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Issue Date: 11 June 2013

Case No.: 2011-LDA-00630

OWCP No.: 02-159530

In the Matter of:

MICHAEL P. FIETH,
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

Limor Ben-Maier, Esq.
Kelley, Kronenberg, Gilmartin, Fichtel, Wander, Bamdas, Eskalyo & Dunbrack
For Employer and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Defense Base Act, 42 U.S.C. § 1651, as an extension of the Longshore and Harbor Workers' Compensation Act ("the Act"). 33 U.S.C. § 901 *et seq*. The Act provides compensation to certain employees engaged in U.S. Department of Defense related employment for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability. Michael P. Fieth ("Claimant") brought this claim against his employer, Service Employees International, Inc. ("SEII") and its insurance carrier, Insurance Company of the State of Pennsylvania (collectively "Respondents") for injuries to his back sustained on May 26, 2006, while he worked as a truck driver in Iraq.

A formal hearing in this matter was held before the Honorable Clement J. Kennington on September 16, 2009. Judge Kennington issued his Decision and Order ("D&O") on January 14, 2010, awarding Claimant temporary total disability benefits from November 4, 2006 to February 28, 2008, and permanent partial disability benefits from February 28, 2008, to present and continuing. *See* Respondents' Exhibit 2. The present matter comes before the undersigned on a Motion for Modification under Section 22 of the Act brought by Respondents claiming that Claimant has had a change in his condition that allows him to work at greater capacities than previously determined and thus seeking a modified disability finding that Claimant either has no lost wage-earning capacity or has a higher post-injury retained earning capacity. Hearing Transcript ("TR") at 6. Claimant also seeks modification of the prior award and a finding that Claimant is not at MMI and that this change in condition entitles him to a new award of temporary total disability benefits rather than the permanent partial disability benefits as awarded by Judge Kennington.[1] TR at 8, 12; Claimant's Post-Hearing Brief ("CPHB") at 12, 14. On March 7, 2012, I convened a formal hearing in Houston, Texas. The parties had a full and fair opportunity to present evidence and arguments on the issues. The following exhibits were admitted into evidence: ALJ Exhibits ("AX") 1-4; Claimant's Exhibits ("CX") 1-4; and Respondents' Exhibits ("RX") 1-14. TR at 5-6, 14-15. Subsequently, Claimant submitted CX 5 and Respondents submitted RX 15-18. No objection to these additional exhibits having been lodged by either party, the undersigned hereby admits same. The Claimant testified on his own behalf.

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

STIPULATIONS

The Decision and Order of Judge Kennington noted and accepted the following stipulations of the parties:

1. Jurisdiction exists under the Act. RX 2 at 2.

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[1] A request for modification need not be formal. It simply must be a writing or verbal notice which indicates a clear intention to seek further compensation. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 527 (4th Cir. 1996), *cert denied*, 519 U.S. 807 (1996); *Gilliam v. Newport News Shipbuilding & Dry Dock Co*., 35 BRBS 69 (2001); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *Fireman's Fund Ins. Co. v.Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989) *Butts v. NewportNews Shipbuilding & Dry Dock Co*., (BRB No. 00-0440) (Jan. 17, 2001)(Unpublished). Modification may be initiated before the administrative law judge while the case is pending before him or is on appeal to the Board. *L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008). Requests for modification need not be formal in nature and may consist of the submission of new evidence while the case is before the administrative law judge. *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004). Accordingly, Claimant's request for modification through his opening statement at the hearing as well as his claim for such in his Post-Hearing Brief suffice as a proper Section 22 modification request.

2. Claimant injured his lower back, spine nerves, and general body on May 26, 2006. *Id.*

3. Claimant's injury occurred at Camp Kalsu, Iraq. *Id.*

4. The injury arose out of and in the course of the worker's employment with the Employer. *Id.*

5. There was an Employer/Employee relationship at the time of the injury. *Id.*

6. Employer was timely notified of the injury. *Id.*

7. The claim was timely filed. *Id.*

8. Employer's Notice of Controversion was timely filed. *Id.*

9. Claimant's average weekly wage at the time of his injury was $1,781.01. *Id.*

10. Claimant reached maximum medical improvement ("MMI") on February 5, 2008. *Id.*

11. Claimant has not returned to his usual job. *Id.*

ISSUES

1. Nature and extent of Claimant's disability. TR at 12-13.

2. Whether Respondents must pay attorney's fees to Claimant's counsel. *Id.*

FINDINGS OF FACT

Claimant's Hearing Testimony

Claimant is a longtime resident of Houston, Texas. TR. at 21. He testified that he has begun to have "minor shocks running down the back sides of my thighs down through the knees" which have gotten worse over time. *Id.* He has not returned to work since he has been home from Iraq. *Id.* Claimant indicated that he would be "open" to possible further back surgery. *Id.* at 22. He stated that he currently takes Zanaflex, Celebrex and Cyclobenzaprine. *Id.* Claimant testified that the body armor worn while working in Iraq varied from 40 to 65 pounds depending on the person's body size and noted that he is 6'1" and weighs about 220 pounds. *Id.*; *see also* RX 1 at 8.

Claimant testified that he could not return to work in Iraq as he could not lift the 50 pounds or more required in loading and unloading the trucks and because the truck "beats you to death." TR at 22-23. He stated that Dr. Francis had given him a 20 pound weight lifting restriction which he has been living within. *Id.* at 23; CX 4 at 1. Although Claimant originally testified that he had no accidents since returning from Iraq, he admitted under cross-examination

that he did fall off a ladder while changing a light bulb in February of 2009, which increased his back pain. TR at 24.

Claimant stated that Dr. Francis had released him without restrictions in February of 2008, but had later added a restriction against wearing a Kevlar vest. *Id.* Prior to that Dr. Francis had imposed light duty restrictions on Claimant which restrictions Claimant showed to potential employers when he applied for work. *Id.* at 24-25. Claimant stated he did not bring Dr. Francis' no restriction letter with him because he did not have a copy. *Id.* Between January 2010 when Judge Kennington issued his decision and order through the time of the hearing, Claimant testified that he had not applied for any work. *Id.* at 25-26. Although Claimant agreed that he had not applied for any work for over two years, he stated he would take the recent labor market survey and apply for work the following week or two. *Id.* at 26-28.

Complainant agreed that he did not return to see Dr. Francis after he released him from treatment in 2008, until after Dr. Kaldis issued his report releasing Claimant to work. *Id.* at 29. He stated that he complained of tingling all the way down to his feet at that time, yet Dr. Francis still released him to work with only a restriction against wearing the Kevlar vest. *Id.* Claimant testified that he sought no treatment from February, 2011 until he saw Dr. Whitsell in August, 2011, at which time he was complaining of increasing pain for the past two to three months. *Id.* at 29-30. He related the pain to the fact that he and his wife had been walking up to three miles a day so he tapered the walking off. *Id.* at 30. Claimant stated that he saw Dr. Francis after seeing Dr. Whitsell and then tapered off the walking to less than a mile per day. *Id.* at 31- 34, 38-39. He agreed that he did not see Dr. Francis after his increased symptoms until after he saw Dr. Whitsell. *Id.* at 38. He indicated that Dr. Francis has not suggested surgery yet as he wanted to try injections first. *Id.* at 31. Claimant agreed that his condition was considerably better after his micro surgery by Dr. Francis in 2007; and that he assumed his current deterioration in condition was related to walking so much. *Id.* at 32-34. He noted that the symptoms came on suddenly noting that "one day I was at three miles, and the next day I couldn't hardly make a lap around the track." *Id.* at 37.

Claimant testified that he owns a boat and six ATV's but has not used them himself since the prior hearing although his 10 year old son does use the ATV. *Id.* at 34-35, 41-42. He stated his wife works while he is a stay at home dad. *Id.* at 35. Claimant testified that the statement in Dr. Francis' report of January 11, 2012, that he has been working is wrong as he has not. *Id.* at 35-36. Claimant stated that he has pain currently like a shock and some numbness running down both legs although more on the right which comes and goes. *Id.* at 36-37. He testified that he doesn't walk much anymore but does chase tennis balls for his ten year old son. *Id.* at 40.

Deposition Testimony of Claimant

The deposition of Claimant was taken on February 16, 2012. RX 14 at 1. Claimant testified that he had read the decision and order by Judge Kennington and understood that he had been found permanently partially disabled and was capable of returning to work as a truck driver but not wearing a Kevlar vest as he wore in Iraq. *Id*. at 3. He stated that he has not been employed since returning from Iraq. *Id*. Claimant indicated that he recalled Dr. Francis had returned him to work with no restrictions but stated he had never seen a copy of the report. *Id*. He recalled that he had given a copy of Dr. Francis's light duty restrictions to potential employers

but had not given any employers the full duty release. *Id*. Claimant stated that after seeing Dr. Kaldis, he went to Dr. Francis who agreed with Dr. Kaldis that he could return to work but Dr. Francis did restrict him from wearing a Kevlar vest. *Id*. at 3-4. He testified that he did not apply for work after receiving the reports of Dr. Kaldis and Dr. Francis. *Id*. at 4. Claimant stated that the report of Dr. Francis that he was working was incorrect and that he had called the doctor's office to have it corrected. *Id*. He reported that he had seen Dr. Grover, a pain management specialist whom Dr. Francis had recommended for injections before considering any further surgery. *Id*. at 5.

Claimant testified that Dr. Francis has issued a new report stating that Claimant cannot work until he has injections or has a fusion based on new MRI's and an EMG. *Id*. He stated that he has been taking Zanaflex twice a day and Celebrex once a day since Dr. Francis prescribed them to him in February of 2011, at the same time that he said Claimant could return to work. *Id*. He noted that he also takes Cyclobenzaprine two or three times per week and "a bunch of Motrin." *Id*. at 6. Claimant testified that he has not used his boat or ATV's since his last hearing. *Id*. at 6. Claimant stated that he had last applied for work prior to his last hearing stating "I've applied for jobs, because we had to do some before we went to court." *Id*. at 7. He testified that he had not applied for work following Judge Kennington's decision indicating that he could go back to work. *Id*.

Claimant was deposed on February 26, 2009, prior to the earlier hearing. RX 5 at 1. Claimant testified that he pays child support of $225 per month for his 10 year old son who lives with his ex-wife. *Id*. at 9. Claimant has a high school education, served in the Army as a diesel mechanic technician and also had welding training and holds a commercial driver's license. *Id*. at 7-10. He stated that he has tried taking his boat out but that the waves "beat the hell out of me." *Id*. at 13. Claimant testified that he injured his right hand once on a prior job but did not make a claim for it and that he had hurt his back in an automobile accident in 1991 but did not seek any treatment and his back felt fine after a couple of days. *Id*. at 14-15. He worked as a truck driver after getting out of the Army in 1996 until he went to work for Employer in July of 2003. *Id*. at 15-17. Claimant testified that he did not finish his first contract as he left Iraq in April of 2004 due to lax security by the military. *Id*. at 17-18. He stated that he stayed off work until February of 2005, when he decided to return to Iraq since he heard that the security was better. *Id*. at 18-19. He testified that he did not work as a heavy truck driver long before Employer promoted him to convoy commander. *Id*. at 19-20.

Claimant stated that he was injured in a truck accident on May 26, 2006 when another truck hit and totaled the truck in the convoy he was in. *Id*. at 21-22. He continued working with pain, taking medications, until November of 2006, when he went to a Kuwaiti International Clinic while on a business trip to Kuwait. *Id*. at 23-26. After an MRI, he was sent back to Houston where he saw Dr. Larry Perkins, a chiropractor he chose out of the phone book since he would see him without insurance and Employer was refusing medical treatment. *Id*. at 27-30. Dr. Perkins eventually referred Claimant to Dr. Francis who performed surgery on him. *Id*. at 31-32. Claimant stated that the 2007 surgery was successful but that the physical therapy that Dr. Francis prescribed thereafter starting increasing his pain. *Id*. at 32. Claimant testified that when Dr. Francis released him to return to work that he looked for jobs. *Id*. at 33. He stated that he applied and was interviewed by Swift Transport but was told he needed a complete medical release and "off all meds with no restrictions." *Id*. at 34. Claimant reported that a number of truck

companies told him the same. *Id*. at 35-36. He insisted that they wanted him off all medications. *Id*. at 42-43. He applied to work as a parts counter salesperson but could not lift the weight of a battery. *Id*. at 36.

Claimant testified that after being told of Dr. Francis releasing him to full work status in February of 2008, he returned to see Dr. Francis who agreed with Claimant that he should not wear a Kevlar vest and changed his restrictions accordingly. *Id*. at 37-38. Claimant stated that he was taking Cyclobenzaprine, Tylenol and ibuprofen and had just gotten a prescription for Celebrex from Dr. Francis. *Id*. at 38-39. He reported that he had tingling and shocks down his legs "once in a while" and that Dr. Francis had talked of further physical therapy, which was apparently not approved by Carrier, and of possible steroid injection. *Id*. at 39.

Claimant stated that he did make biodiesel fuel by processing vegetable oil from a restaurant which he used in his pickup truck. *Id*. at 45-46. He also spends his time on the computer surfing the internet, checking e-mails and conversing with people he met in Iraq, many of whom are also clients of his attorney. *Id*. at 46. Claimant stated he fell off a step ladder against the wall while changing a light bulb recently and called Dr. Francis to tell him of the increased pain following the fall. *Id*. at 47. Claimant testified that he walked about a mile with some pain, sits without much problem and can carry a jug of milk in each hand but cannot lift 50 pounds. *Id*. at 47-48. Claimant stated he did not believe he could return to long haul driving without taking copious breaks but stated he might be able to do a light delivery job and was willing to try it. *Id*. at 49-50.

Claimant's Affidavit Regarding Labor Market Survey

Following the hearing, Claimant submitted an Affidavit Regarding Labor Market Survey dated March 28, 2012. CX 5. Claimant noted that he is 38 years old and had contacted the 14 employers listed in the Labor Market Survey by "either emailing my resume, calling or applying in person at the company". *Id*. at 1. He attached copies of four emails which he had sent to four of the employers. *Id*. Claimant stated he was told by Troy Vanzondt of Ryder Systems, Inc. that he did not meet the physical requirements. *Id*. He stated that Stevens Transports, Inc. told him he could not be on any pain medicine or muscle relaxants while driving trucks while Werner Enterprises told him he needed verifiable drivers experience for the past five years and that the job required lifting of 70 pounds. *Id*. He averred that the positions with RLG International Services, Inc., Grocers Supply and Lehigh Hansen had been filled. *Id*. at 1-2. Claimant stated he went personally to Shield International Protection where Jeff Evans told him he did not meet the physical qualifications of the job and did not hold a valid state security certification. *Id*. at 1. He went to the office of Possible Missions where James Morris indicated the job required lifting 35 pounds which Claimant cannot perform. *Id*. Claimant stated he emailed or applied online with Burnett Staffing Specialist, BOASSO America, Donovan Watkins and Insperity Recruiting, but had received no response from any of them. *Id*. at 2. Claimant noted that 70 pounds of lifting was required at Industrial Security Service and that he was unable to locate RBH Trucking in a "run-down neighborhood and was unable to leave a voice message because their mailbox was full. *Id*.

An email from Ryder System, Inc. attached to Claimant's affidavit dated March 7, 2012 contained a handwritten note indicating that Troy Vonzandt had told Claimant the lightest job available required "pushing and pulling of full racks of suits." *Id*. at 4. Three emails sent to RLG

International, Burnett Staffing and BOASSO America, dated March 7, 9 and 12, 2012, included Claimant's current resume as well as a copy of his physical restrictions. *Id*. at 5-7.

Summary of Medical Evidence

Dr. William R. Francis, Jr.

Dr. William R. Francis, Jr. first saw Claimant on January 27, 2007, and noted Claimant had marked sciatica bilaterally with left hamstring tension as well as weakness in both plantar flexors, both feet, ankle jerks present bilaterally and deprivation of his S1 vertebral area bilaterally. RX 2 at 6. Dr. Francis performed a left L5-S1 decompression with diskectomy and foraminotomy on February 6, 2007. Claimant showed improvement following surgery and took a course of physical therapy. *Id*. at 7. In February of 2008, Dr. Francis released Claimant to full-time work without restrictions based on a functional capacity evaluation ("FCE") performed in January of 2008, which indicated Claimant could perform work at the medium-work level. *Id*. However, Dr. Francis completed an OWCP-5c form requiring breaks for Claimant for twenty minutes every two hours and limiting pushing or pulling to ten pounds and indicating that Claimant would need lumbar support and medication to be able to return to work. *Id*. Claimant complained of pain when he accompanied his uncle on a "hot shot" trucking assignment in April of 2008 following which Dr. Francis suggested that Claimant may want to find work other than driving and restricted Claimant from wearing body armor and a helmet and restricted any driving to civilian-type and not for transportation of military equipment. *Id*. Claimant saw Dr. Francis in October and November of 2008, with deterioration of his L5-S1 disc space and recurrent symptoms for which Dr. Francis prescribed physical therapy (which apparently was not approved by Carrier) and continued anti-inflammatory and muscle relaxant medications. *Id*. at 7-8.

The next report from Dr. Francis contained in the record is dated February 3, 2009,and states that Claimant was seen for routine follow up on that date and has "done reasonably well" since his last visit in March of 2009. RX 12 at 1. Claimant reported that he had occasional flare-ups of pain which he handled with rest and over the counter medication which usually resulted in a quick recovery. *Id*. Claimant's main complaint was erectile dysfunction for which Dr. Francis gave him a trial of Viagra and advised him to see an urologist if it persisted. *Id*. Dr. Francis noted that he would obtain x-rays but of the x-rays were satisfactory, then he did not need to see Claimant for two years. *Id*.

Claimant next saw Dr. Francis on February 16, 2011, although he noted that Claimant had been trying to get in to see him for three weeks prior to that but couldn't due to weather and scheduling difficulties. CX 2 at 1; RX 12 at 2. Dr. Francis stated he was concerned that claimant continued to have a "heaviness sensation in his lower back" which caused difficulty with sleeping and functioning in the afternoons. *Id*. Dr. Francis opined that current x-rays showed only degenerative changes which were seen in the past and prescribed Claimant Zanaflex and Celebrex. *Id*. Dr. Francis stated that he had reviewed the report of Dr. Kaldis and agreed with it in full except that he believed Claimant should be restricted from driving while wearing body armor as he felt the 40 to 50 pound weight of the body armor would cause Claimant's back to hurt perhaps only 4 hours into a shift. *Id*. Dr. Francis reported that he planned to see Claimant in one month to see how the medications worked and to review more current x-rays. *Id*.

On October 13, 2011, Dr. Francis ordered refills of Celebrex, Ultram, Prednisone DosePak and Zanaflex for Claimant. CX 2 at 9. On that same date, Dr. Francis ordered two weeks of physical therapy for Claimant. *Id*. at 10.

On December 21, 2011, Claimant underwent a MRI at Dr. Francis' order which reported showing "Disc degeneration and dorsal bulge of the disc osteophyte complex at L5-S1 in association with an annular tear and degenerative retrolisthesis of L5. Suspected prior left-sided laminectomy. Arthrosis of the facet joints. Mild central spinal canal stenosis, mild to moderate proximal lateral recess stenosis, and mild bilateral foraminal stenosis." CX 4 at 3; RX 12 at 4. Claimant also underwent an EMG on January 4, 2012, which concluded "Probable bilateral S1 radiculopathies." CX 4 at 5; RX 12 at 6.

On January 11, 2012, Dr. Francis met with Claimant to review the MRI and EMG results. CX 2 at 11; RX 12 at 7. His report indicates that Claimant has back pain on a consistent basis but that he was able to manage it and that Claimant "works full time presently." *Id*. Dr. Francis conducted an examination of Claimant and noted some reduction of ankle jerk reflex on both sides; that plantar flexion, although present, was only available in a bilateral fashion; that claimant could not consistently stand, walk or do multiple toe raises; and that his knee reflexes were slightly hyperactive which he attributed to the tension in his legs. *Id*. Dr. Francis reported that the EMG showed bilateral S1 radiculopathies. *Id*. He noted that the MRI showed degenerative changes at L5-S1 with facet hypertrophy and some disc thinning and a general broad based protrusion of the disc with additional scarring and "mass effect" on the left side where the surgery had been performed. *Id*. Dr. Francis wrote that he told Claimant he may need either injections or possibly surgery in the future but that he thought Claimant could continue working and should return for follow up in six months. *Id*. Dr. Francis also noted that his finding of weakness in the S1 nerve roots bilaterally corresponded to the EMG findings and led Dr. Francis to believe that the mechanical changes in the back since the surgery and the loss of strength in the S1 nerve root distribution may hasten the need for future surgery so that he would want to follow this over time. *Id*.

On February 23, 2012, Dr. Francis completed an OWCP-5c wherein he restricted Claimant from lifting, pushing or pulling over 20 pounds or performing any reaching, twisting, bending, stooping, kneeling or squatting. CX 4 at 1; RX 12 at 8. He also reported that Claimant should work with a lumbar support and should not wear body armor. *Id*. Dr. Francis noted that Claimant could work 8 hours per day with these restrictions with a 20 to 30 minute break every 2 hours. *Id*. Finally, Dr. Francis opined that MMI had not been reached. *Id*.

Dr. Michael G. Kaldis

Dr. Michael G. Kaldis is a board certified orthopedic surgeon. RX 9. Claimant was seen by Dr. Kaldis on November 1, 2010, at the request of Respondents. RX 8. Claimant reported constant radiation of pain into the left leg radiating into both buttocks, both thighs and left toes with numbness of the left leg and both buttocks as well as constant tingling in both legs and buttock. *Id*. at 1. Claimant further reported that nothing relieved the pain and that lifting, standing, walking, sitting, sneezing and riding in a vehicle made his pain worse. *Id*. Dr. Kaldis performed an examination of Claimant which was essentially normal although his surgical scar was noted. *Id*. at 2-3. Dr. Kaldis noted that Claimant denied working although he had ridden

around with a hot shot driver and had tried to boat but it caused him low back pain. *Id*. at 3. Dr. Kaldis found no evidence of neurologic deficit and noted the film studies revealed no current evidence of instability. *Id*. at 3-4. Dr. Kaldis opined there was no reason for surgical intervention at the present. *Id*. at 4.

Dr. Kaldis reviewed the medical records and reports of Dr. William Francis and noted that Dr. Francis had found Claimant to be at MMI on March 4, 2009, and had released him to work. *Id*. He also noted that Dr. Francis reported on February 3, 2010, that Claimant may need over the counter medication and that his biggest problem at that time was erectile dysfunction. *Id*. Dr. Kaldis reported that Claimant told him the problem was mainly when he had back pain. *Id*. at 5. In response to questions posed by the nurse case manager, Dr. Kaldis opined that Claimant had reached MMI in February, 2008 and remained at MMI; that no additional diagnostic tests or treatment was needed except for home exercise; that he agreed with Dr. Francis that Claimant should be fully released with no work restrictions; and that he saw no evidence of malingering on Claimant's part. *Id*.

Dr. Kaldis issued a supplemental report entitled Independent Review of Medical Records dated March 2, 2012 addressed to Respondents' counsel. RX 15 at 1. Dr. Kaldis noted that he had reviewed Judge Kennington's decision and order of January 15, 2010; his own IME report of November 1, 2010; Dr. Francis' February 2011 and January 2012 reports; and Dr. Whitsell's August 2001 report. *Id*. Dr. Kaldis noted that Dr. Francis had released Claimant to work with only a restriction against wearing a Kevlar vest on February 16, 2011. *Id*. at 2. He also noted Dr. Whitsell's opinion that Claimant should be restricted to light work lifting no more than 20 pounds and thus that he could not return to his former job. *Id*. Finally, Dr. Kaldis noted the degenerative changes at L5-S1 with facet hypertrophy and disc thinning reported by Dr. Francis on January 11, 2012 from an MRI and bilateral S1 radiculopathies from an EMG as well as the suggestion by Dr. Francis that Claimant may need a surgical fusion at some time in the not too distant future. *Id*.

Dr. Kaldis concluded that he agreed with the recommendation for future fusion surgery but opined that this was as a result of Claimant's underlying degenerative condition as were the EMG findings. *Id*.

Dr. Robert Whitsell

Dr. Robert E. Whitsell is a board certified orthopedic surgeon who retired from active practice in 2005. RX 11. Dr. Whitsell saw Claimant on August 29, 2011, for an IME at the request of OWCP. RX 10 at 1. Claimant reported good recovery from his back surgery in 2007 but noted that he had an increase in back and leg pain over the preceding several months which he related to walking up to three miles a day until the pain returned. *Id*. at 2. He stated he was taking Zanaflex, Celebrex and a muscle relaxer. *Id*. Claimant reported present complaints of pain in his low back and some discomfort in his left leg. *Id*. at 3. Dr. Whitsell's examination was essentially normal although he noted Claimant could only do one half of a squat or deep knee bend. *Id*. Dr. Whitsell's diagnosis was lumbar herniated disc, L-5, S-1, postoperative state and "Rule out recurrent lumbar disc herniation." *Id*. at 4.

Apparently in response to specific questions posed by OWCP, Dr. Whitsell opined that there is a direct relationship of the Claimant's condition to his work injury of May 26, 2006. *Id*. at 5. He also opined that while Claimant had reached MMI in 2008, Claimant had increased symptoms such that he should not be considered currently at MMI until such time as he had appropriately responded to further treatment. *Id*. Dr. Whitsell stated that further treatment by Dr. Francis would probably include a repeat MRI and possibly a lumbar fusion. *Id*. Dr. Whitsell opined that Claimant could perform light-duty level work with lifting no more than 20 pounds and avoiding stooping, bending, leaning, squatting and crawling. *Id*. He also recommended that Claimant not wear a bulletproof vest if it weighed around 50 pounds. *Id*.

Dr. Pawan Grover

In an operative report dated March 16, 2012, Dr. Pawan Grover states that he performed a four level facet joint block with lidocaine injections at the right L4/5, right L5/S1, left L4/5, and left L5/S1 levels. RX 16 at 1-2. Claimant was discharged following the procedure. *Id*. at 2.

Summary of Vocational Evidence

William L. Quintanilla

Respondents' vocational expert William L. Quintanilla, presented his opinions through a written report dated March 10, 2009, and updated by a labor market survey dated March 2, 2012, as well as by a letter dated April 30, 2012. RX 6, 13, 18. Mr. Quintanilla's original report was reviewed and discussed at length in Judge Kennington's D&O and thus need not be addressed further in this subsequent modification proceeding. See RX 2 at 10-11, 18-19.

On March 2, 2012, Mr. Quintanilla reported that he had reviewed the transcript of the prior hearing as well as Dr. Kaldis' report of November 1, 2010; Dr. Whitsell's report of August 30, 2011; and reports of Dr. Francis dated February 18, 2011 and January 11, 2012. RX 13 at 1-3. He also noted that he had reviewed surveillance videos of Claimant that were taken on December 28-31, 2011. *Id*. at 3-4. Mr. Quintanillo opined that based on Dr. Kaldis' medical opinion that Claimant had no work restrictions, Claimant was capable of performing work as a truck driver. *Id*. at 4. He then identified four employers in the Houston area who had truck driver positions available paying from $15 an hour up to $65,000.00 per year: Ryder Transportation and Logistics; Stevens Transports, Inc.; Werner Enterprises; and RLG International Services, Inc. *Id*. at 4-5.

Next, Mr. Quintanillo noted that Dr. Whitsell had restricted Claimant to light work; and he thus opined that claimant should be capable of performing such light jobs as courier, order clerk, security guard, production assembler and counter clerk. *Id*. at 5. Mr. Quintanillo reported the following positions:

1. Non-commissioned Security Guard with Shield International Protection, paying $8.15 to $10.57 per hour depending on post.
2. Assembly Operator with Possible Missions, paying $8.25 per hour.
3. Assembler with Burnett Staffing Specialists, paying $9.50 to $10.00 per hour.

4. Non-commissioned Security guard with Industrial Security Service Corp., paying $9.00 to $12.50 per hour.
5. Courier with Grocers Supply Co., paying $9.90 to $13.31 per hour, depending on experience.

Id. at 5-6.

Finally, Mr. Quintanilla opined that even at the sedentary work level set by Dr. Francis in 2008, Claimant would be employable as a truck dispatcher based on his past work experience as a convoy commander. *Id*. at 7. He then identified truck dispatcher positions available with the following employers:

1. BOASSO America Corp., paying up to $42,000 per year depending on experience.
2. Donovan & Watkins, paying $13.50 per hour.
3. Lehigh Hansen, paying $12.29-$19.75 per hour depending on experience.
4. Insperity Recruiting for Excargo Services, paying $12.29-$19.75 per hour depending on experience.
5. RBH Trucking, paying $10.00 per hour.

Id. at 7-8.

Based on his labor market survey, Mr. Quintanilla concluded that it appeared there were employment opportunities available in the Houston area at each of the three levels of restriction as identified above. *Id*. at 8. He then opined that based on the results of his labor market survey, Claimant has "a wage earning potential of from $16,952 to $60,000 per year." *Id*.

In a letter dated April 30, 2012, Mr. Quintanilla responded to Claimant's affidavit regarding his attempts to locate work. RX 18 at 1. Mr. Quintanilla stated that the truck driving jobs were at a medium level of exertion which requires lifting 20 to 50 pounds occasionally; but noted that even if some required lifting up to 70 pounds, Dr. Kaldis had placed no restrictions on lifting nor regarding medications so that Claimant should be able to perform these jobs under Dr. Kaldis' opinion. *Id*. He also noted that while Claimant had not been driving for the past 5 years, his prior driving experience should make him a viable candidate for any of the listed truck driving jobs. *Id*. Mr. Quintanilla confirmed that the positions were no longer available with RLG International (although some openings were expected in one month); Assembly Operator position through Cypress Worksource; Grocers Supply; Donovan & Watkins; Lehigh Hansen; and RBH Trucking. *Id*. at 2-3. However, he pointed out that the labor market survey was done February 22-24, 2012, so that it was not surprising these positions had been filled when Claimant applied form March 7 through 12, 2012, or when he himself checked in late April of 2012. *Id*. at 2. Mr. Quintanilla also reported that his calls to Ryder Transportation, Stevens Transport and BOASSO America were not returned. *Id*. at 2-3.

Mr. Quintanilla reported that he spoke with Morgan at Werner Enterprises who indicated there were two truck driving jobs available, one requiring the driver to load and unload and one long haul job that only required hooking and unhooking the trailer at origin and destination. *Id*. at 2. Although RLG reported current openings were filled, more openings were expected in about a

month which did require ability to lift up to 50 pounds but involved pulling containers which were loaded and unloaded by crane or pallet jack. *Id*. Shield International Protection Services advised Mr. Quintanilla that a Level II certificate was required for non-commissioned security guards but could be obtained upon completion of an eight hour training course offered in several Houston area locations costing $30.00. *Id*. Both Shield and Industrial Security Service reported they were accepting applications for security guard positions. *Id*.

In conclusion, Mr. Quintanilla opined that Claimant had not presented himself to potential employers in a desirable manner as he had sent emails attaching not only his resume but also his physical restrictions. *Id*. at 3. He noted that Claimant should have first sent only his resume and then discussed his physical restrictions upon interview or job offer as employers are more willing to offer accommodations to a candidate whom they have already interviewed and found qualified. *Id*.

Surveillance Video

Surveillance video obtained by investigators retained by Respondents dated July 20-21 and December 28-31, 2011 was submitted. RX 7, 17. I have carefully observed the video of these days. Claimant is shown standing, walking, getting in and out of and driving a truck, carrying small bags of groceries or other items in his hands, bending, stooping and leaning over the bed of a pickup truck as well as filling the truck and a container inside the bed of the truck with gas. *Id.* He is also seen carrying a cinder block in each hand for a distance of about 20 to 30 feet. RX 17. While none of these activities would be inconsistent with work restrictions at the light level of work, or even the medium level of work, I do find that these activities, seemingly carried out effortlessly by Claimant, appear somewhat inconsistent with Claimant's alleged inability to work.

Hearing Transcript and D&O[2]

The transcript of the original hearing was submitted as RX 1. I have reviewed the transcript and find no additional evidence that would not be repetitive to that already discussed above except that I do note the concession by Respondents' counsel in the hearing that the wearing of a Kevlar vest and helmet is a job requirement to work in Iraq and thus that a valid inability to do so would eliminate Claimant from consideration of rehiring to his former position in Iraq. RX 1 at 4. Claimant did testify at the original hearing that the Kevlar vest weighed about 45 pounds and the helmet an additional 3 and ½ pounds. *Id*. at 8.

In his D&O, Judge Kennington found that Claimant was unable to return to his former employment as a truck driver in Iraq due to the restrictions against wearing a Kevlar vest and

[2] In considering a request for modification, it is appropriate for the administrative law judge to have before him the record from the prior hearing that resulted in the award or denial. *See Dobson v. Todd Pacific Shipyards Corp*., 21 BRBS 174 (1988); *Baker v. New Orleans Stevedores Co.*, 6 BRBS 382 (1977). This follows from the broad scope of modification based on a mistake in fact, which includes further reflection on the evidence initially submitted, and the fact that, where change in claimant's physical or economic condition is alleged, the prior record is relevant in determining whether there has been a change.

helmet as imposed by Dr. William Francis. RX 2 at 14. Judge Kennington explicitly found Respondents' argument that Claimant had no residual disability since he could still drive trucks in the United States at an alleged higher salary than he earned in Iraq, to be without merit, pointing out that Claimant was entitled to the presumption of total disability due to his inability to return to work as a truck driver in Iraq. *Id*. at 12, 14. The D&O then proceeded with the usual examination as to whether Respondents had met their burden of proving available alternative employment, and, if so, whether Claimant then proved his inability to obtain such alternative employment following a diligent job search. Judge Kennington determined that the labor market surveys offered by Respondents did indeed prove the existence of suitable alternative employment and further found that Claimant had not been diligent in his job search efforts, primarily by simply "going through the motions" in his application process without follow ups and in not adequately explaining his restrictions and medications, and particularly his use of prescription medication only at night. *Id*. at 17-21. Since Judge Kennington had accepted the parties' stipulated MMI date of February 28, 2008, he then proceeded to determine Claimant's post-injury wage-earning capacity for purposes of calculating his entitlement to permanent partial disability benefits from that date forward. *Id*. at 15, 21. Judge Kennington calculated Claimant's wage-earning capacity to be $709.08 per week. *Id*. at 23. He came to this calculation by using the average wage from all of the jobs set out in the labor market surveys which numbered more than 30 and included truck driving, light haul truck driving, delivery driving, insides sales, truck dispatching, warehouse clerking and supervising, and security guard positions. *Id*. at 8-11, 23. Accordingly, Judge Kennington concluded that Claimant's permanent partial disability should be calculated based on a loss of earnings of $1,071.93 per week (AWW of $1,781.01 less wage earning capacity of $709.08). *Id*. at 23, 24.

Other Documentary Evidence

Respondents' records indicate that Claimant has been paid temporary total disability benefits from November 4, 2006, to February 27, 2008, at the rate of $1,073.64 per week, the maximum rate in effect at the time of injury. RX 3. Claimant has been paid permanent partial disability benefits at the rate of $714.62 per week since February 28, 2008, representing 2/3's of Claimant's lost earnings of $1,071.93 per week pursuant to Section 8(c)(21) of the Act as found in Judge Kennington's D&O. *Id*.

CREDIBILITY

Credibility of the Medical Experts

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

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

Dr. Francis

The opinions of Dr. Francis were generally credible. Little in the reports from Dr. Francis justifies overturning the deference to which his opinions as treating physician are entitled. Dr. Francis opined that Claimant has continued to have back complaints attributable to his work injury and the consequent surgery that he performed. CX 2 at 11; RX 12 at 7. I found no other medical evidence offered herein compelling enough to controvert this opinion and thus accept it in this matter. I further credit Dr. Francis's opinion that Claimant's continued back problems have not prevented him from working although he should be restricted to essentially light work without the wearing of body armor at least by the time of Dr. Francis' OWCP-5c on February 23, 2012. *Id.*; CX 4 at 1; RX 12 at 8. I further credit Dr. Francis' opinion that Claimant should try injections for his back and that he may eventually require spinal fusion surgery, a course of treatment approved by both Drs. Whitsell and Kaldis. CX 2 at 11; RX 12 at 7. I do not credit Dr. Francis' opinion contained in the February 12, 2013 OWCP-5c that Claimant should no longer be considered at MMI, as will be discussed hereinafter. CX 4 at 1; RX 12 at 8.

Dr. Whitsell

The opinions of Dr. Whitsell were likewise generally credible. Dr. Whitsell opined that Claimant's back condition was related to his work injury of May 26, 2006, agreeing with Dr. Francis. RX 10 at 4. He also opined that Claimant could perform light duty work but not wearing an armored suit on his date of examination of August 29, 2011, also in accord with the opinions of Dr. Francis. RX 10 at 5. Dr. Whitsell further agreed with the course of treatment by Dr. Francis to potentially include spinal fusion surgery. I found no other medical evidence offered herein compelling enough to controvert these opinions and thus accept them in this matter. *Id*. Finally, while Dr. Whitsell also opined that Claimant was no longer at MMI as of the date of his examination on August 29, 2011, I decline to accept such opinion as I believe it is legally incorrect as discussed hereinafter. *Id*.

Dr. Kaldis

I find the reports of Dr. Kaldis to be significantly limited in terms of credibility. I do not accept Dr. Kaldis' opinion that Claimant's current back condition and the potential need for spinal fusion surgery are solely the result of degenerative changes. RX 15 at 2. This opinion is not only contrary to that of Drs. Francis and Whitsell, but also flies in the face of common sense as clearly a young man under the age of 40, like Claimant, would ordinarily not need spinal surgery for degenerative changes. Obviously, Claimant's work injury necessitated his initial back surgery and, while degenerative changes may have played a role in the potential for future spinal fusion surgery, it seems clear that the work injury is at least a contributing cause, which is sufficient under the Act. I also do not accept Dr. Kaldis' conclusion that Claimant had no work restrictions as these opinions conflict with the more reasoned opinions of the treating physician and that of Dr. Whitsell that the injury resulted in Claimant's continuing need for medical treatment and need for work restrictions. RX 8 at 5. I do, however, accept Dr. Kaldis' opinion that Claimant has been at MMI since February 28, 2008, and remains at MMI, as I find this opinion more in accord with applicable law, as discussed hereinafter. *Id*.

Conclusion

After considering the opinions of all the physicians, I credit the opinions of Drs Francis and Whitsell that Claimant suffered an injury to his lumbar spine on May 26, 2006. I credit the opinions of Drs. Francis and Whitsell that Claimant has required medical treatment including evaluation and injections as performed by Dr. Pawan Grover, and may require future spinal fusion surgery for these conditions. I credit the opinion of Dr. Kardis that Claimant reached MMI on February 28, 2008 and remains at MMI. I credit the opinions of all the doctors that Claimant has been able to work at all pertinent times but credit Drs. Francis and Whitsell that Claimant should be limited to light work with no wearing of body armor since August 29, 2011. I also credit the opinions of Drs. Francis and Whitsell that Claimant could not return to his job as truck driver in Iraq if it required wearing body armor.

Credibility of Vocational Expert

I find no intrinsic basis to discredit those portions of the labor market survey performed by Mr. Quintanilla as it pertains to job positions at the light and sedentary levels.

Claimant

I found Claimant to be somewhat credible. However, I find that Claimant's credibility suffers from his failure to look for work except when forced to do so by the scheduling of the two hearings. In fact, Claimant did not look for any jobs from the time he appeared before Judge Kennington in September of 2009 until the modification hearing held in March of 2012 despite the fact that he had been released to work by Dr. Francis; he rarely had followed up with Dr. Francis; and was aware that Judge Kennington had found that he was only entitled to partial disability payments due to his failure to look diligently for work. TR at 25-28; RX 14 at 4-5. While the surveillance video does not show Claimant performing significant physical activities beyond the

light level, it certainly does not support the claim being made herein that Claimant should be found totally disabled and tends to further diminish Claimant's credibility herein.

CONCLUSIONS OF LAW

The Act is construed liberally in favored of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any particular medical or other expert witness. *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

Parties' Contentions

Respondents filed their motion for modification following the medical report from Dr. Kaldis on the basis that Claimant had a change in physical condition and was thus now able to return to his normal work or some other work paying as much or more. This claim rests solely upon Dr. Kaldis' opinion that Claimant no longer had any work restrictions and should be fully released to work. In the alternative, Respondents assert that even with the restriction against wearing body armor, there was civilian truck driving work available paying as much or more than claimant's AWW. In the further alternative, Respondents contend that there is work available at higher wages than previously found by Judge Kennington which would increase Claimant's wage-earning capacity and thus reduce his permanent partial disability payments. Claimant contests that there has been any increase whatsoever in Claimant's wage earning capacity. In fact, Claimant contends that on the basis of the opinions of Drs. Whitsell and Francis that Claimant is no longer at MMI, that Claimant is now in a total temporary disability status.

Thus, both parties claim their separate rights to Section 22 modification based on their differing perceptions of alleged change in Claimant's physical or economic condition. Accordingly, an examination of the modification process is in order.

MODIFICATION OF DISABILITY

Section 22 of the LHWCA provides:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) in accordance with the procedure prescribed in respect of claims in section 19 of this title), and in accordance with such section issue a new compensation

> order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

33 U.S.C. § 922.

Section 22 of the Act provides the only means for changing otherwise final decisions and modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Buttermore v. Electric Boat Corp*., 46 BRBS 41 (2012). Further, the fact that the administrative law judge's prior decision became final for purposes of appeal to the Board cannot bar a petition for modification, as Section 22 displaces traditional notions of finality and, indeed, provides the parties' only recourse where a prior decision has become final. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). An award based on the parties' stipulations is subject to modification. Stipulations are offered in lieu of evidence and thus may be relied upon to establish an element of the claim. *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). A determination based on stipulations is subject to Section 22 modification based on grounds of either a change in condition or a mistake of fact, and Section 22, which reflects a statutory preference for accuracy, displaces equitable doctrines of finality such as judicial estoppel. *Buttermore, supra*.; *Ramos, supra*; *Lucas v. Louisiana Ins. Guaranty Ass'n,* 28 BRBS 1, 6 and n.5 (1994).

The Board has held that a change in claimant's economic condition may provide justification for Section 22 modification. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.,* 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1042 n.6, 26 BRBS 30, 32 n.6 (CRT)(5th Cir. 1992). An employer may attempt to modify a total disability award pursuant to Section 22 by offering to establish the availability of suitable alternate employment. *Moore*, 23 BRBS at 52; *Blake v. Ceres, Inc.*, 19 BRBS 219 (1987). Disability determinations may also be modified based on a mistake of fact. In determining whether to grant modification based on a mistake of fact, the administrative law judge must also consider whether modification would render justice under the Act. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Craig v. United Church of Christ*, 13 BRBS 567, 571-572 (1981).

The party requesting modification has the burden of proof in showing a change in condition. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). The Section 20(a) presumption is inapplicable to the issue of whether a claimant's condition has changed since the prior award. *Leach v. Thompson's Dairy, Inc.*, 6 BRBS 184 (1977). Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. In *Fleetwood*, 16 BRBS 282, the Board reversed its prior precedent and determined that a change in the claimant's economic condition may be properly considered for Section 22 modification, even without a change in physical condition. *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291 (1995). Thus, physical and economic condition are interrelated under the LHWCA and at times a determination of one factor resolves an issue regarding the other. This situation is particularly true when the issue on modification relates to the availability of suitable alternative employment. *Id*.

The scope of modification is not narrowed because the employer is seeking to terminate or decrease an award. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), *rev'g* 1 BRBS 81 (1974); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). The Board has stated that Section 22 was intended by Congress to displace traditional notions of *res judicata*, and to allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *McCarthy Stevedoring Corp. v. Norton*, 40 F. Supp. 960 (E.D. Pa. 1940). Thus, "the modification process is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276, 37 BRBS 99, 101(CRT) (2d Cir. 2003), quoting *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-498 (4th Cir. 1999) and *Banks*, 390 U.S. at 464. The Act reflects a preference of accuracy over finality; thus, the fact that evidence was not presented earlier in the proceedings is not a sufficient basis to deny a petition for modification. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

Upon applying the law to the facts in this case, I find that there has been a change in the economic condition of Claimant. However, that change in condition is not that originally relied upon by Respondents in bringing the Section 22 modification motion as I have discredited the predicate upon which Respondents based their request. I do not accept Dr. Kaldis' opinion that Claimant can return to work with no restrictions but rather find the opinions of Dr. Whitsell and Francis to be more credible in that respect. Further, I find that the increased work restrictions imposed first by Dr. Whitsell and later by Dr. Francis do indeed evidence a change in Claimant's condition as he cannot physically perform the truck driving jobs accepted by Judge Kennington in his original D&O based on Dr. Francis' opinion at that time that Claimant could perform civilian truck driving jobs but not overseas where body armor must be worn. Judge Kennington found that even with the availability of the civilian truck driving jobs, Claimant had a substantial loss of wage-earning capacity. As these jobs are no longer available due to Claimant's new physical restrictions and as these were among the higher paying jobs on all of the labor market surveys, Claimant has clearly suffered a change in his economic condition warranting a

modification of his original award in order to secure "justice under the Act." *Jensen supra*, quoting *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-498 (4th Cir. 1999) and *Banks*, 390 U.S. at 464. Having found a basis for modification, I must proceed with determining the current nature and extent of disability, just as if this were an original proceeding. *See Vasquez, supra*; *Winston, supra*.

Nature and Extent of the Disability

Date of Maximum Medical Improvement

The claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (Feb. 14, 1985). An injured worker's disability becomes permanent if and when his condition reaches the point of "maximum medical improvement" or "MMI." *James v. Pate Stevedoring Co*., 22 BRBS 271, 275 (1989). Any disability before reaching MMI is temporary in nature. *Id.* In this case, Claimant contends that he is no longer at MMI as previously stipulated at the initial hearing. Claimant contends that the opinions of Drs. Whitsell and Francis should be accepted and that he should be found no longer at MMI despite his prior stipulation to the date of February 28, 2008, the date of MMI based on Dr. Francis' opinion at that time. As noted previously, a party may seek modification even a previously stipulated issue. *See Buttermore, supra*.; *Ramos, supra*; *Lucas, supra.* However, the party seeking to do so must carry the burden of proof. Thus a party must prove that he is no longer at MMI and thus should receive temporary rather than permanent benefits until such time as he again reaches MMI. *See Pac. Ship Repair and Fab., Inc. v. OWCP, [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012); *Alexander v. Avondale Industries, Inc*., 36 BRBS 142 (2002). In the relatively recent *Benge* decision, the Ninth Circuit addressed this issue and stated:

> A disability initially deemed permanent is not immutably so. An initial finding of medical stability may be later proven wrong or warrant reassessment depending on changed circumstances. Nothing in the Longshore Act limits re-characterizations to a one-way street from temporary to permanent; instead, the statute's broad thoroughfare allows for two-way traffic.

Benge, supra at 1186. Thus, Claimant's argument that he is no longer at MMI must be addressed to determine whether he can traverse this "two-way thoroughfare" from permanent to temporary disability.

It is the medical evidence that determines the start of permanent disability, regardless of economic or vocational considerations. *Ballesteros v. Willamette Western Corp*., 20 BRBS 184, 186 (1988). Thus, a judge must discuss the medical opinions of record regarding permanency, rather than relying on economic factors, such as the loss of a job, a return by the claimant to employment, or the likelihood of a favorable change in employment. See *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986) (erroneous for the ALJ to use the date that claimant was fired as the date of maximum medical improvement); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6, 9 (1984) (erroneous for ALJ to base permanency determination on

date employee returned to work); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 324 (1983) (unreasonable for ALJ to find permanency reached, based on physician's release of claimant to return to work, where the same physician specifically stated that he did not know the exact date on which claimant reached maximum medical improvement); *Williams v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979) (the date upon which the employee was rehired is not a reasonable basis for the date of maximum medical improvement). Likewise, evidence of the ability to do alternative employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

Permanent does not mean unchanging. Where an employee's condition only deteriorates after a physician rates it as stable, maximum medical improvement may be found. *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). Similarly, a temporary worsening of a condition does not render a permanent disability temporary. *Leech v. Service Eng'g Co.*, 15 BRBS 18, 22 (1982). Therefore, a prognosis that the employee may improve and his condition stabilize in the future does not establish that his condition is temporary in nature. *Watson v Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Shoemaker v. Schiavone & Sons, Inc*., 11 BRBS 33 (1979); *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988); *Brown v. Bethlehem Steel Corp*., 19 BRBS 200, 204, *aff'd on recon*., 20 BRBS 26 (1987); *see also Seals v. Ingalls Shipbuilding, Div. of Litton Systems Inc.*, 8 BRBS 182 (1978). Even a prognosis that improvement and future employment are likely does not preclude a finding of permanency; a prognosis stating that chances for improvement are remote is sufficient to support permanency. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442 (1981).

The Board has held that where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). The Board has further held that where a claimant undergoes surgery, his condition is permanent only after recovery from surgery. *Walker v. National Steel & Shipbuilding Co.*, 8 BRBS 525, 528 (1978); *Edwards v. Zapata Offshore Co.*, 5 BRBS 429, 432 (1977). The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. *Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984), *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985). Also, a claimant's disability is permanent if the future surgery is not expected to improve the condition. *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988). In fact, if the employee's recovery or ability to do any work after surgery is uncertain or unknown, his disability may be found to be permanent. *White v. Exxon Co*., 9 BRBS 138, 142 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980). Where surgery would fail to alleviate or cure a claimant's underlying conditions and would only address the symptoms of a condition, but not the condition itself, it was found that MMI had been reached. *Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP*, 227 F.3d 934 (7th Cir. 2000). Where the record contained a medical opinion establishing that the employee's condition was of lasting and indefinite duration, a prognosis that the employee's condition may

improve in the future did not preclude a finding of permanency. *Mills v. Marine Repair Serv*., 21 BRBS 115 (1988), *modified on other grounds on recon*., 22 BRBS 335 (1989).

A prognosis that claimant may improve in the future does not support finding that maximum medical improvement has not been reached. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon*., 20 BRBS 26 (1987), *aff'd in part and rev'd in part on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp*., 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989). The Sixth Circuit observed that the Watson test allows for a determination of permanency even when the disability is not "pronounced medically incurable." Thus, the court stated that once the Watson test is met, a disability is permanent notwithstanding a medical prognosis that includes the possibility of the employee's condition improving at some future date. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

Claimant bears the burden of proof in this respect as there is no true doubt rule under the LHWCA. S*ee Director, OWCP v. Greenwich Colleries*, 512 U.S. 267 (1994).

In the present case, Dr. Whitsell opined in his August 29, 2011 report that because his symptoms had increased, Claimant should no longer be considered at MMI until such time as he had appropriately responded to further treatment which Dr. Whitsell stated should consist of an MRI and possibly a lumbar fusion. RX 10 at 5. Dr. Whitsell then opined that Claimant could perform essentially light duty work. *Id*. Dr. Francis wrote on a February 23, 2012 OWCP-5c that he felt Claimant was no longer at MMI while he did opine that Claimant was capable of performing light duty work. CX 4 at 1; RX 12 at 8. Notably, on his last examination of Claimant on January 11, 2012, Dr. Francis reported that Claimant was able to manage his pain and able to work fulltime. CX 2 at 11; RX 12 at 7. While Claimant contends that the notation about his working was an error in dictation, it is clear that whether or not Claimant was actually working at the time, Dr. Francis felt that Claimant was able to work, at least within the light duty restrictions he reported on the February 23, 2012 OWCP-5c. Further, although Dr. Francis noted some changes on the MRI and some weakness in the S1 nerve root distribution accounting for Claimant's complaint of continuing pain, he specifically noted that these findings may only "hasten" the need for possible further surgery and told Claimant to return in six months and to continue working. CX 2 at 11; RX 12 at 7. Claimant testified that he has had "minor shocks running down the back sides of my thighs down through the knees" which have gotten worse over time. TR at 21. Although he complained of an increase in pain for several months prior to seeing Dr. Whitsell, he also attributed this increase in symptoms to the increase in his walking from a mile to three miles which he cut back down. *Id*. at 32-34, 36-37, 40. Although Claimant testified at his deposition that Dr. Francis had issued a new report stating that Claimant could not work until he had injections or back surgery, no such report was offered into evidence. RX 14 at 5. Thus, the last report by Dr. Francis relating to Claimant's ability to work in the record is the February 23, 2012 OWCP-5c, which indicates that Claimant can work at a light exertional level. CX 4 at 1; RX 12 at 8. Dr. Kaldis has opined that Claimant is at MMI and has been since February 28, 2008. RX 8 at 5.

Having weighed the evidence, the undersigned concludes that Claimant has not met his burden of proving that he is no longer at MMI. I find this situation most akin to *Davenport v.*

Apex Decorating Co., 18 BRBS 194 (1986) where it was found that if an employee's condition only deteriorates after a physician rates it as stable, maximum medical improvement had been reached and to *Leech v. Service Eng'g Co.*, 15 BRBS 18, 22 (1982) which held that a temporary worsening of a condition does not render a permanent disability temporary. Dr. Francis' conclusion that future surgery may be necessary, as supported also by Drs. Whitsell and Kaldis, brings this situation within the purview of *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986) (Holding that the mere possibility of future surgery, by itself, does not preclude a finding that a condition is permanent) and *Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984), *aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985) (Holding a physician's opinion that a condition will progress and ultimately require surgery will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period). A change in MMI is most often sought in connection with the actual surgery and recovery therefrom, which would indeed trigger a period of temporary disability. *See Walker v. National Steel & Shipbuilding Co.*, 8 BRBS 525 (1978); *Edwards v. Zapata Offshore Co.*, 5 BRBS 429 (1977). Indeed, that was the situation in *Benge* where the Ninth Circuit found a period of temporary disability despite the prior finding of permanency for the nine month "period of recuperation or healing" following Claimant's three level cervical discectomy and fusion. *Benge, supra* at 1184. There was no temporary disability allowed for the preceding five years during which permanent partial disability benefits were paid even though "Benge's condition continued to deteriorate." During those preceding years. *Id*. As in *Benge*, I do not find Claimant's period of deterioration after being found at MMI to represent a change in the MMI date. Rather, such a change in MMI, entitling Claimant to temporary disability once again must await future surgery, if any. Accordingly, I find any current disability of Claimant to remain of a permanent nature since February 28, 2008.

Extent of Disability

The extent of a claimant's disability is determined by his/her ability to work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). If a claimant meets the evidentiary burden of establishing that s/he is unable to perform his usual employment because of his/her injuries, then the evidentiary burden shifts to the employer to establish the availability of other jobs that the claimant could perform and secure. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 292 (4th Cir. 2002). If the employer meets its burden by showing suitable alternative employment, the evidentiary burden shifts back to the claimant to prove a diligent search and willingness to work. *See Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). Here, Claimant apparently contends that he has been totally disabled, since the date of Dr. Whitsell's report limiting him to light exertional level work. Respondents argue either no loss of wage-earning capacity or that Claimant retains some wage-earning capacity as shown in the labor market surveys.

A claimant's usual employment is his/her regular duties at the time s/he was injured. A claimant's employment immediately prior to the injury is his/her "usual" employment, even if his/her duties had lasted a mere four months and the claimant has had other jobs in the near past. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS

248 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978).

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

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

In this case, I accept the opinions of Drs. Francis and Whitsell that Claimant's work restriction of not wearing body armor precludes Claimant from returning to his former occupation as a truck driver in Iraq where he would be required to wear heavy body armor. Thus, Claimant has met his initial burden. I further credit the opinions of Drs. Francis and Whitsell that Claimant is restricted to light exertional level work. I completely discount the opinion of Dr. Kaldis that Claimant has no work restrictions as Dr. Francis saw and treated Claimant on numerous occasions and was in a far better position to evaluate Claimant's pain complaints and resulting work restrictions. Given these restrictions, Claimant clearly could not perform the medium exertional level jobs set forth in the labor market surveys upon which Judge Kennington partially relied in his calculation of Claimant's wage-earning capacity in his D&O. Accordingly, the undersigned must determine Claimant's current wage-earning capacity under the stricter work restrictions set out by Drs. Whitsell and Francis.

Claimant's Post-Injury Earning Capacity

Section 8(h) of the LHWCA provides:

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

33 U.S.C. § 908(h).

Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. *Id.* at 796-97, 16 BRBS at 64. The undersigned must make this second inquiry as Claimant evidently has no actual post-injury wages.

It is well-settled that the employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in close proximity to the place of injury or home. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondent must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding &Dry Dock Co.*, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985), the employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981). 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 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). 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. v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991). The employer must demonstrate that the claimant "would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp*., 849 F.2d 1194. 1196 (9th Cir. 1988); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In order to establish alternative suitable employment, Respondents engaged Mr. Quintanilla to conduct a labor market survey. Since I find that Claimant is limited to light exertional work, I will not consider the various truck driving positions located by Mr. Quintanilla at the medium exertional level. Mr. Quintanilla did locate job opportunities for Claimant at the light or sedentary levels of exertion as a security guard, assembler, courier and truck dispatcher. I find that all 10 of these jobs represent positions which Claimant could perform within his restrictions.

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). If the employer has established suitable alternate employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. West State Inc.*, 31 BRBS 118 (1997); *Hooe v. Todd Shipyards Corp*., 21 BRBS 258 (1988). The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981), rev'g 5 BRBS 418 (1977). See also *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Trans-State Dredging v. Benefits Review Bd. (Tarney)*, 731 F.2d 199, 201-02, 16 BRBS 74, 76 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 n.2 (1985). Claimant contends that he applied for the positions identified by Mr. Quintanilla and was unable to procure them and thus the undersigned should discard the labor market survey job opportunities in its entirety and award him total disability benefits.

For similar reasons to those cited by Judge Kennington in his D&O, I find that Claimant was not diligent in his job search. First, I would note that the only two periods of time that Claimant has sought out a job has been in connection with his two hearings and the only efforts Claimant has made to search for work have been rather perfunctory attempts at contacting the employers set out in Respondents' labor market surveys.[3] Despite Judge Kennington's finding that Claimant had a wage-earning capacity based on medium exertional level work, Claimant never made any effort to locate any work from the time of the initial hearing on September 16, 2009, until the hearing held by the undersigned on March 7, 2012. TR at 25-28; RX 14 at 3-4. I certainly do not find this gap in attempting to locate work to evidence a "diligent" job search. Further, as did Judge Kennington, I find that Claimant only "went through the motions" in his job search and did not follow up with any applications he filled out. I also find that sending out emails to potential employers with attached physical restrictions was not a diligent effort to procure work. As noted by Mr. Quintanilla, physical restrictions would more appropriately be

[3] As Claimant noted, he contacted the potential employers prior to the initial hearing "because we had to do some before we went to court." RX 14 at 7.

discussed with potential employers either at an interview or in discussing a job offer after the potential employer had expressed interest in Claimant's qualifications and experience for the job. RX 18 at 3. Finally, I am unimpressed by Claimant's disregard of potential security officer positions on the basis that he did not possess a state license or certificate as Mr. Quintanilla advised that such a certificate could be obtained through a single day of coursework at a cost of $30. *Id*. at 2. For all these reasons, I find that Claimant has not at any time conducted a diligent job search.

If Claimant does not prove a diligent job search, then at the most his disability is partial, not total. See 33 U.S.C. § 908(c); *Southern v. Farmers Export Co*., 17 BRBS 64 (1985). Accordingly, I must determine Claimant's current wage-earning capacity. In order to calculate such wage-earning capacity, I followed the same process as did Judge Kennington of using the average of the wages indicated for the ten light and sedentary jobs set forth in the March 2, 2012 labor market survey since such averaging is permitted by the Fifth Circuit where this case was heard. Using the median wages where a range was given, I calculated that the average wage for these ten positions is $11.50 per hour, or $472.00 per 40 hour work week. Accordingly, I find that Claimant has a current wage-earning capacity of $472.00 per week. Deducting this amount from the AWW of $1,781.01 yields a loss of wage-earning capacity of $1,309.01, and a permanent partial disability compensation rate of $872.67.

A final issue remains as to when Claimant's permanent partial disability rate should be increased from Judge Kennington's award of $714.62 to the above determined rate of $872.67. A modifying order terminating compensation based on a change in the claimant's physical and/or economic condition may be effective from the date of the change in condition. *Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (2002); see also *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1732 (2001). A modification order increasing compensation may be applied retroactively if the fact-finder determines that according retroactive effect to the modification order renders justice under the LHWCA. *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976), rev'g 1 BRBS 81 (1974). As the first indication that Claimant's economic condition (wage-earning capacity) had changed was the August 29, 2011 report of Dr. Whitsell, I find that the increase in permanent partial disability payments should commence as of that date.

Medical Benefits[4]

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

[4] Although the parties did not enumerate Section 7 medical benefits to be at issue herein, I find it prudent to address Respondents' continuing Section 7 responsibilities in light of Dr. Kaldis' opinion that any future spinal fusion is attributable solely to his underlying degenerative condition, an opinion which I have rejected in my discussion of the credibility of Dr. Kaldis.

diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402. As noted hereinabove, I find Claimant is entitled to medical assessment and treatment for his lumbar spine as reasonable and necessary under Section 7 of the Act. Claimant is therefore entitled to reimbursement of all medical treatment including that rendered by Drs. Francis and Grover. All of the doctors agree that future treatment of Claimant's spine should include consideration of spinal fusion surgery. Accordingly, I do find that Claimant is entitled to receive continuing medical care, including potential spinal fusion surgery.

Interest

The Claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co*., 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation owed by the Employer should be included in the District Director's calculations of amounts due.

Attorney's Fees

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

ORDER

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

It is therefore **ORDERED**:

1. Respondents shall pay the Claimant compensation for permanent partial disability from February 28, 2008 through August 10, 2011 at the compensation rate of $714.62 per week.

2. Thereafter Respondents shall pay the Claimant compensation for permanent partial disability from August 11, 2011 and continuing, at the compensation rate of $872.67 per week.

3. Respondents are entitled to credit for all disability and claims payments previously made in connection with the May 26, 2006 accident.

4. Respondents shall be liable to Claimant for necessary and reasonable medical treatment of his lumbar spine pursuant to Section 7 of the Act, including payment of injections by Dr. Grover and potential spinal fusion surgery by Dr. Francis.

5. Respondents shall pay interest on Claimant's unpaid compensation benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.

IT IS SO ORDERED.

Russell D. Pulver
Administrative Law Judge

Digitally signed by Russell Pulver
DN: CN=Russell Pulver,
OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA