

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 February 2014

CASE NO.: 2012-LDA-613

OWCP NO.: 02-222767

IN THE MATTER OF:

RICHARD LOPEZ

Claimant

v.

DYNCORP INTERNATIONAL

Employer

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
c/o Chartis WorldSource**

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

LIMOR BEN-MAIER, ESQ.

For The Employer/Carrier

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

DECISION AND ORDER

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

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 7, 2013, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered eleven exhibits, Employer/Carrier proffered eleven exhibits which were admitted into evidence along with one Joint Exhibit.¹ This decision is based upon a full consideration of the entire record.²

Post-hearing briefs were received from the Claimant on November 4, 2013, and the Employer/Carrier on December 2, 2013. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

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

1. That the Claimant was injured on November 5, 2011.
2. That Claimant's right leg injury occurred during the course and scope of his employment with Employer, but alleged injuries to other areas of the body are disputed.
3. That there existed an employee-employer relationship at the time of the accident/injury.
4. That the Employer was notified of the accident/injury on November 5, 2011.
5. That Employer/Carrier filed a timely Notice of Controversion.

¹ On November 1, 2013, EX-21 and EX-22, the late received vocational reports from Rapant-McElroy & Associates and the curriculum vitae of Ms. Susan Rapant, were received into evidence. The record was held open for Claimant to file a report on his vocational efforts. On January 7, 2014, Claimant submitted a job application log by facsimile transaction, which is hereby received into evidence as CX-11.

² References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____; and Joint Exhibit: JX-____.

6. That an informal conference before the District Director was held on June 27, 2012.
7. That Claimant received temporary total disability benefits from November 13, 2011 through April 14, 2012 at a compensation rate of \$977.28 for 22 weeks or a total of \$22,147.76.
8. That medical benefits for Claimant's leg injury have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Fact of injury/causation to other body parts other than the right leg.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.
4. Claimant's average weekly wage.
5. Entitlement to and authorization for medical care and services, including reimbursement.
6. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing and was deposed by the parties on March 4, 2013. (EX-16). Claimant testified he is 47 years of age. (Tr. 14). He is a high school graduate. He attended Frank Phillips College for three semesters studying blueprints, metallurgy and welding. (Tr. 15). His vocational history includes hoeing cotton and picking vegetables from the age of ten, performing maintenance work for a hide tannery, installing windshields, and furniture appliance repair work. He also worked for Zachry, as a supervisor in the crane and rigging department. (Tr. 15-16).

Claimant testified that he was out of work for about nine months because he had a motorcycle accident. After his recovery, he began working for Employer in Kandahar City, Afghanistan. (Tr. 16). He left the U.S. for Afghanistan in April 2011. (Tr. 17).

Claimant worked for Employer as a certified crane rigger. His job duties included lifting crane pads, which weighed 20 to 50 pounds. (EX-16, pp. 5-6).

Claimant was injured on November 5, 2011, at a forward operating base where a wall was being built. (Tr. 17-18). Claimant was working on a bunker. His job was to move force protection walls. The walls were "stacked too high". (Tr. 18). It was nighttime, and the only light was from a crane 30 feet away. (Tr. 19). A force protection wall came down on Claimant's head. (Tr. 19-20). Claimant tried to grab the wall and push himself out from underneath it. The wall "bounced off" his right leg. (Tr. 20). Claimant was wearing a hard hat, but he sustained a cut on his nose when the falling wall hit him in the face. (Tr. 20, 23).

After the incident, medics gave Claimant an exercise band and some morphine. They told him to start exercising his leg, and then sent him to his room. The next morning he could not move his head right to left. (Tr. 21). Claimant remained isolated in his tent nine or ten days after the accident. He was then flown to KAF, where medical personnel recommended that he return to the U.S. for treatment. After returning to the U.S., he sought medical treatment from Dr. James Parker who performed x-rays and found a fracture in his leg. (Tr. 22).

Before going to Afghanistan, Claimant testified he never missed work or sought medical treatment for a neck problem. (Tr. 23-24). Regarding injuries he sustained from his motorcycle accident, he stated: he injured his right leg and "had a donor ACL put in it." Regarding any pre-Afghanistan visits to an orthopedist or a neurosurgeon, Claimant testified that he visited one and received injections in his lower back.

Prior to the injury in Afghanistan, Claimant never had any radiculopathy or referred pain. (Tr. 24). Claimant stated his left arm has been tingling and numb. He has a loss of grip strength in his left hand. (Tr. 25).

Claimant testified he has gained 40 to 45 pounds since his injuries. His left arm is "mushy" and has atrophy. (Tr. 26-27). Claimant stated he has depressive symptoms and is a different person. (Tr. 27). He has always provided for his family and would like to be the provider again. (Tr. 27-28).

On cross-examination, Claimant stated he worked as a crane rigger for Zachry before going to work for Employer. (Tr. 28). He was placed on personal medical leave, and received short-term disability after an off-work motorcycle accident. (Tr. 28-29)

Claimant stated he injured his leg in the motorcycle accident. He did not have a helmet on at the time of the accident. (Tr. 30). He also testified that he sustained "road rash" and pain in both of his arms. (Tr. 30-31).

Claimant testified he had two right shoulder surgeries, one in 2001 and one in 2006. In 2001, he had surgery on his right shoulder for a torn rotator cuff. This injury occurred after he strained his right shoulder while "pushing a pump" at work. (Tr. 32-33). He was also diagnosed with degenerative joint disease. (Tr. 33.) In 2006, he sustained a cut to his head, which required staples, after falling and hitting his head on a forklift. (Tr. 33-34, 46).

Claimant testified that he told Drs. Brylowski and Huebner about his prior injuries. However, his medical records indicate he had "no prior injuries." (Tr. 34).

After his work accident in Afghanistan, Claimant was sent to the paramedics. The medical records do not mention Claimant being hit on the head. (Tr. 36; CX-1, p. 1). Claimant underwent a neck MRI, which showed a disc osteophyte complex, indents of anterior thecal sac and uncontrovertible hypertrophy causing mild bilateral foraminal stenosis at C5-C6. The results for cervical disc levels, C2-C3, C3-C4, C4-C5, C6-C7, and C7-T1, were normal. (Tr. 38-39; EX-15, p. 104).

Claimant stated the wall that hit him in the head weighed four tons. (Tr. 39-40)

Medical bills for Claimant's right leg have been paid by Employer/Carrier. (Tr. 40-41). Claimant still gets bills for an MRI. (Tr. 41). In mid-December 2011, Claimant hired an attorney because compensation had not been paid. (Tr. 41-42).

Dr. Parker's records do not show any visit between July 2010 and December 2010. Claimant believed he had surgery on his knee in August 2010. (Tr. 45-46).

Claimant has not applied for Social Security disability. (Tr. 47).

Claimant's present complaints are right leg pain from hip to ankle, left arm pain and neck pain. (Tr. 47-48). His doctor will not release him to return to work. (Tr. 48). He is seeking authorization to return to Dr. Parker for treatment for his right leg. (Tr. 49-50). He stated he never had left arm tingling and numbness before the work accident. (Tr. 50-51). He rated his neck pain at a level five out of ten, for which he takes pain medications prescribed by Dr. Parker with refills. (Tr. 51-52). He has not seen Dr. Parker in one year. He ran out of pain medication one week before the formal hearing. (Tr. 52). Claimant stated he takes approximately two to four pain pills a day and also takes Ibuprofen regularly. (Tr. 52-53). An Emergency Room doctor at Northwest Texas Hospital prescribed medications for his anxiety and depression, Tramadol and diabetes medication. (Tr. 55, 58). Claimant has borrowed pain medication from his wife and diabetes medication from his brother. (Tr. 52, 55-56). Dr. Mann is his primary care doctor who treats his diabetes. (Tr. 57).

Claimant testified he has not applied for any jobs. Employer contacted Claimant offering jobs in Afghanistan; he declined work offers because he has not been released by his doctor. (Tr. 59).

Claimant has not ridden a motorcycle since his accident. Claimant and his wife drove nine hours to the formal hearing. He drives himself to Dr. Parker's office, which is over two hours round-trip. He has not had any car accidents in the past year. (Tr. 60).

On re-direct examination, Claimant testified he had pain in his neck the day after the work accident. (Tr. 61-63). On November 6, 2011, the day after the accident, he complained about his neck to the medics. (Tr. 62; CX-1, p. 2). On November 30, 2011, he complained to Dr. Parker about neck pain and left arm pain, numbness and tingling. (Tr. 63; CX-1, p. 9). On February 17, 2012, he underwent an EMG. Dr. Lewis, the physician who administered the EMG, found Claimant had radiculopathy in his arm from his neck. He recommended that Claimant see a neurologist. (Tr. 64-65; CX-1, pp. 23-24). Carrier has not approved requests by Dr. Parker for a referral to a neurologist. (Tr. 65; CX-1, p. 31).

On re-cross examination, Claimant testified the medic in Afghanistan did not examine his neck. He disputed the medical records indicating that the medic examined his neck. He could not remember if he complained of neck pain during his first examination with Dr. Parker on November 15, 2011. (Tr. 66).

On re-direct examination, Claimant testified he did not have numbness or tingling in either arm before his work-injury. (Tr. 68).

Joy Lopez

Mrs. Lopez has known Claimant for 17 years, and they have been married for five years. (Tr. 69). Mrs. Lopez testified Claimant had a motorcycle accident before he went to Afghanistan. Both of Claimant's forearms were injured in the motorcycle accident, but he had no other health issues, neck pain, numbness or tingling in the arms. (Tr. 70).

Mrs. Lopez stated that since the work accident Claimant has been in pain and depressed. He does little. (Tr. 71). He is "down" and has panic attacks. Claimant is depressed because he cannot provide for his family. (Tr. 72).

On cross-examination, Mr. Lopez testified that a Texas Tech doctor prescribed medications for Claimant's depression and anxiety. (Tr. 73). Claimant also takes Metformin for diabetes and Crestor for high cholesterol. He has not taken Hydrocodone in the last week. (Tr. 74). Claimant has not seen Dr. Parker in over a year. Joe Perry is a physician's assistant with Dr. Parker. (Tr. 75).

Following his motorcycle accident, Claimant had knee surgery. Mrs. Lopez drove Claimant to the formal hearing. (Tr. 76).

On re-direct examination, Mrs. Lopez testified that she and Claimant drove to the formal hearing over several days. (Tr. 76). Claimant drove some of the time, but Mrs. Lopez did the majority of the driving. (Tr. 77).

Claimant has gained 40 to 50 pounds since returning from Afghanistan. He had diabetes before going to work in Afghanistan. He enjoyed his job. (Tr. 77). He wants to return to work. (Tr. 78).

The Medical Evidence

Pre-Employment Medical Records

Claimant presented to Dr. Jesse Perales on September 1, 2000, with pain in the left side of his neck. He was diagnosed with a neck strain. He was released to return to work on September 2, 2000. (EX-15, p. 1).

On April 9, 2002, Claimant underwent a chest radiograph, which revealed minimal degenerative changes in the thoracic spine. (EX-15, p. 3).

On June 23, 2006, Claimant presented to Dr. James Parker with right shoulder pain. He indicated that he was hit by a forklift at work. Dr. Parker noted that Claimant had a right rotator cuff repair in 2001. (EX-15, p. 4). An MRI revealed a partial thickness rotator cuff tear. (EX-15, p. 5). Injections were performed. (EX-15, p. 6). On July 28, 2006, Claimant was released to full-duty work. (EX-15, p. 8). On September 1, 2006, Claimant presented with pain in his right shoulder that began while he was lifting something. (EX-15, p. 11). On October 6, 2006, he complained of pain and soreness. (EX-15, p. 14).

On October 16, 2006, Dr. Parker performed the following procedures on Claimant's right shoulder: a right shoulder arthroscopy with rotator cuff repair, an arthroscopic subacromial decompression, an arthroscopic distal clavicle excision and an arthroscopic debridement of a biceps tear. (EX-15, p. 17). Claimant had follow-up appointments with Dr. Parker on October 26, 2006, November 2, 2006, November 9, 2006, November 29, 2006 and January 3, 2007. (EX-15, pp. 20-31). On January 3, 2007, Claimant indicated he had pain and a catching sensation in his right arm when he raised it or slept on it. He indicated that his right arm had felt numb for two weeks. (EX-15, p. 29). He was released to return to work on February 14, 2007. (EX-15, p. 32).

On July 16, 2010, Claimant presented to the Hansford County Hospital Emergency Room. He was involved in a motorcycle accident, which caused abrasions to his arms, chest and right leg. (EX-15, p. 35). An x-ray of his left shoulder was normal. (EX-15, p. 48). His right shoulder showed no acute abnormalities. (EX-15, p. 49). X-rays of his hands were normal. (EX-15, p. 50). No acute left knee abnormalities were found. A loose bony body in the posterior knee joint was found. (EX-15, pp. 51, 73-74, 77-78, 81). No acute fractures or other

bony abnormalities were found in either elbow. (EX-15, pp. 52, 71, 75, 79). Dr. Parker diagnosed Claimant with a left knee anterior cruciate ligament tear and a left elbow/forearm abrasion. Injections were performed into Claimant's left elbow joint and left knee aspiration. Claimant was given a knee immobilizer. (EX-15, p. 58).

Deployment Medical Records

On November 5, 2011, Claimant was brought to the clinic by his co-workers. The medical records indicate that a tri-wall hit Claimant's right thigh, knee and ankle. Claimant indicated that when the tri-wall fell he scrapped his nose on another tri-wall. The medic noted that Claimant had a minor abrasion to the bridge of his nose. His abdomen was soft and non-tender. He had an abrasion and contusion across the middle of the anterior right thigh, in a diagonal direction. There was notable swelling to the thigh. He had a right knee contusion and a contusion to the medial aspect of the right ankle. His distal pulses were present and strong. (CX-1, p. 1; EX-15, p. 85).

On November 6, 2011, the medic noted that Claimant's right thigh was still swollen, but slightly improved. Claimant indicated that his right thigh and ankle pain had improved. He complained of continued knee pain. He also complained of neck pain "along the sides." On physical examination, his neck was supple. There was no pain to palpation of the cervical spine and no deformity was noted. There was some tightening of the trapezius muscles on each side of the neck. He had a large hematoma to his right thigh with an abrasion. His thigh was markedly less swollen than on his previous visit. His knee had an abrasion and minor swelling. He was able to bear weight on his leg. His ankle had improved, and no swelling or deformity was noted. (CX-1, p. 2; EX-15, p. 86).

On November 10, 2011, Claimant indicated that his thigh and ankle were feeling much better. His right knee was swollen, and he had a limited range of motion. (CX-1, p. 3; EX-15, pp. 87-88). The medic requested an orthopedic consultation. (CX-1, p. 4; EX-15, p. 89).

Parker Sports Medicine and Orthopedics Medical Records

On November 15, 2011, Claimant was evaluated by Dr. James Parker. He indicated that he was injured on November 5, 2011, when a concrete wall fell and crushed his right leg. He rated his pain at an eight out of ten, on a ten scale. He indicated that the pain ranged from his anterior right thigh to his knee, but he was in no acute distress. Dr. Parker indicated Claimant

rated his pain at a three out of ten, on a ten scale, while sitting and talking with Dr. Parker. He indicated that his severe pain was an intermittent, burning pain to the lateral thigh. His knee pain was diffuse throughout the knee. He had some swelling and bruising of his knee and thigh. (CX-1, p. 5; EX-15, p. 94).

On physical examination, Claimant had a full range of neck motion, and "no step offs" were noted. He had a limited range of motion of his right hip and knee, secondary to stiffness and pain along the lateral thigh. His sensation was intact to all dermatomes except at the lateral thigh where there was some hypersensitivity. His strength was a five out of five in the lower extremities. His reflexes were plus two and symmetric at the patellar tendon and Achilles. An x-ray of Claimant's right leg revealed a minimally angulated traverse femur fracture and a right proximal tibia shaft fracture. Dr. Parker prescribed Neurontin. (CX-1, p. 6; EX-15, p. 95).

On November 30, 2011, Claimant presented for a follow-up appointment with Dr. Parker. He rated his right leg pain at a five out of ten, on a ten scale. He also complained of posterior neck pain, which was worse on the left side. He had tingling and numbness in his left arm. He rated his neck pain at a three out of ten, on a ten scale. (CX-1, p. 9; EX-15, p. 98).

On physical examination, Claimant had a limited range of motion of the cervical spine. He had no appreciable weakness in the left arm. His right knee range of motion was from zero to 115 degrees with some quad pain and proximal tibia pain. An x-ray of his cervical spine was negative. His femur and tibia fractures appeared to be healing. (CX-1, p. 9; EX-15, p. 98).

Claimant presented for a follow-up with Dr. Parker on December 28, 2011. Dr. Parker noted that he referred Claimant for an MRI of his cervical spine, but it was denied by Carrier. (CX-1, p. 12; EX-15, p. 101). Dr. Parker prescribed physical therapy and occupational therapy. (CX-1, p. 14; EX-15, p. 103).

Claimant underwent a cervical MRI on January 4, 2012. There was no fracture, destructive lesion or compression deformity. The AP diameter of the cervical spinal canal was relatively narrow on a developmental basis from shortened pedicles. The alignment of Claimant's spine, his spinal cord and his paraspinal area were all normal. A disc osteophyte complex, indents of anterior thecal sac and uncontroversible hypertrophy causing mild bilateral foraminal stenosis were found at C5-C6. The results for cervical disc levels, C2-C3, C3-C4,

C4-C5, C6-C7, and C7-T1, were normal. (CX-1, p. 16; EX-15, p. 104).

On January 18, 2012, Claimant presented for a follow-up with Dr. Parker. He reported that physical therapy had helped and his upper thigh was much better. He reported pain in his medial and lateral aspects of his right knee at night, which he rated at a three out of ten, on a ten scale. On physical examination, his range of motion was from zero degrees to 120 degrees in the right knee. He had a limited range of motion of the cervical spine. (CX-1, p. 18; EX-15, p. 105). Dr. Parker diagnosed Claimant with cervical radiculopathy. (CX-1, p. 19; EX-15, p. 106).

On February 8, 2012, Claimant presented for a follow-up with Dr. Parker. He reported slight pain with physical therapy and palpation of the proximal tibia. His right knee "locked up" on several occasions. He had to "readjust" his knee before he could extend it. His neck symptoms remained the same. He continued to experience occasional numbness of the left arm and radiating pain into his dorsal forearm. He rated his knee pain at a one or two out of ten, on a ten scale, and his neck pain at a four out of ten, on a ten scale. He took Hydrocodone and Ibuprofen for pain, with relief noted. On physical examination, his range of motion was good for the right hip and knee, with some pain laterally at the proximal tibia. He had a full range of motion of the left shoulder with some numbness and tingling in the left arm intermittently. (CX-1, p. 21; EX-15, p. 108). Dr. Parker diagnosed Claimant with degenerative disc disease. He recommended a left arm EMG for a possible brachial plexus injury. (CX-1, p. 22; EX-15, p. 109).

Claimant underwent an EMG on February 17, 2012. (CX-1, p. 23; EX-15, p. 111). There was electrodiagnostic evidence of an early or subacute with on-going denervation, upper trunk brachial plexopathy or C5, C6 and C7 radiculopathies. (CX-1, p. 24; EX-15, p. 112).

On March 5, 2012, Dr. Parker referred Claimant to a neurologist. Claimant rated his leg pain at a zero out of ten, on a ten scale. He reported some tingling in his anterior thigh. On physical examination, Claimant had a full range of motion of his right hip and knee with some intermittent, painless popping in his hip. He had a limited range of motion of the cervical spine with paresthesias in the left arm and hand. He had a full range of motion of the left shoulder, elbow and wrist. (CX-1, p. 25; EX-15, p. 113). Dr. Parker diagnosed Claimant with cervical radiculopathy and brachial plexus injury. He released Claimant with respect to his right leg injury. (CX-

1, p. 26; EX-15, p. 114). However, he also noted that Claimant could not return to work at that time. (CX-1, p. 27; EX-15, p. 115).

On April 9, 2012, Dr. Parker noted that Carrier had not approved the neurologist referral. Claimant rated his neck pain at a three or four out of ten, on a ten scale, with radiation of pain to his left arm and hand. He reported numbness and tingling of the cervical spine on range of motion. (CX-1, p. 28; EX-15, p. 117). On physical examination, Claimant had positive radicular symptoms in the left arm on range of motion of the cervical spine. He had positive Roo's and Allen's tests. He had a full range of motion of the right hip and knee. (CX-1, p. 29; EX-15, p. 118). Dr. Parker noted that Claimant could not return to work at that time. (CX-1, p. 30; EX-15, p. 119).

On May 21, 2012, June 13, 2012 and July 2, 2012, Dr. Parker completed a work form indicating Claimant will not be able to return to work until further notice. (EX-15, pp. 121-123).

Dr. Melborn H. Huebner

On September 5, 2012, Dr. Huebner, an orthopedic surgeon, issued a report after evaluating Claimant on April 2, 2012. Claimant was referred to Dr. Huebner by Employer/Carrier. Dr. Huebner also reviewed Claimant's February 17, 2012 EMG and Dr. Parker's notes dated April 9, 2012 through August 13, 2012. (CX-1, pp. 35, 39; EX-17, p. 2).

An isometric lifting evaluation was performed, which showed a leg lift with an average force of 172 pounds. This placed Claimant in the lifting category of heavy, allowing for occasional lifting of 86 pounds. The arm lift test maneuver showed an average force of 119.2 pounds. This placed Claimant in the lifting category of heavy, allowing for occasional lifting of 60 pounds. The high near lift test showed an average force of 38 pounds. This placed Claimant in the lifting category of light, allowing for occasional lifting of 19 pounds. (CX-1, p. 36; EX-17, p. 3).

Claimant complained of discomfort with palpation over the right and left para cervical area and the right and left trapezial muscle area. He complained of discomfort with range of motion of his neck. His cervical flexion was measured at 26 degrees, extension at 52 degrees, right lateral flexion at 30 degrees, left lateral flexion at 21 degrees, right cervical rotation at 50 degrees and left cervical rotation at 70 degrees. He did not have significant pain with rotation. His pain mainly came from flexion and extension. He had a full range of motion

of both shoulders, elbows, wrists, hands and fingers. He had excellent strength in flexion and extension, internal and external rotation and abduction and adduction of both shoulders. His trapezial muscle function was intact. He had intact sensation over the entire right and left upper extremities. (CX-1, p. 37; EX-17, p. 4).

Claimant denied having any pre-existing neck problems. Dr. Huebner opined that the MRI scan showed pre-existing disc osteophyte complex and mild foraminal stenosis. However, he opined that Claimant's pain complaints were not pre-existing, and were caused by the work-injury. Dr. Huebner recommended a home conditioning program. He opined that Claimant did not have any findings of radiculopathy, and Claimant's complaints of numbness were non-anatomic. He did not recommend injections, surgery or additional diagnostic studies. He recommended a functional capacity evaluation. (CX-1, p. 38; EX-17, p. 5).

On September 17, 2012, Dr. Huebner gave Claimant a zero percent impairment rating for his right lower extremity and a one percent impairment rating for his cervical spine. (CX-1, p. 47; EX-18, p. 1; EX-19, p. 1). He opined that Claimant had a mild degree of disability with respect to his cervical spine. He recommended a functional capacity evaluation. (CX-1, p. 47; EX-19, p. 1).

Dr. Andrew Brylowski

Dr. Brylowski is board-certified in pain medicine, psychiatry and neurology. Claimant was referred to Dr. Brylowski by Employer/Carrier. On March 20, 2013, Dr. Brylowski conducted an evaluation of Claimant. Psychiatric/neuropsychiatric diagnostic interview, psychiatric testing and neuropsychiatric testing were conducted. (CX-10, p. 1). Dr. Brylowski also reviewed Claimant's medical records. (CX-10, pp. 5-6).

Claimant reported pain in the left posterior/anterior neck, back of the head and left arm. He reported daily pain which is aggravated by lying down, activity or driving. He rated his pain at a five or six out of ten, on a ten scale. (CX-10, p. 6).

On physical examination, Claimant had a positive Spurling's test with tingling in his left arm. No muscle spasms were noted. (CX-10, p. 8). His range of motion for his neck was to 40 degrees on flexion, 50 degrees on extension, 45 degrees on lateral flexion to the right, 34 degrees on lateral flexion to the left, 40 degrees on rotation to the right and 80 degrees on

rotation to the left. The range of motion in Claimant's right and left shoulders was normal. His muscle strength was plus five. (CX-10, p. 9). No muscle atrophy, spasticity, rigidity or flaccidity was noted. (CX-10, p. 10). Visible atrophy of Claimant's left bicep was found. (CX-10, p. 11).

Dr. Brylowski opined that Claimant's insight and judgment were poor with respect to his neck condition. He believed Claimant was attributing more decreased capacity to his neck condition than was warranted. (CX-10, p. 15). Dr. Brylowski diagnosed Claimant with mild depression and mild anxiety. (CX-10, p. 16).

Dr. Brylowski opined that Claimant's neck condition and left cervical radiculopathy were "consistent with the history of a wall hitting the claimant in the head but he was wearing a hard hat, turning and lifting himself quickly at the time to get out the way of the moving/falling wall." (CX-10, pp. 19-20). He noted that there was minimal attention to this part of the mechanism of injury throughout the medical record, but it was relevant to Claimant's neck complaints. (CX-10, p. 20).

Dr. Brylowski opined that Claimant had not reached maximum medical improvement with respect to his neck because his condition had not been adequately addressed with conservative treatment, interventional procedures or education. He released Claimant to return to work with a 40-pound intermittent lifting restriction and cautious use of the left upper extremity. He opined that Claimant's neck condition was related to his work-injury. He found signs of radiculopathy. (CX-10, pp. 20-21). He recommended a cervical MRI, chiropractic care and psychophysiological treatment. (CX-10, pp. 21-22).

Dr. Brylowski stated, "In a reasonable medical probability, the condition is not a temporary aggravation as the mechanism of injury, in the context of significant pre-existing congenital and degenerative neck pathology, is likely consistent with minor aggravation." However, he noted that the minor aggravation was significant enough to produce symptomatic radiculopathy, given the significant congenital and degenerative neck pathology. He noted that it was unlikely a major surgical procedure would improve Claimant's overall circumstances and would likely worsen his psychosocial circumstances, neck and arm pathology. (CX-10, p. 22).

The Vocational Evidence

Susan Rapant, Certified Rehabilitation Counselor

On August 27, 2013, Ms. Rapant completed a vocational report and labor market survey. She did not interview Claimant, but she reviewed the medical records provided by Employer/Carrier and Claimant's deposition. (EX-21, pp. 1-6). Ms. Rapant identified the following jobs within a 50-mile commuting radius of Claimant's residence in Borger, Texas, and overseas:

1) "Laborer, Pipe Fitter, Boilermaker Helper, Rigger and Crane Operator" positions with Austin Industrial in La Porte, Texas. The pay for the positions was not listed. The physical demands of the jobs would be discussed at the interview. (EX-21, p. 8).

2) A "Retail Sales Consultant" position with AT&T in Pampa and Amarillo, Texas. (EX-21, p. 9). The position paid \$9.00 to \$11.00 per hour. One to three years of retail/customer facing/sales experience was preferred. The physical demands of the job would be discussed at the interview but included standing for long periods of time and lifting up to 25 pounds. (EX-21, p. 10).

3) A "Meter Reader I" position with the City of Amarillo, Texas. (EX-21, p. 10). The position paid \$8.96 per hour. Related experience was preferred. The physical demands of the job included extensive walking, lifting 100 pounds occasionally, 50 pounds frequently and 20 pounds constantly. (EX-21, p. 11).

4) A "License Plate Inventory Agent" position with Standard Parking in Amarillo, Texas. The position paid \$8.25 per hour. One month of related experience was required. (EX-21, p. 11). The physical demands of the job included standing, walking, reaching, sitting, climbing and lifting 25 pounds occasionally. (EX-21, p. 12).

5) An "Operator Heavy Equipment 1" position with Zachry Industrial in Borger, Texas. The position paid \$8.25 per hour. Three years of experience in industrial maintenance was required. (EX-21, p. 12). The physical demands of the job included standing, walking, bending, squatting, climbing and lifting 25 pounds. (EX-21, pp. 12-13).

6) A "Helper Rigger" position with Zachry Industrial in Borger, Texas. The position paid \$14.42 to \$18.27 per hour. Four years of experience as a Rigger Helper or Journeyman Rigger was required. (EX-21, p. 13). The physical demands of the job included pushing and pulling objects with up to 70 feet per pound of pressure, climbing and lifting 50 pounds. (EX-21, p. 14).

7) A "Rigger 1" position with Zachry Industrial in Borger, Texas. The pay for the position was not provided. Three to five years of industrial maintenance experience was required. (EX-21, p. 15). The physical demands of the job included climbing, standing, walking, bending, squatting and lifting 50 pounds. (EX-21, pp. 15-16).

8) An "Equipment Operator" position with PAE in Antarctica. The position paid \$46,078.43 to \$52,524.94 per year. One year of equipment operation experience was required. The physical demands of the job were not provided. (EX-21, p. 16).

9) An "Office Assistant/Warehouse Assistant" position with URS in Hong Kong. The position paid \$21,389.49 to \$32,862.59 per year. Three years of office experience was required. The physical demands of the job were not provided. (EX-21, p. 17).

10) A "Maintenance Mechanic" position with KBR in Djibouti. The pay for the position was not provided. Two years of related experience was required. The job required completing records, maintaining tools, performing housekeeping activities and following safety rules. (EX-21, pp. 17-18).

Job Application Log

Claimant completed a job application log indicating he applied for the "Laborer, Pipe Fitter, Boilermaker Helper, Rigger and Crane Operator" position on September 7, 2013. He applied for a sales position with AT&T. The "Meter Reader I" position with the City of Amarillo, Texas was closed, but he applied for a bailiff position with the City of Amarillo. He applied for the "License Plate Inventory Agent" position with Standard Parking on September 27, 2013. He applied in person on September 27, 2013, for each of the three positions with Zachry listed in the labor market survey. He applied online for the "Equipment Operator" position with PAE, the "Office Assistant/Warehouse Assistant" position with URS and the "Maintenance Mechanic" position with KBR. (CX-11, p. 1).

The Contentions of the Parties

Claimant was a crane rigger who worked seven to eight months for Employer in Afghanistan. A wall fell on Claimant causing a fracture to his right femur, and injuries to his tibia, hip and shoulder. He contends that he has established compensable injuries to his right knee, right ankle, right hip, left arm, left shoulder and neck. He asserts that he is entitled to all reasonable and necessary medical care related to these injuries. He argues that Employer/Carrier failed to provide substantial evidence that Claimant's injury is limited to his right leg. He asserts that the opinions of Employer/Carrier's evaluating doctors support his contention of injury to his neck and left arm. Claimant also contends he is experiencing depression as a result of his injuries. He relies on the opinion of Dr. Brylowski that his depression, anxiety and fear symptoms are related to his work-injury.

Claimant asserts that Employer/Carrier have failed to establish suitable alternative employment. He contends that he diligently sought employment by applying for positions listed in the labor market survey. Therefore, he asserts that he is entitled to temporary total disability benefits from November 6, 2011 to present and continuing. He argues that his average weekly wage should be \$1,797.73, based on his actual earnings while working for Employer.

Employer/Carrier contend Claimant is not credible. They assert that Claimant misrepresented the facts of the work-accident and misrepresented his medical history. They argue the subjective testimony Claimant provided to his physicians is not credible and renders their findings unreliable. They assert that Claimant failed to account for the source of his pain medications and failed to provide discovery supplementation. They also contend that Claimant changed his story regarding the work-accident.

Employer/Carrier dispute Claimant's neck and psychological claims. Claimant was a crane operator before going overseas and his average weekly wage should be blended between his overseas wages and his prior earnings in the US. They claim his average weekly wage should be \$1,298.58 which yields a compensation rate of \$865.72. They also contend that Claimant's leg has reached maximum medical improvement with a zero percent impairment as of March 2012, and Employer/Carrier is entitled to an overpayment.

IV. DISCUSSION

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

A. Credibility

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

Moreover, in arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n.3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating

physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

Employer/Carrier argue that Claimant repeatedly misrepresented and downplayed his medical history in order to increase the value of his claim. They argue that Claimant attempted to expand a minor or unrelated neck injury into a claim for total disability benefits. They rely on the medical records which indicate that Claimant did not mention neck pain on the day of his accident, he only mentioned neck stiffness on the day after his accident and he did not mention neck pain to Dr. Parker until November 30, 2011. They assert that this evidence indicates that Claimant's neck injury was, at most, minor.

I disagree with Employer/Carrier's assertion. Claimant informed the medics in Afghanistan of his neck pain on November 6, 2011, when he complained of neck pain "along the sides." On physical examination, his neck was supple. There was no pain to palpation of the cervical spine and no deformity was noted. There was some tightening of the trapezius muscles on each side of the neck. During Claimant's first appointment with Dr. Parker on November 15, 2011, he had a full range of neck motion, and no step offs were noted. However, during his second appointment with Dr. Parker on November 30, 2011, Claimant complained of posterior neck pain, which was worse on the left side. He had tingling and numbness in his left arm. Claimant complained of neck pain at each of his subsequent appointments with Dr. Parker and during the evaluations by Drs. Huebner and Brylowski.

Claimant's subjective neck complaints are also supported by objective medical testing. He underwent a cervical MRI on January 4, 2012, which showed a disc osteophyte complex, indents of anterior thecal sac and uncontroversible hypertrophy causing mild bilateral foraminal stenosis at C5-C6. On February 17, 2012, Claimant underwent an EMG, which showed electrodiagnostic evidence of an early or subacute with on-going denervation, upper trunk brachial plexopathy or C5, C6 and C7 radiculopathies.

Employer/Carrier contend Claimant misrepresented his medical history to Drs. Huebner and Brylowski by failing to disclose his prior neck problems. Dr. Huebner's report reflects that Claimant denied having any pre-existing neck problems. Dr. Brylowski's report reflects that Claimant had two prior right shoulder surgeries, but it does not mention pre-existing neck problems. However, I disagree with Employer/Carrier's contention that the opinions of Drs. Huebner and Brylowski are unreliable and unsuitable evidence.

Employer/Carrier point to the following three instances as evidence that Claimant was not forthcoming regarding his medical history: his treatment for a neck strain on September 1, 2000; his April 9, 2002 chest radiograph; and his January 3, 2007 evaluation by Dr. Parker. The 2002 radiograph revealed minimal degenerative changes to the thoracic spine. During the 2007 evaluation by Dr. Parker, Claimant complained of right arm pain and numbness, but it appears that these complaints were related to his right shoulder condition, for which Dr. Parker was treating him at that time. The only instance where Claimant was treated for neck pain was the 2000 incident, which caused him to be off work for only one day. I find it unreasonable to expect Claimant to recall a neck strain that occurred more than 10 years earlier and only caused him to be off work for one day. Further, Employer/Carrier provided Drs. Huebner and Brylowski only "some" of Claimant's prior medical records to review. Accordingly, I find no reason not to give credit and consideration to the reports of all physicians of record.

Employer/Carrier contend Claimant changed his story regarding his work-accident. Following the accident, Claimant told medics that he scraped his nose against a different tri-wall than the wall that landed on his leg. However, at the formal hearing Claimant testified that the same wall that landed on his leg also scraped his face. I find this minor discrepancy does not detract from Claimant's credibility.

Employer/Carrier assert that Claimant failed to account for the source of his pain medications and failed to supplement discovery. Claimant testified that he consumes two to four Hydrocodone pills per day, but he also admitted that his last prescription from Dr. Parker was one year earlier. Claimant also admitted to seeing a physician at the Northwest Texas Hospital Emergency Room. However, he did not supplement his discovery responses to include this treatment. In sum, I find Claimant made inconsistent statements regarding his medication usage and he failed to supplement discovery following his treatment at the Northwest Texas Hospital Emergency Room. These

actions detract from the weight to be accorded his testimony and his claim in general.

Notwithstanding these internal inconsistencies and contradictory statements, I will analyze whether Claimant established a **prima facie** claim for compensation and whether the medical evidence of record rebuts the Section 20(a) presumption, provided the presumption invocation has been met.

B. The Compensable Injury

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

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

33 U.S.C. § 920(a).

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

Under the Defense Base Act, an employee need not establish a causal relationship between his actual employment duties and the event that occasioned his injury. O'Leary v. Brown-Pacific-Mason, Inc., 340 U.S. 504, 506-507 (1951). "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose. Id.

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

1. Claimant's Prima Facie Case

Based on the stipulations of the parties, injury to Claimant's right leg is undisputed. Claimant contends that he has also established compensable injuries to his left arm, left shoulder and neck. He argues that Employer/Carrier failed to provide substantial evidence that Claimant's injury is limited to his right leg. Claimant also contends he is experiencing depression as a result of his injuries. Employer/Carrier dispute Claimant's neck, arm and psychological claims.

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

On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a **prima facie** case that the alleged injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. Bonin v. Thames Valley Steel Corp., 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding an ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have caused his alleged injury); Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-215 (1976).

In the instant case, Claimant complained of neck pain on November 6, 2011, the day after his work injury. A cervical MRI performed on January 4, 2012, revealed disc osteophyte complex, indents of anterior thecal sac and uncontroversible hypertrophy causing mild bilateral foraminal stenosis at C5-C6. An EMG performed on February 17, 2012, showed evidence of an early or subacute with on-going denervation, upper trunk brachial plexopathy or C5, C6 and C7 radiculopathies. Dr. Huebner opined that the MRI scan showed pre-existing disc osteophyte complex and mild foraminal stenosis. However, he opined that Claimant's pain complaints were not pre-existing, and were caused by the work-injury. He did not find signs of radiculopathy. Dr. Brylowski opined that Claimant's neck condition was related to his work-injury, and he found signs of radiculopathy in the left arm. Based on the foregoing, I find and conclude that Claimant's neck condition and left arm radiculopathy are causally related to the compensable injury, and are therefore compensable.

It has been consistently held that psychological impairment is compensable "where a work-related accident has psychological repercussions." Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778, 782 (1981) (quoting Tampa Ship Repair & Dry Dock v. Director, OWCP, 535 F.2d 936 (5th Cir. 1976)).

The Board has further held that the Section 20(a) presumption applies to the issue of whether a psychological injury is causally related to the employment. Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989).

Dr. Brylowski diagnosed Claimant with mild depression and mild anxiety. He recommended psychophysiological treatment. Dr. Brylowski's report links Claimant's psychological condition to his neck problems. He noted that Claimant's insight and judgment were poor with respect to his neck condition, and he believed Claimant was attributing more decreased capacity to his neck condition than was warranted. Claimant and his wife credibly testified of Claimant's behavioral changes and problems which began shortly after the compensable injury. Based on the foregoing, I find and conclude that Claimant's psychological problems are causally related to the compensable injury, and are therefore compensable.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on November 5, 2011, to his neck, and subsequently left arm radiculopathy and psychological problems as a residual of his neck injury, in addition to his right leg injuries, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

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

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

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

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

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

As rebuttal evidence, Employer/Carrier rely exclusively on their argument that Claimant is not credible and the opinions of Drs. Huebner and Brylowski are unreliable and unsuitable evidence because their opinions are based on Claimant's subjective complaints. As discussed extensively above, while there are several instances detracting from Claimant's credibility, I find that the opinions of Drs. Huebner and Brylowski are reliable and suitable evidence. Dr. Huebner and Dr. Brylowski's opinions are based not only on the subjective pain complaints of Claimant, but also on the MRI and EMG testing. Both Drs. Huebner and Brylowski opined that Claimant's degenerative neck condition was aggravated by his work injury. Dr. Huebner did not find signs of radiculopathy. However, Dr. Brylowski found signs of radiculopathy, and he noted that the minor aggravation to Claimant's neck was significant enough to produce symptomatic radiculopathy, given the significant congenital and degenerative neck pathology. Dr. Brylowski also linked Claimant's psychological problems to his neck condition. Employer/Carrier failed to present any rebuttal evidence regarding Claimant's psychological problems. Accordingly, I find that Employer/Carrier have failed to produce substantial evidence to rebut Claimant's neck, left arm radiculopathy and psychological conditions were neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions.

3. Weighing All the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Assuming, **arguendo**, that Employer/Carrier rebutted Claimant's **prima facie** case, I will consider whether the record, as a whole, establishes the compensability of Claimant's alleged injuries under the Act.

Viewing the record as a whole, I find that Claimant established that he suffered a neck injury, left arm radiculopathy and psychological problems. The opinions of Dr. Parker, his treating physician, and Drs. Huebner and Brylowski, experts hired by Employer/Carrier, support his position. As rebuttal evidence, Employer/Carrier rely exclusively on their credibility arguments. Given the foregoing, I find Claimant has shown, after weighing the entire record, that he suffers from compensable injuries to his neck, left arm radiculopathy and psychological problems, in addition to his right leg injuries, as a result of the work-related accident that occurred on November 5, 2011.

C. Nature and Extent of Disability

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

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

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may

be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

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

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

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

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

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record.

Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

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

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

The medical record is devoid of medical opinion relating Claimant's psychological problems to any inability to perform work. Neither Claimant nor his wife testified as to how his psychological problems would prevent him from performing work. Accordingly, I do not find that Claimant has established a **prima facie** case for disability, or any work restriction, based upon his psychological problems.

On March 5, 2012, Dr. Parker released Claimant with respect to his right leg injury, but he never released Claimant to return to work. On September 17, 2012 and October 15, 2012, Dr. Huebner gave Claimant a zero percent impairment rating for his right lower extremity and a one percent impairment rating for his cervical spine. He opined that Claimant had a mild degree of disability with respect to his cervical spine. On March 20, 2013, Dr. Brylowski opined that Claimant had not reached maximum medical improvement with respect to his neck because his condition had not been adequately addressed with conservative treatment, interventional procedures or education.

Based on the foregoing, I find Claimant reached maximum medical improvement on September 17, 2012, with respect to his right leg injury. I find that Claimant has not reached maximum medical improvement with respect to his neck injury and left arm radiculopathy.

On September 5, 2012, an isometric lifting evaluation was performed by Dr. Huebner. It showed a leg lift with an average force of 172 pounds, which placed Claimant in the lifting category of heavy, allowing for occasional lifting of 86 pounds. The arm lift test maneuver showed an average force of 119.2 pounds. This placed Claimant in the lifting category of heavy, allowing for occasional lifting of 60 pounds. The high near lift test showed an average force of 38 pounds. This placed Claimant in the lifting category of light, allowing for occasional lifting of 19 pounds. Nonetheless, Dr. Huebner recommended a functional capacity evaluation to determine

Claimant's work restrictions, which was not performed. Dr. Brylowski released Claimant to return to work with a 40-pound intermittent lifting restriction and cautious use of the left upper extremity. I will follow the restrictions ordered by Dr. Brylowski because the functional capacity evaluation ordered by Dr. Huebner was not performed.

Claimant worked for Employer as a certified crane rigger. His job duties included lifting crane pads, which weighed 20 to 50 pounds. Based on the restrictions imposed by Dr. Brylowski, I find Claimant has established that he cannot return to his former work. Accordingly, Claimant has established entitlement to temporary total disability benefits from November 6, 2011, to present and continuing, unless suitable alternative employment is shown.

E. Suitable Alternative Employment

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

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

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

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

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

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

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

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

Claimant's physical restrictions are set forth in Dr. Brylowski's report dated March 20, 2013, as no lifting over 40 pounds and cautious use of the left upper extremity.

Ms. Rapant provided Claimant with a labor market survey dated August 23, 2013. The physical requirements of the following jobs were not provided: "Laborer, Pipe Fitter, Boilermaker Helper, Rigger and Crane Operator," "Equipment Operator," "Office Assistant/Warehouse Assistant" and "Maintenance Mechanic." Therefore, I find the descriptions of these positions fail to allow for a comparison of the job's requirements with Claimant's physical restrictions. Accordingly, I find these jobs are not sufficient to establish suitable alternative employment.

The "Meter Reader I," "Helper Rigger" and "Rigger 1" positions require lifting which exceeds Claimant's lifting restrictions. Accordingly, I find these positions do not constitute suitable alternative employment.

The "Retail Sales Consultant," "License Plate Inventory Agent" and "Operator Heavy Equipment 1" position appear to comport with Claimant's physical restrictions. However, it is unlikely that Claimant would qualify for the "Retail Sales Consultant" and "License Plate Inventory Agent." One to three years of retail/customer facing/sales experience was preferred for the "Retail Sales Consultant" position, and one month of related experience was preferred for the "License Plate Inventory Agent" position. Accordingly, I find these jobs do not constitute suitable alternative employment because it is not reasonably likely Claimant could secure those positions. Therefore, the only position constituting suitable alternative employment is the "Operator Heavy Equipment 1" position. I am not convinced that Employer/Carrier have met their burden of establishing suitable alternative employment given that they have only shown one job opportunity that Claimant is reasonably likely to secure.

Assuming, **arguendo**, that Employer/Carrier have established suitable alternative employment, I further find Claimant has made a diligent effort to obtain employment. He inquired about the positions on Ms. Rapant's 2013 labor market survey and applied for the positions that were available at that time. While he has not been successful in his search, he has made a diligent effort in attempting to obtain employment and thus remains temporarily totally disabled.

In view of the foregoing, I find Employer/Carrier shall pay Claimant temporary total disability compensation for the period of November 6, 2011, to present and continuing, based on his average weekly wage discussed below.

F. Average Weekly Wage

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

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

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

In addition, Claimant worked as a certified crane rigger for only 30.14 weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979) (36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

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

33 U.S.C § 910(c).

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

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

adequately reflect the Claimant's earning capacity at the time of the injury.

Claimant testified that he worked for employer seven days per week. Further, he was not employed by Employer for substantially all of the year preceding his injury. Therefore, I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

The Fifth Circuit has observed that wages earned at the time of injury will best reflect a claimant's earning capacity at the time and it would be an "exceedingly rare case" where a claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful, or unreliable. Hall v. Consolidated Employment Systems, Inc., 139 F.3d 1025, 1031 (5th Cir. 1998). The judge may compute annual wages using the wages the claimant would have earned in the year preceding injury but for personal business, or a personal illness or injury, such as an automobile accident. Browder v. Dillingham Ship Repair, 24 BRBS 216, 219 (1991); Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 186 (1984) (claimant lost time from work due to an automobile accident).

Claimant contends his average weekly wage should be \$1,797.73, based on only his earnings while working for Employer. He argues that he was out of work from July 16, 2010 until he began working for Employer on April 9, 2011, because of his motorcycle accident. Employer/Carrier contend Claimant's average weekly wage should be based on a blended rate based on his earnings while working for Employer and his earnings for the four years preceding his injury. Claimant earned \$43,281.68, \$52,543.72, \$50,629.63 and \$34,165.95 during the four years preceding his tenure with Employer performing similar rigger work. (CX-14, p. 6). These figures yield an average annual salary of \$45,155.24, and an average weekly wage of \$868.37 ($\$45,155.24 \div 52 = \868.37). Employer/Carrier argue that an average of this figure and the \$1,797.73 average wage he earned while working for Employer more accurately represents Claimant's average weekly wage. By accepting pre-deployment wages, Claimant will receive the benefits of all wages paid by Employer during his period of actual employment, without creating a windfall for Claimant or unfairly penalizing Employer. In the Matter of K.S. v. Service Employee's Int'l Inc., 2007-LDA-00040 (ALJ Romero, 7/16/07); Service Employee's Int'l Inc. v. Director, Office of Workers Compensation Programs, 2013 WL 943840 (S.D. Tex.). Claimant testified that he was out of work for about nine months because he had a motorcycle accident. After his recovery, he began working for Employer in Kandahar

City, Afghanistan. Therefore, I find it proper to compute the annual wages using the wages Claimant would have earned in the year preceding injury but for the motorcycle accident. Accordingly, I find Claimant's average weekly wage to be \$1,333.05 ($\$1,797.73 + \$868.37 = \$2,666.10$; $\$2,665.10 \div 2 = \$1,333.05$).³

G. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

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

33 U.S.C. § 907(a).

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

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

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

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

³ I note based on the National Average Weekly Wage (NAWW) that the maximum compensation rate at the time of Claimant's November 5, 2011 injury was \$1,295.20.

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

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

Having established a compensable right leg injury, neck injury, left arm radiculopathy and psychological problems, Claimant is entitled to all reasonable and necessary medical expenses for such injuries pursuant to Section 7 of the Act.

V. INTEREST

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

States Treasury Bills" Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

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

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.⁴ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

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

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from November 6, 2011 to present and continuing, based on Claimant's average weekly wage of \$1,333.05, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November 5, 2011 work injuries, pursuant to the provisions of Section 7 of the Act and consistent with this Decision and Order.

⁴ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **JULY 19, 2012**, the date this matter was referred from the District Director.

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

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

5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

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

ORDERED this 27th day of February, 2014, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge