

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 August 2011

CASE NO.: 2010-LDA-00527

OWCP NO.: 02-193007

In the Matter of:

RONALD WEST,
Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.,
Employer,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier.

Appearances: GARY PITTS, ESQ.
PITTS & MILLS
For the Claimant

JAMES AZZARELLO, JR., ESQ.
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
For the Employer/Carrier

Before: STEPHEN W. WEBSTER
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

INTRODUCTION

This is an action for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, (Act), as extended, 42 U.S.C. §§ 1651 *et seq.*, filed by the Claimant, for an injury suffered on October 4, 2009, while working for SERVICE EMPLOYEES INTERNATIONAL, INC., the Employer, which was insured by the Insurance Company of the State of Pennsylvania (collectively the Respondents). It was initiated with the Office of Administrative Law Judges (OALJ) on September 9, 2010, when it was referred to the OALJ for

formal hearing by the District Director of the Office of Workers' Compensation Programs (OWCP). The matter came on for hearing on May 4, 2011.

For the reasons set forth below, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

STIPULATIONS AND ISSUES

The parties stipulated to the following:

1. The Act applies to this claim.
2. An employer-employee relationship existed at the time of injury.
3. There was coverage under the Defense Base Act.
4. The claim was timely noticed and timely filed.
5. No compensation or medical benefits have been provided.
6. Claimant's average weekly wage was \$1,731.00.

TR 9-11.

The parties set forth the following issues to be decided:

1. Injury arising out of and occurring in the course of employment to Claimant's left knee, left ankle, left hip, back, and aggravation of high blood pressure.
2. Periods of temporary total disability. Claimant requesting 10/06/2009 to present and continuing.
3. Extent of medical improvement. (Date of Maximum Medical Improvement)
4. Respondent's liability for medical treatment.
5. Nature and extent of disability.
6. Ability to perform regular or modified work, or any work.

Id.

The Claimant filed a post trial brief on June 30, 2011, in which he raised the issue of work caused depression. Respondents objected through a Motion to Strike filed on July 6, 2011. This issue was raised for the first time in the post trial brief. At the hearing, I specifically asked the parties if I had correctly stated the stipulations and issues. Claimant's counsel indicated that I had overlooked the lower back in my statement, but otherwise covered the matter thoroughly. *TR 10, lines 17 to 25.* Claimant will not be allowed to raise the issue for the first time in his brief.

Claimant's exhibits 1 through 14 were admitted without objection. *CX 1-14*. Respondents' exhibits 1 through 16 were admitted without objection. *RX 1-16*. Respondents were given leave to file a medical report from Dr. Edward Berghausen. The report of May 4, 2011, was subsequently received, and will be designated as *RX 17*.

FACTUAL BACKGROUND

SUMMARY

Claimant testified that he was fifty-one years of age and had been born in Los Angeles. He left school in the twelfth grade, but finished high school in the military. He served in the Army for three years and was honorably discharged. He attended college for about two years but did not receive a degree. He attended truck driving school, and worked as a truck driver. He began working for the Employer on June 12, 2004 in Iraq, where he worked for about thirteen months. He again worked for the employer in Iraq from July of 2007 until his injury on October 4, 2009. *TR at 17-23*.

With regard to his work for Employer, Claimant began on June 12, 2004, as a truck driver. His job was to haul various types of fuel. He drove in convoys which were attacked every day. The roads which he traveled were rough and full of holes, and he was required to drive at very high rates of speed. *Id. at 22-26*. He was required to wear heavy protective gear. *Id. at 28-30*. In his second tour in Iraq, Claimant was initially tasked with setting up tool rooms throughout the country. *Id. at 23*. Later he was employed delivering the mail. *Id. at 24-26*. At the time of injury, and sometime before that, he was employed getting the mail trucks ready for use. *Id. at 35*. It was while doing this job that he was injured on October 4, 2010. He stepped down off of a truck and twisted his left leg. *Id. at 35-36*.

STATEMENT OF CLAIMANT

The Claimant's statement was taken on October 29, 2009 at the Bangkok Hospital in Thailand by an investigator with Tangiers International. At the time of the interview, Claimant indicated that he was taking morphine for pain, but would have no problems answering questions. *RX 7 at 1-3*. He went to a computer school in 1982 and to college in 1986. He took courses in engineering, criminal law and real estate, but did not earn a degree. He also went to truck driving school when he got out of the military. His civilian carrier was in truck driving. *Id. at 13-16*. He was in the U.S. Army in Germany, and his job was as a gunner, loader, and driver of tanks. He served from 1978 to 1981, and received an honorable discharge. *Id. 7 at 16*.

He was employed by Kellogg Brown & Root (KBR) in 2004 to 2007 in Iraq as a fuel truck driver. He returned home but started work again in 2007 for KBR. *RX 7 at 25-26*. His job duties in 2007 involved backing trucks full of mail to the dock, and when they were empty, moving them from the dock. He unhooked trailers from trucks, and took trucks to dispatch. He would have to make sure that the trucks were washed, check the tires, and make sure that they were ready for their mission. He would climb up and down the truck cabs fifty times per day. *Id. at 27*.

He stated that he did not have any general or chronic health problems prior to working for KBR. He did have a torn anterior cruciate ligament (ACL) in 1996, and had right hip replacement surgery in 2008. That surgery was in Bangkok Hospital. He did twist his left leg prior to the current injury, in about 2008, but went back to work. *Id. at 40-44.* After his right hip surgery he returned to work and was fine. *Id. at 46-47.*

Prior to the current injury he felt dizzy and went to the clinic for blood pressure monitoring, but was cleared to work. The injury happened on October 4th at about 8:30 a.m. in the morning. He twisted his leg getting down from a truck. He believes that he stepped on a rock. He reported the injury to his foreman, who took him to the medics by truck. *Id. at 49-62.* At the clinic he was given some ice, and Ace bandages, and Motrin. They wanted him to do light duty, but he was going to be sent to Dubai for blood pressure testing. *Id. at 49-69.*

He arrived in Dubai on October 7 or 8 of 2009. He was seen at the Canadian Hospital, where his blood pressure was checked out. He was cleared for work with regard to the blood pressure. He also saw doctors regarding his leg, and got a CAT SCAN. He was told that he needed further treatment. Apparently, the Employer offered to send him to the United States. However, he asked to go to Thailand. He had been previously treated in Thailand and he could afford to stay there. *Id. at 72-82.*

He was told by Jamie in "HR" that he was terminated for being unsafe. This apparently was by telephone. This was evidently as of October 15 (2009). *Id. at 86-87.* (The exhibit file does not document this contention).

DEPOSITION OF CLAIMANT

The deposition of Claimant was taken on August 3, 2010 at Tucson, Arizona. *RX 8.* He was born in Los Angeles, California on March 16, 1960. He attended high school but did not graduate. However, he finished high school in the military. He served in the army for three years and received an honorable discharge. He was a gun loader in the army. After the military he worked at Garwood Industries and attended college. He did not receive a degree. *Id. at 3-4.* He was first employed by Employer in 2004, and he worked until 2005. He was then employed again in 2007. *Id. at 6.*

During the twenty years following the 1980s and until he worked for Employer, he was as truck driver. He did have an injury to his left knee during this time, in 1996 or 1997. He did not have surgery, but got better with medication and physical therapy. He was eventually returned to work. He had a workers' compensation claim, which he settled. *Id. at 6-7.*

He went to work for Employer due to bad economic times in Arizona. He went through processing in Houston, filling out paperwork and getting a physical examination. This was in June of 2004. He had only one duty station in Iraq, at Balad. His job was to drive tanker trucks, and he remained there for over a year. *Id. at 9.*

He returned to Tucson and worked for Phoenix Fuels, driving a tanker truck. He returned to Employer in about June of 2007. He first worked a tool room attendant. He then applied for and

got a position as a truck driver, hauling the mail. He did get “R&R” about once every four months, and when he did, he went to Thailand. *Id. at 9-11.* When he was driving the mail, it was in convoys protected by the military. The convoys were never under attack, unlike in his first tour when they were hit almost every day. *Id. at p12.*

He suffered an injury on October 4, 2009, when he hurt his left leg. At the time, his job was to work in the yard. He had to “bump up” the tires, making sure that there were no flats. He had to pull the trucks away that were loaded and put them in the ready line. When the trucks came in he had to make sure that they were unloaded and placed in the empty line. He did not do the actual unloading. He had to climb up and down from the trucks to clean the windows. *Id. at 13.*

At the time of the accident he was feeling dizzy. He was being seen at the clinic for blood pressure monitoring, but was cleared to work even though he did not feel well. He had been referred to EAP for counseling around this time. He saw two different counselors who were very nice. They counseled him regarding job problems. (*No records from EAP were submitted*). He was scheduled to go to a hospital in Dubai for a blood pressure check when the accident occurred. *Id. at 14-15.*

He was injured when he got down from a truck and twisted his leg. His supervisor took him to the medics by truck. He was scheduled to go to the hospital in Dubai for blood pressure monitoring at the time, and he did go there. He did ask about treatment for his leg at the hospital, but was told that he was there for blood pressure monitoring. He did see a doctor at the hospital for testing of his leg, on his own. He was terminated at this time for “being unsafe”. After termination he was asked if he wished to return to the America, but he chose Thailand because he had past medical treatment there and knew everybody. *Id. at 17-18.*

He went to Thailand and care under the care of Dr. Suradej Loiduenxal. This doctor had previously performed a right hip replacement for Claimant. Claimant told him about his left knee, his left ankle, and some back pain. The doctor told him that a knee replacement surgery was needed. Claimant really did not understand the medical terminology, as it “went right over my head”. The doctor did a knee replacement, in October, and it help tremendously. He was in the hospital for about two weeks. He got out of the hospital in November and spent November and December recovering. He had pain in his knee, his foot, and his back. His back pain was about right at the belt line. His surgeon wanted him to see a back doctor, and he did briefly. His surgeon then advised him that he needed hip replacement surgery on the left side. This was a surprise to him as he was having back pain. Left hip replacement surgery was done in February of 2010. The doctor found that he had reached maximum medical improvement in May of 2010, but he could not return to work. *Id. at p20-24.*

He returned to the states and went to the Veterans Administration (VA) for treatment. They assisted him with hip and knee strengthening. They also provided him with blood pressure medication. He has also seen Dr. Hassman for treatment. He did go to the employment development department, but was not eligible for benefits. He doesn’t think that he could work for his prior employer, Phoenix Fuels, because he cannot climb stairs or sit for prolonged periods of time. *Id. at 25-27.*

TESTIMONY OF CLAIMANT

Only the Claimant testified in this matter, and was questioned first by his counsel. Claimant, Ronald West, testified that he was 51 years of age and was born in Los Angeles, California. He grew up in Pico Rivera. He attended high school to the twelfth grade, but finished high school through the military. He served in the United States Army for three years as an armored crewman, and received an honorable discharge. *TR at 17.*

After the army he worked at Garwoods Laboratories, and then attended college full time. He studied engineering, music, art, math, and reading. He attended trucking school, and then he attended college for about two years but did not get a degree. *TR at 18.* He worked as an over the road truck driver for a number of companies. *Id. at 19.*

He decided to work overseas due to a bad economy. He worked for KBR or their subsidiary Service Employees International. He left the United States for Iraq on June 12, 2004. His first tour was for thirteen months. His job was as a truck driver hauling different types of fuel. *Id. at 21.*

He drove tanker trucks in convoys. During the thirteen months of his tour, the convoys were attacked every day. He was never physically injured but he saw a colleague injured, burned alive. *Id. at 21-22.*

After thirteen months he went home for awhile. He returned to Iraq in July of 2007, and worked until his accident of October 4, 2009. *Id. at 22-23.* He was going to go back as a truck driver, but could not pass the seat belt test. He is a very large guy and they would not provide seat belt extensions. Instead he took a tool room position, which lasted for about eighteen months. He traveled the country setting up tool rooms and checking on inventory. He traveled by airplane, helicopter, or truck. *Id. at 23-24.*

After the first eighteen months, he got a job driving the mail. He drove a Mercedes Benz truck. The roads were very rough, and the trucks have no air seats. The roads were in very bad condition and he would have to drive over them at very high speeds, up to seventy-five miles per hour. *Id. at 24-26.*

During both of his tours he worked twelve hours per day, seven days per week. On occasion he worked twenty-four hours straight. He was required to wear protective gear; helmet, ear plugs, goggles, and vests. At first the vests had metal plates. Just before he left the country he got a kelvar vest. The equipment was very heavy. *Id. at 27-30.*

When he first went overseas, he weighed about 245 pounds. On his second tour, he weighed between 300 and 320 pounds. At the present time he weighs about 360 pounds. *Id. at 30.*

Before he went overseas he had suffered a torn ACL in his left knee. Before his first deployment, the doctor cleared him to work. He admitted that he could run, jog, ride a bike, squat, climb a ladder, and that he had no pain or instability. He was taking no medication. He denied degenerative problems in the left hip, and the hip was not bothering him prior to his first

deployment. He admitted to back problems, but said that they weren't anything that ibuprofen couldn't handle. *Id. at 30-32.*

Claimant admitted that he had taken Wellbutrin for mild depression prior to going to Iraq, but had stopped. He had no blood pressure problems prior to going overseas. He felt that his general health was pretty good prior to going overseas, and he was able to work full time without physical limitation. He passed a physical examination before going overseas. *Id. at 32-34.*

In October of 2009, his foreman asked him to inventory the trucks, and he worked out a way to account for everything. He worked in the yard. He would have to get the trucks ready for their mission, getting up and down off of them all of the time. He was having dizzy spells and he went to the clinic to have it checked out. He was placed on seven-day blood pressure testing but otherwise released to work. On October 4, 2009, he still felt dizzy. He was washing the windows on a truck, and when he got off he twisted his left knee. He reported to his foreman and was taken to the employers' clinic. He was given Ibuprofen. He was suffering pain in his left leg, ankle, knee, and back. *Id. at 35-37.*

He did return to the clinic after this for blood pressure monitoring. He testified that he asked for treatment of his leg. He was sent to Dubai for his high blood pressure evaluation. He stated that he asked about his leg while at the hospital in Dubai, but was told that he was there for high blood pressure only. He was told that he was okay to return to work. He said that he was terminated while there. (*It is noted that there no documentary evidence of the termination was submitted*). *Id. at 38-39.*

He requested treatment for his leg, but there was never any offer of treatment. He, and his health insurance company, paid for x-rays and care for the leg in Dubai. He had to pay for his own hotel. He went to Thailand for treatment, as his private insurance would pay 100 percent of his care. Thailand was less expensive than Dubai and he had been treated by a doctor there. When in Thailand, he waited for a period of time to hear from the Employer's insurance company. When he did not hear, he went ahead with treatment. *Id. at 39-41.*

He did provide a copy of a report by his doctor to the workers' compensation carrier (*CX 1 at 43*), but they provided him with no care, and stated that the matter had been turned over to their attorneys. *Id. at 41.* He decided that he had no choice but to proceed with treatment. *Id. at 41.* His general health insurance company, Aetna, paid for his treatment. *Id. at 42.*

He did have total knee replacement and total hip replacement surgery. After the surgeries he did have back pain, which has continued. *Id. at 44.*

When he first went overseas he did notice a lot of back pain. He had to carry about one hundred pounds of equipment from the hooch to his truck. This was in 2005, before his injury. *Id. at 44-46.*

Since his left knee and left hip surgeries, his back pain has been getting worse. He did go to the VA in 2006, and was told that he had the hips of a ninety year old man. *Id. at 46.* He had gone off of Wellbutrin before going overseas, but started again in about June of 2010, and has been on

it since that time. *Id. at 46-47*. Before going overseas he had really good sleep, but since then he has had nightmares and night terrors. He stated that this was due to the attacks on convoys. *Id. at 48*. He has had concentration problems since his return from Iraq. *Id. at 49*.

The claimant was questioned by Respondents' counsel. He admitted that it was important to tell a medical provider everything that was bothering him. He might not mention a one-time thing, like a cut. He admitted that back pain would be important. With regard to the injury of October 4, 2009, he hurt his left leg and foot. Although his testimony was somewhat evasive, he did admit that he did not report back pain when he went to the clinic on October 4. *Id. at 53-55*.

He stated that he had been developing back pain from the time that he arrived in Iraq, but did not see the medics for back pain while in Iraq. He did not go to a doctor while on "R&R" for back pain. *Id. at 56-57*. He recalled giving a statement to an investigator from Tangiers investigators while in Thailand, and he told the truth. He recalled having his deposition taken, and he told the truth. *Id. at 57-59*.

On further questioning by Claimant's counsel, he stated that he did mention back pain to his surgeon in Thailand, and to Dr. Hassman. He cooperated with the vocational expert. *Id. at 61-62*.

MEDICAL TREATMENT

A review of the submitted medical record reveals the following information. Claimant visited the Veterans Administration Medical Center in Phoenix in May of 2004. His file reveals that his "labs" were normal. He had an orthopedic consultation regarding an old ACL tear in his left knee. He denied pain in the left knee and stated that he could conduct regular daily living activities, and could jog, ride a bike, and swim with no discomfort. He was taking no medication and was using no braces. The doctor indicated that Claimant could go a number of years before needing treatment. *CR 1 at 2-3*. A doctor prepared a letter to that effect on May 6, 2004. *CR 1 at 4-6*.

On May 24, 2004, Claimant filled out two questionnaires for the Employer. On one Medical Questionnaire he indicated that he had occasional back pain. *RX 2 at 41*. On a Confidential Questionnaire of the same date he denied current back complaints as well as problems bending squatting, or climbing stairs. *RX 2 at 48*. In addition, a pre-employment physical of the same date found Claimant to be within normal limits with regard to his back and lower extremities. *Id. at 55*.

Claimant testified that he was seen by the Veterans Administration in 2006 for back pain, and was told that he had the hips of a ninety year old man. *TR at 46, lines 18-19*. (*However, I did not see this visit reported in the submitted medical record.*)

Claimant once again filled out a Medical Questionnaire for the employer on June 26, 2007, and indicated that he had occasional back and knee problems. *CX 1 at p18*. A medical examination was performed for the Employer on the same date and the Claimant's back and lower extremities were found to be within normal limits. *Id. at p25*.

Claimant had right hip replacement surgery in April of 2008. *RX 8 at 8-13*. The surgery was performed by Dr. Suradej Loiduennxal M.D. at the Bangkok Hospital in Thailand. *RX 2 at 5-13*. Claimant was released by his surgeon for full duty on June 24, 2008. *Id. at 14*.

On September 27, 2009, the Claimant reported to Employer's clinic with complaints of stress, but was unable to give specific complaints or information. He was placed on a seven day blood pressure monitoring schedule and referred to EAP for evaluation of mental health. *CX 1 at 29-30*. (*It is noted that no mental health records were submitted*). He was referred to the Canadian Hospital in Dubai for further blood pressure monitoring on October 5, 2009, but was otherwise returned to work. *Id. at p32*.

On October 4, 2009, the Claimant stepped down from a truck and twisted his left leg. He testified that he reported to the Employer's clinic shortly after the incident. *TR at 35-36; RX 1 at 1-3*. The Claimant testified that he complained of left leg, left ankle, left knee and back pain. *TR at 37*. However, it is noted that claimant complained of only left knee and left foot pain at the clinic. *CX 1 at 31*.

As noted above, Claimant was referred to the Canadian Hospital in Dubai for evaluation of his blood pressure. *CX 1 at 29-30*. Claimant testified that he asked about his leg before leaving, but was told that this evaluation was for high blood pressure only. *TR at 38*. When in Dubai the Claimant was evaluated for his high blood pressure, given medication, and pronounced fit to return to work. *CX 1 at 40*. Claimant testified that he again asked about his leg while at the hospital. *TR at 38*. Claimant testified that he paid for testing and treatment for his lower extremity while at that hospital. *Id. at 39*.

Claimant stated that he then went to Thailand for treatment because it would be covered by his private insurance. *Id. at 39*. Apparently, there was no initial conservative care or therapy to Claimant's lower extremity in Thailand. He was admitted to Bangkok Hospital under the care of Dr. Suradej Loiduennxai M.D., and he had total knee replacement surgery. On January 10, 2010, the doctor noted that he had returned to nearly 100% function of the knee. However, problems with the left hip were noted. *CX 1 at 41-42*. On February 10, 2010 Dr. Loiduennxai performed a total left hip replacement. Dr. Loiduennxai authored two reports on March 10, 2010. In the first report the doctor noted that Claimant had not reached maximum medical improvement, and should avoid physical demand or heavy activity. The doctor felt that Claimant had a 40% work function deficit, and had some degree of back pain. *Id. at 40*. In the second report, Dr. Loiduennxai reviewed Claimant's treatment, and once again indicated a 40% deficit in working ability, and indicated that Claimant could not return to previous work. *Id. at 44-45*. On May 10, 2010, Dr. Loiduennxai completed a Department of Labor form (OWCP-5C) imposing very severe restrictions and indicating that Claimant could not work in a war zone. *Id. at 46*.

On July 29, 2010, Claimant was examined by Dr. Jeri Hassman M.D. She prepared a medical report of the same date. Dr. Hassman found total replacement of both hips, and of the left knee. As well, she found morbid obesity, hypertension, and a tightness for lumbar range of motion. Dr. Hassman also indicated that Claimant suffered from stress and anxiety. She indicated that Claimant was not able to return to work in a war zone secondary to all of his conditions. She

further indicated that Claimant was not cleared to lift more than twenty pounds, and was not cleared to perform repetitive bending, stooping, or squatting. He also needed to avoid any stressful work environments because of hypertension and anxiety. *CX 1 at 8-51.*

Claimant was seen by Dr. Edward Berghausen M.D. on November 1, 2010, who prepared a medical report of the same date. Dr. Berghausen indicated that the twisting injury of October 4, 2009 aggravated Claimant's underlying left knee osteoarthritis. He did not feel that the left hip was aggravated by the industrial event but was pre-existing. He also felt that the Claimant's obesity aided in the natural progression of the knee problem. *RX 10.*

Dr. Berghausen prepared a supplemental report of his findings on December 13, 2010. With regard to the Claimant's left leg, Dr. Berghausen stated that he should have returned to pre-injury status with conservative care by three months following injury. He also stated that Claimant returned to pre-injury status without impairment. He indicated that Claimant was not totally disabled. However, Dr. Berghausen stated that, in light of his hip replacement and knee replacement surgeries, Claimant could not work in a war zone. *RX 10 at 52-54. (As I understand Dr. Berghausen's findings, he believed that Claimant should have returned to pre-injury status with conservative care, having no disability).*

Claimant returned to the VA for treatment. He submitted records from December 17, 2010 to April 5, 2011. *CX 1 at 55-63, 65-74.* Claimant was seen on December 17, 2010, complaining of back, hip, and knee pains. *Id. at 56.* He noted low back pain that shot down his buttocks and legs, and electric and blunt pain in his hips and knees. He denied weakness or loss of sensation in the lower extremities, but denied bowel or bladder problems. He stated that his medications were not helping him. It was noted that he had received some physical therapy. *Id. at 56.* It was noted that Claimant's symptoms were suggestive of radiculopathy but that straight leg testing was negative. He was advised to lose weight. It was further noted that he had been to the gym and was working with two trainers, and a nutritionist. *Id. at 57.* An orthopedic consultation also was done on December 17, 2010. The hip and knee replacement surgeries were noted, and the replacements were stable. Claimant had a full range of motion of his hips. Pain seemed to be coming mainly from the lower back. He was advised to see his primary care physician for medication. He was advised to contact his surgeon in Thailand to see if the hip replacements had been recalled. *Id. at 55.* Claimant was again seen on January 3, 2011, complaining of pain in back and buttocks. X-rays showed degenerative changes in, unchanged from prior films (*it is noted that the prior x-ray results were not provided*). There were no acute changes in the spine and straight leg raising was negative. Vicodin was prescribed, and physical therapy ordered. It was noted that his hypertension was under good control. *Id. at 61.* Claimant was again seen on February 7, 2011 complaining of chronic back pain and insomnia. An MRI was ordered. *Id. at 65.* The MRI was performed on March 31, 2011. The test showed multilevel degenerative disease with bulky facet arthropathy and moderate to severe central canal compromise from L1-L2 to L4-S1. *Id. at 68-69.* Claimant was seen on April 4, 2011 for review of the noted MRI. He complained of back pain radiating into the lower extremities, and of walking with a limp. No obvious limp was noted. Straight leg raising was noted as 5/5 (*negative*). He was referred for a neurological consultation. *Id. at 71.*

Claimant saw Dr. Hassman on January 12, and January 20, 2011. Dr. Hassman's findings were similar to her report of July 29 2010, except that she noted chronic back pain. Her impression was underlying degenerative joint disease of the left knee and left hip exacerbated by the twisting injury of October 4, 2009, and chronic back pain exacerbated by the foregoing, as well as by obesity. She stated that Claimant could not work in a war zone, and would not be safe to perform moderate or heavy work. He was not cleared to lift more than twenty pounds, or to perform repetitive bending stooping or squatting. She also indicated that Claimant needed to avoid any stressful work environment because of hypertension and anxiety. *Id. at 48-51; 63-64.* He once again saw Dr. Hassman on April 6, 2011. She noted chronic back pain exacerbated by bilateral hip pain and knee pain, and obesity. The doctor noted her review of the MRI. She advised continued use of a TNS unit, and indicated that a neurosurgery consult was pending, as well as a sleep study for sleep apnea. *Id. at 75-76.*

Claimant saw Dr. Craig Hoover M.D., at the request of Respondents, on January 11, 2011. Dr. Hoover prepared a report of his findings on January 14, 2011. *RX 14 at 1-4.* Dr. Hoover reviewed Claimant's history, and concluded on page 3 of his report:

Mr. West is a 50 year old gentleman with a history of hypertension diagnosed in 2009. This has been appropriately treated and reasonably well controlled since that time. It is my opinion that within reasonable medical probability, this diagnosis represents essential hypertension, and that his condition is unrelated to his prior employment or industrial injury of 10/4/2009. He has no complications related to his high blood pressure. With adequate control, hypertension does not preclude him from employment. ...

Additionally, at page 4, Dr. Hoover stated:

... Mr. West will continue to require blood pressure monitoring and treatment through his physicians. As stated above, it is my opinion that this does not represent a disability. The concept of maximal medical improvement is therefore not applicable. ...

Dr. Berghausen prepared another supplemental report, dated May 4, 2011, apparently in response to Dr. Hassman's report of April 6, 2011. (*It is noted that Dr. Berghausen refers to Dr. Hassman as "he" in his review of her findings.*) *RX 17.* On page 2 of his report, Dr. Berghausen states:

It is my opinion, therefore, that the low back condition predated the year 2009 industrial event and with degenerative changes present according to the records by Dr. Hassman of the year 2006 clearly indicating that these are not related by causation to the industrial injury.

The records of Dr. Hassman also identify x-rays taken in the year 2006 which he reviewed identifying advanced osteoarthritis of both of his hips such that he underwent an unrelated prior right total hip replacement in year 2008 secondary to degenerative joint disease of the right hip.

It is my opinion that left hip osteoarthritis would have progressed in an identical fashion even absent the industrial injury of 2009. The industrial injury did not result in any left hip pain based upon the records that were available to me for review....

VOCATIONAL REPORT

Respondents provided a vocational report from Shelley Lindley M. Ed., CRC, dated April 22, 2011. Ms. Lindley concluded that Claimant's transferable skills were truck driving skills; skills as a delivery driver; ability to follow management directives; and inventory skills. His educational background involved a high school diploma, and some college. She submitted potential jobs, namely: trailer-rental clerk; radio dispatcher (government); audit clerk; production coordinator; service dispatcher (utilities); and order clerk. She did not discuss how Claimant's background prepared him for any of these occupations. She listed two current job openings in the Tucson, Arizona area. *RX 16 at 1-13.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant contends that he sustained compensable injury to his left ankle, left knee, left hip, left leg, back, hypertension, anxiety, and depression (*see my previous discussion of depression*). Respondents denied injury, as well as responsibility for compensation and medical treatment.

The Claimant's Credibility

I have had the opportunity of hearing only the Claimant's testimony in this matter, and observing his manner and appearance, which forms a part of the evidence in the record. As the U.S. Court of Appeals for the Ninth Circuit has explained, the credibility of witnesses "involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963); *see also Indiana Metal Prods. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971). Insofar as credibility must be weighed as part of the resolution of certain issues, I have based my findings of credibility on a review of the entire testimonial record and exhibits, according due regard to the demeanor of the witness, the logic of probability, and "the test of plausibility," in light of all circumstances apparent to me from the record. *Indiana Metal*, 442 F.2d at 5.

I find that the Claimant is a somewhat credible witness. Claimant said that he had back pain during the course of his tours in Iraq, but admitted that he did not seek treatment for his back. He said that he hurt his back when injured on October 4, 2009, but made no report of back injury at the time. However, The MRI conducted at the VA showed significant degenerative disc disease. *CX 1 at 65.* This type of degenerative disease does not happen overnight, and it doubtless had occurred over quite some time. Dr. Loiduenxai noted back pain in a March 10, 2010 report. *Id. at 40.* In December of 2010, Claimant was seen at the VA complaining of back pain. *Id. at 56.* He was seen by Dr. Hassman, who first noted a tightness in lumbar range of motion on July 29, 2010. I am convinced that the back pain came about after the left knee and hip surgeries, which aggravated Claimant's compromised back, as indicated by Dr. Hassman in her report of April 6, 2011. *Id. at 75, 76.* There is no real doubt that the Claimant suffered an

injury to his left leg on October 4, 2009, or that he reported it to the Employer's agents. I do not doubt that Claimant sought medical care, and that the medical care did aggravate his already compromised back.

I do not doubt Claimant's testimony that he had no blood pressure problems prior to his work for Employer. I do not doubt the accuracy of Claimant's testimony regarding the conditions of his employment. He worked long hours in a hot, dusty, and miserable environment. He drove in convoys that were in constant attack during his first tour in Iraq.

Credibility Determinations and Weight Accorded to Medical Opinions

In arriving at a decision, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence, to draw his own inferences from such evidence, and is not bound to accept the opinion or theory of any particular medical examiner or other expert witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615 (9th Cir. 1999). 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. *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3d Cir. 1975). Resolving factual disputes among the medical experts is central to this case. In cases under the Act, the judge determines the credibility and weight to be attached to the testimony of a medical expert. It is solely within the judge's discretion to accept or reject all or any part of any testimony, according to his judgment. *Perini Corp. v. Hyde*, 306 F. Supp. 1321, 1327 (D.R.I. 1969). In evaluating expert testimony, the judge may rely on his own common sense. *Avondale Indus., Inc. v. Dir., OWCP*, 977 F.2d 186, 189 (5th Cir. 1992). A judge is not bound to accept the opinion of a physician if rational inferences urge a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Ennis v. O. Hearne*, 223 F.2d 755, 758 (4th Cir. 1955). The judge, furthermore, may base one finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 157 (1993). (ALJ may rely on one medical expert's opinion on the issue of causation and on another's opinion on the issue of disability). Nonetheless, the opinion of a Claimant's treating physician is generally to be accorded greater weight, since the treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Amos v. Dir., OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Duhagon*, 31 BRBS at 101; *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 n.3 (2003). The opinion of a treating physician that a claimant is unable to work at his former job is generally entitled to greater weight than the opinion of a non-treating physician. *Downs v. Dir., OWCP*, 152 F.3d 924, at n1 (9th Cir. 1998) (*Table*) (Jul. 10, 1998). A treating physician's opinions are "not, however, necessarily conclusive as to either a physical condition or the ultimate issue of disability," and the ALJ retains the discretion to disregard even an uncontradicted opinion of a treating physician when the ALJ can identify clear reasons for doing so. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (Health and Human Services administrative law decision).

The Veterans Administration. The VA has served as a neutral treating source for Claimant. The records show that he was treated for back complaints, and suffered from underlying degenerative disc disease. *CX 1 at 55-74*. The MRI taken at the VA facility showed degenerative disc disease. *Id.* This type of disease is not something that happens overnight. Claimant has been referred for neurosurgical consultation regarding his back. They also show that he was treated for high blood pressure, which was controlled by medication. *Id.*

Dr. Suradej Loiduennxal M.D. Dr. Loiduennxal is the surgeon who treated Claimant in Thailand. His actual qualifications are unknown to me however, he apparently performed successful surgery on the Claimant. Dr. Loiduennxal noted that claimant had a 40% work deficit and could not work in a war zone. The doctor also felt that Claimant had not reached maximum medical improvement. *CX 1 at 44-45*. However, he also filled out a Department of Labor form indicated restrictions which would seem somewhat excessive (and concluded that Claimant had reached MMI). *Id. at 46*.

Dr. Edward Berghausen M.D. Dr. Berghausen is a physician with outstanding qualifications. He served an orthopedic consultant to Respondents in this matter. Dr. Berghausen indicated that, if only the Claimant had received conservative care complete recovery would have been achieved in three months. *CX 1 at 52-54*. This, of course, is complete speculation. The Employer neglected to provide care, leaving Claimant to his own devices. He followed the advice of his treating doctor and had surgery. Dr. Berghausen acknowledged that Claimant had underlying degenerative problems with his back and hip, but indicated that the injury did not cause or aggravate these problems. *RX 17*. This too must be treated as speculation, since he did not support his conclusion. However, he did acknowledge that Claimant could not work in a war zone. *Id.*

Dr. Jeri Hassman M.D. Dr. Hassman's role is not entirely clear. She does not appear to be engaged in active treatment of Claimant however, her reports appear to be more in the nature of a treating consultation than medical-legal reporting. From her letterhead, Dr. Hassman appears to be a board certified specialist in physical and rehabilitative medicine, however, I have not been provided with a "cv" for the doctor. Dr. Hassman found bilateral hip replacement, left knee replacement, obesity, back pain (aggravated by the foregoing), hypertension, depression, and anxiety. She noted that Claimant was not cleared to lift more than twenty pounds, nor to perform repetitive bending, stooping or squatting, and could not work in a war zone. She also indicated that Claimant needed to avoid any stressful work environment because of hypertension and anxiety. She also noted that Claimant had a pending neurosurgical evaluation. *CX 1 at 48-51; 63-64; 75-76*. I find Dr. Hassman's reporting to be the most persuasive with regard to Claimant's orthopedic problems. Although it is noted that Claimant's blood pressure problems and his anxiety are outside of her area of practice.

Dr. Craig Hoover M.D. Dr. Hoover is a board certified cardiologist, who saw Claimant at the request of Respondents. Dr. Hoover found an essential hypertension, controlled by medication, which produced no work limitations. He did not feel that Claimant's hypertension had been caused or aggravated by Claimant's prior employment or the injury of October 4, 2009. *RX 14 at 1-4*. Dr. Hoover apparently did not have Dr. Hassman's reports. The record would indicate that Claimant's hypertension is controlled by medication and causes no work limitations.

Credibility Determinations and Weight Accorded to Vocational Expert

Vocational consultant Shelley Lindley prepared a report dated April 22, 2001. *RX 16 at 1-13*. She noted Claimant's education and prior employment, and noted six potential jobs. *Id.* She never explained how Claimant's past experience would qualify him for any of the tendered positions. In addition, she listed two openings in the Tucson area, a major metropolitan area. Frankly, her report gave the appearance of being hurried and put together at the last minute.

Prima Facie Case

It has been consistently held that the Longshore Act must be liberally construed in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Keenan v. Dir., Benefits Rev. Bd.*, 392 F.3d 1041, 1043 (9th Cir. 2004); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the so-called "true doubt rule," which was previously used to resolve factual doubt in favor of Longshore claimants in cases where the evidence was evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 281(1994), *aff'g* 990 F.2d 730 (3d Cir. 1993).

Under § 20(a) of the Act, a court may presume that a claimant's injury relates to his or her employment. *See Pedroza v. BRB*, 583 F.3d 1139, 1143 (9th Cir. 2009); *Kelaita v. TripleA Mach. Shop*, 13 BRB326, 331 (BRB 1981). To establish a *prima facie* case for compensation, the initial burden is on the Claimant to prove 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, aggravated, or accelerated his harm or pain. *See U.S. Indus/Fed. Sheet Metal, Inc. v. Dir., OWCP*, 455 U.S. 608, 615 (1982); *Ramey v. Stevedoring Servs. of America*, 134 F3d 954, 959 (9th Cir. 1998); *Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). The Claimant need not establish a connection between the harm or pain and the work-related accident. Under Section 20(a), once the claimant has established physical harm or pain and that there was a work-related accident that could have caused the harm or pain, he is afforded a rebuttable presumption that the two elements are casually connected. 33 U.S.C. § 920(a). If Claimant establishes a *prima facie* case, the burden shifts to the Employer to rebut the Claimant's *prima facie* case with substantial countervailing evidence. *See James v. Pate Stevedoring Co.*, 22 BRBS 271(1989). In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152 (2nd Cir. 1991). The term injury means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment. *See 33 U.S.C. § 902(2)*. The injury need not be the sole cause or factor of the claimant's disability. Under the aggravation rule, if the employment-related injury contributes to, combines with, or aggravates a preexisting disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir 1986). The 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. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom, Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir.1982). Once the

presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts, not mere speculation, that the harm was not work-related. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-688 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. See *Rainey v. Dir., OWCP*, 517 F.3d 632, 637(2d Cir. 2008); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an unquantifiable hearing loss prior to his compensation claim against employer for a hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based on a misreading of a medical table insufficient to rebut the presumption). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

I do not doubt that Claimant suffered injury to his left leg on October 4, 2009, or that the treatment for the injury aggravated his previously compromised left hip and back, as the record supports these facts. Therefore, as to the left knee, left hip, and back, I find that the Claimant has established a *prima facie* case.

I do not doubt Claimant's testimony that he had no blood pressure problems prior to his work for Employer. I do not doubt the accuracy of Claimant's testimony regarding the conditions of his employment. He worked long hours in a hot, dusty, and miserable environment. He drove in convoys that were in constant attack during his first tour in Iraq. He provided a medical report from Dr. Hessman to the effect that the stress and anxiety of his employment caused his hypertension. *CX I at 50*. Therefore, I find that the Claimant has established a *prima facie* case with regard to his blood pressure.

Respondents' Rebuttal

Respondents seek to rebut the § 20(a) presumption through the reporting of Dr. Berghausen. Dr. Berghausen's thesis seems to be that if Claimant had received conservative care he would have returned to work with no disability. *RX I at 10*. As a rebuttal tool, this utterly fails. A second thesis propounded by Dr. Berghausen is that Claimant had preexisting back and hip problems which would have lightened up absent the industrial injury. *Id. at 17*. The doctor offers no more than his bare conclusion, which is insufficient to rebut the presumption.

Respondent's provided a medical report from Dr. Craig Hoover, a board certified cardiologist. *RX 14*. Dr. Hoover concluded that Claimant had essential hypertension unrelated to his work, was controlled by medication, and produced no work limitations. *Id. at 4*. Dr. Hoover's opinion was based on his examination, review of medicals, and Claimant's deposition. This appears sufficient to rebut the presumption with regard to hypertension.

Causation of Hypertension

Viewed in the light most favorable to Claimant, the evidence in this regard is evenly balanced, and thus, the Respondents must prevail. *Director, OWCP v. Greenwich Collieries, supra*.

Nature and Extent of Disability

Having established a work-related injury, the burden rests on the Claimant to prove the nature and extent of his disability, if any, from those injuries. See *Trask v. Lockheed Shipbldg. Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is defined in the Act as “incapacity because of an injury to earn the wages which the employee was receiving at the time of injury in the same or any other reemployment.” 33 U.S.C. § 902(10). The claimant must have an economic loss coupled with a physical or psychological impairment, to receive a disability award. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). The concept of disability is based on two classifications, the nature or duration of the disability (temporary or permanent) and the degree of disability (total or partial). *Palombo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991) (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991)). See also 33 U.S.C. § 908(a)-(e). Following these standards, an employee will be found to either have no loss, a total loss, or a partial loss of wage earning capacity.

Nature of Disability: The nature of a disability can be either permanent or temporary. A claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). See *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Trask*, 17 BRBS at 60. Any disability before reaching MMI would thus, be temporary in nature. MMI is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve, and it is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of MMI marks the end of the temporary period of disability, and any remaining injury thereafter is considered permanent. *Palombo*, 937 F.2d at 76. Determining the date of MMI is a question of fact based upon the medical evidence in the record. See *Ballestros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). In making a factual determination, I am entitled to weigh the medical evidence and draw my own inferences without being bound to accept the opinion or theory of any particular medical examiner. See *Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, Claimant has established a work related injury of October 4, 2009. After a review of the record, I find Claimant to be temporarily disabled as a result of this injury.

With the exception of Dr. Hoover, while there may be degrees of disagreement among the doctors as to causation, they all agree that he cannot return to his prior work. Additionally, Dr. Hessman noted that a neurosurgical evaluation was pending regarding Claimant’s back. CX I, p76. Thus, it appears that Claimant condition has not reached MMI, and there is nothing conclusive to suggest that the condition is lasting or indefinite. I therefore, find that Claimant is temporarily disabled as he has not reached MMI.

Extent of Disability: A three-step burden-shifting process is employed when analyzing whether the claimant is totally or partially disabled. *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976). First, the claimant must establish a *prima facie* claim by demonstrating that he can no longer perform his former job due to his job-related injury. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56 (1985). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). A doctor's opinion that return to the employee's usual work would aggravate his condition may support a finding of total disability. *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). Once a *prima facie* case for total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment (SAE). *Trans-State Dredging v. Benefits Review Bd. (Tarner)*, 731 F.2d 199 (4th Cir. 1984), *rev'g Tarner v. Trans-State Dredging*, 13 BRBS 53 (1980); *P&M Crane*, 930 F.2d at 430; *Turner*, 661 F.2d at 1038; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. *Palombo v. Director, OWCP, supra*; *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish SAE retroactively to the day the claimant reached MMI, even if the jobs are no longer available at the time of the survey. *New Port News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). In establishing SAE, the employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides, which the claimant is capable of performing considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041 (5th Cir. 1981). *See also American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 97 (1989); *Young v. Todd Pac. Shipyards*, 17 BRBS 201, 203 (1985).

The employer must prove the availability of actual, not theoretical employment opportunities. *Turner*, 661 F.2d at 1042; *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). A failure to establish SAE results in a finding of total disability.

As I previously noted, the vocation report appeared hurried and put together at the last minute. *RX 16 at 1-16*. The vocational expert never really explained how Claimant's education and experience prepared him to work in any of the tendered job categories. She then noted two potential jobs in the Tucson, a major metropolitan area. I find that the Respondents did not meet their burden.

Therefore, I find that the Claimant is entitled to temporary total disability benefits from October 6, 2009 to the present and continuing, based on the stipulated average weekly wage of \$1,731.00.

Medical Benefits

The Respondents have provided no medical benefits. Based on the above and foregoing, they are obligated to provide present and future medical benefits for Claimant's orthopedic injuries. Claimant has requested "reimbursement" of medical expenses. However, he has only provided a listing of payments by his health care provider. CX 9 Section 907(d)(1)(B) allows for reimbursement if the employer neglected to provide medical services, as was the case here. There is no indication if the treating doctor in Thailand timely submitted medical reports as required by § 907(d)(2). 33 U.S.C. 907(d)(2). However, the Act states that the Secretary may excuse the failure to furnish such reports whenever he finds it to be in the interest of justice. *Id.* Unfortunately, the Benefits Review Board has held that the authority to determine whether non-compliance with Section 7(d)(2) may be excused rests with the District Director and not the administrative law judge. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72, 75 (1995); *Toyer v. Bethlehem SteelCorp.*, 28 BRBS 347 (1994); *see also* 33 U.S.C. § 939(a); 20 C.F.R. § 701.201. Thus, based on the BRB's decision in *Toyer*, I would have no authority to excuse the failure to submit medical reports to the carrier within 10 days after the Claimant's first treatment.

CONCLUSION

In conclusion, the Claimant is temporarily totally disabled from his orthopedic injuries. He is entitled to temporary total disability benefits beginning October 6, 2009, based on the stipulated average weekly wage of \$1,731. The Claimant is additionally entitled to future medical expenses and treatment for his injuries. He is also entitled to reimbursement for his past medical expenses for these work-related injuries if the District Director determines that any failure to comply with the requirements of § 907(d)(2) with regard any medical providers should be excused in the interest of justice.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that:

1. Employees International, Inc. and Insurance Company of the State of Pennsylvania shall pay temporary total disability benefits to the Claimant beginning October 6, 2009, and continuing based on an average weekly wage of \$1,731.00 for his injury.
2. Service Employees International, Inc. and Insurance Company of the State of Pennsylvania shall pay all of the Claimant's future reasonable and necessary medical expenses and treatment of his orthopedic injuries.
3. The District Director shall determine whether the Claimant's failure to comply with the reporting requirements of Section 907(d)(2), if any, should be excused for the Claimant's past medical expenses. If the District Director finds that the Claimant is entitled to reimbursement for these expenses, the Claimant shall provide the District Director documentation of such expenses, and Service Employees International, Inc. and Insurance Company of the State of Pennsylvania shall reimburse the Claimant the expenses determined by the District Director.

4. Service Employees International, Inc. and Insurance Company of the State of Pennsylvania shall pay interest on all past due medical expenses that are reimbursed at the rates prescribed under 28 U.S.C. § 1961.

5. All computations are subject to verification by the District Director who, in addition, shall make all calculations necessary to carry out this Order.

6. Counsel for the Claimant shall submit a fully supported application for costs and fees to Respondents' counsel and to me. Within 20 days thereafter, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of initial fee petition, provide the undersigned and Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with Respondents' counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, Respondents' counsel shall file and serve a Statement of Final Objections. The Claimant's counsel may file a reply 10 days after receipt of Respondents' objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

7. The parties are ordered to notify this Office immediately upon the filing of an appeal.

A

STEPHEN W. WEBSTER
Administrative Law Judge

San Francisco, California