

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 March 2011

CASE NO.: 2010-LDA-223

OWCP NO.: 02-190739

IN THE MATTER OF:

JAMES DODSON

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,
c/o CHARTIS PROPERTY CASUALTY

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

JERRY R. MCKENNEY, ESQ.,
WESLEY R. YOUNG, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act, brought by Claimant against Service Employees International, Inc., (Employer) and Insurance Company of the State of Pennsylvania, c/o Chartis Insurance Company (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 hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on September 28, 2010, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered sixteen exhibits, Employer/Carrier proffered twenty-eight exhibits, all of which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, 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 Order.

I. STIPULATIONS

The parties stipulated (JX-1), and I find:

1. That the Claimant was injured on August 10, 2009.
2. That there existed an employee-employer relationship at the time of the accident/injury.

¹ CX-16 and EX-26, EX-27, EX-29 through EX-33 were received by Order Receiving Exhibits, Closing Hearing and Setting Brief Due Date issued December 3, 2010. EX-16 through EX-18, EX-22, EX-23 and EX-28 were withdrawn. Although Claimant's post-trial deposition was marked and offered into evidence as EX-32, Claimant's medical records from Clear Lake Medical Center had previously been received as EX-32 at the formal hearing. Accordingly, Claimant's post-trial deposition will hereby be marked and received as EX-33. References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____; and Joint Exhibit: JX-____.

3. That the Employer was notified of the accident/injury on August 10, 2009.
4. That Employer/Carrier filed Notices of Controversion on August 24, 2009, March 1, 2010 and March 4, 2010.
5. That an informal conference before the District Director was held on February 8, 2010.
6. That Claimant's average weekly wage at the time of the injury was \$1,562.96.
7. That Claimant reached maximum medical improvement on August 26, 2010.

II. ISSUES

The unresolved issues presented by the parties are:

1. Fact and causation of injury.
2. The nature and extent of Claimant's disability.
3. Entitlement to and authorization for medical care and services.
4. Employer/Carrier's entitlement to Section 8(f) relief.
5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant, fifty-four years old, testified at the formal hearing. (Tr. 21).² He was born and raised in Virginia, then moved to Houston, Texas, in 1978. He was employed by Monsanto Chemicals in Houston for twenty-five years; he retired early. Claimant then started a trucking company that was in the business of hurricane clean-up in 2004 and 2005. Claimant obtained a job with Employer and left to work overseas on August 16, 2006. He stayed overseas until his heart attack on August

² Except as otherwise indicated, Claimant's hearing testimony was consistent with his deposition testimony taken on March 30, 2010 (EX-9) and November 11, 2010. (EX-33).

10, 2009. He was stationed at several military bases in Afghanistan, including Kandahar, Bagram Airfield, Camp Phoenix and Camp Blessing. (Tr. 22). Claimant suffered his heart attack while stationed at Camp Blessing, a forward operation base in east Afghanistan. (Tr. 22-23).

Claimant testified he had no heart problems prior to his deployment. (Tr. 23). He additionally testified his mother, father or siblings never had a history of heart problems. (EX-9, p. 42). Claimant further testified to having chest pain ten or eleven days prior to his heart attack after working out for approximately thirty minutes on the treadmill. He went to the medic where "they did a EKG, took my blood pressure, and if I'm not mistaken, they drew blood." Claimant stated his results were normal and the medic told him to relax. Even after a second round of testing, "everything was fine." (Tr. 23).

Claimant testified that temperatures rose to 125 and 130 degrees during the day and cooled to approximately 110 degrees at night. (Tr. 24). He stated the tents in which he lived had small window unit air conditioning, but they consistently froze up "because everybody was trying to max them out to keep it running -- to keep it cool." (EX-9, p. 33).

Claimant testified, "My job was processing raw water coming from the latrine, coming from the showers, processing the cleaning of that and getting it ready to be disposed back out to the environment." Claimant stated all his equipment, the plant facility and his chemical systems required to complete his job were outside. (Tr. 24). Claimant worked seven days per week at least twelve hours per day, but sometimes fourteen or sixteen hours. (Tr. 24-25). "It depended on what we had going on." (Tr. 25). Claimant testified his job duties themselves were not stressful, but being at Camp Blessing was stressful because the camp was attacked by mortars, rockets and small arms two or three times a week. (EX-9, pp. 30-31).

Claimant testified he is six feet three inches tall and weighs approximately 270-275 pounds. He has gained approximately twenty pounds since his return to the United States. He has not worked out since his August 10, 2009 heart attack, other than walking three to four times per week. (Tr. 25).

Claimant stated Camp Blessing was relatively small and housed approximately 300 troops and twenty KBR employees. He further stated his base was attacked often. His base was attacked five times in eight days in the end of July. (Tr. 25). The attacks came during the day and at night. "It would happen in the a.m. It would happen around lunchtime, noon, dinner hour, then again at night." Claimant testified the last attack he remembered occurred approximately two or three days before his August 10, 2009 heart attack. He further testified the attacks affected his sleep and agreed he was fatigued by the time he had the heart attack. (Tr. 26). He stated the attacks and gunfire affected his stress level "mainly on the sleeping end." (EX-9, p. 58).

Claimant testified that on August 10, 2009, he began experiencing severe sweating, chest tightness and pain in his left elbow while walking up a hill taking paperwork to a co-worker. He went to his office and turned the air conditioning system on high to try to stop the sweating. (Tr. 27). He decided it would be best to seek medical attention and walked over to the medic, where he was told he had an irregular heart beat and was having a heart attack. (Tr. 27-28). Claimant was administered a nitroglycerin tablet that eased the pain. Claimant testified it was approximately 110 or 115 degrees outside at that time. (Tr. 28).

Claimant was evacuated via helicopter to Bagram, a large air base, where tests were run. (Tr. 28-29). He was then sent to Landstuhl, Germany where he underwent triple bypass surgery. (Tr. 29). After staying in Germany for less than two weeks, Claimant was sent home to Houston. (Tr. 29). He testified the doctor in Germany told him he had the triple bypass surgery because he had three blocked arteries and "plaque had broken away from three arteries." He further testified he did not ask, nor was he told, whether his work in Afghanistan could have caused the plaque to break away from the arteries. (EX-9, p. 63).

Claimant testified Dr. Tran has basically been his treating physician. He calls his office with questions, but has not been able to physically see him because his insurance was cancelled when his employment with Employer was terminated. (Tr. 29). Claimant stated Dr. Tran and Dr. Levine, Employer/Carrier's physician, both advised him not to return to Afghanistan. (Tr. 30).

Claimant testified he is looking for lighter work in the United States. He has discussed employment with two companies, but neither were hiring. (Tr. 30). Claimant left his phone number with both companies. (Tr. 31). He stated he does not feel healthy enough to return to work overseas because Dr. Samman and Dr. Tran indicated to him "extreme heat does create a significant amount of stress on the body." He further stated Dr. Levine told him he needs to be physically near advanced medical treatment because of his condition. (Tr. 32). Claimant stated he would be concerned with driving across country because advanced medical treatment may not be available, and that he may not be able to keep his commercial driver's license (CDL) because he is on blood pressure medicine. (Tr. 32-33). He stated he would apply for all suitable jobs provided by Employer/Carrier and would also continue to look for suitable employment on his own. (Tr. 33-34).

Upon questioning by the undersigned, Claimant testified his job title in Afghanistan was waste water technician. His job duties included processing waste water, which required him to lift fifty-pound chlorine buckets. (Tr. 34). He also had to move sludge weighing seventy-five to one hundred pounds, but had a dolly for moving sludge. (Tr. 34-35).

Claimant further testified he is currently taking Plavix (blood thinner), blood pressure medicine and Lipitor (cholesterol reducer). (Tr. 35).

On cross-examination, Claimant testified he worked in Afghanistan for approximately three years, but denied becoming accustomed to the extreme heat. (Tr. 36-37). He agreed he worked at Camp Blessing for over a year prior to his heart attack, including two summers. He could expect what a summer at Camp Blessing would be like. (Tr. 37). "[F]rom like November to around March, it is cold, and then it started warming up, April, May, June. It's like what maybe we're feeling here, maybe a little warmer, but then the second week of July, somewhere around that, that's when that high temperature comes in, and it stays until around September." (Tr. 38). He agreed that he learned how to deal with the heat by taking breaks, going inside and drinking water when necessary. (Tr. 39).

Claimant testified when he began experiencing chest pain after coming off the treadmill on July 31, 2006, he was not afraid he was having a heart attack. "I just know that I didn't feel right, and I actually thought maybe it was a blood pressure problem." (Tr. 43). He further testified the chest pain was

similar to the chest pain he experienced when he actually had the heart attack on August 10, 2009. (Tr. 44). Claimant routinely walked the treadmill for thirty minutes and lifted light weights five times per week, and exercised regularly prior to his deployment. (EX-9, pp. 50-51). After the July 31, 2006 incident, Claimant continued to exercise regularly. (EX-9, p. 55).

Claimant stated he had the heart attack at 10:30 p.m. on August 10, 2009. He had not been running, but had been working hauling water hoses up a flight of stairs, washing reactors, moving scum, mixing chemicals, and cleaning tanks since 6:00 a.m. that morning. (Tr. 45-46). He further stated he felt no chest pain while working. Claimant testified there was no combat activity on that particular night, and agreed there had been none for three days prior to his heart attack. (Tr. 46). He agreed that he had experienced combat activity throughout the three years he had been in Afghanistan, including mortars, small arms fire and rocket attacks, during none of which he experienced chest pain. (Tr. 47).

Claimant agreed that his one treatment with Dr. Tran in August 2009 was the only time he ever actually met with him. (Tr. 49). He treated with Dr. Samman from September 2009 to October 2009; he placed a stent in Claimant's heart. (Tr. 49). Claimant stated he had not seen any cardiologists since October 2009. (Tr. 49-50). He further stated he has not been told he could return to work and has not inquired on the matter. (Tr. 50).

Claimant testified he never had chest pains in Afghanistan and did not have heart problems prior to July 2009. "No doctor has ever told me that I had heart problems prior to 2009." (Tr. 51). He agreed that chest pain sent him to Clear Lake Regional Medical Center on June 24, 2002, but it turned out to be a stomach problem. (Tr. 51-52). He denied being diagnosed with a heart problem at that time. (Tr. 52). When he was presented with his medical record that indicated "mild to moderate aortic insufficient," he agreed that he had some kind of heart problem in 2002. (Tr. 53-54).

Claimant testified he had not been diagnosed with high cholesterol prior to his employment with Employer, but "was told once that it was slightly elevated. Exercise and diet took care of it." Claimant denied ever taking any cholesterol medication prior to his deployment. (EX-9, p. 36). Claimant agreed that multiple medical records indicated he had elevated cholesterol

levels from 1989 to 2004. (Tr. 54-59). He continued to smoke approximately half a pack of cigarettes per day and did not take cholesterol medication during that time. He explained, "it was told to me that working out would reduce my cholesterol, and then the next time when I go back in and had a blood test done, the cholesterol came back down within normal range. Then when I got off of a good healthy diet, cholesterol went back up." (Tr. 59). Claimant testified he stopped smoking after his heart attack. (EX-9, pp. 42-43).

Claimant testified he has a good understanding of the chemistry involved in purifying water, that he knows how to operate steam boilers, pumps and other equipment used to manufacture chemicals. (Tr. 60-61). He additionally has a commercial driver's license (CDL) with a double trailer and tanker endorsement. (Tr. 61). He agreed he was capable of some form of work and would like to begin working. (Tr. 61-62).

Claimant testified he doubts whether he would renew his CDL even if his blood pressure medication were not a problem. He explained, "I have no intentions of driving across country." (Tr. 63). He agreed he would probably renew his CDL if a job did not require him to travel across the country. (Tr. 64).

Claimant stated there were jobs in Employer/Carrier's labor market survey for which he intended to apply, but did not intend to apply for the position of reverse osmosis water purification unit operator position in Djibouti because he does not think he would be able to receive modern medical care there. (Tr. 64-65). He agreed he would consider the job if there was a showing of the availability of modern medical care. (Tr. 65). He stated the same were true regarding the position available in Dubai. (Tr. 66). "I have no intention of going overseas and not know what type of medical treatment that I can get. Now, if I could get into a place where they have a modern cardiac facility, then I don't have a problem working overseas." (Tr. 66-67).

Claimant testified in his post-trial deposition taken November 11, 2010, that he was taking blood pressure medication, Plavix, and cholesterol medication. He began employment at the Dollar Tree in Friendswood, Texas, on October 29, 2010, as a stocker putting products on the shelves. He moves boxes around and anticipates he may have to unload boxes weighing no more than fifty pounds from trucks. (EX-33, p. 2). Claimant works approximately twenty hours per week earning \$7.50 per hour for the day shift and \$8.50 per hour working the night shift; he works both shifts. (EX-32, p. 3). He further testified he is

not searching or applying for higher-paying jobs because he feels Dollar Tree has offered him the best opportunity, and his ultimate goal is to be a regional manager earning \$85,000 to \$100,000 per year. (EX-33, p. 4).

On re-direct examination, Claimant testified that the temperatures in Djibouti and Dubai are extreme and he probably should not be there considering his heart condition. (Tr. 68). He testified he was told by three doctors, including Employer/Carrier's physician, that heat stress is not good for him. (Tr. 69).

He testified that prior to his heart attack, no doctor had ever recommended any type of medication for a heart condition. "[T]he only thing the doctors have told me is diet and exercise And when my cholesterol goes high, I change my diet up and I started exercising. I used to work out four or five times a week, playing racquetball, to drop my cholesterol. And when it comes low, then, of course, you know, I'm like everybody else. I get a little relaxed, and it goes high again." (Tr. 71).

Claimant testified there were approximately three attacks on his base between the time he began experiencing chest pains on July 31, 2009, and his heart attack on August 10, 2009. When the attacks would occur, they would have to go to a bunker, affecting his sleep. "If I'm in bed at 9:00, a rocket -- and get to sleep at 9:00, a rocket come in at 11:00, I have to get up, go to my bunker, so -- and we may stay there five minutes, or we may stay there 30 minutes, until it clears. . . . If I get back to bed at 12 midday, there's no guarantee -- and a lot of times, I did not go back to sleep. Then I have to be up at 4:00, to take a shower and get ready to go to work at 6:00 p.m., so I got two hours sleep after working all night. Then I have to work all night again before I was down." (Tr. 72-73).

Claimant testified his base was approximately the size of a football field, and he would hear when the United States soldiers would return fire with hand artillery, further interrupting his sleep. (Tr. 74). He further testified there was small-arms fire that came into the camp. (Tr. 75). Claimant stated there was further stress at the camp because some of the locals that were working on the base were actually collaborating with the enemy. (Tr. 75).

On re-cross examination, Claimant testified that despite the stress in Afghanistan, he had stayed for three years and would have continued to stay for another three years. (Tr. 76-77).

Claimant testified he had not experienced pain for a while and that he has not seen a doctor for his heart condition since September 2009. He further testified his physicians indicated to him "when I do get back to working, they did not want me in a high stress environment, lift no more, I think they said 80 pounds." (EX-32, p. 4).

The Medical Evidence

Claimant's medical records from Clear Creek Clinic and Clear Lake Regional Medical Center indicate he previously suffered from pneumonia, sinus infections, possible neck, shoulder, back and hip injuries, and stomach/gastric problems. (EX-10; EX-32). In August 1994, June 2001, November 2003, and March 2004 Claimant was found to have elevated cholesterol. (EX-10, pp. 16, 28, 38, 75). In June 2002, a myocardial perfusion scan indicated "no evidence of stress induced myocardial ischemia," and sinus rhythm was normal in his EKG. He was diagnosed with mild to moderate aortic insufficiency, mild mitral and tricuspid regurgitation and normal left systolic function. He was placed on a low-cholesterol, weight loss diet. (EX-10, pp. 46-47; EX-32, pp. 236, 250).

Claimant's pre-deployment medical records indicated he "can be assigned to any work consistent with skills and training; examination revealed no immediately significant medical problems." (CX-1, p. 4; EX-6, p. 6). Claimant reported no prior medical problems except stomach pain, change in bowel habits, vomiting, nausea, mole growth and difficulty hearing in his right ear. (CX-1, pp. 6-7; EX-6, pp. 8-9). His cholesterol was high (286 total). (CX-1, p. 9; EX-6, p. 11).

KBR Medic Records

On April 30, 2009, Claimant developed a respiratory illness due to the inhalation of chlorine fumes. He was treated on-site with oxygen and sent to Bagram for further treatment. (EX-3, pp. 27-28).

On August 5, 2009, Claimant was diagnosed with shingles (herpes zoster). He was isolated and given medication until August 10, 2009. (EX-3, pp. 10-11).

On August 10, 2009, Claimant suffered a myocardial infarction. He was evacuated to Bagram on August 11, 2009, for further and more advanced care. (EX-3, p. 1).

On August 18, 2009, Claimant was moved to Landstuhl Regional Medical Center. Claimant stated he was in good health until August 10, 2009, when he experienced chest tightness and marked diaphoresis. Claimant went to the KBR medic and was "flown to Bagram hospital where further tests showed his troponin went up to 0.57 and 0.6 and CK MB at 7.2 and 6.6." (CX-1, p. 21). "Given degree of disease coronary bypass surgery was recommended and hence patient was transferred to Homburg University Hospital where he underwent CABG x 3 with LIMA to the LAD and radial sequence graft to the LPL and admitted to ward overnight." Claimant tolerated the surgery well without complications. He was discharged with a lifting restriction of fifty-one pounds. (CX-1, p. 26).

On August 23, 2009, Claimant was sent home from Germany to Houston, Texas. (EX-3, p. 4).

Dr. Tony Tran, M.D.

On August 27, 2009, Claimant reported to Dr. Tony Tran, M.D., in Houston, Texas, for a follow-up cardiology visit. (EX-29, p. 3). Dr. Tran testified via deposition that he saw Claimant only on August 27, 2009, for post-operative care of the bypass surgery he underwent in Germany. (EX-29, pp. 2-3). Dr. Tran did an EKG and physical examination. Claimant did not complain of chest pain or cardiovascular symptoms. "His functional status appeared stable." Dr. Tran testified he did not have an opinion regarding Claimant's ability to work or perform activities at the time he saw Claimant. He instructed Claimant to return for a follow-up visit. Claimant had relayed to Dr. Tran that "he was on the front line in Afghanistan, had been working very long shifts without much sleep and that he was under fire and he developed chest pain, was subsequently transferred to Germany for more medical care." (EX-29, p. 3).

Dr. Tran testified he received Claimant's medical records from Germany subsequent to his visit, from which he learned "the magnitude of the blockages [Claimant] had would be clinically considered significant." He agreed that coronary artery disease is the process that leads to blockages, but it "takes time." Dr. Tran stated Claimant "could have" had components of coronary artery disease prior to his employment in Afghanistan. (EX-29,

p. 4). He additionally stated coronary artery disease "could be" progressive, and agreed that the process is caused more likely than not by Claimant's metabolism, diet, physical activity, physical makeup and stress factors.

Dr. Tran testified Claimant's work activity in Afghanistan "could have" had an effect on his coronary artery disease or the acute symptoms he experienced. (EX-29, p. 5). He agreed, however, that because of the coronary artery disease, Claimant would have probably ended up with chest pain and probably a myocardial infarction eventually. (EX-29, pp. 5-6). Dr. Tran clarified that although he could not say with any degree of medical probability whether Claimant's heart attack was work-related, his work "could have" caused it, and further agreed that Claimant's pre-existing condition of coronary artery disease, coupled with his work in Afghanistan "could have" caused his heart attack. (EX-29, p. 6).

Dr. Tran testified he did not restrict Claimant's activities other than stating he should not return to a combat zone in Afghanistan. (EX-29, p. 6). He stated he did not have enough information to render any further opinions regarding Claimant's functional capacity. He stated temperature could be a stressor for someone with a heart condition. (EX-29, p. 7).

On December 9, 2009, Dr. Tran recommended via letter to Claimant's counsel that Claimant "find different setting of employment." (CX-1, p. 34). Dr. Tran reiterated such an opinion on February 2, 2010, in a letter to Claimant's counsel indicating, "due to his underlying circumstances of myocardial infarction while in combat in Afghanistan, I would advise that he find a different setting as part of managing his coronary disease." (CX-1, p. 35).

From August 31, 2009 to December 16, 2009, Claimant reported to the Kelsey-Seybold Clinic in Houston, Texas, and specifically to Dr. Tannique N. Rainford, M.D. and Dr. Tony Tran, M.D., for follow-up visits. Kelsey-Seybold Clinic's records indicate Claimant was living in Afghanistan and was transferred to Germany for care of a heart attack on August 10, 2009. Claimant's examinations revealed no new issues and he appeared to be healing well from his surgery with the exception of a minor bacterial infection of his wound, which was effectively treated. (EX-11, pp. 5-10).

On September 8, 2009, Claimant was admitted to Clear Lake Regional Medical Center with complaints of chest pain. Claimant reported his prior heart attack in Afghanistan and his subsequent transfer to and bypass surgery performed in Germany. Claimant noticed epigastric burning and discomfort after walking approximately half a mile, which relieved on its own. The pain, however, returned after a few hours with more severity, "radiating into the right side of the neck and to the jaw, also associated with mild shortness of breath." After a normal troponin level was discovered and Claimant's EKG indicated "no acute ST-T changes," Claimant was diagnosed with hypertension and hyperlipidemia. (EX-32, pp. 79-81). A heart catheterization was performed on September 9, 2009, and Dr. Ghyath Al Samman, M.D. "proceeded with angioplasty with stent placement to the circ." Claimant tolerated the procedure well without any complications. (EX-32, pp. 95-96).

Claimant followed-up with Dr. Ghyath A. Samman, M.D., in Webster, Texas, on September 24, 2009; he was counseled on smoking cessation and a low cholesterol diet. (CX-1, p. 31).

Dr. Glenn N. Levine, M.D.

On September 1, 2010, Dr. Glenn N. Levine, M.D. reviewed Claimant's medical records, interviewed and examined him at Employer/Carrier's request.³ Dr. Levine noted Claimant's history of high cholesterol and coronary disease. He stated, "It is very unlikely that the patient's underlying coronary artery disease was caused by his time in Afghanistan." He reasoned Claimant had coronary risk factors, including smoking and elevated cholesterol. He further opined Claimant's heart attack was likely caused by his underlying coronary artery disease. He further stated, however, "While it cannot be excluded that his time in Afghanistan had some modest contribution to any progression of his underlying coronary artery disease, this [time in Afghanistan] more likely than not was the major reason he developed coronary artery disease that required bypass surgery." (EX-19, pp. 1-4).

On September 11, 2010, Dr. Levine, without actually examining Claimant, opined he appeared to have fully recovered from his bypass surgery and would be capable of resuming a normal, eight-hour work day. He advised Claimant should not be

³ Dr. Levine's credentials are located at EX-21. He is a board-certified cardiologist.

exposed to "extremes of temperatures like those in Afghanistan," and should avoid activities "that have a reasonable chance of catastrophic bleeding" because of the blood thinners he currently takes. (EX-20, pp. 1-2).

On October 23, 2010, Dr. Levine reviewed Claimant's catheterization films and opined Claimant had blockages "likely in three arteries that apparently lead to his bypass operation." He further opined Claimant likely developed the blockages over a prolonged period. Dr. Levine stated Claimant "is apparently able to do normal physical activity without experiencing chest pain (angina)." He opined Claimant could resume working, provided "that work involves mild-moderate though probably not heavy physical activity, he does not experience further chest pains during such work, the work does not involve extremes of temperature, and wherever he works he has reasonably expeditious access to advanced medical care." (EX-31, p. 1). Dr. Levine further opined Claimant should be limited to "carrying 20 or so pound objects." (EX-20, p. 2).

Dr. Levine testified via deposition on November 23, 2010, that Claimant's physical examination was no different than it would have been for one of his treating patients. (EX-30, p. 4). He further testified Claimant's elevated cholesterol level significantly increased his risk for developing coronary artery disease and heart attack. (EX-30, p. 5). He stated Claimant began having elevated cholesterol levels at least as far back as 1994, suggesting his heart disease "was a process going on probably over decades." (EX-30, p. 8).

Dr. Levine further testified that Claimant's 2002 medical records indicated "essentially normal heart function with mild abnormalities of the heart valves." He further indicated that if Claimant continued to have angina chest pains, there may be a chance he has underlying blockages. (EX-30, p. 7). Dr. Levine stated "with a high degree of confidence, it is medically very likely that at the time he [Claimant] already had significant underlying coronary artery disease" at the time he began employment with Employer. He further stated that the nature of coronary artery disease is it progresses and build-up accrues over time that will continue to progress until vessels are occluded if unchecked, and that Claimant's coronary heart disease was likely to progress if he were not on medication. (EX-30, p. 9).

Dr. Levine testified that Claimant's troponin levels and his subsequent echocardiogram indicate he "would not have had any lasting damage to the heart muscle of any clinical relevance." (EX-30, pp. 10-11). He further testified that bypass surgery treats not only the heart attack symptoms, but also any underlying coronary artery disease, preventing future heart attacks. (EX-30, pp. 11-12).

Dr. Levine stated, "The heart attack that [Claimant] had was by troponin level a very, very small heart attack. And by the echocardiogram done in Clear Lake in 2009, his heart function is normal. So the fact that he had a very small heart attack really is not what would limit future ability to work. . . if he had any limitations, it was primarily derived from his longstanding coronary artery disease, as long as he has recovered from his bypass operation which he appeared to have done." (EX-30, p. 12).

Dr. Levine further stated that stress is not considered to be a major risk factor for coronary artery disease, and that Claimant was at an increased risk because of his high cholesterol and smoking. He stated further, "any stress [Claimant] experienced in Afghanistan either had no effect on him developing coronary artery disease or at most a very minor effect in developing coronary artery disease or having his heart attack." (EX-30, p. 12).

Dr. Levine opined that because Claimant had a successful bypass procedure and was exhibiting no symptoms, "he should be able to do normal activities such as gainful employment or driving." He further opined Claimant could drive between Houston, Texas and New Orleans, Louisiana because "there are very good medical centers" along the way. Dr. Levine stated Claimant could work anywhere, including United Arab Emirates, Qatar, Kuwait and Djibouti if he had "reasonably good medical care available to him, if he did happen to develop any more chest discomfort." Dr. Levine testified Claimant should be able to do mild to moderate activities. (EX-30, p. 15).

Dr. Levine testified on cross-examination that he saw no evidence Claimant had suffered a heart attack prior to 2009 and that a nuclear stress test showed no signs of blockage. He clarified, however, that the nuclear stress test was not as reliable as a cardiac catheterization. (EX-30, p. 16). He further testified that he would not change any of the opinions given in his written reports from September 1, 2010, September 11, 2010, or October 23, 2010. (EX-30, pp. 17-18).

The Vocational Evidence

Employer/Carrier provided EX-24, which was admitted into evidence and is the Vocational Rehabilitation Report and Labor Market Survey of Wallace A. Stanfill, Certified Rehabilitation Counselor. Claimant was interviewed on August 6, 2010, at his attorney's office, and Mr. Stanfill issued a vocational report on September 16, 2010, including a Labor Market Survey.

Mr. Stanfill reviewed Claimant's extensive medical history considered Claimant's age, work history, vocational background, interests and physical capabilities. Specifically, Mr. Stanfill discussed the limitations placed on Claimant by Drs. Tran and Levine, that Claimant cannot work in a combat zone or an environment with high temperatures and can "perform moderate work with frequent lifting of up to 20 pounds and general lifting of 80 pounds or less." (EX-24, p. 6). Although Dr. Levine opined that Claimant could work overseas if he had "reasonably good medical care available to him," Mr. Stanfill did not indicate the availability of the standard of medical care in any overseas job opportunities. Given Claimant's limitations, I find it would be incumbent on Employer/Carrier to establish the availability of reasonably good medical care in job locations overseas. The following job opportunities were identified by Mr. Stanfill as suitable for Claimant:

1. Reverse Osmosis Water Purification Unit Operator, on a full-time basis with a pay of \$4,200 per month was available in Djibouti, Africa. Duties consisted of controlling treatment plant machines and equipment, operating and controlling electric motors, pumps and valves, dumping specified amounts of chemicals into water, turning valves, pumping purified water into water mains, monitoring panel board and adjusting controls, cleaning tanks and filter beds, repairing and lubricating machines and equipment, testing water samples and recording data. Mr. Stanfill noted that temperatures in Djibouti ranged from 71 and 106 degrees. Physical requirements or limitations were not described. (EX-24, p. 8).

2. Bus driver, on a full-time basis paying a salary of \$3,950 per month in United Arab Emirates. Average temperatures of the job location ranged from 50 to 118 degrees. Duties included driving buses, vans or other vehicles to transport passengers in support of missions. The physical requirements were not described. (EX-24, pp. 8-9).
3. Facilities Technician I, on a full-time basis paying \$22,750 to \$23,088 annually was available in Houston, Texas. Job duties included operating, maintaining and monitoring water treatment systems and sludge processing equipment, performing repairs, mechanical duties, sampling, monitoring and calibration, maintaining inventory of supplies, general housekeeping, painting, and cleaning tools and equipment. Physical requirements were not listed. (EX-24, p. 9).
4. Plant operator was available in Houston, Texas, on a full-time basis with a starting salary of \$17.60 to \$21.05 per hour. Job duties were not listed. The only physical requirement listed was the employee would be required to work twelve-hour days. (EX-24, pp. 9-10).
5. Public Works Operator was available in Panorama Village, Texas, with no pay listed. The employee was required to possess or immediately be eligible for a Texas Commission on Environmental Quality Class C Water and Wastewater Operator License. Job duties included operating and maintaining water and wastewater facilities, meter reading, street and park maintenance and general duties assigned by the superintendent. Physical requirements were not listed. (EX-24, p. 10).
6. Truck Driver was available in Houston, Texas, on a full-time basis paying a \$500 per week guaranteed draw and was otherwise paid based upon a shared percentage of the load. The job required the employee to drive in the Texas/Louisiana area with occasional runs to Oklahoma, Arkansas, Mississippi and Alabama. The employee was required to have a valid TWIC card, two years of recent tractor trailer experience. Physical requirements were not listed. (EX-24, p. 10).

7. Over-the-Road Truck Driver was available on a full-time basis, paying \$29,100 to \$32,000 per year. The employee would be required to run a weekly route beginning in Houston, Texas. Physical limitations were not listed. (EX-24, p. 10).
8. Car Transporter was available in Houston, Texas, on a full time basis paying \$8.50 per hour. Job duties included transporting vehicles safely within the airport to service areas and moving vehicles between the airport and off-airport locations. Physical requirements were not listed.

The Contentions of the Parties

Claimant contends he suffered a heart attack in the course and scope of his employment in Afghanistan and that the heart attack arose out of his employment, and that he is entitled to disability compensation payments and medical care as a result of the heart attack. Employer/Carrier contend Claimant's heart attack was the direct result of his underlying and pre-existing coronary artery disease and is unrelated to his overseas employment.

Employer/Carrier further contend that if the undersigned finds Claimant to suffer a disability as a result of his heart attack, they are entitled to Section 8(f) relief because Claimant had pre-existing coronary artery disease prior to deployment and that the combined effect of this pre-existing condition and any other work-related conditions aggravated or accelerated the Claimant's coronary artery disease, yielding a materially and substantially greater degree of disability than he would have endured from the heart attack alone. The Director contends Employer/Carrier have failed to establish Claimant's present disability is not due solely to Claimant's heart attack. The Director further contends Employer/Carrier have failed to establish Claimant's present disability is materially and substantially greater than would have resulted from the work-related heart attack alone.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. 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, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

A. Credibility

I have considered and evaluated the rationality and internal consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See Indiana Metal Products v. National Labor Relations Board, 442 F.2d. 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941 (5th Cir. 1991).

Here, I find Claimant's credibility questionable, but not fully lacking. For example, Claimant's testimony that he was told only once his cholesterol was "elevated" is inconsistent with the medical records indicating high cholesterol for years prior to his heart attack. I also note that in June 2002, Claimant was put on a low-cholesterol diet. Additionally, though Claimant testified he quit smoking after his heart attack, his medical records indicate he did not seek counsel on smoking cessation until more than one month subsequent to his heart attack, on September 24, 2009.

Given these inconsistencies, I find Claimant's veracity is questionable, and his testimony will be weighed accordingly. However, such inconsistencies do not rise to a level sufficient for the undersigned to fully discredit Claimant's testimony.

Moreover, 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. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v.

Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n.3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

In this matter, although Claimant considered Dr. Tran to be his "treating physician," I note that Dr. Tran saw Claimant only one time. Dr. Levine, Employer/Carrier's physician, saw Claimant one time also. Because each physician saw Claimant only once, I find their opinions shall be given equal probative weight.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Under the Defense Base Act, an employee need not establish a causal relationship between his actual employment duties and the event that occasioned his injury. O'Leary v. Brown-Pacific-Mason, Inc., 340 U.S. 504, 506-507 (1951). "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose. Id. The zone of special danger is well-suited to cases, like this one, arising under the Defense Base Act, since conditions of the employment place the employee in a foreign setting where he is exposed to dangerous conditions. See N. R. v. Halliburton Services, 42 BRBS 56 (June 30, 2008). An employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger. Id., p. 60. The specific purpose of the zone of special danger doctrine is to extend coverage in overseas employment such that considerations including time and space limits or whether the activity is related to the nature of the job do not remove an injury from the scope of employment. O'Leary, 340 U.S. at 506; see Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 481 (1947).

1. Claimant's Prima Facie Case

In the present matter, Claimant contends he suffered a heart attack in the course and scope of his employment in Afghanistan and that the heart attack arose out of his employment. Employer/Carrier contend Claimant's heart attack was the direct result of his underlying and pre-existing coronary artery disease and is unrelated to his overseas employment.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a **prima facie** case that the alleged injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. Bonin v. Thames Valley Steel Corp., 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding an ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have caused his alleged injury); Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-215 (1976).

Here, it is clear that Claimant suffered a heart attack while in the zone of special danger in Afghanistan. At the time he suffered the heart attack, he was engaged in his work duties returning from the dining hall after bringing paperwork to another employee. Further, Dr. Tran testified in his deposition that Claimant's activity in Afghanistan **could have** had an effect on his underlying coronary artery disease or the acute symptoms (heart attack) he experienced. Dr. Levine also admitted that he could not exclude the possibility that Claimant's time in Afghanistan **contributed to progression** of his coronary artery disease.

Thus, I find Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on August 10, 2009, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. **Employer's Rebuttal Evidence**

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

Substantial evidence is evidence that provides "a substantial basis of fact from which the fact in issue can be reasonably inferred," or such evidence that "a reasonable mind might accept as adequate to support a conclusion." New Thoughts Finishing Co. v. Chilton, 118 F.3d 1028, 1030 (5th Cir. 1997); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). "The presumption . . . is not rebutted merely by suggesting an alternate way that claimant's injury might have occurred; employer must submit evidence that the employment was not a cause in order to sever the causal

nexus." Piceynski v. Dyncorp (Unpublished) (BRB No. 97-1451) (July 17, 1998). However, the testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

Here, Employer/Carrier attempt to rebut Claimant's **prima facie** case by pointing to the fact that his lifestyle habits and high cholesterol were the likely cause of his coronary artery disease, which was, in turn, likely the cause of Claimant's heart attack. Dr. Tran testified that Claimant's coronary artery disease was likely caused by his lifestyle choices, physical make-up and stress factors. Dr. Levine's testimony was consistent with Dr. Tran in that he agreed it was unlikely Claimant's coronary artery disease was work-related because Claimant had coronary risk factors such as smoking and a history of high cholesterol. He further opined that any work-related stress Claimant experienced in Afghanistan had little to no effect on his coronary artery disease or made little to no contribution to his ultimate heart attack.

However, even if this court were to assume Claimant's coronary artery disease was pre-existing and not work-related, the primary focus here is the ultimate injury, which is the heart attack, and not Claimant's pre-existing heart condition. Gooden v. Director, 135 F.3d 1066, 1069 (5th Cir. 1998); See also Pacific Employers' Ins. Co. v. Pillsbury, 31 F.2d 101 (9th Cir. 1932); Todd Shipyards Corp v. Donovan, 300 F.2d 741 (5th Cir. 1962); Jones v. Hawkins, 1998 WL 327091 (E.D. La.). Employer/Carrier have failed to produce any evidence that Claimant's heart attack itself was not work-related. In fact, Employer/Carrier's physician, Dr. Levine, admitted Claimant's employment could have had at least a minor effect on Claimant's propensity to have a heart attack. Dr. Levine also recommended Claimant stay out of extreme temperatures like he experienced in Afghanistan after he had the heart attack, which allows the undersigned to reasonably infer that extreme heat is a stress factor that would affect Claimant's heart condition. Moreover, "it is well settled that a heart attack suffered in the course and scope of employment is compensable even though the employee may have suffered from a related pre-existing heart condition." Gooden, at 1069 (5th Cir. 1998).

Furthermore, contrary to Employer/Carrier's argument that Claimant's coronary artery disease is not work-related, both Drs. Tran and Levine contribute Claimant's work environment and work stress as a minor factor in his development or acceleration

of coronary artery disease, which establishes a nexus to his employment. Thus, I find Claimant's coronary artery disease to be, in part, work-related as well.

Considering the foregoing, I find Employer/Carrier have failed to rebut Claimant's **prima facie** case of compensability. As such, Claimant shall enjoy all presumptions granted under the Act.

C. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "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.

Dr. Tran recommended Claimant find alternative employment and that he should not return to a combat zone in Afghanistan. Dr. Levine opined Claimant could return to work resuming a normal, eight-hour work day, but should not be exposed to extreme temperatures like those in Afghanistan. He further opined that Claimant's work should not include heavy physical activity and reasonably expeditious advanced medical care must be available. Because these restrictions do not fit with Claimant's usual or former employment working twelve to sixteen hour days, seven days per week in Afghanistan, in extreme heat, I find Claimant is unable to perform his usual employment and is thus totally disabled under the Act.

D. Maximum Medical Improvement (MMI)

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); Trask v. Lockheed Shipbuilding Construction Co., *supra*; 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).

In the present matter, the parties have stipulated Claimant reached MMI on August 26, 2010.

E. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(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?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. 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., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Mr. Stanfill, the vocational expert in this matter, performed a labor market survey on September 16, 2010, taking into account Claimant's extensive medical history, age, work history, vocational background, interests and physical capabilities. He listed eight specific jobs, which he contended

were reasonably available in Claimant's geographic area and within Claimant's physical limitations. Details of these positions are listed in the Vocational Evidence Section above, and each is addressed in turn below.

However, Mr. Stanfill did not discuss the fifty-one pound lifting restriction given by the hospital in Landstuhl, Germany, on September 18, 2009. He also did not discuss the fact that Dr. Levine opined on September 11, 2010, that Claimant could return to a normal, eight-hour workday. Additionally, the undersigned notes Dr. Levine's opinion on October 23, 2010, subsequent to the labor market survey, that Claimant could return to "mild-moderate though probably not heavy physical activity . . . [if] work does not involve extremes of temperatures, and wherever he works has reasonably expeditious access to advanced medical care." Although not fully considered by Mr. Stanfill in his labor market survey, these medical opinions will be considered by the undersigned in making the determination of whether Employer/Carrier have met their burden of showing suitable alternative employment.

1. Reverse Osmosis Water Purification Unit Operator, on a full-time basis with a pay of \$4,200 per month was available in Djibouti, Africa. Duties consisted of controlling treatment plant machines and equipment, operating and controlling electric motors, pumps and valves, dumping specified amounts of chemicals into water, turning valves, pumping purified water into water mains, monitoring panel board and adjusting controls, cleaning tanks and filter beds, repairing and lubricating machines and equipment, testing water samples and recording data. Mr. Stanfill noted that temperatures in Djibouti ranged from 71 and 106 degrees. However, the physical requirements are not specified to allow a comparative analysis with Claimant's capabilities. Additionally, there is no indication whether reasonably expeditious medical care would be available to Claimant in Djibouti, Africa. Accordingly, I find that this position does not constitute suitable alternative employment.
2. Bus driver, on a full-time basis paying a salary of \$3,950 per month in United Arab Emirates. Average temperatures of the job location ranged from 50 to 118 degrees. Duties included driving buses, vans or other vehicles to transport passengers in support of missions. However, the physical requirements are not

specified to allow a comparative analysis with Claimant's capabilities. Moreover, not only is the temperature of United Arab Emirates comparable to the extremes Claimant endured in Afghanistan, but there has been no showing of reasonably expeditious advanced medical care as recommended by Dr. Levine. Accordingly, I find that this position does not constitute suitable alternative employment

3. Facilities Technician I, on a full-time basis paying \$22,750 to \$23,088 annually was available in Houston, Texas. Job duties included operating, maintaining and monitoring water treatment systems and sludge processing equipment, performing repairs, mechanical duties, sampling, monitoring and calibration, maintaining inventory of supplies, general housekeeping, painting, and cleaning tools and equipment. However, the physical requirements of this position are not specified to allow a comparative analysis with Claimant's capabilities. Accordingly, I find that this position does not constitute suitable alternative employment.
4. Plant operator was available in Houston, Texas, on a full-time basis with a starting salary of \$17.60 to \$21.05 per hour. Job duties were not listed. The only physical requirement listed was the employee would be required to work twelve-hour days. Twelve-hour workdays are not commensurate with the normal, eight-hour workday recommended by Dr. Levine. Moreover, the physical requirements of this position are not specified to allow a comparative analysis with Claimant's capabilities. Accordingly, I find that this position does not constitute suitable alternative employment.
5. Public Works Operator was available in Panorama Village, Texas, with no pay listed. The employee was required to possess or immediately be eligible for a Texas Commission on Environmental Quality Class C Water and Wastewater Operator License. Job duties included operating and maintaining water and wastewater facilities, meter reading, street and park maintenance and general duties assigned by the superintendent. However, the physical requirements of

this position are not specified to allow a comparative analysis with Claimant's capabilities. Accordingly, I find that this position does not constitute suitable alternative employment.

6. Truck Driver was available in Houston, Texas, on a full-time basis paying a \$500 per week guaranteed draw and was otherwise paid based upon a shared percentage of the load. The job required the employee to drive in the Texas/Louisiana area with occasional runs to Oklahoma, Arkansas, Mississippi and Alabama. The employee was required to have a valid TWIC card, 2 years of recent tractor trailer experience. However, the physical requirements of this position are not specified to allow a comparative analysis with Claimant's capabilities. Accordingly, I find that this position does not constitute suitable alternative employment.
7. Over-the-Road Truck Driver was available on a full-time basis, paying \$29,100 to \$32,000 per year. The employee would be required to drive a weekly route beginning in Houston, Texas. However, the physical requirements of this position are not specified to allow a comparative analysis with Claimant's capabilities. Accordingly, I find that this position does not constitute suitable alternative employment.
8. Car Transporter was available in Houston, Texas, on a full time basis paying \$8.50 per hour. Job duties included transporting vehicles safely within the airport to service areas and moving vehicles between the airport and off-airport locations. Physical requirements were not listed. However, the description indicates Claimant's job duties would be limited to driving cars, which would be within his physical restrictions posed by the hospital in Landstuhl, Germany, and discussed by Dr. Levine.

I was not impressed with Claimant's efforts at securing suitable employment. I found his efforts to secure alternative employment to be insufficient to establish that he diligently sought appropriate work in his local community. He did not obtain alternate employment at Dollar Tree until October 29, 2010, after the formal hearing. His job is limited in hours to 20 hours per week, paying \$7.50 for day shift and \$8.50 for night shift. He expressed no desire to seek higher paying jobs.

He did not apply for any of the jobs identified in the labor market survey. Therefore, I conclude that Claimant did not engage in a diligent search for alternative employment. As a result, Claimant's disability status converted from permanent total to permanent partial and he became entitled to permanent partial disability compensation benefits as of September 16, 2010, when suitable alternative employment was established by Mr. Stanfill.

Since I have found the establishment of suitable alternative employment on September 16, 2010, the wages which the alternative job would have paid at the time of Claimant's injury must be compared to Claimant's pre-injury average weekly wage to determine if he has sustained a loss in wage-earning capacity. Otherwise, it would be unfair in the present case to allow Employer/Carrier to use 2010 wages to offset Claimant's 2009 average weekly wage. To achieve fairness, in Richardson v. General Dynamics Corp., 23 BRBS 327 (1990), the Board used the percentage increase in the National Average Weekly Wage (NAWW) of the U.S. Department of Labor to adjust the present wage rate of alternative employment downward.

The NAWW at the time of Claimant's August 10, 2009 injury was \$600.31, and it was \$612.33 at the time suitable alternative employment was established on September 16, 2010, an increase of approximately 2.0 percent.⁴

A 2.0 percent reduction of Claimant's 2010 weekly wage earning capacity results in a residual wage earning capacity of \$333.20 for the car transporter position (\$8.50 per hour X 40 hours = \$340.00).⁵

F. 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 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning

⁴ This percentage is derived by determining the difference between \$612.33 - \$600.31 = \$12.02 and calculating the percentage of increase: $\$12.02 / \$600.31 = 2.0\%$,

⁵ $\$340.00 \times 0.02 = \6.80 ; $\$340.00 - \$6.80 = \$333.20$.

power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; 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).

In this matter, the parties have stipulated that Claimant's average weekly wage at the time of the injury was \$1,562.96.

G. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Claimant has established the treatment he sought for his heart attack was both reasonable and necessary. Therefore, Employer/Carrier are responsible for Claimant's medical care and treatment from August 10, 2009, and continue to be responsible for such care which is reasonable and necessary and associated his work-related heart attack.

H. Section 8(f) Application

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

(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers [an] injury . . . [and] is totally and permanently disabled, and the disability is found not to be due solely to that injury . . . 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 [foregoing] 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).

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. Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); 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). In permanent partial disability cases, such as here, an additional requirement must be shown, i.e., that Claimant's **disability is materially and substantially greater than that which would have resulted from the new injury alone.** 33 U.S.C. § 908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). 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, 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 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).

"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).

1. Pre-existing permanent partial disability

I find that the record medical evidence establishes that Claimant suffered pre-existing coronary artery disease, which both Dr. Tran and Dr. Levine testified was a precipitating factor to Claimant's heart attack. The medical records show Claimant's cholesterol to be high for years prior to his deployment, and both Dr. Tran and Dr. Levine testified that Claimant's coronary artery disease was likely progressive and had developed for years prior to his heart attack. However, there is no record medical evidence indicating Claimant's coronary artery disease was disabling. To the contrary, Claimant was cleared to work overseas by employer and worked for three years without difficulty in Afghanistan, while having the underlying coronary artery disease. Accordingly, I find Claimant did not suffer a pre-existing permanent partial disability.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v. Cooper Stevedoring Company, Inc., 23 BRBS 420, 426 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

I find that the medical records prior to Claimant's injury did not manifest Claimant suffered from coronary artery disease. In fact, coronary artery disease was not even discussed in the medical records until after Claimant's heart attack, even though he had consistently high cholesterol, was a smoker, and had previously complained of chest pains to Clear Creek Clinic and Clear Lake Regional Medical Center. Moreover, Claimant's pre-deployment medical records indicate he could work overseas with no restrictions, even with his high cholesterol. Thus, I find and conclude that Claimant's pre-existing coronary artery disease was not manifest to Employer at the time of his August 10, 2009 heart attack.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or disability. Id. If a claimant's permanent disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does

not apply when a claimant's permanent disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

Based on the medical evidence of record, I find and conclude that Employer has failed to show that Claimant's permanent disability is not due solely to the heart attack. Though I am mindful the medical evidence indicates one of the underlying causes of Claimant's heart attack was his coronary artery disease, there is no medical evidence whatsoever that Claimant's disability is greater than it would be had he only suffered the heart attack without having the underlying coronary artery disease.

Accordingly, Employer/Carrier's application for 8(f) relief is **DENIED**.

V. 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.

VI. ATTORNEY'S 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. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.⁶ 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.

VIII. ORDER

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

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from August 10, 2009 to August 26, 2010, based on Claimant's average weekly wage of \$1,562.96, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from August 27, 2010 to September 16, 2010 based on Claimant's average weekly wage of \$1,562.96, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from September 17, 2010, to present and continuing based on two-thirds of the difference between Claimant's average weekly wage of \$1,562.96 and his reduced weekly earning capacity of \$330.20 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c) (21).

⁶ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 9, 2010**, the date this matter was referred from the District Director.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 10, 2009 heart attack, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier's application for Section 8(f) relief is **DENIED**.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, if any, as and when paid.

7. Employer shall pay interest on any 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).

8. 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.

ORDERED this 18th day of March, 2011, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge