condition was long-standing, and Claimant would continue to have these problems for the foreseeable future. (EX-13A, p. 36).

Beginning on March 9, 1999, Claimant began complaining of right shoulder pain and limited movement due to an accident involving the opening of a garage door. (EX-13A, p. 33). Continuing over several visits to the VA, Claimant repeated these right shoulder problems culminating with a suggestion of right shoulder rotator cuff surgery on May 6, 2002.⁶ Claimant ultimately elected surgery on his right shoulder on July 23, 2004, but Claimant would wait on the elective list for this surgery with the VA for several years. (EX-13A, pp. 14-43).

On December 11, 2003, Claimant visited Employer's clinic in Iraq, complaining of lower back pain. (CX-1, p. 6; EX-13B, p. 1). An Employer medic noted Claimant's extensive history of back pain and Claimant's frequent use of pain medication and muscle relaxers prior to his deployment to Iraq. (CX-1, p. 6; EX-13B, p. 1). Claimant complained of gradually increasing pain similar to the chronic pain he suffered due to his previous neck fracture. Claimant was referred to the International Clinic in Kuwait for x-rays, which showed early degenerative changes in Claimant's lumbar spine. (CX-1, p. 7). Claimant returned to Employer's clinic on December 15, 2003, complaining of back pain. A medic noted Claimant was evasive when questioned about his prior back injuries, and Claimant admitted to his failure to take muscle relaxers that had been prescribed to him. (CX-1, p. 9). Claimant was referred to the International Clinic for full radiographic films.

On December 29, 2003, Claimant returned to Employer's clinic, stating he could no longer perform his job. (CX-1, p. 20). On December 31, 2003, Employer's medic documented that Claimant's back pain started in the early part of November, 2003, and preventive measures such as days off and switching to a lighter Kevlar vest provided some pain relief. (CX-1, p. 13). On January 1, 2004, Claimant was placed on leave so full CT/MRI films of his head and back could be taken in the United States. (CX-1, p. 14).

On February 16, 2004, Dr. Gary C. Freeman provided a second medical opinion of Claimant at the request of Carrier. (CX-1, p. 35). Dr. Freeman noted Claimant and his wife did

⁵ Reports for visits on August 13, 1997, October 15, 1997, November 12, 1997, February 2, 1998, April 15, 1998, May 13, 1998, July 27, 1998, March 9, 1999, and September 7, 1999, note Claimant's complaints of chronic back pain and/or lumbar spine strain associated with a November 1995 automobile accident. (EX-13A, pp. 21-40).

⁶ Reports for visits on March 9, 1999, July 22, 1999, July 28, 1999, September 7, 1999, November 3, 2000, March 25, 2002, May 6, 2002, April 5, 2004, May 17, 2004, July 23, 2004, and August 16, 2005 note Claimant's complaints of right shoulder pain. (EX-13A, pp. 14-33).

not want him to return to Iraq, but rather wanted Claimant to transfer to somewhere in the United States. (CX-1, p. 35). Upon examination, Dr. Freeman found Claimant's spine unremarkable and normal. (CX-1, p. 35). Dr. Freeman recommended Claimant perform no work overseas or perform any work while wearing a heavy vest. Dr. Freeman found Claimant to not need surgical intervention, and believed Claimant would benefit from a job that made him happy. (CX-1, p. 35).

On May 13, 2004, Claimant visited Dr. Kushwaha, who diagnosed Claimant when spondylosis and disc protrusion at the L3-4, L4-5, and L5-S1 vertebral areas. (EX-9, p. 1). Dr. Kushwaha noted Claimant had used Motrin and muscle relaxers in Iraq. Claimant's x-rays evidenced annular tearing with bulging at Claimant's L4-5 and L5-S1 vertebral areas, with mild protrusion at the L3-4 vertebral area. (EX-9, p. 1). Dr. Kushwaha recommended physical therapy for treatment.

On September 17, 2004, Dr. Robert W. Whitsell provided a second medical opinion at the request of Carrier. (CX-1, p. 38). Dr. Whitsell noted Claimant explained he took two prescription medications in Iraq, but had not received any prescription medication while in the United States. (CX-1, p. 38). Upon examination, Dr. Whitsell found no swelling, no tenderness, and no spasms in Claimant's lumbar spine. (CX-1, p. 40). Dr. Whitsell diagnosed Claimant with a lumbosacral strain with no evidence of radiculopathy. (CX-1, p. 41). Dr. Whitsell opined that there was probably a relationship between Claimant's work and his symptoms of back discomfort. (CX-1, p. 41). Dr. Whitsell did not find Claimant to be a surgical candidate at that time, but did not believe Claimant was not at maximum medical improvement. (CX-1, p. 41). Dr. Whitsell agreed with Dr. Kushwaha's recommendation of physical therapy. (CX-1, p. 42).

On October 20, 2006, Dr. Kushwaha performed a fusion on Claimant's L3-L4 and L4-L5 vertebral areas. (CX-1, p. 43). Post-operation, Claimant was diagnosed with disc herniation in L3-L4 and L4-5, stenosis, degeneration, and discogenic pain. (CX-1, p. 44). Following surgery, Claimant began seeing Dr. R. Alan Moore, Jr. for pain management. (CX-1, p. 47). Claimant also began receiving prescription medication from Dr. Kushwaha. (CX-1, p. 49).

On January 15, 2008, Dr. J. Martin Barrash performed a second medical opinion on Claimant at the request of Carrier. (CX-1, p. 51). Dr. Barrash found Claimant to be neurologically normal, but also found Claimant to suffer from "injured workers' syndrome." (CX-1, p. 53). Dr. Barrash opined it would be difficult to motivate Claimant to return to work. Dr. Barrash further opined Claimant could perform light-to-medium-duty work with corresponding restrictions. (CX-1, p. 54).

On March 19, 2008, Dr. Kushwaha issued a letter regarding Claimant's treatment. Dr. Kushwaha determined Claimant was under strict restrictions from activity to help the healing process. Dr. Kushwaha kept Claimant restricted from any type of work at this time. (CX-1, p. 55). On August 12, 2008, Dr. Kushwaha noted Claimant's functional capacity evaluation determined Claimant could perform light-duty work, which was in line with Dr. Kushwaha's expectations. (CX-1, p. 61).

On December 16, 2008, Dr. Kushwaha filed an OWCP 5c form regarding Claimant's back injury. Dr. Kushwaha noted Claimant was restricted from bending, lifting, twisting, driving any distances, and from sitting or standing for any periods of time. (CX-1, p. 64). Dr. Kushwaha further determined Claimant was unable to work at all, and had permanent restrictions on his working ability. (CX-1, p. 64). Dr. Kushwaha opined Claimant was not at maximum medical improvement at this time. (CX-1, p. 64).

On April 14, 2009, Dr. Kushwaha recommended Claimant use anti-inflammatories for his chronic back pain. (CX-1, p. 66). On August 18, 2009, Dr. Kushwaha continued Claimant's prescription medications. (CX-1, p. 68).

E. Deposition of Dr. Vivek Kushwaha

Dr. Kushwaha is a board-certified orthopedic surgeon who was deposed on January 20, 2010. (EX-9). Prior to testifying about his treatment of Claimant, Dr. Kushwaha verified that numerous past medical reports of Claimant noted Claimant's consistent complaints of lower back pain. (EX-9, pp. 6-15). Dr. Kushwaha also noted Claimant had been diagnosed with early degenerative joint disease of his lumbar spine at least once prior to his accident in Iraq. (EX-9, p. 8). Dr. Kushwaha testified Claimant had right shoulder rotator cuff surgery in July 1999. (EX-9, p. 12). He further testified that it appeared Claimant had not worked due to his shoulder injury since 1995.

Dr. Kushwaha testified that it was fair to say that Claimant complained and had been treated for lower back pain prior to his first date of treatment for his injury in Iraq. (EX-9, p. 18). He further testified that the primary areas of complaint in past medical records could be the area in which Dr. Kushwaha performed a fusion. (EX-9, p. 18). Dr. Kushwaha believed Claimant had preexisting conditions prior to his start of treatment, and these conditions were related to Claimant's prior surgical procedures on his neck and right shoulder. (EX-9, p. 25).

Regarding Claimant's overseas medicals, Dr. Kushwaha noted Claimant had on one occasion complained about an extensive history of back-related problems while at a clinic in 2003. (EX-9, p. 26). Dr. Kushwaha testified he was never made aware of this report prior to his treatment of Claimant. (EX-9, p. 27).

Regarding Claimant's current working abilities, Dr. Kushwaha testified he had full confidence in the functional capacity evaluation performed by ErgoRehab. (EX-9, p. 19). He noted the evaluation detailed numerous restrictions, some of which were directly related to his prior medical conditions. (EX-9, p. 25). He further noted Claimant had some complaints during the evaluation regarding his shoulder and neck that would not be directly related to his injury in Iraq. (EX-9, p. 23).

Dr. Kushwaha testified he would release Claimant to work based on the limitations set forth in ErgoRehab's functional capacity evaluation. (EX-9, p. 27). He believed the evaluation was conducted at Claimant's point of maximum medical improvement, and believed the evaluation would control what Claimant could do physically. (EX-9, pp. 27-28)

F. Functional Capacity Evaluation

A functional capacity evaluation was performed on Claimant by ErgoRehab on July 14, 2008. (EX-11, p. 1). At the completion of the evaluation, Claimant was functioning at a light-to-medium demand characteristic level, which is defined as lifting thirty-five pounds infrequently and twenty pounds or less frequently. (EX-11, p. 4). Claimant possessed upper and lower extremity muscle strength within normal limits and excellent cardiovascular endurance. (EX-11, p. 4). Claimant did not exhibit any inconsistencies during testing. Overall, Claimant exhibited the ability to lift forty pounds infrequently and twenty-five pounds infrequently, and the ability to carry forty pounds. (EX-11, p. 4).

G. Vocational Evidence

Claimant was initially referred to the United States Department of Labor for vocational services on November 13, 2006. (EX-8, p. 9). Susan Rapant (Ms. Rapant) performed an initial assessment on January 4, 2007. (EX-8, p. 21). At this time, Claimant was three months removed from fusion surgery and wearing a lumbar brace. At the assessment, Claimant expressed interest in returning to work overseas or for driving trucks in Houston. (EX-8, pp. 8, 18). On January 23, 2007, Ms. Rapant noted Dr. Kushwaha had filed an OWCP-5c form, noting Claimant could not work at that time. (EX-8, pp. 21-22). On February 26, 2007, Ms. Rapant closed Claimant's vocational file with the Department of Labor, noting Dr. Kushwaha was not releasing Claimant at the time. (EX-8, p. 17).

On November 26, 2008, Mr. Stanfill performed an Initial Rehabilitation Assessment and Labor Market Survey at the request of Employer. (EX-8, p. 4). Following the restrictions placed on Claimant by the functional capacity evaluation, Mr. Stanfill opined Claimant could work as a truck driver with no loading or unloading requirements. (EX-8, p. 10). Mr. Stanfill further opined Claimant could work several light-to-medium jobs, the titles of which were documented in his assessment. (EX-8, p. 11).

Regarding his labor market survey, Mr. Stanfill found Claimant could make an average of \$40,417.00 annually in 2007 as a truck driver in Houston, Texas. (EX-8, p. 13). Mr. Stanfill further found experienced drivers such as Claimant in the Houston area earned approximately \$51,179.00 annually in 2007. (EX-8, p. 13).

In total, Mr. Stanfill found thirteen positions available to Claimant in March 2008 taking into consideration Claimant's cervical injury, shoulder injuries, and lumbar injuries. (EX-8, pp. 13-16). The jobs and salaries are listed below:

EMPLOYER	POSITION	WEEKLY WAGE ⁷
Texas Workforce Commission	Truck Driver No. 3016848	\$1,000.00

⁷ All positions that provided hourly wages had weekly wages calculated by multiplying the hourly rate by 40 hours a week.

Texas Workforce Commission	Truck Driver No. 4754054	\$1,000.00
Texas Workforce Commission	Truck Driver No. 3001863	\$850.00 - \$1,295.00
Texas Workforce Commission	Truck Driver No. 6724045	\$980.00 - \$1,153.00
Texas Workforce Commission	Truck Driver No. 3010682	\$640.00
Averitt Express	Designated Driver	\$850.00 - \$1,250.00
J.H. Walker Trucking	Flat-Bed Truck Driver	\$875.00
Waste Management	Recycling Center Driver	\$596.00 – \$692.00
Action Stainless Steel	Truck Driver	\$596.00 - \$615.00
University of Houston	Parking Enforcement Assistant	\$356.80 - \$484.40
PolySpec Thiokol	Production Workers	\$460.00
M&R Manufacturing	Machine Operator Trainee	\$360.00 - \$440.00
Executive Security Systems	Patrol/Security Drivers	\$400.00

Mr. Stanfill also provided a labor market survey of jobs while considering Claimant's lumbar injury as the only injury of record. (EX-8, p. 16). Mr. Stanfill found that without his cervical and shoulder injuries, Claimant could perform truck driving work that required lifting in the 50 pound range. (EX-8, p. 16). Mr. Stanfill opined Claimant could return to these types of jobs making \$51,179 annually in the Houston area in 2007. (EX-8, p. 16). Mr. Stanfill also found two of these jobs, which are summarized below:

EMPLOYER	POSITION	WEEKLY WAGE ⁸
Schneider National	Truck Driver	\$961.00 - \$1,153.00
McKinney Management	Truck Driver	\$923.00 - \$1,057.00

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he is owed temporary total benefits from the date of his accident until January 10, 2010. He further contends he is owed permanent total disability benefits from

⁸ All positions that provided hourly wages had weekly wages calculated by multiplying the hourly rate by 40 hours a week.

January 10, 2010, to present and continuing. Claimant argues all benefits owed should be calculated based on his average weekly wage while working overseas in Iraq in 2003.

Employer/Carrier contends Claimant was at maximum medical improvement in July 2008 and suitable alternative employment was shown in November 2008. Thus, Employer/Carrier argue Claimant is owed permanent partial disability benefits from November 2008, to present and continuing, as Claimant has failed to diligently search for employment. Employer/Carrier further contend all disability benefits should be based on a blended average weekly wage of Claimant's overseas earnings and his very limited earnings in prior years. Employer/Carrier argue that any different average weekly wage calculation will severely distort Claimant's just benefits. Employer/Carrier request Special Fund Relief.

Director contends Employer/Carrier are not entitled to Special Fund Relief, as the requirements for relief under Section 8(f) with regards to an unscheduled permanent partial disability have not been met in this case.

B. Credibility of Parties

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

The undersigned finds Claimant to be generally credible regarding his back injury. However, the undersigned notes Claimant provided contradictory testimony regarding his previous back and shoulder injuries when such testimony was compared to the medical evidence in this matter. As such, the undersigned cannot provide Claimant's testimony of his past injuries and complaints with much evidentiary weight and rather, the undersigned will follow the medical evidence in consideration of Claimant's past injuries.

The undersigned finds Dr. Kushwaha to be credible given his medical training and experience and the absence of any contradictory testimony and evidence.

C. Nature and Extent of Injury

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of*

America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask, supra*, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services v. Director, OWCP, supra*, at 443.

The question of extent of disability is an economic as well as a 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); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991).

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

A claimant's ability to perform daily activities is usually not enough to show the claimant has an ability to work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Further, it is possible for a claimant to be totally disabled, even if he or she is physically capable of performing certain work, if he or she is unable to secure the particular kind of usual and former employment. *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 12 (5th Cir. 1994).

In this case, it has been stipulated that Claimant suffered an injury in the course and scope of his employment. It has further been stipulated that this injury has caused Claimant to be unable to return to his usual employment in Iraq. Thus, Claimant has suffered a total disability.

It has further been stipulated that Claimant became totally disabled on December 27, 2003. To classify the nature benefits owed, the undersigned must first determine Claimant's date of maximum medical improvement.

i. Maximum Medical Improvement

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, n. 5 (1985); *Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981). A claimant's condition can be deemed permanent even though an employee may require surgery in the future. *Morales v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979). A claimant's condition may also be considered permanent when the claimant is not receiving medical treatment. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for an ALJ to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where the treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the ALJ to conclude that the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986).

A date of permanency may not be based, however, on the mere speculation of a physician. Therefore, a physician's statement to the effect that he "supposed" that he could project a disability rating was rejected as too speculative to support a rating of permanent disability. *Steig v. Lockheed Shipbuilding & Constr. Co.*, 3 BRBS 439, 441 (1976).

The Board has held that where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. *Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984). If there is any doubt as to whether the employee has recovered, such doubt should be resolved in favor of the claimant's entitlement to benefits. *Fabijanski v. Maher Terminals*, 3 BRBS 421, 424 (1976).

In this matter, Claimant reached maximum medical improvement on July 14, 2008. Claimant's treating physician, Dr. Kushwaha, has testified Claimant reached maximum medical improvement on July 14, 2008. In Claimant's post-hearing brief, he requested permanent disability benefits beginning on July 14, 2008. As such, the undersigned finds Claimant reached maximum medical improvement on July 14, 2008, and on that date, his disability became permanent. The undersigned must now determine if suitable alternative employment has been shown in order to classify the extent of Claimant's permanent disability as either total or partial.

ii. Suitable Alternative Employment

Claimant has established an inability to return to her former employment and thus has made a *prima facie* showing that he is totally disabled. Therefore, the burden shifts to employer to show suitable alternative employment. The Fifth Circuit has developed a two-part test by which an employer can meet its burden of showing suitable alternative employment:

- 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 the 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 reasonably and likely could secure?

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042 (5th Cir. 1981). 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 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). To establish suitable alternative employment, the employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience and physical restrictions, and which he could secure if he diligently tried. *Turner*, 661 F.2d at 1038.

The Fifth Circuit has held that an employer is not required to become an employment agency for an injured claimant. Thus, the Fifth Circuit does not strictly follow the notion that an employer must provide Claimant with specific job openings. Rather, “an employer does not need to prove evidence of ... specific job openings... an employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community.” *Avondale Shipyards v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane Co.*, 930 F.2d at 424, 430.

A claimant’s active interest in finding employment is irrelevant and cannot be used by an employer to satisfy their burden of showing suitable alternative employment. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

On the date of a showing of suitable alternative employment, a claimant's disability becomes a partial disability. *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Nevertheless, an employer is not prevented from attempting to establish the existence of suitable alternative employment as of the date an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternative employment existed on the date of maximum medical improvement. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Rinaldi*, 25 BRBS 128; *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

If the employer has established suitable alternate employment, the employee can nevertheless establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Turner*, 661 F.2d at 1042-43; *P & M Crane Co.* 930 F.2d at 430. The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. However, the claimant need not diligently search for employment until the employer first meets its burden of showing suitable alternative employment. *Piunti v. I.T.O. Corp. of Baltimore*, 23 BRBS 267 (1990).

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *Turner*, 661 F.2d at 1040. A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (A.L.J. July 7, 1999) (claimant's use of a brace and/or cane when visiting prospective employers persuaded the administrative law judge that claimant was conveying the impression to potential employers that his injury left him even less able to perform the potential jobs than his real limitations might have otherwise conveyed). The claimant need not prove that he was turned down for the exact jobs that the employer showed was available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed was available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991). *See also Martin v. Marine Terminals Corp.*, 32 BRBS 338, 340 (A.L.J. 1998) (finding a diligent job search when the claimant submitted a list of twenty-four prospective employers that he contacted over a four month period with whom he inquired about job opportunities, sent resumes and applications, conducted follow-up inquires to a vast range of potential employers, and credibly testified that he wanted a job to support his family but no employer would not hire him because he had to use a cane).

In assessing whether a claimant has used due diligence in his job search, it is appropriate to look at both the number of jobs claimant applied for and the enthusiasm he evidenced in seeking these jobs. *Edmonds v. Al Salam Aircraft Co., Ltd.*, 35 BRBS 168 (A.L.J. January 24, 2001). Although applying to a large number of jobs is evidence of due diligence, it is not dispositive of the issue; a claimant may not mechanically go through the motions of applying for jobs with no apparent desire to actually gain employment. *Livingston*, 33 BRBS at 526; *Simmons v. I.T.O. Corp.*, 24 BRBS 442 (A.L.J. 1991) (finding no due diligence where claimant applied for

jobs but gave the impression to employers that he was not interested in working); *Edmonds*, 35 BRBS at 177 (finding no due diligence where claimant could not name any of his potential employers and failed to maintain a suitable record of his job search, which made it impossible for him to follow up on initial contacts). Credibility problems with a claimant can also cast doubt on whether he has actually undergone a diligent search for employment. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 830 (A.L.J. November 7, 2001).

If an employee does not meet this burden, then at most, his disability is partial. 33 U.S.C. § 903(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Here, the undersigned finds suitable alternative employment for Claimant was shown on November 26, 2008, the date of Mr. Stanfill's Labor Market Survey. Based on Mr. Stanfill's expertise and the lack of any contradictory evidence, the undersigned finds these jobs to be suitable. Mr. Stanfill's Labor Market Survey takes into account Claimant's restrictions given to him by his functional capacity evaluation, restrictions which were approved by Dr. Kushwaha. As all the jobs shown are within Claimant's work restrictions, the undersigned finds the Survey to be a proper showing of suitable alternative employment, allowing Employer/Carrier to carry their burden. However, the undersigned shall not credit these jobs retroactively to March 2008, as there is no evidence to suggest that Claimant was provided with the Survey until November 26, 2008.

Regarding Claimant's search for employment, Claimant contends his reliance on the December 2008 OWCP 5-c form of Dr. Kushwaha, restricting him from any work, precludes him having to search for work. The medical evidence shows that Dr. Kushwaha's final OWCP 5-c form was provided to Claimant on December 16, 2008. In his January 10, 2010 deposition, Dr. Kushwaha clarified that Claimant should have been released to work on July 14, 2008, and believed Claimant was at maximum medical improvement on that date. However, Claimant contends he relied on the December 16, 2008 OWCP-5c form up until Dr. Kushwaha's deposition date of January 10, 2010, which was the date that Dr. Kushwaha first stated Claimant should have been released to work to the restrictions of his functional capacity evaluation on July 14, 2008.

The undersigned finds Claimant failed to diligently search for employment as of November 26, 2008. Claimant was aware of both the findings of his functional capacity evaluation, the presence of suitable alternative employment, and Dr. Kushwaha's agreement with the functional capacity evaluation prior to December 2008. Coincidentally, after being made aware of the presence of suitable alternative employment, Claimant obtained an OWCP-5c form from Dr. Kushwaha, removing Claimant from work. This OWCP-5c form restricting Claimant from work was in obvious contrast with Dr. Kushwaha's earlier opinions of Claimant's functional capacity evaluation. At his deposition, Dr. Kushwaha admitted he erred with the OWCP-5c form and that he deferred to the findings in the functional capacity evaluation.

It is interesting to note that Claimant's visits to Dr. Kushwaha then reduced dramatically in 2009 after he received the OWCP-5c form. Claimant also failed to even attempt to search for any employment, regardless of the findings of his functional capacity evaluation that he could work and in direct contrast to his testimony that he wanted to work. Rather, he believed he could

not perform the jobs located on Employer/Carrier's labor market survey, and thus did not attempt to try and obtain any employment. Claimant continued this refusal to search for employment even after Dr. Kushwaha clarified his opinion in January 10, 2010. Based on the circumstances provided, it is evident Claimant did not attempt any search for employment and relied on an erroneous OWCP-5c form, even though it was obvious that Claimant could attempt some form of employment.

The undersigned shall not give Claimant the benefit of relying on his treating physician's error, especially when Claimant should have been aware of Dr. Kushwaha's deference to the functional capacity evaluation. Claimant knew he could perform some type of employment, yet refused to search for any type of work. Claimant unreasonably relied upon Dr. Kushwaha's error in restricting him from work in direct contrast to Claimant's functional capacity evaluation. As such, the undersigned finds Claimant failed to diligently search for employment beginning on the date in which suitable alternative employment was provided to Claimant, November 26 2008. On November 26, 2008, Claimant's total disability became partial.

As Claimant is entitled to permanent partial disability benefits as of November 26, 20078, the undersigned must determine if these benefits are to be based on a scheduled or unscheduled injury. If the benefits are based on an unscheduled injury, the undersigned must determine Claimant's post-injury wage-earning capacity.

iii. Post-Injury Wage-Earning Capacity

If a date of maximum medical improvement has been shown, on that date, a temporary disability becomes permanent. Once suitable alternative employment has been shown by Employer and Claimant has failed to rebut this showing, Claimant's disability becomes a permanent partial disability. The Act provides guidance under Section 8(c) as to schedule and non-schedule permanent partial disabilities. If an employee suffers a scheduled injury under Section 8(c)(1)-(20), he is entitled to two thirds of his average weekly wage, for a specified number of weeks, irrespective of whether he suffered a loss of earning capacity. *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994). *See also Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980) (herein, "*PEPCO*"). Under this schedule of compensation, the injured employee is automatically entitled to a certain level of compensation as a result of his injury and no proof of actual wage-earning capacity is required to receive the specified compensation. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

In all other cases of injuries not listed as scheduled injuries under Section 8(c)(1)-(20), the Act, under Section 8(c)(21), directs compensation for this non-scheduled injury to be two-thirds of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability. *PEPCO*, 449 U.S. at 277.

In this case, Claimant suffered an unscheduled injury to his back. As such, Claimant is entitled to unscheduled permanent partial disability benefits under Section 8(c)(21) from the date of maximum medical improvement, July 14, 2008, through the continuation of the disability, at

an appropriate compensation rate of two-thirds the difference between Claimant's average weekly wage and his post-injury wage-earning capacity.

Further, it has been stipulated that Claimant's post-injury wage-earning capacity is \$340.00 per week, or an \$8.50 per hour earning capacity based upon a 40-hour work week. As such, Claimant's permanent partial disability benefits shall be based on the difference between Claimant's average weekly wage, to be determined further below, and Claimant's stipulated post-injury wage-earning capacity of \$340.00 per week.

D. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staflex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc., v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998).

1. Section 10(a)

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a); *See also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). In this case, Claimant did not work a substantial portion of the year preceding his injury, and thus Section 10(a) cannot be used to calculate his average weekly wage.

2. Section 10(b)

If Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to

the application of Section 10(c). 33 U.S.C. §910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). In this case, the record is devoid of wage records of similar employees and thus Section 10(b) cannot be utilized.

3. Section 10(c)

If neither of the previously discussed sections can be applied “reasonably and fairly, then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

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

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to “arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury.” *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

The Fifth Circuit has observed that wages earned at the time of injury will best reflect a claimant's earning capacity at the time and it would be an “exceedingly rare case” where a

claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful, or unreliable. *Hall*, 139 F.3d at 1031.

In recent years, the Benefits Review Board has issued decisions regarding the calculation of Claimants' average weekly wage under the Defense Base Act that require discussion. In *Proffitt v. Service Employers International, Inc.*, 40 BRBS 41 (2006), the Board affirmed the administrative law judge's average weekly wage calculation for a Defense Base Act worker based solely on his overseas earnings. More specifically, the Board stated:

Moreover, the use of claimant's earning with employer fully compensates claimant for the earnings he lost due to his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The goal of Section 10(c), that of arriving at a reasonable "annual earning capacity," is intended to reflect the *potential* of claimant's ability to earn. *Id.* Claimant's employment contract with employer stated, "The duration of your assignment is anticipated to be approximately 12 months. There is no minimum guaranteed duration of employment." Thus, while claimant's employment in Iraq was not necessarily intended to be long-term, claimant's injury cost him the ability and opportunity to earn higher wages for at least the rest of his contract term.

Proffitt, 40 BRBS at 45 (emphasis in original). In *Proffitt*, the claimant was injured when he was approximately three-and-a-half months (3.5) into a one (1) year contract which paid him a higher wage than his stateside employment to compensated for working under the dangerous condition existing in Iraq.

In *K.S. v. Service Employers International, Inc.*, BRB No. 08-0583 (March 13, 2009), *aff'd per curiam*, BRB No. 08-0583 (September 25, 2009), the Board overruled the undersigned's decision, finding contrarily that the claimant's average weekly wage had to be calculated based solely on his overseas earnings in order to reflect his earning capacity in the current employment in which he was injured. The Board found the facts of *K.S.* to be indistinguishable to those in *Proffitt*, in that the claimant in *K.S.* was paid a substantially higher wage for his work in the dangerous conditions of Iraq; claimant was hired by employer to work full-time under a contract with an expected duration of twelve (12) months; there was no evidence that claimant did not intend to fulfill that contractual obligation; and claimant was injured very early into his contractual obligation. The Board stated:

The goal of Section 10(c) in this regard is intended to result in a sum that reflects the *potential* of claimant to earn absent injury. Average weekly wage calculations based solely on a claimant's new, higher wages have been affirmed where they reflect the potential to earn at that level. Claimant's potential to maintain the higher level of earnings afforded by his overseas work was cut

short by his injury. Moreover, while claimant's job was not everlasting, he had a one-year contract, and there is no evidence to suggest he would not have fulfilled this term absent injury, and claimant expressed intent to continue working in Iraq for a longer period. The one-year contract term is consistent with the Act's focus on annual earning capacity, and his earnings under this contract thus provide the best evidence of claimant's capacity to earn absent injury.

K.S., BRB No. 08-0583 at 6 (citations in original omitted). Based on this reasoning, the Board determined the claimant's average weekly wage calculated under Section 10(c) had to be based exclusively on the higher wages earned in the job for which the claimant was injured in Iraq, particularly since those wages were the primary reason for his accepting employment under the dangerous working conditions that existed there. *Id.*

On reconsideration, the Board in *K.S.* affirmed its decision. However, the Board clarified its reasoning for its decision, stating:

Contrary to employer's contention, the Board did not hold that in every DBA case the claimant's average weekly wage must be derived solely from overseas earnings. Rather, the Board held that the circumstances presented in this case required that claimant's average weekly wage be based exclusively on the higher wages earned in the job in which he was injured. *K.S.*, 43 BRBS at 21. In this regard, we reject employer's argument that *Proffitt* is distinguishable, as the relevant fact are the same in both cases.

K.S. BRB No. 08-0583 *on reconsideration*, at p. 2 (emphasis added). Thus, the Board designated it was the express circumstances of *K.S.* that required a finding consistent with that in *Proffitt*. However, the Board noted cases with different circumstances of both *K.S.* and *Proffitt* may beg for a different result than the one the Board applied in both of those cases respectively.

Here, the undersigned finds Claimant's average weekly wage is to be calculated using Claimant's overseas earnings only. Claimant meets the requirements under *K.S.*: (1) he had a one-year contract; (2) he made higher wages overseas; (3) he subjected himself to the dangerous conditions of work overseas for the benefit of those higher wages; and (4) the evidence is absent of anything to suggest Claimant would not have fulfilled or did not intend to fulfill his one-year contract. While the undersigned does not necessarily agree with the Board's holding in *K.S.*, he recognizes that he is bound by the precedent of the decision until such time where the decision is modified.

Claimant's disability compensation rate shall be based solely on his overseas average weekly wage under Section 10(c). According to the evidence, Claimant had an average weekly wage of \$1,774.74. (CX-10). This amounts to a corresponding weekly compensation rate of \$1,183.16. According to the U.S. Department of Labor, Division of Longshore and Harbor Worker's Compensation, the National Maximum Compensation Rate for injuries occurring

between October 1, 2003, and September 30, 2004 is \$1,030.78. As Claimant's weekly compensation rate is higher than the national maximum, Claimant shall receive the National Maximum Compensation Rate for his total disability benefits. The National Maximum Compensation Rate will not apply to Claimant's permanent partial disability compensation, which will be calculated as two-thirds the difference between Claimant's average weekly wage and post-injury wage-earning capacity under Section 8(c)(21).

E. Second Injury Fund Relief

Section 8(f) of the Act provides in pertinent part:

(f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

(2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . .

33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. *Director, OWCP v. Cargill Inc.*, 709 F.2d 616, 619 (9th Cir. 1983).

Section 8(f) is to be liberally applied in favor of the employer. *Maryland Shipbuilding and Drydock Co. v. Director, OWCP*, 618 F.2d 1082 (4th Cir. 1980); *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317 (9th Cir. 1980), *aff'g Ashley v. Todd Shipyards Corp.*, 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949).

In a timely and appropriately filed application for Section 8(f) relief, the employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f) *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), *rev'g* 4 BRBS 23 (1976); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 222 (1988).

“Pre-existing disability” refers to disability in fact and not necessarily disability as recorded for compensation purposes. *Id.* “Disability” as defined in Section 8(f) is not confined to conditions which cause purely economic loss. *C&P Telephone Company, supra.* “Disability” includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. *Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

A disability is considered manifest to an employer if, prior to the second injury, an employer had actual or constructive knowledge of such a disability. *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 1223 (5th Cir. 1989). Constructive knowledge is established where medical records of pre-existing conditions are in existence and can make such conditions objectively determinable. *Delinski v. Brandt Air-Flex Corp.*, 9 BRBS 206 (1978), *aff’d, Director, OWCP, v. Brandt*, 645 F.2d 1053 (D.C. Cir. 1981).

With respect to permanent partial disabilities, an employer may obtain relief under Section 8(f) of the Act where an employer shows that the resulting disability from the combination of prior and second injuries is “materially and substantially greater” than would have resulted from the second-injury alone. *See* 33 U.S.C. § 908(f)(1); *Dreyfus Corp. v. Director*, 125 F.3d 884, 888 (5th Cir. 1997); *Kent v. Commissioned Officers’ Mess*, 13 BRBS 1117 (1981). Employment-related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. *Strachan Shipping Company v. Nash*, 782 F.2d 513, 516-17 (5th Cir. 1986) (*en banc*).

The Fifth Circuit has held that the lack of the “magic words” of “materially and substantially” from the medical record in a case will not immediately bar Section 8(f) coverage. *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 391 (5th Cir. 1997). Rather, when such “magic words” are absent from the record, “the fact finder’s inquiry must of necessity be resolved by inferences based on such factors as the disabilities and the current employment injury, as well as the strength of the relationship between them.” *Id.*

At the outset, the undersigned finds Employer/Carrier have shown the presence of two of the necessary elements for Special Fund relief. Medical records of Claimant’s previous injuries were available, thus making such injuries manifest through constructive knowledge to Employer/Carrier prior to the hiring of Claimant. The medical records in this case, regardless of the duration of time between the previous injuries and Claimant’s hiring by Employer, suggest Claimant suffered debilitating injuries that would cause Employer to question whether it would want to hire Claimant.

Further, Claimant suffered from three “pre-existing disabilities” prior to be hired by Employer: a cervical fusion of his neck, a left shoulder rotator cuff injury, and a right shoulder rotator cuff injury. Medical records and a functional capacity evaluation taken in 1999 affirmatively state Claimant was caused some form of employment impairment by these three injuries. The medical records further document Claimant’s lasting problems with such injuries,

both before and after surgical intervention. All three injuries can be classified as physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Dr. Kushwaha testified that Claimant's prior pre-existing disabilities would make him more susceptible or fragile to re-injury or an aggravation of his pre-existing conditions and would lower the threshold of his ability to return back to work activities. (EX-9, p. 36). Employer was hiring Claimant for an overseas occupation that was inherently dangerous. There is no doubt that Employer would have been interested in knowing Claimant's full medical history, including a cervical fusion, which could have effectively been aggravated performing the dangerous labor Claimant was been hired to do.

Regarding the third "contribution" element, the undersigned finds that Claimant's current disability is not due solely to his lumbar fusion as a result of his overseas employment injury. The undersigned further finds that Claimant's current disability from the combination of prior and overseas injuries is "materially and substantially greater" than the disability that would have resulted from the overseas injury alone. Thus, Employer/Carrier have met their burden and are entitled to Special Fund Relief.

The undersigned notes that the medical record is absent of the "magic words" of "material and substantially greater" in this case. However, by looking to the totality of the evidence and the entire set of circumstances surrounding this case, Claimant's pre-existing disabilities and his disability resulting from his overseas injury have combined to vocationally restrict Claimant in such a degree that a reasonable person could find that the combination disability is "materially and substantially greater" than the resulting disability of the overseas injury alone.

Looking at Claimant's functional capacity evaluation with ErgoRehab, it is evident that Claimant had impairments and difficulties in certain activities that were specifically related to his cervical fusion and his shoulder injuries. Specifically, Dr. Kushwaha testified the restrictions on above-shoulder reaching, maximum knuckle-to-shoulder lifting; frequent carrying; and overall lifting were not due to Claimant's overseas lumbar injury. (EX-9, pp. 23-25). The therapists at ErgoRehab further documented that Claimant's issues with his shoulders and neck were not related to his lumbar injury. Regarding Claimant's other restrictions on his functional capacity evaluation, Dr. Kushwaha directly related those to his overseas lumbar injury. As such, medical evidence shows Claimant had work restrictions casually related to both his past injury and his overseas injury.

According to the functional capacity evaluation, Claimant's overseas injury places him in the light-to-medium-duty work level. The undersigned notes that the combination of Claimant's pre-existing injuries and his overseas injury also places him in the light-to-medium-duty category for work. While it is argued that this lack of change in Claimant's work level denotes Claimant did not suffer a materially and substantially greater disability due to the combination of his injuries, the undersigned finds this argument has no merit. Had Claimant not suffered his overseas injury, he would have only been given restrictions dealing with his cervical and shoulder injuries. Had Claimant not had any pre-existing disabilities prior to his overseas injury, he would not have received certain restrictions detailed in his functional capacity evaluation. As

a result of a combination of the disabilities, Claimant is precluded from more work opportunities than he would have been had he only suffered from one of the disabilities. Therefore, both injuries combined to provide Claimant with materially and substantially greater work restrictions, restrictions that would otherwise be absent had Claimant not suffered from combined disabilities. It is the work restrictions, not his work level, which should control under the circumstances, as the work restrictions due to the combination of injuries materially and substantially restrict Claimant's ability to earn wages.

Such a finding is supported by the vocational evidence in this matter. In his testimony, Mr. Stanfill noted the functional capacity evaluation had significant restrictions on above-shoulder work, which were principally related to Claimant's pre-existing conditions. During his labor market survey, Mr. Stanfill looked for jobs taking into consideration the combination of Claimant's injuries and also looked for jobs taking into consideration only Claimant's overseas injury. As a result, Mr. Stanfill found two trucking positions that Claimant could have worked had he not been restricted from above-shoulder work by his pre-existing cervical and shoulder injuries. These two positions offered higher wages annually than the jobs found in the Labor Market Survey when the combination of injuries was considered. The parties stipulated to Claimant having a post-injury wage-earning capacity of \$340.00 per week as a result of the combination of his injuries. According to Mr. Stanfill's Labor Market Survey, Claimant could have earned anywhere from \$930.00 to \$1,154.00 weekly with the two trucking positions had Claimant only suffered an injury overseas. As such, Claimant was materially and substantially restricted from acquiring higher paying jobs due to the combination of his pre-existing injury and his overseas injury.

Taking all of the evidence and circumstances into consideration, the undersigned finds Employer/Carrier have satisfied their burden for Section 8(f) relief. Claimant suffered from pre-existing disabilities to his neck and shoulders. These pre-existing disabilities and their conditions were manifest to Employer prior to Claimant's hiring. The combination of Claimant's pre-existing disabilities and his overseas injury left Claimant with a resulting disability that was "materially and substantially greater" than the disability caused by the overseas injury alone. As such, Employer/Carrier are entitled to Section 8(f) relief. Employer/Carrier shall be liable to Claimant for all permanent partial disability benefits for 104 weeks beginning on January 10, 2010. Upon the 105th week, the Special Fund shall assume liability for Claimant's permanent partial disability benefits, and the liability shall continue for the duration of Claimant's disability as determined by Section 8(c)(21).

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose

of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

In this case, the undersigned has found that Claimant is owed past-due compensation benefits. As such, interest on these benefits is owed by Employer/Carrier in this matter, at a rate to be determined by the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. As Counsel has obtained benefits for Claimant, Counsel is entitled to a reasonable attorney's fee. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, the undersigned enters the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from December 27, 2003, to November 26, 2008, based on Claimant's average weekly wage of \$1,774.74, or \$1,183.16. This compensation rate is above the national maximum weekly compensation rate for injuries sustained on December 27, 2003, and thus Claimant is entitled to the national maximum weekly compensation rate of \$1,030.78., in accordance with the provisions of Section 8(b) of the Act. 33 § 908(b).
2. Employer/Carrier shall pay Claimant compensation for permanent partial disability from November 26, 2008, to present and continuing, until such time where Claimant's ceases to have a disability or suffer a loss in post-injury wage-earning capacity, based on two-thirds the difference between Claimant's pre-injury average weekly wage of \$1,774.74, and Claimant's stipulated post-injury weekly wage-earning capacity of \$340.00, in accordance with the provisions of Section 8(c)(21) of the Act. 33 U.S.C. § 908(c)(21).

3. Employer/Carrier shall receive credit for all compensation and wages heretofore paid, as and when paid. 33 U.S.C. § 933.
4. Employer's liability for permanent partial disability benefits shall be limited to one-hundred-and-four (104) weeks of compensation beginning on November 26, 2008. Upon the one-hundred-and-fifth week of compensation, liability for Claimant's permanent partial disability benefits shall be assumed by the Special Fund under Section 8(f) of the Act. 33 U.S.C. § 908(f).
5. Employer shall pay interest on any past-due compensation benefits sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984). The amount of interest is to be determined by the District Director.
6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

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**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**