

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 24 November 2014

In the Matter of:
JEREMY D. STOKES,
Claimant

Case No.: 2013 LDA 364
OWCP No: 02-203336

v.

SERVICE EMPLOYEES INTERNATIONAL, INC./
INSURANCE. CO. OF THE STATE OF PENN.
Employer/Employer

and

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

Appearances: Mr. Gary B. Pitts, Attorney
Mr. Joel S. Mills, Attorney (on brief)
For the Claimant

Mr. Nicholas W. Earles, Attorney
For the Employer/Insurer

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER –
PARTIAL AWARD OF DISABILITY COMPENSATION &
PARTIAL AWARD OF MEDICAL TREATMENT BENEFITS**

This case involves a claim filed by Mr. Jeremy Stokes for disability compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("Act"), and as extended by the Defense Base Act, 42 U.S.C. § 1651, and the War Hazards Compensation Act, 42 U.S.C. § 1701, for injuries Mr. Stokes suffered while an employee of Service Employees International, Inc., ("SEIU").

Procedural History

On July 22, 2010, Mr. Stokes filed a disability compensation and medical treatment benefits claim due to an injury he suffered on June 6, 2010 while working for SEII in Iraq, CX 2 and EX 2.¹ On March 18, 2013, the District Director forwarded the case to the Office of Administrative Law Judges for a formal hearing. Pursuant to a Revised Notice of Hearing, dated April 8, 2013 (ALJ I), I conducted a hearing on July 26, 2013 in Washington, D.C., with Mr. Stokes, Mr. Pitts, and Mr. Earles.

Evidentiary Discussion

At the hearing, I admitted into evidence EX 1 to EX 19. However, upon adjudication, I discovered that EX 13 – Curriculum Vitae of IME physician,² and EX 17 – Curriculum Vitae of Labor Market Survey Specialist, did not contain the referenced documents. Accordingly, my decision in this case is based on the hearing testimony and the following documents admitted into evidence: CX 1 to CX 28, EX 1 to EX 12, EX 14 to EX 16, EX 18, and EX 19.

Issues

1. Disability compensation.
2. Medical treatment benefits.

Parties' Positions

Claimant³

Mr. Stokes suffered a work-related injury on June 6, 2010 when he fell to hard-packed ground after a handrail gave way. In the fall, he suffered a bruised left flank, and pain in his left shoulder. Initially, he was placed on light-duty status and then placed on a medical leave of absence on June 27, 2010. Mr. Stokes has established a *prima facie* case of total disability.

The Employer started temporary total disability on July 21, 2010; however, Mr. Stokes seeks temporary total disability compensation as of June 27, 2010 when he was placed on medical leave.

¹The following notations appear in this decision to identify specific evidence and other documents: ALJ – Administrative Law Judge exhibit, CX – Claimant exhibit, EX – Employer exhibit, and TR – Transcript of hearing.

²I note the IME physician's report, EX 12, indicates that Dr. Sidhu is a board certified orthopedic surgeon and independent medical examiner.

³TR, pp. 6-9, 11-13; and Closing Brief dated September 24, 2013.

Mr. Stokes reached MMI on June 8, 2012. Dr. Sharma imposed a work restrictions included no lifting more than five pounds. Dr. Pavan opined Mr. Stokes can lift up to 40 pounds.

None of the job opportunities identified in the labor market survey developed on May 29 and 30, 2013 are suitable alternative employment. The sales representative exceeds the lifting restrictions and there is no indication that pain medication is allowed. The dispatcher job required long periods of sitting which is unsuitable for Mr. Stokes; and again, no indication that medication is allowed. The truck driver jobs require long periods of sitting which exceed his limitation. The security officer positions did not indicate whether Mr. Stokes would have to confront individuals, and be able to take his medications. And, the storage position requires sales experience and the ability to pass a drug screen.

While the Employer identified overseas employment opportunities, the relevant community for employment opportunities is usually where the claimant lives. In situations involving relocation, several factors must be consider, including where a disability compensation claim is filed, the reason and motivation for relocation after an accident, and the duration of the claimant's stay in the new location. Additionally, the Employer has the burden of demonstrating prejudice due to the relocation by establishing the relocation was unreasonable. In Mr. Stokes' case, his eventual return to his home in Virginia after being injured in Iraq was not unreasonable.

Mr. Stokes re-employment efforts upon receipt of the labor market survey have been unsuccessful.

On April 16, 2013, he earned \$101.75 for one day of work, but that wage-earning capacity needs to be adjusted for inflation to establish a rate of pay at the time of his injury. He has worked with DOL vocational rehabilitation and several weeks prior to the labor market survey submitted job applications which were unsuccessful. He has also applied for international jobs without success. And, the gross receipts Mr. Stokes received from his personal business venture did not realistically represent a wage-earning capacity since it operated at a net loss.

Mr. Stokes also seeks reimbursement for the medical treatment of the side-effects due to his work-related pain medication, mileage associated with medical treatments, a TENS unit, colonoscopy, shoulder injection, and \$40 billed by a physician to complete workers' compensation forms. He has established the claimed medical expenses are reasonable and necessary and the employer has not rebutted that evidence. The colonoscopy was related to complications from Mr. Stokes of pain medication and the employer has refused his requests for reimbursement of his prescriptions

Mr. Stokes is entitled to temporary total disability compensation from June 27, 2010 to June 8, 2012; permanent total disability compensation from June 8, 2012 through April 15, 2013; permanent partial disability compensation on April 16, 2013 based on an adjusted earnings of \$101.75; and permanent total disability compensation from April 17, 2013 and continuing.

Employer⁴

The Employer has established suitable alternative employment, which in the absence of Mr. Stokes' diligent effort to obtain re-employment demonstrates that he has a post-injury weekly wage-earning capacity of \$615.20, based on the availability of job opportunities in the local community paying no less than \$15.38 an hour.

On June 6, 2010, while working as a maintenance technician in Iraq, Mr. Stokes fell on a fuel tank storage facility stairway injuring his left shoulder and causing low back pain. The Employer provided medical treatment and has voluntarily paid disability compensation of \$1,190.58 per week.

As of September 7, 2012, Mr. Stokes has been medically cleared to engage in medium to heavy demand level employment.

Following his return from Iraq, Mr. Stokes operated his own party rental business through February 2013 at a loss.

On April 16, 2013, Mr. Stokes was employed for one day and earned \$101.75, which represents a post-injury weekly wage-earning capacity of \$508.75.

The medical record, including a function capacity evaluation ("FCE"), as well as his education, military service, and work history, clearly establishes that Mr. Stokes is physically capable of some form of employment. And, consistent with his physical capabilities, the Employer developed a labor market survey establishing suitable alternative employment in Mr. Stokes' local community. The job opportunities included commercial truck driver, dispatcher, security officer, and sales person.

The evidentiary record also demonstrates that Mr. Stokes did not engage in a diligent search for work. His failure to pass a requisite DOT physical for the truck driving position was based on his inaccurate representation concerning his medical condition. His expenditure of only two days to apply for work after receiving the labor market survey and vague testimony regarding other re-employment efforts are insufficient to demonstrate due diligence. Additionally, the change in his family situation does not relieve Mr. Stokes of his obligation to seek work. Further, the lack of a response from potential employers for a period of the less than 30 days does not demonstrate the unavailability of employment opportunities in the local communities.

As a result, rather than permanent total disability compensation, Mr. Stokes is only entitled to permanent partial disability on April 16, 2013, based on a weekly wage-earning capacity of \$508.75, and from May 31, 2013, and continuing based on a weekly wage-earning capacity of \$923.20.

⁴TR, pp. 6-7, and Closing Brief dated September 30, 2013.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

Sworn Testimony

Testimony of Mr. Jeremy D. Stokes (TR, pp. 17-109)

[Direct examination] Mr. Stokes is 36 years old and grew up in Petersburg, Virginia. Mr. Stokes graduated from high school; and after two semesters of college, he joined the U.S. Army and was trained as a petroleum supply specialist. After honorably servicing for six and a half years and achieving the rank of sergeant, Mr. Stokes left the service in 2002 with a disability rating of 30%. He then drove a garbage truck for a brief period before being hired as a Pepsi Cola tractor-trailer operator and customer representative.

In October 2007, in part due to the physical demands of his work with Pepsi Cola, and a significant increase in wages, Mr. Stokes began working for SEII, which was a subsidiary of Kellogg, Brown, and Root (“KBR”). In November 2007, he arrived in Iraq. While overseas, Mr. Stokes worked seven days a week, 12 hours a day. Initially, Mr. Stokes was a fuel equipment operator. In August 2008, he was promoted to fuel systems foreman and supervised five fuel system operators. His job required only minimal use of a computer. In February 2009, due to a security clearance issue, Mr. Stokes became a maintenance technician. In that position, Mr. Stokes calibrated fuel meters to help better monitor fuel supplies and reduce pilferage.

On June 6, 2010, after Mr. Stokes started his equipment for the day, he exited a storage area by using a stairway that crossed a fuel retention berm that was about six feet high. As he was descending the wooden stairs, the guardrail on his left side gave way causing Mr. Stokes to stumble, fall off the stairs, strike the ground with his outstretched left hand and the lower left side of his body, and roll all the way down the berm. Mr. Stokes got up, noticed some scraps and cuts, finished his work, and then reported the incident to his foreman. His supervisor told Mr. Stokes to get cleaned up and see a medic.

In order to conduct an examination, the medic asked Mr. Stokes to strip down to his waist. As Mr. Stokes was removing his shirt over his head, he experienced “a lot of pain” towards the back of his shoulder as he attempted to raise his left arm, and he could only raise his left arm half way. The medic helped Mr. Stokes get his shirt off and then took pictures of his back and shoulder which showed some bruising around the beltline. The medic also placed Mr. Stokes’ left arm in a sling and taped an ice pack to it. The medic’s record indicated Mr. Stokes was guarding his left shoulder and had decreased range of motion. An x-ray showed a separated shoulder. Due to pain associated with moving his shoulder around for additional x-rays to assess the damage, Mr. Stokes was given a dose of morphine. He was also given Vicodin for nighttime relief and told to take Motrin during the day.

The next day, due to blood in Mr. Stokes' urine, the medic also diagnosed a bruised kidney. Mr. Stokes was released to light duty in an office. About three days later, Mr. Stokes began physical therapy exercise. However, as he brought his left arm up to shoulder level he heard a pop and experienced sharp shooting pain on the top of his left shoulder. From that point on, every time he brought his left arm up to shoulder level, he heard a pop and experienced pain that started as seven on a pain scale of one to 10 and then increased to 10.

Later in June 2010, Mr. Stokes was sent to Dubai for further examination. A doctor conducted a complete physical examination and took an MRI of his left shoulder, which confirmed a separated shoulder, and an x-ray of his spine, which revealed no injury. After the doctor confirmed the separated shoulder, he recommended Mr. Stokes be returned to the United States for additional evaluation.

On June 26, 2010, Mr. Stokes returned to Tampa, Florida and saw Dr. Dykes, who treated his shoulder injury.

By the time he returned, Mr. Stokes was off pain medication and was experiencing stiffness in his lower back, on the left side. He was still using a sling for his left arm and shoulder.

In October 2010, Mr. Stokes moved to Virginia to assist his wife with their children since she had started nursing school, while working full-time. He now takes care of their children for more than 50% of the time.

Once in Virginia, Mr. Stokes went to Colonial Orthopedics for continuing medical care for both his shoulder and low back issues. He also received injections at the Spine Institute of Virginia. Eventually, an MRI revealed a labral tear in his left shoulder which led to shoulder surgery on March 22, 2011 by Dr. Sharma. While the shoulder surgery relieved a lot of the pain, Mr. Stokes still experiences clicking in his left shoulder, and it seems to be worsening. Previously, the issue only occurred with overhead activity, but now he experiences the clicking with full extension. As an example, recently, when he was kneeling and lifted a gallon of milk to place in the refrigerator, his left shoulder snapped and Mr. Stokes dropped the milk container due to the shooting pain. The physician stated that it's his scapula snapping. Mr. Stokes no longer suffers with left shoulder pain with weight-bearing activities. However, he stills experiences pain at full extension whenever his shoulder clicks. While Mr. Stokes can now lift up to 25 pounds with both hands, Dr. Sharma has limited Mr. Stokes to lifting no more than five pounds with his left hand, and no overhead lifting with the left arm. Mr. Stokes stays away from activities that require overhead lifting.

As part of his job overseas, because he worked in a hostile environment, Mr. Stokes was required to be able to put on personal protective gear, including a 55 pound fragmentation vest, and a five to seven pound helmet. Towards the end of his work in Iraq, he had to put the gear on two or three times a month. With his current physical restrictions, Mr. Stokes does not believe that he could put on the personnel protection gear now. Additionally, his job required him to lift and move large fuel meters, weighing up to three hundred pounds, with the assistance of others; and small fuel meters weighing up to 45 pounds. CX 15 contains pictures of the fuel meters.

Despite three epidural injections for his low back pain, Mr. Stokes has not achieved any relief. He still has constant pain which is exacerbated by pushing and pulling. Those activities also cause a shooting pain down his left leg. Dr. Pavan is treating Mr. Stokes' back pain. Mr. Stokes has never declined back surgery. Due to his back, Dr. Pavan has limited Mr. Stokes to no more than 40 pounds lifting, and no standing longer than 60% of the total work hours.

At one point, on April 16, 2013, Mr. Stokes accepted a warehouse job through Integrity Staffing, but because the job required standing for the entire shift, he was not able to continue with the job due to pain and stiffness in his back. He made \$101.75 that day (CX 14).

Mr. Stokes cares for three sons, ranging in age from 6 to 17. Due to his shoulder pain, he is unable to do many physical activities with them.

In 2010, Mr. Stokes purchased some inflatable party equipment, such as a bounce house, and rented the equipment as a business. His older two sons helped him move and set up the equipment. However, Mr. Stokes realized he was the weak link physically. During the two years that he operated his business he grossed about \$15,000. However, his expenses exceeded that gross and the business wasn't profitable. In February 2013, he liquidated the business' assets and sold everything.

Mr. Stokes has applied for several of the positions in the labor market survey and other positions, but has been unable to obtain employment. He has also worked with the Department of Labor vocational rehabilitation department. CX 14 is a counselor's report regarding his opportunities. She also recommended that Mr. Stokes try to get some computer training.

EX 16 is the May 31, 2013 labor market survey. CX 17, 19, and 20, and 21 to 28 document Mr. Stokes' re-employment efforts in regard to that survey. None of the companies have offered Mr. Stokes a job.

Mr. Stokes noted that the Schwan's Home Service job required lifting frozen food weighing up to 50 pounds from floor to waist, and 30 pounds from waist to crown, which exceed his physical limitations.

The position as a police telecommunicator required the ability to sit and be attentive for long periods of time, which Mr. Stokes believes would be difficult for him, since he has to constantly adjust his position to relieve pain.

The driver positions at Martin Enterprise and Schneider International required a commercial driver's license which in turn requires a DOT physical. Mr. Stokes attempted to pass the DOT physical in July 2013 (CX 16) but was disqualified because when he was told to extend his left arm, his left shoulder popped and it was too painful to continue.

The security officer position at Securitas required occasional reaching with arms and hands; sitting, standing, and walking for long periods; and lifting up to 25 pounds. Mr. Stokes believed that the 25 pound lifting requirement included being able to use just one hand and arm, which exceeds the lifting limit for his left shoulder and arm.

Similarly, the security officer job at Allied Barton was outside his 60% standing limitation because it preferred an employee who could walk and stand for the duration of the shift. Mr. Stokes is also concerned that such a job might involve physical confrontation.

Mr. Stokes believed that he might not have the one year of customer service for sales experience to qualify for the Public Storage job. Nevertheless, his work with Pepsi Cola might qualify. However, after submitting an application, Mr. Stokes has not been contacted by the company.

Concerning the overseas jobs, based on their locations and job descriptions, Mr. Stokes believes the work would exceed his physical restrictions. Additionally, the overseas work is not suitable because he has joint custody of, and responsibility for, his three sons, and their mother is in nursing school.

CX 8 sets out Mr. Stokes' claims for mileage associated with medical treatments, which also includes \$40 he had to pay Colonial Orthopedics to complete OWCP Forms. CX 14 and CX 15 are expenses that he incurred for a colonoscopy and treatment of hemorrhoids attributable to constipation caused by his pain medications. Mr. Stokes has not been reimbursed for his co-pays for that treatment, about \$320.00.

In addition to the labor market survey positions, Mr. Stokes applied for work at CarMax, Traveler's Insurance, and River Forest. The later two companies have not contacted him, and Car Max selected another applicant who had sales experience.

Mr. Stokes takes anti-inflammatory medications, and Lyrica, Celebrex and Tramadol for pain management.

Since July 27, 2010, the Employer has paid \$1,190.58 a week in disability compensation, EX 3.

[Cross-examination] Mr. Stokes applied for the labor market positions on June 23 and 24, 2013.

In September 2012, after Dr. Sharma looked at the FCE, he released Mr. Stokes to medium to medium-heavy duty. Mr. Stokes did not apply for work in June, July, or August 2012 since he was still running his business. The last setup of the party equipment occurred in October 2012.

Mr. Stokes didn't attempt to find other work until April 2013 for two reasons. First, he was still trying to make his business profitable. Second, Mr. Stokes was waiting for the labor market survey which he believed was part of the OWCP process.

After he sold the party equipment in February 2013, Mr. Stokes went to a job fair in New Jersey and applied for several jobs online but was again unsuccessful. One of the companies was AT&T. He also looked at newspaper employment ads but could not find anything that was suitable due to his lifting restrictions. He was hoping to get back to work in computer or equipment repair with some re-training. He also contemplated going back to school under the GI Bill.

You may only take the DOT physical examination every 90 days. Mr. Stokes believed the examiner determined that Mr. Stokes was temporarily disqualified because during their discussion he indicated that he was under a physician's care and shoulder surgery to alleviate the shoulder popping had been mentioned, but Mr. Stokes had reservations about the procedure. The physical tests in the FCE was not at all similar to the DOT examination. When he contacted Colonial Orthopedics about a DOT physical, he was advised they did not conduct physical examinations.

Based on his military training, Mr. Stokes was able to obtain a commercial driver's license. It expires at the end of December 2013. However, he can't legally drive a commercial vehicle without a DOT physical.

Mr. Stokes' three sons live with him. When their mother graduates from nursing school in about two years, the arrangement may change.

Mr. Stokes hasn't received the result from the OWCP vocational rehab counselor's testing.

Including the sales of the party equipment, Mr. Stokes grossed \$17,500 from his business, but his estimated expenses were \$20,000.

Mr. Stokes has not received rejections for all his job applications; he is still waiting for a response from some employers.

[Re-direct examination] The DOT physical costs \$65, which he paid. Mr. Stokes intends to attend an upcoming veterans' job fair.

Ms. Kisa Banks Stokes
(TR, pp. 112-115)

[Direct examination] She is no longer married to Mr. Stokes but has joint custody of their sons. She is attending school to upgrade her LPN to RN. As a result, Mr. Stokes has more responsibility for their sons at this time. Before Mr. Stokes deployed overseas, he was in excellent shape and was very active in sports with their sons. Now, Mr. Stokes can not even lift their youngest son. Mr. Stokes also periodically complains about back and shoulder pain.

Documentary Evidence⁵

Treatment Records, 2002 to 2007

(EX 8)

Between September 5, 2002 to November 2, 2007, Mr. Stokes' treatment records for various ailments contain no reference to a shoulder injury, or limited range of motion in the left shoulder.

On July 9, 2003, Mr. Stokes presented to a chiropractor with constant low back pain for the past three weeks, which was exacerbated by activity. The onset was insidious but probably work-related since he did a lot of heavy lifting. The lumbar spine was tender with palpitation. He received multiple chiropractic adjustments through September 4, 2003, when he reported excellent improvement. He continued chiropractic therapy through November 2003.

On February 3, 2004, Mr. Stokes returned to the chiropractor with low lumbar discomfort, and received several adjustments.

On October 6, 2004, Mr. Stokes presented to a chiropractor with mid-back stiffness and received multiple adjustments.

On December 16, 2004, Mr. Stokes reported low back pain due to lifting at work. He received multiple adjustments.

From May 16, 2005 through January 19, 2006, Mr. Stokes received multiple chiropractic adjustments for low back pain which periodically ranged in the pain scale from two to five.

On May 18, 2006, Mr. Stokes advised his chiropractor that his low back pain was increased due to work (at Pepsi Cola). Specifically, when Mr. Stokes opened the door of the trailer, the weight of the bottles shifted and fell on him. For the next week, Mr. Stokes received four adjustments.

On May 17, 2007, Mr. Stokes presented with low back pain at a pain level of seven due to work, which required a "great deal" of lifting.

SEII/KBR Medical Records

(CX 1 and EX 8)

On November 6, 2007, upon physical examination, which included a physical abilities evaluation, Mr. Stokes was deemed medically qualified.

⁵Since the parties stipulated to the applicable average weekly wage, I have not summarized in detail Mr. Stokes' SEII compensation evidence and his tax records. Additionally, I have not summarized medical treatments unrelated to Mr. Stokes' claimed injuries and alleged complications. Finally, I have only included portions of Mr. Stokes' deposition which either were not covered in his hearing testimony, or significantly varied from his hearing testimony.

On January 17, 2009, Mr. Stokes presented with low back pain after spending the day moving fuel hoses and sandbags. He described his back sensation as a low dull pain at a pain level of seven out of 10. Although non-radiating, the pain increased with movement. Upon examination, tenderness was present at L3-L5 but there was no swelling or muscle tension. Pain was elicited with forward flexion, left lateral flexion, and lateral rotation to the right. However, good range of motion without restriction or difficulty was noted. The diagnosis was low back strain. The treatment was periodic icing and Ibuprofen. Mr. Stokes was returned to work.

On June 6, 2010, Mr. Stokes was evaluated for left shoulder and left flank injuries due to a fall of about six feet down a fuel retention wall when a handrail gave way. He struck the stairs or handrail with his left flank and hit the hard-packed ground with his left shoulder. He has pain in his left shoulder and left flank with noted abrasions to both elbows and the right knee. Mr. Stokes denied any back pain. Upon examination, a six to seven centimeter bruise was noted on the mid left flank. Palpitation of the area caused pain. Additionally, "there is a large area of bruising and swelling to the left superior to posterior shoulder, from the ac/clavicle joint to the mid-scapula area." His left shoulder range of motion was greatly decreased with point tenderness at the shoulder joint. The diagnosis was left shoulder sprain. Radiographic imaging was ordered and Vicodin for pain was prescribed. Mr. Stokes was directed to use a sling for support and placed on light duty.

On June 7, 2010, although his left shoulder pain had diminished, Mr. Stokes still had greatly reduced range of motion.

On June 8, 2010, Mr. Stokes reported more pain in his left flank, and blood in his urine.

During a June 11, 2010 follow-up visit, while his shoulder range of motion had improved, Mr. Stokes reported popping and clicking in his left shoulder joint, and experienced pain raising his arms above his head. Upon examination, the left flank bruising and swelling had resolved, but tenderness remained. The blood in the urine had resolved.

From June 11 through 17, 2010, Mr. Stokes engages in range of motion of stretching exercises. He requested further evaluation in Dubai. The diagnosis remained muscle strain/sprain.

A June 23, 2010 left shoulder x-ray showed normal joint alignment and joint space; no soft tissue calcification was noted.

A June 23, 2010 MRI of the left shoulder was "unremarkable," with normal findings.

A June 23, 2010 x-ray of the cervical spine was normal.

A June 23, 2010 MRI of the cervical spine was essentially normal.

**Florida Orthopaedic Institute –
Dr. H. Wesley Dykes
(CX 1 and EX 8)**

On July 21, 2010, Dr. Dykes evaluated Mr. Stokes for a left shoulder injury that he sustained during a June 6, 2010 fall at work. Recently, due to continued left shoulder discomfort, he returned to the United States from Iraq. Mr. Stokes had persistent, pulsating left shoulder pain at a pain level of seven, which radiated down his left arm to his fingers. He also experienced an associated clicking or popping. Mr. Stokes denied any neck pain or previous history of left shoulder injury. Upon physical examination of the left shoulder, Dr. Dykes did not find any instability or impingement and the radiographic studies were unremarkable. Dr. Dykes diagnosed left shoulder sprain and recommended a MRI arthrogram. Dr. Dykes also completed a Florida Workers' Compensation form, advising that Mr. Stokes' left shoulder sprain and possible ligament tear were work-related injuries due to the June 6, 2010 accident. He also included his recommendation for a MRI arthrogram, and indicated that the associated work restrictions were no lifting, pulling, or pushing greater than 15 pounds.

A July 27, 2010 MRI arthrogram revealed an intact rotator cuff, biceps tendon, and labrum, with no evidence of a fracture or contusion. While OS acromiale⁶ was observed, no significant impingement was noted. The glenohumeral joint and ligaments were normal.

In a July 28, 2010 visit, Dr. Dykes advised Mr. Stokes that the results of the MRI were unremarkable. Dr. Dykes also administered a cortisone injection. On the workers' compensation form, Dr. Dykes recommended physical therapy and changed Mr. Stokes' work restrictions to no lifting, pushing, or pulling greater than 25 pounds.

During August 2010, Mr. Stokes attended several physical therapy sessions for his left shoulder. On August 20, 2010, he reported feeling 75% better.

On August 26, 2010, Mr. Stokes presented for a follow-up concerning his left shoulder after nine physical therapy sessions. He reported doing much better, with less shoulder pain. During the second week of physical therapy, Mr. Stokes started experiencing a popping and clicking sensation over the anterior aspect of his left shoulder, with associated parenthesis. Upon physical manipulation, Dr. Dykes heard an audible pop over the anterior superior aspect of the left shoulder, which might be coming from the subacromial bursa. Dr. Dykes advised that the popping was not uncommon and it might settle down. Dr. Dykes' goal was to return Mr. Stokes to normal activities without any work restrictions.

Also, on August 26, 2010, Mr. Stokes presented with a complaint of left-sided low back pain as a result of his June 6, 2010 fall. He presented this injury initially and his urine samples contained blood associated with his left flank pain. The left S1 region is the source of his stiff soreness, especially in the morning, after prolonged sitting, and with extension activities. Mr. Stokes denied any prior injury to his low back. However, in 2003, while working as a Pepsi truck driver, he had some lumbar discomfort, which was treated by a chiropractor. Mr. Stokes

⁶The acromion is part of the scapula or shoulder blade that extends laterally over the shoulder joint. OS acromiale occurs when one of the four ossification centers, or growth plates, of the acromion fails to fuse,

later attributed the issue to sitting on his wallet. Prior to the June 6, 2010 accident, he had no discomfort or problems with his back. Upon physical examination, Dr. Dykes found near-normal range of motion of the back and hips, and no tenderness over the left flank and no lumbar tightness or spasm. The only observation was tenderness of the left S1 joint. Radiographic studies of the lumbar spine, including flexion and extension views were “unremarkable.” Dr. Dykes diagnosed left SI (sacroiliac) dysfunction,⁷ recommended four weeks of physical therapy, and indicated on the workers’ compensation form that the SI palpable tenderness and dysfunction were work-related. However, no work restrictions were necessary.

On October 4, 2010, Mr. Stokes completed physical therapy.

On October 11, 2010, Dr. Dykes gave Mr. Stokes another shoulder injection. He also advised that Mr. Stokes will need four to six more visits with an orthopedist due to his move to Richmond, Virginia. The physician also completed a workers’ compensation form and imposed no work function limitations or restrictions.

Colonial Orthopaedics –
Dr. S. Saraiya, Dr. V. Sharma, Dr. J. Snyder, and Dr. J. Pavan
(CX 1, CX 7, CX 9, CX 19, and EX 8)

On October 25, 2010, Mr. Stokes presented with left shoulder pain, and reported that he had fallen off a platform, landed on his left shoulder and hurt his lower back. Mr. Stokes reported that the onset of his low back pain had been “acute,” persisted for four months, and was now decreasing to a dull, non-radiating ache. However, walking aggravated the low back pain. His left shoulder pain initially was acute, and while gradually improving, it had persisted for four months. At present, his shoulder pain was a moderate dull ache, with painful range of motion and difficulty lifting. He had cortisone injections on July 28, 2010 with slight improvement, and October 11, 2010 with no improvement. Upon physical examination of the left shoulder, Dr. Saraiya noted normal range of motion, strength, and tone; with no muscle atrophy, tenderness, or pain. At the same time, the anterolateral border of the acromion was tender to palpitation. The cervical spine was normal. Impingement tests were normal. Although a previous MRI of the left shoulder did not reveal any abnormalities, since physical therapy and cortisone shots had not resolved Mr. Stokes’ shoulder issue, Dr. Saraiya diagnosed possible torn left shoulder labrum, and recommended another MRI. The physician also annotated back pain as another complaint arising from the June 6, 2010 fall; and that as a maintenance worker Mr. Stokes had to lift up to 150 pounds.

A November 4, 2010 left shoulder MRI arthrogram revealed mild degenerative change in the acromioclavicular joint, and mild supraspinatus tendinopathy. The study did not find a focal rotator cuff tear, and the glenoid labral was unremarkable. When contrast mixture was injected, no abnormality were identified.

⁷The treatment note says “left thigh dysfunction,” which I attribute to a transcription error considering that Dr. Dykes wrote “SI dysfunction” on the workers’ compensation form.

On November 12, 2010, Dr. Sharma, board certified in orthopedic surgery and family medicine, reviewed the radiographic studies and conducted a physical examination. In addition to tenderness over the border of the acromion, Dr. Sharma's impingement tests were positive. Mr. Stokes was able to "demonstrate clicking and popping in his left shoulder," which based on the near-normal radiographic studies, the physician attributed to the "possibility of increased anterior laxity." There was no evidence of muscle or rotator cuff tears. Dr. Sharma prescribed activity modification, ice therapy, anti-inflammatory medication, and possible ultrasound treatment. The possibility of arthroscopy repair was also discussed. Dr. Sharma imposed light duty restrictions of no lifting greater than 10 pounds with the left arm for four weeks.

When Mr. Stokes returned on December 17, 2010, he reported worsening left shoulder pain and inability to do overhead activities. Due to a lack of improvement, Mr. Stokes was requesting surgery. Additionally, Mr. Stokes had been on Percocet for eight weeks and had developed significant constipation, a known side-effect, and been treated by a gastroenterologist. Since conservative treatment had failed, and Mr. Stokes did not want to live with the pain, Dr. Sharma recommended shoulder arthroscopic surgery.

On January 7, 2011, a pre-operative examination was conducted. Mr. Stokes reported aggravated and sharp pain in his left shoulder with movement. Tenderness was noted over the anterolateral border of the left acromion, with pain beyond 90 degrees of abduction. Dr. Sharma again recommended a left shoulder arthroscopic repair and anticipated Mr. Stokes would be out of work for four weeks after the surgery.

On March 22, 2011, Mr. Stokes had left shoulder arthroscopic surgery, consisting of subacromial decompression, and tendon repair with a screw fixation.

On September 21, 2011, Dr. Snyder diagnosed spondylosis, and degenerative lumbar/lumbosacral disc. He placed Mr. Stokes out of work until October 21, 2011. Subsequently, Dr. Snyder gave Mr. Stokes two injections at L4-L5/L5-S-1 and the left sacroiliac joint, which did not provide any relief.⁸

On October 27, 2011, Mr. Stokes returned to Dr. Snyder for evaluation of his back pain, which was worsening and exacerbated by exertion, weight lifting, and prolonged standing. Prior injections and a facet block had been unsuccessful. A radiographic study showed several disc bulges with foraminal narrowing without radicular symptoms. Treatment options were discussed. Dr. Snyder released Mr. Stokes to work with a limitation of no carrying more than 10 to 20 pounds.

On November 17, 2011, Dr. Snyder considered the possibility of nerve root impingement, and a radicular component; however the injections had provided no relief and Mr. Stokes' clinical presentation did not reflect those problems. As a result, Dr. Snyder did not feel strongly about those diagnoses. Instead, Dr. Snyder opined Mr. Stokes' low back pain may be muscular in nature and thus suitable for rehabilitation and a referral to Dr. Pavan.⁹

⁸As reported in Dr. Sidhu's review of the medical treatment record, EX 12.

⁹Again, as reported by Dr. Sidhu, EX 12.

On January 3, 2012, a light duty restriction was imposed through February 2, 2012 due to physical therapy for Mr. Stokes' chronic low back pain associated with foraminal stenosis.

On March 13, 2012, Dr. Pavan, board certified in physical medicine and rehabilitation, evaluated Mr. Stokes, who reported gradual onset and worsening of low back pain for the past 18 months. An EMG showed mild left lumbar paraspinal denervation suggestive of lumbar nerve root irritation. And, a MRI revealed disc protrusion at L4-S1. Dr. Pavan continued a light duty restriction, with no lifting.

On May 11, 2012, following shoulder surgery, Dr. Sharma restricted lifting to five pounds pending a scheduled FCE.

A May 22, 2012 FCE showed that Mr. Stokes had the ability to work in medium to medium-hard work environment. Although he reported high pain levels, the evaluator concluded "his pain rating was out of proportion to his movement patterns." Mr. Stokes had limitations with overhead lifting. Mr. Stokes had reached MMI. He had the capacity to frequently lift up to 40 pounds. His frequent overhead lifting capacity was limited to 25 pounds due to decreased overhead range of motion. He was capable of frequent sitting, standing, and walking.

On May 24, 2012, Dr. Pavan prescribed a TENS unit with electrode supplies for Mr. Stokes' low back pain.

On June 8, 2012, Dr. Pavan indicated that Mr. Stokes was capable of medium to medium-heavy duty with a no pulling/lifting limit of 40 pounds. Mr. Stokes' back pain had been present since June 2010.

On September 7, 2012, Mr. Stokes reported that with more activity he experienced more popping, pain, and swelling in his left shoulder. Dr. Sharma diagnosed snapping scapula syndrome. Dr. Sharma released Mr. Stokes to medium to medium-heavy duty, with the FCE restrictions.

On September 14, 2012, Dr. Pavan prescribed an interference TENS unit for Mr. Stokes' chronic low back pain.

On November 30, 2012, Mr. Stokes presented with worsening low back pain. A physical therapy evaluation was prescribed.

On December 20, 2012, the Employer's insurer denied authorization for physical therapy since Mr. Stokes had reached MMI.

On February 8, 2013, Mr. Stokes returned for low back pain. Dr. Pavan noted tenderness over the lower lumbar area.

On June 27, 2013, Dr. Pavan restricted Mr. Stokes to no standing for more than 60% of the total work hours, and no lifting greater than 40 pounds until after physical therapy.

Southside Regional Medical Center
(CX 1 and EX 8)

On November 26, 2010, Mr. Stokes was evaluated for worsening and severe hemorrhoid which first onset gradually two weeks earlier. Mr. Stokes was taking one medication – Lisinopril, 5 mg (for hypertension). Upon physical examination, bleeding, external hemorrhoid was observed. Mr. Stokes was discharged with detailed treatment instructions for external hemorrhoids and prescriptions, including 30 Percocet tablets with instructions to take one or two tablets every four to six hours as needed for pain.

Payment of Compensation Notice
(CX 3 and EX 3)

On July 21, 2010, the Employer voluntarily initiated disability compensation due to the June 6, 2010 accident based on an average weekly wage of \$1,785.87. Medical treatment had been provided.

Employment Physical and Employment Agreements
(CX 4, EX 6, and EX 7)

During an employment physical conducted on November 6, 2007, the chest x-ray showed no active disease. Mr. Stokes' pre-existing health condition was high blood pressure, which was controlled with medication. He had no musculo-skeletal problems, never suffered a back injury, and did not have back pain. Mr. Stokes also reported no difficulty moving his arms. Upon physical examination, his spine and shoulders were normal. Mr. Stokes was determined to be medically qualified for employment.

On November 8, 2007, Mr. Stokes signed an employment agreement with SEII as a fuel distribution operator with a base monthly salary of \$2,583.00, with a 5% foreign service benefit and 35% area differential. As of September 21, 2008, Mr. Stokes' classification changed to fuel distribution system foreman with a base salary of \$3,057.00. On May 8, 2010, Mr. Stokes became a maintenance technician with a base salary of \$3,000.00.

Medical Expenses
(CX 8)

Mileage

Mr. Stokes claims the following mileage for his medical treatments: a) Florida Orthopedic Institute (July to October 2010) – 234 miles; b) Colonial Orthopedic, Spine Institute, and Southside Regional Medical Center (October 2010 to May 2011) – 1,136 miles; c) Spine Institute, Walmart (medication), West End MRI, and Colonial Orthopedic (September 2011 to March 2012) – 755 miles; and d) Colonial Orthopedic, Walmart, Spine Institute, Hopewell Orthopedic, Chesterfield Imaging, and Bonsecurs (March to May 2012) – 730 miles.

Radiographic Study

November 4, 2010 Arthroscopy for shoulder - \$295.54.

TENS Unit

A TENS unit kit, May 26, 2012: rental fee - \$125.00; and purchase price - \$795.00.

Forms Fee

June 8, 2012 Colonial Orthopedic “forms” fee - \$40.00.¹⁰

Colonoscopy

December 1, 2010 colonoscopy with “hemorrhoid banding,” amount due - \$441.48.

Digestive Care Center

November 29, 2010 charge for \$20.00.¹¹

Vocational Referral
(CX 13)

On May 15, 2013, OWCP referred Mr. Stokes to Ms. Sharon Bunger, a rehabilitation counselor.

DOT Commercial Driver Fitness Determination
(CX 16)

On July 2, 2013, Mr. Stokes underwent a DOT physical examination for a commercial driver’s license. In his medical history, Mr. Stokes advised that due to a June 6, 2010 accident, he suffered a separated left shoulder and lumbar disc displacement. Upon physical examination, an impaired limb was identified. Specifically, the examiner observed that Mr. Stokes was unable to fully extend, abduct, and rotate his left shoulder, which had been dislocated in his accident. Following surgery, the left shoulder had residual limitations. The DOT examiner determined that Mr. Stokes was temporarily disqualified medically due to his left shoulder and upper arm impairment.

¹⁰Based on the date of the document, this charge appears to relate to Dr. Pavan’s treatment.

¹¹Based on the date of the receipt, this charge appears to be related to the colonoscopy procedure.

Potential Employer Application and Contacts/Responses
(CX 17, and CX19 to CX 28)

By June 25, 2010, Mr. Stokes had applied to Schwan's Home Service; City of Petersburg telecommunicator (although they were not hiring at the moment; Martin Enterprises; Securitas Security (although job on labor market survey was not in their system); Allied Barton; Schneider National; Public Storage; DynaCorp (neither overseas job was still in their system); CarMax (sales consultant); River Forest (maintenance man); and Travelers (field support specialist).

On July 1, 2013, Mr. Stokes annotated that Schwans Home Service indicated that the driver position would not be a good fit since it required a lot of driving, walking, and bending. Schneider National noted that the job required occasional manual loading and unloading of the trailers. After an interview, he received an email that CarMax had hired another applicant. and River Forest told him that they had hired another applicant.

On July 8, 2013, Mr. Stokes informed Schneider National and Martin Enterprises that he did not pass the DOL examination. Mr. Stokes applied for another job in the area with Allied Barton.

Dr. Oscar Perez¹²
(CX 1 and EX 8)

On September 29, 2008, Mr. Stokes presented with foot pain associated with bunions. During the examination, Mr. Stokes did not mention back pain.

On July 12, 2010, Mr. Stokes returned with decreased range of motion of his left upper shoulder with tingling and numbness in his hands. His left shoulder also popped. Upon physical examination, tenderness and decreased range of motion were noted. An x-ray of the clavicle showed no evidence of a fracture, dislocation, or soft tissue foreign body. An x-ray of the left shoulder also produced no evidence of fracture or dislocation and was "unremarkable."

Chiropractic Care – 2009
(EX 8)

On August 21, 2009, Mr. Stokes presented with middle back pain with decreased range of motion, and pain between his shoulder blades.

Interrogatory Answers
(EX 9)

On May 8, 2013, Mr. Stokes claimed that he sustained the following injuries due to his accident: separated left shoulder, torn bicep tendon; and left side lower back lumbar disk displacement which was pinching a nerve.

¹²A substantial portion of Dr. Perez's treatment notes are illegible.

Mr. Stokes' July 19, 2013 Deposition
(EX 11)

Mr. Stokes started working for SEII in November 2007 and was sent home on medical leave on June 26, 2010. While an SEII employee, he suffered injuries to his left shoulder and lower back during the June 6, 2010 accident. Prior to June 6, 2010, Mr. Stokes had not suffered an injury to his left shoulder and lower back.

Mr. Stokes worked as a Pepsi Cola tractor-trailer driver from September 2002 to October 2007.

In his first job with SEII, in addition to preventive maintenance, his primary duty was refueling convoy trucks. When he became a foreman, Mr. Stokes moved to airfield fueling operations, which included offloading aviation fuel from convoy trucks to fuel storage tanks, moving aviation fuel from pipeline bulk fuel facilities to fuel storage tanks. Finally, in his last job as a maintenance technician, Mr. Stokes' responsibilities involved fixing and maintaining fuel transfer and storage equipment.

Following the June 6, 2010 accident, Mr. Stokes first discovered something was wrong with his left shoulder when he attempted to remove his shirt for a physical examination. The medic had to help him undress. After an x-ray was taken of his shoulder, a "colonel" told Mr. Stokes that his shoulder was separated. Although Mr. Stokes returned to work the next day, another doctor recommended a MRI to determine whether any soft tissue damage was present, and on June 20, 2010 he went to Dubai for the MRI. After the MRI was completed, the physician recommended that Mr. Stokes return to the United States for further treatment. He returned home to Tampa, Florida.

The insurer representative was Ms. Perez. Subsequently, in Tampa, he was treated by Dr. Dykes for his left shoulder and low back injuries. Mr. Stokes later returned to Richmond, Virginia, to be closer to his children.

Mr. Stokes had surgery on his left shoulder in April 2011. Mr. Stokes believes that he reached MMI for his left shoulder and low back in June 2012. His doctors have recommended additional surgery but Mr. Stokes has declined.

Dr. Pavan's work restriction is no lifting greater than 40 pounds due to Mr. Stokes' back condition. Although Mr. Stokes does not believe he can do overhead lifting up to 25 pounds, his doctor told him that the FCE measures overhead lifting capacity in terms of the whole body, which includes using both hands.

From February 2010 to February 2013, Mr. Stokes was employed, running his own small company renting party equipment. In April 2013, Mr. Stokes also worked a day or so in an Amazon warehouse but it didn't work out because he couldn't do the work, which required 10 hours of standing.

Mr. Stokes applied for every job on the labor market survey, although he isn't really qualified for commercial truck driving because he hasn't passed the requisite DOT physical because of the popping in his left shoulder.

The department with the telecommunicator job was not taking applications.

Mr. Stokes believes that he could work as a security guard, but he is concerned about the amount of standing associated with a roving guard position.

Mr. Stokes had an interview with CarMax but they selected someone who had sales experience.

Mr. Stokes applied to be an apartment maintenance man but was unsuccessful because he didn't have the necessary experience.

Mr. Stokes does small chores around the house. He can shop for groceries in small amounts. He drives a car. He prefers an automatic transmissions because on occasion manually shifting while turning will cause his left shoulder to snap which produces "instant" pain.

Mr. Stokes currently goes to maintenance therapy for his back. Mr. Stokes takes anti-inflammatory medication for his left shoulder which swells when it snaps.

Dr. Baljit S. Sidhu
(EX 12)

On April 5, 2012, Dr. Sidhu, a board certified orthopedic surgeon and independent medical examiner, examined Mr. Stokes, and reviewed his medical record, which included treatment records from KBR, Dr. Dykes, Colonial Orthopedics (Dr. Saraiya, Dr. Sharma, Dr. Kalluri, and Dr. Pavan), and Dr. Snyder; multiple radiographic studies of Mr. Stokes' left shoulder; and physical therapy records. Mr. Stokes described the circumstances of his June 6, 2010 fall, when he fell on his left side and outstretched left hand. Dr. Sidhu then reviewed with Mr. Stokes the subsequent treatments that he received for his injuries. Dr. Dykes' August 26, 2010 treatment record indicated that Mr. Stokes presented with low back pain due to his fall. According to Mr. Stokes, he advised Dr. Dykes of his low back pain when he first saw him after his return to the U.S. However, Dr. Dykes indicated that he would first deal with the left shoulder injury. Mr. Stokes later reported low back pain to Dr. Saraiya in October 2010, and that issue was subsequently addressed by Dr. Snyder and Dr. Pavan.

At the start of the examination, as medical history, Mr. Stokes reported that he had no problems with his back in the past. Mr. Stokes experienced left shoulder pain whenever he raised his arm above his shoulder, and when he pushed and pulled. He also had persistent back pain on the left side at a pain level of six. When identifying the location, Mr. Stokes pointed to the left S1 joint. The pain increased with spine extension.

Upon physical examination, Dr. Sidhu noted that Mr. Stokes was able to bend forward and touch his toes without any problems. Deep tendon reflexes of, and sensation in, both lower extremities were normal. Some tenderness was located over the left S1 joint area, with minimal tenderness at the lumbosacral area. Forward elevation of the left shoulder was limited to 143 degrees versus 180 degrees. Mr. Stokes complained of left shoulder pain during impingement maneuvers and Dr. Sidhu could feel clicking in the upper medial corner of the scapula, rather than the scapula joint. With pressure applied to the scapula, the clicking stopped. The most recent MRI of the left shoulder revealed an intact rotator cuff, surgical repair of a tendon attachment, and mild AC arthritis. The MRI of the lumbar spine showed degenerative changes at L4-L5 and L5-S1, with bulging disc; but no evidence of acute herniation was noted.

Upon completion of the evaluation, Dr. Sidhu first commented that Mr. Stokes moved far too normally to have the significant back pain that he reported. At the same time, Dr. Sidhu did not conclude that Mr. Stokes was magnifying his symptoms. Next, Mr. Stokes had successful left shoulder surgery. The remaining pain was coming from the scapula area, accompanied by snapping in the scapular area. Third, any cervical issues had been resolved. Fourth, the examination confirmed Mr. Stokes had pain over the S1 joint and the posterior, superior iliac spine. Fifth, in Dr. Sidhu's opinion, the degenerative changes pre-existed Mr. Stokes' fall, and he only suffered a soft tissue injury to the left side of his lower back and flank. The soft tissue injuries would have resolved within 12 weeks. Similarly, any associated lumbar strain from the accident would have resolved following treatment. Consequently, Mr. Stokes' continued low back pain is probably not related to his fall and is instead attributable to his chronic degenerative changes of his spine. Sixth, the left shoulder injury was related to the June 6, 2010 accident and the snapping in his left shoulder may require surgery and a steroid injection. Seventh, Mr. Stokes will be left with only a mild disability from his June 6, 2010 injury. He is capable of returning to work at light duty.

Vocational Counseling (EX 14)

Between May 18, and June 15, 2013, Ms. Sharon Bunger, on behalf of OWCP, conducted a vocational rehabilitation assessment of, and counseling with, Mr. Stokes. A May 2012 FCE demonstrated that Mr. Stokes was capable of medium to medium-heavy work. Physicians have released Mr. Stokes to work with a lifting restriction of no more than 40 pounds. Mr. Stokes was interested in returning to work as a driver, outside sales person, or technician. While Mr. Stokes had experience in commercial transportation, fuel operations, supervision, and bulk fuel equipment maintenance, the transferability of the associated skills was questionable given the physical demands of such employment. Upon review of the labor market for maintenance technicians, Ms. Bunger found most positions required standing the full work shift and frequent lifting of up to 50 pounds. Based on Mr. Stokes' willingness to return to work within his residual ability, the counselor recommended vocational testing.

Labor Market Survey
(EX 16)

On May 29 and 30, 2013, after conducting a vocational assessment and reviewing the medical record, Ms. Susan Rapant conducted a labor market survey. Dr. Pavan imposed a lifting, pushing, or pulling limitation of 40 pounds. And, an FCE determined Mr. Stokes was capable of medium to medium-heavy work with frequent sitting, standing, walking, and occasional reaching, bending and stooping. Mr. Stokes owns a computer; has basic computer skills, including typing; and uses e-mail. The identified employment opportunities in the local community and specific requirements are set out below.

Schwan's Home Service, Inc. – Route Sales Representative

Description: a trainee level position that requires driving a truck to sell and deliver 300 varieties of frozen food, and other company products to up to 120 customers. Full time position, with an average of 60 hours a week.

Physical requirements: lifting 50 pounds from floor to waist and 30 pounds waist to crown.

Other requirements: driver's license, but CDL not required.

Weekly income: \$9.58 per hour, up to 60 hours a week.

Availability: apply online.

City of Petersburg Police Department - Telecommunicator

Description: performs technical work, dispatching police, fire, and rescue personnel on an emergency basis.

Physical requirements: ability to work in an office environment, and to sit and be attentive for long periods of time.

Weekly income: \$13.38 per hour, full time (40 hours a week).

Availability: submit application/resume by mail or walk-in.

Martin Enterprises of the Carolinas – Team or Solo OTR (over the road) driver

Description: long haul truck driver, "no touch" refrigerator freight.

Physical requirements: must be able to do a paper log properly.

Other requirements: six months experience and CDL.

Weekly income: \$13.85 to \$23.00 per hour, up to 65 hours a week.

Availability: apply online.

Securitas Security Services USA, Inc. – Security Officer

Description: observes and reports activities and incidents at assigned sites, providing security and safety for client property. Makes appropriate patrols and inspects protection devices and fire control equipment. Preserves order, and may act to enforce applicable regulations and directives.

Physical requirements: occasional reaching; and frequent sitting, standing, and walking for long periods of time. Occasional lifting and moving up to 25 pounds required.

Other requirements: must have high diploma.

Weekly income: \$8.50 to \$10.50 per hour, full-time and part time.

Availability: apply online.

Allied Barton – Security Officer

Description: patrols facility, or is present at post as directed. Serves as a general security presence and visible deterrent to crime. Reports and responds to all incidents, accidents, and medical emergencies.

Physical requirements: applicants with physical limitations may apply. Must be able to walk and stand for duration of shift. However, a few positions allow employee to sit.

Other requirements: must have high school diploma.

Weekly income: \$11.00 per hour, full-time and flex.

Availability: apply online

Schneider National – OTR Truck Driver

Description: long haul truck driver, with 95% “no touch” freight.

Physical requirements: (none listed.)

Other requirements: experienced truck driver or recent truck driving school graduate and valid CDL.

Weekly income: \$15.38 per hour, up to 65 hours a week.

Availability: apply online.

Public Storage – Retail Sales

Description: provides customer service by helping customers understand their storage needs. Assist appointment and walk-in customers in renting storage units. Ensure appearance of property by cleaning units, sweeping, mopping, and removing debris.

Physical requirements: ability to perform light cleaning and maintenance.

Other requirements: minimum one-year experience of customer service and/or sales experience. Valid driver’s license.

Weekly income: \$9.00 per hour, full-time.

Availability: apply online.

DynaCrop – Overseas Petroleum, Oil, and Fuels Technician

Description: establish, perform, and document a preventive maintenance program for fuel and fuel equipment, including fuel pumps.

Physical requirements: ability to carry, push, or pull up to 50 pounds.

Other requirements: work location – Iraq.

Weekly income: (not specified), full-time.

Availability: apply online.

DynaCrop – Overseas Security Escort Guard

Description: responsible for the safe and timely escort of selected personnel on and off post at Al Udeid Air Force Base (Doha, Qatar). Makes spot inspections and checks to ensure security of assets.

Physical requirements: must be physically fit.

Other requirements: must have high school diploma, driver's license, and working knowledge of personal computers.

Weekly income: \$9.62 to \$10.58 per hour, based on similar position in Fort Worth, TX, full-time.

Availability: apply online.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Credibility Determination

Based on his hearing demeanor, usually straight-forward and apparently earnest responses to questioning, and the absence of equivocation, I found Mr. Stokes to be a generally credible witness. However, as subsequently discussed in detail, I nevertheless have some concerns about the accuracy of his testimony and statements concerning his low back problems based on the medical record. While the noted inconsistencies affect the probative value of his low back pain representations, based on my consideration of the hearing testimony and evidentiary record as a whole, I attribute the accuracy issue to less-than-complete memory recall, which caused a less-than-precise medical history, rather than purposeful deceit.

Stipulations of Fact

At the hearing, the parties stipulated to the following facts: (a) on June 6, 2010, Mr. Stokes suffered an injury that arose out of, and during the course of, his employment with SEII; b) Mr. Stokes reached maximum medical improvement on June 8, 2012; c) the applicable average weekly wage is \$1,935.02; d) from July 21, 2010 to June 7, 2012, Mr. Stokes had a temporary total disability due to his work-related injury; e) from June 8, 2012 to April 15, 2013, Mr. Stokes had a permanent total disability due to his work-related injury; f) on April 16, 2013, Mr. Stokes had a permanent partial disability, and g) from April 17, 2013 to May 30, 2013, Mr. Stokes had a permanent total disability due to his work-related injury. TR, pp. 9, 65, and 109-111.

Work-Related Injury

Although the parties stipulated that Mr. Stokes suffered a work-related injury on June 6, 2010, I must render specific determinations regarding the actual nature of those injuries. Mr. Stokes claims that due to his fall he suffered damage to his left shoulder, and left lower lumbar disc displacement, which pinched a nerve.

In determining whether there is a causal relationship between Mr. Stokes' left shoulder condition and his low back pain, and his fall on June 6, 2010, I am guided by multiple adjudication principles and must make several determinations involving the *prima facie* case of entitlement, a presumption under Section 20(a) of the Act, substantial contrary evidence, and the Claimant's ultimate burden of proof. In making these determinations, I am entitled to weigh the evidence and draw inferences from it; and, I am not bound by the opinion or theory of any particular medical expert. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1969).

Prima Facie Case

The fundamental initial step in the disability claim process is the establishment of a *prima facie* case of entitlement, which consists of two elements. First, a claimant has the burden of establishing that he sustained an injury – a physical or mental harm or pain. During this consideration, no presumption exits. *See Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15 (1990). Instead, a claimant must prove the existence of some bodily malfunction or harm through the preponderance of the evidence. Second, the claimant must show that an accident or incident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). The establishment of this preliminary *prima facie* case of entitlement is significant because it then in turn invokes a presumption under Section 20(a) of the Act. *See U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455 (D.C. Cir 1980).

Injury

Under the Act, 33 U.S.C. § 902(2), a compensable “injury” is defined as an accidental injury arising out, and in the course, of employment. The federal courts and the Benefits Review Board (“BRB” or “Board”) have provided substance and boundaries to this definition through numerous interpretations. A claimant has sustained an injury when he experiences some harm, pain, or something unexpectedly “wrong within the human frame.” *Wheatly v. Adler*, 407 F.2d 307, 313 (D.C. Cir 1968) (en banc). A psychological impairment can be an injury under the Act. *Director, OWCP v. Potomac Elec. Power Co. (Brannon)*, 607 F. 2d 1378 (D.C. Cir. 1979); *see also, Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984) (depression due to a work-related disability), and *Spence v. ARA Food Serv.*, 13 BRBS 635 (1980) (headaches from a work-related incident are compensable). Even the claimant's credible complaints of subjective symptoms and pain can be sufficient to demonstrate the requisite harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub. nom. Sylvester v. Director, OWCP*, 681 F. 2d 359 (5th Cir. 1982).

A work-related aggravation of a pre-existing condition is also an injury under the Act. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989). To be a compensable injury under the Act, the employment-related injury need not be the sole cause, or primary factor, in a disability. If an employment-related injury contributes to, combines with, or aggravates a pre-existing or underlying condition, the entire disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Kooley v. Marine Indus. N. W.*, 22 BRBS 142 (1989). Thus, the term “injury” includes aggravation of a pre-existing, non-work-related condition, or the combination of work and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

Under the “aggravation rule,” the relative contribution of the accident and prior disease are not weighed. *Independent Stevedore Co. v. O’Leary*, 357 F.2d 812, 815 (9th Cir. 1966). The aggravation rule or doctrine does not require that the employment injury interact with the underlying condition itself to produce some worsening of the underlying condition. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any event, the employee is nevertheless considered to be incapacitated by the employment injury and the resulting disability is compensable under the Act. *Id.* Although an injury may not be the medical cause of the pre-existing non-work-related condition, if the injury brings on symptoms earlier than would be expected, the injury is considered the proximate cause. *Id.* (citing a determination by the Arizona Supreme Court). To hasten disability is to cause it. *Id.* at 814-15.

With those principles in mind, I first note that between his arrival in Iraq in 2007 and his June 6, 2010 fall, Mr. Stokes had no problems with his left shoulder. And, although Mr. Stokes sought treatment for low back pain in January 17, 2009 after moving fuel hoses and sandbags, he returned to work and had been symptom-free in regards to his low back through June 6, 2010.¹³ The evidentiary record further demonstrates that on June 6, 2010, when the stair handrail broke away, Mr. Stokes struck the stairs and handrail with the left flank of his body and the hard-packed, earthen berm with his out-stretched left hand, and then rolled down the remaining portion of the six-foot high berm, sustaining cuts and abrasions to his elbows, a large area of bruising and swelling to the posterior of his left shoulder, and a six to seven centimeter bruise on the “mid-left flank.” Physical examination also revealed left shoulder and mid-left flank pain with palpitation. And, within four days of the accident, Mr. Stokes developed popping and clicking in his left shoulder joint and pain while raising his left arm above his head. At the same time, his left flank remained tender, and he developed blood in his urine. Consequently, I find Mr. Stokes left shoulder popping/clicking, left shoulder pain, and left flank pain were injuries.

¹³When Mr. Stokes received chiropractic care on August 21, 2009, he presented with middle, rather than low, back pain.

Accident

Under the second prong of a *prima facie* case, a claimant must show that an accident or incident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain, or aggravated a pre-existing condition. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

Given the undisputed suddenness and violence of Mr. Stokes' fall down the fuel storage area berm when the handrail gave way, I find the June 6, 2010 work-related accident could have caused Mr. Stokes' left shoulder and left flank abnormalities and pain, and aggravated a possible pre-existing condition of his low back.

Conclusion

Having proven that he suffered injuries on June 6, 2010, and a work-related accident occurred on that day which could have caused his left shoulder and left flank abnormalities and pain, or aggravated a pre-existing condition of his low back, Mr. Stokes has established a *prima facie* case.

Presumption Under Section 20(a) of the Act

Under Section 20(a) of the Act, 33 U.S.C. § 920(a), it is presumed, in the absence of substantial evidence to the contrary, that a compensation claim comes within the provisions of the Act. The courts have applied this language to the establishment of a nexus between an employee's injury and employment activities. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir 1976) *cert. denied*, 429 U.S. 820 (1976). Specifically, once a claimant establishes a *prima facie* case, a presumption arises under Section 20(a) that the employee's injury arose out of his employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). If the presumption is invoked, and the employer fails to respond, then the claimant is entitled to compensation under the Act for an injury arising out, and in the course, of employment.

Having established a *prima facie* case, Mr. Stokes has invoked the presumption under Section 20(a) of the Act that his left shoulder popping/clicking, and related pain, and left flank/back pain were caused, or aggravated, by his work-related accident on June 6, 2010.

Substantial Contrary Evidence

Once the claimant establishes a *prima facie* case and invokes the Section 20(a) presumption, the burden of production of evidence shifts to the other party, the employer, to demonstrate the claimant's condition was not caused, or aggravated by, the accident. *Brown v. Pacific Dry Dock*, 22 BRBS (1989). To rebut the Section 20(a) presumption, the employer must present substantial evidence (specific and comprehensive medical information) that would support a finding that a connection between the bodily harm and accident, or working conditions is absent or has been severed by an intervening event. *Parsons Corp. v. Director OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 191 (1990) (unequivocal physician testimony that no relationship exists between an injury and a claimant's

employment may be sufficient to rebut the presumption). Substantial evidence is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), cert. denied, 360 U.S. 931 (1959); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976). The employer must produce specific and comprehensive evidence, and not speculation, that is substantial enough to support the findings that were made. *American Grain Trimmers, Inc. v. O.W.C.P. (Janich)*, 181 F.3d 810 (7th Cir. 1999); *Fortier v. General Dynamic Corp.*, 15 BRBS 4 (1982).

This adjudication stage does not involve a shift in the burden of proof. When there has been a work-related accident followed by an injury, the employer need only introduce medical testimony or other evidence contradicting the existence of a causal relationship and need not necessarily prove some other agency of causation to rebut the Section 20(a) presumption. *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982). At the same time, the presumption is not rebutted merely by suggesting an alternate way that the claimant's injury might have occurred. *Williams v. Chevron, U.S.A.*, 12 BRBS 95 (1980).

Once rebutted, the presumption no longer affects the outcome of the case. *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986). In that event, the claimant must establish the requisite causation link between his injury and the work-related accident by a preponderance of the probative evidence. See *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cr. 1982). On the other hand, in the event the evidence relied upon by the employer is not sufficient to rebut the presumption, then even if no other evidence in the record establishes causation or aggravation, causation or aggravation is nevertheless established by law under the un-rebutted Section 20(a) presumption. *Cairns v. Matson Terminals*, 21 BRBS 252 (1988).

As will become readily apparent, at this point of the adjudication, I need to separate Mr. Stokes' two injuries.

Left Shoulder Abnormalities

The Employer has not presented any substantial contrary evidence to rebut the Section 20(a) presumption that Mr. Stokes' left shoulder abnormalities, consisting of continued clicking/popping and pain with overhead movement of his left arm represent a compensable work-related injury under the Act. To the contrary, upon completion of his physical examination, Dr. Sidhu opined that Mr. Stokes' continued left shoulder condition was related to his June 6, 2010 accident. Accordingly, in the absence of sufficient medical opinion to sever the presumptive causal connection, I find under Section 20(a) that Mr. Stokes' continued left shoulder abnormalities and pain were caused by his June 6, 2010 accident, and represent a work-related injury which is compensable under the Act.

Left Low Back Pain

On the other hand, also after his physical examination and record review, Dr. Sidhu reached a different conclusion concerning Mr. Stokes' persistent low back pain. Specifically, in light of MRI finding of degenerative changes in the lumbar spine with disc bulges, and upon review of the KBR treatment records following the accident, Dr. Sidhu opined: a) Mr. Stokes' continued low back pain was attributable to chronic degenerative changes in his spine, and b) Mr. Stokes only suffered soft tissue injury to his left side which would have resolved within 12 weeks. In light of his physical examination and record review which included lumbar radiographic evidence, I find Dr. Sidhu's opinion sufficient contrary evidence to rebut the invoked Section 20(a) presumption.

Causation

Since the Employer has rebutted the Section 20(a) presumption, I turn to consideration of the evidentiary record as a whole to determine whether Mr. Stokes can establish that his low back abnormalities, including continued back pain, were caused, or aggravated, by his June 6, 2010 fall. My adjudication on this issue will consist of a review of the medical record both before and after the June 6, 2010 accident, and the opinions of the physicians who addressed causation.¹⁴

In terms of pre-accident low back issues, starting in July 2003, Mr. Stokes presented to a chiropractor for constant low back pain and received chiropractic therapy through November 2003. Mr. Stokes also received chiropractic care for low lumbar discomfort and low back pain, ranging up to pain level five in 2004 and 2005. Further, on May 18, 2006, Mr. Stokes advised his chiropractor that his low back pain was increased while working as a Pepsi Cola delivery driver when as he was opening the truck door the bottles shifted their weight and fell on him. Finally, on May 17, 2007, Mr. Stokes presented with low back pain at a pain level of seven due to work, which required a "great deal" of lifting.

Upon physical examination after the June 6, 2011 accident, Mr. Stokes had a soft tissue bruise on his left flank, and pain that transitioned to tenderness within four days. And, while he developed blood in his urine, the diagnosis was possible bruised kidney and there was no specific treatment for low back pain complaints. Likewise, between June 12, 2010 and August 25, 2010, Mr. Stokes' treatment records contain no reference to low back pain. And, when Mr. Stokes saw Dr. Perez on July 10, 2010, a little over a month after the accident, Mr. Stokes only presented a complaint of left shoulder pain, with decreased range of motion.

After his return to Tampa, Florida in the summer of 2010, Mr. Stokes purchased inflatable party equipment and rented the equipment as a personal business. Although his sons helped move and set up the equipment, Mr. Stokes was the weak link physically.

¹⁴Dr. Perez and Dr. Sharma did not discuss the condition of Mr. Stokes' low back.

On August 26, 2010, Mr. Stokes reported stiff soreness in his left low back to Dr. Dykes.¹⁵ As part of his medical history, Mr. Stokes denied any prior injury to his lumbar spine and recalled that he only experienced some lumbar discomfort in 2003 when he worked as a truck driver. Upon physical examination, Dr. Dykes found near-normal range of motion of the back and hips, and no tenderness in the left flank and no lumbar tightness or spasm. The only observation was tenderness of the left S1 joint. Radiographic studies of the lumbar spine, including flexion and extension views were “unremarkable.” Dr. Dykes diagnosed left SI dysfunction, recommended four weeks of physical therapy, and indicated on the workers’ compensation form that the SI palpable tenderness and dysfunction were work-related.

For two reasons, Dr. Dykes’ terse work-related annotation on the workers’ compensation form has little probative value. First, although Mr. Stokes advised that he injured his left flank during the June 6, 2010 fall, experiencing discomfort, and Dr. Dykes actually found no tenderness over left flank upon physical examination, the physician still attributed the SI dysfunction to the accident without any explanation. Second, Mr. Stokes’ reported medical history of minimal antecedent low back discomfort in 2003 significantly understated his actual prior low back problems which persisted well beyond 2003, reached a pain level of seven and required recurrent treatment into 2007, and included a low back injury in 2006 when Pepsi Cola bottles fell off a truck and struck him.

Mr. Stokes reported low back pain to Dr. Saraiya on October 25, 2010, and advised that the onset of his low back pain had been “acute,” persisted for four months, and was now decreasing to a dull, non-radiating ache. Focusing on Mr. Stokes’ left shoulder injury, and without conducting a physical examination of Mr. Stokes’ low back,¹⁶ Dr. Saraiya annotated as an “additional complaint” in the treatment record that Mr. Stokes’ back pain arising from his June 6, 2010 fall and assigned a date of injury for the back pain of June 6, 2010.

In the absence of physical examination of Mr. Stokes’ back, or any explanation, Dr., Saraiya’s causation determination has diminished probative value due to apparent reliance on Mr. Stokes’ problematic representation about his low back injury at the time of the accident. Specifically, Mr. Stokes told Dr. Saraiya that after the June 6, 2010 accident the onset of low back pain had been “acute,” persisted for four months, and was only just recently decreasing. However, the treatment record demonstrates that to the contrary, within four days of the accident, Mr. Stokes was only experiencing tenderness in his left flank, and despite several additional medical contacts through August 25, 2010, the treatment records contain no reference to low back pain.

¹⁵While I have considered Mr. Stokes’ representation to Dr. Sidhu that he first advised Dr. Dykes of his low back pain during his first visit in July 2010, I consider Dr. Dykes’ actual contemporaneous treatment notes from that time period which first mention a low back pain complaint on August 26, 2010 to be more probative.

¹⁶Dr. Saraiya only physically examined Mr. Stokes’ cervical spine.

Over the course of his evaluation of Mr. Stokes' low back pain in 2011, Dr. Snyder obtained radiographic evidence showing degenerative changes in the lumbar spine with bulging discs, and administered injections and facet blocks. When the prescribed treatments did not provide relief, Dr. Snyder opined that Mr. Stokes' low back pain may be muscular in nature and not due to radiculopathy associated with the degenerative disc disease.

While Dr. Snyder's treatment notes provide additional detail concerning the treatment of Mr. Stokes' low back pain and potential diagnoses, his opinion has little probative value concerning causation because he did not render an etiology determination for Mr. Stokes' low back issues.

Based on a referral from Dr. Snyder, Dr. Pavan treated Mr. Stokes' low back pain from March 2012 into the summer of 2013, when the evidentiary record closed. Mr. Stokes indicated that his low back pain had been present since June 2010 and was gradually worsening. Upon physical examination, Dr. Pavan noted low back pain and stiffness, which he diagnosed as low back tenderness. Dr. Pavan indicated Mr. Stokes' low back pain was S/P (status post) fall.

As Mr. Stokes' treating physician for low back pain, Dr. Pavan was well positioned to provide a probative assessment concerning the cause of Mr. Stokes' low back which had been present since June 2010 and gradually worsened. Nevertheless, his abbreviation diagnosis relating Mr. Stokes' low back pain to his fall is insufficient to establish causation in the absence of any discussion how the objective medical evidence, including radiographic findings showing degenerative disc disease, supported his causation determination. Also, notably absent in his assessment is any finding that Mr. Stokes' June 6, 2010 fall may have aggravated any pre-existing degenerative disc disease, or accelerated its progression.

Finally, relying on objective radiographic evidence showing degenerative disc disease, a physical examination showing no tenderness in the left flank and only "some" tenderness over the left S1 area, as well as Mr. Stokes' treatment records, including KBR's post-accident medical documentation, Dr. Sidhu presented a documented, reasoned, and probative determination that Mr. Stokes only suffered a soft tissue injury to his left flank when he fell on June 6, 2010, such that his present low back pain was not attributable to his work-related injury.

In summary, for various reasons, on the issue of causation, the opinions of Dr. Dykes, Dr. Saraiya, Dr. Snyder, and Dr. Pavan have diminished probative value. The remaining opinion by Dr. Sidhu is probative and demonstrates that Mr. Stokes' low back pain was not caused, or aggravated by, his June 6, 2010 work-related accident. Accordingly, Mr. Stokes is unable to prove through the preponderance of the probative medical evidence that his low back pain is attributable to the June 6, 2010 work-related accident, which thus precludes a finding that his low back abnormalities and pain represent a compensable injury under the Act.

Issue # 1 – Disability Compensation

Because Mr. Stokes has established that he suffered injuries to his left shoulder in a work-related accident on June 6, 2010, I must next address the nature and extent of the resulting disability associated with that injury.

Under the Act, disability is defined as the “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” 33 U.S.C. § 902(10). Thus, a claimant’s inability to work due to a work-related injury is addressed in terms of the extent of the disability (total or partial) and the nature of the disability (permanent or temporary). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985).

Nature

The nature (or character) of a disability may be either temporary or permanent. Although the consequences of a work related injury may require long term medical treatment, an injured employee reaches maximum medical improvement when his condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). In other words, the nature of the worker’s injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). Consequently, if a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent. *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1979).

MMI is a medical determination and medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that the condition will not improve, regardless of economic or vocational considerations. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Trask* 17 BRBS at 60. In the absence of any other relevant evidence, a judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

As stipulated by the parties, Mr. Stokes reached maximum medical improvement on June 8, 2012. As a result, the nature of any impairment associated with Mr. Stokes’ left shoulder injury was temporary through June 7, 2012, and then became permanent on June 8, 2012.

Extent

Stipulated Extent, Average Weekly Wage, and Associated Compensation Awards

At the hearing, the parties stipulated to the extent of Mr. Stokes' impairment for several periods as follows: total from July 21, 2010 to April 15, 2013, and total from April 17, 2013 to May 2013. They also stipulated that the applicable average weekly wage in this case is \$1,935.02.

Consequently, in light of the above stipulations, and the nature of his impairment, Mr. Stokes is entitled to the following disability compensation awards: a) temporary total disability compensation based on an average weekly wage of \$1,935.02 from July 21, 2010 through June 7, 2012; b) permanent total disability compensation based on an average weekly wage of \$1,935.02 from June 8, 2012 through April 15, 2013; and c) permanent total disability based on an average weekly wage of \$1,935.02 from April 17, 2013 through May 30, 2013.

Additional Extent of Mr. Stokes' Impairment Determinations

Based on the presentations of the parties, I still must determine the extent of Mr. Stokes' impairment for three periods: June 27, 2010, when Mr. Stokes departed SEII on a medical leave of absence through July 20, 2010; April 16, 2013, when Mr. Stokes was employed for one day;¹⁷ and from May 31, 2013, which is the principle issue in this case.

General Adjudication Principles

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). The employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates, a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5th Cir. 1986). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity.

¹⁷Although the parties stipulated that the extent of Mr. Stokes' impairment was partial on this day, I must also determine his residual earning capacity.

In determining the extent of an impairment, the Board and the federal Courts of Appeals have adopted a “shifting burdens” approach, involving a multi-step adjudication process. *SEACO and Signal Mutual Indemnity Assoc., Limited v. Bess*, 120 F.3d 262 (4th Cir. Aug. 7, 1997) (unpublished) (Table, text in WESTLAW No. 96-2635); see also *Newport News Shipbuilding & Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

Prima Facie Case of Total Disability

First, to establish a *prima facie* case of total disability, whether temporary or permanent in nature, a claimant has the initial burden of proof to show that he cannot return to his regular or usual employment due to work-related injuries. See *Newport News Shipbuilding & Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). Since the extent of disability is measured in terms of adverse impact on wage-earning capacity, if a claimant has a physical impairment from a work-related accident but is still doing his usual work adequately and regularly, the claimant has suffered no loss of wage-earning capacity and is therefore not disabled under the Act. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1980). Correspondingly, total disability occurs if a claimant is not able to adequately return to his or her pre-injury, regular, full-time employment. *Id.* The same standards apply regardless of whether the claim is for temporary total or permanent total disability. *Bell v. Volpe/Head Constr. Co.*, 11 BRBS 377 (1979).

This evaluation of loss of wage earning capacity focuses both on the work that an injured employee is still able to perform and the availability of that type of work which he can do. *McBride*, 844 F.2d at 798. At this initial stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former, regular employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). A claimant’s credible testimony of considerable pain while performing work may be a sufficient basis for disability compensation even though other evidence indicates the claimant has the capacity to do certain types of work. *Mijangos v. Avondale Shipping, Inc.*, 948 F.2d 194 (8th Cir. 1999); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In addition, a physician’s opinion that the employee’s return to his usual or similar work would aggravate his condition may also be sufficient to support a finding of disability. *Case v. Washington Metro. Area Transit. Auth.*, 21 BRBS 248 (1988). There is no requirement that a claimant be bedridden for there to be a finding of total disability. *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied* 394 U.S. 976 (1969). Finally, the fact that a claimant works after his injury does not necessarily preclude a finding of total disability, if his re-employment involves unsuitable work, *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 451 (4th Cir. 1978).

Suitable Alternative Employment

If a claimant is able to demonstrate he is unable to return to his former job, then in the second step of the disability adjudication process, the employer has the burden of production to show that suitable alternate post-injury employment is reasonably available. *Nguyen v. Ebttide Fabricators*, 19 BRBS 142 (1986). The availability of suitable alternative employment involves defining the type of jobs the injured worker is reasonably capable of performing, considering his

specific capabilities; that is, age, background, education, employment history, experience, and physical capacities; and determining whether such jobs are reasonably available in the local community for which the claimant is able to compete and realistically obtain. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1978); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Trans-State Dredging v. Benefits Review Bd. (Tarner)*, 731 F.2d 199 (4th Cir. 1984); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 690-1 (5th Cir. 1986). In terms of identifying work restrictions, an employer cannot be faulted for failing to account for restrictions which were unannounced prior to an evidentiary hearing. *Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 336 (4th Cir. 2013). Additionally, the Employer must demonstrate such jobs are readily available. *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993) *cert. denied*, 511 U.S. 1031 (1994). The terms of the suitable alternative employment must include the pay scale in order to establish the claimant's earning capacity. *Moore v. Newport News Shipbuilding & Dry Dock, Co.*, 7 BRBS 1024 (1978). At the same time, the showing of a single job opening is not sufficient. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). Additionally, the applicable local community for the determination of suitable alternative employment is usually the community in which the injury occurred. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979). However, a legitimately motivated post-accident relocation can create a new community for establishing suitable alternative employment. *See Wood v. U.S. Department of Labor*, 112 F.3d 592 (1997); *See v. Washington Metro. Area Transit. Auth.*, 36 F.3d 375 (4th Cir. 1994); *Wilson v. Crowley Maritime*, 30 BRBS 199, 203-204 (1996). An injured worker's total disability becomes partial on the earliest date that the employer shows suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991); *Palombo v. Director, OWCP*, 937 F.2d 70 (2d Cir. 1991).

Diligent Search for Re-Employment

In the third step, if the employer demonstrates that suitable alternate employment was available, then to meet his burden of proof, the claimant must demonstrate a willingness to work and show he has tried to obtain alternative employment but has been unable to do so. *Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP*, 784 F. 2d 687 (5th Cir.1986), *cert. denied*, 479 U.S. 826 (1986); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981) *rev'g* 5 BRBS 418 (1977); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987). Notably, a claimant's lack of diligence does not displace an employer's initial burden to establish suitable alternative employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir.), *cert. denied*, 479 US 826 (1986). However, once an employer produces evidence of suitable alternative employment, a claimant has a "complimentary burden" of "establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably obtainable and available." *Id.* If the claimant establishes that he diligently tried to obtain employment and was unable to obtain a job identified in a labor market survey, he may prevail. *See Roger's Terminal*, 784 F.2d at 691. On the other hand, if the claimant is not successful at this third stage of the adjudication, he is considered employable and, at the most, the extent of economic disability is partial, not total. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985); *Director, Office of Worker's Compensation Programs v. Berkstresser*, 921 F. 2d 306, 312 (D.C. Cir. 1991).

June 27, 2010 to July 20, 2010

In addition to the inference from the parties' stipulations regarding the extent of Mr. Stokes' impairment, I note that prior to his injury, Mr. Stokes had to lift up to 150 pounds of fuel pump equipment and fuel monitoring devices as a fuel maintenance technician. He was also periodically required to carry, lift, and wear personal protective gear weighing up to 62 pounds.¹⁸ As discussed later in detail, due to his compensable shoulder injury, Mr. Stokes is now limited to frequently lifting no more than 40 pounds. As a result, Mr. Stokes is unable physically to return to his pre-injury employment, which establishes a *prima facie* case of total disability. And, the employer has not presented any evidence of suitable alternative employment during this period. As a result, the extent of his impairment from June 27, 2010 through July 20, 2010 was total. Further, because Mr. Stokes had not reached MMI during this period, the nature of his impairment was temporary. And, the applicable average weekly wage is \$1,935.02.

Accordingly, Mr. Stokes is entitled to temporary total disability under Section 8(b) of the Act, due to a work-related injury, from June 27, 2010 to July 20, 2010, based on an average weekly wage of \$1,935.02.

April 16, 2013

On April 16, 2013, the nature of Mr. Stokes' impairment remained permanent. However, since he returned to work, the extent of his impairment associated with his wage-earning capacity on that one day changed from total to partial.

For permanent partial disability, Section 8(c), 33 U.S.C. § 908(c), sets out a schedule of compensation for numerous specific physical impairments or losses. However, Mr. Stokes' left shoulder injury is not one of the scheduled injuries. *See Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1988); *Rivera v. United Masonry*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774 (D.C. Cir. 1991). Instead, compensation for his permanent partial disability is determined by Section 8(c)(21). Section 8(c)(21) bases permanent partial disability compensation on two-thirds the difference between the average weekly wage of the employee and the employee's wage-earning capacity thereafter in the same or another employment. The determination of wage-earning capacity used in the Section 8(c)(21) calculation is defined by Section 8(h). Any compensation is payable during continuance of the partial disability.

Section 8(h) specifies that the wage-earning capacity of an injured employee under Section 8(c)(21) is determined by his actual post-injury earnings, if those earnings reasonably and fairly represent his wage-earning capacity, or a reasonable wage earning capacity based on the nature of the injury, usual employment, and other factors. In addition, the courts and Board have indicated the post-injury wage-earning capacity must be adjusted to the wage levels which the job paid at the time of the injury. *See Walker v. Washington Metro Area Transit Authority*, 793 F.2d 319, 321 n.2 and 323 n. 5 (DC Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.* 12 BRBS 691, 695 (1980).

¹⁸Protective vest – 55 pounds and helmet – up to seven pounds.

Based on the parties' stipulation, the average weekly wage at the time of Mr. Stokes' June 6, 2010 work-related injury was \$1,935.02. And, on April 16, 2013, Mr. Stokes earned a total of \$101.75, which represents a weekly wage earning capacity of \$508.75.¹⁹

Because the critical date for the determination of the amount of disability compensation is the date of injury, the BRB in *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 and 331 (1990), stated post-injury wages must be adjusted to wage levels that were paid at the time of injury. According to the BRB, since the U.S. Department of Labor National Average Weekly Wage ("NAWW") is a more accurate reflection of wage changes over time than the Consumer Price Index, the post-injury wages should be adjusted downward to the time of injury using the NAWW. In *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 7 (1988), the BRB further explained that in order to neutralize the effect of inflation, an administrative law judge must adjust the post-injury wage level to the level paid pre-injury so that the wage can be compared to the pre-injury average weekly wage.

Based on the rationale set out in *Richardson* and *Cook*, I need to adjust Mr. Stokes' April 2013 weekly wage-earning capacity back to the wage level existing at the time of his injury on June 6, 2010, using the applicable NAWW in June 2010 and April 2013. As of October 1, 2009, the NAWW in June 2010 was \$612.33.²⁰ The NAWW in April 2013 was \$662.59. Using the ratio of these two NAWW figures, 0.924,²¹ to bring Mr. Stokes' April 2013 average weekly wage down to the June 2010 wage level, I find his April 2013 average weekly wage of \$508.75 represents a June 2010 weekly wage-earning capacity of \$470.09.²²

After the adjustment based on the change in NAWW, Mr. Stokes' April 2013 weekly post-injury earning capacity of \$508.75 becomes \$470.09 in June 2010 wage levels terms. That adjusted post-injury earning capacity is less than his pre-injury average weekly wage of \$1,935.02. Consequently, under Section 8 (c) (21) of the Act, Mr. Stokes is entitled to two-thirds of the difference between his pre-injury average weekly wage of \$1,935.02 and his adjusted post-injury wage-earning capacity of \$470.09, under Section 8(c)(21).

¹⁹\$101.75 x 5 workdays.

²⁰The NAWW is calculated annually at the start of the federal fiscal year.

²¹\$612.33/\$662.59.

²²\$508.75 x 0.924.

May 31, 2013, and Continuing

The determination of the extent of Mr. Stokes' impairment on May 31, 2013 due to his work-related left shoulder injury requires the full application of the multiple step adjudication process previously discussed.

Prima Facie Case of Total Disability

As previously discussed, prior to his June 6, 2010 accident, Mr. Stokes' usual and regular work as a fuel maintenance technician in Iraq required lifting heavy fuel pumping and monitoring equipment weighing up to 150 pounds, and periodically putting on and wearing 62 pounds of personal protection gear. Although he briefly returned to light duty right after his fall, Mr. Stokes no longer engaged in his usual and regular employment. And, by May 31, 2013, based on medically established work restrictions due to his left shoulder injury, Mr. Stokes did not retain the physical capacity to engage in his pre-injury regular and usual employment as a fuel maintenance technician. Accordingly, I find that by May 31, 2013 Mr. Stokes had established *prima facie* case of total disability.

Suitable Alternative Employment

In response to Mr. Stokes' *prima facie* case of total disability, the Employer produced evidence of purported suitable alternative employment that was available as of May 31, 2013. Consequently, to proceed with determining the extent of Mr. Stokes' impairment (total, partial, or none), I turn to the work restrictions and the Employer's labor market surveys.

Work Restrictions²³

During the course of the treatment for his work-related, left shoulder injury, Mr. Stokes' work restrictions changed on several occasion. For example, following shoulder surgery, Dr. Sharma imposed work restrictions of light duty and no lifting greater than five pounds, pending a FCE. Subsequently however, Dr. Sharma's final work restrictions due to the left shoulder injury were medium to medium-heavy duty within the FCE limitations, which included frequent lifting to 40 pounds; frequent overhead lifting to 25 pounds; and frequent sitting, standing, and walking.²⁴ In regards to physical limits due to Mr. Stokes' low back pain, Dr. Paven likewise limited Mr. Stokes on June 8, 2012 to medium to medium-heavy duty, with no lifting greater

²³In determining whether Mr. Stokes can establish a *prima facie* case of total disability, the sole focus was on Mr. Stokes' work-related injury to his left shoulder. However, for the purposes of establishing Mr. Stokes' present physical capacity to engage in alternative employment, I must consider his whole-body capacity for employment, which thus includes consideration of the physical limitations attributable to his non-work related low back pain. See *Trans-State Dredging*, 731 F.2d at 201.

²⁴Dr. Dykes also imposed varied work restrictions in 2010. However, as the most recent physician to treat Mr. Stokes' left shoulder injury, and having considered the May 2012 FCE, Dr. Sharma was in a better position to assess Mr. Stokes' physical capabilities and provide more probative work restrictions. Similarly, at the end of his April 2012 evaluation, Dr. Sidhu determined Mr. Stokes was only capable of light duty. Once again, however, Dr. Sharma's determination remains more probative because she was able to review the May 2012 FCE.

than 40 pounds. And, on June 27, 2013, Dr. Pavan further restricted Mr. Stokes to no standing for more than 60% of the time.²⁵ Consequently, I will apply the following work restrictions: frequent lifting limited to no more than 40 pounds; frequent overhead lifting limited to no more than 25 pounds; medium to medium-heavy duty; frequent sitting and walking; and no standing for more than 60% of the work shift.

Labor Market Survey

The Employer has presented a labor market survey developed on May 29 and May 30, 2013. Prior to considering whether that survey established suitable alternative employment, I find the following jobs were unsuitable: Schwan's Home Service route representative (50 pound lifting requirement exceeds Mr. Stokes' work restriction); Martin Enterprises and Schneider National commercial truck driver (requires current CDL which Mr. Stokes is unable to obtain since he did not pass the requisite DOT physical due to his left arm and shoulder impairment); and DynaCorp fuels technician and security escort (not in local community²⁶).

The remaining four labor market survey jobs minimally represent suitable alternative employment, even though at the time of Mr. Stokes' inquiry, the employers may not have accepted an application. While Mr. Stokes had reservations about his ability to remain seated and attentive as a telecommunicator with the City of Petersburg Police Department, his only restriction in that category is no standing for more than 60% of the time.²⁷ And, although the Allied Barton job included the requirement to stand for the duration of shift, which would exceed his work restriction, the company additionally indicated that a few positions allowed sitting. Mr. Stokes was also concerned about the possibility for confrontation as a security officer. However, the security officer job descriptions for Securitas Security and Allied Barton did not include physical confrontation and apprehension. Finally, even though Mr. Stokes noted that he did not have the requisite minimum one year of sales experience, the Public Storage job remained a viable opportunity because the job announcement permitted substitution of customer service for sales experience, and Mr. Stokes' work as a Pepsi Cola sales representative for five years, and his employment in Iraq providing fuel support and maintenance for numerous organizations represent significant customer service experience.

²⁵Although this restriction was not in place on May 31, 2013, I still consider the limitation a significant factor in assessing whether the jobs listed on the labor market survey remained viable opportunities after June 26, 2013.

²⁶Although his left shoulder injury occurred in Iraq, Mr. Stokes returned to the United States for medical treatment that was not available in Iraq, which is a legitimate purpose for relocation. Consequently, Iraq is no longer the relevant community for determining suitable alternative employment.

²⁷Mr. Stokes further observed that the job's overhead lifting requirement of 25 pounds, which he believed included with one hand, exceeded his limitation. At one time, Dr. Sharma limited Mr. Stokes' lifting with his left arm to five pounds. But, after the FCE, Dr. Sharma no longer included that limitation and instead referenced the FCE limitation, which included overhead lifting up to 25 pounds without a specific limitation on the left arm.

Mr. Stokes' Re-Employment Efforts

Mr. Stokes expressed a willingness to return to work within the parameters of the medical work restrictions. And, by end of May 2013, Mr. Stokes had submitted applications to the City of Petersburg, Securitas Security, Allied Barton (applied twice), and Public Storage. In addition, Mr. Stokes applied for employment with CarMax - sales representative, River Forest - maintenance man, and Travelers - field support specialist. CarMax and River Forest hired someone else. The remaining employers have not responded to Mr. Stokes' applications. Based on these unsuccessful re-employment efforts, I find Mr. Stokes has demonstrated the unavailability of suitable alternative employment as of May 31, 2013. As a result, the extent of Mr. Stokes' impairment due to his work-related left shoulder injury was total as of May 31, 2013, which thereby entitles Mr. Stokes to permanent total disability compensation under Section 8(a) of the Act, due to a work-related injury, from May 31, 2013, and continuing, based on an average weekly wage of \$1,935.02.

Issue # 2 – Medical Treatment Benefits

Mr. Stokes seeks specific medical treatment benefits, including mileage reimbursement for medical care for his left shoulder and low back, a November 4, 2010 arthroscopy radiographic study, TENS unit, form fees, colonoscopy and associated mileage (Southside Regional Medical Center), and Digestive Care Center charge.

Under Section 7(a) of the Act, 33 U.S.C. § 907(a), an employer shall furnish all reasonable and necessary medical care and other attendant care or treatment, hospitalization, and medication for a work-related injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The claimant bears the burden to establish that the claimed medical expenses are attributable to a work-related injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). The term “necessary” relates to whether the medical care is appropriate for the injury. See 20 C.F.R. § 702.402. Consequently, an administrative law judge may reject payment for unnecessary treatment. *Ballesteros v. Williamette W. Corp.*, 20 BRBS 184, 197 (1988). A claim for medical benefits is never time-barred. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). In addition, Section 7 does not require that the injury be economically disabling; instead, the injury need only be work-related. *Ballesteros*, 20 BRBS at 187. According to 20 C.F.R. § 702.401(a), medical care includes the reasonable and necessary cost of travel for care and treatment of a claimant's injury. As a result, parking expenses, and highway and bridge toll expenses incurred for obtaining medical treatment for which an employer is liable are chargeable to the employer as transportation costs. See *Castagna v. Sears, Roebuck & Co.*, 4 BRBS 558 (1976).

Preliminarily, based on my determination that Mr. Stokes' low back abnormalities and pain are not work-related, Mr. Stokes is not entitled to medical treatment benefits for his low back issues. Consequently, his claim for the TENS unit, mileage associated with low back treatments, and the Colonial Orthopedic forms fee related to Dr. Pavan's treatment for low back pain must be denied.

Next, Mr. Stokes' claim for a December 2, 2010 colonoscopy for hemorrhoid treatment, associated mileage reimbursement (Southside Regional Medical Center), and apparently related \$20 charge from the Digestive Care Center is principally based on his testimony that these charges were related to the severe constipation and resulting hemorrhoids that he developed due to pain medication which at that time would have been related to his left shoulder. However, the medical record associated with the colonoscopy indicated that when Mr. Stokes presented on November 26, 2010 to the Southside Regional Medical Center treatment with constipation and a severe hemorrhoid problem, he reported that he was taking only one medication, Lisinopril, which is prescribed for hypertension. A subsequent treatment note from December 17, 2010 by Dr. Sharma notes that constipation is a known side effect of pain medication. But, the specific medication Dr. Sharma mentioned was Percocet, which is the pain drug prescribed on November 26, 2010 to relieve Mr. Stokes' hemorrhoid pain. Further, notably absent in the evidentiary record is any medical determination that the colonoscopy and associated charges represented reasonable and necessary medical care attributable to Mr. Stokes' work-related left shoulder injury. Accordingly, in the absence of sufficient probative evidence, Mr. Stokes' claim for the colonoscopy, and related mileage, and \$20 charge is denied.

Finally, since Mr. Stokes has established that he suffered a work-related injury to his left shoulder, the Employer shall provide under Section 7(a) all reasonable and necessary medical treatment required by his work-related left shoulder injury, past, present, and future, including associated treatment travel expenses,²⁸ and a November 4, 2010 arthroscopy radiographic study.

Attorney Fee

Section 28 of the Act, 33 U.S.C. § 928, as implemented by 20 C.F.R. § 702.132(a), permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." Because I have determined issues in favor of Mr. Stokes, his counsel is entitled to submit a petition to recoup fees and costs associated with his professional work before the Office of Administrative Law Judges within 30 days of receipt of this Decision and Order. Employer's counsel has 30 days from receipt of such attorney fee petition to respond.

²⁸In his mileage claims, Mr. Stokes only designated the location of the treatment. However, because the Employer is not liable for treatment of the low back pain, and the physicians at the Florida Orthopedic Institute and Colonial Orthopedic provided treatment for both the left shoulder and low back, Mr. Stokes must remove mileage associated with the low back treatments and resubmit his mileage claim to the Employer.

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation awards shall be administratively performed by the District Director. Additionally, the Employer, SEII, shall receive credit for all previous, voluntary disability compensation payments made to Mr. Stokes.²⁹

1. The Employer, SEII, shall pay the Claimant, MR. JEREMY D. STOKES, compensation for temporary total disability, due to a work-related injury from June 27, 2010 through July 20, 2010, based on an average weekly wage of \$1,935.02, such compensation to be computed in accordance with Section 8(b) of the Act, 33 U.S.C. § 908(b).

2. The Employer, SEII, shall pay the Claimant, MR. JEREMY D. STOKES, compensation for temporary total disability, due to a work-related injury from July 21, 2010 through June 7, 2012, based on an average weekly wage of \$1,935.02, such compensation to be computed in accordance with Section 8(b) of the Act, 33 U.S.C. § 908(b).

3. The Employer, SEII, shall pay the Claimant, MR. JEREMY D. STOKES, compensation for permanent total disability, due to a work-related injury from June 8, 2012 through April 15, 2013, based on an average weekly wage of \$1,935.02, such compensation to be computed in accordance with Section 8(a) of the Act, 33 U.S.C. § 908(a).

4. The Employer, SEII, shall pay the Claimant, MR. JEREMY D. STOKES, compensation for permanent partial disability, due to a work-related injury on April 16, 2013, based on a pre-injury average weekly wage of \$1,935.02, and a post-injury wage earning capacity of \$470.29, such compensation to be computed in accordance with Section 8(c)(21) of the Act, 33 U.S.C. § 908(c)(21).

5. The Employer, SEII, shall pay the Claimant, MR. JEREMY D. STOKES, compensation for permanent total disability, due to a work-related injury from April 17, 2013 through May 30, 2013, based on an average weekly wage of \$1,935.02, such compensation to be computed in accordance with Section 8(a) of the Act, 33 U.S.C. § 908(a).

6. The Employer, SEII, shall pay the Claimant, MR. JEREMY D. STOKES, compensation for permanent total disability, due to a work-related injury from May 31, 2013, and continuing, based on an average weekly wage of \$1,935.02, such compensation to be computed in accordance with Section 8(a) of the Act, 33 U.S.C. § 908(a).

7. The Employer, SEII, shall furnish the claimant, MR. JEREMY D. STOKES, all reasonable and necessary medical treatment, past, present, and future, as required by his work-related left shoulder injury, including associated transportations costs, and a November 4, 2010 arthroscopy radiographic study, in accordance with Section 7(a) of the Act, 33 U.S.C. § 907(a).

²⁹Since the Employer's voluntary disability compensation payments were based on an average weekly wage of \$1,785.67, the following compensation orders will result in additional disability compensation payments to Mr. Stokes even after application of the credit.

8. The claim of MR. JEREMY D. STOKES for disability compensation and medical treatment benefits under Section 7(a), consisting of reimbursement for treatment mileage, a TENS unit, and a Colonial Orthopedic forms fee, for his low back abnormalities and pain is denied.

9. The claim of MR. JEREMY D. STOKES for medical treatment benefits under Section 7(a), consisting of reimbursement for a colonoscopy, associated mileage, and related \$20 charge, is denied.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: November 24, 2014
Washington, D.C.