U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 August 2007

CASE NOS.: 2005-LHC-1343
2005-LHC-2072

OWCP NOS.: 07-160558
07-159036

IN THE MATTER OF:

N. W.[1]

Claimant

v.

INGALLS SHIPBUILDING, INC./
NORTHROP GRUMMAN SHIP SYSTEMS, INC.

Employer

APPEARANCES:

N. W.

Pro Se

DONALD P. MOORE, ESQ.

For The Employer

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

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Ingalls

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

Shipbuilding, Inc./Northrop Grumman Ship Systems, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 2, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered five exhibits, including one offered post-hearing. Employer proffered 15 exhibits, including two exhibits and one supplement offered post-hearing, which were admitted into evidence. No Joint Exhibits were offered. In a letter dated August 4, 2006, Employer withdrew its request for relief under Section 8(f) of the Act. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of the parties, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the formal hearing, the parties stipulated, and I find:

1. That the Claimant's knee was injured on December 5, 2000, and an accident occurred on January 8, 2001, involving Claimant's low back. (Tr. 15, 19).

2. That Claimant's knee injury on December 5, 2000, and the incident on January 8, 2001, occurred during the course and scope of his employment with Employer. (Tr. 15; EX-1, pp. 1-3).

3. That there existed an employee-employer relationship at the time of the accident/injury. (Tr. 15, 19).

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___.

4. That Claimant received temporary total disability benefits from January 13, 2001 through August 5, 2001 at a compensation rate of $610.95. Claimant also received temporary total disability benefits from October 1, 2001 through October 15, 2001, and from July 16, 2002 through November 19, 2002. (Tr. 15-16, 20-21; EX-3 p. 2).

5. That Claimant's average weekly wage at the time of injury was $610.95. (Tr. 15, 19).

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury of Claimant's back.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement with regard to his left knee and back.

4. Entitlement to and authorization for medical care and services.

5. Attorney's fees[3] and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at formal hearing. (Tr. 28). He obtained a GED, and received training as a welder. (Tr. 28-29). He also obtained certification as an electrician from Job Corp, and training in communications and diesel mechanics from the National Guard. (Tr. 31, 59, 67). He built computers under the direction of a co-worker, and as a hobby, and can play computer games. However, he is not familiar with other programs or "going online." (Tr. 60, 61). He also testified he has worked on cars. (Tr. 67).

[3] Claimant was represented by Michael G. Huey Esq., who withdrew as Counsel for Claimant on January 9, 2006. Mr. Huey has filed an attorney fee application and lien for his services performed on behalf of Claimant.

Claimant was in the National Guard for approximately twenty years before being released in 2003. (Tr. 30). He worked at Alabama Dry Dock as an electrician for about seven years, and was employed by Employer for approximately nineteen years. He held a position as a combination tac welder and electrician at the time of his injury. (Tr. 31, 32).

Claimant testified he was injured on December 5, 2000, when he missed a step coming down stairs, causing him to twist his left knee. (Tr. 32, 37). He presented to Employer's medical facility that day, but did not take time off from work because he did not want to forfeit any "Christmas pay." (Tr. 32-33).

Claimant then presented to Dr. Coleman who referred him to Dr. Ray. (Tr. 33). Dr. Ray performed two operations on Claimant's knee. Claimant then returned to work for Employer working light duty. (Tr. 34). His restrictions were later changed to exclude climbing stairs after Claimant encountered problems performing his light duty work. (Tr. 35).

In January 2001, Claimant was working in the office on light duty. He was asked to carry a box of plugs upstairs when he hurt his back. (Tr. 36). Claimant testified that it strained his back and the next day Dr. Ray took him off of work because his back began hurting and he "couldn't hardly walk and my back started hurting." (Tr. 36).

Claimant stated his only prior back injury was a strain which had resolved. (Tr. 37). However, he had previously injured his left knee when he was in the military, which also resolved. (Tr. 37). He did not receive surgery for his knee injury while in the military. (Tr. 38). He described himself as a "strong worker," and stated he did not have back problems prior to carrying the plugs. (Tr. 41).

Claimant testified Dr. Ray eventually told him that there was nothing further he could do for Claimant's knee, and assigned permanent restrictions. However, Employer would not allow him to return to work with the permanent restrictions assigned. (Tr. 38). Thereafter, in March 2002, Claimant presented to Dr. Crotwell. (Tr. 38; EX-5, p. 5).

Claimant testified that Dr. Crotwell performed a third operation on his knee, which did not help. His knee further deteriorated following the operation. Claimant then received injections, and was released to return to work. (Tr. 39). Dr. Crotwell also treated Claimant for his back problems,

prescribing exercise. He did not order an MRI, nor did he prescribe physical therapy. (Tr. 39-40). Claimant was having problems on a daily basis with bending over, lifting, and sitting. (Tr. 40).

Claimant testified his last day of work with Employer was December 3, 2002. (Tr. 41). In February 2003, he was then activated by the National Guard, where he was restricted from climbing, marching, and pushups. (Tr. 41-43). He was forced to retire from the National Guard due to his physical inability to perform jobs assigned to him. (Tr. 44).

At the time Claimant was retired by the National Guard, he had been scheduled to see Dr. Serrato at the Columbia Pain Center for back treatment. (Tr. 45). However, he did not continue to treat with Dr. Serrato because the military personnel with whom Claimant dealt were not cooperative. (Tr. 46). Claimant also treated with muscle relaxers prescribed by the VA Hospital for his back. (Tr. 46).

Prior to his activation by the National Guard, Claimant had applied for Social Security disability benefits based on his back, knee problems, and depression. (Tr. 47). He was referred to Dr. Fontana for evaluation by Social Security. (Tr. 47-48).

Claimant testified that currently his back becomes stiff if he sits for a period of time. (Tr. 50). His knee and back hurt when he walks, which causes sleeplessness. (Tr. 50). He also has problems bending. (Tr. 51). Claimant currently treats with a VA doctor for his back and memory problems. (Tr. 50). He treats with Dr. Crotwell approximately every six months for his knee. (Tr. 52). He currently takes blood pressure medicine and pain pills prescribed by Dr. Crotwell. (Tr. 51). He has never had back surgery. (Tr. 57).

Claimant stated he is currently under restrictions assigned by Dr. Crotwell of no climbing, crawling, bending, twisting of the knee, or lifting above ten pounds. (Tr. 53). However, his duties as a “combination electrician” with Employer required climbing, crawling, bending, and lifting of greater than ten to fifteen pounds. (Tr. 54). He was also required to pull cables and stand for long periods of time. (Tr. 54-55). Claimant believes he was assigned a restriction against sitting for long periods of time by the military. (Tr. 55).

Claimant testified that he applied for a total of six jobs in May and June 2005. (Tr. 62). He did not look for work at any other time because he did not think he could do the work. (Tr. 63). Claimant applied for one job at Searcy Hospital that was not identified by the vocational expert. (Tr. 66). The other jobs for which he applied were those the vocational counselor informed him about. (Tr. 65). Claimant's wife went with him to fill out an application at Pinkerton Security. She secured the job where she is still employed. (Tr. 64-65).

Claimant’s Wife

Claimant's wife testified at formal hearing. (Tr. 69). She has been married to Claimant for about ten years, and they have four children. (Tr. 69, 73).

She testified Claimant "complains a lot" about pain in his back and knee. (Tr. 69). She sometimes has to help him to and from bed. (Tr. 69). He complains of back pain when he walks, and sometimes when he gets up from a sitting position. (Tr. 70). Most nights he wakes up complaining of pain. (Tr. 70). Around the house, Claimant washes some dishes, but does not do outside chores. (Tr. 70).

Claimant's wife testified that she accompanies Claimant to most of his doctors' appointments. (Tr. 71). Claimant last treated with Dr. Crotwell in approximately March 2006, and he treats at the VA clinic. (Tr. 72).

She testified that she accompanied him to look for jobs and that she was hired for a job for which he went to interview. (Tr. 72). She has now worked for that employer for almost five years. (Tr. 72). Claimant had applied as a convenience store clerk and at a security company. (Tr. 73).

The Medical Evidence

Dr. Joseph Ray

Claimant initially presented to Dr. Ray of Mobile Orthopaedic Center on December 6, 2000, the day following his knee injury. Dr. Ray performed an MRI which revealed numerous problems with Claimant’s knee including “numerous ovoid interarticular loose bodies . . . osteoarthritic changes with joint space narrowing.” (EX-4, pp. 2, 5).

Claimant again presented on January 10, 2001. Dr. Ray determined that Claimant's knee required arthroscopic inspection, and also noted "non-tender in low back, sciatic notches, no suggestion of neurogenic pain to the lift leg at this time." (EX-4, p. 4). Dr. Ray also instructed that Claimant was to be off work until his return appointment on January 15, 2001, noting a diagnosis of "post-op arthroscopy left knee on 1-13-01." (EX-4, p. 5). Dr. Ray performed arthroscopic procedures on Claimant's left knee on January 12, 2001 and March 21, 2001. (EX-4, pp. 8, 32).

On March 12, 2001, Claimant again presented to Dr. Ray, who noted "Incidentally, he has a back complaint. He has had some back problems before, but no disability because of it. I think we should go ahead and clear his knee before we do any evaluation on his back." (EX-4, p. 26). In April 2001, Claimant attended physical therapy for his knee. (EX-4, pp. 39, 41).

On May 29, 2001, Dr. Ray noted "[Claimant] says his back is improving as his knee does . . . we will review that subject about his back with relationship to the leg . . . see if there is any further consideration to be given to his back." (EX-4, p. 44).

On June 19, 2001, Claimant again presented to Dr. Ray with his physical therapist Mr. Ware. Dr. Ray reviewed x-rays of Claimant's knee and prescribed aquatic therapy. (EX-4, pp. 45-46).

On July 31, 2001, Dr. Ray noted Claimant was not at MMI, but stipulated a return to light duty work for one month with restrictions. Concerning Claimant's back, Dr. Ray noted "[Claimant] complains of some soreness in his left calf and low back, but he is not exquisitely tender in the low back." Dr. Ray additionally noted "I am not able to detect any major pain generator in the low back. I think he just has a preponderant abdomen and needs to do a home exercise program to tighten up his stomach. We will provide him with a lumbar support to see if that will be of benefit . . . need to pay attention to the low back enough to bring about resolution of his low back strain." (EX-4, p. 50).

Dr. Ray's diagnoses on July 31, 2001 were: (1) Post-op knee surgery for osteochondromatosis and internal derangement of menisci; and (2) associated lumbar strain related to altered use of his leg over a long period of time and during the rehab phase. (EX-4, p. 50). Dr. Ray noted on Claimant's work authorization form a diagnosis of "low back strain." (EX-4, p. 51).

On August 16, 2001, Claimant again presented to Dr. Ray who noted "he has been returned to work on a light duty basis with restrictions. He comes in saying that he was required to do things that aggravated his left knee and even his low back . . . he is able to walk independently although he carries a crutch with him today." Dr. Ray assigned new restrictions and noted "he should not be expected to do excessive bending or heavy lifting because of some tendency to complain of back strain although we have no major diagnostic entity here." (EX-4, p. 52).

Dr. Ray recommended a functional capacity evaluation on September 4, 2001, which was done on September 10, 2001. (EX-4, pp. 54, 58). Dr. Ray reiterated Claimant's restrictions including no excessive bending or heavy lifting because of "a tendency to aggravate his low back." (EX-4, p. 54). The FCE recommendations included "strengthening exercises to the left knee and lumbar stabilization exercises for increased trunk stability." (EX-4, p. 63).

On September 28, 2001, Dr. Ray noted "He continues to insist that he has a back problem and that it should be covered by his workers' compensation, but we don't have authorization to address that this date. Therefore, it will not be commented upon at this time." (EX-4, p. 67). He also noted with regard to the FCE that Claimant had a high degree of credibility and completed lifting activities consistent with a medium level of physical demand. (EX-4, p. 66).

On October 1, 2001, Dr. Ray released Claimant to return to work with permanent restrictions, and assigned MMI for Claimant's knee on October 16, 2001. Permanent restrictions were: no crawling, kneeling, full squatting, stair climbing not more than 45-50% of the usual stair climbing, and no ladder climbing. (EX-4, pp. 70, 73).

On November 5, 2001, a handwritten notation was placed on Dr. Ray's note stating "back cannot be covered yet per FARA." The notation is signed "Donna." (EX-4, p. 69).

On November 21, 2001, Dr. Ray noted he spoke with Dr. Warfield, Employer's physician. Dr. Ray stated that Claimant was ready to return to his regular work as an electrician but to avoid deep squatting and twisting on his leg which would be involved in crouching and squatting tasks. (EX-4, p. 76).

On November 29, 2001, Claimant stated in a letter to Dr. Ray that Employer would not allow him to return to work with restrictions listed. He requested work hardening to help him "get his job back." (EX-4, p. 78).

On December 18, 2002, Dr. Ray assigned 30% impairment rating to Claimant's lower left extremity, equating to 12% whole body impairment. He notes that Employer did not allow Claimant to return to work with restrictions imposed. He further notes "as far as my part is concerned, I will continue to follow him on a monthly basis if the workers' compensation will sponsor him, but otherwise he would have to rely on his own insurance or his own devices." (EX-4, pp. 79-80).

Dr. William Crotwell

On March 11, 2002, Claimant first presented to Dr. William Crotwell with Alabama Orthopaedic Clinic, Azalea Road office, regarding his knee. (EX-5, p. 5). He took x-rays and opined he would place Claimant's disability at 25% impairment to the left lower extremity, 10% whole person, of which 80% of the impairment was attributable to severe arthritic condition which pre-existed the injury. (EX-5, p. 7).

In April and May 2002, Dr. Crotwell treated Claimant's knee with Synvisc injections. (EX-5, pp. 14-18).

On May 28, 2002, Claimant presented to Dr. Crotwell for evaluation of his back as requested by the workman's compensation carrier. Dr. Crotwell noted Claimant reported he was injured around January 8, 2001, when taking a box up a flight of stairs, and had pain the next day. He stated he was told by Dr. Ray that he would treat his back later after treatment for his knee and "he's just rocked along." He also

noted Claimant stated his back has gotten better. He saw a chiropractor in April 2002, under his private insurance and received three or four therapy sessions. X-rays "show some mild degenerative changes at 4-5, but very mild changes noted." (EX-5, p. 20).

Dr. Crotwell noted an impression of: (1) mild to moderate lumbosacral strain; and (2) mild lumbar degenerative disc disease. He recommended exercise to control lumbar strain, weight reduction, and stated no permanent restrictions or disability resulted as "this was basically a lumbar strain that has essentially healed." Concerning Claimant's back, Dr. Crotwell additionally noted "I don't think there's any permanent disability and no permanent restrictions, as far as his back goes he is released to carry out normal activity." (EX-5, p. 21).

On July 16, 2002, Dr. Crotwell performed a third video arthroscopy on the left knee. (EX-5, p. 34). On August 22, 2002, Dr. Crotwell noted Claimant was "still using his crutches, we have to get him off the crutches." (EX-5, p. 41).

On October 2, 2002, a second functional capacity evaluation was performed. The FCE report listed Complainant's "primary complaints" as left knee pain and low back pain that he described as "aching." The report further stated Claimant reported that his low back began to hurt when he was working with his left knee injured, his low back was hurt about one year ago, and his low back pain will come and go depending on what activities he performs. (EX-7, p. 3).

On October 7, 2002, Claimant again presented to Dr. Crotwell who noted Claimant had the FCE which indicated no inconsistencies and no symptom magnification. The FCE placed Claimant in the full light, partial medium category. Dr. Crotwell additionally noted "patient really wants to try to return to regular duty so we are going to let him return." (EX-5, p. 44).

On October 9, 2002, it is noted in Dr. Crotwell's records that Claimant called regarding work hardening, but "WAC (workman's comp) denies, patient informed." (EX-5, p. 44).

On November 13, 2002, Dr. Crotwell noted "as far as his knee I think he's reached MMI," and released Claimant to full light/partial medium category work with restrictions of no excessive kneeling, crawling, bending, twisting or stooping, and

no ladder climbing. Claimant's disability was noted as still 25% impairment left lower extremity, 10% whole person, with 80% of impairment caused by pre-existing arthritic condition. (EX-5, p. 46).

On October 15, 2004, a handwritten note at the bottom of Dr. Crotwell's medical note states "WAC (workman's compensation) . . . back not covered." (EX-5, p. 55).

On November 2, 2004, Dr. Crotwell stated in a clinic note that Claimant was discharged from the military in June 2004 and was using a cane. He noted Claimant had severe pain in his left knee and x-ray evaluation "shows a horrible patella with calcification and a lot of severe patellofemoral arthritis." He stated Claimant could receive conservative treatment with knee brace and occasional injections, or total knee replacement. Dr. Crotwell released Claimant to "very light duty" work with restrictions, opining that Claimant would have the restrictions until he received the knee replacement surgery. (EX-5, pp. 61-62).

In a letter to Dr. Crotwell dated November 13, 2004, Claimant stated he cannot do any type of work that "doesn't cause me to have a problem." He indicates he does not want to have a knee replacement, and he believes his knee problem is causing his other [including back] problems, as they did not start until 12/05/2000. He further stated "I would like to have a second opinion on what you said about my back, and being able to go to work in the conditions I am in . . . my back gives me problems when I am sitting down, walking, squatting, and standing up for even a short period of time." (EX-5, p. 64).

A work capacity evaluation was performed on March 23, 2005. Secondary complaints are listed as low back and right knee pain. (EX-7, p. 11). Claimant reported an increase in low back pain from "4-5" pre-evaluation, to "8.5" post evaluation. (EX-7, p. 15). Four inconsistencies were noted, however "Waddell" test[4] did not show Claimant magnified low back pain symptoms. (EX-7, pp. 11, 17). The report notes Claimant reported increased low back pain in addition to left and right knee pain when performing many tasks, low back pain was the only limiting factor to standing during the frequent lifting test. (EX-7, pp.

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[4] Waddell test is used to identify symptom magnification in patients reporting LBP [low back pain]. (Screening for Psychological Factors in Patients With Low Back Problems: Waddell's Nonorganic Signs, Waddells Nonorganic Signs, http://www.orthoteers.org/content/ contentnoframeset.aspx?section=19&article=392&c=1, March 22, 2006).

12, 14). Claimant also reported increased low back pain as a limiting factor when performing side to side reaching while seated. (EX-7, p. 15). The report further notes that Claimant ambulates with a cane, and "tries to control his pain [and] . . . spends most of the day intermittently laying down or sitting because of increased low back and left knee pain. Patient reported he prefers to lay down because sitting exacerbates his low back pain." (EX-7, pp. 15-16).

On March 25, 2005, Dr. Crotwell found Claimant to be at MMI, and spoke to Claimant about inconsistencies noted in the FCE evaluation. He released Claimant to return to work on March 28, 2005, and assigned limitations consistent with the work capacity evaluation of: no frequent lifting over five to ten pounds, with infrequent lifting limited to fifteen to twenty pounds, no ladders, no crawling, no climbing, no excessive bending, twisting, torquing, and only occasional stairs and walking. Dr. Crotwell opined Claimant's physical capabilities were "basically in the very light to sedentary range." (EX-5, p. 87).

On July 1, 2005, responding to a letter from FARA, Dr. Crotwell noted his agreement with the statement: "[Claimant] has no limitations or disability associated with his low back." (EX-5, pp. 89-90).

On October 6, 2006, at Employer's request, Dr. Crotwell addressed three points of his earlier opinions. (EX-14, pp. 3-4). Dr. Crotwell reiterated his position that "in regard to [Claimant's] alleged back injury of January 8, 2001 . . . released [Claimant] as of May 28, 2002 . . . he had recovered 100% from his strain, and was at his preexisting state at that time . . . [Claimant] had no limitations or disability associated with his low back injury of January 8, 2001." He also reiterated that the work restrictions he assigned on March 28, 2005, were "associated with his left knee [injury] only sustained on December 5, 2000." (EX-14, pp. 1-2).

Dr. Andre J. Fontana

On October 20, 2005, Claimant presented to Dr. Andre J. Fontana with Alabama Orthopaedic Clinic for evaluation pursuant to a referral by Social Security. (Tr. 47-48; EX-15, pp. 1-2). Dr. Fontana noted Claimant complained of lower back pain and bilateral knee pain since his injury while working for Employer.

In addition to his knee and back problems, Claimant was diagnosed by a VA doctor as having problems with cholesterol, hypertension, and sleep apnea. He also noted that Claimant ambulates with a cane and walks with a limp. (EX-15, p. 1).

Dr. Fontana noted that x-rays of the Claimant's lumbar spine "reveals some anterior spurring at the L1-2 and L3 areas." He noted an impression of: (1) Severe degenerative arthritis, left knee; and (2) Degenerative Disk Disease Lumbar Spine. Dr. Fontana opined that Claimant should be limited to basically sitting-sedentary type of activities, limited from any heavy lifting, no climbing, and should be limited in standing and walking activities. (EX-15, p. 2).

Dr. Fontana also signed a physical capacities evaluation dated October 10, 2005, in which he listed Claimant's capabilities to include: sitting not to exceed 1 hour at one time, not more than 6 hours total, and standing of less than 1 hour at one time, not to exceed 3 hours total, and walking of less than 1 hour at one time, not to exceed 2 hours total during an eight hour work day. Lifting was limited to five pounds frequently, and six to ten pounds occasionally. Carrying was lifted to ten pounds occasionally only, with no frequent carrying. The report further notes restrictions of no pushing or pulling of arm controls, no use of foot controls, no bending, squatting, crawling, climbing, and only occasional reaching. Dr. Fontana remarked "patient could tolerate sedentary activities." (EX-15, p. 3).

On October 21, 2005, Dr. Fontana signed a certification that Claimant was "considered totally disabled as of 11-2-04." (CX-1, p. 1; EX-15, p. 5).

Dr. James R. Hagler

Claimant, a guardsman, was mobilized by the National Guard in February 2003. (Tr. 41-43). On May 15, 2003, CPT Mary A. Leninski (apparently Claimant's commanding officer) sent correspondence to Commander, Martin Army Community Hospital in which she avers that Claimant's physical condition leaves him "physically incapable of reasonably performing his duties as a 63W10 due to his physical condition." (CX-4, p. 2).

A Medical Retention Board convened on June 11, 2003. They recommended Claimant be referred to the Medical Examination Board/Physical Evaluation Board. (CX-4, p. 1).

Apparently pursuant to military protocol, Claimant was then examined by several military doctors, including Dr. James Hagler who examined Claimant on September 24, 2003, and December 2, 2003. Other examinations were performed by: Dr. Reagan R. Parr, Orthopedics, on March 22, 2003; and Dr. Neil Taufen, Family Practice, on August 7, 2003. (CX-4, p. 5).

Dr. Hagler issued a "Narrative Summary-Medical Evaluation Board" report dated December 2, 2003, summarizing the medical findings. (CX-4, p. 5). The report lists Claimant's chief complaint as "chronic knee pain and chronic back pain." Dr. Hagler noted that Claimant reported he initially injured his left knee in basic training in 1981. (CX-4, p. 5).

Concerning Claimant's back pain specifically, Dr. Hagler noted "lower back has been bothering him increasingly in the past nine months. [Claimant] notes that with limitations of the knee, this has thrown him off and caused more problems with the back. In October 2003 . . . Dr. Daniel Serrato did further MRI . . . multilevel degenerative disc changes." (CX-4, p. 6). Dr. Hagler's diagnoses include chronic knee pain, and low back pain with multilevel degenerative disc disease. (CX-4, p. 7).

An MRI report by Dr. Hunter Nelson on October 9, 2003, notes an impression of "mild lumbar spondylosis with dehydrated disks at all levels. No focal protrusion, stenosis or foraminal narrowing seen. Facet hypertrophy noted at all levels." (CX-4, p. 19).

Ultimately, Claimant was found to be physically unfit for duty by the Physical Evaluation Board and was released from active duty on approximately April 19, 2004. (CX-4, p. 4).

Dr. Reagan R. Parr

Included in Claimant's military medical records is an examination by Dr. Parr, an orthopedist, who examined Claimant on March 22, 2003, apparently as part of his medical discharge evaluation. (CX-4, p. 5). Dr. Parr opined "likely to require total knee replacement in not-to-distant future. His lack of full extension and resultant gait alterations likely contribute to (if not wholly causative of) low back pain. Recommend focus treatment on knee, observe response from back." (CX-5, p. 20).

The Vocational Evidence

Tommy Sanders

Mr. Sanders, a licensed vocational rehabilitation consultant, testified at formal hearing and rendered reports and performed labor market surveys. (Tr. 77). He interviewed Claimant to gather information regarding his employability and reviewed his medical restrictions. (Tr. 78-80). Mr. Sanders also reviewed reports from Ms. Skinner, a vocational counselor at the Department of Labor. (Tr. 86, 89). Ms. Skinner attempted to secure employment for Claimant with Employer, but apparently closed her file pending Claimant's third surgery. (Tr. 89).

Claimant's restrictions changed several times since his knee injury, but the most recent restrictions were assigned by the military and Dr. Crotwell. (Tr. 79-80). Mr. Sanders performed labor market surveys each time Claimant's restrictions changed, and found alternative jobs as listed in his reports. (Tr. 81).

Mr. Sanders testified Claimant called him about a week after receipt of a letter from Mr. Sanders concerning jobs. (Tr. 82). Claimant informed him that the security company was not interested in him because he could not lift over ten pounds, and some of the other jobs had been filled or were no longer available. Claimant also informed him that he was applying for the jobs because his attorney told him to do so. (Tr. 82). They discussed the approximate thirty-mile distance of the jobs from Claimant's home. (Tr. 84). He had no further inquiries from Claimant about employment. (Tr. 83).

Mr. Sanders testified that he was familiar with Claimant's former position with Employer as a combination electrician. (Tr. 90). The job is classified as skilled and requires medium physical activity, which includes lifting fifty pounds occasionally, twenty-five pounds frequently, climbing, crawling, kneeling, stooping, and bending. (Tr. 90-91). He stated that in his opinion, Claimant could not return to his regular job after his three knee operations due to his limitations. (Tr. 91).

Mr. Sanders testified that the jobs he located in the labor market surveys did not require physical activity outside of the restrictions assigned by Drs. Ray or Crotwell. (Tr. 91-92). The latest restrictions used by Mr. Sanders were those assigned by Dr. Crotwell which were: infrequent lifting up to 20 pounds, frequent lifting of five to ten pounds, no repetitive bending, limited climbing, no crawling, ladder climbing, and only occasional stair climbing. (Tr. 80, 92).

Mr. Sanders agreed that if Claimant were restricted from any lifting, some of the jobs he found would not be within that restriction. (Tr. 93-94). Also, if Claimant had problems with memory and depression, depending on the degree, some jobs may be excluded. (Tr. 94).

Mr. Sanders rendered labor market surveys with follow-up on: November 13, 2001, which was hypothetical based on restrictions imposed by Dr. Ray; June 27, 2005; October 31, 2005; February 6, 2006; June 16, 2006; and Sept. 11, 2006. (EX-9).

The labor market survey on November 13, 2001 listed three jobs. No interview was conducted of Claimant in the survey process.

The position of full-time gate supervisor with Nyco Security was identified. The wage rate was $7.25 per hour. Duties included supervision of other guards and ensuring manning of a gate. Assisting other personnel is listed as a duty, but without elaboration. Physical requirements included occasional lifting of five pounds, occasional standing/walking, and frequent sitting/handling. (EX-9, p. 2).

The position of convenience store cashier for Shell working 20-40 hours per week was also identified. The wage rate was $6.00 per hour. Duties included cash register operation, restocking shelves and coolers, sweeping, moping, cleaning restrooms, picking up parking lot once per shift, emptying trash, and making coffee. Physical requirements were described as occasional lifting of five to eighteen pounds, pushing/pulling of five pounds occasionally, occasional sitting, bending, stooping and squatting, with frequent standing and walking. A modified squat was noted as an option for retrieving items from the floor. (EX-9 pp. 2-3).

The full time position of warehouse worker for Calagaz Photo Supply was also identified. The wage rate was $5.25 per hour, and duties were primarily receiving, marking, and shipping merchandise, and delivery to other stores twice per day. Physical requirements included frequent lifting and carrying of 20 pounds, occasional lifting of 40-50 pounds, occasional sitting, and frequent standing, walking, and handling, with occasional bending, stooping and squatting. (EX-9 p. 3).

Mr. Sanders's June 27, 2005 labor market survey listed three jobs that were available about March 2005, and referred three jobs listed in correspondence to Claimant dated June 22, 2005. (EX-9, pp. 8-9). Mr. Sanders noted Claimant received an honorable discharge from the National Guard in 2003, and was awarded 10% service connected disability due to an injury to his left knee. (EX-9, p. 7).

Restrictions used were those assigned on March 25, 2005, by Dr. Crotwell and "temporary" restrictions assigned by the military of: no running, repetitive spinal flexion, formation standing, road marching, jumping or prolonged standing or sitting. (EX-9, pp. 7-8).

The position of full-time cashier at Shell Convenience Store was identified in the correspondence dated June 22, 2005. The starting salary was $6.00 per hour. Duties included operating a cash register and stocking a cooler. The cooler required lifting of a twelve-pack of beer or soda, and frequent lifting of ten pounds, with occasional sitting, frequent standing, frequent use of the upper extremities, and infrequent bending. (EX-9, pp. 4-5).

The position of full-time customer service representative / cashier for Cash America Pawn was also identified. The wage was $6.50 per hour. Duties included processing payments, telephone collections and other telephone contacts. Physical requirements included occasional lifting of five to ten pounds with frequent sitting and occasional standing or walking, and infrequent bending. (EX-9, pp. 4-5).

The position of full-time security officer with Vinson Guard Service was also identified. The wage rate was $6.00 per hour. Physical requirements included a fifteen to twenty minute "round" each hour, lifting, pushing or pulling of five to ten pounds frequently, frequent sitting, and intermittent sitting, standing and walking. (EX-9, pp. 4-5).

The position of full-time courier for Lab Corps was identified as available about March 2005. The wage rate was $7.00 per hour, and duties included pick up of lab samples and supply request forms at doctors' offices. (EX-9 pp. 8-9).

The position of convenience store cashier for Circle K working 35-40 hours per week was also identified. The wage rate was $6.00 per hour, and the position called for alternate sitting, standing and walking. (EX-9 pp. 8-9).

The position of full-time convenience store cashier at Meyers Oil was also identified. The wage rate was $6.00 per hour. Specific physical requirements were not stated. (EX-9 pp. 8-9).

Mr. Sanders performed a follow-up labor market survey on October 31, 2005, in which he identified three positions. (EX-9, pp. 12-13).

A full-time cashier position at Rick's Car Wash was identified in the October 2005 survey. The rate of pay was $6.50 per hour and duties included cash register operation, stocking accessory items, and keeping waiting area neat. Physical requirements included frequent lifting of two to ten pounds, frequent use of the upper extremities, occasional to frequent standing, occasional sitting and walking, and infrequent bending or squatting. (EX-9, pp. 12-13).

A full-time position as convenience store clerk for Chevron was also listed. Duties included activating gas pumps, receiving payments, shelf-stocking, and pulling drinks from coolers. Physical requirements included lifting of two to five pounds frequently, five to fifteen pounds occasionally, occasional sitting, walking, and bending, and frequent standing. The rate of pay was $5.25 per hour.

The survey also included a full-time position as cashier/drink filler at Golden Corral. Duties included operating a cash register, filling drink orders, and keeping silverware stocked. The rate of pay was $6.00 per hour, and physical requirements were listed as frequent lifting of 2-5 pounds occasional lifting of 10-20 pounds, occasional walking and bending, and frequent standing.

Again on February 6, 2006, Mr. Sanders performed a follow-up labor market survey in which he identified three positions. (EX-9, pp. 14-15).

The position of full-time laundry presser at Master Cleaners was identified. The wage rate was $6.25 per hour, and duties included pressing clothing. Physical requirements included frequent lifting of one to five pounds, frequent use of the upper extremities, frequent standing, occasional walking, and bending or squatting to obtain garments. (EX-9, pp. 14-15).

The position of full-time pizza delivery person for Pizza Hut was also identified. The wage rate was $5.50 plus $1.00 per run and tips. Duties included primarily delivering pizzas, plus folding pizza boxes, preparing pizzas or sweeping and mopping when not delivering pizzas. Physical requirements included 50% sitting, 25% standing and walking, lifting of ten to fifteen pounds, infrequent stair climbing and frequent use of upper extremities and low back flexion when entering and exiting a vehicle. (EX-9, pp. 14-15).

The position of full or part-time appointment setter for Portrait America was listed. The wage rate was $7.00 per hour plus bonuses, and duties included calling potential customers to schedule portrait appointments. This job is classified as sedentary, required frequent use of the upper extremities, and infrequent lifting of two to five pounds. (EX-9, pp. 14-15).

On June 16, 2006, Mr. Sanders performed an additional follow-up labor market survey in which he identified three positions. (EX-9, pp. 16-17). Mr. Sanders testified that the labor market survey in June 2006, was the last he had performed at the time of formal hearing. (Tr. 84).

The position of full-time tow truck dispatcher for Pitts and Sons was listed. The wage rate was $6.00 per hour, and duties included telephone contacts, office cleaning and organizing paperwork. Physical requirements were listed as frequent use of the upper extremities, and lifting of one to two pounds. The employee would have the latitude to stand and move about. (EX-9, pp. 16-17).

The job of full-time fuel booth cashier for Murphy USA was also identified. The wage rate was $7.00 per hour, and duties included accepting payments, periodic stocking of a cooler, picking up trash, and sweeping. Physical requirements included frequent lifting of two to five pounds, pushing and pulling of a broom, reaching to stock overhead tobacco products, alternate sitting, standing, and walking, and infrequent bending or squatting. (EX-9, pp. 16-17).

The full-time job of parking lot cashier for Central Parking System was listed. The wage rate was $6.00 per hour, and duties included operating a cash register, accepting payments, cleaning the inside of the booth and sweeping. Physical requirements included infrequent lifting of bags of coins weighing five to ten pounds, sitting or standing at the discretion of the employee, frequent use of the upper extremities, and infrequent bending or squatting. (EX-9, pp. 16-17).

On September 11, 2006, Mr. Sanders performed a final follow-up labor market survey in which he identified three positions. Mr. Sanders noted that the survey includes restrictions set forth by Dr. Andre Fontana on a physical capacity evaluation form dated October 10, 2005. He additionally notes: "the above mentioned jobs . . . reach/utilize the upper extremities on a frequent basis versus being 'limited to occasionally' as noted by Dr. Fontana." (EX-9 Supp., pp. 1-2).

The full-time job of parking lot cashier at Apcoa, Inc. was identified. Duties included collecting tickets and payments, balancing a cash drawer, and picking up trash in the area of the booth. Physical demands required frequent use of the upper extremities, and is considered sedentary. The rate of pay was $6.50 per hour. (EX-9 Supp., pp. 1-2).

The position of full-time dispatcher for Davis Air Design was also listed. The rate of pay was $8.00 per hour, and duties included dispatching technicians, entering of billing information, picking up trash and sweeping. The job was considered sedentary, requiring frequent use of the upper extremities. (EX-9 Supp., pp. 1-2).

Finally, full or part-time employment as an appointment setter for Portrait America was identified. This job was also identified in the labor market survey update dated February 6, 2006, and requires the same physical tasks.

Mr. Sanders testified that several of the jobs identified have regular openings and are usually available. Particularly, jobs as security guard, cashier, parking lot attendants, and dispatchers have regular openings. (Tr. 84).

He further testified that in his opinion, the security jobs were within Claimant's present restrictions. The dispatcher job is sedentary, except the person has the latitude to stand and move around. (Tr. 92). The booth and parking lot cashiers were required to stock only the outside soda cooler and tobacco products. (Tr. 93).

The Other Evidence

Employer's records reflect payment to Claimant of temporary total disability from January 13, 2001 through August 5, 2001. (EX-3, p. 1).

Claimant was treated by Dr. John Wetzel, a chiropractor, who issued a bill dated April 18, 2002, for charges totaling $345.00. (CX-3).

Claimant's military record includes a notation acknowledging a "[military] service connection" for Claimant's left knee degenerative joint disease of ten percent. The record denies a "service connection" for Claimant's back condition. (CX-4, p. 11).

Included in Employer's hospital file concerning Claimant were:

An internal memo dated December 10, 2001, from "Mr. Wilkie" which states Claimant presented to him for work on August 5, 2001. Claimant told him "he could not work on the boat because of his knee and back and wanted to go to the hospital." Mr. Wilkie further stated "I could not find a job that he felt he could [physically] perform." (EX-11, p. 9).

A handwritten internal fax sent on April 4, 2002, from "Mel" to Dr. Warfield, Employer's doctor, states "[Claimant] was <u>very</u> disabled in December . . . Mr. Wilkie <u>really</u> does not want this fellow back in the electrical dept." (EX-11, p. 5).

The Contentions of the Parties

Claimant contends that he is permanently totally disabled as a result of work-related injuries to his left knee and back. He further contends that his back problem is causally related to or was aggravated by his injury on January 8, 2001, and contributed to a greater degree of disability than his knee injury alone.

Employer contends that Claimant has no impairment related to his back, and is therefore restricted to the scheduled recovery for an impairment caused by his knee condition. An impairment, if any, related to Claimant's back is not causally related to his employment, but rather is only a temporary strain condition, which has since fully resolved. (Tr. 26). Alternatively, Employer contends that suitable alternative employment has been identified.

Employer concedes that Claimant received a scheduled injury to his left knee, for which Employer contends Claimant has been fully paid. This contention is not controverted by Claimant.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

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

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are

accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

The parties stipulated that Claimant suffered a compensable scheduled injury to his left knee on December 5, 2000, which Claimant contends did not resolve. Additionally, Claimant

contends he suffered a back injury on January 8, 2001, and alleges back pain which he contends is causally related to the compensable injury and/or his subsequent injury.

Employer denies that Claimant's back injury on January 8, 2001, if any, was of sufficient magnitude to cause the physical harm alleged, and contends any back injury resulting from the incident on January 8, 2001, fully resolved prior to Claimant's release as no permanent restrictions were assigned related to Claimant's back. Employer further contends that Claimant's back pain is not causally related to the compensable knee injury. In support of its position, Employer notes the timing of Claimant's complaints of back pain as reflected in the medical record.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Claimant credibly testified that on January 8, 2001, while working light duty for Employer, he carried a "box of plugs" upstairs, injuring his back. Claimant further testified that he "couldn't hardly walk and my back started hurting," following the incident. On January 10, 2001, Dr. Ray authorized Claimant to be off work until January 15, 2001, although the record does not reflect Claimant's back ailment as the reason for the work suspension. Dr. Ray also noted on January 10, 2001, that Claimant was non-tender in the low back.

Therefore, Claimant credibly complained of pain, constituting an "injury" under the Act, as a physical harm resulting from the work-related incident or working conditions on January 8, 2001, which could have caused the harm or pain. Accordingly, I find that Claimant has established a **prima facie** case with regard to his back injury based on the January 8, 2001 incident.

Moreover, based on the stipulation of the parties, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on December 5, 2000, and that his working conditions and activities on that date could have caused the harm or pain

sufficient to invoke the Section 20(a) presumption with regard to Claimant's left knee. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988). Thus, Claimant has established a **prima facie** case with regard to both injuries.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard,

Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

In this case, causation concerning the compensable injury on December 5, 2000, to Claimant's left knee is uncontroverted. Also uncontroverted is Employer's contention that Claimant has been paid in full for the scheduled compensation based on the permanent partial impairment rating assigned to Claimant's left knee by Dr. Crotwell. As the 25 percent impairment rating to Claimant's knee has not been controverted, it is alleged that full payment of the scheduled compensation pursuant to Section 908(c)(2) and (19), would fulfill Employer's responsibility for compensation with regard to Claimant's compensable left knee injury alone.

In support of this position, Employer presents evidence that two of Claimant's treating physicians, Dr. Ray and Dr. Crotwell, have assigned dates of MMI for Claimant's left knee, impairment ratings and permanent restrictions. Employer also introduced its record of payments to Claimant showing what it contends to be full payment of temporary total disability for the applicable time periods and the scheduled compensation.

The medical records of Drs. Ray and Crotwell as noted constitute substantial evidence in support of Employer's position. Accordingly, I find that Employer has successfully rebutted the Section 20(a) presumption regarding additional compensation due to Claimant based on his knee injury.

Employer further contends that Claimant's complaints of back pain are not causally related to either the injury, if any, on January 8, 2001, or as a residual of the compensable injury

on December 5, 2000. Employer notes the length of time between documented complaints of back pain by Claimant, and a notation by Dr. Crotwell on May 28, 2002, that Claimant stated his back had gotten better.

Claimant presented to Dr. Ray on January 10, 2001, two days after the incident involving his back. Dr. Ray noted Claimant was "non-tender in low back" at that time. Dr. Ray noted Claimant's back complaint on March 12, 2001, but opined it should be evaluated only after treatment of Claimant's knee was completed. On May 29, 2001, Dr. Ray noted "[Claimant] says his back is improving as his knee does." Later, Dr. Ray's diagnoses included "associated lumbar strain related to altered use of his leg over a long period of time and during the rehab phase."

While Dr. Ray's comments document Claimant's complaints of back pain, the timing and progression do not indicate it is the result of a single traumatic event. Conversely, Dr. Ray's opinion that treatment of the back should be deferred until resolution of the knee problem would infer that the back problem was causally related to Claimant's knee problem, and not the result of a trauma or aggravation occurring on January 8, 2001.

Again, the medical records of Drs. Ray and Crotwell as noted constitute substantial evidence in support of Employer's position. Accordingly, I find that Employer has successfully rebutted the Section 20(a) presumption regarding Claimant's back injury.

Having found that Employer has rebutted Claimant's **prima facie** case with regard to causation of his back pain, the record evidence as a whole must be weighed and evaluated to determine whether Employer has fulfilled its obligation for compensation to Claimant with regard to the compensable knee injury on December 5, 2000, and whether Claimant's complaints of back pain were causally related to the compensable injury or a work-related injury on January 8, 2001.

3. Weighing All the Evidence

Claimant's compensable knee injury on December 5, 2000, is undisputed. However, Employer contends that Claimant suffered no compensable injury on January 8, 2001, as any injury caused during that incident fully resolved prior to Claimant being released to return to work, and that Claimant's subsequent complaints of back pain are not causally related to either an injury on January 8, 2001 or the compensable injury.

The medical evidence presented consists mainly of opinions and records of two of Claimant's treating physicians, Drs. Ray and Crotwell, the military doctors who evaluated Claimant for purposes of his medical discharge, and Dr. Fontana who evaluated Claimant for purposes of a determination by Social Security. Although Dr. Crotwell initially examined Claimant at the behest of Employer, Claimant chose Dr. Crotwell as his treating physician for his knee and continues to treat with him for that condition.

Claimant's left knee injury

Employer's contentions concerning Claimant's left knee injury and Employer's concomitant obligation are largely uncontroverted.

The medical record indicates Claimant was initially treated by Dr. Ray, who performed two surgeries on his knee, and assigned a date of MMI of October 16, 2001, with a permanent impairment of the lower left extremity of 30 percent.

Thereafter, Claimant was treated by Dr. Crotwell who performed a third arthroscopic procedure on Claimant's left knee. Dr. Crotwell initially assessed Claimant's impairment of his lower left extremity of 25 percent, which did not change after the surgery. Dr. Crotwell assigned a date of MMI for Claimant's knee of November 13, 2002. Both physicians released Claimant to return to work with restrictions as noted above. No medical evidence was introduced to controvert the impairment rating assigned by Drs. Ray and Crotwell.

The injury to Claimant's left knee is a scheduled injury under Section 908(c)(2) of the Act. Employer contends, and no evidence has been introduced to dispute, that the scheduled compensation pursuant to Section 908(c)(2) and (19) of the Act, has been paid to Claimant in full. Under this scenario, if Claimant's injury and disability are found to be isolated to his knee, Employer's liability for compensation is limited as provided in Section 908(c)(2) and (19) of the Act.

Consequently, if Employer's liability for compensation is found to be limited as provided in Section 908(c)(2) and (19) of the Act, I find that Employer has paid to Claimant all compensation due, and has thereby fulfilled its obligation for compensation for Claimant's scheduled injury to his left knee.

Are Claimant's back problems causally related to the injury on January 8, 2001?

Employer stipulates to an incident on January 8, 2001, which may have caused an aggravation to Claimant's back. However, Employer contends any aggravation was a strain that resolved prior to Claimant reaching MMI with regard to his knee, as no work restrictions regarding Claimant's back were assigned by either doctor. In support, Employer relies on medical records of Dr. Ray noting on January 10, 2001, two days after the alleged injury, Claimant was non-tender in the low back. Both Drs. Ray and Crotwell diagnosed Claimant's back condition as a strain. Further, Employer contends that Claimant did not immediately notify his supervisor of any incident on January 8, 2001, which is uncontroverted.

Claimant credibly testified that the onset of his back symptoms is related to his carrying a "box of plugs" upstairs. However, in light of medical evidence that correlates Claimant's back pain to a cause other than a trauma, correlation of the onset of symptoms alone is insufficient to establish the January 8, 2001 event as a separate independent cause of Claimant's back pain. Here, both Drs. Ray and Parr relate the cause of Claimant's back pain to his altered gait. Dr. Crotwell diagnosed Claimant's back pain as a lumbar strain that had resolved by the date of his examination on May 28, 2002. No medical evidence has been introduced to suggest that Claimant's back pain was caused by the incident on January 8, 2001, or any other traumatic event.

Based on the evidence presented, I find and conclude that Claimant has failed to establish a causal relationship between his back problems and the alleged work-related incident on January 8, 2001.

Are Claimant's back problems causally related to the compensable knee injury?

If there has been a **subsequent non-work-related injury or aggravation**, the Employer is liable for the entire disability **if** the second injury or aggravation is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, supra; Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988).

The medical record contains several instances in which Claimant's doctors have related his back pain to the altered use of his leg. On July 31, 2001, Dr. Ray noted "associated lumbar strain related to altered use of his leg over a long period of time and during the rehab phase." This is consistent with his earlier statements on March 12, 2001 and May 29, 2001, concluding that Claimant's knee should be resolved before evaluation and treatment of his back. Thus, Dr. Ray, one of Claimant's treating physicians, opined that Claimant's back condition is related to his leg/knee condition, not an independent traumatic event.

Similarly, in 2003, Dr. Parr, one of the military doctors who examined Claimant, opined that Claimant's "lack of full extension and resultant gait alterations likely contribute to (if not wholly causative of) low back pain." Like Dr. Ray, he recommended primary treatment of Claimant's knee, and to "observe [the] response from [Claimant's] back."

Drs. Ray and Crotwell both diagnosed Claimant's back problem as a strain. However, only Dr. Crotwell specifically opined that Claimant's back problem was a temporary aggravation of a condition which pre-existed his knee injury, and which fully resolved. As stated above, aggravation of a pre-existing condition can constitute a compensable injury.

On October 20, 2005, Dr. Fontana evaluated Claimant pursuant to a referral by Social Security. He noted Claimant's complaints of lower back pain, and noted that Claimant ambulated with a cane and walked with a limp. He noted an impression of degenerative disk disease of the lumbar spine.

Both Claimant and his wife credibly testified that his back pain persists, and did not resolve. Additionally, the medical records are replete with references to Claimant's persistent complaints of back pain since his initial treatment by Dr. Ray through the present time.

In light of the medical evidence, particularly the opinion of Dr. Ray, I find and conclude that Claimant's back pain is a natural and unavoidable consequence of the work-related knee injury sustained on December 5, 2000. Accordingly, I find and conclude that Claimant's back pain is causally related to the compensable injury on December 5, 2000.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his 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 Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

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

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

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

In this case, the uncontroverted testimony of Claimant and Mr. Sanders, the vocational rehabilitation specialist, in addition to the medical records establish that Claimant is unable to return to his usual employment because of his knee injury alone. Accordingly, I find that Claimant is incapable of returning to his usual employment.

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

C. Maximum Medical Improvement (MMI)

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

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

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

Claimant's testimony makes no representation with regard to maximum medical improvement of either his knee or his back except to contend that he is totally disabled because of a combination of both conditions.

Concerning Claimant's knee, both Drs. Ray and Crotwell assigned dates of maximum medical improvement. Dr. Crotwell opined that Claimant is a candidate for total knee replacement. However, Claimant stated in correspondence to Dr. Crotwell that he does not want to have knee replacement surgery. Therefore, no further surgery on Claimant's left knee is anticipated.

Dr. Crotwell assigned November 13, 2002, as the date of maximum medical improvement of Claimant's left knee following his third surgery. At that time, Dr. Crotwell also assigned 25 percent impairment to Claimant's lower left extremity. Although Claimant has received subsequent treatment for his knee, including a brace and injections, the medical record does not indicate significant improvement to Claimant's knee condition following the November 13, 2002 date of MMI. Conversely, Dr. Crotwell noted on November 4, 2004, that Claimant's knee x-ray showed "a horrible patella." He also opined that Claimant would be restricted to "very light duty" work until he had knee replacement surgery.

Thus, I find that Claimant reached maximum medical improvement with regard to his left knee on November 13, 2002, as assigned by Dr. Crotwell.

Claimant credibly testified that his back pain began with his work-related incident on January 8, 2001, and has never resolved. Significantly, although it appears Claimant inquired of Dr. Ray concerning treatment for his back, the record does not reflect treatment of Claimant's back by Dr. Ray or significant treatment by any other doctor. Claimant apparently sought treatment from a chiropractor under private insurance in April 2002.

Dr. Crotwell examined Claimant's back on May 28, 2002, as requested by Employer's workman's compensation carrier. He opined that the January 8, 2001 incident may have resulted in a

back strain, but the strain had fully resolved by the examination date. Dr. Crotwell noted an impression of: (1) mild to moderate lumbosacral strain; and (2) mild lumbar degenerative disc disease.

There is no indication in the record that Dr. Crotwell treated Claimant's back after May 2002, although he has continued to treat Claimant's knee. A notation in the medical records of Dr. Crotwell indicates that as of October 15, 2004, workman's compensation would not cover Claimant's back. None of Claimant's physicians have specifically assigned a date of maximum medical improvement with regard to Claimant's back.

Dr. Hagler, a military doctor, in his report dated December 2, 2003, noted Claimant's lower back "has been bothering him increasingly in the past nine months." He also noted that Claimant reported that the limitations of his knee had caused more problems with his back. Dr. Hagler's diagnosis included low back pain with multilevel degenerative disc disease. Thus, Claimant's back may have deteriorated between May 2002 and the examination by military doctors in December 2003.

Claimant underwent a work capacity evaluation on March 23, 2005, and examination and evaluation on October 10, 2005. Low back pain was identified as a limiting factor in both instances, although Dr. Crotwell opined in July 2005 that Claimant has no disability associated with his back.

Drs. Ray and Parr specifically opined that Claimant's back pain is tied to his knee condition. Dr. Ray noted in May 2001, Claimant reported his back improved commensurate with the improvement in his knee. In 2003, Dr. Parr specifically opined that Claimant's knee condition may be wholly causative of his back condition.

Since Claimant's knee condition has reached maximum medical improvement and Claimant's consistent back pain has persisted for a significant period of time, it is reasonable to conclude that Claimant's back pain is of a lasting or indefinite duration, as distinguished from a malady in which recovery merely awaits a normal healing period. As no additional treatment specifically targeted toward Claimant's back problem is pending, and no improvement in Claimant's knee condition can reasonably be expected, it is reasonable to conclude that no improvement to Claimant's back pain may be expected.

While the medical record documents a decline in Claimant's back condition between May 2002 and Dr. Hagler's examination and report dated December 2, 2003, no significant change is documented thereafter.

Based on the evidence, I find and conclude that Claimant's back condition has also reached maximum medical improvement. As no date of maximum medical improvement was specifically assigned by any physician, I find that Claimant's back condition reached maximum medical improvement on December 2, 2003, the date of Dr. Hagler's examination and report.

Therefore, any disability regarding Claimant's back was temporary until December 2, 2003, and permanent from December 3, 2003 and continuing.

Scheduled vs. Non-scheduled Disability

If a permanent disability occurs to a body member identified in Section 908(c)(1) through (20), the injured employee is entitled to receive two-thirds of his average weekly wage for a specified number of weeks, regardless of whether his earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D. C. Cir. 1984).

In the case of permanent partial disability, Section 8(c)(2) of the Act provides an employee with "leg lost" compensation for 288 weeks at a rate of sixty-six and two-thirds percent of his average weekly wage. Section 8(c)(19) of the Act further states that "compensation for permanent partial loss of use of a member may be for proportionate loss or loss of use of the member." Compensation is limited exclusively to the statutory scheme. See Potomac Electric Power Company v. Director, OWCP, 449 U.S. 268, 101 S. Ct. 509 (1980) (hereinafter "PEPCO").

A scheduled injury can give rise to permanent total disability pursuant to Section 908(a), in which case the statutory scheme of Section 908(c)(1) through (20) becomes irrelevant. PEPCO, supra at n. 17. Further, the Supreme Court limited its holding in PEPCO to circumstances where the scheduled injury was confined in effect to the injured part of the body. PEPCO, supra at n. 20.

In the instant case, the parties stipulated that Claimant experienced a compensable injury on December 5, 2000, to his left knee. MMI was reached and a disability percentage assigned. This was a scheduled injury under Section 8(c)(2) of the Act. Therefore, if Claimant is found to have permanent partial disability, the extent of which is a result of his scheduled injury alone, his compensation is governed by Section 908(c)(2) of the Act, exclusively.

The Board has held that in the case of multiple accidents, where a scheduled injury resulting in permanent partial disability, is followed by a non-scheduled injury, the claimant is entitled to receive scheduled compensation for the scheduled injury in addition to compensation under Section 8(c)(21) for the non-scheduled injury. Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985). Since the scheduled injury is being compensated separately, any loss in wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. Frye v. Potomac Electric Power Company, 21 BRBS 194 (1988).

However, where a non-scheduled injury is the natural consequence of a scheduled injury, the Board has held that a claimant may not recover under both the schedule and Section 8(c)(21), rather recovery under Section 8(c)(21) was proper. Thompson v. Lockheed Shipbuilding and Construction Co., 21 BRBS 94 (1988).

In Thompson, supra, the claimant sustained a work-related scheduled injury to his ankle, and later developed a “mechanical strain of his lower back” due to prolonged casting of his injured ankle. The Board upheld an ALJ’s award under Section 8(c)(21), reasoning that to “limit claimant's recovery to a scheduled award for loss of use of his ankle would effectively deny claimant recovery for his work-related back condition, which is compensable, as claimant is entitled to recover for the sequelae of his work-related injury.” Additionally, the Board recognized the ALJ’s consideration of Claimant’s “combined ankle and back impairments” under a “whole man theory.” Thompson, supra.

In the instant case, it has been determined that Claimant’s back condition is a natural and unavoidable consequence of the scheduled injury, and not the result of a second work-related accident. Therefore, the operative question is whether or not Claimant’s “disability,” defined as an “incapacity to earn the wages which the employee was receiving at the time of injury in

the same or any other employment," is rendered greater as a result of Claimant's back maladies, or a combination of the scheduled injury and the subsequent "natural consequence" injury, than would have resulted from the scheduled injury alone.

Claimant's complaints of back pain were found to be causally related to the compensable knee injury. The back is not a part of the body scheduled in Section 908(c)(1) through (20). Therefore, if Claimant's wage-earning capacity was decreased by the combination of his scheduled and non-scheduled injuries, to a greater extent than by the scheduled injury alone, Claimant is entitled to compensation under Section 908(c)(21). However, if it is determined that Claimant's decreased wage-earning capacity is attributable solely to the scheduled injury, Claimant's compensation must be limited to the scheduled amount.

The burden of proof and persuasion is on the Claimant to prove by a preponderance of the evidence that his wage-earning capacity was decreased by his non-scheduled injury, or a combination of his scheduled and non-scheduled injuries, to a greater extent than by the scheduled injury alone. For this determination, the work-related limitations assigned by Claimant's doctors must be examined to determine if they are assigned as a result of the scheduled injury alone, or a combination of scheduled and non-scheduled injuries, as they will govern Claimant's residual wage-earning capacity.

On November 13, 2002, Dr. Crotwell assigned MMI to Claimant's knee and released him to full light/partial medium category work.

On March 25, 2005, Dr. Crotwell again noted that Claimant was at MMI and assigned restrictions of: no frequent lifting over five to ten pounds, with infrequent lifting limited to fifteen to twenty pounds, no ladders, crawling, climbing, excessive bending, twisting, torquing, and only occasional stairs and walking.

Although the work capacity evaluation performed on March 23, 2005, noted low back pain as a limiting factor to several activities, Dr. Crotwell attributed the foregoing restrictions solely to Claimant's knee injury, as he opined that the work

restrictions were “associated with his left knee [injury] only sustained on December 5, 2000.” The evaluation report also noted that Claimant reported increased low back pain with some reaching activities. However, Dr. Crotwell did not assign a restriction regarding reaching activities.

On October 10, 2005, Dr. Fontana completed a physical capacities evaluation. He assigned work restrictions similar to those imposed by Dr. Crotwell, but added the restriction of only occasional reaching. Dr. Fontana’s diagnosis included “degenerative disk disease lumbar spine,” which may have been a factor contributing to work restrictions imposed. However, Dr. Fontana did not articulate whether Claimant’s restrictions were greater because of a combination of injuries than they would have been based on Claimant’s knee alone. Therefore, given the similarity between the restrictions assigned by Drs. Crotwell and Fontana, the fact Dr. Fontana included this reaching restriction does not in itself determine that Claimant is restricted to a greater degree than he would be from his scheduled injury alone.

To the extent that the restrictions assigned by Drs. Crotwell and Fontana differ, I credit the restrictions assigned by Dr. Crotwell, as a treating physician, over those imposed by Dr. Fontana, who examined Claimant once for purposes of Social Security. Accordingly, I find that the restrictions assigned by Dr. Crotwell are applicable in the instant case.

No other record evidence indicates that Claimant’s restrictions imposed by either doctor are greater because of Claimant’s non-scheduled injury than they would have been because of the scheduled injury alone.

Based on the evidence presented, construed liberally in favor of the pro se Claimant, I find that Claimant has failed to carry his burden of proof that his non-scheduled injury resulted in a greater degree of “disability,” as defined for purposes of the Act, than that which would have resulted from the scheduled injury alone. Accordingly, I find that Claimant’s degree of disability has not been rendered greater because of the combination of his knee and back conditions than it would have been based on his knee injury alone.

Consequently, since Claimant has established a **prima facie** case of total disability, he will be restricted to compensation under Section 908(c)(2) of the Act if the disability is found to be partial. However, if Claimant is found to be permanently

totally disabled, his recovery for compensation is properly governed by Section (c)(21) of the Act. The question of extent of disability is determined by demonstration of suitable alternative employment or lack thereof.

D. Suitable Alternative Employment

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

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

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

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25

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

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

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

Employer contends it has demonstrated suitable alternative employment at various times as outlined in labor market surveys and follow-up performed by Mr. Sanders on: November 13, 2001; June 27, 2005; October 31, 2005; February 6, 2006; June 16, 2006; and September 11, 2006.

It is stipulated that Employer voluntarily paid temporary total disability compensation during three time periods: January 13, 2001 through August 5, 2001; October 1, 2001 through October 15, 2001; and July 16, 2002 through November 19, 2002. As

Claimant's entitlement to temporary total disability compensation during these periods is uncontroverted, I find that Claimant was temporarily totally disabled during these periods of time.

Additionally, Employer voluntarily paid compensation, as shown in EX-3, representing scheduled permanent partial compensation of 72 weeks (288 weeks scheduled compensation per Section 908(c)(2) x 25% disability = 72 weeks of compensation). Permanent partial disability was paid between and after periods in which Employer paid temporary total disability.

The final surgery on Claimant's knee was performed by Dr. Crotwell on July 16, 2002. Dr. Crotwell assigned MMI for Claimant's knee on November 13, 2002. Thereafter, Claimant attempted a return to work for Employer for a brief undetermined period ending December 3, 2002. Claimant was activated by the National Guard in February 2003, and received a medical discharge about April 2004. As noted above, no doctor has assigned MMI with regard to Claimant's back. However, MMI for Claimant's back has been herein assigned as December 2, 2003.

Therefore, the disputed periods of disability are from: August 6, 2001 through September 30, 2001; October 16, 2001 through July 15, 2002; November 20, 2002 (MMI of knee) through December 2, 2003 (MMI of back), and December 3, 2003 and continuing. Claimant was under varying work restrictions, albeit assigned by different doctors, since his initial knee injury on December 5, 2000.

Diligent effort to secure employment

Employer contends that Claimant has failed to demonstrate a diligent effort to secure employment. In support of this position, Employer notes Claimant's statements that he has applied for only one job other than those identified by the vocational expert, did not apply for all jobs identified by the vocational expert, and that he only applied for jobs because his lawyer told him to do so.

Claimant contends that he applied for six jobs in May and June 2005, and did not apply at other times because he did not think he could do the work. Additionally, he contends that some of the jobs identified by Mr. Sanders were beyond his physical capabilities. Claimant presently contends that he is totally disabled.

Thus, the record demonstrates that Claimant has attempted to secure employment only during a two month period in 2005. No ongoing effort to pursue other jobs, even on a part-time basis, is contended.

Based on the above stated evidence, I find and conclude that Claimant has not demonstrated a diligent effort to secure employment.

Work Restrictions

Work restrictions have been assigned at various times by three of Claimant's physicians and military doctors. The restrictions assigned by treating physicians, Drs. Ray and Crotwell, were based upon a functional capacity evaluation and work capacity evaluation, and Dr. Fontana assigned restrictions in a physical capacities evaluation for Social Security purposes. As noted above, the restrictions of Dr. Crotwell are credited over those assigned by Dr. Fontana.

The restrictions imposed by military doctors are specific to military service, such as no marching. As the restrictions assigned by Claimant's civilian doctors are broader and more applicable to civilian work activity, I find the restrictions assigned by the military doctors are not applicable for purposes of establishing suitable alternative employment.

Dr. Ray assigned October 16, 2001, as the date of MMI of Claimant's knee, and assigned permanent restrictions of: no crawling, kneeling, full squatting, stair climbing not more than 45-50% of the usual stair climbing, and no ladder climbing. Dr. Ray's restrictions are based on an FCE, which would have reflected limitations due to Claimant's knee and back conditions.

Following treatment by Dr. Ray, Claimant next presented to Dr. Crotwell on March 11, 2002, who opined that Claimant had 25% impairment to his lower left extremity which equated to 10% impairment to the whole person. After Claimant's third knee surgery, Dr. Crotwell assigned November 13, 2002, as the date of MMI of Claimant's left knee.

At that time, Dr. Crotwell opined that Claimant's percentage of impairment remained unchanged, and assigned work restrictions similar to those imposed by Dr. Ray, releasing Claimant to full light/partial medium category work with restrictions of no excessive kneeling, crawling, bending,

twisting or stooping, and no ladder climbing. Thus, the medical record indicates little if any change in Claimant's knee condition/restrictions between October 2001 and November 2002, and contains no evidence that Claimant's back condition significantly changed during this period.

Because Claimant's knee and back conditions remained substantially unchanged between October 2001 and November 2002, and the restrictions assigned by Drs. Ray and Crotwell were similar, I find that the restrictions imposed by Dr. Ray in October 2001, are applicable to the disputed periods of October 16, 2001 through July 15, 2002.

As stated above, Claimant's back condition appears to have deteriorated during the period between November 2002 and December 2003. However, the record does not contain evidence that Claimant's back condition changed significantly after the December 2003 report by Dr. Hagler, the military doctor. The record does not contain evidence documenting the exact progression of Claimant's back condition during this period.

On March 25, 2005, Dr. Crotwell again noted that Claimant was at MMI and assigned restrictions of: no frequent lifting over five to ten pounds, with infrequent lifting limited to fifteen to twenty pounds, no ladders, crawling, climbing, excessive bending, twisting, torquing, and only occasional stairs and walking. Dr. Crotwell noted Claimant's capability generally in the very light to sedentary range.

Since the timing of progression of Claimant's back condition is undetermined during the period of November 2002 through December 2, 2003, I find that the work restrictions imposed by Dr. Crotwell in November 2002, are applicable to the disputed periods of November 20, 2002 through December 2, 2003, and December 3, 2003 to March 25, 2005. However, it is noteworthy that Claimant was on military duty from February 2003 trough June 2004, and not available for alternative employment. On March 25, 2005, Dr. Crotwell's revised restrictions were assigned and became effective.

August 6, 2001 through September 30, 2001

The record includes a note from Employer's representative, "Mr. Wilkie" concerning Claimant's attempted return to his former employment in August 2001. The note states "I could not find a job that he felt he could [physically] perform." Claimant presented to Dr. Ray on August 16, 2001, with

complaints he was required to do things at work that aggravated his left knee and low back. Dr. Ray assigned additional restrictions.

The first labor market survey was completed in November 2001, and there is no other evidence of a prior attempt by Employer to establish suitable alternative employment.

Therefore, I find and conclude that Claimant was incapable of performing his regular job upon his attempt to return to his regular employment in August 2001. As suitable alternative employment for this period has not been established, I find that Claimant was temporarily totally disabled during the disputed period of August 6, 2001 through September 30, 2001, not including time actually worked by Claimant.

Subsequent time frames in which disability is disputed are addressed below.

October 16, 2001 through July 15, 2002

Mr. Sanders identified three positions in detail as appropriate for Claimant in a labor market survey dated November 13, 2001. In preparing the survey, Mr. Sanders reviewed Claimant's medical and other records, but did not conduct an interview.

Two of the positions identified, convenience store cashier and warehouse worker, called for occasional bending, stooping, and squatting. Mr. Sanders suggested that a modified squat could be performed to accomplish the tasks required. The position of convenience store cashier required stooping/squatting for stocking, cleaning, and picking up trash in the parking lot which appear to be within Claimant's physical restrictions. The warehouse worker position apparently required squatting/kneeling for retrieval and delivery of items and occasional lifting of 40-50 pounds, which exceeds Claimant's physical limitations.

In view of the above, I find the job of convenience store cashier, which paid $6.00 an hour, to be within Claimant's restrictions and further find that it constitutes suitable alternative employment for Claimant. I conclude that the warehouse worker exceeds Claimant's restrictions and is not suitable employment.

The full-time position of gate supervisor for a security company was also identified. Physical requirements included occasional lifting of five pounds, occasional standing/walking, and frequent sitting/handling, which were within Claimant's work restrictions as assigned by Dr. Ray. The wage rate of this position was $7.25 per hour.

Therefore, I find that the positions of convenience store cashier and gate supervisor constitute suitable alternative employment for Claimant. Accordingly, I find that Claimant was temporarily partially disabled during the period of October 16, 2001 through July 15, 2002, and had a wage earning capacity during this period of $265.00, based on an average hourly wage of $6.63 ($6.00 + $7.25 = $13.25 ÷ 2 x 40 hours per week). Based on his stipulated average weekly wage of $610.95, I find that Claimant had a loss in wage earning capacity of $345.95 during this period.

November 20, 2002 through March 25, 2005, and from March 26, 2005 and continuing

As noted above, the work restrictions assigned by Dr. Crotwell in November 2002 are applicable to this period. Because all of the restrictions assigned by Dr. Crotwell were determined to be applicable to Claimant's knee, and November 13, 2002 has been established as the date of MMI of Claimant's knee, Claimant's impairment was permanent during the entirety of these disputed periods.

Therefore, as outlined above, if Claimant is found to be permanently partially disabled during these periods, Claimant's entitlement to compensation is limited to the schedule. If Claimant is found to be permanently totally disabled, compensation is governed by Section (c)(21) of the Act.

Because Claimant had surgery and a period of convalescence after the previous labor market survey, and a significant period of time elapsed between the labor market survey and Claimant's recovery from surgery, I find that the labor market survey performed by Mr. Sanders on November 13, 2001, is not applicable to the disputed periods beginning November 20, 2002. Mr. Sanders rendered labor market surveys and follow-ups on June 27, 2005, October 31, 2005, February 6, 2006, June 16, 2006, and September 11, 2006. The record does not contain evidence of other labor market surveys between November 2001 and June 27, 2005, or any retroactive surveys.

If the Claimant has established a **prima facie** case, he is totally disabled until Employer has demonstrated the availability of suitable alternative employment. This requirement applies to a permanent impairment of a scheduled member. Davenport v. Daytona Marine and Boat Works, 16 BRBS 196 (1984); Hicks v. Pacific Marine and Supply Company, Ltd., 14 BRBS 549 (1981). In Davenport, the Board affirmed an award of permanent total disability of a claimant with a left knee injury based upon the ALJ's finding that the employer had not met its burden of establishing suitable alternative employment. Addressing the issue of whether the claimant was restricted to the scheduled compensation award, the Court noted:

> Employer next argues, based on Potomac Electric Power Co. v. Director, 449 U.S. 268, 14 BRBS 363 (1980), that where a worker is entitled to permanent partial disability for an injury arising under the schedule, he cannot be entitled to greater compensation under Section 8(c)(21), 33 U.S.C. § 908(c)(21). While employer's contention is correct it is somewhat misdirected since claimant was awarded compensation for total disability under Sections 8(a) and (b), 33 U.S.C. §§ 908(a),(b) . . . Pepco does not bar an award for total disability where the injury is to a scheduled member . . . Pepco itself states that once it is determined that an employee is totally disabled, the schedule becomes irrelevant. 449 U.S. at 277, n.17, 14 BRBS at 366, n.17.

Davenport, supra.

Therefore, I find that Employer has failed to establish suitable alternative employment for the disputed period from November 20, 2002 through June 26, 2005, not including time actually worked by Claimant for Employer or during Claimant's military active duty period from February 15, 2003 through April 19, 2004, when he was not otherwise available to perform alternative employment. Accordingly, I find that Claimant was permanently totally disabled during this period.

Mr. Sanders's labor market survey of June 27, 2005, listed six positions: cashier, customer service representative/cashier, security officer, courier, and two positions as convenience store cashier.

The position of cashier at Shell Convenience Store required stocking a cooler, with frequent lifting of ten pounds, and frequent standing. Stocking of the cooler would likely require excessive bending, and the physical requirements combined, particularly frequent lifting, are in excess of Claimant's restriction to "very light to sedentary" work. Accordingly, I find the position of cashier at Shell does not constitute suitable alternative employment, at it exceeds Claimant's physical capacity.

The position of customer service representative/cashier for Cash America Pawn had a wage of $6.50 per hour, with duties of processing payments, telephone collections and other telephone contacts. Physical requirements were occasional lifting of five to ten pounds, frequent sitting, occasional standing or walking, and infrequent bending. These physical requirements are within Claimant's physical restrictions. Therefore, I find that this position constitutes suitable alternative employment.

The position of full-time security officer required a fifteen to twenty minute "round" each hour. This requirement is consistent with Claimant's restriction of occasional walking. Accordingly, I find the position of security officer constitutes suitable alternative employment as it comports with Claimant's physical capacity.

The position of courier required driving between locations. This would require bending and twisting to enter and exit a vehicle. As insufficient information was provided to determine if the frequency of entry and exit of a vehicle would require excessive bending and twisting, I find that insufficient evidence has been provided to allow the undersigned to determine if this job exceeds Claimant's physical capabilities. Consequently, I find that the position of courier does not constitute suitable alternative employment.

The labor market survey also included a position as convenience store cashier at Meyers Oil, but the physical requirements for the job are not stated. In the absence of a description of job demands, a correlation with Claimant's physical capacity cannot be made. Therefore, I find that the position at Meyers Oil does not constitute suitable alternative employment for Claimant.

The position of convenience store cashier at Circle K requires alternate sitting, standing and walking. I find this position appears to comport with Claimant's physical capabilities. Accordingly, I find that the position at Circle K constitutes suitable alternative employment for Claimant.

Therefore, I find that Employer has established suitable alternative employment for Claimant as of June 27, 2005, since the jobs of customer service representative/cashier, security officer and convenience store cashier at Circle K were identified and falls within Claimant's work restrictions. Accordingly, I find that Claimant was permanently partially disabled as of June 27, 2005, and is therefore, entitled to scheduled compensation under Section 908(c)(2) and (19) of the Act thereafter.

Subsequent labor market surveys listed jobs with wage rates which were substantially the same as those listed in the June 27, 2005 labor market survey. Since suitable alternative employment was established as of June 27, 2005, I find that it is unnecessary to consider later labor market surveys.

Based on the foregoing, I find that Claimant was temporarily totally disabled for the periods of January 13, 2001 through September 30, 2001, October 1, 2001 through October 15, 2001, and July 16, 2002 through November 19, 2002. I further find that Claimant was temporarily partially disabled for the period of October 16, 2001 through July 15, 2002, having a residual wage earning capacity of $265.00 per week; Claimant was permanently totally disabled for the period of November 20, 2002 through June 26, 2005, when no suitable alternative employment was established, not including time actually worked by Claimant for Employer or during his military active duty period from February 15, 2003 to April 19, 2004; and permanently partially disabled for the period beginning June 27, 2005 through present and continuing.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such

> period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

Entitlement to medical benefits for treatment of Claimant's compensable knee injury is not controverted.

Employer contends that it is not liable for medical expenses associated with Claimant's back as: (1) Claimant did not timely notify Employer of his back injury on January 8, 2001, (2) Claimant's back problem is unassociated with his compensable knee injury, and (3) Claimant never requested or received authorization for treatment by Dr. John Wetzel on April 12, 2002.

Claimant's back malady was found to be a natural and unavoidable consequence of his compensable knee injury, and not the result of an injury on January 8, 2001. Therefore Claimant was not required to give separate notice of his back condition. Thompson, supra.

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

On March 12, 2001, Dr. Ray noted Claimant's back complaint. Thereafter, Dr. Ray noted on September 28, 2001, that Claimant "continues to insist that he has a back problem and that it should be covered by his workers' compensation, but we don't have authorization to address that this date." Claimant reported to Dr. Crotwell on May 28, 2002, that he was told by Dr. Ray that he would treat his back later after treatment for his knee.

From the notations in the medical record, it is reasonable to conclude that Claimant requested treatment for his back from Dr. Ray in 2001, well prior to his April 2002 treatment by Dr. Wetzel, Dr. Ray inquired of Employer's agent, the workman's compensation carrier, who denied coverage.

I find that Claimant's communication to Dr. Ray requesting back treatment, and Dr. Ray's subsequent inquiry to the workman's compensation carrier, constitutes a constructive request by Claimant to Employer for back treatment. I further

find that the communication to Dr. Ray, and later Dr. Crotwell, by the workman's compensation carrier denying coverage and the lack of forthcoming treatment is an effective refusal of treatment by Employer.

Accordingly, I find that Employer remains responsible to provide reasonable and necessary medical care and treatment for Claimant's work-related knee injury and back condition, which is found to be a natural and unavoidable consequence of the work related injury, including treatment by Dr. Wetzel.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein. Counsel submitted his notice of withdrawal, fee application and lien on January 9, 2006. Employer is hereby allowed thirty (20) days from the date of service of this decision by the District Director to submit any objections

thereto.[5] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the objections. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

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

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from January 13, 2001 to October 15, 2001, and from July 16, 2002 to November 19, 2002, excluding time actually worked by Claimant, based on Claimant's average weekly wage of $610.95, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant temporary partial disability from October 16, 2001 to July 15, 2002, excluding time actually worked by Claimant, based on two-thirds of the difference between Claimant's average weekly wage of $610.95, and his reduced weekly earning capacity of $265.00, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay Claimant compensation for permanent total disability from November 20, 2002 to June 26, 2005, excluding time actually worked by Claimant for Employer or

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[5] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **April 4, 2005**, the date this matter was referred from the District Director, until his withdrawal as counsel of record.

during Claimant's military active duty period from February 15, 2003 through April 19, 2004, based on Claimant's average weekly wage of $610.95, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

4. Employer/Carrier shall pay Claimant compensation for permanent partial disability of the left knee for a 25% permanent impairment rating of 72 weeks (288 weeks x 25% impairment), based on two-thirds of Claimant's average weekly wage of $610.95, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(2) and (19).

5. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2003, for the applicable period of permanent total disability.

6. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's December 5, 2000, work injury, and residual associated back condition, including charges by Dr. John Wetzel, pursuant to the provisions of Section 7 of the Act.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

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

9. Employer shall have twenty (20) days from the date of service of this decision by the District Director to file an objection to Counsel's fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel.

ORDERED this 21st day of August, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge