

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 April 2012

CASE NOS.: 2011-LDA-222
2011-LDA-223

OWCP NOS.: 02-159701
02-184807

IN THE MATTER OF:

FRANK M. SCHANZER

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.
c/o KBR

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
c/o Chartis Worldsource (Dallas, TX)

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

LIMOR BEN-MAIER, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Service Employees International, Inc. (Employer) and Insurance Company Of The State Of Pennsylvania, c/o Chartis Worldsource (Dallas, TX) (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 24, 2011, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 27 exhibits, Employer/Carrier proffered 28 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer/Carrier by the due date of March 1, 2012. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

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

1. That the Claimant was injured on February 12, 2006 and February 25, 2009.
2. That Claimant's knee injury occurred during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.

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

4. That Employer/Carrier filed a Notice of Controversion on March 27, 2009.
5. That an informal conference before the District Director was held on January 6, 2011.
6. That Claimant received temporary total disability benefits from February 26, 2009 through April 7, 2010, at a compensation rate of \$1,160.31 for 58 weeks.
7. That Claimant's average weekly wage at the time of the February 25, 2009 injury was \$1,740.45.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury of the right shoulder.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.
4. The reasonableness and necessity of recommended surgery for the right shoulder and left knee.
5. Claimant's average weekly wage.
6. Entitlement to and authorization for medical care and services.
7. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing and was deposed by the parties on August 12, 2011. (EX-29). Claimant was 57 years of age at the time of the formal hearing. He was born in Galveston, Texas, and grew up in Hitchcock, Texas. (Tr. 19). He is a high school graduate and completed less than two years of college at the College of the Mainland in Lamar, Texas. (Tr. 19; EX-29, p. 3). His vocational career was primarily work in

the air conditioning field. He described the work as heavy work, lifting 80 to 100-pound units. He worked with large industrial units. (Tr. 20).

Claimant served in the U.S. Navy from 1975-1976 and received an Honorable Discharge. (Tr. 21; EX-29, p. 9).

Claimant enjoyed working in Afghanistan because he felt appreciated. (Tr. 22). He began work for Employer on October 6, 2004. (Tr. 22; EX-29, p. 4). In February 2006, his right shoulder began hurting because he was stretching out to lift 100-pound units above his head. (Tr. 23-24; EX-24, p. 4). Claimant is 5'10" and weighs 230 pounds. He felt his shoulder "give way." His co-worker, Robert Doss, went with him to the KBR medics. (Tr. 24). They had worked together for three to four months. (Tr. 24-25). He filled out an incident report on February 12, 2006. He subsequently filled out another incident report when his foreman was present. (Tr. 25). He was placed on bed rest for one day by the medic, who told him to inform his supervisor, which he did. (Tr. 25; CX-1, p. 2; EX-29, p. 4). He was placed on restricted duty on March 11, 2006, because his shoulder was "acting up." (Tr. 26; CX-1, p. 3). He was given lighter jobs. (Tr. 26; EX-29, p. 5). He would vacuum the shop floor, but could not sweep because of his shoulder condition. (Tr. 26).

Claimant testified he tried to quit work in April 2006, but Employer would not manifest him out of the country. In July 2006, he was fired by Employer because he had received too many "write-ups." (Tr. 27; EX-29, p. 5). He went to Thailand for an MRI on his right shoulder at the Bangkok Hospital, but the MRI machine was too small for him. (Tr. 28; EX-29, p. 5). He did not want to return to the United States for tax purposes. He spent three and one-half months in Thailand. (Tr. 29).

Claimant was rehired by Employer, and returned to work in Afghanistan in November 2006. (Tr. 29; EX-29, p. 5). He trained Afghani workers, who performed the heavy work. (Tr. 30; EX-29, p. 5). He was not required to use his right shoulder, but it continued to hurt. (Tr. 30-31).

On February 25, 2009, Claimant was making his rounds to check gas fire heater units. (Tr. 31). He was walking down an incline, when he fell down and "tore up" his left knee. (Tr. 32; EX-29, p. 7). He remained in Afghanistan for four days, before being transferred to Dubai. He underwent MRI testing at Canadian Specialist Hospital in Dubai. He remained in Dubai for

seven days before he was sent home. (EX-29, p. 7). Dr. Kosty, an orthopedic surgeon, performed surgery on Claimant's left knee. He had prior left shoulder problems for which he sought treatment with Dr. Kosty in the past. (Tr. 32; EX-29, p. 8). Dr. Kosty cleared Claimant to work overseas, and he passed the pre-employment physical. (Tr. 32-33; EX-29, p. 8). Claimant stated he had no problems with his right shoulder or with his left knee before going to work in Afghanistan.

Dr. Kosty recommended a unicompartmental arthroplasty to Claimant's left knee, which is a partial knee replacement. Carrier denied the surgery. (Tr. 33). Dr. Kosty also told Claimant that surgery for his right shoulder was a possibility because of a chronic rotator cuff tear. (Tr. 34).

CX-9 contains photographs of the air conditioning equipment and rocky terrain Claimant worked on in Afghanistan. (Tr. 34-35). Claimant took the photographs. CX-10 is Claimant's employment agreement with Employer. (Tr. 35). On February 26, 2005, Claimant received a certificate of appreciation from the Combined Joint Operations Area project manager for his work overseas. (Tr. 35; CX-8).

Claimant has not earned any income since returning to the United States from Afghanistan. (Tr. 35). It is his understanding that Dr. Kosty has not found him to be at maximum medical improvement. (Tr. 36).

CX-26 is a hospital card Claimant received from Bangkok Hospital Pattaya. (Tr. 38-39).

On cross-examination, Claimant stated he now lives with his parents. (Tr. 40). Claimant drove himself to the formal hearing. He drives a manual transmission Ford truck. (Tr. 41).

Claimant stated he was never diagnosed with right shoulder arthritis. He believed he suffered a minor sprain to his right shoulder years before, while working in a chemical plant. (Tr. 41). He could not recall having x-rays of the right shoulder prior to the 2006 incident. In February 2006, he told the KBR medic about his right shoulder injury. (Tr. 42). He did not dispute that the medical records indicated he woke up with a sore shoulder. Six weeks later, he was still having problems with his right shoulder. He had dropped an air conditioning unit, puncturing a copper line. He complained that he had injured his shoulder while using a pressure washer. (Tr. 43).

Claimant was fired on July 4, 2006. On June 28, 2006, he had submitted a written statement indicating he wanted to quit because he was only performing dirty jobs and did not have the opportunity to install units. (Tr. 44).

A doctor at the hospital in Thailand referred Claimant for an MRI. (Tr. 45). Claimant did not receive copies of any of the records from Bangkok Hospital. He did not seek any other treatment while in Thailand. (Tr. 46). He returned to the U.S. in October 2006 and re-applied for work with Employer. (Tr. 46-47). He did not seek any medical treatment for his right shoulder while in the United States. He was rehired by Employer in November 2006. (Tr. 47). He passed his pre-employment physical, and made no complaints about his right shoulder pain at that time. (Tr. 47-48).

When he returned to Afghanistan, he was not using his shoulder because Afghani employees were performing most of the work. (Tr. 48). He required the assistance of others to perform tasks that he previously had performed alone. He could not lift heavy items. (Tr. 49). When he flew to Afghanistan, he used a cart to carry his luggage. In January 2008, he sought treatment with Dr. Kosty for his right shoulder. (Tr. 50).

In February 2009, after his left ankle and knee injury, he had an exit interview with Employer, but could not recall if he reported his right shoulder problems. He received compensation and medical care for his ankle and knee until April 2010. He underwent physical therapy during that time. (Tr. 51). He did not dispute that his physical therapist released him with full range of motion in his knee on June 16, 2009. (Tr. 52).

He engaged in a job search by contacting a hiring company. (Tr. 52). He filled out an application for a control room position at a chemical plant, but did not hear from the company. He contacted KBR regarding potential employment. He was told that he needed a doctor's release, and if he was qualified would be considered for jobs. (Tr. 53). He recalls that in April 2010, Dr. Kosty placed him at maximum medical improvement and sent him to another doctor for an impairment rating on his knee. He was restricted to lifting 25 pounds. Dr. Kosty informed him he could not get approval for the right shoulder treatment or surgery. (Tr. 54).

In 2008, Claimant was treated by a military doctor after being "flipped over by the turbo thrust of a helicopter." (Tr. 55-56). He experienced severe muscle spasms following the incident. (Tr. 56). His back condition improved following the treatment. (Tr. 57).

Claimant uses a crutch daily because of instability in his knee. It was prescribed by Lieutenant Kone from Camp Sweeney in February 2009. Dr. Kosty was aware Claimant used a crutch. (Tr. 57-28). Claimant reported his knee injury to his supervisor Tom Kelly. He reported his shoulder injury to his supervisor Terry Whitman. (Tr. 58). He requested a copy of the accident report, but Employer would not provide it. Everyone had access to help from Afghani workers. (Tr. 59).

On re-direct examination, Claimant testified use of the crutch has not aggravated his right shoulder injury. (Tr. 60). He uses the crutch on his right shoulder. (Tr. 61).

Robert Doss

Mr. Doss was deposed by the parties on September 14, 2011. (CX-28). He is 54 years of age. He has lived in Santa Fe, Texas, since 1997. He was born in Chicago, Illinois, and subsequently moved to Georgia before moving to Texas. (CX-28, p. 5). His vocational career consists mostly of maintenance work. He decided to work overseas for the money and the cultural experience. He worked in Afghanistan for thirteen months and in Iraq for two years. (CX-28, p. 6).

Mr. Doss met Claimant when he went to work in Afghanistan. (CX-28, pp. 7-8). They both worked in the HVAC Department, which was heating and air-conditioning. CX-27 is a list of the employees who worked in the HVAC Department. (CX-28, p. 8). Claimant and Mr. Doss worked together on the same crew for "quite a while." (CX-28, p. 9).

Mr. Doss testified that Claimant waited a few days, after injuring his right shoulder, before seeking treatment with the medics. (CX-28, p. 9). They would reach above their heads to remove the window air-conditioning units from the modular housing, carry them to a cleaning area, and then lift them back into place. He believed the units weighed between 80 and 125 pounds. Two people would remove each unit. (CX-28, p. 10). Claimant told Mr. Doss his right shoulder was hurt. Then, Claimant went for an evaluation by a medic, who prescribed medication. Claimant told Mr. Doss his shoulder worsened the

longer he worked on the units. Claimant initially complained of an injury to his right shoulder in February 2006. (CX-28, p. 11).

Mr. Doss remained in Afghanistan from November 2005 through December 2006. He spoke to Claimant three or four times after returning to the United States. (CX-28, p. 12).

On cross-examination, Mr. Doss testified he returned to the United States in December 2006. He then went to work in Iraq from April 2008 through April 2010. He did not work with Claimant during that time. He worked with Claimant for several months in Afghanistan. (CX-28, p. 14). Employer would change the crew assignments to prevent complacency. He worked directly with Claimant from January 2006 through April 2006. (CX-28, p. 15).

Mr. Doss did not observe how Claimant hurt his right shoulder. Claimant went to the medic several times for treatment of the injury. (CX-28, p. 16). Claimant returned to work and performed the same tasks following his treatment by the medics. (CX-28, p. 17). Removing and reinstalling the window units was one of the most difficult jobs they performed. (CX-28, p. 18). Claimant continued to perform his job. (CX-28, pp. 18-19).

Mr. Doss was not working for Employer at the time of the deposition. He had begun work for Best Bet Marine Services. He never filed a workers' compensation claim against Employer. He has no pending workers' compensation claims. He did not know anything about Claimant's work activities between December 2006 and 2009. (CX-28, p. 19). He never went to a doctor's appointment with Claimant, and he never saw Claimant's medical records. (CX-28, pp. 19-20).

The Medical Evidence

Sterling Chemicals Medical Records

Claimant underwent a pre-placement physical examination on June 6, 1995. (EX-20, pp. 1-6). He underwent periodic physical examinations on February 2, 1996 and February 27, 1997. (EX-20, pp. 7-16). He was off work from April 3, 1997 through April 6, 1997, for a work-related upper respiratory infection. (EX-20, pp. 17-19).

On August 8, 1997, Claimant complained of left wrist pain caused by opening a valve. He was diagnosed with a left wrist strain. (EX-20, p. 20).

On September 11, 1997, he was hospitalized for chest pain. (EX-20, pp. 25-26).

He underwent periodic physical examinations on February 2, 1998 and February 9, 1999. (EX-20, pp. 27-37).

On August 13, 1999, Claimant complained of sharp pain in his right shoulder caused by closing a valve. He was diagnosed with a right bicep tendon strain. (EX-20, p. 38). He reported the incident to his supervisor on August 16, 1999. (EX-20, p. 40). A doctor placed Claimant on "RR" for three weeks on August 17, 1999. (EX-20, p. 43). On August 24, 1999, Claimant was restricted from pushing/pulling 7-10 pounds, lifting 7-15 pounds, overhead work and repetitive use of his right shoulder. (EX-20, p. 44). On September 18, 1999, Dr. Richard Jelsma released Claimant to return to light duty work. His lifting was limited to 10 pounds, and he was restricted from heavy pushing/pulling and ladder climbing. (EX-20, p. 46). On October 15, 1999, Dr. Jelsma released Claimant to return to full duty work. (EX-20, p. 49).

On January 15, 2000, Claimant pulled his right groin muscle after tripping over a pipe at work. He was restricted from climbing for the day by the EMT who treated him. (EX-20, p. 55).

Claimant underwent a periodic physical examination on March 20, 2000. (EX-20, pp. 60-65).

On July 25, 2000, Claimant missed work after a foreign body was found in his left eye, and on September 28, 2000, he missed work due to nausea. (EX-20, pp. 66-69). He also underwent several cardiac evaluations and evaluations related to chronic nasal congestion. (EX-20, pp. 70-85).

On January 4, 2001, Claimant injured his right shoulder while climbing. He was diagnosed with a right bicep strain. (EX-20, pp. 94-96).

Claimant underwent a medical surveillance physical on May 1, 2001. (EX-20, pp. 102-107).

In May 2001, Claimant continued testing and evaluations for his cardiac and respiratory conditions. (EX-20, pp. 112-118). On June 6, 2001, he requested a job change because chemical exposure was causing him respiratory problems. (EX-20, p. 119). He continued to seek treatment with various physicians for his respiratory condition. (EX-20, pp. 120-126, 129-130).

On September 27, 2001, Claimant suffered contusions to both knees and a strain to his left shoulder. He was "hanging on train ladder while moving cars, feet slipped from rung." (EX-20, p. 127).

Claimant presented to Dr. Brian Aquino on October 15, 2001. He complained of "right little finger triggering and pain." He underwent an injection of Depo Medrol and Xylocaine. Dr. Aquino recommended a surgical release if the injection failed to cure his symptoms. (EX-20, p. 131).

From December 2001 through October 2002 Claimant received treatment from various physicians for abdominal pain. (EX-20, pp. 133-145). In July 2003 he resumed treatment for respiratory difficulties. (EX-20, pp. 161-165). On September 17, 2003, he underwent surgery to repair a right inguinal hernia. (EX-20, pp. 170-178).

Dr. John W. Kosty

Claimant presented to The University of Texas Medical Branch Hospital in Galveston, Texas, on March 31, 2003, complaining of pain in his left shoulder. He indicated he injured his left shoulder when lifting a heavy air-conditioning unit on November 1, 2002. An x-ray revealed acromial clavicular arthritis affecting Claimant's right shoulder, but his left shoulder appeared "largely within normal limits." (EX-20, p. 146). Dr. Kosty diagnosed Claimant with a left shoulder rotator cuff tear. (EX-20, p. 147).

An MRI of Claimant's left shoulder was performed on April 14, 2003. It revealed a complete tear of the supraspinatus tendon and infraspinatus tendon with moderate tendinous retraction, mild fatty atrophy of the muscles, complete obstruction of the common rotator cuff outlet and mild tendinosis and delamination of the distal subscapularis tendon without evidence of a full thickness rotator cuff tear. (EX-20, p. 149). Dr. Kosty performed a rotator cuff tear repair surgery on May 5, 2003. A complete rotator cuff tear with retraction was identified during surgery. (EX-20, p. 151).

Claimant presented for a post-operative evaluation on May 9, 2003. (EX-20, p. 153). Claimant presented for another post-operative evaluation on May 22, 2003. Dr. Kosty referred Claimant to physical therapy. (EX-20, p. 154).

Claimant presented on June 12, 2003, and Dr. Kosty noted he failed to begin physical therapy as advised. (EX-20, p. 155). Claimant began physical therapy on June 30, 2003. (EX-20, p. 156).

On July 7, 2003, Dr. Kosty noted Claimant was unable to return to work, but opined he may be capable of returning to work in one month. (EX-20, p. 158). Claimant presented on August 5, 2003 and September 2, 2003. On both occasions, Dr. Kosty found he was unable to return to work. (EX-20, pp. 166, 168). On September 30, 2003, Dr. Kosty ordered additional therapy, and opined Claimant could have to participate in a return to work conditioning program. (EX-20, p. 180).

Claimant presented on October 28, 2003, and Dr. Kosty referred him to Mainland Pain Consultants for electrodiagnostic studies of the ulnar nerves and left upper extremity. (EX-20, p. 192). The testing revealed reduction in left and right median motor nerve conduction velocities at the wrists. (EX-20, p. 204). The upper extremity somatosensory evoked potentials were within the range of normal variation. (EX-20, p. 205).

Claimant underwent a functional capacity evaluation on November 24, 2003, after four weeks of work conditioning. It was determined he could perform all tasks on a consistent basis, with the exception of overhead reaching, which he could perform for over two minutes without stopping. He could lift enough to return to work, but he would require assistance lifting more than 45 pounds overhead. (EX-20, p. 206).

On December 12, 2003, Dr. Kosty noted Claimant completed a work conditioning program on November 24, 2003. Claimant returned to medium duty work, but he was unable to safely lift or maintain his arms overhead. Dr. Kosty opined he would be unable to return to his prior occupation unless his strength improved. (EX-20, p. 211).

Claimant presented on February 10, 2004. Dr. Kosty noted the nerve conduction and EMG studies revealed a C5-C8 nerve root problem. Dr. Kosty ordered an MRI of the cervical spine. (EX-20, p. 212). The MRI was performed on February 14, 2004,

revealing mild to moderate disc degeneration with some spondylosis at C3-4, C4-5 and C5-6 with slight reversal of the cervical lordosis. (EX-20, p. 214).

On February 18, 2004, Dr. Kosty recommended medial epicondylectomy and decompression of the ulnar nerve at the left elbow. He opined that Claimant suffered from compressive neuropathy. (EX-20, p. 215). Claimant underwent the procedure on March 17, 2004. (EX-20, p. 217). He presented for post-operative evaluations on March 24, 2004 and April 14, 2004. (EX-20, pp. 219-220). Dr. Kosty noted Claimant remained off of work, and he opined it was unlikely Claimant would be able to return to his former occupation. (EX-20, p. 220). Dr. Kosty referred Claimant to occupational therapy on May 11, 2004. (EX-20, p. 221). On June 14, 2004, Dr. Kosty noted Claimant was participating in occupational therapy. (EX-20, p. 224).

On July 20, 2004, Dr. Kosty noted Claimant would be evaluated by Dr. John Debender to determine whether he had reached maximum medical improvement and his impairment rating. Dr. Kosty opined that it was likely Dr. Debender would find Claimant had reached maximum medical improvement with a residual impairment rating. (EX-20, p. 231).

On September 21, 2004, Dr. Kosty opined Claimant had reached maximum medical improvement. Claimant had a full active range of motion in his shoulder, but he displayed crepitus with elevation above shoulder height. Dr. Kosty opined Claimant's upper extremity impairment rating was 19 percent for his left shoulder and left elbow. This equaled an 11 percent whole-person impairment rating. He also discharged Claimant. (EX-20, p. 232).

Claimant presented on January 4, 2008, complaining of pain in his right shoulder. An x-ray revealed migration of the humeral head, acromioclavicular arthritis and lateral downsloping of the acromion with a lateral spur. Dr. Kosty diagnosed Claimant with a chronic rotator cuff tear in the right shoulder. Claimant attributed the problem to an injury occurring in February 2006, and Dr. Kosty opined the findings were compatible with this assertion. (EX-20, p. 324).

Claimant presented on March 23, 2009. He had returned to the United States following an injury to his left ankle and left knee. Dr. Kosty diagnosed Claimant with a left ankle sprain and intersubstance degenerative anterior and posterior horns medial meniscus of the left knee. (EX-20, p. 361). He advised that

Claimant begin physical therapy, but did not anticipate an arthroscopy unless the condition failed to resolve with physical medicine. (EX-20, p. 362).

Claimant began physical therapy at Hope Rehab Physical Therapy on March 25, 2009. (EX-20, p. 366). He presented for physical therapy on March 26, 2009, March 30, 2009, March 31, 2009, April 2, 2009, April 6, 2009, April 7, 2009, April 9, 2009, April 13, 2009 and April 14, 2009. (EX-20, pp. 373-375, 381-389). On April 16, 2009, the physical therapist, Clay Covington, issued a progress note indicating Claimant was experiencing difficulty squatting, descending steps, jogging and negotiating unstable surfaces. Mr. Covington opined Claimant was not experiencing difficulty with respect to his left ankle. He noted Claimant made excellent progress with respect to his range of motion, strength and function. He recommended that Claimant continue physical therapy to facilitate a safe return to work. (EX-20, pp. 392-393).

Claimant presented for a follow-up evaluation with Dr. Kosty on April 21, 2009. Claimant's left ankle pain had resolved. The pain in his left knee was rated at a four out of ten, on a ten scale. Dr. Kosty opined Claimant should continue physical therapy for one month. (EX-20, p. 394).

Claimant presented for physical therapy on April 22, 2009, April 24, 2009, April 28, 2009, April 30, 2009, May 5, 2009, May 7, 2009, May 12, 2009 and May 14, 2009. (EX-20, pp. 395-404). On May 19, 2009, Mr. Covington issued a progress note indicating Claimant had a 15-minute walking tolerance but was unable to kneel. He opined Claimant was steadily progressing with strength and function. He recommended continued physical therapy to facilitate a safe return to work. (EX-20, p. 405).

Claimant underwent an MRI of his left knee on June 2, 2009. It revealed moderate subcutaneous swelling and an edema anterior to the patella and patellar tendon with mild proximal and distal patellar tendinosis, a moderate-sized joint effusion and a Grade IV chondromalacia of the medial compartment. The diffuse high signal and truncation at the root of the medial meniscus were consistent with a partial tear. (EX-20, p. 407).

Claimant presented for physical therapy on June 2, 2009, June 4, 2009, June 9, 2009 and June 11, 2009. (EX-20, pp. 409-412). He was discharged on June 16, 2009. Mr. Covington opined

Claimant could run, squat, kneel and negotiate unstable surfaces. He opined that "from a rehab standpoint ready to return to work if cleared." (EX-20, p. 413).

Dr. Kosty again referred Claimant to Hope Rehab Physical Therapy on September 2, 2009, following arthroscopy surgery of the left knee on July 31, 2009. Claimant complained of swelling, increased pain with ambulation and an interrupted sleep pattern. (EX-20, p. 418). Claimant presented for physical therapy on September 4, 2009, September 8, 2009, September 9, 2009, September 11, 2009, September 14, 2009, September 15, 2009, September 17, 2009, September 21, 2009, September 22, 2009, September 28, 2009, October 6, 2009, October 8, 2009, October 13, 2009, October 15, 2009 and October 20, 2009. (EX-20, pp. 421-437). Mr. Covington issued a progress note on October 22, 2009. Claimant's symptoms were improving, but he did not feel comfortable squatting. His pain was "very minimal" at rest. (EX-20, p. 438).

Claimant presented for physical therapy on October 27, 2009, October 29, 2009, November 3, 2009, November 5, 2009 and November 10, 2009. (EX-20, pp. 440-444). Mr. Covington issued a progress note on November 12, 2009. Claimant reported no symptoms while at rest, but he was unable to perform any recreational activities. Mr. Covington discharged Claimant from physical therapy. (EX-20, p. 445).

Claimant was evaluated by Dr. Kosty on December 28, 2009. Claimant reported improvements to his knee pain and mobility. Dr. Kosty advised Claimant to continue activity as tolerated and to work on quad strengthening. (EX-20, pp. 446-447).

Dr. Kosty evaluated Claimant on February 10, 2010. He recommended that Claimant undergo an evaluation with another physician for an impairment rating. (EX-20, p. 448). He believed it was unlikely Claimant would be able to return to his previous work. He opined progression of medial compartment arthritis of Claimant's left knee was anticipated. (EX-20, p. 449).

Dr. Kosty evaluated Claimant on February 26, 2010. (EX-20, p. 450). Claimant had scheduled an evaluation for an impairment rating, and he also wanted his shoulder evaluated. He requested a Synvisc injection. He noted Claimant would likely require "uni-left knee in future." (EX-20, p. 451).

Claimant presented for an evaluation with Dr. Kosty on March 8, 2010. (EX-20, p. 452). Dr. Kosty diagnosed Claimant with osteoarthritis of the left knee. He performed a Synvisc injection of the left knee. (EX-20, p. 453).

Claimant presented for an evaluation with Dr. Kosty on April 16, 2010. (EX-20, p. 454). Dr. Kosty noted Claimant suffered from a right shoulder rotator cuff tear, a left knee meniscus tear and traumatic arthritis of the left knee. He related all conditions to Claimant's work with Employer. (EX-20, p. 455).

On April 16, 2010, Dr. Kosty completed three work capacity evaluations. (EX-20, pp. 457-459). He opined Claimant was unable to return to his former work based on his left knee injury. He placed the following permanent restrictions on Claimant with respect to his left knee: walking for no more than four hours per day; standing for no more than four hours per day; bending and stooping less than 1 hour per day; lifting less than 25 pounds; squatting and kneeling less than 1 hour per day; and climbing less than 1 hour per day. (EX-20, p. 457). He completed a second work capacity evaluation, which indicates Claimant would reach maximum medical improvement with respect to his left knee on July 12, 2010. It imposes the same work restrictions on Claimant as the other evaluation. It indicates the restrictions are permanent, dated April 16, 2010. He also opined Claimant was unable to return to his former work based on his right shoulder injury. He opined Claimant lacked the strength to lift or work in an overhead position. He noted Claimant had not reached maximum medical improvement for his right shoulder. He placed the following permanent restrictions on Claimant with respect to his right shoulder: reaching for no more than one hour per day; reaching above the shoulder for less than one hour per day; pushing less than 25 pounds; pulling less than 25 pounds; and climbing less than 1 hour per day. Dr. Kosty noted Claimant could potentially require surgery to repair the chronic rotator cuff tear. (EX-20, p. 459).

On October 8, 2010, Dr. Kosty opined Claimant was unable to return to work based on his current medical condition. He noted Claimant was a candidate for unicompartmental arthroplasty surgery. (EX-20, p. 460).

Pre-Employment Physicals

Claimant underwent a pre-employment physical on September 8, 2004. (EX-18). The medical questionnaire indicated he underwent surgery on his left rotator cuff on May 5, 2003. (EX-18, pp. 3-4).

Claimant underwent a pre-employment physical on November 16, 2006. (EX-19). He did not indicate that he was suffering from any musculo-skeletal pain or an injury to his right shoulder. (EX-19, pp. 2-3).

Deployment Medical Records

On February 12, 2006, a medic prescribed one day of bed rest to Claimant for an unspecified injury. The medical clinic note was printed on KBR letterhead, which stated "copy for time sheet." (EX-20, p. 233).

On February 13, 2006, Claimant presented to the clinic. (EX-20, p. 234). Claimant indicated he began experiencing right shoulder pain two days earlier. He denied any injury, indicating he woke up with a sore right shoulder. The medic diagnosed him with a postural shoulder sprain. (EX-20, p. 235).

Claimant presented on February 15, 2006, with stomach indigestion, and on March 7, 2006, with a sore throat. (EX-20, pp. 237-240). Claimant presented on March 9, 2006, with a sore throat, congestion and a cough. (EX-20, p. 242).

On March 11, 2006, Claimant was placed on restricted duty for five days due to injury. He was restricted from lifting, climbing, reaching and using his right upper extremity. The medical clinic note was printed on KBR letterhead, which stated "copy for supervisor." (EX-20, p. 241).

Claimant presented on March 23, 2006, for a "Malana" refill. (EX-20, p. 244). He presented on March 29, 2006, complaining of persistent right shoulder pain. He indicated that he injured his left shoulder four years prior. (EX-20, p. 246). He was diagnosed with a tendon/ligament sprain and muscle strain. (EX-20, p. 247).

On April 6, 2006, Claimant was diagnosed with mild dehydration. (EX-20, pp. 248-249). He presented on May 28, 2006, with a head cold. (EX-20, p. 250). He presented on June 6, 2006, with a cough. (EX-20, p. 252). He presented on June

12, 2006, with nausea and vomiting. (EX-20, p. 254). He was placed on bed rest for one day. (EX-20, p. 256). On June 13, 2006 and June 14, 2006, he presented for follow-up appointments. (EX-20, pp. 259, 261). He presented on June 15, 2006, for a blood pressure check. (EX-20, p. 263). He presented on June 16, 2006 and June 17, 2006, for follow-up appointments. (EX-20, pp. 265, 267). He presented on June 18, 2006, for a "FOB physical" and a "Malana" refill. (EX-20, p. 269).

Claimant presented on June 29, 2006, complaining of right shoulder pain. (EX-20, p. 273). The medic opined the examination was normal, and he did not believe Claimant's chief complaints were "consistent with his story." The examination did not reveal any positive findings. (EX-20, p. 274).

On November 28, 2006, Claimant presented for a follow-up evaluation related to his blood pressure. (EX-20, p. 275). He presented on December 15, 2006, with a rash and on December 17, 2006, for a "Malana" refill. (EX-20, pp. 279-280). On January 8, 2007, he presented with a skin rash, and on January 11, 2007, he presented for a follow-up appointment. (EX-20, pp. 284, 286). He presented on February 11, 2007, with a rash on both arms and on February 21, 2007, with a headache and to have his blood pressure checked. (EX-20, pp. 288, 290). Claimant presented on April 25, 2007, for a "CJOA Physical." (EX-20, p. 292).

On May 24, 2007, Claimant presented with a cough caused by dust and particles, which blew into his face while he was cleaning an air-conditioning unit. (EX-20, pp. 294-295). The medic found he could return to full duty work. (EX-20, p. 295).

Claimant presented on August 19, 2007, for another "CJOA Physical." (EX-20, p. 296). He presented on August 20, 2007, for a blood pressure evaluation and for another "CJOA Physical." (EX-20, pp. 298, 300). He was diagnosed with conjunctivitis. (EX-20, p. 301). He presented on August 21, 2007, August 22, 2007, August 24, 2007, August 26, 2007, August 27, 2007, August 29, 2007, August 30, 2007 and September 1, 2007, for follow-up appointments related to the conjunctivitis. (EX-20, pp. 302, 308, 312, 314, 316, 318, 320, 322).

On August 21, 2007, Claimant also complained of back pain. (EX-20, p. 304). He was diagnosed with a muscle strain. (EX-20, p. 305). On August 23, 2007, he underwent a blood pressure check. (EX-20, p. 310).

Claimant underwent a remote site medical screening on January 1, 2008. (EX-20, p. 327).

Claimant presented on February 5, 2008, with head pain caused by falling on ice. (EX-20, pp. 329, 333). He was placed on restricted duty for three days. He could not lift, stoop, bend, kneel, climb, reach, use his upper extremities or use his lower extremities. (EX-20, p. 331). He presented for a follow-up appointment on February 7, 2008. (EX-20, p. 336). On February 7, 2008, he was released to return to work, but he was restricted from lifting more than 25 pounds. (EX-20, p. 338). He was diagnosed with a mild concussion on February 9, 2008. (EX-20, p. 339).

Claimant presented on September 22, 2008, complaining of dizziness and vertigo. He was restricted from driving, working off the ground and "working with tools that cut." (EX-20, p. 340). Valium was prescribed. (EX-20, p. 341).

On February 25, 2009, Claimant was walking on an incline and "lost his footing as he stepped on a rock and fell to the ground on his left knee." Another note in the medical records indicates Claimant "stepped on a stone while walking on an incline, causing him to lose his balance and fall to the ground injuring his knee and ankle." Claimant immediately reported the incident to his supervisor, and he was treated by the military medics onsite. (EX-20, p. 343).

On February 26, 2009, Claimant was diagnosed with a Grade I sprain/strain to his left knee with a meniscal/cruciate ligament injury. He was also diagnosed with a Grade II sprain to the left ankle. Crutches, an ankle brace and Ibuprofen were prescribed. An orthopedic consultation was recommended. (EX-20, p. 351).

On March 4, 2009, Claimant presented for a follow-up appointment. He indicated his pain had not improved since the incident, but his pain was controlled with Ibuprofen. He requested that he be released to return to his point of origin for further treatment. (EX-20, p. 354).

Bangkok Hospital Pattaya Medical Records

Claimant presented to Bangkok Hospital Pattaya on April 13, 2006, for an MRI of his right shoulder. (CX-29, pp. 1-2).

An x-ray of Claimant's right shoulder, performed on April 18, 2006, revealed no evidence of a fracture or dislocation. (CX-29, pp. 13, 15).

Canadian Specialist Hospital Medical Records

Claimant underwent an MRI of his left foot on September 3, 2009. The findings were unremarkable. (EX-20, p. 356). An x-ray of his left knee revealed normal joint alignment and joint space narrowing with sub articular sclerosis and spiking tibial spine. The doctor opined this was consistent with degenerative osteoarthritis. (EX-20, p. 357). An MRI of the left knee revealed joint effusion, a popliteal cyst, an edema of the skin and the subcutaneous tissue of the knee, a "grade 1 tear of ant" and "post. Homs of medial meniscus." (EX-20, p. 358). An x-ray of Claimant's left ankle revealed no fracture, normal joint alignment and normal joint space. (EX-20, p. 359).

On March 10, 2009, Dr. Ali A. H. Al-Hameed prescribed Olfen and Tylenol and ordered several days of rest. (EX-20, p. 360).

Dr. David G. Vanderweide

Dr. Vanderweide evaluated Claimant on March 18, 2010, at the request of Employer/Carrier. Claimant related his medical history to Dr. Vanderweide. (EX-26, p. 1). Dr. Vanderweide reviewed the medical records provided by Employer/Carrier. (EX-26, pp. 2-3).

Dr. Vanderweide opined that an operative report from Dr. Kosty described no evidence of a medial meniscal tear, but instead described significant osteoarthritis. (EX-26, p. 3).

Examination of Claimant's left knee revealed full active range of motion. No effusions or tenderness to palpation were noted. Moderate patellofemoral crepitation was noted. The medial and lateral joint lines were not tender. (EX-26, p. 3).

Dr. Vanderweide opined Claimant suffered from a contusion to the left knee superimposed on pre-existing degenerative joint disease. He did not find any evidence that the structural injury to Claimant's left knee resulted from the work-injury. He did not find sufficient evidence to suggest aggravation or acceleration of Claimant's osteoarthritis. He opined Claimant reached maximum medical improvement within 60-90 days of the work-injury. In his opinion, Claimant could return to work with limitations on kneeling, squatting and climbing. (EX-26, p. 4).

The Contentions of the Parties

Claimant contends he established a **prima facie** case that he suffered a compensable right shoulder injury. He argues Employer/Carrier had actual knowledge of the injury following his treatment at the medical clinic on February 12, 2006 and March 11, 2006. Alternatively, he argues Employer/Carrier were not prejudiced by any lack of actual notice. He asserts the Employer's failure to file a report of injury pursuant to Section 30(f) tolled the statute of limitations until the form was filed on January 14, 2008. Claimant contends repair of the right rotator cuff and left knee arthroplasty constitute reasonable and necessary medical treatment. Claimant asserts maximum medical improvement has not been reached because right rotator cuff repair and left knee arthroplasty surgeries are anticipated. Thus, he seeks temporary total disability benefits from April 8, 2010, to present and continuing. He argues his average weekly wage for the February 12, 2006 injury was \$1,414.23 based on his earnings for the 64.57 weeks preceding the injury.

Employer/Carrier argue the claim is time barred because Claimant failed to timely report the injury or file a claim for compensation because they were not notified of the injury until January 2008. Employer/Carrier assert Claimant failed to provide sufficient evidence to invoke the Section 20(a) presumption with respect to his right shoulder injury. They argue Claimant previously injured his right shoulder in 1999 and 2001, and his current condition constitutes a natural progression of the previous injuries. They contend Claimant was not credible in his hearing testimony, and the medical records do not support a finding that any injury occurred in the course and scope of Claimant's employment with Employer. Alternatively, they argue the Section 20(a) presumption was rebutted because Claimant's condition was the result of the natural progression of his pre-existing right shoulder condition, and weighing the evidence as a whole, no conditions of employment contributed to any injury or harm to Claimant's right shoulder.

Employer/Carrier contend Claimant does not have a permanent shoulder disability because he never suffered a loss of wage earning capacity as a result of his right shoulder condition. Alternatively, they assert benefits should be limited to a period between July 4, 2006 and November 21, 2006, when Claimant was unemployed between his periods of employment with Employer.

They argue Claimant does not have a permanent left knee disability and is only entitled to temporary total disability benefits for 60 to 90 days following injury because the remainder of Claimant's condition is related to the natural progression of his pre-existing osteoarthritis. Alternatively, they assert Claimant has reached maximum medical improvement for both his right shoulder and left knee and ankle injuries. Employer/Carrier allege Claimant's average weekly wage for the right shoulder injury was \$1,572.88 based on his earnings for the 52 weeks preceding the injury.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

A. Credibility

I have considered and evaluated the rationality and internal consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See Indiana Metal Products v. National Labor Relations Board, 442 F.2d. 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941 (5th Cir. 1991).

Moreover, in arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale

Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n.3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

Employer/Carrier argue Claimant's trial testimony should be afforded little weight because it is contradicted by the medical evidence of record, and Claimant may have over-exaggerated his pain symptoms. However, I found that Claimant consistently presented his right shoulder and left knee complaints to all treating and consultative physicians who evaluated him. Therefore, I find Claimant credible in his hearing testimony.

B. Timely Notice Under Section 12(a)

Section 12(a) of the Act 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. It is the claimant's burden to establish timely notice. See 33 U.S.C. §912(a).

Failure to provide timely notice of an injury, as required by Section 12(a), bars a claim unless it is excused under Section 12(d) of the Act. Pursuant to Section 12(d), the failure to provide such notice of an injury to an employer will

not act as a bar to the claim if the employer either (1) had knowledge of the injury or (2) was not prejudiced by the lack of notice. See 33 U.S.C. §912(d)(1),(2); See Sheek v. General Dynamics Corp., 18 BRBS 151 (1986), decision on recon., modifying 18 BRBS 1(1985).

In the absence of evidence to the contrary, Section 20(b) of the Act presumes that the notice of injury and the filing of the claim were timely. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). Accordingly, to establish prejudice, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's failure to provide timely notice pursuant to Section 12. See Cox v. Brady-Hamilton Stevedore Company, 25 BRBS 203 (1991); Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990).

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 injury or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (CRT) (5th Cir. 1978); Addison v. Ryan Walsh Stevedoring Company, 22 BRBS 32 (1989).

Employer/Carrier contend that they were not notified of Claimant's February 12, 2006 right shoulder injury until January 2008, and were prejudiced by such lack of notice. Employer/Carrier argue Claimant sought treatment with a medic, but did not report the incident to Employer. They contend Claimant's failure to provide notice impeded their ability to investigate the claim and manage Claimant's medical condition.

Claimant contends injury occurred to his right shoulder on February 12, 2006. On February 12, 2006, a medic prescribed one day of bed rest to Claimant for an unspecified injury. The medical clinic note was printed on KBR letterhead, which stated "copy for time sheet." On March 11, 2006, Claimant was placed on restricted duty for five days due to injury. He was restricted from lifting, climbing, reaching and using his right upper extremity. The medical clinic note was printed on KBR letterhead, which stated "copy for supervisor." Claimant also credibly testified that he filled out an incident report on February 12, 2006, and informed his supervisor of his right shoulder injury. Further, the First Report of Injury Form Employer/Carrier filed with the District Director on January 14, 2008, indicates knowledge of the accident was "reported to KBR

Medical" and medical attention was authorized on "February 11, 2006." (EX-2).

Therefore, I find Employer was provided with notice of Claimant's injury through the medical reports it received on February 12, 2006 and March 11, 2006. Employer/Carrier clearly had notice of Claimant's right shoulder injury within 30 days of its occurrence on February 12, 2006. Further, Employer/Carrier had access to medical records that clearly show injury to Claimant's right shoulder, and Employer/Carrier admitted to knowledge of the injury in the First Report of Injury. Thus, I find Employer/Carrier had knowledge of the injury.

Assuming, **arguendo**, that Employer/Carrier did not have knowledge of Claimant's injury; I find that Employer/Carrier were not prejudiced by any lack of notice. Claimant presented to the Kandahar Medical Clinic seeking treatment for his right shoulder on February 12, 2006, February 13, 2006, March 11, 2006, March 29, 2006 and June 29, 2006. Employer presumably had access to these medical records, and any lack of actual knowledge would not have impaired its ability to investigate the claim or manage Claimant's medical care.

Based on the foregoing, I find and conclude the present claim is not barred under Section 12(a) for failure to timely provide notice of the claim because Employer/Carrier had actual knowledge of the injury, and they were not prejudiced by any alleged untimely notice.

C. Timeliness of the Claim Under Section 13(b)

Section 13(a) of the Act provides:

Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim thereof is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment.

33 U.S.C. § 913(a).

Both the Fifth Circuit and the Benefits Review Board (herein the Board) have held that the Section 20(b) presumption applies to a determination of whether a claimant complied with the filing requirements of Sections 12 and 13. See Avondale Shipyards v. Vinson, 623 F.2d 1117 (5th Cir. 1980); Shaller v. Cramp Shipbuilding & Drydock Co., 23 BRBS 140 (1989).

The Act requires that an employer file a report of any injury or death with the Secretary within ten days of the injury or death. 33 U.S.C. § 930(a). If the employer or the carrier was given notice or has knowledge of the injury and fails to file such a report, the limitations of Section 13(a) do not begin to run against the claim until such a report is filed. 33 U.S.C. § 930(f).

In Cain v. Fort Lee Officers' Open Mess, 1 BRBS 372 (1975), the Board held that the employer had sufficient knowledge of the injury necessitating the filing of a report of injury where the claimant testified that she advised two supervisory employees of her injury on the date of its occurrence.

As discussed above, Employer had knowledge of Claimant's injury on February 12, 2006, but Employer/Carrier did not file the First Report of Injury until January 23, 2008. (EX-2). Therefore, I find the limitations of Section 13(a) did not begin to run until January 23, 2008, and Claimant timely filed his claim against Employer/Carrier on January 7, 2008.

D. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Board has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Under the Defense Base Act, an employee need not establish a causal relationship between his actual employment duties and the event that occasioned his injury. O'Leary v. Brown-Pacific-Mason, Inc., 340 U.S. 504, 506-507 (1951). "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose. Id. The zone of special danger is well-suited to cases, like this one, arising under the Defense Base Act, since conditions of the employment place the employee in a foreign setting where he is exposed to dangerous conditions. See N. R. v. Halliburton Services, 42 BRBS 56 (June 30, 2008). An employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger. Id., p. 60. The specific purpose of the zone of special danger doctrine is to extend coverage in overseas employment such that considerations including time and space limits or whether the activity is related to the nature of the job do not remove an injury from the scope of employment. O'Leary, 340 U.S. at 506; see Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 481 (1947).

1. Claimant's Prima Facie Case

Based on the stipulations of the parties, injury with respect to Claimant's left knee and ankle is undisputed. With regard to his right shoulder injury, Claimant contends he established a **prima facie** case that he suffered a compensable right shoulder injury. Employer/Carrier assert Claimant failed to provide sufficient evidence to invoke the Section 20(a) presumption with respect to his right shoulder injury. They contend Claimant was not credible in his hearing testimony, and the medical records do not support a finding that any injury occurred in the course and scope of Claimant's employment with Employer. Mr. Doss also testified

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

I find Claimant made credible subjective complaints of pain in his right shoulder. In Afghanistan, he presented to the medical clinic on February 12, 2006, February 13, 2006, March 11, 2006, March 29, 2006 and June 29, 2006, complaining of pain in his right shoulder. He also sought medical treatment for his right shoulder in April 2006 while in Thailand. On January 4, 2008, Dr. Kosty diagnosed Claimant with a chronic rotator cuff tear in the right shoulder. Claimant attributed the problem to an injury occurring in February 2006, and Dr. Kosty opined the findings were compatible with this assertion. On April 16, 2010, Dr. Kosty noted Claimant suffered from a right shoulder rotator cuff tear, and he related the condition to Claimant's work with Employer. Mr. Doss testified Claimant told him that his right shoulder was hurt, and Claimant also told Mr. Doss his shoulder worsened the longer he worked on the air-conditioning units.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on February 12, 2006, to his right shoulder, and on February 25, 2009, to his left knee and left ankle, and that his working conditions and activities on those dates could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); Louisiana

Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

Substantial evidence is evidence that provides "a substantial basis of fact from which the fact in issue can be reasonably inferred," or such evidence that "a reasonable mind might accept as adequate to support a conclusion." New Thoughts Finishing Co. v. Chilton, 118 F.3d 1028, 1030 (5th Cir. 1997); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

Employer/Carrier argue Claimant previously injured his right shoulder in 1999 and 2001, and his current condition constitutes a natural progression of the previous injuries. On August 13, 1999, Claimant was diagnosed with a right bicep tendon strain. Dr. Jelsma released Claimant to return to full duty work on October 15, 1999. On January 4, 2001, Claimant was

diagnosed with a right bicep strain. An x-ray performed on March 31, 2003, revealed acromial clavicular arthritis affecting Claimant's right shoulder.

Employer/Carrier rely on a statement made by an examining medic on June 29, 2006, that he did not believe Claimant's chief complaints were "consistent with his story." However, the medical records reveal that medics also diagnosed Claimant with a postural shoulder sprain on February 13, 2006, and right shoulder tendon/ligament sprain and muscle strain on March 29, 2006.

Employer/Carrier contend Dr. Kosty's diagnosis of a right shoulder rotator cuff tear should be discounted because it was based only on statements made by Claimant and an x-ray, rather than MRI diagnostic testing. I reject this assertion because the lack of diagnostic testing does not diminish Dr. Kosty's opinion that Claimant suffers from a right shoulder rotator cuff tear. Dr. Kosty based the diagnosis on both an x-ray, a physical examination and statements made by Claimant, however, Employer/Carrier presented no evidence to contradict his opinion.

Considering the foregoing, I find and conclude Employer/Carrier have failed to present substantial evidence sufficient to rebut Claimant's **prima facie** case with regards to his right shoulder condition. Dr. Kosty attributed Claimant's right shoulder rotator cuff tear to work for Employer. The record clearly establishes that Claimant suffered from pre-existing arthritis of the right shoulder. However, aggravation of a pre-existing injury constitutes an injury under the Act. Employer/Carrier have produced no persuasive facts to overcome the presumption, and they have failed to present any evidence showing that no relationship exists between Claimant's right shoulder injury and his employment. Accordingly, I find and conclude that Claimant has established he suffered a right shoulder injury, while working for Employer on February 12, 2006, and a left ankle and left knee injury, while working for Employer on February 25, 2009.

E. Nature and Extent of Disability

Having found that Claimant suffers from compensable injuries, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

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

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

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

F. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., *supra*; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

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

On April 16, 2010, Dr. Kosty opined Claimant was unable to return to his former work based on his right shoulder injury. He noted Claimant had not reached maximum medical improvement with respect to his right shoulder. Dr. Kosty opined Claimant could potentially require surgery to repair the chronic rotator cuff tear. Employer/Carrier failed to produce any contradictory evidence. Therefore, I find Claimant has not reached maximum medical improvement with respect to his right shoulder.

On April 16, 2010, Dr. Kosty opined Claimant was unable to return to his former work based on his left knee injury, and he placed permanent restrictions on Claimant with respect to his left knee. He indicated Claimant would reach maximum medical improvement with respect to his left knee on July 12, 2010. However, on October 8, 2010, Dr. Kosty opined Claimant was a candidate for unicompartmental arthroplasty surgery of the left knee. On March 18, 2010, Dr. Vanderweide opined Claimant suffered from a contusion to the left knee superimposed on pre-

existing degenerative joint disease. He opined Claimant reached maximum medical improvement within 60-90 days of the work-injury, and he believed Claimant could return to work with limitations on kneeling, squatting and climbing.

The Board has held that where a treating physician stated that surgery might be necessary in the future, it was reasonable to conclude that the claimant's condition was temporary rather than permanent. Dorsey v. Cooper Stevedoring Co., 18 BRBS 25, 32 (1986). 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 Worthington, the physician opined that the claimant's condition would ultimately progress and require future surgery, but he also imposed a percentage disability impairment rating. Id.

Because Dr. Kosty served as Claimant's treating physician since 2003, I find his opinions are entitled to greater probative weight. Dr. Vanderweide only evaluated Claimant on one occasion, and based his opinions on only the single evaluation and the selected medical records proffered by Employer/Carrier. Dr. Kosty clearly opined that Claimant could not return to his former work. Therefore, Claimant has established a **prima facie** claim of total disability. Dr. Kosty also indicated the restrictions placed on Claimant were permanent. I find that Claimant became permanently totally disabled on July 12, 2010, the date Dr. Kosty indicated Claimant would reach maximum medical improvement. Any period of convalescence following unicompartmental arthroplasty would not affect Claimant's entitlement to permanent total disability benefits.

G. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

The permanent restrictions imposed by Dr. Kosty on April 16, 2010, clearly indicate Claimant cannot return to his former employment, but the restrictions would not preclude Claimant from other forms of employment. However, Employer/Carrier presented no evidence establishing available suitable alternate employment. Therefore, Claimant is entitled to permanent total disability from July 12, 2010 to present and continuing.

H. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power **at the time of injury**. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

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

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

Section 10(c) of the Act provides:

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

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

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

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

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

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

The Board reemphasized that the objective of Section 10(c) is "to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury." It held, based on the facts in the case, "claimant's average weekly wage

must be [calculated] solely on the higher wages he was paid in his overseas employment as it best reflects his annual wage-earning capacity at the time of injury." Id.

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

In the instant case, the parties stipulated Claimant's average weekly wage at the time of his February 25, 2009 left knee and ankle injuries was \$1,740.45. (JX-1). Claimant is entitled to permanent total disability benefits based on his left knee injury. Nevertheless, in brief, Employer/Carrier argue Claimant's average weekly wage at the time of his left knee and ankle injury should be calculated based on Claimant's earnings from April 2008 through March 2009. Based on the wage records (EX-16) provided by Employer, I find that the stipulated average weekly wage is incorrect, as it was based on a 13 month period encompassing March 2008 through March 2009 ($\$90,503.50 \div 52 = \$1,740.45$).

Ordinarily, where a stipulation is not supported by the record evidence, the parties would be notified that the stipulation is unacceptable and provided an opportunity to correct the factual agreement. Here, the record evidence clearly establishes an average of Claimant's wages for the 52 weeks preceding the February 25, 2009 injury more adequately reflects his wage earning capacity. The wage records indicate Claimant grossed \$83,945.10 from March 2008 through February 2009, the 52 weeks preceding his injury ($\$90,503.50 - \$6,558.40 = \$83,945.10$). This yields an average weekly wage of \$1,614.33 ($\$83,945.10 \div 52 \text{ weeks} = \$1,614.33$). In view of the record established by the parties, I find the correct average weekly wage is \$1,614.33.

In brief, Claimant argues his average weekly wage at the time of his February 2006 right shoulder injury should be \$1,414.23. However, Claimant does not seek and the record does not support entitlement to a period of temporary total disability benefits prior to Claimant's left knee and ankle

injury. Therefore, I find it is not necessary to calculate Claimant's average weekly wage at the time of his right shoulder injury because he is entitled to permanent total disability benefits based on his left knee injury.

I. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an

employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Claimant suffered compensable injuries on February 12, 2006 and February 25, 2009, and is entitled to ongoing medical benefits. Therefore, Employer/Carrier are liable for all reasonable and necessary medical expenses related to the February 12, 2006 injury to Claimant's right shoulder, and the February 25, 2009 injury to his left knee and ankle.

Moreover, Claimant has requested authorization for right shoulder surgery and left knee unicompartmental arthroplasty surgery. Employer/Carrier have presented no evidence showing the right shoulder surgery is not reasonable and necessary. Employer/Carrier argue the treatment of Claimant's left knee is excessive. However, Dr. Vanderweide gave no opinion on the proposed unicompartmental arthroplasty surgery. I found Claimant's pre-existing arthritis was aggravated by his work-accident. Therefore, I find these surgeries are reasonable and necessary and the request for approval/authorization is hereby granted.

V. 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.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.² 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.

² Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **January 31, 2011**, the date this matter was referred from the District Director.

VII. ORDER

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

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from February 26, 2009 to July 11, 2010, based on Claimant's average weekly wage of \$1,614.33, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from July 12, 2010 to present and continuing thereafter based on Claimant's average weekly wage of \$1,614.33, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2010, for the applicable period of permanent total disability.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's February 12, 2006 and February 25, 2009, work injuries, pursuant to the provisions of Section 7 of the Act, to include right shoulder surgery and left knee unicompartmental arthroplasty surgery.

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

6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. 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.

8. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 6th day of April, 2012, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge