

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 June 2015

CASE NO. : 2014-LDA-542

OWCP NO. : 02-184807

IN THE MATTER OF:

FRANK M. SCHANZER

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.
c/o KBR

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
c/o Chartis Worldsource (Dallas, TX)

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

LIMOR BEN-MAIER, ESQ.

For The Employer/Carrier

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

DECISION AND ORDER

This is a modification claim under the Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania (Carrier) against Frank Schanzer (Claimant).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on October 15, 2014, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered seven exhibits, and Employer/Carrier proffered exhibits 1 through 35 and 37 through 44, all of which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from Claimant and Employer/Carrier on the due date of May 1, 2015. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

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

1. Jurisdiction and coverage is pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq.
2. That Claimant injured his right shoulder, and left knee and ankle on February 12, 2006 and February 25, 2009, respectively.

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

3. That Claimant's injury occurred during the course and scope of his employment with Employer.
4. That there existed an employee-employer relationship at the time of the accidents/injuries.
5. That Employer/Carrier filed a Notice of Controversion on March 27, 2009.
6. That an informal conference before the District Director was held on January 6, 2011.
7. That Claimant's average weekly wage at the time of injury was \$1,614.33.
8. That Claimant received temporary total disability benefits from February 26, 2009 through April 7, 2010 at a compensation rate of \$1,160.31 for 58 weeks.
9. That Claimant received permanent total disability benefits from July 12, 2010 to present based on his average weekly wage of \$1,614.33 in accordance with the Decision and Order dated April 6, 2012.
10. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.
11. That Claimant reached maximum medical improvement on July 12, 2010.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Employer/Carrier are entitled to modification of the Decision and Order issued by the undersigned on April 6, 2012.
2. The extent of Claimant's disability.
3. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

Procedural History

On April 6, 2012, the undersigned issued a Decision and Order involving Claimant's original claim. I found Claimant's testimony in the first hearing to be credible. I found Claimant consistently presented his right shoulder and left knee complaints to all treating and consultative physicians who evaluated him. Based on the stipulations of the parties, injury with respect to Claimant's left knee and ankle were undisputed. I found that Claimant established a **prima facie** case of injuries to his right shoulder, left knee, and left ankle. I further found that Employer/Carrier failed to provide substantial evidence sufficient to rebut Claimant's **prima facie** case with regard to his shoulder condition.

Dr. Kosty treated Claimant and opined that Claimant was unable to return to his former work based on his right shoulder and left knee injuries. Dr. Kosty noted Claimant had not reached maximum medical improvement with respect to his right shoulder, but that he would reach maximum medical improvement with respect to his left knee on July 12, 2010. Dr. Kosty indicated Claimant could not return to former employment, but his restrictions would not preclude him from other forms of employment. I found Claimant became permanently totally disabled on July 12, 2010, the date Dr. Kosty indicated Claimant would reach maximum medical improvement.

Employer/Carrier did not present any vocational evidence at the initial formal hearing to establish suitable alternative employment. Consequently, I found Claimant was entitled to permanent total disability from July 12, 2010, to present and continuing.

Claimant's average weekly wage was determined to be \$1,614.33 at the time of his February 25, 2009 work injury. All of the reasonable and necessary medical care for Claimant's right shoulder and left knee and ankle was ordered pursuant to Section 7 of the Act.

Thus, Claimant was found to be entitled to temporary total disability compensation benefits for various periods of time as set forth in paragraph one of the Order at page 41 of the Decision and Order, as well as permanent total disability compensation benefits commencing on July 12, 2010.

On April 23, 2014, Employer/Carrier filed for modification and contend they have established suitable alternative employment and as a result, that Claimant is no longer permanently and totally disabled.

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing on October 15, 2014. Claimant stated that he is moving to Sheridan, Texas, which is approximately 120 miles from where he currently lives in Hitchcock, Texas. (Tr. 12). Claimant lives in a trailer while in Sheridan, part of the time, and the rest of the time he lives with his parents at their home in Hitchcock. (Tr. 12-13). Prior to going overseas, Claimant lived in Dickinson, Texas. (Tr. 13).

Claimant can no longer drive a vehicle with a manual transmission because of his injuries. (Tr. 14). Claimant recently traveled to Puerto Vallarta, Mexico, on vacation. (Tr. 14). While in Mexico, Claimant mostly stayed at the hotel because it was too hard for him to walk using a crutch. (Tr. 15). He has taken no other trips since going to Mexico. (Tr. 15). Claimant has been walking with a crutch since he was in Afghanistan in 2009. (Tr. 15). It was given to him by a military medical doctor. (Tr. 15). He is not able to walk very far without the crutch. (Tr. 15-16).

Claimant underwent surgery on his left shoulder in 2001 or 2002, but he is still waiting to have surgery on his right shoulder. (Tr. 16). He has not had surgery since 2012, but he would like to have surgery on his shoulder and left knee. (Tr. 17). Claimant stated that "[w]e asked three times [about having shoulder surgery] and three times . . . we did not get a response." (Tr. 17). Claimant visits Dr. Kosty about every three months to receive injections in his knee. (Tr. 17-18). Dr. Kosty also prescribes to him pain medication which Claimant takes one to two times per day, depending on his pain level. (Tr. 18). Claimant has taken on average ten pain pills per week for the past couple of years. (Tr. 18-19). Dr. Kosty has not provided Claimant with any treatment other than injections and pain medication. (Tr. 19). Claimant believes he last visited Dr. Kosty on August 30, 2014, and received an injection in his knee and a refill for his pain medication. (Tr. 19). However, the record showed and Claimant confirmed that it was July 29, 2014, that he last visited Dr. Kosty. (Tr. 19-20). Claimant

testified he does not remember if he was treated by Dr. Kosty on May 9, 2014, but he believes that he may have given Dr. Kosty a Texas Workers' Compensation Work Status Report to fill out on that day. (Tr. 20-21). Claimant acknowledged that CX-5 listed the jobs he applied to, from 2009 through 2010. (Tr. 21-22).

Claimant stated he did not "consciously" apply for any jobs since 2010 because he still had trouble walking. (Tr. 22). Claimant does not recall that, in 2009, Dr. Kosty released him to return to work but with restrictions. (Tr. 22). Claimant also does not recall a 25-pound lifting restriction or a climbing limitation of less than one hour per day. (Tr. 22). Claimant applied for a job a couple of years ago, but he did not receive a response. (Tr. 22-23). The job was in Galveston, Texas, at Seawall Park, and required collection of parking and fishing tickets. (Tr. 23). Claimant recalls meeting with Susan Rapant in 2010. (Tr. 23). Claimant informed Ms. Rapant about his prior work history and that he had 50 hours of basic college courses. (Tr. 23-24). Claimant told Ms. Rapant that he wanted to be a nurse and MRI technician. (Tr. 24).

Claimant continued taking college courses at the College of the Mainland in Texas City, Texas, until he "found out his injuries were going to be in the way." (Tr. 24). Claimant testified that this was shortly after the Decision and Order was issued on April 6, 2012. (Tr. 24). Claimant's grades were "pretty low." (Tr. 24). Claimant expressed to Ms. Rapant that he wanted to go back to work at light duty. (Tr. 25). In 2010, Claimant applied for a job as an HVAC technician at Clear Creek ISD. (Tr. 25). Claimant did not know the lifting requirements for the job, but he thought it would be more than 25 pounds. (Tr. 25). Claimant thought he would be able to lift more than 25 pounds until he "found out [he] was not getting any better." (Tr. 25). In 2009 and 2010, Claimant applied for construction, electrical, and HVAC jobs. (Tr. 26-27). Claimant believed he could not perform the jobs he applied for unless he got better. (Tr. 27).

Claimant testified that he did not apply for the jobs provided by the vocational counselor, Susan Rapant, because he could only do the jobs that the Pipefitters Local 211 Union sanctioned. (Tr. 27). The jobs the counselor provided required him to walk, which is "pretty painful" for him. (Tr. 28). Claimant does not have pain when he sits. (Tr. 28). On an average day, Claimant walks around a little bit. (Tr. 29). Claimant stated he could not do a job that lets him alternate between sitting and standing with breaks throughout the day

because "it would require working eight hours a day." (Tr. 29-30).

Claimant has trouble staying awake throughout the day because he does not sleep well at night due to pain from his injuries. (Tr. 30). Claimant believes he can lift 10 to 15 pounds and can drive short distances. (Tr. 31). Claimant has a high school diploma, but does not have an associates or bachelor's degree. (Tr. 31-32). Claimant is certified to do HVAC work and completed an apprenticeship for pipefitting. (Tr. 32). Claimant did go to jail one time, but he has no felony charges. (Tr. 32). Claimant testified that he can do basic typing, calculate money, sit for extended periods of time, and stand for 10 minutes at a time. (Tr. 33-34). Claimant stated that he is claustrophobic in certain spaces like a "small booth," an "elevator," and "airplanes." (Tr. 34).

Claimant acknowledged that the Department of Labor (herein DOL) contacted him regarding vocational rehabilitation, to see if Claimant wanted training for jobs. (Tr. 35). Claimant expressed to the DOL that he did not want training because he was in school to become a nurse. (Tr. 36). Claimant did not contact the DOL after he stopped attending school. (Tr. 36). Claimant believes he cannot work anymore because of his injuries. (Tr. 36). Claimant believes he will not make enough money to justify going back to work. (Tr. 36-37). Claimant considers himself retired. (Tr. 37). Claimant confirmed that in January 2013, he slipped and fell in water which increased his pain. (Tr. 37).

On cross-examination, Claimant testified that he is prescribed a narcotic, Norco, for pain. (Tr. 38). Claimant does not take Norco when he has to drive because it makes him sleepy. (Tr. 38). Claimant has trouble sleeping at night "all due to [his] knee injury," which bothers him if he rolls on his knee. (Tr. 38). A doctor in Afghanistan recommended he use crutches to walk. (Tr. 38-39). Claimant confirmed that on October 7, 2013, Dr. Kosty recommended that he use crutches for walking "at all times." (Tr. 39). On this same day, Dr. Kosty also restricted Claimant from driving or using heavy equipment, lifting, carrying, walking, or climbing stairs, as well as no reaching, standing, kneeling, squatting, bending, stooping, pushing, pulling, or twisting. (Tr. 39-40). Dr. Kosty has not withdrawn these restrictions. (Tr. 40).

Claimant confirmed that on May 9, 2014, Dr. Kosty did not list any restrictions, but he told Claimant he could not work

from May 9, 2014 through August 9, 2014. (Tr. 40-41). Dr. Kosty has not released Claimant to return to work. (Tr. 41). Claimant's next appointment with Dr. Kosty is on November 8, 2014. (Tr. 41).

On re-direct examination, Claimant testified that he does not remember if he was evaluated by a doctor for the workers' compensation status reports dated October 7, 2013, and May 19, 2014. (Tr. 42-43).

On re-cross examination, Claimant testified that on May 9, 2014, it was possible that he had an office visit with a doctor at 1:30 p.m. (Tr. 43).

The Medical Evidence

Summary of Prior Medical Evidence²

Sterling Chemicals Medical Records

Sterling Chemicals performed a pre-placement examination on June 6, 1995. Claimant underwent five periodic physical examinations from February 2, 1996 through March 20, 2000. During this time Claimant had a work-related upper respiratory infection, as well as straining his left wrist, was hospitalized for chest pain, and pulled his right groin muscle. Particularly, in August 1999, Claimant strained his right bicep tendon and was placed under restrictions, but he was released to return to full duty in October 1999. From July 2000 through September 2003, Claimant underwent cardiac and respiratory evaluations, he was diagnosed with a right bicep strain, suffered contusions to both knees, strained his left shoulder, received injections for his right little finger triggering, and underwent surgery to repair a right inguinal hernia.

Dr. John W. Kosty

On March 31, 2003, Claimant presented to Dr. John Kosty, complaining of pain in his left shoulder. Dr. Kosty diagnosed Claimant with a left shoulder rotator cuff tear. On May 5, 2003, Dr. Kosty performed a rotator cuff tear repair surgery. Claimant began physical therapy on June 30, 2003. Claimant had follow-up visits with Dr. Kosty on July 7, August 5, and September 2, 2003. On all three occasions, Dr. Kosty opined that Claimant was unable to return to work. On September 30,

² See Decision and Order, Case Nos. 2011-LDA-222 and 2011-LDA-223, April 6, 2012, pp. 8-19.

2003, Dr. Kosty ordered additional physical therapy for Claimant's left shoulder. On October 28, 2003, Dr. Kosty referred Claimant to Mainland Pain Consultants for electrodiagnostic studies of the ulnar nerves and left upper extremity. The testing revealed reduction in the left and right median motor nerve conduction velocities at the wrists.

On November 24, 2003, Claimant underwent a functional capacity evaluation. The evaluation revealed that Claimant could perform all tasks on a consistent basis, with the exception of overhead reaching, which he could perform for over two minutes. However, Claimant could lift enough to return to work. Claimant did return to medium duty work, but he could not safely lift his arms overhead. Dr. Kosty opined that, unless Claimant's strength improved, he would not be able to return to his prior occupation.

On February 10, 2004, testing revealed Claimant had a C5-C8 nerve root problem. Dr. Kosty ordered an MRI, which was performed on February 14, 2004. The MRI revealed mild to moderate disc degeneration with some spondylosis at C3-4, C4-5, and C5-6.

On March 17, 2004, Claimant underwent a medial epicondylectomy and decompression of the ulnar nerve in his left elbow, as recommended by Dr. Kosty. On May 11, 2004, Dr. Kosty referred Claimant to occupational therapy. On July 20, 2004, Dr. Kosty noted that Claimant would be evaluated by Dr. John Debender to determine whether he had reached maximum medical improvement and determine his impairment rating. On September 21, 2004, Dr. Kosty noted Claimant reached maximum medical improvement and opined that Claimant's upper extremity impairment rating was 19 percent for his left shoulder and elbow.

Claimant presented again to Dr. Kosty on January 4, 2008, complaining of pain in his right shoulder. Dr. Kosty diagnosed Claimant with a chronic rotator cuff tear in the right shoulder. Claimant attributed the problem to a work-injury occurring in February 2006, and Dr. Kosty agreed.

On March 23, 2009, Claimant presented to Dr. Kosty, after returning from overseas, with left ankle and knee injuries. Dr. Kosty diagnosed Claimant with a left ankle sprain and intersubstance degenerative anterior and posterior horns medial meniscus of the left knee. Claimant underwent physical therapy at Hope Rehab Physical Therapy for almost two months. On June

16, 2009, Claimant was discharged from therapy. The therapist, Mr. Covington, stated that Claimant could run, squat, kneel, and negotiate unstable surfaces, and was ready to return to work.

On September 2, 2009, Dr. Kosty again referred Claimant to Hope Rehab Physical Therapy, following arthroscopy surgery of the left knee in July 2009. Claimant underwent two months of physical therapy and in November 2009, Claimant was discharged from physical therapy. Mr. Covington noted that Claimant reported no symptoms while at rest, but could not perform any recreational activities. In December 2009, Claimant reported to Dr. Kosty that his knee pain and mobility improved. Dr. Kosty recommended Claimant undergo another evaluation for an impairment rating.

In late February 2010, Claimant presented again to Dr. Kosty. Claimant informed him that he had scheduled an evaluation for an impairment rating. Claimant requested a Synvisc injection as well. In March 2010, Dr. Kosty diagnosed Claimant with osteoarthritis of the left knee and gave him an injection.

Claimant presented for an evaluation with Dr. Kosty on April 16, 2010. Dr. Kosty opined that Claimant suffered from a right shoulder rotator cuff tear, a left knee meniscus tear, and traumatic arthritis of the left knee. Dr. Kosty related all conditions to Claimant's work with Employer. On this same day, Dr. Kosty performed three work capacity evaluations. He opined Claimant was unable to return to work based on his left knee injury. He placed the following permanent restrictions on Claimant with respect to his left knee: walking/standing for no more than four hours per day; bending and stooping less than 1 hour per day; lifting less than 25 pounds; squatting, kneeling, and climbing less than 1 hour per day. He opined Claimant would reach maximum medical improvement with respect to his left knee on July 12, 2010.

Dr. Kosty also opined that Claimant was unable to return to work based on his right shoulder injury, because he lacked the strength to lift in an overhead position. He noted Claimant had not reached maximum medical improvement for his right shoulder. He placed the following permanent restrictions on Claimant with respect to his right shoulder: reaching/reaching above the shoulder for no more than one hour per day; pushing/pulling less than 25 pounds; and climbing less than 1 hour per day. Dr. Kosty noted Claimant may require surgery to repair the chronic rotator cuff tear.

Finally, on October 8, 2010, Dr. Kosty opined Claimant was a candidate for a knee unicompartmental arthroplasty and he could not work as a result of his current medical condition.

Pre-Employment Physicals

On September 8, 2004 and November 16, 2006, Claimant underwent pre-employment physicals. In the first physical, Claimant indicated he had surgery on his left rotator cuff in May 2003. In the second physical, Claimant did not indicate he suffered from any musculo-skeletal pain or an injury to his right shoulder.

Deployment Medical Records

Claimant's deployment records indicate that on February 12, 2006, Claimant was prescribed one day of bed rest for an unspecified injury. On February 13, 2006, Claimant presented to the medical clinic with right shoulder pain and was diagnosed with a postural shoulder sprain. Claimant presented to the clinic on February 15, March 7, and March 9, 2006, with various complaints of stomach indigestion, sore throat, congestion, and cough. On March 11, 2006, Claimant was placed on restricted duty for five days due to injury. He was restricted from lifting, climbing, reaching and using his right upper extremity. Claimant presented to the clinic again on March 23, 2006, complaining of right shoulder pain and was diagnosed with a tendon/ligament sprain and muscle strain.

On several occasions, beginning on April 6, 2006, through June 18, 2006, Claimant presented to the clinic with various symptoms such as nausea and vomiting, and was diagnosed with mild dehydration and a head cold. Claimant also underwent a blood pressure check and a physical. On June 26, 2006, Claimant presented complaining of right shoulder pain, but the exam revealed no positive findings. On December 15, 2006, Claimant presented with a skin rash and returned to the clinic two more times, in January and February 2007, with the same problem.

On April 25, 2007, Claimant underwent a "CJOA Physical" and again on August 19 and August 20, 2007. On August 20, 2007, Claimant was diagnosed with conjunctivitis. Claimant presented eight additional times from August 21, 2007 through September 1, 2007, for follow-up appointments related to his conjunctivitis. On August 21, 2007, Claimant complained of back pain and was diagnosed with a muscle strain. Two days later, on August 23,

2007, Claimant underwent a blood pressure check. On February 9, 2008, Claimant was diagnosed with a mild concussion, after presenting to the clinic on February 5, 2008, with head pain caused by falling on ice. Claimant was placed on restricted duty for three days, and thereafter was able to return to work, but he could not lift more than 25 pounds. On September 22, 2008, Claimant complained of having dizziness and vertigo, he was prescribed valium and restricted from driving, working off the ground, and working with tools that cut.

On February 25, 2009, Claimant injured his left knee and ankle when he slipped and fell to the ground. The incident was reported to his supervisor and Claimant was treated on-site. The day after, on February 26, 2009, Claimant was diagnosed with a Grade I sprain/strain to his left knee with a meniscal/cruciate ligament injury, and a Grade II sprain to the left ankle. An orthopedic consultation was recommended. In a follow-up visit, on March 4, 2009, Claimant's pain had not improved since he fell. At this time, he requested that he be released to return to his point of origin for further treatment.

Bangkok Hospital Pattaya Medical Records

On April 13, 2006, Claimant presented to Bangkok Hospital Pattaya for an MRI of his right shoulder. An x-ray of Claimant's right shoulder revealed no evidence of a fracture or dislocation.

Canadian Specialist Hospital Medical Records

On September 3, 2009, Claimant underwent an MRI of his left foot. The findings were unremarkable. An x-ray and an MRI of Claimant's left knee were also performed. From these tests, the doctor opined that Claimant had degenerative osteoarthritis, joint effusion, a popliteal cyst, an edema of the skin, a "grade I tear of ant" and "post. Homs of medial meniscus." An x-ray of Claimant's left ankle revealed no abnormalities.

Dr. David G. Vanderweide

On March 18, 2010, Dr. Vanderweide examined Claimant at the request of Employer/Carrier. Dr. Vanderweide opined that Claimant had significant osteoarthritis in his left knee. Dr. Vanderweide examined Claimant's left knee and opined Claimant suffered from a contusion to the left knee superimposed on pre-existing degenerative joint disease. He did not find any evidence that the structural injury to Claimant's left knee

resulted from the work-injury. Further, he did not find any evidence to suggest aggravation or acceleration of Claimant's osteoarthritis. He opined that Claimant reached maximum medical improvement within 60-90 days of the work injury and that Claimant could return to work with limitations on kneeling, squatting, and climbing.

The New Medical Evidence

Dr. John W. Kosty

Claimant presented to Dr. Kosty on July 24, 2012, complaining of left knee and shoulder pain. Dr. Kosty noted that Claimant had a meniscus tear and traumatic arthritis of the medial compartment of his left knee, along with a chronic rotator cuff tear in his right shoulder and chronic lower back pain. Dr. Kosty diagnosed Claimant with arthritis of the knee, pain in shoulder joint, and lumbar pain. Dr. Kosty noted that Claimant's knee "precludes activities of daily living and affecting career choices." Claimant was prescribed Norco for pain. (EX-21, pp. 194-96).

On October 9, 2012, Claimant presented to Dr. Kosty for a follow-up visit related to his left knee and right shoulder. Claimant still complained of pain in his left knee and right shoulder. Particularly, Claimant's pain in his left knee was localized, sharp, and painful to the touch. Dr. Kosty diagnosed Claimant with arthritis of the left knee. Claimant was prescribed Norco for pain. Dr. Kosty noted that Claimant should not stand for greater than one hour combined in an eight hour day, along with no heavy lifting, kneeling, pushing, or pulling. (EX-21, pp. 199-200).

Claimant was examined again by Dr. Kosty on January 9, 2013. Claimant presented with complaints of pain in his left knee, which was severe and interfered with ambulation. Claimant reported that his pain was manageable while taking Norco, but that he slipped on water two weeks before this visit, and since then, has increased pain. As a result of the increased pain, Claimant was utilizing the crutches more than usual and had difficulty ambulating through his home. Dr. Kosty injected Claimant's knee with an otherwise unknown substance. Dr. Kosty ordered an MRI of Claimant's left knee and changed his pain medication to Vicodin. Dr. Kosty noted that he was evaluating Claimant for a possible knee unicompartmental arthroplasty. (EX-21, pp. 203-06).

On August 11, 2014, Claimant presented to Dr. Kosty. (CX-2). Claimant's present conditions were noted as a sprain and arthritis of the knee, left knee meniscus tear, rotator cuff complete rupture, and lumbar pain. Additionally, Claimant was prescribed Norco (for pain) and Tylenol.³ (CX-2, pp. 1-2).

Dr. Kosty was deposed by the parties on October 29, 2014. (EX-44). Dr. Kosty opined that Claimant's right shoulder is at maximum medical improvement, without surgery, because Claimant has a "chronic rotator cuff tear." (EX-44, p. 6). Dr. Kosty has not "formally" treated Claimant for his shoulder since 2009 or 2010, but he has treated Claimant's left knee. (EX-44, p. 7). The limitations Dr. Kosty placed on Claimant, on April 16, 2010, in regard to his shoulder, are valid and should be followed by Claimant.⁴ (EX-44, p. 8). Since April 16, 2010, Dr. Kosty has examined Claimant thirteen times. (EX-44, pp. 8-10).⁵

Dr. Kosty opined that Claimant has an arthritic knee and that his current knee condition is "progressive," but that it was exacerbated by his work injury. (EX-44, p. 11). There is evidence of degeneration in Claimant's knee. Dr. Kosty opined that Claimant has "traumatic arthritis" in his left knee which relates to his work injury. (EX-44, p. 12). The restrictions placed on Claimant by Dr. Kosty in April 2010 are valid "forever" because there is no foreseeable change in Claimant's condition. (EX-44, p. 13). Dr. Kosty opined that Claimant can work in a "sedentary or light duty capacity." Dr. Kosty did not prescribe or advise Claimant to use crutches, but he thinks Claimant should use the crutches when he needs assistance walking. (EX-44, p. 14). Nevertheless, Dr. Kosty opined that even given Claimant's current condition; he can still work under the restrictions provided in April 2010. (EX-44, p. 15).

Dr. Kosty testified that he did sign a Texas Work Status Report dated October 7, 2013, which indicated Claimant could not

³ Claimant was examined by Dr. Kosty on several occasions as indicated by Dr. Kosty's testimony in his October 2014 deposition. However, there is no evidence of record concerning **all** of the examinations, other than the documented visits listed under new medical evidence. (CX-2); See also infra note 5.

⁴ In April 2010, as to Claimant's shoulder, Dr. Kosty restricted Claimant to less than one hour reaching/reaching above the shoulder; no pushing/pulling greater than 25 pounds; and no climbing. (EX-44, p. 8).

⁵ Specifically, Dr. Kosty testified that he examined Claimant on September 22, 2010, in July 2011, on August 24, 2011, April 10, 2012, July 24, 2012, August 22, 2012, October 9, 2012, and on January 9, 2013. He also examined Claimant in June 2013, February 2014, and on April 24, 2014, May 9, 2014, and August 11, 2014. Only the month and year were provided where no day was indicated in the record. (EX-44, pp. 8-10).

go back to work until an "unknown" date and that he can sit for four hours, and stand, kneel, bend, push, and twist for zero hours. (EX-44, pp. 15-16; CX-2, p. 4). Dr. Kosty stated that these October 2013 restrictions are not correct and that the April 2010 restriction still apply. Dr. Kosty further testified that he did not sign a similar report on May 9, 2014, which prevented Claimant from doing any type of employment or activity. (EX-44, p. 16; CX-2, p. 5). Dr. Kosty opined that Claimant is capable of doing light to sedentary activity. (EX-44, p. 17). Claimant can drive a vehicle to and from work, but he would restrict Claimant from driving a commercial truck or a forklift. (EX-44, p. 18).

The Vocational Evidence

On March 26, 2010, Susan Rapant, a certified rehabilitation counselor, submitted a vocational report on behalf of Employer/Carrier. She met with Claimant on February 17, 2010, to review his background information, and his educational and employment history. (EX-38, p. 1).

Ms. Rapant reviewed the medical records from Drs. Al-Hameed and Kosty, along with physical therapy notes. Ms. Rapant noted all of Claimant's skills, some of which were being able to troubleshoot, think critically, install equipment, and operate equipment or systems. Ms. Rapant did not provide a labor market survey at the time the report was issued because Claimant had not yet reached maximum medical improvement or been released to work. (EX-38, pp. 2-10).

An addendum to the vocational report was completed by Ms. Rapant on May 2, 2012. Along with all the prior information Ms. Rapant gathered, she also considered Claimant's maximum medical improvement status and Dr. Kosty's April 16, 2010 restrictions as reported in the April 6, 2012 Decision and Order. Labor market research was conducted from March 27 to April 30, 2012, in a 34-mile commuting radius of Claimant's residence in Hitchcock, Texas. Ms. Rapant conducted her labor market survey of positions using sedentary to light⁶ physical demand level

⁶ Ms. Rapant referred to the Dictionary of Occupational Titles (herein DOT) to determine the level of physical demand required by each identified occupation contained within her vocational report. In accordance with the DOT, she noted the following general categories of jobs: Gate Attendant (light); Cashier (light); Telemarketer (sedentary); and Security Guard (light). Please note that only one of the employers in the vocational report provided such designations in regard to the physical demands of each occupation. (EX-39, p. 3).

classifications and Dr. Kosty's April 2010 restrictions.⁷ (EX-39, pp. 1-3). Based on the aforementioned, Ms. Rapant identified the following jobs:

1) A "Gate Attendant/Cashier" position in Galveston, Texas with the Galveston Island Park Board. The employee would sell parking and fishing tickets, monitor cars entering the park, as well as handle cash and make change. The employee would monitor the parking lot using a driving cart or walking. The employee must speak English and pass a background check. Standing, walking, and sitting would be required in "all types of weather conditions." Minimal lifting, bending, and squatting would be required. This part-time position had a flexible work schedule and paid \$7.25 to \$8.00 per hour. (EX-39, p. 4).

2) A "Cashier/Sales Associate" position in La Marque, Texas, with Wal-Mart. The employee would receive payments for merchandise, and issue receipts, refunds, credits, or change due to customers. In addition, the employee would process merchandise returns and exchanges, greet customers, and assist them with locating items. The employee must have a flexible work schedule which includes working weekends and evenings, and must pass a background check and a drug test. A high school diploma/GED is not required and no experience is necessary, but the employee must have good customer service skills. This part-time or full-time position required walking, standing (with an unspecified amount of time for breaks), and the ability to handle merchandise weighing up to 20 pounds, without assistance. The position paid \$7.35 to \$8.50 per hour. (EX-39, p. 4).

3) A "Telemarketer" position in Pasadena, Texas, with Purple Heart. The employee would make outbound calls and take inbound calls, along with soliciting orders for goods or services over the telephone. The position required that the employee pass a background check, but experience is not required. While a high school diploma and basic computer skill are not required, they are a plus. This part-time position with "sedentary" physical demands (but otherwise not described), offers evening shifts and a flexible work

⁷ Dr. Kosty's April 16, 2010 permanent restrictions concerning Claimant's left knee included the following: 4 hours walking/standing; less than one hour bending, stooping, squatting, kneeling; and a lifting restriction of 25 pounds; and for his right shoulder, less than one hour reaching, reaching above the shoulder, climbing; and pushing/pulling of 25 pounds. (EX-39, p. 2; EX-44, pp. 8, 12).

schedule. The position paid \$7.25 per hour. (EX-39, p. 5).

4) A "Security Guard" position with Allied Barton working at various locations in Texas, including Pearland, Friendswood, Alvin, and Almeda. The employee would patrol parking lots in a cart and walk around stores. The position also required that the employee would be at least 18 years old, have a high school diploma/GED or at least 10 years of verifiable work experience. The employee is required to have a valid "TDL" and a 3 year driving record, as well as being customer service oriented, professional in appearance, and have the ability to communicate effectively, both orally and in writing. The employee must have no criminal convictions and be able to pass a drug screening test. Part-time and full-time positions are available, along with evening and night shifts. The position requires variation of standing, walking, and driving a cart. An employee that has restrictions on bending, squatting, reaching, and lifting up to 25 pounds may apply, but will only be placed in suitable work sites. The position paid \$8.50 to \$10.00 per hour. (EX-39, p. 5).

5) An "Overnight Security Guard" position in Galveston, Texas, with Weiser Security Service. The position offered on-the-job training and would require the employee to be stationed in a guard booth, monitoring property cameras, controlling a parking area, randomly patrolling around the property, and responding to incidents or resident complaints. The position also required that the employee would be at least 18 years old, have a high school diploma/GED and a valid "TDL," be neat in appearance, and pass a drug and background check. This is a full-time position, from 11:00 p.m. to 7:00 a.m. that requires variation of sitting, standing, and walking. Also the employee may have to lift up to 25 pounds, but any accommodation needs could be discussed during an interview. The position's starting pay was \$8.50 per hour. (EX-39, p. 6).

On November 9, 2012, Ms. Rapant provided an addendum to her vocational report, taking into consideration an FCE performed on July 31, 2012 and a DWC-73 (Texas Workers' Compensation Work Status Report) from Dr. Kosty dated August 22, 2012, which is otherwise not identified in the record. (EX-40, p. 1). The FCE revealed that Claimant was on Norco, for pain, and that he could not perform any required lifts or obtain the correct lifting

position due to pain increases in his right shoulder and left knee during said tasks. The FCE evaluator opined that the test provided "very limited information on his [Claimant's] work potential" because Claimant's pain was a "significant" limiting factor. Dr. Kosty's restrictions in the DWC-73, according to Ms. Rapant, indicated Claimant could work eight hours a day at a sedentary/light activity level with the permanent restrictions of eight hours of sitting, grasping/squeezing, wrist flexion/extension, keyboarding; four hours standing, walking; two hours lifting, reaching; zero hours kneeling/squatting, bending/stooping, pushing/pulling, twisting, climbing, overhead reaching; and a lifting restriction of 15 pounds. (EX-40, p. 1).

The labor market research was conducted on November 8, 2012, in a 36-mile radius of Claimant's residence in Hitchcock, Texas. (EX-40, p. 2). Ms. Rapant considered Claimant's age, education, work history, vocational background, interests, and physical capabilities based upon Dr. Kosty's restrictions⁸ in the DWC-73 dated August 2012. Based on the aforementioned, Ms. Rapant identified the following jobs:

1) A "Transporter" position in Houston, Texas, with Hertz. The employee would transport vehicles within the airport to service areas, move vehicles between airport and off-airport locations, and provide customer service. The employee must have a professional appearance, follow company safety policies/procedures, and be able to work with minimal supervision. The employee must have a valid driver's license, be at least 20 years old, pass background and drug tests, and have a flexible schedule to allow working nights, weekends, and holidays. This is a full-time position with physical demands of lifting up to 15 pounds. The employer is willing to provide "reasonable accommodations for qualified individuals with disabilities." The position paid \$8.50 per hour. (EX-40, pp. 2-3).

⁸ Ms. Rapant again referred to the Dictionary of Occupational Titles (herein DOT) to determine the level of physical demand required by each identified occupation contained within her vocational report. In accordance with the DOT, she noted the following general categories of jobs: Car Transporter (light); Parking Cashier (light); Advertising Manager (sedentary); Front Desk Sales Associate (light); 911 Operator (sedentary); and Customer Service Representative (sedentary). None of the employers in the vocational report provided such designations in regard to the physical demands of each occupation. (EX-40, p. 2).

2) A "Cashier" position in Houston, Texas, with Ace Parking, Inc. The employee would compute and record transactions for parking fees, issue receipts, refunds, credits, or change due to customers, ensure the booth, gates and surrounding areas are kept clean, and provide customer service. The employee must be at least 18 years old and must pass a drug screening and a criminal background check. A high school diploma/GED is preferred but not required. This is a part-time or full-time position that requires working days, evenings, weekends, and holidays. The physical demands include approximately seven hours or more, per shift, standing, walking, and sitting (intermittently), the ability to lift 10 pounds and to work in changing weather conditions. The position paid \$7.25 to \$8.00 per hour. (EX-40, pp. 3-4).

3) Entry-level positions including "Marketing, Sales, and Advertising" positions in Gulfgate and Clear Lake, Texas, with SKE Management, Inc. The employee would be responsible for outbound marketing and sales, advertising promotions, public and media relations, and customer service. In addition, the employee must be able to determine client needs and have good communication skills. The employer requires a high school diploma/GED, but would prefer college students or graduates (no experience is necessary). This full-time position paid \$14.42 to \$19.23 per hour with a bonus plan and has physical demands that require "mostly sitting at a desk and making phone calls." (EX-40, pp. 4-5).

4) A "Front Desk Sales Associate" position in Pearland, Texas, with Massage Heights. The employee's job duties include membership sales, scheduling appointments, providing customer service, and to assist in maintaining a clean spa environment. The employee must pass a drug screen and background check, have a professional appearance and attitude, and may not have any criminal convictions. There are no requirements for experience or education. This full-time or part-time position has physical demands that require "mostly sitting." The position paid \$8.50 per hour, plus commission and benefits, along with paid sales training. (EX-40, p. 5).

5) A "Front Desk Clerk" position in Pearland, Texas, with La Quinta Inn. The employee would greet guests, register and assign rooms to guests, contact housekeeping and maintenance personnel to report problems, perform

bookkeeping activities and post charges, compute bills and collect payments from guests. There are no educational requirements, but the employee must pass a drug screen, and a background and criminal check (employee cannot have criminal convictions). This full-time position has physical demands that require "mostly standing, but [the employee] can sit as needed." The position paid \$7.25 per hour. (EX-40, pp. 5-6).

6) A "Telecommunicator" position in Galveston, Texas, with the City of Galveston. The employee would coordinate all police, fire, ambulance, and other emergency requests (911 calls). The employee would also receive calls from the public concerning emergencies and broadcast orders to units, and provide preliminary first aid instructions to callers. The employee must have a high school diploma/GED or 1 to 3 months of related experience/training, and must pass a drug screen and background check. This is a full-time position that requires the employee to work rotating shifts with a physical demand of "mostly sitting." The position paid \$14.78 per hour. (EX-40, p. 6).

7) A "Customer Service Specialist" position in Galveston, Texas, with the City of Galveston. The employee is responsible for assisting customers with new account set up and/or changes in present service, to resolve billing issues, and handle customer complaints. A high school diploma/GED is required or one year of related experience, along with passing a drug screen and background check. This is a full-time position with a physical demand of "mostly sitting; standing to assist customers." The position paid \$11.50 per hour. (EX-40, p. 7).

On October 7, 2014, Ms. Rapant provided a final addendum to her vocational report, taking into consideration Dr. Kosty's restrictions⁹ found in a DWC-73 (Texas Workers' Compensation Work Status Report) dated August 22, 2012, as mentioned previously. (EX-41, p. 1). Labor market research was conducted on October 6 to October 7, 2014, in a 31-mile radius of Claimant's residence

⁹ Ms. Rapant again referred to the Dictionary of Occupational Titles (herein DOT) to determine the level of physical demand required by each identified occupation contained within her vocational report. In accordance with the DOT, she noted the following general categories of jobs: Receptionist Officer (sedentary); Parking Cashier (light); Guest Services Representative (light); Room Services Order Taker (sedentary); Garment Inspector (light); and Internet Automotive Sales (sedentary). Only two of the employers in the vocational report provided such designations in regard to the physical demands of each occupation. (EX-41, p. 1).

in Hitchcock, Texas. (EX-41, p. 2). Based on the aforementioned, Ms. Rapant identified the following jobs:

1) A "Receptionist Officer" position in Houston, Texas, with Securitas Security Services USA, Inc. The employee would act as a receptionist which includes such duties as controlling access through admittance process, welcome on-site visitors, observe and report incidents/accidents, write and/or type reports, enter information into a computer, and answer the telephone. Employee must have keyboarding skills and basic knowledge of computer usage and controls. This is a full-time position with physical demands of seeing, hearing, speaking and writing clearly; occasional reaching with hands and arms, stooping, kneeling, crouching, and crawling; frequent sitting, standing, and walking, which may be required for long periods of time, and may involve climbing stairs and walking up inclines and on uneven terrain; frequent lifting and/or moving up to 10 pounds; occasional lifting and/or moving up to 25 pounds. The employer indicated it can accommodate those with specific sitting/standing and lifting abilities. The position paid \$10.00 to \$15.00 per hour. (EX-41, p. 2).

2) A "Cashier" position in Galveston, Texas, with Standard Parking. The employee would compute and record transactions for parking fees, issue receipts, refunds, credits, or change due to customers, ensure the booth, gates and surrounding areas are kept clean (which may require picking up trash), and provide customer service. Less than a high school education or one month of related experience/training is required by employer, along with the ability to compute numbers and make change, and write simple correspondence. This part-time or full-time position may require working 2nd or 3rd shifts, and weekends. The position's physical demands include regularly sitting, using hands, handling objects, tools or controls, and reaching with hands and arms; occasionally walking and sitting; and no lifting. The employer describes this as a "sedentary position" in a booth where the employee can sit or stand. The employer is willing to accommodate an employee with sitting/standing and lifting abilities. The position paid \$12.00 per hour. (EX-41, pp. 3-4).

3) A "Guest Service Representative" position in Pearland, Texas, with Courtyard Houston Pearland. The employee would operate a telephone switchboard station, process guest requests, provide guests with messages, log all guest requests or issues into a computer, provide guests with information about the hotel and the surrounding area, and report accidents/injuries or unsafe work conditions to a manager. The employee must comply with quality assurance standards, follow other company policies/procedures, welcome and acknowledge all guests according to company standards, and maintain confidentiality of proprietary information. This full-time position has physical demands that require reading, standing, sitting, or walking for an extended period of time for an entire shift; and moving, lifting, carrying, pushing, pulling, and placing objects weighing less than 10 pounds, without assistance. The employer is willing to accommodate an employee with specific sitting/standing, walking, or lifting abilities. The position paid \$9.62 to \$12.50 per hour. (EX-41, pp. 4-5).

4) A "Cashier/Room Service Order Taker" position in Houston, Texas, with Hilton Houston Nasa Clear Lake Hotel. The employee would answer the room service telephone and take guests' orders, along with upselling room service features to increase profits, and enter orders into a computerized system. The employee may possess a high school diploma/GED, but it is not required. This is a full-time position with "sedentary" physical demands that require minimal lifting of light items (i.e. phone), and occasional walking. The employee may stand or adjust posture when needed and is encouraged to discuss any physical abilities with a manager. The position's starting pay is \$8.25 per hour and later increases to \$9.00 per hour after a 90-day probationary period. (EX-41, pp. 5-6).

5) A "Cashier and Garment Inspector" position in Galveston, Texas, with Goodwill Industries. The employee would obtain payment for merchandise after totaling customer purchases, along with operating an electronic cash register and credit card machine, provide customer service, receive and record donations, assist in sorting donations, stocking the store, and in store security. The employer prefers the employee have at least a high school diploma/GED, but no experience is required and on-the-job training is provided. The employee must also be able to work rotating shifts, including weekends, and perform basic

math calculations. This is a full-time position with physical demands such as light lifting of clothing or merchandise, usually weighing less than 5 pounds, and sitting or standing (as a cashier) if needed. The employer will make reasonable accommodations for an employee with disabilities. The position paid \$9.00 per hour. (EX-41, pp. 6-7).

6) An "Internet Automotive Sales Consultant" position in Texas City, Texas, with DeMontrond Automotive Group. The employee would track and respond to all internet leads, monitor incoming emails, quote pricing, rates and automobile availability, receive on-line credit applications, and take digital photos of inventory for the website, along with attending weekly department meetings. The employer does not require experience, education, or training, but it is a plus and the employee must have a driver's license and be insurable. This full-time job has physical demands that require the employee to regularly sit, use hand to finger, handle or feel; talk or hear; frequently stand and walk; occasionally lift and/or move up to 10 pounds; and have close vision and depth perception. The position paid \$19.23 to \$24.03 per hour. (EX-41, p. 7).

7) A "ID Card Operator" position in Hohenfels, Germany, with General Dynamics. The employee would perform general administrative tasks such as preparing reports/correspondence, answering phones, filing, and distributing mail. The employee would also compile contract, program, and financial data, collect and input timesheet data, and process purchasing requisitions and invoices. The position requires the employee to have a high school diploma/GED, or 0 to 1 year of related administrative experience. This full-time position has no specified physical demands ("light according to Oasys"). The position paid of \$25.10 to 41.79 per hour (which includes a 25% living allowance of spendable income). (EX-41, pp. 7-8).

8) An "Administrative Assistant" position in Hong Kong, with URS. The employee would copy, sort, and file records of office activities, operate office machines (fax, phone, scanners), maintain and update filing, inventory and mailing systems, and sort incoming mail along with preparing outgoing mail. The employee must have a high school diploma/GED and possess basic computer knowledge.

This is a full-time position with no specified physical demands ("light according to Oasys"). The position paid \$18.66 to 31.07 per hour (which includes a 42% living allowance of spendable income). (EX-41, p. 8).

The Contentions of the Parties

Claimant contends that the positions in the May 2 and November 9, 2012, and October 7, 2014 labor market surveys are physically beyond his restrictions or the listings do not provide enough information to determine whether the work is within Claimant's limitations. Alternatively, Claimant contends that the positions with Purple Heart paying \$7.25 per hour, Massage Heights paying \$8.50 per hour, Hilton Houston paying \$8.75 per hour, and Goodwill paying \$9.00 per hour are the only positions which may constitute suitable alternative employment; however, Claimant avers that there is no indication he would be hired for any of these positions. Finally, Claimant argues that should the undersigned find that Employer/Carrier have established suitable alternative employment, that it be established no earlier than May 2, 2012, and be limited to the position with Purple Heart paying \$7.25 per hour. Therefore, Claimant contends he is entitled to permanent partial disability based on the ability to earn \$290.00 per week.

Employer/Carrier contend that the medical and vocational evidence support a finding that Claimant can return to work in suitable alternative employment, and that they have established a post injury earning capacity. Specifically, Employer/Carrier contend that they have shown suitable alternative employment as early as May 2, 2012, in the area of Claimant's residence and in accordance with the work restrictions issued by Dr. Kosty on April 16, 2010. Further, they contend that the OWCP-5 forms submitted by Claimant, reflecting Dr. Kosty took Claimant off work entirely, are not valid evidence. Finally, Employer/Carrier contend that Claimant has not demonstrated "reasonable diligence" in attempting to secure alternative employment within the employment opportunities provided by Employer/Carrier in its vocational reports and labor market surveys.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves

factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Dir., OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

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

A. Applicability of Section 22 Modification

Section 22 of the Act provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See Metro. Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Cont'l Mar. of S.F., Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. Duran v. Interport Maint. Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Inc., 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a

mistake of fact or a change in physical or economic condition. Id. at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of **res judicata**, and to allow the fact-finder to consider any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted." O'Keefe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g denied, 404 U.S. 1053 (1972). An administrative law judge, as trier of fact, has broad discretion to modify a compensation order. Id.

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding. O'Keefe, supra at 255. The scope of modification based on a mistake in fact is not limited to any particular kinds of factual errors. See Rambo I, supra at 295; Banks v. Chi. Grain Trimmers Ass'n, Inc., supra at 465. However, it is clear that while an administrative law judge has the authority to reopen a case based on any mistake in fact, the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. Kinlaw v. Stevens Shipping & Terminal Co., 33 BRBS 68, 72 (1999). A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making. O'Keefe, supra; see also Gen. Dynamics Corp. v. Dir., OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Modification based upon a change in conditions or circumstances has also been interpreted broadly. Rambo I, supra at 296. There are two recurring economic changes which permit a modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable alternative are not suitable; or (2) the employer contends that suitable alternative employment has become available. Blake v. Ceres, Inc., 19 BRBS 219 (1987). A change in a claimant's earning capacity qualifies as a change in conditions under the Act. Rambo I, supra at 296. Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. Id.; See also Delay v. Jones Wash. Stevedoring Co., 31 BRBS 197 (1998); Vasquez, supra at 431.

However, Section 22 is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation strategy/tactics, errors or misjudgments of counsel. Gen. Dynamics Corp. v. Dir., OWCP [Woodberry], supra; McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Delay v. Jones Wash. Stevedoring Co., supra, at 204.

The U. S. Department of Labor (DOL) has consistently advanced a view that Section 22 articulates a preference for accuracy over finality in judicial decision making. See Kinlaw, supra at 71; Old Ben Coal Co. v. Dir., OWCP [Hilliard], 292 F.3d 533, 36 BRBS 35, 40-41 (CRT) (7th Cir. 2001). DOL has maintained in other modification proceedings that as Section 22 was intended to broadly vitiate ordinary **res judicata** principles, the interest in "getting it right," even belatedly, will almost invariably outweigh the interest in finality. Kinlaw, supra at 71.

B. The Threshold Requirement under Section 22 of the Act

In the present matter, subsequent to the issuance of the original Decision and Order, Employer/Carrier consulted a vocational expert to assess Claimant's vocational potential and future employability. I find the results of the labor market surveys sufficient to constitute a change in Claimant's economic condition. Therefore, I find and conclude that Employer/Carrier have presented new information to warrant consideration of modification under Section 22 of the Act.

Consequently, I find that Employer/Carrier have met the threshold requirements for modification by presenting evidence of a change in Claimant's economic condition. Therefore, balancing the need to render justice under the Act against the need for finality in decision making, I hereby grant Employer/Carrier's motion and reopen the record to consider modification of the prior Decision and Order.

C. Nature and Extent of Disability

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

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of

injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of Am., 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

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

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

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

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

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Constr. Co., supra; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette W. Corp., 20 BRBS 184, 186 (1988); Williams v. Gen. Dynamics Corp., 10 BRBS 915 (1979).

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

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

The parties stipulated that Claimant reached maximum medical improvement on July 12, 2010, with respect to his left knee injury, and that Employer/Carrier have continued to pay permanent total disability compensation benefits pursuant to the initial Decision and Order of April 6, 2012. See (JX-1); Employer/Carrier's Brief pp. 1-2. Dr. Kosty, Claimant's treating physician, testified that the April 16, 2010 restrictions placed upon Claimant are still valid. Particularly, Dr. Kosty noted that the restrictions regarding Claimant's left knee will be in effect "forever" because there is no foreseeable change in Claimant's left knee condition. Dr. Kosty opined that Claimant is unable to return to his former work based on his left knee injury, but that he can work in a sedentary or light duty capacity. Therefore, Claimant cannot return to his former job and has established a **prima facie** case of total disability. Accordingly, Claimant is still entitled to permanent total disability compensation benefits from July 12, 2010 to present and continuing thereafter based on his average weekly wage of \$1,614.33. The remaining issue, then, is whether Employer/Carrier have established suitable alternative employment.

It is also noted that, in the instant case, Dr. Kosty opined that Claimant's right shoulder is at maximum medical improvement, without surgery, because Claimant has a chronic rotator cuff tear. However, the parties have not asserted nor

has the undersigned found Claimant to have reached maximum medical improvement in regard to his right shoulder. Nevertheless, Dr. Kosty stated that the April 16, 2010 restrictions, affecting Claimant's right shoulder, are also still valid.

E. Suitable Alternative Employment

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

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

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

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

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

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical

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

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

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

In my initial Decision and Order, I concluded that the permanent restrictions imposed by Dr. Kosty in April 2010, clearly indicate that Claimant cannot return to his former employment, but the restrictions would not preclude Claimant from other forms of employment. However, Employer/Carrier presented no evidence establishing suitable alternative employment, and as a result, I concluded that Claimant was entitled to permanent total disability from July 12, 2010, to

present and continuing thereafter based on Claimant's average weekly wage of \$1,614.33. (D&O, pp. 33-34, 41).

On modification, Employer/Carrier argue that they established suitable alternative employment in the open market since May 2, 2012, by multiple labor market surveys performed by Ms. Rapant. Specifically, Employer/Carrier contend that the May 2, 2012 labor market survey identified five suitable positions within the April 2010 restrictions assigned by Dr. Kosty. Consequently, they assert that Claimant was partially disabled as of May 2, 2012, with a post-injury earning capacity of \$400.00 per week, reducing Claimant's compensation benefits to \$809.55 per week.¹⁰ Moreover, Employer/Carrier assert that the November 9, 2012 labor market survey, taking into account an FCE dated July 31, 2012, and Dr. Kosty's August 22, 2012 restrictions, provided additional suitable alternative employment (7 positions). Therefore, they contend the survey provides evidence of an increased wage potential of \$769.23 per week, further reducing Claimant's compensation rate to \$563.40.¹¹ In addition, Employer/Carrier contend that the October 7, 2014 labor market survey established ongoing availability of suitable alternative employment, providing six additional positions. Employer/Carrier contend that the survey established a post-injury wage earning capacity of \$1,671.64, which is above Claimant's average weekly wage of \$1,614.33, and thus, Claimant would not be disabled as of October 7, 2014. Finally, Employer/Carrier aver that Claimant has not made any diligent efforts to return to work or seek work.

Initially, I note that I must compare the identified job requirements with Claimant's physical and mental restrictions based on the medical opinions of record.

First, I consider whether suitable alternative employment has been established by the May 2, 2012 labor market survey. This survey did take into account Dr. Kosty's April 2010 permanent restrictions concerning Claimant's left knee which were, 4 hours walking, standing; less than one hour bending, stooping, squatting, kneeling; and a lifting restriction of 25 pounds; and for his right shoulder, less than one hour reaching, reaching above the shoulder, climbing; and pushing and pulling

¹⁰ ($\$1,614.33$ average weekly wage - $\$400.00$ post-injury earning capacity \times $2/3$ = $\$809.55$ compensation rate).

¹¹ ($\$1,614.33$ average weekly wage - $\$769.23$ post-injury earning capacity \times $2/3$ = $\$563.40$ compensation rate).

of 25 pounds.¹² The five jobs contained in the survey are arguably all within Claimant's physical limitations generally, but do not adequately identify the extent of the physical duties or the demands of the job. Particularly, jobs one, two, four, and five state that the physical demands require a "variation" of walking and standing, but do not state for how long Claimant would be required to do either, yet Claimant is limited to four hours of walking/standing. Furthermore, job three lists the physical demands as only "sedentary," however, it does not list whether this includes, standing, walking, sitting, lifting, reaching overhead, or any combination thereof. Accordingly, I find and conclude that Employer/Carrier have not met their burden of proof, and therefore, have not established suitable alternative employment with the May 2, 2012 market labor survey.

Next, I consider whether suitable alternative employment has been established by the November 9, 2012 labor market survey. Unlike the previous survey, this report considered a July 31, 2012 FCE and restrictions provided by Dr. Kosty on August 22, 2012. Nevertheless, Dr. Kosty testified in his October 2014 deposition that the April 2010 restrictions are currently applicable. Consequently, I will consider only the April 2010 limitations (as listed above) when determining whether the following positions are indeed suitable alternative employment for Claimant. Just as with the previous labor market survey, most of the positions are conceivably within Claimant's physical limitations. However, the seven listed positions do not sufficiently describe the extent of the physical duties or demands of the job. For example, jobs three,¹³ four, six, and seven describe the physical demands as "mostly sitting." While I recognize that Claimant has no limitations in regard to sitting, he is restricted to the number of hours he must stand. Unfortunately, none of the aforementioned positions address how long Claimant must stand. Moreover, job one simply lists the physical demands as "lifting up to 15 pounds," but does not address how much the employee would have to stand, walk, bend, or stoop when "transporting" vehicles to and from an airport. On the other hand, job five states that the employee would "mostly stand" which is clearly not within Claimant's limitations. Lastly, in job two an employee may be required to

¹² Dr. Kosty was not presented with an opportunity nor did he opine as to whether any of the positions contained in each market labor survey provided by Employer/Carrier are suitable for Claimant given his physical limitations.

¹³ The third position listed in this labor market survey, with SKE Management, also states that college students or graduates are preferred, rather than a candidate with a high school diploma/GED. Notably, while Claimant has completed college courses, he is not currently enrolled in college nor does he have a college degree.

stand, sit, and walk for seven hours or more per shift, but again, the description does not state how long the employee would be standing or walking. Accordingly, I find and conclude that Employer/Carrier have not met their burden of proof. Thus, they have not established suitable alternative employment with the November 9, 2012 market labor survey.

Finally, I consider the last market survey dated October 7, 2014. Just as with the previous survey, Ms. Rapant considered Dr. Kosty's August 2012 restrictions, but I will instead apply his April 2010 limitations. This survey provided eight potential jobs, two of which were out of the country in Germany and Hong Kong. The first job listed does not comport with Claimant's limitations as it states that there is "occasional" reaching, stooping, kneeling, crouching, and crawling, but it does not state how long the employee would do any one activity, and Claimant is limited to less than one hour concerning all of these activities. Additionally, job one states that the employee may be required to sit, stand, and walk for long periods of time (and climb stairs), yet Claimant is limited to 4 hours of walking/standing. Just as with the first, jobs two through six require standing, sitting, and walking for an unspecified, extended period of time. Lastly, jobs seven and eight list absolutely no physical demands, except to state "light according to Oasys." This clearly provides no guidance to determine whether Claimant is capable of performing the required tasks of each job. Accordingly, I find and conclude that Employer/Carrier have not met their burden of proof, and thus, have not established suitable alternative employment with the positions offered in the October 2014 labor market survey.

Due to the physical job demands not complying with Claimant's complete medical restrictions in each of the three labor market surveys, I find there is no need to discuss the individual positions contained in the surveys and their locations, or Claimant's qualifications, skills, and experience to perform those positions. In addition, it is also unnecessary to discuss Claimant's diligent job search until Employer/Carrier first establish suitable alternative employment. See Roger's Terminal & Shipping Corp. v. Dir., OWCP, 784 F.2d 687 (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Piunti v. ITO Corp., supra at 370.

In view of the foregoing, I find and conclude that Employer/Carrier have not established suitable alternative employment. As such, Claimant remains totally disabled.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.¹⁴ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

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

1. Employer/Carrier's request for modification is **GRANTED**.
2. Employer/Carrier shall pay Claimant compensation for permanent total disability from July 12, 2010 to present and continuing thereafter based on Claimant's average weekly wage of \$1,614.33, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).
3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2010, for the applicable period of permanent total disability.
4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's February 12, 2006 and February 25, 2009, work injuries, pursuant to the

¹⁴ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. Gen. Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **May 7, 2014**, the date this matter was referred from the District Director.

provisions of Section 7 of the Act, to include right shoulder surgery and left knee unicompartmental arthroplasty surgery.

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

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

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

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

ORDERED this 17th day of June, 2015, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge