

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

Issue Date: 14 November 2012

OALJ NO.: 2011-LHC-01484  
OWCP NO.: 01-139808

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*In the Matter of:*

ROBERT MACDONALD,  
*Claimant*

v.

ELECTRIC BOAT CORPORATION,  
*Employer/Self-Insured*

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Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Scott Roberts, Esq., Law Office of Scott N. Roberts, LLC, Groton, Connecticut, for the Claimant

Mark McKenney, Esq., McKenney, Quigley, Izzo & Clarkin, Providence, Rhode Island, for the Employer

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**DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF**

**I. STATEMENT OF THE CASE**

The present matter is a claim for disability compensation and medical benefits filed by Robert MacDonald (the “Claimant”) against Electric Boat Corporation (“EBC” or the “Employer”) under the provisions of the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the “Act”). After an informal conference before the District Director of the Department of Labor’s Office of Workers’ Compensation Programs (“OWCP”), the matter was referred to the Office of Administrative Law Judges (“OALJ”) for a formal hearing, which was conducted before the undersigned administrative law judge on November 28, 2011, in New London, Connecticut.

The Claimant and Employer were represented by counsel and were afforded the opportunity to present evidence and oral argument. There was no appearance on behalf of the Director of the OWCP. Testimony was heard from the Claimant, and the parties offered Stipulations, which were admitted as Joint Exhibit (“JX”) 1. Hr’g Tr. (“TR”) 5-6. Formal papers were admitted without objection as Administrative Law Judge Exhibits (“ALJX”) 1-4. TR 8-9. Claimant’s Exhibits (“CX”) 1-8 and Employer’s Exhibits (“EX”) 1-5 were also admitted without objection. TR 6-8. At the time of the hearing, EBC had a pending motion to leave the record open post-hearing, to which the Claimant filed an objection. TR 9-10; ALJX-4; ALJX-5; TR 60. At trial, the Claimant withdrew his objection to the motion. TR 9-10. Accordingly, the record was left open until January 15, 2012, for Dr. William Bradbury’s medical evaluation of the Claimant, the deposition of Dr. Bradbury, and possibly the deposition of vocational expert Barbara Pellegrini Allen. TR 10-11.

On January 17, 2012, the Employer submitted the following additional exhibits: EX-6, which is the *curriculum vitae* of Dr. Bradbury; EX-7, which is the transcript of Dr. Bradbury’s deposition dated January 3, 2012; EX-8, which is the medical reports of the Claimant’s treating cardiologist, Dr. Christopher Loscalzo; and EX-9, which is a report of the Employer’s vocational expert, Barbara Pellegrini Allen, dated January 13, 2012. On January 30, 2012, the Claimant filed an objection to the Employer’s EX-9, and on February 2, 2012, the Employer filed a response to the objection. As the Claimant did not have a prior opportunity to rebut Ms. Allen’s vocational report, he was allowed additional time to present evidence in response to EX-9. The hearing reconvened on June 12, 2012, during which additional formal papers were admitted without objection as ALJX 5-15 and the deposition of Ms. Allen was admitted without objection as EX-10. TR 55, 61-63. On June 29, 2012, the Claimant submitted a post-hearing deposition transcript of the Claimant and the rebuttal “Vocational Assessment and Employability Evaluation” of Mr. Sabella, both of which are admitted in full as CX-9 and CX-10 respectively. The record is now closed.

On January 18, 2012, the parties filed post-hearing briefs (“Cl. Br.” and “Er. Br.”), and on July 10, 2012, the parties filed supplemental post-hearing briefs (“Cl. Supp. Br.” and “Er. Supp. Br.”) to address the evidence submitted post-hearing.

After careful analysis of the evidence contained in the record, as well as the parties’ Stipulations and arguments presented, I have concluded that the Claimant is entitled to permanent total disability compensation for his work-related heart attack pursuant to Section 8(a) of the Act and medical care pursuant to Section 7 of the Act. 33 U.S.C. §§ 907, 908(a). Additionally, the Employer is entitled to relief from the Special Fund pursuant to Section 8(f) of the Act.

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

## **II. STIPULATIONS AND ISSUES PRESENTED**

The parties offered the following stipulations: (1) the Act applies to the claim; (2) the date of injury is January 28, 1997; (3) the injury occurred at Electric Boat’s facility in Groton, Connecticut; (4) the injury arose out of and in the course of the Claimant’s employment with the

Employer; (5) there was an employer/employee relationship at the time of the injury; (6) the Employer was timely notified of the injury; (7) the claim was timely filed; (8) the Notice of Controversion was timely filed; (9) the District Director's Informal Conference was held on December 5, 2010; (10) the Claimant's average weekly wage at the time of the injury was \$1,094.98; (11) the Claimant was paid temporary total disability benefits from January 29, 1997 until July 6, 2004<sup>1</sup> in the amount of \$729.99 per week and temporary partial disability benefits from July 7, 2004 until July 8, 2009<sup>2</sup> in the amount of \$645.59 per week;<sup>3</sup> (12) the Claimant reached maximum medical improvement ("MMI") on November 19, 2009; and (13) the Claimant has not returned to his usual job. JX-1.

The only issues remaining for adjudication are the extent of the Claimant's disability and the Employer's entitlement to Section 8(f) relief. TR 5; JX-1.

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<sup>1</sup> The benefits switched from temporary total to temporary partial in July 2004 based on a Labor Market Survey conducted by Mr. Brouillette at this time. Er. Br. 1; TR 13-14.

<sup>2</sup> Although the parties' Stipulations indicate that temporary partial disability payments ceased on July 8, 2009, the parties clarified at trial that the Employer has continued to pay the Claimant temporary partial disability compensation through the present. TR 15; *see also* Er. Br. 3; CX-2.

<sup>3</sup> The Stipulations also indicated the EBC paid advances to the Claimant in the amount of \$4,950.00 on July 25, 1997 and August 8, 1997. JX-1. When asked to explicate the meaning of "advances" at the hearing, counsel for both parties were unsure what this referred to, and counsel for the Employer stated "I think what they probably did was, they made an advance and then reconciled that thereafter." TR 15.

### III. FINDINGS OF FACT

#### A. Background

The Claimant was born on June 25, 1947 and is currently 65 years old. TR 20. After graduating high school, the Claimant worked for Hartford Electric Light Company for approximately one year before he was drafted into the service. TR 22; EX-5 at 3.<sup>4</sup> He was stationed in Vietnam for two years as a communication specialist and was honorably discharged in 1968. TR 22; EX-5 at 3. After returning from Vietnam, the Claimant attended Mitchell Junior College for a short period without receiving a degree, and then worked in cost accounting and payroll for about 6 months and as a salesman for an insurance company for another 6 months. TR 23; CX-3 at 1. He commenced employment at EBC in 1971 and continued to be employed there for 26 years. TR 21. He first worked in the planning department for four to five years then transferred to the x-ray department where he worked as an industrial radiographer. TR 23-24.

On January 28, 1997, the Claimant experienced shortness of breath and pain in his chest as he walked up a large hill to the parking lot at the end of his shift. TR 27. After returning home, the symptoms persisted and the Claimant called 911. TR 27-28. He was hospitalized as a result of a myocardial infarction and underwent an angioplasty and placement of two stents. EX-4 at 26, 63. As a result, the Claimant was placed on medical restrictions including no lifting, no shoveling and no climbing. TR 38. The Claimant never returned to work after his heart attack. TR 44.

Since leaving EBC, the Claimant has had multiple heart attacks. TR 29-30. In June of 1997, the Claimant suffered from his second heart attack and underwent triple bypass surgery. EX-4 at 43; EX-1 at 24. He also suffered from a heart attack in 2009, which resulted in the placement of a stent and a balloon, and a heart attack in 2010. EX-1 at 26. The Claimant testified that he has shortness of breath and heavy sweating even with short walks. TR 31. He further testified that he is able to drive approximately half an hour before it becomes uncomfortable and he cannot shovel or lift over 10-20 pounds. TR 33. He plays golf about twice a week with a cart, but does not engage in any additional sports. TR 34; EX-1 at 28.

In addition to his cardiac condition, the Claimant suffers from chronic obstructive pulmonary disease (“COPD”), right hand neuropathy, asthma, carpal tunnel syndrome, diabetes, and bilateral knee osteoarthritis. TR 36; EX-3 at 11, 20. He has had right knee problems since the mid-1970’s, resulting in multiple surgeries, including a total right knee replacement in 2009. TR 36, 45. He also began to have pain in his left knee after he left EBC and underwent a left knee arthroscopy in 2009. EX-1 at 17. Since 2009, he has received multiple injections in both knees. EX-3 at 19. The Claimant filed a worker’s compensation claim based on his right knee and hand injuries, and EBC paid permanent partial disability payments as a result. TR 45; EX-4 at 54. The Claimant also began treating with Dr. Urbanetti in the early 1990’s for his lung problems, including asthma and shortness of breath. TR 45. As a result, Dr. Urbanetti placed the Claimant on restrictive duty at EBC in the early 1990’s, prohibiting exposure to dust and fumes. TR 37, 45.

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<sup>4</sup> EX-5 is not paginated. As such, this exhibit will be cited as if the pages were numbered in chronological order.

As far as the Claimant's ability to work, he testified that he cannot go back to EBC and does not believe that there is any job that he would be able to do. TR 35. The Claimant testified that his inability to work is due to a combination of all his current medical conditions, including those conditions that existed prior to his heart attack in 1997. TR 37-38, 46. The Claimant has not searched for work since he left EBC, and he is currently receiving Social Security benefits. TR 44-45.

Subsequent to the hearing in this matter, the Claimant was deposed in regard to a Labor Market Survey conducted by EBC's vocational expert, Barbara Allen. CX-9 at 4. He testified that he applied to three of the five positions identified in the survey. *Id.* at 4-5. The Claimant applied online to a cashier's position at Dick's Sporting Goods and did not receive a response. *Id.* at 6. He has not followed up with the store. *Id.* As for the cashier position at Staples, the Claimant went to the store and spoke with the manager, who told him that she had no openings. *Id.* She told him he could apply online, which he did. *Id.* at 8. He also applied to the assembler position at Toys R Us. *Id.* He went to the store, spoke to the manager and was told there were no openings but that he could apply online, which he did. *Id.* In regard to the parking garage attendant and room service cashier positions at Davidson Hotels, the Claimant testified that there is no such hotel in the geographic area where he resides. *Id.* at 5, 7, 23. He testified that his counsel's secretary searched for the hotel and the closest one is in Stamford, Connecticut, 87 miles away. *Id.* at 5, 7, 23. He testified that he has lived in the same area all his life. *Id.* at 6. He testified further that there is no hotel in his geographical area that has a parking garage. *Id.* at 5.

The Claimant testified that he is a legal resident of Florida, where he resides for half of the year. CX-9 at 9-10. Other than the one day he applied for the three positions identified in the survey, he has not looked for work because he believes he is disabled. *Id.* at 14-15, 17. He acknowledged that there are hotels such as the Hilton, Marriot, Holiday Inn, and Hyatt in his geographic area, but he had "no idea" whether they are all Davidson Hotels. *Id.* at 19. He testified that the listings for the Davidson Hotel positions did not provide an address. *Id.* at 20.

## **B. Medical Evidence**

### **1. Dr. Christopher Loscalzo**

The record contains several medical reports from the Claimant's treating cardiologist, Dr. Christopher Loscalzo, from June 2008 to November 2011. *See* EX-8. On October 7, 2009, Dr. Loscalzo found that the Claimant was partially and permanently disabled on a cardiovascular basis, with the disability ranging from 25% to 40%. *Id.* at 4. He stated that the Claimant has chronic ischemic heart disease with multiple prior interventions, including bypass surgery. *Id.* On May 25, 2010, Dr. Loscalzo reported that the Claimant was fairly active, playing both golf and tennis. *Id.* at 3. In the most recent medical record dated November 23, 2011, Dr. Loscalzo reported that the Claimant experiences some shortness of breath with climbing stairs or hills but did not report chest pain with exertion. *Id.* at 1. He stated that the Claimant does not exercise but did play golf during the summer. *Id.* He noted that the Claimant has chronic coronary artery disease, known occlusion of the right coronary artery with collaterals, and a history of coronary bypass surgery, angioplasty, and stenting. *Id.* Dr. Loscalzo opined that the Claimant is stable from a cardiac point of view. *Id.*

## 2. Dr. Philo F. Willetts, Jr.

Upon request by EBC, Dr. Philo Willetts examined the Claimant twice on August 15, 2000 and November 7, 2011, and wrote a follow-up medical report after each examination. *See* EX-3 at 1, 17.

In his August 2000 report, Dr. Willetts evaluated the Claimant's right knee and bilateral hand injuries. *See* EX-3 at 1-16. He opined that the Claimant was not totally disabled because of the right knee or bilateral hand injuries, but he did impose certain restrictions on the Claimant. Specifically, he wrote: "with respect to [the Claimant's] right knee, he should avoid squatting, avoid kneeling, avoid crawling, and avoid vertical ladder climbing." *Id.* at 12. As for the Claimant's hands, Dr. Willetts opined that the Claimant "should avoid rapid, frequent, forceful, repetitive use of his hands [and] should avoid using vibrational tools." *Id.*

In his November 7, 2011 medical report, Dr. Willetts noted a neurological examination of the lower extremities indicated decreased vibration sensation and ability to identify toes. EX-3 at 22. Dr. Willetts focused on the Claimant's bilateral knee and bilateral hand issues. *See* EX-3 at 17-31. He opined that the Claimant could return to limited-duty employment and re-imposed the following restrictions:

With respect to his right knee, he should avoid squatting, kneeling, crawling, or climbing vertical ladders. He could sit, stand, walk, and drive, so long as he could occasionally change positions as comfort dictated. There would be no additional restrictions with respect to his more recent onset left knee conditions. With respect to his hands, he should avoid using vibrational tools. He should avoid rapid, repetitive, forceful hand activities. He could otherwise use his hands without further restriction.

*Id.* at 29. Dr. Willetts concluded that the Claimant "could do a variety of sedentary and sedentary light work from an orthopedic standpoint, with the above restrictions." *Id.* at 31. Dr. Willetts opined that the Claimant's disability was due to a combination of his right knee and hand injuries, as well as his obesity and coronary artery disease. *Id.* at 30.

## 3. Dr. William M. Bradbury

Dr. William Bradbury, the Employer's second medical expert in this case, prepared three medical reports dated October 24, 2003, November 19, 2009, and November 29, 2011, and he was deposed on January 3, 2012. *See* EX-2; EX-7. Prior to each medical report, Dr. Bradbury examined the Claimant and reviewed medical records. EX-2 at 1, 5-6; EX-7 at 34.

In his earliest medical report, Dr. Bradbury found that the Claimant had Class II-III dyspnea on exertion and his functional capacity was limited "by dyspnea, which may be pulmonary basis and orthopedic, as knee problems." EX-2 at 1, 3. He opined that the Claimant's pulmonary and orthopedic problems predate his cardiac condition and limit his ability to ambulate. *Id.* at 3. Dr. Bradbury opined that the Claimant was not totally disabled; however, he

was unable to assess the Claimant's impairment and degree of disability resulting from his cardiac problems because "the orthopedic and pulmonary components seem to be masking his cardiac limitations." *Id.* at 4. Dr. Bradbury concluded that the Claimant's overall disability is a combination of orthopedic and pulmonary conditions, myocardial infarction, and coronary disease. *Id.*

In his medical report dated November 19, 2009, Dr. Bradbury found that the Claimant had multifactorial limitations resulting from pulmonary, orthopedic, and cardiac components, and he imposed restrictions against lifting more than 30 pounds. EX-2 at 6. As for the Claimant's impairment, Dr. Bradbury opined that "[f]rom a cardiac perspective, the degree of impairment is similar to what it was in the past, namely, 20% from infarction and 20% to preexisting factors, for a total impairment of 40% . . . . a Class III impairment." *Id.* at 7. As for the Claimant's work capacity, Dr. Bradbury wrote:

He is an avid golfer and therefore capable of some form of activity. The patient does have capacity to perform non-lifting and non-exertional procedures. I have never seen his job description as an inspector. I'm not convinced that he's disabled from being an inspector, if he doesn't have to do any lifting. However, some of his limitation is orthopedic. Nevertheless, based on my prior review, I don't think he has total disability based on his cardiac profile. I think gainful employment could be done with re-education to an area that does not require lifting.

*Id.* Lastly, Dr. Bradbury reported that there had not been any significant cardiac changes since his initial medical report in 2003.<sup>5</sup> *Id.*

In Dr. Bradbury's most recent medical report dated November 29, 2011, he found that the Claimant's degree of impairment was similar to his impairment in 2009, and he did not find any significant differences since his last examination. EX-7 at 35, 36. He noted the Claimant is limited by progressive coronary disease, and his disability is related to a combination of pulmonary, orthopedic and coronary status. EX-7 at 35. Dr. Bradbury noted that the Claimant continues to golf with the assistance of a cart and walks his dog, but overall is "clearly somewhat inactive." *Id.* at 35. Dr. Bradbury stated that the Claimant's cardiac disability "is much less than 100%." *Id.* at 36.

Dr. Bradbury was deposed on January 3, 2012, during which he discussed in depth his past medical evaluations of the Claimant and testified that he had reviewed additional medical records since his last report. EX-7 at 6, 14. He noted that in addition to cardiac interventions, the Claimant had developed diabetes and diabetic neuropathy in his feet between the time of his Independent Medical Evaluations in 2004 and 2009. *Id.* at 10. Dr. Bradbury opined that the medical restrictions that Drs. Loscalzo, Willetts and Urbanetti placed on the Claimant due to his cardio, orthopedic and pulmonary conditions were reasonable. *Id.* at 14-16. With regard to Claimant's coronary condition, Dr. Bradbury said the Claimant has had stability of symptoms

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<sup>5</sup> However, it appears Dr. Bradbury was concerned with whether the Claimant's cardiac condition was work related. Dr. Bradbury, in the context of commenting on causation, noted the Claimant's cardiac disease had progressed since 1997, and required additional medical interventions. EX-2 at 7; *see also* EX-7 at 36.

even though Claimant has had progression of his coronary disease over time. *Id.* at 21. At his 2011 examination, Dr. Bradbury stated the Claimant's multiple medical conditions were essentially the same. *Id.* at 11-12. He further opined to a reasonable degree of medical certainty that the Claimant is able to work at jobs that fall within the restrictions that he and the other physicians placed on the Claimant. *Id.* at 16. Dr. Bradbury testified that the Claimant's ability to golf shows that he is likely able to do some types of lighter work and that a medical record from May 2010 indicating that the Claimant plays tennis demonstrates that the Claimant's symptoms are stable. *Id.* at 20. He also testified that he encourages individuals who suffered from past heart attacks to exercise safely. *Id.* at 31. Lastly, Dr. Bradbury found that pursuant to the AMA guidelines, the Claimant has a 17% impairment due to his coronary artery disease and the Claimant's pre-existing orthopedic and pulmonary conditions caused his overall condition to be materially and substantially worse than it would have been from the 1997 heart attack alone. *Id.* at 22, 27.

#### 4. Additional Medical Evidence

The Employer also submitted into evidence its application for Section 8(f) relief before the District Director. The application contained medical records from the Claimant's treating pulmonologist, Dr. John S. Urbanetti, from 1997 to 2003. *Id.* at 31-46. Dr. Urbanetti treated the Claimant for his shortness of breath, diagnosed him with COPD and conducted several pulmonary function tests which showed moderate bronchodilator responsive airway obstruction. *See id.* He placed the Claimant on light duty work in 1990 as a result of his asthma, prohibiting exposure to dust and fumes. *Id.* at 83, 85.

Prior to treating with his current cardiologist, Dr. Loscalzo, the Claimant treated with Dr. Richard P. Fazio, and his medical reports are also included in the Section 8(f) application. EX-1 at 12; EX-4 at 57-60. Dr. Fazio found that the Claimant had Class I-II angina pectoris, past myocardial infarctions, vibration problems, arthritis, and obesity, and that all of these contributed to his cardiovascular problems. EX-4 at 58. Dr. Fazio also imposed restrictions limiting the Claimant's lifting to 20-30 pounds. *Id.* at 59.

Lastly, the Section 8(f) application contained a medical report of Dr. Joseph R. Gaeta dated August 8, 2000, that evaluated the Claimant's cardiac condition. EX-4 at 63-66. Dr. Gaeta found that the Claimant was disabled from all but sedentary-light work with restrictions of no lifting over 10 pounds on a frequent basis and up to 25 pounds on an occasional basis. *Id.* at 65. He found that the Claimant has a Class III impairment using the AMA guidelines with a 40% impairment, 20% of which is due to the heart attack and 20% due to pre-existing factors. *Id.*

### **C. Vocational Evidence**

#### 1. GENEX/Lawrence P. Takki

Upon request of the Employer, Lawrence P. Takki from GENEX prepared an "Initial Assessment Report: Vocational Case Management," dated July 12, 2002. CX-4. After reviewing the Claimant's past medical history, Mr. Takki found that although the Claimant was unable to return to his usual employment as a radiographer, he did have transferable clerical skills. *Id.* at 4.

Mr. Takki concluded that the Claimant was “capable of sedentary work which would not require frequent use of his upper extremities and would not have exposure to chemicals, dusts, and fumes.” *Id.* at 5. He further concluded that the Claimant’s “vocational potential is limited given the [Claimant’s] limitations as well as the anticipated knee surgery and hand surgeries.” *Id.*

## 2. Art Brouillette

Art Brouillette, the Employer’s second vocational expert, conducted vocational evaluations on June 17, 2004 and June 24, 2010. EX-5. Prior to each written evaluation, Mr. Brouillette reviewed the Claimant’s medical, education, and employment history. *See* EX-5.

In his June 2004 vocational evaluation, Mr. Brouillette conducted a Labor Market Survey and based on the Claimant’s physical abilities, experience, and education, Mr. Brouillette identified five positions that the Claimant would be able to perform: two positions as a Bus Driver at Laidlaw Transit, Inc., a Cashier at Sears, Roebuck and Co., a Sales Associate at The Home Depot, and an Admissions Representative Cashier at Mystic Aquarium. EX-5 at 3-5. All five positions were within 25 miles of the Claimant’s home, were of a sedentary nature, and involved lifting less than 20 pounds. *Id.* at 5. They were a mixture of part-time and full-time positions. *Id.* at 3-5. The bus driver positions required picking up children and driving them to and from school on a specific route. *Id.* at 3. The cashier position at Mystic Aquarium required general knowledge of product/services, and customer service experience was preferred. *Id.* at 4. Mystic Aquarium stated that it would provide a stool at the cash register station to accommodate the inability to stand long periods with a doctor’s note. *Id.* The sales associate position at the Home Depot required an employee to “greet, qualify, recommend and close every customer in their department.” *Id.* It also required an employee to maintain the in-stock condition of assigned areas to “ensure it is clean, shoppable and safe.” *Id.* The Home Depot stated that it would accommodate physical restrictions. *Id.* Lastly, the Admissions Representative Cashier position involved selling general and group admissions and memberships, keeping track of cash, processing credit card sales, filling out membership forms, and recording sales on a computer system. *Id.* at 5. Applicants were required to have cash experience and basic math and computer skills. *Id.* The position involved sitting most of the time. *Id.*

Mr. Brouillette again met with the Claimant on June 17, 2010 and conducted a vocational evaluation on June 24, 2010. EX-5 at 6. During the meeting, the Claimant informed Mr. Brouillette that he could sit for 30 minutes, stand for 15 minutes, lift up to 20 pounds, and drive for 15-20 minutes. *Id.* at 7. He also told Mr. Brouillette that he cannot do any climbing and is not proficient with the computer. *Id.* Mr. Brouillette reported that the Claimant’s daily activities included “reading books, playing golf with a cart, completing Sudoku puzzles and paying his bills online on his computer.” *Id.* Mr. Brouillette concluded that “since [the Claimant] has multiple medical conditions I do not feel that he is employable at this time.” *Id.*

## 3. Barbara Pellegrini Allen

The Employer’s third vocational expert, Barbara Pellegrini Allen, conducted a “Vocational Assessment/Labor Market Review” on January 13, 2012. EX-9 at 3. Ms. Allen reviewed the medical and occupational materials and met with the Claimant on October 19, 2011. *Id.* Ms. Allen concluded that “considering all factors, such as the medical documentation,

work history, education and stated current activities, Mr. MacDonald does have a sedentary and light work capacity with multiple restrictions. The doctors did not restrict him to part time work, so full time work should be included.” *Id.* at 8.

Ms. Allen identified the following occupations that the Claimant would be capable of performing: Bench Assembler, Cashier, Box Office Cashier, Dispatcher (non-emergency), Parking Lot Attendant, Gate Guard, and Parking Valet. EX-9 at 9. Ms. Allen further explained: “These occupations listed typically are sedentary or light and can provide a sit/stand option in many situations. The Parking Lot Attendant would have to exclude snow shoveling. The Bench Assembler could not use vibrational tools and would have to involve light manual activities; not rapid repetitive forceful hand activities.” *Id.*

Ms. Allen conducted a Labor Market Survey, in which she searched for the above job titles within a 25 mile radius of the Claimant’s home in New London, Connecticut. EX-9. She searched available jobs on Indeed.com, but acknowledged that she did not contact employers directly. *Id.* Based on her review of the labor market, she identified five available positions: a Parking Garage Attendant at Davidson Hotels; Cashier at Dick’s Sporting Goods; Room Service Cashier at Davidson Hotels; Cashier at Staples; and Assembler at Toys R Us. *Id.*

The Parking Garage Attendant position requires an employee to greet guests, collect payments, maintain an accurate record and bank of cash transactions, monitor all activity in the garage and report any issues to management, and maintain cleanliness of garage area. EX-9 at 16. The Cashier position at Dick’s Sporting Goods requires cash register ringing, handling cash, and accuracy with math and currency. *Id.* at 20. The Room Service Cashier position requires an employee to answer questions on menu selections, take room service orders, communicate with the culinary department and kitchen, ensure guest satisfaction, and maintain cleanliness of work areas. *Id.* at 21. The Cashier position at Staples requires processing sale and return transactions, responding to customer requests and concerns, maintaining a neat work area, and performing “other related duties as assigned.” *Id.* at 22. Lastly, the Assembler position at Toys R Us involves assembling and repairing bicycles or ticket items. *Id.* at 23. The responsibilities include pulling the item from the storeroom racks, assembling bicycles completely and properly in 15-25 minutes, bundling and disposing of all cardboard in baling machine, and performing routine maintenance and repairs on assembled items. *Id.*

The positions listed above were either full-time or not specified. EX-9 at 9. The employment listings did not include the wage offered. *Id.* However, Ms. Allen stated that in Connecticut, based on the Bureau of Labor Statistics, Cashiers earned from \$8.45 to \$13.75 per hour, Assemblers earned from \$8.93 to \$14.26 per hour, and Parking Lot Attendants earned from \$8.59 to \$14.26 per hour in the year 2010. *Id.*

Ms. Allen was deposed on May 16, 2012. EX-10. She testified that the Claimant is intelligent and capable of learning. *Id.* at 13-14. She testified that a person’s motivation significantly impacts his return to work. *Id.* at 20. In regard to her Labor Market Survey, she testified that she limited the search to a 25 mile radius from the Claimant’s home. *Id.* at 22. She testified that she disagrees with Mr. Brouillette’s 2010 assessment of the Claimant, primarily because it was completed prior to Dr. Bradbury’s most recent report establishing a work

capacity. *Id.* at 27. She testified that she considered the Claimant's age, and that his age did not preclude him from working, although it would be a factor in terms of his candidacy. *Id.* at 28, 37. She testified that she relied on the Bureau of Labor Statistics for wage rates because the wage rates were unavailable for the specific positions identified. *Id.* at 31. She testified that the fact that the Claimant was unemployed for 15 years would impact his candidacy for obtaining a job. *Id.* at 33.

#### 4. Albert J. Sabella

The Claimant's vocational expert, Mr. Sabella, conducted a "Vocational Assessment and Employability Evaluation" on June 8, 2012. CX-10. He interviewed the Claimant and reviewed the medical records and education and work history. *Id.* He noted the limitations set out by Dr. Bradbury and Dr. Loscalzo's coronary impairment rating of 25-40%.<sup>6</sup> *Id.* at 5.

Mr. Sabella explained that from a vocational standpoint the concept of employability is:

the ability to perform required job tasks, duties and physical requirements on a regular and sustained basis. To have access and qualifications to a reasonable number of jobs within the local labor market and ability to compete with other job applicants and have a reasonable expectation that one will be hired. The determination of employability involves more than a medical evaluation of a person's impairment and also includes other vocational factors including: age, education, background, abilities, past work and transferable skills.

CX-10 at 4.

Mr. Sabella opined that the Claimant's "prolonged absence (since 1997) from the workforce will be a significant barrier to his re-employment." CX-10 at 5. He noted that under Department of Labor definitions, one who has been unemployed for 15 weeks or more is considered "long-term unemployed." *Id.* Moreover, he stated studies have demonstrated that individuals who have been out of work for six months or more are much less likely to be considered for jobs when competing against those who are employed. *Id.* He testified that the Claimant's age will also affect his "ability to adapt to new work situations, temperaments, and to compete for work in the labor market." *Id.* Other limitations in addition to his physical limitations include lack of transferable/marketable vocational skills, and functional computer illiteracy. *Id.* at 6.

He opined that "it is clear that [the Claimant] will be unable to return to his usual work as an X-Ray Technician." CX-10 at 6. He further stated:

Theoretically there may be a selective or isolated job in the labor market, i.e., parking garage cashier or surveillance system monitor, that [the Claimant] may be able to physically do. In my opinion, and considering the current condition of the labor market, at most he would be limited to these types of positions. [The Claimant] has incurred a significant vocational disability and his alternative

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<sup>6</sup> Dr. Bradbury's limitations included the orthopedic limitations assigned by Dr. Willetts. CX-10 at 2, 5.

employment prospects will be extremely limited at best. His access to the labor market has been severely eroded.

*Id.* He stated that on a practical basis, the Claimant's employability is inadequate in the current, usual and regular job market. *Id.* He does not have the ability or qualifications to access a reasonable number of jobs within the local labor market or to compete with other applicants. *Id.* Mr. Sabella concluded:

[T]he combined and compounded effect of his work related physical limitations and concomitant employment barriers form a material hindrance to his employment potential that in my opinion renders him unemployable for any practical vocational purpose . . . . In other words, it is vocationally likely that there is little, if any, probability that [the Claimant] can find, secure and maintain any alternative employment, or that an employer will hire him.

*Id.* at 6-7.

#### IV. CONCLUSIONS OF LAW

##### A. Nature and Extent of Disability

Disability is the "incapacity because of injury 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). The concept of disability under the Act involves both medical and economic factors. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). "The degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *Am. Mut. Ins. Co. of Boston v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970) (quoting *E. S.S. Lines, Inc. v. Monahan*, 110 F.2d 840, 842 (1st Cir. 1940)).

Disability is addressed in terms of nature and extent. Thus, a disability analysis is comprised of a two-part inquiry: 1) whether the nature of the disability is temporary or permanent; and 2) whether the extent of the disability is partial or total. *See Palombo v. Dir., OWCP*, 937 F.2d 70, 76 (2d Cir. 1991).

##### 1. Nature of Disability

The parties stipulated that the Claimant reached maximum medical improvement on November 19, 2009, and agree that only the extent of disability is at issue. JX-1; TR 5. As such, I find that the Claimant's disability is permanent in nature as of November 19, 2009. *See Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989) ("The traditional method by which the nature of disability is determined is to ascertain the date of maximum medical improvement. If a claimant has reached MMI, then generally the disability is characterized as permanent.").

## 2. Extent of Disability

### a. *Claimant's Prima Facie Case*

The extent of disability is characterized as either total or partial, and it reflects the economic component of disability. Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. The employee has the **initial burden** of proving total disability. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). The date of the totality or partiality of the disability must be established with reference to economic factors, not merely to medical evidence. *Palombo*, 937 F.2d at 76.

To establish a *prima facie* case of total disability, a claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Elliott*, 16 BRBS at 91. A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). To determine whether a claimant has carried his *prima facie* burden of establishing an inability to return to usual employment, the ALJ must compare "the medical opinions regarding claimant's physical limitations with the requirements of his usual work" at the time of the injury. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988). Here, the Employer does not assert that the Claimant is able return to his usual employment at EBC as a radiographer, but instead argues that there is suitable alternate employment that the Claimant is capable of performing. *See* Er. Br. 22-24. Furthermore, none of the medical or vocational experts in this case found that the Claimant can return to his prior employment at EBC and instead focused on the Claimant's ability to work in alternate employment. As such, the Claimant has met his *prima facie* burden for establishing total disability.

### b. *Suitable Alternate Employment*

The burden now shifts to the Employer to establish that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job." *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (5th Cir. 1981) (*quoting New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981)). To satisfy this burden, the Employer must show the "precise nature, terms, and availability of the job[s]." *Plourde v. Bath Iron Works*, 34 BRBS 45, 48 (2000) (*citing Legrow*, 935 F.2d at 434). An employer that had accommodated work restrictions must establish suitable alternate employment if it can no longer accommodate a claimant. *Vasquez v. Cont'l Mar. of San Francisco, Inc.*, 23 BRBS 428, 430 (1990).

The job opportunities must exist within the geographic area where the employee resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Palombo*, 937 F.2d at 74-75; *Am. Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976). Further, a single job opportunity is insufficient to satisfy the employer's burden of showing a range of suitable alternative employment exists. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988) (holding identification of a single job opportunity insufficient to meet employer's burden); *Berezin v. Cascade Gen., Inc.*, 34 BRBS 163 (2000) (finding a single position could only satisfy an

employer's burden where special circumstances—exceptionally qualified employee, or inclusion of general labor market information—show the employee was likely to get the job).

Based on the record as a whole, I find that the Claimant does not have an earning capacity and the Employer has not met its burden of establishing suitable alternate employment. Dr. Willetts imposed right knee restrictions of no squatting, kneeling, crawling, and vertical ladder climbing. EX-3 at 12. He also imposed restrictions against “rapid, frequent, forceful, repetitive use of his hands” and use of vibrational tools. *Id.* He found that the Claimant could sit, stand, walk and drive, so long as he could occasionally change positions. *Id.* at 29. The Claimant testified credibly that he also experiences occasional numbness in his feet. Both Dr. Bradbury and Ms. Allen made note of the Claimant's diabetic condition and that he experienced neuropathy in the lower extremities from either the non-work related diabetes or from the coronary artery disease. The Claimant further stated that he can sit for 30 minutes, stand for 15 minutes, and drive for 15-20 minutes. EX-5 at 7. In addition, Dr. Urbanetti prohibited exposure to dust and fumes. *Id.* at 83, 85. As for lifting restrictions, Dr. Bradbury imposed restrictions of no lifting more than 30 pounds. EX-2 at 6. Dr. Fazio imposed restrictions of no lifting 20-30 pounds. EX-4 at 59. Dr. Gaeta found restrictions of no lifting over 10 pounds on a frequent basis and up to 25 pounds on an occasional basis. EX-4 at 65. Considering the various lifting restrictions assigned, I find that Claimant is limited to lifting 20-30 pounds and that the restrictions described above are supported.

Several vocational assessments were offered in this matter. Mr. Brouillette, EBC's vocational expert, originally found in 2004 that the Claimant had an earning capacity, and he conducted a Labor Market Survey (“LMS”) identifying five positions that the Claimant could perform. *See* EX-5. The Claimant relies on the fact that in 2010, Mr. Brouillette conducted a second evaluation in which he found that the Claimant is not employable. *Id.* at 7. After noting multiple medical issues and treatment the Claimant received since 2004, Mr. Brouillette opined that “since [the Claimant] has multiple medical conditions I do not feel that he is employable at this time.” *Id.* at 7.

On January 13, 2012, Ms. Allen, a second vocational expert for EBC, also provided a vocational evaluation and Labor Market Survey in this matter. EX-9. Ms. Allen is a licensed rehabilitation counselor and a certified disability management specialist, among other credentials. EX-9; EX-10 at 4-5. Ms. Allen found that the Claimant has a work capacity and identified five positions she deemed suitable for the Claimant. Although the Claimant argues that Ms. Allen did not consider his age, she testified that she did in fact consider his age and that it did not preclude him from working. EX-10 at 28.

Albert Sabella provided a vocational assessment and employability evaluation report on June 8, 2012. Noting the Claimant's multiple medical conditions, physical restrictions, age, lack of transferable skills, and his absence from the labor force for fifteen years, Mr. Sabella opined that the Claimant had little likelihood of obtaining employment in the competitive marketplace. After careful consideration of the opinions of the vocational experts, I credit the opinions of Mr. Brouillette and Mr. Sabella that the Claimant does not have a current earning capacity over the contrary opinion of Ms. Allen. Even Ms. Allen has acknowledged that Claimant's medical conditions and his long absence from the workforce would have an impact on his employability.

I am persuaded that the Claimant's multiple medical conditions, including among other conditions, the progressive coronary disease and associated limitations, the orthopedic and pulmonary limitations, his age, lack of transferable skills, and his prolonged absence from the labor market have eroded his work capacity.<sup>7</sup>

Even if I consider the jobs Ms. Allen identified as suitable in her labor market survey, I do not find that Assembler position at Toys R Us identified by Ms. Allen to be suitable alternate employment as it requires assembling bicycles in 15 to 25 minutes. This job duty is not suitable for the Claimant in light of Dr. Willett's restrictions against "rapid, frequent, forceful, repetitive use of his hands." EX-3 at 12, 29. Furthermore, the position requires pulling items from the storeroom racks, and does not indicate how much these items weigh. There is also a question of whether the two positions with Davidson Hotels as a room service cashier and a parking lot attendant are located within the 25 mile radius of the Claimant's home. CX-9. The Claimant testified that he lived in the same area his whole life and is familiar with hotels in the area, and testified that there are no Davidson Hotels in the area where he resides and there is no a hotel with a parking garage in his area. CX-9 at 5-6, 17, 19, 21. He testified that his counsel's secretary looked online and found that the closest Davidson Hotel was 87 miles away. *Id.* at 17. In contrast, Ms. Allen testified that she identified the Davidson Hotel positions by searching for jobs within a 25 mile radius of the Claimant's residence. EX-10 at 35. However, the job postings did not include the location. EX-9 at 16, 21. Because there is conflicting evidence to establish that such positions were within the required 25 miles radius of his home, and the Employer bears the burden at this stage of the analysis, these positions are not suitable.

Nor can I find that the Cashier positions at Dick's Sporting Goods and Staples in the 2012 LMS represent suitable alternate employment for the Claimant. Although these cashier positions do not identify the physical requirements, I note the commonly understood and observed cashier duties require one to stand at a cash register while checking out customer purchases. Dr. Willetts opined that the Claimant can sit, stand and walk as long as he can change positions occasionally. EX-3 at 29. There is no evidence that either cashier position permits one to change position occasionally. Moreover, the Claimant testified credibly that he can only stand for 15 minutes at a time, and experiences occasional numbness in his lower extremities and feet and must sit down. I conclude that neither cashier position is suitable. Accordingly, the Claimant has established that he is entitled to permanent total disability.

## **B. Compensation Due**

The Claimant is entitled to benefits for his permanent total disability pursuant to Section 8(a) of the Act at the rate of two-thirds of his average weekly wage. 33 U.S.C. § 908(a).<sup>8</sup> The parties stipulated that the Claimant's average weekly wage at the time of the injury was

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<sup>7</sup> The vocational assessment done in 2002 by Lawrence Takki on behalf of the Employer and which found that the Claimant was capable of sedentary work, is accorded little weight. CX-4 at 5. This assessment is ten years old and does not consider the progression of Claimant's coronary disease, his current age and prolonged absence from the workforce.

<sup>8</sup> The claim is for permanent total disability compensation benefits as of November 19, 2009. TR 12.

\$1,094.98. JX-1. Thus, applying Section 8(a), the Claimant is entitled to \$729.99<sup>9</sup> per week commencing November 19, 2009 and continuing.

### C. Entitlement to Special Fund Relief

Special Fund Relief under Section 8(f) of the Act is available where an employee with an existing permanent partial disability suffers from a subsequent permanent total disability and the resulting overall disability is not solely due to the subsequent injury alone. 33 U.S.C. § 908(f)(1). An employer's liability for payment of benefits under Section 8(f) is limited to no greater than a period of 104 weeks with the remaining compensation paid by a Special Fund established pursuant to 33 U.S.C. § 944. *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file an application with the District Director of the OWCP pursuant to Section 8(f)(3). 33 U.S.C. § 908(f)(3). The Employer filed an application for Special Fund relief with the OWCP in accordance with Section 8(f)(3) on December 12, 2010. ALJX-1. As such, the Employer's application is deemed timely. The Regional Solicitor, representing the Director of the OWCP, has not filed any opposition to Section 8(f) relief in this matter.

In cases involving permanent total disability, an employer must meet three requirements to avail itself of Section 8(f) relief: (1) it must show that the employee had a pre-existing permanent partial disability; (2) the pre-existing disability must have been manifest to the employer; (3) the employee's permanent total disability must not be solely due to the subsequent injury. *Dir., OWCP v. Gen. Dynamics Corp.*, 982 F.2d 790, 793 (2d Cir. 1992); *Dir., OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2d Cir. 1992); *Dir., OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45 (1st Cir. 1997) (citing *E.P Paup Co. v. Dir., OWCP*, 999 F.2d 1341, 1352 (9th Cir. 1999)); *Todd Pac. Shipyards Corp. v. Dir., OWCP*, 913 F.2d 1426, 1429 (9th Cir. 1990). In the context of Section 8(f) relief, a pre-existing permanent partial disability is one that would motivate a cautious employer to terminate an employee due to an enhanced risk of consequent compensation liability. *Devor v. Dep't of Army*, 41 BRBS 77, 80 (2007); *Dir., OWCP v. Gen. Dynamics Corp.*, 982 F.2d 790, 793 (2d Cir. 1992). Additionally, a pre-existing condition can be manifest to the employer either by actual knowledge or "if it was diagnosed and identified in medical records available to the employer." *White v. Bath Iron Works Corp.*, 812 F.2d 33, 35 (1st Cir. 1987). Based on the evidence of record, I find that the Employer satisfies all three elements.

The Employer has established that the Claimant had a pre-existing permanent partial disability. In 1976, the Claimant injured his right knee while at work when he slipped on overlapping planks. EX-4 at 6-9. He was found to have a 20% permanent impairment to his right knee as a result. *Id.* at 9. Dr. Willetts found that the Claimant has suffered from progressive osteoarthritis since the 1976 injury. EX-3 at 30. The Claimant was also diagnosed with asthma as early as 1990 and was later diagnosed with COPD. EX-4 at 26, 43. The Claimant additionally had pre-existing bilateral hand injuries since the early 1990's, for which Dr. Willetts attributed an 8% permanent partial physical impairment to each hand. EX-3 at 14-15, 17, 30; EX-4 at 49-51. Therefore, I find the Claimant had pre-existing conditions prior to his work-related heart attack on January 28, 1997.

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<sup>9</sup> 2/3 x \$1,094.98 = \$729.99

The Claimant's pre-existing conditions were manifest to the Employer prior to his heart attack in 1997. *See White*, 812 F.2d at 35. The Claimant filed worker compensation claims against EBC for his right knee and his pulmonary impairment prior to his heart attack in 1997. EX-4 at 6. EBC accepted his knee injury claim in 1976 and paid the Claimant permanent partial disability benefits as a result. EX-4 at 5. The Claimant filed his lung claim against EBC in 1990, which EBC denied. EX-4 at 83, 85. Furthermore, the Claimant's treating pulmonologist, Dr. Urbanetti, placed the Claimant on light duty in 1990 as a result of his asthma, prohibiting exposure to dust and fumes. *Id.*; TR 37, 45. Thus, EBC had actual knowledge of the Claimant's pre-existing conditions prior to his heart attack in 1997.

The third prong is established because the Claimant's current disability is not solely due to the 1997 heart attack condition, but rather results from the combination of the heart attack and the pre-existing pulmonary, right knee and bilateral hand injuries. Dr. Willetts opined that the Claimant's disability was due to a combination of his right knee and hand injuries, as well as his coronary artery disease. EX-3 at 30. Dr. Bradbury testified that the Claimant's pre-existing pulmonary and right knee conditions made his current condition materially and substantially worse than it would have been from the heart attack in 1997 alone. EX-2 at 4, 7; EX-7 at 26. Dr. Bradbury found that 20% of the Claimant's impairment was due to his cardiac condition and 20% was due to his non-cardiac, or pre-existing, conditions. *Id.* Furthermore, the Claimant has significant restrictions in place due to his pre-existing injuries. EX-3 at 30; EX-2 at 6. The Claimant's present disability is not solely the result of the 1997 heart attack alone. Therefore, the Employer is entitled to relief from liability pursuant to Section 8(f) of the Act. The Employer is liable for payment of benefits commencing on November 19, 2009 and for a period of 104 weeks. Thereafter, compensation benefits due are the responsibility of the Special Fund.

#### **D. Credit**

Pursuant to Section 14(j) an employer is entitled to a credit for advanced payments of disability compensation. 33 U.S.C. § 914(j). Accordingly, the Employer is entitled to a credit for advanced payments made for the Claimant's permanent total disability commencing on November 19, 2009.

#### **E. Interest**

Interest is due on all unpaid compensation. The applicable interest rate is determined in accordance with 28 U.S.C. § 1961 (1982), which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984) *modified on recon.* 17 BRBS 20 (1985). My order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

#### **F. Entitlement to Medical Care**

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre*, 23 BRBS at 94-95;

*Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The Claimant is entitled to medical care for his work-related injury. Accordingly, the Employer shall continue to pay the Claimant for medical expenses reasonably and necessarily incurred as a result of his work-related coronary injury. *Colburn v. Gen. Dynamics Corp.*, 21 BRBS 219, 222 (1988).

### **G. Attorney's Fees**

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under Section 28 of the Act. *Am. Stevedores*, 538 F.2d at 937. On July 17, 2012, counsel for the Claimant filed an application for attorney fees. My Order will grant the Employer 30 days from the date of this decision and order to file any objection.

### **V. ORDER**

Based on the foregoing findings of fact and conclusions of law and upon the entire record, the following order is entered:

1. Electric Boat Corporation shall pay to the Claimant, Robert MacDonald, permanent and total disability compensation benefits for his work-related injury pursuant to Section 8(a) of the Act, 33 U.S.C. § 908(a), at a rate of \$729.99 per week commencing November 19, 2009, and continuing, plus annual adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. § 910(f);
2. The Employer is entitled to a credit for compensation benefits already paid to the Claimant since November 19, 2009, pursuant to Section 14(j) of the Act, 33 U.S.C. § 914(j);
3. The Employer is entitled to Special Fund relief under Section 8(f) of the Act, 33 U.S.C. § 908(f), and its liability for permanent total disability compensation is limited to the statutory period of 104 weeks commencing on November 19, 2009;
4. Commencing 104 weeks following November 19, 2009, the United States Department of Labor Special Fund shall pay all continuing compensation benefits at the rate set forth in paragraph 1 above pursuant to Section 8(f), 33 U.S.C. § 908(f);
5. The Special Fund shall reimburse the Employer for any payments made to the Claimant after 104 weeks following November 19, 2009;
6. The Employer shall provide the Claimant with reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury may require pursuant to 33 U.S.C. § 907;
7. The Employer shall pay to the Claimant interest on all past due compensation benefits at the rate provided by 28 U.S.C. § 1961, computed from the date each payment was originally due until paid, and the applicable rate shall be determined

as of the filing date of this Decision and Order with the District Director;

8. On July 17, 2012, counsel for the Claimant filed an application for attorney fees. Should the Employer object to the fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Employer's objections shall be filed not later than **30 days** from the date of this decision and order. **The objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Claimant's attorney prior to the filing of the objections;** and
9. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

**SO ORDERED.**

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts