



**Issue Date: 03 September 2013**

OALJ CASE NO.: **2012-LDA-00547**

OWCP NO.: **02-209129**

*In the Matter of:*

**ROGER HEFNER,**

Claimant

v.

**DYNCORP INTERNATIONAL,**

Employer

and

**CONTINENTAL INSURANCE COMPANY**

Carrier.

Appearances: Joel S. Mills, Esq.  
Pitts & Mills  
For Claimant

Gregory P. Sujack, Esq.  
Law Offices of Edward J. Kozel  
For Respondents

Before: Russell D. Pulver  
Administrative Law Judge

### **DECISION & ORDER GRANTING BENEFITS**

This case arises from a claim for compensation brought under the Defense Base Act, 42 U.S.C. § 1651, as an extension of the Longshore and Harbor Workers' Compensation Act ("the Act"). 33 U.S.C. § 901 *et seq.* The Act provides compensation to certain employees engaged in

U.S. Department of Defense-related employment for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability. Claimant brought a claim against his employer, Dyncorp International (“Employer”), and its insurer, Continental Insurance Company (“Carrier,” or collectively, “Respondents”), for work-related back injuries while he was working as a transport driver in Iraq.

On December 10, 2012, the undersigned convened the formal hearing in San Diego, California. Each party was represented by his or its counsel of record. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted into evidence: Administrative Law Judge Exhibits (“AX”) 1-6; Claimant's Exhibits (“CX”) 1-13, 15-16; and Respondents' Exhibits (“RX”) 1-4.<sup>1</sup> Trial Transcript (“Tr.”) at 6, 10-12. Claimant testified on his own behalf.

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

### **STIPULATIONS**

The parties agree and I find:

1. Claimant's date of injury was October 23, 2010. Tr. at 6; AX 6.
2. Claimant was injured in the course and scope of employment. *Id.*
3. At the time of the alleged injuries, an employer-employee relationship existed between Decedent and Employer. *Id.*
4. Employer was advised of the injury on October 24, 2010. *Id.*; CX 13.
5. An informal conference was held on April 18, 2012. Tr. at 6-7; AX 6.
6. Claimant is entitled to Section 7 medical benefits. Tr. at 7; AX 6.
7. Claimant has been paid temporary total disability benefits from November 15, 2010 to April 6, 2011, at the statutory maximum of \$1,256.84 per week; permanent total disability benefits from April 7, 2011 to September 30, 2011, at the statutory maximum of \$1,256.84 per week; and permanent partial disability benefits from October 1, 2011 and continuing at the rate of \$731.97 per week. *Id.*; CX 6 and CX 7.

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<sup>1</sup> CX 16 and RX 4 were submitted following the hearing as agreed by counsel during the hearing. Tr. at 12-13.

## ISSUES

1. Date of MMI. Tr. at 8; AX 6.
2. Nature and extent of disability. *Id.*
3. Average weekly wage. *Id.*
4. Whether Claimant is entitled to interest on benefits owed, attorney fees and costs. *Id.*

## **FINDINGS OF FACT**

### ***Claimant's Hearing Testimony***

Claimant is a 50 year old man who was born in West Germany but grew up in Arizona where he graduated from high school. Tr. at 21. He stated he attended police academy and served in the U.S. Army Infantry from 1980 to 1983 and again from 1987 to 1988 before receiving a sole parent discharge. *Id.* at 22-23. Between his two Army stints, Claimant was a police officer with the Cocopah Indian Tribe in Yuma County, Arizona and the LaPaz County Sheriff's Office. *Id.* Claimant testified that he also worked as a prosecutor for the Cocopah Tribe in low level misdemeanor cases. *Id.* at 24. He next worked as a federal police officer at the Yuma Proving Grounds for about a year during and also worked as a private investigator in Phoenix before moving back to Yuma to sell TV's, firearms and cars. *Id.* at 24-26. He stated he also worked transporting illegal alien prisoners for Wackenhut on contract for the Border Patrol and as a Captain in a Yuma prison. *Id.* at 26.

Claimant testified that he went to work for about 18 months for Dyncorp in April or May of 2007 training border police in Iraq. *Id.* at 26-27. He next worked for KBR in Iraq as a security technician. *Id.* at 27. After some work as an in-house policeman at Toledo Air Base, Claimant went back to work for Dyncorp as an airport expeditor transporting people to and from Baghdad International Airport in October or November of 2009. *Id.* Claimant stated that he had signed a second one year contract with Employer when he was injured on October 23, 2010. *Id.*

Claimant stated he first injured his back on June 10, 2009 while employed by KBR as he was stepping off a helicopter. *Id.* at 28. He recalled that he missed one or two days of work; used ice packs and ibuprofen; and that the back pain subsided after a few weeks. *Id.* at 28-29, 42. Claimant testified he had been pain free until he injured his back again while employed by Employer when he pulled his back picking up his passenger's 60 to 80 pound bag. *Id.* at 29. He stated he continued to work but that the pain got worse overnight so he went to the medics the following day. *Id.* at 29-30. His pain continued to get worse so that he went to a doctor about two weeks later when he returned to Yuma for a scheduled vacation. *Id.* at 30-31. Claimant stated he agreed with Employer's records that he made \$98,949.48 in the 52 weeks previous to his injury. *Id.* at 33; CX 8.

Claimant did not recall exactly how he began to see Dr. John Serocki but thought he might have been recommended by Carrier. Tr. at 33. Claimant has continued his treatment with Dr. Serocki and has had epidural steroid injection, physical therapy and medications but

continues to have pain in his back and left leg especially with sitting. *Id.* at 31-32. Claimant stated he understood his work restrictions from Dr. Serocki to include no lifting over 15 pounds; no bending, stooping or climbing; and only four hours per day sitting and four hours per day standing or walking. *Id.* at 32-33. He stated he has mild difficulties with bathing, dressing and driving and has quit driving quads and wrestling with his children. *Id.* at 33. He noted that Dr. Serocki had told him he will need continuing medical treatment including medications and steroid injections but has not suggested surgery at this point. *Id.* at 33-34, 41. He agreed that Dr. Serocki had found him to be at MMI on April 6, 2011 and again on August 10, 2011. *Id.* at 34.

Claimant testified that he found a job which lasted from October of 2012 until November 22 or 23 of 2012, as a home inspector for foreclosed homes with American Inspection Systems. *Id.* at 34-35. He worked as an independent contractor at a rate of \$5.50 to \$8.00 per inspection and he inspected 168 houses taking photos of the interior of the homes. *Id.* at 35-36. He was paid more for home inspections over the border into Winterhaven, California. *Id.* at 36. Claimant testified that he applied for all of the positions identified in the labor market survey in the Yuma area where he lives but was never offered a position. *Id.* at 37-38; CX 15. He stated that he quit the inspection job because he had difficulty getting in and out of his vehicle all day. *Tr.* at 38. Claimant stated he found the job through a friend. *Id.* at 38-39. Claimant stated he was concerned about some of the jobs on the original labor market survey since the job site was hundreds of miles away from Yuma. *Id.* at 39. He stated that he has applied for the positions in the Yuma area and that he felt he would be able to at least try to do these positions. *Id.* at 40-41.

### ***Claimant's Deposition Testimony***

Claimant was deposed on November 13, 2012. RX 3 at 1. Claimant was born in West Germany while his father was stationed there in the Army but returned to the United States when he was a little over a year old. *Id.* at 6. He move to Yuma, Arizona at the age of eight and has lived there since, having graduated from high school in Yuma. *Id.* at 6-7. Claimant testified he served in the U.S. Army from July of 1980 to July of 1983. *Id.* at 7-8. He reenlisted for a second three year term in 1987 but was released early on a sole parent discharge in 1988. *Id.* at 8-9. Claimant testified he had married in 1985 and divorced in 1988 when he took custody of his two to three year old child leading to his sole parent discharge. *Id.* at 12-13. He stated that he worked as a police officer between his two stints in the Army, first for the Cocopah Indian Tribe and then, upon completing police academy, as a deputy sheriff for LaPaz County, Arizona. *Id.* at 9-10. He next went to the San Bernardino Sheriff's Academy in California but did not graduate as he had to quit since he could not afford health insurance as required by the school. *Id.* at 10-11. Claimant testified he worked at security jobs until he reenlisted in the Army in California. *Id.* at 11-12.

Claimant stated he served in the infantry in Italy on his first enlistment and at Fort Ord, California on the second. *Id.* at 14. After his discharge from the Army in 1988, Claimant testified he worked about six months for the Cocopah Indian Tribe again as a police officer and then worked from 1989 to 1997 for the Somerton, Arizona Police Department as a patrol officer, undercover narcotics officer and detective. *Id.* at 15-17. He noted the narcotics position was on a joint task force with U.S. Customs. *Id.* at 18. Claimant stated he next returned to work for the Cocopah Tribe as a police sergeant and as a prosecutor of misdemeanors and low felonies under

Tribal Law. *Id.* at 20-21. Thereafter, Claimant stated he worked as a federal police officer at Yuma Proving Ground for about a year. *Id.* at 22. He next moved to Phoenix where he worked about three years as a process server and investigator before moving back to Yuma in 2003. *Id.* at 23-24. For about a year thereafter, Claimant stated he made his living buying, repairing and reselling various items like televisions, cars and firearms. *Id.* at 24-25. Claimant next sold new cars for about a year and a half until he became sales representative in 2006 for JSA Landscaping. *Id.* at 26-27. Claimant testified he worked for Wackenhut Company under a contract with Homeland Security transporting illegal alien prisoners but was released after a few weeks when he couldn't get clearance for his credit. *Id.* at 27-28. Claimant next worked a few months selling cars before going to work for Civigenics for about four months as a captain at a private prison in the Yuma area. *Id.* at 28-29.

Claimant next went to work for Dyncorp in May of 2007 to work as a border police trainer in Iraq. *Id.* at 29-30. Although the contract with Dyncorp was for one year, Claimant testified he actually worked eighteen months on that contract in southern Iraq. *Id.* at 30. After the completion of the eighteen months, Claimant returned to the United States while he awaited his hiring by KBR as a security technician in Iraq. *Id.* at 31. He stated that he investigated corporate level thefts or violence within the company in Iraq. *Id.* at 31-32. Claimant testified that he quit six or seven months into the KBR contract when Dyncorp hired him back in October of 2009 following a month or two at home in the U.S. *Id.* at 32.

Claimant testified his second job with Dyncorp was as an airport expeditor at the Baghdad airport transporting people and their baggage to and from the airport. *Id.* at 32-33. Claimant stated his transport was not armored and he was not armed. *Id.* at 34. He carried a helmet and armored vest but did not wear it. *Id.* at 35. He wore a uniform and transported personnel in a Chevy Tahoe, sometimes assisting personnel with their luggage if they had an abundance. *Id.* at 36. He finished his one year contract with Dyncorp then signed an additional one year extension but completed only an additional month of the extension before he was injured. *Id.* at 34-37. Claimant could not actually recall whether he had begun the second contract when he went home for a vacation and decided to seek treatment for his back. *Id.* at 44-46.

Claimant stated he had twisted his ankles while playing basketball in high school and while in the Army but did not require surgery. *Id.* at 37-38. He also injured his jaw and teeth when he was struck in the face with a mug while making an arrest between his two Army stints but did not need to have his jaw wired. *Id.* at 38-39. Claimant testified he had muscle sprains in his neck and back on occasion while working as a police officer during altercations but could not recall the name of the doctor he saw in Yuma. *Id.* at 39-40. He also stated he has hurt his wrists several times while making arrests. *Id.* at 40. Claimant recalled needing surgery for a torn retina in one of his eyes as the result of a fight when he was employed by the Somerton police. *Id.* at 40-41. He testified he had seen Dr. Hieb in Yuma for a back sprain which occurred when he stepped off a curb while working at the Yuma Proving Ground but did not receive any worker's compensation. *Id.* at 41-42. He stated he was next injured while stepping off a helicopter while working for KBR in Iraq. *Id.* at 43-44. He was treated at the company clinic. *Id.* at 44. He did not recall any continuing pain from this injury until he injured himself in October working for Employer. *Id.* at 52-53.

Claimant testified his accident occurred as he was transporting one or two passengers to the Baghdad airport and hurt his back while lifting a duffel bag in one hand and an armored vest in the other. *Id.* at 46. He stated he felt pain in his mid back which then spread later that day down his left leg. *Id.* at 47. He noted that the pain felt similar to that which he had felt when injured at KBR but was far different than his muscle sprains in earlier employment. *Id.* at 47-48. Claimant stated he worked about seven more days following his accident but did not assist with luggage since he was in pain. *Id.* at 50. He then returned to the U.S. on a scheduled leave and first saw Dr. Serocki although he couldn't recall how he came to see him. *Id.* at 52-52. Dr. Serocki performed a MRI and prescribed physical therapy which aggravated his back pain. *Id.* at 53-54. Dr. Serocki discussed surgery with Claimant but Claimant told the doctor he was not interested in surgery at that point. *Id.* at 54. Claimant stated he saw Dr. McLean at Dr. Serocki's request and also saw Dr. Wesley Johnson. *Id.* at 54-55.

Claimant stated he last saw Dr. Serocki about three to five months ago for medication management. *Id.* at 56. He testified he has taken a muscle relaxant since he first started seeing Dr. Serocki which he currently takes three to four times per week for back and leg pain. *Id.* at 56-58. Claimant noted pain, numbness and weakness in both legs and left thigh. *Id.* at 58. He testified he was currently living in a room rented from a friend in Bard, California just across the border from Arizona as he had to give up his rented apartment in Yuma when Carrier reduced his weekly benefit payments. *Id.* at 61-63, 74.

Claimant testified he has applied for several hundred jobs but was only able to land a part time job inspecting foreclosed homes which he had to quit due to his having to get in and out of the car too much while inspecting 15 to 20 houses a day. *Id.* at 63-64. He worked from September 27, 2012 to the end of October for American Inspection Systems from whom he received the majority of his instructions by e-mail. *Id.* at 65-67. He stated he did not go to see Dr. Serocki since he understood from Dr. Serocki's office that Carrier was no longer paying for Dr. Serocki's care. *Id.* at 64. Claimant testified he has applied for jobs as investigator, loss prevention and dispatcher which are jobs he believes he could perform due to an ability to control somewhat his activities during such jobs. *Id.* at 64-65. He applied for an inspector position with TSA but was told that he would have to lift and move up to 70 pound suitcases up to four hours per day, which he could not physically do. *Id.* at 67-68. Claimant stated he has kept a log of the jobs he has applied for. *Id.* at 68.

Claimant stated he had reviewed the first labor market survey but found that most of the positions were too far away, up to 300 miles from Yuma. *Id.* at 69. He stated he also looked at the second labor market survey and applied at the one or two that were in the area but they had already been filled. *Id.* He applied to work at DHS as well as some other positions but they required a secret security clearance which he does not have. *Id.* at 69-70. He was told it could take up to a year to obtain a security clearance. *Id.* at 71. Claimant testified that federal jobs were being advertised but were not being filled due to the financial situation. *Id.* at 71-72. He stated he applied for jobs locally but could not know whether he could physically perform the jobs without discussing the positions with the employers. *Id.* at 72. He noted he had an interview for a security position with the hospital but was told he had to lift 80 pounds which he didn't think he could do. *Id.* He though that interview was before Dr. Serocki placed a 15 pound lifting limitation upon

him. *Id.* at 73. Claimant stated he does drive his F-250 truck which is not elevated and has running boards. *Id.* at 74.

### ***Summary of Medical Evidence***

Dr. John H. Serocki, a board certified orthopaedic surgeon, first saw Claimant on November 15, 2010, at his office in Yuma, Arizona. CX 1 at 1. Claimant reported his accident of October 23, 2010 while lifting heavy equipment out of his vehicle in Iraq. *Id.* Claimant noted back pain radiating down both legs and mentioned a prior episode of back injury in June of 2009 while working in Iraq with some pain episodes thereafter although he resumed his normal job. *Id.* Dr. Serocki took x-rays which showed moderate narrowing at L5-S1 and diagnosed lumbosacral strain and lumbar degenerative disc disease. *Id.* Claimant was ordered to restrict his activities and take a course of physical therapy. *Id.*

Dr. Serocki next saw Claimant on December 15, 2010, and issued a report to Carrier which had apparently requested that Dr. Serocki examine Claimant. *Id.* at 2. Dr. Serocki noted the same findings and diagnosis and prescribed Arthrotec and Skelaxin and noted he should be considered temporarily totally disabled until his next appointment. *Id.* at 2-3.

Dr. Serocki reported to Carrier on January 12, 2011 that Claimant had completed physical therapy but continued with back pain and increasing radicular symptoms. *Id.* at 5. Dr. Serocki suggested a MRI and continued Claimant on temporary total disability. *Id.*

On March 2, 2011, Dr. Serocki reported to Carrier that the MRI had revealed mild spinal stenosis with bilateral foraminal stenosis at L4-5 and L5-S1 and disc desiccation at L5-S1. *Id.* at 6-7. Dr. Serocki suggested a epidural steroid injection and continued Claimant's status off work. *Id.* at 7.

On April 6, 2011, Dr. Serocki reported to Carrier that Claimant's epidural steroid injection had not given Claimant significant relief and noted he had suggested Claimant consider a consult with a spinal surgeon. *Id.* at 8. Dr. Serocki opined that Claimant could return to modified work status with a lifting restriction of 15 pounds and no climbing, bending or stooping. *Id.*

On April 13, 2011, Dr. Serocki reported that Claimant had returned to see him with increasing severe pain in his back and left leg for which he had decided to see a spinal surgeon for consultation. *Id.* at 10. Dr. Serocki noted Claimant retained the same work restrictions as noted the previous visit. *Id.*

On June 23, 2011, Dr. Terry E. McLean, an orthopaedic spine surgeon in Scottsdale, Arizona, saw Claimant on a consult referral from Dr. Serocki. *Id.* at 12. Claimant reported low back and leg pain that was worsened by prolonged sitting or standing and relieved by laying down. *Id.* at 13. Dr. McLean noted pain and limited range of motion on examination as well as a positive straight leg raising on the left. *Id.* at 14. A MRI performed that day showed disc degeneration at L4/5 and L5-S1 with some disc bulging and left disk protrusion at L5-S1. *Id.* at 11. Dr. McLean opined that Claimant had aggravated his preexisting spondylosis resulting in chronic axial back pain at left lumbar radicular syndrome at L5-S1 with lateral recess stenosis at

L4-5 and L5-S1. *Id.* at 14. Dr. McLean opined further that he did not recommend surgery presently but that Claimant should proceed with transforaminal and facet injections and that Claimant was not permanent and stationary. *Id.* at 15.

On July 6, 2011, Dr. Serocki reported that Claimant had seen Dr. McLean on consult who had opined that although surgery was not indicated, a transforaminal left L5-S1 injection should be performed. *Id.* at 16. Dr. Serocki noted a positive left straight leg raising. *Id.* Claimant was to be scheduled for the injection and to retain the same modified work status with limitations as before. *Id.*

On August 10, 2011, Dr. Serocki reported to Carrier that Claimant had returned for follow up after unsuccessful steroid injection. *Id.* at 17. Claimant noted continued back and leg pain that had somewhat curtailed his activities. *Id.* Dr. Serocki opined that since Claimant did not wish to have any more injections and was not a surgical candidate, he had reached MMI as of that date. *Id.* Dr. Serocki discharged Claimant from his care and rated his back impairment at 9% of the total body pursuant to AMA Guidelines, Sixth Edition. *Id.* at 17. On that same date, Dr. Serocki also completed an OWCP-5c Work Capacity Evaluation stating Claimant was unable to return to his former job but was capable of performing other work at eight hours per day with lifting restricted to 15 pounds and no bending, stooping or climbing. *Id.* at 18.

On February 8, 2012, Dr. Serocki reported to Carrier that Claimant had returned to see him with concerns about his ability to sit or stand for prolonged periods. *Id.* at 19. Claimant reported that sitting or standing more than four hours per day significantly worsened his pain. *Id.* Dr. Serocki modified Claimant's work restrictions to lifting no more than 15 pounds; no climbing, bending or stooping; sitting limited to four hours per day; and standing and walking limited to four hours per day. *Id.* at 19-20.

On May 2, 2012, Dr. Serocki issued a report of Independent Medical Examination at the request of Carrier. *Id.* at 21; also at RX 1 at 1-2. Claimant reported to Dr. Serocki that he still had pain mostly in his back although some in his legs. *Id.* Claimant reported the pain made it difficult to stand or walk more than 15 to 30 minutes per hour and to perform any exercise. *Id.* Dr. Serocki noted that surgery had not been recommended by Dr. McLean but that a repeat MRI and consult with a spine surgeon may be necessary if his symptoms worsened and did not respond to conservative treatment. *Id.* at 22. Dr. Serocki modified his work restrictions to include: no lifting over 15 pounds; no climbing, bending or stooping; walking and standing as tolerated and "be allowed to sit as needed." *Id.*

Dr. Serocki issued a supplement to his IME on June 13, 2012 to clarify Claimant's impairment which he reduced to a 3% total body impairment. RX 1 at 3. Dr. Serocki noted that Claimant did have significant signs of lumbar spondylosis on both x-ray and MRI which would support his need for work restrictions. *Id.* Dr. Serocki suggested a Functional Capacity Evaluation would be helpful in determining the extent of Claimant's work restrictions. *Id.*

On August 1, 2012, Dr. Serocki reported that Claimant had returned to see him. CX 1 at 23. Claimant reported he had not been able to find part time work and that sitting or standing more than four hours per day increased his pain but that Arthrotec afforded some relief. *Id.* Dr. Serocki refilled Claimant's prescription for Arthrotec and continued his work restrictions. *Id.*

Dr. Serocki issued another supplemental IME report in response to Carrier's specific questions on August 22, 2012. RX 1 at 4. Dr. Serocki confirmed that Claimant continued to have low back complaints attributable both to his preexisting degenerative conditions and his October 23, 2010 accident. *Id.* Dr. Serocki noted objective findings of 50% loss of range of motion on lumbar flexion and extension as well as MRI studies showing degenerative disc disease and foraminal stenosis. *Id.* Dr. Serocki opined that Claimant was unable to return to his previous employment due to his symptoms although he is not a surgical candidate. *Id.* Dr. Serocki opined that Claimant sustained a work-related injury on October 23, 2010 which resulted in persistent axial low back pain with contribution from preexisting lumbar degenerative disc disease. *Id.* Dr. Serocki stated that while a FCE was not mandatory, such testing would be able to more precisely define Claimant's ability to perform physical work. *Id.*

### ***Vocational Evidence***

#### *Report of Gary Blackman*

Gary Blackman is a certified rehabilitation counselor who works as a case manager for Carrier in its Chicago offices. RX 2 at 1. On referral from the adjuster, Blackman performed an employability assessment of Claimant and conducted a Labor Market Survey which he reported on December 8, 2011. *Id.* Blackman interviewed Claimant by and reviewed his medical reports. *Id.* at 1-2. Blackman noted that the work restrictions imposed upon Claimant put Claimant at the sedentary work level which made him unable to perform his former work with Employer. *Id.* at 2. Blackman reported that Claimant was evaluated "thru a functional capacity exam and is supported by Dr. Duke." <sup>2</sup> *Id.* Blackman described the permanent physical restrictions as: "1. Maximum lifting of 15 pounds. 2. No climb, bend or stooping." *Id.* Blackman then opined that Claimant, with these physical restrictions and his transferable skills should have prospective employment opportunities at the following occupations: Security Management/Security Sales; Professional Investigator or Dispatching in private business or public agencies. *Id.* Blackman also performed a labor market survey in order to locate actual suitable job positions. *Id.* at 3-4. He located 14 positions involving dispatch or investigative positions that were located well over 100 miles from Claimant's location in Yuma, Arizona. *Id.* at 4-9. Blackman reported a dispatcher opening at the Yuma Regional Medical Center paying \$16.00 per hour. *Id.* at 6. He also noted that he had contacted 9 potential employers about sales or management positions in private security firms and was told that such job openings were rare so he opined that this was not a suitable area to search for Claimant a position. *Id.* at 9-10.

Blackman submitted a second Labor Market Survey Report dated April 13, 2012, noting that he had been asked to limit his survey to jobs within 50 miles of Claimant's residence in Yuma, Arizona. *Id.* at 11. He reiterated his synopsis of Claimant's work history, medical and work restrictions but added Customer Service/Call Center Representative to the list of potential occupations suitable for Claimant. *Id.* at 12. He again contacted seven potential employers for sales or management openings in the security field in the Yuma area and again was told such positions were rare. *Id.* at 16. Blackman identified the following specific job openings:

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<sup>2</sup> Neither the referenced functional capacity exam nor any reports or records of Dr. Duke have been submitted into evidence by any of the parties.

- 1) Human resources personnel technician at Arizona State Prison in Yuma, paying \$12.26 per hour.
- 2) Customer service position working at the front retail desk of Hunter Employment in Yuma, paying \$9.00 per hour.
- 3) Background investigator for CACI in Yuma, paying \$15.80 per hour.
- 4) Customer service and sales for ServiceMagic to be conducted from home office by telephone, paying \$8.50 to \$12.00 per hour.
- 5) Communications assistant for Department of Homeland Security, Customs and Border Patrol in Yuma, paying \$31,315 to \$45,376 per year.
- 6) Property seizure specialist for DHS, Customs and Border Patrol in Yuma, paying \$31,000 to \$42,000 per year.

*Id.* at 14-16.

Blackman noted that these positions appeared to fit within Claimant's physical restrictions and skill level based on comments of the potential employers. *Id.* at 17. He stated the positions paid between \$8.50 to \$15.80 hourly and \$31,000 to \$45,000 on an annual basis. *Id.*

On April 11, 2013, Blackman submitted a third labor market survey. RX 4 at 1. Blackman reported that the position of home inspector was not viable for Claimant due to his work restrictions and lack of training and licensing and was only available on a contract basis. *Id.* at 6-7. Blackman did identify the following positions which he felt were suitable alternative employment for Claimant:

1. Dispatcher for the Yuma Juvenile Justice Center, paying \$12.71 to \$13.34 per hour.
2. Dispatcher for Arizona Western College in Yuma, paying \$12.23 per hour.
3. Customer service representative for AT&T Retail in Yuma, paying \$35,000 to \$35,000 per year.
4. Call center representative for Allstate in Yuma, paying \$11.35 per hour.
5. Telephone sales representative for Safety Sam, Inc. in Yuma, paying \$15.00 per hour.
6. Store protection specialist for Ross/DD Discounts in Yuma, paying \$10.00 per hour.

*Id.* at 4-5.

### ***Other Documentary Evidence***

Carrier filed a LS-206 on November 30, 2010, agreeing to payment of benefits at the maximum weekly rate of \$1,256.84 based on its calculation of AWW at \$1897.89. CX 5.

Employer prepared for Carrier a statement of Claimant's earnings dated February 6, 2011. CX 8 at 1. The document reports Claimant's total earnings from October 29, 2009 through October 28, 2010 to be \$98,949.48. *Id.* It notes that Claimant worked seven days per week at a daily rate of \$171.27 per day. *Id.* The monthly subtotals reflect that Claimant was paid for working a total of 313 days during the preceding year with some substantial days off work in February to March and again in July to August of 2010. *Id.*

A Payment Advice from Employer to Claimant for the period of November 21, 2008 through December 18, 2008 indicates that Claimant was paid a total of \$16,545.42 for that month including completion bonus and hazard pay with a daily rate of \$232.87 shown on the advice. *Id.* at 2.

Claimant submitted a log of his contacts in response to the original labor market survey of Blackman. CX 10. Even though all but the Yuma Medical Center position were located well over a hundred miles from his residence, Claimant attempted to contact all of the potential employers. *Id.* Claimant reported that 10 of the positions had been filled including the Yuma Medical Center position. *Id.* Several employers required applicants to live in the area and another required a state certification and passing of an agility test which Claimant stated he could not pass. *Id.* One of the positions was for a part time job 294 miles from Claimant's residence requiring sitting 8 to 12 hours in a vehicle. *Id.*

Claimant also submitted copies of e-mails and job applications for over 50 positions that he has applied for in May, June, July, August and November of 2012 without any success. CX 15. In response to Blackman's third labor market survey dated April 11, 2013, Claimant submitted a contact list indicating that he had been told on July 8, 2013 that the positions were filled as a dispatcher at the Yuma Juvenile Justice Center; dispatcher at Arizona Western College; call representative for AT&T; and telephone sales representative for Safety Sam, Inc. CX 16. The position as store detective at Ross/DD Discounts was still available on July 8, 2013, but the position was not offered to Claimant. *Id.*

## **CREDIBILITY**

### ***Credibility of the Medical Experts***

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

It is nonetheless generally true that the opinion of a treating physician may be entitled to greater weight than that of a non-treating physician. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n. 3 (2003)(rule similar to the Social Security treating physicians rule, according such physicians special deference); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998)(greater weight afforded to treating physician because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual"). A treating physician's testimony is not, however, automatically entitled to greater weight when the issue is other than the course of medical treatment to be followed. *Duhagan v.*

*Metro. Stevedore Co.*, 31 BRBS 98 (1997). It is the judge who determines credibility, weighs the evidence, and draws inferences; the judge in fact need not accept the opinion of any particular medical examiner. See *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993)(judge determines credibility of expert and weight to attach to expert's opinion). A judge is not bound to accept the opinion of a physician if rational inferences urge a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O. Hearne*, 223 F.2d 755 (4th Cir. 1955). In this case, there is little, if any, difference of medical opinion regarding essential issues.

*Drs. Serocki and McLean*

The opinions of Drs. Serocki and McLean were credible. Nothing in the reports or testimony of these doctors justifies overturning the deference to which their opinions as treating physician and consulting physician are entitled. Indeed, Carrier even retained Dr. Serocki, the treating physician, to perform an IME on its behalf. CX 1 at 21; RX 1 at 1. Dr. Serocki opined that Claimant's spinal conditions were caused or contributed to by his work for Employer. RX 1 at 4. Dr. Serocki further opined that Claimant was unable to return to his work as a transport driver in Iraq. *Id.* Although Dr. Serocki and Dr. McLean disagreed somewhat as to whether Claimant had reached MMI when each saw him, I find that Dr. Serocki's opinion that Claimant reached MMI on August 10, 2011 is the most credible as it took place after Claimant had further active treatment for his back in the form of epidural steroid injection. *Id.* I found no other medical evidence offered to controvert these opinions and thus accept them in this matter.

*Claimant*

I found the testimony of Claimant to be generally credible. I found his description of his accident and medical treatment to be consistent. I also found his testimony regarding his unsuccessful search for work consistent with the other documentary evidence in the record. Accordingly, I have considered his testimony in making the determinations which follow.

*Gary Blackman*

I credit the second and third reports of Mr. Blackman as he actually contacted numerous employers whom he specifically identified in an effort to locate potential suitable alternative employment for Claimant. RX 2 at 14-16; RX 4 at 4-5. I give no credence to the initial report of Mr. Blackman as the jobs identified were located well beyond normal commute distance from Claimant's home with one exception at the Yuma Medical Center which position was not available when Claimant applied. RX 2 at 4-9; CX 10. I further credit his opinion that Claimant could not return to his previous employment. RX 2 at 2. Accordingly, I do credit Mr. Blackman's second and third reports to show potential job opportunities for Claimant.

**CONCLUSIONS OF LAW**

The Act is construed liberally in favored of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953). A judge may evaluate credibility, weigh the evidence, draw inferences, and

need not accept the opinion of any particular medical or other expert witness. *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

### ***Nature and Extent of the Disability***

#### *Nature of Disability & Date of Maximum Medical Improvement*

The claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (Feb. 14, 1985). An injured worker's disability becomes permanent if and when his condition reaches the point of "maximum medical improvement" or "MMI." *James v. Pate Stevedoring Co.*, 22 BRBS 271, 275 (1989). Any disability before reaching MMI is temporary in nature. *Id.* It is the medical evidence that determines the start of permanent disability, regardless of economic or vocational considerations. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Thus, a judge must discuss the medical opinions of record regarding permanency, rather than relying on economic factors, such as the loss of a job, a return by the claimant to employment, or the likelihood of a favorable change in employment. See *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986) (erroneous for the ALJ to use the date that claimant was fired as the date of maximum medical improvement); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6, 9 (1984) (erroneous for ALJ to base permanency determination on date employee returned to work); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 324 (1983) (unreasonable for ALJ to find permanency reached, based on physician's release of claimant to return to work, where the same physician specifically stated that he did not know the exact date on which claimant reached maximum medical improvement); *Williams v. General Dynamics Corp.*, 10 BRBS 915, 918 (1979) (the date upon which the employee was rehired is not a reasonable basis for the date of maximum medical improvement). Likewise, evidence of the ability to do alternative employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

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

The Board has further held that where a claimant undergoes surgery, his condition is permanent only after recovery from surgery. *Walker v. National Steel & Shipbuilding Co.*, 8

BRBS 525, 528 (1978); *Edwards v. Zapata Offshore Co.*, 5 BRBS 429, 432 (1977). The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. *Morales v. General Dynamics Corp.*, 16 BRBS 293, 296 (1984), *aff'd in part, part sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985). Also, a claimant's disability is permanent if the future surgery is not expected to improve the condition. *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988). In fact, if the employee's recovery or ability to do any work after surgery is uncertain or unknown, his disability may be found to be permanent. *White v. Exxon Co.*, 9 BRBS 138, 142 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980). Where surgery would fail to alleviate or cure a claimant's underlying conditions and would only address the symptoms of a condition, but not the condition itself, it was found that MMI had been reached. *Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP*, 227 F.3d 934 (7th Cir. 2000). Where the record contained a medical opinion establishing that the employee's condition was of lasting and indefinite duration, a prognosis that the employee's condition may improve in the future did not preclude a finding of permanency. *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989).

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

In this case, Claimant was initially released to return to work with modifications on April 6, 2011 by Dr. Serocki. CX 1 at 8. Claimant returned to see Dr. Serocki on April 13, 2011, with increasing severe pain and was referred by Dr. Serocki to Dr. Mclean for a spinal surgery consult. *Id.* at 10. Claimant was seen by Dr. McLean on June 23, 2011, who opined that he had not reached MMI as he suggested Claimant pursue further active medical treatment, i.e. – transforaminal and facet injections. *Id.* at 14-15. Dr. Serocki agreed with Dr. McLean's recommendation for epidural injection. *Id.* at 16. Thereafter, Dr. Serocki found Claimant to be at MMI on August 10, 2011 when the injection proved unsuccessful. *Id.* at 17. I find the date of MMI as opined by Dr. Serocki to accurately reflect the date at which Claimant's condition became permanent and stationary. Accordingly, I find that the evidence supports a finding that Claimant was temporarily disabled from November 15, 2010 to August 10, 2011, and that he became permanently disabled commencing on August 11, 2011.

#### Extent of Disability

The extent of a claimant's disability is determined by his/her ability to work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). If a claimant meets the evidentiary burden of establishing that s/he is unable to perform his usual employment because of his/her injuries, then the evidentiary burden shifts to the employer to establish the availability of other jobs that the claimant could perform and secure. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 292 (4th Cir. 2002). If the employer meets its burden by showing suitable alternative employment, the evidentiary burden shifts back to the claimant to prove a diligent search and willingness to work. See *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987).

A claimant's usual employment is his/her regular duties at the time s/he was injured. A claimant's employment immediately prior to the injury is his/her "usual" employment, even if his/her duties had lasted a mere four months and the claimant has had other jobs in the near past. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978).

In this case, there is no dispute that Claimant, with the work restrictions imposed by Dr. Serocki, was unable to return to his usual and customary occupation of crane operator. I accept the opinions of not only Dr. Serocki but also Gary Blackman that Claimant could not perform his prior employment in Iraq. CX 1 at 17; RX 1 at 4; RX 2 at 2. Thus, Claimant has met his initial burden. The extent of a claimant's disability is determined by his/her ability to work. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). If a claimant meets the evidentiary burden of establishing that s/he is unable to perform his usual employment because of his/her injuries, then the evidentiary burden shifts to the employer to establish the availability of other jobs that the claimant could perform and secure.

#### Suitable alternative employment

Based on this evidence, I find that Claimant met his burden in proving that he was unable to return to his usual employment because of his injuries. The burden thus shifts to Respondents to show the availability of suitable alternative employment. The BRB's suitable alternative employment test requires two showings:

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

*Berezin v. Cascade General, Inc.*, 34 BRBS 163, 165 (2000) (quoting *Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). Regarding the second prong, Ninth Circuit case law compels employers to identify specific and actually available jobs, rather than theoretical employment opportunities – a point upon which the BRB agrees. *Berezin*, 34 BRBS at 166. The Ninth Circuit's view is that:

[o]nce the claimant has proved that a work-related injury prevents him from performing his former job, the only remaining issue is the availability of other jobs he can perform. It is appropriate to place on the employer the burden of showing that there are available jobs which the claimant can perform. Otherwise, the claimant would have the difficult burden of proving a negative, requiring him to canvass the entire job market.

*Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980) (citing *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976)). The Ninth Circuit reiterated this requirement, holding that employers must demonstrate the existence of specific job opportunities. *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *cert. denied*, 511 U.S. 1031 (1994). In the Ninth Circuit, the employer must further demonstrate that the claimant “would be hired if he diligently sought the job.” *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *but see Fox v. West State Inc.*, 31 BRBS 118 (1997). The BRB has also held that vocational counselors must identify specific available jobs; general labor market surveys alone are not enough. *Campbell v. Lykes Bros. Steamship Co.*, 14 BRBS 412 (1981); *see also Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987) (must be specific, not theoretical, jobs).

Here, Respondents have submitted three Labor Market Surveys, dated December 8, 2011; April 13, 2012; and April 11, 2013, to show the availability of other employment. RX 2; RX 4. It is well-settled that the employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in close proximity to the place of injury or home. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). Thus, I have placed no credibility upon the initial labor market survey of Mr. Blackman. For the job opportunities to be realistic, the Respondent must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985), the employer’s counsel must identify specific available jobs; generalized labor market surveys are not enough. *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981). The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Company*, 21 BRBS 94, 97 (1988). A showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991). The employer must demonstrate that the claimant “would be hired if he diligently sought the job.” *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In reviewing a labor market survey, a judge must determine the Claimant’s physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. *See Villasenor v. Marine Maintenance Indus.*, 17 BRBS 99, 103, *motion for recon. denied*, 17 BRBS 160 (1985). Should the requirements of a job be absent, it cannot be determined that the claimant is physically capable of performing the job. *Id.* If the vocational expert is uncertain whether any of the positions identified by the expert in the labor market survey are compatible with the claimant’s physical and/or mental capabilities, the expert’s opinion cannot meet the employer’s burden of demonstrating suitable alternative employment. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180, 183 (1991); *Davenport v. Daytona Marina & Boat Works*, 16 BRBS 196, 199-200 (1984).

In order to establish alternative suitable employment, Respondents engaged Mr. Blackman to conduct a labor market survey which he submitted on December 8, 2011 and supplemented on April 13, 2012 and again on April 11, 2013. RX 2; RX 4. These surveys identified the names, addresses, telephone numbers or contact persons for all of the jobs. *Id.* Both the later surveys describe with some specificity the nature of the position and wages offered in most cases. RX 2 at 14-16; RX 4 at 4-5. I find that the positions identified fit within Claimant's prior employment background and mental capabilities and would appear to be well suited to his capabilities and work experience. While some of the positions do not specifically state whether the physical requirements would fit exactly within Claimant's work restrictions, I believe that a number of the identified positions appear to fall within his physical capabilities. Thus, I find that the positions of dispatcher and customer service/telephone sales representative as identified by Mr. Blackman in his later two surveys prove that there was suitable alternative employment for Claimant.

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

Claimant contends that he applied for the positions identified by Mr. Blackman and was unable to procure them and thus the undersigned should discard the labor market survey job opportunities and award him total disability benefits. Claimant has submitted significant evidence of attempts to secure employment at many of the types of positions identified by Mr. Blackman as suitable for him. RX 3 at 63-64, 67-72; Tr. at 37-38, 40-41; CX 15. Claimant sought the job positions specifically identified by Mr. Blackman in his labor market surveys but had no success. CX 10; CX 15; CX 16. The only job position that Claimant was able to procure was a part time foreclosed home inspector job which Claimant had to quit after a short time as his back could not take the getting in and out of the car frequently as he rode from home to home to conduct the inspections. Tr. at 34-6, 38-39; RX 3 at 63-65. Mr. Blackman agreed that such a position was unsuitable for Claimant not only physically but also due to licensing and training issues as well as lack of availability. RX 4 at 1. I thus discard the actual earnings of Claimant of less than \$1,000.00 earned in about six weeks inspecting foreclosed homes as an indication of his ability to earn wages post injury. Further, I find that Claimant has established his willingness to work and his inability to obtain suitable alternative employment despite a reasonably diligent

search. Thus, Claimant has been and remains totally disabled for purposes of the Act since November 15, 2010.

Accordingly, I find that the evidence supports a finding that Claimant was temporarily totally disabled from November 15, 2010 to August 10, 2011, and that he has been permanently totally disabled from August 11, 2011, and continuing.

### ***Average Weekly Wage***

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. 910 (a)-(c), which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage ("AWW"). The computation methods are directed towards establishing a claimant's earning power at the time of injury. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 441 (5th Cir. 1996); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). Under Section 10(a), when a claimant works "substantially the whole of the year" preceding the accident, those wages are used to calculate the AWW. 33 U.S.C. § 910(a); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 609, 38 BRBS 60, 68 (1st Cir. 2004). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. *Hole v. Miami Shipyards Corp.*, 12 BRBS 38, 43 (1980), *rev'd on other grounds*, 640 F.2d 769 (5th Cir. 1981). Where evidence indicates a claimant has not worked substantially all of the previous year, evidence may be utilized as to the wages earned by other employees in the same or similar employment. 33 U.S.C. § 910(b); *Bath Iron Works Corp.*, *supra* at 609. However, where the record lacks evidence of a claimant's wages from the prior work year, as well as evidence as to comparable wages, Section 10(c) of the Act applies. 33 U.S.C. § 910(c); *Bath Iron Works Corp.*, *supra* at 609. In that event, available earnings information regarding the claimant and similarly situated employees may be utilized to arrive at a sum that reasonably represents the annual earning capacity at the time of the injury. 33 U.S.C. § 910(c); *Bath Iron Works Corp.*, *supra* at 609-10.

Claimant argues that his average weekly wage is \$2,212.91 using a Section 10(a) calculation. According to Claimant, although he was a seven day per week worker, he only actually worked 313 days in the 52 weeks prior to his injury. Claimant then arrives at his AWW figure by dividing the total amount earned during the preceding year of October 29, 2009 through October 28, 2010 (\$98,949.48) by the 313 days he actually worked and then multiplying that daily figure of \$316.13 by seven to arrive at the weekly figure of \$2,212.91. *See* Claimant's Post-Hearing Brief at 20-21. Although Respondents refused to stipulate to an AWW figure, their brief is silent as to how the calculation should be made and the correct figure.

Section 10(a) of the Act provides:

If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the

year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. § 910(a).

While Claimant is correct that he meets one of the requirements for application of Section 10(a) in that he was employed substantially all of the preceding year prior to injury, he does not meet the other requirements that he be either a six day or five day per week worker. In *Zimmerman v. Service Employers International, Inc.*, BRB No. 05-0580 Feb. 22, 2006 (unpublished), the Benefits Review Board affirmed calculation of AWW under Section 10(c) since the worker in Kuwait was a seven day a week worker, just as is Claimant in this case. The Board found that Section 10(a) was inapplicable since it refers only to five and six day a week workers. As the evidence clearly demonstrates that Claimant in this case was a seven day a week worker, the undersigned finds that Sections 10(a) and (b) are inapplicable and the AWW determination must be calculated using Section 10(c). Section 10(c) is to be used in instances when neither Section 10(a) nor (b) can be reasonably and fairly applied to calculate a claimant's AWW, or where there is insufficient information for application of those subsections. See *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (5th Cir. 2000); *Taylor v. Smith & Kelly*, 14 BRBS 489 (1981). The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Bath Iron Works Corp.*, *supra* at 610; *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (5th Cir. 1991). Although Section 10(c) permits the use of wages from the claimant's other prior employment in an average weekly wage calculation, it does not require such use, as the administrative law judge is afforded wide discretion in arriving at a Section 10(c) calculation. See generally *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44, *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105 (5th Cir. 2000); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS at 344-345 (1988). Moreover, the use of claimant's earnings with Employer fully compensates claimant for the earnings he lost due to his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The goal of Section 10(c), that of arriving at a reasonable "annual earning capacity," is intended to reflect the *potential* of a claimant's ability to earn. *Id.*

Therefore, the undersigned must calculate Claimant's AWW pursuant to Section 10(c). In making my determination, I consider that "[t]he essential purpose of the average weekly wage determination is to reflect 'a claimant's annual earning capacity *at the time of the injury*.'" *Hall v. Consolidated Employment Systems*, 139 F.3d 1025 (5th Cir. 1998) (citing *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991)) (emphasis added); see also *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991). I am furthermore not limited to considering Claimant's earnings in the year preceding the injury. *New Thoughts Finishing Company v. Travelers Insurance Company*, 118 F.3d 1028, 31 BRBS 51, 54 (5th Cir. 1997). Typically, a claimant's wages at the time of injury

will best reflect the [his] earning capacity. *Hall, supra*. The wage computation includes overseas allowances, including foreign housing allowance, completion awards and cost of living adjustments. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). The computation should also include vacation or holiday pay. See *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Rayner v. Maritime Terminals*, 22 BRBS 5 (1988); *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd per curiam*, 710 F.2d 836 (5th Cir. 1983).

Although Claimant's suggested approach could still be used under Section 10(c) by finding his average daily wage per day *actually* worked, I decline to do so in this case. While Claimant was a seven day a week worker, it is clear that he did not work for a full year without taking time off away from the work site. Claimant testified that he took a scheduled vacation to travel back home shortly after his injury. Tr. at 30-31; RX 3 at 44-46. Claimant testified he had taken off several months previously between working for KBR and being rehired by Dyncorp. *Id.* at 32. Claimant's earnings report produced by Employer clearly reflects substantial vacation time taken off by Claimant in February and March and again in July and August of 2010. CX 8 at 1. It is common knowledge and practice in this type of work, particularly in Iraq and Afghanistan, for workers to take a month or longer off during the course of a year to afford some relief from the seven day a week labor under the hostile conditions. Thus, to calculate the AWW as Claimant suggests would unrealistically inflate the AWW in total denial of the reality that virtually every one of the workers in Iraq take substantial time off just as Claimant did in this case. Accordingly, I find the more accurate measure of Claimant's AWW under Section 10(c) is calculated by dividing his preceding year's earnings of \$98,949.48 by 52 weeks to reach his AWW of \$1,902.87.

### ***Interest***

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Accordingly, interest on the unpaid compensation amounts due and owed by Respondents and the Special Fund should be included in the District Director's calculations of amounts due under this decision and order.

### ***Attorney's Fees and Costs***

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees and costs. A service sheet showing that service has been made upon all the parties, including Claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

## **ORDER**

It is therefore **ORDERED**:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from November 15, 2010, through August 10, 2011 at the statutory maximum of \$1,256.84 per week based on the average weekly wage of \$1,902.87.
2. Employer/Carrier shall pay Claimant permanent total disability compensation from August 11, 2011, and continuing at the statutory maximum of \$1,256.84 per week based on the average weekly wage of \$1,902.87 with annual increases as may be applicable under Section 10(f).
3. Employer/Carrier shall pay interest on Claimant's unpaid compensation benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.
4. Employer/Carrier shall receive credit for all payments made.
5. Pursuant to Section 7 of the Act, Employer/Carrier shall continue to furnish reasonable and necessary medical care and treatment for Claimant's back condition.
6. The District Director is authorized to make the appropriate calculations necessary to implement this Order.

**IT IS SO ORDERED.**

Russell D. Pulver  
Administrative Law Judge