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1-150607
1-150210
1-151025

In the Matter of

BLAIR TRACY
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

Appearances:

James G. Fongemie, Esq., McTeague, Higbee, Case, Cohen, Whitney & Toker, Topsham, Maine for the Claimant

Stephen Hessert, Esq., Norman Hanson & DeTroy, LLC, Portland, Maine, for the Employer

BEFORE: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for workers' compensation benefits filed by Blair Tracy (the "Claimant") against Bath Iron Works Corporation ("BIW" or "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act"). After an informal conference before the District Director of the

Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in Portland, Maine on March 8, 2004, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The parties offered stipulations, and testimony was heard from the Claimant, and from Memanan Abraham, a vocational expert. The Hearing Transcript will be referred to as "TR." Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-23, and Employer's Exhibits ("EX") 1-28, 31-39. TR 10-18. Employer's Exhibits 29 and 30 were admitted over the objection of the Claimant. TR 12-15. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-7. TR 18-19. Thereafter, the parties filed briefs. The record is now closed.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

Four injuries are alleged in this case**.** With regard to the injuries alleged to have occurred on September 2, 1999,[1] December 7, 1999 and August 9, 2000 the parties have offered the following stipulations: (1) the Longshore Act applies; (2) an employer/employee relationship existed at all relevant times; (3) the injuries arose out of and in the course of the Claimant's employment; (4) the notices, claims and controversions were timely filed; (5) the average weekly wage for the September 22, 1999 injury is $541.74; (6) the injury to the right upper extremity occurred on September 2, 1999; (7) an electrocution injury occurred on December 7, 1999; (8) a left upper extremity injury occurred on August 9, 2000; (9) the average weekly wage for the December 7, 1999 injury is $584.18; (10) the average weekly wage for the August 9, 2000 injury is $613.84.; (11) the informal conference was held on May 8, 2003. TR 5-10.

With regard to the alleged injury of November 3, 1999 the parties stipulated: (1) the Longshore Act applies; (2) an employer/employee relationship existed at all relevant times; (3) the notice, claim and controversion was timely filed; (4) the average weekly wage is $567.34. TR 5-10, 25.

With regard to the injuries of September 2, 1999, December 7, 1999 and August 9, 2000 the only issues in dispute are the nature and extent of any disabilities. With respect to the alleged injury of November 3, 1999 the issues in dispute are (1) causation and (2) the nature and extent of any disability.

[1] In their briefs, both parties incorrectly indicate that the date of the September injury is September 22, 1999. However, the notice of injury and the parties' statements at the hearing reflect that the injury actually occurred on September 2, 1999. CX 12; *see also* TR at 8.

III. Findings of Fact and Conclusions of Law

A. Background

Blair Tracy was forty eight years of age at the time of the hearing in this matter. TR 31. After graduating from high school he worked briefly cutting trees for Scott Paper Company and then joined the Navy. TR 31-33. While in the Navy he worked as a cook. TR 32. He was discharged from active duty in 1977 and he began college, completing a Bachelor of Science degree in geology and geography in 1982. TR 32-43.

Unable to find a job in his field of study he began work as a car salesman in 1983. TR 33-34. He worked at several dealerships over the next five to six years. In 1988, the Claimant began working at Gates Formed Fiber as a research and development technician. TR 34. He worked there for ten years until 1998 when he went to work for Bath Iron Works. TR 35. At the shipyard, the Claimant worked as a ship fitter, with significant repetitive work grinding welds, and lifting and installing heavy doors. TR 37-40. In performing his duties he used pneumatic tools powered by air and electric tools. TR 38.

The Claimant went to the shipyard First Aid on September 2, 1999 because he experienced a burning sensation and pain in his right elbow. TR 42-43. He was sent for physical therapy treatment and was given work restrictions which precluded use of vibratory tools with his right arm. TR 42-43; EX 26 at 168. On September 15 he reported pain in his left elbow. TR 43-44; EX 26 at 163-166. He had physical therapy on the left upper extremity and the work restrictions for the right upper extremity were extended to the left arm. EX 26 at 162. By November 8, 1999, the Claimant reported that his right elbow was much better after a cortisone injection and he was cleared to return to full duty, even though he reported bilateral tingling in the palms of the hands which began two weeks previously. EX 26 at 147. On November 17, 1999, the Claimant reported a tingling in his left hand and was diagnosed with left carpal tunnel syndrome. EX 26 at 140-142. He was sent to physical therapy and work restrictions limiting his use of vibratory tools were imposed. *Id.*

On December 7, 1999 the Claimant suffered an electrical shock from a welding or electrical machine. TR 44-45. He was treated at the Hospital overnight and then returned to his restricted duty shipfitter job. On August 9, 2000, BIW informed the Claimant that there was no other work within his work restrictions and he was placed out of work. TR 48. The Claimant testified that he continued to check on the availability of light work with BIW on a weekly basis. *Id*.

The Claimant continued to experience right elbow pain and numbness in the left hand and was seen by Dr. Mazzora, at the shipyard, and by Dr. Caldwell. CX 2; EX 26.

The Claimant was referred to Dr. Hector Rosquete of Central Maine Orthopaedics on March 23, 2000. Dr. Rosquete agreed that the Claimant had right lateral epicondylitis and left carpal tunnel syndrome. He counseled against surgery. CX 5 at 49-50, 52; TR 64-65.

Because the Claimant's right elbow condition did not improve and he continued to have pain over the right elbow, he sought a second opinion. CX 5 at 52. Dr. William Rogers, an orthopedic surgeon, recommended surgery. TR 49; CX 21 at 310. In late April 2001 Dr. Rogers performed the first of two surgeries. Following the initial surgery, the Claimant's right elbow condition did not improve. CX 21 at 311-315; TR 49, 65. Dr. Rogers performed a second surgery, a lateral epicondylectomy with radial tunnel decompression on the right elbow on September 13, 2001. CX 21 at 316-318. The Claimant testified that his right elbow condition has not improved as a result of the two surgeries. TR 65-66. The Claimant's restrictions for his right and left upper extremities were made permanent in November 2001. CX 7 at 57, 59.

In January 2002, John Ruffing, Ph.D., a vocational rehabilitation specialist, began working with the Claimant under the Department of Labor's Office of Workers' Compensation Program's Vocational Rehabilitation Program. CX 16, CX 17; TR 48-52. BIW informed Dr. Ruffing that it could not accommodate the Claimant's restrictions. CX 16 at 234. Dr. Ruffing's reports indicate that the Claimant was highly motivated to make a career change and that he participated fully in the resources available through the Career Center, and followed up on job leads. EX 16 at 232-235. Dr. Ruffing arranged an on-the-job Vocational Training Program for the Claimant with Air & Water Quality, Inc., which was in the Claimant's field of study. CX 16 at 236. The program was to last eight months, and included specific training needed for the position as well as ongoing on the job training. CX 16 at 236-239. The agreement called for Air & Water Quality to employ the Claimant upon completion of the training program. In exchange, the OWCP agreed to reimburse Air & Water Quality 50% of the Claimant's wages during the eight month training program. The Claimant's monthly evaluations indicated he performed well while working and training at Air & Water Quality. CX 16 at 240-249; TR 84. During this period, the Claimant's wages exceeded his pre-injury wages at BIW. However, on March 20, 2003, at the end of the training period and, not coincidentally, the end of the subsidy from OWCP, Air & Water Quality laid the Claimant off, reporting a lack of work. TR 51-53.

The Claimant testified that he immediately began a job search the next day through the Career Center and he also applied and obtained some substitute teaching positions on a part-time basis. TR 53-54; 88-89. During the summer of 2003, the Claimant worked to obtain credentials to work as an Education Technician III. TR 54, 90. In addition, the Claimant unsuccessfully applied for several other jobs unrelated to teaching during that summer. TR 90-91. For example, the Claimant testified that after he was laid off from Air & Water Quality he called two smaller companies that perform the same type of work and was told that they were small family run businesses and were not hiring. TR 86-87. On November 6, 2003 he was hired as a full-time Education Technician III at Oak Hill High School. TR 55. The Claimant earns $9.21 an hour, receives health insurance, is paid for 10 sick days and holidays, but does not receive vacation. TR 56.

On December 2003, the Claimant began working with Martin Fitzpatrick, a vocational rehabilitation specialist, in an effort to obtain employment with an increased wage. CX 16 at 253; CX 17 at 274. Mr. Fitzpatrick was assisting the Claimant in obtaining more lucrative employment and the Claimant continued to use services through the Career Center to obtain employment. CX 17 at 257-265; CX 18 at 280-295. However, at the time of the hearing none of

the employers contacted by Mr. Fitzpatrick and with whom the Claimant followed up had offered the Claimant a job. TR 93-95.

B. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Director, OWCP,* 688 F. 2d 862 (1st Cir. 1982).

The Claimant alleges four injury dates, two of which allege overuse injuries to the left upper extremity. The Claimant contends that left upper extremity injuries occurred on November 3, 1999 and August 9, 2000. BIW points out that the November 3, 1999 and the August 9, 2000 alleged injuries relate to the left hand and upper extremity. BIW argues that the

two alleged injuries are actually the same injury. BIW Br. at 2 n.1.[2] It is necessary to evaluate the evidence to determine whether the alleged upper extremity injuries are separate or the same injury.

On September 15, 1999, the Claimant complained of left elbow pain, was diagnosed with left epicondylitis and referred to physical therapy. EX 26 at 163-167; TR 43. By October 15, 1999, the BIW Health Department indicated that the Claimant's left elbow pain had resolved with physical therapy. EX 26 at 153.

On November 8, 1999 the Claimant reported tingling in both palms of two weeks duration. EX 26 at 143; TR 43-44. On November 17, 1999 the Claimant reported tingling in the left hand that began on November 3, 1999. EX 26 at 142. He was diagnosed with carpal tunnel syndrome, referred to physical therapy and given work restrictions for the left upper extremity, in addition to those he previously had for the right upper extremity. EX 26 at 129-130, 134-136, 140-143. The Claimant continued to work with his restrictions until his last day of work at BIW, August 9, 2000. There is no report of injury to the left upper extremity to the BIW First Aid Department on that date. At the hearing, the Claimant did not testify to a specific injury to his left upper extremity on that date. He did indicate that he continued to have pain in the left elbow and numbness in the last three digits of the left hand. TR 46-47, 66-68. The Claimant had been seen by a neurologist, Dr. Vigna, in February 2000, six months before he was put out of work. Dr. Vigna also diagnosed left carpal tunnel syndrome. EX 25 at 101-104; TR 69-70. In addition, the medical records from 2000 indicate the Claimant was seen for a left carpal tunnel condition on several occasions. EX 26 at 104-105; EX 24 at 98-100. Thus, the Claimant continued to experience flare-ups in carpal tunnel syndrome symptoms on occasion since his initial diagnosis in November 1999. Based upon the evidence submitted, I conclude that the November 3, 1999 injury and the August 9, 2000 injury are overuse injuries to the left upper extremity resulting in carpal tunnel syndrome and are in fact the same injury rather than separate and unrelated left upper extremity injuries. BIW has acknowledged that the injury of August 9, 2000 to the left upper extremity is work-related.

C. Nature and Extent of the Injuries

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

[2] As noted above, BIW has stipulated that the August 9, 2000 overuse injury to the left upper extremity is related to the Claimant's employment at the shipyard.

1. Nature of Disability

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask ,* 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) *cert. denied* 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

In the present case, the Claimant appears to argue that he has reached maximum medical improvement with regard to injuries to his right and left upper extremities.[3] Cl. Br. at 6-7; TR 22-24. As best I can discern, the Claimant relies upon the opinion of Dr. Phelps, who performed permanent impairment evaluations on February 11, 2003. Cl. Br. at 6, 9-11. The Employer concedes that the Claimant has reached maximum medical improvement with regard to his right and left upper extremity injuries. BIW Br. at 14-17.

At the Claimant's request, Dr. Phelps performed permanent impairment assessments for the Claimant's upper extremity injuries on February 11, 2003. Dr. Phelps reviewed the Claimant's medical records and examined the Claimant. He assigned permanent impairment ratings for the Claimant's right and left upper extremity injuries. Although Dr. Phelps' report does not state outright that the Claimant has reached maximum medical improvement, his report reflects a familiarity with the *American Medical Association Guides to the Evaluation of Permanent Impairment*, ("*Guides*"), and he assessed permanent impairment ratings for both upper extremity injuries. Therefore, I conclude that while not explicit, implicit in his report is a determination that the Claimant had reached maximum medical improvement by the date of his examination on February 11, 2003.

On December 10, 2003, at the Employer's request, Dr. Christopher Brigham performed an independent medical and impairment evaluation of the Claimant. EX 32 at 1-2. With the exception of the records from Dr. Rogers, who performed the two surgeries, and from Dr. Raczynski, the Claimant's primary care physician, Dr. Brigham, reviewed the Claimant's medical records. He also examined the Claimant. Based upon his physical examination of the Claimant and his review of the medical records, Dr. Brigham assessed permanent impairment ratings for both upper extremity injuries. Dr. Brigham's opinion that the Claimant had reached maximum medical improvement is qualified. EX 32 at 263, 265. On one hand, he suggests that the Claimant have an orthopedic surgery consultation by a skilled orthopedist in the Portland, Maine area rather than in Augusta where his two prior right elbow surgeries were performed. EX 32 at 265. Although he recommends a surgical consultation he also states "it is questionable whether or not further surgical intervention would be required." *Id.* However, he states that in

[3] The Claimant stated that he does not claim any disability related to the December 7, 1999 electric shock injury. Cl Br. at 8; TR 20.

light of the difficulties the Claimant experiences with use of his right upper extremity after his two "failed" surgeries, such a consultation would be appropriate. *Id*. Nonetheless, he also states that if the Claimant does not have "further diagnostic evaluations or therapeutic interventions" then the Claimant has reached maximum medical improvement with regard to the two upper extremity conditions. EX 32 at 263. After considering Dr. Brigham's report as a whole, I find that his report does support a finding that the Claimant has reached a point of maximum medical improvement with regard to his work-related upper extremity injuries.

In any event, as noted above, a disability may also be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. The Claimant's right elbow condition has persisted since the injury developed in 1999. Right elbow surgeries in April and September 2001 did not correct the condition and the Claimant continued to experience significant and continuous pain, reduced grip strength, and reduced range of motion in the right elbow. With regard to the left upper extremity carpal tunnel syndrome, the Claimant has continued to experience tingling in the left hand and discomfort. Since November 1999, he has suffered flare-ups or aggravations of this condition with associated elevations in discomfort whenever he increases the use of his left hand. The Claimant's impairments have existed for several years without improvement. Accordingly, I find that the Claimant's right and left upper extremity injuries are permanent.

2. Extent of Disability

A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air America, Inc. v. Director OWCP*, 597 F.2d 773 (1st Cir. 1979); *Am. Stevedores v. Salzano* 538 F.2d 933 (2nd Cir. 1976); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir.1981).

The Claimant asserts that he is entitled to both a closed period of permanent total disability compensation from March 20, 2003, the date he was laid off from Air & Water Quality, through November 6, 2002, the date he started working as an Education Technician. He also asserts entitlement to permanent partial disability benefits thereafter under the schedule. Cl. Br. at 2; TR 22-24.[4] The Employer contends that the Claimant is not entitled to any closed period of total disability compensation for the period March 20, 2003 to November 6, 2003 because he was not disabled. The Employer contends that it successfully demonstrated that

[4] Later in his brief, the Claimant asserts for the first time that he is entitled to permanent total disability benefits for the period March 20, 2003 through January 11, 2004, the latter date is the date a Labor Market Survey was completed, and that the Employer is entitled to a credit for earnings received during that period. Cl. Br. at 8.

suitable alternate employment existed during this period. BIW Br. at 11-14. BIW, however, acknowledges that the Claimant is entitled to permanent partial disability compensation under the schedule for a 14% permanent impairment of the right upper extremity and a 3% permanent impairment of the left upper extremity based upon Dr. Brigham's impairment rating, subject to a credit for previous payments made for the right upper extremity injury under the schedule. BIW Br. at 15-17.

The parties agree that the Claimant is unable to return to his pre-injury job at BIW's shipyard. The burden then shifts to the Employer to show that suitable alternative employment is readily available in the Claimant's community for individuals of the same age, experience, education and physical restrictions as the Claimant which requires proof that there is a reasonable likelihood, considering these factors, that the Claimant would be hired if he diligently sought the job. In *Air American*, the First Circuit adopted a slightly different standard and held that the severity of the Employer's burden must reflect the reality of the situation and it indicated it would not shift the burden in all cases. 597 F.2d at 779-780. The First Circuit held that it would not place the burden of establishing that actual available jobs exist on the employer in all cases and specifically that it would not do so when it is "obvious" that there are available jobs that someone of the claimant's age, education, and experience could do. *Id.* Citing *Air American*, Bath Iron Works asserts that in light of the Claimant's college education, work history, transferable skills and work restrictions (limiting lifting with the right upper extremity and repetitive and forceful movements with the left), the existence of suitable alternative jobs is clear. BIW Br. at 13.[5]

The claimant in *Air American* had been a pilot with two years of college. He also had experience with brokerage and personnel work and while his impairment precluded him from flying, it did not preclude him from working at any number of desk jobs. The First Circuit explicitly noted that the claimant admitted he was capable of a desk job but had made no attempt to look for any work since leaving Air American. 597 F.2d at 778. In fact, as the Court stated, the claimant had been offered a job in a brokerage business which he declined. Under these circumstances the Court determined that the burden placed upon the employer did not require the employer to show the actual availability of other jobs. 597 F.2d at 579-580.

In the present case, the Claimant has a college degree in geography and geology, he is forty-eight years old and has experience in sales and laboratory work. The Claimant's work restrictions preclude the use of vibratory tools with either the right or left upper extremity, impose significant right upper extremity lifting limitations and preclude rapid, repetitive use of the left upper extremity. CX 7 at 57, 59. In addition, the Claimant has constant pain in the right elbow which limits the jobs he can perform. Unlike the circumstances in *Air American*, the Claimant in the present case has cooperated fully with vocational rehabilitation efforts and he has diligently pursued employment opportunities. Therefore, I conclude that the facts here are sufficiently different from those present in *Air American* to warrant a finding that BIW is required to show the actual existence of alternative work.

[5] The Claimant failed to address the *Air American* decision in his brief.

BIW asserts that it has provided ample evidence of suitable alternate employment. BIW Br. at 13-14. The Claimant contends that the Employer failed to establish suitable alternate employment. Cl Br. at 7-9. The Claimant became employed at Air & Water Quality in July 2002, through the assistance of Dr. Ruffing a vocational specialist and the OWCP Vocational Rehabilitation Program.[6] An initial question is whether this position actually existed in the competitive market place such that it can properly be considered suitable alternate employment. The agreement between the Air & Water Quality and the OWCP called for the Claimant to receive some on-the-job training and to be hired upon completion of the eight month training period. In exchange, the OWCP covered 50% of the Claimant's salary during the period of the agreement. The Claimant upheld his part of the agreement as he successfully completed the training and certifications required, he worked for eight months and he consistently received favorable monthly evaluations. However, as the training program drew to a close and with it the 50% salary supplement from OWCP, the company laid the Claimant off. Under these circumstances, it is not possible to conclude that this job actually existed in the marketplace as it appears that without the salary subsidy from OWCP, no job existed at Air & Water Quality.[7] Therefore, I find that this position was not suitable alternate employment.[8]

Having determined that the Air & Water Quality position was not suitable, I now consider the additional evidence offered by the Employer to meet its burden of showing that suitable alternate employment existed in the Claimant's community in the period between his layoff on March 20, 2003 and November 6, 2003, the date he obtained employment as an Education Technician. Dr. Ruffing, a vocational rehabilitation counselor, began working with the Claimant in January and February 2002. EX 37 at 4-5, 14-15; EX 16 at 28-29. Dr. Ruffing testified that because of the Claimant's education level and the job market he initially

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[6] BIW also promoted the Claimant's vocational rehabilitation efforts by covering the cost of some training required for this position. EX 37 at 32.

[7] The Claimant's contention that this was not suitable alternate employment because the Claimant required training is not persuasive. Air & Water Quality agreed to provide on-the-job training and by all accounts did so. As long as an employer is willing to provide the training necessary for a claimant to successfully perform the job and the job is consistent with a claimant's physical restrictions, age and education, the job qualifies as suitable alternate employment. Of course, I have previously determined that this position was not suitable as the position was not actually available in the competitive market without the OWCP subsidy.

[8] Assuming for the sake of argument, that the job at Air & Water Quality was deemed suitable alternate employment, the Claimant, citing *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990), nevertheless argues that he is not precluded from establishing entitlement to a subsequent period of total disability compensation from the date of his layoff until he began work as an Education Technician on November 6, 2003. Cl Br. at 8-9. Not surprisingly, quoting *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 659, 658 (1979), the Employer argues that having shown suitable alternate employment by the Claimant's job at Air & Water Quality, it did not become a long-term guarantor of employment for the Claimant. BIW Br. at 13. In this regard, I note that the Board has held that the Employer is not an employment agency for injured employees. In *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49, 51-52 (1991) the Board held that the "fact that the claimant was laid off due to a work reduction, did not impose on the employer the responsibility of identifying new suitable alternate employment, as the employer is not a long-term guarantor of claimant's employment." *But cf Vasquez*, 23 BRBS 428 (1990). Therefore, once the Employer has established suitable alternate employment, which a claimant successfully performs for a period of time, but later loses for reasons not associated with the disability or any misconduct, the employer has satisfied its burden and is not required to identify yet another suitable alternate employment.

recommended that the Claimant be referred for job placement rather than training. EX 37 at 21, 24-26. Dr. Ruffing explained the reason for his recommendation was that when he looked at the local labor market he identified jobs he believed were reasonable for the Claimant and were available in Maine. *Id*. The jobs Dr. Ruffing identified included design technician, laboratory tester, and sales representative. EX 37 at 26-29. The wage rate among these three positions varied between $680 – 900 per week. *Id.* Dr. Ruffing also testified that these positions were within the Claimant's physical capacity. TR 28-29. Dr. Ruffing stated that in the period May through July 2002, before he was able to place the Claimant at Air & Water Quality, he identified and the Claimant applied for several jobs in the three fields identified above. EX 37 at 42-44. Dr. Ruffing opined that those types of positions were still available in February 2004 when his deposition was taken. EX 37 at 44-46.

Martin Fitzpatrick, a vocational specialist, began working with the Claimant in December 2003 in an effort to increase his wages and obtain full-time benefits. EX 17. He identified a position at Katahdin Analytical Services as well as several entities that may have placement specialist positions. EX 17. Mr. Fitzpatrick did not offer any opinion as to whether these positions were also available before December 2003.

The Employer also offered a February 13, 2004 Labor Market Survey prepared by Memana Abraham, another vocational specialist. EX 36; TR 99-101. On March 3, 2004, Mr. Abraham updated his initial Labor Market Survey. EX 39. In preparing his labor market surveys Mr. Abraham relied upon the work restrictions identified by Dr. Brigham. TR 102. Dr. Brigham concluded that the Claimant has a "work capacity at least of a sedentary nature, if not light, as defined in the dictionary of occupational titles." EX 32 at 265. He went on to note that the Claimant is limited to light lifting with the right upper extremity and stated "[i]t is difficult to estimate what his lifting capabilities are, however, it is probable that it is greater than 2 pounds." *Id*. Dr. Brigham advises against repetitive and forceful use of both the right and left upper extremities. *Id.* Mr. Abraham testified that he although he construed Dr. Brigham's report as permitting the Claimant to lift from 2 to 20 pounds, as twenty pound is the lifting limit for light work as defined by the dictionary of occupational titles, he looked mainly for jobs of a sedentary nature which limit lifting to ten pounds. TR 110-111. Dr. Rogers, the Claimant's orthopedic surgeon, indicated that the Claimant should limit lifting with the right upper extremity to five pounds. This is consistent with a sedentary level position.

Mr. Abraham testified that the Claimant has multiple job skills that could be applied in several specific positions. TR 103-106. Mr. Abraham explained that after contacting several employers directly he identified positions he deemed suitable for the Claimant. Mr. Abraham reported that two positions involved automotive sales. EX 39 at 393. The first position at Pape Chevrolet required lifting up to ten pounds occasionally, which can be accomplished using the left arm. This position is consistent with the Claimant's education, experience and physical capabilities and is therefore suitable. The second automotive sales position at Maine Mall Motors requires lifting up to 20 pounds occasionally. Lifting a twenty pound weight is not consistent with the Claimant's physician's restrictions for sedentary level activity and is at the outside limit of weight that Dr. Brigham suggests, but does not unequivocally state, that the Claimant can lift. TR 112-113, 117; EX 36 at 303; EX 39 at 393-394. Additionally, it is more difficult to lift a twenty pound weight using one arm than it is to lift a ten pound weight. Thus, I

conclude that this position is beyond the Claimant's lifting capability and is not suitable. The third position identified was an inside sales representative job with Concurrence, a telemarketing company. EX 39 at 394. This position requires minimal data entry requiring the entry of a customer name, address and order. TR 117-120. Although the Claimant stated that he did not believe he could perform this job as it would be very painful to do the repetitive wrist movement required, he admitted that he used a computer during the eight months he worked at Air & Water Quality. Based upon the evidence before me, I can not conclude that the position at Concurrence required extensive data entry such that it could be considered a position involving repetitive use of the hands. Therefore, I find that this position is suitable. The fourth position listed by Mr. Abraham is a service writer job with Forest City Chevrolet. It appears that this position is consistent with the Claimant's education, experience and physical restrictions and therefore it is suitable. Finally, Mr. Abraham lists a Rental Sales representative Position with Enterprise Rent A Car. This position requires lifting 15 pounds and also requires good math skills. As the Claimant is limited to lifting no more than ten pounds this position is outside his physical capabilities, and therefore, is not suitable. Mr. Abraham's first labor market survey also includes an Education Technician position with the Brunswick Maine School Department. EX 36 at 304. This position is within the Claimant's restrictions and is suitable. Finally, Mr. Abraham testified that based upon his expertise and knowledge of the labor market in Maine, the types of positions he identified in his labor market surveys in early 2004 were also open and available in the local labor market during the time period from March to November 2003. TR 107-109.

The Claimant argues that the labor market surveys only cover the period at the earliest beginning January 11, 2004 and that as a matter of law this is insufficient to establish the availability of suitable work prior to that date. Cl. Br. at 8. The Claimant fails to cite any authority to support his argument in this regard. The Board has held that an employer can attempt retroactively to show that suitable alternate employment existed on the date of maximum medical improvement. *Rinaldi* v. *General Dynamics Corp*., 25 BRBS 128, 131, (1991) citing *Palombo v. Director, OWCP*, 937 F.2d 70, 77 (2nd Cir. 1991). In the present matter, BIW has attempted only to show that suitable alternate employment existed during the period of March 20, 2003 through November 6, 2003 after the Claimant was laid-off from the Air & Water Quality position and prior to his obtaining the Education Technician position. In addition to Mr. Abraham's testimony that positions similar to those he identified in his early 2004 labor surveys also existed in March through November 2003, in the spring of 2003 Dr. Ruffing had identified three positions, design technician, laboratory tester and sales representative that he determined were consistent with the Claimant's education, experience and physical limitations. On this evidence, I conclude that the Employer has established that suitable alternate work was available in the period of March to November 2003.

Having found that the Employer has established suitable alternate employment, the burden now shifts to the Claimant to establish a diligent work search during the relevant period. The Claimant stated that after he was laid off from Air & Water Quality he began looking for work. TR 53-54. He stated that he began substitute teaching on a part-time basis in local schools during the Spring of 2003 and continued until school ended in June 2003. *Id.* The Claimant also testified that he went to the Career Center to use the resources there in his employment search in addition to checking three area newspaper help wanted ads. TR 54-55. The Claimant testified that over the summer of 2003 he also completed the necessary paperwork

to obtain credentials to work as an Education Technician III and he looked for work. TR 54-55, 90-91. In the Fall of 2003, the Claimant interviewed at a few schools and on November 6, 2003 was hired by Oak Hill High School as a full-time Education Technician. He remains in that position. I find the Claimant's testimony as to his job search efforts during this period credible. The Claimant's motivation and commitment to a job search were also corroborated by Dr. Ruffing's testimony that during the time he worked with the Claimant, the Claimant was diligent about using the Career Center and applying for positions that were identified. EX 37 at 42-43. On the record before me, I find that the Claimant has established that he engaged in a diligent job search in the weeks and months following his lay-off from Air & Water Quality. The Claimant's efforts were not successful until November 2003 when he was hired by the Oak Hill High School. Therefore, I conclude that the Claimant has shown that he was permanently disabled for the period March 2003 through November 5, 2003. Accordingly, the Claimant has established that he is entitled to a period of permanent total disability from March 20, 2003 until November 5, 2003.

The parties' agree that the Claimant is also entitled to a scheduled award for permanent partial disability under Section 8(c) of the Act. Cl. Br. at 9; BIW Br. at 5, 15-16. However, the parties disagree as to the extent of the Claimant's permanent partial impairment. Relying on the permanent impairment assessment by Dr. Phelps, the Claimant contends that he is entitled to a 31% permanent impairment of the right upper extremity and a 14% permanent impairment of the left upper extremity. Cl. Br. at 9. In contrast, the Employer, citing Dr. Brigham's assessment of permanent impairment, argues that the Claimant has a 14% permanent impairment of the right upper extremity and 3% permanent impairment of the left upper extremity. BIW Br. at 15.[9]

The permanency ratings of Doctors Phelps and Brigham vary significantly. It appears that the *Guides* do not include a section specifically rating permanent impairment resulting from lateral epicondylitis, the Claimant's condition. Therefore, the physician's were required to look to sections of the *Guides* covering similar conditions to develop a permanent impairment rating for the Claimant. Both physicians determined that the Claimant has a 1% permanent impairment of the right upper extremity as a result of sensory loss. Ex 28 at 210; EX 32 at 32. The principle difference in the two right upper extremity impairment ratings is that Dr. Phelps, relying on Section 16.7 "Impairment of the Upper Extremities Due to Other Disorders," diagnosed tendonitis under Section 16.7d, and made his impairment evaluation on the basis of loss of grip strength pursuant to Section 16.8, ultimately finding a 31% impairment of the right upper extremity. EX 28 at 209-210, 212-213.[10] In contrast, Dr. Brigham stated that lateral

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[9] Dr. Peter Esponnette of Occupational Health & Rehabilitation Inc. also performed an independent medical examination of the Claimant as assessed permanent impairment ratings. EX 31. The parties acknowledge that Dr. Esponnette's permanency rating utilized the Fourth Edition of the Guides to Evaluation of Permanent Impairment, rather than the most current Fifth Edition. Cl Br. at 6; BIW Br. at 15-17. Therefore, neither party relies upon Dr. Esponnette's permanency rating, although both parties refer favorably to some aspects of his permanency determination. Cl Br. at 6; BIW Br. at 16.

[10] I am not persuaded by the Employer's argument that Dr. Phelp's opinion is entitled to less weight simply because the Maine Board of Licensure in Medicine has placed him on probation and in a reciprocal action the New York Board of Professional Medical Health has accepted a voluntary surrender of his license. Despite the Claimant's inference to the contrary, the evidence of record reflects that Dr. Phelps' license issues do not involve his medical competency in terms of orthopedic skills. EX 29, EX 30, CX 22, CX 23.

epicondylitis is not typically considered to result in permanent impairment unless surgery has occurred. EX 32 at 263. However, Dr. Brigham noted that the *Guides* provide that in "situations where impairment ratings are not provided . . . [physicians] use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measurable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living. The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the *Guides* criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment." EX 32 at 264. Applying these factors, Dr. Brigham assessed a 10% right upper extremity impairment resulting from the Claimant's right upper extremity surgery, presumably reflecting strength deficiencies.[11] *Id.* Dr. Brigham then proceeded to used Section 16.4h "Elbow Motion Impairment" to rate the Claimant's motion deficit, finding a 3% impairment of the right upper extremity. EX 32 at 31. In combination then, Dr. Brigham assessed a total permanent impairment of 14% for the right upper extremity.[12]

The Employer challenges Dr. Phelps' findings related to ulnar nerve involvement, noting that Dr. Brigham commented in his report that Dr. Phelps' findings relating to alleged ulnar nerve involvement were unusual because he rated for ulnar nerve involvement when no prior examiner noted problems with the ulnar nerve. BIW Br. at 16; EX 32 at 248. However, in spite of his criticism of Dr. Phelps in this regard, Dr. Brigham also observed clinical evidence of ulnar nerve dysfunction and he assessed a 1% permanent impairment of the right upper extremity. EX 32 at 264-265. Dr. Brigham also found error in Dr. Phelps' failure to perform grip strength in five positions and in the fact that Dr. Phelps evaluated grip strength in the context of pain. EX 32 at 248. Dr. Brigham referred to the *Guides* Section on Strength Evaluation, which states that "decreased strength cannot be rated in the presence of decreased motion, painful conditions…." *Guides* at 508. As the Claimant has significant pain and decreased motion in the right elbow, Dr. Brigham concluded that grip strength could not be used to evaluate his impairment. EX 32 at 263. In addition, the *Guides* state that "[b]ecause strength measurements are functional tests influenced by subjective factors that are difficult to control and the *Guides* for the most part are based upon anatomic impairment, the *Guides* does not assign a large role to such measurements." *Guides* at 507 (5th Ed.).

Dr. Phelps relies heavily upon the *Guides* Section on Strength Evaluation in making his permanent impairment rating of 31% for the right upper extremity. Because the *Guides* explicitly recognize that strength measurements are influenced by subjective factors and are, therefore, not assigned a large role in assessing impairment by the *Guides*, I conclude that in relying almost exclusively on strength measurements in assessing a permanent impairment

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[11] Although he used the Fourth Edition of the *Guides*, Dr. Esponnette assessed a 10% permanent impairment of the right upper extremity for a strength deficit. Dr. Brigham specifically references and concurs with Dr. Esponnette's impairment rating assessing a 10% permanent impairment as a result of strength loss in the right upper extremity when Dr. Brigham makes his determination that the Claimant's surgical intervention accounts for a 10% permanent impairment. EX 32 at 264. Thus, I conclude that Dr. Brigham's assessment of 10% permanent impairment based upon surgical intervention is attributable to diminished strength in the right upper extremity following the Claimant's two right elbow surgeries, even though he does not say so explicitly.

[12] Dr. Brigham's total impairment rating of 14% for the Claimant's right upper extremity reached by combining the 1% impairment for sensory loss, the 10% impairment for strength loss, and the 3%impairment for loss of motion.

rating, Dr. Phelps' impairment rating overstates the extent of the Claimant's permanent impairment. In addition, the *Guides* Section on Strength Evaluation also states that decreased strength cannot be rated in the presence of decreased motion, painful conditions, both of which the Claimant experiences. This further undermines Dr. Phelps' rating.

On the other hand, Dr. Brigham uses a combination of examination findings, experience, training, skill, and ability to apply the *Guides* in assessing a 10% impairment for diminished strength resulting from the effects of surgery. This is not an exact method for assessing permanent impairment and thus would likely result in some variation in opinion among physicians. Dr. Brigham's report indicates significantly reduced grip strength on the right and states that the Claimant's grip strength "appears to be limited by marked pain, with no grip strength noted over 2kg." EX 32 at 257. Because Dr. Brigham's assessment of strength deficiencies is open to variation in interpretation and because the Claimant has substantially reduced grip strength on examination, I conclude that Dr. Brigham's assessment of a 10% permanent impairment for reduced right upper extremity strength underestimates the right upper extremity impairment. The Claimant has stated that he has difficulty gripping objects and he has significant lifting restrictions for the right upper extremity. Based upon the various medical opinions and the Claimant's testimony, I find that the Claimant has a 15% permanent impairment that can be attributed to diminished strength resulting from surgery. Therefore, combining the 1% sensory loss, the 15% strength loss and the 3% motor loss results, I conclude that the Claimant has a total right upper extremity permanent impairment of 19%.

Turning now to the Claimant's left upper extremity permanent impairment, both Doctors Phelps and Brigham find a grade 3 sensory deficit associated with the ulnar nerve. EX 28 at 210; EX 32 at 264. However, Dr. Phelps also finds a grade 2 sensory deficit of the median nerve, whereas Dr. Brigham's report does not reflect a median nerve deficit. The Claimant argues that Dr. Brigham's failure to discuss any median nerve involvement is "curious" because his second diagnosis is "left carpal tunnel syndrome which typically involves the median nerve." Cl. Br. at 10. However, Dr. Brigham's examination of the Claimant explicitly found "discomfort in the ulnar, not median nerve distribution." EX 32 at 256. This likely explains why Dr. Brigham did not discuss median nerve involvement in making his permanent impairment assessment. Dr. Brigham's report points out that the *Guides* provide that for carpal tunnel syndrome only individuals with an objectively verifiable diagnosis should be given a permanent impairment rating. And the diagnosis is made not only on a report of believable symptoms but on the presence of positive clinical findings and loss of function and the diagnosis should be documented by electromyography studies. EX 32 at 264. Dr. Brigham notes that no diagnostic studies were available for his review and he recommends that electromyography studies be done. In spite of his belief that no EMG studies had been done, based upon his clinical examination he believed the Claimant has ulnar nerve sensory involvement and he estimated a 4% permanent impairment.

Contrary to Dr. Brigham's assumption, the medical evidence of record reflects that EMG studies were performed. Dr. Vigna's records state that when he evaluated the Claimant on February 10, 2000 EMG testing showed "left median sensory and motor distal latencies were mildly prolonged with normal proximal conduction velocities, normal amplitudes, and mild dispersion of the sensory wave form." CX 6 at 54. Dr. Vigna diagnosed mild left carpal tunnel

syndrome. Although Dr. Brigham reviewed Dr. Vigna's records in his report, which included the results of EMG testing reflecting some degree of median nerve involvement, Dr. Brigham apparently disregarded those test results when his examination did not reflect median nerve involvement. However, as objective EMG results reflecting median nerve involvement in the Claimant's mild carpal tunnel syndrome exist, Dr. Brigham's failure to factor in the effect of median nerve involvement undermines his impairment rating. In contrast, Dr. Phelps recorded both ulnar and median nerve involvement on physical examination and he noted the electrical conduction delay results in assessing permanent impairment for the left upper extremity. Dr. Phelps impairment assessment is more comprehensive and complete as he considers the effects of both ulnar and median nerve involvement in the left carpal tunnel syndrome diagnosis as evidence by both his physical examination and the EMG study. Accordingly, I credit Dr. Phelps'assessment of a 14% permanent impairment of the left upper extremity.

As an Education Technician, the Claimant works full-time and earns $9.21 per hour, which is less than the pre-injury wages he earned at BIW. The Claimant's actual earnings as an Education Technician establish his wage-earning capacity.

D. Credit

Section 14(j) of the Act provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installment of compensation due." This provision permits the employer to be reimbursed for the amount of its advance payments, where these payments were too generous, for however long it takes out of unpaid compensation found to be due. *Tibbetts v. Bath Iron Works Corp*., 10 BRBS 245, 249 (1979); *Nichols v. Sun Shipbuilding & Dry Dock Co*., 8 BRBS 710, 712 (1978). The Employer argues that it paid temporary total disability benefits pursuant to Section 8(b) of the Act from September 29, 2000 to March 13, 2002, a period of 75 weeks. BIW Br. at 17. The Employer also states that it paid a schedule award under Section 8(c)(1) of the Act for an 11% permanent impairment of the right upper extremity. *Id*. The Employer argues that it is entitled to a credit for both of these prior payments against any compensation benefits awarded herein. The Claimant concedes that the Employer is entitled to a credit for the permanent partial disability already paid (the 11% schedule award) but does not address the Employer's entitlement to a credit for the temporary total compensation benefits paid. Cl. Br. 10-11.

The Employer is entitled to a credit for the scheduled award of 11% permanent impairment of the right upper extremity that it has previously paid against the 15% permanent impairment of the right upper extremity awarded herein. However, the Employer is not entitled to a credit for the temporary total disability compensation previously paid because it was for a period (September 29, 2000 to March 13, 2002) which was prior to and not contemporaneous with the period of permanent total disability compensation awarded herein (March 20, 2003 to November 5, 2003).

E. Compensation Due

Based on the foregoing findings, the Claimant is owed a closed period of permanent total disability compensation pursuant to Section 8(a) of the Act from March 20, 2003 to November 5,

2003, in an amount equal to 66 2/3 percent of the average weekly wages. The Claimant is also entitled to permanent partial disability compensation pursuant to Section 8(c)(1) for a 19% permanent impairment of the right upper extremity and a 14% permanent impairment of the left upper extremity. The Employer is entitled to a credit for permanent partial disability benefits previously paid for the 11% permanent impairment to the right upper extremity.

F. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). The Claimant's counsel filed a fee application on May 25, 2004. In my order, BIW will be granted 15 days from the entry of the Decision and Order to file any objection.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1. The Employer, Bath Iron Works, shall pay directly to the Claimant, Blair Tracy, permanent total disability compensation benefits pursuant to 33 U.S.C.§ 908(a) from March 20, 2003 to November 5, 2003 based on an average weekly wage of $571.54;

2. The Employer shall pay directly to the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C.§ 908(c)(1) for a 19% permanent impairment to the right upper extremity based on an average weekly wage of $571.54 and subject to a credit for permanent partial disability benefits previously paid for the right upper extremity injury;

3. The Employer shall pay directly to the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C.§ 908(c)(1) for a 14% impairment to the left upper extremity based on an average weekly wage of $613.84,

4. The Claimant's attorney has filed a fully supported and fully itemized fee petition pursuant to 20 C.F.R. 702.132(a), sending a copy thereof to counsel for the Employer. The Employer shall have fifteen (15) days from the date this Decision and Order is issued to file any objections;

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

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts