U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 May 2014

Case No.: 2013-LDA-00429

OWCP No.: 02-235824

In the Matter of:

ALAN M. CHIASSON,
Claimant

v.

INNOVATIVE LOGISTICS, LLC,
Employer

and

CONTINENTAL CASUALTY CO.,
c/o CNA INTERNATIONAL,
Carrier

APPEARANCES:

GARY PITTS, ESQ.
On Behalf of the Claimant

GREGORY P. SUJACK, ESQ.
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act ("the Act"),[1] brought by Claimant against Innovative Logistics, LLC and Continental Casualty Co.[2] The

[1] 42 U.S.C. § 1651 (2011) (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950).
[2] Hereinafter referred to collectively as "Employer."

matter was referred to the Office of Administrative Law Judges for a formal hearing on 15 Apr 13. All parties were represented by counsel. On 9 Dec 13, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Maria Chiasson
Claimant

Exhibits[4]
Joint Exhibits (JX) 1
Claimant's Exhibits (CX) 1-15
Employer's Exhibits (EX) 1-3

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

FACTUAL BACKGROUND

Claimant is a paramedic and first worked overseas in 2006. He worked in Iraq and Afghanistan for several different employers and on contracts of varying lengths. In November 2012 he was lifting weights as part of his personal fitness program and reported he sustained an injury doing so. He subsequently left Afghanistan, but has since returned to other work, include some work overseas.

STIPULATIONS[5]

1. If Claimant was injured as alleged, there was an employer-employee relationship at the time of the injury.[6]
2. There was timely notice, claim, and controversion.
3. An informal conference was conducted on 25 Mar 13.
4. No compensation and no medical benefits have been paid.

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Counsel were cautioned that since one exhibit (specifically CX-5) appeared to be an *en globo* collection of records, counsel must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr. 6.
[5] JX-1; Tr. 7-11.
[6] Employer did not stipulate that the alleged injury would fall within the coverage of the Act and in fact argues that it does not.

ISSUES IN DISPUTE & POSITIONS OF THE PARTIES

Claimant maintains that he sustained an injury during the course of his employment with Employer while lifting weights in Afghanistan. He argues that he has since had periods of temporary total and temporary partial disability. He submits that he is currently temporarily totally disabled and seeks medical benefits in accordance with Section 7 of the Act. Claimant also argues that his average weekly wage (AWW) at the time of his injury was $3,000.

Employer responds that Claimant did not suffer any injury while weight lifting or otherwise and, even if he did injure himself while weight lifting, such an injury would not fall within the coverage of the Act. It suggests that his average weekly wage at the time of the alleged injury was $2,650.14 and that if he did sustain an injury during the course of his employment, his wage-earning capacity is now $2,250 per week.

LAW

Causation

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of and in the course of employment[.]"[7] In the absence of substantial evidence to the contrary, it is presumed the claim of an employee comes within the provisions of the Act.[8] The presumption takes effect once a claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.[9]

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.[10] These two elements establish a *prima facie* case of a compensable injury supporting a claim for compensation.[11]

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[7] 33 U.S.C. §902(2).
[8] *Id*. at §920(a).
[9] *Gooden v. Dir., OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998).
[10] *Id., citing Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981), *aff'd sub nom. Kelaita v. Dir., OWCP*, 799 F.2d 1308 (9th Cir. 1986).
[11] *Id.*

A 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.[12] The presumption does not apply, however, to the issue of whether physical harm or injury occurred[13] and does not aid the claimant in establishing the nature and extent of disability.[14]

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that the claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by them.[15] "Substantial evidence" means evidence that throws factual doubt on the claimant's *prima facie* case."[16]

Once an employer offers sufficient evidence to rebut the presumption, it is overcome and no longer controls the outcome of the case.[17] 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.[18]

Coverage

Under the Defense Base Act, the Supreme Court has allowed benefits where the injury did not occur within the boundaries of work, but the employee was in a "zone of special danger."[19] Thus, the effect of the doctrine is that "an employee need not establish a causal relationship between his actual employment duties and the event that occasioned his injury. All that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose."[20] An injury during horseplay at a social club in a remote island[21] and an injury resulting from resisting military police[22] fall within the zone of special danger created by employment.

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[12] *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359 (5th Cir. 1982).
[13] *Devine v. Atl. Container Lines, G.I.E.*, 25 BRBS 15, 19 (1990).
[14] *Holton v. Indep. Stevedoring Co.*, 14 BRBS 441, 443 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112, 119 (1979).
[15] *See Gooden*, 135 F.3d at 1068; *Conoco, Inc. v. Dir. [Prewitt]*, 194 F.3d 684, 690 (5th Cir. 1999), *citing Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).
[16] *Id.* at 231.
[17] *Noble Drilling Co.*, 795 F.2d at 481.
[18] *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997).
[19] *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Edmonds v. Al Salam Aircraft Co.*, BRB No. 01-0602 (April 5, 2002).
[20] *N.R. v. Halliburton Svcs.*, BRB No. 07-0810 (June 30, 2008) (internal quotations omitted, *citing O'Leary*, 340 U.S. 504).
[21] *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085 (9th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004).
[22] *N.R. [Rogers] v. Halliburton Services*, 42 BRBS 56 (2008) (McGranery, J., dissenting).

Nature and Extent

Once it is determined that a claimant suffered a compensable injury, the burden of proving the nature and extent of the disability rests with him.[23] The question of extent of disability is an economic as well as a medical concept.[24] Total disability is the complete inability to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to the work-related injury. "Usual" employment is the claimant's regular duties at the time of injury. In this case, the claimant does not need to establish that he cannot return to any employment at this point, only that he cannot return to his former employment.[25]

If the claimant can establish a *prima facie* case of total disability, the burden of proof shifts to the employer to establish that suitable alternative employment exists, and that the claimant is capable of performing it.[26] The trier of fact may rely on testimony of vocational counselors to establish the existence of suitable jobs.[27] If the vocational expert is uncertain, however, about whether the positions he identified are compatible with the claimant's physical and mental abilities, the employer's burden is not met.[28]

Section 7 Medicals

Section 7 of the Act provides that the employer shall furnish such medical treatment as the nature of the injury and process of recovery may require.[29] For a medical expense to be assessed against the employer, it must be reasonable and necessary.[30] The claimant must establish that medical expenses are related to the compensable injury.[31] The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment.[32] A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[33] An employer is only liable for the reasonable value of medical services.[34]

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[23] *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).
[24] *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 842 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[25] *Eliott v. C&P Tel. Co.*, 16 BRBS 89, 91 (1984).
[26] *Turner*, 661 F.2d at 1039.
[27] *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985).
[28] *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991).
[29] 33. U.S.C. § 907(a).
[30] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).
[31] *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981).
[32] *Lindsay v. George Wash. Univ.*, 279 F.2d 819 (D.C. Cir. 1960).
[33] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).
[34] 20 C.F.R. § 702.413; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 518 (1978).

The ALJ must make specific findings of fact regarding an employer's claim that a particular expense is non-compensable.[35] The judge has the authority to determine the reasonableness and necessity of a procedure refused by the employer.[36] A claimant is entitled to reimbursement for medical expenses paid when she has first requested authorization prior to obtaining the treatment.[37] A claimant is not required to request authorization from her employer when she seeks medical treatment on an emergency basis.[38]

AWW

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[39] which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed toward establishing a claimant's earning power at the time of injury.[40] The objective of subsection 10 is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.[41]

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, her annual earnings are computed using his actual daily wage.[42] Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, her 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.[43]

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. If neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then Section 10(c) is appropriate.[44]

Section 10(c) of the Act provides:

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

[35] *Monrote v. Britton*, 237 F.2d 756, 759 (D.C. Cir. 1956).
[36] *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).
[37] 33 U.S.C. § 907(d)(1); 20 C.F.R. § 702.421.
[38] *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 103 (1997).
[39] 33 U.S.C. § 910(a)-(c).
[40] *SGS Control Servs. v. Dir., OWCP*, 86 F.3d 438, 441 (5th Cir. 1996), *quoting Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).
[41] *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244, 249 (1976).
[42] 33 U.S.C. § 910(a) (2011).
[43] 33 U.S.C. § 910(b) (2011).
[44] *Gatlin*, 936 F.2d at 821.

> employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.[45]

According to the language of the Act, administrative law judges have broad discretion in determining annual earning capacity under subsection 10(c).[46]

EVIDENCE

Claimant testified at hearing in pertinent part:[47]

> He is 54 years old. He was in the U.S. Navy as a hospital corpsman and got certified as a paramedic. After his discharge, he started working for an ambulance company and did EMS work. He also attended a fire academy in San Antonio and worked as a volunteer firefighter. Eventually he got a spot as a professional firefighter and did that for four years. After that he was an ER paramedic in the Houston area and volunteered as a tactical medic with the Houston ISD, a swat team. He did that for about ten years and then started working overseas.
>
> His first job overseas was as a Personal Security Detachment (PSD) team medic for Dyncorp International. He was the medic for a team of security operators. That was in March of 2006. He was doing essentially the same work in Iraq and Afghanistan until he got injured. He had a variety of different employers, but the same basic job.
>
> He had never had a doctor tell him he had a cervical problem. He had X-rays for his Texas Task Force physical, but those didn't show evidence of prior injury. Prior to 14 Nov 12, he had never had a hospitalization because of a neck injury. He had been in some fights and has done some boxing. Once in 1998, one of his EMS patients broke his nose. When he was 15, he had a fracture of his L5. He got in a fight in Afghanistan in 2009 and he was on the losing end, but he didn't go to the hospital or anything. He was in above-average shape right before the injury and wasn't having any neck pain or persistent headaches.
>
> He participated in bar room brawling, which is sanctioned by pubs that have a ring in the center. They use gloves and referees and everything. He has also been in street fights without gloves while he was in high school, while he was in the Navy, while he was in Canada after the Navy, and at least once in Afghanistan. The last one was in October of 2009 against a mixed martial arts fighter who did "ground and pound," which means he takes a position on top and starts pounding. At the time that fight broke up, the man he was fighting was on top. He had some head shots, body shots, and there was twisting and grabbing. There were no gloves or tape involved and it took about five guys to break up the fight. He didn't have any neck problems or other problems after that fight. He has not had any other fights in the last couple of years.

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[45] 33 U.S.C. § 910(c) (2011).
[46] *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549, 550 (1981).
[47] Tr. 25-69.

Between 14 Nov 11 and 14 Nov 12, he had four employers and three contracts. From 15 Nov 11 to 31 Dec 11 he worked for URG. Then he was off for 30 days and came home. Then he went back to work in February 2012 for Dyncorp and worked there until the end of May 2012. Then he was off for about five days and transitioned to work for Reed starting 5 Jun 12 until the end of July 2012. Finally, there was Innovative Logistics, which took over the Reed contract and they paid him between 1 Aug 12 through the end of November 2012.[48] His annual wage was $156,000.

The routine was that on their days off, they were still considered employed as the quick reaction force (QRF), but the other teams are running the missions. On those days he scheduled a harder training day and spent more time in the gym. When he was working, he would just do light training. A harder training day meant heavier weights and longer periods of time.

On 14 Nov 12, he was going heavy, training in the gym. He was halfway through a shoulder routine and doing shoulder presses on a bar bell with a Smith machine on his neck. He got up to 125 pounds behind his neck and did about three reps when he felt some pain on the left side of his neck between his shoulder blades. He tried to walk it off and tried pressing some dumbbells but had pain on the left side so he stopped, went back to his room, and took some Motrin. The next day, when he woke up he couldn't turn his head at all to the left and was in a lot of pain. He had to do a mission so he just dumped a lot of medicine on board and went.

He had to wear PPE gear, between 65 and 75 pounds of weight. He had his full kit on and was in a vehicle going over the roads, which are really bad. That day they were on a mission from Kabul through Sirobi to Jalalabad that follows a road along a cliff face that has a lot of falling rocks and other things that get in the way. His neck bothered him the entire time.

After he hurt it, he stayed out of the gym, which is unusual for him. He usually lifted every day and when he didn't lift, he did cardio. After five days, he went in to do a basic workout with light weights and started bench pressing, but couldn't do even one repetition on the bench with limited weight. He realized he wasn't completely healed.

He went to see a medic. He wasn't sure if he hurt himself by lifting weights, it just kept getting worse. He was just talking about the symptoms that brought him to the clinic that day. They upped the dosage on the NSAID anti-inflammatories, which was Keterolac, by injection. He saw the medic about five days after hurting it. He determined that it was the weight lifting that caused him the neck problems about five days after he did it.

He was also acutely hypertensive so he got Lisinopril for his blood pressure and the medic told him if he didn't feel better the next day he needed to go to Kabul. The next day his blood pressure was still elevated, he had a really bad headache, he could hardly move, and his blood pressure was still elevated; so they took him to the clinic in Kabul. Because his neck was so sore, he had an ataxic gait.

[48] CX-5 at 29.

When he got to the clinic, they admitted him on the spot and he was there for three days. Then they sent him to Dubai, where they did an MRI of his neck on 22 Nov 12.

Since he got back he worked for Performance Systems Medical as a part-time instructor/trainer. They sell specialized medical equipment and require training for their own employees. He goes to those locations. It pays well when there is work, but there's not enough to sustain full-time employment. It's light duty and there's no lifting except of the equipment, which doesn't weigh more than 10 or 15 pounds. He's only taught three times with Performance, and made about $400 each time for a total of $1200.

He also worked for Amestar Ambulance, which was bought out by Emcore as an event medic and trainer. He made about $1200 to $1500 every two weeks with them. He became a supervisor when Emcore bought Amestar. Then Emcore folded and everyone was laid off.

He went overseas to Medi Corp Global as an instructor and combat lifesaver for two months, getting back a couple days before Thanksgiving. They paid him about $235 per day. They offered him an extension for a different position as a clinical paramedic, but he hasn't taken it yet. He will be able to take it if it's available. Usually contract extensions are about six months, but the one he signed was for two months. He had the court date here and he's not sure what the physical requirements are for the extension, which would be as a clinical paramedic in Iraq.

If he can't find anything locally, he would take that position. It was a routine, repetitive job. He didn't have to wear any protective equipment or carry any weapons. He did a lot of standing and teaching for eight hours a day with breaks in between classes. The clinical paramedic job would have a more expanded scope than a general paramedic, because there is a lot less medical direction and the paramedic can do things like surgical intervention and more invasive techniques. Those aren't part of a standard of care for state certified paramedics; it's more like tactical combat casualty care. He was led to believe he might have a drop in his pay because they couldn't afford him, since he was making more money as an instructor. The extension offer was verbal, and no terms have been discussed.

In Afghanistan, when he was doing security work, he had to wear PPE gear weighing between 65 and 75 pounds. He would be in the full kit anywhere from 12 to 18 hours per day. Here in Houston, he has a routine shift and gets maybe six or seven calls in a 24-hour period. He doesn't have to wear body armor. He can rest in between. It's a very routine job.

He has been given a 25-pound lifting restriction, but he hasn't been abiding by that. He tries to make a conscious effort, but sometimes when he's having a good day or does something out of habit, he'll do something that causes pain. He doesn't sleep well anymore. He has to sleep on his side or his back. He has a stiff neck, decreased range of

motion, and headaches. It's not as bad as when he originally hurt it; now it's basically tolerable.

Being in good shape is a prerequisite of these jobs, from being a firefighter to the Texas Task Force to a tactical medic to contracting.

He saw Dr. Davidson because he was trying to get a referral for a neurosurgeon and asked if she would see him pro bono. He had a phone consultation with a neurosurgeon, but didn't actually see one.

CX-6 is a letter from Justin Perkins. He asked Mark Buford to prepare the letter then later found out Justin had taken Mark's position as the operations manager, so he filled it out. He did not talk to Andrew Harold to have him prepare the first report of injury.[49] He gave the best history of his injury that he could. He doesn't know why the report at CX-1 says "no history of trauma."[50] At the Canadian Specialist Hospital, he did tell them he had a headache and neck stiffness. He had also been vomiting for ten days. He thinks that was because of the blood pressure medication. When he talked to Justin, he had nausea, but no vomiting. At the Canadian Specialist Hospital he did not communicate with the doctor for two or three days. The PA who transported him was the one who provided the original report. That was before he was in the Canadian Specialist Hospital.

Maria Chiasson testified at hearing in pertinent part:[51]

She has been married to Claimant for 22 years and they have three children and two grandchildren. Before Claimant went overseas, he was in great condition. He could do everything himself. She never heard him complaining about his neck prior to going to work overseas. He worked overseas for about six or seven years as a combat medic and security officer.

Claimant was home for a 30-day leave at the beginning of 2012 and he did not complain about his neck at all during that time. The first she heard he was injured, she got a phone call from Dubai that he was in the hospital there. Claimant told her he was doing something and he hurt his neck or that he was having headaches and he didn't know what the pain was coming from so he tried to self-medicate but it wouldn't go away.

Since he went home on his leave, they talked on Facebook messenger and via Skype, but not with video. She did not know Claimant was in a fight while he was working overseas.

Before he could do stuff himself, but now they have to ask people. If she has to move something heavy, she'll get her son-in-law or somebody to come help because he can't do it. Claimant always has these headaches that come and go. He can't turn his head over his shoulder. He hasn't had any accidents or injuries since 14 Nov 12 that she knows of.

[49] CX-7; EX-1.
[50] CX-1 at 14.
[51] Tr. 19-29.

When she met him when he was 30, he didn't have any physical limitations. She doesn't know of anything other than his accident overseas that caused his neck problems.

Claimant is a licensed paramedic and has worked in various jobs since he came home. He recently went overseas again and just got back a few weeks ago.

Claimant's medical records state in pertinent part:[52]

On 20 Apr 10, he filled out a medical history and examination for foreign service form. He stated that he had no history of joint or back pain or injury. His examination was normal with respect to musculoskeletal issues. Dr. Benjamin Oei determined he had no medical conditions that required medical supervision or access to emergency or specialized care.

On 19 Nov 12, Claimant received an invoice from the French Field Medical Hospital for a scan for a total of $200.01.

On 22 Nov 12, Dr. Nouruldeen referred Claimant for an MRI of his cervical spine. It showed a posterior disc bulge at C3-4, causing ventral thecal sac compression and bilateral neural foraminal narrowing with exiting nerve root compression. Bilateral facetal hypertrophy was noted. There was also a diffuse disc bulge at C4-5, causing ventral thecal sac compression and narrowing of both neural foraminae. Mild compression of exiting nerve roots were seen on both sides, and facetal hypertrophy was noted on the left contributing to neural foraminal narrowing. There was diffuse disc bulge at C5-6 with ventral thecal sac compression and bilateral neural foraminal compromise with exiting nerve root compression. Facetal hypertrophy contributing to foraminal compromise was noted on the left. At C6-7, disc signal was altered suggesting disc dessication with mild reduction of disc height. There was diffuse disc bulge with ventral thecal sac compression and bilateral neural foraminal compromise with exiting nerve root compression. Facetal hypertrophy was noted on the right, contributing to foraminal compromise. At C7-T1, the disc height was normal, but the disc signal was altered, suggesting disc desiccation. There was no disc contour abnormality, central canal narrowing, or neural foraminal narrowing. The facet joints were within normal limits.

Claimant was admitted to Canadian Specialist Hospital on 22 Nov 12 with complaints of headache, neck stiffness, and vomiting. On examination, Claimant had neck stiffness and an ataxic gait. The MRI revealed multiple cervical disc prolapse. A lumbar puncture and CSF analysis were all normal. Claimant was diagnosed with cervical spine spondylosis and was advised to avoid lifting any heavy weight, including a helmet and a vest, and to follow up with a doctor in his home country. He was discharged on 26 Nov 12.

On 14 Dec 12, Claimant was referred for a neurosurgery consult by Dr. Latha for degenerative spinal conditions. Claimant related that he developed neck stiffness and headache one day. Claimant's main concern was his headache and that he could not bend

[52] CX-1, 9; EX-2.

his neck forward, backward, or turn sideways. Claimant could not return to work due to the findings on his MRI, and had been told not to lift anything over 25 pounds.

On 25 Feb 13, Dr. Davidson at the Well-Care Clinic referred Claimant to an ortho-spine specialist and stated that Claimant had sustained a neck injury while in Afghanistan on 14 Nov 12. She diagnosed him with cervical spine disc herniation. She stated that he could not wear a Kevlar vest and helmet and was unable to perform his usual job. She said Claimant could work in relaxed industry as an instructor, trainer, dispatcher or other administrative position, with limitations on standing, reaching above his shoulder, lifting, and climbing. Claimant was not at MMI and needed to be reevaluated in six months.

Letter from Justin Perkins states in pertinent part:[53]

He was one of three other medics working with Claimant on mobile security teams. Claimant performed his duties well and was considered a valuable member of the team. Claimant's fitness level was above average. He performed physical exercise, mainly weight training, on a daily basis. Claimant returned from a 30-day leave on or around 30 Oct 12 and worked without any issues until mid-November, when he injured himself while lifting weights in the gym. Because Claimant is a medic, he self-diagnosed and self-medicated for a suspected minor muscle injury with associated headache. Claimant stayed out of the gym for approximately one week while symptomatic. Claimant continued to run missions, but complained of pain and his symptoms became increasingly intolerable. Eventually Claimant asked to be evaluated in the clinic to establish a synopsis and possible referral for higher level of care.

During his initial exam, he found Claimant to be in hypertensive crisis with associated complaint of neck pain, limited range of motion, and headache. He stopped the exam and escorted Claimant to the American Medical Clinic in Kabul where he was admitted for observation and continued diagnosis. Claimant was then transferred to the Canadian Specialty Hospital in Dubai and reported to him that an MRI there revealed several prolapsed discs in his cervical spine, making him unfit for duty and unable to return to work.

Various Department of Labor forms state in pertinent part:[54]

An LS-202 dated 28 Nov 12 reported that Claimant was injured on 21 Nov 12 during his usual work. Claimant approached an officer of Employer and stated he needed to be seen by a higher-level health care provider for persistent and increasing neck and head pain, the exact onset of which was not known. An LS-203 dated 28 Nov 12 stated Claimant was injured on 14 Nov 12 and the injury occurred "while working out in the gym, while sleeping, while on mission." Claimant stated he pulled a muscle in the gym and woke up with a stiff neck. He continued to work, but stayed out of the gym for 5 days, when he felt good enough to work out. He only finished half of his routine because he felt something was wrong and then went to the medic. An amended LS-203 dated 19 Feb 13

[53] CX-6.
[54] CX-2-4, 7, 10-12; EX-1.

states that the injury occurred "while working out in the gym and rough roads while on mission."

Various wage forms state in pertinent part:[55]

A letter of offer for contract from Unity Resources Group (Unity) dated 10 Dec 11 states that Claimant would be paid $450 per day with normal operations periods of nine weeks followed by a leave period of three weeks. During an induction course, the pay was $100 per day for no longer than seven days.

A foreign service employment agreement from DynCorp International FZ-LLC states that Claimant would receive $282.59 for each day worked, for a contract period between 21 Mar 12 and 31 May 12. On 14 Mar 12, he was paid for the period ending 8 Mar 12 an amount of $10,593.65. On 10 Apr 12, he was paid $14,813.85 for the period between 9 Mar 12 and 5 Apr 12. For the period between 6 Apr and 3 May 12, he was paid $13,451.28, for a stated total of $39,058.78.

Claimant received two checks from Reed, Inc. On 13 Jul 12, he was paid $9,512.40 for the period between 1 Jun and 30 Jun 12. On 15 Aug 12, he was paid $12,265.50 for the period between 1 Jul 12 and 15 Aug 12, for a total of $21,777.90. Claimant's 2012 W-2 wage summary from Reed, Inc. states that he earned $23,400.

The agreement between Claimant and Afghan Maiwand Security Company (Employer) states that Claimant will be paid $13,000 per month, and partial months worked will be prorated. Claimant was paid $13,000 for the month of August 2012, $13,000 for September 2012, $1,677 for October,[56] and $12,566 for November, for a total of $40,243.

Claimant's post-injury wage records indicate in pertinent part:[57]

From 13 Jan 13 to 26 Jan 13, Claimant earned $1,525.49 working for Emcorps, Inc. From 27 Jan 13 to 9 Feb 13, Claimant earned $1,732.01. Between 10 Feb 13 and 23 Feb 13, he earned $1,950.22. From 29 Jul to 11 Aug 13, Claimant earned $1,669.50. As of 16 Aug 13, his year-to-date pay from Emcorps was $29,676.15. On 29 Aug 13, $470.43 was deposited into his account from Emcorps.[58]

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[55] CX-5 (as cited, see n. 4), 14; EX-3.
[56] The contract states that up to $2,000 will be paid for leave travel.
[57] CX-8, 15.
[58] Claimant states that this was the net pay, which was 83.582% of his gross pay, which would have been $562.84. In the absence of any evidence to the contrary, it appears that this calculation is correct and Claimant's total earnings at Emcorps were $30,238.99.

ANALYSIS

Causation

Employer conceded in its brief that Claimant was able to establish a *prima facie* case of causation. However it also argues that the presumption was rebutted, suggesting that Claimant was not credible because he did not immediately report the injury and that the absence of evidence of "trauma" in the record was sufficient to cast factual doubt on the *prima facie* case and place back upon Claimant the burden of proving causation by a presumption of the evidence.

I do not find an absence of a fresh complaint. Justin Perkins' statement indicates that Claimant did report that he was injured while lifting weights. While it is not clear when Claimant gave that history and it does appear that they were friends, Employer offered nothing to directly contradict or rebut that specific statement. Moreover, the form completed by Claimant within weeks of the injury clearly states that he injured his neck at the gym. I do not find that the record casts factual doubt on Claimant's *prima facie* case.

However, if I did, I would still find that Claimant was able to establish causation by a preponderance of the evidence. Claimant credibly testified that he was training in the gym on 14 Nov 12 when he increased his weight to 125 pounds and felt pain on the left side of his neck. Contrary to Employer's assertions, there is a specific point of trauma. Given his background, it is not surprising that he self-medicated and altered his usual fitness regime rather than immediately seeking medical help from someone else. In the meantime, he continued to work, wearing a full kit of protective gear and traveling over rough roads. He testified that when his condition did not improve, he went to a medic, who took him to a clinic in Kabul. Eventually an MRI of his neck revealed bulging in his cervical discs, as well as foraminal narrowing and nerve root compression. Indeed, Claimant was credible in his description of the pain he felt while lifting weights, as was his explanation that he chose to self-medicate and wait and see if the symptoms would resolve on their own.

The record contains no real rebuttal evidence other than the hospital report of the absence of trauma. However, the MRI results clearly show damage to Claimant's cervical discs and the record includes essentially uncontested evidence that Claimant was asymptomatic before 14 Nov 12, but highly symptomatic after that date.[59] Employer also argued that it was "inconceivable" that someone with Claimant's medical training would be uncertain of the etiology of his injury, but he testified that he immediately felt pain, hoped it would get better, went out on the road anyway, and eventually had to quit.[60] He testified that after five days, he concluded it was the weight lifting that caused his problems. I find that the intensive weight lifting, in addition to regularly carrying a full kit and traveling over rough roads, more likely than not led to that condition.

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[59] Claimant's history of bar brawling and the most recent fight in Afghanistan is made less relevant by his credible testimony that it resulted in no neck injury.

[60] Employer cites a Supreme Court noting that the fact something inexplicably goes wrong with the human frame does not establish an injury under the Act. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). However, I found Claimant's injury was not inexplicable.

Coverage and Zone of Special Danger

Employer included a reference to the Zone of Special Danger, making a brief argument that even if Claimant was injured as he alleges, he would nonetheless not be covered by the Act, since he was not in a Zone of Special Danger. Given the controlling case law, that argument clearly fails. Claimant was in a remote and dangerous location, where recreational opportunities were limited and maintaining his fitness was an important part of being able to perform his job. Claimant's injury is clearly covered by the principle of the Zone of Special Danger.

Nature and Extent

Claimant was diagnosed with cervical spine spondylosis and was told to avoid lifting heavy weights. He was later told he could not return to his original job and should not lift anything over 25 pounds. On 14 Dec 12, the VA doctor stated he would not go back to work. Dr. Davidson opined on 25 Feb 13 that Claimant was not at MMI, but that he could do "relaxed industry" work. Based on his testimony and the medical evidence in the record, Claimant has established that he cannot return to his original job. He is therefore presumptively totally disabled until Employer establishes suitable alternative employment. Employer did not offer any vocational evidence and relied exclusively on Claimant's testimony about and the records from the jobs that Claimant has actually taken since his return.

Therefore, Claimant became temporarily totally disabled on 22 Nov 12, when he was admitted to the Canadian Specialist Hospital. He was advised to avoid heavy lifting, which included the gear necessary to perform his job in Afghanistan. He remained so until he returned to his first suitable alternative employment.

Claimant testified that he worked first for Performance Systems Medical. He was not clear about the specific dates, but did say that he earned at total of $1200 over three assignments. The record is similarly not clear about when he returned home and accepted his first Performance Systems assignment but based on his 26 Nov 12 hospital discharge, it was likely on or about 7 Dec 12. At that point he became temporarily partially disabled until 13 Jan 13 when he started with Amestar/Emcorp. For that 5.3 week period from 7 Dec 12 to 12 Jan 13, he earned a total of $1200 and had a post-injury weekly earing capacity of $226.41.

Claimant was at Emcorps until 29 Aug 13 and earned a total of $30,238.99 over that period, for a post-injury weekly earning capacity of $924.34. Claimant testified that he was laid off Emcorps because it went out of business and with no showing of suitable alternative employment, he returned to temporary total disability status on 30 Aug 13.

On 30 Sept 13, Claimant returned to work at Medi Corp Global, and went back to work overseas until 30 Nov 13. He therefore returned to temporary partial disability. Claimant testified that he was paid $235 per day and worked there for a two-month contract. He stated that though he had been offered an extension of the contract as a clinical paramedic, they had not negotiated anything and he was not sure whether that position would work within his physical restrictions. He also stated that he would prefer to work locally rather than continue overseas. Claimant

earned $19,803.30 total during that time for a post-injury weekly earning capacity of $2,235.89 per week.

Although Claimant chose not to re-commit to a position with Medi Corp Global, it was offered to him at least for a six-month period and constituted suitable alternative employment. He consequently remained temporary partially disabled with a post-injury earning capacity of $2,235.89 as of 30 Nov 13 through 30 May 14. Claimant's statement that he might have had a drop in pay does not make it more likely than not that his pay would have decreased. Therefore I find that Claimant remains temporarily partially disabled at least until 30 May 14. However, in the absence of any other evidence of suitable alternative employment, beyond that date Claimant will return to temporary total disability status.[61]

Average Weekly Wage

The parties agreed that that Section 10(c) should be used to calculate Claimant's average weekly wage at the time of his injury. Claimant argues that he was making $3,000 per week working for Employer, which he calculated by dividing $156,000, the amount Employer stated on the LS-202 that Claimant would earn yearly, by 52. Claimant's agreement with Employer states that he was to earn $13,000 per month, but that partial months worked would be prorated, and it was expected that he would take 30 days of leave after each 90-day period worked. That means Claimant was expected to work only ¾ of the year, for an expected total earnings of $117,000 or AWW of $2,250.00. However, the contract states that Claimant's total number of hours, days, weeks, or months would be on an "as needed" basis, meaning he could be required to work more than nine months out of the year. That leads to uncertainty and diminishes the usefulness of the contract terms as the definitive basis for the AWW.

Consequently, the best estimate of Claimant's AWW is to simply take the year leading up to his injury. In that period, Claimant worked for Unity Resources Group from November 2011 through January 2012 and earned $36,877.36. He worked for DynCorp International and earned $39,058.78 from March 2012 to early May 2012. He worked for Reed, Inc. in June and July, and earned $23,400.00. He earned $38,566 working for Employer in August-November.[62] Claimant thus earned a total of $137,902.06 from 15 November 2011 through the end of November 2012. Dividing this sum by 53 yields an AWW of $2,601.93

[61] Employer may well argue that there is little doubt that Claimant can find more suitable alternative employment at the end of his six month contract. That argument is in all likelihood true and based on his testimony at hearing, it is improbable that even Claimant would suggest otherwise. Nonetheless, the burden is on Employer to offer sufficient evidence to establish an earning capacity associated with the alternative employment. Employer did not offer any such evidence, preferring instead to rely on Claimant's testimony, which did not establish suitable alternative employment beyond the end of May 2014. The parties are encouraged to resolve the inevitable Section 22 modification motion without a formal hearing.

[62] Claimant was paid $13,000 for August, $13,000 for September, testified that he was at home in October and was paid $1,677 which the record shows was for the cost of his airfare home, and $12,566 for the pro-rated month of November.

Section 7 Medicals

Claimant does not indicate a course of treatment he wishes to pursue, but is entitled to reasonable, appropriate, and necessary medical care for his neck injury in accordance with Section 7 of the Act.

ORDER AND DECISION

1. Claimant was injured during the course and scope of his work for Employer on 14 Nov 12. Claimant's average weekly wage at the time of his injury was $2,601.93. He continued to work until he became temporarily totally disabled on 22 Nov 12. Claimant remained temporarily totally disabled until he returned to work on 7 Dec 12.
2. On 7 Dec 12 Claimant became temporarily partially disabled with a weekly post injury earning capacity of $226.41 and remained so through 12 Jan 13.
3. On 13 Jan 13 Claimant became temporarily partially disabled with a weekly post-injury earning capacity of $924.34, and remained so until 30 Aug 13.
4. On 30 Aug 13, Claimant again became temporarily totally disabled and remained so through 30 Sept 13.
5. On 30 Sep 13, Claimant became temporarily partially disabled with a weekly post-injury earning capacity of $2,235.89. He will remain so until 30 May 14, at which point he will return to temporary total disability status unless suitable alternative employment is shown.
6. Employer shall pay Claimant compensation for all of the above mentioned periods of disability.
7. Employer shall pay the costs of all reasonable, appropriate, and necessary medical care related to Claimant's work injury.
8. Employer shall receive credit for any compensation heretofore paid, as and when paid. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[63]

[63] 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. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267, 271 (1984).

9. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.[64] 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. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.

ORDERED this 30th day of May, 2014 at Covington, Louisiana.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
Administrative Law Judge

[64] 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, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.