

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 22 December 2010**

*In the Matter Of:*

**WAYNE HURLEY**

Claimant,

v.

Case No.: **2010-LDA-00030**

**SERVICE EMPLOYEES INTERNATIONAL, INC.,**

Employer,

and

**INSURANCE COMPANY OF THE STATE OF PENN.  
C/O AMERICAN INTERNATIONAL UNDERWRITERS**

Carrier.

**APPEARANCES:** Gary Pitts, Esquire  
For the Claimant

Jerry McKenney, Esquire  
For the Employer

**BEFORE:** DANIEL F. SOLOMON  
Administrative Law Judge

## **DECISION AND ORDER**

### ***AWARDING BENEFITS***

This matter arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651, *et seq.* ("the Act"). The law of the United States Court of Appeals for the Fifth Circuit controls.<sup>1</sup> 42 U.S.C. § 1653. *See also, Hice v. Director, OWCP*, 156 F.3d 214, 218 (D.C. Cir. 1998); *ITT Base Servs. v. Hickson*, 155 F.3d 1272, 1275 (11th Cir. 1998); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1116 (5th Cir. 1991). A formal hearing was held on August 30, 2010, in Washington, D.C.<sup>2</sup> Wayne Hurley, the Claimant, was

---

<sup>1</sup> The initial order for this claim was issued by the District Director in Houston, Texas. Additionally, the parties at the hearing agreed that this claim falls under the law of the United States Court of Appeals for the Fifth Circuit. TR 19-20.

<sup>2</sup> A telephone conference was held on July 19, 2010. During the conference, the parties agreed to move the hearing

represented by Gary Pitts, Esquire, Pitts and Mills, of Houston, Texas. The Employer, Service Employees International, Inc., is represented by Jerry McKenney, of Legge, Farrow, Kimmitt, McGrath & Brown, LLP, of Houston, Texas. At the hearing, the Employer offered Employer's Exhibits ("EX") 1 through 25, and the Claimant offered Claimant's Exhibits ("CX") 1 through 17. TR, 22. All of these exhibits were admitted into evidence. TR, 22-23. The decision in this matter is based upon the testimony of the Claimant at the hearing, all documentary evidence admitted into the record, and the post-hearing arguments of the parties.

#### **STIPULATIONS**

The Claimant and the Employer stipulated to the following, which I adopt as substantiated by the record:

1. The Longshore and Harbor Workers' Compensation Act, as extended by the Defense Base Act, applies to this claim. *See* Employer's Pre-hearing Statement.
2. Jurisdiction is proper. *Id.*
3. The date of the accident was on April 1, 2004. ALJ 1; TR, 6.
4. The Claimant and the Employer were in an employer-employee relationship at the time of the accident. *Id.*
5. The accident arose in the course and scope of the employment. *Id.*
6. The claim was filed in a timely fashion. *See* Employer's Pre-hearing Statement.
7. The Employer had timely notice of the accident. ALJ 1; TR, 6.

#### **THE ISSUES**

Based upon the arguments of counsel and the LS-18 form submitted in this matter, the issues to be decided are:

1. Whether the Claimant suffered general injuries beyond the scheduled injury of the loss of the left eye.
2. Nature and extent of disability.
3. Date of Maximum Medical Improvement (MMI).
4. The Claimant's average weekly wage at the time of injury.
5. Compensation while the Claimant was in vocational rehabilitation.

#### **SUMMARY OF THE FACTS AND THE CLAIMANT'S TESTIMONY**

The Employer paid the Claimant benefits from April 2, 2004, through February 2, 2009, at the rate of \$883.37 per week. ALJ 1; EX 24; CX 5; CX 7; TR, 6. The Employer paid temporary total benefits for 92 weeks, from April 2, 2004, to January 12, 2006, for a total payment of \$81,270.04. TR, 6; EX 24. The Employer paid total disability benefits for 160 weeks, from January 13, 2006, to February 2, 2009, for a total payment of \$141,339.20. *Id.* The Employer also paid medical benefits. ALJ 1; TR, 6.

---

to Washington, D.C., instead of the original location. *See* Telephone Conference Transcript (July 19, 2010), at 5-6.

The Claimant is 51 years old. TR, 26. He began working for the Employer as a truck driver in Iraq on December 6, 2003. TR, 31; EX 20, p. 15. On April 1, 2004, the Claimant was hit by a roadside bomb. TR, 29. As a result, he lost his left eye and the right eye was badly damaged. TR, 35, 44. The explosion fractured the Claimant's retina in his right eye, and the eyelid was also damaged. TR, 45-47. The Claimant was colorblind before the explosion accident, but testified that his colorblindness is now worse than before. TR, 44. He has scar tissue on his right eye and problems with depth perception and peripheral vision. TR, 45, 60-61.

The explosion also fractured the Claimant's nasal bones. TR, 35-36. Reoccurring problems include a bloody nose, nasal congestion, sinus infections, and headaches. TR, 35-37, 40. He had other injuries to his face and ears, including some hearing loss. TR, 35. Additionally, the Claimant has developed breathing and sleeping problems. TR, 33, 37. The Claimant testified that he did not have breathing problems before working in Iraq. TR, 32. *See also*, CX 1, p. 4-5, 8. Now, the Claimant has to use a CPAP machine to help him breathe. TR, 38. Because of these problems, the Claimant testified that he has some limitations on the kind of work he can do, for example, he would be concerned about working in a dusty environment. TR, 38-39, 58. However, at his current job, the Claimant has not lost work because of breathing problems. TR, 55. At the present, the Claimant uses saline solution to treat his sinuses. TR, 39-40, 53. The Claimant also testified that there is nothing more that can be done to address his breathing problems, except possible surgery. TR, 39.

The Claimant signed a one-year contract with the Employer. EX 3; TR, 29. While working for the Employer, from December 6, 2003, to April 1, 2004, the Claimant earned \$27,429.55. CX 11; TR, 29. The Claimant argues that his proper average weekly wage is \$2,109.97.<sup>3</sup> The Employer previously paid the Claimant a compensation rate of \$883.37 per week. ALJ 1; CX 5, 7-8; TR, 6, 13.

The Claimant only has a high school education. TR, 26. Before working for the Employer, the Claimant was in the Army for three years as a mechanic. TR, 27. He then worked as a sawyer for a year and a half, after which, he worked as a civilian in the Army for another 15 years. TR, 27-28. The Claimant then worked as a trucker driver for five years before he began working for the Employer. TR, 28. The Claimant no longer works as a truck driver, as he cannot drive a commercial vehicle. TR, 43. However, he is able to drive a private car and ride his motorcycle. TR, 56. The Claimant did testify that when riding a motorcycle his sinuses are "instantly plugged," but it is easier for him to drive a motorcycle than a car because of the loss of his depth perception. TR, 57. The Claimant stated that he does not drive at night because of his limited vision. *Id.*

After the explosion accident, the Claimant looked after a friend's ranch. He was not paid a salary, but did receive room and board. TR, 40. From April 2009 to October 2009, the Claimant worked as a ranch hand in Antioch, Nebraska, making \$1,600.00 per month. TR, 41; EX 20, p. 34-36. The Claimant was then offered a job as a trucker driver. TR, 42. However, the

---

<sup>3</sup> The only evidence submitted of the Claimant's wages with the Employer is a 2004 W-2 form. The Claimant argues that the proper average weekly wage is \$2,109.97. However, the Claimant argues in the alternative, that if I find the 2004 W-2 form to include wages from December 6 through December 31, 2003, the average weekly wage would be \$1,641.11. *See* Claimant's Post Hearing Brief, at 23-26.

Claimant was ineligible for a commercial driver's license because of his monocular vision. TR, 43. The Claimant attempted to find work training horses, but was unsuccessful in making any money. TR, 47-48. The Claimant then attended a farrier training program. TR, 10. He was in the vocational rehabilitation program for six weeks, from January 11 through February 19, 2010. TR, 50. The Claimant was referred to the training program by the Department of Labor. TR, 52. Currently, the Claimant works full-time as a construction instructor for Chadron YouthBuild, an organization that works with troubled youth. TR, 49-60; EX 17, p. 3. He makes \$14.00 an hour, but no overtime. TR, 50; EX 17, p. 3.

### **SUMMARY OF MEDICAL EVIDENCE**

Following the explosion accident in April, the Claimant was treated in a military hospital and underwent a left eye enucleation. *See, generally*, CX 1; CX 2. He received follow-up treatment at the University of Michigan Hospitals & Health Centers in the Ophthalmology and Visual Sciences Department, as well as the Department of Otolaryngology. *Id.* During that time, the Claimant was under the care of several doctors. The Claimant testified that following the accident he has lost some of his depth perception and also has problems with his sinuses, breathing, dry mouth, and sleep apnea. EX 20, p. 53-56.

Before working for the Employer, the Claimant testified that he did not have any prior work-related injuries. EX 20, p. 14, 19. Prior to the explosion injury, the Claimant did not have any serious eye problems. One medical record, dated November 5, 2003, indicated the Claimant had 20/25 vision with corrective lenses, while the Claimant's pre-deployment exam on November 11, 2003, showed 20/20 vision. CX 1, p. 6; EX 7, p. 7. The Claimant had not been treated for any sinus or nasal problems before working in Iraq. EX 20, p. 26. However, in February of 2000, the Claimant had some difficulties opening his eye and had a sty on his right upper lid, though his vision was still intact. EX 7, p. 8. The Claimant does have a history of smoking. *See, generally*, EX 7.

#### ***Ophthalmology Treatment***

##### **Glaucoma Clinic, Dr. Christina Bruno**

The Claimant was examined on April 14, and April 23, 2004, at the Glaucoma Clinic of the Kellogg Eye Center. Dr. Bruno noted that the Claimant had retina damage in his right eye, as well as damage to his right lower eyelid. CX 1, p. 10. Dr. Bruno found the Claimant's vision to be 20/40 in the right eye. *Id.* Dr. Bruno noted other issues with the right eye, but stated that the left eye socket was healing well with no signs of infection. *Id.* The Claimant's right eye would be treated in the Retina Clinic, while his left eye socket and right lower eyelid would receive treatment in the Eye Plastic and Orbital Surgery Clinic. *Id.*

An exam conducted at the Glaucoma Clinic on May 19, 2004, found the Claimant's vision to 20/25-1, while another exam on October 13, 2004, recorded the Claimant's vision as 20/30+2. EX 14, p. 153, 177. Follow-up exams in April 2005, October 2005, February 2006, October 2006, and September 2007, showed the Claimant to have 20/20 vision. EX 14, p. 77, 187, 199, 209, 211; CX 1, p. 71.

Dr. Christine C. Nelson

Dr. Nelson, who works in the Eye Plastic and Orbital Surgery Clinic at Kellogg Eye Center, first examined the Claimant on April 14, 2004. CX 1, p. 12; EX 7, p. 51. She found the Claimant to have 20/70 vision, pinholed to 20/30, in the right eye. CX 1, p. 12. She also noted several injuries to the right eye, but that the left eye was healing well. *Id.* Dr. Nelson stated that she would schedule the Claimant for reconstruction of the right eye and a prosthesis for his left eye. She also referred the Claimant to Otolaryngology to examine his sinuses. *Id.* A few days later, Dr. Nelson performed eye plastic surgery to repair the right lower eyelid and to remove foreign glass from the Claimant's right cheek. EX 14, p. 51-54; CX 1, p. 15-17. Dr. Nelson reported there were no complications. CX 1, p. 16, 18, 26. In August of 2004, Dr. Nelson performed another surgery to remove shrapnel and other foreign materials and to further repair the right lower eyelid, with no complications. CX 1, p. 26-28. Dr. Nelson continued to monitor the Claimant and in November of 2004, she performed surgeries to repair the Claimant's left eye. CX 1, p. 32-35; EX 36-38.

Dr. Nelson continued to monitor the Claimant at routine follow-up visits in 2004 and 2005, and conducted multiple procedures on the Claimant's left eye, prosthesis and right eyelids. At an examination on January 12, 2006, Dr. Nelson recorded the Claimant had 20/20 vision in his right eye. CX 1, p. 51; EX 14, p. 24. She also discussed the need for a new prosthesis every seven years, possible future eyelid surgeries and routine follow-ups for potential infections and other general medical concerns. CX 1, p. 51. Other medical records from the University of Michigan from 2004 to 2006 stated the Claimant's vision ranged from 20/25 to 20/20. *See*, EX 14, p. 151, 156, 160, 181, 189, 191, 195, 202. During a visit several years later, on February 22, 2007, Dr. Nelson reported the Claimant had 20/40 vision with corrective lenses. EX 7, p. 36; EX 14, p. 14, 215. The following day, Dr. Nelson performed another surgery to remove a cyst in the right eye socket, and to address issues with the left prosthesis, with no complications. EX 14, p. 9-13; CX 1, p. 65. Dr. Nelson last saw the Claimant in April of 2007. EX 23, p. 33-34.

Dr. Nelson testified that she believed the Claimant's injuries to his right and left eyes and nasal fractures were all related to the explosion injury. EX 23, p. 9-10. She further stated that the treatment and surgeries performed to fix the Claimant's left eye socket and right lower eyelid were due to the Claimant's explosion injury. EX 23, p. 12, 34-35. Additionally, Dr. Nelson opined that the Claimant had reached MMI of his left eye socket as of January 12, 2006. EX 23, p. 29-31. However, she also noted the Claimant would need continuing medical care. EX 23, p. 30.

Dr. David N. Zacks

In addition to Dr. Nelson and Dr. Bruno, Dr. Zacks also treated the Claimant at the Kellogg Eye Center. Dr. Zacks first saw the Claimant on April 13, 2004. EX 14, p. 49. The Claimant's vision was 20/60-1, pinholed to 20/30-1. EX 14, p. 134. Dr. Zacks determined the Claimant was unable to drive a truck because of his limited vision. EX 14, p. 49. Dr. Zacks saw the Claimant again in May of 2004. CX 1, p. 21. He advised that the Claimant's injuries prevented him from driving a truck. CX 1, p. 21-22. At an exam on October 10, 2005, Dr. Zacks recorded the Claimant's vision as 20/20-2 but noted that this test was taken under "specific contract lighting conditions." EX 4, p. 30. The Claimant suffered from blurred vision, flashes of light in the right eye, and the loss of depth perception. *Id.* Dr. Zacks noted that the

loss of depth perception was consistent with the loss of one eye, and that the Claimant's "flashes, floaters, and depth perception dysfunctions [were] a direct result of the injuries that he suffered from the explosive injury in Iraq." *Id.*

Mary Buurma, PA-C

In August of 2008, the Claimant was examined by Mary Buurma, a certified physician's assistant with The Eye Doctors at Rapid City Medical Center, LLP.<sup>4</sup> During his first visit on August 8, 2008, Ms. Buurma reported the Claimant had 20/20 vision in his right eye with corrective lenses. CX 1, p. 76. At a subsequent visit on August 19, 2008, the Claimant had 20/25 vision. CX 1, p. 75. Ms. Buurma also noted some deformity in the right lower lid, an early cataract in the right eye and nasal scarring. CX 1, p. 73-74. Using color plate testing, Ms. Buurma found the Claimant's vision to be red-green color deficient. CX 1, p. 74. Because of the Claimant's monocular vision and colorblindness, Ms. Buurma opined the Claimant would not be eligible to work as a commercial driver. CX 1, p. 74, 78. Though she stated the Claimant would not be able to engage in employment that required depth perception and color differentiation, this would not prevent him from other types of employment. CX 1, p. 74. *See also*, EX 6; 12.

***Ear, Nose and Throat Treatment***

Dr. Melissa Pynnonen

The Claimant was treated by Dr. Pynnonen, an ear, nose and throat specialist. TR, 53; EX 21. The Claimant was referred to Dr. Pynnonen to examine the Claimant's sinuses on May 25, 2004. EX 7, p. 48-50; CX 1, p. 23. Dr. Pynnonen noted that the Claimant suffered from nasal dryness, headaches and ringing ears. CX 1, p. 23. A CT scan revealed the Claimant had fractured his nasal bones and some foreign materials. *Id.* Dr. Pynnonen discussed psychiatric treatment and antidepressants, but the Claimant did not want to begin such treatment at that time. CX 1, p. 24. However, Dr. Pynnonen recommended the Claimant's primary care physician monitor the Claimant's psychiatric health. *Id.* From her examination, Dr. Pynnonen concluded the Claimant had tinnitus and requested a formal evaluation of hearing loss. *Id.* She also found foreign material in the Claimant's right cheek, nasal dryness, nasal scarring and symptoms of sleep apnea. CX 1, p. 24-25. Dr. Pynnonen did not recommend surgery, but noted that if the Claimant has persistent breathing problems, she would reassess the need for surgery. CX 1, p. 24. Dr. Pynnonen concluded the Claimant's tinnitus, presence of foreign material in the face, nasal dryness, nasal fractures, and nasal scarring were all related to the explosion injury and that her recommended treatment course was necessary. EX 21, p. 8-9. She also noted that the Claimant's sleep apnea may be related to the injury or that the explosion may have worsened the sleep apnea. EX 21, p. 9, 11.

On June 6, 2005, Dr. Pynnonen saw the Claimant for a yearly follow-up visit. CX 1, p. 37. The Claimant complained of nasal obstruction and dryness. *Id.* He had no prior history of sinus infections or sinusitis. *Id.* The Claimant continued to have sleeping problems. *Id.* Upon examination, Dr. Pynnonen found scarring in the nasal cavities, partially obstructing the sinus. CX 1, p. 37-38. She diagnosed the Claimant with obstructive sleep apnea, nasal obstruction, dryness and scarring. CX 1, p. 38. Dr. Pynnonen recommended a formal sleep study and planned to continue monitoring the Claimant's nasal conditions. CX 1, p. 37.

---

<sup>4</sup> Between his appointments with Dr. Nelson on February 23, 2007, and Dr. Burgess on May 7, 2007, the Claimant relocated to South Dakota from Michigan. *See* CX 9, p.3.

At a visit on March 27, 2006, the Claimant continued to complain of nasal congestion. Upon examination, Dr. Pynnonen found evidence of nasal obstruction and scarring. CX 1, p. 61. Dr. Pynnonen noted that fragment and debris from the Claimant's explosion injury may contribute to the nasal obstruction. *Id.* She prescribed a nasal spray. *Id.* A few months later, Dr. Pynnonen saw the Claimant for a follow-up visit on May 22, 2006. EX 21, p. 5. Dr. Pynnonen found symptoms of a possible nasal infection and chronic sinusitis. CX 1, p. 64; EX 7, p. 38.

The Claimant's last visit with Dr. Pynnonen was on February 18, 2008. TR, 53. He has not seen a physician for nasal or sinus problems since that time. *Id.* Dr. Pynnonen opined the Claimant had reached MMI as of February 18, 2008. CX 1, p. 79; EX 10; EX 21, p. 33. She stated, however, that the Claimant may need future treatment for nasal and sinus conditions. Additionally, Dr. Pynnonen concluded the Claimant should avoid working in dusty environments that would exacerbate his nasal dryness. CX 1, p. 79; EX 10. Dr. Pynnonen did not place any restrictions on the Claimant's daily activities. TR, 54; EX 21, p. 22.

#### Dr. Robert C. Burgess

On May 7, 2007, the Claimant visited Dr. Burgess at the Ear, Nose & Throat Clinic. CX 1, p. 68. The Claimant reported chronic nasal congestion, sinus infections, postnasal drainage and headaches, and Dr. Burgess diagnosed him with chronic sinusitis. CX 1, p. 68-70. Dr. Burgess stated that the Claimant's past treatments, medications and diagnostic testing were both necessary and related to his original explosion injury. CX 1, p. 70. Further, Dr. Burgess found that the Claimant's medical records and reports "certainly do reveal a causal relationship to the patient's eye injury." *Id.* Additionally, the CT scan performed shortly after the explosion injury revealed damage to the Claimant's nose and sinuses which "also suggest a causal relationship to his sinuses." *Id.* Dr. Burgess concluded that the Claimant's "current complaints of chronic nasal congestion and difficulty breathing through his nose are related to the injuries that occurred in Iraq." *Id.*

Dr. Burgess recommended the Claimant receive a follow-up CT scan and to continue treatment with antibiotics and nasal sprays. CX 1, p. 68. Dr. Burgess also opined that though the Claimant was unable to return to his original occupation as a truck driver, his sinus injuries did not prevent him from working. CX 1, p. 70.

#### ***Other Medical Treatment***

##### Primary Care Physician, Dr. Christopher N. Harrison

Dr. Harrison was the Claimant's primary care physician. He examined the Claimant on April 15, 2004, when the Claimant returned from Iraq. CX 1, p. 14. *See also*, EX 7, p. 6. At that time, the Claimant's vision was 20/40. EX 7, p. 6. Dr. Harrison noted that the Claimant had a respiratory infection, but it was improving. *Id.* In addition to the loss of the Claimant's left eye and damage to the Claimant's right eye, Dr. Harrison also diagnosed the claimant with epididymitis, hypertension and hyperlipidemia. *Id.*

On October 15, 2004, Dr. Harrison stated that the Claimant was "completely disabled due to his injuries and loss of vision." CX 1, p. 30. The Claimant would continue to be disabled as

long as he required additional surgeries. *Id.* Dr. Harrison noted the Claimant had blurred vision in his left eye, and also suffered from chronic sinus congestion and drainage, as well as sleeping problems. *Id.* See also, EX 7, p. 5.

Dr. Harrison saw the Claimant at a follow-up visit on June 29, 2005. EX 7, p. 4. Dr. Harrison again stated the Claimant was having problems with sleeping and nasal congestion, “possibly due to scar tissue in the nasal passage.” *Id.* The Claimant still had hypertension and hyperlipidemia, and Dr. Harrison recommended monitoring his blood pressure closely. *Id.*

#### Psychological Assessment, Dr. Richard Heavenrich

Dr. Heavenrich conducted a psychological assessment and found the Claimant to not have any symptoms of post-traumatic stress disorder, nor did he have any other psychological condition. CX 1, p. 50. Dr. Heavenrich noted that the Claimant’s religious beliefs and strong support group of friends and family contributed primarily to the absence of any psychological condition. *Id.*

#### Sleep Disorder Treatment, Dr. Raman K. Malhotra

At the referral of Dr. Pynnonen, the Claimant went to see Dr. Malhotra at the University of Michigan Neurology Sleep Disorders Clinic. At his appointment on November 1, 2005, the Claimant informed Dr. Malhotra that since the explosion injury, he would wake up gasping for air at night. EX 14, p. 26. The Claimant had frequent sore throats and headaches. *Id.* The Claimant also noticed problems with drowsiness, including drowsiness while driving. *Id.* Dr. Malhotra recommended the use of a CPAP machine. EX 14, p. 27. On February 28, 2006, Dr. Malhotra reported that since the Claimant had been using a CPAP machine for his sleep apnea, he was better able to breathe and sleep. CX 1, p. 56. The Claimant continued to complain of discomfort with nasal congestion. *Id.* Dr. Malhotra also noted the Claimant had bouts of dizziness occasionally and that he would continue to monitor the Claimant’s situation for further treatment. CX 1, p. 57.

#### Independent Peer Review, Dr. David Tasker

On July 11, 2005, Dr. Tasker, a certified ophthalmologist, performed a peer review of the Claimant’s condition. CX 1, p. 39; EX 9. He reviewed the Claimant’s medical records from the University of Michigan, Department of Ophthalmology and Department of Otolaryngology. CX 1, p. 39-40. Upon review of the records, Dr. Tasker stated that the Claimant’s current complaints were related to the original explosion injury. CX 1, p. 40. He further stated that the Claimant’s current treatment and medications were appropriate and still related to the original injury. CX 1, p. 40-41. Dr. Tasker noted that the Claimant’s medications for glaucoma and recurrent sinusitis were both necessary and that ailments of these areas of the body were “certainly related to the significant head and facial injury which the claimant experienced from shrapnel on 4/1/2004.” CX 1, p. 42. Dr. Tasker also stated that the Claimant could return to work, on either a full- or part-time basis. *Id.* However, because of the Claimant’s loss of depth perception and his left eye, driving a truck or trailer rig would be unsafe. *Id.*

### **VOCATIONAL EVIDENCE**

The Claimant was initially referred to vocational rehabilitation services through the Department of Labor on December 31, 2007, and began working with a rehabilitation counselor in March of 2008. CX 9, p. 5. *See also*, EX 15. The Claimant continued to work with vocational rehabilitation consultants until he accepted a position with Chadron Youthbuild in March of 2010. EX 15, p. 3. On June 18, 2009, Wallace A. Stanfill, a certified rehabilitation counselor, conducted a vocational rehabilitation assessment for the Claimant. *See, generally*, CX 9. Jerry Gravatt, a vocational rehabilitation consultant and placement specialist, also worked with the Claimant on a rehabilitation plan. *See* CX 13. The Claimant has a high school education. He served in the Army from 1983 through 1998, and following his military career, worked as a truck driver. CX 9, p. 4-5. Taking into account the Claimant's vision limitations, the Assessment identified several types of jobs the Claimant could do that did not require depth perception or color vision. These included such positions as a security guard, cashier, janitor, and mail clerk. CX 9, p. 6. Mr. Stanfill conducted a labor market survey and identified several specific job opportunities within these occupational categories. CX 9, p. 7-10. The survey included salary information for the identified jobs. *Id.* In addition to the Claimant's physical limitations and capabilities, the labor market survey took into account the Claimant's age, education, work history and vocation background. CX 9, p. 7.

With the approval of the rehabilitation counselors, the Claimant decided to pursue a career as a farrier, or horseshoer, and to undertake the necessary training at the Butler Professional Farrier School. CX 13, p. 5-7. *See also*, EX 2, p. 13. The Claimant completed the farrier training program on February 20, 2010, and began work as a farrier part-time on the weekends and in the evenings. CX 13, p. 17; EX 15, p. 2, 5. There is no evidence the Claimant received any monetary compensation for this part-time work.

### **FINDINGS UNDER THE ACT**

The Employer argues that the injury in this case is a scheduled injury for the loss of one eye, while the Claimant contends that it also includes general injuries to the body as a whole. TR, 7, 9-10. The Claimant alleges general injuries to his right eye, nasal passages, sinuses, hearing, respiratory system, including sleep apnea, and psychological worsening. The Employer argues the Claimant does not have disabling injuries to his right eye, nasal passages, sinuses, and hearing, and that he is not disabled due to sleep apnea. At issue here is whether the Claimant's disability benefits are limited to the scheduled injury, or whether he is also entitled to benefits for general, unscheduled injuries. Because the parties do not contest the Claimant's scheduled injury for the loss of his left eye, and this injury is substantiated by the record, I find the Claimant entitled to disability benefits for the scheduled injury and will now discuss whether the Claimant is also entitled to benefits for unscheduled, general injuries.

### **PRIMA FACIE CLAIM FOR COMPENSATION**

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—(a) [T]hat the claim

comes within the provisions of this Act.

33 U.S.C. § 920(a).

To establish a prima facie claim for compensation, the Claimant has the burden of establishing: 1) the Claimant 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. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 330-331 (1986).

The Employer contests the causation of the Claimant's sinus and nasal passage conditions, including the Claimant's sleep apnea, and any injury to the Claimant's auditory system.<sup>5</sup> The Claimant has established that he sustained physical harm and pain as a result of the explosion injury on April 1, 2004. The Claimant has shown evidence of physical injury to other areas of the body, including his respiratory, sinus, ears, and nasal areas. The Claimant testified that following the accident he has had problems with his sinuses, breathing, dry mouth, and sleep apnea. TR, 45, 60-61; EX 20, p. 53-56. The Claimant was diagnosed with sleep apnea and must use a CPAP machine to help him breathe. TR, 38; EX 14, p. 27. To address these medical issues, the Claimant underwent multiple medical procedures, conducted by several doctors and specialists. *See, generally*, Summary of Medical Evidence, *supra*.

The parties have already stipulated that an explosion occurred in the course of the Claimant's employment for the Employer. ALJ 1; TR, 6. The Claimant has also provided evidence of working conditions that could have caused the Claimant's sinus and nasal conditions. The Claimant testified that his working conditions in Iraq were dusty. EX 20, p. 72. There were several dust storms and the Claimant testified that these storms were a "reddish cloud that would engulf everything." TR, 32. The Claimant was required to drive outside the camp in the hot and dusty environment that reached up to 104 degrees. *Id.* Additionally, Dr. Pynnonen, the Claimant's primary ear, nose and throat doctor, has stated that Iraq's dusty environment would exacerbate nasal dryness and crusting. CX 1, p. 79; EX 10.

The Claimant's testimony and the medical evidence show that the Claimant sustained physical harm and pain to several areas of the body, beyond the scheduled loss of the left eye. The Claimant has demonstrated that he suffered injuries affecting his right eye, sinuses, nasal area, ears, and respiratory system, including sleep apnea. In weighing the evidence, I find that the Claimant has established a prima facie claim for compensation, and thus a presumption is created under Section 20(a) that the Claimant's injury arose out of employment.

Once the Claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain, then the burden shifts to the Employer to establish that the Claimant's condition was not caused or aggravated by the employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). The employer must rebut the presumption with

---

<sup>5</sup> The Claimant also alleges general injuries to his right eye and psychological worsening. The Employer does not contest the causation of these injuries, though the Employer does argue that the injury to the Claimant's right eye is not disabling. This issue is addressed in the nature and extent of disability section, *infra*.

substantial evidence to the contrary. 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); *Lennon v. Waterfront Transp.*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). Substantial evidence is evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Avondale Indus. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988) (internal quotations omitted)).

The Employer argues that the Claimant’s employment and work conditions did not cause or aggravate any of the Claimant’s sinus, nasal, and respiratory conditions. As noted above, several of the Claimant’s doctors have specifically stated that these injuries were causally related to the explosion accident. Additionally, the Claimant testified that following the accident, he has developed breathing and sleeping problems. TR, 33, 37. The Claimant did not have breathing problems before working in Iraq. TR, 32. See also, CX 1, p. 4-5, 8.

The Employer points out that there is some evidence that the Claimant’s sleep apnea was a pre-existing condition. A notation in a medical record stated the Claimant was scheduled for a sleep apnea test in 2003, but he did not appear for the appointment. EX 7, p. 8. Where an employment related injury aggravates, combines with, or accelerates a pre-existing condition, the entire resultant condition is compensable. *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986); *Laplante v. Gen. Dynamics Corp./Elec. Boat Div.*, 15 BRBS 83 (1982). Dr. Pynnonen opined that the Claimant’s sleep apnea may be related to the injury, but if it was pre-existing, the explosion may have worsened the sleep apnea. EX 21, p. 9, 11. Despite a possible pre-existing condition, the sleep apnea is still compensable if the injury aggravates, combines with, or accelerates the pre-existing condition.

The Employer has the burden of proving the Claimant’s sinus, nasal, and respiratory conditions were not caused or aggravated by the employment. Reviewing the evidence, the Employer has not met this burden. However, even if the Employer successfully rebuts the Section 20(a) presumption, I find that based on the record as a whole, the Claimant suffered injuries to his sinus, nasal, and respiratory system, including sleep apnea, while working for the Employer or as a result of working conditions.

In looking to the record as a whole, several of the Claimant’s treating doctors have stated that the Claimant’s sinus and nasal conditions are causally related to the explosion injury. Dr. Nelson testified that the Claimant’s nasal fractures were related to the explosion injury. EX 23, p. 9-10. Concerning the Claimant’s injuries to his ear, nose and throat, Dr. Pynnonen found the Claimant suffered from fractured nasal bones, nasal dryness, headaches, and ringing ears. CX 1, p. 23. She diagnosed the Claimant with tinnitus and requested a formal evaluation of hearing loss. CX 1, p. 24. Dr. Pynnonen concluded the Claimant’s tinnitus, presence of foreign material in the face, nasal dryness, nasal fracture, and nasal scarring were all related to the explosion injury and that her recommended treatment course was necessary. EX 21, p. 8-9. She stated that fragment and debris from the Claimant’s explosion injury may have also contributed to the Claimant’s nasal obstruction. CX 1, p. 61. Dr. Pynnonen also noted that the Claimant’s sleep apnea may be related to the injury or that the explosion may have worsened his sleep apnea. EX 21, p. 9, 11. Dr. Burgess, another ear, nose and throat doctor, concluded that the Claimant’s

“current complaints of chronic nasal congestion and difficulty breathing through his nose are related to the injuries that occurred in Iraq.” CX 1, p. 70. A CT scan performed shortly after the explosion injury revealed damage to the Claimant’s nose and sinuses, which Dr. Burgess stated, “also suggest a causal relationship to his sinuses.” *Id.* Therefore, in reviewing the record as a whole, I find the Claimant suffered injuries to his sinus, nasal, and respiratory system while working for the Employer or as a result of working conditions.

The Claimant also alleges that the explosion injury caused damage to his ears, primarily ear-ringing or tinnitus, as part of a general injury to his body as a whole. The Claimant is not seeking a scheduled injury of hearing loss under Section 8(c)(13). *See* 33 U.S.C. § 908(c)(13). To rebut the 20(a) presumption, the Employer states the Claimant had auditory issues prior to working in Iraq. A pre-deployment physical noted the Claimant had some hearing loss, “moderate” loss to high frequencies in the left ear and “mild” hearing loss to high frequencies in the right ear. EX 5, p. 8. A post-injury hearing test also showed the Claimant had mild to moderate hearing loss in the higher frequencies. EX 14, p. 93. A medical record from the University of Michigan notes the Claimant did not have symptoms of hearing loss or ringing after the accident. EX 14, p. 133. I find this evidence to be substantial that “a reasonable mind might accept as adequate to support a conclusion.” Therefore, I will review the record as a whole. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982).

Immediately after the explosion, the Claimant testified that he had ringing in his ears. TR, 35. The Claimant also testified that shortly after the accident he had a dramatic loss of hearing at one tone and thereafter difficulty hearing certain pitches, EX 20, p. 71, though the Claimant stated that now he does not have any major problems with his hearing. *Id.* Upon examination, Dr. Pynnonen found the Claimant had tinnitus, or ringing ears, and requested a formal evaluation of hearing loss. CX 1, p. 24. She also stated that the Claimant’s tinnitus was related to the explosion injury and that her recommended treatment course was necessary. EX 21, p. 8-9. Though there is evidence that the Claimant had some hearing loss before working for the Employer, the Claimant has asked that I find a general injury of tinnitus, not a scheduled injury for hearing loss. In making my determination, I rely upon the testimony of the Claimant, whom I find to be a reliable, credible witness, and upon the opinion of Dr. Pynnonen, the Claimant’s primary ear, nose and throat doctor. Therefore, reviewing the record as a whole, I find the Claimant suffered a general injury of tinnitus which arose out of employment with the Employer.

#### **NATURE AND EXTENT OF THE DISABILITY**

Having established a work-related injury, the burden rests on the Claimant to prove the nature and extent of his disability, if any, from those injuries. *See Trask v. Lockheed Shipbldg. Constr. Co.*, 17 BRBS 56, 59 (1985). Section 2(10) of the Act defines disability as the “incapacity because of an injury to earn wages which the employee was receiving at the time of injury in the same or any other employment....” 33 U.S.C. § 902(10). The Act and the regulations promulgated thereunder provide benefits for permanent partial, permanent total, temporary total and temporary partial disability. 33 U.S.C. § 908(a)-(c), (e). The same standards apply regardless of whether the claim is for temporary total or permanent total disability. *Bell v.*

*Volpe/Head Constr. Co.*, 11 BRBS 377 (1979). The Claimant's disability is a factual determination, which is appropriately determined by the administrative law judge based on the medical evidence of record. See, e.g., *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

#### ***Nature of the Disability***

The nature of a disability can be either permanent or temporary. A claimant's disability is permanent in nature if he has any residual disability after reaching MMI. See *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Trask*, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. MMI is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve, and it is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of MMI marks the end of the temporary period of disability, and any remaining injury thereafter is considered permanent. *Palombo v. Director, OWCP*, 937 F.2d 70, 76, 25 BRBS 1 (CRT) (2d Cir. 1991). Determining the date of MMI is a question of fact based upon the medical evidence in the record. See *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). In making a factual determination, I am entitled to weigh the medical evidence and draw my own inferences without being bound to accept the opinion or theory of any particular medical examiner. See *Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

In this case, the Claimant suffered multiple injuries causally related to the explosion injury, as well as the working conditions overseas. Upon review of the record, I credit Dr. Pynnonen's opinion in finding that the Claimant reached MMI on February 18, 2008. Dr. Pynnonen stated the Claimant had reached MMI concerning his sinus and nasal conditions as of that date. CX 1, p. 79; EX 10; EX 21, p. 33. At that time, Dr. Pynnonen did not place any restrictions on the Claimant's daily activities, though she advised the Claimant should not return to work in dusty environments that would exacerbate his nasal dryness. TR, 54; CX 1, p. 79; EX 10; EX 21, p. 22. I note that Dr. Nelson opined the Claimant had reached MMI concerning his left eye on January 12, 2006, EX 23, p. 29-31, and that Dr. Tasker, in a report dated July 11, 2005, found the Claimant had reached MMI for his right eye as of December 13, 2004. However, the Claimant continued to suffer from disabling sinus and nasal conditions until he reached MMI for those conditions on February 18, 2008. In weighing the evidence, I find that the Claimant reached MMI on February 18, 2008. Therefore, the Claimant had a temporary disability from the date of the explosion injury until February 18, 2008, at which point his disability became permanent in nature.

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

For the Claimant to receive a disability award, he must have an economic loss, coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to the Claimant's age, education, industrial history and the

availability of work he can perform after the injury. *Am. Mut. Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

The Claimant has the initial burden of proving disability. To establish a prima facie case of total disability, the Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. At this stage, the Claimant only needs to establish that he cannot return to his former employer. He is not required to establish that he cannot return to work for any employer. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). This applies to claims for temporary total disability. The Claimant's usual employment is the Claimant's regular duties at the time of injury. See, e.g., *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982).

In making this determination, I must compare the Claimant's medical restrictions with the specific requirements of the Claimant's usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Mills v. Marine Repair Serv.*, 21 BRBS 115, *on recon.*, 22 BRBS 335 (1988); *Carroll v. Hanover Bridge Marine*, 17 BRBS 176 (1985), *Bell v. Volpe/Head Constr. Co.*, 11 BRBS 377 (1979). I am not bound to accept the opinion or theory of any particular medical examiner; rather I may rely upon my personal observation and judgment to resolve conflicts in the medical evidence. A judge is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O'Hearne*, 223 F.2d (4th Cir. 1955).

Any physical impairment that prevents the Claimant from performing his usual employment can establish total disability. The Claimant is unable to return to his regular, usual employment as a truck driver due to the loss of his left eye from the explosion accident. Because the Claimant has monocular vision he is unable to obtain a commercial driver's license. TR, 42-43; EX 20, p. 38. Additionally, the Claimant's doctors have stated that he could not return to his usual employment. See, e.g., EX 15, p. 105, 109. Therefore, I find the Claimant has established a prima facie case of total disability. I also note that the Claimant is unable to return to work in Iraq, or similar environment, because of his sinus and nasal conditions. TR, 33, 38-39, 58. He testified that he would have breathing problems being in an area with dust storms and that he "would have an upper respiratory infection real fast." TR, 33. Dr. Pynnonen also concluded the Claimant should avoid working in dusty environments that would exacerbate his nasal dryness. CX 1, p. 79; EX 10.

#### ***Suitable Alternative Employment***

Once the Claimant establishes the prima facie case of disability, the burden then shifts to the Employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators, Inc.*, 18 BRBS 142 (1986). The Employer must provide available and actual employment opportunities by identifying specific jobs available to the Claimant within the local community, taking into account the Claimant's age, education, work experience and physical restrictions. *Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP*, 227 F. 3d 934 (7th Cir. 2000); *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993). The Employer must also establish the pay scale of alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978); *Dupuis v.*

*Teledyne Seward Seacraft*, 5 BRBS 628 (1977). If the Employer fails to provide suitable alternative employment, I will find that the Claimant was totally disabled during the time period in question.

The Claimant was initially referred to vocational rehabilitation services through the Department of Labor on December 31, 2007, and began working with a rehabilitation counselor in March of 2008 until he accepted a position with his current employer. CX 9, p. 5. *See also*, EX 15. In September of 2006, the Claimant did work as a ranch hand for his friend, but he only received room and board and was not paid a salary. TR, 40. The Claimant did not earn wages while working for his friend, as room and board are not considered income or wages under the Act. *See* 33 U.S.C. § 902(13).<sup>6</sup> Therefore, the Claimant's first paying job was in April of 2009 when he started work at a ranch in Nebraska. TR, 41; EX 20, p. 34-36.

The Employer presented no evidence of suitable alternative employment until June 18, 2009. On that date, Wallace A. Stanfill, a certified rehabilitation counselor, conducted a vocational rehabilitation assessment that identified several types of jobs the Claimant could perform, taking into account his physical limitations. CX 9. As previously noted, the Claimant reached MMI as of February 18, 2008. It is the Employer's burden to establish suitable alternative employment. I do not find that the Employer's has satisfied this burden from the time of the accident to the date the Claimant reached MMI. Therefore, I find the Claimant entitled to temporary total disability benefits for the period of April 2, 2004, to February 18, 2008.<sup>7</sup>

Additionally, I find the Claimant entitled to total disability benefits from February 18, 2008, to April 17, 2009. Upon reaching MMI on February 18, 2008, the Claimant's disability became permanent in nature. Therefore, he is entitled to total disability benefits from the date of MMI until the Claimant began working as a paid ranch hand in Nebraska.

The Employer erroneously began paying the Claimant permanent partial disability on the date of MMI for the Claimant's left eye, January 12, 2006. However, the Claimant was still totally disabled until he found alternate employment in April of 2009. Temporary and permanent go to the nature of the disability; total and partial to the degree of disability. Maximum medical improvement is an indication of the permanency of disability and the availability of suitable alternate employment is an indication of the degree of disability. Thus, the Claimant's entitlement to total disability benefits changes to partial on the date suitable alternate employment is shown rather than on the date of permanency. *Stevens v. Director*,

---

<sup>6</sup> "The term wages does not include fringe benefits...." 33 U.S.C. § 902(13). *See also*, *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), *rev'g in part Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996) (holding that meals and lodging were not income and should not be included as wages under Section 2(13)).

<sup>7</sup> I also note that the fact that an injury was to a scheduled member does not bar an award of total disability if the claimant is unable to work as a result. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366-367 n.17 (1980); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984).

*OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991). *Accord Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990). Therefore the Claimant is entitled to total disability benefits from the date of the accident until April 17, 2009.

On April 17, 2009, the Claimant began earning wages as a ranch hand, earning \$1,600.00 a month. TR, 41. He continued working in this position until he was fired in October 2009. TR 41; EX 20, p. 35. The Claimant testified that he did not know why he was fired from his ranch hand position. He worked for a family ranch and stated that there was some animosity between the family members. He explained that the father would tell him that “whatever happens” he could not quit, and then after a few months, the son would tell him the same thing. EX 20, p. 35. The Claimant did not quit, but was later fired. Subsequently, the Claimant was offered another job as a truck driver, but the Claimant was unable to obtain a commercial driver’s license with his monocular vision. TR 42-43. The Claimant remained unemployed from November 1, 2009, until January 11, 2010, when he began a farrier training program.

The Claimant argues that he is entitled to permanent partial disability benefits for the time he worked on the ranch, April 17, 2009, until October 31, 2009, and permanent total disability until he began working in his current job. The latter time period includes both the time in which the Claimant was unemployed and the time he was enrolled in a farrier training program. As mentioned above, if the Claimant establishes a prima facie case of total disability, the burden shifts to the Employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. At issue is whether the Claimant’s six-month employment as a ranch hand constitutes suitable alternative employment.

The fact the Claimant had a short-term job post-injury does not establish that he is not now totally disabled, unless the Employer shows that it is currently available. *See Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 734, 740 (1978). In *Jarrell*, the Board held that a bartender job at a tavern, in which the claimant worked for a limited and unpaid basis for a “short period,” was not currently available. 9 BRBS at 735-736. The tavern owner never said he would hire the claimant on a regular basis with his limited ability to work. Therefore, the employer did not meet its burden. *Id.* at 740.

Additionally, the Board in *Carter* found that the “fact that claimant found a three and a one-half month position...cannot rebut a claim for total disability without a showing on the part of employer that such positions are currently available to claimant.” 14 BRBS 96-97. The Board went on to say: “Where an injured employee has held various temporary jobs following his injury, such fact does not necessarily defeat a claim for total disability. *See Cunnygham v. Donovan*, 271 F. Supp. 508 (E.D. La. 1967), *aff’d sub. nom. Flour Corp. v. Cunnygham*, 403 F.2d 223 (5th Cir. 1968), *cert. denied*, 394 U.S. 343 (1969).” 14 BRBS at 97. *See also*,

*Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33, 37 (1979) (job held for eight days did not bar finding of permanent total disability); *Seals v. Ingalls Shipbuilding, Div. of Litton Sys.*, 8 BRBS 182, 184 (1978) (sporadic post-injury work does not rule out permanent total disability). Cf. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993) (claimant's post-injury employment lasted only 11 weeks and was a "short-lived job," and thus not sufficiently regular to establish true earning capacity); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978) (claimant worked 31 weeks, and 13 of those weeks, he worked fewer than 40 hours); *Steele v. Assoc. Banning Co.*, 7 BRBS 501, 509 (1978) (claimant worked in a light-duty job for five months, though he worked while in pain). But cf. *Zephir v. Newport News Shipbuilding & Dry Dock Co.*, ALJ Nos. 2001-LHC-1890, 2002-LHC-0426; BRB No. 03-0339 (ALJ) (2005) (Fifteen-month post-injury employment was sufficiently regular to constitute suitable alternative employment); *Lamb v. Metro Machine Corp.*, 33 BRBS 246 (ALJ) (1999) (three-year post-injury employment satisfied employer's burden of suitable alternative employment).

In *Carter*, the Board concluded that the claimant's short-term employment at the gas station "does not rise to the level of an ongoing actual employment opportunity and does not alone provide a basis for an award of partial disability, rather than temporary total disability benefits." 14 BRBS at 97. However, the Board also noted that an award of total disability "while a claimant is working is the exception and not the rule," and that such awards are given when a claimant works in spite of great pain or because of an employer's beneficence. *Id.* See also, *Mitchell v. Bath Iron Works Corp.*, 11 BRBS 770 (1980); *Eaddy v. Rukert Terminals Corp.*, 10 BRBS 31 (1979); *Walker v. Pacific Architects & Eng'rs, Inc.*, 1 BRBS 145 (1974).

This case is similar to the situation in *Carter*. I find that the Claimant's short-lived, six-month employment as a ranch hand does not rise to the level of an ongoing, actual employment opportunity. This short-lived employment does not prove that suitable alternate work was "realistically and regularly available" to the Claimant on the open market. See *Edwards v. Director, OWCP*, 999 F.2d at 1375. I also note that this case is distinguishable from other cases in which the claimant was fired for cause, or of his own doing; and therefore, it cannot be said that the job was unavailable. See *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64 (4th Cir. 1992) (claimant violated company policy); *Walker v. Sun Shipbuilding*, 19 BRBS 171 (1986) (*Walker II*) (claimant violated collective bargaining agreement). Therefore, the Employer still has the burden of establishing suitable alternative employment and must submit other evidence to establish the claimant is partially, and not totally, disabled.

I may rely on the testimony of vocational counselors that identify specific job listings to establish the existence of suitable alternative employment. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). A part-time job may be suitable alternative employment. *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985). A labor market survey was conducted on June 18, 2009, by Wallace A. Stanfill, a certified rehabilitation counselor. He identified several types of jobs the Claimant could perform, taking into account his physical limitations. These included such

positions as security guard, cashier, janitor, and mail clerk, and the survey identified several specific job opportunities within these occupational categories. CX 9, p. 6-10. The survey also included salary information for the identified jobs. CX 9, p. 7-10. In addition to the Claimant's physical limitations and capabilities, the survey took into account the Claimant's age, education, work history and vocation background. CX 9, p. 7.

The survey provided two job opportunities in the Nebraska-South Dakota area and 12 job opportunities in Michigan. CX 9. At the time the survey was prepared, the Claimant had already relocated to Nebraska. In cases where a claimant relocates following an injury, I may consider the following factors in determining the relevant labor market: the Claimant's residence at the time he filed for benefits, motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence and the degree of undue prejudice to the employer in proving suitable alternate employment in a new location. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994). The most persuasive factor is the community in which the Claimant lives. *See*, 36 F.3d at 381, 28 BRBS at 102. *See also, Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43 (CRT) (1st Cir. 1997) (claimant's chosen community is presumptively the proper choice for determining a claimant's earning capacity). In *Holder v. Texas E. Prod. Pipeline, Inc.*, 5 BRBS 23 (2001), the Board found that the Fifth Circuit's language in *P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CFT) (5th Cir. 1991), and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), that in order for jobs to qualify as suitable alternative employment, they need to be reasonably available "in the local or surrounding community," does not preclude a consideration of the factors enumerated by the courts in *See* and *Wood*.

The Claimant first relocated to South Dakota in 2007 and has remained in the western Nebraska-South Dakota area for several years. The Claimant began seeking treatment from Dr. Burgess at the Rapid City Medical Center in May of 2007, and then visited the Center's satellite office in Chadron, Nebraska, in August of 2008. EX 13-14. Since his relocation, the Claimant has secured two jobs, first working as a ranch hand and then accepting his current job as an instructor. When the labor market survey was prepared, the Claimant had not been living in Michigan for two years. I find no prejudice to the Employer in finding suitable alternative employment in the Claimant's new community. Taking into account these factors, I find the relevant labor market to be in the western Nebraska-South Dakota area in which the Claimant resides.

It is the Employer's burden to establish suitable alternative employment. The Board has held that evidence of a single job opening is not sufficient to satisfy the employer's burden of suitable alternative employment. The employer must provide evidence of a range of existing, available jobs. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Vontronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *vacated*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Green v. Suderman Stevedores*, 23 BRBS 322 (1990). The labor market survey only consists of two jobs in the

relevant labor market. One of those positions is a lubrication technician at an automotive dealership. The Claimant testified that he is unable to work at a mechanic job because of the loss of his depth perception. TR, 45. While the Fifth Circuit has held that evidence of a single job opening may be a sufficient showing of suitable alternative employment, I do not find that to be applicable here. The second job, a janitorial position, is one that does not require any special skills and workers with general skills could compete for such a job. See *Hayes v. P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116, 121-22 (CRT) (5th Cir. 1991) (stating “such an opportunity could well exist, for example, where the employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable qualifications in the local community is small). Therefore, the Employer has not established suitable alternative employment and has not met its burden.

The Claimant seeks partial disability benefits for the time he worked on the ranch, April 17, 2009, until October 31, 2009, and total disability benefits for his period of unemployment, from November 1, 2009, until April 13, 2010. The proper procedure is for the administrative law judge to award total disability benefits from the time the Claimant did not work, and to award partial benefits for the time the Claimant was employed. *Carter*, 14 BRBS at 98. Therefore, I award the Claimant permanent partial disability benefits for the time period he worked on the ranch. Concerning the Claimant’s period of unemployment, I find the claimant entitled to permanent total disability benefits from November 1, 2009, to January 11, 2010, and from February 20, 2010, until April 3, 2010. The Claimant was enrolled in a vocational rehabilitation program from January 11, 2010, to February 20, 2010. Therefore, I will analyze his entitlement to disability benefits for that time period separately.

#### ENTITLEMENT TO BENEFITS DURING VOCATIONAL TRAINING

The Claimant argues that he is entitled to total disability benefits for the time he was in the farrier training program, from January 11, 2010, to February 20, 2010. A claimant may receive continuing permanent total disability compensation where the employer has established the availability of suitable alternative employment at a minimum-wage level, but the claimant is precluded from working because he is undergoing vocational rehabilitation. *Abbott v. Louisiana Ins. Guaranty Assoc.*, 27 BRBS 192 (1993), *aff’d* 40 F.3d 122 (5th Cir. 1995). In *Abbott*, the Board held that while the claimant was physically capable of performing entry level work, this employment was not realistically available to him because his participation in the U.S. Department of Labor-sponsored program precluded him from working. *Id.* at 203. The Board has stated that its holding in *Abbott* clearly serves the Act’s goal of promoting rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force. *Id.* See also *P&M Crane Co. v. Hayes*, 930 F.2d 424 (5th Cir. 1991), *reh’g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156, 164 (CRT) (5th Cir. 1981); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 95 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

The Board has applied the holding of *Abbott* in several subsequent cases to determine whether claimants are entitled to disability benefits while participating in approved vocational retraining. See *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998); *Gregory v. Norfolk Shipbuilding &*

*Dry Dock Co.*, 32 BRBS 264 (1998); *Kee v. Newport Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *Brown v. National Steel & Shipbuilding*, 34 BRBS 195 (2001); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F. 3d 286 (4th Cir. 2002); *Castro v. Gen. Constr. Co.*, 37 BRBS 67 (2003).

In *Kee v. Newport Shipbuilding & Dry Dock Co.*, the Board held that it was the claimant's burden to prove he is unable to perform suitable alternate employment due to his participation in a vocational training program. 33 BRBS 221 (2002). The Board stated this holding was consistent with the claimant's burden to show he was unable to obtain alternative employment, despite a diligent effort, to be entitled to total disability benefits, notwithstanding a showing by employer of suitable alternative employment. *Id.* In the case at hand, the Employer has not met its burden of establishing suitable alternative employment. As a result, the Claimant's duty to diligently seek work once suitable alternate employment is identified has not been triggered.

In *Abbott*, the employer had already met its burden of establishing suitable alternative employment before the Board looked at the issue of whether the claimant was entitled to total disability benefits while enrolled in vocational training. Further, in cases subsequent to *Abbott*, the employers had also already met their burdens of showing suitable alternative employment before the Board examined the question of disability benefits during vocational training. *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998); *Kee v. Newport Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *Brown v. National Steel & Shipbuilding*, 34 BRBS 195 (2001); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F. 3d 286 (4th Cir. 2002); *Castro v. Gen. Constr. Co.*, 37 BRBS 67 (2003). Because the Employer has not met its burden of establishing suitable alternative employment, the Claimant is entitled to total disability benefits while he was enrolled in the farrier training program until he accepted a position with his current employer. I distinguish this case from *Abbott* and all of the subsequent cases, in which the employer had met its burden of suitable alternative employment, and do not turn to the issue of whether the claimant has proven the unavailability of employment due to his participation in a vocational training program. Therefore, I find the Claimant entitled to total disability benefits for the period of November 1, 2009, to April 3, 2010, which includes the time period he was enrolled in the farrier training program.

Additionally, the Claimant seeks permanent partial disability benefits, beginning on the date he began working at his current job with Chadron YouthBuild. Having already found the Claimant to have a permanent disability, I also find the Claimant entitled to permanent partial disability benefits, beginning April 3, 2010, to the present and continuing.

#### **SCHEDULED INJURY**

This claim involves both a scheduled injury, the loss of an eye, and unscheduled, general injuries. The Board has found that where a claimant suffered two distinct injuries, a scheduled injury and a non-scheduled injury, arising either from a single accident or multiple accidents, he may be entitled to receive compensation under both the schedule and Section 8(c)(21). *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988) *overruled in part*, *Bass v. Broadway Maint.*, 28

BRBS 11 (1994). However, where harm to an unscheduled body part results from the natural progression of a scheduled injury, a claimant's recovery is limited to an award under Section 8(c)(21) for the combined effects of his injuries. *Id.*

This claim involves several injuries, both scheduled and unscheduled, arising from the same accident. The general injuries, including the Claimant's right eye, nasal, sinus and tinnitus, are related to the accident and did not develop as a natural progression from the Claimant's scheduled injury, the loss of his left eye. While the Claimant is entitled to be fully compensated for both injuries, the amount of benefits he receives cannot exceed the amount he would have received if he was permanently totally disabled. See *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139 (CRT) (4th Cir. 1999). Since the principle of compensation under the Act is generally to provide for an award to compensate for loss of earning capacity, it has been recognized that a claimant cannot be more than totally disabled or receive compensation which exceeds that payable to the claimant in the event of total disability. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985); *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 243 (4th Cir. 1999). Therefore, I find the Claimant entitled to compensation under both the schedule and Section 8(c)(21), but the amount of benefits the Claimant receives cannot exceed the compensation amount for total disability.

#### AVERAGE WEEKLY WAGE

The parties disagree regarding the Claimant's average weekly wage. Under the Act, disability compensation is based on the injured worker's average weekly wage. 33 U.S.C. § 910. Section 910 of the Act sets forth three (3) alternative methods, Sections 910(a), (b), and (c), for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 910(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. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990); *Orkney v. Gen. Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 910(a) applies in cases where the injured claimant "worked in the employment in which he was working at the time of the injury...during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a); *Hall v. Consolidated Employment Sys., Inc.*, 139 F.3d at 1030. Section 910(a) does not apply because the Claimant did not work for the Employer for substantially the whole year. The Claimant was hired in December 2003, and the explosion accident occurred on April 1, 2004.

Section 910(b) provides that if the employee has not worked substantially all of the preceding year in the employment in which he was working at the time of the injury, his average weekly wage is based on the employment history of a typical worker in the similar employment and in the same locality. 33 U.S.C. § 910(b); *Hall*, 139 F.3d at 1030. Section 910(b) cannot be applied due to the lack of evidence as to the wages earned by a comparable employee. *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 698 F.2d 743 (5th Cir. 1983), *rev'd on other grounds*, 13 BRBS 862 (1981), *rehearing granted en banc*, 706 F.2d 502 (5th Cir. 1983), *petition for*

*review dismissed*, 723 F.2d 399 (5th Cir. 1984), *cert. denied*, 469 U.S. 818 (1984).

Section 910(c) governs when the first two (2) methods cannot “reasonably and fairly be applied.” 33 U.S.C. § 910(c); **Hall**, 139 F.3d at 1030 (citing **Empire United Stevedores v. Gatlin**, 936 F.2d 819, 822 (5th Cir. 1991)). Therefore, I will use section 910(c) to determine the Claimant’s average weekly wage.

I have broad discretion in determining annual earning capacity under Section 910(c). **Sproull v. Stevedoring Servs. of America**, 25 BRBS 100, 105 (1991); **Wayland v. Moore Dry Dock**, 25 BRBS 53, 59 (1991); **Lobus v. I.T.O. Corp. of Baltimore**, 24 BRBS 137, 139 (1990); **Bonner v. National Steel & Shipbuilding Co.**, 5 BRBS 290, 293 (1977), *aff’d in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). A definition of earning capacity for purposes of this section is the “ability, willingness, and opportunity to work,” or “the amount of earnings the claimant would have the potential and opportunity to earn absent injury.” **Jackson v. Potomac Temporaries, Inc.**, 12 BRBS 410, 413 (1980). See **Walker v. Washington Metro Area Transit Auth.**, 793 F.2d 319 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); **Tri-State Terminals v. Jesse**, 596 F.2d 752, 757 (7th Cir. 1979); **Marshall v. Andrew F. Mahoney Co.**, 56 F.2d 74, 78 (9th Cir. 1932); **Mijangos v. Avondale Shipyards**, 19 BRBS 15, 20 (1986).

The Claimant contends that the relevant facts in this case replicate the Board’s discussion in **K.S.** and related cases. **K.S. v. Serv. Employees Int’l, Inc.**, 43 BRBS 18 (2009) *aff’d on recon. en banc*, 43 BRBS 136 (2009). See also **Proffitt v. Serv. Employees Int’l, Inc.**, 40 BRBS 41 (2006). In **K.S.**, the Board established three criteria, as discussed in **Proffitt**, that mandate the exclusive use of overseas wages in calculating the average weekly wage at the time of injury: 1.) Employer paid the Claimant substantially higher wages to work overseas than he had earned stateside; 2.) Claimant’s employment entailed dangerous working conditions; and 3.) Claimant was hired to work full-time under a one-year contract. **K.S.**, 43 BRBS at 20.

In reviewing the facts, I agree with the Claimant. Here, the Claimant’s facts follow **Proffitt** and **K.S.** 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 overseas. Thus, the issue is whether using these earnings from the fifty-two week period immediately prior to the injury would fairly reflect Claimant’s earning capacity at the time of his injury. As the relevant facts are not distinguishable, Claimant contends that his average weekly wage must be calculated solely on the higher wages he was paid in his overseas employment. The Claimant calculated his average weekly wage to be \$2,109.97, based upon a 2004 W-2 form showing the Claimant’s earnings as \$27,429.55 for the period of January 1, 2004, to April 1, 2004. CX 11; EX 25. There is no evidence indicating the Claimant’s earnings from December 3, 2003, to December 31, 2003. Therefore, I agree with the Claimant’s calculations and find the average weekly wage to be \$2,109.97.

#### WAGE-EARNING CAPACITY

The Claimant contends he is entitled to permanent partial disability benefits for the period of April 17, 2009, through October 31, 2009, based on earnings of \$373.33 per week, and

permanent partial disability benefits, based on earnings of \$560.00 a week, beginning April 3, 2010.

Section 8(h) of the LHWCA provides:

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided*, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h).

I have already determined the Claimant's average weekly wage to be \$2,109.97. Additionally, I have found the Claimant entitled to permanent partial disability benefits for the period of April 17, 2009, through October 31, 2009, and beginning April 3, 2010, and continuing. Section 8(c)(21) of the Act provides that an award for unscheduled permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity in the same employment or otherwise. 33 U.S.C. § 908(c)(21).

Section 8(h) of the Act provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 908(h). In making this determination, consideration is given to such factors as a claimant's physical condition, age, education, industrial history, earning power on the open market, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122 (5th Cir. 1994). These factors are not exhaustive and I need not consider every possible factor nor assign each factor an individual monetary value, as long as my final determination of wage-earning capacity is based on appropriate factors and is reasonable. *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 660, 661 (1979). If I find the Claimant's actual wages are unrepresentative of the Claimant's wage-earning capacity, the second inquiry requires that I arrive at a dollar amount which fairly and reasonably represents the Claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796-97, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the Claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. *Devillier*, 10 BRBS at 660 (1979).

The first step in the wage-earning capacity inquiry is to determine the amount of the Claimant's actual post-injury earnings. The Claimant seeks permanent partial disability benefits for two separate periods, based upon his actual post-injury wages during those time periods. No

party contends that the Claimant's actual wages are not representative of his wage-earning capacity. No other arguments were presented concerning the Claimant's wage-earning capacity.

During the first period, from April 17, 2009, to October 31, 2009, the Claimant testified that he earned \$1,600.00 per month. TR, 41. The Claimant seeks permanent partial disability benefits based on earnings of \$373.33 per week. I find that the Claimant's actual earnings for this period are representative of his wage-earning capacity. For six months, the Claimant worked as a ranch hand. There is no evidence that the Claimant could not perform this type of work, or that the Claimant worked despite great pain. Further, the Claimant had prior experience, as well as a great interest, in ranch work. He owned six working horses, using them for moving cows and plowing, as well as for recreational purposes. EX 20, p. 37. The Claimant testified that he wanted to work as a ranch hand, and subsequently attended a farrier training program. *Id. See, generally*, EX 15. The Claimant's earnings during this period fairly and reasonably represent his wage-earning capacity. Therefore, I give deference to the Claimant's arguments, and find the Claimant entitled to permanent partial disability benefits of \$1,736.64 per week, based on the wage-earning capacity of \$373.33 per week, for the period of April 17, 2009, to October 31, 2009.

The Claimant began working as an instructor at Chadron YouthBuild on April 3, 2010. In this position, he currently earns \$14.00 an hour. TR, 50; EX 17, p. 3. The Claimant seeks permanent partial disability benefits, based on earnings of \$560.00 a week, beginning April 3, 2010, to the present and continuing. I find that the Claimant's actual earnings are representative of his wage-earning capacity. In his current position, the Claimant is a construction instructor. TR, 49. This job includes both classroom instruction as well as providing hands-on experience at construction job sites. TR, 50. The Claimant testified that he could continue doing this work indefinitely in the future. *Id.* Additionally, the Claimant had prior experience working in construction. After working as a mechanic for the Army, the Claimant worked as a sawyer, operating commercial saws and building trusses for homes and shopping centers. TR, 27. I also note that the Claimant earns more in his current position than the salaries presented in the labor market survey. The Claimant's actual earnings at Chadron YouthBuild fairly and reasonably represent his wage-earning capacity.<sup>8</sup> Therefore, I find the Claimant entitled to permanent partial disability benefits of \$1,549.97 per week, based on the wage-earning capacity of \$560.00 per week, beginning April 3, 2010, to the present and continuing.

#### INTEREST

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation benefits. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *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); *Santos v.*

---

<sup>8</sup> I also note that the Claimant earns more in his current position than all but two of the job opportunities listed in the labor market survey. CX 9. For the two other job opportunities, the Claimant potentially earns equal to, or a little more than, the listed salaries for those positions. *Id.*

*General Dynamics Corp.*, 22 BRBS 226 (1989); *Adams v. Newport News Shipbuilding*, 22 BRBS 78 (1989); *Smith v. Ingalls Shipbuilding*, 22 BRBS 26, 50 (1989); *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988); *Perry v. Carolina Shipping*, 20 BRBS 90 (1987); *Hoey v. General Dynamics Corp.*, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that "...the fixed six percent rate should be replaced by the rate employed by the United States District Court under 29 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills...." *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984), *modified on recon.*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

#### ATTORNEY FEES

Claimant's attorney, having successfully prosecuted this matter is entitled to a fee assessed against the Employer. Claimant's attorney shall submit, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon.

#### ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer shall pay the Claimant temporary total disability benefits based upon an average weekly wage of \$2,109.97, at the compensation rate as set forth by 33 U.S.C. §§ 906 and 908(b), from April 2, 2004, to February 18, 2008.
2. The Employer shall pay the Claimant total disability benefits based upon an average weekly wage of \$2,109.97, at the compensation rate as set forth by 33 U.S.C. §§ 906 and 908(a), from February 18, 2008, to April 17, 2009.
3. The Employer shall pay the Claimant permanent partial disability benefits at the compensation rate in accordance with the provisions of Section 8(c)(21) of the Act, from April 17, 2009, to and including October 31, 2009. 33 U.S.C § 908(c)(21).
4. The Employer shall pay the Claimant total disability benefits based upon an average weekly wage of \$2,109.97, at the compensation rate as set forth by 33 U.S.C. §§ 906 and 908(a), from November 1, 2009, to April 3, 2010.

5. The Employer shall pay the Claimant permanent partial disability benefits from April 3, 2010, to the present and continuing, at the compensation rate in accordance with the provisions of Section 8(c)(21) of the Act. 33 U.S.C § 908(c)(21).
6. The Claimant is entitled to a scheduled award for the loss of his left eye in accordance with 33 U.S.C. § 908 and at the compensation rate as set forth by 33 U.S.C. § 906.
7. All awards shall include annual adjustments pursuant to 33 U.S.C. § 910(h) and interest on any past due compensation at the rate applicable under 28 U.S.C. § 1961.
8. The Employer shall receive a credit for all compensation already paid to the Claimant.
9. The Employer shall continue to furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of section 7 of the Act.
10. The District Director shall make all calculations necessary to carry out this order.
11. Jurisdiction is reserved to entertain an attorney's fee petition.

**SO ORDERED.**

A

DANIEL F. SOLOMON  
Administrative Law Judge