U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Aug2002

Case No. 1999-LHC-1985

OWCP No. 6-113757

In the Matter of

GLORIA EDWARDS JACKSON,
Claimant

v.

ARMY & AIR FORCE EXCHANGE SERVICE,
Employer

CONTRACT CLAIMS SERVICES,
Carrier

Appearances:
W. Donald Kelly, Esq., for Claimant
L. Lee Bennett, Jr., Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a petition for modification by Employer, Army & Air Force Exchange Service, seeking modification of a compensation order issued on December 12, 1997, by Administrative Law Judge Daniel J. Roketenetz, under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 948(a). (Hereinafter "the Act"). The December 12, 1997, Decision and Order Awarding Benefits[1] awarded Claimant temporary total disability from November 1, 1987 until further notice at the rate of $99.73.[2] It is undisputed that those payments are ongoing. *See* (Emp. Br. at 3); (Cl. Br. at 2). Employer seeks modification pursuant to 33 U.S.C. § 922 on two grounds. First, Employer argues that it should be entitled to retroactively convert Claimant from temporary total disability to permanent partial disability for a scheduled injury because Claimant is at maximum medical improvement and the labor market surveys submitted demonstrate suitable alternate employment is available. In the alternative, Employer argues that Claimant's temporary total disability benefits should be retroactively suspended on the

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[1] The 1997 Decision and Order Awarding Benefits will be referred to as Decision. Employer exhibits will be referenced as DX.

[2] In the original Decision, dated December 12, 1997, compensation was listed as $66.52. That amount was subsequently corrected in a January 16, 1998 Errata Order.

grounds of a change in Claimant's wage earning capacity. Employer submitted a Petition for Section 22 Modification dated February 2, 1999 and an Amended Petition for Modification Under Section 22 and Section 8 dated August 30, 2000.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. By letter dated May 24, 2001, the parties agreed that a decision should be made on the record. Accordingly, on June 27, 2001, an order was issued directing that the parties should submit all exhibits and stipulations of fact by August 6, 2001, and should submit briefs by September 10, 2001. On August 3, 2001, the Employer submitted exhibits identified as D-1 through D-34. No exhibits were submitted by the Claimant. On September 17, 2001, briefs were received from the Employer and Claimant.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Employer has shown a physical change in condition by proving that Claimant's condition has reached maximum medical improvement, thereby entitling Employer to a modification order;

2. If so, whether Employer has proven suitable alternate employment establishing Claimant's disability as partial;

3. If not, whether Employer has shown an economic change in condition by establishing suitable alternate employment, thereby entitling Employer to a modification order;

4. Whether and to what date the conversion from temporary total disability to permanent partial disability becomes effective for compensation purposes.

DISCUSSION OF LAW AND FACTS

In his Decision and Order dated December 12, 1997, Judge Roketenetz held that Claimant had shown an injury to her feet which could have occurred after standing in cleaning solution on the break room floor at work. (Decision at 12). Thus, the Section 20(a) presumption of causation was invoked. The Employer was not found to have presented evidence sufficient to rebut that presumption. (Decision at 13). Further, it was found that Claimant's condition had not, at that time, reached permanency, as no doctor had placed her at maximum medical improvement or given a normal time for recovery. He stated:

> Because the physicians have been unable to accurately diagnosis [sic] the Claimant's condition or provide a normal healing period I find that the paucity of medical evidence offered relating to permanency is based on mere speculation and the Claimant's condition is not permanent in nature. As a result, I find that the Claimant's condition, which began in March 1987, as a result of the Claimant's work accident, is temporary in nature.

(Decision at 14). It was also found that Claimant had established evidence, due to "uncontradicted work restrictions," that she could not return to her former position as a sales associate. (*Id.*). Further, it was held that Employer did not produce sufficient evidence to show suitable alternate employment.

Therefore, the Claimant was found entitled to ongoing compensation for temporary total disability beginning November 1, 1987 at the rate of $99.73 in addition to future medical benefits. (Decision at 17). It has not been argued and no evidence has been presented regarding a mistake in the finding of injury or causation, rather, Employer has requested a Section 22[3] modification based upon a change in condition. *See* (Emp. Br. at 1-2).

It is well established that modification pursuant to Section 22 is permitted based on a mistake of fact in the initial decision or on a change in a claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo* [Rambo I], 515 U.S. 291 (1995). The party requesting modification due to a change in condition bears the burden of showing that change in condition. *See Metropolitan Stevedore Co. v. Rambo* [Rambo II], 521 U.S. 121 (1997).

Employer argues that it is entitled to modification based upon two grounds. First, Employer argues that Claimant is at maximum medical improvement and that a wage earning

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[3] Section 22 states:

> Upon his own initiative, or upon the application of any party in interest ... on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case...in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

33 U.S.C. § 922.

capacity has been shown through suitable alternate employment, and therefore Claimant is entitled only to scheduled compensation. (Emp. Brief at 1-2). The reaching of maximum medical improvement, if proven, is sufficient to show a change in physical condition allowing for modification of the original order. *See e.g. Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167 (2nd Cir. 2000).

In the alternative, Employer argues that Claimant's temporary total disability benefits should be retroactively suspended on the grounds of a change in Claimant's wage earning capacity. This argument appears to be based solely on labor market surveys, performed in 1998 and after, and surveillance tapes dated 1998 and 1999. (Emp. Br. at 2); (DX 11)(surveillance tape);(DX 12)(same).[4] The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. *See e.g. Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 187, 204 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1, 8 (1994).

In response, Claimant asserts that her condition is not, in fact, changed. She argues that her best prospect is for stabilization of her foot condition, not complete healing, and that such stabilization has not yet occurred. (Cl. Br. at 1-2). In addition, Claimant states that the doctor who assigned a rating to Claimant's injury, Dr. McClusky, was outside of his specialty as an orthopedic specialist. (Cl. Br. at 2). In response to Employer's second argument, Claimant asserts that Employer has provided no evidence that the jobs listed in the labor market surveys were not available prior to the 1997 hearing or that Claimant's physical condition prevented her from working in those jobs before the 1997 order. (Cl. Br. at 4-5). Thus, Claimant argues, there has not been an economic change in conditions and modification should not be granted.

Permanency and Maximum Medical Improvement

Maximum medical improvement ("MMI") is a question of fact, based primarily upon medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when the claimant has reached MMI or when the condition "has continued for a lengthy period and appears to be of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Ion v. Duluth Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997)(citing *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969)). Under this second test, permanency is reached when the claimant is "no longer undergoing treatment with a view toward improving his condition." *Leech v. Service Engineering Comp.*, 15 BRBS 18, 21(1982)(citing *Brown v. Lykes Bros. Steamship Co.*, 6 BRBS 244 (1977)). Permanency may be found even if there is "a remote or hypothetical possibility" that the condition will improve. *Watson* 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988).

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[4] The surveillance tapes at DX 11 and DX 12, although viewed, are given no weight in this determination. As the tapes are composites they do not show Claimant exceeding the 2 hours per 8 hour workday restrictions. Further, all of the medical evidence states that Claimant's condition will wax and wane.

The medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309(1984). If a physician does not specify the exact date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. *Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

In the instant case, Employer asserts that Claimant has reached maximum medical improvement. To support this assertion, Employer has offered the testimony of Dr. Leland C. McCluskey stating that Claimant has reached MMI. This testimony is further supported by the testimony of Dr. Lloyd B. Sampson and the written opinion of Dr. William H. Paull. In addition, the sheer duration of Claimant's condition indicates permanency.[5] Thus, I find that the medical evidence offered by Employer is sufficient to bring the claim within the scope of Section 22. Therefore, all of the relevant evidence must be weighed.

Dr. Leland C. McCluskey,[6] examined Claimant in an "independent medical evaluation" dated November 19, 1999. His impression was "Hyperkeratosis secondary to chemical irritation." (DX 29 at 1). He wrote: "[s]he is certainly at MMI with it being over 12 years from the episode." (*Id.*). In a letter to Employer's counsel dated August 8, 2000, Dr. McCluskey affirmed this opinion and assigned Claimant a permanent rating, discussed *infra*. (DX- 29 at 3). In his deposition Dr. McCluskey explained that maximum medical improvement, in this case, meant that "it's been long enough from the injury that she had that she's the best she's going to be or at least at a plateau where she is the best she will be from it." (DX 3 at 11).

In a letter dated April 16, 1998, Dr. Lloyd B. Sampson expressed the opinion that, even if medication helped Claimant's condition, it would not provide a cure. He anticipated "at least some trouble on a permanent basis." (DX 31). At Dr. Sampson's November 8, 2000 deposition, he was asked if he thought Claimant had reached MMI. Counsel explained the term by stating "a lot in terms of disability or just when a person has – their point of recovery has more or less plateaued, is not going to get any better – or more fairly to say that they are not going to get any worse." (DX 1 at 28). In assessing Claimant at the time of her last visit with him, Dr. Sampson testified:

> [Claimant] probably [would not get] worse, as I remember. Probably not worse. But again, if she would have been given or at some point been given some of the

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[5] Although Claimant's counsel emphatically asserts that duration is not a factor in assessing permanency, the Board and the Courts have held otherwise. *See e.g. Watson*, 400 F.2d 649, 654(5th Cir. 1986)(holding an employee is disabled when "his condition has continued for a lengthy period and it appears to be of lasting or indefinite duration").

[6] Dr. McCluskey is a board-certified orthopedic surgeon and is active in the Orthopedic Academy and in the foot and ankle societies. (DX 3 at 4). Although Claimant asserts that this makes him unqualified to comment on Claimant's skin condition it is noted that his diagnosis and opinion is overwhelmingly supported by the medical evidence in the record and the duration of Claimant's condition. It is also noted that Claimant testified that Dr. McCluskey only examined her medical records and spoke with her, he did not examine her feet. (DX 24 at 43).

> oral medicines, maybe she would have gotten better – at least temporarily.

(DX 1 at 28). He agreed that, overall Claimant's condition could plausibly have gotten better but probably would not have gotten any worse after approximately 11 years. (*Id.*). Dr. Sampson clarified: "If you mean overall that there may be times that are a little worse than others. But the general condition, I would think, is probably well settled in by then [April 29, 1998, the date of his last examination of Claimant] and that it might be reasonable to think that that would be the case." (*Id* at 28-29). He opined that Claimant's condition would be chronic, and "if not always very severe, what I would certainly expect is it to sort of wax and wane and at times be worse than others." (DX 1 at 11). After reviewing Dr. McCluskey's November 19, 1999 report, Dr. Sampson agreed that they had essentially the same diagnosis, and that his statement regarding MMI was consistent with his opinion as far as the natural course of Claimant's condition. (DX 1 at 29-30). Dr. Sampson's testimony provides strong support for Dr. McCluskey's opinion. Due to his seeming equivocation over Claimant's reaching of MMI, however, the date of Dr. Sampson's last examination of Claimant will not be used to establish the date of MMI.

In a letter to Employer's counsel dated March 22, 2001, Dr. William H. Paull stated that he first saw Claimant on September 23, 1999 when she was hospitalized for an infection of her feet. He wrote:

> [Claimant] will need constant medical care. **This is not a condition that can be cured**. She states she has responded well to PUVA therapy. I do have a hand and foot box that we can attempt some trial therapy. Most textbooks suggest using some form of oral retinoid like Soriatane.
>
> Again, **there is no cure for this disorder. This will need constant medical supervision**. It has been almost at [sic] year and a half since our last visit together. ...

(DX 30)(emphasis added).

Conversely, Claimant asserts that her condition is not stabilized. When asked to describe the condition of her feet, Claimant testified: "they crack, they hurt when I walk, they swell. And sometimes it makes it – you know, like I said before, I have good days, I have bad days; sometimes it makes it hard to walk, so I don't try to do anything. And on good days, you know, I walk." (DX 24 at 40). She also points to her 1999 hospitalization for infection as proof that her condition has not stabilized. (Claimant's brief at 3); (DX 24 at 40-41). However, at her deposition dated July 5, 2001, the following exchange occurred:

> Q: ... Has there been any – outside of hospitalization that you talked about that was in September of 1999, outside of that, has there been any significant change in your condition since 1998? The condition of your feet, specifically.
>
> A: They hadn't changed, no.

(DX 24 at 44). Claimant also testified about the pain she felt in her knees, which she believes is

related to her foot condition. (DX 24 at 45-46). *See also* (DX 32)(letter from Dr. Roeben, the doctor who treated Claimant's knee and shoulder opining that Claimant had reached maximum medical improvement for her bilateral knee pain on March 8, 1995 and that he did "not envision any impairment whatsoever to her lower extremity or to her body as a whole."). Finally Claimant testified that, based on her condition, she did not feel it was possible for her to work. (DX 24 at 47-48).

Upon consideration of all of the relevant medical evidence in the record, I find that Claimant's condition has reached permanency. All the medical evidence is in agreement that Claimant's condition is chronic, will wax and wane, and at times be worse than others, however they also all agree that the general condition should be, by this time, well settled. (DX 3 at 18);(DX 1 at 28-29). On November 19, 1999, Dr. McCluskey unequivocally opined that Claimant had reached maximum medical improvement, specifically mentioning the duration of the condition. (DX 29 at 1). The opinion that Claimant's condition would not get worse was corroborated by Dr. Sampson's testimony. Dr. Sampson stated that Claimant's condition would have been well settled by the time he saw her, in April of 1998. (DX 1 at 28-29). However, this date will not be used as the date of permanency because Dr. Sampson also held out the possibility of improvement and was not unequivocal, as Dr. McCluskey was, as to the reaching of MMI. (*Id*. at 28). Dr. Paull, Claimant's treating physician, also states that Claimant's condition will not be cured. (DX 30). Therefore, all of the medical evidence in the record indicates that Claimant's condition is not one that can be cured, or that has a normal time of recovery. As such, I find that Claimant's condition reached permanency through duration and stabilization.

Based upon this medical evidence and the duration of Claimant's condition, I find that Claimant has reached maximum medical improvement as of November 19, 1999. Claimant's hospitalization for infection does not contradict this finding. The Board has held that a permanent partial disability can be interspersed and subsumed by periods of temporary exacerbation. *See Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194, 196-97 (1986) (holding that "permanent" does not mean "unchanging" and that a claimant may be rated when a doctor finds their condition stable enough to rate, and if it declines afterward, they may be rated again when the condition has again stabilized); *Leech v. Service Engineering Co.*, 15 BRBS 18(1982) (holding that the threat of temporary setbacks to a long-standing condition does not invalidate a permanent partial disability rating). In fact, Claimant's own testimony indicates that her condition has stabilized. (DX 24 at 44).

As I have found that the Employer has established that the Claimant reached maximum medical improvement as of November 19, 1999, the Employer is entitled to modification of the prior award of temporary total disability to reflect that Claimant's condition is permanent as of that date. Since the Claimant's injuries are to her feet, her compensation is limited to the schedule at 33 U.S.C. § 908(c)(4) & (19).

Extent of Injury (Total vs. Partial)

The scheduled award, pursuant to both the Board and Circuit Courts, runs for the proportionate number of weeks attributable to the loss of the member at the full compensation rate of two-thirds of the average weekly wage. *Nash v. Strachan Shipping Co.*, 15 BRBS 386,

391 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (5th Cir. 1986). A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under sections 8(a) and (b) by a showing that he is totally disabled. *PEPCO*, 449 U.S. 268, 277 n. 17 (1980); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172 (1984). In the instant case, Claimant has a scheduled injury to her feet; however, she asserts that she is totally disabled.

Where it is uncontroverted that a claimant cannot return to her usual work, she has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). The claimant's diligence is relevant only after the employer satisfies its burden of establishing the availability of suitable alternate employment. *Roger's Terminal*, 784 F.2d at 687.

In the instant case Claimant was previously found to be unable to return to her regular employment as a sales associate due to the condition of her feet and her work restrictions. *See* (Decision at 14). It was previously stipulated that Claimant's "average weekly salary totaled $99.73. (Decision at 2, Stipulation 5).[7] Claimant's current work restrictions include no standing or walking for more than 30 minutes at a time, and no more than a cumulative two hours in a eight hour workday. (DX 3 at 20-21; 8-9). In describing her duties as a sales associate for Employer, Claimant testified that she was on her feet almost constantly. (DX 24 at 37). She testified that, when asked, she put merchandise on the self, operated the cash register, completed purchase requisition forms, mixed paint and helped with yearly inventory. (DX 24 at19-20). In addition, Claimant testified that she felt she was unable to return to her work as a sales associate.

[7] It is noted that in the transcript of the January 18, 1996 hearing, Claimant testified that at the time of injury (March 1987) she made $4.34 per hour, averaging 35 hours per week (which totals $151.90) (Tr 36). Yet the parties stipulated to an average weekly wage at the time of injury of $99.73. Prior to issuance of this opinion, the parties were requested during a telephone conference conducted on July 19, 2002, to explain this discrepancy. The parties advised they would submit a response in writing. On July26, 2002, the parties submitted a stipulation that the average weekly wage for Claimant's March 15, 1987 workers' compensation claim is $99.73. This stipulation is accepted and identified as Joint Exhibit 1.

(DX 24 at 48). Employer does not controvert the fact that Claimant is unable to return to her job as a sales associate due to her work restrictions. *See generally* (Emp. Br.). Therefore, based upon Claimant's work restrictions, the description of her duties and her testimony that she does not feel able to return to work, I find that she has proven she cannot return to her pre-injury employment.

Suitable Alternate Employment

Once Claimant has established that she is unable to return to her former employment because of a work-related injury, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which she could secure if she diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). While Claimant generally need not show that she has tried to obtain employment, she bears the burden of demonstrating her willingness to work once suitable alternative employment is shown. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Co.*, 17 BRBS 156 (1985).

In the instant case, Employer has submitted three labor market surveys dated 1998, 1999, and 2000. (DX 7)(1998 survey); (DX 8)(1999 survey); (DX 9)(2000 survey); (DX 10)(update of 2000 survey). This evidence must be considered to determine whether suitable alternate employment has been shown.

Work Restrictions and Qualifications

In assessing what jobs Claimant is capable of performing, Claimant's work restrictions and qualifications need to be considered. *Turner*, 661 F.2d at 1042. Originally it was found that Claimant had presented "uncontradicted evidence of restrictions." That finding was based upon the recommendations of Dr. Richardson, Claimant's treating physician at the time, and Dr. Sampson, who stated:

> Claimant could not work in conditions which would expose her to irritating chemicals or require her to work on her feet. Dr. Sampson also concurred that the Claimant could not work on her feet or work in conditions where there was no direct exposure to any potentially irritating chemicals.

(Decision at 14). Thus, it was held that Claimant could not return to her previous position as a sales associate where she would be required to work on her feet. (*Id.*). The burden then shifted to Employer to show suitable alternate employment. The ALJ found that no such evidence was presented.

Dr. McCluskey has since issued much more specific, permanent work restrictions for Claimant. Dr. McCluskey stated:

> You know, the bottom line on that is that she has these real sensitive lesions on the bottom of her feet that hurt to stand up and walk much. So, we try to think of, you know, how much standing and walking would be reasonable for her to be able to do for comfort, and also, you know, to not cause more damage to the bottom of the foot, causing blisters or more things like that. I think in the letter subsequent to this [dated August 8, 2000 and in evidence at Exhibit A page 9], I had become more specific on that, and I had written two hours in a whole work day preferring that it be intermittent standing and walking...

(DX 3 at 8-9). *See also* (*id.* at 17). Dr. McCluskey agreed that the employment he had in mind was that where she would primarily be sitting. (DX at 9). Further clarifying these restrictions, Dr. McCluskey stated, "you could say that she probably should not stand at one period of time for more than 30 minutes." (DX 3 at 20-21).

Dr. Sampson agreed, essentially, with Dr. McCluskey's August 8, 2000 letter regarding the jobs listed for Claimant. (DX 1 at 31-32). However, he stated that "I think that even two hours might be a little long. It's very difficult to assign a number, of course. But that one might be as much as 25 percent or more of the time. I think that might be a bit much. I might think that a little less time would be better, but the overall thrust of it sounds reasonable." (DX 1 at 32).

In a handwritten letter dated May 5, 1999, Dr. George B. Skipworth. discussed his opinion, based upon his one examination of Claimant on July 23, 1991. He wrote that maximum medical improvement was unknown, as he had only seen her once. Although he stated that he could not comment on present status, he felt at the time of his examination in 1991, that Claimant should have been able "to perform any normal duty work which required no prolonged standing or walking."[8] He concludes: "Although present status is unknown, in my opinion, Ms. Edwards should have been able to physically perform any of the jobs identified in the enclosed labor market survey at the time of my initial and only examination on 7/23/91." (DX 33).

In a letter to Employer's counsel dated May 19, 1999, Dr. Joseph F. Fowler, Jr., of the University of Louisville School of Medicine, Division of Dermatology, discussed his February 1994 evaluation of Claimant. He stresses that he has no current information regarding her skin condition. (DX 34). His diagnosis, in February of 1994, was allergic contact dermatitis and plantar keratoderma. Her subjective complaints were recurrent infection of the skin as well as

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[8] Dr. Skipworth also enclosed an estimated functional capacities form at DX 33 at 3. That form indicates that Claimant could stand or walk with rests, an entire work day. He restricted her lifting to occasional (0-33%) for 21-50 pounds; frequent (34-66%) and marked never for lifting 51-100 pounds. He restricted her carrying 11-20 pounds to occasional, and 21-100 pounds to never. He also indicated that Claimant should have mild restrictions for exposure to marked changes in temperature and humidity, and moderate for being around moving machinery, driving automotive equipment, and exposure to dust, fumes & gases. (DX 33 at 3). The lifting requirements have not been mentioned by any other doctor, or in fact by Dr. Skipworth in his letter, and based upon the medical evidence in the record do not appear to be related to Claimant's foot condition and therefore will not be considered.

discomfort and difficulty in wearing shoes due to the thickening and fissuring of the plantar skin. He wrote "Since I have not seen Ms. Edwards in over five years I am unable to give an opinion of maximum improvement or on permanent impairment." He continued, however:

> If Ms. Edwards' skin condition has continued at the same level present when I saw her in 1994 then I would think there would be significant restriction regarding employment. Essentially I feel she would be limited to an occupation that primarily was sedentary without need for frequent periods for standing or walking. It would also be important to work in a relatively cool and controlled environment since heat and seating [sic sweating] would tend to exacerbate the foot dermatitis. An opportunity to wear loose fitting or open shoes and sandals might also be helpful. Therefore, this would restrict her from working in a factory; for instance, where heavy boots would have to be worn.
>
> Several of the jobs listed in the report by Ms. Roberts dated July 27, 1998 would seem to be suitable considering these restrictions. Employment as a receptionist or customer service representative should be acceptable since these jobs would be primarily performed in a sitting position and would not require frequent standing. In addition, other similar office type jobs would be acceptable.
>
> These opinions are based on my evaluation of Ms. Edwards in 1994 and are assuming that there has been no significant improvement in her skin condition since that time. Obviously if her skin condition has improved significantly then a wider range of occupational choices should be open to her.

(DX 34 at 1-2).

In addition to her medical restrictions, Claimant's educational and employment history are also a factor in assessing suitable alternate employment. Prior to working for Employer as a sales associate, Claimant worked as a cocktail waitress, as a maid at an apartment complex, at two fast food restaurants, and at a meat-packing plant. (DX 24 at 26-29). Claimant also has her GED. (DX 24 at 13). Claimant also attended a 13 week training session through the Georgia State Employment Office. Claimant testified that the training consisted entirely of filing. (DX 24 at 21-22). In addition, Claimant attended classes sponsored by the Columbus Vocational Technical School. Through this program she took classes in typing, business math, communications, office machines, recordkeeping and filing, however she never had a job using any of those skills. (DX 24 at 38-39). At the completion of that 9-month program, Claimant received a certificate showing completion of a clerical type training. *See* (DX 24 at 38-39); (DX 24 at 25);(DX 14)(transcript);(DX 15) (certificate).

Labor Market Surveys

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). For the job

opportunities to be realistic, Employer must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). While the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs may be relied upon, *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985), Employer's counsel must identify specific, available jobs; labor market surveys are not enough. *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981).

Although the Eleventh Circuit has not directly ruled upon the necessary elements of suitable alternate employment, the Board and the First, Fourth, Fifth, and Seventh Circuits have held that labor market surveys must address two questions:

> (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 this 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 which he could realistically and likely secure?

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1981). *See also Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 201(4th Cir. 1984); *Bunge Corp. v. Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000). Therefore, the Employer's surveys will be held to this standard.

It is noted that during his deposition, Dr. McCluskey was asked to review all of the labor market surveys. He stated that, subject to his restriction of standing and walking, he felt all of the jobs were fine. However, he did point out the lack of specificity in those areas caused him to render his opinion with the caveat that it was subject to the restriction. (DX 3 at 13-17). Dr. Sampson had the same problem of lack of specificity in physical requirements with many of the jobs, approving those listed with the caveat that he would only approve those where Claimant had to be on her feet over her restrictions, or where she had no control over when she could sit or stand. (DX 1 at 39). Those positions that are not specific as to duties, however, will not be considered. *See Bunge*, 227 F.3d at 942 (stating "The problem with the expert testimony Petitioners provided was not that it failed to be specific in naming actual employers who would hire claimant, but that it failed to be specific in considering [Claimant's] capabilities when it attempted to identify potential jobs. ... A report simply matching general statements of [Claimant's] job skills with general descriptions of jobs fitting those skills is not enough to show that suitable employment alternatives existed....").

1998 Survey

Debbie L. Cromwell[9] of Chamberlain Consulting, performed a labor market survey dated

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[9] Ms. Cromwell's resume was Exhibit B of her deposition. (DX 27). Ms. Cromwell discussed her educational and professional background, including her certification as a disability management specialist and her previous experience with Worker's Compensation and Social Security. (DX 27 at 5-7). During the deposition,

July 27, 1998. Ms. Cromwell based her report on recommendations by Dr. Sampson contained in his April 16, 1998 letter. (DX 7); (DX 27 at 8). *See also* (DX 31)(Dr. Sampson's letter containing recommendations for work restrictions); (DX 27)(Ms. Cromwell's deposition testimony taken July 9, 2001); (DX 27 at 26-27)(testifying that Dr. Sampson only gave general limitations, not time specific). Throughout the search process, Ms. Cromwell writes that she conferred with Dr. Sampson by telephone or fax, "in order to secure only those positions that were considered appropriate." (DX 7-1). *See also* (DX 27 at 12)(discussing her interaction with Dr. Sampson throughout the labor market survey); (DX 1 at 24-27)(Dr. Sampson's testimony regarding this survey).

In addition to considering Claimant's medical history, Ms. Cromwell also considered her employment history, the fact that she had her GED, and her nine-month course at Columbus Vocational/Technical School. (DX 27 at 9-10). *See also* (DX7-1)(stating that Ms. Cromwell reviewed the history found in Claimant's earlier deposition). In this 1998 survey Ms. Cromwell located nine viable positions within the appropriate geographical area and approved by Dr. Sampson. (DX 7-1). Ms. Cromwell testified that she was searching for jobs that "were not going to require this lady to have to stand for any long duration or move about excessively. Basically desk-type positions that she appeared to have transferable skills, that she could move right in to." (DX 27 at 9). She states: "The positions located which are viable as of this report date, all offer on the job training." (DX 7-1).

The first position is that of a Customer Service Representative at Regions Banks. The starting salary for someone without banking experience was $14,000-$15,000 per year. Duties of this position include, among others: opening accounts, explaining and processing investments and other bank services, renting safe deposit boxes, interviewing customers, using a computer and/or calculator, typing account information into computer, and answering various questions. (DX 7 at 2). On July 31, 1998, Dr. Sampson signed this job description, designated by THE DICTIONARY OF OCCUPATIONAL TITLES as Light[10] physical demand level of work. (DX 7 at 6). This position was located in Phenix City, which is an Alabama city, located very near Columbus. (DX 27 at 12). On the job training would be provided for anyone without experience. (DX 27 at 12-13). Due to the designation of this employment as "Light" by THE DICTIONARY OF OCCUPATIONAL TITLES and without contradictory specific information regarding physical duties from the employer, however, I find that this position is not suitable alternate employment.

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the parties agreed to recognize her as an expert in vocational rehabilitation during her deposition. (DX 27 at 8).

[10] In pertinent part, the Dictionary of Occupational Titles, the Light Work strength factor is defined as follows:

> ....Even the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing or pulling of materials even though the weight of those materials is negligible.

THE DICTIONARY OF OCCUPATIONAL TITLES, VOLUME II, Fourth Edition, Revised 1991, p. 1013.

The second position is that of a medical clerk or receptionist with the Department of the Army at Fort Benning. (DX 7 at 6). The salary is $18, 815-$24,461 per year. The duties listed include receiving telephone calls, verifying eligibility for treatment, scheduling and coordinating appointments, obtaining and reviewing the medical records of patients prior to scheduled appointments. (*Id.*). The form sent to Dr. Sampson, which he signed, states that this is a temporary appointment, not to exceed 1 year, and that there is a typing proficiency requirement, base level of 40 words per minute. (DX 7 at 9). Although it has been shown that Claimant has taken a typing class, her typing proficiency is not in evidence, therefor it has not been proven that Claimant is qualified for this position. In addition, this is a temporary appointment. It is also not clear how often Claimant would be required to be standing and walking in order to "obtain" medical records. Given this combination of factors, this position will not be considered suitable alternate employment.

Many positions for hotel desk clerks were also listed. The following duties were listed for all of these positions:

> greet, register and assign rooms to guests. Issue room keys and escort instructions to Bellhop. Date stamps, sorts and racks incoming mail and messages. Transmits and receives messages using telephone. Answers inquires pertaining to hotel services; registration of guests; and shopping, dining, entertainment and travel directions. Keeps records of room availability and guests' accounts, manually or using computer. Computes bill, collects payment and makes change for guests.

(DX 7 at 2). The positions available included: Holiday Inn North, salary dependent upon experience, although even an individual with no experience would start above minimum wage[11] however that salary will only be discussed with the individual hired; Howard Johnson Expressway Inn, salary for someone with no previous experience would vary from $6.00 an hour and up; Extended Stay America, starting salary with no experience would be $6.50 an hour; Hampton Inn Airport, both full and part time and the salary will only be discussed with applicants, however, they stated they are competitive with pay; and Hilton, who needs both full and part-time, salary for an individual with no experience is minimum wage, $5.15. (DX 7 at 2-3).

The position of desk clerk is classified as Sedentary[12]/ Light by THE DICTIONARY OF OCCUPATIONAL TITLES and Dr. Sampson approved this position in form dated July 31, 1998. (DX 7 at 8). *But see* (DX 1 at 36)(testifying that he was uncertain of the desk clerk positions in the 2000 survey). Further, Ms. Cromwell testified that, in looking at desk-clerk positions she

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[11] At this time the minimum wage was $5.15 per hour. (DX 27 at 16).

[12] In pertinent part, the Dictionary of Occupational Titles, the Sedentary Work strength factor is defined as follows:

> ....Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

THE DICTIONARY OF OCCUPATIONAL TITLES, VOLUME II, Fourth Edition, Revised 1991, p. 1013.

focused on how busy the hotel was, as the finer and busier hotels tend to prefer their clerks stand the entire time and that position would not be appropriate for Claimant. (DX 27 at 16). In fact, Ms. Cromwell testified that whenever she called of visited any of these positions she asked about the standing requirements and opined that all listed were appropriate. (DX 27 at 23-24). Given Ms. Cromwell's specific information regarding physical duties of the positions listed, her careful inclusion of only those hotels that she felt would be appropriate and accommodating for Claimant, and the inclusion of the Sedentary category in THE DICTIONARY OF OCCUPATIONAL TITLES, I find that these specific positions are suitable alternate employment.

Also available within the hotel industry are the positions of night auditors. According to the survey the duties would be to "verify and balance entries and records of financial transactions reported by various hotel departments during day, using adding, bookkeeping, and calculating machines." (DX 7 at 2-3). Ms. Cromwell listed Econo Lodge, whose starting salary would only be given to the individual hired, however does start above minimum wage, and Howard Johnson Expressway Inn, where the starting salary varies from $6.00 an hour and up. (DX 7 at 2-3). The position of night auditor is classified as Sedentary by THE DICTIONARY OF OCCUPATIONAL TITLES and Dr. Sampson approved this position in form dated July 31, 1998. (DX 7 at 7). Ms. Cromwell testified that this is a sitting job, although you would be able to get up and move around as needed. (DX 27 at 19). Given the courses Claimant has taken, the on the job training, and the classification as Sedentary, this job is considered appropriate for Claimant.

Therefore, I find that the labor market survey dated July 27, 1998 is sufficient to prove suitable alternate employment exits for the Claimant. Ms. Cromwell's continuing consultation with Dr. Sampson, Claimant's treating physician at the time, her use of THE DICTIONARY OF OCCUPATIONAL TITLES, and her specific information regarding the majority of the jobs listed lend increased credibility to this survey. Based upon these factors then, I find that the specific positions of hotel desk clerks listed are suitable and the category of night auditor, in addition to the two specific positions available constitute suitable alternate employment. The Claimant's residual wage earning capacity would be calculated by averaging the wages as listed in the labor market survey, with jobs for which a specific wage was listed being treated as being at minimum wage. Therefore I find that the Claimant had a residual wage earning capacity of $5.59 per hour as of July 27, 1998.

1999 Survey

In a labor market survey dated May 25, 1999, Ms. Melinda J. Hardie[13] identified and contacted approximately 15 potential employers. She wrote that targeted occupations are "those non-skilled positions that fall in the sedentary range." (DX 8 at 1). In preparing the labor market survey, Ms. Hardie testified that she reviewed the records of Dr. Sampson, Dr. Richardson, Dr. Chou, Dr. Earhart, Dr. Bronersky-Enumah, Dr. Borchardt, Dr. Fowler, and Dr. Rouben, in addition to Claimants 1993, 1994 and 1996 deposition. (DX 25 at 8). *See also* (DX 8 at 1). Ms.

[13] Ms. Hardie's resume is Exhibit B to her deposition, taken on July 2, 2001 and in evidence at DX 25. She testified regarding her professional and educational background, as well as her certification as disability management specialist, certified case manager, and registered nurse. (DX 25 at 6). Ms. Hardie was recognized by the parties as an expert in rehabilitation, and in particular vocational rehabilitation. (DX 25 at 7).

Hardie testified as to her assumptions concerning Claimant's restrictions, stating:

> It appeared that her overall restriction or limitations was going to confine her to something more of a sedentary-type job where she would need to stand and walk probably minimally, and be able to move about from a –change from a sitting to a standing position as needed, but most likely a sitting type of job.

(DX 25 at 9-10). No doctor's signatures are included in this survey, however Dr. Sampson testified that the jobs seemed reasonable, again with the caveat that Claimant must be able to be off her feet. He again pointed out a lack of specificity of walking and standing requirements in many of these positions. (DX 1 at 33-36). Ms. Hardie testified that she asked all of the employees if the jobs were suitable for someone confined to a wheelchair. (DX 25 at 20, 26). All of the jobs were in a climate controlled environment, and were reflective of other types of jobs in the area. (DX 25 at 23).

The first position Ms. Hardie lists as available is that of a cashier with Goodwill Industries. The duties listed are ringing purchases at a register area, collecting payment and making change. She notes that stools will be provided for accommodation and Claimant could sit, stand or move around as needed. Minimum wage[14] is the salary, although it could be higher if placed within the community at a private business outside of Goodwill. (DX 8-1). *See also* (DX 25 at 10-11). This position is considered suitable alternate employment, as accommodation would be provided and Claimant would be in control of when she had to stand or walk and it is within her educational abilties.

The second position is that of a laborer at Swift Spinning Mills. The duties are defined as: "work in a textile mill with yarn manufacturing a variety of products, mostly carpet. Light duty work involves monitoring electronic devises operating the machinery and inspecting the product prior to completion for sale." The physical qualifications are listed as: "Minimum to no lifting. Moving about in a work area (cell) to inspect product for flaws or blemishes. Can use a roller chair or wheelchair if necessary." The pay is listed as slightly above minimum wage, average of about $5.50 an hour. (DX 8 at 2); (DX 25 at14). Ms. Hardie testified that this job was essentially monitoring electronic devices that have been pre-loaded. (DX 25 at 14-15). Although this position is listed as light duty, the fact that Claimant could control her standing and sitting, and use a chair when needed indicate that this position is suitable.

Also listed are positions with placement services A-1 Staffing and Kelly Services. A-1 Staffing is listed as having a position in customer service, starting at minimum wage or higher, depending on placement. No specific duties are mentioned, although the physical qualifications state that the position can be done from a sitting position or wheelchair and no lifting is involved. (DX 8 at 2). The positions listed with Kelly Services are telemarketing and receptionist, both full-time. The wages are listed as varying with placement, at least minimum wage, at this time $5.25 per hour. *See* (DX 25 at 42)(stating that Kelly Services has a guaranteed minimum wage). *But see* (DX 25 at 11)(stating that the minimum wage was $5.15 at this time). The duties are listed as

[14] Minimum wage, at this time, was $5.15 per hour. (DX 25 at 11).

answering telephones, placing calls and taking messages. Under the category of physical qualifications the form states: "many sedentary positions are available where sitting the entire work time is acceptable whether this be in a chair or a wheelchair. (DX 8 at 3). Both the Georgia and Alabama Departments of Labor are also listed, and both state that "several positions are available that meet the DOL definition of sedentary duty." (DX 8 at 4). Merely sending Claimant to a placement agency, however, does not satisfy the specificity requirements for suitable alternate employment. The opportunities are not precise in nature or terms. The actual employers are not even listed. Therefore, these positions will not be considered.

Next, Ms. Hardie lists a job as producer with Dolly Madison Cakes. The wages start slightly above minimum wage, averaging $5.55 an hour starting. The duties are to "work in a production factory making bakery items." The description states that many jobs are available. It is stated that the company "will attempt to accommodate limitations in mobility and even a wheelchair although some positions require the employee to be mobile for safety and evacuation purposes." (DX 8 at 3). It is noted that all new employees are hired through the Georgia and Alabama Department of Labor offices. (*Id.*). Dr. Sampson specifically stated that he had a "little more problem" with this position, due to the mobility requirement. He testified:

> Now, if that means that it's something that's a very remote chance of happening, it might not be a problem. But if people have to be mobile very often and it's required, I might have a little trouble with this one. ... And if this was just a thing that might happen just rarely, then this would also seem reasonable.

(DX 1 at 34-35). Again this position lacks specificity in duties and physical requirements and Dr. Sampson expresses reservations about Claimant's abilities given the scant information. Therefore, this position will not be considered suitable alternate employment.

Finally, a telemarketing, clerk position with Express Personnel Services is listed. This states that the duties are to place telephone calls and take messages, and that it is sedentary work, from a sitting position using the telephone. (DX 8 at 4). The wage is at least minimum, with a possibility of a position that is on commission, if the commission is higher than minimum wage. (*Id.*). Although this position is listed with a temporary agency, it is specific enough to constitute suitable alternate employment as it lists the duties, the physical requirements as sedentary, and identifies a specific position with a wage.

Ms. Hardie also testified that, although she did not list positions as hotel desk clerks some were available at this time. She stated she found them through the placement agencies, Department of labor and in the newspaper. (DX 25 at 45). These positions, again, need to be specific to the hotel as discussed *supra*, due to the varying requirements and salaries within the industry.

2000 Survey

In a labor market survey dated July 5, 2000, by Taylor & Associates, Inc., Ms. Ellen M.

Simmons[15] stated that she had not met with Claimant and the information contained in the report was obtained through a review of the material provided by Employer's counsel. Ms. Simmons wrote: "According to office dictation from Dr. Leland McCluskey dated 11/19/00, Ms. Edwards has significant limitations to any standing or walking. She is capable of a sitting job." (DX 9 at 1). Other medical information noted is tendonitis of the knees, bursitis of the left shoulder, and high blood pressure. Past dizzy spells are also noted. (DX 9 at 1). Claimant's employment history is included and it is also noted that Claimant has a GED and took a clerical course in 1981 from Columbus Technical Institute and does know how to type. (*Id*. at 1-2). Ms. Simmons stated that Claimant's educational background and training would give her an advantage in securing a position. (DX 26 at 51-52). This labor market survey provides periodic updates. *See generally* (DX 9)(DX 10).

When asked how she went about performing a survey, Ms. Simmons stated that in locating jobs she looked at classified ads, and the Georgia and Alabama Departments of Labor, called job lines, and occasionally did cold calls for different employers that have positions she felt would fit Claimant's restrictions. (DX 26 at11-12). On-line sources were also used. (DX 26 at 27). It is noted that in many instances the jobs listed are repeats of previously listed positions. *See e.g.* (DX 26 at 24)(testimony of Ms. Simmons that some of the jobs listed on progress reports are repeated in the October 24th progress report). Also, Ms. Simmons admits that she is unaware of Claimant's typing abilities and so does not know if she would be qualified for any of the positions in which a certain typing speed was required. (DX 26 at 55). As many of the jobs listed do not contain a list of duties or a pay scale, those positions will not be discussed or considered sufficient evidence of suitable alternate employment.

In assessing jobs for Claimant, Ms. Simmons wrote:

> A labor market feasibility study was completed which indicated a high turnover in openings for clerical,[16] customer services, collections, and telemarketing areas. Although numerous contacts with local employers were made, no positions were identified during the time period of 6/23/00 through 7/3/00.

(DX 9 at 2). Ms. Simmons then suggested that Claimant register with a variety of employment agencies and the Georgia and Alabama Departments of Labor to be considered for appropriate positions as they became available.

This labor market survey was next updated on August 9, 2000. (DX 9 at 3-4). In this ongoing labor market survey, Ms. Simmons lists additional employment possibilities, although many of those listed do not list duties or pay scales and so will not be considered. (*Id.*). Two of

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[15] Ms. Simmons was deposed on July 5, 2001. (DX 26). Her credentials and resume are attached as Exhibit B to that deposition. Her educational and professional background are summarized at DX 26 at 5-6. The parties recognized her as an expert in the field of vocational rehabilitation. (DX 26 at 6).

[16] Dr. Sampson again pointed to the uncertainty of physical requirements in clerical positions, and approved the jobs only if Claimant could be off of her feet whenever she needed to be and did not have to walk around a lot. (DX 1 at 37).

the positions identified are in Phenix City, Alabama. Those positions are for two full time desk clerk positions at the Ramada Inn of Phenix City. The duties are described as follows:

> First shift clerk duties include checking customers out and folding laundry; second shift position checks customers into the motel and if necessary completes folding the laundry. According to Aaron, a current desk clerk, the positions require no lifting above 10 pounds, sitting as needed, and the starting salary is $6.00 per hour.

(DX 9 at 3). Specifically regarding the positions at the Ramada Inn, Ms. Simmons testified that unless waiting on a customer, the clerk did not have to stand. She agreed, however, that although it might not be a regular occurrence it was possible that there could be times when there would be a rush of customers requiring standing for over two hours at a time. (DX 26 at 59). Dr. Sampson expressed reservations of the position of desk clerk, explaining: "Because it's certainly been my experience that desk clerks at motels, they are often on their feet a lot. And even though they are not moving around, they are standing a lot. And that might be a problem, if she can't be certain that she can be off of her feet." (DX 1 at 36). As discussed *supra*, desk clerk positions in general are not considered suitable alternate employment. If the duties of the specific position listed have been explicitly verified by the expert, then that position may be considered suitable. In this case, the expert stated that she checked with one of the current desk clerks, who stated that sitting could be done as needed. Therefore, this specific position is considered suitable.

Ms. Simmons also lists two positions at St. Francis Hospital. One is a cashier position in the admitting office. It is preferred that the applicant have six months experience as a cashier. The salary is $6.85 an hour. As no physical duties are described for this position and Claimant could be required to stand, retrieve records, etc., this position is not appropriate. The other position is that of patient registration clerk position. That position has a salary of $7.60 an hour and "some knowledge of medical terms is expected to be required." (DX 9 at 4). As there is no evidence that Claimant has the requisite knowledge of medical terms, this position is not appropriate.

Also listed are three positions with the government. The first is the position for a part time ticket seller with the City of Colombus, with a salary of $6.54 per hour. The physical requirement of the job is occasional lifting of up to 20 pounds and the primary position is sitting. The duties are "to provide customer service by selling tickets for events." The second position is one with the Tax Commissioner's office, as a Customer Service Technician, G03. The duties included clerical work, operation of office machines and responding to requests for information from the public. The salary is listed as $16,010 per year. Finally, a part time position as an Administrative Technician I G01 with the City of Colombus is listed. The hourly salary is listed as $6.54. The duties listed are: clerical work of "a routine difficulty involving typing, filing, data entry, answering telephones and other general clerical duties." Basic typing and computer skills are required, as a minimum of 12 months general office duties, although education or training may be accepted in lieu of this requirement. It is also noted that occasionally up to 20 pounds may need to be lifted or moved. (DX 9 at 4). Ms. Simmons stated that she was not aware how much walking would be required throughout the day in the position of Customer Service Technician II and agreed that it was possible the demands would exceed Claimant's restrictions. (DX 26 at 61). Therefore, this position will not be considered suitable alternate employment. As with the

position of customer service technician, the position as Administrative Technician is not specific enough as to the walking and standing time necessary, therefore it too must be disregarded. The part-time position of ticket seller is considered suitable.

Ms. Simmons next report is dated September 14, 2000. In this report Ms. Simmons lists 11 possible job openings, however, each of these positions lacks either specific duties or a pay scale and therefore none of them will be considered suitable alternate employment. (DX 9 at 5-6).

The following report, dated September 26, 2000, also lists many positions which lack the requisite specificity in either duties, pay scale or both. (DX 9 at 7). Only one position is adequate, that of a Retention specialist with Circulation Sales. (*Id.*). That job is listed as part time, 25 hours a week. The job duties are described as "contact newspaper subscribers by phone to retain them." (*Id.*). The pay scale, however, is vague, listed as "hourly base is above minimum wage plus commission." (*Id.*). This position is again listed in Ms. Simmons' October 24, 2000, progress report. (DX 9 at 9). In addition, two positions with the City of Colombus are listed, that of a Criminal Records Technician (G3) and Customer Service Technician II (G4). Both of these positions, however, describe their physical requirements as:

> While performing the essential functions of this job, the incumbent is regularly required to walk, sit, use hands to finger, handle, or feel objects, to reach with hands and arms, and talk or hear. While performing the essential functions of this job the employee is occasionally required to lift and/or move up to 10 pounds.

(DX 9 at 11, 12). Basic knowledge of computer skills is also listed as a requirement for both jobs. (*Id.*). In addition, as discussed Ms. Simmons herself stated that she was not aware how much walking would be required throughout the day in the position of Criminal Records Technician or Customer Service Technician II and agreed that it was possible the demands would exceed Claimant's restrictions. (DX 26 at 61). Therefore while these descriptions are specific enough and do include a pay scale, they will not be considered suitable as the amount of walking required is not specified. (*Id.*).

On November 15, 2000, Ms. Simmons submitted another report. (DX 9 at 13-14). In this report two possible specific positions were listed. First, a position as Administrative Specialist I with the City of Columbus Police Department. (DX 9 at 13). The salary is listed as $14,688 per year. (*Id.*). A high school diploma or GED and 2 years of clerical experience are required. This position is described in the sedentary strength category. (*Id.*). As Claimant does not have the 2 years of clerical experience required, this position will not be considered. The second listing is for a part time position of Customer Service Technician I with the City of Columbus. (*Id.*). The salary is listed as $7.70 per hour. The position is described in the "sedentary strength category." A GED is required, and 2 years of clerical duties or a combination of education, training and experience. (*Id.*). Again, Claimant does not have the requisite 2 years of experience and only 1 year of education and training combined. Therefore, neither of these positions constitute suitable alternate employment.

On December 7, 2000, Ms. Simmons submitted another progress report. (DX 9 at 15-

16). In this progress report, Ms. Simmons lists the position of Yellow Cab Dispatcher. The physical activities required for this position are "sitting, no lifting, use phone and radio." (DX 9 at 15). Salary is "minimum wage or slightly above" and it is eight hour shifts. (*Id.*). Another position listed is Cemetery Lot Sales at Lakeview Memory [sic Memorial] Gardens. Ms. Simmons describes this position as:

> Requirements include selling and showing lots to individuals purchasing burial plots. A golf cart is available to transport individuals to the site for inspection. There will be days when no walking is required. Generally, walking/standing activity is considered to be less than 2 hours in an 8 hour day. Salary is by commission.

(*Id.*). All other positions listed either do not include descriptions or a salary and therefore are not specific enough to meet the requirements of suitable alternate employment. The position of dispatcher is considered suitable as there is no walking requirement, the position in Cemetery Lot Sales is not considered suitable as no salary is specified.

On January 2, 2001, Ms. Simmons submitted a closure report. (DX 9 at 17-18). In this report, Ms. Simmons identified four jobs with the City of Columbus. The first is as a Customer Service Technician II (GE). This position has a $17,451 annual salary, and the responsibilities are described as follows:

> responding to request for information in person and on the telephone. Processing rezoning applications, logging applications and preparing receipts for application fees. Preparing agenda and meeting minutes. Maintaining files, processing incoming and outgoing mail. Receives and accounts for payments and issues receipts. Perform general clerical duties. According to the physical requirements, this position is the sedentary strength category.

(DX9 at 17). Although this position appears suitable, as discussed *supra*, Ms. Simmons testified that she was not aware how much walking would be required throughout the day in the position of Customer Service Technician II and agreed that it was possible the demands would exceed Claimant's restrictions. (DX 26 at 61). Therefore, this position will not be considered suitable alternate employment. The position of Criminal Records Technician is also listed again, and as discussed *supra*, will not be considered suitable despite the more detailed description. (DX 9 at 17); (DX 26 at 61).

The second position listed with the City of Columbus is Administrative Specialist I (G2). Responsibilities for this position are described as:

> performing work of routine difficulty involving typing, filing, data entry, answering telephones, and general clerical and secretarial duties. May serve as unit receptionist, operates office equipment. Physical requirements described are in the sedentary strength category.

(DX 9 at 17). The annual salary for this position is $14,688. This position does meet the

requirements for suitable alternate employment and unlike the previous listing for this same title with the city does not specify 2 years of clerical experience or training, therefore it will be considered.

The final job listed for the City of Columbus is that of part time Customer Service Technician I (G03). The duties are described as:

> Provides information in person, by mail, and on the telephone to requests from the public. Processing tax forms, applications, prepare reports, labels and work orders. Reviews and compares documents for accuracy and completeness. Physical requirements listed for this position is in the sedentary category.

(DX 9 at 18). The hourly salary is listed as $7.70. (*Id.*). This position does meet the requirements for suitable alternate employment and unlike the previous listing for this same title with the city does not specify 2 years of clerical experience or training, therefore it will be considered.

Finally, Ms. Simmons lists a position as a Customer Service Representative with Wells Fargo Financial at an annual salary of $22,000. The description reads: "Individual will perform general clerical activity, customer service and sales duties." This position does not specify the physical requirements of the position, for example, how long Claimant would have to be on her feet filing, and therefore will not be considered. As with the other surveys, all other jobs listed did not meet the specific requirements of suitable alternate employment.

On February 8, 2001, Ms. Simmons reopened her file and began sending out more progress reports. (DX 9 at 19-20). This report lists no jobs that would be considered appropriate suitable alternate employment. The only job description that lists both the salary and the duties required is that of a part-time position with the Bradley & North Columbus Branch Library. (DX 9 at 19). These duties include shelving and shifting books, which indicates to me standing and walking around the library. (*Id.*). There is no indication as to what percentage of the job this duty would entail, therefore the explanation is unsatisfactory and the position will not be considered.

On February 28, 2001, Ms. Simmons sent another progress report. That report lists the position of Clerk IV with Columbus State University in the Registrars office. The duties listed are:

> To provide assistance to faculty and students by phone and in person, prepare enrollment certifications and academic transcripts, process registration forms, enter academic record data online, and general office duties. Minimum qualifications are a high school diploma, familiarity with a computer keyboard, and minimum typing speed of 40 words per minutes [sic]. Salary is $16,000 based on experience.

(DX 9 at 21). There is no evidence as to Claimant's typing ability, although she did take a class in typing, therefore this position is not considered suitable. She also lists a position found through the Georgia Labor Department for an order clerk. The salary is $7.00 an hour with 20-24 hours

per week. Six month customer service experience required. Duties include responding to "consumer issues/ mail order/ parts sales/ customer service/ warranty service. Will answer incoming calls/accurate data entry/communications skills." (DX 9 at 21). This position is considered suitable, as no walking or standing is required and Claimant did previously work as a sales associate.

On March 28, 2001, Ms Simmons sent another progress report. This report listed a position for telemarketer through a temporary agency, Spherion. (DX 9 at 23). The hourly wage is $7.00 and the job is for 3-12 months or longer. (DX 9 at 24). There is a $30.00 one time fee. (*Id.*). The job is listed as sedentary, with no prolonged walking or standing required. (DX 9 at 23). Applicants are required to take a clerical and customer service test, should be able to type 25-30 words per minute and must pass a drug screen, criminal background and credit check. (DX 9 at 23-24). It appears to be a night-shift position. (DX 9 at 24). Again, there is no information as to Claimant's typing ability. In addition, this is a temporary position, listed through an agency which charges a fee. Therefore this position is not considered appropriate.

The only appropriate position is that of Administrative Technician I, part time, with the City of Columbus. The salary is $6.54 an hour and the hours are 1:00 pm to 5:00 pm. Applicants must have a GED or high school diploma, and 1-2 years of experience with general office duties or any combination of education, training and experience. Physically, the requirements are described as: "regular sitting, use of the hands to finger, handle or feel objects, see objects at close range, reach with hands and arms, and talk or hear. Occasionally lifting and/or moving up to10 pounds." (DX 9 at 24). The physical requirements are specific and within Claimant's restrictions. Her education and training, described *supra*, meet the experience requirement. Therefore, this position is considered suitable.

In her April 24, 2001 progress report, Ms. Simmons lists 2 jobs that are considered specific suitable alternate employment. The first is a customer service representative with Char Broil. This position has an hourly salary of $7.00 and the hours vary depending on the volume of calls. Four weeks of training is required. The position is described as: "us[ing] a headset and respond [ing] via phone, to customers for mail orders, parts and sales, and service and warranty questions. This is a sedentary position, no lifting is required, no prolonged standing or walking are required." (DX 9 at 25-26). The second position is another telemarketing position through Global. The salary is quoted at $7.00 an hour, plus commission, 8 hours a day, 5 days a week. (DX 9 at 26). None of the other jobs listed specify a pay scale. (*Id.*).

In her May 23, 2001 progress report, Ms. Simmons again lists the Administrative Technician I part time position with the City of Columbus. (DX 19 at 2). Also listed is the position of Administrative Specialist I. This position has a salary of $14,688 biweekly: $564.92 to $23,5310 biweekly: $905.07. The duties are listed as:

> performing work of a routine difficulty involving typing, filing, data entry, answering telephones, and other general clerical and secretarial duties. Provides information to department staff and public. May serve as unit receptionist and operate various office equipment. Sort and distribute all incoming and outgoing mail. Occasionally required to work overtime. This position requires a high

> school diploma or GED; one to two years of experience in general office work or any combination of education, training and experience which provide the required knowledge, skills and abilities to perform the job. The employee is required to sit, use hands to finger, handle or feel objects, see object at close range, reach with hands and arms, and talk and hear. The employee may occasionally lift or move up to 10 pounds.

(DX 19 at 2). This position is considered suitable as the experience requirement is different than the position listed supra, changed from two years to one year. Claimant has one year of education and training in clerical work, therefore this position is suitable.

Also listed is a position as a cashier/collections clerk with Advance Til Pay Day. Both full and part time positions are available. Duties are assisting customers and phone collection calls. The beginning hourly wage is $5.85 for a 40 hour week. There is no lifting and the employee is able to sit, stand, and change positions as needed. (*Id.*). Ms. Simmons' final report, dated June 26, 2001, again lists the Administrative Specialist I position with the City of Colombus, discussed *supra*. (DX 22 at 2). These positions are appropriate and will be considered.

Ms. Simmons was asked to explain what she meant when she used the term sedentary. She explained that: "Sedentary-strength category, according to the Dictionary of Occupational Titles, refers to ability to lift, carry, or move up to 10 pounds. ... Sedentary category also includes occasional standing, constant sitting, and occasional walking." (DX 26 at 62). She further stated that occasional means one-third of the day, and agreed that two hours in an eight-hour day would be one-quarter and that one-third of a day was more than one-quarter of day, the time allowed by Claimant's restrictions. (DX 16 at 63). However, the definition listed in THE DICTIONARY OF OCCUPATIONAL TITLES, discussed *supra* note 11, states that walking and/or standing will only be required for "brief periods of time." THE DICTIONARY OF OCCUPATIONAL TITLES, Volume II, Fourth Ed., Revised 1991, p. 1013. This fits with the restrictions and concerns expressed by Drs. Sampson and McCluskey.

Employer has proven that suitable alternate employment was consistently available from 1998 to 2000, going far beyond their burden. In 1998, Ms. Cromwell identified specific positions as hotel desk clerks and the general category of night auditors for hotels, with specific positions included. In 1999, Ms. Hardie identified suitable positions as a telemarketer, laborer at Swift Spinning Mills, and as a cashier with Goodwill Industries. In 2000-2001, Ms. Simmons provided many positions including: specific hotel desk clerk positions, various positions with the City of Columbus, dispatcher, and telemarketing. Again, there were some categories of jobs that were unsatisfactory, however, through locating specific positions with appropriate duties within those categories, additional jobs were found. Those specific jobs were found as customer service positions, clerical positions, and hotel desk clerks. The average wage earning capacity for the jobs listed in these surveys is $ 6.00 per hour.

It is only necessary to prove suitable alternate employment once subsequent to Claimant's showing she could not return to her previous employment in order to rebut the presumption of total disability. That has clearly been done in the instant case and it has been shown that Claimant retains a wage-earning capacity. Pursuant to *PEPCO*, then, unless Claimant can show diligence in

seeking employment, she is entitled only to compensation for her scheduled injuries.

Diligence

As Employer has satisfied its burden of showing suitable alternate employment, Claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if she shows she diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

In the instant case, Claimant has put forth no evidence as to her diligence in seeking alternate employment. In fact, Claimant testified that she has not worked since 1987, as she has not felt able to do so. (DX 24 at 47-48). In addition, Employer's vocational expert Ms. Hardie testified that she "followed with all the employers on the [1999] labor market survey and none of the employers had ever heard of Ms. Edwards, had not received an application or had her come in to speak with them about any type of positions or availability or anything else." (DX 25 at 12). Further, Ms. Hardie testified that she had checked to see whether or not Claimant was registered with the Georgia and/or Alabama Department of Labor office and that Claimant was not registered with either. (DX 25 at 19). Ms. Hardie followed up with each of the employers listed and to see if the jobs were still open and testified:

> ...none of the employers had been contacted by Ms. Edwards either by telephone or in person. None of them had received any type of application or contact, and when [she] followed up both with the Department of Labor in Georgia and Alabama neither one had yet had [Claimant registered for their services].

(DX 25 at 23-24).

Based upon the lack of evidence put forth by Claimant as to her diligence in pursuing employment, in addition to the testimony of Ms. Hardie, I find that Claimant has not carried her burden of proving diligence in seeking alternate employment. Therefore, I find that the Claimant has not shown that she is totally disabled, and, pursuant to *PEPCO*, will only be paid a rating according to the schedule.

Rating

The Claimant bears the burden of proving the extent of her injury. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). In the instant case, however, Claimant has put forth no evidence to demonstrate what her disability rating should be, relying instead upon the assertion that she is totally disabled. As discussed *supra*, it has been held that Claimant is not totally disabled. Therefore, the only evidence in the record regarding a rating for Claimant's

injury comes from Employer.

In a letter to employer's counsel dated August 8, 2000, Dr. McCluskey wrote:

> I did state that [Claimant] was at her maximum medical improvement. Based on the *Guides to the Evaluation of Permanent Impairment* 4th Edition set by the American Medical Association she has a permanent partial impairment rating of 10% to the lower extremity on each side. That means 10% on the left side of the lower extremity and 10% on the right side of the lower extremity.

(DX 29 at 3). During his deposition, Dr. McCluskey was asked to elaborate on the rating given in his August letter. He converted his rating for the lower extremity to a rating for the foot, based upon the AMA GUIDES. He stated it would be 14 percent permanent partial impairment rating to each foot, 8 percent to the whole body. (DX 3 at 21-22). He explained that the AMA GUIDES give "a certain number of points for different things, and then you try to extrapolate from all of the tables they have there what would be appropriate for that patient." (DX 3 at 22-23). There is no diagnosis-specific rating for hyperkeratosis. (DX 3 at 23).

Because Employer's medical evidence establishing a 14 percent rating for each foot is uncontradicted and is based upon the AMA GUIDES, I hold that Claimant is entitled to a permanent partial disability of 14 percent in both the left and right foot. A scheduled award, pursuant to both the Board and Circuit Courts, runs for the proportionate number of weeks attributable to the loss of the member at the full compensation rate of two-thirds of the average weekly wage. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (5th Cir. 1986). Since Claimant suffered injuries to more than one member covered by the schedule, she must be compensated under the applicable portion of sections 8(c)(1)-(20), with the awards running consecutively. *PEPCO*, 449 U.S. at 274.

Effective Date of Modification and Award

In *Universal Maritime Services Corp. v. Spitalieri*, 226 F.3d 167, 174-75 (2nd Cir. 2000), the Second Circuit held that a Section 22 modification authorizes a scheduled award to be set off against an employer's excess payment. (*Id.*). The Court found:

> [T]he ALJ had the discretion to modify the prior award and make the modification retroactive from the date of the ALJ's decision, to the date of Claimant's partial recovery. To give the modification retroactive effect, we also conclude, for the reasons stated above, that the excess payment made after Claimant's recovery from his temporary total disability may offset the award made for Claimant's permanent partial disability.

Spitalieri, 226 F.2d at 174. The Board also allows for this retroactive dating, following Spitalieri in Circuits without contrary precedent. For example, in *Ravalli v. Pasha Maritaime Services*, ___BRBS___ (BRB No. 01-0572)(April 8, 2002), the Board held that a termination of benefits is

a decrease in compensation within the meaning of Section 22 in all circumstances, with the statutory caveat that a credit is available for a decrease where benefits are still owing. Therefore, the Board wrote: "A modifiying order terminating compensation based on a change in the claimant's physical and/or economic condition may be effective from the date of the change in condition." This case arose in the Ninth Circuit, and as there was no applicable precedent within that circuit, the Board applied *Spitalieri*. *See also Turk v. Eastern Shore Railroad Inc.*, 34 BRBS 27, n.17 (2000)(stating "contrary to employer's argument, Section 22 modification can be applied retroactively to an increase or decrease in the award, if, in the latter instance, the employer has a continuing obligation to pay benefits.").

An award is modified from temporary to permanent using the date of maximum medical improvement, however it is modified from total to partial as of the date suitable alternate employment is shown. *Palumbo v. Director, OWCP*, 937 F.2d 70, 76 (2nd Cir. 1991). The Board has also adopted this rule, announcing that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached maximum medical improvement and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123, 126 (1998). In so concluding, the Board adopted the rationale expressed in *Palumbo*, that maximum medical improvement "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis."

In the instant case, Claimant's condition became permanent on November 19, 1999. The condition became partial, however, on the date that suitable alternate employment was proven. Suitable alternate employment was proven as of July 27, 1998. Therefore, Claimant's disability became partial on that date and Employer is entitled to a credit for overpayment of temporary total disability from July 27, 1998, until the date of MMI, November 19, 1999. At that time, Claimant's disability became permanent and was rated 14% loss to each foot. As Claimant sustained two scheduled injuries, the awards shall run consecutively. 33 U.S.C. § 908(c)(22). Therefore, as of November 19, 1999, she was entitled to her scheduled payment of 66 2/3 % of her average weekly wage at the time of her injury. As discussed *supra*, it has been stipulated that, at the time of Claimant's injury, her "average weekly salary totaled $99.73. (Decision at 2, Stipulation 5 and Joint Exhibit 1).

As previously noted (*see, supra*, note 7), this stipulation is at odds with Claimant's testimony that she worked 35 hours per week at a wage of $4.34 per hour (minimum wage). In light of the stipulation, and the finding herein that she has a residual wage earning capacity of $5.59 per hour as of July 27, 1998, I find that her residual wage earning capacity exceeds her stipulated average weekly wage as of that date.

Order

Accordingly, it is hereby ordered that the December 12, 1997 award of compensation is modified as follows:

1. Employer, Army & Air Force Exchange Service, is hereby ordered to pay to Claimant, Gloria Edwards Jackson, temporary total disability through July 27, 1998, at the rate of $99.73 per week;

2. From July 27, 1998, through November 19, 1999, the Claimant's residual wage earning capacity exceeded her stipulated average weekly wage, and as such the Claimant is not entitled to any compensation for that period;

3. Employer, Army & Air Force Exchange Service, is hereby ordered to pay to Claimant, Gloria Edwards Jackson, commencing November 19, 1999, permanent partial disability compensation, pursuant § 908(c)(4) of the Act, in the amount of $66.49 per week (based upon wages of $99.73 per week at the time of the injury) for two periods of 28.7 weeks (205 weeks X 14% impairment rating) to run consecutively;

4. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

5. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries; and
6. Employer shall receive credit for any compensation already paid.

A

RICHARD E. HUDDLESTON
Administrative Law Judge