U.S. Department of Labor

Office of Administrative Law Judges
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Case Nos. 2000-LHC-2459
2000-LHC-2460
2000-LHC-2461
2002-LHC-1918

OWCP Nos. 5-91967
5-103623
5-107761
5-103623

In the Matter of

JOSEPH N. DANIELS,
Claimant
v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer

Appearances:
Gregory E. Camden, Esq., for Claimant
Jonathan H. Walker, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for permanent total disability from an injury alleged to have been suffered by Claimant, Joseph N. Daniels, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (Hereinafter "the Act"). Claimant alleged that his bilateral knee injuries contributed, through his weight gain, to the aggravation of his pre-existing spinal stenosis which in turn led to permanent total disability, or in the alternative, that he has become permanently and totally disabled due to his bilateral knee injuries.

The following is a summary of the relevant procedural history of this matter:

1. 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. A formal hearing was held on March 2, 2001. (TR).[1] Claimant submitted sixteen exhibits, identified as CX 1 through CX 16, which were admitted without objection. (TR. at 17, 42, 87). Employer submitted twenty-one exhibits, EX 1 through EX 21, which were admitted without objection. (TR. at 18, 52, 154, 162, 172). Stipulations were admitted as a joint exhibit, JX 1. (TR. at 17). The record was held open for sixty days in order to conduct post-hearing depositions, and simultaneous briefs were due in ninety days. The time for filing briefs was extended and the record closed on June 20, 2001.

2. On March 5, 2002, a Decision and Order[2] was issued finding that the Claimant is not entitled to compensation under the Act for the condition of spinal stenosis, but awarded compensation for permanent total disability due to his bilateral knee injuries from October 5, 1999, to the present and continuing, at a compensation rate of $368.07 per week.

3. By motion filed March 13, 2002, the Claimant asserted that the compensation rate used ($368.07) applied to the Claimant's back injury, and that the compensation rate of $385.42 for his knee injury should have been used instead. Counsel indicated in his motion that he has discussed this matter with Employer's Counsel, who agreed with the request for an errata order. Accordingly, on March 19, 2002, an Errata Order issued which corrected, at page forty-two "Order" paragraph number 2, to award compensation for permanent total disability due to his bilateral knee injuries from October 5, 1999, to the present and continuing, at a compensation rate of $385.42 per week.

4. This matter was pending appeal to the Benefits Review Board ("BRB or Board") when Claimant filed a request for modification on April 26, 2002. On May 9, 2002 the Board issued an order remanding the case to consider the Claimant's modification request.[3]

5. On May 13, 2002, Claimant filed a request for assessment of penalties under § 14(3) of the Act, based upon the Employer having taken credit for previous payments of compensation. This claim was forwarded on May 15, 2002, to the Office of Administrative Law Judges for hearing and was assigned case number 2002-LHC-01918.

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[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript of March 2, 2001 hearing.

[2] Hereinafter referred to as "Decision."

[3] Employer's appeal to the Board of the merits of the decision and order remains pending at the Board as its BRB No. 02-494. Claimant's appeal to the Board is BRB No. 02-494A, and was dismissed by the Board when the case was remanded to consider modification. The parties are cautioned to read and comply with the Board's order of remand regarding the status of both appeals.

6. On May 24, 2002, a telephone conference was conducted with Counsel for Employer and Counsel for Claimant to discuss the status of the modification request. During the conference, the parties agreed to a disposition of the modification request. The Decision and Order issued on March 5, 2002, awarded Claimant permanent total disability compensation from October 5, 1999, to the present and continuing. No award was made for the various periods of temporary disability occurring prior to October 5, 1999, as payment of such had been voluntarily made by the Employer, and the parties had agreed at the formal hearing that there was no dispute over such periods. In making payment of compensation in accordance with the decision and order, the Employer's workers compensation department erroneously took a credit against the permanent disability compensation for the payments made voluntarily for temporary disability compensation. After this matter was called to the attention of Employer's Counsel via the request for modification, the Employer has now made payment in full to the Claimant for the amounts taken as a credit against the permanent disability award. In discussing the request for modification the parties agreed that the compensation for permanent disability is now being paid in compliance with the decision and order. Additionally, the parties agreed that the decision could be modified to include a specific award for the periods of temporary disability that had not been in dispute.

7. Accordingly, on May 24, 2002, an agreed Decision and Order issued on modification awarding, in addition to the permanent disability awarded in the March 5, 2002, decision and order, compensation for the periods of temporary disability as identified in stipulations 8 and 15 (see page 3 of the decision and order); The Employer is entitled to credit for the payment of such periods of temporary disability compensation, which the parties agree has been paid.

8. On June 6, 2002, a request for an errata order or a motion for reconsideration of the Order on Modification was filed by Counsel for the Claimant, along with a proposed Errata Order. On June 10, 2002, a telephone conference was conducted with Counsel for Claimant and Employer to discuss the motion. During the telephone conference the parties agreed to issuance of an errata order which amends the May 24, 2002, Order on Modification. Accordingly, on June 11, 2002, an order was issued finding that, in addition to the permanent disability awarded in the March 5, 2002, decision and order, the Employer shall pay to Claimant compensation for the periods of temporary and permanent disability as identified in stipulations 8 and 15 (see page 3 of the decision and order); The Employer is entitled to credit for the payment of such periods of temporary and permanent disability compensation, which the parties agree has been paid.

9. On July 8, 2002, a notice of hearing was issued scheduling the request for § 14(e) penalties for hearing on September 16, 2002 (case number 2002-LHC-01918).

10. On August 23, 2002, the Employer filed a request for modification directly with this office. As the Employer's appeal was pending before the Benefits Review

Board , the request was forwarded to the Board for appropriate action.

11. A telephone conference was conducted on September 11, 2002, to discuss whether the September 16, 2002 hearing should go forward on the Claimant's request for § 14(e) penalties, and the relationship of the Employer's modification request. Claimant requested that the penalty issue be decided without waiting for the modification request to be remanded. However, because any decision on the modification could impact the amount of penalties assessed, that request was denied. Therefore, an order was issued on September 12, 2002 canceling the hearing and holding the request for penalties in abeyance pending the receipt of the Employer's modification request and the file from the Board.

12. On September 26, 2002, the Board issued an order remanding the Employer's request for modification.

13. On October 3, 2002, a notice of hearing was issued scheduling Employer's request for modification and the Claimant's request for § 14(e) penalties for a consolidated hearing on December 9, 2002.

14. On October 16, 2002, Counsel for Claimant filed a motion to dismiss the request for modification. On October 31, 2002, Employer filed a response to the motion. On November 8, 2002, the Motion to Dismiss was denied as it was, at least, premature.

15. A formal hearing regarding Employer's request for modification was held on December 9, 2002. Claimant submitted six exhibits, identified as CX 1M, CX 3M, CX 4M, CX 12M, CX 13M, and CX 15M which were admitted without objection. (TR. II at 25-36). Claimant did not submit his other exhibits in attempt to avoid repetition. (TR. II at 25). Employer submitted fourteen exhibits, EX 1M through EX 14M. (TR. II at 21). EX 1M was objected to as it had Employer's counsel notes and comments written on it, and Claimant was planning to offer a clean copy of the same exhibit, and was withdrawn. (TR II at 21-22). EX 2M and EX 3M were also objected to, with Claimant's counsel requesting a discussion of the exhibits at a later time, during testimony. (TR. II at 22). Those objections were never made and the exhibits were not admitted. Nevertheless, as discussed *infra*, the finding of this court renders the exhibits irrelevant. *See* note 11 and accompanying text. EX 4M-11M and 13M were admitted over objections of Claimant's counsel. (TR. II at 22-24). EX 14M was admitted without objection. (TR. II at 24). EX 12M was withdrawn. (TR. II at 25). The record was held open for sixty days for briefs to be filed.

16. On February 18, 2003, Employer filed a brief supporting their Petition for Modification based upon mistake of fact.

17. On February 25, 2003, Counsel for Claimant filed a motion to strike the portion of Employer's brief relating to the issue of whether Claimant exercised due diligence

in seeking suitable alternate employment during the period of disability claimed. A response was filed by Employer on March 5, 2003. On March 11, 2003, an Order was issued holding that the argument made by Employer regarding the exercise of due diligence is a necessary element in a case arising under the Act and must be considered in this modification proceeding. Therefore, the argument was not stricken from the Employer's case. However, the record was reopened for a period of 20 days to permit the Claimant to submit an argument in response to the Employer's new argument regarding whether Claimant exercised due diligence in seeking suitable alternate employment during the period of disability claimed. Claimant filed his response on March 27, 2003 and the record closed.

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 or not a petition for modification due to mistake should be denied;

2. Whether or not the Slosson intelligence test, or IQ scores in general, are relevant and appropriate to consider when evaluating suitable alternate employment;

3. Whether a former position with a high rating in the Dictionary of Occupational Titles is sufficient to outweigh a borderline intelligence test;

4. Whether or not specific unarmed security positions should be considered suitable alternate employment;

5. Whether Claimant exercised due diligence in seeking suitable alternate employment;

6. Whether or not Employer is responsible for penalties for failure to controvert benefits.

STIPULATIONS

At the initial hearing, Claimant and Employer stipulated that:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to the jurisdiction of the Longshore & Harbor Workers' Compensation Act;

3. That the Claimant sustained an injury arising out of and in the course of employment to his back on October 18, 1991 [sic January 25, 1991];[4]

4. That a timely notice of injury was given by the employee to the employer;

5. That a timely claim for compensation was filed by the employee;

6. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. That the Claimant's average weekly wage at the time of his injury was $577.93, resulting in a compensation rate of $395.29;

8. That the Claimant was paid compensation benefits as documented by the enclosed LS-208 (sic) dated March 26, 1991;

9. That the Claimant's treating physician for this injury is Dr. Fithian and the employer paid for medical treatment related to this injury;

10. That the Claimant suffered an injury to both his knees on April 15, 1993 arising out of and in the course of his employment;

11. That a timely notice of injury was given by the employee to the employer;

12. That a timely claim for compensation was filed by the employee;

13. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

14. That the Claimant's average weekly wage at the time of this injury was $578.13, resulting in a compensation rate of $385.42;

15. That the Claimant was paid compensation benefits on this injury as documented by the enclosed LS-208 dated September 30, 1999;

16. That Claimant's treating physician for this injury is Dr. Trieshmann and the employer has paid for all medical treatment related to this injury;

17. That the Claimant suffered an injury to his back on August 5, 1997;

18. That a timely notice of injury was given by the employee to the employer;

19. That a timely claim for compensation was filed by the employee;

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[4] Although the written stipulations assert that Claimant's 1991 injury was sustained on October 18, 1991, Counsel advised that correct date is January 25, 1991. *See* (TR. at 24), (CX 2-1).

20. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

21. That Claimant's average weekly wage at the time of this injury was $552.11, resulting in a compensation rate of $368.07;

22. That the Claimant was never paid any compensation benefits as a result of this injury;

23. That the Claimant was treated by the Newport News Shipbuilding clinic physician for this injury;

24. That the Claimant reached maximum medical improvement on October 5, 1999 for his bilateral knee injury;

25. That the Claimant is not able to return to his pre-injury employment at Newport News Shipbuilding as a result of his bilateral knee injury.

(JX 1).

At the December 9, 2002 hearing, Claimant and Employer stipulated that:

1. At the hearing held on March 2, 2001, the parties were asked if there was any dispute over payment of compensation for the knee injury that were made prior to October 5, 1999. Claimant's counsel indicated that there was no dispute over prior payments and employer's counsel did not correct claimant's counsels representation to the Judge nor object to it. (See transcript pages 10 and 11).

2. At the hearing held on March 2, 2001, the parties submitted Stipulations which have been signed by both parties. (See transcript page 17, JX 1).

3. That the Stipulations submitted to the Administrative Law Judge on March 2, 2001, stated that the claimant had been paid compensation benefits as documented by an LS-208 dated 9-30-99. (See attachment 1 to JX 1).

4. That the LS-208 dated 9-30-99 stated that the claimant was paid permanent partial disability benefits for a 5% rating to the right lower extremity, temporary total disability benefits for the time period 2-26-97 to 4-20-97; 11-23-98 to 11-29-98; 2-17-99 to 2-17-99; and 4-14-99 to 9-27-99, totaling $18,158.78. (See attachment 1).

5. On March 5, 2001, a Decision and Order was issued (filed in the District Director's office on March 8, 2002) awarding the claimant permanent total disability benefits from October 5, 1999 to the present and continuing at the rate of $368.07.

6. That on March 17, 2002, the employer issued a check to the claimant in the amount of $30,202.13 for permanent total disability benefits from October 5, 1999 to March 24, 2002, plus interest in the amount of $507.81 for a total payment of $30,710.04.

7. That when the employer calculated the amount of the March 17, 2002, check they took a credit for the $18,158.78, which had been paid to the claimant prior to October 5, 1999, for the same injury.

8. That the employer never filed a Notice of Controversion after March 8, 2002, concerning claimant's entitlement to permanent partial disability benefits for a 5% disability rating to the lower extremity, temporary total disability benefits from 2-26-97 to 4-20-97, 11-23-98 to 11-29-98, 2-17-99, or 4-14-99 to 9-27-99.

9. That on or about March 20, 2002, claimant's counsel contacted Chris Hoyer (in Employer's workers compensation department) concerning claimant's receipt of the March 17, 2002, check and the fact that it appeared to be incorrect. Mr. Hoyer indicated that he would look into the matter and call Claimant's counsel back.

10. That Employer's counsel did not call Claimant's counsel back.

11. That on April 8, 2002, Claimant's counsel requested an informal conference on the issue of the underpayment.

12. That on May 1, 2002, the employer issued a check to the claimant in the amount of $12,608.74 for temporary total disability benefits, $5,550.04 for permanent partial disability benefits, and $1,028.89 for interest totaling $19,187.67.

13. That the payments made in the May 1, 2002, check represent the claimant's benefits for permanent partial disability benefits for a 5% disability rating for a lower extremity, and temporary total disability benefits from 2-26-97 to 4-20-97, 11-23-98 to 11-29-98, 2-17-99, and 4-14-99 to 9-27-99.

14. That any denial of benefits via telephone would not be an appropriate notice of controversion under the Longshoreman and Harbor Workers' Compensation Act.

(CX 1M.1-1M.4). *See also* (CX 1.4M)(stipulations signed by both parties' counsel);(TR. II at 26-27)(CX 1M admitted without objection).

DISCUSSION OF LAW AND FACTS

Employer's Request for Modification

Section 22 of the Act states:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), 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 (including a case under which payments are made pursuant to section 944(i) in accordance with the procedure prescribed in respect of claims in Section 19 of this title), 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 made 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. This modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497(4th Cir. 1999). Any mistake of fact may be corrected whenever justice requires, whether based on wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *Id.* (citing *O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971)).

Employer is seeking modification of the March 5, 2002, Decision and Order based upon an alleged mistake in a determination of fact. Specifically, Employer argues that the initial decision regarding Claimant's intellectual capacity to perform jobs listed in the labor market survey and Claimant's ability to work as an unarmed security guard with specific employers was a mistake. Therefore, Employer seeks a finding that suitable alternate employment has been established. Employer further seeks a finding regarding Claimant's due diligence in searching for employment, an issue reached only if suitable alternate employment is found. Claimant asserts that modification is not warranted as the evidence presented by employer is not new evidence but rather evidence that could have been developed prior to the first hearing. In addition, Claimant asserts that he was diligent in his search for employment.

It is well settled that the modification procedure is very broad, and that finality is not the goal of the Act. *O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254 (1971); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497(4th Cir. 1999). In addition, as stated above, any mistake of fact may be corrected whenever justice requires, whether based on wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *Id.* While the matters asserted in the Employer's request for modification could have been addressed in the first hearing, the broad remedy provided by § 22 of the Act apparently renders such error irrelevant. Therefore, although the Claimant is correct in his argument, Employer's request must

be considered.

The parties have stipulated that the Claimant is not able to return to his pre-injury employment at Newport News Shipbuilding as a result of his bilateral knee injury (JX 1, 25). Therefore, he has established a *prima facie* case of total disability and the burden shifts to Employer to establish the availability of suitable alternative employment which Claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1032 (5th Cir. 1981). The Employer must show that a range of jobs exists which are reasonably available and which the disabled claimant is realistically able to secure and preform. *Lentz v. Cottman Co.*, 852 F.2d 129 (4th Cir. 1988).

In the initial decision, Claimant's physical restrictions were considered, along with his intellectual capacity or abilities, in evaluating his suitable alternate employment. Both the expert for the Employer, Mr. Kay,[5] and the expert for the Claimant, Mr. DeMark, considered Claimant's restrictions from Dr. Carlson. While Mr. Kay considered some of Claimant's restrictions, he was apparently unaware of, and so did not incorporate, Dr. Trieshmann's requirement that Claimant elevate his legs for thirty minutes every three hours. (TR. at 89). Dr. Trieshmann did not formally note that Claimant needed to elevate his feet periodically until the restrictions issued on October 17, 2000. *Id.* In addition, according to Mr. DeMark, Dr. Trieshmann had, at this time, restricted Claimant to light duty, including no ladder climbing, limited stair climbing, and limited standing of one to two and one-half hours maximum. (CX 11-1). He reported that Dr. Carlson's restrictions for Claimant's back injuries involved no lifting of more than twenty pounds, no crawling, kneeling, squatting, bending, or twisting, as well as limited standing and limited work above the shoulder. (*Id.*). Mr. Kay relied on a response from Dr. Carlson to Mr. DeMark dated October 16, 2000, listing Claimant's permanent restrictions as no lifting over 10 pounds, and walking, lifting, bending, squatting climbing, kneeling, twisting, and standing to be limited to1 hour. (EX 12-4). Prior to these restrictions, Dr. Carlson issued temporary restrictions on October 9, 2000 which Mr. Kay also considered. These restrictions included no lifting over 20 pounds, no climbing ladders, no crawling, kneeling, squatting, bending or twisting, frequent standing and stair climbing, occasional work above the shoulders, and avoiding repetitive motion of lumbar spine. (EX 12-5). Finally, Mr. Kay also considered the permanent knee restrictions issued by Dr. Reid on March 2, 1994. Those restrictions included no prolonged kneeling, crawling, or squatting and work which allows Claimant to change position frequently. *Id.* Mr. Kay stated that he primarily used the same restrictions that Mr. DeMark used. (TR. at 89).

Employer asserts that the "primary basis" for the Court's determination that the jobs listed in their labor market survey were not suitable for Claimant was his level of intelligence, based exclusively upon scores of a standardized intelligence test. (Emp. Br. at 7). Employer focuses on the use, or lack thereof, of "raw" IQ scores in the DICTIONARY OF OCCUPATIONAL TITLES (DOT) and Claimant's job experience and high school diploma. (*Id.*).

The Employer is correct that the DOT does not make use of "raw" IQ scores. However, the findings in the decision and order was based upon the testimony of the expert, Mr. DeMark,

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[5] It is noted that Mr. Kay has an office within Employer's facility and has worked solely for Employer for the past year. (TR. II at 94).

and his application of Claimant's intelligence and vocational testing and abilities, and explanation of that application, to the criteria of the DOT. When discussing Claimant's intellectual abilities, or just Claimant's intelligence, the Claimant's IQ scores, were only a factor along with Claimant's vocational scoring on both Mr. DeMark's and Mr. Kay's testing. The Court relied upon the persuasiveness and credibility of Mr. DeMark and his explanation and application of his testing, interviews, and information regarding Claimant to the jobs listed on the labor market survey. In short, Mr. DeMark's testimony was more credible than Employer's expert, Mr. Kay. His explanation and application of Claimant's intelligence scores, transferrable skills, vocational testing and physical restrictions to the general definitions and ratings of the DOT, in addition to the specific job descriptions discussed, was the basis of this Court's decision. However, each of Employer's assertions of mistake will be addressed.

In the initial decision it was held, based upon Mr. DeMark's testimony and the definitions put forth in the DOT, that Claimant was not qualified for the positions listed on Employer's labor market survey, which included three categories: customer service, entry level; unarmed security guard; and driving. (EX 12)(Mr. Kay's labor market survey);(Decision at 40)(holding Claimant was qualified for only one position listed and therefore suitable alternate employment was not found). In addition, it was noted that Mr. Kay did not incorporate Dr. Trieshmann's restrictions, of which he stated he was unaware, in finding jobs for Claimant. (Dec. at 29). Further, it was noted in several instances the job descriptions signed by the employers and the form for the job descriptions submitted to Dr. Carlson, were different. *See e.g.* (EX 21-1) (EX 20-12); (EX 12-15)(EX 20-1); (EX 21-3)(EX 20-8); (EX 21-4)(EX 20-11) (EX 20-10).

Intelligence testing

Employer argues that IQ testing should not be considered in the appraisal of suitable alternate employment. (Emp. Br. at 20). While Claimant's educational and work history are factors to consider, his IQ scores, testing results, and the opinions of the vocational expert are also relevant. Mr. DeMark is the expert that interpreted the DOT and applied it to his testing of Claimant. He applied his intelligence testing, vocational testing, and experience to the Specific Vocational Preparation (SVP)[6] numbers regarding math, reasoning and reading levels in the DOT. As Mr. DeMark testified in the initial hearing and discussed in his written report, he did not focus exclusively on Claimant's IQ testing, rather, he performed vocational testing which indicated that

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[6] SVP is defined as:

> The amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.
>
> The training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Claimant reads at a second grade level, spells on a second grade level and performs arithmetic on a forth grade level. (CX 11-2). He opined that Claimant is borderline functionally illiterate. (TR. at 117-18). In addition, manual dexterity testing indicated poor dexterity. (*Id.*). And finally, Mr. DeMark noted Claimant had no transferrable skills, given his physical restrictions. (TR at 123-24, 49-50).

At the second hearing, Mr. Kay, Employer's vocational expert, was asked to testify again. At that time he testified that the Slosson IQ test[7] used by Mr. DeMark should not be used alone to determine a person's vocational abilities. However, he also testified that Mr. DeMark did not just use the Slosson IQ score in determining Claimant's educational ability or his opinion. Mr. DeMark also used the Wide Range Achievement Test (WRA), that is a tool used by vocational counselors. In addition, Mr. DeMark got a copy of Claimant's high school transcript,[8] discussed *infra*. (TR. at 102). As Mr. DeMark testified, he did the same tests for Claimant that they do for all of their clients. He stated that this testing is required by the Office of Workers' Compensation and it is done to determine a person's competencies regarding basic educational skills and general intelligence. (TR. at 117). Mr. DeMark testified that the specific test used on Claimant was the Wide Range Achievement Test, a test to help measure a person's skill regarding reading, spelling, and math. He stated that Claimant scored on the reading a grade level of 2.4, spelling at 2.2, and math at 4.4. (TR. at 117). Mr. Kay also tested Claimant, finding that he had less than sixth grade verbal abilities, math skills at a sixth grade level, and less than sixth grade composite skills. (TR. at 84)(EX 12-7). When asked, Mr. DeMark stated:

> His reading and spelling tests or scores, in my opinion, do present a situation where he is very limited in his reading and writing. I think that... I believe that those scores would indicate that he is functionally illiterate. Functionally illiterate would generally be accepted as unable to read and write to a degree that would allow him to understand instructions or to communicate with reading and writing.

(TR. at 117).

Mr. DeMark also addressed the issue of Claimant's high school transcripts at the initial hearing. He stated that, although Claimant graduated high school, the testing was done because:

> I've met and worked with many people who have been High School graduates and either because of special ed – special education classes – or what is commonly referred to as social promotion, that people are high school graduates who have different levels of skill regarding education. ... There's no indication of any special

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[7] It is noted that Employer submitted articles and non-binding cases as evidence regarding the use of the Slosson IQ test. However, it has been established that Mr. DeMark used other criteria, in addition to the Slosson IQ test, in reaching his opinion that Claimant was not intellectually capable of performing the listed jobs. In addition, the court notes that the submission of cases from other jurisdictions as evidence is not proper. Cases from other jurisdictions are not evidence, rather they should be used as part of a persuasive argument.

[8] Employer places great emphasis on the fact that Claimant graduated from high school and completed courses such as Algebra. (Emp. Br. at 13). Employer fails to discuss, however, the fact that in testing by both Mr. Kay and Mr. DeMark, Claimant tested at low grade levels in all subjects. See Mr. DeMark's explanation *infra*.

> ed, but again, he attended a rural school in North Carolina, and during the period that he was in school, it wouldn't be unusual not to see a designation of special education. But again, the IQ scores that were recorded with the school records clearly show that he was limited in terms of his intellectual skills.

(TR. at 119). Mr. DeMark also explained the relationship between Claimant's IQ and his search for employment. He stated:

> Well, the IQ score is.. The best way to explain IQ is the idea of being able to learn something...learn something new. The more limited a person's IQ is, is the more difficulty they're going to have in terms of learning what might be called intrinsic issues – things that you have to learn by understanding processes and understanding interactions versus the idea of let me show you how to do this. So IQ has to do more with learning new tasks. ... By the way, my testing showed an IQ of 77. So a 77 would be classified as borderline. Mr. Daniels...along with the High School records and my testing and the results of the Wide-Range Achievement Test, and even Mr. Kay's testing, I don't think there's any question that Mr. Daniels would be considered to have a learning problem.

(TR. at 120-121). And, again, Mr. DeMark explains:

> And by the way, every one of the jobs that Mr. Kay lists, if you analyze it using the DOT, it requires an average learning ability, and under aptitude, that's called General Learning Ability, each job requires a classification III which is the 34 to 66 percent which would correspond to average intelligence.

(TR. at 128). Mr. DeMark's opinion is that Claimant is not competitive in the labor market and that "his wage-earning capacity is zero." (TR. at 135). He based that opinion on "his physical restrictions, his lack of transferrable skill, his education, his limited educational skills, his age, and competition from other workers." (TR. at 136). As stated in the initial decision, the Court finds Mr. DeMark's testimony compelling and credible. Mr. Kay's testimony was not. It is incongruous to assert that vocational experts can rely upon the DOT to assign strength ratings and physical descriptions of jobs, yet ignore the aspect of the description that does not comport with your desired result.[9]

As discussed *supra*, Employer must show that a range of jobs exists which are reasonably available and which the disabled claimant is *realistically able to secure and perform*. *Lentz v. Cottman Co.*, 852 F.2d 129 (4th Cir. 1988)(emphasis added). Intelligence testing plays a role in assessing the ability of a claimant to realistically perform a job. Perhaps in some cases it would preclude securing a job as well. That is not the consideration in this case, therefore Employer's argument and the testimony of his witnesses that they would not consider Claimant's IQ scores in their hiring decisions is irrelevant. *See* (TR. II at 30)(testimony of Mr. Cote that IQ testing is not

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[9] In fact, an expert's opinion must address both the claimant's physical and mental capabilities in order to meet the burden. *See Uglesich v. Stevedoring Servs. Of America*, 24 BRBS 180 (1991); *Davenport v. Daytona Marina & Boat Works*, 16 BRBS 196 (1984); *Bostrom v. I.T.O. Corp. of Baltimore*, 11 BRBS 63 (1979).

done on his workers or applicants and there are no IQ requirements for hiring); (TR. II at 64-65)(Mr. Hill's testimony that he would not consider the scores of an IQ test).[10] In this case Claimant's intellectual abilities, as referenced by his intelligence testing, WRA testing, interviews with and opinions of a credible expert, Mr. DeMark, indicate that a majority of the jobs listed by Employer[11] are neither appropriate nor suitable for Claimant due to his intellectual abilities.

Pre-injury Position

Employer relies heavily on the fact that, according to the DOT, Claimant's pre-injury position had a high SVP, exceeding those of the positions listed in the labor market survey. What Employer fails to discuss, however, is the fact that Claimant had worked his way to this position in the thirty-six years he was employed by Employer. (TR. 20-21). He had worked as a shipfitter for five years prior to his injury. (*Id.*). Therefore, Claimant had worked for thirty-one years to get to the position at which he was injured. As discussed at the hearing, this position has an "SVP" of eight. This indicates four to ten years of experience in that industry. (TR. II at 109). As stated above, Claimant had been working for Employer for over thirty years. Mr. Kay stated that it could take four years to learn that job and it could be learned in an apprentice school, or through experience. (*Id.*). In addition, it was noted that in all the tests Claimant took, he scored substantially better in math than reading, which is unusual. (TR. at 105). Mr. Kay testified that shipfitters use a lot of math in measurements and blueprinting. (TR. at 105). From the evidence it seems clear that Claimant reached the position of shipfitter through many, many years of experience and apprenticeship, far exceeding the four to ten advised by the DOT. Therefore, I find that the SVP of 8 assigned to the position of shipwright is not relevant to the SVPs of the positions listed in the DOT. Claimant began working, at the age of 18, as a "stage builder." (TR. at 21). He eventually progressed to the job of ship wright. (TR. at 22). In 1993, he was put to work as a ship fitter, where he worked for about five years. (TR. at 25). Claimant's thirty-six years of experience led to his being in this position, which is listed as taking four to ten years to reach. Therefore, the SVP of this position mistakenly suggests that Claimant's capabilities are beyond those which he possesses, according to all of the consistent testing results recorded. Many years of on the job experience led to this position and it would be unfair to assume, contrary to the many tests taken by Claimant, that a position reached by **decades** of experience is indicative of his ability to enter a completely different work environment and start from scratch,

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[10] EX 2M and EX 3M, which were not formally admitted at the second hearing also deal with this issue.

[11] Employer also addresses the general positions listed in newspaper advertisements in Mr. Kay's labor market survey. (Emp. Br. at 19). As discussed in the initial decision, these jobs all fall within the general categories listed by Mr. Kay. Because no specifics regarding job duties were given in the advertisements, the general categories of the DOT were considered as the duties. As discussed at length in the initial decision, the general categories of entry level customer service, driving, and unarmed security guards were found to be unsuitable due to Claimant's intellectual capacity and physical restrictions. (Dec. at 40, 29-35). Further, the number of positions listed by Employer (75) is misleading. (EX 12-24 through 74). In fact, many of the positions listed are the same as listings of specific jobs in the survey. In addition, many of the jobs listed are repetitive. *Id. See also* TR. at 74 (Mr. Kay's testimony that he included the listings to show availability and that in many cases they were actually the same jobs listed individually on his survey). Nevertheless, as indicated in the initial decisions the jobs listed are not suitable for Claimant and in many cases do not provide enough information, specifically wages and hours, to be considered as suitable alternate employment. (EX 12-24 through 74).

with no experience. Instead, I find that Claimant's testing results are the true measure of his abilities in entering a field in which he has no experience.

Unarmed Security

Employer also urges that the court reconsider its decision regarding the unarmed security positions listed in its labor market survey. Employer argues that, based upon the evidence submitted in the first hearing and testimony at the second hearing, Claimant is able to perform the jobs listed in the labor market survey. First, Employer states that "no reason exists to believe that the Claimant would not pass the state unarmed security guard examination." (Emp. Br. at 9). In addition, Employer stated that the risk of confrontation is "as remote as that to which the general public is exposed in everyday life..." (Emp. Br. at 29). *See also* (TR. at 39)(Allen Depo at 9)(TR. At 62) (security company owners stating that the guards are merely a physical presence and not involved in physical altercations).

In the initial decision, it was found that the general category of unarmed security guards was inappropriate considering Claimant's physical restrictions. (Dec. at 35). The DOT description,[12] which Mr. Kay purports to rely upon, states that a security guard may be required

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[12] As discussed in the initial decision, the DOT description will be used for all jobs without a specific description. Employer's expert Mr. Kay stated in his report he relied upon the DOT descriptions as well as his specific position descriptions in evaluating positions and Mr. DeMark also relied upon the DOT. Both Mr. DeMark (Claimant's expert) and Mr. Kay (Employer's expert) agreed that this position is listed in the DOT as: **372.667-034 GUARD, SECURITY** (any industry) alternate titles: patrol guard; special police officer; watchguard.

> Guards industrial or commercial property against fire, theft, vandalism, and illegal entry, performing any combination of following duties: Patrols, periodically, buildings and grounds of industrial plant or commercial establishment, docks, logging camp area, or work site. Examines doors, windows, and gates to determine that they are secure. Warns violators of rule infractions, such as loitering, smoking, or carrying forbidden articles, and apprehends or expels miscreants. Inspects equipment and machinery to ascertain if tampering has occurred. Watches for and reports irregularities, such as fire hazards, leaking water pipes, and security doors left unlocked. Observes departing personnel to guard against theft of company property. Sounds alarm or calls police or fire department by telephone in case of fire or presence of unauthorized persons. Permits authorized persons to enter property. May register at watch stations to record time of inspection trips. May record data, such as property damage, unusual occurrences, and malfunctioning of machinery or equipment, for use of supervisory staff. May perform janitorial duties and set thermostatic controls to maintain specified temperature in buildings or cold storage rooms. May tend furnace or boiler. May be deputized to arrest trespassers. May regulate vehicle and pedestrian traffic at plant entrance to maintain orderly flow. May patrol site with guard dog on leash. May watch for fires and be designated Fire Patroller (logging). May be designated according to shift worked as Day Guard (any industry); area guarded as Dock Guard (any industry); Warehouse Guard (any industry); or property guarded as Powder Guard (construction). May be designated according to establishment guarded as Grounds Guard, Arboretum (any industry); Guard, Museum (museums); Watchguard, Racetrack (amuse. & rec.); or duty station as Coin-Vault Guard (any industry). May be designated Guard, Convoy (any industry) when accompanying or leading truck convoy carrying valuable shipments. May be designated: Armed Guard (r.r. trans.); Camp Guard (any industry); Deck Guard (fishing & hunt.; water trans.); Night Guard (any industry); Park Guard (amuse. & rec.). GOE: 04.02.02 STRENGTH: L GED: R3 M1 L2 SVP: 3 DLU: 88.

The DOT strength rating of "L" is described as:

to write reports and respond to emergencies. (CX 11-11, 12, 13). The position is also listed as Light, not Sedentary work by the DOT. This designation exceeds Claimant's restrictions. *See* note 9. In addition, Mr. DeMark had expressed concern that Claimant would be unable to pass the state security guard test and that he would be exposed to a risk of physical confrontation. (TR. at 133, 151). However, at the second hearing, Employer did present evidence from specific employers familiar with the test, who stated that every one of their workers has passed the state test, even their functionally illiterate workers. (TR. II at 71-72). *See* discussion *infra*.

In addition to the general category of unarmed security, three specific employment opportunities were identified by Employer and addressed separately by the Court: Security Services of America, Wackenhut Corporation, and James York Security. These positions were also found to be unsuitable for Claimant based upon the need to respond to emergencies and the state security guard examination, which Mr. DeMark felt Claimant would not be able to pass. (*Id.* at 36, 37, 38). In addition, the job descriptions provided by Mr. Kay to the employers and doctor differed greatly for the Security Services of America positions discussed. (*Id.* at 36). The position with Wackenhut was also found unsuitable. A former hiring employee of Wackenhut refused to rule out the possibility of physical confrontation while on the job. In addition, Claimant would have to respond to emergencies, pass the state test, and would have trouble propping up his feet periodically while driving car patrol, although it may be possible at a desk job. (*Id.* at 37). Further, Claimant applied for a position at the company and there were no openings, therefore the position was not available. (*Id.*). Finally, the James York Security position was not considered suitable as employees were rotated to sites and the requirements differed according to site. In addition, Claimant applied for a position and none were available. (*Id.* at 38).

Gary Cote's Testimony

Gary Cote is the branch manager of the Security Services of America, Newport News Branch Office. He has held that job since June of 1999. (TR II at 28). During that period of time he has been responsible for the hiring of security guards. (*Id.*). He stated that the training, clearances, and demands are more for armed guards than unarmed guards. (*Id.*). Mr. Cote had the opportunity to review the work restrictions of Claimant, and to briefly look over the results of various tests that he took in the vocational setting. (TR. II at 29). He testified that as a hiring

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> **L-Light Work** - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though 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 and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

It is noted that the designation of Light Strength requirements clearly exceeds Claimant's physical restrictions of no lifting over 10 pounds, and walking, lifting, bending, squatting climbing, kneeling, twisting, and standing to 1 hour. (EX 12-4).

agent he does not do any IQ testing of his workers or applicants and that there are no limits or levels of IQ testing in order to hire.[13] He states that the considerations used to determine if someone will be hired is an interview and, within 90 days of being hired, they all have to go to an unarmed security test and pass that. Specifically regarding unarmed security guards, Mr. Cote testified:

> It's basically the application and the sit-down interview and we look the person over. We know our clients. We know what we need, and if the person looks like they are going to fit the bill, we'll hire them.

(TR.II at 30). He did not recall offhand having spoken with or interviewed Claimant. (*Id.*). He does not have an application from him on file. (*Id.* at 31). After reviewing Claimant's work restrictions, however, he stated he would "definitely give him an interview and if the interview was good, I would give him an opportunity." (*Id.*). He also stated that he had never personally terminated a worker for not being intelligent enough. (*Id.*). He has never had a worker he has hired fail the security guard test. (*Id.* at 31-32). He is not familiar with the state security guard test, although he did take the test many years ago. (*Id.* at 32). From what he generally recalls the test involves what an unarmed guard can legally do under the Code of the Commonwealth of Virginia. The majority of the test is first aid, fire prevention, how to enter a burning building and things of that nature. It is a multiple choice test. (*Id.*). The test can be taken orally, and he has had workers take the test orally. (*Id.* at 32-33).

When asked if there was any requirement, in his experience, that an unarmed security guard could be asked to physically remove or become involved in any physical altercations with people, he testified that "It could happen on some contracts. That's where we detail our people, those that we know could handle that. And you have to – I've got 31 clients. Some are more demanding than others." (*Id.* at 36). He also testified, however, that he would not put someone with the restrictions of Claimant into such a contract. (*Id.*). He was then asked "And in those contracts where you would put him, the chances of physical confrontation, can you estimate where they would fall on a scale of, say certain down to remote possibility?" (*Id.*). And he replied: "It would be remote, probably. No more than going out your front door." (*Id.* at 37). Finally, when asked if Claimant would have to rotate into a more physically challenging position, outside of his restrictions, Mr. Cote replied: "I would flag that individual, like I have others in that same category and, no, they would not." (*Id.*). He has three out of sixty workers that have restrictions. (*Id.*).

Mr. Cote also testified that the restrictions he was given involved Claimant's knees and that he was unable to walk more than two hours straight. (*Id.*). He could not recall any other physical restrictions, although "they may have been on there." (*Id.* at 38). The restrictions were given to him in August when he met with Mr. Kay. (*Id.*). He first began meeting with Mr. Kay in June of 1999. (*Id.*). He has an office at the same complex as Mr. Kay. (*Id.*). He did see the

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[13] The Court notes that, as explained by Mr. DeMark and discussed supra, the point of IQ testing is to establish Claimant's abilities, as an addition to the testing of skills by the WRA, much as a functional capacities evaluation establishes a claimant's physical abilities. It has not been argued by the Claimant or found by the Court that IQ testing is done, required, or considered as a prerequisite by employers.

Slosson Intelligence test results, the IQ of 77, however, he testified that he did not see any other testing results and he did not know what the test or testing results meant because he "doesn't go by the numbers." (*Id.* at 39-40).

When asked where he would place Claimant he testified:

> I would look hard at the hotels for security, for tour groups only because that's 90 percent sitting right outside the chaperon's door. It's just to make sure that the kids don't come out of their rooms after the chaperons go to bed. If they do, they just knock on the chaperon's door. We do not discipline the juveniles. Only the chaperon's can. I would look hard at that. Possibly Chesapeake Bay Packing. That's a gate watch. Very, very little walking and no climbing, no stairs.

(*Id.* at 41-42). He testified that the position for tour groups is year round, but it could be less than 40 hours. (*Id.* at 42). He stated he could probably support three part timers for the tour groups. After Christmas, it would be full time. (*Id.* at 42-43). He stated the position is year round, but it peaks after the Christmas season to Easter. Then it slows down. (*Id.* at 43). He agreed that this meant that year round he might have one or two full-time people, and from the rest of the time he would hire part-time workers to fill in. (*Id.*). Currently he has two full-time workers and one part-time worker in the positions. (*Id.*). He testified that at the slowest point part-time hours would be around twenty to twenty-four hours a week. (*Id.* at 48). When asked specifically about Claimant, he stated that the tour groups are all nighttime positions. (*Id.* at 44). He stated that he has not changed the way he operates his business since March of 2001. (*Id.* at 46). At the time of the second hearing, Mr. Cote did not have a full time job available that he would consider Claimant for, however, he did have part time work with the expectation that full time work within his restrictions would be available by New Years. (*Id.* at 50-51).

William Hill Testimony

Mr. William Hill is the CEO of James York Security. He has been employed with James York Security since January 2000. (TR. II at 52). He hires unarmed security guards. (*Id.* at 53). He does hire unarmed security guards with physical restrictions or disabilities. (*Id.*). He currently has such individuals working for him. (*Id.*). He has had the opportunity to review the work restrictions of Claimant. He testified that, during the period of time between October of 1999 and the present he would have had work at routine intervals that would be suitable for Claimant. (*Id.* at 54). He does not give IQ tests to his employees and the results of Claimant's testing would not affect his decision whether or not to hire him. (*Id.*). He does not give them any test prior to hiring them. (*Id.*). Within 90 days of being hired they do have to take and pass a state examination. (*Id.* at 55). He has never had someone fail the unarmed security test. (*Id.*).

Specifically regarding Claimant, Mr. Hill testified that, considering his restrictions, he would have had work suitable for him between the time of October 1999 and present. (*Id.* at 55). Specifically, he would have seasonal school tours. (*Id.*). By seasonal, he explained, he meant:

> Normal travel for the schools seems to be around, anywhere between February and August, sometimes all the way up to October.

(*Id.* at 56). In the off months, he testified, Claimant could have done some motor patrol sites, where "they ride around and just check the parking lot, you know, look for suspicious activities." (*Id.*). He also said he would consider a site where a house is monitored. (*Id.*). The job there is to keep onlookers from coming into the house. (*Id.* at 57). Mr. Hill testified that there would not be any problem with Claimant not being able to rotate into the more strenuous jobs. (*Id.*). He testified that he does rotate workers between sites, but if a person has a restriction he does not rotate them into positions that would violate their restrictions.

Mr. Hill also testified that unarmed security guards are essentially there as a presence and that if it ever became necessary for someone to be physically removed, you would call the police. (*Id.*). He has no memory of any of his unarmed security guards being in a physical confrontation since he has been CEO. (*Id.* at 57-58). The ability to physically confront people is not any part of a requirement for an unarmed security guard. (*Id.* at 58). Presence is the main deterrence. (*Id.*).

Mr. Hill has not changed the way he operates and runs his business since May of 2001. (*Id.*). In his deposition dated May 3, 2001, Mr. Hill agreed that he previously testified he only rotated individuals and did not hire for a particular site. (*Id.* at 61-62). He stated that there were no permanent *per se* positions that would not be rotated but he testified that depending on the limitations he would try to keep them where they could work within that limitation and not rotate them out of it. (*Id.* at 62). He agreed, however, that that was not what he testified to during his May 2001 deposition. (*Id.* at 62). He does not have a full-time, year-round position for Claimant within his physical restrictions. (*Id.*). He has seasonal positions from February to August. (*Id.*). When asked if he had any part-time positions available year-round for Claimant, Mr. Hill testified:

> No. Well, part-time. He could be– I would try – normally I would try to keep him employed, but when the school tours slow down, which they are now, he could stay on the payroll as – every once in a while one pops up. ... So if I had one, he would be able to do that. ... But I'm not sure exactly what – when that's going to happen.

(*Id.* at 63). In fact, in August of 2002, he did not have any work available for Claimant within his limitations. (*Id.*). He also agreed that he did not know what the scores of a Slosson Intelligence test indicated. (*Id.* at 64-65). He stated that Mr. Kay told him that the Claimant had reading and writing difficulties. (*Id.* at 65). He took the unarmed security guard test four or five years ago. (*Id.* at 65). He testified that he has some guards that are illiterate and has not yet had one fail. (*Id.*).

Mr. Hill was asked: "Between the period of 1999 and the present, how routinely would work become available that you believe that Mr. Daniels could perform?" He replied:

> During the busy seasons routinely. During the off seasons, this is the first year, normally, that I've had this much activity. So I'm not going to say it would be routine.

(*Id.* at 74).

Based upon the testimony of both Mr. Cote and Mr. Hill that even their illiterate workers have passed the state security guard test, and that the test can be given orally, the test will not be considered a factor in determining whether or not their positions are suitable for Claimant. Mr. DeMark's concern that Claimant could not pass the test is outweighed by the direct testimony that illiterate workers have passed the test, by people who have taken the test. However, these jobs still do not constitute suitable alternate employment.

As discussed *supra*, the general description of unarmed security job does not fit within Claimant's physical restrictions. The ability to walk or stand to a significant degree, respond to emergencies, lift 20 pounds, and fill out written reports are not within Claimant's abilities. In fact, Employer has referred to Claimant's restrictions as requiring sedentary work. (Emp. Br. at 35). Therefore, only the specific jobs listed will be considered. The job with James York Security is clearly seasonal work. Employer is correct in asserting that part time work may constitute suitable alternate employment, as part time work is routinely considered in establishing an average weekly wage. (Emp. Br. at 33)(citing 33 U.S.C.A. § 10(c); *Rizzi v. Underwater Construction Corp.*, 27 BRBS 273 (1994)). However, by that same logic, seasonal or intermittent work is not considered in establishing an average weekly wage and should not be considered in establishing suitable alternate employment. That type of work is not "stable and continuous" and will not be considered. *See* 33 U.S.C. § 908(h), *Burkhardt v. Bethlehem Steel Corp*., 23 BRBS 273 (1990). The job with Mr. Cote of Security Services of America, Newport News Branch Office, is also inappropriate. Mr. Cote testified at the first hearing that he did not hire workers for a particular site, rather rotating them to various sites. His later testimony that Claimant, if hired from a pool of applicants, would not be rotated is contradictory and therefore will not be credited. Moreover, even given the testimony of Mr. Cote and Mr. Hill regarding the instance of physical confrontation, when a physical confrontation is necessary, it is necessary because of an emergency that requires response.

Given all of these reasons, I find that jobs with Security Services of America and James York Security are not suitable alternate employment for Claimant. In addition, even though the state security guard test is no longer a factor in this decision, the Wackenhut position still does not constitute suitable alternate employment as the hiring official refused to rule out the possibility of confrontation, and Claimant would have trouble propping up his feet periodically while driving car patrol. No new information was presented on this position and the Court's opinion is unaltered upon reviewing the evidence from the initial hearing.

Therefore, upon consideration of the Employer's request for modification, as in the initial decision, I find that suitable alternate employment has not been established, and the request for modification must be Denied.

Due Diligence

Assuming, *arguendo*, that suitable alternate employment had been established within Claimant's restrictions, the burden would shift to the Claimant to show that he is ready, willing and able to return to work, just like any other unemployed worker. *See Palombo v. Director, OWCP*, 937 F.2d 70 (2d Cir. 1991). Thus, the burden would shift to the Claimant to show that with "due diligence," he was unable to secure any of the employer's suitable alternative

employment.

Claimant testified that he applied for all of the jobs that Mr. Kay sent him letters regarding. (TR. at 36-37). The job search records submitted by Claimant indicate that he applied for employment with the following employers: P&M Auto Sales, driver; Customer Service Representative for the Patrick Henry Mall, Trendsetter, service worker; Daily Press, driver; W.S. Hawkins Electric Co.; Subway; Speedymart, cashier; Brake Parts, driver; HHI, packer; Goodwill Industries, attendant; Associated Cabs, Inc., Dispatcher; Wackenhut, security; Hampton City Schools, bus driver; James York Security, security; SSA, security; Central Parking, cashier; Goodwill (second application); SSA (second application); Brake Parks (second application); and The Wackenhut Corporation, security. (CX 14-1,2 & 4).

Claimant testified that he applied for these jobs when Mr. Kay sent him the letters with job applications and after conferring with his attorney. (TR. at 42-43). He also applied to places he had heard of through word of mouth and newspaper advertisements. (CX 14-1). Claimant also registered for job service assistance with the Virginia Employment Commission. (CX 14-3). None of the positions Claimant applied for offered him employment. (CX 14-1,2 &4). Claimant testified that he was hoping that someone would hire him. (TR. at 44). When asked why he did not search for work earlier, Claimant replied that he thought that he was still employed with Employer and that he did not know he was supposed to go and look for other jobs. (TR. at 44). Based upon Claimant's job search records and his credible testimony concerning his desire for employment and his job search, I find that he made a diligent, good faith effort to secure employment. Therefore, even if suitable alternate employment had been demonstrated, Claimant would be entitled to compensation as he genuinely and diligently sought employment within his determined capabilities.

Penalties under § 14(e)

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in § 14(b), the employer shall be liable for an additional 10% penalty of the unpaid installments. 33 U.S.C. § 914. Penalties attach unless the employer files a timely notice of controversion as provided in § 14(d). *Id.* Claimant is not entitled to interest upon the additional compensation he will receive pursuant to section 14 (e). *Cox v. Army Times*, 19 BRBS 195 (1987).

The basic facts regarding whether the Claimant is owed penalties are not in dispute. At the initial hearing the parties were asked if there was any dispute over payment of compensation for the knee injury that were made prior to October 5, 1999. (TR. 10-11)(CX 1M.2 at Stip. 1). It was further stipulated that Claimant had been paid compensation benefits as documented by LS-208 dated 9-30-99. (CX 1M.2 at Stip 3). The LS-208 outlined the dates for which Claimant was paid permanent partial disability benefits for a 5% rating to the right lower extremity and temporary total disability benefits totaling $18,158.78. (*Id*. at Stip. 4). On March 5, an Order was issued that awarded Claimant permanent total disability benefits from October 5, 1999 to the present and continuing at the rate of $368.07. (CX 1M-3M at Stip. 5). Employer paid benefits on March 17, 2002. (*Id*. at Stip. 6).

When Employer calculated the amount of that check, it erroneously took a credit for the $18,158.78 which had been paid to Claimant prior to the Order. (Id. at Stip. 7). The Employer did not file a Notice of Controversion after March 8, 2002, concerning the entitlement of Claimant to permanent partial disability payments for a 5% rating and temporary total benefits from 2-26-97 to 4-20-97, 11-23-98 to 11-29-98, 2-17-99, or 4-14-99 to 9-27-99. (*Id*. at Stip. 8). Employer's representative was contacted but did not respond to the inquiry. (*Id*. at Stips. 9-10). On April 8, 2002 Claimant's counsel requested an informal conference on the issue of underpayment. (*Id*. at Stip. 11). On May 1, 2002, Employer issued a check to Claimant in the amount of $12,608.74, for temporary total disability benefits, $5,550.04 for permanent partial disability benefits and $1,028.89 for interest totaling $19,187.67. (*Id*. at Stip. 12).

Therefore, I find that the Claimant is entitled to a penalty of 10% of the credit erroneously taken by the Employer, $1,815.88.

Order

Accordingly, it is hereby ordered that Employer's Petition for Modification is DENIED and:

1. Employer's request for § 22 modification is Denied;

2. Employer, Newport News Shipbuilding and Dry Dock Company, is hereby ordered to pay a penalty to Claimant, Joseph N. Daniels, in the amount of $1,815.88 pursuant to § 14(e); and

3. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON
Administrative Law Judge