

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 21 April 2014**

CASE NO.: 2013-LDA-111

OWCP NO.: 02-225343

IN THE MATTER OF:

CAJETAN OKEH

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

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

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

JOHN L. SCHOUEST, 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., (herein DBA) 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 Service Employees International, Inc. (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 July 30, 2013, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 14 exhibits, Employer/Carrier proffered 16 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.<sup>1</sup>

Post-hearing briefs were received from the Claimant and the Employer/Carrier on the due date of November 4, 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 there is jurisdiction under the Defense Base Act.
2. That the Claimant was injured on January 23, 2012.
3. That Employer/Carrier filed a Notice of Controversion on August 24, 2012.
4. That an informal conference before the District Director was held on October 18, 2012.

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<sup>1</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Claimant's Exhibits: CX-\_\_\_\_; Employer/Carrier's Exhibits: EX-\_\_\_\_; and Joint Exhibit: JX-\_\_\_\_.

5. That medical benefits for Claimant have been paid in part, pursuant to Section 7 of the Act.

## **II. ISSUES**

The unresolved issues presented by the parties are:

1. Causation; fact of injury.
2. Whether Claimant's injury occurred during the course and scope of his employment with Employer.
3. When Employer was advised of Claimant's injury.
4. Whether an employee/employer relationship existed at the time of Claimant's alleged injury.
5. The nature and extent of Claimant's disability.
6. Whether Claimant has reached maximum medical improvement.
7. Claimant's average weekly wage.
8. Entitlement to and authorization for medical care and services.
9. Attorney's fees, penalties and interest.

## **III. STATEMENT OF THE CASE**

### **The Testimonial Evidence**

#### **Claimant**

Claimant testified at the formal hearing and was deposed by the parties on July 15, 2013. (EX-14). Claimant was born in Nigeria and came to the United States 32 years ago. He lives in Houston, Texas. (Tr. 19).

In 2006, he decided to go to work overseas, but could not because he was not a U.S. citizen. (Tr. 19). In May 2009, Claimant became a U.S. citizen and called KBR. He went to Iraq and worked at Anaconda as a combat truck driver. His first "shock" was a mortar attack on November 5, 2009. (Tr. 20). In the first week in Iraq, the location was attacked and mortared,

airplanes took off and landed 300 times a day and he could not handle it and wanted to return to Houston. (Tr. 20-21). He lost control of his training. He was assigned to do laundry and performed the job for two years and one month. (Tr. 21).

On January 19, 2012, Claimant was moved to Baghdad. (Tr. 21). He was in charge of 43-53 Iraqi workers on the night shift. The troops were leaving the country and there was less washing to do. (Tr. 22). By 2:00 am of January 23, 2012, they had washed everything and had nothing to do. It was down time and the workers were laying on the floor and went to sleep. (Tr. 23). He was not sleeping, but his boss discovered the workers sleeping and fired Claimant. (Tr. 24).

On January 23, 2012, he loaded his stuff and was leaving Iraq. He was paid through January 28, 2012. (Tr. 25). His bags were screened and weighed 47 pounds with a back pack which weighed 16 pounds. (Tr. 26). He had to lift the bags above his shoulders to load his bags and his back twisted and he felt pain. He went to a room until 6:00 am and had spasms. (Tr. 26-27). He went to the medics and was given medications-hydrocodone and bags of ice. CX-5 is a KBR form which indicates Claimant was traveling on January 25, 2012 with back pain. A physical was done before his injury that he was 100 percent okay to return to the U.S. (Tr. 28).

Claimant testified he had a prior back injury 12 years before in 2001. He recovered from his back injury in 2001 and had no restrictions. He passed the pre-employment physical with Employer. (Tr. 29). Claimant had no physical limitations while working in Iraq. (Tr. 30).

When Claimant arrived in Houston, Texas, he went from the airport to a hospital and had an MRI conducted. He treated with neurosurgeon Dr. Malik. (Tr. 31). On September 12, 2012, he had back surgery which helped with the pain. He exercises everyday by walking 6-7 miles a day. He has problems with his left leg being numb, back pain and he cannot sit a long time. (Tr. 31-32). He is restricted to no lifting over 20 pounds. (CX-1, p. 80). If he lifts a gallon of milk, he can feel it in his back. His pain affects his sleep, he is tired, moody and not coherent at times. He takes hydrocodone and two other medications. (Tr. 33). An OWCP-5 form was completed on March 6, 2013, which indicates he is not at maximum medical improvement. (Tr. 35).

Claimant has not return to any work. He is waiting for his doctor to release him to work. (Tr. 35).

On cross-examination, Claimant testified that he has not looked for employment since returning to the U.S. He last saw Dr. Malik in March 2013. The case worker decided Claimant had reached maximum treatment in April 2013 and cut off further medical treatment. (Tr. 36). The doctor cannot treat him unless the Employer authorizes treatment. (Tr. 36-37). He stated that no recommended treatment has been denied. (Tr. 37).

Claimant affirmed that he was terminated from his job with Employer in Iraq because the Iraqis he was supervising were sleeping on the job. He was injured after his termination, but before he arrived in the U.S. (Tr. 39). He was not injured while driving a truck. He drove a truck inside the wire and did not experience any convoy attacks. (Tr. 40). He saw an employee injured during an attack on their location. (Tr. 41). He was paid his salary for the days traveling back to the U.S. until he was "wheels down." (Tr. 43).

On re-direct, Claimant testified he would not have performed light duty work after his injury if asked to do so. (Tr. 44).

On re-cross examination, Claimant testified he has a high school education. He exercises daily by swimming and walking. (Tr. 46).

### **The Medical Evidence**

#### **Dr. Amir Malik**

Dr. Malik is board-certified in neurological surgery with approximately 20 years of experience. (CX-9, pp. 1-2).

Claimant presented to Dr. Malik on February 2, 2012, for low back pain. He reported that the pain started in Iraq after lifting a bag onto a truck. Dr. Malik's report stated it was difficult to do an exam because of Claimant's extreme pain. Dr. Malik also noted that Claimant appeared to be either drunk or extremely sleep deprived and unable to communicate well. (CX-1, p. 3). Palpation around the mid-lower back and over both iliac crests was tender. Claimant reported pain going down the left posterior leg. Claimant's mental status examination showed slowed mentation. Claimant was unable to stand up on his toes or heels. Dr. Malik was unable to get Claimant to sit down to

do a complete exam. Due to Claimant's mental status and severe pain, Dr. Malik recommended that Claimant be taken to an emergency room for a "work up" and an MRI. (CX-1, p. 4).

An MRI of Claimant's lumbar spine was performed on February 2, 2012. Mild disc degeneration and spondylosis were found at L3-L4 and L4-L5 with mild endplate irregularity and adjacent marrow degenerative change anteriorly at L3-L4. A minimal one to two millimeter posterior broad-based disc bulge was found at L2-L3. A four millimeter disc protrusion was found at L3-L4 with annular tear flattening the thecal sac. A five millimeter disc protrusion was found at L4-L5 flattening the thecal sac encroaching on both L5 nerve roots with mild to moderate canal stenosis. A one to two millimeter posterior broad-based soft disc bulge was found at L5-S1. (CX-1, pp. 14-15).

On February 3, 2012, Claimant underwent a percutaneous posterolateral transforaminal discography with discometric evaluations at the L3-L4 and L4-L5 levels. 1% lidocaine was injected into his lower back. Claimant was diagnosed with left lumbar radiculopathy at L3-L4 and L4-L5, lumbar degenerative disc disease at L3-L4 and L3-L5, left spondylosis, low back pain and sciatica. (CX-1, p. 24).

A CT scan of Claimant's lumbar spine was performed following the discography. The L3-L4 and L4-L5 levels demonstrated posterior disc protrusions with mildly degenerative facets resulting in central canal as well as foraminal narrowing at both levels, more pronounced at L3-L4. L4 and L5 lateral recess narrowing was also noted. (CX-1, p. 21).

Dr. Malik evaluated Claimant on February 21, 2012. He indicated that after the discography Claimant had somewhat less than 50 percent improvement in his symptoms, and was much less symptomatic of back and left leg pain than he was before the procedure. Palpation caused pain in the mid-low back region. Claimant was able to flex to 20 degrees, extend zero degrees and lateral bend five degrees. He appeared extremely stiff on the torso and low back. Straight leg raise was positive on the left and negative on the right. (CX-1, p. 26). Lower extremity motor strength showed decreased hip flexion and knee extension on the left. Sensory examination showed slight decrease in light touch sensation around the knee and the medial border of the left lower leg. Dr. Malik concluded that Claimant was a candidate for another set of lumbar epidural steroid injections and possible physical therapy after he became less symptomatic. (CX-1, p. 27).

On February 29, 2012, Claimant underwent a percutaneous posterolateral transforaminal discography with discometric evaluation at L4-L5 and injections of Kenalog, lidocaine and Marcaine at L4-L5 and L5-S1. (CX-1, p. 29).

On March 8, 2012, Dr. Malik evaluated Claimant. He opined that Claimant had greater than 50 percent improvement in his back and left leg pain. The range of motion in Claimant's back was limited. He performed flexion to 30 degrees, extension to 10 degrees and lateral bending to 10 degrees accompanied by pain. He could stand on his toes, but had difficulty standing on his heels. He had a significantly positive straight leg raise on the left and a negative straight leg raise on the right. He had great difficulty standing from a low, sitting position unassisted. Dr. Malik opined that Claimant still appeared to be significantly deconditioned and had weakness in his left lower extremity. He recommended that Claimant go through a course of land and aquatic physical therapy. He noted that surgical decompression would be considered if his condition were not improved by therapy due to the extent of his lumbar spinal stenosis and symptomatology. (CX-1, p. 31).

On April 19, 2012, Dr. Malik examined Claimant. The range of motion in Claimant's back was limited. He performed flexion to 30 degrees, extension to 10 degrees and lateral bending to 20 degrees. Palpation of the back caused pain in the left superior gluteus region more than the right. Both sciatic notches were nontender. He could stand on his toes and heels. He could stand from a low, sitting position unassisted. Dr. Malik concluded that his conditions were improving. He recommended aquatic therapy. (CX-1, p. 32).

Claimant presented for a follow-up with Dr. Malik on July 7, 2012. Claimant rated his pain at a seven out of ten, on a ten scale. He had significantly positive straight leg raises bilaterally, with the left greater than the right. He had difficulty standing on his toes and heels. He could not stand from a sitting position unassisted. Dr. Malik concluded that Claimant had clinically regressed slightly. He recommended aquatic therapy, and possibly injections. (CX-1, p. 33).

On August 2, 2012, Claimant reported to Dr. Malik complaining of severe back pain and depression with occasional suicidal thoughts. Dr. Malik suggested that Claimant be taken to St. Joseph's Medical Center for mental health treatment. (CX-1, p. 34).

On September 12, 2012, Claimant underwent a lumbar laminectomy and decompression at the L3-L4 and L4-L5 levels. (CX-1, pp. 62-63, 66). Dr. Malik's post-operative diagnoses were lumbar spinal stenosis, lumbar spondylosis, lumbar radiculopathy, lumbar degenerative disc disease and low back pain. Dr. Malik opined that Claimant suffered from post-traumatic stress disorder. (CX-1, p. 62).

On September 20, 2012, Claimant presented for a follow-up with Dr. Malik. He was doing well following surgery and walking up to two blocks per day. His range of motion was to 40 degrees on flexion, 20 degrees on extension and 20 degrees on lateral bending. He could take a few steps on his toes and heels. Dr. Malik suggested that Claimant walk one mile per day. (CX-1, p. 66).

Claimant presented for a follow-up with Dr. Malik on October 16, 2012. He was doing well following surgery and walking up to three miles per day. His range of motion had improved. His lower extremity motor strength was equal and symmetric. Dr. Malik ordered physical therapy. (CX-1, p. 58).

On December 4, 2012, Claimant reported to Dr. Malik for a visit. He indicated that his condition had vastly improved, but reported continued difficulties with bending. Claimant had significant bilateral hamstring and quadriceps tightness with decreased flexibility. He was unable to cross his legs while sitting in a chair. Dr. Malik concluded that Claimant was severely deconditioned, and recommended more physical therapy and home exercising. He opined that Claimant was not ready to go back to work. (CX-1, p. 68).

Claimant presented for a follow-up on December 18, 2012. Claimant's range of motion in his back was markedly limited. He was unable to straighten his right leg due to significant posterior thigh and hamstring tightness. He could take a few steps on his toes and heels. Dr. Malik recommended work hardening and a functional capacity evaluation ("FCE"). He started Claimant on a low dose of Neurontin because of complaints of numbness and tingling down his leg. (CX-1, p. 70).

On January 8, 2013, Claimant underwent a FCE. Claimant demonstrated inconsistent effort with Maximum Voluntary Grip Testing, but overall, demonstrated consistent effort with isometric consistency testing and appropriate physiological changes throughout testing. (CX-1, p. 71). Claimant

demonstrated the ability to occasionally lift up to 20 pounds from floor to waist and from waist to shoulder, carry up to 30 pounds, push 25.67 pounds of force and pull 40.67 pounds of force. He could sit, stand and balance constantly. He could climb stairs and reach shoulder level frequently. He could walk, climb ladders, reach floor level, stoop, kneel, crouch and crawl occasionally. He could perform object handling and fine/gross manipulation bilaterally on a constant basis. He could perform fingering, simple hand grasps and firm hand grasps bilaterally on a frequent basis. (CX-1, p. 72). The FCE found skilled intervention to be necessary for Claimant to return to work. (CX-1, p. 74).

Dr. Malik examined Claimant on January 29, 2013. Claimant reported he was lifting 30 to 40 pound weights. His range of motion was to 60-70 degrees on flexion, 5-7 degrees on extension and 5-7 degrees on lateral bending. His straight leg raise was negative, but he had a tremor when picking up his left leg. His lower extremity motor exam showed some weakness in the left leg. He could stand up from sitting unassisted. He could go up on his toes and heels with some effort on the left leg. Dr. Malik concluded that Claimant should not lift more than 20 pounds or walk more than an hour. He also noted that Claimant would have difficulty driving a truck. (CX-1, p. 76).

On March 6, 2013, Dr. Malik placed restrictions on Claimant's activity. He noted Claimant could not perform his usual job or drive heavy machinery. He noted Claimant could work eight hours per day with restrictions, but the form also inconsistently states Claimant could only work four hours per day. He restricted Claimant from sitting more than two hours, walking more than one hour, standing more than one hour, reaching more than four hours, reaching over shoulder more than two hours, operating a motor vehicle more than 30 minutes, performing wrist movements more than four hours and performing elbow movements more than four hours. He restricted Claimant from twisting, bending/stooping and operating a motor vehicle at work. He restricted Claimant from pushing more than 20 pounds, pulling more than 30 pounds, lifting more than 20 pounds, squatting, kneeling and climbing. He noted that these restrictions would apply for six to eight months. He opined that Claimant had not reached maximum medical improvement. (CX-1, p. 80).

## **St. Joseph's Medical Center Medical Records**

Claimant was admitted at St. Joseph's Medical Center on August 2, 2012. Claimant reported feeling depressed and having thoughts of being back in Iraq. He denied a history of PTSD or depression. He also reported suicidal ideation and chronic back pain. (CX-1, p. 36). He was discharged the same day with a diagnosis of depression. (CX-1, p. 47).

### **Dr. Samir S. Ebead**

Dr. Ebead is an orthopedic surgeon with approximately 30 years of experience. (EX-11).

On September 5, 2012, Dr. Ebead evaluated Claimant at the request of Employer/Carrier. Claimant complained of low back pain and pain down his left leg. He reported loss of balance. He also indicated that his pain radiated to his neck and head. Claimant reported difficulty dressing himself. He was unable to bend down, drive or exercise. The pain was disrupting his sleep. (CX-1, p. 49; EX-7, p. 1).

Upon examination, Dr. Ebead noted that there were no visible signs of bruising, swelling, or deformity. On palpation, Claimant was tender in the midline and to a lesser extent at the left "SIJ," and there was also mild muscle rigidity. Claimant was unable to toe gait or heel gait. He was only able to squat about 10 percent. Claimant performed flexion to four inches above knee level, extension to neutral, lateral bending to 15 degrees on the right and ten degrees on the left and later rotation to 40 degrees bilaterally. (CX-1, p. 51; EX-7, p. 3). Neurologically, Claimant had decreased sensation at L4 through SI on the left. He had good muscle tone and muscle power of all lower extremity muscles, including the toes, flexors and extensors on the right. He had considerable weakness of flexors on the left. (CX-1, p. 52; EX-7, p. 4).

Dr. Ebead reviewed Claimant's medical records. (CX-1, pp. 52-54; EX-7, pp. 4-6). He opined that Claimant sustained an injury when he twisted his back while lifting luggage and the mechanism of that injury caused his current symptoms. (CX-1, p. 54; EX-7, p. 6). He agreed that the recommended surgery proposed by Dr. Malik was reasonable and medically necessary. He opined that Claimant had not reached MMI. He anticipated that Claimant would reach MMI in 3 months. (CX-1, p. 55; EX-7, p. 7).

Dr. Ebead issued an addendum to his report on September 25, 2012. He opined that the ligamentum flavum hypertrophy, facet arthrosis and anteroposterior central canal stenosis depicted in the February 2, 2012 MRI at L3-L4 were pre-existing degenerative changes. (EX-8, p. 1). He opined that Claimant aggravated a pre-existing condition on January 23, 2012. (EX-8, p. 2).

On May 6, 2013, Dr. Ebead again evaluated Claimant at the request of Employer/Carrier. Claimant complained of low back pain and pain down his left leg. He reported pain in bending over. He was unable to lift more than 20 pounds or sit and stand more than an hour. The pain was disrupting his sleep. (EX-9, p. 1).

On palpation, Claimant complained of pain across the small of his back, but no muscle rigidity was elicited. He was able to toe and heel gate. He could squat to 50 percent of full range. His range of motion was to two inches below the knee on flexion, 5 degrees on extension, 7 degrees on lateral bending and 40 degrees on lateral rotation. (EX-9, p. 2). Neurologically, Claimant was within normal limits of sensation on the right, but reported decreased sensation on the left from L2 to S1. (EX-9, p. 3).

Dr. Ebead reviewed Claimant's medical records. (EX-9, pp. 3-6). He opined that Claimant's spinal stenosis was pre-existing and not caused by the work injury. He noted that the opinion of Dr. Perez confirmed his suspicion that Claimant magnified his symptoms. He opined that Claimant could return to his previous job with restrictions. He did not find any objective evidence supporting Claimant's pain complaints. (EX-9, p. 6). He found that no further testing was necessary for Claimant's work injury. He recommended that Claimant continue office visits with his physician to wean him off of medication. He noted that Claimant's temporary restrictions should be re-evaluated in six months. (EX-9, p. 7).

Dr. Ebead opined that Claimant could work for eight hours alternating between the activities of sitting, walking, standing and reaching. He restricted Claimant from twisting or bending/stooping more than two hours per day. He limited Claimant's pushing/pulling to 30-40 pounds for two hours per day and his lifting to 30 pounds. He noted that Claimant could occasionally kneel and squat. He also restricted Claimant from climbing ladders and driving heavy machinery. These restrictions were assigned for six months. (EX-10).

**Francisco I. Perez, Ph.D.**

Dr. Perez is a board-certified psychologist and neuropsychologist with over 40 years of experience. (EX-13, p. 2). He evaluated Claimant on November 12, 2012, at the request of Employer/Carrier. He performed a clinical interview, Wechsler Adult Intelligent Scale-IV, Brief Visual Memory Test, Rey Auditory Verbal Learning Test, TOMM Personality Assessment Inventory and Battery for Health Improvement-II. (EX-12, p. 1).

Claimant reported having flashbacks since returning from overseas. He was feeling depressed and angry. (EX-12, p. 2). The testing was performed in English, which is not Claimant's first language. (EX-12, p. 3).

On the Wechsler Adult Intelligent Scale-IV, Claimant obtained a full-scale IQ of 62 and a General Abilities Index of 62. Dr. Perez opined that these results were influenced by cultural and language factors. Claimant performed extremely poorly in memory functioning. Dr. Perez opined it was not a credible performance. (EX-12, p. 3). Claimant also performed extremely poorly in the Test of Memory Malingering. On the Health Improvement-II, Claimant endorsed an extreme level of somatic complaints, which Dr. Perez opined was most likely associated with symptom magnification. He also acknowledged emotional distress and endorsed more items than individuals with true chronic pain, indicating that he was projecting an image of being more impaired. He produced an invalid profile on the Personality Assessment Inventory, which Dr. Perez opined was associated with symptom magnification. (EX-12, p. 4).

Dr. Perez found no evidence of post-traumatic stress disorder. He opined that Claimant's presentation was not probable and associated with significant symptom magnification. (EX-12, p. 4). He found no evidence that Claimant's mental condition was caused or aggravated by his employment with Employer. He also did not find any evidence of a pre-existing psychological condition. He opined Claimant was capable of returning to his job as a laundry attendant in Iraq. (EX-12, p. 5).

## **The Vocational Evidence**

On September 13, 2013, Susan Rapant, a vocational rehabilitation counselor, completed a Vocational Report on Claimant at the behest of Employer/Carrier. She did not meet with Claimant, but reviewed medical records provided to her by Employer/Carrier. (EX-15, p. 1).

Ms. Rapant summarized the medical records received, to include the records of Drs. Malik, Ebead, Perez and the FCE. In her labor market search, Ms. Rapant relied only upon Dr. Ebead's May 6, 2013 work restrictions and Dr. Perez's opinion that from a psychological standpoint Claimant was capable of returning to his job as a laundry attendant in Iraq. (EX-15, pp. 7-8).

The following jobs were identified within the Houston, Texas area:

1) A "Cashier" position in Houston, Texas, with Ace Parking, Inc. (EX-15, p. 8). The position paid \$7.50 to \$12.50 per hour depending on experience. A high school diploma or GED was preferred. The physical requirements included standing, sitting, intermittent walking and lifting up to ten pounds. The employer was willing to accommodate limitations. (EX-15, p. 9).

2) A "Cashier" position in Houston, Texas with Standard Parking Corporation. The position paid \$7.00 to \$10.00 per hour depending on experience. A high school education or one month of related experience was required. (EX-15, p. 10). The physical requirements included standing, sitting, occasional walking, use of hands and reaching with hands and arms. (EX-15, p. 11).

3) A "Security Officer" position in Houston, Texas with Security Services USA, Inc. (EX-15, p. 11). The position paid \$8.00 to \$11.50 per hour depending on experience. A high school education or GED was required. Previous experience was preferred. The physical requirements included occasional reaching with hands and arms; frequent standing, sitting and walking; climbing stairs and uneven terrain; frequent lifting of ten pounds and occasional lifting of 25 pounds. The employer was willing to accommodate limitations. (EX-15, p. 12).

4) A "Customer Care Agent, Inbound Sales" position in Houston, Texas with Interactive Response Technologies. The position paid \$9.00 per hour plus commission, depending on experience and demonstrated skills. Previous sales experience was preferred. (EX-15, p. 12). The physical requirements included sitting during most of the eight-hour shift. Employees were allowed to stand if there is a gap between calls. (EX-15, p. 13).

5) A "Marketing, Sales" position in Houston, Texas with SKE Management, Inc. The position paid \$14.42 to \$19.23 per hour plus a bonus plan. The physical requirements included lifting of booth display materials, and walking to interact with customers. Employees were allowed to sit if they are able to actively engage potential customers. (EX-15, p. 13).

6) A "Security Guard" position in Houston, Texas with Allied Barton. (EX-15, pp. 13-14). The position paid \$8.50 to \$12.00 per hour. A high school education or GED was required. Previous experience was preferred. The physical requirements included standing and walking for the duration of the shift. Some positions allowed for a combination of sitting, standing and walking. The employer was willing to accommodate limitations. (EX-15, p. 14).

7) A "Cashier" position in Houston, Texas, with Goodwill Industries. (EX-15, p. 14). The position paid \$7.80 per hour. A high school diploma or GED was preferred. The physical requirements included twisting, bending, squatting, reaching, stooping, kneeling, crouching, pushing and pulling. The employer was willing to accommodate limitations. (EX-15, p. 15).

### **Job Application Log**

Claimant applied for a "Delivery Driver" position with I.J. Healthcare Services. On August 12, 2013, he was not offered a job because the position did not conform to his physical restrictions. (CX-14, p. 1). On September 25, 2013, Claimant applied online for the "Security Officer" with Securitas Security Services USA, Inc. (CX-14, p. 2). On September 26, 2013, Claimant applied online for the "Customer Care Agent, Inbound Sales" with Interactive Response Technologies. (CX-14, p. 3). On September 27, 2013, Claimant applied online for the "Cashier" position with Ace Parking, Inc. (CX-14, p. 4). No job offers have been received by Claimant.

## **The Contentions of the Parties**

Claimant worked as a laundry worker for Employer for two years and three months. He had a previous back injury in 2001, but passed a pre-employment physical examination before being hired by Employer.

On January 19, 2012, four days before his injury, he was on duty, but there was no work to perform. The workers he supervised became drowsy and fell asleep. He was not sleeping but his boss discovered the workers sleeping and he was terminated. While leaving Iraq, after his termination, he injured his back lifting a heavy bag. He had back surgery on September 12, 2012, and prescribed medications and rest. His demobilization papers (CX-5) indicate he was traveling back to the U.S. with a back injury. CX-3 indicates that Employer/Carrier accepted responsibility for medical care for Claimant's back injury.

Claimant contends that he was injured in a zone of special danger and that an Employer/Employee relationship existed from "wheels up to wheels down" and he was injured on his way back to the U.S. He further contends his average weekly wage should be calculated based on his earnings for the previous 52 weeks of work. He argues his termination does not change the character of his average weekly wage.

Employer/Carrier contend that Claimant was not a covered employee under the Act at the time of his alleged injury since had been terminated from his employment prior to sustaining his alleged back injury. They further argue that since he was not employed at the time of his injury, he has no average weekly wage. Employer/Carrier also contend that Claimant has not shown he suffered any disability or that Claimant's condition prevents him from performing his job duties.

Alternatively, Employer/Carrier contend that even if the injury is compensable, Claimant had no average weekly wage at the time of his injury due to his termination prior to the injury.

## **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 (7<sup>th</sup> 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 (5<sup>th</sup> 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).

I was favorably impressed by Claimant as a witness at the formal hearing. His presentation and history to his treating physician and consultative physicians was generally consistent. Therefore, I credit the testimony of Claimant.

### **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 (9<sup>th</sup> 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.

The Defense Base Act provides workers' compensation coverage for workers engaged in employment under contracts with the United States, or an agency thereof, for public work to be performed outside the continental United States. 42 U.S.C. § 1651. To be compensable under the DBA, "a claim must stem from a 'contract' for 'public work' overseas, public work constituting government-related construction projects, work connected with the national defense, or employment under a service contract supporting either activity." Rosenthal v. Statistica, Inc., 31 BRBS 215 (1985). Under the DBA, "compensation is authorized under a public service contract entered into with the United States but performed outside of the United States irrespective of the place where the injury or death occurs, and includes any injury or death occurring to any employee during transportation **to or from** his place of employment, where the employer or the United States provides the transportation." Id. The DBA contains six bases for coverage. 42 U.S.C. § 1651 (a)(6) provides:

"(a)Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment-- " "(6) Outside the continental United States by an American employer providing welfare or similar services for the benefit of the Armed Forces pursuant to appropriate authorization by the Secretary of Defense; irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee **during transportation to or from his place of employment**, where the employer or the United States provides the transportation or the cost thereof. "

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). Nor is it necessary, "that the employee be engaged at the time of the injury in activity of benefit to his employer." Id. "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.

To recover compensation, claimant and employer must be in an employer-employee relationship at the time of the injury. "The existence of an employment relationship between claimant and employer is a necessary element to establish entitlement in any workers' compensation scheme." R.M. v. P&O Ports Baltimore, Inc., BRB No. 09113 (July 29, 2009). "In order for an employer-employee relationship to exist, there must be an express or implied contract of employment with the informed consent of both parties." Id. When the relationship ceases, the liability of an employer under the Act also ceases.

"Compensation coverage is not automatically and instantaneously terminated by the firing or quitting of the employee." 2 Larson's Workers' Compensation Law § 26.01. (2007). Rather, an employee is given a reasonable period of time to wind up his affairs; and is deemed to be within the course and scope of employment during this time. R.M., supra; 2 Larson's Workers' Compensation Law § 26.01 (2007). Thus, the deciding question in such a situation is: "what is a reasonable time?" 2 Larson's Workers' Compensation Law § 26.01 (2007). Relevant considerations may include: exigencies of transportation, whether incident flows directly from employment, work duties, custom, and/or express or implied agreements between the employee and employer. Id.

In this case, compensability under the Defense Base Act hinges on whether an employer-employee relationship existed at the time of Claimant's injury, which he sustained while in Iraq, but after he was terminated for cause. Employer/Carrier contend that Claimant's injury is not compensable under the DBA due to the fact that he was terminated from his employment prior to suffering his alleged back injury. Thus, it must be determined whether firing an employee overseas for cause automatically terminates coverage under the Defense Base Act.

I find Claimant's injury to be compensable under the DBA. General principles of compensation law, the work agreement between the parties, and the plain language of the Defense Base Act dictate that Claimant's injury is covered under the DBA.

First, while this case may present a novel issue in the context of the DBA and LHWCA, case law flowing from state compensation schemes recognizes the general principle: that firing an employee for cause does not instantaneously terminate coverage. 2 Larson's Workers' Compensation Law § 26.01. (2007); cited in R.M., supra. Instead, compensation continues for a

reasonable interval of time "long enough to encompass the incidents that flow directly from the employment, even though they take effect after employment has technically ceased." 2 Larson's Workers' Compensation Law § 26.01[3] (2007); cited in R.M., supra ("However the relationship ends, the worker must be given a reasonable time to leave the premises."). According to Section 26.01[4] of Larson's, determining what is a reasonable interval, "may [sic] turn on the question of what the employee was doing during the interval before leaving the premises, and whether that activity bore any relation to the employment or was purely personal." To illustrate this test, Larson's provides that:

the clearest case on record for compensability is one in which the claimant actually continued to work after he was told he was fired, because he was dependent on the company truck to take him to his home seventy miles away, and the truck did not leave until the end of the day.

Id.; referring to Matthews v. Milwhite Mud Sales Co., 225 So. 2d 391 (La. Ct. App. 1969).

Under this framework, I find the facts of this case present an even clearer example of compensability.<sup>2</sup> The nature of the employee-employer relationship was such that Claimant completely depended on the employer to transport him back to the United States. Claimant had no choice but to remain on base until he could be safely transported to the airport. I find that because of the unique nature of this work relationship and work environment, the employer-employee relationship, for purposes of DBA coverage, did not cease instantaneously upon Claimant's notification of being fired for cause. Rather, the employee-employer relationship continued for a "reasonable interval of time," "long enough to encompass the incidents that flow directly from the employment, even though they take effect after employment has technically ceased." 2 Larson's Workers' Compensation Law § 26.01[3] (2007). I find that Claimant's injury sustained during his first attempt to safely convoy to the airport clearly is an incident that flowed directly from his employment in Iraq.

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<sup>2</sup> Referring to Matthews v. Milwhite Mud Sales Co., 225 So. 2d 391 (La. Ct. App. 1969). (Claimant reported to company premise and was driven by the company 70 miles to the work site. During the work day, claimant was fired but remained at the work site for the rest of the day because the only means of returning to the company premises was the company's truck. During that time, Claimant sustained injury. The injury suffered was held to be compensable because the delay after termination was reasonable.)

Second, the Employment Agreement executed in 2011 expressly obligated the employer to pay for Claimant's mobilization and demobilization, even subsequent to termination of employment. (CX-7, p. 1). During these demobilization flights, the agreement also obligated the Employer to pay Claimant two days of his base salary plus the international service premium. (CX-7, p. 4). The agreement also indicated that the area of employment would be hostile, and that the inherent dangers of the region should be understood. (CX-7, p. 9). Problematic convoys to the airport are reasonably anticipated dangers associated with regions like the one to which Employer was sending its employees. It would not make sense for injuries sustained during these inherently dangerous convoys to not be covered under the DBA; particularly, when an Employer has contractually agreed to demobilize its employees from a hostile region.

Additionally, 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). 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).

Third, the plain language of the Defense Base Act states that coverage extends to an employee, "during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof." 42 U.S.C. § 1651(a)(6). Section 1651(a)(6) is the applicable basis of coverage here, as it applies to "injuries of any employee engaged in any employment-(4) outside the United States by an American Employer providing welfare or similar services for the benefit of the Armed Forces pursuant to appropriate authorization by the Secretary of Defense." These conditions are satisfied and uncontested. Therefore, because I have rejected Employer's contention that Claimant was no longer an employee at the time of his injury, I also find that the plain language of Section 1651(a)(6) affords DBA coverage to Claimant and accordingly, an Employer/Employee relationship existed at the time of Claimant's work-related injury.

Employer/Carrier cite Rosenthal v. Statistica, Inc., 31 BRBS 215 (1998), to support its contention that Claimant's injury is not compensable under the DBA. Statistica is not instructive to the central legal issue raised in this case. In Statistica, the claimant's death was not covered by the DBA because he was no longer performing work under a covered contract with the State department. Id. Here, the coverage issue hinges on whether an employer-employee relationship existed at the time of claimant's injury. Therefore, I find Statistica is inapplicable as to whether Claimant's injury in Iraq is compensable under the DBA.

In view of the foregoing, having found that Claimant's injury occurred during his course and scope of employment, I further find that Employer was advised of his injury on January 24 or 25, 2012, when Claimant reported his injury to the KBR medics.

#### **1. Claimant's Prima Facie Case**

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).

Claimant testified that on January 23, 2012, he twisted his back as he was putting his items on a truck and he felt immediate pain as he was in the process of moving his 47-pound luggage and 16-pound backpack. Claimant reported his injury and pain to the KBR Medic the next day, and the medic administered Hydrocodone and ice. Claimant reported his back injury the morning following his injury and was administered Hydrocodone while on base. Claimant began treatment with Dr. Malik upon his return to the United States. On September 12, 2012, Claimant underwent a lumbar laminectomy and decompression at the L3-L4 and L4-L5 levels. Dr. Malik's post-operative diagnoses were lumbar spinal stenosis, lumbar spondylosis, lumbar radiculopathy, lumbar degenerative disc disease and low back pain.

On August 2, 2012, Claimant reported to Dr. Malik complaining of severe back pain and depression with occasional suicidal thoughts. Dr. Malik suggested that Claimant be taken to St. Joseph's Medical Center for mental health treatment. Claimant was admitted at St. Joseph's Medical Center on August

2, 2014. Claimant reported feeling depressed and having thoughts of being back in Iraq. He denied a history of PTSD or depression. He also reported suicidal ideation and chronic back pain. He was discharged the same day. Dr. Malik opined that Claimant suffered from post-traumatic stress disorder.

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 January 23, 2012, 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 (5<sup>th</sup> Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5<sup>th</sup> 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.

In the present matter, Employer/Carrier contend that Claimant's overseas employment did not contribute to his current lower back complaints and Claimant suffers nothing more than an age-related, degenerative condition to his back which was not aggravated, degenerated or accelerated by his overseas employment. Employer/Carrier rely on the opinion of Dr. Ebead that the ligamentum flavum hypertrophy, the facet arthrosis and the anteroposterior central canal stenosis did not result from his work incident. However, Dr. Ebead opined that Claimant aggravated these pre-existing conditions on January 23, 2012. Accordingly, I find Employer/Carrier failed to present sufficient evidence to rebut Claimant's **prima facie** case with respect to Claimant's back condition.

With respect to Claimant's psychological condition, Employer/Carrier rely on the opinion of Dr. Perez. Dr. Perez found no evidence of post-traumatic stress disorder. He opined that Claimant's presentation was not probable and associated with significant symptom magnification. He found no evidence that Claimant's mental condition was caused or aggravated by his employment with Employer. He also did not find any evidence of a pre-existing psychological condition. Therefore, I find that Employer/Carrier has rebutted Claimant's **prima facie** case of compensability with respect to Claimant's alleged psychological condition.

### 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.

Claimant relies on the opinion of Dr. Malik that he suffered from PTSD. Dr. Malik based his opinion on his August 2, 2012 evaluation of Claimant, where Claimant reported depression with occasional suicidal thoughts. Dr. Malik suggested that Claimant be taken to St. Joseph's Medical Center for mental health treatment. Claimant was admitted at St. Joseph's Medical Center on August 2, 2014. Claimant reported feeling depressed and having thoughts of being back in Iraq. He denied a history of PTSD or depression. He also reported suicidal ideation and chronic back pain. He was discharged the same day, with a diagnosis of depression.

Dr. Perez performed a comprehensive psychological exam on Claimant. He found no evidence of post-traumatic stress disorder or Claimant having a pre-existing mental condition that was caused or aggravated by his employment with Employer. Dr. Perez is a board-certified psychologist and neuropsychologist with over 40 years of experience, whereas Dr. Malik is a neurosurgeon who did not perform any psychological testing on Claimant.

Thus, weighing all of the medical evidence of record, I find and conclude that Employer/Carrier have successfully produced **specific and comprehensive medical evidence**, namely findings based on objective medical data that refute any connection between Claimant's alleged psychological condition and his January 23, 2012 work accident. Claimant presented no objective evidence that his alleged psychological condition was accelerated or made worse by the January 23, 2012 work accident. Therefore, I find that Claimant failed to meet his burden of proof and persuasion to a preponderance consistent with Greenwich Collieries. Accordingly, I find and conclude Claimant has not established that he suffered from a compensable psychological condition.

### C. Nature and Extent of Disability

Having found the Claimant suffers from a compensable back 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.

On March 6, 2013, Dr. Malik placed restrictions on Claimant's activity. He noted that Claimant could not perform his usual job or drive heavy machinery. He also placed restrictions on Claimant's activity for six to eight months. He opined that Claimant had not reached maximum medical improvement.

On May 6, 2013, Dr. Ebead opined that Claimant could work for eight hours alternating between the activities of sitting, walking, standing and reaching. He restricted Claimant from twisting or bending/stooping more than two hours per day. He limited Claimant's pushing/pulling to 30-40 pounds for two hours per day and his lifting to 30 pounds. He noted that Claimant could occasionally kneel and squat. He also restricted Claimant from climbing ladders and driving heavy machinery. These restrictions were for six months.

Based on the foregoing, I find Claimant has not reached maximum medical improvement. The restrictions imposed by both Dr. Malik and Dr. Ebead would prevent him from returning to his former work in Iraq. Therefore, Claimant has established a **prima facie** claim of total disability, and the burden shifts to Employer/Carrier to show suitable alternative employment.

#### **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).

On January 8, 2013, Claimant underwent a FCE. Claimant demonstrated the ability to occasionally lift up to 20 pounds from floor to waist and from waist to shoulder, carry up to 30 pounds, push 25.67 pounds of force and pull 40.67 pounds of force. He could sit, stand and balance constantly. He could climb stairs and reach shoulder level frequently. He could walk, climb ladders, reach floor level, stoop, kneel, crouch and crawl occasionally.

On March 6, 2013, Dr. Malik placed restrictions on Claimant's activity. He restricted Claimant from sitting more than two hours, walking more than one hour, standing more than one hour, reaching more than four hours, reaching over shoulder more than two hours, operating a motor vehicle more than 30 minutes, performing wrist movements more than four hours and performing elbow movements more than four hours. He restricted Claimant from twisting, bending/stooping and operating a motor vehicle at work. He restricted Claimant from pushing more than 20 pounds, pulling more than 30 pounds, lifting more than 20 pounds, squatting, kneeling and climbing.

On May 6, 2013, Dr. Ebead opined that Claimant could work for eight hours alternating between the activities of sitting, walking, standing and reaching. He restricted Claimant from twisting or bending/stooping more than two hours per day. He limited Claimant's pushing/pulling to 30-40 pounds for two hours per day and his lifting to 30 pounds. He noted that Claimant could occasionally kneel and squat. He also restricted Claimant from climbing ladders and driving heavy machinery.

Ms. Rapant provided Claimant with a labor market survey dated September 13, 2013. She relied only upon the restrictions imposed by Dr. Ebead and Claimant's FCE results. I give more weight to the restrictions imposed by Dr. Malik because he was Claimant's treating physician. He performed Claimant's surgery and evaluated Claimant on numerous occasions and on a consistent basis.

The description of the "Marketing, Sales" position fails to allow for a comparison of the job's physical requirements with Claimant's lifting restrictions. The description states that Claimant must lift booth display materials, but does not indicate the weight of those materials. The description of the

"Cashier" position with Goodwill Industries fails to allow for a comparison of the job's physical requirements with Claimant's restrictions. The description states that Claimant must engage in twisting, bending, squatting, reaching, stooping, kneeling, pushing and pulling. The listing does not indicate the amount of time or weight dedicated to such activities, which clearly exceeds the restrictions assigned by Dr. Malik. The "Customer Care Agent, Inbound Sales" position does not comport with Claimant's restrictions imposed by Dr. Malik because it requires that the employee sit for most of the shift, allowing employees to stand only if there is a gap between calls. The "Security Guard" position with Allied Barton does not comport with Claimant's restrictions imposed by Dr. Malik because it requires that the employee stand and walk for most of the shift. Accordingly, I find these jobs are not sufficient to establish suitable alternative employment.

The "Cashier" position with Ace Parking, Inc., "Cashier" position with Standard Parking Corporation and "Security Officer" position with Security Services USA, Inc. appear to comport with the restrictions imposed by Dr. Malik. Claimant argues the positions do not meet Dr. Malik's restriction that he only work four hours per day. Given this inconsistency in Dr. Malik's report, I find these positions are arguably suitable alternative employment. However, I am not convinced that Employer/Carrier have met their burden of establishing suitable alternative employment given that they have only shown three job opportunities, which may or may not allow work for four hours per day, 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 applied for three positions listed in the labor market survey and another position on his own. 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 from January 23, 2012, 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. When an employee is a 7 day worker subsection 10(c) applies.

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.

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied because Claimant was a 7-day per week worker, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant contends his average weekly wage should be \$1,793.79, based on only his earnings for the 56 weeks preceding his injury. Employer/Carrier contend Claimant's average weekly wage should be \$0.00 because there was no services rendered at the time of his injury. Alternatively, Employer/Carrier assert Claimant's average weekly wage should be based on a blended rate based on his earnings for the nine years preceding his injury.

Employer/Carrier contend calculating Claimant's average weekly wage on his Iraq earnings would result in a windfall for Claimant or unfairly penalize Employer. In Service Employee's Int'l Inc. v. Director, Office of Workers Compensation Programs, 2013 WL 943840 (S.D. Tex.), a district court held that considering only overseas wages in cases where the claimant did not work overseas for substantially the whole of the year was improper. The court advocated blending the claimant's overseas wages with prior years' wages so the claimant would receive the benefits of all wages paid by the employer during his period of actual employment, without creating a windfall for Claimant or unfairly penalizing Employer. Id. In the instant case, Claimant performed the same job for Employer in Iraq for two

years and one month preceding his injury. Accordingly, I find reliance on Employer's cited case inapposite and it proper to calculate his earnings based on his earnings in the year immediately preceding his injury.

The Social Security records presented by Employer show Claimant earned \$80,744.82 in 2011 and \$19,707.20 in 2012. (EX-6, p. 4). Claimant's 2011 W-2 also shows earnings of \$80,774.82. (CX-8, p. 24). There were no other wage records supporting the \$19,707.20 in 2012 reflected in the Social Security records. The Social Security records do not indicate whether the entirety of those earnings was from the four weeks Claimant was employed by Employer in 2012 or from another source. Therefore, I find it proper to base his average weekly wage on only his 2011 earnings. Accordingly, I find Claimant's average weekly wage to be \$1,552.79 ( $\$80,744.82 \div 52 = \$1,552.79$ ).<sup>3</sup>

#### **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).

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<sup>3</sup> I note that the maximum compensation rate at the time of Claimant's January 23, 2012 injury was \$1,295.20.

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).

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 (4<sup>th</sup> 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 back injury, Claimant is entitled to all reasonable and necessary medical expenses for such injury pursuant to Section 7 of the Act.

#### **V. SECTION 14(e) PENALTY**

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall

be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.<sup>4</sup> Employer/Carrier were notified of Claimant's injury on January 25, 2012. Since Employer controverted Claimant's right to compensation on August 24, 2012, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by February 8, 2012, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion on February 8, 2012, and is liable for Section 14(e) penalties from February 8, 2012 until August 24, 2012.

## VI. 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).

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<sup>4</sup> Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

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.

#### VII. 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.<sup>5</sup> 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.

#### VIII. 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 January 23, 2012 to present, and continuing, based on Claimant's average weekly wage of \$1,552.79, 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 January 23, 2012, work injury to his back, pursuant to the provisions of Section 7 of the Act.

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<sup>5</sup> 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 (1<sup>st</sup> Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **NOVEMBER 8, 2012**, the date this matter was referred from the District Director.

3. Employer/Carrier shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to August 24, 2012, as provided herein, exceed the sums which were actually paid to Claimant.

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

5. 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).

6. 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.

7. 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 21<sup>st</sup> day of April, 2014, at Covington, Louisiana.

LEE J. ROMERO, JR.  
Administrative Law Judge