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Office of Administrative Law Judges
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Issue Date: 22 December 2011

CASE NOS.: 2010-LDA-468
2010-LDA-469

OWCP NOS.: 02-166427
02-175896

IN THE MATTER OF:

RANDI TANNER

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

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

Carrier

APPEARANCES:

JOEL MILLS, ESQ.

For The Claimant

FRANK GEROLD, 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 Property Casualty (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 April 5, 2011, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 26 exhibits, Employer/Carrier proffered 43 exhibits 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 on October 17, 2011. 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

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Act covers this dispute.

2. That the Claimant injured some of her teeth on or about August 14, 2007, and injured her wrist, back and left knee on or about April 25, 2008.

3. That the alleged injuries occurred in Iraq.

4. That Claimant's injuries occurred during the course and scope of her employment with Employer.

5. That there existed an employee-employer relationship at the time of the accident/injury.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

6. That the Employer was timely notified of the accident/injuries.

7. That the claims were timely filed.

8. That Employer/Carrier filed Notices of Controversion on April 26, 2010 and July 22, 2010.

9. That an informal conference before the District Director was held on July 8, 2010.

10. That Claimant received temporary total disability benefits from May 7, 2008 through April 6, 2010, at a compensation rate of $1,065.83 per week.

11. That some dental/medical benefits were paid.

12. That Claimant was temporarily totally disabled from March 7, 2008 through March 29, 2010, with the period after March 29, 2010, in dispute.

13. That Claimant has not returned to her usual job.

14. That the headings of the columns on Claimant's Daily Wage Records found in EX-22 and CX-13 equate to the following:

    Employee Name: Name of the employee which the payroll is processed
    Pers ID: SAP ID
    Trans Date: The work date the cost relates to or the day on which Claimant worked
    WT: Wage type
    Base Amount: Gross payroll amount
    Wage Base: Cumulative amount to calculate the burden amounts
    PP End Date: Pay Period End Date
    T. Hours: Total hours processed including base and overtime hours
    B. Hours: Base/Gross hours processed
    OT Hours: Overtime hours processed
    T. Labor: Total gross payroll amount
    Total Payroll: Total payroll processed including gross, overtime and burden

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Claimant's average weekly wage.

5. Section 8(f) relief.[2]

6. Entitlement to and authorization for medical care and services.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing and was deposed by the parties on October 22, 2010. (EX-8). She was born on September 2, 1966, in Seattle, Washington. (Tr. 21). She did not complete high school but received her G.E.D. in 2000. (Tr. 21-22; EX-8, p. 24). She began working in a restaurant after leaving high school in the 11th grade, and she became a truck driver after turning 21 years old. (Tr. 22).

Claimant obtained her CDL in 1989. Since 1989, she has primarily worked as a truck driver in the State of Washington. She testified that her work was "very physical." (Tr. 22). She loaded and unloaded equipment and "strapp[ed] stuff down." (Tr. 22-23). Her job never consisted of simply driving without other physical requirements. (Tr. 23).

[2] Post-hearing, Employer/Carrier notified the undersigned that Section 8(f) relief was no longer being pursued.

Claimant learned about Employer's opportunity to work in Iraq through a friend. Her friend stated that Employer's position in Iraq "was on the up and up." (Tr. 23).

Prior to leaving the United States to work in Iraq Claimant was employed by Costco in a full-time position as a heavy truck driver. (Tr. 23). She worked for Costco for two and a half years. (Tr. 24). She earned approximately $21.50 per hour, plus benefits, at Costco. (EX-8, p. 30).

Claimant testified that she strained her back while working for Skyline Mail Carriers in 2003 and injured her neck or back while working for Santana Trucking in 1993. (EX-8, pp. 30, 38). She did not have any prior leg injuries. (EX-8, p. 31).

Claimant had three surgeries for kidney stones in 2005, 2007 and 2009. (EX-8, p. 33).

After being hired by Employer, Claimant was sent to Houston, Texas, for processing and physical examination. X-rays of her back and a complete physical were performed. No one spoke to her about their findings. (Tr. 24).

Claimant's employment with Employer became effective on January 20, 2007. (Tr. 24; EX-23, p. 14). She flew to Dubai first, spending several days there. Upon arriving in Iraq, she began at the Anaconda base. On February 14, 2007, she transferred to the Key West base. Key West remained Claimant's "main base" for the duration of her employment in Iraq. (Tr. 25).

Claimant worked as a heavy truck driver in Iraq. She loaded and unloaded trucks, binding them down with 75-pound bags of chains. She wore PPE gear weighing approximately 60 pounds. She was also required to perform a lot of walking. (Tr. 25). Claimant explained that the PPE gear was a level 4 safety vest. She also wore a Kevlar helmet, boots and a Nomax fire suit. (Tr. 25-26). She was required to wear the safety equipment when she left the base or during an alert. She also wore the safety equipment while driving. She drove outside the perimeter of the base on a daily basis. (Tr. 26).

She worked in a convoy seven days a week for 12 to 18 hours per day. (Tr. 26). She wore the safety equipment during those periods because at times things would happen on the main service route. Claimant testified that she did not experience problems with her back or spine while wearing the equipment. (Tr. 27).

Claimant's convoy was exposed to enemy fire. (Tr. 27). On one occasion, her truck was directly hit by an improvised explosive device, but she was not injured. (Tr. 27-28).

On August 14, 2007, Claimant was performing a "turn and burn" operation. She explained the process stating, "You come into base, you dropped off the trailer and go and we'd come back off the road, get into base." She stated it was early morning, between 1:00 a.m. and 3:00 a.m., and her group had dropped off one trailer and was picking up another one. She was "hooking up to another trailer" and "rolling landing gear." She used both hands to pull the landing gear handle because it was stuck in place. When the handle came loose it swung back, hitting her in the face and teeth. She reported the accident to her convoy commander within an hour of the accident, after completing the assigned operation. (Tr. 28; EX-8, pp. 51-52).

After reporting to her convoy commander, Claimant began another mission. After the mission, she reported her injury to the foreman. Her face had begun to swell, and she believed something was "seriously wrong." The foreman sent her to a medic. The medic told her, "It's a good thing you women don't mind applesauce because that's all you're going to be eating. It's just bruised." (Tr. 29; EX-8, pp. 53-54, 56).

Claimant received a "complete dental release" prior to her employment with Employer. (Tr. 29).

Claimant was sent to Kuwait on September 2, 2007, after the abscess had progressed toward her sinus cavity. (Tr. 29; EX-8, p. 54). She was treated by medics on approximately five occasions before being sent to Kuwait. (EX-8, pp. 55-56). She asked the medic on numerous occasions to send her to a military dentist, but she was not allowed to see a military dentist because "[t]hey had to wait, keep the numbers down." A medic showed pictures of her abscess to a military dentist, who advised that she be sent out of Iraq for treatment. (Tr. 30; EX-8, p. 57).

Claimant continued to work after the August 14, 2007 accident. She could not recall taking off work any days during that period. She was sent to Baghdad Training Center where she was "held over" for several days due to a sandstorm. She arrived in Kuwait on September 2, 2007. (Tr. 30).

While in Kuwait, Claimant stayed at Egala, and she was sent to International Clinic for treatment with Dr. Adel. Dr. Adel lanced from the center of her upper gums "over to halfway." He placed her on antibiotics and performed an emergency root canal. (Tr. 31; EX-8, p. 57). She remained in Kuwait for two weeks. All of the medical treatment had to be performed within 10 days, which Claimant stated was "part of the problem" because Dr. Adel "seared in the infection" when he performed the emergency root canal. She was required to use her sick leave during that period. (Tr. 31).

Claimant returned to her base camp after finishing her treatment in Kuwait, on approximately September 12, 2007. She returned to work immediately and was sent to Anaconda for convoy commander training. (Tr. 32).

Employer/Carrier paid for the repair of two of her teeth. Claimant paid out-of-pocket for the remainder of the expenses to have "everything fixed the way it was supposed to be." She explained that an emergency root canal was performed but a tooth in her lower jaw was black because "it was never finished and it's actually broke at the root." (Tr. 32). She did not have any dental problems with her lower jaw prior to August 14, 2007. (Tr. 33). She paid for some of her treatment at International Clinic in Kuwait. (Tr. 33; CX-12).

Claimant testified that the abscess and infection "siphoned all the tissue" causing continued soreness on her left side. (Tr. 33).

After returning to her base camp, Claimant received follow-up treatment from camp medics. (Tr. 33). The antibiotics caused her to develop a rash, but she continued to take them "as long as [she] could." (Tr. 33-34).

Claimant went on vacation in Thailand in November 2007. She stayed on a houseboat on the River Kwai and in a bungalow in Talay Village. She had one of her upper left crowns replaced in Thailand. (EX-8, p. 120).

Claimant returned to Kuwait in January 2008 for dental treatment. (Tr. 34; EX-8, p. 58). Employer/Carrier sent her for that treatment. She waited four months between visits to Kuwait to allow her bone to heal. Employer paid for the January 2008 treatment, but she was required to use her sick leave during the trip. (Tr. 34).

Some "temporaries" were applied to her mouth. However, the doctor could not continue that process because the bone was not totally healed. He inserted six sectional bridges on her upper teeth and filed down her other teeth to prevent them "from twisting and turning because of the infection and the bone being soft by the infection." The doctor told her that she would have to return to Kuwait for "complete upper maximal rehabilitation." (Tr. 35; EX-8, pp. 58-59). She remained in Kuwait for 10 to 14 days, but she did not return for follow-up treatment because she injured her back and knee on April 25, 2008. She did not have enough medical leave to cover the entire course of treatment in Kuwait in January 2008. (Tr. 35). Sick leave pay was not the same as her regular pay. (Tr. 35-36).

Claimant estimated that she paid $10,000 total out-of-pocket for the treatments she received in Kuwait. She paid a percentage of the total out-of pocket cost at each visit. (Tr. 36).

After the January 2008 treatment in Kuwait, Claimant returned to her regular job in Iraq, working 12 to 18 hours a day, 7 days a week. She performed her work without any pain in her spine, knee or wrist. She suffered from continuing dental problems. (Tr. 36). She took Ibuprofen to prevent the pain from affecting her work performance. (Tr. 37).

On April 25, 2008, Claimant was preparing her truck for a convoy mission. (EX-8, p. 72). She was on top of a truck cleaning the windshield. As she was climbing down, her safety vest got caught in the brush guard. She tried to pull herself back up, but lost her balance and fell backward approximately four feet. She landed on her left knee, which buckled to the side. She twisted, landing on and breaking her right wrist. She also hit her back on the rocky ground in the impact. (Tr. 37; EX-8, p. 73). She did not know if anyone witnessed the accident. (Tr. 37). She got back into the truck to wait for her convoy commander, whom she was driving. (EX-8, p. 73).

Claimant reported the accident to the convoy commander, who called the foreman because she could not physically push the truck's clutch. They brought her to the medic within an hour of the accident. The medic diagnosed her with a sprained right wrist and a sprained left knee. He determined that she could return to work after a day off. (Tr. 38; EX-8, p. 74).

Claimant visited the medic again the following morning because her arm was swollen. He gave her Ibuprofen and recommended that she drink water. (EX-8, p. 74).

Claimant "knew there was something really wrong." She was given permission by her foreman to see the military doctors, who took x-rays of her right wrist and left knee. They determined that she had broken her right wrist and torn her ACL in her left knee. (Tr. 38; EX-8, p. 75). She did not return to work following the April 25, 2008 accident. (Tr. 38).

Claimant was called to participate in a "smart board" review conducted by her foreman, a superintendent and several company officials, where a determination was made that she was following procedure and not at fault for the accident. (Tr. 39; EX-8, pp. 75-76).

Claimant was flown to Kuwait by Employer, where her right wrist, left knee and neck were x-rayed at the Hadi Clinic. (Tr. 39-40; EX-8, p. 76). The x-rays, taken on May 1, 2008, revealed a torn ACL in her left knee, broken right wrist and disc damage to the neck. (Tr. 39). She was given a neck collar and soft casts for her leg and wrist. (Tr. 40; EX-8, p. 76).

Claimant estimated that she returned to Seattle, Washington, between May 4 and May 6, 2008. (Tr. 40; EX-8, p. 77). She began receiving compensation from Employer/Carrier on May 7, 2008. (Tr. 40).

Dr. Utt began treating Claimant. (Tr. 41; EX-8, p. 77). He referred her to an orthopedist at Rainier Sports Medicine. (Tr. 41; EX-8, p. 78). She could not recall the name of the three doctors who treated her at Rainier Institute. (Tr. 41; EX-8, p. 78). She saw different specialists for her wrist, back and knee. (EX-8, p. 78). She was placed in a thumb cast, and the doctors considered performing reconstructive surgery on her knee. (Tr. 41). She received second opinions from two other doctors in Washington regarding her knee and wrist injuries. (EX-8, p. 79).

Claimant left Washington in August 2008. She went to Oklahoma where she was treated by Dr. Wuller, an orthopedic knee specialist. Dr. Wuller sent her to Tulsa Bone and Joint where she was treated by Dr. Thomas, who injected her low back with steroid injections. (Tr. 42). Dr. Thomas referred her for testing because both her hands were numb and cold. (Tr. 43).

Dr. Wuller performed a complete ACL reconstruction on Claimant's knee on August 21, 2008. (Tr. 43; EX-8, p. 80). He "removed part of the meniscus and perforated the top of the bone" because she had lost all of the cartilage in some areas. It was her understanding that the surgery performed by Dr. Wuller and rehabilitation were the only treatments needed for her knee. (Tr. 43).

Claimant moved to the San Antonio, Texas area in March 2009. (Tr. 43-44). Reba Goldman, her case manager, set up an appointment with Dr. Drazner on April 10, 2009. (Tr. 44; EX-8, p. 81). She waited eight hours to see Dr. Drazner. (Tr. 44). She asked Reba Goldman if she could choose her own physician. Ms. Goldman told her that Dr. Drazner was the best in the field. (Tr. 45).

Dr. Drazner was a pain management rehabilitation specialist. Claimant was taking Lortab and Ultraset for her pain. (Tr. 45). Dr. Drazner referred her to Dr. DiLiberti for right hand surgery and Dr. Duncan for lower back treatments. (Tr. 45; EX-8, pp. 82-83). Dr. DiLiberti performed surgery on her right wrist. (EX-8, p. 83). Dr. Duncan performed two rhizotomies on her lower back. She explained that a rhizotomy cauterizes the nerve. (Tr. 45; EX-8, p. 83).

Claimant did not believe that the rhizotomies were effective because they caused more pain. (Tr. 45). She experienced radiating pain down her left leg after the second rhizotomy, which she had not experienced prior to the rhizotomies. (Tr. 45-46; EX-8, pp. 83-84). She explained that the pain begins four to five inches above her knee and "shoots all the way down." She continued to experience the pain at the time of the formal hearing. She stated that she would wake up at least once per night due to the pain, and standing in one position for an extended period would also trigger the pain. (Tr. 46).

At her deposition, Claimant testified that she could not sit or stand for extended periods due to back pain. She stated that she could stand for one hour at a time and needed to change positions every 30 to 45 minutes. (EX-8, p. 121). She testified that her knee pain also inhibited her ability to stand for extended periods. (EX-8, p. 122).

Claimant told Dr. Drazner about the pain. Dr. Drazner believed that the pain was caused by bumping into something, but she denied hitting anything. On her next appointment, he stated

the pain could have been caused by the needle hitting the nerve during the rhizotomy. Claimant testified that she asked Dr. Drazner to see an orthopedist on numerous occasions. (EX-8, p. 84). She also discussed seeing an orthopedist with a claims manager for Carrier, who stated she would have to first be released by Dr. Drazner. She was frustrated with Dr. Drazner and his refusal to allow her to see a specialist. (EX-8, p. 85). He then determined that she had reached MMI. (EX-8, p. 86).

Drs. Drazner and Duncan both performed Synvisc injections on Claimant's knee. (EX-8, pp. 86-87).

Claimant also participated in physical therapy during that period. She missed several physical therapy appointments due to her mother-in-law being ill and due to vertigo, for which Dr. McFarland provided her a doctor's excuse. (EX-8, pp. 89-90).

Claimant was treated by Dr. Lyday, a hand specialist, one or two times in 2009. He performed steroid injections into her hands, but Dr. Drazner took over that role when she began treatment by him. She was also treated by Dr. Zinsmeister for numbing in her left hand. (EX-8, p. 92). She paid for her appointments with Dr. Zinsmeister through her husband's insurance. (EX-8, p. 93).

Dr. Drazner passed away in October 2010. (Tr. 46-47). Claimant testified that she called four doctors after Dr. Drazner passed away, who were willing to treat her, but Becky Roberts, Carrier's claims examiner, denied the request. (Tr. 47). Dr. Tooey originally treated her, but he stopped working after undergoing back surgery. (Tr. 47; EX-8, p. 95). Dr. Neidre, his partner and a spine specialist, performed an initial consultation on her. (Tr. 47; EX-8, p. 96). He then sent her for an MRI. (Tr. 47). Claimant was treated by Dr. Neidre on two occasions, but he did not want to get involved because Carrier had not approved her treatment. (Tr. 47-48, 76: EX-8, p. 118).

At her deposition, Claimant testified that all of her treatments were covered by her insurance, and she only incurred the cost of deductibles. (EX-8, pp. 97-98). At the formal hearing, she stated that after April 6, 2010, she incurred other out-of-pocket medical expenses. (Tr. 48-49).

Claimant was treated by Dr. Delee, an orthopedic knee specialist, which was covered by her husband Richard Baker's

insurance. (Tr. 49). Dr. Delee advised her of certain work restrictions including driving a truck with a "heavy clutch," climbing stairs, standing for periods of time, walking for periods of time and exercising. (Tr. 49; EX-8, pp. 9-10, 15). Dr. Delee also advised Claimant that she would need complete knee reconstructive surgery in the future. (Tr. 49; EX-8, pp. 14, 101). She could operate a vehicle with an automatic transmission. (EX-8, p. 10). Dr. Delee's restrictions were based on her knee injury. (EX-8, p. 122).

Claimant did not tell Dr. Neidre about the restrictions Dr. Delee placed on her with regard to her knee because she wanted the treatment for her back and knee to remain separate. (EX-8, pp. 122-123).

Claimant testified that she participated in hand therapy with two therapists after injuring her right wrist. She experienced a sharp pain in her hand and numbness at night. Her hand surgery alleviated the numbness. She continued to experience some pain in the back of her hand. (EX-8, p. 105). However, she stated her right hand was "functional." (EX-8, p. 106). She had difficulty lifting heavy objects, like a pot of boiling water, with her right hand. (EX-8, p. 115). She stated that she could do all the other household activities that she performed before her accident. (EX-8, pp. 116-117).

Claimant testified that she also experienced pain and numbness in her left hand and wrist after her April 2008 accident. (EX-8, p. 106). Dr. Thomas sent her to a hand specialist who performed a nerve conduction test that indicated bilateral numbing. (EX-8, pp. 106-107). She had a few steroid injections into her left hand, but she did not undergo any other treatment for it. (EX-8, p. 108).

At her deposition, Claimant testified that her back, neck and knee injuries prevented her from returning to work. She stated that she experienced severe pain in her lower back, which caused her to limp and increased the pain in her knee. She also experienced severe headaches in her lower neck. (EX-8, p. 16). She stated the headaches began after her April 25, 2008 accident. She took Ultracet for pain. (EX-8, p. 17). She testified that she had fallen four or five times, while climbing two steps located in her house. (EX-8, pp. 23-24).

Dr. Drazner treated Claimant's knee with a series of injections to prevent bone on bone contact. (Tr. 49). Approximately one year later, Dr. Delee performed a series of

five injections. (Tr. 49-50; EX-8, pp. 100-101). She testified that Dr. Delee injected her knee because she could not walk. (Tr. 49).

Claimant performed a functional capacity evaluation for Dr. Drazner on December 7, 2009. (Tr. 50; CX-1, p. 97). She could not recall all of the details of the evaluation, but believed her pain level was moderate at that time. She performed a second functional capacity evaluation on March 9, 2010, after undergoing the second rhizotomy. (Tr. 50-51). She stated that her pain was much worse at that time with pain shooting down her leg and in her back. She testified that she called Dr. Duncan's office and told Dr. Drazner about the pain. She stated that she was told, "You must have walked into a table." (Tr. 51).

Claimant was treated by Dr. Drazner for the last time in February or March 2010. (Tr. 52).

Dr. Kennedy evaluated Claimant at the request of Employer/Carrier on January 25, 2010. He performed a brief head to toe physical, but he did not have any of her records. Dr. Kennedy told her his findings, but she could not specifically recall his assessment. (Tr. 52).

Dr. Lee evaluated Claimant in February 2011 at the request of Employer/Carrier. (Tr. 52-53). He evaluated her knee and wrist injuries, took a sonogram of her back and reviewed prior MRIs. He told her that she would eventually require reconstructive knee surgery. (Tr. 53).

Claimant testified that both Drs. Kennedy and Lee told her she should not have undergone the rhizotomies and that they caused more damage. (Tr. 53). It was her understanding that her physical condition, aside from her dental problems, was permanent. (Tr. 53-54).

Dr. Lee advised Claimant of the following restrictions: driving trucks, climbing in and out of trucks, using a clutch and using a shifter. (Tr. 54).

Following her April 25, 2008 accident, Claimant worked for one week in July 2010 at Reynolds Rental Company. She drove a truck with an automatic transmission. (Tr. 54). The company did not offer her employment after the one week trial period because it could not guarantee that she would always have access to the automatic transmission truck and she could not physically

climb in and out of the truck. (Tr. 54-55). Claimant believed that she made $500.00 that week. (Tr. 55).

Claimant attempted to find other employment. She passed tests to join the Post Office, but her medical records prevented her from being hired. She also applied at Somerset Veterinary Office. (Tr. 55). She testified that she applied to all the positions listed on the labor market survey ordered by Employer/Carrier. (Tr. 56). Claimant's job application log indicates that she applied for eight jobs, but she testified that she also applied for other jobs. (Tr. 56; CX-25). She was not contacted by any of the potential employers. (Tr. 56-57).

At the time of her deposition, Claimant was being treated by Dr. Edwards, a dentist. (EX-8, p. 65). After the accident, she experienced pain in her lower and upper jaw. (EX-8, p. 110). She stated that she was not prescribed medication specifically for her jaw pain, but she took Ultracet for back pain, which helped alleviate her jaw pain. (EX-8, pp. 110-111). She experienced problems eating chewy foods because the bridges were temporary, and she also experienced problems eating hot and cold foods because her teeth were very sensitive to them. (EX-8, pp. 111-112).

At the time of the hearing, Claimant was being treated by Dr. Blast, a dentist, and Dr. Lemke, an oral surgeon. Employer/Carrier covered these appointments. Due to infection, the doctors suggested complete removal of her upper teeth and implants. (Tr. 57).

Claimant was participating in the U. S. Department of Labor vocational rehabilitation program. She was also attending school to earn her transportation logistics certificate. (Tr. 57). At the time of the hearing, she had completed two of the six required classes. She was uncertain when she would complete the program because her dental and neck problems make it difficult for her to study. However, she testified that she was working to complete the certification. She was hopeful that she would be able to find a job in logistics after completing the program. She believed that she would earn approximately $35,000 per year in the logistics field. (Tr. 58).

On cross-examination, Claimant testified that she hit her top-left center and bottom-left teeth in the August 2007 accident. (Tr. 59). Several of her bottom left teeth were darkened where a root canal was performed. (Tr. 59-60).

Claimant underwent an MRI in Kuwait following the April 2008 accident, and several subsequent MRIs in the United States. (Tr. 60). She underwent an MRI of her cervical spine shortly after returning to Washington. She could not recall whether that MRI indicated there was no evidence of focal extrusion or neural compression. (Tr. 61). The physician did not tell her there were multi-level disc degenerative changes and no evidence of focal extrusion with neural compression. (Tr. 61; CX-1, p. 57). She could not recall whether a physician had told her that there was some impingement in the nerves of her spine as a function of any protrusion from any disc. (Tr. 61).

Claimant lifted weights as part of the impartial testing performed in both functional capacity examinations. (Tr. 61-62). As a result of the second functional capacity examination, she was found capable of occasional lifting of 25 pounds from floor to waist, 25 pounds from floor to chest and carrying 35 pounds. To test her weight lifting capability, she was asked to lift a wooden crate, loaded with weight from a two and a half foot dock. (Tr. 62).

At Claimant's deposition, she acknowledged that her wrist injury was not inhibiting her daily activities. (EX-8, p. 47). She testified that she experienced some pain in her hands but it was not debilitating. (EX-8, p. 102). She stated her pinky finger continued to go "completely cold." (EX-8, p. 103). Dr. Neidre wanted to determine if there was a nerve problem causing the numbness in her pinky. (EX-8, p. 104). Dr. Lee released her without restrictions, with regard to her wrist. (Tr. 63-65; CX-1, p. 168). She did not disagree with Dr. Lee's evaluation. (Tr. 65).

In March 2010, Dr. Drazner noted that Claimant could use her right wrist to pivot off the examination table without apparent difficulty. (Tr. 65-66). She stated, "I am right-handed and I have to lock my wrist in and do it. I don't have the side to side, up and down." (Tr. 66).

Dr. Kennedy tested Claimant's range of motion in her neck during the physical examination he performed. (Tr. 66). She recalled Dr. Kennedy's finding that she had a full range of motion in her cervical spine and tenderness at the base of her neck in the interscapular area. (Tr. 66-67). She acknowledged that she had full range of motion in her neck, but noted that she suffered from headaches. (Tr. 67).

Claimant did not recall Dr. Drazner telling her that she had a cervical strain in her neck. (Tr. 67).

Dr. Lee, an orthopedic physician, examined Claimant's knee. (Tr. 67). He determined that, with respect to her knee, she could stand for six hours and bend and stoop for up to two hours. He did not want her to squat, kneel or climb. He indicated that, with respect to her spine, she could sit, walk, stand and twist for up to eight hours. Dr. Lee also determined that, with respect to her spine, she could bend or stoop for up to two hours, not continuously. He also found that she would require approximately a five-minute break every two hours. He also restricted her to 50 pounds of pushing and pulling, for up to eight hours. (Tr. 68). Claimant could not recall whether the restrictions were an improvement over her visit with Dr. Delee. (Tr. 69).

Starting in October 2010, Claimant received payments for her medical care through Aetna Insurance Company. (Tr. 69). All medical expenses, not covered by Employer, were covered by Aetna Insurance Company. However, she was required to pay deductibles. (Tr. 69-70).

At the time of the formal hearing, Claimant had a commercial driver's license. She did not inquire into the requirements for obtaining a passenger endorsement for a commercial license. She stated she would "have to see what the Department of Labor thinks," but she had not done so yet because she "did not want to haul people." (Tr. 71). She stated she would have taken the job at Hertz if she had a passenger endorsement and the truck had an automatic transmission. (Tr. 71, 81). The job description did not indicate that the truck had a standard transmission. (Tr. 81).

Claimant testified that her husband drove her to the formal hearing. She continued to ride on her husband's motorcycle but not on her own. (Tr. 72). At the time of her deposition, she stated she could ride her motorcycle for a maximum of 30 minutes at a time. (EX-8, p. 10).

Claimant stated that she could perform activities around the house including washing the dishes, cooking and some cleaning. (Tr. 72-73). She testified that her husband did the vacuuming and helped with the laundry. (Tr. 73).

Claimant stated that she called each of the potential employer's listed on the labor market survey. She told them

that she was seeking employment and asked for the job qualifications and experience requirements. She also discussed her experience with them. (Tr. 73). She discussed her health restrictions with the potential employers who stated the work was strenuous or physically demanding. (Tr. 74).

Claimant stated that she inquired about receiving Social Security disability at one time, but she was told that she did not qualify. She did not apply for Social Security disability, Medicare, Medicaid or unemployment benefits. (Tr. 74).

Claimant believed that her ability to lift things was about the same as it was during the December 2010 functional capacity evaluation. (Tr. 74-75).

Claimant was paid for the days she worked with Employer. (Tr. 75).

Claimant did not discuss Dr. Lee's certification with him or review his resume or curriculum vitae. (Tr. 75).

Claimant stated that she was planning on completing the vocational rehabilitation program in logistics. (Tr. 75). She was in the process of completing two courses, which she planned to finish by May 10, 2011. She planned to schedule the other two courses when they were offered at the college. (Tr. 76).

Claimant estimated that she was treated by Dr. Drazner 10 to 12 times. (Tr. 76).

Claimant was also treated by Dr. McFarland, her family physician. (Tr. 77, 87). He prescribed Trazadone to help her sleep. (Tr. 77). He did not treat her for any of her work-related injuries. (Tr. 87). Dr. Drazner also prescribed medications for her. (Tr. 77).

Claimant called Raytheon Technical Services Company, but the work was too strenuous for her health restrictions. She called Waste Management, but the position also involved strenuous work. (Tr. 78). The Napa Auto Parts delivery driver position was too strenuous because it required driving a standard truck and lifting heavy equipment without assistance, but she did not specifically ask if she could drive an automatic transmission truck. (Tr. 79).

Claimant stated she applied for the transporter position at Hertz, but she was not hired because the position was filled. She testified that she could have performed that job. (Tr. 82).

Claimant testified that the position with True Green required computer and horticultural knowledge. (Tr. 82). She stated that she applied for a position as a cashier/parking lot attendant at University Health Systems. She also applied at Hertz, Morales Feed, Devine Storage and at a lumber yard as a cashier. (Tr. 83). She also spoke with someone at True Value, a hardware store. (Tr. 83-84). She believed that she could perform the duties required of a cashier as long as the employer would allow her to periodically change positions from sitting to standing. Dr. Lee indicated that she needed to change positions every two hours. (Tr. 84).

Claimant stated she was taking a beginners' software class at a college to learn how to preview documents. (Tr. 84). At her deposition, she stated that she owned a laptop, and she was familiar with Microsoft Word and e-mail, but no other computer programs. (EX-8, pp. 49-50).

On re-direct examination, Claimant stated that she had filed at least 20 applications for employment since returning to the United States in 2008. (Tr. 85). She testified that her job application log reflected her understanding of the requirements of each position. (Tr. 85; CX-25).

Claimant began taking classes on January 18, 2011. She stated that the Department of Labor vocational rehabilitation program required that she not work during that time so that she could focus completely on school. (Tr. 86).

The Medical Evidence

All Family Medicine Records

Claimant presented for an appointment with Dr. Terrill R. Utt on March 11, 2004, for a complete annual physical examination. She complained of increased fatigue, abdominal pain and gas and a possible vaginal yeast infection. (EX-18, p. 9).

Dr. Utt diagnosed Claimant with possible carpel tunnel syndrome in both wrists on May 4, 2004. He recommended that she wear carpal tunnel wrist splints for comfort. He also found evidence of a possible recurrent kidney stone. (EX-18, p. 8).

Claimant presented on December 14, 2004, complaining of an acute flare up of tennis elbow in her right elbow. Dr. Utt injected her elbow and recommended a tennis elbow strap. (EX-18, p. 7).

Claimant presented on August 9, 2005, complaining of pain in her right knee, which she injured on a trampoline. Dr. Utt diagnosed her with a mild sprain/strain. He also diagnosed her with depressive disorder and prescribed Zoloft. (EX-18, p. 6).

Claimant presented on April 6, 2006, complaining of foot soreness. Dr. Utt diagnosed her with an early bunion formation. He also prescribed Wellbutrin for depressive disorder. (EX-18, p. 5).

On May 7, 2008, Claimant presented to Dr. Utt. She described her April 25, 2008 fall from her truck which twisted her left knee, landing on her right wrist and injuring her neck. She also reported her back has been hurting since shortly after her fall. Dr. Utt noted objective findings of "left knee braced and tender with swelling of the left knee joint." Claimant's "neck is tender with some tension and spasm and decreased ROM [range of motion]." Dr. Utt reviewed the MRIs from Kuwait. He referred Claimant to Rainier Orthopedics for all of her injuries. (CX-1, p. 48).

Good Samaritan Hospital Records

Claimant presented to the Good Samaritan Hospital Emergency Room on July 22, 2005, complaining of chest pain. (EX-14, p. 3). Dr. Younggren, the emergency room physician, ordered a cardiac nuclear medicine stress test to rule out acute coronary syndrome. (EX-14, p. 4; EX-40).

Pre-Employment Physical

On January 9, 2007, Claimant underwent a pre-employment physical at the request of Employer. (EX-3). She stated that she had never been demobilized for a medical reason. She reported no history of cancer, diabetes, hepatitis, high blood pressure, epilepsy, drug or alcohol abuse, mental illness, stroke, kidney disease, respiratory problems, blood disorders, central nervous system disorders, stomach or intestinal tract disorders, heart or circulatory disorders, skin disorders, vision disorders, allergies, ear problems or head injury. She noted that she had a history of kidney stones, gall bladder

surgery and back surgery to remove a cyst. (EX-3, pp. 3-4; CX-1, pp. 1-2). She was medically cleared for respirator use without restrictions by Sandra Davis. (EX-3, p. 5; CX-1, p. 4). She was cleared as medically qualified for the position. (EX-3, p. 11; CX-1, p. 10).

Job Site Medical Records

Claimant presented to the H3 Clinic on August 17, 2007, reporting she had "hit front tooth with landing gear." She was prescribed Ibuprofen. (CX-1, p. 13). She stated that the pain and tenderness in her mouth was so severe that she could not eat. Steven Carley, a paramedic, treated her. He noted that her teeth appeared in tact and there was no discoloration or edema to any of the soft tissue. He released her to return to full duty work. (CX-1, p. 14).

Claimant presented on August 27, 2007, to the H3 Clinic. She stated that she had an allergic reaction to antibiotics and a rash. (CX-1, p. 15). She had developed a cyst above her tooth and rated her pain at a five out of ten, on a ten scale. The cyst was tender to touch. Steven Carley ordered Claimant to alternate Ibuprofen and Tylenol. He consulted the military dentist, who recommended that Claimant be sent to Kuwait for treatment. (CX-1, p. 16).

Claimant presented on September 2, 2007. (CX-1, p. 18). Her gums were sensitive to heat and cold. Her tooth was chipped, and she was experiencing redness and swelling of the gum. (CX-1, p. 19).

Claimant presented on January 11, 2008, requesting permission to return to Kuwait for follow-up. (CX-1, pp. 30-32). On January 15, 2008, Claimant presented for a check-up to complete dental work. (CX-1, pp. 33-34).

The Employer's job site medical records indicate that Claimant was injured on April 25, 2008, at 10:30 a.m. (EX-6, p. 1; CX-1, p. 38). She was immediately transferred to the KBR Medical Clinic for evaluation and treatment, arriving there at 11:15 a.m. No visible signs of a fracture were noted, and a drug and alcohol test was not performed. She reported she lost her balance and fell backwards from the bumper of her truck landing on her left knee and right wrist. (EX-6, p. 2; CX-1, p. 39).

On April 30, 2008, Steven Carley treated Claimant. Ice packs and a compression bandage were applied. He prescribed Ibuprofen and Tylenol for pain control. She was taken to a TMC physician for evaluation. The x-ray performed revealed a non-displaced fracture of the right radial styloid. He recommended a consultation with an orthopedic specialist, and placed Claimant in an ulnar groove splint and sling. (EX-6, p. 3; CX-1, p. 40).

International Clinic Records

Claimant was treated by Dr. Adel A. Chidiac at International Clinic in Salem Al-Mubarak St Salmia, Kuwait, on September 3, 2007. He diagnosed her with a periapical abscess due to trauma and recommended a root canal and crowns. (CX-1, p. 20). He performed a root canal and fillings on September 4, 2007. He noted that she would have to return to finish her treatment. (CX-1, p. 21). On September 5, 2007, he performed on incision of the abscess and drainage of the pus. He noted a positive prognosis. (CX-1, p. 23). On September 6, 2007, he noted pulp necrosis and performed fillings. (CX-1, p. 24). On September 9, 2007, Dr. Chidiac noted that root canals and fillings were performed on two of Claimant's teeth, but she would have to return to have crowns placed on the teeth. (CX-1, pp. 25, 28).

Claimant returned to Kuwait for treatment on January 30, 2008. (CX-1, p. 35). On January 31, 2008, Dr. Chidiac noted that complete rehabilitation treatment regarding her upper Maxilla was complete, but she would have to return for treatment of her lower teeth. (CX-1, p. 36).

Hadi Clinic

On January 5, 2008, Claimant underwent an MRI of her left knee at the Hadi Clinic. Dr. Yahya Slaiman interpreted the findings as suggestive of a radial tear of the posterior horn of the medial meniscus, a significant tear of the ACL and a Grade II partial tear of the LCL. (CX-1, p. 45). She also underwent an MRI of the cervical spine. Dr. Slaiman found moderate disc protrusions at C3-C4, C4-C5 and C5-C6 and moderate to significant disc protrusions at C6-C7. (CX-1, p. 46). Finally, she underwent an MRI of the right wrist with the findings suggestive of a fracture of the styloid process of the radius. (CX-1, p. 47).

Rainier Orthopedic Institute Records

Claimant presented on May 7, 2008, after being referred by Dr. Utt. She noted pain and numbness in her left hand. She classified the pain in her C-spine at a two or three out of ten, on a ten scale, the pain in her right wrist at a four or five out of ten, on a ten scale, and the pain in her left knee at a four and elevated at times to a five or six, on a ten scale. Vicodin was prescribed. (CX-1, p. 49). She was diagnosed with an ACL rupture of the left knee, medial meniscus tear and MCL tear of her left knee, a scaphoid fracture of her right wrist and degenerative disc disease with a possible herniation of the cervical spine, C4-5. (CX-1, p. 50). She was referred to Dr. VanBergeyk for ACL reconstruction and sent to physical therapy. (CX-1, p. 51).

Claimant presented on May 23, 2008, for an MRI of her cervical spine. The MRI revealed multilevel disc degenerative changes. (EX-15, p. 3; CX-1, p. 52). There was no evidence of focal extrusion or neural compression. (CX-1, p. 52). An MRI of the lumbar spine revealed a small central protrusion at the L5-S1 level with no neural impingement with mild desiccation at the L3-L4 level. (CX-1, p. 53). Disc bulging was found at three levels: C3-4, 4-5, and 5-6. There was no evidence of fractures of the C-spine. (EX-15, p. 5).

Review of an MRI performed on her knee on May 23, 2008, revealed a complete rupture of her ACL, with a possible medial meniscus tear. Review of an MRI performed on her right wrist revealed a possible scaphoid fracture. Dr. Utt prescribed Vicodin and referred her to Dr. VanBergeyk for ACL reconstruction. (EX-15, p. 5). He ordered an additional radiograph of Claimant's right wrist and an additional MRI of her C-spine. (EX-15, pp. 5-6).

Apple Physical Therapy Records

Claimant attended four visits of physical therapy and was discharged on July 21, 2008, after failing to attend an appointment, and when called she reported that she was moving to Oklahoma. (EX-11, p. 3).

Dr. Thomas Wuller

Claimant presented on August 6, 2008, for evaluation by Dr. Thomas Wuller of Ortho Oklahoma. (CX-1, p. 60). He referred her to Stillwater Surgery Center for her left knee injury. (CX-

1, p. 62). He noted that her right wrist had improved significantly. He reassured her that some stiffness in her wrist was expected. (CX-1, p. 63).

On August 21, 2008, Claimant underwent several procedures for her left knee including a diagnostic arthroscopy, arthroscopic ACL reconstruction, partial medial meniscectomy, and shaving chondroplasties of the medial femoral condyle and medial tibial plateau performed by Dr. Wuller. (CX-1, p. 64).

Dr. Wuller examined Claimant in follow-up on August 25, 2008, August 29, 2008, September 16, 2008, October 22, 2008 and November 19, 2008. (CX-1, pp. 67-74, 78-79). He noted significant improvements to her left knee during the October 22, 2008 appointment and the November 19, 2008 appointment. (CX-1, pp. 74, 79).

Dr. Richard D. Thomas

Dr. Thomas of Tulsa Bone and Joint evaluated Claimant on October 30, 2008, for chief complaints of low back pain with left lower extremity pain and neck pain with bilateral upper extremity paresthesias. Claimant related the mechanics of her April 25, 2008 work injury. He noted a prior lumbar MRI showed central disc protrusion of her lumbar spine and a central disc herniation at C6-7. Claimant reported she had had no treatment either for her cervical or lumbar spine. (CX-1, p. 75). He recommended a full course of physical therapy for her cervical and lumbar spine. He diagnosed her with a cervical herniated nucleus pulposus and L5-S1 herniated nucleus pulposus. (CX-1, p. 77). She underwent a lumbar transforaminal epidural injection with corticosteroid on December 18, 2008, and again on January 15, 2009, by Dr. Donald Adams of the Stillwater Surgery Center. (CX-1, pp. 80, 82).

Dr. Hastings performed an EMG on Claimant’s wrist on January 19, 2009, in Tulsa Oklahoma, at the request of Dr. Thomas. The needle electrode examination did not reveal evidence of radiculopathy in either upper extremity. The radial nerve sensory conduction studies and nerve motor and sensory conduction studies were normal. There were also prolongations of the left medial sensory latency and right medial sensory latency. Dr. Hastings opined that these findings were compatible with carpal tunnel syndrome, with slightly greater changes on the right wrist. (EX-13, p. 3).

On February 2, 2009, Dr. Thomas recommended traction for her cervical spine. The epidural steroid injection had decreased her lumbar symptoms. (CX-1, p. 83). On February 26, 2009, Claimant stated the traction unit prevented "really bad headaches," but was otherwise not extremely effective. (CX-1, p. 84).

Dr. Victor I. Lyday

On April 15, 2009, Claimant presented to Dr. Lyday for evaluation of her right wrist. No significant tenderness was noted and she exhibited excellent motion. She had a very positive Tinel's, Phalen's and nerve compression test. Dr. Lyday reviewed studies done by Dr. Hastings which showed signs of bilateral median neuropathy or carpal tunnel syndrome. (CX-1, p. 85). He recommended an MRI in view of Claimant's pain and tenderness at the base of her thumb. (CX-1, p. 86).

Dr. Bryan S. Drazner

On May 1, 2009, Claimant presented to Dr. Drazner's office for a comprehensive initial medical examination at the behest of Employer/Carrier. Ms. Reba Goldman, her nurse case manager accompanied her on the appointment. (EX-19, p. 37; CX-14, p. 3). Claimant complained of pain in the right lower side of her back, pain between her shoulders, numbness in her upper extremities and headaches. She noted experiencing mild crepitus in her right knee without significant right knee pain. (EX-19, p. 45; CX-14, p. 11).

Dr. Drazner diagnosed Claimant with left knee internal derangement, a right wrist radial styloid fracture healed with symptomatology of carpal tunnel syndrome, a lumbar sprain/strain with multilevel degenerative disc disease without cord or nerve root impingement and a mild cervical sprain/strain. (EX-19, pp. 46-47; CX-14, pp. 12-13). He concluded that Claimant had sustained injuries when she fell on April 25, 2008, to her left knee, right wrist and neck and back. He concluded that Dr. Thomas had exaggerated her diagnosis by stating that she had herniated nucleus pulposus in the cervical and lumbar region. Dr. Drazner opined that in fact she sustained a cervical sprain/strain with mild degenerative disc disease, which he believed would respond well to conservative treatment with therapy. He prescribed Ultracet, Lortab and Lyrica. He found that Claimant could not work at that time. (EX-19, p. 47; CX-14, p. 13).

On June 4, 2009, Dr. Drazner noted the "superb result" Claimant experienced with respect to her left knee ACL reconstruction. He opined that her bilateral carpal tunnel syndrome pre-existed her work-related injury since she injured only her right wrist in her work injury. (EX-19, p. 34; CX-14, p. 14). He found that the results of a recent MRI on April 22, 2009, of her left wrist were suggestive of ulnar attachment injury. (EX-19, pp. 34-35; CX-14, pp. 14-15). He recommended therapy three times per week for four weeks to address her lumbar facet joint mediated pain, cervical sprain and right wrist pain. (EX-19, p. 36; CX-14, p. 16).

Claimant presented on July 9, 2009, for a follow-up examination. She expressed frustration with Dr. Lyday's treatment of her right wrist. Dr. Drazner referred her to Dr. Duncan for treatment of her spine through facet joint rhizotomy. (EX-19, p. 32; CX-14, p. 19). She was experiencing recurrent pain in her lower lumbar facets. Dr. Drazner noted that he would discuss three facet joint injections between L4 and L5, versus facet joint rhizotomy with Dr. Duncan, but he preferred the latter. He stated that Claimant would continue with physical therapy. (EX-19, p. 33; CX-14, p. 20).

On July 31, 2009, Dr. Drazner noted that Dr. Duncan had performed lumbar facet joint injections on her, and they were planning to use facet joint rhizotomy. Dr. Drazner hoped to refer her to Dr. DiLiberti for treatment of her wrist after the rhizotomy treatment by Dr. Duncan. (EX-19, p. 29; CX-14, p. 23).

Claimant did not attend an appointment scheduled for August 11, 2009. (EX-19, p. 27; CX-14, p. 25).

Dr. Drazner evaluated Claimant on September 1, 2009. Dr. Drazner was concerned because Dr. Duncan had conducted radiofrequency rhizotomies on both sides even though she was only experiencing pain on the right side. (EX-19, p. 25; CX-14, p. 27). He opined that her back condition had improved, though Claimant rated her back pain at a six out of ten, on a ten scale. Dr. Drazner referred her to Dr. DiLiberti for treatment of her wrist. She remained on Ultracet, Lortab and Lyrica. (EX-19, p. 26; CX-14, p. 28).

On September 17, 2009, Claimant presented for a follow-up evaluation. She complained of grinding in her left knee. Dr. Drazner opined the grinding was due to degenerative changes to the medial compartment of the knee. He noted that her cervical

sprain/strain was essentially resolved. Dr. Drazner again noted that the bilateral injections performed by Dr. Duncan were "unnecessary and inappropriate" and not requested by him. (EX-19, p. 22; CX-14, p. 30). Dr. DiLiberti diagnosed her with carpal tunnel syndrome, de Quervain's tenosynovitis and flexor carpi radialis tendinitis. He recommended a carpal tunnel release, a release of de Quervain's tenosynovitis and a flexor carpi radialis tendon sheath decompression and debridement of any osteophyte around the scaphoid tubercle or trapezium. (EX-19, p. 23; CX-14, p. 31). Dr. Drazner stated, "It is curious the patient for a lengthy period of time has had no complaints relative to the knee whatsoever and now that her lower back has been addressed successfully, and the right wrist has now been addressed, the knee has resurfaced as a source of complaint." He opined that Synvisc injections could be a possible course of treatment for the knee pain. (EX-19, p. 24; CX-14, p. 32).

On October 3, 2009, Dr. Drazner opined that Claimant was providing migratory pain complaints. Her physical therapist recommended that she undergo a right sacroiliac joint injection and he referred her to Dr. Duncan. She continued postoperative rehabilitation for her right wrist. (EX-19, p. 20; CX-14, p. 34). Dr. Drazner noted that she appeared to be experiencing more significant crepitus, restricting the progress of her knee recovery. They discussed Synvisc injections. (EX-19, p. 21; CX-14, p. 35).

On November 20, 2009, Dr. Drazner noted that Claimant had moved forward with the Synvisc injections. (EX-19, pp. 13, 16; CX-14, p. 39). He opined that she continued to provide migratory pain complaints, but he ordered Synvisc injections, one right sacroiliac joint injection and one wrist joint injection. He noted that she reported pain levels at a four to five out of ten, on a ten scale, but she did not appear significantly uncomfortable. He believed that she was "disturbed by the demands on her time" produced by the aggressive return to work program in which she participated. He expressed concern that she may be malingering. (EX-19, pp. 14, 17; CX-14, p. 40).

On December 16, 2009, Dr. Drazner reported that Claimant was diagnosed with a sinus infection the week before, after presenting to her primary physician with vertigo complaints. Her primary physician provided her with a note indicating that she could not begin work conditioning until December 28, 2009. Ms. Goldman reported that Claimant had called her to complain about beginning work conditioning and knee pain. (EX-19, p. 10;

CX-14, p. 44). Dr. Drazner noted that Claimant was complaining of moderate pain in her right wrist, but during the examination raised her entire body using her right arm and pivoted on her right wrist in a hyperextended and hyperflexed position. He ordered an MRI of her left knee "to corroborate the enormous discord between [her] subjective complaint's and objective findings." (EX-19, p. 11; CX-14, p. 45).

Claimant presented on March 10, 2010, for a follow-up examination. Dr. Drazner noted "increasingly obvious disability posturing and malingering." He opined that with regard to her lumbar spine there was no evidence of an acute injury but rather a sprain superimposed on multilevel degenerative disc disease. (EX-19, p. 5; EX-28, p. 1; CX-14, p. 52). He noted that Claimant did not begin complaining of pain in her left knee until after she experienced improvement in other areas. He opined that she had a successful surgical intervention with respect to her left knee and did not require further interventional treatment. (EX-19, p. 6; EX-28, p. 2; CX-14, p. 53). He noted that Claimant experienced a superb result following her right wrist surgery. Nevertheless, he found that she had completely disregarded the occupational injury program. He noted that light duty was not available in Claimant's usual job, and she would require work conditioning because it was unlikely she would "test in a full-duty status." (EX-19, p. 7; EX-28, p. 3; CX-14, p. 54). Nevertheless, he found that she had reached maximum medical improvement and was completely capable of a full-duty work release after two weeks of work conditioning, effective March 29, 2010. (EX-19, p. 9; EX-28, p. 5; CX-14, p. 56).

On March 29, 2010, Dr. Drazner reiterated that Claimant had reached maximum medical improvement and was completely capable of a full-duty work release. He opined that there was no indication for further medical treatment and she had exhibited "increasingly obvious and extraordinary disability posturing." (EX-19, p. 3). He stated that she had continually delayed treatment and failed to comply on multiple occasions. He stated it would be "grossly inappropriate" to refer her for further medical treatment because there was "no medical basis on which to make a recommendation." (EX-19, p. 4).

On April 10, 2010, Claimant refused to attend a scheduled appointment with Dr. Drazner. Dr. Drazner opined that she was dissatisfied with his treatment because he "would not be party to prolonging the disability." He determined that she did not require further medical treatment or prescription medication.

He opined that she had successful surgical interventions of her right wrist and left knee. (EX-19, p. 1; CX-14, p. 59). He stated that her soft tissue injuries to the lumbar and cervical spine regions were successfully treated. He concluded that nothing prevented her from returning to full-duty work. (EX-19, p. 2; CX-14, p. 60).

South Texas Regional Medical Center Records

Claimant was admitted to South Texas Medical Center on May 13, 2009, after experiencing a sudden onset of hematuria. (EX-37, pp. 10-12). She was diagnosed with a right kidney stone and prescribed Morphine and Zofran. (EX-37, p. 22).

Claimant was admitted to South Texas Regional Medical Center on January 13, 2010, by Dr. McFarland for mammogram screening. (EX-37, pp. 2-4).

Dr. Clifford Sarnacki

Dr. Sarnacki initially evaluated Claimant on May 18, 2009. (EX-55, p. 46). He performed an extracorporeal shock wave lithotripsy on May 29, 2009, after diagnosing Claimant with right distal ureteral calculi. (EX-55, pp. 32, 34). He evaluated Claimant again on June 8, 2009, June 19, 2009 and June 22, 2009. (EX-55, pp. 6, 23, 31). On June 22, 2009, Claimant presented complaining of right flank pain. He diagnosed her with a right ureteral calculi and hematuria and performed a cystoscopy, right retrograde. (EX-55, pp. 6, 10).

Dr. Thomas C. DiLiberti

On September 8, 2009, Dr. DiLiberti conducted a surgical consultation on Claimant regarding her right wrist which she reported injuring in Iraq. He noted that the main source of her pain was related to the radial and volar aspects of the right wrist, as well as the first dorsal compartment. She was also experiencing numbness and tingling in the radial digits. (EX-41, p. 2).

Dr. DiLiberti diagnosed Claimant with right carpal tunnel syndrome, right wrist deQuervain's tenosynovitis and right wrist FCR tendinitis. He discussed a carpal tunnel procedure, deQuervain's tenosynovitis release and FCR tendon sheath decompression and debridement with Claimant. He also explained the risks and limitations of the procedures. (EX-41, p. 4).

On September 9, 2009, Dr. DiLiberti performed an open right carpal tunnel release, free fat pad transfer to the undersurface of the radial leaf of the right transverse carpal ligament, tenolysis of adhesions, first dorsal compartment tendon sheath release and tenosynovectomy and carpi radialis tendon sheath release and synovectomy. (EX-41, pp. 6-7).

Advanced Physical Therapy Records

Claimant presented to Advanced Physical Therapy for a Functional Capacity Evaluation on December 7, 2009. She was referred by Dr. Drazner. She had completed a course of physical therapy for low back, right Sacroiliac joint pain and treatment following right wrist and left knee surgeries. It was noted that her pain and range of motion had improved. She continued to experience limitations in squatting due to knee pain and limitations lifting due to wrist pain. She had a full range of motion in her wrist and knee, but she experienced pain when performing repeated lumbar flexion. (EX-10, p. 5). She was evaluated as capable of medium physical demand work, but she was unable to return to her previous job as a truck driver which was considered heavy work. (EX-10, p. 6).

Claimant presented again on March 9, 2010, for a Functional Capacity Evaluation (FCE). She had begun a course of physical therapy for low back, right Sacroiliac joint pain and treatment following right wrist and left knee surgeries. On February 24, 2010, she had presented with low back pain rated at an eight out of ten, on a ten scale, left lateral shift and inability to achieve neutral in standing or extending her lumbar spine. After five visits she reported a 50 percent reduction in pain. She could bend from the side beyond neutral and minimally extend her spine. She continued to experience limitations in squatting due to knee pain and limitations lifting due to wrist pain. She had a full range of motion in her wrist and knee. Her range of motion in her lumbar spine was limited to 75 percent extension and 50 percent in side bending to the right. (EX-10, p. 3; CX-1, p. 119). A musculoskeletal exam revealed significant loss of spinal movement and increased pain. Her lift tests were decreased when compared to her previous FCE on December 7, 2009. (EX-10, p. 4; CX-1, p. 120).

On May 11, 2010, the physical therapist noted that her back and leg symptoms were improving through physical therapy and recommended continued guidance one or two times per week through a home program modification. (CX-1, p. 126).

On February 23, 2011, the physical therapist opined, "it was determined from the FCE that [Claimant] was unable to perform the job functions of Heavy or Very Heavy physical demand, which was required to be a heavy equipment operator in Iraq." (CX-1, p. 161).

Dr. Michael McFarland

On December 9, 2009, Dr. McFarland excused Claimant from work hardening for two weeks due to illness. He issued a full return to work on December 28, 2009. (EX-33, p. 1).

Dr. Charles W. Kennedy

Dr. Kennedy evaluated Claimant on January 25, 2010, at the request of Carrier. Claimant complained of low back pain, mild instability of her left knee and some weakness of grip in her right hand. He opined that she could require reconstruction of the anterior cruciate. He noted that there was no significant shifting on the knee. He found some tenderness in her right wrist and mild difficulty with resistance. He found a full range of motion in the cervical spine and tenderness at the base of the neck. (EX-32, p. 1; CX-1, p. 112).

Dr. Kennedy found mild tenderness of Claimant's low back. He concluded that Claimant's treatment had been reasonable, with the exception of two injections and a rhizotomy at L3-L5. (EX-32, p. 2; CX-1, p. 113).

Dr. Kennedy recommended a myofascial release of the cervical spine. He recommended that she work on an active home exercise program for her knee and use an anterior cruciate protecting brace. He found that she did not require any injections, rhizotomies or surgeries. He found that Claimant's prescribed muscle relaxers were not appropriate, and he opined that she only required Aleve. He noted that a physical therapist or chiropractor could instruct her on the home strengthening program, which would take 2 weeks maximum. He opined that physical therapy or chiropractic care would not be appropriate after such instruction. (EX-32, p. 2; CX-1, p. 113). He stated Claimant would need to perform the home strengthening program for an indefinite period three times per week. (EX-32, pp. 2-3, CX-1, pp. 113-114).

Dr. Kennedy opined that Claimant's estimated return to work and MMI would be reached 60 days after completion of his recommendations, with residual symptoms including intermittent

low back pain and soreness of the knee and wrist. (EX-32, p. 3).

Dr. Steve Edwards, D.D.S.

On May 10, 2010, Claimant was treated by Dr. Edwards, a doctor of dental surgery. He examined her teeth finding "that all the teeth are splinted together in segments," which he found "extremely unusual." As a result, Claimant could not clean between her teeth. He noted an inflammatory response in her gum tissues. He recommended removing the splints and replacing them with individualized full crowns. He also opined that several of her teeth required root canals. (CX-1, p. 136).

On July 12, 2010, Claimant presented for a final evaluation. Dr. Edwards found that her current condition was directly related to the work-related injury. He opined that the treatment rendered in Kuwait was failing due to the entire upper arch being splinted together. He stated that she could lose her teeth if the decay caused was left untreated. He opined restorations needed to be re-made and the upper arch needs to be retreated. Claimant had developed a periapical abscess which will need root canal therapy. (CX-1, p. 141). Dr. Edwards developed an extensive treatment plan totaling $30,915.00. (CX-1, pp. 142-143).

Dr. Jesse C. Delee

On May 13, 2010, Dr. Delee completed a form letter for Carrier which indicated Claimant had persistent knee pain and needed heel wedges and possibly a brace for her left knee. He did not clear Claimant for work pending completion of treatment. (CX-1, p. 135).

Claimant presented to Dr. Delee's office on May 17, 2010. She noted improvement in her knee with 30 to 50 percent pain relief following a pes bursal injection. Dr. Delee noted that he asked Claimant to buy heel wedges "to unload her knee," but she had not done so. He reviewed a May 11, 2010 MRI, which indicated her tibia was slightly sublexed forward. Her ACL graft was intact, but it had stretched out and was "a little vertical." She had grade 4 changes in the medial compartment of her knee. He told Claimant that the chondral damage in the medial compartment of her knee was his biggest concern. He noted that she essentially had an arthritic medial compartment. He wanted to see her again in one month after she purchased heel wedges. (EX-12, p. 3).

On October 7, 2010, Claimant complained of severe pain in her knee. Dr. Delee placed the following restrictions on Claimant for three months: walking up to one hour, standing up to one hour, twisting up to one hour and no operating a motor vehicle. (EX-17, p. 5).

Claimant presented on October 21, 2010. Dr. Delee noted that her MRI showed no signs of a recurrent meniscus tear. She had a lax ACL with tendinopathy in the ACL, which he believed explained the laxity noted during her physical exam. She had grade 4 changes in the medial compartment of her knee, on the lateral tibial spine and in the lateral compartment of her knee. He opined that her feeling of catching was likely a result of the exposed femur bone coming into contact with the tibia. However, he noted that the catching episodes had decreased. (EX-12, p. 4).

He opined that Claimant would ultimately need a knee replacement, but he believed that she was too young and not experiencing enough difficulty to require immediate surgery. He opined that she could not perform her former work duties including climbing in and out of trucks, squatting, kneeling and climbing due to the degenerative changes to her knee. He opined that the current condition of her knee was caused by the original injury. He stated, "It could have been aggravated by the subsequent injury, but this would be difficult to prove." He recommended treatment consisting of intermittent use of anti-inflammatory medication, quad exercises and injections into the knee when necessary. (EX-12, p. 4).

On November 4, 2010, Dr. Delee limited Claimant to working four hours per day. He also restricted her from kneeling, walking long distances, operating a motor vehicle, squatting and climbing. (CX-1, p. 159). He reiterated those restrictions on December 2, 2010, because of left knee instability and locking back pain. (CX-1, p. 160).

UT Medicine of San Antonio Records

Claimant was treated by Dr. Michael McFarland on August 6, 2010. She was seeking a referral for a back specialist, cholesterol medication and sleep medication. She asked questions regarding her bowel movement after experiencing pain and bloating in her stomach. She was prescribed Gabapentin for her leg problem and Trazodone as a sleep aid. (EX-17, p. 4).

Claimant underwent a colonoscopy on November 24, 2010. (EX-17, p. 7). Claimant also underwent an esophagogastroduodenoscopy on November 24, 2010. A small quantity of altered blood and gastritis were found in her entire stomach. Duodenitis was found in the duodenal bulb and the second portion of the duodenum. It was recommended that Claimant avoid all non-steroidal anti-inflammatory drugs including Ibuprofen, Advil, Motrin and Nuprin. (EX-17, p. 8).

Dr. Arvo Neidre

Dr. Neidre evaluated Claimant on October 11, 2010, for complaints of low back pain and neck pain. (CX-1, p. 148). After examination, he noted that new MRI scans of her cervical and lumbar spine were required to determine the proper course of treatment. He opined that cervical epidurals were likely needed. (CX-1, p. 149).

MRI scans of the cervical and lumbar spine were performed on October 19, 2010. (CX-1, p. 152). The MRI of the cervical spine revealed mild congenital short pedicles with small AP canal diameter, moderate-sized focal disc protrusions at the C3-4 and C4-5 levels and spondylosis resulting in borderline spinal stenosis at the C5-6 and C6-7 levels. (CX-1, p. 152). The MRI of the lumbar spine revealed a small focal central disc protrusion with an annular tear at the L5-S1 level. (CX-1, p. 153). Dr. Neidre opined that she would benefit from epidural steroid injections. (CX-1, p. 155).

On November 2, 2010, Dr. Neidre's office noted that Carrier's claim examiner, Becky Roberts, stated Claimant "may use her personal health insurance for treatment regarding her litigated work related claim." (CX-1, p. 158).

Dr. Dennis Rodney Lee

Dr. Lee, a board-certified orthopedic surgeon, evaluated Claimant at the request of Employer/Carrier on February 23, 2011. He identified Claimant's work-related injury as three-fold: spine, right wrist and left knee. (EX-24; EX-25, p. 1; CX-1, p. 162).

He diagnosed Claimant was a cervical and possible lumbar strain superimposed upon pre-existing multi-level degenerative disc disease and arthritis of the cervical and lumbar spine. He found no evidence of a true herniation. He noted that Claimant should "be protected from any required heavy lifting, bending or

stooping" and sitting or standing for longer than two hours without a five-minute break. He stated, "I believe that [Claimant] has no evidence of a true physical abnormality of significance in the spine but may have some ongoing problems that have arisen since the time of the radiofrequency oblations as it does sound that there may be some minor nerve injury." (EX-25, p. 2; CX-1, p. 163).

Claimant reported improvement to her right wrist following the carpal tunnel syndrome surgery performed by Dr. DiLiberti. Dr. Lee's impression was a radial styloid fracture without significant ligamentous injury and mild de Quervains that was released through surgery. (EX-25, p. 2; CX-1, p. 163). He opined that Claimant should not be required to bear weight on her right wrist, perform pull ups or perform overhead lifting exceeding 25 pounds. He observed no secondary gain issues raised by Dr. Drazner. (EX-25, p 3; CX-1, p. 164).

With regard to Claimant's left knee, Dr. Lee found that she suffered from status-post ACL reconstruction with medial menisectomy and chondroplasty with extensive progressive chondromalacia. He opined that Claimant's work restrictions should preclude crawling, kneeling and extensive stair or ladder climbing. Dr. Lee noted that the degenerative changes to her knee were "markedly aggravated or increased over the past few years." (EX-25, p. 3; CX-1, p. 164). He believed that if a total knee replacement were required it would not be due to the pre-existent conditions but rather due to developments thereafter. (EX-25, p. 4; CX-1, p. 165).

Dr. Lee opined that Claimant's spine problems should be managed conservatively with home cervical traction and a TENS unit. He recommended a water walking exercise program and a quadriceps exercise program. He recommended a neoprene support for her wrist, a knee brace and use of an anti-inflammatory on a long-term basis. He believed that Claimant would have to learn to live with some of her problems. (EX-25, p. 4; CX-1, p. 165).

On February 16, 2011, Dr. Lee opined completed a form OCWP-5c and opined that with respect to her spine, Claimant was unable to perform her usual job but could return to work with permanent restrictions. He placed the following restrictions on Claimant: sitting, walking or standing for more than eight hours; bending or stooping for more than two hours; pushing or pulling more than 50 pounds. He also noted that Claimant would require five minute breaks every two hours. (CX-1, p. 166). He found that with respect to her knee, Claimant was unable to

perform her usual job but could return to work with permanent restrictions. He placed the following restrictions on Claimant: squatting, kneeling, climbing, operating a vehicle with a clutch, standing for more than six hours and bending or stooping for more than two hours. (CX-1, p. 167). He opined that with respect to her wrist, Claimant was capable of performing her usual job. (CX-1, p. 168).

In a supplemental report issued on March 21, 2011, Dr. Lee opined that Claimant was not totally disabled. He stated that Claimant would be restricted from driving a truck with a standard transmission because of her right wrist and left knee problems. He stated that Claimant was not disabled with regard to her spine, right wrist or left knee, but she was subject to limitations. (EX-26, p. 1).

He opined that Claimant had a pre-existing spine condition which "is the causation of [her] difficulty with the discs being degenerative in nature." He opined that Claimant also suffered from a neurological spinal complication caused by the rhyzotomies, but noted that the neurological complications were subjective and not measurable. He found that Claimant was partially disabled due to her spine condition, but it was not completely measurable because it was based on some of her subjective complaints. (EX-26, p. 2).

Dr. Lee found that there appeared to be no significant pre-existing condition related to Claimant's left knee injury. He rated her knee impairment as "minor." He opined that Claimant suffered from pre-existing carpal tunnel system, with regard to her right wrist, which he concluded could not have been totally created by a non-displacing fracture. He stated that the pre-existing conditions were the cause of Claimant's problems, but they were made more symptomatic by the accident. He could not quantify that amount. (EX-26, p. 2).

Dr. Lee issued a supplemental report on August 17, 2011. (EX-61). He opined that Claimant's range of motion in her left knee resulted in a 0 percent impairment. He rated her meniscectomy at 7 percent impairment and her ACL at 10 percent impairment. He added an additional 1 percent for aggravation of her pre-existent chondramalacia for a total permanent impairment rating of 18 percent. (EX-61, p. 1).

Drs. Irene Blaess and Richard Lemke

At the time of the formal hearing, Claimant's treating dentists were Drs. Blaess and Lemke. (CX-24, pp. 5-6). On March 21, 2011, Dr. Lemke opined that Claimant's teeth were damaged while working in Iraq. He noted multiple sources of infection and pain despite significant dental treatment. (CX-24, p. 6). He stated a draining abscess, violation of the biological width around her teeth and acid reflux led to his treatment plan. He recommended removing her remaining maxillary teeth and replacing them with up to eight implants. He opined that this treatment would provide long-term stability and relieve her pain. (CX-24, p. 6). He estimated that the treatment plan he proposed would cost $34,677.00. (CX-24, pp. 7-10).

Dr. Trisha Lunsford

Dr. Lunsford evaluated Claimant in follow-up on December 22, 2010, to review the results of her colonoscopy. Claimant reported that she was taking Excedrin twice daily for her back and knee pain. She was experiencing severe gastritis/duodenitis. (CX-24, p. 11). Dr. Lunsford recommended that she "hold NSAIDs if possible" take Tylenol XS, two tabs up to three times per day. (CX-24, p. 12).

On March 21, 2011, Dr. Lunsford opined that Claimant suffered from chronic constipation, overlap of pelvic floor dysfunction, chronic narcotic use and NSAID gastritis/duodenitis. (CX-24, pp. 14-15). She noted that Claimant's lower bowel symptoms had improved after ceasing narcotic medication. She stated that Claimant would have to contemplate extensive surgery for infection. (CX-24, p. 14).

The Vocational Evidence

Mr. Wallace Stanfill is a certified rehabilitation counselor and the owner and manager of Comprehensive Rehabilitation Services. (EX-29, p. 1). He did not conduct a personal interview or assessment of Claimant. At the request of Employer/Carrier, he prepared a report on March 17, 2011, based on Claimant's deposition, personnel records, academic records, vocational rehabilitation records and medical records. (EX-30, p. 1).

Mr. Stanfill noted that Claimant maintained her Texas Commercial Drivers license and Texas Motorcycle Drivers license.

Her commercial license included tanker and hazardous material endorsements. He noted that she completed her GED at Edmonds Community College in Lynnwood, Washington, and completed a flagging course and basic keyboarding course from the same college. (EX-30, p. 4).

He noted that Claimant's past relevant work experience exclusively involved working as a truck driver, which he reported was classified by the U. S. Department of Labor as medium exertional and semi-skilled. He described the physical demand of heavy, medium and light work all of which were exceeded by Claimant's job demands in her former position. He opined that the vehicle operation skills she acquired as a truck driver were "readily transferable to other light driving occupations." (EX-30, p. 5). He observed that she was participating in a vocational rehabilitation program with the Department of Labor, but a letter from her attorney indicated she may have to withdraw due to financial concerns. (EX-30, p. 6).

Mr. Stanfill observed that Claimant had received differing medical opinions. He opined that her current medical condition allowed her to resume working in her past truck driver positions, light to sedentary driving or alternative jobs. (EX-30, p. 7).

Mr. Stanfill used Claimant's records to complete a Labor Market Survey. He considered her age and education, work history and vocational background and physical limitations and capabilities in conducting the survey. (EX-30, p. 8). The following jobs were identified within the Houston, Texas area:

> 1) A "Truck Driver, Tractor Trailer" position for assignment in Fort Richardson, Alaska, with ManTech International Corporation. The employee would operate all tractor and trailers, heavy equipment and vehicles over varied terrain and roadways. The required duties included checking for proper loading and unloading of cargo, securing cargo, operating vehicle component material handling equipment, performing vehicle self-recovery and field expedients, conducting preventative maintenance checks and services, reporting vehicle deficiencies and preparing vehicles for shipment. The position required a high school diploma or GED, a Commercial Driver's License and five years of experience. The salary offered was $3,900.00 per month. The physical demands of the job were

not presented nor was the type of truck identified, i.e., standard or automatic transmission. (EX-30, p. 9).

2) A "HET Truck Driver" position for deployment to Kuwait with ITT Corporation. (EX-30, p. 9). The required duties included conducting preventative maintenance checks and services, performing proper rigging for a variety of equipment loads, assisting in the tie down of equipment and performing minor repairs on section vehicles. (EX-30, pp. 9-10). The position required a high school diploma or GED and five years of experience. The salary offered was $4,200.00 per month. The physical demands of the job were not listed. The type of truck to be driven was not identified. (EX-30, p. 10).

3) A "Truck Driver-Heavy" position for assignment in Afghanistan with ITT Corporation. The required duties included driving a truck over four tons, loading and unloading trucks, performing minor mechanical repairs and maintaining the truck. The position required a high school diploma or GED, a Commercial Driver's License with an A or B endorsement and two years of experience. The base salary offered was $3,800.00 per month. The type of truck to be driven and the physical demands of the job were not identified. (EX-30, p. 10).

4) A "Senior Vehicle Operator" position for deployment to McMurdo research station with Raytheon Technical Services Company. The required duties included operating shuttle service vehicles, training incoming employees, creating and maintaining work schedules, evaluating and documenting employee performance. The physical duties included frequently performing strenuous physical work, lifting and pushing up to 50 pounds, constantly moving 20 pound objects and frequently climbing vertical ladders. The position required a high school diploma or GED, a valid Driver's License and one year of experience. The base salary offered was $4,050.00 per month. (EX-30, p. 12).

5) A "Roll-Off-Truck Operator" position at Waste Management in San Antonio, Texas. The required duties included delivering containers and hauling of construction debris. The position was classified as "physically strenuous." The physical duties included lifting up to 75 pounds, pushing, pulling and bending. (EX-30, p. 12). The position required a Commercial Driver's License with an A

or B endorsement and airbrake endorsement and one year of experience. The type of truck to be driven was not identified. Wages started at $12.50 per hour. (EX-30, p. 13).

6) A "CDL Driver" position at Napa Auto Parts in San Antonio, Texas. The required duties included picking up pre-loaded trucks, making deliveries and unloading merchandise using manual equipment. The physical duties included occasionally pushing, pulling, lifting or moving heavy items without assistance. The position required a Commercial Driver's License with an A or B endorsement and a Hazmat Endorsement. Wages ranged from $16.00 to $18.00 per hour. (EX-30, p. 13).

7) A "Delivery Driver" position at Napa Auto Parts in San Antonio, Texas. The employee would be required to drive vehicles with standard and automatic transmissions. (EX-30, p. 13). A valid driver's license was required. Wages were $9.50 per hour. The physical demands of the job were not identified. (EX-30, p. 14).

8) A "Courtesy Bus Driver" position at Hertz, a car rental company, in San Antonio, Texas. The physical duties included regularly lifting up to 25 pounds. The position required a Class B Commercial Driver's License with a passenger endorsement and air brake endorsement. Wages were $9.50 per hour. (EX-30, p. 14).

9) A "Transporter" position at Hertz, a car rental company, in San Antonio, Texas. The required duties included moving vehicles between airport and off-airport locations. The position required a valid Driver's License. Wages were $8.00 per hour. The physical demands of the job were not identified. (EX-30, p. 14).

10) A "Customer Service Representative" position at TruGreen, a residential and commercial lawn maintenance company, in San Antonio, Texas. (EX-30, p. 14). The position required a high school diploma or GED and one to three months of experience and/or training in a related customer service field. Wages were $10.50 per hour. The physical demands of the job were not identified. (EX-30, p. 15).

Job Application Log

Claimant completed a job application log, for each position listed in the labor market survey. (CX-25).

Claimant spoke with someone at ManTech International who indicated that she was not qualified for the position. She spoke with someone at ITT Corporation on March 18, 2011, who stated she was not qualified for the position because it involved use of a clutch and heavy duty work. She spoke with the human resources representative at Raytheon Technical Services Company who stated she was not qualified for the position because she did not have a "P endorsement" on her driver's license and the position required heavy lifting. (CX-25, p. 1).

Claimant spoke with someone at Waste Management who indicated that she was not qualified because it was a "physically strenuous position" that required use of a clutch. She spoke with someone at Napa Auto Parts who indicated that she did not qualify for either position because both were "very physical." (cx-25, P. 1).

Claimant did not qualify for the Courtesy Bus Driver position at Hertz because she did not have a "P endorsement" on her license. (CX-25, p. 1). The transporter position at Hertz was filled. She spoke with three people at TruGreen who indicated that she did not have the experience the company was looking for with computers and lawn/horticulture. (CX-25, p. 2).

Claimant also applied for the position of temporary rural route carrier at the United States Postal Service. The medical department requested her medical records to make a final decision. She indicated that she had applied for several other positions but did not qualify because she did not speak Spanish. (CX-25, p. 2).

On May 4, 2010, Claimant received an email from Employer's HSE Coordinator. It indicated that she could not return to work for Employer until she received a full duty release with no restrictions. She stated light duty work was not available. Claimant would be required to work in excess of 12 hours per day, in very harsh conditions with extremely limited medical care. (CX-9).

The Contentions of the Parties

Claimant contends that the evidence establishes a **prima facie** case of compensable injuries occurring on August 14, 2007, to her teeth and jaw, and April 25, 2008, to her left knee, right wrist, neck, lumbar spine and head. She argues that she is entitled to reasonable and necessary medical treatment and should be reimbursed for medical expenses incurred. She further contends that her intestinal problems are a natural and unavoidable result of the treatment for her work-related injuries.

Claimant asserts that she has the right to choose her treating physician. She stated that she called four doctors seeking treatment, but each was denied authorization to treat her by Employer/Carrier.

Claimant argues that Employer/Carrier failed to provide substantial evidence showing that she is able to perform her usual job, entitling her to continuing disability compensation. She argues that Employer/Carrier wrongfully terminated compensation on April 6, 2010, contending that a physician found that she was able to return to work.

Alternatively, she asserts that she is entitled to 51.84 weeks of permanent partial disability for her left leg injury, based on the 18 percent impairment rating provided by Dr. Lee.

Claimant asserts that she applied for the positions listed in the labor market survey, in addition to other positions not listed on the survey, but was unsuccessful in securing employment. She argues that she does not qualify for most of the positions because of her restrictions or a lack of credentials. She contends that the U. S. Department of Labor vocational rehabilitation program requires that she not participate in any type of employment. Therefore, she argues that she is entitled to temporary total disability benefits from May 1, 2008 to July 1, 2010, and from July 8, 2010, continuing through the completion of the vocational rehabilitation program. She contends that she is also entitled to temporary total disability benefits for the periods that she missed work due to her injuries in August 2007 and January 2008. Finally, she contends that she is entitled to temporary partial disability benefits for the week in July 2010 where she obtained temporary employment earning $500.00.

Claimant argues her average weekly wage should be calculated under Section 10(c) of the Act and based on the 461 days that she worked for employer, taking into account 29 days of non-pay due to illness. Therefore, Claimant asserts her average weekly wage should be based on 432 days (461-29). Claimant argues that she earned $113,022.63 during her employment with Employer. She argues that the total earnings should be divided by the actual days worked ($113,022.63 ÷ 432 = $261.63 per day). She argues that her daily wage should be multiplied by seven, because she was a seven-day worker, making her average weekly wage $1,831.41.

Employer/Carrier admit that Claimant sustained objective injuries to her teeth, wrist and knee. However, they contend that there is no objective evidence of an injury to Claimant's neck and back. They argue that the injury to Claimant's back is degenerative disc disease, post-dating the work-related injury. Employer/Carrier assert that Claimant's knee reach maximum medical improvement with a 17 percent impairment rating. They argue that Claimant also reached maximum medical improvement with regard to her wrist and is not disabled with respect to her wrist. Finally, they argue that Claimant reached maximum medical improvement with regard to her neck and back.

Employer/Carrier argue that Claimant's average weekly wage with respect to the August 2007 injury was $1,356.44, taking into account all of her earnings within the year immediately preceding the injury including earnings with a prior employer. They assert that Claimant's average weekly wage with respect to the April 2008 injury $1,888.20, taking into account all of her earnings within the year immediately preceding the injury.

Employer/Carrier argue that Claimant has an earning capacity of $35,000 per year or alternatively $945.00 per week. They assert that Claimant's exploration of the jobs listed in the Labor Market Survey was "less than impressive and denoted a lack of desire on her part to get work."

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).

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).

Although Dr. Drazner's medical records indicate that he believed Claimant was disability posturing and malingering, I found that her testimony at hearing, deposition, and history as stated to various health care professionals were consistent. Accordingly, I find and conclude that Claimant's testimony is credible.

I found internal contradictions in the reports prepared by Dr. Drazner. When Claimant began treatment with Dr. Drazner he referred her to Dr. Duncan for rhizotomy treatments of her back. However, Dr. Drazner later opined that Claimant did not suffer an acute injury to her back. On March 10, 2010, Dr. Drazner noted it was unlikely Claimant would "test in a full-duty status." Nevertheless, he found that claimant had reached MMI, and release her to full-duty work. Given these internal inconsistencies, I will give little weight to the conclusions reached by Dr. Drazner.

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 that the evidence establishes a **prima facie** case of compensable injuries occurring on August 14, 2007, to her teeth and jaw, and April 25, 2008, to her left knee, right wrist, neck, lumbar spine and head. She further contends that her intestinal problems are a natural and unavoidable result of the treatment for her work-related injuries. Employer/Carrier admit that Claimant sustained objective injuries to her teeth, right wrist and left knee. However, they contend that there is no objective evidence of an injury to Claimant's neck and back.

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).

In the instant case, injury is undisputed with regard to Claimant's teeth, jaw, right wrist and left knee. I find Claimant made credible subjective complaints of pain to her neck and back. On November 6, 2008, Dr. Thomas diagnosed her with a cervical and lumbar herniated nucleus pulposus. On May 1, 2009, Dr. Drazner diagnosed Claimant with a lumbar sprain/strain with multilevel degenerative disc disease without cord or nerve root impingement and a mid cervical sprain/strain. He concluded that Dr. Thomas had exaggerated her back injury. However, both doctors agreed that Claimant had sustained an injury to her cervical and lumbar spine. She also testified that her back made impact with the rocky ground during her April 25, 2008 accident.

Claimant contends that Employer/Carrier are liable for her intestinal problems because they are the natural and unavoidable result of her work-related injury. If there has been a **subsequent non-work-related injury or aggravation**, the Employer/Carrier are liable for the entire disability **if** the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898 (1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

In October 2010, Dr. Delee recommended intermittent use of anti-inflammatory medication. In February 2011, Dr. Lee also recommended use of an anti-inflammatory on a long-term basis. Dr. Lunsford noted that Claimant was taking Excedrin twice daily for her back and knee pain. In March 2011, Dr. Lunsford diagnosed Claimant with NSAID gastritis/duodenitis. Therefore, I find Claimant's NSAID gastritis/duodenitis was the natural or unavoidable result of her work-related injury.

Thus, Claimant has established a **prima facie** case that she suffered an "injury" under the Act, having established that she suffered a harm or pain on August 14, 2007, to her teeth and jaw, and April 25, 2008, to her left knee, right wrist, cervical spine and lumbar spine, and subsequently NSAID gastritis/duodenitis as a residual of her treatment and that her working conditions and activities on those dates 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").

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 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).

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/Carrier argue that Claimant's back problems are not compensable because they post-date the April 25, 2008 work-injury. They argue that the initial MRI of Claimant's spine revealed no evidence of acute injury. They assert that the injury is not compensable based on Dr. Lee's statement that Claimant had "no evidence of a true physical abnormality of significance in the spine but may have some ongoing problems that have arisen since the time of the radiofrequency oblations." They also rely on statements made by Dr. Drazner indicating that Claimant did not suffer an acute injury to her neck and back. They also assert that Claimant was disability posturing and malingering.

Considering the foregoing in conjunction with Kier, supra, I find and conclude Employer/Carrier have arguably presented substantial evidence sufficient to rebut Claimant's **prima facie** case with regards to her neck and lower-back condition.

3. Weighing All the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Assuming, **arguendo**, that Employer/Carrier rebutted Claimant's **prima facie** case, I will consider whether the record, as a whole, establishes the compensability of Claimant's alleged injuries under the Act.

Employer/Carrier rely on Claimant's MRIs and Dr. Lee's assertion that there was no evidence of a true physical abnormality of Claimant's spine. The MRI performed on January 5, 2008, revealed moderate disc protrusions at C3-C4, C4-C5 and C5-C6 and moderate to significant disc protrusions at C6-C7. The MRI of her cervical spine performed on May 23, 2008,

revealed multilevel disc degenerative changes, with no evidence of focal extrusion or neural compression.

Claimant's record testimony and statements to medical care providers are consistent in that back and neck pain did exist and never fully resolved. She was provided a neck collar during her treatment in Kuwait following the accident. Both Drs. Thomas and Drazner found that Claimant suffered from degenerative disc disease superimposed on an injury to the cervical and lumbar spine. Dr. Drazner opined that she suffered from a cervical and lumbar sprain/strain and referred her for treatment with Dr. Duncan, who performed the rhizotomies. In his first evaluation of Claimant, Dr. Lee identified a spinal injury as part of Claimant's work-related injury. He diagnosed Claimant with a cervical and possible lumbar strain superimposed upon pre-existing multi-level degenerative disc disease and arthritis of the cervical and lumbar spine. Dr. Lee opined that Claimant also suffered from a neurological spinal complication caused by the rhizotomies. Thus, the preponderance of the medical evidence establishes that Claimant's degenerative disc disease condition was aggravated, accelerated or rendered symptomatic by her April 25, 2008 work-injury and subsequent treatment.

Given the foregoing, I find Claimant has shown after weighing the entire record that she suffers from a compensable injury to her neck and back as a result of the work-related accident that occurred on April 25, 2008. Claimant has also shown that she suffered a compensable injury to her teeth, jaw, right wrist and left knee.

C. Nature and Extent of Disability

Having found that Claimant suffers from compensable injuries, however 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.

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, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

On three occasions during March 2010 and April 2010, Dr. Drazner opined that Claimant had reached maximum medical improvement with regard to her right wrist, left knee and spine, and he found that she was completely capable of a full-duty work release. However, the preponderance of the medical evidence of record following the full-duty work release by Dr. Drazner does not support this opinion.

Following the full-duty work release by Dr. Drazner on April 10, 2010, Claimant did not seek medical treatment for her right wrist condition. On February 16, 2011, Dr. Lee opined that with respect to her right wrist, Claimant was capable of performing her usual job. Dr. Lee released her without restrictions, with regard to her wrist. Claimant acknowledged that her wrist injury was not inhibiting her daily activities. She did not disagree with Dr. Lee's evaluation. Therefore, I find that Claimant reached maximum medical improvement with regard to her right wrist on April 10, 2010.

Following the full-duty work release by Dr. Drazner, Claimant continued to seek medical treatment for her left knee condition. In May 2010, Dr. Delee diagnosed Claimant with chondral damage in the medial compartment of her left knee, which he noted has essentially an arthritic medial compartment. On November 4, 2010, Dr. Delee placed work restrictions on Claimant with respect to her left knee. In February 2011,

Claimant's physical therapist opined that her functional capacity exam revealed that she was unable to return to heavy or very heavy work. On February 16, 2011, Dr. Lee opined that with respect to her left knee Claimant was incapable of performing her usual job, but could return to work with permanent restrictions. On August 17, 2011, Dr. Lee issued a supplemental report concluding that Claimant had a permanent impairment rating of 18 percent for her left knee. Therefore, based on the preponderance of the medical evidence presented I find that Claimant reached maximum medical improvement with regard to her left knee on November 4, 2011, when Dr. Delee, her treating physician, issued permanent work restrictions.

Following the full-duty work release by Dr. Drazner, Claimant continued to seek medical treatment for her spine condition. In October 2010, Dr. Neidre opined that Claimant would benefit from epidural steroid shots. On February 16, 2011, Dr. Lee opined that with respect to her spine Claimant was incapable of performing her usual job, but could return to work with permanent restrictions. In February 2011, Claimant's physical therapist opined that her functional capacity exam revealed that she was unable to return to heavy or very heavy work. Therefore, based on the preponderance of the medical evidence presented I find that Claimant reached maximum medical improvement with respect to her cervical and lumbar spine on February 16, 2011.

In view of the foregoing, I find Claimant reached maximum medical improvement with respect to her right wrist on April 10, 2010, with respect to her left knee on November 4, 2010 and with respect to her spine on February 16, 2011.

On November 4, 2010, Dr. Delee placed work restrictions on Claimant with respect to her left knee. He limited Claimant to working four hours per day. He also restricted her from kneeling, walking long distances, operating a motor vehicle, squatting and climbing. In his February 16, 2011 and February 23, 2011 reports, Dr. Lee placed restrictions on Claimant. Specifically, Claimant's spinal injuries prevented her from walking or standing for more than eight hours, bending or stooping for more than two hours and pushing or pulling more than 50 pounds. Claimant's knee injury prevented her from squatting, kneeling, climbing, **operating a vehicle with a clutch**, standing for more than six hours and bending or stooping for more than two hours. Thus, while indicating Claimant could return to work in some diminished capacity, both Drs. Delee and Lee determined Claimant could not return to her former position

as a truck driver because of her work-related knee and back injuries. Therefore, Claimant has established a **prima facie** claim of total disability. I find that Claimant became permanently totally disabled on November 4, 2010, when Dr. Delee issued permanent work restrictions which prevented her from returning to her position as a truck driver.

The Scheduled Injury

It is well-settled that a worker entitled to permanent partial disability for an injury arising under the Section 8(c) schedule provision of the Act, such as here, may also be entitled to greater compensation under Section 8(a) and (b) by showing that she is totally disabled. Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 277, n.17, 14 BRBS 363, 366-367 n.17 (CRT)(1980); Davenport v. Daytona Marine & Boat Works, 16 BRBS 196, 199 (1984). Unless the worker is totally disabled, however, she is limited to compensation provided by the appropriate schedule provision of Section 8(c). Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984). Accordingly, Claimant's entitlement to the scheduled and unscheduled provisions of the Act will be considered.

The scheduled permanent partial disability rates established by Sections 8(c)(1) through 8(c)(20) of the Act are the minimum levels of compensation to which an injured employee is automatically entitled as a result of her injury and no proof of actual loss of wage-earning capacity is required in order to receive at least the amount specified in the schedule for such injury. See Travelers Insurance Company v. Cardillo, 225 F.2d 136 (2d Cir. 1955), cert. denied, 350 U.S. 913 (1955); Greto v. Blakeslee, Arpaia & Chapman, 10 BRBS 1000 (1979).

In determining the appropriate impairment rating for a scheduled injury, the Board has held that the determination must be based upon a consideration of physical factors alone. Bachich v. Seatrain Terminals, 9 BRBS 184, 197 (1978). Any disability resulting from the impairment that results in economic loss is irrelevant. Masse v. Frank J. Holleran, Inc., 9 BRBS 1053, 1054-1055 (1978). Although any economic loss is irrelevant, I can properly consider Claimant's ability to return to work at her regular job as evidence in determining whether or not Claimant has sustained any measure of permanent physical impairment. Id.; Michael v. Sun Shipbuilding & Dry Dock Co., 7 BRBS 5 (1977).

In determining Claimant's impairment rating, I may also properly rely on medical evaluations as well as Claimant's own description of her symptoms and the physical effects of her injury. Amato v. Pittston Stevedoring Corp., 6 BRBS 537 (1977). I cannot award benefits for pain and suffering, but I can consider Claimant's pain and its symptoms in determining the extent of her degree of impairment. Young v. Todd Pacific Shipyards Corp., 17 BRBS 201 (1985); Pimpinella v. Universal Maritime Service, Inc., 27 BRBS 154, 159-160 (1993).

In the absence of regulations, the Act does not require adherence to any particular guide or formula to determine disability. Rosa v. Director, OWCP, 33 BRBS 121 (CRT)(9th Cir. 1998).

The burden is on Claimant to establish the nature and extent of her impairment. Hunigman v. Sun Shipbuilding and Dry Dock Co., 8 BRBS 141, 145 (1978); see also, Harrison v. Potomac Electric Power Co., 8 BRBS 313, 314 (1978).

One medical opinion has been offered in this matter regarding the extent of Claimant's knee injury. Dr. Lee opined that Claimant's range of motion in her left knee resulted in a 0 percent impairment. He rated her meniscectomy at 7 percent impairment and her ACL reconstruction at 10 percent impairment. He added an additional 1 percent for aggravation of her pre-existent chondramalacia for a total permanent impairment rating of 18 percent. I find Dr. Lee's rating to be reasonable and accurate.

Section 8(c)(2) of the Act sets the scheduled benefits for the permanent loss (or loss of use) of a leg at 288 weeks of pay at a rate of 66 2/3 percent of a claimant's average weekly wage. In this case, Claimant suffered a permanent impairment of 18 percent to her left leg, entitling her to a total of 18 percent of the 288 weeks scheduled for a total loss in accordance with Section 8(c)(10). Consequently, Claimant is entitled to 51.84 weeks of compensation (288 weeks x .18 = 51.84 weeks). Based on Claimant's average weekly wage of $1,883.00, as discussed below, or a compensation amount of $1,160.36 per week, the maximum compensation rate for the National Average Weekly Wage,[3] she is entitled to $1,160.36 per week for 51.84 weeks which yields a total of $60,153.06 ($1,160.36 x 51.84 weeks = $60,153.06).

[3] See http://www.dol.gov/owcp/dlhwc/nawwinfo.htm.

Since Claimant is due both scheduled and unscheduled benefit payments, the combined payments cannot exceed the statutory limit set forth in Section 8(a) of the Act for permanent total disability. Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995). Claimant will be entitled to the scheduled award if, and when, she is no longer totally disabled since she cannot receive more than 66 2/3 percent of her average weekly wage in compensation payments.

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).

As previously discussed, Claimant has established a **prima facie** case of total disability as of May 1, 2008, considering the requirements of her job at the time of the workplace accident on April 25, 2008, and the work limitations placed on

Claimant by Dr. Delee and Dr. Lee. Employer/Carrier did not establish any vocational evidence until March 17, 2011, when Mr. Stanfill, a Certified Rehabilitation Counselor, reviewed Claimant's medical records and prepared a labor market survey.

At the time of Mr. Stanfill's labor market survey of March 17, 2011, several doctors had assigned permanent work restrictions for Claimant. On November 4, 2010, Dr. Delee limited Claimant to working four hours per day. He also restricted her from kneeling, walking long distances, operating a motor vehicle, squatting and climbing. He reiterated those restrictions on December 2, 2010. On February 16, 2011, Dr. Lee placed the following restrictions on Claimant with respect to her spine: sitting, walking or standing for more than eight hours; bending or stooping for more than two hours; pushing or pulling more than 50 pounds. He also noted that Claimant would require five minute breaks every two hours. He found that with respect to her knee, Claimant could not squat, kneel, climb, operate a vehicle with a clutch, stand for more than six hours and bend or stoop for more than two hours.

I find and conclude Mr. Stanfill's labor market survey was not sufficient to establish suitable alternative employment. The report either fails to allow for comparison of the jobs' physical requirements identified by Mr. Stanfill with Claimant's physical restrictions based on the medical opinions of record or fails to comport with Claimant's physical restrictions. The descriptions provided for the "Truck Driver, Tractor Trailer," "HET Truck Driver," "Truck Driver-Heavy," "Senior Vehicle Operator," "Roll-Off-Truck Operator," "CDL Driver," "Courtesy Bus Driver" and "Transporter" positions fail to allow for a comparison because they do not indicate whether operation of a vehicle with a clutch is required. The "Delivery Driver" position does not comport with Claimant's physical restrictions because it requires operation of a truck with a standard transmission. The description of the "Customer Service Representative" position fails to allow for a comparison of the job's requirements with Claimant's physical restrictions.

None of the jobs in the labor market survey met the Employer/Carrier's burden of proof for establishing suitable alternative employment. Some of the positions may have comported with Claimant's physical restrictions, but their descriptions did not meet the standard of specificity required for the undersigned to compare with Claimant's physical limitations. Accordingly, I find and conclude Employer/Carrier

did not meet their burden to establish suitable alternative employment after May 1, 2008.

Furthermore, I find Claimant has made a diligent effort to obtain employment. She inquired about the positions on Mr. Stanfill's 2011 labor market survey and applied for the positions that were available at that time. She has also performed job searches on her own. The record reflects her efforts in applying for numerous cashier positions and a position with the United States Postal Service. She was also participating in a U.S. Department of Labor sponsored vocational rehabilitation program at the time of the formal hearing. While she has not been successful in her search, she has made a diligent effort in attempting to obtain employment.

Moreover, a claimant may receive continuing permanent total disability compensation where the employer has established the availability of suitable alternate employment, but the claimant is precluded from working because she is undergoing vocational rehabilitation. Abbott, supra. Assuming, **arguendo**, that Employer/Carrier established the availability of suitable alternate employment, Claimant is entitled to continuing permanent total disability compensation because she is participating in a U.S. Department of Labor-sponsored vocational rehabilitation program.

In view of the foregoing, I find Employer/Carrier shall pay Claimant temporary total disability compensation for the period of May 1, 2008, when she ceased working for Employer, to July 1, 2010, and from July 8, 2010 through November 3, 2010, when Claimant achieved MMI with respect to her left knee. She is entitled to temporary partial disability benefits from July 1, 2008 to July 8, 2010, based on two-thirds of the difference between the earnings of $500.00 and her average weekly wage discussed below. Employer/Carrier shall also pay Claimant permanent total disability from November 4, 2010, and continuing thereafter.

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 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).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, her annual earnings are computed using her actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, her average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning

capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held, under Section 10(c), that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the **wages at the employment where he was injured** would best adequately reflect the Claimant's earning capacity at the time of the injury.

Sections 10(a) and 10(b) do not apply because Claimant was a 7-day worker. I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

In K.S. v. Service Employees International, Incorporated, 43 BRBS 136 (2009), the Board, in its Order on Reconsideration En Banc, affirmed its Decision and Order that under the extant circumstances a "claimant's average weekly wage must be calculated based solely on the his earnings in Kuwait and Iraq in order to reflect his earning capacity in the employment in which he was injured." The Board noted that in K.S., which is not substantially factually distinct from the instant case, the claimant was paid substantially higher wages to work overseas than he earned stateside, the claimant's employment entailed dangerous working conditions, and the claimant was hired to work full-time under a one-year contract. Under such circumstances, the Board concluded that the claimant's earnings in Iraq are determinative of his annual earning capacity. K.S., 43 BRBS 20-21.

The Board rejected employer's contention that it was usurping the administrative law judge's discretionary authority to determine the claimant's average weekly wage pursuant to Section 10(c). It was noted that although the administrative law judge is afforded broad discretion, that discretion is not unfettered. The Board observed that its holding regarding the use of overseas wages **provides the legal framework within which the administrative law judge may exercise his discretion** in determining the amount of claimant's average weekly wage. K.S., 43 BRBS 137.

The Board reemphasized that the objective of Section 10(c) is "to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury." It held, based on the facts in the case, "claimant's average weekly wage **must be [calculated] solely** on the higher wages he was paid in his overseas employment as it best reflects his annual wage-earning capacity at the time of injury." Id.

Because Claimant meets the specific requirements set forth therein, I find that the Board's holding in K.S. applies to the instant case, and its holding is binding authority on the undersigned. Accordingly, I find Claimant's average weekly wage should be determined solely by her overseas earnings which is the legal framework within which my discretion may be exercised as provided in K.S. As such, not only do I agree with, but also I am required to follow the Board's holding in K.S. as precedent. Accordingly, I shall calculate Claimant's average weekly wage consistent with the rationale of K.S.

Based on the Wage Detail records (EX-22) provided by Employer, I find that an average of Claimant's wages from the 52 weeks preceding the April 25, 2008 injury adequately reflects her daily wage earning capacity. The Wage Detail records indicate Claimant grossed $86,619.20 and worked for 322 days in the 52 weeks preceding her injury. This yields an average daily wage of $269.00 ($86,619.20 ÷ 322 days = $269.00). Claimant worked seven days per week. Therefore, her average weekly wage is $1,883.00. ($269.00 x 7 days = $1,883.00).

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 suffered compensable injuries on August 14, 2007 and April 25, 2008, and is entitled to ongoing medical benefits.

Therefore, Employer/Carrier is liable for all reasonable and necessary medical expenses related to the August 14, 2007 injury to Claimant's teeth and jaw, and the April 25, 2008 injuries to her left knee, right wrist, cervical spine and lumbar spine, and the residual NSAID gastritis/duodenitis from her medical treatment.

Moreover, Claimant has requested authorization to treat with her choice of physician for her injuries, which is considered reasonable and is hereby granted. Claimant is entitled to all reasonable and necessary medical expenses arising from her teeth, jaw, left knee, right wrist, cervical and lumbar spine and NSAID gastritis/duodenitis conditions, to include reimbursement of any out-of-pocket medical expenses.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier paid Claimant temporary total disability compensation benefits from May 7, 2008 through April 6, 2010, when payments ceased. Employer/Carrier filed their first notice of controversion on April 26, 2010, 20 days after cessation of payments.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of her injury or compensation was due.[4] Thus, Employer was liable for Claimant's total disability compensation payments on May 9, 2008 and began payments of benefits on May 7, 2008. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by May 4, 2010, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer/Carrier filed a

[4] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

timely notice of controversion on April 26, 2010, and is not liable for Section 14(e) penalties.

VI. 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.

VII. 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.[5] A

[5] 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

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 May 1, 2008 to July 1, 2010 and from July 8, 2010 through November 3, 2010, based on Claimant's average weekly wage of $1,883.00, and a maximum compensation rate of $1,160.36, 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 temporary partial disability from July 1, 2010 to July 8, 2010, based on two-thirds of the difference between Claimant's average weekly wage of $1,883.00 and her reduced weekly earning capacity of $500.00 in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay Claimant compensation for permanent total disability from November 4, 2010, to present and continuing thereafter based on Claimant's average weekly wage of $1,883.00, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

4. Employer/Carrier shall pay Claimant compensation for permanent partial disability for an 18 percent scheduled impairment to her left knee/leg based on two-thirds of Claimant's average weekly wage of $1,883.00 for 51.84 weeks or a total of $60,153.06, in accordance with the provisions of Section 8(c) of the Act, and as discussed in this Decision and Order. 33 U.S.C. § 908(c)(2) and (19).

5. Employer/Carrier shall pay Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2011, for the applicable period of permanent total disability.

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for Claimant is entitled to a fee award for services rendered after **AUGUST 16, 2010**, the date this matter was referred from the District Director.

6. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 14, 2007 and April 25, 2008, work injuries, pursuant to the provisions of Section 7 of the Act, to include reimbursement of any out-of-pocket medical expenses.

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

8. Employer/Carrier 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).

10. 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 22nd day of December, 2011, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge