

**U.S. Department of Labor**

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**Issue Date: 17 March 2011**

**Case No.: 2009-LDA-00523**

**OWCP No.: 02-182107**

***IN THE MATTER OF:***

**PHILIP ROWAN,**  
Claimant,

v.

**ITT CORPORATION,**  
Employer,

and

**INSURANCE CO. OF THE STATE OF PENNSYLVANIA/AIG WORLD SOURCE,**  
Carrier.

*Appearances:* **Joel S. Mills, Esq.**  
**Pitts & Mills**  
For Claimant

**Julie E. Lotz, Esq.**  
**Griffin & Griffin**  
For Employer/Carrier

*Before:* **Russell D. Pulver**  
**Administrative Law Judge**

**DECISION AND ORDER AWARDING BENEFITS**

This case arises from a claim for compensation brought under the Defense Base Act, 41 U.S.C. § 1651 *et seq.*, which is an extension of the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (together, "the Act"). The Act provides compensation to certain employees engaged in U.S. Department of Defense related employment for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability. Philip Rowan ("Claimant") brought claims against his employer, ITT Corp. ("Employer"), and its insurance carrier, the Insurance Company of the State of Pennsylvania ("Carrier"; Employer and Carrier together, "Respondents"), for injuries arising from an alleged work-related injury that occurred on November 1, 2008.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges on September 10, 2009. On March 29, 2010, the undersigned convened a formal hearing in Long Beach, California. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs. The following exhibits were admitted into evidence: ALJ Exhibits (“AX”) 1 through 4; Respondents' exhibits (“RX”) 1 through 8; and Claimant’s Exhibits (“CX”) 1 through 21. TR at 13-15, 41. The record was left open for admission of CX 21 which was furnished post hearing. Claimant testified on his own behalf at the hearing.

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

### STIPULATIONS

1. This Office has jurisdiction over this claim under the Act, as extended by the DBA. TR at 9, AX 3 and 4.
2. There was an employment relationship between Employer and Claimant at the time of the injury. *Id.*
3. Fact of Injury and Causation. *Id.*
4. Claimant reached MMI on April 20, 2009. TR at 9-10.
4. The claim was timely noticed and timely filed. *Id.* at 9.
5. Claimant has received medical treatment under Section 7 of the Act and some compensation payments. *Id.*

### ISSUES<sup>1</sup>

1. Average Weekly Wage. TR at 10.
2. Extent of Disability commencing March 29, 2010. *Id.*
3. Attorney’s fees. *Id.* at 10-12.
4. Interest. *Id.*

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<sup>1</sup> Claimant and Respondents reached an agreement prior to starting the hearing with respect to the total amount owed Claimant for compensation payments from November 1, 2008 to the date of the hearing, March 29, 2010, including interest. Thus, the issues of extent of disability and average weekly wage determined herein are applicable only to compensation due March 29, 2010, and thereafter.

## FINDINGS OF FACT

### *Summary of Claimant's Testimony*

#### *Claimant's Trial Testimony*

At trial, Claimant testified on direct examination that he was a thirty year-old man, born in Colorado but currently living in Yuba City, California. TR at 18. He is a high school graduate who served a little over two years in the Army as a heavy mobile equipment mechanic. *Id.* at 18-19. Following his discharge from the Army in 2002, Claimant worked for several automotive related companies doing primarily repairs until he went to work in Iraq for Lear Siegler as a heavy wheel mechanic in February of 2006. *Id.* at 19-20. On September 29, 2006, Claimant went to work for ITT as a heavy equipment mechanic in Iraq.<sup>2</sup> *Id.* at 20-21. Claimant testified that he was subject to small arms and mortar fire three or four times in Baghdad and twice in Balad when he had to run to a bunker and put on his personal protective equipment. *Id.* at 21, 26.

Claimant stated that he was first injured in November of 2006, as he was pulling a box of armor from underneath a door kit for a Humvee for which he returned to the United States for treatment to his shoulder. *Id.* at 21-22. Claimant testified that he was released and returned to Iraq in February of 2007, following which he reinjured his shoulder in April of 2007. *Id.* at 22-23. He stated that he returned home for treatment in May of 2007 and underwent shoulder surgery by Dr. Tortosa for a versal tear in October of 2007. *Id.* at 24. Claimant was released to full duty on July 1, 2008, and returned to work for Employer in August of 2008 at Camp Anaconda, Balad, Iraq. *Id.* at 24-25. Claimant testified that he signed a new contract in 2008 which had a higher rate of pay at \$19.06 an hour with a 75% uplift for 72 hours per week plus \$30 per diem daily. He noted that he was then increased to working seven days per week, 12 hours per day about two weeks before he was injured. *Id.* at 26, 39; CX 9.

Claimant testified that he had no problems performing his job until he injured his shoulder again on November 1, 2008, when he slipped in rainwater on the floor of his trailer as he tried to catch himself with his right arm. TR at 26. Claimant stated that he didn't get to see a doctor for several days due to vehicle availability problems and then was put on quarters for rest. *Id.* at 27; CX 1 at 3. Finally, Claimant was sent back to the United States for orthopedic evaluation on November 13, 2008. TR at 28. Claimant saw Dr. Tortosa on November 21, 2008. Dr. Tortosa had some problems in getting an MRI approved by Carrier but after the MRI, both Dr. Tortosa and a specialist, Dr. Weber, recommended shoulder surgery. *Id.* at 28-29. Claimant understood the work restrictions set by Dr. Tortosa to be no pulling, no pushing, no repetitive movements and minimal lifting with his right arm. *Id.* at 29. Claimant has decided not to undergo surgery at this point since neither Dr. Tortosa nor Dr. Weber could guarantee that surgery would fix his shoulder problem. *Id.* at 30.

Claimant stated that he has applied for work at Kragen Auto Parts where he was told he was overqualified for the position; at Costco which would not hire him due to his shoulder injury; and at Petersen's Four Wheel Drive shop and Auto Zone, where he was also unsuccessful.

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<sup>2</sup> ITT was under contract with the United States military to provide support services to the troops stationed in Iraq.

*Id.* at 30-31. He testified that he worked with Department of Labor's vocational counselor and had attended classes to become a smog technician at West Valley Occupational College in Canoga Park, California in the fall of 2009. *Id.* at 31. Claimant stated that he had to quit the course because he wasn't getting funds to pay for the books timely and he also had to move to northern California as his parents lost their home in bankruptcy. *Id.* at 32-33. Claimant indicated he has tried to finish up the course at another college near Yuba City but has to take additional courses. He expects to earn about \$10 to \$15 per hour upon completion. *Id.* at 33-34, 38. He stated that he had also applied for work with ITT in southern California but was told he couldn't just transfer within the company and would need a security clearance which he does not have. *Id.* at 34. Claimant testified that he had intended to work for ITT overseas as long as possible due to the higher wages he was able to earn. *Id.* at 34-35. Claimant stated that he has never sold insurance or worked as an automotive insurance adjuster and does not believe he could work as an automotive mechanic because it would involve overhead work beyond his medical restrictions. *Id.* at 35. Both Dr. Tortosa and Dr. Weber have indicated that he should not do automotive repair work due to the repetitive nature of the work. *Id.* at 36.

Claimant stated that he did some inventory work on the computer for his Dad's store but was not paid for it. *Id.* at 36-37. Claimant moved himself to Yuba City in November of 2009. *Id.* at 37. He testified that he applied for jobs in 2009 but had not applied for any jobs in 2010 since he was going to school in Yuba City. *Id.* at 37-38.

#### Summary of Claimant's Deposition Testimony

On July 10, 2009, the parties deposed Claimant. RX 6 at 1. Claimant attended Yuba City, California high school and took three automotive courses at Butte College near Chico, California before joining the Army. *Id.* at 9. Claimant testified that he earned a heavy mobile equipment certification through the Army. *Id.* at 10-11. Claimant worked for several companies doing mechanic work from the time he got out of the Army until he went to work as an engineer mechanic for Lear Siegler in Iraq in February, 2006, earning about \$86,000.00 per year with travel pay and bonuses. *Id.* at 13-18. Claimant stated that he then went to work for ITT in September, 2006 as a heavy mobile equipment mechanic earning about \$140,000 per year. *Id.* at 18-20.

Claimant testified he was first injured with ITT at the end of November, 2006 when he hurt his right shoulder pulling a box of armor. *Id.* at 20-21. He was sent home for treatment which consisted of physical therapy from December of 2006 through February of 2007. *Id.* at 22-24. Claimant stated that he returned to Iraq in February of 2007 and worked at his regular job until he reinjured his shoulder and was placed on light duty driving a forklift in April of 2007. *Id.* at 25-28. In May of 2007, Claimant returned to Yuba City, California where he again saw Dr. Su who performed a MRI on his shoulder and referred him to Dr. Tortosa, an orthopedist in Yuba City who operated in October of 2007 to repair a bursal tear in Claimant's right shoulder. *Id.* at 30-32. After post surgery physical therapy, Dr. Tortosa released Claimant to return to his job in Iraq in July of 2008. *Id.* at 33-35. Claimant was then cleared in a pre-employment physical by ITT in August of 2008 and returned to Iraq. *Id.* at 35-36. Claimant testified that he signed another one year contract with ITT but at an increased pay rate that came out to about \$158,000.00 per year. *Id.* at 36-37; CX 9. Claimant stated that he was supposed to work 12 hours

per day, six days per week but actually worked seven days per week. RX 6 at 38-39. He estimated that he lifted items on the job weighing 100 pounds and up. *Id.* at 39-40.

Claimant testified that he reinjured his right shoulder on November 1, 2008, when he slipped on rainwater in the trailer he was sleeping in at the Balad airfield when he tried to break his fall with his right arm. *Id.* at 40-42. Claimant eventually returned to the United States on November 14, 2008 in order to see his own surgeon to determine whether he had torn his shoulder again. *Id.* at 44-46. He stated that there had been some discussion of having an MRI done in Kuwait but an Army physician assistant had recommended he return to his own orthopedist in view of his prior injuries to that shoulder. *Id.* at 45-47; CX 1 at 2. Claimant testified that Carrier refused to pay for his plane ticket so he had to purchase his own ticket and that he had problems getting Carrier to authorize his MRI with Dr. Tortosa. RX 6 at 47-48. Finally, Claimant stated that he got his family physician to order an MRI that was paid for by his medical insurer. *Id.* at 49-50. Dr. Tortosa reviewed the MRI and referred Claimant to another specialist, Dr. Steven Weber, who saw Claimant in January of 2009. *Id.* at 50-51. Dr. Weber recommended surgery but indicated he could not guarantee it would be successful. Dr. Weber also told Claimant he should not continue working as a mechanic due to the repetitive nature of the work. *Id.* at 51-52. Claimant stated that although Dr. Tortosa and Dr. Weber recommended surgery, his nurse case manager appointed by AIG recommended against it and he had decided to defer surgery as long as possible. *Id.* at 53-55.

Claimant stated that he had met with Ken Winters, a vocational consultant from Department of Labor. He indicated that he had considered training for smog technician but was concerned since many of the smog technicians also did the repairs and Claimant could not physically do repairs. *Id.* at 57-60. Claimant also testified that he had considered training for 12 weeks as an automobile accident investigator but felt it would involve a lot of looking underneath automobiles which would be more physically taxing than work as a smog technician. *Id.* at 60-61. Claimant stated that ITT had terminated his employment but he would be willing to return to work for ITT in the States as he could not go overseas due to the need to carry heavy Kevlar vests which would exceed his medical restrictions. *Id.* at 61-63. Dr. Tortosa issued a report on April 17, 2009, finding Claimant to be at MMI and setting work restrictions which varied somewhat from the functional capacity evaluation ordered by Carrier. *Id.* at 65-68. Claimant testified that he still has pain in his right shoulder and tries to use his left side primarily since he is left handed. *Id.* at 68-69.

### Credibility

I found Claimant to be a credible witness. Claimant offered virtually identical testimony, inasmuch as his testimony at trial and his deposition overlapped. In particular, his testimony regarding the alleged injury and the resulting pain was remarkably consistent.

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

### **Dr. Richard Tortosa**

Dr. Tortosa performed arthroscopic surgery to Claimant's right shoulder on October 27, 2007 to repair a superior glenoid labral tear. CX 1 at 14-15 (also found at RX 2). Following post surgical physical therapy, Claimant was released by Dr. Tortosa to full duty on July 1, 2008. CX 1 at 15. Dr. Tortosa next saw Claimant on November 21, 2008, when Claimant returned from Iraq having reinjured his right shoulder in a November 1, 2008 fall in a trailer. *Id.* Dr. Tortosa diagnosed a sprain of the right shoulder superimposed upon the prior labral tear. *Id.* On January 9, 2009, Dr. Tortosa recommended Claimant see Dr. Stephen Weber for a second opinion when a MRI study failed to show a re-tear of the right shoulder. *Id.* When Dr. Weber recommended further conservative management or arthroscopic evaluation, Dr. Tortosa suggested to Carrier on March 6, 2009, that a functional capacity evaluation ("FCE") be performed. *Id.*

Dr. Tortosa reviewed the FCE performed by physical therapist Terry Lawson on March 26, 2009, and issued his own report on April 17, 2009, in which Dr. Tortosa found Claimant to be at MMI with work restrictions. *Id.* at 15-16. Dr. Tortosa found Claimant restricted from pushing, pulling, or climbing using the right shoulder. He opined that Claimant could safely lift "overhead frequently on the right 15 pounds, occasionally 35 pounds, and with limitation of the left shoulder occasionally 65 pounds and floor to knuckle lifting frequently 55 pounds." *Id.* at 17. Dr. Tortosa noted that Claimant should be able to drive as long as he did not have to operate levers with his right upper extremity. *Id.* at 16.

Following the hearing in this matter, Dr. Tortosa was asked to review several job descriptions taken from the Labor Market Survey of December 10, 2009, prepared by Maria J. Pozos-Elloyay. RX 8. On April 23, 2010, Dr. Tortosa opined that Claimant was not physically capable of performing neither the job of automotive mechanic/technician at Galpin Ford nor the position of maintenance mechanic at Pharmavite. CX 21 at 1-4. Dr. Tortosa did find that Claimant was physically capable of performing three positions: insurance sales agent trainee for Auto Club of Southern California; insurance sales agent entry level for Farmers Insurance; and auto damage adjuster trainee for GEICO. *Id.* at 5-10.

### **Credibility**

I find the records and opinions therein of Dr. Tortosa to be credible. As a treating physician, he saw and examined Claimant more frequently than any other physician. I moreover found no fatal inconsistencies or flaws in his reports. As a result, I find Dr. Tortosa records and the opinions expressed to be credible.

### **Dr. Stephen C. Weber**

Dr. Weber, a board certified orthopaedic surgeon, saw Claimant on February 5, 2009 on referral from Dr. Tortosa. CX 1 at 6 (also found at RX 4). Dr. Weber performed an examination of Claimant and reviewed his history and took x-rays. CX 1 at 6. Dr. Weber concluded that

Claimant had tendinitis of the right shoulder and possibly a recurrent tear or lesion in the same area as his prior surgery by Dr. Tortosa. *Id.* at 8. Dr. Weber recommended that Claimant pursue conservative management although Dr. Weber offered Claimant the option of further arthroscopic evaluation but advised he could not assure Claimant that such further surgery would be successful given that no "gross problems" had been identified by MRI. *Id.* In a follow up report dated February 11, 2009, Dr. Weber noted that Claimant had really never become "totally normal" following his surgery by Dr. Tortosa in October of 2007, although he had been released to return to work in July of 2008. *Id.* at 10 (also found at RX 3). Dr. Weber stated that Claimant had apparently been able to perform his duties in Iraq up until his injury on November 1, 2008. Thus, Dr. Weber opined that the November 1, 2008 fall aggravated Claimant's preexisting shoulder condition. CX 1 at 10.

### **Credibility**

I found the reports of Dr. Weber to be credible. Although he apparently saw Claimant on only one occasion, he conducted a thorough examination and review of Claimant's prior medical history. I find no reason to discredit any of the opinions set forth in Dr. Weber's reports.

### **Dr. Luga Podesta**

Dr. Podesta is an orthopaedic surgeon practicing in Thousand Oaks, California. CX 1 at 18 (also at RX 5). On August 18, 2009, Dr. Podesta authored an IME report based on a review of a number of Claimant's records as well as an examination of Claimant. CX 1 at 18. On the basis of his review of Claimant's medical records and his examination of Claimant, Dr. Podesta concluded that Claimant had subjective complaints of moderate right shoulder pain supported by objective findings of restricted range of motion, instability and impingement of the right shoulder. *Id.* at 23. Dr. Podesta opined that Claimant had suffered a significant aggravation on November 1, 2008 to his preexisting injury to his right shoulder which had been appropriately treated by his treating physicians. *Id.* at 23-24, 28. Dr. Podesta opined that Claimant had reached MMI and would not be able to return to his previous employment due to his significant permanent work restrictions. *Id.* at 28. Dr. Podesta suggested Claimant should avoid "repetitive reaching, overhead lifting, shoulder level work, pushing or pulling with the right arm." *Id.* Dr. Podesta opined that Claimant should be afforded medications for his pain as well as cortisone injections. Dr. Podesta also noted that Claimant may need in the future surgery on his right shoulder together with post surgical physical therapy. *Id.* at 29.

Dr. Podesta issued a Supplemental Report dated March 24, 2010, responding to a request by Respondents' counsel to address the appropriateness of certain job positions noted in the Labor Market Survey. RX 7 at 75. Dr. Podesta stated that he had reviewed the job descriptions furnished by Respondents' counsel as well as his own IME report of August 18, 2009 and opined that Claimant "will be able to work at any of the four potential jobs described in your letter." *Id.* Unfortunately, Dr. Podesta's Supplemental Report only describes three positions: auto damage adjuster trainee, insurance agent sales trainee and automotive mechanic technician. *Id.* Since Respondents' counsel's letter to Dr. Podesta is not in evidence, I cannot determine what the "fourth" job position is that Dr. Podesta felt Claimant capable of performing.

## **Credibility**

I find only one major defect in Dr. Podesta's credibility. His credentials are undoubtedly impressive and his report lucid. He did examine Claimant and thoroughly reviewed his medical records. He agreed that Claimant's medical treatment had been appropriate and that his current injury resulted from an aggravation of his preexisting right shoulder injury. Dr. Podesta further agreed with Dr. Weber that arthroscopic evaluation of Claimant's right shoulder may be called for in the future when Claimant's pain may require further surgical intervention. However, I found Dr. Podesta's listing of work restrictions in his original report to be fairly general and conducted without apparent reference to the FCE which I believe contributed to Dr. Podesta's universal agreement with the ability of Claimant to perform the jobs identified in Respondents' labor market survey. Thus, in this respect, I discredit Dr. Podesta's opinion.

## ***Labor Market Survey***

Respondents have submitted a labor market survey, authored by Maria J. Pozos-Eloway, MS, who holds herself out as a "Sr. Bilingual Vocational Case Manager/Return to Work Specialist" with Coventry Workers' Comp Services of Tampa, Florida. RX 8. In drafting the survey, Ms. Pozos-Eloway was not able to interview Claimant, but she had access to all the relevant information necessary to form a reasoned opinion including Claimant's medical records and the vocational reports of Ken Winters, MA, CRC, who had assisted Claimant at the request of the Department of Labor. *Id.* at 1-2. Ms. Pozos-Eloway had access to a transferable skills analysis prepared by Mr. Winters and she prepared one of her own as well. *Id.* at 2-3. She reported that she utilized various resources in her survey including the O\*Net Online, Dictionary of Occupational Titles, and various online sites which post job opportunities. *Id.* at 3.

Taking into consideration Claimant's age, education, work history, and physical limitations, she identified several categories of jobs that she thought Claimant could appropriately perform. *Id.* at 3. The categories she identified all essentially dealt with different types of automobile mechanics, repair or insurance claims. *Id.* Ms. Pozos-Eloway focused her search on the area within a 50 mile radius of Thousand Oaks, California. *Id.* at 1. She stated that the following occupations were identified as goals for Claimant given his education, work history and medical restrictions: Auto Claims, D.O.T. Code 241.267-018 at the light exertional level; Maintenance mechanic, D.O.T. Code 638.281-014 at the medium exertional level; and auto service technician, D.O.T. Code 620.261-030 at the medium exertional level. *Id.* at 3.

Ms. Pozos-Eloway next identified five specific job openings for which she felt Claimant was qualified and capable of performing: insurance sales agent trainee for Auto Club of Southern California in Santa Monica, California earning \$17.00 per hour; maintenance mechanic for Pharmavite in Mission Hills, California earning \$20 plus per hour; auto damage adjuster trainee for GEICO in Pleasant Hill, California earning \$17.90 per hour; automotive mechanic/technician for Galpin Ford in North Hills, California earning \$21 plus per hour; and insurance agent entry level for Farmers Insurance in Westminster, California earning \$19 per hour plus commissions. *Id.* at 3-5. Ms. Pozos-Eloway concluded that Claimant was capable of earning between \$17 and \$21 plus per hour or an average of \$18.98 per hour as demonstrated by this "sampling" of available

positions. *Id.* at 5. She attached to her report job description/job analysis for each of these five positions with a blank doctor's certification as to whether Claimant could perform these jobs or not. *See* attachments to RX 8.

### ***Credibility***

I find no intrinsic basis to discredit portions of the labor market survey. However, I do discredit the findings of Ms. Pozos-Eloway that Claimant could physically perform jobs as auto service technician or maintenance mechanic as both of these jobs are at the medium exertional level. Based on the restrictions set by both Dr. Tortosa and Dr. Podesta, I do not find Claimant capable of performing jobs at the medium exertional level given the absolute restrictions against working overhead and the significant restrictions on lifting. Thus, I do not credit the labor market survey as to any such jobs. Additionally, the report does not indicate whether Ms. Pozos-Eloway actually spoke with any of the potential employers regarding the specific job duties and qualifications as well as Claimant's rather significant right extremity limitations but rather appears to be primarily information gained from websites on the computer. I suspect this lack of significant personal contact to be the case in view of the inclusion of the GEICO position in Pleasant Hill, California which is located just outside of San Francisco, several hundred miles from the Thousand Oaks locale where her job search was to be centered. Accordingly, I give the labor market survey only limited credence.

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

Payroll records submitted by Employer are prefaced with the Average Weekly Wage calculation used by Respondents in this matter. The calculation summary indicates that gross earnings of \$30,782.45 were divided by 52 to arrive at an AWW of \$591.97 with the corresponding compensation rate of \$394.65. RX 1 at 1. This equates with the amounts paid by Carrier on this claim. CX 8; CX 10. The earnings of \$30,782.45 reflected the amount that Claimant actually earned with Employer from the time he went back to work in July of 2008 following his recovery from his October, 2007 surgery until he was injured in November of 2008. RX 1 at 3-6. However, Claimant's final paystub following his accident in November of 2006 indicated total payments to Claimant from Employer for the year 2008 in the amount of \$35,432.52. CX 15. For Claimant's two previous periods of injury payments, Employer used an AWW of \$1,293.98 with a corresponding compensation rate of \$862.70. CX 6 and CX 7. The Employer's Statement of Wage Earnings for this accident indicated gross earnings of \$76,327.31 for the preceding year by another similarly situated employee. RX 1 at 2; CX 14. The Statement of Earnings indicated that the similarly situated employee also received per diem, travel allowance, danger and hardship pay and sign-on bonus amounting to an additional \$1,243.92 per week. *Id.*

Claimant signed his last contract of employment with Employer on July 24, 2008. CX 9. He was to be paid \$19.04 per hour for a 72 hour work week with 35% uplift for hardship premium and 35% uplift for danger pay, plus \$30 per day as per diem, \$7500 as signing bonus and vacation, sick days and travel benefits. *Id.* at 1-2. This reflected an increase over his original agreement with Employer which paid \$17.84 per hour for 72 hours per week with completion bonus of \$6,000.00 and uplifts of only 25% apiece. CX 11.

Claimant submitted post hearing his job application log. CX 21. He applied online for the automotive mechanic/technician position with Galpin Ford on April 9, 2010. *Id.* at 2. He also determined from calling the potential employer that the job required repetitive lifting and an ASE certification. *Id.* Claimant noted that he called Pharmavite on April 12, 2010, regarding the maintenance mechanic position. *Id.* at 4. Claimant was advised that the position, fleet truck mechanic, was not available and that it required lifting of over 50 pounds and repetitive overhead movement. *Id.* Claimant spoke with the human resources department at Auto Club of Southern California on April 13, 2010, and was advised he was not eligible for hire as an insurance sales agent trainee since the position required a credit score above 530 and life, property and automobile insurance licenses. *Id.* at 6. Claimant's log reflects that he contacted Farmers Insurance on April 12, 2010, but was told he was not eligible for hire as an insurance sales agent since he did not have a life, property and automobile insurance license and needed a good FICO score and background check. *Id.* at 8. Finally, Claimant applied online for the auto damage adjuster trainee position with GEICO on April 9, 2010, but had heard no response as of April 22, 2010. *Id.* at 10.

### CREDIBILITY

Having assessed the independent credibility of the evidence in this case, I turn to weighing the credibility of the evidentiary sources against one another. The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the true-doubt rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993). In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners or other expert witnesses. *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997).

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

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

Here, I wholly credit Dr. Tortosa and Dr. Weber for the independent reasons discussed above, irrespective of their value in relation to other witnesses and evidence in the case. I afford both an additional measure of credibility given that they reflect the views of Claimant’s treating physicians. Although, I lend somewhat less such credibility to Dr. Podesta’s opinions regarding work restrictions as noted previously, I nonetheless credit Dr. Podesta’s remaining opinions as they harmonize well with the opinions of the treating physicians, Dr. Tortosa and Dr. Weber.

## CONCLUSIONS OF LAW

This dispute encompasses several issues. First is Claimant’s average weekly wage. Second, the parties dispute the extent of Claimant’s alleged injury. Meanwhile, Claimant seeks attorney’s fees and interest.

### *Calculation of Average Weekly Wage*

Section 10 of the Act sets forth three alternative methods for calculating a claimant’s average annual earnings, 33 U.S.C. 910 (a)-(c), which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant’s earning power at the time of injury. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 441 (5th Cir. 1996); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff’d sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). Under Section 10(a), when a claimant works “substantially the whole of the year” preceding the accident, those wages are used to calculate the average weekly wage. 33 U.S.C. § 910(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 609, 38 BRBS 60, 68 (CRT) (1st Cir. 2004). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. *Hole v. Miami Shipyards Corp.*, 12 BRBS 38, 43 (1980), *rev’d on other grounds*, 640 F.2d 769 (5th Cir. 1981). Where evidence indicates a claimant has not worked substantially all of the

previous year, evidence may be utilized as to the wages earned by other employees in the same or similar employment. 33 U.S.C. § 910(b); *Bath Iron Works Corp.*, *supra* at 609. However, where the record lacks evidence of a claimant's wages from the prior work year, as well as evidence as to comparable wages, Section 10(c) of the Act applies. 33 U.S.C. § 910(c); *Bath Iron Works Corp.*, *supra* at 609. In that event, available earnings information regarding the claimant and similarly situated employees may be utilized to arrive at a sum that reasonably represents the annual earning capacity at the time of the injury. 33 U.S.C. § 910(c); *Bath Iron Works Corp.*, *supra* at 609-10.

The Board has recently confirmed its position, on reconsideration of its earlier decision in *K.S. v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), that average weekly wage calculations for workers earning substantially higher wages in dangerous overseas areas should be based solely on such overseas wages—rejecting the “blended rate” approach sought by Respondents in that case. *K.S. v. Service Employees Int'l, Inc.*, 43 BRB 136 (2009). This result is consistent with the Board's earlier decision in *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), wherein the Board affirmed this administrative law judge's average weekly wage calculation based solely on the claimant's earnings in Iraq. In this case, Respondents urge that the undersigned apply the blended rate approach, either ignoring the ruling in *K.S.*, or finding that its rationale should not be applied to cases pending prior to the decision in *K.S.*

Here, Claimant resembles the claimants in *Proffitt* and *K.S.* in this regard. The claimants in all three instances were injured while working under one-year contracts that paid each a higher wage than their stateside employment to compensate for the dangerous conditions in Iraq. Claimants in each case worked seven days per week for at least twelve hours per day. While on the job, they were subject to mortar, rocket and/or improvised explosive device (IED) attacks. All three claimants worked full-time under a twelve-month contract and intended to not only fulfill their contractual obligation, but to work beyond the contract period. However, Claimant in the present case differs from those in *K.S.* and *Proffitt* in that he had actually worked overseas in Iraq under a similar contract for over two years prior to his November 1, 2008 injury in Iraq except for periods when he was recuperating from his previous shoulder injuries incurred while working for Employer in Iraq. Claimant's earnings for the 52 week period prior to his November 1, 2008 injury reflect only his work from July through November of 2008, as he was recuperating from his October 2007 shoulder surgery prior to that time. Thus, it would seem appropriate to use the earnings figures calculated by Respondents for a similarly situated employee who actually worked the entire 52 week period preceding the date of injury.

Therefore, the undersigned must calculate Claimant's average weekly wage pursuant to Section 10(b). In making its determination, the Court notes that “[t]he essential purpose of the average weekly wage determination is to reflect ‘a claimant's annual earning capacity *at the time of the injury.*’” *Hall v. Consolidated Employment Systems*, 139 F.3d 1025 (5th Cir. 1998) (citing *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991) (emphasis added)); *see also Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991). The Court is not limited to considering Claimant's earnings in the year preceding the injury. *New Thoughts Finishing Company v. Travelers Insurance Company*, 118 F.3d 1028, 31 BRBS 51, 54 (CRT) (5th Cir. 1997). “Typically, a claimant's wages at the time of injury will best reflect [his] earning capacity at that time.” *Hall, supra*.

Therefore, the actual earnings of the similarly situated employee calculated by Employer provides the most accurate basis for establishing Claimant's annual earning capacity at the time of his injury. Employer's wage records indicate that the similarly situated employee earned a total of \$76,327.31 for the preceding 52 weeks or a weekly average of \$1,467.83. RX 1 at 2; CX 14. However, the wage information also notes that the similarly situated employee earned an average of \$1,243.92 per week for per diem, travel allowance, danger/hardship pay and sign-on bonus. *Id.* The wage computation includes overseas allowances, including foreign housing allowance, completion awards and cost of living adjustments. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). The computation should also include vacation or holiday pay. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Rayner v. Maritime Terminals*, 22 BRBS 5 (1988); *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd per curiam*, 710 F.2d 836 (5th Cir. 1983). Accordingly, I find that these additional payments should be added as components of Claimant's actual earnings. Thus, I calculate Claimant's average weekly wage to be the sum of \$1,467.83 plus \$1,243.92, which yields an average weekly wage for Claimant of \$2,711.75, entitling him to the corresponding maximum compensation rate of \$1,200.62 per week.

### ***Extent of Disability***

The parties dispute the extent of Claimant's disability. The Section 20(a) presumption does not aid the claimant in establishing the nature and extent of disability. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979). Therefore, I must review the record on the whole in analyzing this issue.

### ***Nature of disability***

A claimant has the initial burden to establish the nature and extent of his/her disability. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985). The worker's disability is of a permanent nature if the injury or condition has reached the point of maximum medical improvement, while temporary in nature if not ("MMI"). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 275 (1989). Alternatively, the disability is permanent if the impairment has continued for a lengthy period and appears to be of a 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, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 9761 (1969); *Care v. Washington Metro Area Transit Auth.*, 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment to improve his condition. *Leech v. Service Eng'g Co.*, 15 BRBS 18, 12 (1982); *Brown v. Lykes Bros. Steamship Co.*, 6 BRBS 244, 247 (1977).

Here, Claimant and Respondents stipulate that Claimant reached MMI on April 20, 2009. TR at 9-10. This roughly equates to the date of Dr. Tortosa's April 17, 2009 report in which he found Claimant to have reached MMI with permanent work restrictions. CX 1 at 14-15 (also found at RX 2). Accordingly, I find that Claimant reached MMI as of April 20, 2009. Any

disability Claimant may have suffered as a result of his shoulder injury prior to reaching MMI on April 20, 2009, is therefore temporary, while any such disability thereafter would be permanent.

Extent of disability

The extent of a claimant's disability is determined by his/her ability to work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). If a claimant meets the evidentiary burden of establishing that s/he is unable to perform his/her usual employment because of his/her injuries, then the evidentiary burden shifts to the employer to establish the availability of other jobs that the claimant could perform and secure. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 292 (4th Cir. 2002). If the employer meets its burden by showing suitable alternative employment, the evidentiary burden shifts back to the claimant to prove a diligent search and willingness to work. *See Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). The claimant can prevail in establishing total disability by demonstrating that s/he diligently tried and was unable to secure employment. *Fox v. West State Inc.*, 31 BRBS 118 (1997); *Turner*, 661 F.2d at 1043. If the claimant does not demonstrate diligence, at the most his/her disability is partial and not total. *See* 33 U.S.C. § 908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

A claimant's usual employment is his/her regular duties at the time s/he was injured. A claimant's employment immediately prior to the injury is his/her "usual" employment, even if his/her duties had lasted a mere four months and the claimant has had other jobs in the near past. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). Similarly, where a claimant is promoted to foreman shortly before his/her injury, that is his/her usual employment. *Moore McCormack Lines v. Quigley*, 178 F. Supp. 837 (S.D.N.Y. 1959). A physician's opinion that the employee's return to his/her usual or similar work would aggravate his/her condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978). If the physician recommends surgery and light-duty work and the claimant experiences pain while performing many activities, s/he has also met his/her burden. *Carter v. General Elevator Co.*, 14 BRBS 90 (1981); *see also Offshore Food Serv. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Serv. v. Benefits Review Bd.*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975).

Here, both sides agree that Claimant can not return to his usual employment. Both Dr. Tortosa and Dr. Podesta agree that Claimant is unable to return to his previous employment due to his work restrictions. CX 1 at 16, 24 and 28.

The burden thus shifts to Respondents to show the availability of suitable alternative employment. The BRB's suitable alternative employment test requires two showings:

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is what types of jobs is he capable of performing or capable of being trained to do?

(2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure?

*Berezin v. Cascade General, Inc.*, 34 BRBS 163, 165 (2000) (quoting *Stevedores v. Turner*, 661 F.2d 1031, 1042-1043 (5th Cir. 1981).

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

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

*Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980) (citing *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976)). The Ninth Circuit reiterated this requirement, holding that employers must demonstrate the existence of specific job opportunities. *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *cert. denied*, 511 U.S. 1031 (1994). In the Ninth Circuit, the employer must further demonstrate that the claimant "would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *but see Fox v. West State Inc.*, 31 BRBS 118 (1997). The BRB has also held that vocational counselors must identify specific available jobs; general labor market surveys alone are not enough. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380, 384 (1983); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981); *see also Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987) (must be specific, not theoretical, jobs).

In addition, to demonstrate that suitable alternative employment is available, an employer must identify appropriate jobs, not merely one job. The Board and the United States Court of Appeals, Fourth Circuit, have both held a single job opening is not sufficient to satisfy the employer's burden of suitable alternate employment. The employer must present evidence that a range of jobs exists. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990). *But see P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116, 121-22 (CRT) (5th Cir. 1991) (finding that identification of a single job opening may be sufficient under appropriate circumstances, where the employee is highly skilled, the job found by the employer is specialized, and only a small number of workers in the local community possess suitable qualifications).

In this case, while the labor market survey by Ms. Pozos-Eloway identifies a number of job openings, I am troubled by the job requirements of some of these positions. While Dr. Podesta approved three positions as suitable, Dr. Tortosa specifically found one of those three, the automotive mechanic technician position, exceeded Claimant's physical work restrictions. Dr. Tortosa also found Claimant incapable of performing the maintenance mechanic position. As indicated hereinabove, I discredit the more general work restrictions opined by Dr. Podesta in

favor of the more specific work restrictions based on the FCE set forth by Dr. Tortosa. Given the severe restrictions on overhead work and lifting, neither of these jobs listed as medium exertional level fall would seem appropriate as medium level work requires lifting 20 to 50 pounds occasionally while Dr. Tortosa restricted occasional lifting to 35 pounds. *See* Dictionary of Occupational Titles ("DOT"), Appendix C, Sec. IV – Physical Demands. The DOT lists the automotive mechanic position as being in the medium exertional level. DOT. 620.261-030 – Automobile-Service-Station Mechanic (automotive ser.). However, the DOT describes the maintenance mechanic position as falling within the heavy exertional level, requiring lifting up to 100 pounds. DOT. 638.281-014 – Maintenance Mechanic (any industry). The O\*NET, which replaced the Dictionary of Occupational Titles in December, 1998, lists occupations in considerably more specific detail than the DOT. The O\*Net lists at section 85302A–Automotive Master Mechanics, the following description of required work activities: "83. Performing General Physical Activities – Performing physical activities that require moving one's whole body, such as in climbing, lifting, balancing, walking, stooping, where the activities often also require considerable use of the arms and legs, such as in the physical handling of materials." Similarly, the O\*Net at section 85302B –Automotive Specialty Technicians and at section 85132 – Maintenance Repairers, General Utility contain the identical description of physical work activities. Obviously, Claimant's work restrictions would prevent his taking a position as an automotive mechanic or maintenance mechanic since the climbing and repetitive use of the arms would exceed his limitations. Common sense further buttresses this conclusion as it would be difficult to imagine Claimant, with his right arm and shoulder limitations being able to perform automotive or maintenance mechanic work with the obvious frequent use of both upper extremities and overhead work. Accordingly, I accept Dr. Tortosa's opinion that Claimant is physically incapable of performing the automotive mechanic and maintenance mechanic positions.

As to the remaining job positions identified, Both Dr. Tortosa and Dr. Podesta opined that Claimant was physically capable of working at the insurance sales agent trainee, insurance sales agent entry level and auto damage adjuster trainee positions. CX 21 at 5-10; RX 7. However, Claimant's job application search documents that he contacted each of the employers offering these three positions and was told he was ineligible for hire because he did not possess the requisite insurance licenses. CX 21. Accordingly, since these positions required license qualifications that Claimant does not possess, I find that they do not constitute suitable alternative employment. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *cert. denied*, 511 U.S. 1031 (1994).

In Employer/Carrier's Post Trial Brief, Respondents advise that an additional labor market survey was conducted within the 50 mile radius of Claimant's new address in Yuba City, California. *See* Employer/Carrier's Post Trial Brief at 5. Respondents submit that such survey "identified four (4) additional employment opportunities with GEICO, Tri-Counties Bank, Western Dental Services and Sutter Gould Medical Center which would pay between \$27,000.00 to \$40,000.00 annually." *Id.* However, no such report has been offered into evidence. Bald unsupported assertions in a party's brief are insufficient to serve as evidence of the facts asserted therein. Additionally, there is no indication of what job positions these four alleged job opportunities represent, only the employer's name has been given with no further information whatsoever. Even were I to consider this snippet of information in Respondents' Post Trial Brief

to constitute evidence, the information provided falls woefully short of identifying specific job opportunities which Claimant could perform. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980) (citing *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976)); *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *cert. denied*, 511 U.S. 1031 (1994).

Further, I find that Claimant did diligently seek work within his limitations. Claimant was unsuccessful despite contacting numerous potential employers, including those identified in Respondents' labor market survey. Further, I find Claimant's testimony credible in this regard and find that his good faith effort to seek employment within his restrictions is borne out by his testimony and his job application log. Thus, I find Claimant has conducted a diligent search without success. *See Fox v. West State Inc.*, 31 BRBS 118 (1997); *Turner*, 661 F.2d at 1043. As a result, I find Claimant to have been temporarily totally disabled from the date of injury through April 20, 2009, the date of MMI. I further find Claimant to be permanently totally disabled from April 21, 2009, and continuing.

### ***Medical Benefits***

The Act requires an employer to furnish medical benefits for such period as the nature of the injury or process may require. 33 U.S.C. § 907. A claimant establishes a *prima facie* case for compensable care when a physician describes the care as necessary for a work-related condition. *Turner v. The Chesapeake and Potomac Telephone Company*, 16 BRBS 255 (1984). Medical expenses incurred since the industrial injury may be assessed against the employer if they are reasonable and necessary. 33 U.S.C. § 907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402. In view of the foregoing stipulations and findings, Claimant is entitled to continuing medical assessment and treatment as reasonable and necessary under Section 7 of the Act.

### ***Interest***

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

### ***Attorney's Fees and Costs***

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including Claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

## **ORDER**

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

It is therefore **ORDERED**:

1. Respondents shall pay Claimant compensation for permanent total disability from the date of hearing, March 29, 2010, and continuing, payable at the statutory maximum compensation rate of \$1,200.62 per week.
2. Pursuant to Section 7 of the Act, Respondents shall pay all outstanding medical claims and costs related to Claimant's injuries and shall continue to furnish all future reasonable and necessary medical treatment of the injuries.
3. Respondents are entitled to credit for all disability and claims payments previously made in connection with the November 1, 2008, injury that have been paid for periods subsequent to the date of hearing, March 29, 2010.
4. Respondents shall pay interest on Claimant's unpaid compensation benefits since March 29, 2010, from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.
6. The District Director shall make all calculations necessary to carry out this Order.

**IT IS SO ORDERED.**

A

Russell D. Pulver  
Administrative Law Judge

*San Francisco, California*