

U.S. Department of Labor

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Issue Date: 21 December 2011 **DATE ISSUED:**

**CASE NOS.: 2011-LDA-257
2011-LDA-258
2011-LDA-259**

**OWCP NOS.: 02-195988
02-203188
02-203189**

**IN THE MATTER OF
ISAIAS GOMEZ,
Claimant
v.**

**ITT FEDERAL SERVICES
INTERNATIONAL CORP.,
Employer**

**and
INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA
Carrier**

APPEARANCES:

**GARY PITTS, ESQ.
On behalf of Claimant**

**FRANK GEROLD, ESQ.
On behalf of Employer, Carrier**

**BEFORE: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, and its extension, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq.* (2000), brought by Isaias Gomez (Claimant) against ITT Federal Services International Corp. (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was

referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on September 12, 2011, in Houston, Texas.

At the hearing, all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant testified and introduced eighteen (18) exhibits including various DOL forms (LS-18, 202, 203, 207, and 280); Claimant's medical, personnel, and payroll records from Employer; Claimant's Social Security earning statement; and Claimant's earnings records and W-2 for 2009 from Lear Siegler.

Employer introduced twenty-five (25) exhibits including various DOL forms; wage data; job site medical records; personnel file; employment contract; deposition of Claimant; labor market survey; medical report and records of Dr. Dennis Rod Lee, Dr. Frank H. Gonzales, and Dr. Manuel Mondragon Ritche; medical records of Southwest Diagnostic Imaging Center; employment records of Coastal Bend Mooring, Hadin Honda, McNeilus Financial, Inc.; personnel and payroll records from URS Federal Support Services, Inc.; academic records from Eagle Pass High School and the University of Phoenix; IRS tax records; SSA earnings records; and medical records from Southside Orthopedics Rehab Associates.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant's alleged injuries/accidents occurred on June 6, 2008; April 30, 2009; and October 29, 2009;
2. An employer/employee relationship existed at the time of the alleged injuries/accidents;
3. Employer filed Notices of Controversion on January 19, 2010; November 4, 2010; and February 5, 2011;
4. An informal conference was held on January 24, 2011.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Fact of injury/causation.
2. Nature and extent of injuries.
3. Timeliness of notice

4. Average weekly wage.
5. Section 7 benefits.
6. Attorney fees and expenses.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 47 year old male born in Loredo, Texas, on May 23, 1965. Claimant grew up in Eagle Pass, Texas, where he attended and graduated high school. After graduating high school on May 25, 1984, Claimant joined the U.S. Marine Corps and after serving for four (4) years was honorably discharged. While in the Marine Corps, he learned the skills of a heavy equipment mechanic. After his discharge, he continued working as a heavy equipment mechanic for many years. Claimant also obtained forty-five (45) credit hours of college work at the University of Phoenix. (Tr. 15, EX-19, 20, 21)

Claimant began working overseas as a heavy equipment mechanic in Iraq for Lear Siegler in 2007. After approximately six (6) months of working for Lear Siegler, he began working for Employer doing the same type of work, and he continued working for Employer for approximately two (2) years. As a heavy equipment mechanic, he replaced transmissions, engines, cabs, armor, tires, axles, seals, springs, and electrical systems; he would also diagnosis problems with the hydraulic systems and test drive the vehicles. Claimant worked on the night shift six (6) days a week. (Tr. 16).

Claimant testified about the three (3) instances surrounding the injuries that are the subject of this claim, all of which occurred while working for Employer. The first instance occurred on June 6, 2008, as he was leaving the gym. According to his testimony, the chain slipped on the bike he was riding causing him to slip and fall off the bike. The following day, he was treated by military medical personnel for right ankle and bilateral knee pain. Medical personal diagnosed right ankle sprain and right knee sprain, lateral collateral ligament. Claimant was instructed on icing for the pain and swelling and to limit his running, jumping, and weight bearing activities for ten (10) days. (Tr. 17; CX-1, pp. 2-3). After this incident, Claimant taped his injuries and continued working.

The second incident began on April 30, 2009, when Claimant started experiencing right wrist problems. Claimant had been assigned to temporary duty putting new armor on the Humvees. Claimant testified that his job was to drill holes so that the new armor could be attached to the Humvee, and he further testified that he was given a corded electrical drill to drill the holes. While drilling, the drill-bit would periodically become lodged in the Humvee and instead of stopping the drill itself would continue spinning while the drill-bit remained stationary. This would sometimes result in Claimant's glasses being knocked from his face. Claimant protested to his supervisors about the equipment and on May 3, 2009, sought medical treatment for sharp, needle like, pain and numbness in his right wrist and hand. (Tr. 18, CX-1, pp. 4-5). Unlike the bike incident, Claimant has continued to experienced severe right wrist pain

up to the present. According to Claimant's testimony, Dr. Richie recommended surgery on the wrist and connects the injury with Claimant's overseas work. (Tr.19).

The third claimed injury occurred on October 28, 2009, when Claimant slipped on hydraulic oil. According to his testimony, Claimant and another mechanic were in the process of getting hydraulic oil off a wrecker in order to replace the hydraulic cylinders. As he attempted to step down, Claimant slipped on hydraulic oil and injured his knees and lower back. Claimant sought help from military medical personnel the next day. He initially reported only knee pain but later also reported a slow numbness in his lower back. (Tr.20, 21; CX-1 pp.6-7). Subsequently, Claimant saw Dr. Richie for low back and knee pain who, following MRIs of Claimant's knees and back, recommended surgery to correct meniscal tears in both knees and recommended epidural steroid injections in the low back. (Tr. 21-22).

On cross, Claimant testified he told his supervisors about each incident. Further, he has not suffered any monetary loss as a result of the June 2008 incident and also has not sought medical care for that incident, other than the one time visit he made to the clinic. Concerning the second incident of April 30, 2009, Claimant admitted the wrist pain was associated not only with machine tools but also with doing push-ups. After this incident, Claimant admittedly went back to work as a heavy equipment mechanic for approximately a two (2) month period. According to Claimant, there were times during the two (2) month period when he had his partner assist him in performing his tasks; however, Claimant did not lose pay, did not suffer discipline or complaints from his supervisors, and did not seek additional medical attention as a result of this injury. (Tr. 24-26).

Claimant also admitted that when he was chosen to demobilize in November 2009, the reason given for his demobilization was that the end of his contract had been reached. Claimant returned to the U.S. in December 2009. Claimant also testified that from June 2008 until October 27, 2009, he was able to perform all of his assignments and tasks as a heavy equipment mechanic with the assistance of his partner.

After additional cross-examination, Claimant also admitted that he did not know when he began having a back problem or where it came from and that when he saw the medic in October or November 2009 he did not complain about his back. (Tr. 26-29). Claimant also admitted not mentioning his back when he saw Mr. Mares in Eagle Pass in early 2010, when he saw Dr. Guajardo in February 2010, or when he saw Dr. Gonzales. (Tr. 29-30).

Claimant also admitted he stated at his deposition in September of 2010 that he was able to do the work of a secretary, although he has not sought out any work as either a secretary or a file clerk. Regarding the labor market survey, Claimant admits he did not look for some of the jobs listed and could not provide a reason for not doing so. Claimant also admits that he had no back complaints until long after he demobilized and came back to the U.S.

On re-direct, Claimant testified that his military medical records became part of his personnel file with Employer. (Tr. 40-41). Claimant also asserted the reason he was unable to work was the pain in his wrist and his knees and not his back. (Tr. 42).

B. Medical Records

Following his return to the U.S., Claimant visited Southside Orthopedic & Rehabilitation Association where he was examined by Dr. Pablo Guajardo on February 25, 2010. (EX-27) At this visit, Claimant's complained of severe pain in both of his knees as well as tingling, numbness, and pain in his right wrist. (EX-27, p. 4). Claimant attributed the wrist pain to working overhead with a power drill and the knee pain to the overseas incident when he slipped on hydraulic oil and fell on his knees. After the examination, Dr. Guajardo diagnosed Claimant with (1) Chondromalacia patella with internal derangement in both knees; (2) Subluxing patella in both knees; and (3) carpal tunnel syndrome in his right wrist. Dr. Guajardo prescribed Voltaren gel and recommended Aleve for Claimant's injuries. (Ex. 27, p. 6).

On March 10, 2010, Claimant presented to the office of Dr. Frank Gonzales complaining of pain in his right wrist and both of his knees. (CX-1, pp. 9-13; EX-11). In a report dated March 18, 2010, Dr. Gonzales noted the same complaints and stated that Claimant was unable to return to work due to the injuries in his right wrist and both of his knees. (CX-1, pp. 11-13; EX-11).

This treatment was followed by additional testing and treatment by orthopedist, Dr. Manuel Ritchie who referred Claimant to Southwest Diagnostic for MRI testing. As a result, Claimant underwent MRI testing of his lumbar spine and of his right wrist on November 23, 2010, and MRI testing of his knees on November 30, 2010. The MRI on Claimant's wrist revealed a cystic osteochondral lesion within the proximal articular surface of the lunate with attenuation of the triangular fibrocartilage complex with associated partial tearing of the triangular fibrocartilage complex and reactive wrist joint effusion. (CX-1, p. 15; EX-13, p. 3). The MRI of his right knee revealed medial meniscal tear, tricompartmental osteoarthritis with moderate-grade medial femorotibial compartment chondrosis, and reactive joint effusion. (CX-1, p.16; EX-13, p. 5). In addition, the MRI of Claimant's left knee revealed a medial meniscal tear and patellofemoral and femorotibial compartment osteoarthritis with moderate medial femorotibial compartment chondrosis. (CX-1, p.17; EX-13, p. 6). The MRI on Claimant's lumbar region showed posterior central disk protrusion with thecal sac impingement at L2-L3 and additional disc protrusions at L4-L5 and L5-S1. (CX-1, p. 14; EX-13, p. 4).

Dr. Ritchie recommended surgery for the wrist and knees as well as epidural steroid injections for the back. (EX-12, pp. 4-5). In a report dated December 15, 2010, Dr. Ritchie stated Claimant should avoid heavy lifting, continuous bending or squatting, and pushing and pulling heavy objects; he further believed these restrictions were permanent. (EX-12, p. 5). Based upon a review of the medical evidence, Dr. Ritchie opined that Claimant's injuries occurred as a result of those incidents he reported occurring on June 6, 2008; April 30, 2009; and October 29, 2009. (EX-12, p.5).

The only medical opinion questioning the above diagnosis came from Dr. Dennis Rod Lee, an Employer sponsored orthopedic surgeon. Dr. Lee found Claimant moaning with all movements which Dr. Lee described as indicating possible symptom magnification. As a result, Dr. Lee opined that his evaluation of Claimant's impairment level would likely be invalid. However, he did find Claimant suffering right wrist pain, secondary to inflammatory response to

degenerative changes in the wrist; bilateral degenerative arthritis of the knees with strain versus contusion and possible, but not probable, aggravation of pre-existing degenerative arthritis; and lumbosacral strain and possible aggravation of pre-existing multilevel degenerative changes of the lumbar spine. (EX-9)

C. Labor Market Survey

Employer presented a labor market survey conducted in the geographical area of Eagle Pass, Texas, by Ms. Shelley Lindley, a vocational expert. According to Ms. Lindley, Claimant had supervisory skills from the military and from working at Hardin Honda where he supervised thirteen (13) employees as a shop foreman/advisor. Claimant also has the ability to operate a fork lift and automobile diagnostic machines. Ms. Lindley found light duty work as an automotive service manager and parts clerk appropriate for Claimant. Ms. Lindley also found the following positions appropriate for Claimant dispatcher, inventory audit clerk, order clerk, customer complaint clerk, security officer, material clerk, parts-order and stock clerk, and warehouse supervisor. According to government data, the average salary for jobs in Eagle Pass is \$21,848 with an unemployment rate of 14.6% versus a national rate of 5.8%.

Specifically, Ms Lindley found the following job openings appropriate and available for Claimant: Advanced Auto Parts: general manager and/or assistant manager (\$32,190 annually), salesperson (\$21,000 annually), retail parts pro (\$21,000 annually); Cricket Communications: assistant manager (\$32,190 annually); The GEO Group: payroll clerk (\$32, 870 annually); Pizza Hut: general manager, shift leader (\$29,690); and Time Warner Cable: warehouse facility person (\$27,560). In finding the above jobs appropriate, Ms. Lindsey noted that the job market in Eagle Pass was limited and that the file contained no FCE or IME to indicate Claimant's ability to work. (EX-7).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he provided timely notice of his injuries and timely filed his claims. Claimant argues that he sprained his ankle and injured his knees on June 6, 2008, and thereafter filed a claim for these injuries on June 24, 2010. Claimant asserts, and there is no testimony to the contrary, that he told his supervisor, Mark Hepel, about the injury and showed Mr. Hepel his ankle on the evening of the injury. Claimant further asserts the military medical records of the injury became part of his personnel file. (EX-6, p. 5; CX-1, pp.1-2; Tr. 40).

Regarding the injury April 30, 2009, for which he filed claim on February 1, 2010 he also his supervisor about it and the care he was receiving for it which was documented by military medical records of May 31, 2009, (Cx-1, pp. 4,5; Ex- 1, pp.17; Tr. 40,41). Regarding the October 29, 2009 injury for which he filed a claim on December 29, 2009, Claimant also reported this to his supervisor who placed him on light duty. (CX-1, pp.6, 7, Tr. 41).

Claimant argues that pursuant to Section 13(a) an employee is required to file a claim for compensation within a year of a traumatic injury but the time limitations do not run against employees until the employer filed a report of injury with the District Director. Claimant argues

that pursuant to Section 12 (a) he is required to give his employer 30 days notice of a traumatic injury unless the employer has actual knowledge of the injury which it had in this case. Thus, since Employer had actual notice of the injuries when the injuries occurred, Claimant is entitled to rely upon the presumption of Section 920 (b) of sufficient notice of instant claims.

Claimant next argues that he is entitled to temporary total disability as of March 18, 2010, because he has established that he was unable to return to his former heavy equipment mechanic work on this date. According to Claimant, Employer has, at most, established the suitability of two positions, sales person position and parts pro position, each paying \$21,000 per year or \$403.85 per week. Using Employer records for 2009, Claimant argues that he earned \$150,620.20 per year or \$2,896.54 per week. (CX-18).

Employer contends that Claimant is not entitled to any Section 7 benefits for the 2008 ankle injury, the April 2009 wrist injury, or the October 2009 back injury. Concerning the 2008 ankle injury, Employer argues he lost no wages, is in no way disabled, and has not sought medical care since June 2008 for the injury. Concerning the April 2009 wrist injury, Employer argues Claimant continued to work until he was demobilized in November 2009, did not lose any wages as a result thereof, did not return to the clinic for treatment, and did not receive any work related criticism. Employer also notes that Claimant waited until June 24, 2010, to file a claim related to this injury.

Concerning the October 2009 back injury, Employer argues that Claimant never reported any back injury to the medic in 2009 and that he never reported any back injury to the physician's assistant or to his two (2) treating physicians in 2010. Furthermore, Employer avers that any back injury suffered by Claimant occurred when Claimant was lifting his son out of a wheel chair.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Assn v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case, I was impressed with Claimant's candor while testifying and describing the problems which keep him from working, namely the problems with his right wrist and knee. I credit his assertion of severe pain as a result these injuries which were timely and promptly reported to his immediate supervisor. When questioned about whether his ankle or back problems prevented him from working, Claimant admitted that his ankle problem had resolved shortly after it happened and that he was not relying upon any back problems for his inability to

work. Further, I find that MRI findings show severe wrist and knee problem which require surgery before improvement can be realized. I also find that Claimant's treating sources generally support Claimant's assertion that he is unable to return to his former mechanic work. In particular, I credit the March 18, 2010, report of Dr. Gonzales stating Claimant was unable to return to his work as a mechanic because of injuries to his right wrist and his knees. (CX-1, p. 13).

C. Timeliness of the Claims

a. Section 12: Timely Notice

Section 12 contains one of the two timeliness provisions which claimant must satisfy in order to pursue a claim under the Act. These time limitations are mandatory and jurisdictional in nature. *See, e.g., Director, OWCP v. National Van Lines Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146 (3d Cir. 1975); *Young v. Hoage*, 90 F.2d 395 (D.C. Cir. 1937). Section 12 provides that claimant must give timely notice of an injury or death.

Section 12(a) of the LHWCA provides that notice of an injury or death for which compensation is payable must be given within 30 days after injury or death, or within 30 days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. 33 U.S.C. § 12(a). While it is the claimant's burden to establish timely notice, the Fifth Circuit has held that Section 20(b) provides the claimant with a presumption that notice was timely given. *Avondale Shipyards v. Vinson*, 623 F.2d 1117 (5th Cir. 1980); *United Brands Co. v. Melson*, 594 F.2d 1068, 1072 (5th Cir. 1979), *aff'g* 6 BRBS 503 (1977). The Board has also adopted this stance, finding that in the absence of substantial evidence to the contrary, it is presumed under Section 20(b) that the employer has been given sufficient notice pursuant to Section 12. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period (Section 12(d)(1)) or that the employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989). The Board and circuit courts generally require that the employer have knowledge not only of the fact of the claimant's injury, but also of the work-relatedness of that injury. *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

In *Matthews v. Jeffboat*, the Board found the employer had knowledge of the injury where the administrative law judge found claimant orally notified his leadman and foreman of his injury. *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986). Furthermore, prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *White v. Sealand Terminal Corp.*,

13 BRBS 1021 (1981). The employer bears the burden of proving, by substantial evidence, that it has been unable to effectively investigate some aspect of the claim by reason of the claimant's failure to provide timely notice as required by Section 12. *Strachan Shipping Co.*, 571 F.2d at 972. The allegation of difficulty in investigating is not sufficient to establish prejudice. *Williams v. Nicole Enters.*, 21 BRBS 164 (1988).

In this case, Claimant testified that he informed his supervisor of his injuries. Furthermore, medical records which became a part of Claimant's personnel file support the contention that Employer had actual knowledge of Claimant's injuries. Employer has come forward with no evidence that it did not have actual knowledge or that it suffered any prejudice as a result. Considering the Section 20(b) presumption, I find this claim is not barred under Section 12.

b. Section 13: Timeliness of the Claim

The Section 13 limitations period does not begin to run until claimant is aware that he has sustained a work-related injury resulting in the likely impairment of his earning capacity or of the full character, extent and impact of the harm done as a result of the work injury. *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *J.M. Martinac Shipbuilding v. Director, OWCP [Grage]*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987). An initial period of temporary total disability does not necessarily establish that claimant was aware of the full nature of the injury and thus the Section 13 time period may not commence until a later date when claimant becomes aware of a permanent impairment. *See Parker*, 935 F.2d 20, 24 BRBS 98(CRT); *Grage*, 900 F.2d 180, 23 BRBS 127(CRT). Thus, in order to be "aware," claimant must know, or should know, the true nature of his injury, *i.e.*, that he has a work-related condition resulting in a likely impairment of earning capacity.

Section 20(b) provides claimant with a presumption that his claim was timely filed. In order to rebut the presumption, employer must produce evidence that the claim was not filed within the required time after claimant's "awareness." *See Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only). Employer's burden under Section 20(b) includes establishing that it filed a first report of injury in compliance with Section 30 before it can prevail under Section 13. *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev'g in part* 32 BRBS 174 (1998); *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991); *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201, *vacated on other grounds on recon.*, 24 BRBS 63

(1990). As Employer has not come forward with sufficient evidence to rebut the Section 20(b) presumption, I find Claimant has established the timeliness of his claims.

D. Causation

Under the Act, Claimant has the burden of establishing the *prima facie* case of a compensable injury. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). See *U.S. Industries/Federal Sheet Metal v. Director, OWCP* (Riley), 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). It is the claimant's burden to establish each element of his *prima facie* case by affirmative proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In *U.S. Industries*, the United States Supreme Court stated, "[a] *prima facie* 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries*, 455 U.S. at 615, 14 BRBS at 633.

Section 20 provides that in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act. 33 U.S.C. § 920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a 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 the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

Section 2(2) of the Act defines injury as an accidental injury or death arising out of and in the course of employment. 33 U.S.C. § 902(2)(2003). In order to show the first element of harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden

of proof to the employer.” *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending, stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In a Defense Base Act case, all a Claimant has to prove is that the “obligations or conditions” of his employment created a “zone of special danger” out of which the injury or death arose. *Kalama Services, Inc., v. Director, OWCP*, 354 F.3d 1085, 1091 (9th Cir. 2003). In “zone of special danger” cases, the Court in *O’Leary v. Brown –Pacific-Maxon* 340 U.S. 504-507 (1951), held that an employee need not establish a causal relationship between the nature of his employment and the accident that occasioned his injury. Neither was it necessary that an employee be engaged at the time of injury in activity of benefit to his employer. Rather all that was required for compensability is that the obligations or conditions of employment create the “zone of special danger” out of which the injury arose. Further, an employer can be said to create a zone of special danger simply by employing an employee in a foreign country, as long as the employment is related to a federal contractual obligation. *Harris v. England Air Force Base*, 23 BRBS 175, 179 (1990).

In establishing that an injury occurred in the course and scope of his employment, a claimant is entitled to rely on the presumption provided by Section 20(a) of the Act. *Willis*, 20 BRBS at 12; *Mulvaney*, 14 BRBS at 595; *Wilson*, 16 BRBS at 75. Section 20 provides that “[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act.” 33 U.S.C. 920(a). Once a *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of his employment. *Hunter*, 227 F.3d at 287.

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, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *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 prior, unquantifiable 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 of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003) (stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a ruling outstandard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *affd mem.*, 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient 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, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

In this case, Claimant established the he suffered injuries to his right wrist and both of his knees while at work. I find the Dr. Lee's medical report regarding a possible aggravation of a preexisting condition as insufficient to rebut the Section 20(a) presumption and equivocal at best. The undersigned further finds that overall Employer has not come forward with sufficient evidence to rebut the Section 20(a) presumption of causation regarding these injuries.

However, I do find that Employer has raised substantial doubts regarding Claimant's back injury. Moreover, I find Claimant's back injury, based on the record as a whole, was likely not caused by his employment.

E. Nature and Extent

Disability is defined under the Act as the, "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity. Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

Assuming Claimant has established an inability to return to his former employment and thus makes a *prima facie* showing that he is totally disabled, the burden shifts to employer to show suitable alternative employment. *Turner*, 661 F.2d at 1038. The Fifth Circuit has developed a two-part test by which an employer can meet its burden of showing suitable alternative employment:

- 1.) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- 2.) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. The employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." *P & M Crane Co.* 930 F.2d at 431; *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). To establish suitable alternative employment, the employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience and physical restrictions, and which he could secure if he diligently tried. *Turner*, 661 F.2d at 1038. An employer is not required to place a claimant in an actual job. *Id.* Furthermore, a showing of only one job opportunity may suffice

under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane Co.*, 930 F.2d at 424, 430.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask, supra*, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services v. Director, OWCP, supra*, at 443.

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In this case, Dr. Ritchie and Dr. Gonzales both found that as a result of the injuries to his right wrist and his knees Claimant's condition prevented Claimant from resuming his former mechanic work and found that Claimant would require surgery for these impairments. To avoid a finding of total disability, Employer attempted to show Claimant was only partially disabled by showing suitable alternative employment. In that regard, Employer introduced the labor market survey of vocational expert Ms. Lindley who found eight (8) jobs which appeared appropriate for Claimant. However, none of these positions show the level of exertion demanded. Furthermore, Ms. Lindley was unable to consider Claimant's functional capacity. Thus, it is impossible to tell whether these jobs are appropriate for Claimant. Therefore, I find that Employer has failed to establish the existence of suitable alternative employment and that Claimant's condition has caused him to be temporary and totally disabled.

F. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty*

Assoc., v. Bunol, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998).

1. Section 10(a)

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has “worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury.” 33 U.S.C. § 910(a); *See also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average annual earnings consists of “three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker.” 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998).

In this case, Claimant did work a substantial portion of the year preceding his injury and earned \$150,620.20 according to his 2009 W-2. Pursuant to Section 910(d)(1), this results in an average weekly wage of \$2,896.54 which entitles Claimant to the maximum compensation rate of \$1,224.66. 33 U.S.C. § 910.

G. Medical Benefits

Section 7(a) of the Act provides that Athe employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. Sec. 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to

medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

In this case, Claimant is entitled to surgery on his right wrist and knees as well as related medical care as recommended by Dr. Ritche. To the extent Claimant has borne the expense for the medical treatment of either his right wrist or knee problems, he shall be reimbursed by Employer for such payment.

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

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

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from March 18, 2010, to the present and continuing based on an average weekly wage of \$2,896.54 and a corresponding maximum compensation rate of \$1,224.66.
2. Employer shall reimburse Claimant for all past medical expenses he paid for in connection with his right wrist and knee problems he suffered as a result of his injuries he suffered on April 4, 2009, and October 29, 2009, while employed by Employer in Iraq and shall pay for future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, including surgery to the right wrist and knees if Claimant elects to undergo the procedures.
3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.
4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.
5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

A

CLEMENT J. KENNINGTON
Administrative Law Judge