

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)



Issue Date: 25 January 2012

CASE NO.: 2011-LDA-00326

OWCP NO.: 02-196099

IN THE MATTER OF

**MICHAEL VERM,
Claimant**

vs

**SERVICE EMPLOYEES
INTERNATIONAL, INC.,
Employer**

and

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

APPEARANCES:

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

**JOHN L. SCHOUEST , ESQ.
On behalf of Employer Carrier**

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

**DECISION AND ORDER
AWARDING BENEFITS**

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 Michael Verm (Claimant) against Service Employees International, Inc. (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 eleven (11) exhibits including various DOL forms (LS -18, -203, -206, -207); Claimant's medical and tax records from 2005 through 2010; accident report; Claimant's medical leave and expense receipts; informal conference recommendations; and Claimant's discovery requests.

Employer introduced twenty-two (22) exhibits including various DOL forms; Claimant's wage data, personal file, pre-deployment and employment medical records; medical evaluation of Claimant by Dr. David Vanderweide; medical evaluation of Claimant by Dr. Samir Ebead; medical records of Dr. David Howie; functional capacity evaluation; vocational report of Susan Rapan; Claimant's discovery responses; and Claimant's Social Security earnings records.¹

I. STIPULATIONS

Prior to the hearing, the parties stipulated and I find:

1. Claimant's right foot/ankle injury occurred on November 9, 2009.
2. Claimant's right foot/ankle injury arose out of and in the course of his employment with Employer;
3. An Employer/Employee relationship existed at the time of the injury.
4. Employer was notified of the injury on November 9, 2009.
5. The Notice of Controversion was filed on July 15, 2010.
6. An informal conference occurred on August 11, 2010.
7. Compensation benefits have been paid at the rate of \$1,224.66 per week.
8. Medical Benefits have been paid for Claimant's right foot injury but not for Claimant's alleged back injury.
9. Claimant has a permanent, scheduled disability to his right foot/ankle.
10. Claimant reached Maximum Medical Improvement (MMI) for his right foot/ankle injury on April 14, 2010.

II. ISSUES

The following unresolved issues were presented by the parties:

¹ References to the record are as follows: transcript - (Tr.), Claimant's exhibits - (CX), Employer exhibits - (EX).

1. Fact of injury/causation regarding Claimant's alleged injuries to his back, right hip, and right shoulder.²
2. Nature and extent of disability.
3. Average weekly wage at time of alleged injuries.
4. Section 7 medical benefits.
5. Attorney fees and expenses.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 39 year old male born in Dallas, Texas but educated in Conroe, Texas, where he graduated from high school. Following graduation, Claimant went to work at Kroger Supermarket as a sacker and then began working in the meat department. After this, Claimant worked on diesel pickup trucks in his father's shop for approximately fifteen (15) years, worked in construction for several years, and then went to truck-driving school. In March 2006, Claimant went overseas to Iraq where he worked until December 2009. In his first few months overseas, Claimant worked as a truck driver but was later transferred to a "bobtail" position. According to Claimant's testimony, the "bobtail" position mainly involved working outside the wire assisting the military with truck repairs. (Tr. 21). Claimant reported assisting the drivers of damaged trucks by pulling them to safety. (Tr. 22). He further testified that the convoys were frequently attacked. (Tr. 22).

In Iraq, Claimant worked seven (7) days a week and at times more than twelve (12) hours per day. (Tr. 22). On November 9, 2009, Claimant was loading trucks in the morning for a convoy departure the next day. (Tr. 22). While attempting to step out of the driver's side door of his truck, Claimant slipped from the battery box, fell approximately four (4) feet, and landed on his right heel. (Tr. 22-23). Following this, Claimant sought medical help, and the medics who initially treated Claimant diagnosed a sprained ankle and gave Claimant crutches to walk. (Tr. 23). After approximately two (2) weeks, Claimant was sent for x-rays which revealed Claimant had fractured his heel. (Tr. 24).

Claimant was scheduled to return home on the 25th for R&R. (Tr. 24). However, when he arrived at the airport in Dubai he was informed that his plane ticket home had been canceled and that he had been reimbursed the \$1,300. (Tr. 24-25). After Claimant spoke with Employer, another plane ticket was issued at a cost of \$1,600 which was deducted from Claimant's paycheck. (Tr. 25). In the end and as a result of this confusion, Claimant paid \$1,600 for his plane ticket home to receive medical treatment and was never reimbursed. (Tr. 22-25; CX-3).

² At the hearing the issue on causation was limited to Claimant's back because Employer admitted Claimant had injured his right ankle and Claimant did not allege injuries to his right hip or right shoulder. In his brief, Claimant's Counsel expanded the issue to include Claimant's right hip and right shoulder complaints. As stated in more detail below, Claimant's attempt to include these complaints does not affect this decision except to make his allegations of back pain even more incredible.

After being on crutches for approximately a month, Claimant was able to put pressure on his foot. However, this caused Claimant to experience a shooting pain from his right heel, up his leg, and into his lower back. (Tr. 26). Dr. Howie began treating Claimant for the injury to his right ankle but then also treated Claimant for his back injury. (Tr. 26).

On June 3, 2010, Employer sent Claimant to Dr. Cannon for an evaluation, and Claimant testified that when he mentioned his back pain to Dr. Cannon he stated that people with heel injuries can also injure their spine at the same time. (Tr. 27). Furthermore, Claimant has received limited treatment for his back injury even though he mentioned his back problems to Dr. Howie on several occasions. According to Claimant's testimony Dr. Howie said that he could not treat Claimant for his back injury because ". . . they have me locked into your foot; that's all I can treat you for, until you have the money to pay me to check your back out." (Tr. 27, ll. 8-10). As a result, Claimant paid \$275.00 without reimbursement in order to have Dr. Howie evaluate his back. (Tr. 28; CX-8, p. 12). Claimant also told Vocational Expert, Susan Rampant, about his back problems when he met with her for a vocational evaluation on July 14, 2010. (Tr. 28). He further testified that he informed Dr. Vanderweide about his back when he met with him for an evaluation in August, 2010. (Tr. 28-29).

In Claimant's opinion, his right side is now shorter than his left due to his injury and this has caused him to walk with an altered gait. (Tr. 29). Claimant testified that his back pain has remained constant since he stopped using the crutches. (Tr. 30). He also verified that in 2009 he made \$106,334.30. (Tr. 30; CX-6, pp. 9-14).

On cross, Claimant admitted that if he was traveling home for R&R he would pay for his plane ticket but if he was traveling for medical leave Employer would pay for the plane ticket. (Tr. 31). Claimant also stated that his back would be extremely painful in the morning even if he were to lay in a recliner the entire previous day. (Tr. 32). Moreover, he had to lie in bed for two hours, taking pain pills and muscle relaxers, the morning after undergoing the functional capacity evaluation, and his back continued hurting for the next three days. (Tr. 32). Claimant also admitted that he has not looked for work since returning to the United States. According to his testimony, he did not look for work because he feared that he would make his injury worse and force that employer to compensate him for the injury. (Tr. 32).

B. Medical Records

Claimant's medical records show that he visited the Fort Apache Clinic the same day of his injury, November 9, 2009, and that he was complaining of right ankle pain. (EX-9, pp. 1-2). At the clinic, Claimant was diagnosed with a sprained ankle, and no x-rays were taken. (EX-9, pp 1-2). Because the problems persisted, he returned two weeks later on November 24, 2009, complaining of echymosis³ as well as swelling and pain with ambulation. (CX-1, p. 2). The records also indicated that on this visit he denied back pain.⁴ (CX-1, p. 2). X-rays were taken and showed evidence of a right calcaneus fracture. (CX-1, p. 2). On November 28, 2009, Claimant returned to work with a cast on his right foot/leg and with the following restrictions:

³ The term "echymosis" is defined as "a purplish patch caused by extravasation of blood into the skin."

⁴ Claimant did not complain of any right hip and right shoulder pain until August 18, 2010 when seen by Dr. Vanderweide.

No use of right lower extremity, crutches, and minimal ambulation. (EX-9, p. 9). Claimant continued working under these restrictions until he returned to the United States. (EX-9, pp. 9-10).

Claimant's medical records also indicate that on December 22, 2009, his cast was replaced and a bi-valve was added to account for the change in pressure during his flight home. He was told to remain in the cast for at least two weeks, and medical management recommended a medical leave of absence (MLOA). (EX-9, p. 10). The records also contain an Amendment dated December 25, 2009, which states the "MLOA for this patient has been rescinded, as he has chosen to continue forward on his regularly scheduled R&R." (EX-9, p. 10). The Amendment continues and states that if Claimant is stateside "longer than his scheduled R&R, and his condition is such that it is expected, an R&R to MLOA approval shall be sought." (EX-9, p. 10). There is also a notation dated January 19, 2010, stating Claimant had requested the switch from R&R to MLOA. (EX-9, p. 10).

After returning to the United States, Claimant commenced treatment with Dr. David Howie. On January 6, 2010, Dr. Howie took x-rays and confirmed the fracture in Claimant's heel. Dr. Howie's treatment plan included placing Claimant in a cam walker and allowing him to begin placing some weight on his injured foot. (CX-1, pp. 1-7). In 2010, Dr. Howie examined Claimant during follow-up treatment visits on January 11th, February 1st, March 3rd, and April 14th. In Claimant's April follow-up, Dr. Howie opined that Claimant had reached MMI and that he would have significant impairment ratings. He also sent Claimant for an examination to determine his impairment rating. The medical records covering Claimant's treatment to this point show no reports of any complaints regarding back pain. (CX-9, pp.15-28).

At Employer's request, Dr. Carl Cannon evaluated Claimant on June 3, 2010, and assigned Claimant a twelve percent (12%) whole person impairment. (EX-9, p. 32; CX-1, p. 23). Upon examination, Dr. Cannon noted that although he had healed Claimant had residual problems such as an antalgic gait. (*Id.*). Furthermore, Dr. Cannon opined that Claimant could not and would not ever be able to return to his former employment. (*Id.*). For the first time, Claimant's records show a complaint of back pain although Dr. Cannon's report indicates Claimant contended he had suffered from back pain since the time of the injury but had been unable to obtain an evaluation. (EX-9, p. 33; CX-1, p. 24). Moreover, post-injury back pain is consistent with a fracture of the calcaneus and a patient with such an injury should be questioned regarding the presence of back or spine pain. (*Id.*).

Dr. Cannon diagnosed Claimant with a comminuted fracture of the right calcaneus, post-traumatic subtalar arthritis in the right ankle, right calf atrophy, and post-injury back pain for which Claimant was awaiting an evaluation. (EX-9, p. 33; CX-1, p. 24). Dr. Cannon assigned a twelve percent (12%) whole person impairment rating but because Claimant's back had yet to be evaluated, Dr. Cannon stated the "calculations may need to be apportioned at a later date adding in his spine as part of his impairment." (*Id.*).

Employer had Claimant evaluated on August 18, 2010, by Dr. David Vanderweide. According to Dr. Vanderweide's report, Claimant complained of pain in his ankle, back, right

hip, and right shoulder and claimed he had consistently complained of this pain since returning from Iraq but has not been evaluated or treated.⁵ (EX-10, p. 2).

Based upon his examination and the medical records reviewed, Dr. Vanderweide's opined that Claimant suffered a right calcaneus fracture with subtalar arthrosis and a limited range of motion. (EX-10, p. 3). According to the report, Claimant reached MMI, has received appropriate treatment, and was assigned an appropriate impairment rating. (*Id.*). Dr. Vanderweide suggested a functional capacity evaluation (FCE) with appropriate validity controls. (*Id.*). He also suspected Claimant may gain some benefit from physical therapy, anti-inflammatory medications, and a subtalar injection of corticosteroid. (*Id.*).

Thereafter, Claimant returned to Dr. Howie on August 25, 2010, for a follow-up visit. In his records, Dr. Howie states that he agrees with the twelve percent (12%) impairment rating. (EX-9, p. 42). On September 1, 2010, Claimant returned to Dr. Howie for a follow-up and evaluation of his back. (CX-1, p. 30; EX-9, p. 44). On examination, he noted that Claimant had limited spinal motion in all three planes; that straight leg raising was positive on the right at sixty (60) degrees; that a neurological exam showed weakness of long toe flexor muscles, bilaterally; and that Claimant's right hemipelvis was depressed which is indicative of leg length discrepancy. (*Id.*). Dr. Howie's impressions were (1) chronic low back pain with evidence of bilateral lumbosacral radiculopathy and (2) mild length discrepancy in his right leg, and as a result he recommended an MRI scan of Claimant's lumbar spine. (*Id.*).

On October 21, 2010, Claimant underwent an FCE. He was referred to Mr. Steven Clark, an Occupational Therapist, by Dr. Vanderweide for an evaluation to determine Claimant's maximum physical capacities. (EX-11, p. 1). Clark stated that throughout his evaluation Claimant showed inconsistent performance. (*Id.*). For example, Claimant showed significant lumbar restriction during formal lumbar ROM; however, he showed much greater lumbar flexion while unaware of observation. (*Id.*). Claimant's behavior also indicated less than full effort; specifically, Claimant demonstrated minimal postural change as well as minimal accessory muscle recruitment during the testing. (*Id.*).

Claimant demonstrated the ability to lift twenty (20) pounds from floor to waist, (20) pounds waist to shoulder, carry up to twenty (20) pounds, push forty-four (44) pounds, and pull twenty-eight (28) pounds. (EX-11, p. 1). According to the report, Claimant terminated all lifting and positional tolerance procedures due to pain in his right ankle, back, and shoulder. (*Id.*). Also noted in the report is Claimant's contention that he has made intermittent complaints of right shoulder and upper trap pain after ten (10) to fifteen (15) minutes of sitting. (*Id.*). According to Claimant, he had previously mentioned this; however, no one has evaluated or treated any of his complaints except his ankle. (*Id.*).

Following the FCE, Claimant returned to Dr. Vanderweide who opined that, related to Claimant's right calcaneus fracture, the following restrictions were necessary: no prolonged standing, walking and running, and no repetitive climbing, squatting, and kneeling. (EX-10, p. 5).

⁵ This is the first time there is any record of any complaint regarding pain in Claimant's right hip or right shoulder.

On August 29, 2011, Dr. Samir S. Ebead evaluated Claimant, after he was referred by Employer. (EX-21, p. 1). In his report, Dr. Ebead mentioned that Claimant complained of pain in his right heel and ankle, his low back, his right hip, and his right shoulder. (*Id.*). Dr. Ebead also stated that Claimant had not previously been evaluated for low back, right hip, or right shoulder pain and referenced a note by Carrier that these alleged injuries were denied by previous physicians and, thus, by Carrier as well. (*Id.*). As a result, Dr. Ebead limited his evaluation to Claimant’s right heel and ankle area. (*Id.*).

Overall, Dr. Ebead’s opinion is in agreement with Dr. Vanderweide; however, Dr. Ebead opined that physical therapy would not be significantly beneficial to Claimant because the fracture extended into the subtalar joint. (EX-21, p. 5). In addition, Dr. Ebead agreed with Dr. Howie that Claimant will likely need fusion of the ankle. (*Id.*). Regarding the FCE report, Dr. Ebead noted that according to the report Claimant was able to fully squat; however, he doubted whether Claimant would have been capable of “fully squatting” at the time of the evaluation and stated that Claimant “obviously” cannot at the time of his evaluation.⁶ (*Id.*).

Based on his evaluation and in response to direct questions from Carrier, Dr. Ebead reported that he “tended to discount” any problem regarding Claimant’s lower back and right hip. (EX-21, pp. 5-6). As for the right shoulder complaints, Dr. Ebead was unsure how Claimant could even relate this to his ankle injury. (*Id.*). Dr. Ebead also filled out a DOL Work Capacity evaluation form wherein he stated Claimant’s limitations as follows: one to two (1 – 2) hours of intermittent standing or walking; occasional bending and stooping, operating his personal car only whether to, from, or at work; occasional pushing, pulling, and lifting – up to twenty (20) pounds; and intermittent squatting, kneeling, and climbing – no ladders. (EX-21, p. 8).

C. Vocational Evidence

In this case, Employer presented two labor market surveys and the results are summarized below. The first is dated January 21, 2011, and was conducted by vocational expert Ms. Susan Rapant. (EX-13). The second is dated July 1, 2011, and was conducted by vocational expert Ms. Shelley Lindley. (EX-19).

According to the January 21, 2011, survey, Ms. Susan Rapant conducted labor market research from August 13, 2010, through September 8, 2010, and within a thirty-two (32) mile radius of Claimant’s residence. Ms. Rapant concluded Claimant was employable at wages between \$8.00 and \$13.00 per hour. For this report, Ms. Rapant assumed a sedentary work release and based her conclusions on Claimant’s age, education, work history, vocational background, interest, physical capabilities, and current skills. In her report, she identified the following five (5) positions as suitable:

POSITION	PHYSICAL DEMAND ⁷	WAGE PER HOUR
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⁶ Dr. Ebead’s report states, “Another observation is what the FCE evaluation stated about the claimant being able to fully squat. Obviously the claimant cannot do that today, and I doubt that he was able to do that at the time of evaluation, at least not now.”

⁷ Based on the Dictionary of Occupational Titles

Front Entrance Greeter	Light Work ⁸	\$9.00
Appointment Setter	Sedentary Work	\$8.00 – \$10.00
Dispatcher	Sedentary Work	\$8.00 – \$12.00
Customer Service Representative	Sedentary Work ⁹	\$10.00
Security Guard	Light Work ¹⁰	\$12.00 – \$13.00

Ms. Shelley Lindley conducted labor market research from May 27, 2011, through June 27, 2011, in Claimant’s geographical area, Conroe, Texas. Ms. Lindley was able to identify various positions which may be appropriate for Claimant based on his work history, skills, and physical/work capabilities. In addition, Ms. Lindley based her conclusions on a sedentary work restriction, but she also noted the potential employment options may increase with a “more accurate FCE.” In her report, she identified the following twelve (12) positions as appropriate and available:

POSITION	WAGE PER HOUR¹¹
Customer Service Dispatcher	\$14.36 (*)
Customer Service	\$16.83
Customer Service Dispatcher	\$14.36 (*)
Customer Service Representative	\$14.36 (*)
Dispatcher	\$14.36 (*)
Customer Service Representative	\$14.36 (*)
Sales Representative	\$14.36 (*)
Customer Service Representative	\$14.36 (*)
Customer Service Dispatcher	\$14.36 (*)

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends that (1) he sustained injuries to his lower back, right shoulder, and right hip on November 9, 2009; (2) provided timely notice of his injuries and timely filed his claims; and (3) has never been fully evaluated or treated concerning these injuries. Furthermore, Claimant argues he has established a *prima facie* case and is therefore entitled to the Section 20(a) presumption which the Employer has failed to rebut. According to Claimant, Employer has also failed to show that he has attained MMI or that suitable alternative employment exists.

⁸ Physical Demands of this specific job were not given.

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¹⁰ The report states the Employer may require a physical examination.

¹¹ (*) = the median wage from the DOL Occupational Outlook Handbook. According to her report, Ms. Lindley listed this figure because the wage for the actual position was not available.

As a result, Claimant contends he is entitled to (1) temporary total disability from the date of the accident to the present and continuing; (2) medical and transportation expenses he incurred related thereto; and (3) compensation based on an average weekly wage of \$2,039.55.

Employer first contends that Claimant injured only his ankle on November 9, 2009, for which he has received full compensation. Employer asserts that it paid to Claimant (1) compensation for temporary total disability at the maximum weekly rate of \$1,224.66 for the period beginning November 9, 2009, and ending April 14, 2010; (2) compensation for permanent partial disability for a scheduled injury at the maximum compensation rate, pursuant to Section 908(c)(4); and (3) medical benefits.

Next, Employer contends Claimant has failed to show a compensable back injury as there is no documentation from November 9, 2009, through June 3, 2010, showing any complaints of back injury. Further, during this period he was treated fifteen (15) times by medical personnel; however, the first documentation of Claimant's alleged back injury was on September 1, 2010, by Dr. Howie. In addition, medical records resulting from Claimant's ankle injury show that he denied experiencing any back pain. Employer also argues that if Claimant is experiencing back pain it is the natural progression of a degenerative condition unrelated to his overseas work with Employer.

In the alternative, if this court finds Claimant's back condition compensable, Employer asserts it has established the existence of suitable alternative employment providing an offset of \$38,000.00 annually. Finally, Employer contends that Claimant is not entitled to reimbursement for the airfare back to the U.S. because the trip was for R&R and not for medical treatment and because Claimant is not entitled to receive reimbursement for a trip home for R&R.

B. Credibility of the 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 not impressed with Claimant's testimony regarding pain in his lower back, right hip, or right shoulder. At one point, he claimed the pain had been present from the initial date of injury but later changed his testimony and stated that the pain began thirty (30) days after the initial injury. Indeed, Claimant's medical records show that he specifically denied any back pain while receiving medical treatment twenty (20) days after the injury. (CX-9, p. 2). Moreover, Claimant asserted that he informed Dr Howie, his treating physician, of the back pain

on numerous occasions from January 6, 2010, through August 25, 2010; however, Dr. Howie's records suspiciously contain no mention of these alleged complaints. (CX-9; pp. 15-42).

Furthermore, Dr. Howie's records indicate that Claimant first reported his back pain on September 1, 2010. The records also indicate that this is a new complaint from an existing patient. I find it incredible that Claimant's treating physician would fail to record, fail to evaluate, and refuse to treat a back condition which his patient had complained of on numerous occasions, especially considering that back pain is not uncommon in a patient with a fractured heel. I find it much more probable that there is no record of back pain because Claimant, in fact, made no complaints relating back pain to any of the examining physicians prior to June 3, 2010.

As stated above, Claimant's medical records show no complaints of back pain until June 3, 2010; the date Dr. Cannon evaluated Claimant's ankle injury. In evaluating Claimant's credibility, the undersigned finds it significant that by this time Dr. Howie had declared Claimant at MMI and that Claimant had been assigned a twelve percent (12%) impairment rating. I further find it is highly likely that Dr. Howie's declaration of MMI on April 14, 2010, is the true motivation behind the sudden complaints of back pain. As a result, I discredit Claimant's testimony regarding pain in his lower back, right hip, or right shoulder.

C. Fact of Injury/Causation

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

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

33 U.S.C. § 920(a).

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

i. Claimant's *Prima Facie* case

Under the Act, Claimant has the burden of establishing the *prima facie* case of a compensable injury. *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.

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). In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

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 Blutworth 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). The term "injury" includes the aggravation of a pre-existing, non-work related condition or the combination of work- and non-work-related conditions. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational disease cases, 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.

For an injury to be compensable under the Act, it must have "arose out of" and occurred "in the course of employment." 33 U.S.C. 902(2). These are separate elements that must both be proven. "Arising out of" refers to the activity in which the claimant was engaged when the injury occurred. "Course of employment" refers to the time, the place and the circumstances surrounding the injury. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1981). The general rule as established by the Board is that an injury occurs in the course and scope of employment if it occurs within the time and space boundaries of employment and in the course of an activity the purpose of which is related to the employment. *Alston v. Safeway Stores*, 19 BRBS 86, 88 (1986), *citing Wilson v. WMATA*, 16 BRBS 73 (1984); *Willis v. Titan Contractors*, 20 BRBS 11 (1987). The Board further defined their position in *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997), holding that the employee's action would be found within the "scope of employment" if it was of some benefit to the employer. However, the Act does not require that the employee, at the time of injury, be engaged in activity of benefit to the employer. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951).

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).

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.

The undersigned must consider whether Claimant has made a *prima facie* showing that an injury or harm has occurred. A "harm" has been defined as something that has unexpectedly gone wrong with the human frame. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987).

Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case for Section 20(a) invocation. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). This is true even though there is no objective findings that the claimant has been harmed. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In cases where the Claimant alleges the aggravation of an underlying disease, "an injury includes one occurring gradually as a result continuing exposure to conditions of employment, and it is sufficient if the employment aggravates the symptoms of the process." Moreover, the Act does not require a Claimant suffer a sudden injury; compensable injuries include those which occur over a long period of time. *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

Claimant's testimony and the medical evidence support the contention that Claimant has suffered an injury to his right ankle. However, I find the record does not support the contention that Claimant suffered a harm/injury to his lower back, right hip, or right shoulder. While credible subjective complaints of pain may be sufficient to establish the existence of a harm or injury, clearly discredited assertions are not sufficient. As explained above, the undersigned does not find Claimant's allegations of back, hip, or shoulder pain credible. As a result, I find Claimant has failed to present credible evidence to support his assertion that he suffered any pain to his lower back, right hip, or right shoulder. Therefore, the undersigned finds Claimant has sufficiently alleged only an injury to his right ankle.

For the reasons stated above, I find Claimant has established a *prima facie* case sufficient to invoke the Section 20(a) presumption regarding only the injury to his right ankle. Claimant has thereby established a presumption that the Claimant's current condition is worked related. Further, the parties have stipulated that Claimant injured his ankle on November 9, 2009, while working in the course and scope of his employment. (JX-1). Accordingly, I find Claimant's right ankle injury as well as any resulting disability was caused by his employment and must now determine the nature and extent of any resulting disability.

D. Nature and Extent of Claimant's Disability

Regarding Claimant's right ankle, the parties have stipulated that Claimant reached Maximum Medical Improvement (MMI) on April 14, 2010, and that he has a permanent, scheduled disability as a result. In addition, the undersigned has found that Claimant's other alleged injuries are not compensable. Accordingly, I find that as of April 14, 2010, Claimant was permanently and partially disabled as a result of the scheduled injury to his right ankle/foot.

However, Claimant has also alleged a subsequent period of total disability. Therefore, the undersigned must still examine the extent of Claimant's disability resulting from his ankle injury.

i. Extent of Claimant's disability

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.

As stated above, Claimant has established a *prima facie* case of total disability if he has shown 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).

Considering the limitations noted above and the requirements of his former employment, the undersigned finds Claimant is unable to return to his former employment. In addition, the medical evidence such as Dr. Cannon's statement that Claimant could not and would not ever be able to return to his former employment, supports Claimant's contention. Thus, Claimant has met his burden of establishing a *prima facie* case of total disability resulting from right foot/ankle injury.

ii. Suitable Alternative Employment

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. 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. *Id.* 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).

An employer is not required to place a claimant in an actual job. *Turner*, 661 F.2d at 1038. 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.*, 930 F.2d 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.*, 930 F.2d at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). If the employer has established suitable alternate employment, the employee can nevertheless establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Turner*, 661 F.2d at 1042-43; *P & M Crane Co.* 930 F.2d at 430. The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. If an employee does not meet this burden, then at most, his disability is partial. 33 U.S.C. § 903(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

The Act provides guidance under Section 8(c) as to schedule and non-schedule permanent partial disabilities. If an employee suffers a scheduled injury under Section 8(c)(1)-(20), he is entitled to two thirds of his average weekly wage, for a specified number of weeks, irrespective of whether he suffered a loss of earning capacity. *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994). *See also Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980) (herein, "PEPCO"). Under this schedule of compensation, the injured employee is automatically entitled to a certain level of compensation as a result of his injury and no proof of actual wage-earning capacity is required to receive the specified compensation. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988).

Under *PEPCO*, an injured employee who suffers a scheduled injury is only entitled to benefits based on the schedule in Section 8(c) of the Act, but the Schedule is only applied when a claimant has a permanent partial disability, which necessitates the claimant reach maximum medical improvement. *Id.*; *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985); 33 U.S.C. § 908(c) (2002). Prior to reaching maximum medical improvement, the claimant is either entitled

to temporary total disability benefits or temporary partial disability benefits. 33 U.S.C. § 908(b), (e).

Scheduled awards for an injury commence where a claimant with a rated physical impairment reaches maximum medical improvement or permanency under the *Watson* test and suitable alternate employment is available. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). A partial award commences on the date employer establishes the availability of suitable alternate employment; thus, if claimant has reached permanency prior to that date, his disability remains total until the date suitable alternate employment is available. *Id.* Thus, once a claimant establishes a *prima facie* case of total disability by demonstrating that he cannot resume his former job, the claimant remains totally disabled even after reaching maximum medical improvement, and the scheduled award cannot apply until the employer demonstrated evidence of suitable alternative employment.

Unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision, and economic factors are not to be taken into account when calculating disability benefits under the schedule. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172 (1984); *Rowe v. Newport News Shipbuilding and Dry Dock Co.*, 193 F.3d 836 (4th Cir. 1999).

Based on the labor market survey of Ms. Susan Rapant, the undersigned finds Employer showed suitable alternative employment at a sedentary level of work was available as of January 21, 2011. I further find that Claimant has failed to show that he diligently tried and was unable to secure employment. Thus, on January 21, 2011, Claimant's permanent total disability became a permanent partial disability.

However, a claimant's permanent partial disability condition may thereafter deteriorate. See *Davenport v. Apex Decorating Co.*, 18 BRBS 194, 197 (1986); *Leech v. Service Eng'g Co.*, 15 BRBS 18, 22 (1982). In this case, Claimant's condition deteriorated to such a point that even sedentary work was beyond Claimant's abilities, due to a collapse of the joint space in his right ankle. On May 23, 2011, Dr. Howie opined Claimant would be a candidate for surgery which Claimant agreed to have during a follow-up visit with Dr. Howie. As a result of Claimant's pending surgery, Dr. Howie issued an "excuse slip" on September 27, 2011, stating that Claimant was unable to work due to the scheduled surgery but that he may return to work in three (3) months. (EX-22, p. 6). Furthermore, there is nothing in the record indicating that the deteriorated condition of Claimant is permanent. Therefore, the undersigned concludes that this is a temporary exacerbation of Claimant's work-related condition and that it has rendered him totally disabled.

Where an employee with a permanent partial disability suffers a temporary exacerbation, the permanent partial disability may be subsumed in a period of temporary total disability, but it does not disappear. *Leech*, 15 BRBS at 22. The Board has held that it is inconsistent with the wage-earning capacity principle to allow an award for scheduled permanent partial disability to

coincide with temporary total disability. *James v. Bethlehem Steel Corp.*, 5 BRBS 707 (1977); *Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977). To avoid double recovery, schedule awards lapse during periods of temporary total disability; once the claimant reaches maximum medical improvement and the temporary total award is terminated, the scheduled award resumes. *Turney*, 17 BRBS at 235 n.4. Thus, Claimant's is currently temporary totally disabled; however, Claimant's permanent partial disability has not disappeared.

In summary, Claimant was temporary totally disabled until he reached maximum medical improvement on April 14, 2010. Thereafter, Claimant's disability became a permanent, total disability until Employer showed suitable alternative employment was available on January 21, 2011. By showing suitable alternative employment, Employer established Claimant was only permanently partially disabled and entitled to a scheduled award of compensation rated at twelve percent (12%) for the injury to his right foot. Thus, pursuant to Sections 908(c)(4) and (c)(19) Claimant became entitled compensation for a period equal to twelve percent (12%) of two hundred and five (205) weeks, or twenty-four and six-tenths (24.6) weeks. Thereafter, Claimant's condition deteriorated leaving him in a temporary state of total disability as of September 27, 2011.

E. Claimant's AWW & Resulting Compensation Rate

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 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 weekly 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 not work a standard five or six day work week, and thus Section 10(a) cannot be used to calculate his average weekly wage as it distorts his annual earning capacity.

2. Section 10(b)

If Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. §910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id.* To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id.* at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991). In this case, the record is devoid of wage records of similar employees and Claimant has worked substantially the whole year. Thus, Section 10(b) cannot be utilized.

3. Section 10(c)

If neither of the previously discussed sections can be applied “reasonably and fairly, then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the 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 services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to “arrive at a sum that reasonably

represents a claimant's annual earning capacity at the time of injury.” *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

The Fifth Circuit has found that vacation and holiday pay on which a claimant did not report to work but receive wages should be counted as days actually worked when calculating average weekly wage under Section 10(c). *Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000).

According to the records submitted, Claimant earned \$102,144.38 in total wages from Employer in the fifty-two (52) weeks prior to Claimant’s injury.¹² Dividing that figure by fifty-two (52) weeks shows that Claimant earned \$1,964.32 per week. I find this figure to reasonably represent his earning capacity at the time of the injury. Thus, I find Claimant’s average weekly wage under Section 10(c) is \$1,964.32 which entitles Claimant to the maximum compensation rate of \$1,224.66.

F. Section 7 Medical Benefits

Section 7(a) of the Act provides that “the 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. § 907(a); 20 C.F.R. § 702.402. 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). The test of whether medical treatment is necessary is whether 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). In order for medical care to be compensable, it must be appropriate for the injury, and the administrative law judge has the authority to determine the reasonableness and necessity of a procedure refused by employer. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). A claimant establishes a *prima facie* case that medical treatment is reasonable and necessary when a qualified physician indicates that such medical 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 employer must raise the reasonableness and necessity of treatment before the judge. *Salusky v. Army Air Force Exch. Serv.*, 3 BRBS 22 (1975). The judge is required to make specific findings of fact regarding an employer's claim that a particular expense is non-compensable. *Monrote v. Britton*, 237 F.2d 756 (D.C. Cir. 1956). An administrative law judge may deny a medical expense he finds unnecessary, *Scott v. C & C Lumber, Inc.*, 9 BRBS 815 (1978); *See generally Weikert*, 36 BRBS 38. Elaborate and costly medical procedures not recognized in the medical community or found rational by a substantial group of other physicians

¹² This period covers from November 8, 2008 until November 9, 2009. (See EX-6, p. 2)

can be found to be not necessary or reasonable medical treatment. *Pascaretti v. General Dynamics Land Systems*, 37 BRBS 477 (ALJ 2003). An employer is only liable for the reasonable value of medical services. See 20 C.F.R. § 702.413; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 518 (1978); *Potenza v. United Terminals, Inc.*, 1 BRBS 150 (1974), *aff'd*, 524 F.2d 1136, 3 BRBS 51 (2nd Cir. 1975). 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).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. For example, an employer must pay for the treatment of the claimant's myocardial infarction, if the judge finds that it is causally related to a prior work-related injury. See *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980). If the disability results, however, from aggravation of an injury compensable under the LHWCA, incurred while the employee is working for a second covered employer, the second employer is liable for medical expenses due to the "reinjury." *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Office of Workers Comp. Programs*, 698 F.2d 1235 (9th Cir. 1982).

In this case, Employer is required to pay for all medical expenses which are the natural and unavoidable result of Claimant's work-related ankle injury. I find this amount includes reimbursement for airfare back to the U.S. for treatment because Claimant was approved for a medical leave of absence (MLOA) prior to returning to the U.S. and his status was later amended to MLOA. However, the undersigned finds Employer is not liable for medical expenses related to Claimant's alleged back injury as it has not been found to be work-related.

G. 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.

H. Attorneys 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/Carrier shall pay Claimant compensation for temporary total disability from December 25, 2009, to April 13, 2010, based on Claimant's average weekly wage of \$1,964.32, 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 April 14, 2010, to January 20, 2011, based on Claimant's average weekly wage of \$1,964.32, 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 Claimant compensation for permanent partial disability based on a twelve percent (12%) disability rating to Claimant's right foot/ankle for a period of twenty-four and six-tenths (24.6) weeks beginning January 21, 2011, in accordance with the provisions of Sections 8(c)(4) and 8(c)(19) of the Act. 33 U.S.C. § 908(c)(4), (c)(19).
5. Employer/Carrier shall pay Claimant compensation for temporary total disability from September 27, 2011, to the present and continuing based on Claimant's average weekly wage of \$1,964.32, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).
6. Employer/Carrier shall pay all reasonable, appropriate, and necessary medical expenses arising from Claimant's November 9, 2009, work injury, pursuant to the provisions of Section 7 of the Act. This shall include reimbursement for his air travel.
7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).
9. 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.

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CLEMENT J. KENNINGTON
Administrative Law Judge