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Issue Date: 23 January 2015

CASE NO.: 2012-LDA-00194
OWCP NO.: 02-191126

In the Matter of:

JAMES L. GATZ,
Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.,
Employer,

and

INSURANCE CO. OF THE STATE OF PENN.,
c/o CHARTIS WORLDSOURCE,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

Gary B. Pitts, Esq.
Houston, Texas
For the Claimant

Limor Ben-Maier, Esq.
Houston, Texas
For the Employer

James Culp, Esq.
Dallas, Texas
For the Director

Before: Stephen R. Henley
Associate Chief Judge

DECISION AND ORDER—GRANTING BENEFITS

This proceeding arises from a claim under the Defense Base Act, 42 U.S.C. § 1651 *et seq.*, an extension of the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq.* James L. Gatz ("Claimant") is seeking compensation and medical benefits from Service Employees International ("Employer") and Insurance Company of the State of Pennsylvania ("Carrier") for a work-related injury suffered on August 23, 2009 in Iraq.

PROCEDURAL HISTORY¹

A formal hearing was held in this case before Administrative Law Judge Stephen M. Reilly on November 7, 2012 in Ann Arbor, Michigan at which both parties were afforded a full and fair opportunity to present evidence and argument as provided by law and applicable regulations. No representative of the Director, OWCP appeared at the hearing.

On April 25, 2014, a Notice of Reassignment was issued by this Office, informing the parties that Judge Reilly had retired from federal service prior to issuing a decision. The parties were notified that this matter would be transferred to another Administrative Law Judge for a decision on the record made before Judge Reilly. The parties were provided an opportunity to object to this transfer to another judge, or to request an additional hearing before the newly-assigned Administrative Law Judge, within 15 days of the date of issuance of the notice. Neither party responded to the Notice of Reassignment. Accordingly, on August 8, 2014, this matter was assigned to the undersigned Administrative Law Judge for decision.

The record before me reflects that, at the hearing, Claimant offered Exhibits 1 through 14, which were admitted into evidence without objection. Employer offered Exhibits 1 through 23 and 26 through 27,² which were also admitted into evidence without objection. Judge Reilly also submitted ALJ Exhibit 1, which was admitted into evidence. The record remained open post hearing for the submission of supplemental evidence pertaining to Claimant's attempt to

¹The following references will be used: "TR" for the official hearing transcript; "CX" for a Claimant's exhibit; and, "EX" for an Employer's exhibit.

² Employer recalled EX 24 and 25. TR at 6.

obtain employment. Specifically, Claimant was allowed to submit notes documenting his job search, and Employer was allowed additional time to respond to this evidence after attempting to verify Claimant's job search efforts. TR at 67-70. On November 3, 2012, Claimant filed with this Office Exhibits 15 and 16, documenting his job search. These exhibits are hereby admitted into evidence without objection. Further, on May 6, 2013, Employer filed with this Office *Employer/Carrier's Motion to Re-Open the Record for Submission of Employment Records*. Employer's motion seeks admission of Employer's Exhibits 27 and 28. As these exhibits are responsive to Claimant's Exhibits 15 and 16, and as Claimant has not responded to Employer's motion, Employer's post-hearing exhibits are hereby admitted into evidence as Employer's Exhibits 28 and 29.³ Both parties filed post-hearing briefs addressing the merits of this claim. Further, on March 21, 2013, the Director, OWCP filed a letter stating his position on the issue of Employer's entitlement to Section 8(f) relief. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

STIPULATIONS⁴

The parties have stipulated and I find that:

1. The Act applies to this claim;
2. Claimant sustained an injury (hernia) on August 23, 2009;
3. The injury occurred in the course and scope of Claimant's employment with Employer;
4. There was an Employer/Employee relationship at the time of the injury;
5. Employer was timely notified of the injury on August 24, 2009;
6. The claim was timely filed;
7. The Notice of Controversion was timely filed on September 22, 2009;
8. The District Director's Informal Conference was conducted on December 16, 2011;
9. Claimant's average weekly wage ("AWW") at the time of injury was \$1,655.99.
10. Claimant reached maximum medical improvement ("MMI") on August 9, 2011.

³ Employer's exhibits submitted post-hearing are re-numbered, since Employer's exhibits admitted into evidence at the hearing included Exhibit 27.

⁴ The private parties cannot bind the Special Fund absent the Director's agreement to the stipulations. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985); *see also Bomback v. Marine Terminals Corp.*, 44 BRBS 95 (2010). Stipulations affecting the Special Fund may be accepted if there is evidence of record to support them. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000) (citing *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part sub. nom., E.P. Paup Co. v. Dir., OWCP*, 999 F.2d 1341 (9th Cir. 1993)).

ISSUES

The following unresolved issues were presented by the parties:

1. What is the extent of Claimant's disability?
2. Is Claimant entitled to payment of attorney fees and costs?
3. Is Employer entitled to relief under § 8(f) of the Act?

SUMMARY OF THE EVIDENCE

Claimant's Testimony (TR 19-66; EX 20)

Claimant is a 43 year-old man. TR at 19. He presently resides in Gladwin, Michigan with his wife. *Id.* His education consists of high school, followed by a two-year trade school at a state technical institute and rehabilitation center where he learned "building and cabinet making." *Id.* at 19-20. For the ensuing 25 years, Claimant worked as a carpenter "rebuild[ing] custom furniture, cabinets, countertops," among other. *Id.* This work entails "heavy lifting," specifically "[f]ifty pounds plus constant lifting," such as lifting sheets of plywood. *Id.* Claimant's work history includes "mill work" (i.e., making molding and casing); cabinet making; a four- or five-year period of self-employment, which included building cabinets, gazebos, additions, and decks; working as a design craftsman for a "museum company," installing custom cabinet exhibits; as well as facility maintenance and building work at a Christian retreat center (with free housing provided). *Id.* at 20-21; *see also* EX 20 at 11-14.

Claimant then worked as a carpenter overseas in support of the U.S. troops for approximately three years. He went to work overseas because of "the money and the experience." *Id.* at 22. Claimant elaborated that "[t]he economy was tight in Michigan," his kids were getting ready to go to college, and Claimant and his wife had sold their house. *Id.* at 21. He initially worked as a carpenter for KBR in Afghanistan for about one year from 2005 to 2006, with no injury. *Id.*; *see also* EX 20 at 15-16. Claimant went on R&R every four months. EX 20 at 15. In 2006, Claimant returned to the U.S. and did maintenance work in Wyoming for two-three months. EX 20 at 17.

Thereafter, Claimant worked in Iraq for approximately two years, starting in June of 2007. TR at 21-22; EX 20 at 20 at 17. Claimant sustained his first hernia in August of 2008.⁵ *Id.* at 23-25. At the time, he was working "[s]even days a week, 14 hours [a] day," building "a camp where all the MPs would live." *Id.* at 22. When asked to describe his injury, Claimant stated that he was lifting stairs weighing hundreds of pounds along with three other workers when he felt pain in his groin. EX 20 at 22. Initially, a KBR medic told him it was just a groin strain. TR at 23. Claimant continued to work, but his groin still bothered him. EX 20 at 23. He

⁵ At his deposition, Claimant stated that he sustained his first hernia in May of 2008. EX 20 at 17-18.

returned to the U.S. on R&R for two weeks, and was hoping to recover while on vacation. *Id.* When he returned to Iraq, he started a new job doing maintenance at the Army base. *Id.* at 24. This position involved driving around and doing 20 to 30 small jobs. *Id.* Driving on bumpy roads made his hernia hurt and, when he finally saw the Army doctor, he was diagnosed with a hernia and flown back to the U.S. *Id.* at 24-25; TR at 23. He was told by KBR that if he did not return to work within a certain amount of time, his position could be filled. Claimant had a hernia surgery within days of returning to the U.S., as he was “trying to get fixed and back to work and as soon as [the doctor] released me to work, I tried to get back into the company because I couldn’t afford to lose my work.” *Id.* at 24. Although Claimant’s doctor released him to work after four months, the KBR “wouldn’t take [him] back” because “the Army doctor over in Iraq wouldn’t sign off.” *Id.* at 24. Thus, Claimant did not go back to work until the end of January of 2009. *Id.* He did not work while in the U.S. *Id.* at 26. He was “not being paid” and “just stayed home.” *Id.*

In January of 2009, Claimant returned to work in Iraq, and was able to do his job without pain until he re-injured himself. EX 20 at 20, 27. On or about August 23, 2009, he sustained another hernia injury while lifting trusses. TR at 25-26. He was initially sent to Kuwait for medical tests and then flown to the U.S. Claimant underwent steroid injections for his groin pain, which did not help. *Id.* at 28. His groin pain was difficult to diagnose, and he was eventually referred for a consultation with Dr. Shaheen, who diagnosed left inguinal hernia and recurrent right inguinal hernia. *Id.* at 28-29. Claimant had surgery on March 3, 2010. Dr. Yong Yoon⁶ performed the laparoscopic surgery on the left hernia and Dr. Hackett repaired the right hernia. *Id.* at 29. In addition to the double hernia, Claimant was also diagnosed with entrapment of the ilioinguinal nerve. *Id.* Claimant testified that “[t]hey ended up cutting some nerves in my groin because the nerves were sewn into the hernia, first hernia repair.” *Id.* Claimant testified that, after his second surgery, his groin “is just as painful” and “my groin feels like I have a constant toothache in it.” *Id.* In March of 2011, Claimant had his third surgery at which time “they removed my right testicle and spermatic cord.” *Id.*

Claimant testified that prior to his work overseas, he never had a hernia and was generally in good health. *Id.* at 22. He once broke his foot and pulled a muscle in his shoulder, “but other than that, I’ve always been healthy and I’ve been 50 pounds less of weight.” *Id.*

Claimant testified that, during his July 26, 2011 functional capacity evaluation (“FCE”), he “gave it everything I could give it.” He added that “I lifted, I did everything. I can lift whatever you want me to lift. I can lift that thing, but that doesn’t mean I’m not going to be sore.” *Id.* at 30. At the end of the FCE, he was “extremely sore and sore the next day.” *Id.* He was really hurting the next day. *Id.* at 30-31.

⁶ Dr. Yoon’s name is misspelled in the transcript of the hearing as “Dr. Ewen.” CX 14.

In January 2012, Claimant's doctors raised the possibility of a nerve ablation procedure, which, according to Claimant, would entail "killing the nerves in my groin. They inject alcohol into your nerves, in your spinal cord to kill the nerves in my groin and my legs." *Id.* at 31. Claimant testified that his pain is chronic and constant, and that "it feels like somebody just got me and is pinching me, twisting their fingers in my groin." *Id.* When asked about pain medications, Claimant testified that "I'm not a person that takes hard narcotics. I don't want to get addicted." *Id.* He takes Tramadol, and his daily dose has been raised from 4 pills to 6 pills and, recently, to 8 pills a day. *Id.* He added that "they're not paying for the 6 yet." *Id.* at 32. He also takes Neurontin three times a day, and one Cymbalta in the morning. *Id.* at 32. Claimant testified that he was told that Neurontin and Cymbalta were prescribed "to block the nerve centers that go to your brain." *Id.* at 32. He stated that he can take 6 pain pills a day. *Id.*

Claimant also testified regarding Form OWCP-5c (*Work Capacity Evaluation Musculoskeletal Conditions*), dated August 9, 2011, which he had submitted into evidence. (CX 1 at 68). He testified that "Dr. Yoon did not fill this out. His nurse did fill that out and what Dr. Yoon did as I went into the doctor's office, after the function evaluation and Dr. Yoon read the function evaluation and he says I don't trust, I don't believe any of this and he told me he would stand behind me 100 percent" *Id.* at 33. Claimant described as follows Dr. Yoon's role in completing the OWCP form: "[h]e's with his secretary, he hands the paper to the secretary, and he said he gave out the main weight restrictions and said finish filling this out and then he left and came back and it was signed." *Id.* at 33. Claimant was under the impression that Dr. Yoon had read his FCE and disagreed with it. *Id.* at 48. When Claimant was asked whether it would surprise him that Dr. Yoon had testified that he had never reviewed the FCE, Claimant stated "I know he did because I brought it." *Id.* at 48. Claimant reiterated that Dr. Yoon "stood in the doorway and told his nurse what to set the [weight lifting] limits at." *Id.* at 49. Claimant could not recall whether Dr. Yoon said anything about limitations on sitting, standing, and walking. *Id.* Claimant testified that the restrictions set forth on the form "make sense" to him. *Id.* at 34.

At his deposition, Claimant testified that Dr. Yoon "said I never could return to work." EX 20 at 36. According to Claimant, Dr. Yoon told him that if he were to get another hernia, "the surgeons won't touch me" because there is "too much liability," with the exception of "the emergency if the hernia was strangulating." EX 20 at 37; TR 34. Claimant testified that he has to obey the restrictions, so as not to get worse. TR at 34. With additional surgeries, the chances of success go down and this could entail "get[ting] more scar tissue ... more entrapment." *Id.* Claimant also testified that, after the third surgery, "I'm not any better and that's why when Dr. Yoon did write out my prescription and tell her what to write out what my restrictions are, he didn't agree with the studies that they send (sic)." *Id.* at 30.

Claimant also testified regarding his efforts to find work. At his July 30, 2012 deposition, Claimant acknowledged that he would be able to perform a job that met his

restrictions. EX 20 at 39. However, as of the date of the deposition, Claimant had not looked for a job within his restrictions because “with the medications I’m on, and the restrictions I’m on, I don’t believe there’s any jobs I’m going to find in my category to be able to perform.” Id.

At the hearing, Claimant testified that he started looking for work on August 1, 2012, and has “[a] lot” of notes from his job search. TR at 61. He did not apply to any jobs prior to this date. He started by filling out paperwork with Michigan Works, and then “tried to do a few, make phone calls or stop by businesses every week.” Id. Claimant testified that he never received Employer’s labor market survey (“LMS”) and had not seen it prior to the hearing date. Id. at 62. Claimant could not recall whether he had ever contacted the Department of Labor for assistance with retraining or returning to work. Id. Claimant further testified that “I’ve been worker all my life” and “I loved woodworking.” Id. at 34-35. He also “love[s] riding the lawnmower,” but after mowing the yard for about an hour, “I hobble off and go lay down in the house.” Id. Claimant further described his job search as follows:

“I went online and filled out one the Michigan talent base, ... it’s Michigan Works and you put your resume online and I’m not big into typing, to be honest with you my wife did it, you know, whenever I ran a business, you know, when I’d get a contract, my wife would type up the contract, I would take care of the work.

....

... [W]e called different builders and hardware stores, Lowes, you know, Home Depot, you know, with my cabinetmaking background I could work in the cabinet department, you know, but I don’t know if I can, I have no computer skills of doing, you know, the CAD work or any of the layouts but, you know, if there was any – I’ve contacted automotive centers, you know, to work, you know, behind a hardware desk or being a, you know, Wal-Mart, you know, I’ve contacted all of them and filled online, you know, we filled out online and I didn’t start after my deposition.”

Id. at 36. Claimant testified that he had been waiting to hear back from Employer’s vocational counselor, but never heard back. Id. at 36-37. He added that “there’s 4 or 5 jobs in there I could go apply for.” Id. So far, he has applied for “close to 40 [jobs] in different towns within an hour ride of my house.” Id. at 37. He added that “Gladwin is just a small town and all around Gladwin is a small town.” Id. The closest one, Midland, is an hour away, but “there’s no home building going on around and that’s why I went to work overseas is because I didn’t work towards everything I have and now my kids are both in college to lose everything I have with not being able to work.” Id. at 37.

On cross-examination, Claimant testified that after he suffered his first hernia in August of 2008, he was paid compensation (after a delay of 2 to 3 months) until he returned to work in January of 2009. *Id.* at 38, 42. When he returned to work overseas in 2009, he worked as a carpenter and was on light duty doing “lunder duty.” *Id.* at 39. He also did regular duty work, but his supervisor knew about his injury and did not ask him to do really heavy work. *Id.* at 40-41. Claimant was placed on medical leave on August 23, 2009, and then received disability benefits from October 9, 2009 until October 21, 2012 at the rate of \$1,103.99 per week. On October 21, 2012, the compensation benefits were reduced to \$810.70 per week. *Id.*

Claimant testified that he has no side effects from Neurontin, Cymbalta, or Tramadol. *Id.* at 47. He did not take any of his medications before he went for the FCE test, but he did take medication after the test. *Id.* at 47. However, he was still in pain. *Id.*

Claimant was also questioned about his hobbies and recreational activities, both before and after his injury. Claimant testified that he does not golf, but has done it with his dad “one time in 4 years, 5 years possibly.” *Id.* at 50. Claimant enjoys metal detecting and has done it “quite a bit” in the summer of 2012. *Id.* He does metal detecting in local parks. *Id.* The metal detector is a hand held device, made of aluminum and plastic, that weighs 2-3 pounds. *Id.* at 51. When Claimant and his wife go metal detecting, they can go for “most of the day” -- six, seven or eight hours. *Id.* at 51. He elaborated that “[w]e walk, we sit down. My wife would do my digging.” *Id.* Claimant’s wife does not work. *Id.* at 52. She did work in 2010 and 2011, so tax returns from those years show his wife’s earnings, not his earnings. *Id.* at 52. Claimant testified that he also hunts “sometimes.” *Id.* at 53. He went deer hunting “last year,” but only on the first day of the season and only for a couple of hours. *Id.* at 53-54. Hunting begins at daybreak and goes on for days, but Claimant only stays out a couple of hours; he is not “much of a hunter.” *Id.* at 55. Claimant owns many guns and has a concealed weapons permit, and he does target shooting in his backyard. *Id.* at 54. Claimant testified that he continues to use his woodworking shop, but does not make “a whole lot;” his kids and “buddies” use the shop. *Id.* at 56-57.

When asked about his typical day, Claimant testified that he may start the day by watching the news. *Id.* at 58-59. Some days, he stays at home all day, sits in bed, and watches TV. Other days, he does household chores and runs errands with his wife. Sometimes, he rides the lawnmower, visits the woodworking shop, or visits his parents who live 5 miles away. *Id.* at 59. When asked if he is “pretty active” during the day, Claimant denied this characterization and stated that he takes an afternoon nap every day for a couple of hours. *Id.* at 59. Claimant has two dogs and a cat. He does not walk the dogs, but simply lets them out on his property. *Id.* at 60. Claimant does not exercise regularly, but he “walked a few times this year but not too often.” *Id.* He does not go fishing. *Id.* With respect to his ability to drive, Claimant testified that he can drive for an hour or two, and he makes stops to stretch and walk. EX 20 at 40.

Claimant testified that his treating doctors include Dr. Yoon, a pain management doctor, and his family doctor. The last time Claimant saw Dr. Yoon was in August of 2011. He sees his pain management doctor every 4 to 6 months; his last appointment was approximately one month prior to the hearing, and the doctor “upped [his] script.” TR at 63. Claimant also received a recommendation for an MRI of the spine from Dr. Yoon and from his pain management doctor, but the Carrier refused to authorize this test. Id. at 63-64. Claimant could not recall telling Dr. Hackett in October of 2009 that he had increased pain after moving logs, nor could he recall moving log. Id. at 65.

On cross-examination, Claimant was further asked whether carpentry work allowed him to alternate his position, as needed, between sitting, standing, and walking. Claimant stated this was “not necessarily” the case because “[i]f you’re doing carpentry job, you may be all day on your feet” or “up on the roof shingling.” Id. at 66. One might take a break every 3 hours for 10-15 minutes to get a drink. Id.

Medical Records (CX 1; EX 10)

Claimant’s medical records reflect a history of groin pain starting in 2008. On 08/27/08, Claimant visited Employer’s medic complaining of groin pain “when driving and bouncing down the road” and stating that he had sustained an unspecified injury on 05/02/08. EX 10 at 2. The medic assessed Claimant as having a possible hernia and, on 08/28/08, placed Claimant on medical leave for a surgical consultation. Id. at 2-3. Thereafter, a military physician assessed Claimant as having an inguinal hernia on the right side and recommended a surgical evaluation. Id. at 4.

Claimant saw Dr. Wilfredo Abesamis on 09/08/08. Id. at 5-7. On 09/18/08, Dr. Walter Leibold performed a right inguinal herniorrhaphy with Marlex mesh plug. Id. at 11. Claimant’s postoperative diagnosis was right inguinal hernia. Id. On 10/22/08, Dr. Leibold opined that Claimant would be able to return to his work as a carpenter in Iraq without restrictions as of 11/24/08. EX 10 at 14, 16.

Claimant’s medical records further reflect a recurrence of groin pain/hernia in August of 2009. On 08/25/09, Claimant was assessed by a KBR medic with abdominal/groin pain/hernia and placed on sick leave retroactive to 08/23/09. Id. at 5. Claimant reported right groin pain since March 2009 that increased from time to time. Id.

On 08/31/09, Claimant saw Dr. Wilfredo Abesamis, who assessed him with a possible recurrence of right inguinal hernia, hypertension, and obesity. CX 1 at 7. On 09/11/09, Claimant saw Timothy R. Marsh, D.O. who did not see evidence of a hernia on Claimant’s CAT scan and suggested injections for groin pain. In September 2009, Claimant saw Dr. John

DiBella, a pain management specialist, reporting constant pain described as deep, throbbing, cramping and aching. The pain got aggravated when lifting even modestly heavy objects, walking, raising up from a sitting or supine position, or driving a car. There was some degree of relief with frequent changes of position, with the use of NSAIDs and ice applied to the affected area. *Id.* at 9. Dr. DiBella noted that Claimant had returned to work in Iraq five months after his hernia repair surgery and “[w]hile in his first week back to work, he bent forward lifting a fairly heavy object and experienced recurrent pain in the right groin.” *Id.* Dr. DiBella performed a series of ilioinguinal nerve blocks with local anesthetic and corticosteroid, which initially relieved the pain. *Id.* at 9-11.

In October 2009, Claimant was seen by Drs. Timothy Hackett, Samuel Shaheen, and Yong C. Yoon of Midwestern Surgical Associates, P.C. for an evaluation of right groin pain approximately one year after right inguinal hernia repair with mesh. Claimant was prescribed Neurontin and a high dose of Ibuprofen. The note dated 10/19/09 states that Claimant “did note last week when he was moving some logs that he did have some increasing discomfort even after a minimal amount of activity with this.” *Id.* at 15. Claimant reported recurrent pain in his right groin “with more extensive exercise or sitting for long periods of time;” he also reported some left groin pain. *Id.* at 15. Dr. Hackett, in consultation with Dr. Shaheen, diagnosed left inguinal hernia as well as right groin pain due to possible ilioinguinal nerve entrapment. Dr. Hackett suggested operative exploration for neurolysis or recurrent hernia, following an additional consultation with Dr. Yoon of the same practice. Dr. Yoon agreed with the recommendation. He noted that the risks of the procedure were discussed with patient and his wife, including continued chronic groin pain and the possibility of an injury to the spermatic cord and spermatic vessels. *Id.*

On 03/03/10, Drs. Hackett and Yoon performed bilateral laparoscopic preperitoneal inguinal hernia repair with mesh, as well as right groin exploration with excision of old mesh and ligation of ilioinguinal nerve. *Id.* at 16. Claimant’s post-operative diagnoses were left direct inguinal hernia, recurrent right direct inguinal hernia, and entrapment of the ilioinguinal nerve with prior right inguinal herniorrhaphy. *Id.*

On 03/16/10, Dr. Yoon reported that Claimant denied groin pain and felt much better. He did report some sciatic symptoms in the right leg. Dr. Yoon concluded that Claimant was “doing very well” and he advised no straining. *Id.* at 19. However, on 05/03/2010, Claimant saw Dr. Abesamis complaining of groin pain after sitting for long periods of time and with any strenuous activity, including walking. Claimant continued to take Neurontin and Ibuprofen. Claimant was advised to increase activity and work as tolerated and it was noted that Claimant’s goal was to be able to return to his construction job in Iraq. EX 10 at 50.

On 11/18/10, Claimant saw Dr. James McGillicaddy, a herniologist at the Lansing Hernia Center. Dr. McGillicaddy noted that Claimant reported continuing right groin pain described as a severe activity-limiting “pinching” lasting hours to days following any activity, including riding in a car or mowing the lawn. Claimant was taking Neurontin and Motrin continuously and daily. Dr. McGillicaddy examined Claimant, and diagnosed inguinal neuritis, secondary to scarring. He opined that Claimant had a 20% chance of improvement if nothing was done, reduced to 5% after March 2011. Thereafter, additional treatment choices would be “only fair for long term improvement,” including transcutaneous neurolysis or groin reexploration and remodeling mesh repair which would include spermatic cordectomy and testicular atrophy. Either choice would have approximately a 50% chance of major improvement. EX 10 at 56.

On 12/21/10, Claimant saw Dr. Yoon for severe intolerable right groin pinching sensation. EX 10 at 63. Dr. Yoon recommended right groin exploration, neurectomy, removal of mesh and orchiectomy. Dr. Yoon informed Claimant that pain relief is achieved in about 50% of patients and that Claimant would have some residual pain for his lifetime. On 03/03/11, Dr. Yoon performed right groin exploration with removal of hernia mesh, right orchiectomy, and recurrent right inguinal hernia repair. Id. at 70.

On 03/22/11, Dr. Yoon noted that Claimant was doing well and felt “much better.” EX 10 at 74-75. He advised no straining and a follow-up in one month, prior to returning to work. At the 04/26/11 visit, Claimant reported recurrent pain with sitting and standing, as well as a stabbing sensation. Dr. Yoon opined that Claimant was not yet fit for duty and had a twenty-pound lifting restriction. Id. at 76. He also referred Claimant to physiatry. On 05/27/11, Dr. Yoon noted that Claimant was still having pain, worsened with straining and sitting. He also noted that Claimant was “[u]nable to work.” Id. at 77. Dr. Yoon recommended follow-up with Dr. Wiersma and ordered an MRI of the lumbar spine pelvis. On 08/09/11, Claimant returned to Dr. Yoon, who noted that Claimant was “[s]till having severe right groin pain worsened with any straining and sitting. Just underwent a functional evaluation which left him in severe pain the next day. Is filing for disability. Right groin wound well healed. Hernia reduced. Continues to have severe pain which is limiting his ability to do any kind of physical exertion. Agree that he needs to file for disability.” Id. at 67.

The record also contains treatment records from Matrix Pain Management, PC. The treatment notes reflect that Claimant was seen by Valeria A. Holmon, Nurse Practitioner, and was also followed by Dr. Ryan W. Bearer, D.O. Claimant was initially seen at this pain clinic on 06/28/11, on referral from Dr. Yoon. EX 10 at 78-83. Claimant reported pain level corresponding to the visual analog score of 5. Claimant reported that over-the-counter medication was not relieving his pain and asked for pain medication. At the same time, he expressed concern about taking strong pain medications, such as Vicodin, and the possibility of addiction. Id. at 82-84. Claimant also expressed “quite a bit of concern about driving to his

appointments.” Id. at 82. Claimant was prescribed 50 mg of Tramadol to be taken twice a day. As reflected in a telephone note of 7/7/11, Claimant reported that Tramadol was helping, but asked for the dose to be increased, and was advised to take up to four pills per day. On 7/11/11, he was additionally prescribed Cymbalta 30 mg progressing to 60 mg q. day. On 7/19/11, Claimant was again seen at the pain clinic. He reported bilateral groin pain more prominent on the right, with a visual analogue score of 4.5. The note states:

“He continues to have pain that is throbbing and aching which is exacerbated with any extended activities when he is working around in his yard, doing yard work, riding his lawnmower, and extended walking. He says that if he sits down and rests most of the day that he does not notice that the pain is too bad; however, with most activities he has significant pain to the point where he has recently been prescribed Ultram 50 mg. Initially he was taking two a day; however, he is up to four a day and occasionally six depending on his activity level. He is also taking Neurontin 300 mg typically four a day which does seem to help; however, the pain is not relieved completely. He says that the pain is achy, throby, and occasionally sharp, stabbing in the right groin. He has some sensitivity to touch predominantly in the incision area. He also has the left groin pain that is not as intense, achy, and throby with sensitivity noted in that area as well.”

EX 10 at 86. It was noted that Claimant had had injections in the ilioinguinal areas in 2009 without much success. It was also noted that Claimant gained approximately 20 pounds post surgery. Lumbar MRI was recommended, but Carrier would not authorize this test. Id. at 95. Additionally, the progress note lists the restrictions identified during the Functional Capacity Evaluation (“FCE”) and states that “Dr. Yoon has suggested, according to the patient, that he does not agree with that evaluation and that the patient is at his maximum capacity.” The note indicates that “the patient states that Dr. Yoon has suggested that maybe he should look at filing for some type of disability insurance.” It was further noted that Claimant was taking Neurontin, Tramadol, and Cymbalta and was not having any difficulty with these medications. Id. at 95. The most recent note reflects that, on 02/14/12, Claimant returned for a follow-up appointment at the pain clinic. He reported pain with a visual analogue score of 3.5. He also reported right groin and lower abdominal pain and left inguinal pain intermittent, “described as aching, constant pinching and worsening since last visit however medication helps.” The note states “[I]mitation of activities occurs; moderately limits activities walking extended time. The symptom is exacerbated by heavy lifting, riding in car too long.” Id. at 104.

The record also contains Claimant’s pre-deployment medical records. EX 21.

Functional Capacity Evaluation (EX 11)

On July 26, 2011, Claimant underwent a Functional Capacity Evaluation at Employer's request.⁷ EX 1. The FCE Report summarizes Claimant's history of surgeries as follows: "Sept. 8, 2008 – hernia surgery, May 2010 hernia surgery, June 2011 surgery to remove spermatic cord and right testicle." Id. at 7.

As reflected in the FCE Report, Claimant reported his activity level as "Negligible; Requires Daily Naps." Claimant estimated his maximum tolerance as follows: lifting and carrying limited to 40 lbs; sitting, static standing and dynamic standing limited to one hour; walking limited to one mile; and driving limited to two hours. EX 11 at 8.

With regard to Claimant's level of effort during the FCE, the FCE Report states that "[o]verall test findings, in combination with clinical observations, suggest the presence of full physical effort on [Claimant's] behalf" throughout the evaluation. Id. at 1-2. The report further states that "[o]verall test findings, in combination with clinical observations, identify [Claimant's] subjective reports of pain and associated disability to be both reasonable and reliable." Id.

The Summary of Findings section of the FCE Report states that Claimant "demonstrates the capacity to return to work on a part time basis (shifts of 4 hours or less) in a medium level job, or full time performing a light or sedentary job." Id. at 2. It further states that Claimant "experienced significant increased symptoms after 4 hours [of medium category work] and remained in significant pain the following day. His tolerance for work may be increased if placed in a sedentary or light category job." Id. Additionally, Claimant "would benefit from a job that allows frequent position changes, as his sitting and standing tolerances are up to 1 hour at a time." EX 11 at 2.

In detailing Claimant's physical abilities, the FCE Report states that Claimant is able to tolerate sitting, static standing, dynamic standing, and walking "in 60 minute increments."⁸ Id. at 3. The FCE Report also identifies the following limitations on lifting:

"Lifting (Occasional basis): floor to waist – 57 lbs.
waist to shoulder – 50 lbs.
overhead – 30 lbs.
carry 50 ft. – 55 lbs.

⁷ See Emp. Br. at 4.

⁸ During his four-hour FCE, Claimant sat for a total of 2 hours 28 minutes, with the longest duration of 1 hour 17 minutes; stood for a total of 1 hour 31 minutes, with the longest duration of 48 minutes; and walked for a total of 39 minutes, with the longest duration of 19 minutes. Id. at 21.

push 30 feet – 65 ft. lbs.
pull 30 feet – 80 ft. lbs.”

EX 11 at 2-3. It was further determined that Claimant is able to lift 33 pounds to waist and 23 pounds overhead frequently. *Id.* The FCE Report defines “occasional” as “up to 1/3 day,” and further defines “frequent” as “1/3 to 2/3 day.” *Id.* at 3.⁹ Claimant also demonstrated “good tolerance to overhead and low level work.” *Id.* at 2.

With regard to his pain level, Claimant reported hip pain on the right side as 2/10 pre-test and 3.75/10 post-test; and also reported hip pain on the left side as 1.5/10 pre-test and 3.5/10 post-test. EX 11 at 29. Claimant reported next-day pain as 6/10 on both sides. During the next-day follow-up, Claimant reported that he stayed in bed the rest of the day following his FCE and needed to take four pain pills throughout the night. He also reported that his right groin was swollen and required a cold pack application. *Id.*

U.S. Department of Labor Form OWCP-5c (CX 1 at 68)

The record contains a U.S. Department of Labor Form OWCP-5c (*Work Capacity Evaluation Musculoskeletal Conditions*), dated August 9, 2011 and signed by Dr. Yong Yoon. The form indicates that Claimant is not capable of performing his usual job because “Pt cannot lift or sit for more than 1 hr, can’t stand for more than 1 hour.” Based on these restrictions, the form indicates that Claimant is not able to work for 8 hours per workday with restrictions. Claimant can work 2-3 hours per day, and is not expected to be able to work more hours in the future. These restrictions apply “indefinitely,” and Claimant has reached maximum medical improvement (“MMI”). The form further details Claimant’s restrictions as follows. Sitting, walking, standing, twisting and bending/stooping are limited to one hour. Operating motor vehicle at work and to/from work is limited to less than one hour, respectively. Pushing is limited to one hour with a 30-pound limit. This same restriction applies to pulling. Lifting is limited to one hour with a 25-pound limit. Climbing is limited to one hour. Claimant must take a 15-minute break after every hour of work. The form states that Claimant was “on Neurontin, Pain meds, Ultram.”

Deposition Testimony of Dr. Yong Yoon (EX 26)

At his deposition, Dr. Yoon was initially questioned by Employer’s counsel. Dr. Yoon testified that he is a general surgeon, and he devotes 100 percent of his work to performing surgeries. EX 26 at 6. He does not have any specialized training in evaluating patients’ ability to return to work. *Id.* When asked to state his opinion regarding functional capacity evaluations, Dr. Yoon testified that “if done by a competent screener, I believe they are valid;” he could not

⁹ These same definitions were used in Employer’s labor market survey. EX 16 at 13.

think of a more accurate way to determine one's ability to return to work. Id. at 7. Dr. Yoon referred Claimant to a physiatrist for an assessment of his work capabilities. Id.

Based on his treatment notes, Dr. Yoon testified as follows regarding his treatment of Claimant. He first saw Claimant on 01/08/10 on referral from Dr. Hackett. Id. at 11-12. He was a co-surgeon with Dr. Hackett during Claimant's 03/03/10 surgery, and he examined Claimant following the surgery on 03/16/10. Id. at 13. He then did not see Claimant until December of 2010; during that time Claimant followed up with Dr. Hackett. Id. at 14. On 03/03/11, Claimant underwent another surgery, which involved right groin exploration with removal of hernia mesh, a right orchiectomy, and recurrent right inguinal hernia repair without mesh. Id. at 15. Claimant followed up with Dr. Yoon on 03/22/11 and 04/26/11. Id. On 04/26/11, Claimant reported severe pain with sitting and standing, as well as a stabbing sensation. Id. at 16. Dr. Yoon felt that Claimant was not ready for physical activity or his occupation, and he assigned a 20-pound lifting restriction. Id. When asked how he arrived at this restriction, Dr. Yoon testified that "after any of my hernia repairs that is my standard weight restriction for everybody up to six to eight weeks postoperatively." Id. at 16. Dr. Yoon added that the generally accepted restriction is 10 to 20 pounds. Id. When Dr. Yoon saw Claimant on 05/27/11, Claimant reported that he was having the same amount of pain and could not return to work. Id. at 17. Dr. Yoon referred Claimant to psychiatry and ordered an MRI of the lumbar spine to rule out any nerve entrapment from lower back which could be causing referred pain in the right groin. The MRI was never performed.

Dr. Yoon testified that he next saw Claimant on 08/09/11. Id. at 17. On that day, Dr. Yoon's staff filled out Form OWCP-5c (*Work Capacity Evaluation Musculoskeletal Conditions*). Id. Dr. Yoon testified that he could not remember whether or not he personally filled out the form. Id. Typically, Cathy Carlton, Dr. Yoon's physician's assistant, fills out the form. Id. In so doing, "[t]ypically she talks to me about what restrictions the patients have" and also "sits down with the patients and finds out what their functional capacity is." Id. at 18. Dr. Yoon testified that the restrictions he provided were based on his physical examination of Claimant's groin area as well as "based on his symptomology which is namely pain and what I think he could have performed, what function he could have." Id. at 7. When asked whether he agrees with the restrictions stated on the form, Dr. Yoon responded "[y]es." Id. at 19. However, he further testified that the stated restrictions represent Claimant's opinion more than his own medical opinion because the form "is based on what the patient tells me he can or can't do." Id. at 19. Thus, the stated restrictions, such as sitting for one hour, are based on Claimant's self-reporting. Id. at 18. In this regard, Dr. Yoon explained that "I cannot feel his symptoms. I can only state my opinion based on what he tells me. That's what ... the psychiatry consultation is for, to have a certified person evaluate his function." Id. at 20. Dr. Yoon never measured Claimant's physical abilities, nor did he do any testing with regard to sitting, standing, lifting, pushing, or pulling. Id. at 7. When asked whether he disagreed with the results of the 07/26/11

FCE, Dr. Yoon testified “I haven’t read it fully so I can’t tell you one way or the other.” Id. at 20-21. He did not take a detailed history regarding Claimant’s work experience, but Claimant did report that his work prior to the injury was somewhat strenuous and entailed a lot of standing, lifting, and stretching. Id. at 8-9.

When questioned about Claimant’s ability to perform household chores, Dr. Yoon testified that Claimant “stated that he had pain with any – any movement at all, sitting or standing.” Id. at 9. Based on this statement and on his physical examination, Dr. Yoon concluded that Claimant would not be able to do normal household chores. Id. at 9. Dr. Yoon stated that if Claimant were able to do such chores, it would not necessarily change Dr. Yoon’s evaluation. Id. at 9. Dr. Yoon opined that Claimant could do normal grocery shopping because it involves walking and taking items off the shelf that are not very heavy. Id. at 10. By contrast, “some household chores are somewhat strenuous, especially with the twisting and lifting associated with cleaning, bending over.” Id.

On cross-examination by Claimant’s attorney, Dr. Yoon testified that Claimant was a cooperative and straightforward patient. Id. at 22. Based on Claimant’s symptoms at his most recent examination, Dr. Yoon would not recommend that Claimant return to working as a carpenter in a war zone in Iraq. Id. at 23. Dr. Yoon further testified that, based on Claimant’s treatment records from Iraq, his hernia was more likely than not caused by his work overseas in the war zone. Id. at 24.

With respect to the restrictions specified on Form OWCP-5c, Dr. Yoon testified on cross-examination that the stated lifting restrictions (lifting 25 pounds, pushing 30 pounds, pulling 30 pounds) are reasonable for somebody who has gone through the surgeries that Claimant had. Id. at 23. Dr. Yoon testified that Claimant is more susceptible to recurrent hernia than he was before his initial hernia. Id. at 25. Limitations on lifting, pushing, and pulling are intended to minimize the chance of a recurrent hernia. Id. at 25. Dr. Yoon added that, with recurrent hernias, “every surgery it becomes more dangerous and more difficult secondary to scarring from the previous surgery.” Id. at 26. The odds of success start dropping with each recurrent surgery. Id. Dr. Yoon testified that Neurontin is prescribed to reduce nerve-related discomfort, and that Claimant will probably continue taking Neurontin for the rest of his life. Id. at 26.

On re-direct examination, Dr. Yoon testified that he had not seen Claimant in two years and therefore could not opine regarding his current restrictions. Id. at 27. Dr. Yoon testified that, based on his last evaluation, Claimant could do sedentary work. Id. at 28. Also, if there was a job that Claimant could do in the U.S., he would not be precluded from doing the same job overseas. Id. at 27. Dr. Yoon testified that he could not opine regarding Claimant’s ability to do light-duty work “because I don’t know ... what his symptoms were after doing any kind of

work.” Id. at 28. Similarly, when asked about Claimant’s ability to do medium-duty work, Dr. Yoon stated “I cannot testify to that either. I have not seen him in two years.” Id. at 28.

On re-cross examination, Dr. Yoon testified that Claimant was at the point of maximum medical improvement when he saw Claimant on August 9, 2011. Id. at 29.

Medical Evaluation Report of Dr. Charles E. Syrjamaki (EX 12; EX 13; CX 1 at 74-77)

Dr. Syrjamaki, examined Claimant on January 20, 2012 at Employer’s request,¹⁰ and also reviewed Claimant’s medical records. EX 12. Dr. Syrjamaki is Board Certified in Internal Medicine. EX 13. He completed Occupational Medicine Training Course at the University of Cincinnati in March – June 1995, and has been a Medical Director at two different occupational health centers (consecutively) since 1994. He has served as an Assistant Clinical Professor at the Michigan State University from November 1985 to the present. Id.

Dr. Syrjamaki concluded that Claimant suffers from “inguinal neuralgia status post surgeries for recurrent hernias” and obesity. EX 12 at 4. He observed that Claimant did not have any hernias, but had some neuropathic pain related to his prior surgeries. Dr. Syrjamaki opined that Claimant should continue to avoid opiates because “[i]n individuals with such chronic pain it would be a mistake to take chronic opiate medications due to addition and lack of long term efficacy, etc.” He added that Neurontin and Cymbalta “could be increased to relieve his pain.” Alternatively, Claimant could also consider “some type of spinal nerve block with the idea that neurotomy/ablation therapy could be done, if he did have some benefit from the nerve block. He further opined that Claimant “should not go through any further surgical procedures.” Dr. Syrjamaki further stated that “[i]n the meantime he could work with the work restrictions outlined in the Functional Capacity Evaluation of July 26, 2011.”

Vocational Assessment Report (EX 15)

The record contains a vocational assessment report, dated December 6, 2011, prepared at Employer/Carrier’s request by Vocational Rehabilitation Consultant Debbie Ditto, MA, CRC, LPC. Ms. Ditto conducted a telephonic interview with Claimant on December 6, 2011. She also reviewed Claimant’s medical records provided by Employer/Carrier, the 07/26/11 FCE report, and Form OWCP-5c of 08/09/11. EX 15 at 1.

According to the report, Claimant graduated from high school and also completed training in cabinet making and mill work at “State Tech & Rehab Ctr.” Id. at 3. Claimant is learning disabled. Id.

¹⁰ ER Br. at 4.

Ms. Ditto described as follows Claimant's reported "activities of daily living:"

- "Pain continues in groin/leg after sitting/driving/walking for long periods of time
- Is able to do advanced ADL's (personal grooming) without difficulty
- Is able to do household chores without assistance, but makes accommodations based on limitations
- Is able to do yard work at a slower pace and stages, but experiences soreness the next few days
- Sleep pattern is poor and describes it as fragmented
- Is able to walk up to 1 hour before feeling symptoms
- Is able to sit for 30 minutes before needing postural changes; sitting aggravates his symptoms."

Id. at 2.

With regard to restriction listed on Form OWCP-5c, Ms. Ditto observed that "it is not clear whether these modifiers are accumulative (sic) over an 8 hour day or are indicating consecutive/repetitive for up to 1 hour." Id. at 2. Elsewhere, she noted that these restrictions are "vague and need clarification on many indicators." Id. at 6. With respect to Claimant's current symptoms, Ms. Ditto noted "throbbing pain at times; pinching in the groin when sitting and driving; pain is less while moving and increases when at rest." Id. at 1.

In her report, Ms. Ditto noted that Claimant worked as a carpenter in Iraq in 2008. He was building stair steps/platforms for trailers and he experienced severe pain in his groin when he lifted a set of stairs. She also noted that Claimant had three surgeries to repair bilateral hernia, with minimal improvement. The report states that Claimant had made no efforts to return to work. Ms. Ditto listed several assets for, and barriers to, Claimant's returning to work. Among the barriers, she noted "[l]imited transferrable skills into sedentary or even light duty work." Ms. Ditto also addressed Claimant's computer skills, stating "[n]o keyboarding skills," "[o]wns a laptop computer," "[k]nowledge of E-mail and Internet," and "[l]imited knowledge [of] base computer fundamentals." Id. at 5.

Ms. Ditto concluded that Claimant's "vocational prognosis at this time is guarded due to his restrictions needing further clarification and his limited transferrable skills. Due to his work history being comprised of Carpentry jobs, his transferrable skills are limited. However, if his restrictions indicate that he can do medium duty work, even part-time, then he would be able to return to work as a Carpenter with few modifications or accommodations." With respect to Claimant's motivation for return to work, Ms. Ditto noted that "[Claimant] appears to be financially motivated to return to work due to financial hardship and the need for health insurance for his family." Id. at 6. Ms. Ditto further noted that Claimant's "job goal" is to

“[r]eturn to work using current skills as a Carpenter in possibly Artisan type work.” Id. at 6. Ms. Ditto stated that a LMS would be performed once Claimant’s restrictions were updated and clarified. Id. at 7.

Labor Market Survey (EX 16; EX 17)

The record contains a Labor Market Survey (“LMS”), dated April 13, 2012, prepared by Susan Rapant, MA, CRC, CDMS, CCM. The LMS was based on the results of the July 26, 2011 FCE,¹¹ which demonstrated Claimant’s “capacity to return to work at the medium level on a part-time basis (shifts of 4 hours or less) or at a light or sedentary level for 8 hours per day,” with specific weight restrictions specified in the FCE. EX 16 at 4, 12.

As detailed in the LMS Report, “sedentary work” entails exerting up to 10 lb. of force occasionally and a negligible amount of force frequently to lift, push, pull, or otherwise move objects; “light work” entails exerting up to 20 lb. of force occasionally, and/or up to 10 lb. of force frequently, and/or a negligible amount of force constantly to move objects; and “medium work” entails exerting 20 to 50 lb. of force occasionally, or 10 to 25 lb. of force frequently, or an amount greater than negligible and up to 10 lb. constantly to move objects. EX 16 at 13.

Claimant’s educational and vocational background is summarized in the LMS Report as follows:

“He graduated from high school and attended a two-year program in cabinetmaking and millwork. He has experience working as a carpenter, construction foreman, and production foreman. He has limited computer skills. His job skills include construction experience, carpentry experience, teaching skills, and supervisory skills.”

Id. at 12.

The LMS Report further states that the “[l]abor market survey was conducted from March 29 to April 10, 2012, selecting employers within a 50-mile commuting radius of [Claimant’s] residence in Gladwin, MI, as well as employers with jobs overseas. Employers were chosen from internet research and were contacted by telephone or email when possible.” Id. at 5.

¹¹ The LMS Report states that it was prepared based on “an FCE performed on July 29, 2011,” which appears to be a typographical error.

Based on Claimant's "current skills," the LMS Report identified eight jobs stateside and two jobs overseas, with a range of wages of \$7.40 - \$14.38 per hour. The LMS identified the following positions (only the most pertinent aspects of the job descriptions are included below):

1. Production worker with Advance Team Staffing:
Location (and distance to Claimant's residence): Mount Pleasant, MI (48 miles).
Job duties: Entry level production worker for large manufacturer.
Hours worked: Full- and part-time positions available.
Wage: \$8.00-8.25/hr plus benefits; pay raise with performance evaluations at 30, 60, and 90 days.
Qualifications: Must undergo drug screening, employment test, and a reference or security check. Also requires high school diploma/GED and less than 1 year of reliable production/assembly type experience.
Physical demands: Able to stand for extended periods of time and lift up to 40 lbs. occasionally.

2. Janitor/commercial cleaner with Executive Management Services:
Location (distance): Midland, MI (42 miles).
Job duties: mopping, dusting, vacuuming, etc., for a large chemical facility in Midland, MI.
Hours worked: part-time day shifts; 25 hours/week.
Wage: \$7.40/hr plus benefits after 6 months.
Qualifications: Must have high school diploma/GED. Must have driver's license. Must pass drug screening and background check.
Physical Demands: Requires constant activity and lifting of approximately 25 lbs.

3. Host/hostess with The H Hotel:
Location (distance): Midland, MI (42 miles)
Job duties: Will greet guests and seat them in the café in a courteous and genuine manner. Maintain knowledge of table numbers and seating capacity for the dining space. Control the reservation book. Provide guests with menus and inform servers of new guests in their stations. Assist in clearing of tables for servers and maintaining the cleanliness of dining room.
Hours worked: full-time.
Wage: \$8.50/hr plus benefits.
Qualifications: High school diploma/GED. Must pass drug and background checks. Previous experience a plus but not required.
Physical Demands: Ability to lift up to 30 lb. occasionally; must be able to stand and walk throughout shift.

4. Auto dealer with McGuire Chevrolet:
Location (distance): Clare, MI (33 miles)
Job duties: Will be responsible for detailing vehicles from cars, boats, RV's; some accessory installation; shop maintenance; shop cleanliness; etc.
Hours worked: full-time.
Wage: \$7.40/hr.
Qualifications: Must have valid driver's license and clean driving record. High school diploma/GED preferred; must pass drug screening. Previous experience a plus but not required.
Physical Demands: "Applicant with [Claimant's] physical abilities may apply."

5. Assembler with Terex/Woodsman Chippers:
Location (distance): Farwell, MI (36 miles)
Job duties: "Will assemble wood chippers per blueprint. Perform a variety of line assembly operations related to mechanical assembly using air/power tools and hand tools. Position, measure, assemble, and secure parts according to blueprints, specified tolerances, special instructions, and unit specifications. Perform assembly operations including wiring, plumbing, measuring, drilling, positioning and assembling. Operate equipment such as grinder, impact, soldering equipment, sander, drill press, fixtures and gauges, hydraulic press, and hand tools to aid in assembly."
Hours worked: full-time.
Wage: \$11.00/hr plus benefits.
Qualifications: "Must be able to use shop math, be able to read and interpret blueprint drawings. ... Must have 1 to 3 years of work experience, preferably assembly experience in a heavy equipment environment. Requires hands-on experience, good mechanical aptitude, tools and equipment operation."
Physical Demands: Exerting up to 50 pounds of force occasionally, and /or up to 50 pounds of force frequently, and /or up to 10 pounds of force constantly to move objects. Must be able to stand, bend, steep, and climb for 8+ hours. Will be given a physical examination if considered for position. Terex provides reasonable accommodations in the application process to any qualified individuals with disabilities and/or disabled veterans.

6. General assembler with Globe Fire Sprinkler Corp.:
Location (distance): Standish, MI (33 miles)
Job duties: Will assemble sprinkler parts in high-paced manufacturing environment.
Hours worked: full-time; 4-10 hours/day, Monday-Thursday.
Wage: \$7.40/hr plus benefits available.

Qualifications: Must have high school diploma/GED and one year of reliable experience.

Physical Demands: Must be able to lift 10-15 lb. repetitively.

7. Route sales representative trainee with Schwan's Home Service Inc.:

Location (distance): Clare, MI (33 miles)

Job duties: "Will drive the Schwan's truck to sell and deliver more than 300 varieties of frozen foods to families around the area. Sells and delivers frozen food and other company products to up to 120 customer's homes or places of business daily.

Completes all assigned route and building days according to schedule determined by manager. Follows guidelines of good sales practices including, but not limited to, displaying products, calling on all customers, following up on missed/not at home customers, professional demeanor."

Hours worked: full-time; an average of 60 hours/week.

Wage: \$29,900/year (\$14.38/hr) plus benefits.

Qualifications: Various qualifications related to safe driving are listed; high school diploma is preferred; previous experience working in sales-related role or customer service experience is preferred.

Physical Demands: Must have the ability to sit for extended periods of time, lift products, bend, twist, and climb in and out of truck. Must pass physical exam which includes: lifting 50 lb. three times from floor to waist; lifting 50 lb. three times from waist to crown; ability to carry, push, and pull 50 lb; hand grip test; and ability to ascend and descend an 18" step three times.

8. Carpenter with Green Chicken Coop.:

Location (distance): Kawkawlin, MI (50 miles)

Job duties: Company designs and builds coops of wood from timber plantations that are certified to be ecologically sustainable.

Hours worked: full-time.

Wage: \$10.00/hour or higher, depending on skill level.

Qualifications: Must be able to do framing as well as use a saw to accurately cut wood. Cabinet work experience a must. Must pass drug and background check.

Physical Demands: Not specified.

Additionally, the LMS identifies the following two positions overseas:

1. Monitor position with URS Corporation:

Location (distance): Afghanistan

Job duties: "The objective is to maintain high level of security at selected operations. The task will be accomplished by providing United States nationals (USN) monitors

for local national and/or third country national laborers (LN/TCN) at Bagram Air Field (BAF) and Kandahar Air Field (KAF), Afghanistan construction sites. Positions available through remainder of URS's contract with the USAF – May 2012.”

Hours worked: Full-time; able to lead monitoring teams for up to 12.5 hour daily shifts.

Wage: Unspecified.

Qualifications: qualifications include, inter alia, computer literacy (capable of completing online tasks and training).

Physical Demands: “Fit for duty (physically fit and medically qualified). Extreme danger, stress, physical hardships, and possible field living conditions associated with this position within a desert camp complex. Ability to function during an extended assignment at a foreign, in-country facility exposed to seasonal temperature extremes. Ability to cope with shared cafeteria, bath, and sleeping quarters. Only those willing to work and live under these conditions should apply.”

2. Security escort with DynCorp International:

Location (distance): Doha, Qatar.

Job duties: Responsible for the safe and timely escort of selected personnel on and off post (Al Udeid Air force base) ensure equipment, machinery, tools, storage area is secure and safe (custodial storage area).

Hours worked: Full-time.

Wage: Unspecified.

Qualifications: High school diploma or equivalent. Fluent in English. Must have a working knowledge of personal computers. Must be physically fit. Prior customer service or customer relations experienced desired. Capacity to work with persons of different cultures. Must possess a U.S. driver's license and passport.

Physical Demands: Must be physically fit.

Claimant's Employment Records (EX 6-9, 14; CX 9)

The record contains various records pertaining to Claimant's employment with Employer, including Employment Agreement of 06/14/07; Personnel Action Notice (EX 7); Employer's Incident Report (EX 8); Employer's wage records (EX 9); Claimant's resume (EX 14); and Employment Agreement of 06/20/07 (CX 9).

Evidence Pertaining to Claimant's Job Search (CX 15-16; EX 28-29)

Claimant submitted into evidence a hand-written log, approximately nine pages long, documenting his job search efforts between August 1, 2012 and October 23, 2012. CX 15. The

log lists approximately forty positions with different employers, including “kitchen sales” and other sales jobs, carpenter jobs, carpenter/sales jobs, and one apartment maintenance position. According to Claimant’s notes, several employers indicated that they are not hiring, while others accepted Claimant’s job application, either online or in-person. As part of this exhibit, Claimant also submitted a print-out of electronic records of Michigan Talent Bank which reflects that, on 08/01/12, Claimant electronically submitted his resume/cover letter to the following employers: GLD Management Company (Apartment Maintenance position)¹² and Sheffield Builders (Carpenter position).¹³

The record also contains Claimant’s email message to his counsel, dated 11/29/12, detailing his post-hearing job search efforts based on Employer’s Labor Market Survey. CX 16. The pertinent portions of this exhibit are discussed below.

Employer has attempted to verify Claimant’s job search efforts, as reflected in Employer’s Exhibits 28 and 29 submitted post-hearing. Employer’s Exhibit 28 contains a *Notice of Intention to Take Deposition by Written Questions*, dated 02/18/13, signed by Employer’s counsel and addressed to Claimant through his attorney. The Notice states that Employer intended to depose custodians of records for 20 different employers; the names of employers are evidently derived from Claimant’s job application log (CX 15). This Exhibit also contains a notarized document titled *Direct Questions to be Propounded to the Witness*, dated 03/06/13, completed and signed by Victoria Roggenback, HR Coordinator for Menards. Ms. Roggenback stated, *inter alia*:

“State whether or not personnel records of the company’s employees, including the above-named person, are kept and maintained by said company?

Answer: Yes

[]State whether or not personnel records of the company’s employees, including the above-named person, of said company are kept under your custody and supervision?

Answer: No, I only maintain personnel record of employees at our store.

....

[]Are the personnel records, including the personnel records of the above-named person, made and maintained by the company in the usual and regular course of business?

¹² This employer sought candidates “with knowledge in general maintenance, electrical, plumbing, carpentry and painting;” this is a full-time position with a salary of \$9 to \$10 per hour; job requirements include “a private driver’s license, undergo drug screening, pass an employment test, provide your own tools, pass a physical examination and undergo a reference or security check.”

¹³ This employer sought “carpenter with 5 years experience,” able to read blue prints and do layouts, with a driver’s license and own reliable transportation. Applications were accepted by email only with “no phone calls accepted.”

Answer: Yes, but Mr. Gatz was never employed with us.

[]Do you have the personnel records of the above-named person?

Answer: No, I have no record of the above-named person.”

EX 27 at 4-5. Employer’s Exhibit 29 contains the *Notice of Intention to Take Deposition by Written Questions*, dated 02/18/13. Attached is a letter dated 03/21/13, prepared on a Lowe’s letterhead and containing a notarized signature of Karen Allegrati. The letter states: “I do hereby certify to the best of my knowledge and belief, a thorough search of Lowe’s records failed to reveal any employment application for James Gatz – DOB [...]” EX 28 at 4.

U.S. Department of Labor Forms and Filings (EX 1-5; EX 27; CX 2-7; 11-12)

The record contains various Department of Labor forms pertaining to this claim.

Records of Claimant’s Earnings (CX10; EX 22-23)

Claimant’s Exhibit 10 contains Remuneration Statements pertaining to Claimant’s job with Employer, Claimant’s timesheet from 2008, and Claimant’s W-2 forms from 2008 and 2009. CX 10.

Employer’s Exhibit 22 contains Claimant’s and his wife’s joint tax returns from 2010 and 2011. EX 22. Employer’s Exhibit 23 contains Social Security Administration’s records pertaining to Claimant’s application for disability benefits, which was denied.

Other Evidence

Both Claimant and Employer submitted into evidence responses provided by the opposing party in the course of discovery. CX 13; EX 18-19.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well established that an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw inferences and conclusions from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT)(4th Cir. 1994); *see also Banks v. Chicago Grain Trimmers Ass’n, Inc.*, 390 U.S. 459, *reh’g denied*, 391 U.S. 929 (1968) (fact finder may credit part of the witness’s testimony without accepting it all); *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (Administrative Law Judge entitled to weigh the evidence and choose the inferences he deems most reasonable considering

the evidence as a whole). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *See, e.g., Cordero v. Triple A Mach. Shop*, 580 F.2d 1331 (9th Cir. 1978). The Administrative Law Judge's decision must be affirmed if the Judge's findings are supported by substantial evidence in the record considered as a whole, if they are rational, and if the decision is in accordance with law. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *O'Keeffe v. Smith, Hinchman & Grylls Assoc.*, 380 U.S. 359 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947).

In the present case, the parties agree that Claimant sustained a hernia injury on August 23, 2009 in the course and scope of his employment with Employer. The parties also agree that Claimant has reached MMI on August 9, 2011. For purposes of resolving Employer's entitlement to Section 8(f) relief, I find that these stipulations are supported by substantial evidence of record. *See McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988); *Phelps v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 325 (1984). To recapitulate, undisputed evidence detailed above reflects that Claimant sustained a hernia injury in 2008, while working for Employer in Iraq. TR at 25; CX 1; EX 10. He returned to the United States and received treatment, including a surgery (right inguinal herniorrhaphy with Marlex mesh plug) on September 18, 2008. EX 10 at 11. Claimant's postoperative diagnosis was right inguinal hernia. *Id.* Claimant returned to his job with Employer in Iraq in January of 2009. TR at 24-25, 38-39; EX 20 at 20, 27. On or about August 23, 2009, Claimant developed the work-related hernia injury that is the subject of this claim. TR at 25-26; EX 10 at 5. As a result, he returned to the U.S. and received treatment. TR at 25-28. On March 3, 2010, Drs. Hackett and Yoon performed bilateral laparoscopic preperitoneal inguinal hernia repair with mesh, as well as right groin exploration with excision of the old mesh and ligation of ilioinguinal nerve. CX 1 at 16; TR at 29; EX 26 at 4. Claimant's postoperative diagnoses were left direct inguinal hernia, recurrent right direct inguinal hernia, and entrapment of the ilioinguinal nerve with prior right inguinal herniorrhaphy. CX 1 at 16. This evidence establishes that Claimant sustained a bilateral hernia in the course of his employment with Employer. On March 3, 2011, due to Claimant's continued complaints of groin pain (CX 1; EX 10), Dr. Yoon performed right groin exploration with removal of hernia mesh, right orchiectomy, and recurrent right inguinal hernia repair. EX 10 at 70; EX 26. Dr. Yoon opined that Claimant reached the point of maximum medical improvement ("MMI") on August 9, 2011, and the parties stipulated to this MMI date. The parties, however, disagree as to the extent of Claimant's disability.

EXTENT OF DISABILITY

Disability under the Act is defined as the "incapacity because of injury 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). Total disability is demonstrated where the employee is unable to work at his pre-injury job or perform suitable alternate work. The Board and the United States Courts of

Appeals have adopted a “shifting burdens” approach to disability analysis. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. If the employee meets this burden, the employer must establish the availability of realistic job opportunities within the geographic area where the employee 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. *See, e.g., P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013); *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). If the employer carries its burden of demonstrating the existence of suitable alternate employment (“SAE”), the claimant can nevertheless establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). *See, e.g., Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986); *Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985).

In the present case, Claimant asserts that he is totally disabled as a result of his work-related injury. Cl. Br. at 3-26. The evidence establishes, and it is undisputed, that Claimant cannot return to his pre-injury job with Employer in Iraq (e.g., this conclusion is consistent with the results of the FCE, and is supported by Dr. Yoon’s testimony). Accordingly, the burden shifts to Employer to establish the availability of suitable alternate employment (“SAE”). Claimant contends that Employer has failed to establish the reasonable availability of suitable alternate employment (“SAE”), and, in any event, Claimant has demonstrated a diligent but unsuccessful attempt to secure SAE. *Id.* Employer, for its part, asserts that Claimant has the capacity to work as demonstrated by the Functional Capacity Evaluation (“FCE”), that Employer has established the availability of SAE, and that Claimant has not established a diligent attempt to secure employment. Emp. Br. at 4-15.

Claimant’s Physical Restrictions

Underlining the dispute regarding the extent of Claimant’s disability is a disagreement between the parties as to the nature of Claimant’s work restrictions related to his hernia injury and subsequent surgeries. In support of his claim of total disability, Claimant relies on the U.S. Department of Labor Form OWCP-5c (*Work Capacity Evaluation Musculoskeletal Conditions*), dated August 9, 2011 and signed by Dr. Yong Yoon. CX 1 at 69. The form details Claimant’s work restrictions as follows:

- “Pt cannot lift or sit for more than 1 hr, can’t stand for more than 1 hour.”
- Claimant is not able to work for eight hours per workday, even with restrictions.
- Claimant can work 2-3 hours per day.
- Sitting, walking, standing, twisting and bending/stooping are limited to one hour.
- Operating motor vehicle at work and to/from work is limited to less than one hour, respectively.
- Pushing/pulling is limited to one hour with a 30-pound limit.
- Lifting is limited to one hour with a 25-pound limit.
- Climbing is limited to one hour.
- Claimant must take a 15-minute break after every hour of work.

Employer counters that Form OWCP-5c does not represent a medical opinion, as it is based on Claimant’s unreliable self-reporting. Emp. Br. at 4-7. Rather, according to Employer, the results of the FCE performed on July 26, 2011 represent a reliable assessment of Claimant’s capabilities. Id. The relevant restrictions are addressed in turn below.

Restrictions on sitting, standing, and walking

According to Claimant, restrictions on sitting, standing, and walking listed on Form OWCP-5c represent his treating surgeon’s medical opinion. Specifically, Claimant asserts that

“Dr. Yoon completed form OWCP-5c, opining that Mr. Gatz had reached maximum medical improvement (‘MMI’) and is unable to perform his usual job. He opined that Mr. Gatz cannot lift, sit or stand for more than one hour; that he is able to work as many as three hours per day though he must have a fifteen-minute break after every hour of work; and that he should limit his driving to less than one hour to/from work or while at work.”

Cl. Br. at 14-15 (citations to record omitted). Employer counters that the restrictions stated on OWCP-5c should not be credited as medical opinion evidence, as they are based on Claimant’s unreliable self-reporting. Emp. Br. at 4-7.

While Form OWCP-5c was apparently signed by Dr. Yoon, the record does not substantiate Claimant’s contention that the stated restrictions represent Dr. Yoon’s medical opinion, with the exception of the weight lifting restrictions (discussed below). The evidence, including Dr. Yoon’s testimony and Claimant’s own testimony, indicates that restrictions other than the weight limits were entered on the form by Dr. Yoon’s physician’s assistant based on Claimant’s self-reported symptoms and functional limitations. Further, while Dr. Yoon testified that the stated weight limits are reasonable, he did not expressly endorse the other restrictions noted on the form. Although Dr. Yoon initially testified that he agrees with the restrictions stated on the form, he subsequently elaborated that restriction such as sitting for one hour were based on

Claimant's self-reported symptoms and functional limitations. EX 26 at 9, 17-19, 27-18. In the same vein, Dr. Yoon testified that the stated restrictions represent Claimant's opinion more than his own medical opinion because the form "is based on what the patient tells me he can or can't do." EX 26 at 19. In particular, Dr. Yoon was under the impression that Claimant could not do normal household chores because Claimant "stated that he had pain with any – any movement at all, sitting or standing." Id. at 9. Dr. Yoon also testified that he did not perform an evaluation of Claimant's functional capacity and referred Claimant to a physiatrist for such an evaluation. EX 26 at 7. Importantly, Dr. Yoon unequivocally opined that, based on his last evaluation of Claimant on August 9, 2011, Claimant could in fact perform sedentary work. EX 26 at 27-28. Based on Dr. Yoon's expertise in treating hernias and his status as Claimant's treating surgeon, his opinion on this issue is highly probative. *See generally Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001) (ALJ properly did not summarily credit the treating physician's opinion, but fully discussed his opinion and its underlying rationale, as well as the other medical evidence of record); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011)(In concluding that claimant's condition is work-related, ALJ rationally gave claimant's doctor's opinion greater weight as he was the most familiar with claimant's condition and his opinion was supported by medical records; ALJ rationally rejected the opinion of employer's expert, who examined claimant only twice); *see also Monta v. Navy Service Exch.*, 39 BRBS 104, 107 n.2 (2005) (ALJ did not err in concluding that surgery was reasonable based on his finding that the opinion of claimant's treating physician is entitled to greater weight; ALJ discussed the opinions of claimant's doctor, employer's doctor and independent examiner, noting their credentials, and rationally found that employer is liable for claimant's choice of treatment). *See also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

To the extent that Form OWCP-5c reflects Claimant's assessment of his functional abilities, the medical evidence and the record as a whole do not sufficiently substantiate this assessment. The evidence supports Claimant's testimony that he has ongoing groin pain and that the pain limits his functional abilities, but not to the extent claimed on Form OWCP-5c and in Claimant's post-hearing brief. The record reflects that Claimant takes three different prescription pain medications (Cymbalta, Neurontin, and Ultram/Tramadol) to control his groin pain and that his medication dose has increased over time. CX 1; EX 10; TR at 32, 63. At the same time, the record indicates that Claimant's medication regimen provides relief for his groin pain and is well tolerated by Claimant. TR at 47; EX 23 at 15;¹⁴ *see also* CX 1; EX 10. For example, during his July 26, 2011 FCE, Claimant reported pre-test pain level on the right side as 2/10 and on the left side as 1.5/10, before taking any medications. EX 11 at 29. Additionally, Claimant's most recent treatment records from the pain management clinic, dated February 14,

¹⁴ On his SSA disability application, Claimant stated: "My pain can be controlled by medication, but the medications restrict the use of power equipment due to safety. I have a daily struggle maintaining my pain level, even with medications."

2012, reflect that Claimant reported a pain level of 3.5/10 “described as aching, constant pinching and worsening since last visit however medication helps.” EX 10 at 104. The note further states “[I]mitation of activities occurs; moderately limits activities walking extended time. The symptom is exacerbated by heavy lifting, riding in car too long.” I also note that while Claimant has been prescribed stronger pain medications (Vicodin)(see EX 23 at 5), he has been advised to avoid such medications (e.g., by Dr. Syrjamaki) and has been able to do so. Claimant also testified that he is able to perform household chores and run errands with his wife. TR at 58-59; *see also* EX 25 at 17;¹⁵ EX 15 at 2.¹⁶ Further, as Employer points out, Claimant’s testimony also indicates that he engages in recreational activities requiring significant level of physical activity – most notably, metal detecting in surrounding parks for up to eight hours per day, with breaks to rest. TR at 51. Thus, while Claimant testified at the November 7, 2012 hearing that his pain management doctor had “upped [his] script” one month prior to the hearing (TR at 63), Claimant also testified that he had done “quite a bit” of metal detecting in the summer of 2012, that he hunts “sometimes,” and that he uses his woodworking shop albeit not “a whole lot.” TR at 51-53, 56-57.

I find that Dr. Yoon’s testimony that Claimant can perform sedentary work as well as the FCE Report provide the most probative evidence of Claimant’s ability to sit and stand. I also note that Dr. Syrjamaki endorsed the FCE findings. EX at 12. The FCE Report states in relevant part:

- Claimant “demonstrates the capacity to return to work on a part time basis (shifts of 4 hours or less) in a medium level job, or full time performing a light or sedentary job;”

¹⁵ On his SSA disability application, Claimant described as follows his ability to do household chores: “dishes, laundry – folding clothes as needed, mow the lawn for short amounts of time;” “I take my time with each & stop if I am in pain or feel I will be in pain if done too long;” “I can never finish mowing the whole lawn due to pain & I never weed wack anymore. Sometimes, I have to leave the dishes or laundry if I am not feeling well. My wife asks me to do what I can so I am not sitting around too much.”

¹⁶ Similarly, as reflected in Claimant’s Initial Vocational Assessment performed at Employer’s request, Claimant described as follows his “activities of daily living:”

- “Pain continues in groin/leg after sitting/driving/walking for long periods of time
- Is able to do advanced ADL’s (personal grooming) without difficulty
- Is able to do household chores without assistance, but makes accommodations based on limitations
- Is able to do yard work at a slower pace and stages, but experiences soreness the next few days
- Sleep pattern is poor and describes it as fragmented
- Is able to walk up to 1 hour before feeling symptoms
- Is able to sit for 30 minutes before needing postural changes; sitting aggravates his symptoms.”

Id. at 2.

- Claimant’s “tolerance for work may be increased if placed in a sedentary or light category job;”
- Claimant “would benefit from a job that allows frequent position changes, as his sitting and standing tolerances are up to 1 hour at a time;”
- Claimant is able to tolerate sitting, static standing, dynamic standing, and walking “in 60 minute increments.”

EX 11 at 2-3. Setting aside the weight-lifting requirements (addressed below), the FCE Report establishes that Claimant is capable of performing a full-time job that requires sitting and standing, as long as he is allowed to alternate his position every hour.¹⁷ From this, I infer that Claimant can operate a motor-vehicle to and from work, as well as at work, in one-hour increments. Claimant is also able to walk in one-hour increments. To the extent Employer interprets the FCE Report as not requiring the ability to alternate sitting and standing, I reject this characterization.

Restrictions on lifting

Based on the record before me, I credit Dr. Yoon’s testimony that the lifting restrictions stated on Form OWCP-5c – *i.e.*, lifting up to 25 pounds, pushing up to 30 pounds, and pulling up to 30 pounds – are appropriate for Claimant.¹⁸ EX 26 at 23; CX 1 at 68. Dr. Yoon opined that these weight limits are reasonable for a person with Claimant’s history of three surgeries. EX 26 at 23. He explained that limitations on lifting, pushing, and pulling are intended to minimize the chance of getting a recurrent hernia. *Id.* at 25. He also explained that Claimant is more susceptible to recurrent hernia than he was before his initial hernia. *Id.* at 25. I find that Dr. Yoon’s opinion on this issue is consistent with the evidentiary record and is highly probative. The fact that Dr. Yoon is Claimant’s treating surgeon who examined Claimant on several occasions further supports this determination. *See generally Brown*, 34 BRBS 195; *Young*, 45 BRBS 35; *Monta*, 39 BRBS 104. I also note that Claimant has consistently and credibly reported that his pain increases with lifting activities, including the lifting he performed during the FCE. Thus, the FCE Report documents that Claimant credibly reported substantially increased pain level immediately after the FCE and the following day (he also reported swelling). EX 11.

I further find that the less stringent lifting restrictions set forth in the FCE Report,¹⁹ summarily approved by Dr. Syrjamaki, are less probative than Dr. Yoon’s opinion on this issue.

¹⁷ Additional restrictions are addressed below.

¹⁸ As discussed above, the record before me indicates that Form OWCP-5c was completed by Dr. Yoon’s physician’s assistant. It further appears that Dr. Yoon provided the weight limits specified on the form, while additional restrictions were based on Claimant’s self-reporting. In any event, whether or not Dr. Yoon originally provided the restrictions stated on the form has little significance, as he expressly agreed with the stated weight limits during his deposition.

¹⁹ The FCE Report states that Claimant can perform lifting as follows:

In contrast to Dr. Yoon, the record does not indicate that Dr. Syrjamaki has specialized expertise in the treatment of hernias, recurrent hernias, or inguinal neuralgia. EX 12; EX 13. Dr. Syrjamaki provided a brief, two-paragraph opinion that focused on additional pain management options available to Claimant (stating that Neurontin and Cymbalta could be increased and spinal nerve block could be considered, while opiates are not recommended) and then summarily endorsed the FCE findings. Thus, while Dr. Syrjamaki evidently specializes in occupational medicine, he did not elaborate his opinion with respect to Claimant's functional limitations in light of his medical history. In particular, unlike Dr. Yoon, neither the FCE Report nor Dr. Syrjamaki expressly addressed the concern with potential recurrence of hernia. Further, while Dr. Syrjamaki reviewed the FCE Report, he did not comment on the fact that Claimant credibly reported substantial increase in pain following the FCE.

In sum, the credited lifting restrictions are consistent with sedentary and light work, as those terms are defined in the LMS Report. EX 16 at 13;²⁰ *see also* 20 C.F.R. § 404.1567.²¹ I also find that the FCE Report credibly concluded that Claimant is capable of performing sedentary or light work on a full-time basis. EX 16. While Form OWCP-5c states that Claimant's lifting, pushing, and pulling is limited to one hour, I do not credit this restriction. I have previously determined that restrictions specified on this form, other than the weight limits, were entered by Dr. Yoon's physician's assistant based on Claimant's overly limiting self-reporting. EX 26 at 9, 17-19, 27-18. During his deposition, Dr. Yoon agreed with the weight limits specified on Form OWCP-5c, but did not endorse the one-hour limitation on lifting. EX 26. Similarly, Dr. Yoon testified that his usual lifting restriction during six-to eight weeks immediately following surgery is 20 pounds, again without mentioning a one-hour limitation. EX 26 at 16. Thus, the record contains no medical opinions expressly collaborating the one-hour restrictions specified on Form OWCP-5c.

“Lifting (Occasional basis): floor to waist – 57 lbs.
waist to shoulder – 50 lbs.
overhead – 30 lbs.
carry 50 ft. – 55 lbs.
push 30 feet – 65 ft. lbs.
pull 30 feet – 80 ft. lbs.”

“Occasional” is defined in the Report as up to 1/3 day. EX 11 at 3. It was further determined that Claimant is able to lift 33 pounds to waist and 23 pounds overhead on a frequent basis. *Id.* at 3. He also demonstrated “good tolerance to overhead and low level work.” *Id.* at 2.

²⁰ The LMS Report states that “sedentary work” entails exerting up to 10 lb. of force occasionally and a negligible amount of force frequently to lift, push, pull, or otherwise move objects. It further states that “light work” entails exerting up to 20 lb. of force occasionally, and/or up to 10 lb. of force frequently, and/or a negligible amount of force constantly to move objects; and “medium work” entails exerting 20 to 50 lb. of force occasionally, or 10 to 25 lb. of force frequently, or an amount greater than negligible and up to 10 lb. constantly to move objects.

²¹ The Social Security Administration's regulations use these terms as defined in the Dictionary of Occupational Titles, published by the U.S. Department of Labor.

As for “medium work,” the credited evidence indicates that Claimant cannot perform such work if it requires lifting over 25 pounds or if it fails to meet his other restrictions.²² EX 16 at 13; *see also* 20 C.F.R. § 404.1567. And since the FCE Report limits any medium-duty work to “part time basis (shifts of 4 hours or less),” this additional limitation also applies.²³ Within these parameters, the record is not entirely clear regarding the *frequency* with which Claimant can safely lift 25 pounds. While Dr. Yoon testified that a 25-pound restriction is reasonable for Claimant, he did not address how frequently Claimant can lift such weigh and he expressly cleared Claimant for sedentary work only, based on his last evaluation (at which time he found Claimant to be at MMI). Further, as detailed above, the one-hour per day lifting limitation set forth on OWCP Form-5c has little probative value. EX 11 at 2. This uncertainty regarding Claimant’s ability to perform medium-duty work would be significant if any of the jobs identified in Employer’s LMS fell within this zone of uncertainty, while satisfying all the other restrictions. However, since none of the jobs were rejected on this basis alone, any such uncertainty is not material for purposes of this proceeding.

Other Restrictions

Form OWCP-5c contains additional limitations, namely twisting and bending/stooping are limited to one hour. CX 1 at 68. For reasons detailed above, I find that these restrictions do not reflect Dr. Yoon’s opinion, but rather are based on Claimant’s self-reporting. Nevertheless, Dr. Yoon testified that Claimant’s condition precludes him from performing certain household chores “especially with the twisting and lifting associated with cleaning, bending over.” EX 26 at 10. This testimony supports an inference that Claimant’s condition entails restrictions on bending and twisting.

Claimant additionally asserts that while some of the jobs identified by the LMS require drug screening, “Dr. Yoon opined that [Claimant’s] medication usage must be taken into account when identifying suitable work.” Cl. Br. at 20. However, to the extent Claimant is asserting that his medication regimen entails additional work restrictions, this contention is not substantiated by medical evidence. In this regard, Claimant points to Form OWCP-5c, which contains the following question along with a handwritten answer evidently provided by Dr. Yoon’s physician’s assistant:

²² As defined in the LMS Report, “medium work” entails exerting 20 to 50 lb. of force occasionally, or 10 to 25 lb. of force frequently, or an amount greater than negligible and up to 10 lb. constantly to move objects. EX 16 at 13; *see also* 20 C.F.R. § 404.1567.

²³ The FCE Report further acknowledged that Claimant “experienced significant increased symptoms after 4 hours [of medium category work] and remained in significant pain the following day.” *Id.*

“Are there OTHER medical facts, situational factors, equipment or devices which need to be considered in the identification of a position for this person? If so, please explain.

Pt on Neurontin, Pain meds, Ultram.”

CX 1 at 68. However, this notation does not constitute substantial evidence that could support a finding that Claimant’s pain medications entail specific work restrictions or undermine Claimant’s ability to pass drug screening that some employers may require. As noted above, the record shows that Claimant is tolerating his pain medications well, and there are no medical opinions in the record indicating that Claimant’s current medication regimen entails work restrictions. TR at 47; EX 23 at 15;²⁴ *see also* CX 1; EX 10. Claimant testified that he has no side effects from Neurontin, Cymbalta, or Tramadol/Ultram. TR at 47. Additionally, as detailed above, Claimant’s testimony indicates that he is able to drive and operate woodworking equipment in his workshop. *See, e.g.*, EX 20 at 40. Based on the foregoing, Claimant has not established that his pain medications entail additional restrictions or undermine his ability to pass a drug screening test. *See generally Johnson v. SSA Marine Terminals, LLC*, BRB No. 11-0823 (July 26, 2012)(unpub.)

Finally, in support of his claim of total disability, Claimant also points to Dr. Yoon’s treatment notes of August 9, 2011. Cl. Br. at 14. The note reflects that Claimant indicated his intention to file for disability benefits, and Dr. Yoon noted “[a]gree that he needs to file for disability.” *Id.* On that day, Claimant reported experiencing severe pain the day after his July 26, 2011 FCE, and also reported “severe right groin pain worsened with any straining and sitting.” EX 10 at 67. Dr. Yoon was aware that Claimant performed strenuous work prior to his injury (see EX 26 at 8-9), and Dr. Yoon’s lifting restrictions preclude Claimant from returning to his pre-injury job. At the same time, there is no indication that Dr. Yoon considered the suitability of less strenuous work when he made this remark. Most notably, when asked directly regarding Claimant’s ability to perform sedentary work, Dr. Yoon stated that, based on his evaluation of Claimant on August 9, 2011, Claimant could do such work. EX 26 at 28. Thus, I do not find that the treatment note of August 9, 2011 reflects Dr. Yoon’s opinion that Claimant cannot perform any work.

Suitable Alternate Employment

Having identified Claimant’s injury-related physical restrictions, I must next determine whether Employer has established the availability of realistic job opportunities within the geographic area where Claimant resides which he is capable of performing, considering his age,

²⁴ On his SSA disability application, Claimant stated: “My pain can be controlled by medication, but the medications restrict the use of power equipment due to safety. I have a daily struggle maintaining my pain level, even with medications.”

education, work experience, and physical restrictions. Employer contends that its April 13, 2012 Labor Market Survey demonstrates the existence of suitable alternate employment (“SAE”). Notably, Employer’s post-hearing brief does not discuss the individual positions identified in the LMS; indeed, the section of the brief addressing SAE is one-page long – Employer simply references the LMS and asserts that the survey satisfies the prerequisites for establishing SAE. Claimant, for his part, asserts that none of the positions identified in the LMS are suitable in light of his physical restrictions, and that he does not possess the required or preferred qualifications for several of the listed positions. Cl. Br. at 19-24.

Employer’s LMS identified eight different positions. I will consider them in turn.

Production worker with Advance Team Staffing:

Employer has not established that this position is consistent with Claimant’s credited physical restrictions. First, this position requires standing “for extended periods of time” and there is no indication that Claimant would be able to alternate sitting and standing on an hourly basis. Second, this position requires lifting up to 40 lbs. occasionally, and therefore exceeds Claimant’s lifting restriction.

Janitor/commercial cleaner with Executive Management Services:

Employer has not established that this position is consistent with Claimant’s credited physical restrictions. The job description states that this is a part-time (25 hours/week) position that requires “constant activity and lifting of approximately 25 lb.” EX 16 at 6. On its face, this position description is inconsistent with Claimant’s need to alternate sitting, standing, and/or walking on an hourly basis, and Employer has not established otherwise. Additionally, there is some uncertainty as to whether the need to lift “approximately 25 lb.” might exceed Claimant’s 25-pound lifting restriction. Considering that the burden of proof is on Employer, I am inclined to resolve this uncertainty in Claimant’s favor. However, even if I were to find that this job is consistent with Claimant’s lifting restriction, it fails to meet his other restrictions, as noted above.

Host/hostess with The H Hotel:

Employer has not established that this position is consistent with Claimant’s credited physical restrictions. This full-time position requires “[a]bility to lift up to 30 lb. occasionally; must be able to stand and walk throughout shift.” This job description is not consistent with Claimant’s lifting restriction and there is no indication that it provides the ability to alternate sitting, standing, and/or walking on an hourly basis. Employer has not presented any evidence to suggest otherwise.

Auto dealer with McGuire Chevrolet:

The LMS Report describes as follows the job duties of this full-time position: “Will be responsible for detailing vehicles from cars, boats, RV’s; some accessory installation; shop maintenance; shop cleanliness; etc.” With regard to the physical demands, the LMS Report states that “[a]pplicant with [Claimant’s] physical abilities may apply.” Claimant asserts that this position is not suitable, because “[t]he listing does not provide enough information to allow this Court to determine whether the physical requirements meet [Claimant’s] restrictions.” Cl. Br. at 21.

The limited information provided in the LMS Report supports the inference that Ms. Rapant, who conducted the survey, contacted this employer, provided Claimant’s restrictions, and was informed that Claimant may apply for this position. Since Ms. Rapant relied on the weight lifting restrictions identified during the FCE, it is possible that this position may require lifting in excess of the credited lifting restrictions.²⁵ In any event, I am not persuaded that Ms. Rapant properly considered – or communicated to this potential employer -- that Claimant must be able to alternate sitting, standing, and/or walking on an hourly basis. Ms. Rapant’s LMS Report indicates that, in conducting the labor market survey, she relied on the physical restrictions identified by the FCE, which included the need to alternate positions. However, in summarizing the FCE findings in two different places in her LMS Report, Ms. Rapant omitted this important requirement. EX 16 at 4-5, 12. Accordingly, the record does not support an inference that Ms. Rapant communicated this restriction to the potential employer. In the absence of more specific information, I am unable to credit the statement that “[a]pplicant with [Claimant’s] physical abilities may apply” or Ms. Rapant’s opinion that this position is suitable for Claimant. *See generally Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013).²⁶ Based on the foregoing, I find that Employer has not established that this position is consistent with Claimant’s credited physical restrictions.

Assembler with Terex/Woodsman Chippers:

This full-time position is clearly inconsistent with Claimant’s credited restrictions, as it entails the following physical demands: “Exerting up to 50 pounds of force occasionally, and /or

²⁵ The LMS Report states that “Automobile dealer” positions are defined in the Dictionary of Occupational Titles as medium duty, and further states that this information is not provided with reference to the specific jobs identified in the LMS. EX 16 at 5.

²⁶ The Sixth Circuit affirmed the Board’s decision holding that substantial evidence supported the Administrative Law Judge’s finding that employer failed to establish the availability of suitable alternate employment. The court stated that, as the labor market survey identified jobs based on employer’s expert’s opinion of claimant’s abilities, and not on the restrictions set by claimant’s physician and credited by the Administrative Law Judge, the Administrative Law Judge rationally found that the jobs identified were not suitable for claimant. Accordingly, the court affirmed the award of benefits.

up to 50 pounds of force frequently, and /or up to 10 pounds of force constantly to move objects. Must be able to stand, bend, steep, and climb for 8+ hours. Will be given a physical examination if considered for position.”

General assembler with Globe Fire Sprinkler Corp:

This full-time position entails “assembl[ing] sprinkler parts in high-paced manufacturing environment.” The work schedule is described as “4-10 hours/day, Monday-Thursday.” The physical demands are described as follows: “[m]ust be able to lift 10-15 lb. repetitively.” As Claimant points out, there is no indication of the amount of time the employee would be required to sit or stand, or whether the employee would be allowed to alternate his position on an hourly basis.²⁷ Cl. Br. at 22. I also note that there is no evidence in the record that Claimant can work ten hours per day. Thus, Employer has not established that this position is consistent with Claimant’s credited physical restrictions.

Route sales representative trainee with Schwan’s Home Service Inc.:

This full-time position (averaging 60 hours/week) entails the following physical demands: “Must have the ability to sit for extended periods of time, lift products, bend, twist, and climb in and out of truck. Must pass physical exam which includes: lifting 50 lb. three times from floor to waist; lifting 50 lb. three times from waist to crown; ability to carry, push, and pull 50 lb; hand grip test; and ability to ascend and descend an 18” step three times.” This position is clearly inconsistent with Claimant’s credited restrictions, as it entails extensive sitting/driving (with no ability to change positions), as well as lifting/pushing/pulling beyond Claimant’s weight limits. Additionally, while Dr. Yoon’s testimony indicates that Claimant’s ability to bend and twist is limited, this position description emphasizes such tasks.

Carpenter with Green Chicken Coop.:

This full-time position is described as follows:

Location (distance): Kawkawlin, MI (50 miles)

Job duties: Company designs and builds coops of wood from timber plantations that are certified to be ecologically sustainable.

Hours worked: full-time.

Wage: \$10.00/hour or higher, depending on skill level.

Qualifications: Must be able to do framing as well as use a saw to accurately cut wood. Cabinet work experience a must. Must pass drug and background check.

Physical Demands: Not specified.

²⁷ While the job listing includes employer’s telephone number, there is no indication that Ms. Rapant contacted this employer to discuss these restrictions.

It is clear that Claimant, who has 25 years of work experience as a carpenter, possesses the skills required for this position. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999). However, as Claimant correctly states, because the physical demands of this position are not specified, the job description does not provide sufficient information to ascertain whether this position is consistent with Claimant's credited work restrictions, including restrictions on lifting, standing, and sitting. The LMS Report indicates that carpenter positions are generally classified as medium duty (EX 16 at 3, 5), and this evidence is consistent with Claimant's testimony that his stateside work as a carpenter entailed "heavy lifting," including lifting sheets of plywood. TR at 19-20. Thus, Employer has not established that this position is suitable for Claimant. *See, e.g., Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

Additionally, the LMS Report identifies the following two positions overseas. EX 16 at 9-11.

Monitor position with URS Corporation:

This position is described in the LMS Report as follows:

Location (distance): Afghanistan

Job duties: "The objective is to maintain high level of security at selected operations. The task will be accomplished by providing United States nationals (USN) monitors for local national and/or third country national laborers (LN/TCN) at Bagram Air Field (BAF) and Kandahar Air Field (KAF), Afghanistan construction sites. Positions available through remainder of URS's contract with the USAF – May 2012."

Hours worked: Full-time; able to lead monitoring teams for up to 12.5 hour daily shifts.

Wage: Unspecified.

Qualifications: qualifications include, *inter alia*, computer literacy (capable of completing online tasks and training).

Physical Demands: "Fit for duty (physically fit and medically qualified). Extreme danger, stress, physical hardships, and possible field living conditions associated with this position within a desert camp complex. Ability to function during an extended assignment at a foreign, in-country facility exposed to seasonal temperature extremes. Ability to cope with shared cafeteria, bath, and sleeping quarters. Only those willing to work and live under these conditions should apply."

This position is not suitable for Claimant. There is every reason to infer that this position is inconsistent with Claimant's restrictions on lifting, standing, sitting, and walking, and Employer has not established otherwise. In particular, Employer has not established that Claimant, who

has significant physical restrictions and takes multiple doses of pain medications on a daily basis, is “physically fit and medically qualified” to work in Afghanistan in conditions of “[e]xtreme danger, stress, physical hardships, and possible field living conditions” and is “able to lead monitoring teams for up to 12.5 hour daily shifts.” Additionally, Employer’s vocational experts documented that Claimant has “limited computer skills,” “[n]o keyboarding skills,” and “[l]imited knowledge [of] base computer fundamentals.” EX 15 at 5; EX 16 at 12. Thus, Employer has not demonstrated that Claimant’s computer skills are sufficient to satisfy the requirement of “computer literacy (capable of completing online tasks and training).” I also note that the wage for this position is not specified.

Security escort with DynCorp International:

The LMS Report describes this position as follows:

Location (distance): Doha, Qatar.

Job duties: Responsible for the safe and timely escort of selected personnel on and off post (Al Udeid Air force base) ensure equipment, machinery, tools, storage area is secure and safe (custodial storage area).

Hours worked: Full-time.

Wage: Unspecified.

Qualifications: High school diploma or equivalent. Fluent in English. Must have a working knowledge of personal computers. Must be physically fit. Prior customer service or customer relations experienced desired. Capacity to work with persons of different cultures. Must possess a U.S. driver’s license and passport.

Physical Demands: Must be physically fit.

This position is not suitable for Claimant. This position description creates a strong inference that the duties of this job are inconsistent with Claimant’s restrictions on lifting, standing, sitting, and walking, and Employer has not established otherwise. In particular, Employer has not established that Claimant, who has significant physical restrictions and takes multiple doses of pain medications on a daily basis, is “physically fit” to perform the duties of this position in Qatar, including “safe and timely escort of selected personnel on and off post (Al Udeid Air force base).” Further, Employer has not established that Claimant’s “limited computer skills” (EX 15 at 5; EX 16 at 12) satisfy the job requirement of “a working knowledge of personal computers.”

In sum, I find that Employer has failed to establish the availability of suitable alternate employment. It follows that Claimant is totally disabled as a result of his work-related injury.

Diligence in Seeking Work

If employer demonstrates the availability of suitable alternate employment, the burden shifts back to the injured worker; an injured employee can rebut the employer's showing of suitable alternate employment by demonstrating that he was unable to secure such work despite his diligent effort. *Turner*, 661 F.2d 1031. Claimant's burden in this regard does not arise until employer has shown suitable alternate employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *see also Palombo*, 937 F.2d 70; *Tann*, 841 F.2d at 542; *Dove*, 18 BRBS 139; *Royce*, 17 BRBS 157. Claimant is not required to demonstrate that he tried to get jobs identical to those identified by employer. Rather, the claimant merely must establish that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991), *citing Turner*, 661 F.2d at 1043, 14 BRBS at 165. *See also CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991).

Where, as in this case, an Administrative Law Judge finds that employer has failed to demonstrate the availability of suitable alternate employment, the Administrative Law Judge is not required to address the issue of whether the claimant diligently sought work. *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *see also Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989)(Because the Board affirmed ALJ's finding that employer failed to establish SAE, it did not need to address employer's contention that claimant did not diligently seek work). However, in the interests of completeness, I will address the arguments and evidence presented by the parties on this issue. Assuming, *arguendo*, that Employer met its burden of showing SAE, I find that Claimant has rebutted Employer's showing by demonstrating a diligent yet unsuccessful job search. *See generally DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).²⁸

Claimant asserts that he conducted his own job search prior to the November 7, 2012 hearing, in August-October 2012, and also unsuccessfully attempted to secure the jobs identified in Employer's LMS Report after the hearing.²⁹ Cl. Br. at 24; CX 15; CX 16. Claimant asserts that, in August-October 2012, he applied to some forty positions within an hour's drive of his

²⁸ In The Eighth Circuit affirmed the finding that employer did not establish suitable alternate employment, but added that, assuming, *arguendo*, employer met its burden, claimant rebutted employer's showing by demonstrating a diligent yet unsuccessful job search through evidence including a job application log containing more than 200 entries and expert testimony that claimant had made diligent efforts to secure a position.

²⁹ Claimant contends that, because he began applying for work on 08/01/2012, he demonstrated diligence "no later than 08/01/12" and thus "any finding of permanent partial disability should be limited to the period from 04/13/12 to 08/01/12." Cl. Br. at 24; TR at 62.

home, ranging from carpentry to sales to apartment maintenance. Cl. Br. at 25; TR at 37; CX 15. Claimant argues that these jobs are “within the compass of employment opportunities” identified in Employer’s LMS, citing *Turner*, 661 F.2d 1031. Claimant points out his testimony at the hearing that the vast majority of employers were not hiring. Id.; TR at 37. He also testified that his hometown is small and the nearest larger town is an hour away though there is not much home construction occurring, which is why he went overseas for work. Id. Claimant asserts that he also applied for the positions identified in the LMS Report. Cl. Br. at 24; CX 16. Specifically, he applied online for the positions with Executive Management Services, Terex, and Schwans. Id. Schwans was not hiring part-time workers. Claimant also “applied with McGuire Chevrolet, though the employer was not hiring, nor was Globe Fire Sprinkler, the H Hotel or Green Chicken Coop.” Id.

Employer argues, at length, that Claimant has failed to establish a diligent search for employment. Emp. Br. at 8-15. With regard to positions identified by Claimant prior to the hearing date (EX 15), Employer asserts:

“First, [Claimant] delayed his job search until more than one year after being released to return to work and provided potential suitable alternative employment options. Second, the evidence he has provided to the Court fails to provide sufficient facts to support a finding of diligence. Diligence in seeking employment requires a claimant to seek out jobs for which [he] is qualified and which he can physically and medically perform. But [Claimant’s] evidence does not address in any way the physical demands required by the jobs he purportedly sought prior to the formal hearing.”

Emp. Br. at 9; EX 26 at 7-8. With regard to Claimant’s hand-written job application log, Employer asserts that “[i]n large part, the log fails to meet [Claimant’s] legal burden because it does not provide any evidence of the physical demands required by various jobs that Claimant allegedly sought.” Emp. Br. at 9-10, citing *Harrell v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 239, 246 (ALJ)(2004). Employer further asserts that the log is deficient because it does not provide information detailing the nature of Claimant’s inquiries, applications submitted, any subsequent follow-ups, the name of the person(s) to whom Claimant spoke, and the potential wages. Id, citing *Harrell, supra*.³⁰ Employer asserts that, without this evidence, it is impossible to determine whether these jobs actually constituted SAE, and, furthermore, the log indicates that Claimant was seeking jobs outside his physical restrictions. Specifically, Employer points out that carpenter jobs are classified as medium-duty (EX 15 at 3) and asserts that “returning to full-time work in the building and construction trades appears to be beyond [Claimant’s] physical restrictions.” Emp. Br. at 11.

³⁰ In *Harrell*, a different Administrative Law Judge considered claimant’s failure to list the name of the person to whom he spoke, identify the position sought, and specify the wages as factors weighing against a finding of diligence.

Similarly, with regard to Claimant's post-hearing job search, Employer asserts that Claimant "cannot demonstrate a diligent attempt to secure the jobs identified by [Employer's] labor market survey," and that "his evidence of post-hearing job seeking is not sufficient to rebut the labor market survey." *Id.* at 9. Employer points out that Claimant did not attempt to contact employers identified in the LMS for six months after he received the LMS; Claimant's testimony that he had never seen the survey before the hearing is "a complete fabrication and evidence that he has made no diligent effort to return to work." *Emp. Br.* at 12. Employer contends that the jobs were no longer available as a result of Claimant's delay and not because of any deficiencies in the LMS. *Id.* Employer asserts that, in any event, continued availability of the jobs identified in the LMS is not required, citing *Tann*, 841 F.2d 540. Further, Claimant's "unverified" log detailing his job search based on Employer's LMS (CX 16) does not establish a diligent attempt to obtain these jobs, because Claimant only applied to three out of ten jobs, did not provide copies of his job applications, and did not document the names of individuals who told him the jobs were no longer available. *Emp. Br.* at 13.

I find that Claimant has demonstrated a diligent job search effort from August 1, 2012 to October 23, 2012, as well as a diligent attempt to obtain jobs identified in Employer's LMS after the November 7, 2012 hearing (CX 16). While Claimant concedes that he did not begin his job search until August 1, 2012, on the facts of this case, this delay does not negate his assertion of diligence. In this regard I note that Dr. Yoon did sign Form OWCP-5c containing severe work restrictions, and although I gave little weight to this evidence in identifying Claimant's physical restrictions, this signed form provides some justification for the delayed job search.³¹ Further, Claimant's medical records reflect that he continued to experience groin pain, exacerbated by prolonged sitting and heavy lifting, even with multiple pain medications. EX 10 at 78-104. I also note that while Claimant underwent an FCE on 07/26/2011, Employer did not conduct an LMS until 04/13/2012.

Further, Employer's (equivocal) assertion that "[i]n large part, the [job application] log fails to meet [Claimant's] legal burden" is unpersuasive. The hand-written job application log contains some forty jobs; indicates each employer's address and, in most cases, telephone number; identifies multiple positions that are facially consistent with Claimant's vocational qualifications; and identifies several positions (e.g., "kitchen sales," carpenter/sales, and other sales positions) within the "compass of employment opportunities" deemed suitable and available by Employer's vocational expert (CX 15; EX 16; *see also* EX 15). Contrary to Employer's contention, the log contains a "follow-up" column documenting Claimant's attempts to follow-up with several of the listed employers, approximately one or two weeks after the initial inquiry/job application. Employers' responses recorded on the log are sufficiently detailed

³¹ Similarly, as discussed above, Dr. Yoon's treatment note of 08/09/2011 reflects that Claimant "[c]ontinue[d] to have severe pain which is limiting his ability to do any kind of physical exertion. Agree that he needs to file for disability." *Id.* at 67.

and do not raise credibility concerns (e.g., “not hiring,” “still reviewing apps,” “will call if needed,” “possibly in November,” etc.). Furthermore, there is no indication that Claimant applied for jobs for which he was not qualified, or that he exaggerated his physical restrictions or emphasized his limitations when he contacted potential employers. *Cf. Wilson v. Virginia Int’l Terminals*, 40 BRBS 46 (2006); ³² *J.T. [Tracy] v. Global Int’l Offshore, Ltd.*, 43 BRBS 92 (2009),³³ *aff’d sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013). Additionally, credible evidence of limited job opportunities in the local labor market is a relevant consideration. *See, e.g., Parris v. Eller & Co.*, 16 BRBS 252 (1984)(Where the employee met with the vocational expert’s identified potential employers and was not hired, and the ALJ took judicial notice that the local unskilled labor market was especially competitive in light of recent immigration of young, able-bodied men from Cuba and Haiti, the Board upheld his finding of permanent total disability); *Army & Air Force Exchange Service v. Neuman*, 278 F.Supp. 865 (W.D.La. 1967)(Trier-of-fact may consider economic conditions in employee’s area); *see also Fred Wahl Marine Constr. v. Dir., OWCP, et al. [McCullough]*, 2011 WL 1338826 (9th Cir. 2011)(unpub.)(The Board erred in affirming the ALJ’s finding that a job of a server/food preparer at Dairy Queen constituted SAE, as claimant’s physical limitations did not support this finding; ALJ erred in disregarding claimant’s wife’s testimony regarding the availability of fast food/restaurant jobs in claimant’s small town). In this case, Claimant credibly testified that carpenter/construction job opportunities in his small town and the neighboring towns are limited, which is why he went overseas for work. TR at 37. At the same time, Employer’s vocational rehabilitation consultant observed that Claimant is learning disabled and concluded that, due to Claimant’s work history being comprised of carpentry jobs, Claimant has “[l]imited transferrable skills into sedentary or even light duty work.” EX 15.

Employer additionally asserts that the notarized statements Employer obtained from Ms. Roggenback at Menards (dated 03/06/13) and Ms. Allegrati at Lowe’s (dated 03/21/13) establish that Claimant “did not submit his application for employment” to either Menards or Lowe’s

³² The Board affirmed the Administrative Law Judge’s finding that claimant did not diligently seek alternate work. The Administrative Law Judge considered the nature and sufficiency of claimant’s job search and rationally found that claimant applied for jobs for which he was not qualified, made cold calls and did not apply for advertised openings, exaggerated his infirmities through the use of unnecessary crutches, and de-emphasized his strengths such as some college education and computer skills. Claimant also refused to work weekends or mornings and did not follow up on applications.

³³ Where employer presented evidence of suitable alternate employment, and claimant testified that he would probably turn down a job offer because of low pay or because of his many doctors’ appointments, and where claimant emphasized his limitations to interviewers, and did not perform his own job search, the Board affirmed the Administrative Law Judge’s determination that claimant’s attempts to obtain post-injury work were not diligent. Accordingly, the Board affirmed the Administrative Law Judge’s finding that claimant is partially disabled.

Home Improvement Centers.³⁴ EX 28; EX 29. Claimant's job application log indicates that he submitted an "online application-in store" for a "Pro-Sales" position with Menards on 9/18/2012, and that he applied online for a "Contractor Sales/Kitchen Sales" position with Lowe's on 09/26/2012. CX 15. I find that the evidence submitted by Employer does not establish that Lowe's and Menards retain job applications for the type of positions that Claimant was seeking such that the applications submitted in September of 2012 would be expected to remain on file in March of 2013. Indeed, Ms. Roggenback's statement merely indicates that Menards maintains records of its employees and that Claimant was never employed by Menards. EX 28.

As for Claimant's delayed attempt to pursue the job leads identified in Employer's LMS, Employer is correct in stating that this delay undermines Claimant's assertion that these jobs were not available.³⁵ CX 16. This issue, however, is not material, as I have determined that the LMS jobs are not suitable in light of Claimant's physical restrictions. Assuming, *arguendo*, that at least some of the LMS jobs are suitable, I find that Claimant has established a diligent attempt to obtain jobs within the compass of employment opportunities identified in the LMS. The two positions that came closest to satisfying Employer's burden of showing SAE in light of Claimant's physical restrictions are positions with Green Chicken Coop (carpenter) and McGuire Chevrolet (auto dealer). I find that the carpenter jobs and various sales positions that Claimant attempted to obtain in August – October 2012 fall within this same "compass of employment opportunities," and thus Claimant has established a diligent but unsuccessful attempt to obtain jobs of the same type. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Turner*, 661 F.2d at 1043, 14 BRBS at 165; *Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT).

In sum, Claimant has demonstrated a diligent yet unsuccessful attempt to find work, and is therefore entitled to total disability benefits.

³⁴ Employer does not indicate whether it contacted other employers listed on its Notice of Intention to Take Deposition by Written Questions regarding Claimant's job applications and, if so, what response these employers provided.

³⁵ Employer asserts that the LMS was provided to Claimant's counsel in June and July 2012. Emp. Br. at 12. Indeed, Employer's Responses to Requests for Production, served on Claimant's counsel on July 9, 2012, state that the LMS was attached to this discovery response. Thus, while Claimant's counsel stated that the LMS was "produced about the time of the Formal Hearing" (see 11/29/12 cover letter to CX 15-16), it was apparently produced earlier. As Employer points out, an employer need not present information concerning job openings directly to the claimant in order to establish SAE. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

SECTION 8(f) RELIEF

Section 8(f) of the Act provides that the Special Fund³⁶ will assume responsibility for permanent disability payments after 104 weeks where an employee suffers from a manifest, pre-existing, permanent partial disability which combines with the (unscheduled) work-related injury, resulting in permanent disability. 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). To be entitled to Section 8(f) relief where the work injury results in permanent total disability or death, the employer must establish (1) that the employee had a pre-existing permanent partial disability; (2) that this disability was "manifest" to the employer; and (3) that the employee's permanent total disability is not due solely to the employment injury but is the result of the combination of the pre-existing permanent partial disability and the subsequent work-related injury. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Jacksonville Shipyards Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); *Director, OWCP v. Campbell Industries Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). When an employee is permanently partially disabled due to the work injury, in addition to these three elements the employer must show that the permanent partial disability being compensated "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1). The subsequent employment-related injury to which Section 8(f) applies is also known as the "second injury."

Employer bears the burden of proving each element of Section 8(f) relief. *See, e.g., Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). *Accord CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Two "R" Drilling*, 894 F.2d 748, 23 BRBS 34(CRT); *Stokes*, 851 F.2d 1314, 21 BRBS 150(CRT). An employer is eligible for Section 8(f) relief where the employee's pre-existing disability and second injury both arise from the same course of employment with the same employer. *Electric Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2^d Cir. 2007); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987); *Barclift v.*

³⁶ *See* 33 U.S.C. §944.

Newport News Shipbuilding & Dry Dock Co., 15 BRBS 418 (1983), *rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107(CRT) (4th Cir. 1984); *Scott v. Rowe Machine Works*, 9 BRBS 198 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675 (1978). The Special Fund also cannot be held liable for claimant's attorney's fees. *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

In its post-hearing brief, Employer asserts that, if it is determined that Claimant is entitled to disability compensation, then it is Employer's position that Section 8(f) relief should be awarded in this case. Emp. Br. at 15-20. Employer states that it had filed an *Application for Limitation of Liability Under Section 8(f)* with the OWCP, and a copy of this filing is in evidence. EX 27. Further, on March 21, 2013, the OWCP Director filed with this Office a letter stating in relevant part:

“[t]he Director does not object to section 8(f) relief if the Court finds, in a compensation order, that the underlying claim for permanent disability is meritorious and that the period of permanent disability exceeds that for which the employer would retain liability under section 8(f). For the Director's concession to be valid, the request for section 8(f) relief must be part of the same proceeding as that in which the issue of permanent disability is first litigated, and both issues must be resolved in a single, complete compensation order. The Director's concession is also conditioned on the Court finding that substantial evidence supports each of the requisite elements of entitlement to compensation. Should the private parties resolve the elements of compensation entitlement by entering into stipulations that affect the liability of the Special Fund, the Director's concession is also premised on the Court determining that those stipulations are indeed supported by substantial evidence.”

Director's Letter at 1-2 (citations and footnote omitted). As I have determined that Claimant sustained a compensable injury and is entitled to ongoing permanent total disability compensation, I further find that the Director has conceded that the prerequisites to Section 8(f) relief have been met in this case. However, I will briefly discuss the relevant facts.

Pre-existing Permanent Disability

A condition alleged to be a pre-existing disability for Section 8(f) purposes must precede the injury on which the compensation claim is based. The term “disability” in the context of Section 8(f) can be a scheduled loss under Section 8(c) of the Longshore Act, an economic disability arising out of a physical infirmity, or a serious physical disability which would motivate a cautious employer to discharge an employee because of a greatly increased risk of an employment-related accident and compensation liability. *C & P Telephone Co.*, 564 F.2d at 513;

Dir., OWCP v. Gen. Dynamics Corp. [Bergeron], 982 F.2d 790, 26 BRBS 139(CRT)(2nd Cir. 1992). The mere fact that an employee previously sustained an injury, however, does not by itself establish a pre-existing disability. *Lockheed Shipbuilding v. Dir., OWCP*, 951 F.2d 1143, 1145 (9th Cir. 1991). There must exist, as a result of the injury, some serious, lasting physical problem. *Dir., OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222 (D.C. Cir. 1985); *Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41, 42-43 (1986).

Here, the record supports Employer's contention that Claimant had a pre-existing permanent disability prior to his August 23, 2009 injury. Specifically, Claimant was diagnosed with a right inguinal hernia in 2008, evidently sustained in the course of his employment with Employer. TR at 25; CX 1; EX 10. Claimant underwent a hernia repair with mesh on September 18, 2008. EX 10 at 11. While this procedure initially brought relief and Claimant was able to return to his work overseas, the evidence of record establishes that Claimant sustained a permanent disability as a result of his 2008 hernia injury and related surgery. Thus, Dr. Yoon testified that Claimant's initial hernia rendered him susceptible to recurrent hernia. EX 26 at 25-26. Indeed, Claimant did sustain a recurrent right inguinal hernia in 2009. Furthermore, in the course of the 2010 surgery, it became apparent that Claimant sustained an entrapment of the ilioinguinal nerve with his prior 2008 right inguinal herniorrhaphy. CX 1 at 16; TR at 29; EX 26. Additionally, Dr. Yoon also indicated that Claimant's initial hernia surgery predisposed him to complications during subsequent hernia repair surgeries. EX 26 at 26. Thus, I find that Employer has established a pre-existing permanent disability for purposes of Section 8(f). *See Marko v. Morris Boney Co.*, 23 BRBS 353 (1990)(two prior hernias constituted pre-existing permanent partial disability).

The Manifest Requirement

A pre-existing disability is considered manifest to an employer if it has either actual knowledge or constructive knowledge of the disability. *See, e.g., Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991); *Director v. Universal Terminal & Stevedoring Corp. [DeNichilo]*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984); *Rowe v. Western Pacific Dredging*, 12 BRBS 427 (1980);³⁷ *Delinski v. Pragnot Air Flex Corp.*, 9 BRBS 206 (1978); *Mapp v. U. S. Airforce Center Welfare Fund*, 12 BRBS 418 (1980). *Cf. Sheek v. General*

³⁷ In *Vlasic v. American President Lines*, 20 BRBS 188 (1987), the Board overruled *Rowe*, finding it inconsistent with *Campbell Industries*, insofar as *Rowe* found a manifest pre-existing PPD without evidence that the prior conditions were serious physical conditions. In *Vlasic*, medical records indicated prior back injuries, but claimant returned to work with no time lost. The Board concluded that the facts were similar to those in *Campbell Industries* and held that the manifest requirement was not met.

Dynamics Corp., 18 BRBS 1 (1985), *modified on other grounds on recon.*, 18 BRBS 151 (1986) (Denial of § 8(f) relief affirmed where employer assumed on the basis of one physician's letter to another noting a history of muscle spasms dating back 10-15 years that hospital records existed documenting a pre-existing back problem). An employer has constructive knowledge if there is a medical record in existence making the disability objectively determinable. *Campbell Indus., Inc.*, 678 F.2d at 841. The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest, so long as there is sufficient information that might motivate a cautious employer to consider terminating the employee because of the risk of compensation liability. *Todd*, 16 BRBS at 167-68; *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of the injury. *Currie v. Cooper Stevedoring Co. Inc.*, 23 BRBS 420 (1990). The pre-existing disability need not be manifest at the time of hiring, but only at the time of the compensable subsequent injury. *Dir., OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983).

Here, Employer has established that Claimant's pre-existing permanent partial disability was manifest prior to August 23, 2009, as Employer had both actual and constructive knowledge of the pre-existing hernia condition. Emp. Br. at 18-19. Claimant was working for Employer in Iraq in 2008, when he developed hernia while building living quarters for military police. TR at 22-23. He returned to the U.S. for medical care, was diagnosed with hernia, and underwent surgery performed by Dr. Walter Leibold on September 18, 2008. EX 10 at 7, 11-12. On November 20, 2008, Dr. Leibold signed a medical release form, stating that Claimant had been diagnosed with a right inguinal hernia and releasing Claimant to return to work without restrictions on November 24, 2008. EX 10 at 14-16. This medical release form was provided to Employer, and Claimant returned to his job with Employer in Iraq in January of 2009. EX 10 at 16.

The Combination and/or Contribution Requirement

Section 8(f) will not apply to relieve employer of liability unless claimant's ultimate disability or death is "found not to be due solely to" the work injury for which benefits are sought. Thus, in order for Section 8(f) relief to be awarded, the existing permanent partial disability must contribute to claimant's permanent total disability or death, and in the case of permanent partial disability, the ultimate disability must also be "materially and substantially" greater than that due to the subsequent injury alone. Employment-related aggravation of a pre-existing disability will suffice as contribution to the total disability for purposes of Section 8(f). *Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130(CRT) (1st Cir. 1983), *aff'g Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982); *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980), *aff'g Ashley v. Todd Shipyards Corp.*, 10 BRBS 42 (1978); *Director, OWCP v. Sun Shipbuilding & Dry Dock Co.*, 600 F.2d

440, 10 BRBS 621 (3d Cir. 1979), *aff'g Frame v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 885 (1978); *Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (2d Cir. 1979), *aff'g Brannon v. Potomac Electric Power Co.*, 6 BRBS 527 (1977); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). This rule applies even if the pre-existing disability is also work-related. *Sun Shipbuilding*, 600 F.2d 440, 10 BRBS 621. Thus, where claimant has a pre-existing PPD, and her employment aggravates that condition resulting in a greater degree of disability, employer may be entitled to Section 8(f) relief. It is not sufficient for employer to prove only that claimant's existing PPD combined with the work injury to result in a greater degree of disability; employer must specifically prove that the work injury alone did not cause claimant's ultimate disability.³⁸ *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

As discussed above, Claimant's 2008 hernia and associated surgery, as well as the entrapment of the ilioinguinal nerve in the course of that surgery, predisposed Claimant to recurrent hernias and undermined the success of subsequent surgeries. His current condition, including nerve damage and chronic pain, stems from a combination of his recurrent hernias and associated surgeries. I find that Claimant's pre-existing permanently partial disability caused by the 2008 hernia injury and surgery contributed in a material way to his present permanent total disability.

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 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

³⁸ In *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983), the Board reversed a denial of Section 8(f) relief, holding that where claimant had prior injuries to the lumbar area of the back, and his current diagnosis is degenerative disc disease, common sense dictates that the previous condition must have contributed. The "common sense" test, however, has been rejected by the courts. *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). *Compare Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997) (opinions sufficient to establish pre-existing conditions pushed the employee "over the hump" from partial to total disability). Thus, Employer must establish, through medical or other relevant evidence, that claimant's disability was not solely due to the work injury.

accompany the petition. Employer has twenty (20) days following the receipt of such application within which to file any objections thereto. The LHWCA prohibits the charging of a fee in the absence of an approved application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, it is hereby ordered that:

1. Employer/Carrier shall pay to Claimant temporary total disability compensation for the period from August 23, 2009 until August 8, 2011, based on the AWW of \$1,655.99.
2. Employer/Carrier shall pay to Claimant permanent total disability compensation for the period beginning on August 9, 2011, based on the AWW of \$1,655.99, subject to paragraph 3 of this Order.
3. Employer/Carrier's obligation to pay Claimant permanent disability benefits is limited to the payment of 104 weeks of permanent benefits and after this obligation has been satisfied, continuing benefits shall be paid by the Special Fund established in Section 44 of the LHWCA.
4. Employer/Carrier are entitled to credit for any benefits payment made in the past.
5. Employer/Carrier shall pay Claimant for all past, present, and future reasonable medical care and treatment arising out of his work-related injury pursuant to Section 7(a) of the LHWCA.
4. Employer/Carrier shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.
5. All computations are subject to verification by the District Director who, in addition, shall make all calculations necessary to effectuate this Order.
6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

SO ORDERED:

STEPHEN R. HENLEY
Associate Chief Judge